

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

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Elizabeth A. Brown  
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THE STATE OF NEVADA,

Plaintiff,

vs.

FERRILL JOSEPH VOLPICELLI,

Defendant.

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Sup. Ct. Case No. 87505

Case No. CR02-0147

Dept. 10

RECORD ON APPEAL

VOLUME 3 OF 10

DOCUMENTS

APPELLANT

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STATE OF NEVADA vs FERRILL J. VOLPICELLI  
DATE: NOVEMBER 17, 2023

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## INMATE REQUEST

FILED  
7-22-03

only one issue/topic per request form.

only one form per each issue/topic.

do not address your request to a named individual.

2. Write only in the space provided

4. No profanity.

Inmate's Name: John Ferrill Volpicelli, Sr. JurisBooking #: 03-06889Housing Unit: 7Cell #: 12Date: 07/15/2003Describe Request: P. 3Affidavit in Support of Motion to grant a new trial and/or order a judgement of acquittal based upon newly discovered evidence CONT...

Following the Trial of before mentioned allegation, it was brought to my attention that it was Former Judge Kadlic, who is known to this Court as John Kadlic, Esq., who authorized the warrant which resulted in the seizure of Personal Property depicted in Exhibit A and of which continues to be an on-going dilemma. The latter mentioned reality leads the accused to believe and now understand why relevant evidence and testimony was not presented during the Trial on the alleged wrong conduct and how Mr. Kadlic had an uncanny familiarity with my legal issues despite the concerns which are reflected in Exhibits B thru D. See McCabe v. State, 98 Nev. 604, 655 P.2d 536 (1982). Said accused recognized that it is at the discretion of the Trial Court to review the foregoing information without prejudice.

Witnesses pursuant to my procedural due process and/or substantive rights will testify that I did not understand the reason for the obvious conflict of interest and

Inmate's Signature: [Signature]

7/15/03

U.C.C. 1-103.6 + U.C.C. 1-207 All Rights Reserved

Receiving Staff Member/I.D.#:

(PRINT NAME)

Date:

(INMATE IS NOT TO WRITE BELOW THIS SPACE)

## ACTION

Routed to: \_\_\_\_\_ Date: \_\_\_\_\_ Re-Routed to: \_\_\_\_\_ Date: \_\_\_\_\_

Answer: Approved ☐Denied ☐

Reason:

Responding Staff Member/I.D.#:

(PRINT NAME)

Date:

**INMATE REQUEST**

1. Only one issue/topic per request form.
2. Write only in the space provided.
3. Only one form per each issue/topic.
4. No profanity.
5. Do not address your request to a named individual.

Inmate's Name: John Ferrill Valpicelli, San Luis Booking #: 03-06889Housing Unit: 7 Cell #: 12 Date: 7/15/2003

(P.4)

Describe Request:

Affidavit in Support of Motion to grant a new trial and/or order a judgement of acquittal based upon newly discovered evidence.

[ineffective], or lack thereof, of the Bill of the Right's required assistance of an expert / counsel trained to defend the common-law and/or bound to support the Constitution of the United States of America. Also see: U.S. Kiliti, 156 F.3d 150 (2nd Cir. 1998); U.S. v. Shorter, 54 F.3d 1248 (7th Cir.) - 516 U.S. 896 (1995).

Conclusion

It shall be presumed that John Keditic knowing, intelligently, and willfully withheld the knowledge of his past actions concerning me and that this also affected his willingness to adequately defend my Personal liberty and submit the evidence and Testimony which would have resulted in a verdict of innocent.

Inmate's Signature: [Signature]

7/15/03

N.E.C. Without Prejudice 1-201 + 1-07-0 All Rights Reserved.

Receiving Staff Member/I.D.#:

Date:

(PRINT NAME)

(INMATE IS NOT TO WRITE BELOW THIS SPACE)

**ACTION**

Routed to: \_\_\_\_\_ Date: \_\_\_\_\_ Re-Routed to: \_\_\_\_\_ Date: \_\_\_\_\_

Answer: Approved ☐Denied ☐

Reason:

Responding Staff Member / I.D.#:

Date:

(PRINT NAME)

1  
2 AFFIDAVIT  
3 STATE OF NEVADA }  
4 } SS CASE# 02-0147  
5 COUNTY OF WASHOE  
6

7 COMES NOW DEFENDANT FERRILL T. VOLPICELLI,  
8 UNDER PENALTY OF PERJURY UNDER THE LAWS  
9 OF THE STATE OF NEVADA; DEPOSES AND SAYS:  
10

11 THAT WITHIN A DAY OF THE TRIAL ADJOURNMENT  
12 IN THE ABOVE REFERENCED CASE, IT CAME TO  
13 THE ATTENTION OF THE DEFENDANT THAT A  
14 CONFLICT OF INTEREST EXISTS WITH LOCAL  
15 REPRESENTATION BY MR. JOHN KADUC ESQ.  
16 THAT SAID CONFLICT OF INTEREST WAS  
17 REALIZED BY DEFENDANT THROUGH COMMUNICATION  
18 WITH MS. LORI INMAN'S AND DEFENDANT'S  
19 CHILDREN.

20 THAT DEFENDANT CONFIRMED SAID CONFLICT OF  
21 INTEREST VIA RESEARCH OF COUNTY RECORDS -  
22 VERIFYING THAT IN OR ABOUT APRIL OF 1993,  
23 FORMER JUDGE KADUC'S NAME APPEARED ON  
24 A SEARCH WARRANT.  
25

26 THAT SAID SEARCH WARRANT AUTHORIZED  
27 INVESTIGATIONS INTO DEFENDANT'S RETAIL  
28 ACTIVITIES.

1  
2 THAT THIS INCLUDED INVESTIGATIONS BY RENO  
3 POLICE DEPARTMENT, CALIFORNIA DEPARTMENT  
4 OF JUSTICE, THE CRIMINAL DIVISION OF THE  
5 U.S. JUSTICE DEPARTMENT, AND THE REPEAT  
6 OFFENDER PROGRAM OF NEVADA.

7 THAT SAID INVESTIGATIONS CULMINATED IN  
8 SUBSEQUENT INDICTMENTS AND EVENTUAL  
9 CONVICTIONS WITH COMMITMENTS OF THE  
10 DEFENDANT TO STATE AND FEDERAL FACILITIES.  
11 THAT TO DATE, UNRESOLVED ISSUES LINGER  
12 WITH RESPECT TO PROPERTY SEIZED BY  
13 THE C.D.O.T UNDER SAID WARRANT,  
14 (SEE ACCOMPANYING LETTER AND WASHNE DISTRICT  
15 ATTORNEY ROGER WHITES.)

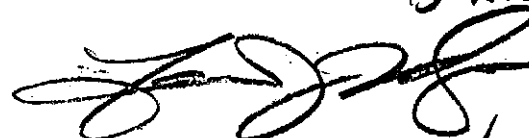
16  
17 THAT IF THE DEFENDANT WAS MADE AWARE  
18 OF THIS CONFLICT OF INTEREST EARLIER,  
19 HE WOULD HAVE PROMPTLY DISMISSED MR.  
20 KADUC ESQ.

21 THAT IN OR ABOUT THE MONTHS OF APRIL  
22 MAY, JUNE, AND JULY OF 1993, DEFENDANT  
23 SOUGHT LOCAL REPRESENTATION THROUGH  
24 MR. TARE ALIAN REGARDING THE WARRANT  
25 AND ENSUING INVESTIGATIONS.

26 THAT DEFENDANT IS NOT SATISFIED WITH  
27 THE REPRESENTATION OF MR. KADUC  
28

1  
2 PRIOR TO AND DURING TRIAL, AS EVIDENCED  
3 BY THE ACCOMPANYING LETTERS.  
4 THAT DEFENDANT WAS NOT EVEN MADE  
5 AWARE OF THE 21 FEBRUARY, 2003 COMPLAINT  
6 AMENDMENT UNTIL DATE OF TRIAL.  
7 THAT AGAINST DEFENDANTS WISHER, MR  
8 KADIC PURPOSEFULLY DID NOT PRESENT EVIDENCE  
9 RELEVANT TO DEFENDANTS CASE.  
10 THAT IN VIEW OF THE FOREGOING, THE  
11 DEFENDANT APPEALS THE FINAL VERDICT  
12 BASED UPON EXCULPATORY EVIDENCE WITH  
13 REGARD TO ATTORNEY-CLIENT CONFLICT OF INTEREST.  
14 THAT IN THE EVENT THE PROSECUTION REDACTS  
15 THE ELIMINATION OF CONTROVERSIAL INFORMATION  
16 PERTAINING TO THE 27, SEPTEMBER 2003  
17 INCIDENT, DEFENDANT INSISTS UPON A  
18 SEVERANCE OF MATTERS INTO TWO TRIALS.  
19 AND FINALLY, THAT IT WILL BE THE  
20 DEFENDANT'S INTENTION TO TESTIFY AT BOTH  
21 OF THESE TRIALS.  
22

23 RESPECTFULLY SUBMITTED,  
24 DATED THIS 16<sup>TH</sup> DAY OF JULY, 2003.

25  
26   
27 FERRILL V. VOLPICELLI  
28

June 25, 2002

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

C.D.O.J.  
Attention: Special Agent In Charge  
Mr. Vincent Jura  
Mariposa Street  
Room 5000  
Fresno, CA.

**RE: RETURN OF PROPERTY**

Dear Mr. Jura,

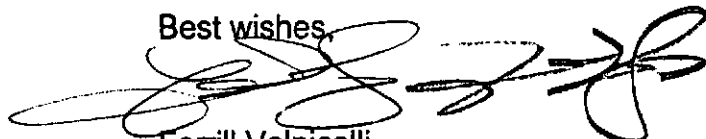
In February of this year, I wrote a letter apprising you of my predicament and my continued interest in resolving the issue concerning the return of my property. Please find a copy of such for your review.

It is my ardent hope that I can make arrangements with my family to secure the property that you continue to store in evidence. Again, please bear with me on this matter.

At your earliest convenience, please provide me with a timely reply acknowledging your receipt of my correspondence, as well as your cooperation with this matter.

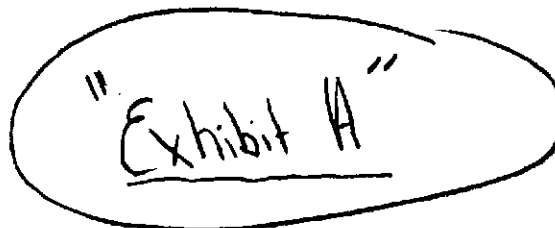
Thank you.

Best wishes,



Ferrill Volpicelli

Cc: file



"Exhibit A"

April 4, 2003

Ferrill Volpicelli  
60076 @ NNCC  
Box 7000  
Carson City, NV 89702

John Kadlic, Esq.  
147 E. Liberty Ste 2  
Reno, NV 89501

RE: REPLY TO PREVIOUS LETTERS

Dear Mr. Kadlic,

Thus far, I have made innumerable attempts to contact you, including two letters and countless dozens of calls to your office: all to no avail.

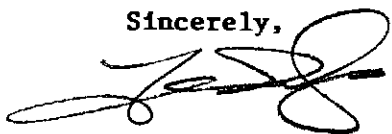
Of paramount concern is the state bail situation for reasons clearly outlined in my last letter. It is my objective to deal with this matter in advance of the imminent status hearing with the early May trial date.

In addition, I am still without confirmation as to my representation on the three other matters. In view of this, coupled with the lack of discovery on certain issues, there is no way that I am prepared to venture in to trial.

Finally, as a result of my desperation to discuss matters with you, I have requested my Power of Attorney, Kevin Sigstad, to call you. Please advise him as to the particulars regarding my bail situation. He is fully aware of my legal woes.

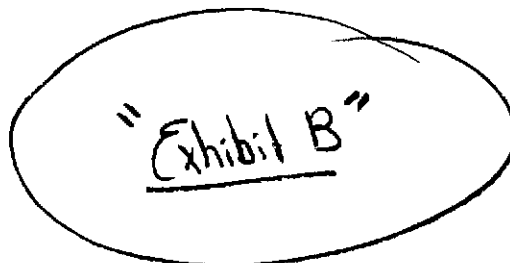
Thank you for your cooperation.

Sincerely,



Ferrill Volpicelli

cc: file



April 9, 2003

Ferrill Volpicelli  
60076 @ NNCC  
Box 7000  
Carson City, NV 89702

John Kadlic Esq.  
147 E. Liberty Ste 201  
Reno, NV 89501

RE: REQUEST FOR IMMEDIATE BAIL HEARING

Dear Mr. Kadlic,

According to my federal public defender, it is imperative that you schedule an immediate bail hearing. In view of my pending federal warrant/detainer, I am requesting that you seek an O.R. on all the state matters.

In this way, I can achieve a timely and prudent objective of resolving my federal supervised release violations.

Inasmuch as your office does not accept my calls, and I have not received a reply to any of my written inquiries, I must insist that you pursue this matter within 5 business days. If not, I will be compelled to write the Honorable Judge Hardesty.

Thank you.

Sincerely,



Ferrill Volpicelli

cc: file

"Exhibit C"



FERRIS VOLPICELLI  
03-06119 WEST  
911 PARK  
RENO, NV 89512  
JUNE 15, 2003

LAW  
OFFICE  
OF  
TODD  
KADUC

DEAR MR. KADUC,  
TO DATE, I HAVE LEFT SEVERAL  
MESSAGES OF INQUIRY ON YOUR VOICE  
MAIL; ALL TO NO AVAIL.

02-0147

IN MY LAST CONVERSATION WITH MR.  
AZIAN, HE PURPORTED THAT YOU CONTINUE  
TO BE THE COUNSEL OF RECORD ON  
02-0147.

ALSO, I SPECIFICALLY RECALL YOUR PROMISED  
VISIT IN CARSON CITY TO DISCUSS ISSUES  
WITH MY CASE.


AS I MENTIONED IN MY LAST MESSAGE  
TO YOUR VOICE MAIL, THE JULY 10TH  
SCHEDULED TRIAL DATE POSES A CONFLICT  
WITH MY HEARING IN THE FAMILY  
DIVISION OF WASHOE COUNTY DISTRICT  
COURT. 03-02634

IT IS MY ASSUMPTION THAT 02-0147 WILL  
BE DEFERRED. HOWEVER, I WOULD LIKE  
TO MEET WITH YOU FOR THE PREPARATION  
AND SUBMISSION OF A PRE-TRIAL MOTION  
TO SEVER THE 3 COUNTS INTO TWO  
TRIALS.

PLEASE VISIT ME AT WEST HOUSING UNIT  
1 ON THIS MATTER WITHIN THE NEXT  
10 DAYS.

SINCERELY

THANK YOU  
"Exhibit D"

  
V3: 252

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

By [Signature] Deputy Clerk

STATE OF NEVADA.

PLAINTIFF,

CASE #: 02-0147

VS

DEPT #: 9

FERRILL V. VOLPICELLI  
DEFENDANT,

REQUEST FOR  
SUBMISSION.

COME NOW THE DEFENDANT, FERRILL V.  
VOLPICELLI, TO REQUEST THAT THE ACCOMPANYING  
DOCUMENTS IN THE MATTER REFERENCED ABOVE,  
BE SUBMITTED TO THE COURT FOR CONSIDERATION.

THE UNDERSIGNED CERTIFIES THAT A COPY OF  
THIS REQUEST AND ACCOMPANYING DOCUMENTS  
HAVE BEEN MAILED TO WASHOE COUNTY DISTRICT  
ATTORNEY, HONORABLE JUDGE HENDERY, STEVE  
ALAN ESQ AND JOHN KADUC ESQ.

DATED THIS 16<sup>th</sup> DAY OF JULY, 2003.

[Signature]  
FERRILL V. VOLPICELLI

Ferrill Volpicelli  
03-06889 @WCSO  
911 Parr Blvd  
Reno, NV 89512

FILED

CR02-0147 DC-09900055260-041  
STATE VS FERRILL JOSEPH VOLPI 1 Page  
District Court 08/01/2003 12:15 PM  
Washoe County 3860  
WTSBPC

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

2003 AUG 01 12:15 PM  
BY DEPUTY

STATE OF NEVADA  
PLAINTIFF,

CASE #: 02-0147

VS

DEPT #: 9

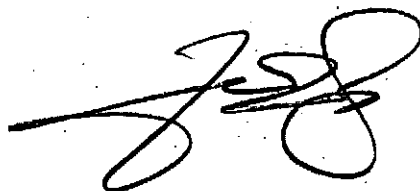
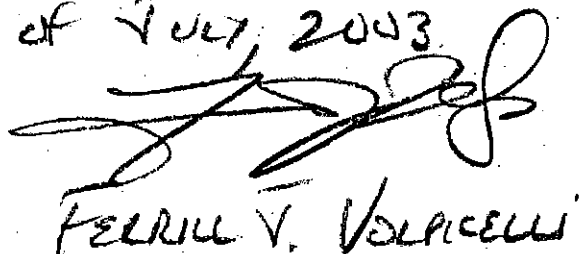
FERRILL T. VOLPICELLI  
DEFENDANT,

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HAVE BEEN MAILED TO, WASHOE COUNTY DISTRICT  
ATTORNEY, HONORABLE JUDGE HENDERLY, TAREL  
ALAN ESQ AND JOHN KADUC ESQ.

DATED THE 16<sup>th</sup> DAY OF JULY, 2003.


  
FERRILL T. VOLPICELLI

FILED  
Hearing Date  
Hearing Time

2003 AUG -1 PM 12:15

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

BY DEPUTY

FERRILL J. VOLPICELLI,  
Petitioner,

vs

STATE OF NEVADA  
Respondents et al.,

CASE NO. 02-0147

02-0148

03-1263

DEPT. NO. 9 EX PARTE

PETITION FOR CLARIFICATION  
ON ISSUES REGARDING  
STATE BAIL

COMES NOW THE PETITIONER, FERRILL J. VOLPICELLI, AND THROUGH HIS COUNSEL, TO MOVE THE COURT FOR CLARIFICATION ON ISSUES REGARDING THE POSTING OF PETITIONER'S STATE BAIL; AS IT RELATES TO HIS FEDERAL HOLD. SAID PETITIONER'S FAMILY SEEKS TO MITIGATE PETITIONER'S CUSTODY SITUATION BY EXPEDITING HIS TRANSFER TO FEDERAL CUSTODY.

THAT THIS WILL COMPEL THE DISPOSITION OF PETITIONER'S FEDERAL MATTER CONCOMITANT WITH THE STATE PENDING CHARGES.

IN THE EVENT THE STATE BAIL IS POSTED WITH REGARDS TO THE ABOVE REFERENCED CASES, PETITIONER'S CUSTODY WILL TRANSFER TO THE FEDS VIA THE US MARSHALS.

AND ALTHOUGH IT IS THE PETITIONER'S OBJECTIVE TO APPROACH THE US ATTORNEY FOR A STIPULATION TO HAVE PETITIONER REMAIN IN

1 FEDERAL CUSTODY AT WCSO, WITH THE  
2 ANTICIPATION OF APPEARING IN STATE  
3 COURT, THERE IS THE POSSIBILITY OF THE  
4 PETITIONER'S TRANSFER FROM WCSO TO A  
5 FEDERAL FACILITY.

6 THAT IN EFFECT, THIS WILL POSE ADVERSE  
7 CONSEQUENCES IN TERMS OF PETITIONER'S  
8 ABILITY TO APPEAR IN STATE COURT.

9 INASMUCH AS THIS POTENTIAL COMPLICATION  
10 IS THROUGH NO FAULT OF THE PETITIONER,  
11 PETITIONER'S FAMILY WOULD LIKE WRITTEN  
12 CONFIRMATION THAT THIS COURT WILL NOT  
13 REVOKE THE STATE BAIL FOR AN F.T.A.;  
14 THEREBY SUBJECTING PETITIONER'S FAMILY'S  
15 FUNDS TO FORFEITURE.

16 THAT WHETHER THE PETITIONER IS IN STATE  
17 OR FEDERAL CUSTODY, PETITIONER'S FAMILY  
18 REQUESTS CONFIRMATION THAT, AT THEIR  
19 OPTION, THE PETITIONER'S FAMILY CAN  
20 REVOKE BAIL AND RECEIVE A PROMPT RETURN  
21 OF THEIR FUNDS.

22 FURTHER, THAT PETITIONER'S FAMILY RESPECTFULLY  
23 REQUESTS A COURT DOCUMENT ON THIS  
24 MATTER WITHIN THE NEXT 10 (TEN)  
25 BUSINESS DAYS.

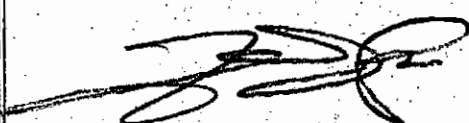
26 THAT THIS PETITION IS BASED UPON ALL  
27  
28

1 PAPERS AND PLEADINGS ON FILE  
2 HEREIN, AS WELL AS ORAL ARGUMENTS  
3 AT AN IMMEDIATE HEARING.

4 THE PETITION ITSELF WAS SUGGESTED BY  
5 JUDGE HARDESTY AT THE CONCLUSION OF  
6 THE DAY'S COURT PROCEEDINGS ON 10  
7 JULY, 2003.

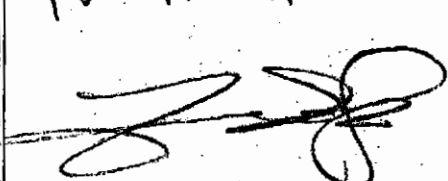
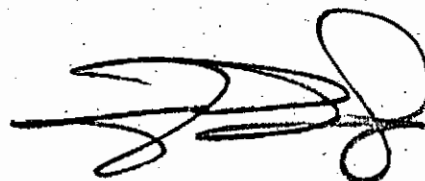
8  
9 RESPECTFULLY SUBMITTED,

10  
11 DATED THIS 14<sup>TH</sup> DAY OF JULY, 2003

12  
13 

14 FERREL VOLPICELLI

15  
16  
17 CERTIFICATE OF SERVICE: DATED AND COPY  
18 MAILED ON THIS 14<sup>TH</sup> DAY OF JULY, 2003,  
19 TO THE WASHOE COUNTY DISTRICT ATTORNEY'S  
20 OFFICE UNDER PENALTY OF PERJURY PURSUANT  
21 TO N.R.S. 20F.165.

22  
23  

24  
25 FERREL VOLPICELLI

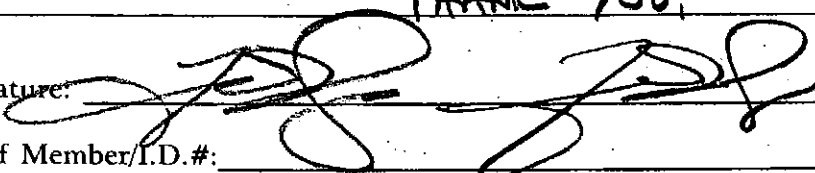
INMATE REQUEST

1. Only one issue/topic per request form.
2. Write only in the space provided.
3. Only one form per each issue/topic.
4. No profanity.
5. Do not address your request to a named individual.

Inmate's Name: FERRILL VOLPICELLI Booking #: 03-06449Housing Unit: 7 Cell #: 12 Date: 7-15-03

Describe Request: DEAR MR. KADUC  
INASMUCH AS YOU DO, NOT ACCEPT MY CALLS,  
ALONG WITH MR. ALAN'S POSITION THAT CASE 03-0147  
IS NOT HIS CONCERN, I WAS LEFT WITH NO ALTERNATIVE  
BUT TO WRITE YOU. AND IN ORDER TO BE IN  
COMPLIANCE WITH THE GUIDELINES OF THE APPLICABLE  
NEVADA REVISED STATUTE, I WAS COMPELLED TO FILE  
THE ACCOMPANYING PLEADING.  
MOREOVER, IT IS SELF EXPLANATORY IN VIEW OF THE  
RECENT REVELATION CONCERNING YOUR INVOLVEMENT  
AS A JUDGE & A CONFLICT OF INTEREST WHICH  
CONTINUES TO DAUNT MY FAMILY AND I THROUGH  
PRESENT DAY.  
I'M CONFIDENT THAT YOU UNDERSTAND THE IMPLICATIONS  
WITH MY CASES.

THANK YOU.

Inmate's Signature: 

Receiving Staff Member/I.D.#:

(PRINT NAME)

Date:

(INMATE IS NOT TO WRITE BELOW THIS SPACE)

ACTION

Routed to: \_\_\_\_\_ Date: \_\_\_\_\_ Re-Routed to: \_\_\_\_\_ Date: \_\_\_\_\_

Answer: Approved ☐Denied ☐

Reason:

CERTIFICATE OF SERVICE: DATED AND COPY MAILED ON THE  
16TH DAY OF JULY 2003 TO THE HONORABLE JUDGE HARDESTY,  
WASHOE COUNTY DISTRICT ATTORNEY, WASHOE COUNTY DISTRICT COURT  
CLERK AND JAIL ALAN, ESQ. AS CERTIFIED UNDER THE PENALTY  
OF PERJURY PURSUANT TO NRS 208.165.

Responding Staff Member / I.D.#:

(PRINT NAME)

FERRILL VOLPICELLI

Date: JULY 16

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AFFIDAVIT

STATE OF NEVADA }  
COUNTY OF WASHOE } ss CASE# 02-0147

COMES NOW DEFENDANT FERRILL T. VOLPICELLI,  
UNDER PENALTY OF PERJURY UNDER THE LAWS  
OF THE STATE OF NEVADA; DEPOSES AND SAYS:

THAT WITHIN A DAY OF THE TRIAL ADJOURNMENT  
IN THE ABOVE REFERENCED CASE, IT CAME TO  
THE ATTENTION OF THE DEFENDANT THAT A  
CONFLICT OF INTEREST EXISTS WITH LEGAL  
REPRESENTATION BY MR. JOHN KADLEC ESQ.  
THAT SAID CONFLICT OF INTEREST WAS  
REALIZED BY DEFENDANT THROUGH COMMUNICATION  
WITH MS. LORI INMAN'S AND DEFENDANT'S  
CHILDREN.

THAT DEFENDANT CONFIRMED SAID CONFLICT OF  
INTEREST VIA RESEARCH OF COUNTY RECORDS -  
VERIFYING THAT IN OR ABOUT APRIL OF 1993,  
FORMER JUDGE KADLEC'S NAME APPEARED ON  
A SEARCH WARRANT.

THAT SAID SEARCH WARRANT AUTHORIZED  
INVESTIGATIONS INTO DEFENDANT'S RETAIL  
ACTIVITIES.



1  
2 THAT THIS INCLUDED INVESTIGATIONS BY RENO  
3 POLICE DEPARTMENT, CALIFORNIA DEPARTMENT  
4 OF JUSTICE, THE CRIMINAL DIVISION OF THE  
5 U.S. JUSTICE DEPARTMENT, AND THE REPEAT  
6 OFFENDER PROGRAM OF NEVADA.

7 THAT SAID INVESTIGATIONS CULMINATED IN  
8 SUBSEQUENT INDICTMENTS AND EVENTUAL  
9 CONVICTIONS WITH COMMITMENTS OF THE  
10 DEFENDANT TO STATE AND FEDERAL FACILITIES.  
11 THAT TO DATE, UNRESOLVED ISSUES LINGER  
12 WITH RESPECT TO PROPERTY SEIZED BY  
13 THE C.D.O.T UNDER SAID WARRANT.  
14 (SEE ACCOMPANYING LOTTER AND WASHNE DISTRICT  
15 ATTORNEY ROGER WITOMES.)

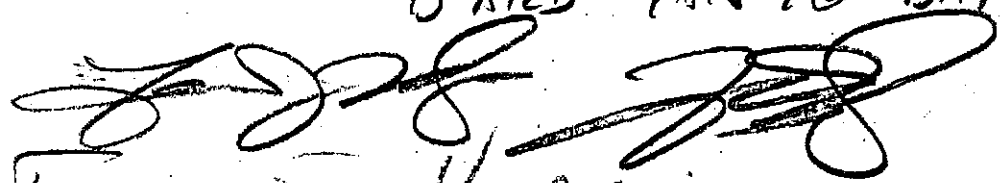
16  
17 THAT IF THE DEFENDANT WAS MADE AWARE  
18 OF THIS CONFLICT OF INTEREST EARLIER,  
19 HE WOULD HAVE PROMPTLY DISMISSED MR.  
20 KADUC ESQ.

21 THAT IN OR ABOUT THE MONTHS OF APRIL  
22 MAY, JUNE, AND JULY OF 1993, DEFENDANT  
23 SOUGHT LEGAL REPRESENTATION THROUGH  
24 MR. TACK ALAN REGARDING THE WARRANT  
25 AND ENSUING INVESTIGATIONS.

26 THAT DEFENDANT IS NOT SATISFIED WITH  
27 THE REPRESENTATION OF MR. KADUC  
28

Ferrill Volpicelli  
03-06889 @WCSO  
911 Parr Blvd  
Reno, NV 89512

1  
2 PRIOR TO AND DURING TRIAL, AS EVIDENCED  
3 BY THE ACCOMPANYING LETTERS.  
4 THAT DEFENDANT WAS NOT EVEN MADE  
5 AWARE OF THE 21 FEBRUARY, 2003 COMPLAINT  
6 AMENDMENT UNTIL DATE OF TRIAL.  
7 THAT AGAINST DEFENDANTS WISHEI, MR  
8 KADIC PURPOSEFULLY DID NOT PRESENT EVIDENCE  
9 RELEVANT TO DEFENDANTS CASE.  
10 THAT IN VIEW OF THE FOREGOING, THE  
11 DEFENDANT APPEALS THE FINAL VERDICT  
12 BASED UPON EXCULPATORY EVIDENCE WITH  
13 REGARD TO ATTORNEY-CLIENT CONFLICT OF INTEREST.  
14 THAT IN THE EVENT THE PROSECUTION REDACTS  
15 THE ELIMINATION OF CONTROVERSIAL INFORMATION  
16 PERTAINING TO THE 27, SEPTEMBER 2003  
17 INCIDENT, DEFENDANT INSISTS UPON A  
18 SEVERANCE OF MATTERS INTO TWO TRIALS.  
19 AND FINALLY, THAT IT WILL BE THE  
20 DEFENDANT'S INTENTION TO TESTIFY AT BOTH  
21 OF THESE TRIALS.  
22

23 RESPECTFULLY SUBMITTED,  
24 DATED THIS 16<sup>TH</sup> DAY OF JULY, 2005  
25  
26   
27 FERRILL V. VOLPICELLI  
28

June 25, 2002

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

C.D.O.J.  
Attention: Special Agent In Charge  
Mr. Vincent Jura  
Mariposa Street  
Room 5000  
Fresno, CA.

**RE: RETURN OF PROPERTY**

Dear Mr. Jura,

In February of this year, I wrote a letter apprising you of my predicament and my continued interest in resolving the issue concerning the return of my property. Please find a copy of such for your review.

It is my ardent hope that I can make arrangements with my family to secure the property that you continue to store in evidence. Again, please bear with me on this matter.

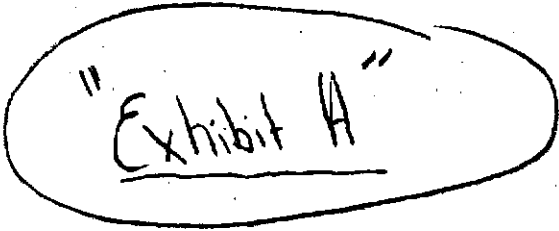
At your earliest convenience, please provide me with a timely reply acknowledging your receipt of my correspondence, as well as your cooperation with this matter.

Thank you.

Best wishes,

  
Ferrill Volpicelli

Cc: file

  
"Exhibit A"

April 4, 2003

Ferrill Volpicelli  
60076 @ NNCC  
Box 7000  
Carson City, NV 89702

John Kadlic, Esq.  
147 E. Liberty Ste 2  
Reno, NV 89501

RE: REPLY TO PREVIOUS LETTERS

Dear Mr. Kadlic,

Thus far, I have made innumerable attempts to contact you, including two letters and countless dozens of calls to your office: all to no avail.

Of paramount concern is the state bail situation for reasons clearly outlined in my last letter. It is my objective to deal with this matter in advance of the imminent status hearing with the early May trial date.

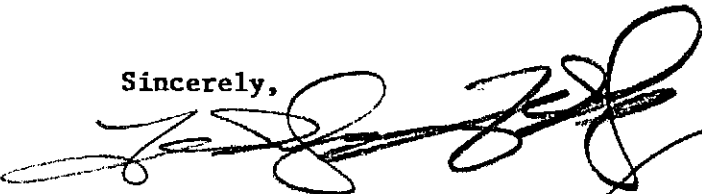
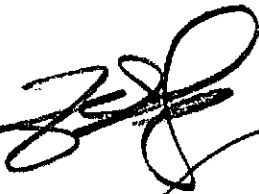


In addition, I am still without confirmation as to my representation on the three other matters. In view of this, coupled with the lack of discovery on certain issues, there is no way that I am prepared to venture in to trial. Finally, as a result of my desperation to discuss matters with you, I have requested my Power of Attorney, Kevin Sigstad, to call you. Please advise him as to the particulars regarding my bail situation. He is fully aware of my legal woes.

Thank you for your cooperation.

Sincerely,

  
Ferrill Volpicelli

cc: file


April 9, 2003

Ferrill Volpicelli  
60076 @ NNCC  
Box 7000  
Carson City, NV 89702

John Kadlic Esq.  
147 E. Liberty Ste 201  
Reno, NV 89501

RE: REQUEST FOR IMMEDIATE BAIL HEARING

Dear Mr. Kadlic,

According to my federal public defender, it is imperative that you schedule an immediate bail hearing. In view of my pending federal warrant/detainer, I am requesting that you seek an O.R. on all the state matters.

In this way, I can achieve a timely and prudent objective of resolving my federal supervised release violations.

Inasmuch as your office does not accept my calls, and I have not received a reply to any of my written inquiries, I must insist that you pursue this matter within 5 business days. If not, I will be compelled to write the Honorable Judge Hardesty.

Thank you.

Sincerely,



Ferrill Volpicelli

cc: file



"Exhibit C"

FERRIE VOLPICELLI  
03-06889 WCD  
911 PARK  
RENO, NV 89572

JUNE 15, 2003

LAW  
OFFICE  
OF  
TODD  
KADUC

DEAR MR. KADUC,  
TO DATE, I HAVE LEFT SEVERAL  
MESSAGES OF INQUIRY ON YOUR VOICE  
MAIL; ALL TO NO AVAIL.

02-0147

IN MY LAST CONVERSATION WITH MR.  
AZIAN, HE PURPORTED THAT YOU CONTINUE  
TO BE THE COUNSEL OF RECORD ON  
02-0147.

ALSO, I SPECIFICALLY RECALL YOUR PROMISED  
VISIT IN CARSON CITY TO DISCUSS ISSUES  
WITH MY CASE.

AS I MENTIONED IN MY LAST MESSAGE  
TO YOUR VOICE MAIL, THE JULY 10TH  
SCHEDULED TRIAL DATE POSES A CONFLICT  
WITH MY HEARING IN THE FAMILY  
DIVISION OF WASHINGTON COUNTY DISTRICT  
COURT. 03-02634

IT IS MY ASSUMPTION THAT 02-0147 WILL  
BE DEFERRED. HOWEVER, I WOULD LIKE  
TO MEET WITH YOU FOR THE PREPARATION  
AND SUBMISSION OF A PRE-TRIAL MOTION  
TO SEVER THE 3 COUNTS INTO TWO  
TRIALS.

PLEASE VISIT ME AT WCD HOUSING UNIT  
1 ON THIS MATTER WITHIN THE NEXT  
10 DAYS.

THANK YOU  
"Exhibit D"

SINCERELY

ORIGINAL

Ferrill Volpicelli  
03-06889 @WCSO  
911 Parr Blvd  
Reno, NV 89512

FILED

IN THE SECOND JUDICIAL DISTRICT COURT STATE OF NEVADA

2003 AUG 11 AM 2:34  
RONALD A. LONGTIN, JR.

IN AND FOR THE COUNTY OF WASHOE

THE STATE OF NEVADA,  
Plaintiff,

CASE NO. CR02-0147

VS

DEPT. NO: 9

Ferrill T. Volpicelli,  
Defendant,

MOTION FOR New Trial  
Pursuant to NRS § 176.515

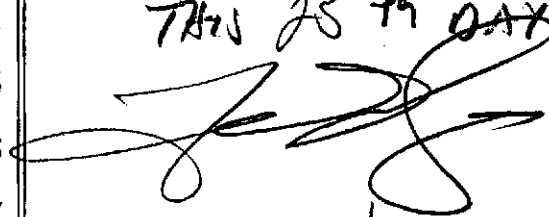
Comes Now, Ferrill T. Volpicelli, Defendant  
and in pro per due to complications with  
existing counsel, hereby moving this  
Honorable Court for a "New Trial" and/or  
order a judgment of acquittal based  
upon newly discovered evidence which  
shall be construed to conclude that a  
highly prejudicial presumption with direct  
and circumstantial evidence that the  
appointment of counsel was an  
ineffective appointment, since the court

DC-09900055260-039  
STATE VS FERRILL JOSEPH VOL 11 Pages  
District Court 08/01/2003 02:34 PM  
Washoe County 2490  
MTADDER

1 AND THE DEFENDANT WERE UNAWARE OF THE  
2 VOLPICELLI / KADUC PREJUDICIAL "CONFLICT OF  
3 INTEREST" WHICH RESULTED IN INACTION, LACK  
4 OF DEFENSIVE ASSERTIONS REQUIRED TO PRODUCE  
5 A FAIR TRIAL, AND CONSCIOUS UNLAWFUL  
6 CONCEALMENT OF RELEVANT INFORMATION  
7 LINKING RENO POLICE DEPARTMENT INVESTIGATIONS  
8 AS FAR BACK AS 1993. HAD COUNSEL  
9 DISCOVERED, PRODUCED AND PRESENTED THIS  
10 EVIDENCE AND ALLIANCE, THE OUTCOME OF  
11 THE TRIAL WOULD HAVE, WITHOUT DOUBT,  
12 YIELDED A DIFFERENT AND MORE FAVORABLE  
13 RESULT FOR THE DEFENSE; ESPECIALLY IF THE  
14 JURY HAD HEARD AND CONSIDERED SAID  
15 EVIDENCE.

16  
17 THIS HUMBLE LEGAL MOVEMENT IS MADE  
18 AND BASED UPON THE STATE AND FEDERAL  
19 CONSTITUTIONS, FACTS, STATEMENTS, POINTS AND  
20 AUTHORITIES; AFFIDAVIT IN SUPPORT OF MOTION,  
21 ALL PAPERS, PLEADINGS AND EXHIBITS ON FILE  
22 HEREIN.

23  
24 THIS 25<sup>TH</sup> DAY OF JULY, 2003

25  
26   
27  
28 FERRILL VOLPICELLI, DEFENDANT IN PRO PER  
2



I. STATEMENT OF FACTS  
AFFIDAVIT IN SUPPORT  
OF MOTION FOR A NEW TRIAL AND/  
OR ORDER FOR JUDGMENT OF ACQUITTAL

I, FERRILL Y. VOLPICELLI, AFFIRM UNDER THE  
PAINS OF PERJURY THAT ASSERTIONS OF THIS  
AFFIDAVIT ARE TRUE:

THAT FOLLOWING THE TRIAL IN THE ABOVE  
ENTITLED CASE, CERTAIN RELEVANT FACTS WERE  
BROUGHT TO MY ATTENTION THAT THE FORMER  
JUDGE KADUC, JOHN KADUC ESQ, WHO  
AUTHORIZED THE WARRANT WHICH RESULTED  
IN ENSUING INVESTIGATIONS AND THE SEIZURE  
OF PERSONAL PROPERTY DEPICTED IN EXHIBIT  
"A" AND CONTINUED TO BE AN ON-GOING  
DILEMMA OF HIGHLY PREJUDICIAL CONFLICTING  
NATURE.

THAT RELEVANT EVIDENCE OF RENO POLICE  
DEPARTMENTS AND KADUC'S ALLIANCE PREVENTED  
RELEVANT EVIDENCE OF R.O.P.'S DISCRIMINATORY,  
ARBITRARY AND VINDICTIVE ENFORCEMENT OF LAWS  
AGAINST ME, PAST AND PRESENT. THUS,  
RELEVANT EVIDENCE AND TESTIMONY WERE  
NOT PRESENTED AT TRIAL.

THAT MR. JOHN KADUC, ESQ. DISPLAYED

1 AN UNCANNY FAMILIARITY WITH MY LEGAL  
2 ISSUES RELEVANT TO MY PAST RETAIL ACTIVITIES,  
3 DESPITE CONCERNS REFLECTED IN EXHIBITS "B"-"D".


4 THAT MR. KADUC'S WITHHOLDING OF KEY  
5 INFORMATION AND EVIDENCE CONCERNING THE  
6 RENO POLICE DEPARTMENT INVESTIGATIONS, AND  
7 THE APPARENT PREJUDICIAL "CONFLICT OF  
8 INTEREST" HEREIN, HAVE ADVERSELY ALTERED  
9 THE OUTCOME AND RESULT OF TRIAL.

10 THAT WITNESSES, PURSUANT TO MY  
11 SUBSTANTIVE DUE PROCESS RIGHTS, WILL TESTIFY  
12 AND BRING FORTH EVIDENCE THAT I DID NOT  
13 UNDERSTAND THE REASONS FOR THE OBVIOUS  
14 "PREJUDICIAL CONFLICT OF INTEREST". THAT THE  
15 DISTRICT ATTORNEY, KADUC ESQ AND THE RENO  
16 POLICE DEPARTMENT WITHHELD FROM THE  
17 JURY AND COURT WHICH EVIDENCES MANIFEST  
18 INEFFECTIVE COUNSEL PRODUCING EVIDENCE  
19 THAT SUPPORTS GROUNDS FOR NEW TRIAL AND/  
20 OR JUDGMENT OF ACQUITTAL.

21  
22 THAT MR. KADUC KNOWINGLY, INTELLIGENTLY  
23 AND VOLUNTARILY WITHHELD THE KNOWLEDGE,  
24 WISDOM AND UNDERSTANDING OF HIS PAST  
25 ACTIONS CONCERNING ME, AND THAT THIS  
26 ALSO AFFECTED HIS WILLINGNESS TO ADEQUATELY  
27 DEFEND MY PERSONAL LIBERTY AND SUBMIT  
28

1 THE EVIDENCE AND TESTIMONY WHICH WOULD  
2 HAVE PRODUCED AN INNOCENT VERDICT.

3 THAT THIS SUPPORTIVE AFFIDAVIT IS  
4 BROUGHT IN IN THE "GOOD FAITH" EFFORTS TO  
5 SECURE A BRAND NEW TRIAL WITH ALTERNATIVE  
6 COUNSEL.

7 THIS 25<sup>th</sup> DAY OF JULY, 2003  
8 

9  
10 FERRIL V. VOLPICELLI, DEFENDANT IN PRO PER

11  
12 II. THE MEMO OF POINTS  
13 AND AUTHORITIES; A  
14 JURISDICTION OVER MATTER

15 "THE COURT MAY GRANT A NEW TRIAL TO A  
16 DEFENDANT IF REQUIRED AS A MATTER OF LAW  
17 OR ON GROUND(S) NEWLY DISCOVERED EVIDENCE  
18 (SEE NRS § 176.515(1)). THIS MOTION IS TIMELY  
19 (§ 176.515(3)). THE EXERCISE BY THE TRIAL COURT  
20 OF THE RIGHT TO GRANT A NEW TRIAL WILL  
21 BE PRESUMED CORRECT AND PROPER BY THE  
22 APPELLATE COURT UNTIL THE CONTRARY IS  
23 SHOWN. STATE V. CRACKET, 84 NEV. 516, 444 P2d  
24 896 (1961). SEE ALSO STATE V. STANLEY, 4 NEV 71,  
25 (1968) (DECISION UNDER FORMER SIMILAR STATUTE).

26  
27 5  
28

1  
2 III NECESSARY SHOWING FOR NEW TRIAL  
3 NEWLY DISCOVERED EVIDENCE MUST BE: (1),  
4 NEWLY DISCOVERED; (2) MATERIAL TO MOVANT'S  
5 DEFENSE; (3) SUCH THAT IT COULD NOT WITH  
6 REASONABLE DILIGENCE HAVE BEEN DISCOVERED  
7 AND PRODUCED FOR THE TRIAL; (4) NOT  
8 CUMULATIVE (5) SUCH AS TO RENDER A DIFFERENT  
9 RESULT PROBABLE UPON RETRIAL; (6) SUCH THAT  
10 IT DOES NOT ATTEMPT ONLY TO CONTRADICT A  
11 FORMER WITNESS OR IMPEACH OR DISCREDIT  
12 HIM, UNLESS THE WITNESS TO BE IMPEACHED  
13 IS SO IMPORTANT THAT A DIFFERENT RESULT  
14 MUST FOLLOW; and (7) THAT THESE FACTS BE  
15 SHOWN BY THE BEST EVIDENCE THE CASE  
16 ADMITS. MCLEMORE V STATE, 94 NEV. 237,  
17 577 P2d 871 (1978)

18  
19 IV NEWLY DISCOVERED EVIDENCE COULD...  
20 NOT HAVE BEEN OBTAINED PRIOR TO TRIAL.  
21  
22 AS THE COURTS AND COUNSEL PRESUMED  
23 NON-BIAS, NON-PROTUDICIAL AND NON  
24 CONFLICTING ACTIONS, CONDUCT AND  
25 REPRESENTATIONS ARE GIVEN IN OUR CRIMINAL  
26 JUSTICE SYSTEM, THE DEFENDANT ASSUMED  
27 THE ABSENCE OF NEGATIVE ACTIONS, CONDUCT  
28 AND REPRESENTATIONS, BY THE COURT AND

1  
2 COUNSEL. THUS, NEWLY DISCOVERED  
3 EVIDENCE WAS NOT SOUGHT-BUT RATHER  
4 DISCOVERY AFTER TRIAL. THE EVIDENCE  
5 WILL HAVE NO DEFINITE EFFECT OF A  
6 DIFFERENT VERDICT ON RETRIAL.

7 BURTON V STATE, 84 NEV 191, 437 P2d 601  
8 SEE ALSO HILL V STATE, 91 NEV, 654 P2d 640  
9

10 CONCLUSION

11 WHEREFORE, MR. VOLPICELLI PRAYS FOR  
12 AN ORDER GRANTING A BRAND NEW TRIAL  
13 WITH ALTERNATIVE COUNSEL TO CORRECT THE  
14 UNJUST RESULT OF A GUILTY VERDICT.  
15

16 THE 28<sup>th</sup> DAY OF JULY, 2003.

17  
18  
19  
20 FERRILL VOLPICELLI, DEFENDANT IN PRO PER  
21

22 CERTIFICATE OF SERVICE: DATED AND COPY MAILED  
23 THE 28<sup>th</sup> DAY OF JULY, 2003 TO THE WASHINGTON  
24 COUNTY DISTRICT ATTORNEY UNDER PENALTY OF  
25 PENALTY PURSUANT TO NRS. 20A.160  
26

27  
28 FERRILL VOLPICELLI, DEFENDANT IN PRO PER

June 25, 2002

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

C.D.O.J.  
Attention: Special Agent In Charge  
Mr. Vincent Jura  
Mariposa Street  
Room 5000  
Fresno, CA.

**RE: RETURN OF PROPERTY**

Dear Mr. Jura,

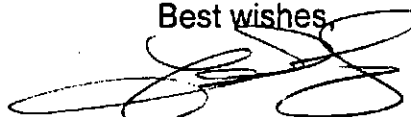
In February of this year, I wrote a letter apprising you of my predicament and my continued interest in resolving the issue concerning the return of my property. Please find a copy of such for your review.

It is my ardent hope that I can make arrangements with my family to secure the property that you continue to store in evidence. Again, please bear with me on this matter.

At your earliest convenience, please provide me with a timely reply acknowledging your receipt of my correspondence, as well as your cooperation with this matter.

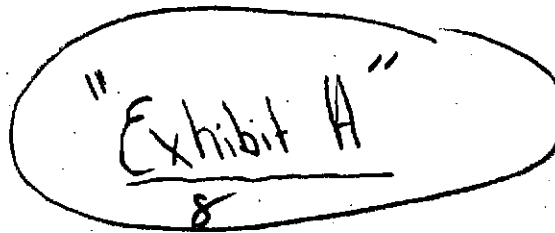
Thank you.

Best wishes,



Ferrill Volpicelli

Cc: file



"Exhibit A"  
8

April 4, 2003

Ferrill Volpicelli  
60076 @ NNCC  
Box 7000  
Carson City, NV 89702

John Kadlic, Esq.  
147 E. Liberty Ste 2  
Reno, NV 89501

RE: REPLY TO PREVIOUS LETTERS

Dear Mr. Kadlic,

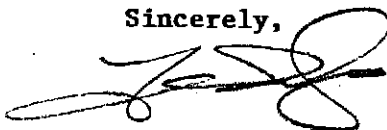
Thus far, I have made innumerable attempts to contact you, including two letters and countless dozens of calls to your office: all to no avail.

Of paramount concern is the state bail situation for reasons clearly outlined in my last letter. It is my objective to deal with this matter in advance of the imminent status hearing with the early May trial date.

In addition, I am still without confirmation as to my representation on the three other matters. In view of this, coupled with the lack of discovery on certain issues, there is no way that I am prepared to venture in to trial. Finally, as a result of my desperation to discuss matters with you, I have requested my Power of Attorney, Kevin Sigstad, to call you. Please advise him as to the particulars regarding my bail situation. He is fully aware of my legal woes.

Thank you for your cooperation.

Sincerely,



Ferrill Volpicelli

cc: file

"Exhibit B"  
9

April 9, 2003

Ferrill Volpicelli  
60076 @ NNCC  
Box 7000  
Carson City, NV 89702

John Kadlic Esq.  
147 E. Liberty Ste 201  
Reno, NV 89501

RE: REQUEST FOR IMMEDIATE BAIL HEARING

Dear Mr. Kadlic,

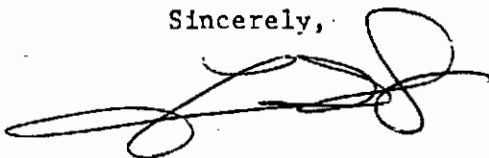
According to my federal public defender, it is imperative that you schedule an immediate bail hearing. In view of my pending federal warrant/detainer, I am requesting that you seek an O.R. on all the state matters.

In this way, I can achieve a timely and prudent objective of resolving my federal supervised release violations.

Inasmuch as your office does not accept my calls, and I have not received a reply to any of my written inquiries, I must insist that you pursue this matter within 5 business days. If not, I will be compelled to write the Honorable Judge Hardesty.

Thank you.

Sincerely,



Ferrill Volpicelli

cc: file

"Exhibit C"  
12



FERRIE VOLPICELLI  
03-06589 WEST  
911 PARK  
RENO, NV 89512  
JUNE 15, 2003

LAW  
OFFICE  
OF  
JUDN  
KADUC

DEAR MR. KADUC,  
TO DATE, I HAVE LEFT SEVERAL  
MESSAGES OF INQUIRY ON YOUR VOICE  
MAIL; ALL TO NO AVAIL.

02-0147

IN MY LAST CONVERSATION WITH MR.  
AZIAN, HE PURPORTED THAT YOU CONTINUE  
TO BE THE COUNSEL OF RECORD ON  
02-0147.

ALSO, I SPECIFICALLY RECALL YOUR PROMISED  
VISIT IN CARSON CITY TO DISCUSS ISSUES  
WITH MY CASE.

AS I MENTIONED IN MY LAST MESSAGE  
TO YOUR VOICE MAIL, THE JULY 10TH  
SCHEDULED TRIAL DATE POSES A CONFLICT  
WITH MY HEARING IN THE FAMILY  
DIVISION OF WASHINGTON COUNTY DISTRICT  
COURT. 03-02634

IT IS MY ASSUMPTION THAT 02-0147 WILL  
BE DEFERRED. HOWEVER, I WOULD LIKE  
TO MEET WITH YOU FOR THE PREPARATION  
AND SUBMISSION OF A PRE-TRIAL MOTION  
TO SEVER THE 3 COUNTS INTO TWO  
TRIALS.

PLEASE VISIT ME AT WEST HOUSING UNIT  
1 ON THIS MATTER WITHIN THE NEXT  
10 DAYS.

THANK YOU.

"Exhibit D"

SINCERELY,

ORIGINAL

FILED

AUG 13 2003

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

2840

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

FERRILL J. VOLPICELLI,

Plaintiff,

v.

Case No. CR02-0147

Dept. No. 9

THE STATE OF NEVADA,

Defendant.

ORDER

The Court has reviewed and considered Petitioner's Ex Part Petition for  
Clarification filed on August 1, 2003.

Pursuant to WDCR 9(3)(c) "The court shall not consider any ex parte  
communication, letter, report or other document but shall forthwith notify counsel for all  
parties, on the record, of any attempted ex parte communication or document or  
submission."

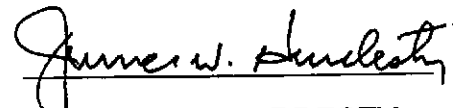
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////

CR02-0147  
STATE VS FERRILL  
District Court  
Washoe County  
DC-09900055260-040  
JOSEPH VOLP 3 Pages  
08/13/2003 01:48 PM  
2840  
MTNDEF

1 Good cause appearing, IT IS HEREBY ORDERED that Petitioner's Ex Parte  
2 Petition for Clarification is DENIED without prejudice.<sup>1</sup>

3 Dated this 13 day of August, 2003.

4  
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6   
7 JAMES W. HARDESTY  
8 DISTRICT JUDGE  
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<sup>1</sup> The relief requested by Petitioner must be resubmitted by his counsel of record pursuant to LCR 7.

CERTIFICATE OF MAILING

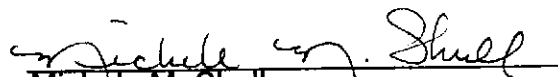
Pursuant to NRCP 5(b), I hereby certify that I am an employee of the Second Judicial District Court, in and for the County of Washoe; and that on this 13 day of August, 2003, I deposited in the County mailing system for postage and mailing with the United States Postal Service in Reno, Nevada, a true and correct copy of the attached document addressed as follows:

Ferrill J. Volpicelli, #60076  
Washoe County Detention Facility  
(via interoffice mail)

Bradley O. Van Ry, Esq.  
1403 E. Fourth Street  
Reno, NV 89512

John J. Kadlic, Esq.  
550 California Avenue  
P. O. Box 2477  
Reno, NV 89505

Tammy Riggs, Esq.  
WASHOE COUNTY DISTRICT  
ATTORNEY'S OFFICE  
(via interoffice mail)

  
Michele M. Shull  
Administrative Assistant

V3. 280

FILED

WASHOE COUNTY DETENTION FACILITY

AUG 25 2003

## INMATE REQUEST

RONALD A. LONGTIN, JR., CLERK

Courts Transportation

1. Only one issue/topic per request form.  
 3. Only one form per each issue/topic.  
 5. Do not address your request to a named individual.

2. Write only in the space provided.  
 4. No profanity.

AUG 20 2003

Inmate's Name:

FERRIL VOLPICELLI

Booking #:

03-06889

Inmate Unit:

7

Cell #:

12

Date:

8-19-03

Describe Request:

TO THE HONORABLE JUDGE HANDESY  
 DEPT. 9 WASHOE DISTRICT COURT.

ATTACHED 8 LETTER TO JUDGE PRESIDING

02-0147

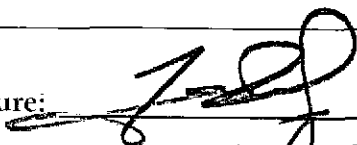
8/19/03

AND LETTER TO JOHN KADLIC ESQ

8/8/03.

Respectfully Submitted,

Inmate's Signature:



Receiving Staff Member/I.D.#:

M. O. B. S.

2273

Date: 8-19-03

(PRINT NAME)

(INMATE IS NOT TO WRITE BELOW THIS SPACE)

## ACTION

Routed to:

COURTS

Date:

8-19

Re-Routed to:

Date:

Answer: Approved ☐Denied ☐

Reason:

Filed letter in as "Notice of Document Received But Not Considered  
 By the Court". Copies of this request and Notice sent to D.A.,  
 Mr. Volpicelli, Mr. Kadlic and Mr. Van Ry

mms

8-22-03

RECEIVED

8-21-03

RONALD A. LONGTIN, JR., Clerk  
 Deputy Clerk

Responding Staff Member / I.D.#:

(PRINT NAME)

Date:

ORIGINAL

FILED

CODE: 2528

AUG 25 2003

RONALD A. LONGTIN, JR., CLERK

By: [Signature]  
DEPUTY

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

STATE OF NEVADA,

Plaintiff,

Case No. CR02-0147

vs.

Dept. No. 9

FERRILL J. VOLPICELLI,

Defendant.

NOTICE OF DOCUMENT RECEIVED BUT NOT CONSIDERED BY THE COURT

TO: District Attorney's Office and Defense counsel:

Take notice that the attached document has been received unsolicited by the Court. The Court has not reviewed the document. Further, the Court will not review the document absent an affirmative request to do so from a party.

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///

This document was considered by the Court only if initialed and dated by the Judge below.

Date

Judges Initials

FERRILL VOLPICELLI  
03-06889 WCSO  
911 PARR  
RENO, NV 89512

AUGUST 19, 2003

RE: 02-0147

HONORABLE  
DISTRICT  
COURT

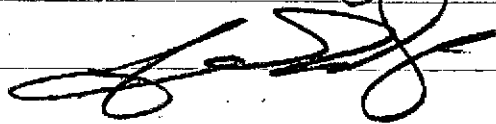
DEAR HONORABLE JUDGE HARDESTY,

JUDGE  
DEPT.  
9

PLEASE BE AWARE THAT I AM FILING  
MOTIONS AND PETITIONS WITH MY CASES  
BECAUSE MY COUNSEL HAS REFUSED TO  
BRING ISSUES TO THE COURT'S ATTENTION.  
ENCLOSED IS A COPY OF MY MOST RECENT  
ATTEMPT TO HAVE MR. KADIC PREPARE AND  
FILE A MOTION FOR ACQUITTAL OR NEW TRIAL.  
THUS, I AM COMPELLED TO POSE THIS  
MATTER FOR YOUR REVIEW.

PLEASE HAVE YOUR CLERK SCHEDULE AN  
IMMEDIATE HEARING TO RESOLVE THE  
CONFLICT OF INTEREST ISSUES WITH MY CASE.  
THANK YOU.

RESPECTFULLY SUBMITTED,



FERRILL VOLPICELLI

CERTIFICATE OF SERVICE: DATED AND COPY MAILED ON THIS  
19<sup>th</sup> DAY OF AUGUST, 2003, TO JOHN KADIC ESQ  
AND WASHOE COUNTY DISTRICT ATTORNEY UNDER  
PENALTY OF PERJURY PURSUANT TO NRS 43.282/65

FERRILL VOLPICELLI  
03-06889 WESD  
911 PARK BLVD  
RENO, NV 89512  
#02-0147

Law  
office  
of  
JOHN  
KADUC  
ESQ.

AUGUST 8, 2003

DEAR MR. KADUC,

FINALLY, AFTER ALMOST A MONTH'S WORTH  
OF DAILY ATTEMPTS TO CONTACT YOU BY  
TELEPHONE, MY FAMILY ACCOMMODATED ME  
WITH A 3 WAY CONNECTION TO YOUR  
OFFICE.

REGARDING OUR CONVERSATION TODAY, MICHAEL  
AT JUDGE HANDELY'S OFFICE INFORMED ME  
THAT MY MOTIONS REGARDING THE COMPLICATIONS  
WITH MY CASE HAVE BEEN FORWARDED TO  
YOUR OFFICE. IT IS MY UNDERSTANDING THAT  
SINCE YOU REMAIN COUNSEL OF RECORD, IT  
IS YOUR RESPONSIBILITY TO ASSIST ME WITH  
SUCH PROCEEDINGS. AND DESPITE YOUR RECENT  
AND EXPERIENCE RELEVANT TO OTHER CASES  
WHERE ALLEGED CONFLICTS OF INTEREST PRESENTED  
THEMSELVES, I BELIEVE THAT MY SITUATION IS  
UNIQUE.

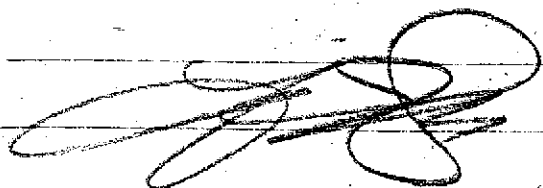
FIRSTLY, I BEG TO DIFFER WITH YOUR  
POSITION THAT YOUR INVOLVEMENT AS A JUDGE  
DATING BACK 10 YEARS AGO IS NOT RELEVANT  
TO THIS CASE. THE FACT REMAINS, REAR  
AUTHORITIES, SPECIFICALLY R.C.P., COMMENCED  
WITH ONGOING INVESTIGATIONS STEMMING FROM  
THE 1993 WARRANT YOU ISSUED CONCERNING MY  
RETAIL ACTIVITIES. AND AT MY ARREST, R.C.P.  
EMPHATICALLY STATED THAT THEIR INVESTIGATION



CONCLUDED ALMOST NINE YEARS OF SURVEILLANCE  
AND INVESTIGATIONS INTO MY RETAIL ACTIVITIES,  
ACTIVITIES WHICH THIS CASE'S POLICE REPORTS CLEARLY  
INDICATE WERE THE BASIS WITH REGARDS TO WHY I  
WAS SURVEILLED IN THE MONTHS OF SEPTEMBER  
AND OCTOBER OF 2001; PARTICULARLY ON SEPTEMBER 25<sup>th</sup> & 26<sup>th</sup>.  
SECONDLY, EXHIBIT 'A' CLEARLY DEMONSTRATES A  
LINGERING ISSUE WHICH CONTINUES TO THIS DAY DUE TO  
THAT WARRANT AND THE AUTHORITIES' INVESTIGATIONS.  
THUS, I IMPLORE YOU TO RECONSIDER YOUR  
POSITION WITH REGARDS TO NOT FILING A  
MOTION ON MY BEHALF. ESPECIALLY AFTER TALL  
ALAN INFORMED ME SEVERAL WEEKS AGO THAT  
IT WOULD BE YOUR INTENTION TO DO SO.  
I TRUST THIS LETTER OF REQUEST WILL  
CULMINATE IN YOUR COOPERATION WITH THIS  
MATTER.

INASMUCH AS YOU DO NOT ACCEPT MY CALLS,  
AND ANOTHER FACILITATED 3 WAY CALL TO  
YOU IS UNLIKELY, PLEASE REPLY TO ME IN  
WRITING WITHIN THE NEXT 5 BUSINESS DAYS.

SINCERELY,



cc's file.

CERTIFICATE OF MAILING


Pursuant to NRCP 5(b), I hereby certify that I am an employee of the Second Judicial District Court, in and for the County of Washoe; and that on this 25<sup>th</sup> day of August, 2003, I deposited in the County mailing system for postage and mailing with the United States Postal Service in Reno, Nevada, a true and correct copy of the attached document addressed as follows:

Ferrill J. Volpicelli, #60076  
Washoe County Detention Facility  
(via interoffice mail)

Bradley O. Van Ry, Esq.  
1403 E. Fourth Street  
Reno, NV 89512

John J. Kadlic, Esq.  
550 California Avenue  
P. O. Box 2477  
Reno, NV 89505

Tammy Riggs, Esq.  
WASHOE COUNTY DISTRICT  
ATTORNEY'S OFFICE  
(via interoffice mail)

  
Michele M. Shull  
Administrative Assistant

FILED

SEP 12 2003

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

CODE: 1930

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

STATE OF NEVADA,

Plaintiff,

vs.

FERRILL JOSEPH VOLPICELLI,

Defendant.

Case No. CR02-0146

CR02-0147

CR02-0148

CR03-1263

Dept. No. 9

LETTER FROM DEFENDANT

SEE ATTACHED DOCUMENT

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FERRILL VOLPICELLI  
03-06449 WCSO  
911 PARR BLVD  
RENO, NV 89512

SEPTEMBER 1, 2003

CHIEF  
DISTRICT  
COURT  
JUDGE  
DEPT.  
9

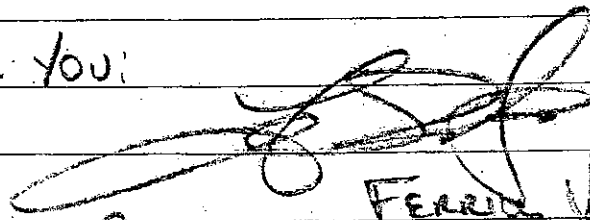
RE: DISINTERESTED COUNSEL

DEAR HONORABLE JUDGE HARDESTY,

AGAIN, I FIND MYSELF THE SAME ISSUES  
REGARDING THE DISINTEREST OF MY COUNSEL  
TO ASSIST ME WITH MY STATE BAIL  
SITUATION. (SEE PETITION FOR CLARIFICATION)  
ENCLOSED ARE COPIES OF LETTERS TO MY  
ATTORNEYS, AND TYPICALLY, NOT ONE OF THEM  
IS RESPONDING TO THE MATTER.

SO I RESPECTFULLY INQUIRE AS TO  
WHAT I AM TO DO NEXT?

THANK YOU:



FERRILL VOLPICELLI

SINCERE REGARDS,

CERTIFICATE OF SERVICE

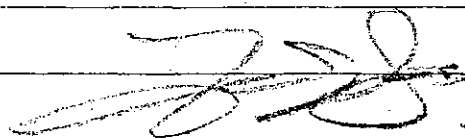
THE UNDERSIGNED HEREBY  
CERTIFIES THAT ON THE 4<sup>th</sup>  
DAY OF SEPTEMBER 2003, HE  
DID MAIL A COPY OF THIS  
LETTER TO WASHOE COUNTY  
DISTRICT ATTORNEY, JACK ALIAN  
JOHN KADUC, BRADLEY VAN DYKE.

RECEIVED

SEP 09 2003 -

Department Nine

ENCLOSURES  
cc 3 FILE



FERRILL VOLPICELLI

HEROIC VOLPICKI  
03-06889 WCSO  
911 PARR BLVD  
RENO, NV 89512

AUGUST 19, 2003

LAW OFFICE

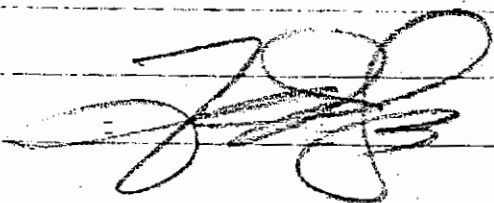
OF

Jack Alan Esq.

DEAR MR. ALAN,

PLEASE FIND THE ACCOMPANYING  
ORDER FROM JUDGE HARDESTY REGARDING MY  
EFFORTS TO RESOLVE MATTERS WITH MY STATE BAIL  
AT THIS POINT, I IMPURE YOU TO SCHEDULE A  
HEARING ON THIS MATTER WITHIN THE NEXT WEEK,  
IF NOT, THEN I WILL BE OVERWHELMINGLY  
COMPELLED TO WRITE JUDGE HARDESTY APPRISING  
HIM OF INATTENTIVE AND INEFFECTUAL COUNSEL

SINCERE REGARDS,



cc: file

ENCLOSURE

FERRILL VOLPICELLI  
03-06119 WCSO  
911 PARK BLVD  
RENO, NV 89572

AUGUST 19, 2003

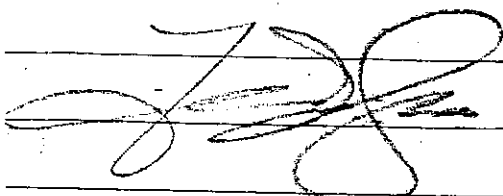
LAW OFFICE  
OF

DEAR MR. KADIC,

JOHN KADIC ESQ. BY NOW YOU ARE LIKELY IN  
RECEIPT OF JUDGE HARDESTY'S ORDER REGARDING  
CLARIFICATION OF MY STATE BAIL.

AT THIS POINT, I IMPLORE YOU TO SCHEDULE A  
HEARING ON THIS MATTER WITHIN THE NEXT WEEK  
IF NOT, THEN I WILL BE OVERWHELMINGLY  
COMPELLED TO WRITE JUDGE HARDESTY APPRAISING  
HIM OF INATTENTIVE & INEFFECTUAL COUNSEL.

SINCERE REGARDS,



cc & file

ENCLOSURE

AUGUST 19, 2003

LAW OFFICE OF  
BARTLEY VAN RY ESQ.

Dear Mr.

PLEASE FIND THE ACCOMPANYING PLEADING WHICH  
COINCIDES WITH JUDGE HANDELY'S RECENT OR  
I WAS MIST AS YOU ARE THE ONLY ATTORNEY  
THAT PROFESSIONALLY ACKNOWLEDGES MY CORRESPONDENCE.  
I IMPLORE YOU TO SCHEDULE A HEARING ON  
THIS MATTER IN THE COMING WEEK. I'D  
NOT PURSUE THIS MATTER AGAIN ON MY OWN.  
SIMPLY APPRISE JUDGE HANDELY OF A LACK  
OF COOPERATION BY COUNSEL. THANK YOU

SINCERE REGARDS,



cc & file

ENCLOSURE

CERTIFICATE OF MAILING

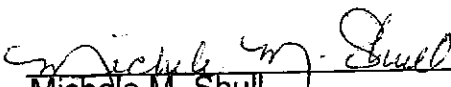
Pursuant to NRCP 5(b), I hereby certify that I am an employee of the Second Judicial District Court, in and for the County of Washoe; and that on this 12 day of September, 2003, I deposited in the County mailing system for postage and mailing with the United States Postal Service in Reno, Nevada, a true and correct copy of the attached document addressed as follows:

Ferrill J. Volpicelli, #60076  
Washoe County Detention Facility  
(via interoffice mail)

Jack A. Alian, Esq.  
360 W. Liberty Street  
Reno, NV 89501

John J. Kadlic, Esq.  
550 California Avenue  
P. O. Box 2477  
Reno, NV 89505

Tammy Riggs, Esq.  
Deputy District Attorney  
WASHOE COUNTY DISTRICT  
ATTORNEY'S OFFICE  
(via interoffice mail)

  
Michele M. Shull  
Administrative Assistant



FERRILL JOSEPH VOLPICELLI  
 03-06889 @ WCSO  
 911 PARK BLVD  
 RENO, NV 89512  
 PETITIONER PRO PER

Hearing Date

Hearing Time

FILED

IN THE SECOND JUDICIAL DISTRICT COURT OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

RONALD A. MONDIN JR.

BY [Signature]  
DEPUTY

FERRILL J. VOLPICELLI,  
 Petitioner,

VS

STATE OF NEVADA  
 Respondents et al.,

CASE NO. CR02-0147 CR03-0263DEPT. NO. 9

PETITION FOR DISMISSAL  
OF COUNSEL AND  
PRO SE REPRESENTATION

COMES NOW FERRILL J. VOLPICELLI, PETITIONER AND  
 DEFENDANT, TO REQUEST THE COURT'S DISMISSAL OF  
 MR. JOHN KADLIC ESQ. ALSO, SAID PETITIONER DEMANDS  
 HIS CONSTITUTIONAL SIXTH AMENDMENT RIGHT TO REPRESENT  
 HIMSELF.

THE COURT HAS APPOINTED JOHN KADLIC ESQ. TO  
 REPRESENT THE PETITIONER IN THE ABOVE REFERENCED  
 MATTER. THROUGHOUT THE COURT PROCEEDINGS, PETITIONER  
 HAS DOCUMENTED INDICIA OF SECOND-CLASS REPRESENTATION.  
 THIS INCLUDES, BUT IS NOT LIMITED TO, PETITIONER'S  
 AWARENESS OF AN ATTORNEY-CLIENT CONFLICT OF INTEREST  
 SUBSEQUENT TO THE DAY OF TRIAL ON 10 JULY, 2003,  
 INASMUCH AS THE HONORABLE COURT WILL NOT  
 ACKNOWLEDGE THE FOREGOING CONCERNS THAT PETITIONER  
 HAS BROUGHT FORTH; SPECIFICALLY PLEADINGS REGARDING  
 INEFFECTIVE COUNSEL; PREJUDICIAL CONFLICT OF INTEREST

1 AND CLARIFICATION OF ISSUES WITH RESPECT TO  
2 BAIL, PETITIONER IS OVERWHELMINGLY COMPELLED  
3 TO REPRESENT HIMSELF. THE PLEADINGS FILED BY  
4 PETITIONER REGARDING THE FOREGOING CONCERNS  
5 WITH COUNSEL ARE SELF EXPLANATORY, AND  
6 SERVE AS THE BASIS FOR THE MOTION; TOGETHER  
7 WITH ALL OTHER PLEADINGS, DOCUMENTS, PAPERS  
8 AND EXHIBITS ON FILE HEREIN.

### 10 POINTS AND AUTHORITIES

11 PETITIONER SEEKS TO PROTECT HIS FOURTH  
12 AMENDMENT RIGHTS AND DUE PROCESS RIGHTS,  
13 THAT MR. KADUC'S PERFORMANCE HAS BEEN  
14 SECOND CLASS YIELDING SECOND CLASS  
15 JUSTICE. THIS INCLUDES, BUT NOT LIMITED TO  
16 OMISSION OF INVESTIGATIONS, FAILURE TO RESPOND  
17 TO CLIENTS INQUIRIES AND ISSUES OF CONCERN,  
18 AS WELL AS OMISSION OF EVIDENCE; ALL OF WHICH  
19 SHOULD LEAD TO A NEW TRIAL ON THE  
20 RATIONALE THAT ONE CAN NEVER BE CERTAIN  
21 WHAT MIGHT HAVE HAPPENED HAD COUNSEL  
22 PERFORMED BETTER.

24 IN THE FOREGOING MATTERS, COUNSEL BREACHED  
25 THE DUTY OF LOYALTY - PERHAPS THE MOST  
26 BASIC OF COUNSELORS DUTIES. AND PLAINLY, IT  
27 IS DIFFICULT TO MEASURE THE PRECISE EFFECT  
28 ON THE DEFENSE OF REPRESENTATION

1 CORRUPTED BY CONFLICTING INTERESTS. IN THE  
2 NEVADA SUPREME COURT RULES, #162 AT (1)  
3 CLEARLY STATES, WITH REGARDS TO FORMER  
4 JUDGE OR ARBITRATOR, ... EXCEPT AS STATED IN  
5 SUBSECTION (4), A LAWYER SHALL NOT REPRESENT  
6 ANYONE IN CONNECTION WITH A MATTER IN WHICH  
7 THE LAWYER PARTICIPATED PERSONALLY AND  
8 SUBSTANTIALLY AS A JUDGE OR OTHER  
9 ADJUDICATIVE OFFICER, ARBITRATOR OR LAW CLERK  
10 TO SUCH A PERSON, UNLESS ALL PARTIES  
11 TO THE PROCEEDING CONSENT AFTER DISCLOSURE.  
12 THE RIGHT TO COUNSEL IS THE RIGHT TO  
13 EFFECTIVE ASSISTANCE OF COUNSEL, *Mc Mann V*  
14 *RICHARDSON* (1970). IN *CUYLER V SULLIVAN*, THE  
15 COURT HELD THAT PREJUDICE IS PRESUMED WHEN COUNSEL  
16 IS BURDENED BY AN ACTUAL CONFLICT OF INTEREST,  
17 IN *GLASSNER V U.S.* (1972), WHERE COUNSEL'S EFFECTIVE-  
18 NESS WAS LIMITED BY A CONFLICT OF INTEREST, THE  
19 COURT HELD THAT A DEFENDANT'S SIXTH AMENDMENT  
20 RIGHT WAS VIOLATED BY SUCH INEFFECTIVE COUNSEL.  
21 FURTHER, THE COURT OF APPEALS FOR THE  
22 SECOND CIRCUIT GRANTED RELIEF, CONCLUDING  
23 THAT UNDER *ANDERS V CALIFORNIA* (1967),  
24 WHEN A DEFENDANT INSISTS THAT HIS ATTORNEY  
25 RAISE ADDITIONAL COLORABLE POINTS, THE  
26 ATTORNEY MUST ARGUE THE ADDITIONAL POINTS  
27 TO THE FULL EXTENT OF HIS PROFESSIONAL  
28

1 ABILITY. (EMPHASIS ADDED BY SUPREME COURT).  
2 AND THAT SINCE MR. KADUC REFUSES TO  
3 ACKNOWLEDGE AND PROFFER SUCH ISSUES TO  
4 THE COURT FOR REVIEW AND DETERMINATION,  
5 PETITIONER MUST PRESERVE CONCERNS AND RIGHTS  
6 ON HIS OWN ACCORD.

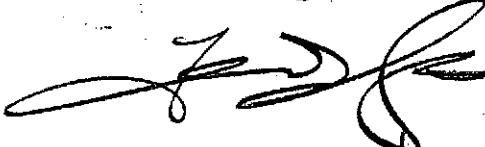
7 IN CONSEQUENCE, THE PETITIONER REQUESTS  
8 THE COURT TO REPRESENT HIMSELF IN THE  
9 CASE AND FOR THE COURT TO RE CONSIDER  
10 THE PREVIOUSLY FILED MOTIONS BY PETITIONER  
11 WITH RESPECT TO A NEW TRIAL AND  
12 CLARIFICATION OF STATE BAIL.

13 FARETA V CALIFORNIA (1975)  
14 MARTINEZ V CALIFORNIA (2000)

15  
16 PETITIONER RESPECTFULLY REQUESTS THIS COURT  
17 TO ENTER AN ORDER DISMISSING JOHN KADUC  
18 ESQ AS APPOINTED COUNSEL, THAT THE  
19 PETITIONER BE ALLOWED TO PROCEED PRO SE  
20 AND A HEARING BE SCHEDULED WITHIN  
21 TEN DAYS OF THE FILING OF THIS PETITION.  
22

23  
24 RESPECTFULLY SUBMITTED.

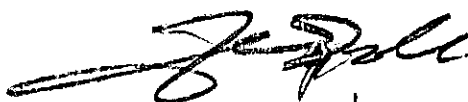
25 ON THIS 9<sup>TH</sup> DAY OF SEPT. 2003

26  
27   
28 FERRIL VOLPICELLI

## AFFIDAVIT

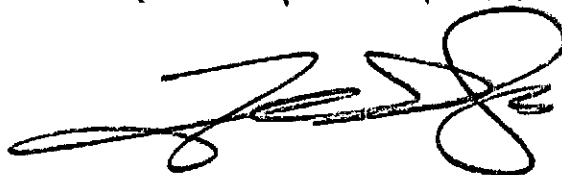
I, FERRIL J. VOLPICELLI, SWEAR UNDER PENALTY OF PERJURY, PURSUANT TO THE APPROPRIATE RULES, THAT I KNOWINGLY AND INTELLIGENTLY WAIVE MY RIGHT TO COUNSEL AND DEMAND MY RIGHT TO SELF-REPRESENTATION IN THE FOREGOING ACTION. THAT I UNDERSTAND THE DISADVANTAGES OF SELF-REPRESENTATION. HOWEVER, IN VIEW OF THE AFOREMENTIONED CIRCUMSTANCES, I AM LEFT WITH NO CHOICE IN ORDER TO BE HEARD BY THE COURT SO AS TO PRESERVE ISSUES RELEVANT TO MY RIGHTS.

DATED THIS 9<sup>TH</sup> DAY OF SEPT. 2003



FERRIL VOLPICELLI

CERTIFICATE OF SERVICE: DATED AND COPY MAILED ON THIS 9<sup>TH</sup> DAY OF SEPT. 2003, TO THE WASHTENAW COUNTY DISTRICT ATTORNEY AND JOHN KADUC ESQ. UNDER PENALTY OF PERJURY PURSUANT TO N.J. R. 1:6-1.



FERRIL VOLPICELLI

FERRILL JOSEPH VOLPICELLI  
 03-06889 @ WCSO  
 911 PARK BLVD  
 RENO, NV 89512  
 PETITIONER PRO PER

Hearing Date FILED  
 Hearing Time FILED

2003 OCT -8 PM 3:17

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

BY ROBERT A. LONGTIN, JR.  
 DEPUTY

FERRILL J. VOLPICELLI,  
 Petitioner,

CASE NO. 02-0147

vs

STATE OF NEVADA  
 Respondents et al.,

DEPT. NO. 9

PETITION FOR DISMISSAL  
OF COUNSEL AND  
PRO SE REPRESENTATION

COMES NOW FERRILL J. VOLPICELLI, PETITIONER AND  
 DEFENDANT, TO REQUEST THE COURT'S DISMISSAL OF  
 MR. JOHN KADLIC ESQ. ALSO, SAID PETITIONER DEMANDS  
 HIS CONSTITUTIONAL SIXTH AMENDMENT RIGHT TO REPRESENT  
 HIMSELF.

THE COURT HAS APPOINTED JOHN KADLIC ESQ. TO  
 REPRESENT THE PETITIONER IN THE ABOVE REFERENCED  
 MATTER. THROUGHOUT THE COURT PROCEEDINGS, PETITIONER  
 HAS DOCUMENTED INDICIA OF SECOND-CLASS REPRESENTATION.  
 THIS INCLUDES, BUT IS NOT LIMITED TO, PETITIONER'S  
 AWARENESS OF AN ATTORNEY-CLIENT CONFLICT OF INTEREST  
 SUBSEQUENT TO THE DAY OF TRIAL ON 10 JULY, 2003,  
 INASMUCH AS THE HONORABLE COURT WILL NOT  
 ACKNOWLEDGE THE FOREGOING CONCERNS THAT PETITIONER  
 HAS BROUGHT FORTH; SPECIFICALLY PLEADINGS REGARDING  
 INEFFECTIVE COUNSEL, PREJUDICIAL CONFLICT OF INTEREST

1 AND CLARIFICATION OF ISSUES WITH RESPECT TO  
2 BAIL, PETITIONER IS OVERWHELMINGLY COMPELLED  
3 TO REPRESENT HIMSELF. THE PLEADINGS FILED BY  
4 PETITIONER REGARDING THE FOREGOING CONCERNS  
5 WITH COUNSEL ARE SELF EXPLANATORY, AND  
6 SERVE AS THE BASIS FOR THIS MOTION; TOGETHER  
7 WITH ALL OTHER PLEADINGS, DOCUMENTS, PAPERS  
8 AND EXHIBITS ON FILE HEREIN.

9  
10 POINTS AND AUTHORITIES  
11 PETITIONER SEEKS TO PROTECT HIS FOURTH  
12 AMENDMENT RIGHTS AND DUE PROCESS RIGHTS,  
13 THAT MR. KADLEC'S PERFORMANCE HAS BEEN  
14 SECOND CLASS YIELDING SECOND CLASS  
15 JUSTICE. THIS INCLUDES, BUT NOT LIMITED TO  
16 OMISSION OF INVESTIGATIONS; FAILURE TO RESPOND  
17 TO CLIENT'S INQUIRIES AND ISSUES OF CONCERN,  
18 AS WELL AS OMISSION OF EVIDENCE; ALL OF WHICH  
19 SHOULD LEAD TO A NEW TRIAL ON THE  
20 RATIONALE THAT ONE CAN NEVER BE CERTAIN  
21 WHAT MIGHT HAVE HAPPENED HAD COUNSEL  
22 PERFORMED BETTER.  
23 IN THE FOREGOING MATTERS, COUNSEL BREACHED  
24 THE DUTY OF LOYALTY - PERHAPS THE MOST  
25 BASIC OF COUNSELORS' DUTIES. AND PLAINLY, IT  
26 IS DIFFICULT TO MEASURE THE PRECISE EFFECT  
27 ON THE DEFENSE OF REPRESENTATION  
28

1 CORRUPTED BY CONFLICTING INTERESTS. IN THE  
2 NEVADA SUPREME COURT RULES, #162 AT (1)  
3 CLEARLY STATES, WITH REGARDS TO FORMER  
4 JUDGE OR ARBITRATOR, ... EXCEPT AS STATED IN  
5 SUBSECTION (4), A LAWYER SHALL NOT REPRESENT  
6 ANYONE IN CONNECTION WITH A MATTER IN WHICH  
7 THE LAWYER PARTICIPATED PERSONALLY AND  
8 SUBSTANTIALLY AS A JUDGE OR OTHER  
9 ADJUDICATIVE OFFICER, ARBITRATOR OR LAW CLERK  
10 TO SUCH A PERSON, UNLESS ALL PARTIES  
11 TO THE PROCEEDING CONSENT AFTER DISCLOSURE.  
12 THE RIGHT TO COUNSEL IS THE RIGHT TO  
13 EFFECTIVE ASSISTANCE OF COUNSEL, *Mc Mann v*  
14 *RICHARDSON* (1970). IN *CUYLER v SULLIVAN*, THE  
15 COURT HELD THAT PREJUDICE IS PRESUMED WHEN COUNSEL  
16 IS BURDENED BY AN ACTUAL CONFLICT OF INTEREST.  
17 IN *GLASSNER v U.S.* (1972), WHERE COUNSEL'S EFFECTIVE-  
18 NESS WAS LIMITED BY A CONFLICT OF INTEREST, THE  
19 COURT HELD THAT A DEFENDANT'S SIXTH AMENDMENT  
20 RIGHT WAS VIOLATED BY SUCH INEFFECTIVE COUNSEL.  
21 FURTHER, THE COURT OF APPEALS FOR THE  
22 SECOND CIRCUIT GRANTED RELIEF, CONCLUDING  
23 THAT UNDER *ANDERS v CALIFORNIA* (1967),  
24 WHEN A DEFENDANT INSISTS THAT HIS ATTORNEY  
25 RAISE ADDITIONAL COLORABLE POINTS, THE  
26 ATTORNEY MUST ARGUE THE ADDITIONAL POINTS  
27 TO THE FULL EXTENT OF HIS PROFESSIONAL  
28



1 ABILITY. (EMPHASIS ADDED BY SUPREME COURT).  
2 AND THAT SINCE MR. KADUC REFUSES TO  
3 ACKNOWLEDGE AND DISSESS SUCH ISSUES TO  
4 THE COURT FOR REVIEW AND DETERMINATION,  
5 PETITIONER MUST PRESERVE CONCERNS AND RIGHTS  
6 ON HIS OWN ACCORD,

7 IN CONSEQUENCE, THE PETITIONER REQUESTS  
8 THE COURT TO REPRESENT HIMSELF IN THE  
9 CASE AND FOR THE COURT TO RE CONSIDER  
10 THE PREVIOUSLY FILED MOTIONS BY PETITIONER  
11 WITH RESPECT TO A NEW TRIAL AND  
12 CLARIFICATION OF STATE BAIL.

13 FARETTA V CALIFORNIA (1975)  
14 MARTINEZ V CALIFORNIA (2000)

16 PETITIONER RESPECTFULLY REQUESTS THIS COURT  
17 TO ENTER AN ORDER DISMISSING JOHN KADUC  
18 ESQ AS APPOINTED COUNSEL, THAT THE  
19 PETITIONER BE ALLOWED TO PROCEED PRO SE  
20 AND A HEARING BE SCHEDULED WITHIN  
21 TEN DAYS OF THE FILING OF THIS PETITION.  
22

23  
24 RESPECTFULLY SUBMITTED

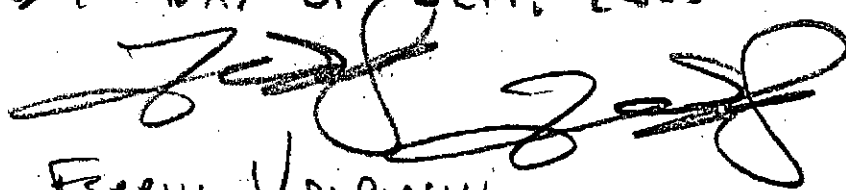
25 ON THIS 28<sup>TH</sup> DAY OF SEPT. 2003

26  
27  
28 FERRIL VOLPICELLI

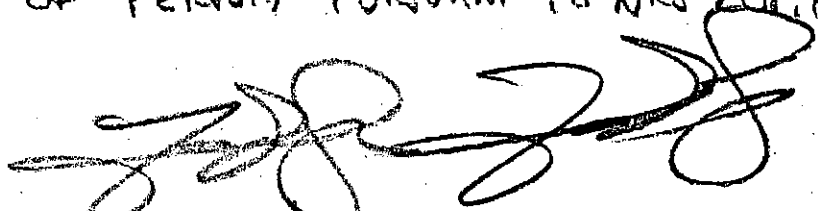
## AFFIDAVIT

1  
2 I, FERRIL T. VOLPICELLI, SWEAR UNDER  
3 PENALTY OF PERJURY, PURSUANT TO THE  
4 APPROPRIATE NRS, THAT I KNOWINGLY  
5 AND INTELLIGENTLY WAIVE MY RIGHT TO  
6 COUNSEL AND DEMAND MY RIGHT TO  
7 SELF-REPRESENTATION IN THE FOREGOING  
8 ACTION. THAT I UNDERSTAND THE  
9 DISADVANTAGES OF SELF-REPRESENTATION.  
10 HOWEVER, IN VIEW OF THE AFOREMENTIONED  
11 CIRCUMSTANCES, I AM LEFT WITH NO CHOICE  
12 IN ORDER TO BE HEARD BY THE COURT  
13 SO AS TO PRESERVE ISSUES RELEVANT TO  
14 MY RIGHTS.

15  
16 DATED THIS 29<sup>th</sup> DAY OF SEPT. 2003

17  
18   
19 FERRIL VOLPICELLI

20  
21 CERTIFICATE OF SERVICE: DATED AND COPY MAILED  
22 ON THIS 29<sup>th</sup> DAY OF SEPT. 2003, TO THE WASHTENAW  
23 COUNTY DISTRICT ATTORNEY AND JOHN KADUC ESQ.  
24 UNDER PENALTY OF PERJURY PURSUANT TO NRS 20A.1601

25  
26   
27 FERRIL VOLPICELLI  
28

FERRILL JOSEPH VOLPICELLI

03-06889 @ WCSO

911 PARR BLVD

RENO NV 89512

PETITIONER PRO PER

Hearing Date  
Hearing Time

2003 OCT 24 PM 3:18

IN THE SECOND JUDICIAL DISTRICT COURT OF NEVADA  
IN AND FOR THE COUNTY OF WASHOEBY WILLIAM A. MAGNIN, JR.  
DEPUTYFERRILL J. VOLPICELLI,  
Petitioner,CASE NO. 02-0147

VS

DEPT. NO. 9

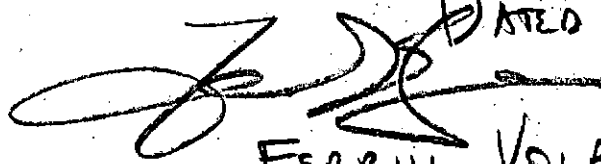
STATE OF NEVADA

Respondents et al.,

REQUESTFORSUBMISSION

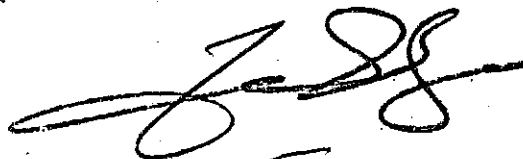
COMES NOW PETITIONER, FERRILL J. VOLPICELLI, MOVING  
THE COURT FOR AN IMMEDIATE SUBMISSION OF DOCUMENTS  
REGARDING THE DISMISSAL OF COUNSEL, ORDER FOR THE  
PETITIONER TO PROCEED IN PRO SE, AND FOR COURT'S REVIEW  
AND CONSIDERATION OF A MOTION FOR NEW TRIAL/REQUITAL  
THAT SAID DOCUMENTS WERE FILED IN JULY THROUGH  
OCTOBER OF 2003 WITH NO REPLY FROM THE PARTIES LISTED BELOW,

RESPECTFULLY SUBMITTED,

DATED THIS 22<sup>ND</sup> DAY OF OCT. 2003


FERRILL VOLPICELLI

CERTIFICATE OF SERVICE DATED AND COPY MAILED ON THIS 22<sup>ND</sup>  
DAY OF OCT. 2003, TO TAMMY RIGGS, ESQ AND JOHN KADUCH, ESQ.  
AS CERTIFIED UNDER PENALTY OF PERJURY PURSUANT TO NRS.  
201.165.



FERRILL VOLPICELLI

FERRILL JOSEPH VOLPICELLI

03-06881 C WCSS

911 PARR BLVD

LENO NV 89512

PETITIONER PRO PER

Hearing Date

Hearing Time

2003 OCT 24 PM 3:18

IN THE SECOND JUDICIAL DISTRICT COURT OF NEVADA  
IN AND FOR THE COUNTY OF WASHOE A. LONGHIN, JR.BY \_\_\_\_\_  
DEPUTYFERRILL J. VOLPICELLI,  
Petitioner,

CASE NO. 02-0147

VS

STATE OF NEVADA  
Respondents et al.,

DEPT. NO. 9

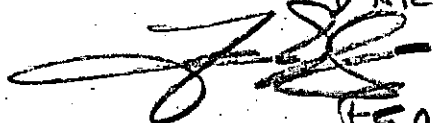
REQUEST  
FOR  
SUBMISSION

COMES NOW PETITIONER, FERRILL J. VOLPICELLI, MOVING THE COURT FOR AN IMMEDIATE SUBMISSION OF DOCUMENTS REGARDING THE DISMISSAL OF COUNSEL, ORDER FOR THE PETITIONER TO PROCEED PRO SE, AND FOR THE COURT'S REVIEW AND CONSIDERATION OF A MOTION FOR NEW TRIAL/ACQUITTAL.

THAT SAID DOCUMENTS WERE FILED IN JULY THROUGH OCTOBER OF 2003 WITH NO REPLY FROM THE PARTIES LISTED BELOW.

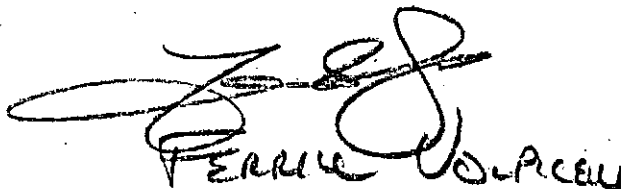
RESPECTFULLY SUBMITTED,

DATED THIS 22<sup>nd</sup> DAY OF OCT. 2003



FERRILL VOLPICELLI

CERTIFICATE OF SERVICE: DATED AND COPY MAILED ON THE 22<sup>nd</sup> DAY OF OCT. 2003, TO TAMMY RUGGS ESQ AND JOHN KADUC ESQ. AS CERTIFIED UNDER PENALTY OF PERJURY PURSUANT TO NRS. 208.160



FERRILL VOLPICELLI

CASE NO. CR02-0147

STATE OF NEVADA VS. FERRILL JOSEPH VOLPICELLI

DATE, JUDGE  
OFFICERS OF  
COURT PRESENT

APPEARANCES-HEARING

CONTINUED TO

12/05/03  
HONORABLE  
JAMES W.  
HARDESTY  
DEPT. NO. 9  
S. Sattler  
(Clerk)  
C. Vohl  
(Reporter)ENTRY OF JUDGMENT AND IMPOSITION OF SENTENCE

Deputy D.A. Tammy Riggs represented the State.

Defendant present with counsel, John J. Kadlic.

Probation Officer, Heidi Poe, also present.

Counsel for Defendant addressed the Court and stated he wanted this matter continued until the sentencing in Department 10 had taken place, to see what the outcome of that case was and made statements thereto; response and objection by counsel for State.

COURT ORDERED: Motion to continue is hereby denied.

Counsel for Defendant indicated he resented the comments made by counsel for State and stated he did not request a continuance for the reasons stated by Ms. Riggs and further, concurred with the recommendation by the Division.

The following exhibit was marked for identification only:

**State's exhibit A**

Counsel for Defendant indicated he had not reviewed this exhibit and challenged its validity; counsel for State responded and indicated this exhibit was provided at discovery and made statements thereto. Response by counsel for Defendant.

Court suggested this matter be continued until next week. Counsel for Defendant so concurred and requested he be provided with a copy of the prior conviction. Response and objection by counsel for State.

COURT ORDERED: Matter continued for entry of judgment and imposition of sentence.

Defendant remanded to the custody of the Sheriff.

12/10/03  
at 8:30 a.m.  
Sentencing  
(Continued)

CR02-0147  
STATE VS FERRILL  
District Court  
Washoe County  
DC-09000058303-034  
JOSEPH VOLPI 1 Page  
12/05/2003 02:10 PM  
MIN  
MTADDEC

ORIGINAL

FILED

✓ 1 CODE: 1930

DEC 10 2003

RONALD A. LONGMAY JR., CLERK

By: Shuel  
DEPUTY

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

STATE OF NEVADA,

Plaintiff,

Case No. CR98-2160

vs.

CR02-0147

FERRILL VOLPICELLI,

Dept. No. 9

Defendant.

LETTER FROM DEFENDANT

SEE ATTACHED DOCUMENT

///

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///

///

CR02-0147  
STATE VS FERRILL VOLPICELLI  
District Court  
Washoe County  
NVC  
DC-09900055260-033  
12/10/2003 12:22 PM  
1930  
FERRILL

FERRILL VOLPKE  
0306179 WCD  
911 PARR BLVD  
RENO NV 89512

5 DECEMBER, 2003

RE: 98:2160 & 02:0147

DEPT  
NINE  
COURT  
CLERK  
OF  
WASHOE  
COUNTY

DEAR MS. SATTLER,  
FOR NEARLY 6 MONTHS NOW I HAVE  
BEEN ADVISED BY MICHELLE THAT AN  
ORDER IS FORTHCOMING FROM THE HONORABLE  
JUDGE HARDESTY REGARDING 98:2160.  
TO DATE I HAVE NOT RECEIVED SAME, AND  
I CONTACT DEPT 9 EITHER TELEPHONICALLY  
OR IN WRITING REGULARLY. PLEASE ADVISE!

ADDITIONALLY, I AM CURIOUS AS TO WHY MY  
MOTION FOR DISMISSAL OF COUNSEL IN  
CASE 02:147 HAS NOT BEEN DEALT WITH  
AT THE REQUESTED HEARING? AS IT STANDS  
NOW, I AM FILING SENTENCING ON THIS  
MATTER WITH ABSOLUTELY NO REFERENCE TO MY  
MOTIONS. PLEASE ADVISE!

THANK YOU

SINCERE REGARDS,



CERTIFICATE OF SERVICE  
ON THIS 5TH DAY OF DECEMBER  
2003, I CERTIFY UNDER PENALTY  
OF PERJURY, NRS 208.015, THAT  
A COPY OF THIS LETTER WAS  
SENT TO DEPT. 9 COURT CLERK  
& WASHOE COUNTY DISTRICT  
ATTORNEY.

CERTIFICATE OF MAILING

Pursuant to NRCP 5(b), I hereby certify that I am an employee of the Second

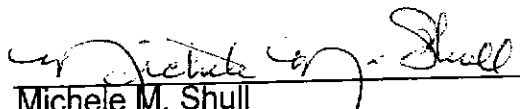
Judicial District Court, in and for the County of Washoe; and that on this 10<sup>th</sup> day of  
December, 2003, I deposited in the County mailing system for postage and mailing with the  
United States Postal Service in Reno, Nevada, a true and correct copy of the attached  
document addressed as follows:

Ferrill J. Volpicelli, #60076  
Washoe County Detention Facility  
(via interoffice mail)

Bradley O. Van Ry, Esq.  
1403 E. Fourth Street  
Reno, NV 89512

John J. Kadlic, Esq.  
550 California Avenue  
P. O. Box 2477  
Reno, NV 89505

Tammy Riggs, Esq.  
WASHOE COUNTY DISTRICT  
ATTORNEY'S OFFICE  
(via interoffice mail)

  
Michele M. Shull  
Administrative Assistant





MEMORANDUM OF POINTS AND AUTHORITIESFACTS

At the second scheduled sentencing hearing in this case on December 10, 2003, the State attempted to admit its certified proof of the defendant's prior conviction of indecent exposure for the purpose of enhancing the defendant's crimes in the current case to felonies. The defendant objected, asserting that the canvass conducted during the 1983 plea hearing was inadequate and that the defendant never actually pled guilty during that hearing. Both assertions are incorrect and the State's certified proof of the defendant's prior conviction should be admitted.

LAW

"A defendant's comprehension of the consequences of a plea, the voluntariness of a plea, and the general validity of a plea are to be determined by reviewing the entire record and looking to the totality of the facts and circumstances surrounding the plea." State v. Freese, 116 Nev. 1097, 1106, 13 P.3d 442, 448 (2000). Also, "[a] Court must be able to conclude from the oral canvass [and] any written plea memorandum...that the defendant's plea was freely, voluntarily, and knowingly made. No specific formula for making this determination is required. Each case must be decided upon the facts and circumstances of that case." Id., citing Taylor v. Warden, 96 Nev. 272, 607 P.2d 587 (1980).

At plea hearings, the "articulation of talismanic phrases" is not required. Bryant v. State, 102 Nev. 268, 271, 721 P.2d 364, 367 (1986). Instead, district judges have "wide latitude" in

1 determining whether defendants understand the nature and consequences  
2 of their pleas. Id. If the court makes factual statements  
3 concerning the offense, "e.g...by way of summary, that are sufficient  
4 to constitute an admission to the offense had they been make  
5 personally by the accused, then the accused may affirmatively adopt  
6 the court's factual statements as true, and thereby admit the offense  
7 by adoption." Croft v. State, 99 Nev. 502, 505, 665 P.2d 248, 250  
8 (1983). See also, Bryant, 102 Nev. at 271, 721 P.2d at 367: "[T]he  
9 defendant himself need not make a factual admission of guilt, but may  
10 instead adopt a factual statement of guilt made by the judge or one  
11 of the attorneys at the hearing."

12 The State's burden to go forward with evidence to prove the  
13 validity of a prior felony judgment of conviction does not arise  
14 until the defendant has presented sufficient evidence to rebut the  
15 presumption of validity afforded all judgments of conviction.  
16 Dressler v. State, 107 Nev. 686, 696, 819 P.2d 1288, 1295 (1991). In  
17 order to use a prior felony conviction for enhancement purposes, the  
18 state's initial burden of production shall be satisfied if the state  
19 presents prima facie evidence of the existence of the prior  
20 conviction. Id., 107 Nev. at 697, P.2d at 1295. If the record does  
21 not raise a presumption of constitutional infirmity, the defendant is  
22 nonetheless free to present evidence tending to rebut the presumption  
23 or regularity. If a defendant can establish, by a preponderance of  
24 the evidence, that the prior conviction is constitutionally infirm,  
25 the conviction may not be used to enhance the defendant's sentence.  
26 Id.

1 In the case of prior misdemeanor convictions used for  
2 enhancement purposes, the State has the burden of proving either that  
3 the defendant was represented by counsel or validly waived that  
4 right, and that the spirit of constitution principles was respected  
5 in the prior misdemeanor proceeding. Id. The Dressler court  
6 asserted that the higher burden of proof on the state is justified  
7 with misdemeanors by the fact that they are generally not viewed with  
8 the same gravity as felony convictions and often entered without the  
9 benefit of counsel. Id.

10 The Nevada Supreme Court has not ruled on the State's  
11 burden with regard to the admission of gross misdemeanor prior  
12 convictions. However, because the district court has jurisdiction  
13 over gross misdemeanors and felonies, and because the justification  
14 for the State's higher burden does not exist with gross misdemeanors  
15 (which are often serious and seldom entered without the benefit of  
16 counsel), it is appropriate to apply the lower burden applicable to  
17 felonies.

18 ARGUMENT

19 The defendant pled guilty during the 1983 change of plea hearing.

20 The defendant asserts that he never actually pled guilty  
21 during his September 22, 1983 change of plea hearing. That claim is  
22 invalid. In the transcript of the hearing (attached as Exhibit A),  
23 it is evident that the defendant intended to plead guilty:

24 THE COURT: This is what you want to do then is enter a  
25 guilty plea to the charge of indecent exposure, a gross  
26 misdemeanor?

1 THE DEFENDANT: Yes.

2 (Exh. A at 2.) After a canvass by the judge regarding the  
3 defendant's understanding of his constitutional rights and a reading  
4 of the elements of the offense by the State's attorney, the defendant  
5 pled guilty by adopting the court's assertion within its inquiry:

6 THE COURT: You are entering a guilty plea, then, because  
7 you are guilty?

8 THE DEFENDANT: Yes, your Honor.

9 (Exh. A at 5.) Under Croft, the defendant was not required to  
10 actually speak the word "guilty", and the defendant's adoption of the  
11 court's statement/inquiry regarding the fact of his guilt was  
12 sufficient to constitute a plea of guilty to the offense.

13 The record of the defendant's prior conviction does not raise a  
14 presumption of irregularity, nor has the defendant shown that the  
15 prior conviction was constitutionally infirm by a preponderance of  
16 the evidence.

17 As indicated supra, the appropriate burden to be applied to  
18 the prior conviction in this case is that applicable to felony prior  
19 convictions. The State has met its burden of providing proof of a  
20 prior conviction that is valid on its face. The court in the 1983  
21 change of plea hearing canvassed the defendant with regard to his  
22 understanding of the plea bargain, the privilege against self-  
23 incrimination, the right to plead not guilty and proceed to jury  
24 trial, and the right to confront accusers, all of which the defendant  
25 indicated he understood. (Exh. A at 2-3.) The court also inquired  
26 as to whether any promises were made to the defendant, whether his  
plea was voluntary, and informed the defendant of the maximum

1 possible penalty and the fact that sentencing would be up to the  
2 court. (Id. at 3.) Then the State's attorney read the elements of  
3 indecent exposure. (Id. at 4.) The court then inquired whether the  
4 defendant understood that the State would have to prove all elements  
5 beyond a reasonable doubt, to which the defendant replied in the  
6 affirmative.

7 The defendant has not shown that the court's canvass during  
8 the prior change of plea hearing is unconstitutional in any way, let  
9 alone by a preponderance of the evidence. Accordingly, the defendant  
10 has not met his burden in proving the prior conviction  
11 constitutionally infirm, and the State's proof of the defendant's  
12 prior conviction should be admitted.

13 Even if the higher burden applicable to misdemeanor prior convictions  
14 is applied, the State's proof of prior conviction should be admitted.

15 As delineated supra, the State's burden under Dressler for  
16 admission of prior misdemeanor convictions is to show that the spirit  
17 of constitutional principles was respected in the prior misdemeanor  
18 proceeding, and that the defendant was represented by counsel or  
19 validly waived that right.

20 As indicated in Exh. A, the defendant was represented in  
21 the prior proceeding by Lew Carnahan, Esq.. The defendant  
22 acknowledged that Mr. Carnahan explained the defendant's  
23 constitutional rights to him. (Exh. A at 2.) In addition, the court  
24 engaged in a canvass of the defendant regarding his constitutional  
25 rights and the consequences of his plea, as discussed supra.  
26 Accordingly, the State's proof of prior conviction passes muster even

1 under the more rigorous standard for prior misdemeanor convictions.

2 CONCLUSION

3 Under Croft, the defendant's plea of guilty was valid in  
4 the prior proceeding. The State has shown prima facie evidence of a  
5 constitutionally valid prior conviction that the defendant has not  
6 rebutted by a preponderance of the evidence, as is required under  
7 Dressler to contest a prior felony conviction. Additionally, even if  
8 the more rigorous standard for the admission of prior misdemeanor  
9 convictions is applied, the State has shown that the defendant was  
10 represented in the prior proceeding by counsel, and that the spirit  
11 of constitutional principles was respected in that proceeding.  
12 Therefore, the State's certified proof of the defendant's prior gross  
13 misdemeanor conviction for indecent exposure should be admitted.

14 Dated this \_\_\_\_\_ day of \_\_\_\_\_, 2003.

15 RICHARD A. GAMMICK  
16 District Attorney  
Washoe County, Nevada

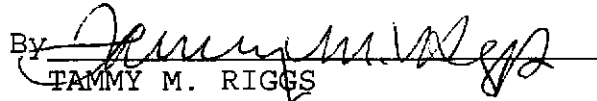
17  
18  
19 By   
20 TAMMY M. RIGGS  
21 Deputy District Attorney  
22  
23  
24  
25  
26

Exhibit A



1 No. C83-1099

2 Dept. No. 5

FILED

'83 NOV 30 AIO:56

JUDGE DAILEY

BY *R. A. H. H. H.*  
DEPUTY

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

7 IN AND FOR THE COUNTY OF WASHOE

8 HONORABLE WILLIAM N. FORMAN, DISTRICT JUDGE

9 --o0o--

10 THE STATE OF NEVADA,

11 Plaintiff,

12 vs.

13 FERRILL JOSEPH VOLPICELLI,

14 Defendant.

)  
) TRANSCRIPT OF PROCEEDINGS

)  
) CHANGE OF PLEA

)  
) September 22, 1983

)  
) Reno, Nevada

16  
17 APPEARANCES:

18 For the Plaintiff:

PATRICK MOONEY  
Deputy District Attorney  
Washoe County Courthouse  
Reno, Nevada

20 For the Defendant:

LEW CARNAHAN  
Deputy Public Defender  
111 N. Virginia Street  
Reno, Nevada

23 The Defendant:

FERRILL JOSEPH VOLPICELLI

24  
25  
26  
27  
28  
29  
30 Reported by:

LINDA DUFFY, CSR

1 RENO, NEVADA; THURSDAY, SEPTEMBER 22, 1983; 9:30 A.M.

2 --o0o--

3 THE COURT: This is Case Number C83-1099, the State  
4 of Nevada versus Ferrill Joseph Volpicelli.

5 Mr. Volpicelli is in court with his attorney,  
6 Mr. Carnahan. The State is being represented by Mr. Mooney.

7 I believe this hearing is held to allow the  
8 defendant to change his plea; is that correct?

9 MR. CARNAHAN: That is correct, your Honor.

10 THE COURT: What is Mr. Volpicelli's plea?

11 MR. CARNAHAN: He is going to plead guilty to  
12 indecent exposure.

13 THE COURT: What are the negotiations?

14 MR. CARNAHAN: The DA's office has said that they  
15 have no objection to his receiving probation if the proper  
16 persons certify that he is not a threat-- There is a certain  
17 requirement by statute that he is not a threat to the health,  
18 safety, and welfare of the community.

19 MR. MOONEY: That's correct.

20 THE COURT: Mr. Volpicelli, do you have any questions  
21 on the plea bargain in your case?

22 THE DEFENDANT: No, your Honor.

23 THE COURT: This is what you want to do then is enter  
24 a guilty plea to the charge of indecent exposure, a gross  
25 misdemeanor?

26 THE DEFENDANT: Yes.

27 THE COURT: Has your attorney explained your  
28 constitutional rights to you?

29 THE DEFENDANT: Yes.

30 THE COURT: The privilege against self-incrimination?

1 THE DEFENDANT: Yes, your Honor.

2 THE COURT: Your right to plead not guilty and have  
3 a jury trial?

4 THE DEFENDANT: Yes.

5 THE COURT: Right to confront your accusers?

6 THE DEFENDANT: Yes.

7 THE COURT: Any questions on your rights?

8 THE DEFENDANT: No.

9 THE COURT: You realize you are giving up these rights  
10 if you enter a guilty plea?

11 THE DEFENDANT: Yes.

12 THE COURT: Have any promises been made to you or  
13 any threats been made against you in order to induce you to make  
14 this plea?

15 THE DEFENDANT: No.

16 THE COURT: You are entering the plea voluntarily, then?

17 THE DEFENDANT: Yes.

18 THE COURT: You realize that the maximum you could  
19 receive for this particular offense would be up to one year in  
20 the Washoe County Jail and a two-thousand-dollar fine?

21 THE DEFENDANT: Yes, sir.

22 THE COURT: You understand that matters of sentencing  
23 and probation will be up to the Court?

24 THE DEFENDANT: Yes.

25 THE COURT: Let me ask counsel if you contemplate a  
26 presentence report in order to allow you to get certification?

27 MR. CARNAHAN: My attitude is this: I differ with  
28 Mr. Mooney. Their policy is to request a PSI report in every  
29 gross misdemeanor that hasn't been totally negotiated out by  
30 the parties. I think Mr. Volpicelli is a long-time Reno resident

1 They know his background and can fill it in for the Court. He  
2 does acknowledge his responsibility. He fully confessed to the  
3 offense. Frankly, I don't see any reason to waste the Parole and  
4 Probation Department's time doing a PSI report. This is not an  
5 exceptional case at all.

6 THE COURT: Do you want to get a presentence report?

7 MR. MOONEY: In these types of cases we are concerned  
8 with the welfare of the community. It is probably appropriate.

9 MR. CARNAHAN: The certification comes from a  
10 psychologist or a psychiatrist rather than the Parole and Probation  
11 Department. There are no exceptional circumstances. It is just  
12 a run-of-the-mill gross misdemeanor. It is not a fiction that  
13 we have here. I can't see any arguments for it. There are no  
14 exceptional circumstances. He does not have a number of felonies  
15 reduced to a gross misdemeanor.

16 THE COURT: I don't see where it would hurt anything.

17 MR. CARNAHAN: It is a waste of time.

18 THE COURT: Let me ask Mr. Volpicelli. I will order  
19 a presentence report and the sentencing will be set out for  
20 thirty days. This is a most important thing. I cannot give you  
21 probation unless a psychiatrist licensed in the State of Nevada  
22 certifies that you are not a danger to the health, safety or  
23 morals of others. Do you understand how that works?

24 THE DEFENDANT: Yes, your Honor.

25 THE COURT: Any questions on the sentencing?

26 THE DEFENDANT: No, your Honor.

27 THE COURT: Mr. Mooney, will you explain the elements  
28 of this particular offense.

29 MR. MOONEY: Yes, your Honor.

30 Indecent Exposure includes the wilfull, and unlawful

1 making an open and indecent and obscene exposure of his person  
2 to another individual. We have to show that happened on the  
3 17th day of April, 1983.

4 THE COURT: Mr. Volpicelli, do you understand what  
5 the State would have to prove, all the elements of the offense  
6 to a jury of twelve people beyond a reasonable doubt, if this  
7 case did go to trial?

8 THE DEFENDANT: Yes, your Honor.

9 THE COURT: You are entering a guilty plea, then,  
10 because you are guilty?

11 THE DEFENDANT: Yes, your Honor.

12 THE COURT: I will accept the plea then.

13 MR. CARNAHAN: I do have a letter from the Nevada  
14 Health Institute. It is not a certification. It is a To-Whom-  
15 It-May-Concern letter indicating that he has been voluntarily  
16 undergoing treatment for quite some time.

17 THE COURT: Why don't you save that for sentencing.  
18 I will set this matter for October 26th at nine  
19 o'clock.

20 MR. MOONEY: Counsel has indicated something about wanting  
21 to get someone appointed. I think that for whatever reason  
22 if Mr. Levinson doesn't feel qualified to make that evaluation  
23 I would come back to the Court and ask you to appoint someone.

24 THE COURT: I think you can pick the psychiatrist.

25 MR. MOONEY: That's fine, your Honor.

26 (Proceedings concluded.)  
27  
28  
29  
30

1 STATE OF NEVADA, )  
2 County of Washoe. ) ss.

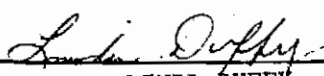
3  
4 I, LINDA DUFFY, official reporter of the Second  
5 Judicial District Court of the State of Nevada, in and for the County of Washoe,  
6 DO HEREBY CERTIFY:

7 That as such reporter I was present in Department No. 5 of  
8 the above-entitled court on Thursday, September 22, 1983,

9  
10 of said day and I then and there took verbatim stenotypy notes of the proceedings had and  
11 Change of Plea  
12 testimony given therein upon the trial of the case of THE STATE OF NEVADA,  
13 Plaintiff, vs. FERRILL JOSEPH VOLPICELLI, Defendant, Case  
14 C83-1099.

15 That the foregoing transcript, consisting of pages numbered 1 to 5 both  
16 inclusive, is a full, true and correct transcript of my said stenotypy notes, so taken as  
17 aforesaid, and is a full, true and correct statement of the proceedings had and testimony  
18 Change of Plea  
19 given upon the trial of the above-entitled action to the best of my knowledge, skill and ability.

20 DATED: At Reno, Nevada, this 27th day of November, 1983

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22   
23 LINDA DUFFY  
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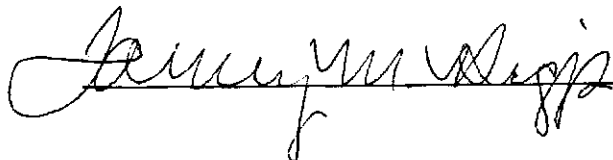
/rb

CERTIFICATE OF FORWARDING

I hereby certify that I am an employee of the Washoe County District Attorney's Office and that, on this date, I forwarded a true copy of the foregoing document, via facsimile, to:

John J. Kadlic, Esq.  
P.O. Box 2477  
Reno, NV 89505-2477  
Fax: (775) 322-7511

DATED this 11<sup>th</sup> day of December, 2003.



ORIGINAL

Code: 4185

2003 DEC 11 PM 2:27

ROBERT W. HARDESTY, JR.

B. J. HARDESTY

## SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

HONORABLE JAMES W. HARDESTY, DISTRICT JUDGE

-oOo-

STATE OF NEVADA,

Plaintiff,

Case No. CR02-0147

vs.

Dept. No. 9

FERRILL JOSEPH VOLPICELLI,

Defendant.

TRANSCRIPT OF PROCEEDINGS

SENTENCING

Friday, December 5, 2003

RENO, NEVADA

Reported By: CECILIA VOHL, NV CCR#246, CA CSR#5195, RPR, CRR

DC-09900055260-029  
CR02-0147  
STATE VS FERRILL JOSEPH VOLPICELLI  
District Court  
Washoe County  
4185  
MT/BBP/c



A P P E A R A N C E S

For the Plaintiff:

TAMMY M. RIGGS, ATTN. AT LAW  
Deputy District Attorney  
75 Court Street  
P.O. Box 30083  
Reno, Nevada 89520

For the Defendant:

JOHN J. KADLIC, ESQUIRE  
550 California Avenue  
P.O. Box 2477  
Reno, Nevada 89505

For the Parole and  
Probation Department:

Heidi Poe

-oOo-

I N D E XE X H I B I T S

<u>STATE'S</u>	<u>DESCRIPTION</u>	<u>MARKED</u>	<u>ADMITTED</u>
A	Documentation of Defendant's prior conviction on November 22nd, 1983	8	-

-oOo-

1 RENO, NEVADA, FRIDAY, DECEMBER 5, 2003, 8:42 A.M.

2 -oOo-

3  
4 THE COURT: All right. State versus Ferrill  
5 Volpicelli, CR02-0147. Ms. Riggs is here on behalf of the  
6 State. Is counsel present for Mr. Volpicelli?

7 MS. RIGGS: He was. If we could trail.

8 THE COURT: All right.

9 (Whereupon, other cases were heard, and the time is  
10 now 9:27 a.m.)

11 THE COURT: All right. State versus Ferrill  
12 Volpicelli, CR02-0147. Ms. Riggs is here on behalf of the  
13 State, Ms. Poe for the Division, and Mr. Kadlic is here on  
14 behalf of Mr. Volpicelli.

15 Mr. Volpicelli, have you seen the presentence report  
16 dated November 25th?

17 THE DEFENDANT: Yes, Your Honor.

18 THE COURT: Are there any factual corrections you'd  
19 like to raise to the Court, Mr. Kadlic, or Mr. Volpicelli?

20 MR. KADLIC: No, Your Honor. Mr. Volpicelli went  
21 through it, and there were some minor discrepancies, but  
22 nothing material, so the answer is no.

23 THE COURT: All right. What is your position with  
24 regard to the recommendation of the Division, Mr. Kadlic?

1 MR. KADLIC: Well, our position is we would ask the  
2 Court to continue this. As you recall, this went to trial back  
3 in July with the hopes that all of his other charges would be  
4 completed by that time.

5 If anybody has read the newspaper, he went to trial  
6 several weeks ago and was convicted, I believe, on eight counts  
7 of burglary.

8 MS. RIGGS: That's correct.

9 MR. KADLIC: And he has a sentencing, I believe, in  
10 front of Judge Elliott on December 23rd. They were also going  
11 to add the habitual criminal to that. So I would prefer to  
12 continue this one after that to find out what happens -- you  
13 know, if he gets 50 years, 70 years at this point, then I would  
14 ask the Court just to run this one concurrent to whatever -- he  
15 has -- if he gets the habitual criminal, potentially, I guess  
16 it's life in prison.

17 So, I would ask the Court to trail this one until he  
18 is sentenced on the one in front of Judge Elliott just to see  
19 what he gets, because it will have a lot of bearing, I think,  
20 on what the Court chooses to do. I mean, if he gets 50 or 75  
21 years out of the charges -- he's got eight counts of burglary.  
22 I mean, this one becomes minuscule in the great scheme of  
23 things.

24 So, I would ask the Court to consider that before

1 going forward with sentencing today before -- we've continued  
2 this out for six months for sentencing, anyway. I would ask  
3 for another month's continuance. I don't see where it's going  
4 to harm him.

5 THE COURT: Ms. Riggs?

6 MS. RIGGS: I would absolutely object to any kind of  
7 continuance in this sentencing, Your Honor.

8 I think, since this case was charged, the name of the  
9 game has been delay on the part of the defendant. Any sentence  
10 that he receives in the burglary case and potential sentence  
11 that he could get in the other pending burglary cases is not  
12 going to be affecting the State's recommendation regarding this  
13 case.

14 And as Mr. Kadlic advised you, the other two cases,  
15 the defense has been put on notice that we'll be seeking  
16 habitual criminal offender status. Continuing this case out  
17 will make this conviction unavailable for that purpose, and  
18 that's what I believe is the purpose for this request, for yet  
19 another continuance.

20 And as you recall, back in July, at the end of trial,  
21 Your Honor, we continued this for five months, which is not an  
22 ordinary continuance for sentencing -- or it's not an ordinary  
23 setting for sentencing.

24 The State explained at bench conference last time one

1 of the reasons why we wanted to get it done in December. The  
2 State stands by that, and we'd ask to go forward with the  
3 sentencing today.

4 THE COURT: Okay. The motion for continuance is  
5 denied.

6 Your argument on sentencing, Mr. Kadlic?

7 MR. KADLIC: Well, one thing, first of all, I want to  
8 make a comment. I didn't go with the idea of the habitual  
9 criminal. I resent her remarks. I think they're  
10 unprofessional. I resent them. I don't do that kind of crap.  
11 Pardon my French, Your Honor. I don't do that. And that  
12 really offends me from Ms. Riggs. I didn't deliberately  
13 request that continuance. It was just simply to see what  
14 sentences he gets out of the burglary; he's going to get  
15 forever. So I just resent those comments. I want to make that  
16 clear for the record. I'm a professional. I've been one for  
17 30 years and 15 as a judge, and I resent those comments.  
18 Maybe she's unprofessional, but I'm not.

19 Bottom line, Your Honor, I think the sentence  
20 recommendation is fair. I mean, I would ask the Court to  
21 consider to run -- to run them both concurrent is right. I  
22 would ask them -- to actually run both of these concurrent to  
23 anything else he gets.

24 He's going to get a tremendous sentence out of all of

1 those other charges, plus the habitual. I mean, what more can  
2 I say? I think that's right.

3 THE COURT: Okay. Ms. Riggs?

4 MS. RIGGS: Your Honor, at this time, the State moves  
5 to have marked and admitted State's exhibit next in sequence.  
6 I'm not sure which it is, Your Honor. This is the certified  
7 proof of this defendant's prior conviction on November 22nd,  
8 1983, for indecent exposure.

9 THE COURT: Okay. We'll mark it as a separate  
10 sentencing exhibit.

11 THE CLERK: State's Exhibit A marked for  
12 identification.

13 (State's Exhibit A was marked for identification.)

14 THE COURT: Okay. Have you seen the exhibit,  
15 Mr. Kadlic?

16 MR. KADLIC: I have not, Your Honor.

17 THE COURT: All right. Do you want to take a look at  
18 this soon?

19 MR. KADLIC: Yes, if I'm forced to look at it today  
20 without having a chance to investigate its validity, but I  
21 guess I'm forced to.

22 MS. RIGGS: Your Honor, you'll notice that there are  
23 red stars in the corner of this document which indicates that  
24 this has been discovered to him.

1 MR. KADLIC: The problem is, Your Honor, with these  
2 court-appointed cases -- Mr. Volpicelli has 12 million cases  
3 pending out there. They may have given it to -- he's got at  
4 least, I think, three different attorneys. In fact, Mr. Alian  
5 was here this morning. He didn't know which one of the many  
6 Volpicelli cases were here. So, it could be in a file  
7 somewhere.

8 My experience -- that's why I'm glad I'm not on the  
9 court-appointed list anymore, is half the time half of the  
10 files are incomplete. They may have given the discovery --  
11 Mr. Van Ry has a number of his other cases; I think Mr. Alian  
12 has also. So it may well have gotten to somebody, but it  
13 didn't get to me, and so --

14 THE COURT: Well, we can trail this matter if you  
15 would like to review it, or I can continue the sentencing to  
16 next Wednesday to give you additional time to review the  
17 exhibit.

18 MR. KADLIC: I'm trying to think. Why don't we  
19 continue it until next Wednesday, Your Honor. I would prefer  
20 that. Give me a chance to at least look at this, if they could  
21 get me a copy, since this is now part of the court. Since it's  
22 marked, I assume the Court wants it back, so if they could just  
23 fax me a copy of it, I'd appreciate it, before next Wednesday  
24 is fine, Your Honor.



1 THE COURT: All right. Ms. Riggs?

2 MS. RIGGS: Your Honor, just for the record, I'm going  
3 to voice another objection to a continuance in this case. I've  
4 just been assailed for my professionalism in this case. This  
5 sentencing has been pending for five months. If there was  
6 going to be a problem with a prior, or if he didn't have  
7 records, then he had plenty of time to request that from us if  
8 we didn't have what we have in our record as discovered to him.

9 Your Honor, we're ready to go today. And if he needs  
10 time to trail this today, that's fine with me, but I would ask  
11 that we go forward today. There's no reason for him to require  
12 another five days to review a cert. that is valid.

13 THE COURT: Well, I appreciate your opinion about  
14 that, Ms. Riggs, but I don't want to have to do this sentencing  
15 two or three times by requiring Defense Counsel to review an  
16 exhibit he claims he just got today.

17 Sentencing is continued to next Wednesday at 8:30.

18 MR. KADLIC: Thank you, Your Honor. And I'll return  
19 this back to the Court. Thank you.

20 THE COURT: Get a copy before next Wednesday.

21 MR. KADLIC: I will, Your Honor. Thank you.

22 (Proceedings concluded.)

23 -oOo-

24


1 STATE OF NEVADA       )  
                              ) ss.  
2 COUNTY OF WASHOE     )

3  
4 I, CECILIA VOHL, Official Reporter of the Second  
5 Judicial District Court of the State of Nevada, in and for  
6 The County of Washoe, do hereby certify:

7 That as such reporter, I was present in Department  
8 No. 9 of the above court on said date, time and hour, and I  
9 then and there took verbatim stenotype notes of the  
10 proceedings had and testimony given therein.

11 That the foregoing transcript is a full, true and  
12 correct transcription of my said stenotype notes, so taken  
13 as aforesaid. That the foregoing transcript was taken down  
14 under my direction and control, and to the best of my  
15 knowledge, skill and ability.

16 DATED: At Reno, Nevada, this 11<sup>th</sup> day of December,  
17 2003.

18   
19 CECILIA VOHL, NV CCR #246  
20  
21  
22  
23  
24

ORIGINAL

FILED

'03 DEC 12 AM 10:48

*S. Sattler*

1 Code: 1205  
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 4 Nevada State Bar #1291  
 5 Attorney for Ferrill Joseph Volpicelli

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

7 IN AND FOR THE COUNTY OF WASHOE

8 THE STATE OF NEVADA,

9 Plaintiff,

Case No. CR02-0147

10 vs.

Dept No. 9

11 FERRILL JOSEPH VOLPICELLI,  
 12 Defendant.

13 DEFENDANT'S BRIEF

14 COMES NOW, Defendant, FERRILL JOSEPH VOLPICELLI, by and  
 15 through his attorney, John J. Kadlic, Esq., and submits his  
 16 Brief on the issue of the validity of his 1983 conviction.

17 There are no cases in Nevada which address the issue in  
 18 question although the case of State v Freeze, 116 Nev. 1097, 13  
 19 P.3d 442 (2000) offers some guidance as what a proper plea  
 20 canvas should be like.

21 There, however, are cases from other states which address  
 22 the issue of what constitutes a guilty plea. In Com. v Nikas,  
 23 727 N.E.2d 1166 (2000), the Supreme Judicial Court of  
 24 Massachusetts, Middlesex, stated, at page 1168, as follows:  
 25

26 "There are two "constitutionally permissible ways" to  
 27

CR02-0147  
 STATE VS FERRILL JOSEPH VOLPICELLI  
 District Court  
 Washoe County  
 NV  
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1 establish a defendant's guilt without a trial.... A defendant  
2 may admit his "guilt in open court".... Or, as was the case  
3 here, a defendant may make a "plea of guilty accompanied by a  
4 claim of innocence in accordance with the standards of North  
5 Carolina v Alford, ...."

6 A complete copy of that decision is attached to this brief  
7 as Exhibit "A".

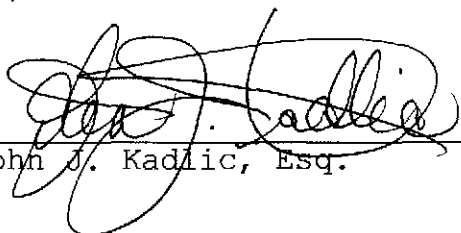
8 In Davis v State, 675 N.E.2d 1097 (1996), the Supreme Court  
9 of Indiana, at page 1101, stated as follows:  
10

11 "An Indiana defendant must admit the offense to which he is  
12 pleading guilty".

13 A complete copy of that decision is attached to this brief  
14 as Exhibit "B".

15 It is clear from both of those decisions that in order for  
16 a Defendant to plead guilty there must an affirmative act on his  
17 part, to wit, a plea to the charge. In the case of Defendant  
18 Ferrill Joseph Volpicelli, it is clear from the record of his  
19 change of plea in September 22, 1983 that he never entered a  
20 plea of guilty to the charge. Because there was no actual plea  
21 to the charge there was no conviction which can be used to  
22 enhance the penalty in this case.

23 Dated this 11th day of December, 2003.

24  
25  
26   
27 John J. Kadlic, Esq.

counsel indicated that, although there was some evidence of the defendant's intoxication on the night of the murder, the Commonwealth had "rather strong . . . evidence" to the contrary. He also reiterated that he had reviewed the possible "defenses" with the defendant, and that the defendant understood and was aware of those defenses.

6. *Conclusion.* The record supports the judge's determination that the defendant was competent when he made his plea. The record also indicates that the defendant's plea was knowing and voluntary. There is nothing to suggest that "justice may not have been done." *Commonwealth v. Russin*, 420 Mass. 309, 318, 649 N.E.2d 750 (1995), quoting Mass. R.Crim. P. 30(b), 378 Mass. 900 (1979). See *Commonwealth v. DeMarco*, *supra* at 482, 440 N.E.2d 1282.

*Judgment affirmed.*



431 Mass. 453

1453 COMMONWEALTH

v.

John E. NIKAS, Jr.

Supreme Judicial Court of Massachusetts,  
Middlesex.

Argued March 6, 2000.

Decided May 11, 2000.

Defendant pled guilty to carrying a firearm without a license and second-degree murder. The Superior Court Department, Middlesex County, Hiller B. Zobel, J., granted defendant's subsequent motion for new trial on the murder conviction, on ground that defendant's plea was not knowing and voluntary. Commonwealth

appealed, and the Appeals Court affirmed. After granting Commonwealth's request for further appellate review, the Supreme Judicial Court, Abrams, J., held that record supported determination that defendant was not sufficiently informed of elements of first-degree murder and second-degree murder prior to when he entered guilty plea.

Affirmed and remanded.

#### 1. Criminal Law §273(4.1)

There are two constitutionally permissible ways to establish a defendant's guilt without a trial: a defendant may admit his guilt in open court or a defendant may make an *Alford* plea of guilty accompanied by a claim of innocence.

#### 2. Criminal Law §273(4.1)

An individual accused of crime may voluntarily, knowingly and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime.

#### 3. Criminal Law §274(3.1), 949(1)

A postsentence motion to withdraw a guilty plea, which the court treats as a motion for a new trial pursuant to postconviction relief rule, should be granted only if it appears that justice may not have been done. Rules Crim.Proc., Rule 30, 43C M.G.L.A.

#### 4. Criminal Law §274(3.1)

Judges are to apply the standard set out in rule governing postconviction motions for new trial rigorously, and should only grant a postsentence motion to withdraw a plea if the defendant comes forward with a credible reason which outweighs the risk of prejudice to the Commonwealth. Rules Crim.Proc., Rule 30(b), 43C M.G.L.A.

#### 5. Criminal Law §914

Justice is not done, and a new trial is therefore warranted, where a defendant pleads guilty without an understanding of

EXHIBIT "A"

V3. 336

the proceedings. Rules Crim.Proc., Rule 30(b), 43C M.G.L.A.

# 6. Constitutional Law $\S$ 265.5

## Criminal Law $\S$ 274(4)

As a matter of constitutional due process, a guilty plea must later be set aside, unless the record shows affirmatively that the defendant entered the plea freely and understandingly, and a defendant's plea is not entered into freely and understandingly unless he comprehends the nature of the crime to which he is pleading guilty. U.S.C.A. Const.Amend. 14.

# 7. Criminal Law $\S$ 273.1(5)

Where the defendant makes an *Alford* plea of guilty, the record must support the conclusion that the defendant understood the nature of the crime of which he was accused.

# 8. Criminal Law $\S$ 274(1), 956(4)

Record supported determination that defendant was not sufficiently informed of elements of first-degree murder and second-degree murder prior to when he entered *Alford* plea of guilty to second-degree murder, and thus plea had to be set aside and defendant was entitled to new trial, where trial judge gave incorrect explanation of difference between the two offenses, record showed only that defense counsel discussed Commonwealth's evidence with defendant and not the law, and defendant's statement during colloquy did not show that he understood nature of intent required for first-degree murder. U.S.C.A. Const.Amend. 14; Rules Crim.Proc., Rule 30(b), 43C M.G.L.A.

# 9. Criminal Law $\S$ 273.1(5)

Fact that evidence against murder defendant was strong did not support conclusion that he understood nature of charges

1. The defendant does not request a new trial on the firearm conviction.
2. The gap in time between the filing of the motion and the hearing occurred because of various procedural and pragmatic concerns. The defendant's initial motion was unaccompanied by a memorandum of law. The judge

against him, so as to support his *Alford* plea of guilty to second-degree murder.

Douglas E. Zemel, Assistant District Attorney, for the Commonwealth.

Edward B. Gaffney, Wayland, for the defendant.

Present: MARSHALL, C.J., ABRAMS, LYNCH, GREANEY, IRELAND, & SPINA, JJ.

ABRAMS, J.

On June 24, 1983, the defendant, John E. Nikas, Jr., pleaded guilty to carrying a firearm without a license and murder in the second degree.<sup>1</sup> After a colloquy that is the subject of this appeal, the judge accepted the defendant's guilty pleas. The judge sentenced the defendant to from three to five years for the firearm violation, to run concurrently with a life sentence for the murder.

In October, 1996, the defendant filed a motion for a new trial, alleging defects in the plea colloquy. A hearing was held on the defendant's motion in December, 1998,<sup>2</sup> and the judge who accepted the defendant's guilty pleas vacated the defendant's conviction of murder. The judge determined that the defendant's plea was not knowing and voluntary because the defendant had not been informed sufficiently on the elements of murder in the first degree. The Commonwealth appealed, and the Appeals Court affirmed the judge's decision. See *Commonwealth v. Nikas*, 48 Mass.App.Ct. 1102, 716 N.E.2d 1083 (1999). We granted the Commonwealth's request for further appellate review. See G.L. c. 211A, § 11. We affirm

required the defendant to file a memorandum in support of the motion by January 21, 1997. The defendant filed the memorandum, but later discovered that his attorney was seriously ill. The defendant obtained new counsel, who filed a supplemental memorandum in support of the motion in October, 1998.

the decision allowing the defendant's motion for a new trial.

1. *Facts.* The defendant was convicted of the January 2, 1983, murder of Michael Povich. The defendant, the victim, and another friend had all been drinking and using drugs that night. The three drove around Cambridge until the defendant, who was driving, pulled the car over so that one of the three could relieve himself.

The Commonwealth offered to prove the following additional facts. While the vehicle was stopped, the victim accused the defendant of taking some of his Valium tablets. The victim and the defendant argued. The defendant pulled a .22 caliber shotgun from the car and shot the victim once in the head. After a pause, the defendant shot the victim a second time in the head.

At the plea colloquy, the defendant maintained that he had not acted intentionally. According to the defendant, the victim and the third person in the car began to fight, and one of the two of them pulled a gun. The defendant claimed that he entered the fray to help. The defendant told the judge that "[i]t was an accident" and "the gun went off while three of us were in a struggle."

The Commonwealth charged the defendant with murder in the first degree by reason of premeditation and proposed to bring forward two witnesses who would identify the defendant <sup>145</sup>as the perpetrator.<sup>3</sup> Because of the strength of the Commonwealth's evidence, the defendant decided to plead guilty to murder in the second degree rather than risk prosecution for murder in the first degree.

[1] 2. *Alford pleas.* There are two "constitutionally permissible ways" to establish a defendant's guilt without a trial. See *Commonwealth v. McGuirk*, 376 Mass. 338, 343, 380 N.E.2d 662 (1978), cert. denied, 439 U.S. 1120, 99 S.Ct. 1030, 59

3. The Commonwealth also planned to put on evidence of the defendant's consciousness of guilt. The defendant, at first, had lied about

L.Ed.2d 80 (1979). A defendant may admit his "guilt in open court." See, e.g., *Commonwealth v. Robbins*, 431 Mass. 442, 727 N.E.2d 1157 (2000). Or, as was the case here, a defendant may make a "plea of guilty accompanied by a claim of innocence in accordance with the standards of *North Carolina v. Alford*, 400 U.S. 25 [91 S.Ct. 160, 27 L.Ed.2d 162] (1970)." *Commonwealth v. McGuirk*, *supra* at 343, 380 N.E.2d 662.

[2] Under *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970), a defendant need not admit his guilt to make a valid guilty plea. "An individual accused of crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime." *Id.* at 37, 91 S.Ct. 160, 27 L.Ed.2d 162. See *Huot v. Commonwealth*, 363 Mass. 91, 95 n. 4, 292 N.E.2d 700 (1973), quoting *North Carolina v. Alford*, *supra*. Typically, a defendant makes an *Alford* plea to a lesser charge, or for the purpose of obtaining a lesser sentence, when the State's evidence is strong. See, e.g., *North Carolina v. Alford*, *supra*; *Huot v. Commonwealth*, *supra*.

The Commonwealth's case for a conviction of murder in the first degree by reason of premeditation was strong. The Commonwealth planned to present an eyewitness to the shooting who would testify that the defendant shot the victim twice, the second time after a pause of several seconds. The Commonwealth also planned to present a witness who placed the defendant at the murder scene immediately after the murder. Finally, the Commonwealth had evidence that the defendant had falsely asserted an alibi for the night of the murder, thus evincing his consciousness of guilt. According to the defendant's comments during the plea colloquy, he de-

his whereabouts on the evening of the murder.

cided to plead guilty to murder in the second degree because, as his attorney had explained to him, the Commonwealth's evidence that he committed premeditated murder was strong.

3. *Discussion.* The judge granted the defendant's postsentence<sup>456</sup> motion for a new trial because the judge determined that the defendant's plea was not knowing or intelligent. In his memorandum and order, the judge wrote that, "although, under the circumstances[,] the explanation of second degree murder was adequate (albeit barely so), the Court seriously misstated the elements of first-degree murder."<sup>4</sup> The Commonwealth argues that the defendant understood the charges against him because, according to the Commonwealth, the record shows that (1) persons other than the judge explained the elements of murder to the defendant; (2) the defendant understood the difference between the degrees of murder; and (3) the case against the defendant was strong. We disagree with the first two of these assertions, and we observe that the third is a necessary, but not sufficient, showing to support an *Alford* plea.

[3, 4] A postsentence motion to withdraw a guilty plea, which we treat as a motion for a new trial pursuant to Mass. R.Crim. P. 30, 378 Mass. 900 (1979), should be granted "only 'if it appears that justice may not have been done.'" *Commonwealth v. Fanelli*, 412 Mass. 497, 504, 590 N.E.2d 186 (1992), quoting *Commonwealth v. DeMarco*, 387 Mass. 481, 482, 440 N.E.2d 1282 (1982), and cases cited. "By focusing on possible injustice, rule 30(b) is different from Mass. R.Crim. P. 12(c)(2)(B), which provides judges with broad discretion to allow a defendant to withdraw his plea before the plea has been accepted and sentence imposed." *Commonwealth v. DeMarco*, *supra* at 484, 440 N.E.2d 1282. "Judges are to 'apply the standard set out in Mass. R.Crim. P. 30(b)

rigorously,' *id.* at 487, 440 N.E.2d 1282, and should 'only grant a postsentence motion to withdraw a plea if the defendant comes forward with a credible reason which outweighs the risk of prejudice to the Commonwealth.' [Footnote omitted.] *Id.* at 486, 440 N.E.2d 1282. *Commonwealth v. Hason*, 27 Mass.App.Ct. 840, 844-845, 545 N.E.2d 52 (1989)." *Commonwealth v. Fanelli*, *supra* at 504, 590 N.E.2d 186.

[5, 6] Justice is not done, and a new trial is therefore warranted, where a defendant pleads guilty without an understanding of the proceedings: "as a matter of constitutional due process, a guilty plea ... must later be set aside, unless the record shows affirmatively that the defendant entered the plea freely and understandingly."<sup>457</sup> *Commonwealth v. Foster*, 368 Mass. 100, 102, 330 N.E.2d 155 (1975), discussing *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). A defendant's plea is not entered into "freely and understandingly" unless he comprehends the nature of the crime to which he is pleading guilty. See *Commonwealth v. McGuirk*, *supra* at 342, 380 N.E.2d 662, discussing *Henderson v. Morgan*, 426 U.S. 637, 96 S.Ct. 2253, 49 L.Ed.2d 108 (1976) ("[I]f the defendant is ignorant of a critical element of an offense, his plea of guilty to that offense cannot serve as an intelligent admission of guilt").

[7] Where the defendant makes an *Alford* plea, the record must also support the conclusion that the defendant understood the nature of the crime of which he was accused. *North Carolina v. Alford*, *supra* at 28-29, 91 S.Ct. 160, 27 L.Ed.2d 162. Thus, the United States Supreme Court held that a defendant's plea was made knowingly and voluntarily only after noting that defense counsel had explained to the defendant both the crime with which the defendant was charged (murder in the

4. As we discuss, *infra* at 457, 727 N.E.2d at 1169-1170, the explanation of murder in the

second degree also was incorrect.



first degree) and the crime to which the defendant pleaded guilty (murder in the second degree). *Id.*

[8] Here, the defendant pleaded guilty to murder in the second degree in order to avoid the possibility of being sentenced to life in prison without possibility of parole if convicted of murder in the first degree. The Commonwealth asserts, correctly, that it does not matter whether a defendant acquires an understanding of the elements of the relevant crime or crimes from the judge, from his attorney, or in some other way. All that is necessary is that the record show that, by some means, the defendant possessed enough comprehension to plead "freely and understandingly." *Commonwealth v. Foster*, 368 Mass. 100, 102, 330 N.E.2d 155 (1975), discussing *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969).

The Commonwealth does not dispute that the judge's explanation of the difference between murder in the first degree and murder in the second degree was incorrect.<sup>5</sup> The judge told the defendant that the elements of second degree murder are an unlawful killing and an "intent to inflict serious injury."<sup>6</sup> The judge then explained that, for "[f]irst degree murder, they have to prove all of that plus they have to prove that you not only intended to injure, but you intended to kill." The judge did not mention "premeditation" or "deliberation."<sup>7</sup>

5. The Commonwealth argues, without citation to authority, that, because the defendant's motion for a new trial was grounded on the judge's incorrect explanation of murder in the second degree, the defendant waived the claim that the judge's explanation of murder in the first degree was incorrect. We reject this argument. The incorrect explanation involved the distinction between the degrees of murder and, therefore, necessarily involved the judge's comments on both murder in the first degree and murder in the second degree.

6. In fact, the malice element of second degree murder includes: "(1) an intent to cause death ... (2) an intent to cause *grievous bodily*

The Commonwealth, however, argues that the record shows that the defendant's counsel explained the relevant law to the defendant before the plea colloquy. Even if we assume, *arguendo*, that the judge's subsequent incorrect explanation would not have vitiated any understanding the defendant had gained from his counsel, we disagree with the Commonwealth's reading of the record.

During the plea colloquy, the defendant said that he was pleading guilty because his counsel told him that he did not "stand a chance in hell" if he went to trial. In order to clarify the record, defense counsel explained to the judge that he had access to the police reports, grand jury testimony, photographs, and other relevant evidence in the case. Defense counsel said that "[a]ll of that information was given to [the defendant] and ... he indicated that he read it and he understood it and he is aware of what the Commonwealth's case is against him." Counsel then explained that he did not quantify the odds "on success or failure with respect to the case."

Unlike in *Commonwealth v. Robbins*, *supra* at 450-451, 727 N.E.2d at 1164-1165, here, defense counsel never stated that he had reviewed the relevant law with the defendant. The record supports only the conclusion that defense counsel discussed the Commonwealth's evidence with his client. Contrast *Commonwealth v. Robbins*, *supra* (defense counsel stated that he had reviewed, at length, proposed

by harm ... [or] (3) an intent to do an act which, in the circumstances known to the defendant, a reasonable person would have known would create a plain and strong likelihood that death will result." Model Jury Instructions on Homicide (1999).

7. The judge noted that the Commonwealth did not "have to prove that [the defendant] sat down and plotted it out for any length of time previously." This statement as to what the Commonwealth need not prove was insufficient to inform the defendant that the Commonwealth would be required to prove deliberate premeditation to obtain a conviction of murder in the first degree.

jury instructions explaining elements of crime with which defendant was charged). Therefore, the defense attorney's statement does not suffice to establish that the defendant understood the elements of the relevant crimes.

The Commonwealth also notes that the prosecutor, in his recitation of the Commonwealth's evidence, concluded that the timing of the two gun shots could raise "an inference of deliberation[ ] and premeditation." This statement, in the midst of nine pages of narrative transcript describing the Commonwealth's evidence, is insufficient to support the conclusion that the defendant understood that the Commonwealth would have to prove beyond a reasonable doubt that he had premeditated the murder of the victim.

The Commonwealth calls our attention to the defendant's statement, during the colloquy, that one commits murder in the first degree when one "plans to do something and commits it." According to the Commonwealth, this statement evinces the defendant's understanding of premeditation.

The defendant's statement is incomplete. To prove premeditation, the Commonwealth would have had to prove that "the defendant decided to kill after deliberation" (emphasis added). Model Jury Instructions for Use in Superior Court (1999). We are not persuaded that the record supports the conclusion that the defendant understood the nature of the intent required.

Furthermore, the defendant made his statement in response to being asked whether he had any questions for the judge. The defendant said: "I don't really understand the law too much, as far as first degree murder, second degree murder, only that first degree murder [means] that someone, I guess, basically plans to do something and commits it." It was in

answer to the defendant's implicit question that the judge gave his incorrect explanation of the distinction between the degrees of murder. Therefore, even if the defendant had some understanding of premeditation before the judge's explanation, we cannot be confident that his understanding remained after the explanation.

[9] The Commonwealth also asserts that, because the evidence against the defendant was strong, the record supports the conclusion that the defendant's plea was intelligent. The Commonwealth's argument misapprehends the significance of the fact that the evidence against the defendant was strong. This fact supports the conclusion that the defendant understood the nature of making an *Alford* plea, that he understood that he would likely be convicted of murder in the first degree and sentenced to life in prison without parole if he went to trial. The strength of the evidence against the defendant, however, does not support the conclusion that the defendant understood "the nature of the charges" against him. *Commonwealth v. Quinones*, 414 Mass. 423, 436, 608 N.E.2d 724 (1993).

4. *Conclusion.* The record supports the judge's determination that the defendant was not sufficiently informed of the elements of the crime with which he was charged.<sup>8</sup> Because "justice may not have been done," we affirm the judge's decision vacating the conviction of murder in the second degree. *Commonwealth v. Fanelli*, 412 Mass. 497, 504, 590 N.E.2d 186 (1992), quoting *Commonwealth v. DeMarco*, 387 Mass. 481, 482, 440 N.E.2d 1282 (1982). "Upon the vacation of the judgment[ ], the defendant will face the possibility of the Commonwealth's moving for retrial on the indictments. We note that retrial might result in severer sentences than those imposed on the guilty pleas." *Common-*

<sup>8</sup> Because this ground suffices to support the vacation of the defendant's conviction, we do not reach the defendant's other argument that his plea was not voluntary because the judge

failed to ask specific questions as to his understanding of the privilege against self-incrimination.

*wealth v. Foster*, 368 Mass. 100, 108 & n. 6, 330 N.E.2d 155 (1975).

The order allowing the defendant to withdraw his plea and for a new trial is affirmed. The case is remanded to the Superior Court for further proceedings consistent with this opinion.

*So ordered.*



431 Mass. 501

1501 COMMONWEALTH

v.

Willie JENKINS.

Supreme Judicial Court of Massachusetts,  
Suffolk.

Argued April 4, 2000.

Decided May 12, 2000.

Commonwealth sought relief from order of a Superior Court judge dismissing without prejudice an indictment charging defendant with drug offenses. A single justice of the Supreme Judicial Court, Lynch, J., denied Commonwealth's petition, and Commonwealth appealed. The Supreme Judicial Court, Abrams, J., held that Commonwealth was not entitled to extraordinary relief from Superior Court judge's order, in view of existence of other remedy.

Affirmed and remanded.

#### 1. Courts ⇨207.1

Commonwealth was not entitled to extraordinary relief, under statute governing Supreme Judicial Court's superintendence of inferior courts, from order of a Superior Court judge dismissing without prejudice an indictment charging defendant with

drug offenses, as Commonwealth had other available remedy in that it was not precluded from prosecuting case on new indictment. M.G.L.A. c. 211, § 3.

#### 2. Courts ⇨207.1

Extraordinary relief pursuant to statute governing Supreme Judicial Court's superintendence of inferior courts is available only where there is no other remedy. M.G.L.A. c. 211, § 3.

#### 3. Indictment and Information ⇨144

A judge has inherent authority to dismiss an indictment sua sponte.

#### 4. Criminal Law ⇨1024(2)

Because the allowance of a motion to dismiss ends the Commonwealth's prosecution, it has the right to appeal the allowance of a motion to dismiss.

#### 5. Criminal Law ⇨1024(2)

If a judge dismisses an indictment on his or her own motion, the Commonwealth has a right of appeal in the same manner as provided by rule of criminal procedure governing interlocutory appeals and statute governing appeals by Commonwealth. M.G.L.A. c. 278, § 28E; Rules Crim.Proc. Rule 15, 43C M.G.L.A.

#### 6. Criminal Law ⇨1023(3)

The denial of a motion to dismiss is not appealable by a defendant until after trial. Rules Crim.Proc., Rule 15, 43C M.G.L.A.

#### 7. Courts ⇨207.1

To obtain review of interlocutory matters under statute governing Supreme Judicial Court's superintendence of inferior courts, a defendant must demonstrate both a substantial claim of violation of his substantive rights and irremediable error, such that he cannot be placed in status quo in the regular course of appeal. M.G.L.A. c. 211, § 3.

#### 8. Courts ⇨209(2)

Unless the single justice of the Supreme Judicial Court determines that the denial of a motion to dismiss meets the

DAVIS v. STATE

Cite as 675 N.E.2d 1097 (Ind. 1996)

Ind. 1097

Frank DAVIS, Appellant  
(Defendant Below),

v.

STATE of Indiana, Appellee  
(Plaintiff Below).

No. 50S00-9008-PD-539.

Supreme Court of Indiana.

Dec. 31, 1996.

Following affirmance, 477 N.E.2d 889, of his convictions for murder and attempted murder and death sentence, defendant petitioned for postconviction relief. The Marshall Circuit Court, Marvin D. McLaughlin, Special Judge, vacated death sentence but not the two 50-year sentences for attempted murder and denied defendant's request to withdraw his guilty plea. Defendant appealed. The Supreme Court, Shepard, C.J., held that: (1) defendant was not denied effective assistance of counsel, and (2) guilty plea was knowing and voluntary.

Affirmed.

1. Criminal Law  $\S$  1158(1)

In reviewing denial of petition for postconviction relief, Supreme Court does not reweigh evidence or judge credibility of witnesses.

1. Criminal Law  $\S$  1158(1)

To prevail on review of denial of petition for postconviction relief, petitioner must establish that evidence as a whole leads unambiguously to decision in his favor.

1. Criminal Law  $\S$  641.13(1)

To establish ineffective assistance of counsel, defendant must show that attorney's performance fell below objective standard and that attorney's performance was so deficient and prejudicial that defendant was denied fair trial. U.S.C.A. Const.Amend. 6.

1. Criminal Law  $\S$  641.13(1)

Isolated poor strategy, bad tactics, mistake, carelessness, or inexperience do not necessarily amount to ineffective counsel un-

less, taken as a whole, defense was inadequate. U.S.C.A. Const.Amend. 6.

5. Criminal Law  $\S$  641.13(4)

Defendant's lead attorney's performance in capital murder prosecution did not fall below prevailing standards, so as to deny defendant effective assistance of counsel; although lead attorney had only slim experience with jury trials, he was aided by experienced cocounsel, and much of his anxiety appeared to have stemmed from defendant's failure to cooperate with his defense, rather than from his inability to handle legal issues involved. U.S.C.A. Const.Amend. 6.

6. Criminal Law  $\S$  641.13(5)

Defense counsel's decision to allow defendant to plead guilty in capital murder prosecution did not deny defendant effective assistance of counsel; although testimony obtained four years after defendant's conviction showed that defendant had suffered brain damage during birth, that he suffered from posttraumatic stress disorder, borderline personality disorder, and major features of antisocial personality disorder, and that as result of those problems, defendant might have had trouble cooperating with counsel, evidence available to defendant's trial counsel indicated that defendant was competent to stand trial. U.S.C.A. Const.Amend. 6.

7. Criminal Law  $\S$  641.13(6)

Defendant was not prejudiced by counsel's failure to attempt to suppress evidence of his statement to police in capital murder prosecution, since even if counsel had raised issue during suppression hearing, it was not clear he would have prevailed. U.S.C.A. Const.Amend. 6.

8. Searches and Seizures  $\S$  178

Consent by member of defendant's family validated search of defendant's home. U.S.C.A. Const.Amend. 4.

9. Searches and Seizures  $\S$  171

Consent to search is valid exception to search warrant requirement.

10. Criminal Law  $\S$  641.13(2.1)

Defense counsel was not ineffective for failing to prepare and present insanity de-

EXHIBIT "B"

fense in capital murder prosecution, even though testimony obtained four years after defendant's conviction showed that defendant had suffered brain damage during birth; record indicated that counsel made substantial effort to prepare insanity defense, evidence available to counsel at time of trial indicated that defendant was competent, and in moments before trial began, counsel made tactical decision to drop insanity defense in order to keep some of the more unsavory aspects of defendant's past from jury. U.S.C.A. Const. Amend. 6.

#### 11. Criminal Law §641.13(1)

Trial strategy decisions rest only with counsel and a choice of tactics rarely sustains ineffective assistance claim. U.S.C.A. Const. Amend. 6.

#### 12. Criminal Law §641.13(5)

Defense counsel's advice to plead guilty to two counts of murder and two counts of attempted murder was not ineffective assistance in capital murder prosecution, given defendant's admission to the crimes which provided sufficient basis for plea. U.S.C.A. Const. Amend. 6; West's A.I.C. 35-41-5-1, 35-42-1-1.

#### 13. Criminal Law §273(4.1)

Defendant must admit the offense to which he is pleading guilty.

#### 14. Criminal Law §641.13(7)

Defendant's attorneys were not ineffective based on their alleged failure to adequately advise defendant on how to respond to aggravating factors charged under death penalty statute; counsel and defendant discussed aggravating factors, and counsel succeeded in getting one of aggravating circumstances reversed. U.S.C.A. Const. Amend. 6.

#### 15. Criminal Law §641.13(2.1)

Defendant, who pleaded guilty to capital murder, was not prejudiced by his counsel's alleged failure to voir dire the jury adequately; even if voir dire was inadequate, it was not clear that failure to conduct proper voir dire by itself prompted guilty plea by making it seem to defendant he had no other choice but to plead. U.S.C.A. Const. Amend. 6.

#### 16. Criminal Law §273(4.1), 273.4(1)

Guilty plea constitutes waiver of constitutional rights, and this waiver requires trial court to evaluate validity of every plea before accepting it.

#### 17. Criminal Law §273.1(1)

For guilty plea to be valid, defendant's decision to plead guilty must be knowing, voluntary, and intelligent.

#### 18. Criminal Law §273(4.1)

Defendant's admission that he intended to murder two victims and that he intended to attempt to murder two other victims, and introduction by prosecutor of audio tapes of defendant's confession to police established sufficient factual basis for defendant's guilty plea to two counts of attempted murder and two counts of murder. West's A.I.C. 35-41-5-1, 35-42-1-1.

#### 19. Criminal Law §273.1(2)

Defendant's guilty plea to two counts of attempted murder and two counts of murder was not induced by fear of greater punishment than was legally possible, since, even with guilty plea, death penalty was still legally possible.

#### 20. Criminal Law §273.1(4)

Defendant's right to have jury consider whether it would recommend death penalty was not constitutional right of which defendant had to be advised before pleading guilty. West's A.I.C. 35-50-2-9(d).

#### 21. Criminal Law §273(2), 273.1(1)

Despite testimony obtained four years after defendant's conviction which showed that defendant had suffered brain damage during birth, defendant's guilty plea to two counts of attempted murder and two counts of murder was voluntary and intelligent.

Susan K. Carpenter, Kenneth L. Bird, Ann M. Pfarr, Eric K. Koselke, Indianapolis, for appellant.

Pamela Carter, Attorney General of Indiana, Thaddeus Arthur Perry, Deputy Attorney General, Indianapolis, for appellee.



SHEPARD, Chief Justice.

### I. Introduction

In his post-conviction appeal, appellant Frank R. Davis alleges that ineffective assistance of counsel prompted him to plead guilty to two counts of murder and two counts of attempted murder. He also alleges his guilty plea was not intelligent or voluntary. The post-conviction court held otherwise, and we affirm.

### II. Statement of the Facts

Davis was arrested following separate assaults on four teenaged boys in northern Indiana over a six-month period in 1983. The State's evidence showed that he molested and attempted to murder one fifteen-year-old boy by hitting him repeatedly in the head with a handgun in January 1983. Six months later, he molested another teenage boy before choking him to death. Two days after that, he befriended two more teenaged boys who were camping. He forced one youth who had been sleeping outside the tent to accompany him to a set of nearby railroad tracks. Along the tracks, he molested the boy and strangled him with a piece of wire. Davis returned to the campsite and told the other youth his friend had been hurt. The youth followed Davis back to the railroad tracks where Davis, at knife point, tied the youth's hands with wire and performed oral sex on him. Then he told the boy to roll over onto his stomach and hit him in the head with an axe four times. The youth lost consciousness but survived to tell police later that a man named Frank Davis had harmed him. Davis was arrested on June 21, 1983 and told police about his involvement in all four crimes.

On July 13, 1983, the State charged Davis with ten criminal counts, and asked for the death penalty. Davis initially planned an insanity defense, but "thirty seconds" before the trial started his defense counsel withdrew the insanity defense. That decision left him without any defense at all. The next day Davis told his lawyer he wished to plead

guilty. As part of an agreement, he pled guilty to two counts of murder<sup>1</sup> and two counts of attempted murder, a class A felony.<sup>2</sup>

Twelve days later, the trial court sentenced Davis to death for murder and imposed two consecutive fifty-year sentences for the attempted murder convictions. On direct appeal, we affirmed. *Davis v. State*, 477 N.E.2d 889 (Ind.1985), cert. denied, 474 U.S. 1014, 106 S.Ct. 546, 88 L.Ed.2d 475. In early 1986 Davis filed a petition for post-conviction relief. The State disputed the allegations in the motion and argued he should have sought relief on direct appeal. After two amendments to Davis' petition, the trial court opened a postconviction relief hearing on November 10, 1993.

The hearing terminated when the court approved a Joint Motion for Equitable Relief. Under its terms, the post-conviction court vacated Davis' death sentence but not the two fifty-year sentences. It determined that the sentencing hearing would be reopened "for the sole purpose of entering additional mitigating evidence. There are no restrictions on the penalties that may be given." (R. at 278.)<sup>3</sup> The only issue remaining was Davis' request to withdraw his guilty plea, which the post-conviction court denied.

### III. Statement of the Issues

Davis advances two arguments in support of his request to withdraw his guilty plea.

First, Davis argues his lawyer rendered ineffective assistance by forcing him to forego a jury trial and waive his constitutional rights in exchange for a plea agreement that gave him no real benefit. Specifically, he argues his counsel lacked the experience to handle a death penalty case, allowed an incompetent defendant to plead guilty, failed to suppress statements and the fruits of an illegal search of the Davis family home, failed to prepare and present an insanity defense, and allowed Davis to plead guilty without the requisite intent. Finally, Davis argues his counsel failed to advise him on the aggrava-

1. Ind.Code Ann. § 35-42-1-1 (West 1986).

2. Ind.Code Ann. § 35-41-5-1 (West 1986), § 35-42-1-1 (West 1986).

3. References to the post-conviction record are denoted by the letter "R." The record of the guilty plea is denoted by "G.R."

ting circumstances and failed to voir dire the jurors properly.

Second, Davis argues that his plea was not voluntary and intelligent. In particular, Davis alleges his plea was invalid because during the plea hearing he denied an intent to kill until after an off-the-record conference, received incorrect advice about the aggravating circumstance that would apply to the case, pled guilty to what the defense called an "illusory plea," and was not properly informed about the role of the jury in evaluating the appropriateness of the death penalty. Finally, Davis alleges he was not sufficiently competent to enter a guilty plea.

#### IV. Ineffective Assistance of Counsel

[1, 2] In reviewing the denial of a petition for post-conviction relief, we do not reweigh evidence or judge the credibility of the witnesses. To prevail, a petitioner must establish that the evidence as a whole leads unmistakably to a decision in his favor. *Schiro v. State*, 479 N.E.2d 556 (Ind.1985), *cert. denied*, 475 U.S. 1036, 106 S.Ct. 1247, 89 L.Ed.2d 355 (1986).

[3, 4] Defendants who challenge the quality of their legal defense face a demanding two-part test. First, the defendant must show that the attorney's performance fell below an objective standard. Second, the defendant must show the attorney's performance was so deficient and prejudicial that the defendant was denied a fair trial. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Whatley v. State*, 508 N.E.2d 537 (Ind.1987). Indiana courts have required strong and convincing evidence to overcome the presumption of effective defense counsel. *Terry v. State*, 465 N.E.2d 1085, 1089 (Ind.1984). "Isolated poor strategy, bad tactics, a mistake, carelessness or inexperience do not necessarily amount to ineffective counsel unless, taken as a whole, the defense was inadequate." *Id.*, citing *Holton v. State*, 272 Ind. 439, 398 N.E.2d 1273 (Ind.1980).

[5] Davis' lead attorney, George Hofer, had just two years experience, but he had worked as both a deputy prosecutor and a public defender. Hofer had only slim experience with jury trials, none of them a capital

case, but he was aided by an experienced co-counsel, Jere Humphrey. Humphrey, who assisted with jury selection, had handled several capital cases. Hofer was also astute enough to argue that the charged aggravator of lying-in-wait did not apply to Davis' case. This Court later agreed with Hofer and held that the trial court erred when it found the lying-in-wait aggravator was supported by the evidence. *Davis*, 477 N.E.2d at 897. As the post-conviction court noted, "viewing the case as a whole, the Trial Counsel were competent." (R. at 269.)

Hofer conceded at the post-conviction hearing that he was "overwhelmed" by the case. Much of his anxiety appeared to have stemmed from the Davis' failure to cooperate with his defense, however, rather than from his inability to handle the legal issues involved.

At the post-conviction hearing, Hofer acknowledged that even with the experience he had gained since Davis' original trial, he did not believe he could have been able to obtain Davis' cooperation. Hofer recalled Davis' answering his lawyers' questions with statements such as "Well, you find out" or "you get the answer" or "that's your job." (R. at 433.) Ultimately, it was the defendant's behavior, not his counsel's representation, that hampered the defense. It is hard to see, therefore, how the attorney's conduct fell below prevailing standards required by *Strickland*.

[6] Davis also argues he was denied effective assistance of counsel because his lawyer allowed him to plead guilty even though he was incompetent. Testimony obtained four years after the conviction showed Davis suffered brain damage during birth that caused his right brain to function less effectively than his left. As a result of this injury and the odd behavior it produced, he was placed in Beatty Hospital at age fourteen. During his time at Beatty, testimony showed he was placed in an adult ward where he was sodomized and abused for his entire one-year commitment. Due to this traumatic abuse, a physician testified, Davis suffered from post-traumatic stress disorder, borderline personality disorder, and major features of anti-

social personality disorder. (R. at 658.) As a result of these problems, a physician testified, a criminal defendant might have trouble cooperating with his counsel.

This evidence contradicts, however, the evidence available to Davis' trial counsel. According to the guilty plea record, psychiatric examinations had found Davis competent (G.R. 637-38,653-54), and even Humphrey thought Davis was competent to stand trial. (R. at 728). Faced with this evidence, Hofer and Humphrey opted to drop the insanity defense just before the trial started. Under the *Strickland* standard, counsel's decision to allow Davis to plead, especially in light of the evidence, appears reasonable.

[7] Davis also argues that because of the ineffective work of his counsel, there was no attempt to suppress evidence of his statement to police. With respect to the suppression of Davis' admission he committed the crimes, counsel testified that he believed the State had promised to forego the death penalty charge in exchange for Davis' confession. (R. at 329.) Counsel also said the deputy prosecutor trying the case told him there was no such promise. Despite the conflict in evidence, trial counsel did not ask the county prosecutor to testify at the suppression hearing. The contradictory statements about the link between the death penalty and the confession, however, shows that the record does not inevitably lead to the conclusion that such a promise existed. Even if counsel raised this issue during the suppression hearing, it is not clear he would have prevailed.<sup>4</sup>

[8,9] Davis also claims ineffective assistance with respect to suppression of the results of a search of the Davis family's home. At the suppression hearing, a police officer testified he told Davis' family he had a warrant to search Davis' room. A family member told him that if he was going to search that room he would search the entire house anyway, so he gave him his consent. Even without a search warrant, the consent given by the family member would have validated a search of the home by police officers. "The

consent to search is a valid exception to the search warrant requirement under Indiana law." *Hill v. State*, 267 Ind. 480, 487, 371 N.E.2d 1303, 1307 (Ind.1978). Davis suggests that duress was applied to the Davis family in order to obtain consent, but the record reveals no evidence of duress. There is no showing of ineffective assistance on this score.

[10] Davis also argues that his lawyers were ineffective for failing to prepare and present an insanity defense. He finds this particularly egregious because of the later discovery of his childbirth brain injury. As noted above, however, there was substantial testimony suggesting Davis was indeed sane. For the post-conviction court, there was enough evidence in the record to support a conclusion Davis was sane when he committed the acts.

[11] The record also shows Davis' counsel made a substantial effort to prepare an insanity defense. In the moments before the trial began, however, they elected to abandon the defense in order to keep some of the more unsavory aspects of Davis' past from the jury. (R. at 349.) Trial strategy decisions rest only with counsel and a choice of tactics rarely sustains an ineffective assistance claim. *See Adams v. State*, 575 N.E.2d 625, 629 (Ind.1991). In light of the evidence of sanity before the postconviction court and the reasoned decision to drop the insanity defense by Davis' counsel, it is apparent the *Strickland* standard has not been met.

[12,13] Davis also alleges that Hofer advised him to plead guilty even though he never admitted committing the crimes. An Indiana defendant must admit the offense to which he is pleading guilty. *Patton v. State*, 517 N.E.2d 374, 375-76 (Ind.1987), *aff'd after remand*, 588 N.E.2d 494 (Ind.1992). Davis states Hofer suggested he plead guilty even though Davis told him he would not say he intentionally committed the crimes. By urging him to plead guilty under these circumstances, Davis argues, his defense team was

<sup>4</sup> The post-conviction court made a finding that implicitly rejects Davis' claim that the State promised to forego its death penalty request: "After Defendant proceeded to plead guilty,

counsel did advise him that they believed that with a guilty plea his odds of not getting the death penalty were better with a judge than with a jury." (R. at 267.)



aware the plea would not meet the requirements for a guilty plea.

A review of the record reveals that Davis, albeit reluctantly, admitted to the attempted murder in January, and the second attempted murder count in June. It also shows he admitted intentionally killing the two youths in June. (G.R. at 567-68.) In light of Davis' own testimony, it appears obvious that a sufficient factual basis existed for the guilty plea and that counsel's conduct was not deficient.

[14] Davis also argues that his counsel inadequately advised him on how to respond to the aggravating factors charged under the death penalty statute. There is evidence in the record, however, that Hofer and Davis discussed the aggravating factors. Indeed, as noted earlier, Hofer's legal theory that at least one of the aggravators, lying in wait, did not apply was found to be correct. *Davis*, 477 N.E.2d at 897. In light of the discussions and our later decision it is hard to understand Davis' claim his counsel was ineffective.

[15] Finally, with respect to his ineffective assistance claims, Davis argues that his counsel failed to voir dire the jury adequately. However, the defense team had interviewed the jury enough to know how it might view capital punishment. In fact, one member of the defense team described it as a "hanging jury." (R. at 730). In any event, the composition of the jury appeared to have little impact on Davis. According to Humphrey, one reason Davis decided to plead guilty was to spare his family any pain, not because he felt the jury was against him. Even if voir dire was inadequate, it is not clear that failure to conduct proper voir dire by itself prompted the guilty plea by making it seem to Davis he had no other choice but to plead.

#### V. Guilty Plea Was Knowing and Voluntary

Davis argues his guilty plea was not knowing and voluntary due to ineffective assistance of counsel. He claims the record shows he denied an intent to kill and that the advice he received at his trial was insufficient

to allow him to make an intelligent and voluntary decision about pleading. He argues this failure in advice meant he was improperly advised about the aggravating circumstances that would apply to his case. Further, he argues, the breakdown in advice from counsel led him to an "illusory plea" which gave him no real benefit. Finally, Davis argues he was not competent to enter a plea voluntarily and intelligently.

[16, 17] A guilty plea constitutes a waiver of constitutional rights and this waiver requires a trial court to evaluate the validity of every plea before accepting it. *Butler v. State*, 658 N.E.2d 72, 75 (Ind.1995), citing *Stowers v. State*, 266 Ind. 403, 363 N.E.2d 978 (Ind.1977). For the plea to be valid, the defendant's decision to plead guilty must be knowing, voluntary and intelligent. *Boykin v. Alabama*, 395 U.S. 238, 242-44, 89 S.Ct. 1709, 1711-13, 23 L.Ed.2d 274 (1969). In *Boykin*, the U.S. Supreme Court noted: "What is at stake for an accused facing death or imprisonment demands the utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and its consequences." *Id.* at 243-244, 89 S.Ct. at 1712. Indiana's guidelines on this issue predate the U.S. Supreme Court's holding. "[L]ong before the leading federal cases on guilty pleas, Indiana courts recognized that fundamental fairness required something more than a docket sheet notation that the defendant appeared and pleaded." *White v. State*, 497 N.E.2d 893, 896 (Ind. 1986).

Indiana law specifies that a trial court shall not accept a plea of guilty or guilty-but-mentally-ill without first determining that the defendant understands the nature of the charges against him and that pleading guilty waives a number of valuable constitutional rights. Ind.Code Ann. § 35-35-1-2 (West 1986).

[18] Davis argues specifically his guilty plea is invalid because at the guilty plea hearing he initially denied he had an intent to kill. (G.R. at 562-64.) To establish a factual basis for the plea agreement, Humphrey asked Davis a series of questions

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about the crimes. Initially, Davis said he did not know what he was doing when he killed *Darrin Reed*. (G.R. at 564). It was only after an off-the-record conference that he testified he intended to kill the two youths and intended to kill two others. (G.R. at 566-68.) With respect to each crime, Davis admitted he intended to murder the two boys and intended to attempt to murder the two others. (G.R. at 566-68.) In *Underhill v. State*, 477 N.E.2d 284, 287 (Ind.1985), this Court held that a defendant's admission of the facts outlined before the trial court sufficed to establish a basis for the entry of a plea. Similarly, Davis' admission at his guilty plea hearing and the introduction by the prosecutor of audio tapes of Davis' confession to police established a sufficient factual basis for the guilty plea.

Davis also argues his plea should be withdrawn due to the advice he received from counsel and his knowledge about the consequences of a guilty plea when he made the decision to plead. Specifically, he asserts that his counsel failed to advise him properly of the charged aggravating circumstances. Davis argues when he pled guilty, he had more than the mere expectation he would receive a term of years. He believed he could not receive the death penalty because the aggravating circumstances did not apply to his case." (Appellant's brief at 62). Davis also argues that the trial court did not correct any misunderstanding he had.

There is ample evidence in the record, however, to show that Davis and his counsel discussed the aggravating circumstances. As noted above, Davis' counsel succeeded in getting one of the aggravating circumstances reversed. *Davis*, 477 N.E.2d at 897. Also, Davis' counsel never said the "intentional murder in the course of a felony" aggravator would not apply. He only said he would try to argue against it.

[19] Davis also argues he pled guilty to what amounted to an "illusory plea." As part of the plea agreement, Davis pled guilty to two counts of murder and two counts of attempted murder. In exchange, the State agreed to drop two counts of felony murder and four counts of deviate sexual conduct. He argues there was no real benefit to the

plea since the trial court still had the option under the plea agreement to impose the death penalty. Counsel asserts the bargain was meaningless because the doctrines of double jeopardy and merger would have prevented the convictions and sentences on all ten counts as alleged. *Eddy v. State*, 496 N.E.2d 24 (Ind.1986) (one may not be convicted and sentenced for both felony murder and the accompanying felony of robbery). Davis also cites *Daniels v. State*, 531 N.E.2d 1173 (Ind.1988), for the proposition that a guilty plea is invalid if induced by the fear of greater punishment than would have been legally possible. In this case, however, Davis pled guilty after his defense counsel made a calculated decision that he would be less likely to receive the death sentence if he did so. His plea was not induced by a fear of greater punishment than was legally possible. Even with a guilty plea, the death penalty was still legally possible.

[20] Finally, with respect to the advice he received about the plea agreement, Davis argues the pleas should be set aside because the trial court simply read the death penalty statute to him but did not explain the special role the jury plays in evaluating the appropriateness of the death penalty. Davis is correct in asserting that *Boykin* requires a conviction to be vacated unless the defendant knows or is advised at the time of his plea that he was waiving his right to a jury trial. Davis was advised he was waiving his right to a jury trial. He may not have been specifically told he was also waiving the opportunity to have a jury consider whether it would recommend that death penalty, as required by Ind.Code Ann. § 35-50-2-9(d) (West 1986). However, *Boykin* establishes only that the U.S. Constitution requires that a defendant be advised of his right to a trial by jury, the right to confront one's accusers and the right against self-incrimination. By foregoing the opportunity for a jury to make a recommendation on his sentence, Davis was not giving up a constitutional right that would require a separate advisement.

[21] Finally, Davis alleges he was not sufficiently competent to enter a guilty plea voluntarily and intelligently. As has been

noted earlier, however the post-conviction court found there was sufficient evidence to determine that Davis was competent to stand trial and consequently participate in his guilty plea hearing. To prevail on appeal, a petitioner must establish that the evidence as a whole leads unmistakably to a decision in his favor. *Schiro v. State*, 479 N.E.2d 556 (Ind.1985), cert. denied, 475 U.S. 1036, 106 S.Ct. 1247, 89 L.Ed.2d 355 (1986). Davis has not met this burden.

### VI. Conclusion

For the foregoing reasons, the decision of the post-conviction court to deny Davis' request to withdraw his guilty plea is affirmed.

DICKSON, SULLIVAN, SELBY and BOEHM, JJ., concur.



In the Matter of L.B., a Child Alleged to  
be a Delinquent Child, Appellant-  
Respondent,

v.

STATE of Indiana, Appellee-Petitioner.

No. 71A03-9511-JV-391.

Court of Appeals of Indiana.

Dec. 23, 1996.

In juvenile delinquency proceedings, St. Joseph Probate Court, Peter J. Nemeth, J., entered finding of delinquency based on molestation of 14-year-old victim. Appeal was taken. The Court of Appeals, Hoffman, J., held that: (1) right of parents to be present at proceedings on delinquency of their child existed at time of delinquency hearing from which they were excluded; (2) exclusion of parents, on basis of witness separation order, from substantial portion of delinquency proceedings was not harmless absent knowing and voluntary waiver; and (3) child could

assert right to have his parents present at juvenile delinquency proceedings.

Reversed and remanded.

Chezem, J., concurred in result with opinion.

### 1. Statutes $\S$ 230

Amendments to statutes are to be construed in conjunction with original act to which they relate, as constituting one law, and with other statutes on same subject or relative subjects whether in force or repealed.

### 2. Statutes $\S$ 230

Upon enacting amendatory statute, legislature is presumed to have intended to alter law, but presumption is inapplicable if it appears that amendment was made only to express original intention of legislature more clearly.

### 3. Infants $\S$ 200

Right of parents to be present at proceedings on delinquency of their child existed at time of delinquency hearing from which they were excluded, even though statutory amendment formalizing status of parents as parties to delinquency proceedings was not added until several months after hearing. legislature intended amendment to clarify parents' rights as parties, in light of other acts regarding juveniles which were already replete with references to parents' rights to attend and participate in proceedings regarding their minor children whether proceedings were directed to acts of parents or children West's A.I.C. 31-6-4-9.

### 4. Criminal Law $\S$ 636(1)

Generally, it is right of every party litigant to be present in person in court upon trial of his or her own case.

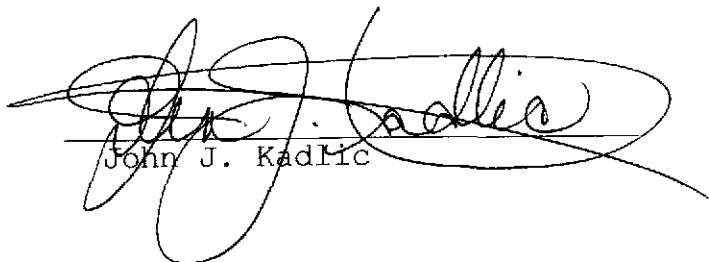
### 5. Infants $\S$ 200, 253

Exclusion of parents, on basis of witness separation order, from substantial portion of delinquency proceedings, including entire case-in-chief for state during adjudication hearing, was not harmless absent knowing and voluntary waiver of parents' right to be present.

CERTIFICATE OF MAILING

Pursuant to NRCP 5(b), I certify that John J. Kadlic, Esq.  
on the 11th day of December, 2003, personally delivered a true  
copy of the Defendant's Brief to the following:

Tammy M. Riggs, Esq.  
Washoe County District Attorney's Office  
75 Court St.  
Reno, NV 89501



John J. Kadlic

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CODE NO. 1850

FILED

12-12-03  
RONALD A. LONGTIN, JR., ClerkBy S. Satter  
Deputy Clerk

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

\* \* \*

THE STATE OF NEVADA,

Plaintiff,

Case No. CR02-0147

vs.

Dept. No. 9

FERRILL JOSEPH VOLPICELLI,

Reporter: D. Davidson

Defendant.

JUDGMENT

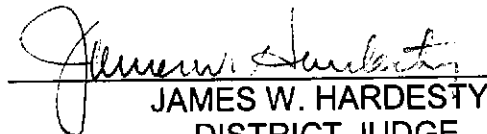
The Defendant having been found Guilty by a jury, and no sufficient cause being shown by Defendant as to why judgment should not be pronounced against him, the Court rendered judgment as follows:

That Ferrill Joseph Volpicelli is guilty of the crimes of Indecent Exposure, a violation of NRS 201.220, a felony, as charged in Count I of the Amended Information and Open or Gross Lewdness, a violation of NRS 201.210, a felony, as charged in Count II of the Amended Information, and that he be punished by imprisonment in the Nevada State Prison for the minimum term of twelve (12) months to a maximum term of forty-eight (48) months and by payment of a fine in the amount of Five Thousand Dollars (\$5,000.00), as to each of Counts I and II. The sentence in Count II shall run concurrently with the sentence in Count I. The Defendant is further ordered to pay the statutory Twenty-Five Dollar (\$25.00) administrative assessment fee, submit to a DNA analysis test for the purpose of determining genetic markers and pay a testing fee of One Hundred Fifty Dollars (\$150.00), an Eight

CR02-0147  
STATE VS FERRILL  
JOSEPH VOLPICELLI  
District Court  
Washoe County  
DC-09900055260-030  
JOSEPH VOLP 2 Pages  
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1 Hundred Dollar (\$800.00) Psychosexual Evaluation fee and reimburse the County of  
2 Washoe the sum of One Thounsad Dollars (\$1,000.00) for legal representation by the  
3 Washoe County Public Defender's Office. The Defendant is given credit for two hundred  
4 twenty-eight (228) days time served.

5 DATED this 12th day of December, 2003.

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8 JAMES W. HARDESTY  
9 DISTRICT JUDGE  
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CASE NO. CR02-0147

STATE OF NEVADA VS. FERRILL JOSEPH VOLPICELLI

DATE, JUDGE  
OFFICERS OF  
COURT PRESENT

APPEARANCES-HEARING

CONTINUED TO

12/12/03  
HONORABLE  
JAMES W.  
HARDESTY  
DEPT. NO. 9  
S. Sattler  
(Clerk)  
D. Davidson  
(Reporter)ENTRY OF JUDGMENT AND IMPOSITION OF SENTENCE

Deputy D.A. Tammy Riggs represented the State.

Defendant present with counsel, John J. Kadlic.

Probation Officer, Heidi Poe, also present.

Court indicated respective counsel had provided him with briefs regarding the admissibility of **State's exhibit A**. Court indicated he had reviewed the transcript and the microfilm and concluded with regards to the proposed enhancement judgment, that the Defendant was to be advised of certain constitutional rights, or at least that was the case in 1983 and further noted said rights had been waived. Further, stated that he was satisfied with the canvass and indicated a guilty plea was entered by the Defendant. COURT ORDERED: **State's exhibit A** is hereby admitted.

Counsel for State addressed the Court and submitted the matter as to the concurrent or consecutive time stating that the Albertson's incident had been stricken, however, requested a sentence of eighteen (18) to forty-eight (48) months and presented argument thereto.

Officer Poe indicated the Defendant had two hundred twenty-eight (228) days credit for time served.

Defendant read letter into the record.

COURT ORDERED: Judgment entered. Defendant sentenced to the Nevada State Prison for the minimum term of twelve (12) months to a maximum term of forty-eight (48) months and by payment of a fine in the amount of Five Thousand Dollars (\$5,000.00), as to each of Counts I and II. The sentence in Count II shall run concurrently with the sentence in Count I. The Defendant is further ordered to pay the statutory Twenty-Five Dollar (\$25.00) administrative assessment fee, submit to a DNA analysis test for the purpose of determining genetic markers and pay a testing fee of One Hundred Fifty Dollars (\$150.00), an Eight Hundred Dollar (\$800.00) Psychosexual Evaluation fee and reimburse the County of Washoe the sum of One Thousand Dollars (\$1,000.00) for legal representation by the Washoe County Public Defender's Office. Office.

CR02-0147  
STATE VS FERRILL  
JOSEPH VOLP 2 Pages  
District Court  
Washoe County  
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CASE NO. CR02-0147

STATE OF NEVADA VS. FERRILL JOSEPH VOLPICELLI

DATE, JUDGE  
OFFICERS OF  
COURT PRESENT

APPEARANCES-HEARING

CONTINUED TO

12/12/03  
HON. JAMES W.  
HARDESTY  
DEPT. NO. 9  
S. Sattler  
(Clerk)  
D. Davidson  
(Reporter)

**ENTRY OF JUDGMENT AND IMPOSITION OF SENTENCE-  
CONTINUED**

The Defendant is given credit for two hundred twenty-eight (228) days time served.

Counsel for Defendant indicated the Defendant would be appealing this matter and moved the transcript be prepared at the county's expense; SO ORDERED.

Defendant remanded to the custody of the Sheriff.



PATY: Tammy Riggs  
DATY: John J. Kadlic

Case No: **CR02-0147** Dept. No: **9** Clerk: **S. Sattler** Date: **12/12/03**

[illegible]

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STATE VS FERRILL JOSEPH VOL 19 Pages  
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FILED

DEC 16 2003

RONALD A. LONGTIN, JR., CLERK

By: *C. W. [Signature]*  
DEPUTY

SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

THE HONORABLE JAMES W. HARDESTY, DISTRICT JUDGE

--ooOoo--

STATE OF NEVADA,

Plaintiff,

Case No. CR02-0147

Dept. No. 9

vs.

FERRILL JOSEPH VOLPICELLI,

Defendant.

TRANSCRIPT OF PROCEEDINGS

SENTENCING

DECEMBER 10, 2003

RENO, NEVADA

Reported by:

DONNA DAVIDSON, CCR #318, RMR, CRR  
Computer-Aided Transcription

## A P P E A R A N C E S

For the Plaintiff:

TAMMY M. RIGGS  
Deputy District Attorney  
75 Court Street  
Reno, Nevada 89520

For the Defendant:

JOHN A. KADLIC  
Attorney at Law  
147 East Liberty Street  
Suite 2  
Reno, Nevada 89801

For the Division of Parole and Probation:  
HEIDI POE

1 RENO, NEVADA, WEDNESDAY, DECEMBER 10, 2003, 9:53 A.M.

2 --oOo--

3  
4 THE COURT: All right. State versus Ferrill  
5 Volpicelli, CR02-0147.

6 Ms. Riggs is here for the State, Mr. Kadlic is  
7 here on behalf of Mr. Volpicelli.

8 This was a continued sentencing in order to  
9 allow Mr. Kadlic the opportunity to review the Exhibit  
10 A.

11 Mr. Kadlic, have you had an opportunity to do  
12 that?

13 MR. KADLIC: Yes, I appreciate Ms. Riggs. She  
14 faxed it to me over the weekend. I did have an  
15 opportunity to look at it. I appreciate that.

16 THE COURT: Any objection?

17 MR. KADLIC: Absolutely, Your Honor.

18 THE COURT: Okay.

19 MR. KADLIC: If you go back and read the  
20 transcript, the change of plea of September 22nd of  
21 1983, you run into you one slight problem. If you go to  
22 page 5, they explain to Mr. Volpicelli the elements,  
23 although I must admit Mr. Mooney never did explain to  
24 him that this occurred in the County of Washoe, State of

1 Nevada, they asked him if he understands the elements.

2 Then he goes down, and the judge says, "Are you  
3 entering a guilty plea then because you are guilty?" He  
4 says, "Yes, Your Honor, I will accept the plea then."

5 The problem is he never asks him to plead to the  
6 charge. So there is no actual plea in this case. He  
7 never pled to the charge.

8 So if you don't plead, you can't be guilty of  
9 something. And NRS 174.035, the only plea a judge can  
10 enter for you is a plea of not guilty.

11 So there is nothing in the transcript, and I  
12 went through it several times to check it out, that  
13 indicates he's ever pled to the charge, which -- and I  
14 was looking at a case this morning, which is State v.  
15 Freese, which is 116 Nev. 1097, it's a 19 -- it's a 2000  
16 case where the supreme court says while you don't have  
17 to have sort of a ritualistic routine, you must follow  
18 some kind of guideline.

19 Of course in later times -- now, this was in  
20 1983. They apparently weren't doing written waivers.  
21 They are now doing those. But if you look at it,  
22 there's no written waiver in this case.

23 There are other problems with the canvass  
24 itself, and which is also covered in the Freese case.

1 And I'll just point out a couple of other little  
2 problems.

3 One, they never mention he has a right to  
4 subpoena witnesses.

5 There's sort of what I call a half explanation  
6 of the facts that lead to the underlying charge.

7 There's no discussion of possible defenses, no  
8 discussion of his right to appeal, no discussion of his  
9 right to counsel or if he's satisfied with his counsel;  
10 if you read the Freese case, if the counsel has had  
11 enough time to discuss the elements with him.

12 In other words, back in 1983, this may have been  
13 what courts would have considered an adequate canvass,  
14 but it's certainly not today.

15 But again, if you go back through it, he's never  
16 pled guilty to the charge. So all of the other  
17 documents are extraneous. Because if he didn't plead  
18 guilty and the judge can't accept a plea of guilty  
19 unless he actually pleads to it, you don't have a valid  
20 prior conviction, which then takes this out of being a  
21 felony and puts this back to being a gross misdemeanor.

22 And so I strenuously object to the admission of  
23 the exhibit on the basis I have stated.

24 THE COURT: Okay. Before we move on to

1 arguments from counsel for the State on this point, the  
2 Court's administrative assistant received a letter from  
3 Mr. Volpicelli bringing to my attention, which I was not  
4 aware of until this morning, that there was a pending  
5 motion by him to remove his counsel. Have you seen that  
6 motion, Mr. Kadlic?

7 MR. KADLIC: No, I have not.

8 THE COURT: So your client never sent that to  
9 you?

10 MR. KADLIC: Apparently not. I don't know what  
11 date it's file-stamped. I haven't received it.

12 THE COURT: Well, the one that I have in the  
13 file here, once I located it, after seeing the AA -- the  
14 letter from the AA this morning, is October 24th, 2003.  
15 And it, the letter makes reference to two of them, and I  
16 haven't found the other one yet, but I'm looking for it.

17 Mr. Volpicelli, are you wanting to remove your  
18 counsel before sentencing in this case?

19 THE DEFENDANT: Your Honor, if you review the  
20 record, you'll see that -- I believe that there was a  
21 conflict of interest with Mr. Kadlic being my attorney  
22 for reasons that are referenced in I believe a motion  
23 for new trial or acquittal filed within five days of the  
24 July 10th, I believe, trial itself. And --

1 THE COURT: Did you serve that on the State?

2 THE DEFENDANT: Yes, I did.

3 MS. RIGGS: No, Your Honor, the State has not  
4 received any kind of motion in this case. We have  
5 received an ex parte document referred to us by the  
6 Court, I believe, or -- it's hard to keep track, Your  
7 Honor. He sends so much stuff to us, to you, and  
8 there's no formal motion regarding his trying to get  
9 Mr. Kadlic off his case.

10 MR. KADLIC: If I can explain the basis of what  
11 that comes from, Your Honor.

12 Apparently back when I was a justice of the  
13 peace, I issued a search warrant on a totally unrelated  
14 case than this. We went through a similar hearing with  
15 Mr. Grayhouse in front of Judge Elliott, and if you look  
16 at the statute, there is a statute that says judges  
17 aren't supposed to represent people if they have had  
18 anything to do with a case, but as I read that and the  
19 way Judge Elliott read it in Grayhouse decision that he  
20 made, it goes to the case that's in front of the Court.

21 This thing happened I couldn't even tell you how  
22 long ago. It was probably 10 to 15 years ago when I was  
23 a justice of the peace. It has nothing to do with this  
24 charge.



1           So if you read the rule, I'm now convinced --  
2 originally I wasn't sure until we did that hearing in  
3 front of Judge Elliott -- that you have -- it has to be  
4 the case you were working on. In other words, if you  
5 were to leave the bench today and suddenly representing  
6 Mr. Volpicelli in this case tomorrow, you couldn't do it  
7 without both sides agreeing, the State and the defendant  
8 agreeing to allow you to represent him.

9           Well, this isn't the case. This is a case that  
10 has nothing to do with this case here, it has nothing to  
11 do with probably half of Mr. Volpicelli's cases. And  
12 that's the only thing apparently I did, and that one  
13 somehow slipped through the cracks that I didn't catch  
14 until later on and somebody caught it. I tried to go  
15 back. There were only about three that I actually had  
16 during my 15-year tenure in the justice's court that  
17 actually had any, and one was Mr. Grayhouse, one was  
18 Mr. Mills, I believe, and one was Mr. Volpicelli, and  
19 that's it.

20           But nothing substantive to this case. So the  
21 motion, even if he were -- I doubt the Court is going to  
22 rule in his favor based on what I now believe the rule  
23 to say.

24           THE COURT: Is there any other basis,

1 Mr. Volpicelli, for the removal of counsel, other than  
2 the conflict issue that you have referenced?

3 THE DEFENDANT: Your Honor, in regards to the  
4 conflict issue, I initially brought to the Court's  
5 attention that there's an ongoing issue at this point,  
6 and the fact that a search warrant was signed which  
7 turned me into a repeat offender program -- eventually a  
8 repeat offender program target, and if you review the  
9 record you'll see during the trial that it was brought  
10 up that I was under investigation as a ROP target. So I  
11 believe that it was a related case.

12 THE COURT: A search warrant issued in '83 --

13 THE DEFENDANT: A search warrant issued back in  
14 1992. In addition to that, there is still an ongoing  
15 issue with the fact that the property that was seized  
16 during the investigation has not been resolved to date,  
17 and that I've been in touch with the California  
18 Department of Justice as late as July, I believe, of  
19 2002, in regards to that matter.

20 So the way I interpreted the statute was that if  
21 there's an ongoing matter still pending or if there  
22 wasn't complete agreement between counsel and client as  
23 to a conflict of interest, that a relationship between  
24 client and attorney created a conflict.

1           THE COURT: Why didn't you send a copy of this  
2 motion to your lawyer?

3           THE DEFENDANT: I did, Your Honor. And the  
4 Court has -- I have filed documents, but I didn't bring  
5 them here today because I didn't anticipate this. I  
6 thought it was just going to be sentencing.

7           MR. KADLIC: Your Honor, he may have sent it to  
8 me. Again, as Ms. Riggs said, this is the one thing  
9 we'll both agree on. Mr. Volpicelli sends out volumes  
10 of stuff. Some applies to one case; some applies to  
11 another.

12           As I have said in the past, I think he has three  
13 different conflict attorneys. So he may well have sent  
14 this one. Again, I was aware of what Judge Elliott did,  
15 so if he did, it's probably in the file somewhere along  
16 with numerous other documents. I think my file is  
17 probably about 10 inches thick at this point.

18           I mean I just basically -- knowing what Judge  
19 Elliott already ruled, I did not respond because I'm of  
20 the opinion he's not going to prevail anyway just based  
21 on the rule. The reading of the rule, after having that  
22 other hearing, has convinced me that you have to be the  
23 actual case that it's involving, and the indecent order  
24 had nothing to do with the search warrant that was

1 issued -- if it's issued in 1992, that's 11 years ago.  
2 It had nothing to do with this case.

3 THE COURT: All right.

4 MR. KADLIC: To be honest with you, I would be  
5 happy to step aside if the Court gives him another  
6 counsel. I mean, it isn't going to hurt my feelings.  
7 But I'm here as a professional to represent him.

8 I think I've gone a good job at trial. I'm  
9 raising the issue as far as this conviction here that  
10 they are trying to get into evidence. I mean, I'm  
11 trying to do my job as a professional.

12 THE COURT: You have not seen this motion,  
13 though?

14 MR. KADLIC: I probably have. You know, it's  
15 just -- I mean, like, again, I agree with Ms. Riggs,  
16 there are numerous papers that come through, again some  
17 apply to other cases that don't apply, you look at them  
18 and I must admit you don't spend a lot of time with  
19 them. Most of them frankly lack merit.

20 THE COURT: Well, Mr. Volpicelli doesn't cite  
21 the statute that addresses the conflict question in his  
22 paper to me, but apparently this is an issue that you  
23 have discussed in an unrelated case with Judge Elliott.

24 MR. KADLIC: That is correct, Your Honor. I

1 believe -- I hate to be held to this, I believe it's  
2 Supreme Court Rule 1 -- it's either in the 150s or the  
3 170s.

4 THE COURT: I think it's 162.

5 MR. KADLIC: Okay.

6 THE COURT: But factually what occurred in this  
7 case, there was a search warrant that you signed in  
8 when?

9 MR. KADLIC: Apparently in 1992 that had to do  
10 with some form of property crime. This is obviously an  
11 indecent exposure -- it has nothing to do with this.

12 I mean, it could have longstanding  
13 repercussions, and you could, I guess, bootstrap your  
14 way all the way in, if you want to think about it, into  
15 the fact that I mean, yeah, it probably -- if I issued a  
16 search warrant, they found evidence, he was convicted,  
17 that condition is then used to have him held to be a  
18 habitual criminal, I suppose there's some marginal  
19 connection.

20 But as far as the actual charge of indecent  
21 exposure and the charge which is what we are here on  
22 today, that search warrant had nothing to do with that  
23 case, it had to do with things that may have led to  
24 convictions of other charges that may be -- granted the

1 habitual criminal isn't before this court on this case  
2 either, so it would actually go in front of Judge  
3 Elliott, which I'm not representing him on, Mr. Van Ry  
4 is. I have nothing to do with that case.

5 THE COURT: What's the disposition of the '92  
6 case, if you know?

7 MR. KADLIC: I don't. Alls I did is signed a  
8 search warrant. I haven't the slightest idea, Your  
9 Honor, whatever happened to it beyond that. I assume  
10 that he may have been convicted. I have no way of  
11 knowing.

12 MS. RIGGS: Your Honor, he was convicted of two  
13 counts of burglary in that case. Also --

14 THE COURT: When was that conviction?

15 MS. RIGGS: When was it?

16 THE COURT: Yes.

17 MS. RIGGS: It was in 1993, Your Honor.

18 THE COURT: Okay.

19 MS. RIGGS: Also, Your Honor, regarding this or  
20 Mr. Kadlic's representation resulting in this defendant  
21 being a ROP target, that's inaccurate. This defendant  
22 was not voted in as a ROP target until August 2001,  
23 after he committed several other property crimes, as  
24 Mr. Kadlic says, completely unrelated to the indecent

1 exposure charges.

2 THE COURT: Okay. The motion to discharge  
3 Mr. Kadlic on the basis of conflict is denied. With  
4 respect to the judgment then, Ms. Riggs, what is your  
5 position with regard to the arguments of counsel on  
6 that?

7 MS. RIGGS: Your Honor, firstly, this sounds  
8 like a collateral attack on this defendant's guilty  
9 plea. Of course that should have been made many, many  
10 years ago. And any problem that this defendant had with  
11 his guilty plea should have been handled, he should have  
12 appealed it and the issue is over.

13 The Court now -- or the State is arguing that  
14 this prior or record of prior conviction follows the  
15 mandates of Dressler, and under Dressler what the State  
16 must show is that the spirit of constitutional  
17 principles were followed and that this defendant was  
18 either represented by counsel or made a valid waiver of  
19 counsel.

20 THE COURT: And if the underlying -- if the  
21 judgment is the product of a void plea, I mean,  
22 counsel's correct, for some odd reason the judge in 1983  
23 never asked the defendant to plead.

24 MS. RIGGS: Well, Your Honor, and I will go

1 through that. As you'll see, this is a valid guilty  
2 plea to begin with.

3 THE COURT: Well, here's what I'm going to do,  
4 because there's a lot of -- in the Court's mind, there's  
5 a lot riding on these issues in this case and some other  
6 cases. And I'm not going to make a decision on this  
7 just based upon this matter having been presented to me  
8 this morning.

9 I want you to submit, each of you, some  
10 authorities with respect to your arguments on this  
11 matter. I'm going to continue it to the 19th. I want  
12 your authorities submitted by the 17th so that I know  
13 what your argument is.

14 MR. KADLIC: Okay, Your Honor, that -- that  
15 presents a problem. I'm going -- as a matter of fact, a  
16 week from today at this time, I may actually be able to  
17 see -- well, I won't be able to see without glasses.  
18 I'm having laser surgery on the 17th.

19 The 19th presents -- I'll be out of commission  
20 for two days. So -- at least that's what they tell me.  
21 So I mean, I've even scheduled some things for the 19th  
22 I'm going to try to vacate. I would prefer to move it,  
23 if the Court is going to hear things on the 26th, which  
24 is the day after Christmas, I would prefer to do it



1 then.

2 THE COURT: I can do it on the 31st.

3 MR. KADLIC: The 31st would be better.

4 MS. RIGGS: Your Honor, I'm not going to be able  
5 to do it on the 31st, I know for sure.

6 If Mr. Kadlic is going in for surgery, I would  
7 actually ask to move it backwards from the 19th -- or  
8 from the 17th. If we could do this by the -- I'm sorry,  
9 what is the date today?

10 MR. KADLIC: Today is the 10th.

11 MS. RIGGS: I could do this, Your Honor, by  
12 either the end of the week or Monday.

13 THE COURT: Well, Mr. Kadlic, would you be  
14 available to argue this and provide me with your  
15 authorities on this -- I have hadn't had a chance to  
16 look at Freese, I think I remember the case, but I want  
17 to read it. Would you be available the morning of the  
18 16th?

19 MR. KADLIC: No. My schedule -- I'm trying to  
20 get everything else done before I'm out of commission on  
21 the 17th and 18th, so that is no. That's putting a real  
22 short notice. I have another -- I am working on a writ  
23 of habeas corpus on a client out of Yerington that is  
24 basically taking up a lot of time, he's a retained

1 client, he paid me a lot of money, frankly. I prefer to  
2 do it after Christmas.

3 THE COURT: Are you available this Friday?

4 MR. KADLIC: That is open. We were supposed to  
5 have -- I've got a major business case in Carson City.  
6 We may be -- we were a third set. I've got a call from  
7 the judge's chambers. Apparently -- we have got  
8 co-counsel coming out of San Jose on that one. It looks  
9 like it's going to be vacated. If it's vacated, the  
10 answer is yes; but I don't know if I can get a brief to  
11 you in --

12 THE COURT: No, I want to, if you have time or  
13 you want to submit any authorities, I just want to  
14 research this myself.

15 MR. KADLIC: I will try to make time. It looks  
16 like we're going to vacate because there's a jury trial  
17 and we were a third setting in Carson City. It's just  
18 that I have co-counsel coming out of San Jose. But I  
19 can do it Friday. I can work it out with my -- they  
20 have been admitted to practice, so I think they can work  
21 without me being there if they have to.

22 THE COURT: 8:30.

23 MR. KADLIC: 8:30 would be fine, Your Honor.

24 THE COURT: All right. Ms. Riggs, if you have

1 some legal authorities to address, you can present them  
2 by tomorrow.

3 I'll see you back here Friday morning.

4 MR. KADLIC: Thank you, Your Honor.

5 MS. RIGGS: Thank you, Your Honor.

6 (Proceedings concluded.)

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1 STATE OF NEVADA )  
2 ) SS.  
3 COUNTY OF WASHOE )

4 I, DONNA DAVIDSON, Official Reporter of the  
5 Second Judicial District Court of the State of Nevada,  
6 in and for the County of Washoe, do hereby certify:

7 That as such reporter, I was present in  
8 Department No. 9 of the above court on said date, time  
9 and hour, and I then and there took verbatim stenotype  
10 notes of the proceedings had and testimony given  
11 therein.

12 That the foregoing transcript is a full, true  
13 and correct transcript of my said stenotype notes, so  
14 taken as aforesaid.

15 That the foregoing transcript was taken down  
16 under my direction and control, and to the best of my  
17 knowledge, skill and ability.

18 DATED: At Reno, Nevada, this 15th day of  
19 December, 2003.

20  
21   
22 DONNA DAVIDSON, CCR #318  
23  
24

CR02-0147 DC-09900055260-028  
STATE VS FERRILL JOSEPH VOL 14 Pages  
District Court 12/22/2003 09:47 AM  
Washoe County 4185  
NAC

CODE: 4185

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2003 DEC 22 11:09:46

J. J.

SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

THE HONORABLE JAMES W. HARDESTY, DISTRICT JUDGE

--ooOoo--

STATE OF NEVADA,

Plaintiff,

Case No. CR02-0147  
Dept. No. 9

vs.

FERRILL JOSEPH VOLPICELLI,

Defendant.

TRANSCRIPT OF PROCEEDINGS

SENTENCING

DECMEBER 12, 2003

RENO, NEVADA

Reported by:

DONNA DAVIDSON, CCR #318, RMR, CRR  
Computer-Aided Transcription

## A P P E A R A N C E S

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For the Division of Parole and Probation:

HEIDI POE

1 RENO, NEVADA, FRIDAY, DECMEBER 12, 2003, 8:29 A.M.

2 --oOo--

3  
4 THE COURT: Please be seated.

5 State versus Ferrill Volpicelli, CR02-0147.

6 Ms. Riggs is here for the State, Mr. Kadlic is  
7 here on behalf of Mr. Volpicelli, Ms. Poe is here for  
8 the Division of Parole and Probation.

9 Counsel has provided to the Court a brief --  
10 both counsel have provided to the Court briefs on this  
11 topic and the admissibility of State's Exhibit A. The  
12 Court has reviewed the transcript; in fact, I have  
13 looked at the microfilm of the file in 1983.

14 The Court concludes that with respect to the  
15 proposed enhancement judgment that have been offered, a  
16 defendant is to be advised of certain constitutional  
17 rights under Boykin versus Alabama, 395 US 238, at the  
18 time of a plea canvass. At least that was certainly the  
19 situation in 1983.

20 Several federal constitutional rights are  
21 involved in a waiver that takes place when a plea of  
22 guilty is entered in a state criminal trial. First is  
23 the privilege against compulsory self-incrimination;  
24 next is the right to a trial by jury; third is the right

1 to confront one's accusers.

2 In reviewing the transcript, the Court concludes  
3 that all three of those constitutional rights were  
4 discussed with Mr. Volpicelli; he acknowledged the  
5 existence of those rights and waived them.

6 Although counsel has argued that the question of  
7 his right to subpoena witnesses was not addressed, the  
8 Court is satisfied that the constitutional rights  
9 required by Boykin were provided and discussed with  
10 Mr. Volpicelli and he waived the necessary  
11 constitutional rights through the plea canvass.  
12 Therefore, the Court concludes that at least the canvass  
13 was satisfactory and met constitutional requirements.

14 The next issue raised by the defense concerns  
15 whether the defendant entered a guilty plea. The  
16 transcript says on page 5:

17 "The Court: Mr. Volpicelli, do  
18 you understand what the State  
19 would have to prove, all the  
20 elements of the offense to a  
21 jury of 12 people beyond a  
22 reasonable doubt if this case  
23 did go to a trial?

24 "The Defendant: Yes, Your Honor.



1           "The Court: You are entering a  
2           guilty plea then because you  
3           are guilty?"

4           "The Defendant: Yes, Your Honor.

5           "The Court: I will accept the plea then."

6           The question is whether the defendant must enter  
7           or state the words guilty as a basis for a guilty plea.

8           The Court has been provided with a reference to  
9           the Croft case, but in addition the Court believes that  
10          the defendant in this case and in other cases can by an  
11          affirmative acceptance of a leading question by the  
12          Court enter a guilty plea; therefore, the Court  
13          concludes that the guilty plea in 1983 was entered by  
14          the defendant, the objection to Exhibit A is overruled,  
15          and Exhibit A is admitted.

16                 (Exhibit 1 admitted into  
17                 evidence.)

18          THE COURT: I would now like to proceed with  
19          sentencing in this matter.

20                 Is there anything further you would like to add  
21          in the way of argument, Mr. Kadlic?

22          MR. KADLIC: No, Your Honor.

23          THE COURT: All right. Ms. Riggs?

24          MS. RIGGS: Your Honor, regarding the

1 recommendation of the department, we're going to submit  
2 it to your discretion whether you want to run these two  
3 counts concurrently or consecutively.

4           You'll recall that -- and actually I do have a  
5 correction to make to the P and P report. On page 6,  
6 you'll note in the second paragraph about in the middle  
7 the report goes into the Albertsons incident on December  
8 27th, 2001. You'll recall that that incident and all  
9 reference to it were stricken in this case. We weren't  
10 allowed to proceed on those.

11           And so the two separate incidents that we  
12 started with, we ended up with two counts coming out of  
13 one, so that's the reason the State is going to submit  
14 on the issue of concurrent versus consecutive, Your  
15 Honor.

16           The P and P came back, though, with minimums,  
17 Your Honor, and we certainly don't think that is  
18 appropriate. The State is asking you to sentence this  
19 defendant to 18 to 48 months in the Nevada State Prison  
20 and \$5,000 on each count.

21           Your Honor, this defendant admits to multiple  
22 incidents of masturbating in his car in public areas,  
23 and that's on page 7 of --

24           MR. KADLIC: Your Honor, I object to that. He's

1 not been charged with those, so I don't think you can  
2 bring that into the sentencing now. He has to be  
3 charged with them. If they want to charge him, fine,  
4 charge him.

5 THE COURT: Ms. Riggs?

6 MS. RIGGS: Your Honor, we're letting you know  
7 the background of this defendant, why we think that 18  
8 to 48 months is appropriate. It's already on the  
9 record. He's already asserted this.

10 THE COURT: Overruled.

11 MS. RIGGS: Thank you. He says at least 40 such  
12 acts since he was 17 years old. The State considers  
13 this conservative since when the ROP detectives were  
14 following him he engaged in this kind of conduct at  
15 least three to four times, and they only saw him on  
16 eight different days.

17 Simultaneously, Your Honor, this defendant  
18 denies his actions. He has what the assessment  
19 physician says is a pronounced history of antisocial  
20 thinking and appears unable to take responsibility for  
21 his actions. And the explanation that he gives to the  
22 assessor borders on the ridiculous, Your Honor. It's  
23 also inconsistent with prior statements that he's made.

24 Ironically, even though the evidence in the

1     Albertsons case got thrown out, he admits the fact of  
2     performing that conduct in his statement to the  
3     assessor, so the State is sort of at a loss as to  
4     whether he is going to be taking responsibility for  
5     these or not. But he does blame everybody else for his  
6     conduct.

7             Your Honor, you recall that there was an  
8     assessment done by Lakes Crossing physicians back in  
9     July. In that assessment he blamed his attorneys, the  
10    repeat offender program, officer witnesses in this case,  
11    the co-conspirator in his burglary cases; and now a new  
12    thing, addictions, for his predicament. In fact, on  
13    page 8 of the Lakes Crossing assessment, Your Honor, he  
14    even blames you and makes some sort of allegations of  
15    possible prejudice by you.

16            Also, Your Honor, the evaluator considers his  
17    likelihood to reoffend high, moderate to high. The  
18    three assessments that were conducted, there was one,  
19    the RRASOR assessment mentioned on page 8 of the  
20    evaluation that puts generally his risk at 21 percent to  
21    reoffend in ten years.

22            However, since 1987, Your Honor, or, excuse me,  
23    1977, when he was first arrested, to 1983, he had a 100  
24    percent risk -- or 100 percent rate of reoffense. He

1 did the exact same conduct in 1977 for which he was --  
2 the charges were dismissed; 1983 he gets convicted of  
3 the exact same conduct; and then and now, this conduct.

4 The State believes that he will reoffend when  
5 he's out, Your Honor, so we think that the best course  
6 is to segregate him from the population as long as  
7 possible.

8 Also, Your Honor, you'll note that the evaluator  
9 regards his treatment possibilities at page 9 as  
10 guarded at best. He's resistant to treatment. And  
11 interestingly, the assessor states that his other  
12 criminal behavior needs to be stabilized before  
13 treatment can be effective.

14 Well, Your Honor, this defendant has just been  
15 found guilty on eight counts of burglary and two other  
16 misdemeanor counts, and he also has a burglary case  
17 pending in this court.

18 Your Honor, he's -- this defendant has been in  
19 custody for the last five years, at least, and during  
20 the four months that he was out he was reoffending. So  
21 we don't believe that he's amenable to treatment at all.  
22 We believe that the 18 to 48 months is the appropriate  
23 sentence in this case. Thank you, Your Honor.

24 THE COURT: All right. Ms. Poe, anything you

1 wish to add?

2 MS. POE: No, Your Honor. Corrected credit for  
3 time served should be 228 days, though.

4 THE COURT: All right. Mr. Volpicelli, is there  
5 anything you would like to say before the Court imposes  
6 sentence in this case?

7 THE DEFENDANT: Yes, Your Honor. I have been in  
8 denial with my addiction for the past decade, and since  
9 my arrest for these charges in 2001, I went and cleaned  
10 up my 1998 judgment and put in to date almost two years.

11 During that time I've been convicted, changed  
12 with programming, but more importantly I've been on  
13 psychotropics, and I think it's made a definite impact  
14 on my life.

15 I'd like for you to consider the fact that over  
16 the last six years outside of the four and a half months  
17 that I was on parole, I have just been warehousing my  
18 problems, and it didn't do anything; and what I need is  
19 obviously psychotherapy, the psychotropic regimen, and  
20 some type of structured drug program, but it just  
21 doesn't seem to be in the cards.

22 And in view of that, it would appear that I'm  
23 probably going to be going back to prison. And in that  
24 event, what I was requesting is that you defer my

1 transport to prison until I conclude with all of these  
2 cases, including my family court matters, which would  
3 probably be around February the 1st.

4 The other thing is that if you recall back in  
5 April, when I first arrived here, I came here with my  
6 legal supplies and/or resources, and you allowed me to  
7 keep them at Washoe County in the sheriff's office.

8 As a result of their investigations, a  
9 typewriter that I purchased in prison was seized, and I  
10 was wondering if you could put that back -- have that  
11 put back on my property so I can return to prison with  
12 that.

13 THE COURT: A what? What is it?

14 THE DEFENDANT: It's just a typewriter I  
15 purchased in prison.

16 THE COURT: A typewriter.

17 THE DEFENDANT: It was seized, and I want to put  
18 it back on my property at the Washoe County Sheriff's  
19 Office so that I can return to prison with that.

20 And I think I'm probably going to need a court  
21 order for my box itself to accompany me back with the  
22 transport to the Nevada Department of Corrections  
23 because they probably won't want to take it right away.

24 And then I'd just ask for work time credit

1 because I was a porter at Washoe County Sheriff's Office  
2 as well. Thank you.

3 THE COURT: Okay. The Court sentences you to a  
4 term of 48 months in the Nevada Department of  
5 Corrections on Count 1, with a minimum parole  
6 eligibility of 12 months.

7 On Count 2 you're sentenced to a similar 48  
8 months in the Nevada Department of Corrections, with a  
9 minimum parole eligibility of 12 months concurrent to  
10 Count 1.

11 You'll have 228 days credit time served.

12 You will pay a \$25 administrative-assessment  
13 fee, \$1,000 in attorney's fees, \$150 DNA fee, \$800  
14 psychosexual evaluation fee.

15 And you're fined in the sum of \$5,000 on each of  
16 the two counts.

17 With respect to your current custody status,  
18 there is a pending case. The Court expects to rule on  
19 that matter next week. I'll set it for Wednesday at  
20 8:30. We'll notify Mr. Alian on that point, and I'll  
21 address any further custody status with you at that  
22 time.

23 THE DEFENDANT: Thank you, Your Honor.

24 THE COURT: All right.



1           MR. KADLIC: One thing, Your Honor, since  
2 obviously I'm going to appeal this case, could you order  
3 the court reporter -- I'll file the necessary paperwork,  
4 but I seem to get in these glitches of getting the  
5 transcripts prepared, and I always end up having to ask  
6 for extensions on these fast tracks; so order that they  
7 prepare the transcript at county expense so I don't have  
8 to go through that. I'll file the request for  
9 transcript, the case appeal statement, the notice of  
10 appeal; but I run into these glitches with the court  
11 reporters, but I'm trying to avoid that right now.

12           THE COURT: So ordered.

13           MR. KADLIC: Thank you, Your Honor.

14           (Proceedings concluded.)

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1 STATE OF NEVADA )  
 2 ) ss.  
 3 COUNTY OF WASHOE )

4 I, DONNA DAVIDSON, Official Reporter of the  
 5 Second Judicial District Court of the State of Nevada,  
 6 in and for the County of Washoe, do hereby certify:

7 That as such reporter, I was present in  
 8 Department No. 9 of the above court on said date, time  
 9 and hour, and I then and there took verbatim stenotype  
 10 notes of the proceedings had and testimony given  
 11 therein.

12 That the foregoing transcript is a full, true  
 13 and correct transcript of my said stenotype notes, so  
 14 taken as aforesaid.

15 That the foregoing transcript was taken down  
 16 under my direction and control, and to the best of my  
 17 knowledge, skill and ability.

18 DATED: At Reno, Nevada, this 19th day of  
 19 December, 2003.

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 DONNA DAVIDSON, CCR #318

ORIGINAL

CR02-0147  
STATE VS FERRILL  
JOSEPH VOLP 2 Pages  
District Court  
Washoe County  
01/02/2004 08:55 AM  
1310  
KTNBEE

1 Code: 1310  
2 John J. Kadlic, Esq.  
3 Attorney at Law  
4 P.O. Box 2477  
5 Reno, Nevada 89505-2477  
6 Nevada State Bar #1291  
7 (775) 322-7099  
8 Attorney for Defendant

2004 JAN -2 AM 8:55



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

7 IN AND FOR COUNTY OF WASHOE

8 THE STATE OF NEVADA,  
9 Plaintiff,

10 vs.

CASE NO. CR02-0147

11 FERRILL JOSEPH VOLPICELLI,  
12 Defendant.

DEPT NO. 9

13 **CASE APPEAL STATEMENT**

14 1. Name of appellant filing this case appeal statement: FERRILL  
15 JOSEPH VOLPICELLI.

16 2. Identify the judge issuing the decision, judgment, or order  
17 appealed from: Honorable James W. Hardesty.

18 3. Identify all parties to the proceedings in the district  
19 court: THE STATE OF NEVADA, FERRILL JOSEPH VOLPICELLI.

20 4. Identify all parties involved in this appeal: THE STATE OF  
21 NEVADA, FERRILL JOSEPH VOLPICELLI.

22 5. Set forth the name, law firm, address, and telephone number  
23 of all counsel on appeal and identify the party or parties whom  
24 they represent: John J. Kadlic, Esq., Attorney at Law, P.O. Box  
25 2477, Reno, Nevada 89505-2477, (775) 322-7099, Attorney for  
26

1 Defendant, FERRILL JOSEPH VOLPICELLI. Washoe County District  
2 Attorney's Office, Appellate Division, P.O. Box 30083, Reno,  
3 Nevada 89520, (775) 328-3200, Attorney for Plaintiff, THE STATE  
4 OF NEVADA.

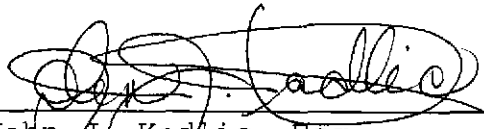
5 6. Indicate whether appellant was represented by appointed or  
6 retained counsel in the district court: Appellant was  
7 represented by appointed counsel in the district court.

8 7. Indicate whether appellant is represented by appointed or  
9 retained counsel on appeal: Appellant is represented by  
10 appointed counsel on appeal.

11 8. Indicate whether appellant was granted leave to proceed in  
12 forma pauperis, and the date of entry of the district court  
13 order granting such leave: Defendant was not granted leave to  
14 proceed in forma pauperis.

15 9. Indicate the date the proceedings commenced in the district  
16 court: the Notice of Appeal was filed on January 2, 2004.

17 Dated this 2nd day of January, 2004.

18  
19  
20   
21 John J. Kadlic, Esq.  
22 Attorney for Defendant  
23 FERRILL JOSEPH VOLPICELLI  
24  
25  
26  
27  
28

ORIGINAL

DC-0990005303-026  
CR02-0147  
STATE VS FERRILL JOSEPH VOLPICELLI  
District Court  
Washoe County  
01/02/2004 08:55 AM  
3868  
WTRBPC

1 Code: 3870  
2 John J. Kadlic, Esq.  
3 Attorney at Law  
4 P.O. Box 2477  
5 Reno, Nevada 89505-2477  
6 (775) 322-7099  
7 Nevada State Bar No. 1291  
8 Attorney for Defendant

2004 JAN -2 AM 8:55

J. JR.

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

7 IN AND FOR COUNTY OF WASHOE

8 THE STATE OF NEVADA,  
9 Plaintiff,

10 vs.

CASE NO. CR02-0147

11 FERRILL JOSEPH VOLPICELLI,  
12 Defendant.

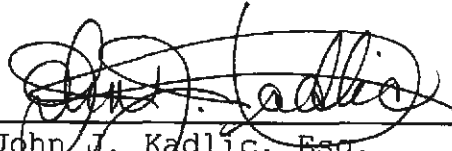
DEPT NO. 9

13 **REQUEST FOR TRANSCRIPTS**

14 Notice is hereby given that Defendant, FERRILL JOSEPH  
15 VOLPICELLI, by and through his attorney, John J. Kadlic, hereby  
16 requests rough draft transcripts of the trial held on July 10-  
17 11, 2003 and the sentencing held on December 5, 10, 12, 2003.

18 The Judge in open court ordered that all transcripts  
19 requested be supplied to Defendant at public expense.  
20

21 Dated this 2nd day of January, 2004.

22   
23 John J. Kadlic, Esq.  
24 Attorney for Defendant  
25 FERRILL JOSEPH VOLPICELLI  
26  
27  
28

ORIGINAL

V3. 393

DC-09900055303-031  
JOSEPH VOLP 2 Pages  
01/02/2004 08:55 AM  
CR02-0147  
STATE VS FERRILL  
District Court  
Washoe County  
Nevada

Code: 2505  
John J. Kadlic, Esq.  
Attorney at Law  
P.O. Box 2477  
Reno, Nevada 89505-2477  
(775) 322-7099  
Nevada State Bar No. 1291  
Attorney for Defendant

2004 JAN -2 AM 8:55

AT. JR.

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR COUNTY OF WASHOE

THE STATE OF NEVADA,  
Plaintiff,

vs.

CASE NO. CR02-0147

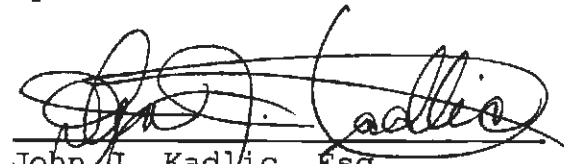
FERRILL JOSEPH VOLPICELLI,  
Defendant.

DEPT NO. 9

NOTICE OF APPEAL

Notice is hereby given that Defendant, FERRILL JOSEPH VOLPICELLI, by and through his attorney, John J. Kadlic, hereby appeals to the Supreme Court of Nevada from the Judgement entered in this action on the 12<sup>th</sup> day of December, 2003.

Dated this 2nd day of January, 2004.

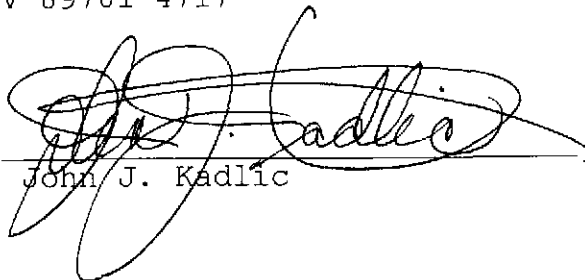
  
John J. Kadlic, Esq.  
Attorney for Defendant  
FERRILL JOSEPH VOLPICELLI

CERTIFICATE OF MAILING

Pursuant to NRCP 5(b), I certify that John J. Kadlic, Esq.  
on the 2nd day of January, 2004, personally deposited for  
mailing at Reno, Nevada, postage prepaid, a true copies of the  
Notice of Appeal and supporting documents to the following:

Washoe County District Attorney's Office  
Appellate Division  
P.O. Box 30083  
Reno, NV 89520

Office of the Attorney General  
100 N. Carson St.  
Carson City, NV 89701-4717



John J. Kadlic

FERRILL VOLPICELLI  
BOX 7000 N.N.C.C.  
CANYON CITY, NV 89702

ORIGINAL

FILED

2004 JAN -5 PM 2:03

IN THE SECOND JUDICIAL DISTRICT COURT OF NEVADA

IN AND FOR THE COUNTY OF WASHOE  
BY RONALD A. TONGIN, JR.  
DEPUTY

FERRILL T. VOLPICELLI,  
PETITIONER,

CASE NO. 02-0147

DEPT. 9

STATE OF NEVADA,  
RESPONDENT,

NOTICE OF ADDRESS  
CHANGE.

NOTICE IS HEREBY GIVEN OF A CHANGE OF ADDRESS  
FOR PETITIONER, FERRILL T. VOLPICELLI. HEREOFORTH,  
ALL CORRESPONDENCE IS TO BE SENT TO PETITIONER  
c/o N.N.C.C. BOX 7000 CANYON CITY, NV 89702.

SUBMITTED AND DATED THIS 31 DAY OF DECEMBER, 2003.

CERTIFICATE OF SERVICE: DATED AND COPY MAILED ON  
THIS 31 DAY OF DECEMBER, 2003, TO WASHOE COUNTY  
DISTRICT ATTORNEY'S OFFICE AS CERTIFIED UNDER PENALTY  
OF PERJURY PURSUANT TO NRS 208.165.

FERRILL T. VOLPICELLI  
PETITIONER PWS PER

DC-09900055303-027  
STATE VS FERRILL VOLPICELLI, 1 Page  
District Court 01/05/2004 02:03 PM  
Washoe County 2525  
WTR/BBP



ORIGINAL

CODE 1350

FILED

2004 JAN -6 AM 9:35

RONALD A. LONGTIN, JR.

BY C. Kepler  
DEPUTY

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

FERRILL JOSEPH VOLPICELLI,

Appellant,

vs.

THE STATE OF NEVADA,  
Respondent,

Case No. CR02-0147

Dept. No. 9

## CERTIFICATE OF CLERK

I hereby certify that the enclosed documents are certified copies of the original pleadings on file with the Second Judicial District Court, in accordance with the Revised Rules of Appellant Procedure Rule D(1).

Dated: January 6, 2004

Ronald Longtin, Jr., Court Clerk

By: C. Kepler

Cathy Kepler, Deputy Clerk

Appeals Desk 328-3114

ORIGINAL

FILED

2004 JAN -6 AM 9:36

RONALD A. LONGTIN, JR.

BY Cathy Kepler  
DEPUTY

CODE 1365

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

FERRILL JOSEPH VOLPICELLI,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent,

Case No. CR02-0147

Dept. No. 9

## CERTIFICATE OF TRANSMITTAL

I hereby certify that the enclosed Notice of Appeal and other required documents  
(certified copies) were delivered to the Second Judicial District Court mailroom  
system for transmittal to the Nevada Supreme Court.

Dated: January 6, 2004

Ronald Longtin, Jr., Court Clerk

By: Cathy Kepler  
Cathy Kepler, Deputy Clerk  
Appeals Desk 328-3114

ORIGINAL

SUPREME COURT OF THE STATE OF NEVADA  
OFFICE OF THE CLERK

Supreme Court No. 42603

District Court Case No. CR020147

FERRILL JOSEPH VOLPICELLI,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

2004 JAN -8 PM 1:59

FILED

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

RECEIPT FOR DOCUMENTS

TO: John J. Kadlic  
Attorney General Brian Sandoval/Carson City  
Washoe County District Attorney Richard A. Gammick  
Ronald A. Longtin Jr., District Court Clerk

You are hereby notified that the Clerk of the Supreme Court has received and/or filed the following:

01/07/04 Filing Fee Waived: Criminal.

01/07/04 Filed Certified Copy of Notice of Appeal.  
Fast track appeal docketed in the Supreme Court this day. (Fast Track Notice mailed to all counsel.)

DATE: January 07, 2004

Janette M. Bloom, Clerk of Court

By: [Signature]  
Deputy Clerk

ORIGINAL

SHEET 1 PAGE 1  
CODE: 4185

2004 JAN 12 AM 10:58

RONALD A. ECKSTEIN, JR.

SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHINGTON

THE HONORABLE JAMES W. HARDESTY, DISTRICT JUDGE

--ooOoo--

STATE OF NEVADA,

Plaintiff,

Case No. CR02-0147  
Dept. No. 9

vs.

FERRILL JOSEPH VOLPICELLI,

Defendant.

ROUGH DRAFT TRANSCRIPT OF PROCEEDINGS

APPEAL - JURY TRIAL

JULY 10, 2003

RENO, NEVADA

Reported by: DONNA DAVIDSON, CCR #318, RMR, CRR  
Computer-Aided Transcription

PAGE 3

RENO, NEVADA, THURSDAY, JULY 10, 2004, 8:38 A.M.

--oOo--

THE COURT: Please be seated.

This case is State versus Ferrill Volpicelli,  
CR02-0147.Ms. Riggs is here for the State, Mr. Kadlic  
is here for Mr. Volpicelli, who is present. Good  
morning to all of you.

MS. RIGGS: Good morning, Your Honor.

MR. KADLIC: Good morning, Your Honor.

THE COURT: This was the time set prior to  
the trial for a pretrial motions.

Ms. Riggs, did you have any?

MS. RIGGS: State has no pretrial motions,  
Your Honor. We do have a stipulation to discuss with  
you regarding the jury panel. There are three jurors  
that both parties would like to stipulate to have  
dismissed before the jury comes in. They.Would be Deb Bartgis, who is a court reporter  
and has asserted in her jury questionnaire that she  
does not believe she can be impartial towards a  
criminal defendant.

We would also ask to dismiss Rachel Villareal

PAGE 2

A P P E A R A N C E S

For the Plaintiff:

TAMMY M. RIGGS  
Deputy District Attorney  
75 Court Street  
Reno, Nevada 89520

For the Defendant:

JOHN A. KADLIC  
Attorney at Law  
147 East Liberty Street  
Suite 2  
Reno, Nevada 89801

PAGE 4

who asserts in her questionnaire that she -- due to  
her religious convictions she is enable to judge  
another.

Also, Your Honor, we would like to --

THE COURT: I have Rafaela.

MR. KADLIC: It's Rafaela.

MS. RIGGS: I apologize, Your Honor, that's  
correct.

THE COURT: Okay.

MS. RIGGS: And lastly, Your Honor, there's a  
person named Xan Harris, and that person is the  
sister of a criminal defendant who subsequently was  
involved in civil proceedings that I participated in  
as a law clerk for Judge Breen.So on that basis, we would ask that those  
three jurors be dismissed.MR. KADLIC: I would agree with that, Your  
Honor, Ms. Bartgis, everybody knows her situation;  
Ms. Harris I was reading that, she was part of the  
Ali Shaw situation; and the other lady are dealing  
with people who say that only God can judge, I don't  
care how many questions you ask them, they are going  
to stick to that. You may as well in my book get rid  
of them early and not even spend time because you are

ROUGH DRAFT TRANSCRIPT

SHEET 2 PAGE 5

1 never going to rehabilitate them looking to God to be  
2 the judge.

3 THE COURT: All right. Pursuant to the  
4 stipulation of counsel, the Court will excuse  
5 prospective Jurors Bartgis, Harris, and Villareal,  
6 and we will notify the jury commissioner to notify  
7 those three jurors, if they have reported, that they  
8 are excused.

9 THE CLERK: I don't recognize the last name  
10 that you called.

11 THE COURT: V-I-L-L-A-R-R-E-A-L. V, as in  
12 Victor.

13 THE CLERK: This is the latest list that I  
14 got.

15 THE COURT: Maybe she was taken off the list  
16 anyway.

17 MR. KADLIC: It appears, Your Honor, that she  
18 is not on the list. So she may not be --

19 THE COURT: All right. So Ms. Villareal  
20 wasn't on the juror list anyway. Okay.

21 Any other pretrial matters for the State?

22 MS. RIGGS: None, Your Honor.

23 MR. KADLIC: Didn't you want to do your --  
24 the photograph.

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1 1 and Count 2. Line 6 on page 2 of the Amended  
2 Information and also on line 21 from that, that that  
3 is redacted; two, that there be no reference to the  
4 fact that the defendant is a ROP target, that is a  
5 Repeat Offender Program target, that none of the  
6 officers refer to that; three, that they not refer to  
7 any prior incidences, involving Mr. Volpicelli, that  
8 there be no reference to that.

9 The fourth part, that's the part that  
10 concerns me, is how we're going to get to the State's  
11 cases because they were -- if you read the police  
12 reports, they were investigating him and these  
13 charges are actually weren't the target of what they  
14 were really trying to do, they were trying to do  
15 something else, it's just that these charges arose  
16 from what they were doing.

17 I have great concern as to how the State is  
18 going to be able to, since one of the incidents  
19 results as an effort of using binoculars to observe,  
20 to try to see what the defendant was doing, the other  
21 one they voluntarily walked up to his car to look in  
22 to see what he was doing. I just have great concern  
23 how the State is going to prove that without  
24 referring to other prior criminal conduct which is

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1 MS. RIGGS: Well, Your Honor, when we were  
2 discussing exhibits yesterday, the defense has  
3 stipulated to the admission of seven of the State's  
4 exhibits, and I just wanted to put on the record that  
5 regarding Exhibits 1, the Safeway parking lot exhibit  
6 and Exhibit 4, the Albertson's parking lot we have  
7 stipulated that it would be all right to write on  
8 those in front of the jury for demonstrative  
9 purposes.

10 MR. KADLIC: And I agree with that, Your  
11 Honor. We just wanted to put that on the record.

12 THE COURT: Exhibits 1 through 7 will be  
13 admitted.

14 (Exhibits 1, 2, 3, 4, 5, 6, 7  
15 admitted into evidence.)

16 MS. RIGGS: Thank you, Your Honor.

17 THE COURT: Mr. Kadlic, any pretrial matters  
18 on your part, sir?

19 MR. KADLIC: Yes, I just wanted to make sure.  
20 I know that it was redacted from the Information his  
21 prior conviction, but I just want to make that as a  
22 motion in limine to make sure that that is redacted  
23 and there is no reference to the fact that  
24 Mr. Volpicelli has a prior conviction both in Count 1

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1 not the subject of this proceeding.

2 So I move in limine to eliminate all of those  
3 issues where possible, because otherwise they are  
4 going to prejudice Mr. Volpicelli.

5 That's why in some ways it is unfortunate  
6 that the State chose to have a jury, this would have  
7 been the better case to try before a judge because  
8 the judge can erase out of his mind that evidence  
9 which is inadmissible which is harder to make a jury  
10 do.

11 MS. RIGGS: Your Honor, the State doesn't  
12 have any of the same concerns that defense has. What  
13 the State's -- the way the State intends to set these  
14 matters up is for instance when we are directing one  
15 of the police officers we'll ask them are you a  
16 police officer, what is your position, Reno police  
17 detective. We won't refer to ROP.

18 I'll also ask were you conducting -- what  
19 were you doing? They will answer we were conducting  
20 an investigation. They are not going to be saying  
21 that they are conducting an investigation of  
22 Mr. Volpicelli.

23 Just as the defendant is concerned about  
24 prejudice toward his case regarding any sort of

ROUGH DRAFT TRANSCRIPT

SHEET 3 PAGE 9

1 insinuation that these people are already following  
2 him, there would be prejudice towards the State's  
3 case if we were not at least able to say there's an  
4 investigation going on.

5 It's going to become clear to the jury that  
6 there's at least a few police officers in the area in  
7 each area that we're talking about, each location at  
8 one time.

9 Now, the jury is either going to think that  
10 they are ganging up on him for some reason if we're  
11 not allowed to say they were conducting an  
12 investigation, or they are going to be wondering what  
13 are they all doing there. It's going to create more  
14 confusion.

15 If we're allowed to say that these detectives  
16 were there conducting a criminal investigation that's  
17 it, Mr. Volpicelli's vehicle came to their attention,  
18 there's no prejudice to the defendant, there's no  
19 prejudice to the prosecution.

20 THE COURT: Well, with respect to the first  
21 motion redacting those portions of the Information,  
22 that's granted. And I always ask the clerk in the  
23 department to meet with counsel to review the  
24 Information that will be read, and I'm sure she's

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1 done that.

2 Secondly, with respect to the reference to  
3 ROP, that's granted, and there will be no reference  
4 to the fact that the defendant is a target of the  
5 repeat offender program. Additionally, there will be  
6 no references made to Mr. Volpicelli's prior criminal  
7 history or any prior incidents or events.

8 I do think the State's suggested solution  
9 solved the problem. I don't think the officers  
10 should make reference to the fact that they are  
11 engaged in a criminal investigation but rather  
12 engaged in an investigation, and leave it at that,  
13 and as a consequence of that investigation observe  
14 the defendant, if that's what their claim is.

15 So that's how the State is admonished to  
16 advise its witnesses of the Court's rulings.

17 Mr. Volpicelli, am I pronouncing your name  
18 correctly?

19 THE DEFENDANT: Yes, Your Honor.

20 THE COURT: It's not Volpicelli?

21 THE DEFENDANT: Either or.

22 THE COURT: You tell me how you prefer it.

23 THE DEFENDANT: I prefer Volpicelli.

24 THE COURT: Okay. I would like the parties

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1 to be consistent with respect to the reference of the  
2 defendant's name.

3 Any other pretrial matters?

4 MR. KADLIC: No, Your Honor, thank you.

5 THE COURT: Okay. Then I'll ask Ms. Clerk to  
6 have the jurors come up with the exception of Bartgis  
7 and Harris, and we'll get started as soon as  
8 everybody is here.

9 (Recess taken.)

10 THE COURT: Please be seated.

11 This case is State versus Ferrill Joseph  
12 Volpicelli, CR02-0147.

13 Are counsel ready to proceed?

14 MS. RIGGS: State is prepared, Your Honor.

15 MR. KADLIC: Defense is prepared, Your Honor,  
16 thank you.

17 THE COURT: All right. Good morning, ladies  
18 and gentlemen. I would like to welcome all of you to  
19 Department 9 of the Second Judicial District Court.

20 As you heard from the call of the case, my  
21 name is Jim Hardesty. I have the privilege of  
22 serving as the presiding judge in this department of  
23 this district. I'd like to welcome all of you as  
24 prospective jurors.

PAGE 12

1 You have been called upon to serve as a juror  
2 in this case and lend your good judgment and sense of  
3 fair play to this important service. Our nation has  
4 traditionally placed great faith in its citizens to  
5 serve as jurors and to reach fair and objective  
6 decisions in matters of great importance.

7 In my opinion at no time in the history of  
8 our State or our country has our faith new been  
9 misplaced. I ask you now to share in this tradition  
10 and to look upon your service as a juror as both a  
11 privilege and a responsibility of citizenship.

12 I ask you to serve willingly so that all  
13 persons who come before this Court, perhaps even  
14 yourself some day, will have the benefit of a fair  
15 and unbiased judgment of a juror of one's peers. I  
16 know that jury service is an inconvenience, and every  
17 effort will be made today to take advantage of the  
18 time that you are here and not abuse that time in any  
19 respect.

20 I also know that it is uppermost in jurors'  
21 minds the length of trial and the time that you will  
22 be committed, so let me tell you initially this case  
23 is relatively short by most circumstances and is  
24 expected to last today and perhaps into tomorrow

SHEET 4 PAGE 13

1 morning under the worst of circumstances. Much  
2 better I might add than some trials we have coming up  
3 here soon which are scheduled to last anywhere from  
4 three weeks to three months. You're not on that  
5 panel.

6 I'd like to introduce the Court staff that  
7 serve in Department 9 and have you here a little bit  
8 about their functions.

9 To my left is the Court clerk. She is  
10 responsible for all of the exhibits that are  
11 introduced during the course of the trial. As you'll  
12 hear in a moment, she manages the process for juror  
13 selection, administers oaths and handles all of the  
14 computer operations that take place inside the court  
15 during the time we are in session.

16 Ms. Clerk, would you introduce yourself.

17 THE CLERK: Good morning, my name is Sigrid  
18 Sattler.

19 THE COURT: All that we say and all that we  
20 do in a court of law is reported by a court reporter,  
21 as it should be. I am very fortunate to have one of  
22 the most experienced court reporters in our state.  
23 She has recently returned from an extended vacation,  
24 we're glad to have her back, which she is very tan as

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1 a result of it, has us all envious.

2 Ms. Reporter.

3 THE COURT REPORTER: Good morning, I'm Donna  
4 Davidson.

5 THE COURT: The Court has the benefit of a  
6 bailiff who provides any number of services while we  
7 are in court, in session and out. The bailiffs are  
8 provided by the Washoe County Sheriff's Office by  
9 statute.

10 The bailiff in this instance is an  
11 outstanding representative of the Washoe County  
12 Sheriff's Department and we're very fortunate to have  
13 him with us.

14 Bailiff, would you introduce yourself to the  
15 jurors.

16 THE BAILIFF: Good morning, ladies and  
17 gentlemen. My name is Mickey Oxhorn. Welcome.

18 THE COURT: It is important for you all to  
19 get to know Deputy Oxhorn. He is the person that you  
20 will communicate with should there be a need to  
21 communicate with me.

22 I'd like counsel to introduce themselves now.  
23 First, for the State.

24 MS. RIGGS: Good morning, ladies and

PAGE 15

1 gentlemen. My name is Tammy Riggs, and I'm a deputy  
2 district attorney.

3 THE COURT: And Mr. Kadlic, if you would  
4 introduce yourself and your client, sir.

5 MR. KADLIC: Yes, my name is John Kadlic.  
6 I'm an attorney in the private practice in the City  
7 of Reno, State of Nevada. This is my client, Ferrill  
8 Joseph Volpicelli. Thank you.

9 THE COURT: Ladies and gentlemen, as you  
10 heard from the call of the case, this case is a  
11 criminal case. A criminal case begins with the  
12 filing of an Information, which is a pleading that is  
13 filed with the Court by the district attorney's  
14 office advising the Court that certain charges are  
15 being presented.

16 It is by no means evidence in the case, and  
17 of course Mr. Volpicelli has pled not guilty which is  
18 why we are here.

19 In order for you to have an understanding of  
20 the subject matter of the case, I will now ask the  
21 clerk to read the Information that has been filed in  
22 this matter. Ms. Clerk.

23 THE CLERK: In the Second Judicial District  
24 Court, in and for the County of Washoe, the State of

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1 Nevada, plaintiff, versus Ferrill Joseph Volpicelli,  
2 defendant.

3 Case number CR02-0147, Department Number 9.

4 Amended Information filed February 21st,  
5 2003, Ronald Longtin, Jr., by Pat Cronin, deputy.

6 Richard A. Gammick, District Attorney within  
7 and for the County of Washoe, State of Nevada, in the  
8 name and by the authority of the State of Nevada  
9 informs the above entitled Court that Ferrill Joseph  
10 Volpicelli, the defendant above named, has committed  
11 the crimes of:

12 Count I, indecent exposure, a violation of  
13 NRS 201.220, a felony, in the manner following: That  
14 the said defendant, on or between the 25th day of  
15 September, 2001, and the 27th day of September, 2001,  
16 or thereabout, and before the filing of this  
17 Information, at and within the County of Washoe,  
18 State of Nevada, did willfully and unlawfully on one  
19 or more occasions make an open and indecent or  
20 obscene exposure of his person to Detective Patricia  
21 Brown and/or the public at large in a public parking  
22 lot during daytime hours located at 10500 North  
23 McCarran Boulevard and/or 5150 Mae Anne Boulevard,  
24 Reno, Washoe County, State of Nevada, in that the

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1 said defendant did masturbate inside a vehicle.  
 2 Count 2, open or gross lewdness, a violation  
 3 of NRS 201.210, a felony in the manner following:  
 4 That the said defendant on or between the  
 5 25th day of September, 2001, and the 27th day of  
 6 September 2001, or thereabout, and before the filing  
 7 of this information at or within the County of  
 8 Washoe, State of Nevada, did willfully and unlawfully  
 9 on one or more occasions commit an act of open or  
 10 gross lewdness in a public parking lot during daytime  
 11 hours located at 10500 North McCarran Boulevard and  
 12 5150 Mae Anne Boulevard, Reno, Washoe County in that  
 13 the said defendant did masturbate inside a vehicle,  
 14 all of which is contrary to the form of the statute  
 15 in such case made and provided and against the peace  
 16 and dignity of the State of Nevada.  
 17 Richard A. Gammick, District Attorney, Washoe  
 18 County, Nevada, by Shawn Sullivan Deputy District  
 19 Attorney, to which Amended Information defendant  
 20 entered a plea of not guilty as charged.  
 21 THE COURT: All right. Ladies and gentlemen,  
 22 if you have served on a jury before and what I'm  
 23 about to say is redundant, I apologize, but I always  
 24 found it helpful to get an overview of a process that

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1 I hadn't participated in, so let me give you a kind  
 2 of an overview of what we will try to accomplish this  
 3 morning in connection with jury selection.  
 4 In a moment, Ms. Clerk will read the names of  
 5 the prospective jurors. When you hear your name  
 6 announced, would you please confirm your presence and  
 7 let us know that you are here.  
 8 I will then ask her to ask all of you to  
 9 stand and take an oath, raise your right hand and  
 10 take an oath to be administered by the clerk, under  
 11 the terms of which you agree to answer questions  
 12 under oath placed to you by me and by the attorneys  
 13 having to do with your qualifications to serve as a  
 14 juror in this case.  
 15 After that, Ms. Clerk will read the names  
 16 randomly of 23 of you who will sit in the jury box  
 17 here and then questioning will begin by myself then  
 18 the attorneys and at the conclusion of the  
 19 questioning each counsel will then have the  
 20 opportunity to exercise four peremptory challenges.  
 21 These are challenges in which the lawyers are  
 22 permitted to excuse a prospective juror for any cause  
 23 and without explanation to the other side or to the  
 24 Court.

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1 At the conclusion of that process, we will  
 2 select 12 jurors and one alternate who will hear and  
 3 decide this case.  
 4 All right. Ms. Clerk, would you please read  
 5 the roll of prospective jurors in the case.  
 6 (The clerk called the roll  
 7 of prospective jurors.)  
 8 THE COURT: All right. Ladies and gentlemen,  
 9 would you please all stand and raise your right hand  
 10 and take an oath to be administered by the clerk.  
 11 (The prospective jurors were  
 12 sworn at this time.)  
 13 THE COURT: All right. You may be seated.  
 14 Ladies and gentlemen, the clerk will now read  
 15 the names of 23 of you to serve in the initially in  
 16 the box. Please see the bailiff if you hear your  
 17 name announced. We will begin filling the back row  
 18 at the north wall and he'll assist you in directing  
 19 you to your seat.  
 20 Ms. Clerk.  
 21 (Jury voir dire was conducted  
 22 at this time and is not a part  
 23 of this record.)  
 24 THE COURT: All right. Ladies and gentlemen,

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1 if your name was not announced, you are excused with  
 2 the thanks of the Court and Ms. Riggs and Mr. Kadlic  
 3 an Mr. Volpicelli. Thank you. Please see the jury  
 4 commissioner downstairs.  
 5 For those of you whose names were announced,  
 6 please remain seated.  
 7 All right. Ladies and gentlemen, would you  
 8 all please stand and take yet another oath to serve  
 9 as a trial juror in this case. Please raise your  
 10 right hand.  
 11 (The jury was sworn at this  
 12 time.)  
 13 THE COURT: All right. If you would be  
 14 seated, please, I'd like to review a couple of  
 15 matters with you before we begin the trial, and we  
 16 will take a rest room break in just a moment for  
 17 those of you who are interested.  
 18 Let me review the schedule first with you.  
 19 Today we have kind of an awkward day. The Court has  
 20 a number of other matters that are occurring  
 21 throughout the course of the day. So we are going to  
 22 go through until 12:30 today, and I'll ask you to  
 23 come back at 2:00. The reason for that is because I  
 24 have a hearing in another case that will start at



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1 12:30 and go until 2:00. We will go until 4:00 to  
2 4:15 today because we have another matter that has to  
3 be heard at that time. It is possible that the case  
4 may be concluded by that time and you may be in  
5 deliberations by then.

6 If not, you'll have to come back tomorrow  
7 morning at 10 o'clock for that purpose.

8 Ladies and gentlemen, objections must be made  
9 by attorneys if in their judgment evidence is being  
10 presented or questions are being asked that may not  
11 be legally permissible.

12 As I have indicated to you, the Court is to  
13 rule on objections of law. No one is trying to hide  
14 anything from you, rather we are trying to ensure  
15 that in your evaluation of the case you consider only  
16 legally admitted evidence. Therefore, if I sustain  
17 an objection, you are to ignore the question that was  
18 asked and not speculate on what the answer may have  
19 been. If I strike testimony, you are to disregard  
20 the testimony that I have ordered stricken.

21 I tend to write a lot of notes during a  
22 trial, both on a note pad here and on the computer.  
23 I am fortunate in this district to have a court  
24 reporter who uses a process called real time. Real

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1 time is a process which everything that she is  
2 currently taking down immediately comes up on my  
3 screen, which enables me to know exactly what was  
4 said by a party during the course of the trial. If  
5 you see me making notes during the course of the  
6 trial, please do not place greater evidence or  
7 greater weight on that. I may be making a note about  
8 a totally unrelated matter.

9 My point is nothing that I say or do should  
10 be influencing your decision about the weight to be  
11 given to someone's testimony, that's for you to  
12 decide.

13 You may take notes during the trial yourself;  
14 and in fact, in a moment when we break, the bailiff  
15 will provide you with a note pad and pen for that  
16 purpose. I would urge you to consider a couple of  
17 things regarding notes, however.

18 I think it important for you to write down  
19 the names of each witness who testifies and a summary  
20 of the testimony that you heard that you think is  
21 important in the case to remind yourself of what was  
22 said during the course of your deliberations.

23 But, as I said before, it is important for  
24 you to watch the witnesses who testify and evaluate

PAGE 23

1 their demeanor on the stand and the reasonableness of  
2 the things that they say so that you can make  
3 credibility decisions regarding those witnesses.

4 The bailiff and the other court staff are  
5 here to make you as comfortable as possible. If  
6 there's anything that you need, please let me know.  
7 I do not permit food or soda pop in the courtroom but  
8 certainly you're welcome to have bottled water if you  
9 like or we have lots of water and cups that can be  
10 provided to you.

11 Occasionally the lawyers and I have to take  
12 up matters outside of your presence. I try to limit  
13 this as much as possible during the course of a trial  
14 to maximize the utilization of your time while you're  
15 in the courtroom, but we apologize in advance if we  
16 have to take up breaks to address legal issues during  
17 the course of the trial.

18 As you have probably observed in coming to  
19 the courthouse today, all of us use the same common  
20 elevators and hallways and the like, and for that  
21 reason it's not uncommon for you to encounter or come  
22 in contact with the lawyers or perhaps even  
23 Mr. Volpicelli during the course of the trial.

24 I can assure you that the lawyers in this

PAGE 24

1 case are very courteous people, very friendly people.  
2 However, if they reviews to acknowledge your presence  
3 and do not speak to you, it's not because they are  
4 rude, it's because they are fulfill their obligations  
5 to have no contact with a person who is a juror  
6 during a pending trial.

7 In that regard, one of the things the bailiff  
8 will provide to you is a sticker, a blue and white  
9 sticker which I request that you wear at all times on  
10 your clothing while you're in the courthouse.

11 This was something that was initiated by  
12 Judge Torvinen many years ago, and it was intended to  
13 identify jurors who are serving to other people in  
14 the courthouse.

15 As you might imagine, the courthouse is  
16 always abuzz with lots of conversation and  
17 discussions about pending trials and the like, and  
18 we're trying to limit discussions in your presence by  
19 people about trials that are taking place. So  
20 identifying you as a juror is important.

21 Ladies and gentlemen, no juror may declare to  
22 a fellow juror any fact relating to the case of your  
23 own knowledge. If a juror discovers during the trial  
24 or after the jury has retired for deliberation that

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1 you or some other juror has personal knowledge of a  
2 fact in controversy in the case, you will disclose  
3 that situation to me outside the presence of the  
4 other jurors and not discuss it with your fellow  
5 jurors. What I mean by this admonition is this:

6 It is not uncommon for you to see a witness  
7 who you now recognize or hear testimony that you now  
8 believe may cause you to have some personal knowledge  
9 about the case or hear an address or some other fact  
10 that gives you some personal knowledge.

11 If you have that, please don't discuss it  
12 with your fellow jurors, just let the bailiff know  
13 and he will tell me.

14 When we return to the courtroom we will begin  
15 the trial with opening statements. You will hear  
16 from the jury instructions that nothing that a lawyer  
17 says during the course of the trial is evidence in  
18 the case. Opening statements are intended by the  
19 lawyers to provide you with an outline or an  
20 explanation of what they think the evidence might be.

21 In a criminal trial, the defense is permitted  
22 to give an opening statement following the State's or  
23 can waive their opening statement or not give one at  
24 all. I'm not sure what Mr. Kadlic will do in this

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1 trial, but I want you to know that procedurally he  
2 has the right to defer his opening statement or waive  
3 it altogether. So don't be disconcerted or place any  
4 emphasis on the fact that he may choose to waive his  
5 opening statement.

6 When we return to the courtroom, please sit  
7 in the same position that you are, although, Ms.  
8 Bowman, you'll be sitting where Ms. Duenke is, to  
9 help in letting you see the witnesses a little  
10 easier, and then you'll just move and crunch up a  
11 little closer and fill all of the juror chairs that  
12 are sitting in the box up there and we'll be taking  
13 these chairs and moving them into the jury room.

14 Ladies and gentlemen, it is important, in  
15 fact it is imperative that your decision rest only on  
16 what you see and hear during the trial; that is on  
17 legally admissible evidence. If your decision is  
18 tainted by conversations you have with others, by  
19 information you read or by investigations you conduct  
20 outside of the courtroom, it would be improper.

21 Therefore, you are admonished that you are  
22 not to discuss this case among yourselves or with  
23 anyone else until it is finally given to you for a  
24 decision at the end of the trial.

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1 You're not to discuss this case with anyone  
2 outside of the courtroom, and this includes spouses,  
3 family, and friends. You may tell them only that you  
4 have been selected to serve on a jury.

5 You are not to form any conclusions  
6 concerning the case until it is finally submitted to  
7 you for a decision; and you may not do any  
8 investigation of the facts of the case.

9 In the Information you heard two addresses or  
10 locations mentioned. You may not go by those  
11 addresses during the course of this trial.

12 And you are not to read or listen to any news  
13 media accounts about the days should there be any.

14 Finally, if anyone approaches you to discuss  
15 this case, I ask that you immediately notify the  
16 bailiff who will notify me.

17 We'll be in recess, counsel, until 10:30, at  
18 which time we will return and begin with opening  
19 statements.

20 (Recess taken.)

21 THE COURT: Please be seated. Do counsel  
22 stipulate to the presence of the jury?

23 MS. RIGGS: The State will stipulate, Your  
24 Honor.

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1 MR. KADLIC: Yes, Your Honor.

2 THE COURT: All right. Ms. Riggs, you may  
3 begin with the State's opening statement.

4 (The State's opening statement was  
5 had at this time and is not a part  
6 of this record.)

7 THE COURT: All right, Ms. Riggs.

8 Mr. Kadlic, do you wish to make an opening  
9 statement?

10 MR. KADLIC: Not at this time, Your Honor. I  
11 want to see what the State can show.

12 THE COURT: All right, then, your first  
13 witness, Ms. Riggs.

14 MS. RIGGS: State will call Washoe County  
15 Sheriff's Officer Adam Wagnanski.

16 THE COURT: Okay.

17  
18 ADAM WYGNANSKI,  
19 called as a witness on behalf of the  
20 State, having been first duly sworn,  
21 was examined and testified as follows:

22 >>>>>

23 >>>>>

24 >>>>>

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## DIRECT EXAMINATION

1  
2  
3 BY MS. RIGGS:  
4 Q. Would you state your name and spell it for  
5 the record, please.  
6 A. Yes, Adam WYGNANSKI, WYGNANSKI.  
7 Q. Who employs you?  
8 A. Reno Police Department.  
9 Q. Were you employed with Reno Police Department  
10 as of September 25th, 2001?  
11 A. Yes, I was.  
12 Q. What was your job title at that time?  
13 A. A detective.  
14 Q. Do you recall being on duty on September  
15 25th, 2001, at approximately 2:30 p.m.?  
16 A. Yes.  
17 Q. And at that date and time, where were you  
18 located physically?  
19 A. I was located in the parking lot of the  
20 Safeway and Shopko store on McCarran and Mae Anne.  
21 Q. Sir, is that location in Washoe County?  
22 A. Yes, it is.  
23 Q. And can you tell me what you were doing  
24 there, please?

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1 A. We were conducting an investigation.  
2 Q. On that date and approximately that time, did  
3 a particular SUV come to your attention?  
4 A. Yes.  
5 Q. And can you describe that vehicle, please?  
6 A. Yes, it was a blue Explorer two-door vehicle  
7 that drew my attention to it in the parking lot.  
8 Q. And why was your attention drawn to that  
9 vehicle?  
10 A. Well, that day it was particularly warm, and  
11 I observed a driver without exiting the vehicle  
12 jumping over the seat into the back seat and the  
13 vehicle having a rocking motion, and I stood there  
14 and observed that vehicle and wondered why the  
15 subject or the driver did not get out of that  
16 vehicle. It was kind of suspicious to me.  
17 Q. Now, did you -- did that vehicle first come  
18 to your attention when it was parked, or did you see  
19 it as it was in motion?  
20 A. When it was parked.  
21 MS. RIGGS: May I approach for Exhibit 1,  
22 Your Honor.  
23 THE COURT: Yes. Excuse me, Ms. Riggs.  
24 Ladies and gentlemen, at a pretrial hearing in this

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1 matter, counsel have marked all of the exhibits in  
2 the case, and the Court has admitted into evidence  
3 Exhibits 1 through 7.  
4 MS. RIGGS: Thank you, Your Honor.  
5 BY MS. RIGGS:  
6 Q. Now, detective, I am showing you what is an  
7 aerial photograph. Can you describe to me what this  
8 photograph depicts?  
9 A. Would you like me to step down?  
10 Q. You can if you would like. In fact, I'll get  
11 the easel.  
12 And for the record, this is State's Exhibit  
13 1. Again, can you tell me what this depicts, please?  
14 A. Yes. This is Mae Anne and this is McCarran,  
15 this is the Shopko store and this is the Safeway  
16 store.  
17 Q. And you said that your attention was first  
18 drawn to the vehicle after he had parked, correct?  
19 A. That is correct.  
20 Q. Can you, with a D, please mark where you saw  
21 the vehicle parked.  
22 A. I will not be able to tell you exactly what  
23 space the vehicle was in, but I can tell you that for  
24 sure the vehicle was in line with the entrance into

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1 the Safeway store, so I would probably venture to say  
2 that vehicle was right here.  
3 Q. Okay. And, detective, will you also mark  
4 where your position was where you were observing the  
5 vehicle from with a red pen.  
6 A. I was right -- like I said, it may not be the  
7 exact parking spot, but I was within that vicinity.  
8 Q. Okay. Thank you. You can have a seat.  
9 Was your view of the defendant's vehicle or  
10 the blue Ford Explorer unobstructed at this time?  
11 A. Yes, it was.  
12 MR. KADLIC: Can we remove the easel so I can  
13 see the witness.  
14 THE COURT: Are you through with the --  
15 MS. RIGGS: Actually, I'm not, Your Honor.  
16 May I move it over?  
17 THE COURT: Sure. Of course.  
18 Mr. Volpicelli, can you see the witness?  
19 THE DEFENDANT: Yes. Thank you.  
20 THE COURT: Okay.  
21 BY MS. RIGGS:  
22 Q. Now, detective, you had mentioned that you  
23 thought it was in line with the front doors, the Ford  
24 Explorer?

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1 A. Yes.  
 2 Q. Based on what you saw from that parking  
 3 space, would someone in that blue vehicle be able to  
 4 see the front doors of the Safeway?  
 5 A. Yes.  
 6 MR. KADLIC: Objection, Your Honor, that's  
 7 speculation. He can't say that because he's not in  
 8 the vehicle.  
 9 THE COURT: Sustained. That answer is  
 10 stricken.  
 11 BY MS. RIGGS:  
 12 Q. Detective, could you see the front door from  
 13 where you were?  
 14 A. Yes.  
 15 Q. Did you observe any kind of tint on the  
 16 windows of the Ford Explorer?  
 17 A. Yes.  
 18 Q. Dark tint, light tint?  
 19 A. It was a light tint. I could see movement in  
 20 the vehicle.  
 21 Q. So can you estimate approximately how far  
 22 away you were from the vehicle?  
 23 A. I would say 50 yards, approximately.  
 24 Q. And from that position you could see the

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1 defendant moving inside the vehicle?  
 2 A. Yes.  
 3 Q. Based on this diagram and your being at the  
 4 scene, was your position approximately equal distance  
 5 or the same distance from the -- to the Ford Explorer  
 6 as the front door was to the Ford Explorer?  
 7 A. I may have been just a little bit further.  
 8 Q. So if you could see into the Ford Explorer,  
 9 you are just a little bit further away than the front  
 10 from the front door, is it fair to assume that  
 11 someone from the front door could see into the Ford  
 12 Explorer as well?  
 13 MR. KADLIC: Objection, Your Honor, again,  
 14 that's speculation.  
 15 THE COURT: Sustained.  
 16 BY MS. RIGGS:  
 17 Q. Detective, did anyone ever get out of the  
 18 Ford Explorer, that you recall?  
 19 A. When I observed the vehicle? No.  
 20 Q. You testified that you saw the driver move  
 21 into the back seat, correct?  
 22 A. That's correct.  
 23 Q. You did this without ever getting out of the  
 24 vehicle?

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1 A. That's correct.  
 2 Q. Were you able to see what else, if anything,  
 3 was going on inside the vehicle?  
 4 A. No, other than observe the movement from one  
 5 subject, the driver, who was in the back seat.  
 6 Q. What did you do at that point, sir?  
 7 A. I notified my supervisor of what was going on  
 8 and the supervisor assigned Detective Allen to do a  
 9 walk by the vehicle.  
 10 MS. RIGGS: Thank you. No further questions.  
 11 THE COURT: All right. Any  
 12 cross-examination, Mr. Kadlic?  
 13 MR. KADLIC: Yes, Your Honor.  
 14  
 15 CROSS-EXAMINATION  
 16  
 17 BY MR. KADLIC:  
 18 Q. What time of the day was this?  
 19 A. It was approximately 2:00, 2:30 in the  
 20 afternoon.  
 21 Q. And what day of the week was this?  
 22 A. I would not be able to tell you what day of  
 23 the week it was.  
 24 Q. Now, you said that the reason you were

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1 observing this vehicle was it made some sort of  
 2 rocking motion?  
 3 MS. RIGGS: Your Honor, objection, that's  
 4 misstates what he said.  
 5 THE COURT: He's asking for clarification.  
 6 The witness can reject that proposal or accept it.  
 7 Overruled. You can answer.  
 8 THE WITNESS: The motion was from the  
 9 individual, the driver getting from the driver's seat  
 10 into the back seat, causing the vehicle to rock.  
 11 BY MR. KADLIC:  
 12 Q. Is it illegal to do that?  
 13 A. I just found it a little suspicious.  
 14 Q. That somebody moves from the front seat of  
 15 their car to the back seat of their car was  
 16 suspicious?  
 17 A. And remains in that vehicle, yes.  
 18 Q. Have you ever seen people move from the front  
 19 seat to the back seat and fall asleep?  
 20 A. No, I have not.  
 21 Q. Weren't you on highway patrol once?  
 22 A. Yes.  
 23 Q. And you never saw anybody pull off the road,  
 24 get out of the front -- get from the front seat of

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1 the car, go to the back seat and sleep?  
 2 A. Well, normally they would exit through their  
 3 door and then they would walk out of the vehicle and  
 4 then into the back seat. But I never -- it's kind of  
 5 suspicious for someone to climb over the seat into  
 6 the back seat.

7 Q. Has the police department ever done a study  
 8 showing that the customary way to get out from the  
 9 front to the back is to walk around, exit one door  
 10 and enter the other door rather than going from the  
 11 front to the back?

12 A. Not to my knowledge, no.

13 Q. So you have no way of knowing that that's any  
 14 more suspicious then getting out and walking from one  
 15 side back to the other, correct, those, no studies  
 16 that correlate that?

17 A. It was suspicious to me, yes, sir.

18 Q. But you have no studies to show that that is  
 19 unusual conduct from people, correct?

20 A. I thought it to be unusual.

21 Q. You. But you have no studies that back that  
 22 up. Just your --

23 A. Just my personal experience as an officer.

24 Q. Just a guess?

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1 A. A suspicion, hunch.

2 Q. So that's the total of the rocking motion is  
 3 this moving from the front to the back, which you  
 4 have already agreed is not illegal?

5 A. That's correct.

6 Q. Just you didn't like the way it was done?

7 A. It drew suspicion to me, yes, sir.

8 Q. Now, did you ever notice for example whether  
 9 or not the vehicle had any kind of petition?

10 A. No, I did not.

11 Q. Could you tell me how far the vehicle was  
 12 parked from the front door again, if you know of your  
 13 own personal knowledge?

14 A. I would say approximately 30 to 40 yards from  
 15 the front door, maybe more.

16 Q. Okay. So a substantial distance? Half a  
 17 football field?

18 A. Yeah.

19 Q. Okay. Now, you said you could see movement  
 20 in the back. What kind of movement could you  
 21 observe?

22 A. I observed from this point obviously the back  
 23 seat was to the back of the individual, and I  
 24 observed movement, the head movement from side to

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1 side and getting back in the seat.

2 Q. Is that illegal?

3 A. No.

4 Q. And that's -- could you see what type of  
 5 clothes the person was wearing?

6 A. I observed light shirt and I couldn't be for  
 7 sure on the slacks.

8 Q. Well, you said you could only see basically  
 9 from the neck up, so you could see the top of the  
 10 shirt?

11 A. When the individual moved from the front seat  
 12 to the back seat, I observed that he had a light-  
 13 colored shirt on.

14 Q. Was it short sleeved or long sleeved?

15 A. I would not be able to tell you that.

16 Q. Could you tell what the color was?

17 A. Light-colored.

18 Q. Well, that could be anywhere from white to  
 19 pink to yellow to light blue, light green. Any  
 20 particular color?

21 A. I couldn't tell you exactly what color. I  
 22 know it was a light color.

23 Q. How about the pants?

24 A. I do not know the pants.

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1 Q. But he was wearing pants?

2 A. He could have been wearing shorts.

3 Q. So you're not even sure?

4 A. Right.

5 Q. And at that point, you observed nothing else;  
 6 is that correct?

7 A. That's correct.

8 Q. And at least to this point nothing illegal  
 9 has happened; is that correct?

10 A. That's correct.

11 MR. KADLIC: I have no additional questions  
 12 of this witness, Your Honor. Thank you.

13 THE COURT: All right. Any redirect,  
 14 Ms. Riggs?

15 MS. RIGGS: Yes, Your Honor.

16  
 17 REDIRECT EXAMINATION

18  
 19 BY MS. RIGGS:

20 Q. Detective, do you recall how warm it was that  
 21 day?

22 A. It was fairly warm for a September day. I  
 23 believe it was pretty close to 85 degrees, maybe even  
 24 a little warmer.

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1 Q. And yet this defendant or the person that you  
2 saw in the car never got out?  
3 A. No. And that kind of concerned me with it  
4 being that hot and the windows rolled up. So like I  
5 said, I drew a little suspicion to it.  
6 Q. Any indication to you that the person inside  
7 the van was going to be going to sleep at all?  
8 A. No.  
9 Q. Would you find it unusual for somebody to be  
10 sleeping in a van in 90 degree weather?  
11 A. I would.  
12 Q. And, detective, you just testified that that  
13 van was approximately 30 to 40 yards away from the  
14 front doors, correct?  
15 A. That's correct.  
16 Q. Not quite a half football field, is it?  
17 A. No, it's not.  
18 Q. More like a third of a football field?  
19 A. Yes.  
20 Q. And --  
21 MS. RIGGS: I'll strike that, Your Honor.  
22 State has nothing further, Your Honor.  
23 THE COURT: Mr. Kadlic?  
24

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1 MS. RIGGS: Objection, relevance.  
2 THE COURT: Sustained.  
3 BY MR. KADLIC:  
4 Q. So to you it's unusual, but it does happen?  
5 A. Yes, sir.  
6 MR. KADLIC: No additional questions, Your  
7 Honor, thank you.  
8 THE COURT: All right. Anything further,  
9 Ms. Riggs?  
10 MS. RIGGS: Nothing further, Your Honor.  
11 THE COURT: All right. Officer, you may step  
12 down.  
13 Your next witness?  
14 MS. RIGGS: State will call Patricia Allen,  
15 Your Honor.  
16 THE COURT: Okay.  
17  
18 PATRICIA ALLEN,  
19 called as a witness on behalf of the  
20 State, having been first duly sworn,  
21 was examined and testified as follows:  
22 >>>>>  
23 >>>>>  
24 >>>>>

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## RE-CROSS-EXAMINATION

1  
2  
3 BY MR. KADLIC:  
4 Q. So it's unusual for people to sleep in their  
5 vehicles?  
6 A. Well, it was unusual for me to have somebody  
7 climb into the back seat when it was hot outside and  
8 the windows rolled up and not exiting the vehicle, so  
9 I found that to be a little suspicious.  
10 Q. But do people sleep in the back of their  
11 vehicles?  
12 A. There's been times when they have.  
13 Q. You've noticed that when you're a highway  
14 patrol officer, you have seen people pull off the  
15 side of the road, isn't that one of the things they  
16 encourage drunk drivers to pull off the side of the  
17 road and sleep it off?  
18 A. But it's kind of unusual for them to do it in  
19 the middle of a parking lot at 2:30 in the afternoon.  
20 Q. But have you ever seen other people do it?  
21 A. I have seen them do it in night in rest  
22 areas.  
23 Q. Have you ever seen people do it with their  
24 children?

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## DIRECT EXAMINATION

1  
2  
3 BY MS. RIGGS:  
4 Q. Would you state your name and spell it for  
5 the record, please.  
6 A. Patricia Allen, ALLEN.  
7 Q. And who employs you?  
8 A. The City of Reno.  
9 Q. And what is your position with -- what agency  
10 of the City of Reno employs you?  
11 A. The Reno Police Department.  
12 Q. And were you employed with the Reno Police  
13 Department on September 25th, 2001?  
14 A. Yes, I was.  
15 Q. What was your job title at that time?  
16 A. I'm a detective.  
17 Q. And were you a detective at that time as  
18 well?  
19 A. Yes, I was.  
20 Q. Do you recall, Detective Allen, being on duty  
21 on September 25th, 2001, or approximately 2:30 p.m.?  
22 A. Yes, I was.  
23 Q. Where were you located on that date and time?  
24 A. At the Shopko and Safeway stores up on North

SHEET 12 PAGE 45

1 McCarran and Mae Anne.  
 2 Q. What were you doing there?  
 3 A. An investigation.  
 4 Q. Now, detective, can you tell me what the  
 5 crowd situation was in that parking lot on that day?  
 6 For instance, were there a lot of cars parked there,  
 7 not very many cars, do you recall?  
 8 A. At 2:30 in the afternoon it was a relatively  
 9 busy parking lot, lot of cars, lot of -- is this  
 10 thing echoing or is it just me?  
 11 THE COURT: It's echoing.  
 12 THE WITNESS: Anyway, there was several cars,  
 13 there were people coming and going, shopping.  
 14 MS. RIGGS: Your Honor, if I may pull the  
 15 microphone back a little more.  
 16 BY MS. RIGGS:  
 17 Q. At that time did you see anyone walking  
 18 around the parking lot?  
 19 A. Yes, I did.  
 20 Q. And can you describe those people or that  
 21 person, please.  
 22 A. There were several people, primarily women,  
 23 some with children, just going about their daily  
 24 business, shopping. You're in a shopping mall,

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1 parking area.  
 2 Q. Do you recall what the weather conditions  
 3 were like on that day?  
 4 A. It was warm, very warm.  
 5 Q. Detective, at about that time on that date,  
 6 did you receive direction to go anyplace in  
 7 particular?  
 8 A. Yes, I did.  
 9 Q. And how did you receive this information?  
 10 A. Via radio, hand-held radios.  
 11 Q. Where did you go?  
 12 A. Well, specifically in the parking lot  
 13 primarily in front of the Safeway market, midway in  
 14 the parking lot.  
 15 Q. Now, I'm directing your attention to the  
 16 State's Exhibit 1, which has already been marked and  
 17 admitted.  
 18 Detective, would you mind stepping off the  
 19 stand and showing me approximately where you went?  
 20 A. All right. Mae Anne, McCarran. This would  
 21 be the Shopko store, and this would be the Safeway  
 22 store. And I was directed to walk about in this area  
 23 in here.  
 24 Q. And again, for the record, detective, you

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1 recognize what this photograph depicts, correct?  
 2 A. Yes, I do.  
 3 Q. And it does depict the parking lot we're  
 4 talking about today?  
 5 A. Yes, it does. This is one of the entrance  
 6 here.  
 7 Q. Explain to the jury how you got to this area  
 8 in particular?  
 9 A. Well, my vehicle was actually parked up here.  
 10 I was picked up by --  
 11 THE COURT: Excuse me, officer. Can the  
 12 jurors, particularly Ms. Huffer see -- apparently  
 13 neither can Ms. Jonkey. Can you move that a little  
 14 closer to the jury. There you go. All right. Go  
 15 ahead, officer.  
 16 THE WITNESS: Thank you. This is the Shopko  
 17 department store and this is the Safeway market. I  
 18 had arrived at that area in my own vehicle and parked  
 19 up here.  
 20 One of my partners had picked me up and drove  
 21 me over to here, at which time he dropped -- anyway,  
 22 I was dropped off and walked in on foot right up in  
 23 here. And just right kind of walked down through  
 24 here.

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1 BY MS. RIGGS:  
 2 Q. Did you have any destination in particular?  
 3 A. Yes. I was instructed to take a look at a  
 4 vehicle that had already parked in the parking lot.  
 5 Q. Do you recall what kind of vehicle it was?  
 6 A. Yes, it was a beautiful blue-colored Ford  
 7 Explorer.  
 8 Q. Now, detective, I'm now handing you a red  
 9 marker pen. Could you please mark on the exhibit --  
 10 I guess you can start with an X at the point that you  
 11 were dropped off. And I assume you approached the  
 12 vehicle on foot?  
 13 A. Uh-huh. Yes.  
 14 Q. Could you show the jury the path that you  
 15 took past the vehicle?  
 16 A. I was dropped off approximately here and  
 17 walked just once the vehicle was -- I knew exactly  
 18 where the vehicle was, then just kind of walking down  
 19 through here. I picked up a shopping cart along the  
 20 way so I didn't look like I was walking, and I kept  
 21 going and kept going a few more spaces past the  
 22 vehicle, which was right in this area. I stopped and  
 23 then turned around.  
 24 Q. Detective, you can get back on the stand.

SHEET 13 PAGE 49

1 Thank you.

2 MR. KADLIC: Could we again have the easel

3 moved, Your Honor, so I can keep an eye on the

4 officer.

5 BY MS. RIGGS:

6 Q. Now, detective when you walked past the

7 vehicle, did you look inside the vehicle?

8 A. Yes, I did.

9 Q. Did you see anything in the vehicle?

10 A. Yes, yes, I did.

11 Q. What did you see inside the vehicle?

12 A. I saw the defendant in the back seat of the

13 vehicle.

14 Q. Did you make eye contact with --

15 A. Yes, we did.

16 Q. Did you form an impression as to whether he

17 had seen you?

18 A. I believe he had seen me.

19 MR. KADLIC: Objection, it's speculation,

20 Your Honor. I object on the basis of speculation.

21 MS. RIGGS: Your Honor, this is her personal

22 observation.

23 THE COURT: Overruled.

24 BY MS. RIGGS:

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1 Q. What makes you say that? What makes you say

2 that the person in the Explorer saw you?

3 A. We were looking at each other, and as close

4 as you and I are right now, if not -- maybe even a

5 little bit closer.

6 Q. Was there anything that was obstructing your

7 view of the person in the Explorer?

8 A. No.

9 Q. Where was the person in the Explorer located?

10 A. He was sitting in the -- I'm assuming he was

11 sitting --

12 MR. KADLIC: Objection. If she's assuming

13 anything, I object. You can't assume anything.

14 THE COURT: All right. Sustained.

15 THE WITNESS: He was in the vehicle in the

16 passenger's side back compartment, directly behind

17 the front passenger seat.

18 BY MS. RIGGS:

19 Q. And you could see his head, correct?

20 A. Yes, I could.

21 Q. Over the seat, between the seats, what was

22 your vantage point?

23 A. Right about at the seat.

24 Q. Did you see -- happen to get a view of his

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1 hands at all?

2 A. Yes.

3 MR. KADLIC: Objection. That's a leading

4 question, Your Honor.

5 THE COURT: Sustained.

6 BY MS. RIGGS:

7 Q. Did you see any other part of him besides his

8 hand?

9 A. Yes. I saw a left hand somewhat grasping the

10 top of the passenger -- the front passenger seat, so

11 it would be grabbing from the back to the front. And

12 I did not see his right hand.

13 Q. And as you drew up on the board, you continue

14 past the vehicle, correct?

15 A. I walked past about three spaces, yes.

16 Q. Then what did you do?

17 A. Stopped, turned around and came back.

18 Q. Did you follow the same path that you had

19 taken away from the Explorer?

20 A. Yes, I did.

21 Q. So I'm now marking on the exhibit basically

22 on the line that you drew going past the Explorer,

23 correct?

24 A. Uh-huh. Walked to the front of the Explorer

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1 and then walked along the passenger side of the

2 vehicle.

3 Q. Now, when you went along -- and, pardon me,

4 Your Honor, I'm marking on the Exhibit, and as you

5 indicated I'm drawing a line next to the passenger's

6 side of the vehicle.

7 A. That would be the correct route.

8 Q. When you went past the front of the vehicle,

9 did you see the person in the vehicle anymore?

10 A. No, I didn't.

11 Q. And, detective, can you tell me about how

12 long it took you to go past the Ford Explorer, turn

13 around and come back and approach it again?

14 A. Less than a minute.

15 Q. And again you didn't see the person in the

16 vehicle once you came around the front, correct?

17 A. No, I did not.

18 Q. You continued down the passenger's side of

19 the vehicle?

20 A. Yes, I did.

21 Q. Did you happen to look inside the vehicle?

22 A. Yes, I did.

23 Q. Detective, which window did you look inside

24 when you looked inside this vehicle?



SHEET 14 PAGE 53

1 A. Well, as I was approaching the vehicle, I'm  
2 looking through all the windows, and as I came around  
3 to the front of the vehicle, I was looking through  
4 the windshield; and then as I turned on the right,  
5 walking along the passenger side, the front passenger  
6 window and then the back seat passenger window.

7 Q. Was there anything that was obstructing your  
8 view to the inside of the vehicle?

9 A. No. No. I could see clearly into the  
10 vehicle.

11 Q. Was there any tint on the windows?

12 A. It was lightly tinted.

13 Q. Was that tint inhibiting your view inside the  
14 vehicle at all?

15 A. Definitely not.

16 Q. When you walked past the back passenger  
17 window, again you were looking in, correct?

18 A. Uh-huh.

19 Q. What did you see?

20 A. I saw the defendant laying in the back seat  
21 of the vehicle.

22 Q. Do you remember what clothing, kinds of  
23 clothing he had on?

24 A. Yes, I do. Tan slacks, white underwear, a

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1 yellow polo-type shirt, light yellow polo shirt.

2 Q. How was his clothing arranged on him?

3 A. The polo shirt was pulled up high up on his  
4 chest. It's a short-sleeved shirt. As I said, it  
5 was hot. And it was pulled up around the top part of  
6 his chest. His pants were pulled down around his  
7 knees, along with his underwear.

8 Q. And that is how you happened to see his  
9 underwear, correct?

10 A. Yes.

11 Q. What was he doing, detective?

12 A. He was masturbating. He was laying on his  
13 left side and masturbating with his right hand.

14 Q. Did you happen to see his penis, defendant?  
15 Or detective?

16 A. Defendant?

17 Q. Detective. I'm sorry.

18 A. It was in his right hand.

19 Q. And his penis was erect, correct?

20 MR. KADLIC: Objection, it's a leading  
21 question.

22 BY MS. RIGGS:

23 Q. Was his penis --

24 THE COURT: Sustained.

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1 BY MS. RIGGS:

2 Q. -- erect?

3 A. I would believe so.

4 Q. Did you see it?

5 A. I saw the head of his penis in his right  
6 hand. His hand was totally encased around his penis.

7 Q. Detective, is there any doubt in your mind  
8 that this person in that vehicle was masturbating?

9 MR. KADLIC: Objection, Your Honor, calls for  
10 speculation.

11 MS. RIGGS: Your Honor, it's --

12 THE COURT: Overruled.

13 MS. RIGGS: -- based on her observation.

14 Thank you.

15 BY MS. RIGGS:

16 Q. Again. Is there any doubt in your mind that  
17 the person in that vehicle was masturbating?

18 A. There is no doubt in my mind. His hand was  
19 moving up and down on his penis.

20 Q. And, again, this is less than a minute after  
21 you had made eye contact with him, correct?

22 A. That's correct.

23 Q. Detective, did you happen to get a look at  
24 the person's face?

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1 A. Yes, I did.

2 Q. Would you recognize him if you saw him again?

3 A. Yes, I would.

4 Q. Is he seated in the courtroom today?

5 A. Yes, he is.

6 Q. Would you please point him out to the Court  
7 and the jury and describe briefly what he's wearing?

8 A. The defendant, he has dark hair, light blue  
9 short-sleeved shirt.

10 MS. RIGGS: Your Honor, may the record  
11 reflect that the witness has identified the defendant  
12 in this case.

13 THE COURT: The record will reflect the  
14 identification of the defendant by the witness.

15 MS. RIGGS: Thank you, Your Honor.

16 BY MS. RIGGS:

17 Q. Detective, based on your observations of the  
18 defendant inside the vehicle, could you tell whether  
19 he saw you?

20 A. Yes, he did.

21 Q. What makes you say that?

22 A. Because again, we made direct eye contact and  
23 he almost looked -- his facial expression changed  
24 immediately to one of surprise, such as you know,

SHEET 15 PAGE 57

1 ahha, and he started like he was trying to get up.  
 2 Q. What did you do at this point?  
 3 A. I just continued walking. I wasn't -- I had  
 4 partners in the area, so I knew I was okay, I just  
 5 continued walking past the vehicle and then turned to  
 6 the left up towards the store and my partner picked  
 7 me up again.  
 8 Q. Did you see the Ford Explorer move at all?  
 9 A. Yes, it did, rather quickly. They left --  
 10 again, within about a minute he had crawled back into  
 11 the front seat and drove it away.  
 12 Q. And, detective, did you observe anyone else  
 13 in this vehicle?  
 14 A. No. There was no one else in the vehicle,  
 15 and no one else got into the vehicle when it left.  
 16 MS. RIGGS: Your Honor, may I approach for an  
 17 exhibit?  
 18 THE COURT: Yes.  
 19 MS. RIGGS: Thank you.  
 20 May I approach the witness, Your Honor?  
 21 THE COURT: Yes.  
 22 BY MS. RIGGS:  
 23 Q. Detective, I'm showing you what's been  
 24 previously marked and admitted as State's Exhibit 2.

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1 Can you tell me what is depicted in that photograph?  
 2 A. This is the Ford Explorer and this photo was  
 3 taken up at the --  
 4 Q. That's fine. You've answered the question,  
 5 detective.  
 6 A. This is the Ford Explorer.  
 7 Q. Now I'm showing you what's been marked as  
 8 State's Exhibit 3 and also admitted.  
 9 Can you tell me what's depicted in that  
 10 photograph?  
 11 A. Again, it's the Ford Explorer and this is the  
 12 passenger side of the vehicle.  
 13 Q. Now, detective, do these two photographs  
 14 fairly and accurately depicted the Ford Explorer in  
 15 approximately the same condition that you saw it in  
 16 on December 25th, 2001?  
 17 A. Yes, it does.  
 18 Q. I'll ask you to observe the windows in those  
 19 photographs, detective. What do you observe about  
 20 the tint on the window -- level of tint on the  
 21 windows in those photographs?  
 22 A. It's lightly tinted on the windshield and  
 23 passenger windows and darker tinted in the cargo area  
 24 of the vehicle.

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1 Q. In those photographs, detective, is the  
 2 interior compartment of the vehicle observable from  
 3 the windshield and from the side windows?  
 4 A. Most definitely. And one thing, these --  
 5 this vehicle in the photograph is inside a building.  
 6 My original observation was outside where it was much  
 7 brighter and much more visible than this.  
 8 Q. So you're saying that you could see even more  
 9 clearly into the vehicle than what is depicted in  
 10 those photographs?  
 11 A. Most definitely. It's the same thing as  
 12 looking at your car in the garage or looking at in it  
 13 your driveway. Same thing.  
 14 Q. Thank you.  
 15 MS. RIGGS: Your Honor, may I show the  
 16 photographs to the jury?  
 17 THE COURT: All right.  
 18 MS. RIGGS: Thank you.  
 19 BY MS. RIGGS:  
 20 Q. Now, detective, one final question. Did you  
 21 observe the vehicle before it went into the parking  
 22 space?  
 23 A. Yes, I did.  
 24 Q. And can you describe to me what that vehicle

PAGE 60

1 was doing before it went into the parking space?  
 2 A. Just driving around the parking lot. Didn't  
 3 appear to -- it was just driving around the parking  
 4 lot. It had passed several other parking spaces that  
 5 were available and I guess decided on that one.  
 6 MS. RIGGS: Thank you. The State has nothing  
 7 further, Your Honor.  
 8 THE COURT: Okay.  
 9  
 10 CROSS-EXAMINATION  
 11  
 12 BY MR. KADLIC:  
 13 Q. Officer, why don't you come down again and  
 14 help me out.  
 15 A. Sure.  
 16 Q. Okay. Would you show the jury how the  
 17 vehicle was parked?  
 18 A. You guys can see it okay? Okay.  
 19 The nose of the vehicle is just as it is  
 20 depicted here. The nose is facing out into the  
 21 travel area of the parking lot, so the rear of the  
 22 vehicle is right here, where another vehicle could  
 23 park in there.  
 24 Q. Now, show me your path again. Why don't you

SHEET 16 PAGE 61

1 just -- I just want to be sure. The front is here?  
 2 A. Uh-huh.  
 3 Q. The rear is there?  
 4 A. Yes, sir.  
 5 Q. So the rear is to the north, the front is to  
 6 the south?  
 7 A. Right. The vehicle is parked in a southeast,  
 8 this being north, so the vehicle is southeast, facing  
 9 southeast. And I walked from here. I'd say about  
 10 three spaces and turned left.  
 11 Q. Okay. Were there any other cars parked east  
 12 of the vehicle?  
 13 A. Further this way, no. Nothing over here.  
 14 Q. Were there any other cars parked west of the  
 15 vehicle?  
 16 A. There was one vehicle parked next to it.  
 17 Q. Okay. How far away was it parked from that  
 18 vehicle?  
 19 A. Well, parking space to parking space, I mean,  
 20 they were both legally parked. Just like at your  
 21 grocery store if you were to park next to someone,  
 22 about that space.  
 23 Q. Do you recall what kind of vehicle that was?  
 24 A. You know what, I really don't recall what

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1 kinds of vehicle it was. I just know that it was  
 2 there because I had to go between the two to pass on  
 3 the passenger's side.  
 4 Q. So in order for you to get -- where on the  
 5 passenger's side did you look in the window?  
 6 A. Well, I could see into the vehicle anywhere  
 7 from here, and that's where I was looking.  
 8 Q. Well, let's start again. When you first went  
 9 by, you had to look through the front window?  
 10 A. Right.  
 11 Q. How close were you to the vehicle when you  
 12 walked by the front vehicle?  
 13 A. Oh, gosh, the nose of the vehicle was there,  
 14 I was right here, just walking past and looked and  
 15 continued going.  
 16 Q. So when you looked, what could you observe?  
 17 A. Well, I observed Mr. Volpicelli in the back  
 18 passenger's seat.  
 19 Q. How much did you observe of Mr. Volpicelli?  
 20 A. Well, everything that was visible.  
 21 Q. Which is what?  
 22 A. His hand, his upper chest to his head.  
 23 Q. Well, was there any obstructions for you to  
 24 see, such as partitions?

PAGE 63

1 A. Well, there was the seat of the vehicle,  
 2 which covered the body, and there was a -- some sort  
 3 of partition thing that went from about, oh, probably  
 4 the left side of the front passenger seat to perhaps  
 5 the right side of the driver's seat.  
 6 Q. Let's try this. Could you show the jury  
 7 where this partition was on -- this is, for the  
 8 record, Exhibit 2.  
 9 A. This right here would be the driver's side,  
 10 the -- if you're sitting on the driver's seat, this  
 11 is the right side of the driver's seat, this is the  
 12 left side of the passenger's seat, so there would be,  
 13 I don't even know what the heck it was, a cloth. So  
 14 between the two captain seats in the front, there was  
 15 some sort of divider, but not -- I mean it didn't  
 16 cover all the way from one side to the other.  
 17 Q. But it did cover up part so you couldn't see  
 18 into the back seat.  
 19 A. The center part.  
 20 Q. So you couldn't see into the back seat?  
 21 A. No, you could only see the seat in here and  
 22 the seat in here but not the center piece.  
 23 Q. Did all the jurors have a chance? Okay.  
 24 Thank you. You can resume your seat then. Thank

PAGE 64

1 you.  
 2 A. Okay.  
 3 Q. So there was a partition object securing the  
 4 back for you to see into, correct?  
 5 A. Well, that part, the center part, yes, sir.  
 6 Q. So all could you see was basically his head  
 7 and shoulders?  
 8 A. And his hand.  
 9 Q. And you said you were pushing a shopping  
 10 cart. Do you remember where the shopping cart bay  
 11 was where you put the shopping cart?  
 12 A. Oh, I just dumped it.  
 13 Q. Isn't it customary for most people when they  
 14 are walking, they walk back to their car, they don't  
 15 turn around and come back; isn't that correct?  
 16 A. That's true.  
 17 Q. So if you came back it would surprise  
 18 Mr. Volpicelli, since he made eye contact with you  
 19 the first time generally most people aren't going to  
 20 come back, correct?  
 21 A. True.  
 22 Q. So he genuinely would be surprised if you  
 23 came back?  
 24 A. Sure.

SHEET 17 PAGE 65

1 Q. Now, did you notice other people out there?  
 2 A. Yes, there were.  
 3 Q. Were they looking in the car windows?  
 4 A. I don't know. There were just other people  
 5 out there.  
 6 Q. Just walking?  
 7 A. Yeah.  
 8 Q. Did anyone ever complain to you?  
 9 A. I was there for a very short time. No.  
 10 Q. Did anyone make a complaint that you're aware  
 11 of?  
 12 A. Not that I'm aware of.  
 13 Q. And in order to go by his passenger window,  
 14 as I understand it, you would have to go -- make a  
 15 turn and go by it, correct?  
 16 A. Well, sure.  
 17 Q. In other words, you didn't walk straight line  
 18 back to Shopko -- this is Safeway, I believe. You  
 19 didn't walk a straight line back to Safeway?  
 20 A. No, I would have taken the same path that if  
 21 you were putting something in the vehicle that was  
 22 parked next to him you would have had to have gone  
 23 through the two cars, just like I did.  
 24 Q. Were you putting something in the vehicle

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1 parked next to him?  
 2 A. It was not my vehicle, no. I was just  
 3 walking between the cars.  
 4 Q. So you had no business walking between those  
 5 cars?  
 6 A. Well, that's not necessarily true.  
 7 Q. Was the car next to it your car?  
 8 A. No, it was not.  
 9 Q. Did you have any groceries or anything to put  
 10 into that car?  
 11 A. No, I did not.  
 12 Q. Did you have a car parked one bay over?  
 13 A. No, I did not.  
 14 Q. So you voluntarily walked by that car on the  
 15 passenger's side?  
 16 A. Yes, I did.  
 17 Q. With the idea of looking in the window?  
 18 A. Yes, I did.  
 19 Q. And if you didn't look in the window, you  
 20 wouldn't have seen what you saw?  
 21 A. It was somewhat suspicious, and I walked by  
 22 and specifically looked in the window.  
 23 Q. Okay. Now, when you were in this -- let me  
 24 borrow the exhibits again -- vehicle, if a person

PAGE 67

1 were walking by the window and not looking in, would  
 2 they see anything if they just looked straight  
 3 across?  
 4 A. Oh, wouldn't think so.  
 5 Q. So, in other words, they wouldn't see into  
 6 the car if you're just walking by the car like this  
 7 and just turn, you're not going to see anything?  
 8 A. Not if you were getting into the vehicle next  
 9 to you.  
 10 Q. Because Mr. Volpicelli was down on the seat?  
 11 A. Yes. But we're not talking about a monster  
 12 truck, we're talking about a smaller SUV with the  
 13 windows, well, as you can see in the photograph where  
 14 the windows are.  
 15 Q. That he is down in the seat.  
 16 A. Yes.  
 17 Q. If you were looking -- well, let's pick --  
 18 this is a good one here. Again, this is Exhibit 3.  
 19 If you're looking straight across this window  
 20 here, how much of Mr. Volpicelli are you going to see  
 21 without looking down?  
 22 A. None.  
 23 Q. Okay. So you're not going to see anything.  
 24 MR. KADLIC: Does all the jury understand

PAGE 68

1 what --  
 2 BY MR. KADLIC:  
 3 Q. So without looking in the window, you can't  
 4 see anything, you don't even see his head?  
 5 A. Okay.  
 6 Q. True?  
 7 A. Sure. If you just look straight across.  
 8 Q. You don't see his body?  
 9 A. Pardon me?  
 10 Q. You don't see his body then?  
 11 A. Oh, no.  
 12 Q. And was this a bench seat or bucket seat?  
 13 A. In the back?  
 14 Q. Yes.  
 15 A. It was a bench seat. But it split, so they  
 16 do fold.  
 17 Q. Okay. So when you observed him, how far away  
 18 were you from him in far as -- in terms of feet when  
 19 you observed him masturbating?  
 20 A. Standing next to the car between the car that  
 21 was parked next to him.  
 22 Q. Which is what, how many feet in terms of  
 23 feet?  
 24 A. Oh, gosh, I don't know what the average

SHEET 18 PAGE 69

1 parking space is. I couldn't tell you.  
 2 As if you're grocery shopping. I have plenty  
 3 of chips in my door jams from cars getting me, so you  
 4 figure a car door.  
 5 Q. Did you ever see him ejaculate?  
 6 A. No.  
 7 Q. You just saw him manipulating his penis?  
 8 A. Exactly.  
 9 Q. How many times?  
 10 A. I walked slowly by. I don't know.  
 11 Q. Didn't count?  
 12 A. No.  
 13 MR. KADLIC: If I may I have a moment, Your  
 14 Honor.  
 15 THE COURT: Yes.  
 16 BY MR. KADLIC:  
 17 Q. Were these high bucket seats?  
 18 A. In the front?  
 19 Q. Yes.  
 20 A. They were probably stock. They didn't look  
 21 like anything special. They are not high. I have  
 22 high bucket seats in my truck, and these aren't high.  
 23 Q. So if I may, are these the high bucket seats?  
 24 A. Well, those are bucket seats, yes.

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1 Q. So in --  
 2 A. They're not like captain's chairs where the  
 3 bucket comes up here on the top of your head.  
 4 Q. Well, they have a high head rest, isn't that  
 5 true?  
 6 A. Okay.  
 7 Q. For the juror's benefit, I'm referring to  
 8 Exhibit 2. I'll point it out to you.  
 9 MR. KADLIC: One more moment, Your Honor.  
 10 THE COURT: Okay.  
 11 MR. KADLIC: Your Honor, I do not think I  
 12 have any additional questions of this witness, Your  
 13 Honor. Thank you.  
 14 THE COURT: Okay. Ms. Riggs?  
 15 MS. RIGGS: Thank you, Your Honor.

## REDIRECT EXAMINATION

19 BY MS. RIGGS:  
 20 Q. Detective, you described a partition that  
 21 appeared to block the view of the back seat between  
 22 the driver's side window and part of the back seat.  
 23 Is that a fair assessment of what you testified to?  
 24 A. No, that's not fair. It blocked the center.

PAGE 71

1 For instance, the right side of the driver's side arm  
 2 rest, perhaps, to the left side of the passenger's  
 3 seat arm rest. So it's the center console area.  
 4 Q. At any time did this partition or stepping  
 5 back, could you tell what kind of material this  
 6 partition was made out of?  
 7 A. No, I really couldn't.  
 8 Q. At any time, did this partition block your  
 9 view of the defendant?  
 10 A. No.  
 11 Q. Did the bucket seats block your view of the  
 12 defendant at any time?  
 13 A. Only as I was walking by originally when I  
 14 could see his head and we made eye contact and his  
 15 hand was on it, so from window view up to here, where  
 16 his neck and that parted is the only part blocked.  
 17 Q. So when you observed him masturbating, your  
 18 view was unobstructed; is that a fair assessment?  
 19 A. Yes.  
 20 Q. The defense counsel asked you if other people  
 21 were looking into the cars and you testified that  
 22 they were not, correct?  
 23 A. From what I observed, they were not.  
 24 Q. Could someone walking by have seen the

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1 defendant masturbating if they had been there instead  
 2 of you?  
 3 MR. KADLIC: Objection, Your Honor,  
 4 speculation.  
 5 MS. RIGGS: Your Honor, this is lay opinion.  
 6 THE COURT: Objection is sustained.  
 7 BY MS. RIGGS:  
 8 Q. You said that you saw another adult in the  
 9 parking lot. Correct?  
 10 A. Uh-huh.  
 11 Q. Do you recall approximately how tall she was?  
 12 A. Well, I'm 5-7. And I think I'm average  
 13 height. So I'm going to say the other women and  
 14 other people --  
 15 Q. I don't want you to guess, detective, I just  
 16 want you --  
 17 A. Average.  
 18 Q. From what you observed, did other people  
 19 you're saying they seemed like they were average  
 20 height?  
 21 A. Yes. I didn't see anybody who was toweringly  
 22 tall or extremely small.  
 23 Q. Did you see any full-grown children, I'll say  
 24 in their preteen years?

SHEET 19 PAGE 73

1 A. You know, I don't know.  
 2 Q. Did you see any children at all?  
 3 A. Yes, there were children.  
 4 Q. Could you describe to me, detective, based on  
 5 your observation, how high the bottom of the  
 6 passenger side window was on this Explorer from the  
 7 ground?  
 8 A. Well, again, I'm not very good with distance  
 9 and heights, but I'm going to say that the passenger  
 10 window was probably right about here on me.  
 11 Q. And so you're indicating --  
 12 MR. KADLIC: I'm going to --  
 13 MS. RIGGS: For the record, she's indicating  
 14 rib height.  
 15 MR. KADLIC: That's kind of speculation. If  
 16 she's not sure, that's speculation.  
 17 THE COURT: She can testify where she  
 18 believes the window was on her, the height in  
 19 comparison to her body. Go ahead.  
 20 THE WITNESS: Okay.  
 21 BY MS. RIGGS:  
 22 Q. And for the record, you were indicating  
 23 approximately bottom of the rib height?  
 24 A. The bottom of the window would be right about

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1 here and the top of it right about here. So as I  
 2 said, it's not a monster truck, it's your typical  
 3 stock Ford Explorer.  
 4 Q. And again there's no -- Your Honor, I'll  
 5 withdraw that. It's been answered.  
 6 Detective, this is a public parking lot,  
 7 correct?  
 8 A. Yes, it is.  
 9 Q. The public has a right to walk on this  
 10 parking lot, correct?  
 11 A. Yes, they do.  
 12 Q. Were you anywhere that you weren't supposed  
 13 to be on this parking lot?  
 14 A. No, I was in a public parking lot at the  
 15 shopping center.  
 16 Q. And, in fact, detective, you are a police  
 17 officer, correct?  
 18 A. Yes, I am.  
 19 Q. And the defense counsel asked you if you had  
 20 any business looking into this vehicle. Do you  
 21 recall that question?  
 22 A. Yes, I do.  
 23 Q. Detective, isn't it your job to look at  
 24 suspicious activity where you detect it?

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1 A. Very much so.  
 2 Q. Now, earlier, detective, you testified that  
 3 you kept walking after you saw the defendant  
 4 masturbating, correct?  
 5 A. (Nods head.)  
 6 Q. You also indicated that you had no concern  
 7 for your safety because you had people who were  
 8 watching you. Do you recall that testimony?  
 9 A. That's correct.  
 10 Q. Detective, can you tell me, would you have  
 11 had concern for your safety if you didn't have people  
 12 watching you at that time?  
 13 MR. KADLIC: Objection, Your Honor, that's  
 14 speculation.  
 15 THE COURT: Sustained.  
 16 MS. RIGGS: Your Honor, the State has nothing  
 17 further.  
 18 THE COURT: Okay. Any further  
 19 cross-examination?  
 20 MR. KADLIC: Just one question.  
 21 THE WITNESS: Yes, sir.  
 22 MR. KADLIC: Proverbial one question, and  
 23 I'll ask five more.  
 24 >>>>

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## RE-CROSS-EXAMINATION

1  
 2  
 3 BY MR. KADLIC:  
 4 Q. Is someone who gets in the back seat of their  
 5 car from the front seat of their car suspicious?  
 6 A. I think so.  
 7 Q. So any time -- I guess all of us the next  
 8 time we get into our car instead of going around we  
 9 go from our front seat to our back seat are going to  
 10 be suspected by the police of some criminal conduct  
 11 because it's suspicious?  
 12 MS. RIGGS: Objection, Your Honor, that's  
 13 speculation.  
 14 THE COURT: That's sustained.  
 15 MR. KADLIC: No additional questions, Your  
 16 Honor. I've made my point.  
 17 MS. RIGGS: One last question, Your Honor.  
 18 THE COURT: Yes.

## REDIRECT EXAMINATION

19  
 20  
 21 BY MS. RIGGS:  
 22 Q. Detective, you testified this was a hot day,  
 23 correct?  
 24

SHEET 20 PAGE 77

1 A. Yes, it was.  
 2 Q. The fact that the person in the vehicle  
 3 stayed in their vehicle on a hot day, was that  
 4 suspicious to you?  
 5 A. It was suspicious in nature because the  
 6 engine was not running, he did not exit the vehicle  
 7 and enter the vehicle, he just got into the back seat  
 8 and put up a partition.  
 9 MS. RIGGS: Thank you. Nothing further.

## RE CROSS-EXAMINATION

13 BY MR. KADLIC:  
 14 Q. Well, could that also mean that he possibly  
 15 wanted to go to sleep in the back seat and wanted to  
 16 obscure the sunlight?  
 17 A. I would think he would have driven to a shady  
 18 area to have done that.  
 19 Q. Well, does everybody -- well, is anybody  
 20 react to the weather the same?  
 21 MS. RIGGS: Objection. Speculation.  
 22 THE COURT: We are getting a bit far afield,  
 23 but certainly these are issues the jury can decide.  
 24 BY MR. KADLIC:

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1 Q. So is it -- does everybody handle weather the  
 2 same?  
 3 A. I assume not.  
 4 Q. Okay. So some people handle the heat a lot  
 5 better than others?  
 6 A. Sure.  
 7 Q. Some people like living in cold climates?  
 8 A. Okay.  
 9 Q. So if some people might like to stay in warm  
 10 cars even though it's a hot day, correct?  
 11 A. Okay.  
 12 Q. Fine. You've answered my questions.  
 13 THE COURT: Ms. Riggs, anything further?  
 14 MS. RIGGS: The State will have nothing  
 15 further.  
 16 THE COURT: Okay. You may step down.  
 17 THE WITNESS: Thank you.  
 18 THE COURT: Your next witness, Ms. Riggs.  
 19 MS. RIGGS: Your Honor, the State will call  
 20 detective Reed Thomas.  
 21 >>>>>  
 22 >>>>>  
 23 >>>>>  
 24 >>>>>

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1 REED THOMAS,  
 2 called as a witness on behalf of the  
 3 State, having been first duly sworn,  
 4 was examined and testified as follows:  
 5  
 6 DIRECT EXAMINATION  
 7  
 8 BY MS. RIGGS:  
 9 Q. Detective Thomas, would you please state your  
 10 name and spell your last name for the record?  
 11 A. Detective Reed Thomas, THOMAS.  
 12 Q. Who employs you?  
 13 A. Reno Police Department.  
 14 Q. Were you employed with Reno Police Department  
 15 on September 27th, 2001?  
 16 A. Yes, I was.  
 17 Q. Can you tell me what your job title was at  
 18 that time?  
 19 A. I was a detective.  
 20 Q. Do you recall being on duty on September  
 21 27th, 2001, at approximately 9:30 a.m.?  
 22 A. Yes.  
 23 Q. Sir, can you tell me where you were located  
 24 on that date and time?

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1 A. At that point I was at the northwest corner  
 2 of Seventh and North McCarran, across the street from  
 3 the parking lot of the Albertson's there. It's a car  
 4 wash parking lot actually with a dirt lot adjacent to  
 5 it.  
 6 Q. And the parking lot of the Albertson's, is  
 7 that in Washoe County?  
 8 A. Yes.  
 9 Q. What were you doing in your position, where  
 10 you were?  
 11 A. We were conducting an investigation.  
 12 Q. Detective, do you recall whether other  
 13 vehicles were parked in that Albertson's parking lot  
 14 at that time of day?  
 15 A. Yes, there were.  
 16 Q. Did you see any other people there?  
 17 A. A few.  
 18 Q. And could you describe to me what kind of  
 19 people you saw?  
 20 A. I was at a little bit of a distance, I just  
 21 saw a few people walking through the lot. Didn't  
 22 really make a distinction whether they were adults or  
 23 children or otherwise.  
 24 Q. On that date and about that time, 9:35,

SHEET 21 PAGE 81

1 detective, did you observe a gold Mazda van going  
 2 into that parking lot?  
 3 A. Yes, I did.  
 4 Q. Did you happen to see the vehicle's license  
 5 plate?  
 6 A. Yes.  
 7 Q. Do you recall the state of that license  
 8 plate?  
 9 A. It was California.  
 10 Q. Now, did you observe that vehicle to park, or  
 11 did it simply drive through the parking lot?  
 12 A. No, I parked.  
 13 MS. RIGGS: Your Honor, may I approach for an  
 14 exhibit?  
 15 THE COURT: Sure.  
 16 MS. RIGGS: Exhibit 4, please.  
 17 BY MS. RIGGS:  
 18 Q. Detective, I'm showing you what's been  
 19 previously marked and admitted as State's Exhibit 4.  
 20 Can you tell me what this exhibit depicts?  
 21 A. Would you like me to get down?  
 22 Q. Not yet. If you can generally tell me what  
 23 that depicts.  
 24 A. That is the parking lot I mentioned. The

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1 Albertson's is the large building on the upper right  
 2 portion of that photograph.  
 3 Q. And you're talking about this building I'm  
 4 indicating the rectangular building in the top right  
 5 corner of the photograph?  
 6 A. That's correct.  
 7 Q. Now, Detective Thomas, if you wouldn't mind  
 8 coming down and indicating with a blue pen  
 9 approximately where your position was.  
 10 A. I moved a couple of times. The car wash that  
 11 I mentioned is right here in the -- pretty much the  
 12 line there is where the pavement starts, and this is  
 13 just an empty dirt lot, so I initially started in the  
 14 paved part of the parking lot and parked right in  
 15 here.  
 16 Q. And detective, were you on foot or in a  
 17 vehicle?  
 18 A. I was in a vehicle.  
 19 Q. And can you tell me indicating with the black  
 20 pen approximately where the gold van was parked?  
 21 A. This has changed a little bit since this  
 22 picture was taken. This is the Schlotzky's Deli that  
 23 wasn't there at the time, so I pretty much had a  
 24 direct line of site into the parking lot here. I

PAGE 83

1 remembered he was parked right about here. An X?  
 2 Q. That's fine. Now, detective, are you aware  
 3 of where the doors to the store are here?  
 4 A. This is the front side of the Albertson's.  
 5 This is a strip mall. The Hacienda is here.  
 6 Q. Thank you. Now, were you able to see what  
 7 was happening inside the vehicle from your position?  
 8 A. From this distance I saw movement. I  
 9 couldn't specifically tell what was going on inside  
 10 the vehicle.  
 11 Q. Did you ever see anybody get out of that  
 12 vehicle?  
 13 A. No, I did not.  
 14 Q. And how long did you watch that vehicle?  
 15 A. 20 or 25 minutes.  
 16 Q. So if you started observing it at 9:35 and  
 17 watched it for 25 minutes, is it fair to say you  
 18 watched that vehicle until approximately 10 a.m.?  
 19 A. That's correct.  
 20 Q. And during that time, did you just testify  
 21 that no one ever got out of the vehicle?  
 22 A. I didn't see anybody get out.  
 23 Q. Did the vehicle move at any time?  
 24 A. Yes, it did.

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1 Q. Where did that vehicle go, sir?  
 2 A. Well, when the vehicle started to move, I  
 3 started to move, had radio communication with a  
 4 couple other officers out there, and since I was over  
 5 here I had started to move this direction through the  
 6 parking lot, which would be south, so I naturally  
 7 started moving myself closer to where the vehicle was  
 8 headed.  
 9 Q. Did it stop anywhere inside that parking lot?  
 10 A. I didn't see it stop. Radio traffic from  
 11 another officer --  
 12 MR. KADLIC: Objection as to what someone  
 13 else said.  
 14 MS. RIGGS: That's fine.  
 15 THE COURT: Sustained.  
 16 MS. RIGGS: That's fine. You can have a  
 17 seat, detective.  
 18 May I approach for an exhibit, Your Honor?  
 19 THE COURT: Yes.  
 20 MS. RIGGS: Thank you.  
 21 BY MS. RIGGS:  
 22 Q. Detective, I'm showing you what's been  
 23 previously marked for identification and admitted as  
 24 State's Exhibit 5. Can you tell me what that



SHEET 22 PAGE 85

1 depicts?  
 2 A. It's the same gold van we just spoke about  
 3 with the California plates.  
 4 Q. Is that the vehicle that you observed on  
 5 September 27th?  
 6 A. Yes, it is. Yes.  
 7 Q. And one more question about the photograph,  
 8 detective. Does that fairly and accurately depict  
 9 the condition of the vehicle in which you saw it on  
 10 September 27th?  
 11 A. Yes, it does.  
 12 MS. RIGGS: Your Honor, may I show the  
 13 photograph to the jury?  
 14 THE COURT: Yes.  
 15 MS. RIGGS: Thank you.  
 16 BY MS. RIGGS:  
 17 Q. Detective, did you look into the vehicle's  
 18 registration status at any point?  
 19 A. Yes, I did.  
 20 Q. How did you do that?  
 21 A. I contacted California DMV.  
 22 Q. According to California DMV, who was that  
 23 vehicle registered at the time of the incident, to  
 24 whom?

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1 A. Mark and Leslie Volpicelli.  
 2 Q. Detective, are you aware of -- withdraw that,  
 3 Your Honor. I'll rephrase.  
 4 Detective, were you at the Safeway parking  
 5 lot on Mae Anne on September 25th, 2001,  
 6 approximately 2:30 in the afternoon?  
 7 A. Yes, I was.  
 8 Q. And did you observe a blue Ford Explorer at  
 9 that time?  
 10 A. Yes, I did.  
 11 Q. Can you tell me if you observed the Explorer  
 12 -- first of all, tell me if it parked. If the  
 13 vehicle was parked?  
 14 A. Yes, it was.  
 15 Q. Did you have a chance to observe that vehicle  
 16 before it parked?  
 17 A. Yes.  
 18 Q. Can you tell me what the vehicle was doing  
 19 before it parked?  
 20 A. Just kind of driving through the parking lot  
 21 up and down the rows fairly slow.  
 22 Q. Sir, did you happen to investigate the  
 23 registration status of the Ford Explorer?  
 24 A. Yes, I did.

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1 Q. Did a California registration card for that  
 2 Ford Explorer come to your attention?  
 3 A. Yes, it did.  
 4 MS. RIGGS: Your Honor, may I approach the  
 5 witness?  
 6 THE COURT: Yes.  
 7 BY MS. RIGGS:  
 8 Q. Sir, I'm showing you what's been marked for  
 9 identification and admitted as State's Exhibit 6.  
 10 Can you tell me what that depicts?  
 11 A. This is the registration card of that Ford  
 12 Explorer.  
 13 Q. Can you tell me who that Ford Explorer is  
 14 registered to?  
 15 A. Registered to Shannel Ann or Ferrill Joseph  
 16 Volpicelli.  
 17 Q. Thank you. And again, detective, does this  
 18 fairly and accurately depict the registration card as  
 19 you saw it on or about September 27th, 2001?  
 20 A. Yes.  
 21 MS. RIGGS: Thank you. Your Honor, may I  
 22 show this exhibit to the jury?  
 23 THE COURT: Yes.  
 24 BY MS. RIGGS:

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1 Q. Finally, detective, for clarification, you  
 2 said that you saw this vehicle pull out of the  
 3 parking place, correct?  
 4 A. Yes.  
 5 Q. And which direction did you see it drive?  
 6 A. It went in a south direction, which would be  
 7 to the right side of that photograph there.  
 8 MS. RIGGS: Okay. Thank you.  
 9 THE WITNESS: I just saw it briefly. Like I  
 10 say, I was in the process of moving myself.  
 11 MS. RIGGS: Thank you. The State has nothing  
 12 further, Your Honor.  
 13 THE COURT: Okay. Mr. Kadlic, any questions  
 14 on cross-examination?  
 15 MR. KADLIC: Yes.  
 16  
 17 CROSS-EXAMINATION  
 18  
 19 BY MR. KADLIC:  
 20 Q. Did you see anything that was going on in  
 21 that vehicle?  
 22 A. Again, I just saw movement. From that  
 23 distance, I didn't see specifically what was going on  
 24 in that vehicle.

SHEET 23 PAGE 89

1 MR. KADLIC: I think I'll quit with that  
 2 question, Your Honor.  
 3 MS. RIGGS: State has nothing further, Your  
 4 Honor.  
 5 THE COURT: All right. You may step down.  
 6 Your next witness, Ms. Riggs.  
 7 MS. RIGGS: Your Honor, the State will call  
 8 Brian Phay.  
 9 THE COURT: All right.

BRIAN PHAY

12 Called as a witness on behalf of the  
 13 State, having been first duly sworn,  
 14 was examined and testified as follows:

DIRECT EXAMINATION

18 BY MS. RIGGS:  
 19 Q. Would you please state your name and spell  
 20 your last name for the record?  
 21 A. Brian Louis Phay, PHAY.  
 22 Q. Who employs you, sir?  
 23 A. Washoe County Sheriff's Office.  
 24 Q. And were I employed with Washoe County

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1 Sheriff's Office on September 27th, 2001?  
 2 A. I was.  
 3 Q. Sir, what was your job title at that time?  
 4 A. Detective.  
 5 Q. Do you recall being on duty on September  
 6 27th, 2001, approximately 9:30 a.m.?  
 7 A. Yes, I do.  
 8 Q. And where were you located on that date and  
 9 time?  
 10 A. Albertson's shopping center on West McCarran  
 11 and Mae Anne.  
 12 Q. And is that in Washoe County, sir?  
 13 A. Yes, it is.  
 14 Q. And what were you doing there, sir?  
 15 A. We were conducting an investigation.  
 16 Q. On that date and approximately that time, did  
 17 you observe a gold Mazda van go in the parking lot?  
 18 A. Yes, I did.  
 19 Q. Did the vehicle park?  
 20 A. It did.  
 21 Q. And where did it park, sir?  
 22 A. It parked near a mailbox, et cetera.  
 23 Q. Okay. If you wouldn't mind coming off the  
 24 stand for a second and show me -- can you tell me

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1 where your observation position was.  
 2 A. I was right here by the Jack In The Box.  
 3 Q. Okay. If you wouldn't mind marking on that  
 4 exhibit with the blue.  
 5 A. With an X.  
 6 Q. That's fine, with an X. And with the black  
 7 marker can you tell me where you observed that gold  
 8 van.  
 9 THE COURT: Detective, you might need to move  
 10 a little bit in this direction so the jurors can see.  
 11 THE WITNESS: Okay. I thought he was up in  
 12 here.  
 13 BY MS. RIGGS:  
 14 Q. Okay. Would you mind putting an X there,  
 15 please. That's fine.  
 16 A. (Witness complies.)  
 17 Q. Thank you. I'll ask you to stand there for a  
 18 second, detective.  
 19 Did you have full view of that van from your  
 20 position over in this corner?  
 21 A. Yes, I did.  
 22 Q. Was it an unobstructed view?  
 23 A. Yes. Well, for most of the time. There may  
 24 have been a car parked in the space blocking my view

PAGE 92

1 occasionally.  
 2 Q. At any time did you see anybody get out of  
 3 that vehicle?  
 4 A. No, I did not.  
 5 Q. So you watched him park, correct?  
 6 A. Yes.  
 7 Q. And you never watched anybody come out?  
 8 A. No, I did not.  
 9 Q. Did you ever watch the van move?  
 10 A. You mean drive away?  
 11 Q. Correct.  
 12 A. No.  
 13 Q. You never saw --  
 14 A. Well, did I see it leave, yes.  
 15 Q. Do you recall approximately what time that  
 16 was?  
 17 A. 10:25, 10:30, I believe.  
 18 Q. And during that time, you never saw anybody  
 19 get out?  
 20 A. No, I did not.  
 21 Q. Where did the van go? And if you could  
 22 use -- actually use the blue marker. The black  
 23 marker is running out of ink. If you could draw a  
 24 path from where you observed -- in fact, could you

ROUGH DRAFT TRANSCRIPT

SHEET 24 PAGE 93

1 put a blue X here for the jury because the other X  
 2 isn't showing up.  
 3 A. (Witness complies.)  
 4 Q. Could you draw a path from where you observed  
 5 this vehicle to where you watched it. Do you  
 6 understand my question?  
 7 A. Yes. He drove out, came down, came up to  
 8 here, and then stopped right here.  
 9 Q. And again, your location is the X, correct,  
 10 right here?  
 11 A. Yes.  
 12 Q. Can you estimate the distance between where  
 13 the defendant's -- or where the vehicle stopped and  
 14 where you were?  
 15 A. 20, 25 feet.  
 16 Q. Okay. Okay. Thank you. You can have a  
 17 seat.  
 18 BY MS. RIGGS:  
 19 Q. What happened when the gold vehicle stopped?  
 20 A. The drive got out of the vehicle and then  
 21 walked over to the trash can that was parked right  
 22 next to the vehicle and placed something into the  
 23 trash can.  
 24 Q. Did you see what it was that he put into the

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1 trash can?  
 2 A. At the -- no, I could not tell what it was  
 3 that he put into it.  
 4 Q. Did you get a look at the man?  
 5 A. Yes, I did.  
 6 Q. Did you see his face?  
 7 A. Yes.  
 8 Q. And again, you were 25 feet away?  
 9 A. Yes.  
 10 Q. Would you recognize that man if you saw him  
 11 again?  
 12 A. I would.  
 13 Q. Is he seated here in the courtroom today?  
 14 A. Yes, he is.  
 15 Q. Would you please point him out for the jury  
 16 and describe briefly what he is wearing?  
 17 A. The gentlemen over here next to Mr. Kadlic in  
 18 the blue shirt.  
 19 Q. The light blue shirt?  
 20 A. Light blue shirt.  
 21 MS. RIGGS: Your Honor, may the record  
 22 reflect that the witness has identified the defendant  
 23 in this case?  
 24 THE COURT: Yes.

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1 MS. RIGGS: Thank you.  
 2 BY MS. RIGGS:  
 3 Q. What happened after the man threw something  
 4 into the trash can?  
 5 A. He got back in his vehicle and made a circle  
 6 through the parking lot and drove back on to McCarran  
 7 Boulevard.  
 8 Q. What did you do at that point?  
 9 A. After the vehicle got on to McCarran, I  
 10 walked over to the trash can to see what was placed  
 11 into it.  
 12 Q. What did you see when you looked into the  
 13 trash can?  
 14 A. When I looked in the trash can, there was a  
 15 single white paper towel that was in the trash can  
 16 itself.  
 17 Q. And would you mind describing briefly what  
 18 kind of trash can it was?  
 19 A. Just normal trash can, it belonged to the  
 20 Jack In The Box, three feet tall, four feet tall.  
 21 Q. So an industrial trash can?  
 22 A. Yes.  
 23 Q. Did the trash can have any kind of liner in  
 24 it?

PAGE 96

1 A. It had a plastic liner in it.  
 2 Q. Was there anything else in the trash can  
 3 besides what you observed?  
 4 A. No, it was nothing. It looked like the liner  
 5 was brand new in there.  
 6 Q. And again, can you tell me exactly what it  
 7 was that you saw when you looked into the trash can,  
 8 what kind of item did you see in there?  
 9 A. It was a wadded up paper towel, white, like  
 10 household paper towel.  
 11 Q. Sir, you did train in the collection of  
 12 evidence?  
 13 A. Yes.  
 14 Q. Can you describe to me what your training is  
 15 in the collection of evidence?  
 16 A. I have been a CSI investigator for the  
 17 sheriff's office.  
 18 Q. What sort of training did that entail?  
 19 A. Collection of evidence, photography,  
 20 processing of evidence.  
 21 Q. Have you had very many occasions to collect  
 22 evidence?  
 23 A. Yes.  
 24 Q. What precautions do you take when you're

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1 collecting forensic evidence?  
 2 A. In this case, I put on latex gloves before  
 3 picking up the paper towel.  
 4 Q. And you picked up the paper towel out of the  
 5 can after you put the latex gloves on?  
 6 A. Yes.  
 7 Q. Sir, did you notice whether the paper towel  
 8 had anything on it?  
 9 A. I didn't at that time, no.  
 10 Q. At any time did you happen to notice?  
 11 A. I don't think so.  
 12 Q. What did you do with that towel?  
 13 A. I placed it into a brown paper bag that I had  
 14 in my vehicle.  
 15 MS. RIGGS: Your Honor, at this time the  
 16 State moves to have this exhibit marked as State's  
 17 Exhibit 8.  
 18 THE COURT: Okay. It will be marked.  
 19 THE CLERK: Exhibit 8.  
 20 MS. RIGGS:  
 21 (Exhibit 8 marked for  
 22 identification.)  
 23 MS. RIGGS: Thank you.  
 24 BY MS. RIGGS:

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1 A. Yes, I do.  
 2 Q. And can you tell me what that is?  
 3 A. It's a brown paper bag.  
 4 Q. And are your initials on there anywhere, sir?  
 5 A. Yes, they are.  
 6 Q. And can you tell me where they are?  
 7 A. They are right here, a BP.  
 8 Q. Is your name anywhere placed inside that --  
 9 in that package at all?  
 10 A. Yes. Can I open it a little bit?  
 11 Q. That's fine to open the staple.  
 12 A. I put the date and time that I collected it.  
 13 My name is right here on the bag.  
 14 Q. Can you tell me what date and time that  
 15 indicates on the bag when you collected it?  
 16 A. 9-27-01 at 10:02 a.m.  
 17 Q. So you collected that evidence at 10:02?  
 18 A. Yes.  
 19 Q. You stated earlier that your normal practice  
 20 is to seal an evidence bag with red tape. Did you do  
 21 that in this case?  
 22 A. Yes.  
 23 Q. Which piece of tape is the tape that you  
 24 sealed this bag with, sir?

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1 Q. Now, did you fill out any paperwork when you  
 2 placed the item into the paper bag?  
 3 A. Eventually I did paperwork for -- to process  
 4 it into evidence, yes.  
 5 Q. So why don't you describe to me the steps you  
 6 take when you're placing an item that you collect in  
 7 the field into evidence.  
 8 A. The paper bag is sealed with red evidence  
 9 tape, there's some forms we fill out describing what  
 10 it is we are placing into evidence, what we are  
 11 collecting, the date and time it's collected, where  
 12 it's collected, and then it's placed into a secure  
 13 locker.  
 14 Q. Now, did the -- does the item ever leave your  
 15 possession from the time you take it from the field  
 16 to the time you get it to evidence?  
 17 A. No, it does not.  
 18 MS. RIGGS: May I approach the witness, Your  
 19 Honor?  
 20 THE COURT: Yes.  
 21 BY MS. RIGGS:  
 22 Q. I'm showing you, sir, what's been marked for  
 23 identification as State's Exhibit 8. Do you  
 24 recognize that at all, sir?

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1 A. Probably the one underneath. It would be the  
 2 first one on there. It looks like there's two pieces  
 3 of tape. Mine would be the bottom one.  
 4 Q. Okay. Is it your understanding that this  
 5 evidence is processed after you submit it into  
 6 evidence?  
 7 A. Yes.  
 8 Q. Did this bag remain sealed after you sealed  
 9 it from the entire time that you had it in -- from  
 10 the time you collected the evidence to the time that  
 11 you submitted it into evidence?  
 12 A. Yes.  
 13 MS. RIGGS: Your Honor, State moves to admit  
 14 State's Exhibit 8.  
 15 MR. KADLIC: Your Honor, she wants to admit  
 16 the bag, the bag is fine with me. She can admit the  
 17 bag. I don't know what the contents of the bag are.  
 18 I'll admit the bag.  
 19 MS. RIGGS: Your Honor, I would like to admit  
 20 the contents of the bag at a later time.  
 21 THE COURT: Okay. The bag is admitted.  
 22 MS. RIGGS: Thank you.  
 23 (Exhibit 8 admitted into  
 24 evidence.)

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1 BY MS. RIGGS:  
 2 Q. Again, detective, after you admitted this bag  
 3 into evidence, your involvement in the case was over?  
 4 A. Yes.  
 5 Q. Thank you.  
 6 MS. RIGGS: State has nothing further, Your  
 7 Honor.  
 8 THE COURT: Okay. Any cross-examination,  
 9 Mr. Kadlic?  
 10 MR. KADLIC: I don't have any questions, Your  
 11 Honor.  
 12 THE COURT: All right. You may step down,  
 13 officer.  
 14 Your next witness, Ms. Riggs?  
 15 MS. RIGGS: Your Honor, the State will call  
 16 Susan Harmon.  
 17 THE COURT: Okay.  
 18 MS. RIGGS: Your Honor, may we approach.  
 19 THE COURT: Yes.  
 20 (Off-the-record discussion  
 21 held at the bench.)  
 22 THE COURT: Ladies and gentlemen, in  
 23 discussing the scheduling of the case with counsel,  
 24 we think it best to take a break with you folks now

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1 Mr. Kadlic, have you had a chance to review  
 2 those instructions yet?  
 3 MR. KADLIC: Yes.  
 4 THE COURT: Okay. Before we get into the  
 5 details of the instructions, I have a concern about  
 6 them, and primarily the concern I have is that, as  
 7 counsel knows, neither the statutes under which the  
 8 defendant is being prosecuted define the terms  
 9 indecent exposure or define the terms open or gross  
 10 lewdness.  
 11 Our research shows that under *ran sin* versus  
 12 State and *Young* versus State the supreme court has  
 13 adopted common law definitions for those terms. The  
 14 terms, however, I think need to be, or the elements  
 15 need to be contained in the instructions for the  
 16 crime.  
 17 So I would request that counsel, if you have  
 18 not already done so, look at those cases and tell me  
 19 whether you feel that the instructions as tendered  
 20 adequately provide elements of the crime of open and  
 21 gross lewdness and indecent exposure.  
 22 MS. RIGGS: Your Honor, if I may, I only got  
 23 the citation for the first case, *ran son* V State.  
 24 Would you mind --

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1 and have you return at 2:00. And I'm going to work  
 2 with counsel on some other matters related to the  
 3 case between now and 12:30, before my next hearing  
 4 starts.  
 5 So you are instructed not to discuss this  
 6 case among yourselves or with anyone else or form or  
 7 express any opinions or conclusions concerning the  
 8 case until it is finally submitted to you for a  
 9 decision in the trial.  
 10 You're not to read or look at or listen to  
 11 any news media accounts of the case should there be  
 12 any.  
 13 We'll be in recess with the jury until 2:00  
 14 p.m. this afternoon.  
 15 I'll remain on the record with counsel.  
 16 All rise for the jury, please.  
 17 (The following proceedings  
 18 were held outside the  
 19 presence of the jury.)  
 20 THE COURT: All right. Please be seated.  
 21 We remain on the record outside the presence  
 22 of the jury.  
 23 I wanted to take a few minutes to discuss  
 24 with counsel the jury instructions in this matter.

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1 THE COURT: *Ran son* versus State, which is  
 2 found at 99 Nev. 766, and *Young* versus State, 109  
 3 Nev. 205.  
 4 Those cases also make clear that in a  
 5 situation in which the legislator has failed to  
 6 define, as it has in this case, these terms, then the  
 7 common law definition of those offenses will be used.  
 8 And the supreme court seems to have adopted at least  
 9 with respect to the definition of open and gross  
 10 lewdness the definition found in *ward mans* criminal  
 11 law at section 315, the 14th edition as an unlawful  
 12 indulgence of lust involving gross indecency with  
 13 respect to sexual conduct committed in a public place  
 14 and observed by persons lawfully present.  
 15 But I still haven't found a definition for  
 16 the term of open and gross lewdness, although the  
 17 *Young* case seems to suggest that -- and in *ran son*  
 18 those terms would be lewd acts done in a private  
 19 location in a nonsecretive manner clearly intending  
 20 that the perpetrator's acts be offensive to his  
 21 victim.  
 22 But I think we need to work on the definition  
 23 of these terms.  
 24 Now, having said that, let me go through some

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1 of the instructions and determine whether there are  
 2 any objection on the part of the defense and also  
 3 offer to you the order in which I would intend to  
 4 give the instructions that I have at least at this  
 5 point. Okay?  
 6 Ladies and gentlemen of the jury would be  
 7 first.  
 8 Mr. Kadlic, I'll simply ask, since these are  
 9 tendered by the State, if you have any objection, as  
 10 I go through them. If I don't hear from you, I'll  
 11 assume that you -- I would rather you state objection  
 12 or no objection.  
 13 Ladies and gentlemen of the jury.  
 14 MR. KADLIC: No objection.  
 15 THE COURT: An Amended Information is a  
 16 formal method.  
 17 MR. KADLIC: No objection.  
 18 THE COURT: The defendant in this matter.  
 19 The recitation of the Information.  
 20 MR. KADLIC: Oh, thank you. Okay. I'm  
 21 sorry. No objection.  
 22 THE COURT: If in these instructions any  
 23 rule, direction, or idea.  
 24 MR. KADLIC: Objection. No objection.

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1 THE COURT: If during this trial I have said  
 2 or done.  
 3 MR. KADLIC: No objection.  
 4 THE COURT: Neither the prosecution nor the  
 5 defense is required.  
 6 MR. KADLIC: No objection.  
 7 THE COURT: Nothing that counsel say.  
 8 MR. KADLIC: No objection.  
 9 THE COURT: It is the duty of attorneys on  
 10 each side.  
 11 MR. KADLIC: No objection.  
 12 THE COURT: The State has offered two  
 13 instructions; one that begins to the jury alone  
 14 belongs the duty of weighing the evidence and another  
 15 one that says you are the sole judges of the  
 16 credibility of the witnesses. They seem to me to be  
 17 duplicitous.  
 18 Ms. Riggs, your thoughts on that.  
 19 MS. RIGGS: State has no preference which  
 20 one --  
 21 MR. KADLIC: Your Honor, to the jury alone  
 22 or --  
 23 THE COURT: You are the sole judges of the  
 24 credibility.

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1 I'll leave it to you, Ms. Riggs, as to which  
 2 one you would prefer.  
 3 MS. RIGGS: To the jury alone, the one that  
 4 begins with to the jury alone belongs the duty of  
 5 weighing.  
 6 THE COURT: Okay.  
 7 MR. KADLIC: I can go with that, Your Honor.  
 8 THE COURT: The other, you are the sole  
 9 judges is withdrawn; is that correct.  
 10 MS. RIGGS: Thank you.  
 11 THE COURT: There are two types of evidence.  
 12 MR. KADLIC: No objection, Your Honor.  
 13 THE COURT: Intent may be proved by  
 14 circumstantial evidence.  
 15 MR. KADLIC: No objection, Your Honor.  
 16 THE COURT: Every person charged with the  
 17 commission.  
 18 MR. KADLIC: No objection, Your Honor.  
 19 THE COURT: In every crime there must exist.  
 20 MR. KADLIC: No objection, Your Honor.  
 21 THE COURT: The burden rests upon the  
 22 prosecution to establish.  
 23 MR. KADLIC: No objection, Your Honor.  
 24 THE COURT: A reasonable doubt is one based

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1 on reason.  
 2 MR. KADLIC: No objection, Your Honor.  
 3 THE COURT: Okay. Now, the Court will  
 4 propose at this point an instruction that says the  
 5 State has charged the defendant in Count 1 with  
 6 indecent exposure.  
 7 The elements of indecent exposure are, 1, 2,  
 8 3, 4, 5. The defendant in Washoe County, on  
 9 September 27th, and then we get into the more dicey  
 10 problem of what are the other elements from what I  
 11 can discern in the Ranson and Young cases; and I  
 12 wanted to give you, Ms. Riggs, an opportunity to take  
 13 a stab at that, if you would, please.  
 14 MS. RIGGS: Okay. Thank you.  
 15 THE COURT: And then the next instruction  
 16 would similarly be in Count 2 the State has charged  
 17 the defendant with open and gross lewdness, the  
 18 elements of that are, and identify those elements.  
 19 MS. RIGGS: Okay.  
 20 THE COURT: The instruction in order for  
 21 conduct to be indecent or obscene, do you have any  
 22 objection to that instruction, Mr. Kadlic?  
 23 MR. KADLIC: Which one is that?  
 24 THE COURT: It reads in order for conduct to

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1 be indecent or obscene, it must affront the standards  
2 of decency accepted in the community and be patently  
3 offensive.

4 MR. KADLIC: No, no objection, Your Honor.

5 THE COURT: Okay. And these are explanatory  
6 instructions which I think are appropriate following  
7 the element instructions.

8 And the next instruction, an exposure becomes  
9 indecent when it occurs at such a time and place  
10 where a reasonable person knows or should know his or  
11 her act will be open to the observation of others.  
12 The required criminal intent is usually established  
13 by some action by which a defendant draws attention  
14 to his exposed condition or by a display in a place  
15 so public that it must be presumed it was intended to  
16 be seen by others.

17 MR. KADLIC: I like that one.

18 THE COURT: No objection?

19 MR. KADLIC: No objection, Your Honor.

20 THE COURT: One may not knowingly expose his  
21 or her person in a public place under circumstances  
22 which make it probable that he or she will be  
23 observed and then assert that if he or she was  
24 observed the exposure was unintentional and

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1 regarding your earlier statement about -- I believe  
2 you said wardens criminal law definition of lewdness.  
3 This seems to contradict that definition because my  
4 understanding of the Young versus State instruction  
5 is that an observer need not even see what's  
6 happening.

7 THE COURT: Well, this is why I want you to  
8 look at those two cases in particular, you may want  
9 to also look at the Peck case, which is -- but it's a  
10 concurring opinion. That's at 116 Nev. 840.

11 With all due respect to our supreme court,  
12 these opinions are not real instructive and seem to  
13 contain conflicting statements on the definitional  
14 issues. And you're absolutely correct, the statement  
15 that I read is a correct statement out of Young but  
16 seems to be contrary to the warden definition. So  
17 I'm not quite sure how to reconcile that, but I'm  
18 asking for counsel's comments on that.

19 The next instruction, the rules of evidence  
20 ordinarily do not permit. And I'm assuming that that  
21 will be in connection with Ms. Harmon's testimony.

22 MR. KADLIC: No objection.

23 THE COURT: The penalty provided by law for  
24 the offense.

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1 accidental.

2 My observation is that this seems to be a  
3 defense instruction, and since I haven't heard the  
4 defense case I don't know that this is yet  
5 appropriate for consideration.

6 That is to say, if Mr. Volpicelli were to get  
7 on the stand and say my conduct here was  
8 unintentional and accidental, then this instruction  
9 might be appropriate. Until then, I'm not sure that  
10 it is.

11 MS. RIGGS: Okay.

12 MR. KADLIC: That's correct.

13 THE COURT: And then the next instruction,  
14 conviction for statutory offenses of gross lewdness  
15 or indecent exposure does not require proof of intent  
16 to offend the observer or even that exposure was  
17 observed, it is sufficient that the public sexual  
18 conduct or exposure was intentional.

19 And this is a statement right out of Young,  
20 but I'll let you take a look at that, unless you have  
21 no objection.

22 MR. KADLIC: If it's right out of Young, I'll  
23 take the Court's word for it.

24 MS. RIGGS: Your Honor, I do have a concern

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1 MR. KADLIC: No objection.

2 THE COURT: It is your duty as jurors to  
3 consult.

4 MR. KADLIC: No objection.

5 THE COURT: Although you are to consider only  
6 the evidence.

7 MR. KADLIC: No objection.

8 THE COURT: Upon retiring to the jury room,  
9 you will select.

10 MR. KADLIC: No objection.

11 THE COURT: And do you intend to --

12 MR. KADLIC: Yes, I have two.

13 THE COURT: -- Mr. Kadlic, to offer an  
14 instruction?

15 MR. KADLIC: I have two. Ms. Volpicelli will  
16 not be testifying; there is no value to him  
17 testifying.

18 THE COURT: Okay.

19 MR. KADLIC: Those are out of CALJIC. As a  
20 matter of fact, we used the one in Gallegos. I used  
21 both of those in Roski in front of Judge Elliott.

22 THE COURT: Have you seen these instructions?

23 MS. RIGGS: I have, Your Honor. The State  
24 does not object to the instruction that begins the

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1 defendant in a criminal trial has a constitutional  
2 right.

3 The State does object to the second  
4 instruction, Your Honor, in deciding whether or not  
5 to testify the defendant may choose to rely on the  
6 State of the evidence and upon the failure, if any,  
7 of the State to prove beyond a reasonable doubt every  
8 essentially element of the charge against him. And,  
9 Your Honor, I believe that that's -- that contains an  
10 implication that if the defendant does not testify  
11 then the State has failed to prove its case. So I  
12 would object to this instruction.

13 THE COURT: The Court has been using an  
14 instruction on this subject in almost every criminal  
15 trial that I have tried here, and during the break  
16 we'll make a copy for counsel to look at.

17 MR. KADLIC: Okay. That will be fine.

18 THE COURT: It does incorporate some of the  
19 theme of this objectionable instruction, Mr. Kadlic,  
20 and I'll let you both take a look at that proposed  
21 instruction before resolving this issue.

22 MR. KADLIC: That will be fine.

23 MS. RIGGS: Thank you, Your Honor.

24 THE COURT: Okay. All right. After you've

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1 that you have the opportunity to testify in this case  
2 at or near the end of the State's case in chief. Are  
3 you aware of that right?

4 THE DEFENDANT: Yes, Your Honor.

5 THE COURT: Without discussing with me your  
6 discussions with your counsel, have you discussed  
7 your right to testify with him?

8 THE DEFENDANT: Yes, I have, Your Honor.

9 THE COURT: Have you discussed the  
10 implications, detriments and benefits associated with  
11 testifying in this case with your counsel?

12 THE DEFENDANT: Yes, I have.

13 THE COURT: Okay. All right. Then we'll  
14 return at 2:00 in the trial and begin with the  
15 evidence at that point. It's possible we may need to  
16 go into tomorrow morning because there may be some  
17 conflicting viewpoints on what the instructions  
18 should look like, which is certainly understandable  
19 in this matter. Okay.

(Lunch recess.)

--oOo--

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1 had a chance to spend some time looking at the cases,  
2 then we'll talk more about these element instructions  
3 after two p.m.

4           Although, my intent would be to conclude your  
5 evidence, have you rest; and then it's my  
6 understanding that, Mr. Kadlic, your intent is not  
7 to -- is for your client not to testify.

8 MR. KADLIC: That's correct. I would  
9 probably make a motion at the conclusion of the  
10 State's case, because I know the rest of the evidence  
11 isn't going to change the facts from where they are  
12 now, whatever the Court rules on that.

13 THE COURT: Okay.

14 MR. KADLIC: And we would not present any  
15 evidence, and we would rest, and we could go right to  
16 the settling instructions and arguments.

17           Whether we can make that all today or end up  
18   doing it at 10 o'clock tomorrow morning, I'm sure the  
19   jury would appreciate if we could finish it today.

20 THE COURT: We'll see how we go.

21 MR. KADLIC: I don't mind staying later.

22 THE COURT: I'm going to take this  
23 opportunity, then, Mr. Volpicelli, to advise you  
24 pursuant to a case entitled State versus Phillip;

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1 RENO, NEVADA, THURSDAY, JULY 10, 2004, 2:17 P.M.

--o0o--

4 THE COURT: Please be seated.

5 Do counsel stipulate to the presence of the  
6 jury?

7 MR. KADLIC: So stipulated, Your Honor.

8 MS. RIGGS: So stipulated, Your Honor.

9 THE COURT: Okay. Good afternoon, ladies and  
10 gentlemen. Sorry we ran over a little bit, but the  
11 court reporter, myself and the clerk have been  
12 working at it since we left you last, so she needs a  
13 break. Hopefully we have built up her blood sugar so  
14 we can get through the afternoon.

15 Ms. Riggs, your next witness, please.

16 MS. RIGGS: Thank you, Your Honor. Your  
17 Honor, the State will call Susan Harmon.

18 THE COURT: Okay.

SUZANNE HARMON.

21 Called as a witness on behalf of the  
22 State, having been first duly sworn,  
23 was examined and testified as follows:

24 >>>>>



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## DIRECT EXAMINATION

1  
2  
3 BY MS. RIGGS:  
4 Q. Would you please state your name and spell  
5 your last name for the record.  
6 A. Suzanne Harmon, HARMON.  
7 Q. Who employs you?  
8 A. I'm a criminalist with the Washoe County  
9 sheriff's forensic laboratory.  
10 Q. Could you tell me what your position is with  
11 the crime lab. It's called the crime lab as well?  
12 A. That's correct. For the last two years I've  
13 been in the primary exam section.  
14 Prior to that, I spent about nine half years  
15 in the breath, alcohol section for DUI testing and  
16 about a year and a half in the toxicology section.  
17 Q. Can you tell me what your duties were with  
18 the crime lab as September 2000 or October 2000?  
19 A. I was in the primary exam section at that  
20 time, and what my primary duties are is to examine  
21 evidence in order to locate and identify stains of  
22 body fluid types such as blood or seminal fluid,  
23 saliva.  
24 I also look for hairs and identify if it's

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1 animal or human hair.  
2 I collect trace evidence, such as fibers or  
3 pieces of glass, for further testing down the road.  
4 Q. Ms. Harmon, would you please describe your  
5 education and training to perform such analysis?  
6 A. I have a bachelor's of science degree from  
7 the University of Nevada, Reno, that I received in  
8 1980 in medical technology, which was primarily  
9 clinical testing for medical purposes of blood and  
10 urine, which actually is a similar -- is a good  
11 background for the type of testing that I do now.  
12 When I moved into this section, I underwent a  
13 prescribed training course under another criminalist.  
14 I attended a class at the California  
15 Criminalistics Institute, which was microscopy,  
16 evidence of rape.  
17 I had to take a competency exam, where I was  
18 given unknown body fluids and had to identify it  
19 before I started doing actual case work.  
20 And then once a year I have to perform a  
21 proficiency exam where again an outside source sends  
22 in unknown stains, usually about five of them, and I  
23 have to correctly identify those stains.  
24 Q. Ms. Harmon, when you get in a piece of

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1 evidence into your laboratory, where does that  
2 typically come from?  
3 A. We have an evidence section in our laboratory  
4 where all evidence is located. It's in a secure  
5 area.  
6 We have two evidence custodians who are the  
7 only ones who have access to that evidence in order  
8 for us to basically check it out or sign a chain of  
9 custody to take possession of it.  
10 Q. And do you know which agencies would be  
11 placing the evidence into your secured evidence  
12 section?  
13 A. We do lab work for numerous agencies  
14 throughout not only the State of Nevada but also  
15 California, so there are quite a few agencies that  
16 book evidence into our facility.  
17 Q. Now, Ms. Harmon, can you describe the path  
18 that a piece of evidence takes from the time it gets  
19 say to your secured evidence facility to where you  
20 are located in your laboratory?  
21 A. Typically when an agency submits evidence  
22 they will attach a lab request to it obviously saying  
23 what the item is, their agency and what work they  
24 wish to have done.

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1 So if they have requested work for my  
2 section, a lab request is initiated, I would receive  
3 a piece of paper saying you need to do the lab work  
4 on this item.  
5 I would then go down to our evidence section,  
6 give them that item number, the evidence custodians  
7 would give it to me, I would sign a temporary custody  
8 of it, I would take that package back to my  
9 laboratory.  
10 I would make notes as to the condition that I  
11 received it, basically was it sealed. Our lab will  
12 not take evidence that isn't sealed, so I certainly  
13 note that. I would open the package.  
14 Typically on the outside of the package I  
15 will put my initials, the date that I work on it, we  
16 assign a lab number to it, and then I would basically  
17 describe the item, put some sort of identification on  
18 to the item so if I were to see it again I would know  
19 in fact that I had looked at it.  
20 I have lab benches with great lighting, I  
21 have different types of lights, magnifying glasses,  
22 to assist me with looking for stains.  
23 If I were to find a stain there are certain  
24 chemical tests that I perform on it in order to

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1 identify is it blood, is it seminal fluid, is it  
2 saliva.

3 From that point forward then I may do some  
4 further testing.

5 Q. Now you testified that when you received  
6 evidence personally from your secured evidence  
7 section you receive it in a sealed state, correct?

8 A. That's correct.

9 Q. Does anyone else have access to that evidence  
10 after you have unseal it?

11 A. I keep in it my possession while I'm working  
12 on it. If I were not able to finish work and return  
13 it to my evidence section I have my own locker that I  
14 have a padlock key to that I have the key to, so I  
15 would lock that evidence up in my laboratory.

16 Additionally our laboratory is a secured area  
17 where only people who work there are allowed to be  
18 there basically unescorted.

19 Q. Now, Ms. Harmon, do you recall taking a bag  
20 item or a bag evidentiary item out of your secured  
21 evidence section on October 22nd, 2001?

22 A. Do you have a specific one or -- it's  
23 difficult for me just to remember a day.

24 Q. I am speaking specifically regarding an item

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1 A. I did.

2 Q. And what did you do then?

3 A. I removed the contents of it, and basically,  
4 as I described, I described what was in there,  
5 identified it, again with the initials, date, lab  
6 number, and I performed laboratory examinations on  
7 it.

8 Q. What did you find when you opened that  
9 envelope?

10 A. Testwise or the item?

11 Q. The item, please.

12 A. My records indicate that I found seven pieces  
13 of three-layer tissue. I described possibly that  
14 it's a paper towel or Kleenex.

15 Q. Was it simply a piece of tissue or piece of  
16 Kleenex, or did you notice anything on that?

17 A. I did note a stain on the item.

18 My recollection I'm just remembering this,  
19 it's not in my notes, it was kind of altogether, and  
20 I most likely separated those pieces of tissue.

21 Q. Could you describe the stain that you saw,  
22 please, if you recall?

23 A. My notes indicate that I found a fairly large  
24 yellow stain. There's actually stain on quite a few

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1 you assigned laboratory number L7970-01-0.

2 A. Yes. My records indicate that on that day,  
3 on October 22nd of 2001, I did receive a bag of  
4 evidence that was assigned that laboratory number.

5 MS. RIGGS: May I approach for an item of  
6 evidentiary, Your Honor?

7 THE COURT: Yes.

8 MS. RIGGS: May I approach the witness, Your  
9 Honor?

10 THE COURT: Yes.

11 BY MS. RIGGS:

12 Q. Ms. Harmon, I'm showing you what's been  
13 previously marked and admitted as State's Exhibit 8.  
14 Do you recognize that item?

15 A. I do. Again, the laboratory number is  
16 written on here in my handwriting; a different date,  
17 October 23rd, 2001, which means that's the date I  
18 actually looked at the item; and my initials.

19 Q. And you see that marked on that item?

20 A. I do.

21 Q. Ms. Harmon, did that item come to you in a  
22 sealed state?

23 A. My records indicate that it did.

24 Q. Now, Ms. Harmon, did you open that envelope?

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1 of the pieces of tissue, but I just used one to  
2 examine since they were all contained together. I  
3 only needed, I felt, to test one of them.

4 Q. Now, Ms. Harmon, did you perform any  
5 laboratory analysis on the tissue?

6 A. I did. I performed a test to indicate to me  
7 the presence of seminal fluid.

8 I have a laboratory test that seminal fluid  
9 contains a substance in a very high concentration,  
10 it's called acid phosphatase, and I have a chemical  
11 test that indicates the presence of that, and it's a  
12 color reaction. Like I use swabs and I come in  
13 contact with the stain to basically soak some of the  
14 stain up on to the swab, and I look for a color  
15 change which tells me that very likely seminal fluid  
16 is present on that stain.

17 Q. Ms. Harmon, why in particular were you  
18 testing for seminal fluid on that item?

19 A. It had the appearance of that. Obviously it  
20 didn't look like blood. It wasn't red.

21 Typically in my section I'm looking for  
22 either semen or blood, those are the two main things  
23 that I look for.

24 Q. Did the agency that submitted that request

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1 request that you test for semen?

2 A. If I could look here.

3 Q. Certainly.

4 A. The lab request did in fact indicate to look  
5 for the presence of seminal fluid.

6 Q. Ms. Harmon, when you say a presumptive test,  
7 what does that mean?

8 A. It basically means that it's not 100 percent  
9 for sure that that what's it is. It means it's a  
10 pretty good reliability that's what it is, but I  
11 couldn't tell you a hundred percent certain that's  
12 what it is.

13 Q. Again, your results indicated what regarding  
14 the sample?

15 A. I had positive results, so presumptively I  
16 believed that seminal fluid was present.

17 Q. What happened to the paper towel after you  
18 tested it?

19 A. Whenever I find a stain, I cut part of that  
20 stain out. I identify it. The first item I ever  
21 look at, I assign the first letter of the alphabet A,  
22 and the first stain would be 1.

23 So I make marks on there saying this is A-1,  
24 and I actually cut out with scissors part of the

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1 A. If our laboratory maintained all of the  
2 original items of evidence, we have would have to  
3 purchase a couple of city blocks to store all of  
4 that.

5 So by taking only a small portion of the  
6 stain, I can return the original item to the agency,  
7 I can maintain that cutting that we can test at a  
8 later date; and it's stored in our laboratory in a  
9 freezer, which is the ideal way to store biological  
10 fluids, and it's a very secure area under strict  
11 criteria.

12 So any future testing that has to be done on  
13 that, we have access to that stain, and we don't need  
14 the rest of the item.

15 Q. Now, Ms. Harmon, I provided you with a pair  
16 of scissors. Would you please open the large  
17 evidentiary bag.

18 A. (Witness complies).

19 Q. Ms. Harmon, is something in the bag?

20 A. There is.

21 Q. Can you tell me what is in the bag?

22 A. It looks to me like the actual pieces of  
23 tissue just right here in the bag. They are not  
24 inside of anything else.

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1 stain. I attach it to a little index card, and I  
2 place it inside of a coin envelope labeling it where  
3 it came from, my initials, the date.

4 I then put that coin envelope into a manila  
5 envelope similar to this. I assign a bar code number  
6 to it that's unique for our laboratory.

7 It then gets sealed with evidence tape, and a  
8 chain of custody for that cutting now is initiated  
9 for that cutting.

10 As far as the original item of evidence, it's  
11 returned to the original packaging, resealed, taken  
12 back to our evidence section who in turn then returns  
13 it to the submitting agency.

14 Q. Now, was the original paper towel in fact  
15 resealed inside its original envelope?

16 A. It was.

17 Q. And how do you know that?

18 A. My notes indicate it. The evidence tape  
19 here, I see my initials and the date that I sealed  
20 this package back up.

21 Q. Ms. Harmon, can you tell me what the reason  
22 is for your taking a separate sample or a section of  
23 the original sample and basically excluding it out  
24 from the original evidence?

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1 Q. Do you recognize those to be the pieces of  
2 tissue that you tested in this case?

3 A. I have my identification on one of them, so  
4 just to say do I recognize these, no.

5 Q. Would you mind -- I know that you brought  
6 some gloves with you. Would you mind taking the item  
7 out.

8 A. I find here on one of the pieces of tissue  
9 the laboratory number, the date, and my initials.

10 Q. Thank you, Ms. Harmon.

11 MS. RIGGS: Your Honor, at this time, the  
12 State would move to have marked and admitted State's  
13 Exhibit 8-A regarding the samples.

14 I'd like to put on the record that those are  
15 biohazardous materials, and although I would like the  
16 jury to be able to see them, if they need to, I would  
17 like them to be held in the possession of the clerk  
18 at this time.

19 THE COURT: Any objection to admissibility,  
20 counsel?

21 MR. KADLIC: No, Your Honor. And I think  
22 that's a wise way so the jury --

23 THE COURT: Well, the exhibit is admitted.  
24 The handling will be handled by the clerk.

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1 MS. RIGGS: Thank you, Your Honor. Thank  
 2 you, Ms. Harmon.  
 3 BY MS. RIGGS:  
 4 Q. Now, Ms. Harmon, did you conduct any further  
 5 testing, any further laboratory testing in this case?  
 6 A. I did. On this particular date -- whenever I  
 7 find that presumptive positive test for seminal  
 8 fluid, then I proceed to another step, which would be  
 9 looking for sperm cells, which would be a  
 10 confirmation of seminal fluid, obviously, if you  
 11 found sperm cells; and how that is done is by cutting  
 12 out a tiny little piece of that stain, this tissue, I  
 13 cut a little piece out and put into it a little tube  
 14 and add some water, and it's basically soaked in that  
 15 water which would allow the sperm cells to leave that  
 16 tissue and go into the water.  
 17 It's then put into a centrifuge, which is a  
 18 laboratory equipment that spins very fast so that you  
 19 understand that heavy things would fall to the  
 20 bottom, and in this case we would hope sperm cells  
 21 would fall to the bottom of that tube, I could then  
 22 take a little section of that, it's called a button  
 23 that would spin to the bottom, place it on a  
 24 microscope slide, add stain to it, which gives color

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1 to it, and then I would look under the microscope to  
 2 find those sperm cells.  
 3 Q. Did you find sperm cells in the semen on the  
 4 tissue in this case?  
 5 A. I did not.  
 6 Q. Did you conduct any further testing?  
 7 A. At a later date, I did. At the time that I  
 8 did this in October, that was the only test that we  
 9 did, confirmatory test for seminal fluid.  
 10 So at a later point in time, then, I did  
 11 another test where when sperm cells are not present  
 12 there's another exam that we can do, again looking  
 13 for a substance that is only found in seminal fluid,  
 14 and I did perform that test.  
 15 Q. Can you tell me what the results of that test  
 16 were, please.  
 17 A. That was in July 26th of 2002, and the  
 18 results of that test were positive; thereby being  
 19 confirmation that that stain was seminal fluid.  
 20 Q. So it's fair to say we went to a presumptive  
 21 test or from a presumptive test that wasn't a hundred  
 22 percent sure to now a test that we can basically be a  
 23 hundred percent sure that this is seminal fluid on  
 24 the tissue; is that correct?

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1 A. That's correct.  
 2 Q. Now, Ms. Harmon, we have a semen sample, a  
 3 sample that we now know is positive for semen but no  
 4 sperm. How is this possible?  
 5 A. There are instances that a male could be --  
 6 have had a vasectomy, then their seminal fluid would  
 7 no longer have sperm cells.  
 8 There are instances where men actually do not  
 9 produce sperm cells, they wouldn't have sperm cells.  
 10 Or there are instances where their sperm  
 11 count is so low that it would be possible that in  
 12 that stain I wasn't able to find them.  
 13 Q. Now, Ms. Harmon, based on your experience,  
 14 your training, and all the analysis that you did on  
 15 the sample in this case, did you form an opinion as  
 16 to whether the contributor to the semen sample had  
 17 either a low sperm count or had been vasectomized?  
 18 A. That was my belief, yes.  
 19 Q. So you did form a positive opinion regarding  
 20 that?  
 21 A. Yes.  
 22 MS. RIGGS: Thank you. The State has nothing  
 23 further, Your Honor.  
 24 THE COURT: Mr. Kadlic?

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## CROSS-EXAMINATION

1  
 2  
 3 BY MR. KADLIC:  
 4 Q. For one thing, Ms. Harmon, you have no idea  
 5 where that sample came from other than what somebody  
 6 wrote on the bag; isn't that correct?  
 7 A. That's correct.  
 8 Q. And at the time you will analyzed it, I  
 9 assume that stain was dry, dry, and dry?  
 10 A. Yes.  
 11 Q. Do you know how long it had been dry for?  
 12 A. I do not.  
 13 Q. Is there a way to test for that?  
 14 A. We don't test the age of the stain, just  
 15 basically what's in the stain.  
 16 MR. KADLIC: I have no additional questions,  
 17 Your Honor, thank you.  
 18 MS. RIGGS: State will have nothing further,  
 19 Your Honor.  
 20 THE COURT: All right. Ms. Harmon, you may  
 21 step down.  
 22 Your next witness, Ms. Riggs?  
 23 MS. RIGGS: Your Honor, the State will call  
 24 Lori Inman.

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LORI INMAN,

Called as a witness on behalf of the  
State, having been first duly sworn,  
was examined and testified as follows:

## DIRECT EXAMINATION

BY MS. RIGGS:

Q. Would you please state your name and spell  
your last name for the reported.

A. Lori Inman, INMAN.

Q. Ms. Inman, at one time were you married to a  
man named Ferrill Volpicelli?

A. Yes.

Q. Can you tell me what the dates were when you  
were married to him, ma'am?

A. We got married December 7th, 1981, and  
divorced July 1997.

Q. Do you see Mr. Volpicelli here today?

A. Yes.

Q. Would you please point him out for the Court  
and describe briefly what he's wearing?

A. Light blue shirt and gray pants.

MS. RIGGS: Your Honor, may the record

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Q. Ms. Inman, do you and the defendant have any  
children in common?

A. Yes, we have three.

Q. Are you required to keep somewhat in contact  
or know something about the defendant because of the  
relationship with your children?

A. I have cut off all contact.

Q. In the latter part of 2001, did you still  
know something of what was going on in his life at  
all through your children?

A. Yes, he was seeing my children on a regular  
basis.

Q. Do you know whether the defendant had access  
to a van in approximately September, 2001?

A. Yes, his brother's van.

Q. And do you recall what kind of van that was?

A. I believe it was a Mazda.

Q. And who is his brother?

A. Mark Volpicelli.

Q. And, Ms. Inman, do you also know whether the  
defendant had access to a Ford Bronco in -- during  
the time period surrounding September 2001?

A. Not a Ford Bronco.

Q. I apologize, ma'am, that is my fault. A Ford

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reflect that this witness has identified the  
defendant in this case?

THE COURT: Yes, the record will reflect the  
identification by the witness.

MS. RIGGS: Thank you.

BY MS. RIGGS:

Q. Ms. Inman, during the time that you that  
married to the defendant, were you aware of whether  
he went -- underwent any particular medical  
procedures?

A. Yes.

Q. And I'm speaking particularly of a procedure  
of a procedure in December of 1993?

A. Yes.

Q. What kind of procedure did he undergo?

A. A vasectomy.

Q. Are you aware of whether that operation was  
successful?

A. Yes.

Q. It was successful?

A. Yeah. I believe his girlfriend --

Q. I'm sorry. I'm going to have to stop you  
right there.

A. Okay.

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Explorer?

A. Yes, two Ford Explorers. Both registered in  
my daughter's name.

Q. Who is your daughter?

A. Shannel Volpicelli.

Q. Also the defendant's daughter?

A. Yes.

Q. Now, Ms. Inman, are you under subpoena here  
today?

A. Yes.

Q. Did you want to be here today?

A. No.

MS. RIGGS: State has nothing further, Your  
Honor.

THE COURT: Mr. Kadlic, any  
cross-examination?

MR. KADLIC: I have none of this witness,  
Your Honor. Thank you.

THE COURT: All right. You may step down,  
Ms. Inman.

THE WITNESS: Okay.

THE COURT: Your next witness, Ms. Riggs.

MS. RIGGS: Your Honor, the State will rest.  
Thank you.

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1 THE COURT: Okay. All right. Mr. Kadlic,  
2 are you ready to proceed with the defense case?  
3 MR. KADLIC: Yes, I am, Your Honor. At this  
4 point, I choose to make no opening statement.  
5 THE COURT: Okay. Do you intend to call any  
6 witnesses?  
7 MR. KADLIC: No, I do not, Your Honor.  
8 THE COURT: All right. Then the defense  
9 rests?  
10 MR. KADLIC: We do, Your Honor.  
11 THE COURT: Okay. Ladies and gentlemen, I  
12 need to have a few minutes with counsel to resolve  
13 the jury instructions in this matter, so we will take  
14 a recess.  
15 MR. KADLIC: Your Honor, could we approach  
16 the bench for a brief second.  
17 THE COURT: Sure.  
18 (Off-the-record discussion held  
19 at the bench.)  
20 THE COURT: Ladies and gentlemen, I'm  
21 thinking we're going to need about a half hour to  
22 conclude some of the issues that are involved, and as  
23 comfortable as our jury room is, I'm confident you  
24 don't want to sit there all that time. You're

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1 welcome to do so. But you're also welcome to go  
2 outside or take a walk or go into other parts of the  
3 building if you'd like so you're not confined in the  
4 jury room.  
5 But I'm going to have you come back about  
6 3:15. My purpose in all of this is to get this case  
7 to you today so you don't have to come back tomorrow.  
8 So you are instructed in the meantime not to  
9 discuss this case among yourselves or with anyone  
10 else or form or express any opinions or conclusions  
11 concerning the case until it is finally submitted to  
12 you for a decision.  
13 You're not to read, look at or listen to any  
14 news media accounts relating to the case, should  
15 there be any.  
16 We'll be in recess until about 3:15,  
17 approximately. Ms. Riggs needs to get some  
18 paperwork, we'll reconvene as soon as you're back so  
19 we'll be in short recess with counsel, and we'll be  
20 in recess until 3:15 with the jury.  
21 (Recess taken.)  
22 THE COURT: Please be seated.  
23 We're back in court outside the presence of  
24 the jury.

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1 Ms. Riggs, have you had a chance to formulate  
2 those instructions we discussed?  
3 MS. RIGGS: Yes, I did. May I approach, Your  
4 Honor?  
5 THE COURT: Yes, ma'am. Thank you.  
6 All right. Before addressing the  
7 instructions, Mr. Kadlic, you wanted to comment?  
8 MR. KADLIC: Yes. Did you want to canvass  
9 again -- you never did actually technically ask Mr.  
10 Volpicelli if he wanted to testify, you just told him  
11 about his right to. I have advised him --  
12 THE COURT: All right. Mr. Volpicelli, do you  
13 wish to testify in this case?  
14 THE DEFENDANT: No, Your Honor.  
15 THE COURT: All right.  
16 MR. KADLIC: Okay. At this point, Your  
17 Honor, I move to dismiss within the complaint itself  
18 all references to the second place, which I believe  
19 is the 5150 Mae Anne Boulevard, the one that Officer  
20 Phay testifies to. In both counts. And here's why.  
21 If the Court goes back and pulls up Officer  
22 Phay's testimony what they will find is that what he  
23 said in court today, which may be different than what  
24 he said in his reports, was that he never opened the

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1 paper towel, so he does not know whether it is wet or  
2 dry.  
3 One of the essential elements of the crime is  
4 it has to occur in a public place. So if he doesn't  
5 know whether it's wet or dry, that's why I  
6 specifically didn't ask him some questions, because I  
7 didn't want to lose that issue, and on top of the  
8 fact that Ms. Harmon testified that she has no idea  
9 how long that was, so there is no way to prove beyond  
10 a reasonable doubt, and it's only going to confuse  
11 the jury as to whether or not it occurred there,  
12 because without that essential element of knowing  
13 it's wet or dry, that paper towel could have been ten  
14 months old for all you know, because there's no  
15 testimony here showing any kind of dating on that.  
16 And again you go back to the testimony and I  
17 had the court reporter pull it up when I came back  
18 from lunch just to be sure I heard him right, and  
19 it's exactly what it says, he says he pulled it out  
20 of there, he put into it evidence, and that's when he  
21 left.  
22 So I believe they have failed to prove the  
23 essential element that it occurred in a public place,  
24 which was there. I mean, there's nothing illegal

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1 about dropping tissue into a dumpster, so I ask that  
2 you dismiss all reference to that and dismiss those  
3 charges as it applies to that because I think the  
4 State has failed to meet their nexus, their burden in  
5 that matter.

6 MS. RIGGS: Your Honor, the State did provide  
7 testimony that this defendant was sitting in his  
8 vehicle for 25 minutes prior to himself dumping the  
9 tissue into the trash can.

10 Now, there's a reasonable inference there  
11 that he was doing something, and we know he was in a  
12 public place. The fact of whether that semen was  
13 deposited on the towel during that 25-minute period,  
14 Your Honor, is now an issue for the jury. It's a  
15 fact issue for the jury, Your Honor, and I would ask  
16 that you not dismiss that count.

17 THE COURT: Well, as counsel knows, I can't  
18 dismiss any counts, all I can do is provide to the  
19 jury an instruction with respect to what the jury  
20 should conclude and why.

21 And on that issue, the Court will grant the  
22 defendant's motion and instruct that an instruction  
23 be prepared that the Court provides an advisory  
24 verdict on that point for that reason, that the State

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1 MR. KADLIC: Same thing, Your Honor. It  
2 states exactly what the statute says basically in a  
3 line by line manner.

4 THE COURT: And the definition of a lewd act?

5 MR. KADLIC: It comes from the Young case,  
6 and I pulled up the Young case, so I have no  
7 objection to that one either.

8 THE COURT: Okay. Any other instructions --  
9 I don't think counsel saw the instruction that I  
10 proposed regarding the defendant's right to testify.

11 MR. KADLIC: No, I have not, Your Honor.

12 THE COURT: And I need you to prepare an  
13 advisory instruction for the Court with respect to  
14 the factual basis of that location and that count.

15 MR. KADLIC: Okay. And so the advisory  
16 instruction, should I have beginning the text  
17 something like this is an advisory instruction to the  
18 jury that based on the evidence presented at the  
19 trial that the State has failed to establish an  
20 essential element of the crime of open and gross  
21 lewdness and indecent exposure as it applies to the  
22 location of 5150 Mae Anne Boulevard, Reno, Washoe  
23 County, Nevada, and the jury is instructed as to that  
24 particular location they must find the defendant not

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1 failed to establish beyond a reasonable doubt the  
2 circumstances surrounding that count.

3 MR. KADLIC: I assume it applies to  
4 actually --

5 THE COURT: And for that specific factual  
6 reason.

7 MR. KADLIC: Okay. That would be fine, Your  
8 Honor.

9 So now what do we do, do we take a recess for  
10 today and bring the jury back in the morning? I  
11 mean --

12 THE COURT: I think you ought to prepare  
13 that. I still want to give the case to the jury  
14 today.

15 Before we depart, I'd like to look at the  
16 instructions counsel has prepared.

17 MR. KADLIC: That would be fine.

18 THE COURT: The first one, as applicable to  
19 Count 1, the elements of indecent exposure, have you  
20 seen that instruction?

21 MR. KADLIC: That's fine. That appears to be  
22 exactly what the count says, Your Honor. I have no  
23 objection to it in its form.

24 THE COURT: And Count 2?

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1 guilty of those charges as it applies to that  
2 location, something to that effect?

3 THE COURT: I'll show you an advisory verdict  
4 form, or I mean an advisory --

5 MR. KADLIC: That will be fine, and I'll go  
6 have it taken care of right now.

7 THE COURT: Why don't counsel come into  
8 chambers, and we'll go over those two forms.

9 (Recess taken.)

10 THE COURT: Please be seated.

11 We are back on the record outside the  
12 presence of the jury.

13 First of all, the Court conferred with  
14 counsel regarding the instruction to be given in  
15 connection with the exercise by the defendant of his  
16 constitutional right not to testify, and it's my  
17 understanding that counsel are in agreement with the  
18 instruction proposed by the Court. Is that correct?

19 MR. KADLIC: That is correct, Your Honor.

20 MS. RIGGS: It is correct, Your Honor.

21 THE COURT: Okay. You may not have a copy,  
22 however.

23 MR. KADLIC: We do not.

24 THE COURT: All right. Then I'll ask

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1 Ms. Clerk to copy before we begin argument.  
 2 MR. KADLIC: Thank you.  
 3 THE COURT: In fact, bailiff, do you mind  
 4 making a copy while we're handling this matter.  
 5 Thank you.  
 6 All right. Additionally, the Court conferred  
 7 with counsel on the subject of an advisory  
 8 instruction as to the events surrounding the location  
 9 of 10500 North McCarran Boulevard, which, as I  
 10 understand it, is the address of the Albertson's  
 11 incident.  
 12 MS. RIGGS: That's correct, Your Honor.  
 13 THE COURT: And it is my understanding that  
 14 based on the Court's intention to give an advisory  
 15 instruction, the parties have stipulated that the  
 16 State will withdraw that incident from both Count 1  
 17 and Count 2 and does not any longer intend to  
 18 prosecute the defendant for that incident under each  
 19 of those two counts. Is that correct, Ms. Riggs?  
 20 MS. RIGGS: Correct. The incident at North  
 21 McCarran Boulevard only.  
 22 THE COURT: Yes. Now, what I would like to  
 23 do, then, in looking at the jury instruction that  
 24 contains the Amended Information is make sure that we

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1 thereabout, and then on lines 1 on page 2 of that  
 2 instruction, strike the words 10500 North McCarran  
 3 Boulevard, and/or; so that in essence the State the  
 4 proceeding with charges of indecent exposure and open  
 5 and gross lewdness for the circumstances surrounding  
 6 the incident on September 25th, 2001 on both counts.  
 7 Okay?  
 8 MS. RIGGS: Yes.  
 9 THE COURT: Mr. Kadlic, do you concur in the  
 10 amendments?  
 11 MR. KADLIC: I'm sorry, yes, I do, Your  
 12 Honor.  
 13 THE COURT: Okay. That's fine.  
 14 All right. I will read the instruction as I  
 15 have indicated, but we can retype it before it goes  
 16 to the jury.  
 17 I'd like to number the instructions at this  
 18 point. Are counsel ready to do that?  
 19 MR. KADLIC: Yes, Your Honor.  
 20 MS. RIGGS: Yes, Your Honor.  
 21 THE COURT: Okay. Ladies and gentlemen of  
 22 the jury is the first instruction.  
 23 An Amended Information is a formal method of  
 24 accusing is instruction number 2.

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1 are reciting this correct. Would we not also strike  
 2 the date, the 25th of September?  
 3 MR. KADLIC: Which date --  
 4 MS. RIGGS: Your Honor, may I have the  
 5 Court's indulgence for one moment, please?  
 6 THE COURT: Sure.  
 7 MS. RIGGS: Your Honor, we would be striking  
 8 the date of 27th of September.  
 9 MR. KADLIC: Your Honor, if that's the case,  
 10 I suppose it should be on line 8, defendant on or  
 11 about the 25th day of September.  
 12 THE COURT: Yeah. So it will read on line 8  
 13 in Count 1, that the said defendant on or about the  
 14 25th day of September AD, 2001, and then strike the  
 15 language and the 27th day of September, AD, 2001, or  
 16 thereabout, and then pick up again and before the  
 17 filing of the Information. And then continuing to  
 18 line 15, in a public parking lot during daytime hours  
 19 located, and then strike the words -- excuse me,  
 20 located at, and then strike the words 10500 North  
 21 McCarran Boulevard and/or, and then the same change  
 22 would be made on lines 21 under Count 2, 20 and 21,  
 23 between would become about on line 20, and the words  
 24 and the 27th day of September AD, 2001, or

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1 Instruction number 3, the defendant in this  
 2 matter. I'm assuming, Ms. Riggs, the State seeks  
 3 amendment of the Amended Information consistent with  
 4 the modifications that have been made to the jury  
 5 instruction?  
 6 MS. RIGGS: Yes, please, Your Honor.  
 7 THE COURT: All right. Any objection to the  
 8 amendment to the Amended Information?  
 9 MR. KADLIC: No, Your Honor. Thank you.  
 10 THE COURT: Mr. Volpicelli, do you understand  
 11 the amendments to the Amended Information?  
 12 THE DEFENDANT: I do, Your Honor.  
 13 THE COURT: What is your plea to the Amended  
 14 Information as amended?  
 15 THE DEFENDANT: Not guilty.  
 16 THE COURT: If in these instruction any rule  
 17 idea, is instruction number 4.  
 18 If during this trial, instruction number 5.  
 19 Neither the prosecution nor the defense,  
 20 instruction number 6.  
 21 Nothing that counsel say, instruction number  
 22 7.  
 23 It is the duty of attorneys, instruction  
 24 number 8.



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1 To the jury alone belongs, instruction number  
 2 9.  
 3 There are two types of evidence, instruction  
 4 number 10.  
 5 Intent may be proved, instruction number 11.  
 6 Every person charged, instruction number  
 7 number 12.  
 8 In every crime there must exist, instruction  
 9 number 13.  
 10 The burden rests upon the prosecution to  
 11 establish, instruction number 14.  
 12 A reasonable doubt is one based, instruction  
 13 number 15.  
 14 Instruction number 16, as applicable to  
 15 Count 1.  
 16 Instruction number -- excuse me. That  
 17 instruction needs to be modified so that on line 3  
 18 and the 27th day of September 2001 is stricken.  
 19 MS. RIGGS: Your Honor, I'm sorry, what are  
 20 the first few words of that instruction?  
 21 THE COURT: As applicable to Count 1, the  
 22 elements of indecent exposure are that the defendant,  
 23 Ferrill Joseph Volpicelli, did, on or about the 25th  
 24 day of September, 2001, at and within the County of

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1 Washoe, State of Nevada, 3, in a public place, to  
 2 wit: A public parking lot during daytime hours; 4,  
 3 make an open and indecent or obscene exposure of his  
 4 person to Patricia Brown Allan; 5, in that the  
 5 defendant did masturbate inside a vehicle. Okay.  
 6 MS. RIGGS: Your Honor, that's -- did you say  
 7 that's instruction number 16?  
 8 THE COURT: Yes, ma'am.  
 9 MS. RIGGS: Thank you.  
 10 THE COURT: Any objection, Mr. Kadlic?  
 11 MR. KADLIC: No, Your Honor.  
 12 THE COURT: All right. Instruction number 17  
 13 is Count 2; and again, the same change is made on  
 14 line 4 striking the date September 27th, 2001.  
 15 Instruction number 18, a lewd act is defined.  
 16 Instruction number 19, one may now knowingly  
 17 expose his or her person in a public place.  
 18 Instruction number -- excuse me. That's not  
 19 correct. In order for conduct to be indecent or  
 20 obscene is instruction number 19.  
 21 An exposure becomes indecent when it occurs,  
 22 instruction number 20.  
 23 The rules of evidence ordinarily do not  
 24 permit the opinion of a witness, instruction number

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1 21.  
 2 The penalty provided by law for the offense  
 3 is instruction number 22.  
 4 It is the constitutional right of a defendant  
 5 in a criminal trial is instruction number 23.  
 6 And here are copies of that instruction for  
 7 counsel.  
 8 MR. KADLIC: Thank you, Your Honor.  
 9 THE COURT: It is your duty as jurors to  
 10 consult, 24.  
 11 Although you are to consider only the  
 12 evidence, 25.  
 13 Upon retiring to the jury room, 26.  
 14 And then there are verdict forms, not guilty  
 15 and guilty for both counts 1 and count 2.  
 16 Does the State object to the giving of  
 17 instructions 1 through 26 as proposed by the Court?  
 18 MS. RIGGS: No objection, Your Honor.  
 19 THE COURT: Does the defense?  
 20 MR. KADLIC: No, Your Honor.  
 21 THE COURT: Does the State wish to offer any  
 22 other instructions?  
 23 MS. RIGGS: No further instructions, Your  
 24 Honor.

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1 THE COURT: Does the defense?  
 2 MR. KADLIC: Nor do I, Your Honor.  
 3 THE COURT: All right. Are counsel ready to  
 4 proceed then with the reading of instructions and  
 5 closing argument?  
 6 MS. RIGGS: Yes, Your Honor.  
 7 MR. KADLIC: Yes, Your Honor. Thank you.  
 8 THE COURT: Do you want some additional time?  
 9 MS. RIGGS: Your Honor, frankly, after all  
 10 the changes I could use approximately five more  
 11 minutes before we bring in the jury.  
 12 THE COURT: Take your time. If you need a  
 13 little bit more time. Bailiff, will you let the jury  
 14 know that we're just about there, we're almost  
 15 completed, but I want counsel to collect their  
 16 thoughts. Okay.  
 17 We'll be in recess.  
 18 (Recess taken.)  
 19 THE COURT: Please be seated.  
 20 We're back on the record in State versus  
 21 Volpicelli. Do counsel stipulate to the presence of  
 22 the jury?  
 23 MR. KADLIC: So stipulated, Your Honor.  
 24 MS. RIGGS: State will stipulated, Your

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1 Honor.

2 THE COURT: Would counsel approach, please.

3 (Off-the-record discussion

4 held at the bench.)

5 THE COURT: All right. Ladies and gentlemen,

6 it is now time to read the instructions that have  
 7 been prepared for you in this case. You will have a  
 8 complete set of these instructions in the jury room  
 9 with you for your deliberations, and I commend them  
 10 to your separate reading. I would like to recommend,  
 11 however, that you might want to make a note or two as  
 12 you hear the instructions read as to these matters,  
 13 if you might want to review more carefully or in  
 14 particular.

15 (Whereupon, the jury was instructed  
 16 by the judge and is not a part of this  
 17 record.)

18 THE COURT: You'll be provided with a verdict  
 19 form on count 1, not guilty and guilty, and a verdict  
 20 form on count 2, not guilty and guilty.

21 You'll now hear the closing statements of  
 22 counsel.

23 All right. Ms. Riggs, are you ready to  
 24 proceed?

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1 detective saw this defendant driving his van around  
 2 the parking lot and finally selecting a space close  
 3 to the front doors of the Safeway. On a 90 degree  
 4 day, this defendant never got out of that vehicle and  
 5 moved himself into the back seat of the vehicle.

6 Now, regarding count 1, which is indecent  
 7 exposure count, you heard Judge Hardesty tell you  
 8 that the elements of that crime are that on September  
 9 25th, 2001, within the County of Washoe, State of  
 10 Nevada, in a public place, to wit: A public parking  
 11 lot during daytime hours, the defendant did make an  
 12 open and indecent or obscene exposure of his person  
 13 to Patricia Brown Allen in that the defendant did  
 14 masturbate inside that vehicle.

15 Ladies and gentlemen, he did make an indecent  
 16 exposure to her. You heard Detective Allen testify  
 17 that she walked past the front of the Ford Explorer  
 18 and she made direct eye contact with that defendant.  
 19 He knew she was there. She saw him, he saw her.  
 20 There was light tint on those windows, but tint not  
 21 great enough to obstruct her vision.

22 Also you heard some testimony regarding some  
 23 kind of partition that may have been drawn between  
 24 the bucket seats. You also heard Detective Allen

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1 MS. RIGGS: I am, Your Honor.

2 THE COURT: Okay.

3 MS. RIGGS: Ladies and gentlemen, you may  
 4 have noticed while Judge Hardesty was reading you  
 5 those jury instructions that the allegations  
 6 regarding the incident at Albertson's, that is 10500  
 7 McCarran Boulevard have been omitted in this case.

8 Based on the way the testimony occurred in  
 9 this case, the State has -- will not be proceeding on  
 10 the incident that occurred at Albertson's, so you are  
 11 to disregard the testimony of Brian Phay, also that  
 12 of the criminalist, Susan Harmon, and any evidence  
 13 that you heard regarding this defendant's vasectomy.  
 14 So those are irrelevant to the case now.

15 What we are focusing on at this point are the  
 16 incidents or the incident that occurred on September  
 17 25th, 2001, in the Safeway parking lot at 2:20 p.m.  
 18 The State is proceeding on both counts, indecent  
 19 exposure and open and gross lewdness, because that  
 20 defendant committed both of those crimes on that  
 21 date.

22 Now, you heard from Detectives Wygnanski and  
 23 Allen about what they saw on September 25th, 2001 n  
 24 that Safeway parking lot. On a 90 degree day, the

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1 testify that that partition did not block her view of  
 2 the defendant. Now, at this point, defendant knows  
 3 he's spotted, and he could have driven away, but he  
 4 didn't. Detective Allen continues down the aisle,  
 5 down approximately 3 parking spaces and comes back,  
 6 notices -- and you heard her testimony in less than a  
 7 minute this defendant is not visible seated upright  
 8 in the back seat of this vehicle anywhere, so she  
 9 walks around to the side of the vehicle to see what's  
 10 going on. There it is, in plain view. This  
 11 defendant openly masturbating on the back seat of his  
 12 vehicle.

13 Ladies and gentlemen, you heard her testify  
 14 that she saw his penis in his hand, and he -- that's  
 15 what he's looking for, that's what he wanted. He  
 16 wanted somebody to come look at him, that's why he  
 17 didn't drive away when she saw him. That's why he  
 18 was there on his back in the vehicle at that time,  
 19 because that was the charge that he was looking for,  
 20 ladies and gentlemen, that was the excitement that he  
 21 was looking for by being in such a public place at  
 22 that time.

23 You heard the testimony that he was in full  
 24 view of the front doors. Well, why was he in full

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1 view of the front doors of that grocery store? It  
2 was because he wanted to see people, and he wanted  
3 them to see him.

4 Now, ladies and gentlemen, regarding count 1,  
5 you heard Judge Hardesty tell you, you know, in  
6 instruction 20 that exposure becomes indecent when it  
7 occurs at such a time and place where a reasonable  
8 person knows or should know that his act will be open  
9 to the observation of others. The required criminal  
10 intent is usually established by some action by which  
11 the defendant either draws attention to his exposed  
12 condition or by a display in a place that it must be  
13 presumed it was intended to be seen by others. Let  
14 me correct that. Or by a place so public that it  
15 must be presumed it was intended to be seen by  
16 others.

17 How can you get more public than a parking  
18 lot in a grocery store at 2:20 p.m. about 30 to 40  
19 feet away from the doors as Detective Wagnanski  
20 testified?

21 This defendant intentionally selected a  
22 public place so that he could be seen for his active  
23 masturbation because that is the purpose, that's his  
24 motivation, that is his motivation for masturbating

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1 so as you heard Detective Allen testify that it  
2 obstructed her view none whatsoever.

3 By the way, ladies and gentlemen, you heard  
4 an implication in this case, well, the detective  
5 doesn't have any business looking at somebody's  
6 private vehicle. Well, who else was in that parking  
7 lot did we hear? We heard there were several people  
8 in that parking lot, mostly women and their kids.  
9 You heard Detective Allen testify that the window in  
10 that Ford Explorer, the bottom of the window was  
11 approximately at her rib level. That's this high.

12 How many kids in Reno have heads higher than  
13 this level? How many kids in Reno or Washoe County  
14 walk straight ahead at all times and don't look at  
15 what's going on around them? Anybody who walked past  
16 that vehicle could have seen what that defendant was  
17 doing. It was in a perfectly public place, he made  
18 no attempt to hide himself, and that in fact, ladies  
19 and gentlemen, is what he was looking for, it's what  
20 he wanted, and that's what happened.

21 Now, ladies and gentlemen, moving on to count  
22 2, that's the open or gross lewdness charge, the  
23 elements of that crime are that on or between --  
24 pardon me, that on September 25th, 2001, at and

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1 is the fact that he can see out and the risk that  
2 other people are going to be able to see in.

3 Now, regarding the issue of privacy, did he  
4 intend for this to be private? I just asserted to  
5 you that no, he did not intend this to be private.  
6 How else can we tell? I told you that he's in this  
7 public parking lot. Well, where could he have driven  
8 this vehicle? He could have driven it up to Peavine,  
9 he could have driven it up to Verdi in the bushes.  
10 He could have driven it to a park away from other  
11 people. He could have driven it to the back of the  
12 store where there's no traffic. And he didn't do  
13 that. And again, why, because he wanted to see out,  
14 he wanted others to see him.

15 Now, what about this partition. Was that  
16 meant to be private? Well, you heard the testimony  
17 of Detective Allen. What exactly did this little  
18 partition cover? She said it covered no more than  
19 the space between the two seats. Did it cover the  
20 front windshield? No. Did it cover either of the  
21 side windows with a light tint? No. Did he have  
22 some sort of curtain area around the inside of the  
23 vehicle? No. That partition was not intended to  
24 keep the view of other people out. And it did not do

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1 within the County of Washoe, State of Nevada, in a  
2 public place, to wit: A public parking lot, during  
3 daytime hours, the defendant committed an act of  
4 lewdness and that was instruction 17.

5 In instruction 18, you're instructed that a  
6 lewd act is defined as the unlawful indulgence of  
7 lust involving gross indecency with respect to sexual  
8 conduct.

9 This defendant was masturbating in the back  
10 of his vehicle. That was direct testimony,  
11 eyewitness testimony, no doubt about it. He was  
12 masturbating, that's an unlawful lewd act when  
13 committed in a public place. That proves this  
14 State's Count 2.

15 Again, he exposed himself to anybody who  
16 would walk by, but in particular detective Patricia  
17 Allen regarding Count 1, and he was masturbating to  
18 fulfill the elements of Count 2.

19 So, ladies and gentlemen, as I told you at  
20 the beginning of this case, it's a simple case. The  
21 State is asking you to convict this defendant, find  
22 him guilty beyond a reasonable doubt of both Counts 1  
23 and Count 2. Thank you.

24 THE COURT: All right. Thank you.

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1 Mr. Kadlic, are you ready to proceed.

2 MR. KADLIC: Yes, Your Honor.

3 I'd like to give you the framework of what

4 I'd like you to look at and those are the three  
5 instructions that I think are the keys to this whole  
6 case, 18, 19, and 20.

7 Let's start with looking at peeping Patricia  
8 as I like to think of her. The officer walks by the  
9 vehicle the first time and she admits that normally  
10 most people are not going to walk back, she sees the  
11 defendant, she sees his head and shoulders, but she's  
12 not satisfied, not peeping Patricia, she wants to  
13 come back, why, because she hasn't seen enough, and  
14 she comes back by and walks by so she can look into  
15 the vehicle.

16 And she clearly admits to you that but for  
17 looking in you can't see him. Whether you like the  
18 fact that Mr. Volpicelli was out there masturbating  
19 in the back of that car, the bottom line is he wasn't  
20 doing it in open, public view. If he wanted to do  
21 that, why didn't he sit in the front seat? He could  
22 have sat up there, if it's as the prosecutor says,  
23 why didn't he sit in the front seat, he could be  
24 looking around, he could see everybody, and he could

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1 head rest. There were no cars on one side, there was  
2 one car on the other. It wasn't like again he was  
3 looking for attention.

4 And again, when he sees her that first time,  
5 like she admitted, like the officer admitted most  
6 people aren't going to walk back by, you walk to your  
7 car and go. You don't go back by. She came back by  
8 because she didn't see the first time she glanced  
9 through, so she came back by to take another look.  
10 And what she saw is what she -- but for her looking  
11 in, but for peeping Patricia looking into the window  
12 we would not be here today, if she had -- I mean,  
13 again, you don't have to like what he did, but he  
14 didn't do it in public view, he didn't do it for  
15 everybody to see because if he did, he would have sat  
16 in the front of the seat.

17 So you have to look at the entire case, you  
18 have to look at the pictures and use your common  
19 sense, look at instructions 18, 19, 20, and bring  
20 back what I think is the right verdict, and that is  
21 the verdict of not guilty on both counts.

22 Thank you.

23 THE COURT: All right, Mr. Kadlic.

24 Ms. Riggs, your final statement.

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1 do it at the same time if that's what is going to get  
2 them to get his jollies off.

3 Ask yourself that. Why didn't he do it in  
4 the front seat? Why did he put up a partition? You  
5 can look at what they said about those head rests.  
6 If you look at those head rests, those sit up there  
7 high, between the partition and the head rest it's  
8 clear in the back that you can't see unless you go  
9 and look in there.

10 Further the officer admits she had to  
11 literally go up and look in because if you look  
12 straight across you can't see anything. Why?  
13 Because he's laying down on the seat. If he truly  
14 wants to get some sort of public acknowledgement of  
15 what he's doing, he's not going to sit down in his  
16 seat, he's not going to lay down, she admits he's  
17 laying down on his left side doing this.

18 Again, you don't have to like what he did,  
19 you probably don't, but the bottom line is he didn't  
20 do it in the open and public view, he's not the  
21 pervert who is out in the park, behind a bush  
22 watching children doing masturbating.

23 This is not the case. He's in the privacy of  
24 his own vehicle, he's got his partition, he's got his

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1 MS. RIGGS: Ladies and gentlemen, regarding  
2 Detective Allen, as you heard her testimony to, it is  
3 her job where she sees suspicious activity to  
4 investigate.

5 She walked by the vehicle, saw what looked  
6 suspicious to her, a person sitting in the back seat  
7 of the vehicle grasping the front seat in 90 degree  
8 heat. She walked by again to see what was going on.  
9 That's her job.

10 Also, you heard Mr. Kadlic say, well, she had  
11 to walk up to the window and look in. No, that's no  
12 what she testified to. She agreed with him, when he  
13 asked her did she see anything if she looked straight  
14 across. Well, no, because the defendant was lying  
15 down.

16 She looked down while she was walking by the  
17 vehicle. She wasn't up to the window looking in,  
18 peering in. Even if she was, that was within her  
19 right to do.

20 But the point is that anybody could have seen  
21 him masturbating in that vehicle. Anybody. And  
22 anybody could have looked down. And he says we  
23 wouldn't be here if it weren't for peeping Patricia.  
24 Well, how does he know that? How do we know that

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1 this wouldn't have been reported by somebody else?  
2 How would we know?

3 Also, regarding privacy, ladies and  
4 gentlemen, and I ask you to use your common sense.  
5 Was this defendant looking for privacy in the  
6 location where he was parked at Safeway 50, 30 to 40  
7 feet from the front doors of the grocery store with  
8 no privacy whatsoever, with a car parked right next  
9 to him? No, he was not.

10 So, ladies and gentlemen, again, I ask you to  
11 use your common sense, return a verdict of guilty on  
12 both counts. Thank you.

13 THE COURT: All right. Thank you, Ms. Riggs.

14 Ladies and gentlemen, contrary to the  
15 admonition I have given to you throughout the day  
16 that you should not discuss this case, now is your  
17 time to do so.

18 I will ask Ms. Clerk to swear in the bailiff  
19 who will take charge of the jury.

20 With respect to Ms. Huffer, you are the  
21 alternate in the case. Out of courtesy to your  
22 schedule you may leave the courthouse; however, you  
23 are admonished that you are not to discuss this case  
24 with anyone or form or express any opinions

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1 We're giving you conflicting instructions. I'm  
2 sorry. If you wouldn't mind waiting outside the  
3 courtroom, the bailiff will get your phone number  
4 from you. Thank you.

5 I'd like to put a few matters on the record.  
6 First, it is my understanding that the parties  
7 stipulate to the withdrawal from evidence of all  
8 exhibits relating to the incident at 10500; is that  
9 correct?

10 MS. RIGGS: That's accurate, Your Honor.

11 MR. KADLIC: So stipulate, Your Honor.

12 THE COURT: And those exhibits would include,  
13 Ms. Clerk -- let's get them by number:

14 THE CLERK: 4, 5, 6, 7, 8.

15 THE COURT: 4, 5, 6, 7, 8a and b.

16 THE CLERK: Not 6, Your Honor. 4, 5, 7 and  
17 8. I'm sorry.

18 THE COURT: 4, 5, 7, 8, and 8A and B.

19 MR. KADLIC: That would be fine, Your Honor,  
20 I agree to that.

21 THE COURT: Okay. Additionally, the Court  
22 advised counsel that it intended to give an  
23 additional instruction which has been inserted in the  
24 packet as number 24. That is an instruction that

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1 concerning the case unless and until you are fully  
2 discharged.

3 If you'll leave a phone number with the  
4 bailiff, we will advise you that a verdict has been  
5 rendered or of the need for you to return to the  
6 courthouse.

7 You're not to read or look at any news media  
8 accounts relating to the case should there be any.

9 Ms. Clerk.

10 (The bailiff was sworn to  
11 take charge of the jury at  
12 this time.)

13 THE COURT: All right. Ladies and gentlemen,  
14 you may begin your deliberations.

15 All rise for the jury, please.

16 (The following proceedings  
17 were held outside the  
18 presence of the jury.)

19 THE COURT: Please be seated.

20 MR. KADLIC: Is there juror --

21 Ms. Huffer, you'll have to step outside the  
22 courtroom, please.

23 MS. HUFFER: He told me to sit here.

24 THE COURT: Oh, that's okay. Thank you.

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1 reads a separate crime is charged in each count, you  
2 must decide each count separately, your verdict on  
3 one count should not control your verdict on any  
4 other count. And the Court understood before reading  
5 the instructions that counsel concurred with that  
6 additional instruction.

7 MS. RIGGS: That's correct, Your Honor.

8 MR. KADLIC: That's correct, Your Honor.

9 THE COURT: The Court then renumbered  
10 instructions number 24, 25, and 26 as 25, 26, and 27.  
11 Okay?

12 MS. RIGGS: That's fine, Your Honor.

13 THE COURT: The State needs to retype  
14 instructions 3, 16, and 17. And Ms. Clerk has those,  
15 and I have highlighted the areas where they need to  
16 be revised before they are taken into the jury for  
17 their review.

18 Can you attend to that, Ms. Riggs?

19 MS. RIGGS: Yes, I can, Your Honor.

20 THE COURT: Okay. All right. Anything  
21 further then?

22 MR. KADLIC: Do they get the exhibits, as  
23 well, in the jury room?

24 THE COURT: With the exceptions of course of

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1 the ones that have been withdrawn, yes.  
 2 MR. KADLIC: Of the ones we redacted?  
 3 THE COURT: Yes.  
 4 MR. KADLIC: Okay. Thank you.  
 5 THE COURT: All right, then, we'll be in  
 6 recess until there are either questions or a verdict  
 7 in this case. Okay.  
 8 (Recess taken.)  
 9 THE COURT: Please be seated.  
 10 Do counsel stipulate to the presence of the  
 11 jury absent the alternate?  
 12 MS. RIGGS: State will stipulate, Your Honor.  
 13 MR. KADLIC: So stipulated, Your Honor.  
 14 THE COURT: Ladies and gentlemen, it's my  
 15 understanding that you have reached a verdict in this  
 16 matter.  
 17 Have you selected a foreperson? Okay.  
 18 Mr. Pruett, correct?  
 19 MR. PRUETT: Yes, sir.  
 20 THE COURT: Would you hand the verdict forms  
 21 to the bailiff, please.  
 22 All right. Ms. Clerk, would you please read  
 23 the verdicts.  
 24 Mr. Volpicelli, will you please rise.

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1 THE CLERK: In the Second Judicial District  
 2 Court of the State of Nevada, in and for the County  
 3 of Washoe, State of Nevada, the State of Nevada,  
 4 plaintiff, versus Ferrill Joseph Volpicelli,  
 5 defendant.  
 6 Case number CR02-0147, Department 9.  
 7 Verdict. We, the jury in the above entitled  
 8 matter, find the defendant, Ferrill Joseph Volpicelli  
 9 guilty of Count One, indecent exposure.  
 10 Dated this 10th day of July, 2003, Chris  
 11 Pruett, foreperson.  
 12 Verdict. We, the jury in the above entitled  
 13 matter find the defendant, Ferrill Joseph Volpicelli  
 14 guilty of Count 2, open or gross lewdness.  
 15 Dated this 10th day of July, 2003, Chris  
 16 Pruett, foreperson.  
 17 THE COURT: Do you wish to have the jury  
 18 polled, Mr. Kadlic?  
 19 MR. KADLIC: No, Your Honor, Your Honor.  
 20 MS. RIGGS: No, thank you, Your Honor.  
 21 THE COURT: All right. Mr. Volpicelli, the  
 22 Court will set a sentencing date for this case.  
 23 MR. KADLIC: Your Honor, could we approach  
 24 the bench for a minute?

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1 THE COURT: Yes.  
 2 (Off-the-record discussion held  
 3 at the bench.)  
 4 THE COURT: All right. The Court will set  
 5 the sentencing day after conferring with counsel at  
 6 the bench for December the 5th at 8:30.  
 7 At that time, Mr. Volpicelli, you'll be  
 8 required to pay a \$25 administrative-assessment fee.  
 9 You are ordered to cooperate with the  
 10 Division of Parole and Probation. They will prepare  
 11 a presentence report that will guide the Court in  
 12 sentencing.  
 13 And you'll be taken into custody at this  
 14 time.  
 15 All right. Ladies and gentlemen of the jury,  
 16 this concludes your service in this case. On behalf  
 17 of the Court and counsel and the parties, I would  
 18 like to thank you for your time and effort. This  
 19 will conclude your service for at least one year.  
 20 There's a new statute that's been adopted that will  
 21 give you an exemption for two years starting October  
 22 1st we're going to extend that to you all, however,  
 23 even though it isn't until October first. And  
 24 hopefully a longer period of time if we can summons a

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1 greater number of our citizens to come in as jurors.  
 2 You're under no obligation to discuss this  
 3 case with anyone. It is your right to decline to do  
 4 so. However, I'll tell you that when I was trying  
 5 cases, I always found it helpful to be able to speak  
 6 with jurors and gain from you some insight about my  
 7 performance as a lawyer or your thoughts about the  
 8 case that would help me in my work the next time  
 9 around.  
 10 However, as I have explained, you are under  
 11 no obligation to talk to anyone about the case.  
 12 Before you leave the courthouse, I would like to  
 13 invite all of you back to chambers so that I can  
 14 thank you personally and meet all of personally. We  
 15 thank you for your time. You are discharged.  
 16 All rise for the jury, please.  
 17 MR. KADLIC: Your Honor, Mr. Volpicelli has  
 18 one question of the Court. It has to do with his  
 19 bail status, I think.  
 20 THE DEFENDANT: Your Honor, I think about a  
 21 month and a half ago, we brought up the matter of an  
 22 OR with my cases. In the interest of prudence with  
 23 respect to me accomplishing the resolution of my  
 24 federal charges and at the same time saving the State

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1 money, but then I guess with all the paper  
2 complications, it didn't turn out that way.

3 My family is wishing to post bail so that I  
4 could go into federal custody. When they called over  
5 to Washoe County Sheriff's Office, someone over them  
6 advised them that if I do go into federal custody,  
7 even though there might be some type of stipulation  
8 with the US attorney and for me to stay here and  
9 resolve these charges, which is in all likelihood,  
10 there's a possibility that something may happen and  
11 I'll not be able to appear here and receive an FTA.  
12 And my family just wants to know if you'll revoke the  
13 bail money and keep it or because I'm still in  
14 custody that you'll just hold it until I get back  
15 into state custody. They just wanted something in  
16 writing to that effect.

17 THE COURT: I'm not going to respond to that  
18 orally. I would ask Mr. Kadlic to put a motion  
19 before the Court or your other counsel so that we can  
20 clarify your bail status if orders are appropriate  
21 and the State has an opportunity to respond then I  
22 can issue them, okay? So you can put this back on  
23 calendar when I have an order or a written motion or  
24 I can address the issues.

PAGE 175

1 STATE OF NEVADA)  
2 ) Ss.  
3 COUNTY OF WASHOE)

4 I, DONNA DAVIDSON, Official Reporter of the  
5 Second Judicial District Court of the State of  
6 Nevada, in and for the County of Washoe, was present  
7 in Department No. 9 of the above-entitled Court on  
8 said date, time and hour;

9 That the foregoing transcript is an  
10 uncertified rough draft transcription of my stenotype  
11 notes of said proceedings. This transcript has not  
12 been edited, proofread, finalized, indexed or  
13 certified.

14  
15  
16 DATED: At Reno, Nevada, this 8th day of  
17 January, 2004.

18  
19  
20 *Donna Davidson*  
21 DONNA DAVIDSON, CCR #318  
22  
23  
24

PAGE 174

1 MR. KADLIC: I think that really needs to  
2 come from his other counsel. This is my sum total of  
3 Mr. Volpicelli.

4 THE COURT: Well, then let him know.

5 MR. KADLIC: I will let him. He has to talk  
6 to his family, and then Mr. Van Ry is his counsel on  
7 the other charges.

8 THE COURT: I understand your request, but I  
9 want it to be in writing. Okay.

10 MR. KADLIC: Thank you, Your Honor.  
11 (Proceedings concluded.)

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ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEVADA

FILED

2004 MAY 14 AM 9:06

No. 42803 RONALD A. LONGTIN, JR.

FILED BY *C. Kepler* DEPUTY

MAY 12 2004

ORDER OF AFFIRMANCEJANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY *J. Richards*  
CHIEF DEPUTY CLERK

FERRILL JOSEPH VOLPICELLI,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count each of indecent exposure and open or gross lewdness. The district court sentenced appellant Ferrill Joseph Volpicelli to serve two concurrent prison terms of 12-48 months and ordered him to pay a fine of \$10,000.00.

First, Volpicelli contends that the evidence presented at trial was insufficient to support the jury's finding that he was guilty beyond a reasonable doubt of indecent exposure and open or gross lewdness. Volpicelli argues that he should not have been found guilty because the acts for which he was convicted occurred "in his vehicle and not in public view." We disagree with Volpicelli's contention.

Our review of the record on appeal reveals sufficient evidence to establish guilt beyond a reasonable doubt as determined by a rational trier of fact.<sup>1</sup> In particular, we note that Detective Patricia Allen of the Reno Police Department testified at trial that she was instructed to investigate a vehicle parked in the lot outside of a Shopko and a Safeway

<sup>1</sup>See Wilkins v. State, 96 Nev. 367, 609 P.2d 309 (1980); see also Mason v. State, 118 Nev. 554, 559, 51 P.3d 521, 524 (2002) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)).



store, approximately 30-40 yards from the front entrances. Detective Allen stated that she arrived at the busy parking lot at 2:30 p.m.; she walked by the vehicle and saw Volpicelli through the "lightly-tinted" windows in the backseat, they made eye contact and the detective continued past the vehicle. Less than one minute later, Detective Allen turned around and headed back towards the vehicle in question. This time, Detective Allen saw Volpicelli laying down on the backseat of the vehicle, his shirt "was pulled up around the top part of his chest . . . [and] [h]is pants were pulled down around his knees, along with his underwear." Detective Allen testified that she could clearly see Volpicelli's exposed penis in his right hand, and that he was masturbating.

Based on the above, we conclude that the jury could reasonably infer from the evidence presented that Volpicelli committed the crimes of indecent exposure and open or gross lewdness.<sup>2</sup> This court has stated that a conviction for both indecent exposure and open or gross lewdness requires intentional public sexual conduct or exposure.<sup>3</sup> Here, Volpicelli intentionally exposed his penis and masturbated in the backseat of his vehicle while parked in a busy public parking lot in the middle of the afternoon. Although Volpicelli's actions took place in the backseat of his vehicle, he was readily observable by any passerby, and therefore, his argument that he was not in public view is without merit. It is for the

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<sup>2</sup>NRS 201.220(1)(b) ("[a] person who makes any open and indecent or obscene exposure of his person . . . is guilty . . . [f]or any subsequent offense, of a category D felony"); NRS 201.210(1)(b) ("[a] person who commits any act of open or gross lewdness is guilty . . . [f]or any subsequent offense, of a category D felony").

<sup>3</sup>See Young v. State, 109 Nev. 205, 215, 849 P.2d 336, 343 (1993); Ranson v. State, 99 Nev. 766, 767-68, 670 P.2d 574, 575 (1983).

jury to determine the weight and credibility to give conflicting testimony, and the jury's verdict will not be disturbed on appeal where, as here, sufficient evidence supports the verdict.<sup>4</sup> We also note that circumstantial evidence alone may sustain a conviction.<sup>5</sup> Therefore, we conclude that the State presented sufficient evidence to sustain the conviction.

Second, Volpicelli contends that the district court erred at sentencing by admitting into evidence a prior conviction in order to enhance his conviction to a felony pursuant to NRS 201.210(1)(b) and NRS 201.220(1)(b). In 1983, Volpicelli was charged with indecent exposure, a gross misdemeanor. Volpicelli argues that a review of the change of plea hearing transcript reveals that there was never a written waiver of rights, he was not thoroughly canvassed by the district court, "[b]ut, most of all, it shows that the district court failed to ask Defendant how he wished to plea[d]." Volpicelli claims that "[t]he failure to ask [him] how he wished to plea[d] negated the prior conviction," and therefore, could not be used for enhancement purposes in the instant case. We disagree with Volpicelli's contention.

To establish the validity of a prior misdemeanor conviction, the State must "affirmatively show . . . that counsel was present . . . and that the spirit of constitutional principles was respected in the prior misdemeanor proceedings."<sup>6</sup> "[I]f the state produces a record of a judgment of conviction which shows that the defendant was represented by counsel, then it is presumed that the conviction is constitutionally

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<sup>4</sup>See Bolden v. State, 97 Nev. 71, 624 P.2d 20 (1981); see also McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992).

<sup>5</sup>See Buchanan v. State, 119 Nev. \_\_\_, \_\_\_, 69 P.3d 694, 705 (2003).

<sup>6</sup>Dressler v. State, 107 Nev. 686, 697, 819 P.2d 1288, 1295 (1991).

adequate.”<sup>7</sup> “[I]n consideration of the realities of misdemeanor prosecutions,” a formal, written judgment of conviction is not necessary if other documents provide sufficient evidence of the conviction.<sup>8</sup> The burden shifts to the defendant, represented by counsel, to present evidence to rebut the presumption of constitutionality.<sup>9</sup>

In the instant case, we conclude that the State has met its burden and demonstrated that the spirit of constitutional principles was respected. Volpicelli was represented by attorney Lew Carnahan on September 22, 1983, when he pleaded guilty to gross misdemeanor indecent exposure. Our review of the change of plea hearing transcript reveals that Volpicelli was present when Carnahan informed the district court about the plea negotiations and that Volpicelli agreed to plead guilty to indecent exposure with the hope of receiving probation. The district court asked Volpicelli if he had any questions about the proceedings, and he replied that he did not. In response to the district court’s questions, Volpicelli affirmatively answered that: it was his intent to plead guilty; Carnahan explained the rights he was waiving by pleading guilty; he was not coerced or induced by any means to plead guilty; and he was pleading voluntarily. Volpicelli also informed the district court that he was aware of the possible sentencing options, that the matter of sentencing was left to the district court, and that he was pleading guilty because he was, in fact, guilty of indecent exposure.

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<sup>7</sup>Davenport v. State, 112 Nev. 475, 478, 915 P.2d 878, 880 (1996).


<sup>8</sup>English v. State, 116 Nev. 828, 836, 9 P.3d 60, 64 (2000); see also Pettipas v. State, 106 Nev. 377, 794 P.2d 705 (1990).


<sup>9</sup>Davenport, 112 Nev. at 478, 915 P.2d at 880.

We also note that included in the record on appeal is a waiver of preliminary examination form signed by Volpicelli in 1983, and the criminal information stating that Volpicelli was being charged with "open, indecent, and obscene exposure of his person" for actions taking place in the parking lot of a Mervyn's store. Accordingly, based on all of the above, we conclude that the district court did not err in using the 1983 indecent exposure conviction to enhance Volpicelli's sentence in the instant case to a felony.

Having considered Volpicelli's contentions and concluded that they are without merit, we

ORDER the judgment of conviction AFFIRMED.<sup>10</sup>

  
\_\_\_\_\_, J.  
Rose

  
\_\_\_\_\_, J.  
Maupin

  
\_\_\_\_\_, J.  
Douglas

cc: Hon. James W. Hardesty, District Judge  
John J. Kadlic  
Attorney General Brian Sandoval/Carson City  
Washoe County District Attorney Richard A. Gammick  
Washoe District Court Clerk

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<sup>10</sup>Because Volpicelli is represented by counsel in this matter, we decline to grant him permission to file documents in proper person in this court. See NRAP 46(b). Accordingly, the clerk of this court shall return to Volpicelli unfiled all proper person documents he has submitted to this court in this matter.

ORIGINAL

FERRILL T. VOLPICELLI  
665 HOSP  
BOX 650INDIAN SPRING, NEVADA 89018  
DEFENDANT PRO PER

FILED

2004 MAY 28 PM 2:02

THE SECOND JUDICIAL DISTRICT COURT OF NEVADA  
IN AND FOR THE COUNTY OF WASHOEBY RONALD A. JOHNSON, JR.  
DEPUTYSTATE OF NEVADA,  
PLAINTIFF,

CR-02-0147


DEPT. 9

FERRILL T. VOLPICELLI,  
DEFENDANT

NOTICE OF ADDRESS CHANGE

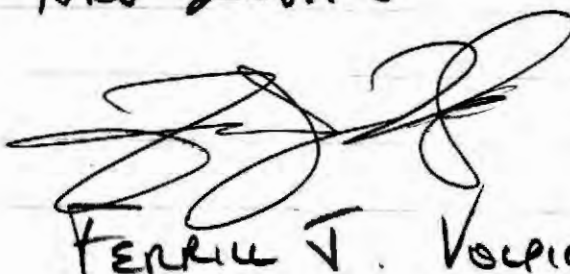
NOTICE IS HEREBY GIVEN OF A CHANGE OF ADDRESS FOR  
 DEFENDANT, FERRILL T. VOLPICELLI, HEREOFORTH, ALL  
 CORRESPONDENCE IS TO BE SENT TO C/O  
 H.D.S.P. BOX 650 INDIAN SPRINGS, NEVADA 89018

DATED THIS 24 DAY  
 OF MAY, 2004



FERRILL T. VOLPICELLI  
 DEFENDANT PRO PER

CERTIFICATE OF MAILING  
 DATED AND COPY MAILED  
 ON THIS 24 DAY OF MAY, 2004  
 TO WASHOE COUNTY DISTRICT  
 ATTORNEY & JOHN KADLEC ESQ  
 AS CERTIFIED UNDER PENALTY  
 OF PERJURY PURSUANT TO  
 NRS 208.165



FERRILL T. VOLPICELLI

IN THE SUPREME COURT  
OF THE STATE OF NEVADA

FERRILL JOSEPH VOLPICELLI,  
APPELLANT,

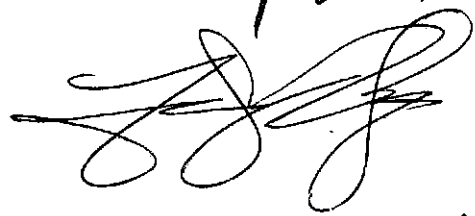
No. 42603  
CR02-0147  
D-9

NOTICE OF ADDRESS CHANGE

THE STATE OF NEVADA,  
RESPONDENT,

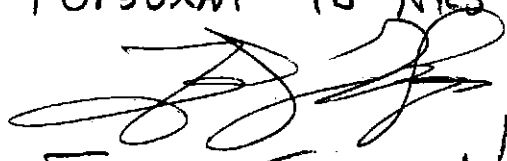
NOTICE IS HEREBY GIVEN OF A CHANGE OF ADDRESS  
FOR APPELLANT, FERRILL JOSEPH VOLPICELLI, HEREOFORTH,  
ALL CORRESPONDENCE IS TO BE SENT TO C/O  
H.D.S.P. BOX 650 INDIAN SPRINGS, NV 89018

DATED THIS 24 DAY  
OF MAY, 2004



FERRILL JOSEPH VOLPICELLI  
APPELLANT PRO PER

CERTIFICATE OF MAILING  
DATED AND COPY MAILED  
ON THIS 24 DAY OF MAY,  
2004 TO DISTRICT COURT  
CLERK, NEVADA ATTORNEY  
GENERAL & WASHOE COUNTY  
DISTRICT ATTORNEY AS CERTIFIED  
UNDER PENALTY OF PERJURY  
PURSUANT TO NRS 208.165



ORIGINAL

CRO2-0147

FILED

IN THE SUPREME COURT OF THE STATE OF NEVADA

2004 JUN -9 PM 2: 14

No. 42603  
RONALD A. LONGTIN, JR.

FILED

MAY 12 2004

ORDER OF AFFIRMANCEJANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY *J. Richards*  
CHIEF DEPUTY CLERK

FERRILL JOSEPH VOLPICELLI,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count each of indecent exposure and open or gross lewdness. The district court sentenced appellant Ferrill Joseph Volpicelli to serve two concurrent prison terms of 12-48 months and ordered him to pay a fine of \$10,000.00.

First, Volpicelli contends that the evidence presented at trial was insufficient to support the jury's finding that he was guilty beyond a reasonable doubt of indecent exposure and open or gross lewdness. Volpicelli argues that he should not have been found guilty because the acts for which he was convicted occurred "in his vehicle and not in public view." We disagree with Volpicelli's contention.

Our review of the record on appeal reveals sufficient evidence to establish guilt beyond a reasonable doubt as determined by a rational trier of fact.<sup>1</sup> In particular, we note that Detective Patricia Allen of the Reno Police Department testified at trial that she was instructed to investigate a vehicle parked in the lot outside of a Shopko and a Safeway

<sup>1</sup>See Wilkins v. State, 96 Nev. 367, 609 P.2d 309 (1980); see also Mason v. State, 118 Nev. 554, 559, 51 P.3d 521, 524 (2002) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)).

DC-0900055303-018  
CRO2-0147  
STATE VS FERRILL JOSEPH VOLPICELLI  
District Court  
Washoe County  
05/09/2004 09:03 AM  
4134  
MTORPEC  
hnr

store, approximately 30-40 yards from the front entrances. Detective Allen stated that she arrived at the busy parking lot at 2:30 p.m.; she walked by the vehicle and saw Volpicelli through the "lightly-tinted" windows in the backseat, they made eye contact and the detective continued past the vehicle. Less than one minute later, Detective Allen turned around and headed back towards the vehicle in question. This time, Detective Allen saw Volpicelli laying down on the backseat of the vehicle, his shirt "was pulled up around the top part of his chest . . . [and] [h]is pants were pulled down around his knees, along with his underwear." Detective Allen testified that she could clearly see Volpicelli's exposed penis in his right hand, and that he was masturbating.

Based on the above, we conclude that the jury could reasonably infer from the evidence presented that Volpicelli committed the crimes of indecent exposure and open or gross lewdness.<sup>2</sup> This court has stated that a conviction for both indecent exposure and open or gross lewdness requires intentional public sexual conduct or exposure.<sup>3</sup> Here, Volpicelli intentionally exposed his penis and masturbated in the backseat of his vehicle while parked in a busy public parking lot in the middle of the afternoon. Although Volpicelli's actions took place in the backseat of his vehicle, he was readily observable by any passerby, and therefore, his argument that he was not in public view is without merit. It is for the

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<sup>3</sup>See Young v. State, 109 Nev. 205, 215, 849 P.2d 336, 343 (1993); Ranson v. State, 99 Nev. 766, 767-68, 670 P.2d 574, 575 (1983).



jury to determine the weight and credibility to give conflicting testimony, and the jury's verdict will not be disturbed on appeal where, as here, sufficient evidence supports the verdict.<sup>4</sup> We also note that circumstantial evidence alone may sustain a conviction.<sup>5</sup> Therefore, we conclude that the State presented sufficient evidence to sustain the conviction.

Second, Volpicelli contends that the district court erred at sentencing by admitting into evidence a prior conviction in order to enhance his conviction to a felony pursuant to NRS 201.210(1)(b) and NRS 201.220(1)(b). In 1983, Volpicelli was charged with indecent exposure, a gross misdemeanor. Volpicelli argues that a review of the change of plea hearing transcript reveals that there was never a written waiver of rights, he was not thoroughly canvassed by the district court, "[b]ut, most of all, it shows that the district court failed to ask Defendant how he wished to plea[d]." Volpicelli claims that "[t]he failure to ask [him] how he wished to plea[d] negated the prior conviction," and therefore, could not be used for enhancement purposes in the instant case. We disagree with Volpicelli's contention.

To establish the validity of a prior misdemeanor conviction, the State must "affirmatively show . . . that counsel was present . . . and that the spirit of constitutional principles was respected in the prior misdemeanor proceedings."<sup>6</sup> "[I]f the state produces a record of a judgment of conviction which shows that the defendant was represented by counsel, then it is presumed that the conviction is constitutionally

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adequate.”<sup>7</sup> “[I]n consideration of the realities of misdemeanor prosecutions,” a formal, written judgment of conviction is not necessary if other documents provide sufficient evidence of the conviction.<sup>8</sup> The burden shifts to the defendant, represented by counsel, to present evidence to rebut the presumption of constitutionality.<sup>9</sup>

In the instant case, we conclude that the State has met its burden and demonstrated that the spirit of constitutional principles was respected. Volpicelli was represented by attorney Lew Carnahan on September 22, 1983, when he pleaded guilty to gross misdemeanor indecent exposure. Our review of the change of plea hearing transcript reveals that Volpicelli was present when Carnahan informed the district court about the plea negotiations and that Volpicelli agreed to plead guilty to indecent exposure with the hope of receiving probation. The district court asked Volpicelli if he had any questions about the proceedings, and he replied that he did not. In response to the district court’s questions, Volpicelli affirmatively answered that: it was his intent to plead guilty; Carnahan explained the rights he was waiving by pleading guilty; he was not coerced or induced by any means to plead guilty; and he was pleading voluntarily. Volpicelli also informed the district court that he was aware of the possible sentencing options, that the matter of sentencing was left to the district court, and that he was pleading guilty because he was, in fact, guilty of indecent exposure.

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<sup>8</sup>English v. State, 116 Nev. 828, 836, 9 P.3d 60, 64 (2000); see also Pettipas v. State, 106 Nev. 377, 794 P.2d 705 (1990).


<sup>9</sup>Davenport, 112 Nev. at 478, 915 P.2d at 880.

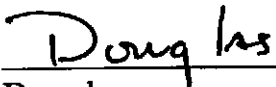
We also note that included in the record on appeal is a waiver of preliminary examination form signed by Volpicelli in 1983, and the criminal information stating that Volpicelli was being charged with "open, indecent, and obscene exposure of his person" for actions taking place in the parking lot of a Mervyn's store. Accordingly, based on all of the above, we conclude that the district court did not err in using the 1983 indecent exposure conviction to enhance Volpicelli's sentence in the instant case to a felony.

Having considered Volpicelli's contentions and concluded that they are without merit, we

ORDER the judgment of conviction AFFIRMED.<sup>10</sup>

 J.  
Rose

 J.  
Maupin

 J.  
Douglas

cc: Hon. James W. Hardesty, District Judge  
John J. Kadlic  
Attorney General Brian Sandoval/Carson City  
Washoe County District Attorney Richard A. Gammick  
Washoe District Court Clerk

<sup>10</sup>Because Volpicelli is represented by counsel in this matter, we decline to grant him permission to file documents in proper person in this court. See NRAP 46(b). Accordingly, the clerk of this court shall return to Volpicelli unfiled all proper person documents he has submitted to this court in this matter.

ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEVADA

FILED

2004 JUN -9 PM 2:1

RONALD A. LONGTIN, J.

BY C. Kepler  
DEPUTY

FERRILL JOSEPH VOLPICELLI,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

Supreme Court No. 42603

District Court Case No. CR020147

CLERK'S CERTIFICATE

STATE OF NEVADA, ss.

I, Janette M. Bloom, the duly appointed and qualified Clerk of the Supreme Court of the State of Nevada, do hereby certify that the following is a full, true and correct copy of the Judgment in this matter.

JUDGMENT

The court being fully advised in the premises and the law, it is now ordered, adjudged and decreed, as follows: "ORDER the judgment of conviction AFFIRMED."

Judgment, as quoted above, entered this 12th day of May, 2004.

IN WITNESS WHEREOF, I have subscribed my name and affixed the seal of the Supreme Court at my Office in Carson City, Nevada, this 8th day of June, 2004.

Janette M. Bloom, Supreme Court Clerk

By: J. Richards  
Chief Deputy Clerk

CR02-0147  
STATE VS FERRILL  
JOSEPH VOLPICELLI  
District Court  
Washoe County  
DC-05900055303-019  
JOSEPH VOLPICELLI  
06/09/2004 02:11 PM  
4111

ORIGINAL

## IN THE SUPREME COURT OF THE STATE OF NEVADA

FILED

2004 JUN -9 PM 2: 1

FERRILL JOSEPH VOLPICELLI,  
Appellant,

Supreme Court No. 42603

RONALD A. LONGTIN, J.

vs.

THE STATE OF NEVADA,  
Respondent.

District Court Case No. CR020147

BY C. Kepler  
DEPUTYREMITTITUR

TO: Ronald A. Longtin Jr., Washoe District Court Clerk

Pursuant to the rules of this court, enclosed are the following:

Certified copy of Judgment and Opinion/Order.  
Receipt for Remittitur.

DATE: June 8, 2004

Janette M. Bloom, Clerk of Court

By: J. Richards

Chief Deputy Clerk

cc: Hon. James W. Hardesty, District Judge  
Attorney General Brian Sandoval/Carson City  
Washoe County District Attorney Richard A. Gammick  
John J. Kadlic

## RECEIPT FOR REMITTITUR

Received of Janette M. Bloom, Clerk of the Supreme Court of the State of Nevada, the

REMITTITUR issued in the above-entitled cause, on

JUN 09 2004

Ronald Longtin Jr. by C. Kepler  
District Court Clerk