CA NO. 04-99003

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

* * *

TERRY JESS DENNIS, by and through KARLA BUTKO, as Next Friend, Petitioner-Appellant, vs. MICHAEL BUDGE, Warden, and BRIAN SANDOVAL, Attorney General of the State of Nevada, Respondents-Appellees.	D.C. No. CV-S-04-0798-PMP-RJJ (Nevada, Las Vegas)

Appeal from the United States District Court for the District of Nevada

APPELLANT'S EXCERPTS OF RECORD

Volume VIII of XI

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

* * *

TERRY JESS DENNIS,

Petitioner,

vs.

Case No. CR99P0611

Dept. No. 1

E.K. McDANIEL, Warden, Nevada State Prison, Ely; FRANKIE SUE DEL PAPA, Attorney General of the State of Nevada,

Respondents.

/

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

STATEMENT OF THE CASE

On March 29, 1999, the State filed an Information charging Petitioner TERRY JESS DENNIS with one count of first-degree murder with the use of a deadly weapon. The Information alleged that on the 6th or 7th day of March, 1999, Petitioner killed Ilona Straumanis, by strangulation with a belt.

On April 14, 1999, the State filed a Notice of Intent to Seek the Death Penalty against Petitioner.

Only two days later, on April 16, 1999, Petitioner plead guilty to first-degree murder, with the use of a deadly weapon. Petitioner pleaded to the maximum charges available without the benefit of a

plea bargain of any type. Petitioner was canvassed by the District Court, the Honorable Janet J. Berry, regarding the voluntariness of his plea, after which the District Court accepted his plea.

During the plea canvass, Dennis admitted that he was not taking medications and that he had not taken medications for 12 days. (Arr. Tscpt: "AT": P. 7). Dennis indicated that he had been prescribed Depakote and Cenion for a bipolar two disorder. Dennis admitted that he stopped taking the medications without a doctor's order or consultation. (AT 8). Dennis advised the district court that he suffers from severe chronic depression, bipolar, posttraumatic stress disorder and was diagnosed with those mental health issues in 1995. (AT 9). Dennis stated that he was placed on suicide watch at some point at the jail. He advised the court that he was suffering from mental illness on the day of the plea as "they just don't go away," but that he declined treatment. (AT 10).

During the plea canvass, the Court referred to the report of Dr. Lynn. Dennis advised the Court that he had not seen the report of Dr. Lynn. The Court asked defense counsel to let Dennis take a "quick look at it" and summarized the conclusion that Dennis was competent yet clinically depressed. (AT 11). The Court deferred to Dennis to ask if he wanted another psychiatric opinion or further evaluation. The Court asked defense counsel for her opinion of her client's mental state. (AT 12).

Dennis advised the Court that he tried to commit suicide when he was in the service and hadn't received any treatment until he came to Nevada three and one-half years earlier. (AT 14). When asked if mental health issues ran in his family, Dennis commented to the Court that his mother used to escape from the sanitarium, pick

up sailors and get drunk. Dennis stated that potential witnesses in the mental health field would assist in the defense. (AT 18-19, 33). When pressed about giving the court more information, Dennis stated, "Not at this time. We keep pushing on in, I might. Let's just see. Let's see how it goes." (AT 35).

At the time of the entry of plea, Dennis stated that he had only been able to spend about two and one-half to three hours going over the case with his counsel. He further relayed that he and counsel had not discussed pretrial motion work at all. Dennis inferred that he had been pushing hard to plead guilty and get to the death sentence. (AT 38). Counsel admitted that as of the date of the plea, she was still receiving discovery. (AT 52). Counsel admitted that she did not recommend the guilty plea and that the plea was entered against advice of counsel. (AT 47). Nonetheless, Judge Berry accepted the guilty plea as knowingly and voluntarily entered.

A Penalty Hearing was held before a Three-judge Panel consisting of the Honorable Janet J. Berry, the Honorable Michael Cherry, and the Honorable Michael Memeo, commencing on July 19, 1999. The Penalty Hearing lasted two days. At the conclusion of the hearing, the Three-judge Panel sentenced Petitioner to Death. (Transcript of Penalty Hearing, Vol. IV[1] (TPH IV), 108-113). The Panel found three (3) aggravating circumstances: two prior felonies

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[1] There are two transcripts for each day of the Penalty Hearing. The transcripts are not sequentially numbered. Further, each day's transcripts are labeled Volume I & II. For the purposes of clarity, transcripts of the second day, July 20, 1999, are designated Volumes 3 & 4 throughout this Petition.

for assault[2], and one prior felony for arson[3]. (TPH IV, 108). The Panel found two mitigating circumstances: that Petitioner was under the influence of alcohol when he killed the victim, and that Petitioner suffers from mental illness. (TPH IV, 108-109). However, the Panel found that the mitigating circumstances did not outweigh the aggravating circumstances. (TPH IV, 109).

Petitioner appealed the Sentence of Death. The Nevada Supreme Court Affirmed the decision of the Three-judge Panel on December 4, 2000. Dennis v. State, ___ Nev. ___, 13 P.3d 434 (2000), a copy of this opinion is attached hereto as Exhibit "A."

On April 25, 2001, the Second Judicial District Court appointed Karla K. Butko, Esq., to represent Petitioner on his post-conviction proceedings. This Petition and Supporting Points & Authorities follows.

STATEMENT OF FACTS

On the afternoon of March 9, 1999, Petitioner, then fifty-two years old, telephoned the Reno Police Department ("RPD") Dispatch, and told a dispatcher that he had killed a woman and her body was in his room at a local motel. Petitioner stated that he was in the same room watching television and would wait for police to arrive. Petitioner also stated that dispatchers should send a coroner, as "[t]he bitch ha[d] been dead for three or four days." Petitioner stated that he did not have a weapon.

An RPD detective responded to Petitioner's motel room,

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[2]One assault conviction was in 1979, the other in 1984 -- twenty (20) and fifteen (15) years old, respectively.

[3]The arson charge was also in 1984 and arose out of the exact same events as the 1984 assault charge.

contacted Petitioner, and asked whether he had any weapons. Petitioner stated that he had used his hands to kill the victim and did not have any weapons.[4] Petitioner then allegedly agreed to be interviewed and was transported to the police department. (Vol I 33).

At the police department, detectives advised Petitioner of his Miranda rights. Petitioner allegedly waived his rights and agreed to be interviewed. When questioned about the murder, Petitioner stated that his memory was unclear on certain details because he had consumed about a fifth of vodka a day for the past week.[5]

During the interview, Petitioner reported the following facts to police. Petitioner had been staying at the motel where the murder occurred, since March 3, 1999. Two or three nights into his stay, he left his room to go to a local bar. On his way to the bar, he met the victim, who was later identified as Ilona Straumanis, a fifty-six-year-old woman. Straumanis had bruises about her eyes and told Petitioner that she had been beaten by another man. Straumanis accompanied Petitioner to the bar, and later, to Petitioner's motel room. Thereafter and until the murder, both Petitioner and Straumanis remained in an intoxicated state, staying in Petitioner's room, except for a shared meal out and Petitioner's outings to get more alcohol.

On the day of her alleged murder, Petitioner and Straumanis engaged in a conversation about whether Petitioner had ever killed

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[4]The Nevada Supreme Court recognized the same. Dennis, 13 P.3d at 435.

[5]Following the interview, Petitioner's blood alcohol level was tested and determined to be .112 and descending.

anyone. Straumanis accused Petitioner of being too kind to be capable of killing. Petitioner and Straumanis then began "sort of" "making love." During this encounter, Petitioner states, he ended up killing her.

Petitioner made a statement to the effect that during their love-making he began strangling Straumanis with a belt. He felt somewhat aroused by Straumanis's struggling. Petitioner made a statement that "as she was fading," he began to engage in anal intercourse with her.[6]

Petitioner stated that he took the belt off and used his hands to choke her, and then suffocated her by covering her nose and mouth, making sure that she was not breathing and that "it was all done."

Petitioner said that after the murder, he covered Straumanis's body and slept in the other bed. Prior to contacting police, Petitioner also left the room at times to go to a local casino or the store for more liquor.

Petitioner made statements at the time that he did not care about anybody, including himself. He knew murder was wrong and did not care. Petitioner also told detectives, "[I]f I didn't get stopped this would not be the last time that I would do something like this, because I found it exciting. I actually enjoyed it."[7]

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[6]No evidence of this statement was found by police. This fact makes Petitioner's statement suspect, and confirms concerns about his lucidity during his statement. Further, it lends credence to the theory that Petitioner was engaging in bravado with police, in order to facilitate his own death.

[7]Again, this statement is evidence that Petitioner was engaging in bravado in order to invoke the passions of the police.

At the conclusion of the interview, detectives formally placed Petitioner under arrest.

Meanwhile, another RPD detective searched Petitioner's motel room pursuant to a search warrant. There, the detective discovered Straumanis's nude dead body underneath a blanket on one of the two beds in the room. The detective also discovered numerous empty beer and vodka containers in the room.

An autopsy performed on Straumanis's body on March 10, 1999, showed that she had died between three and seven days earlier as a result of asphyxia due to neck compression, most likely by strangulation. The State's expert could not conclude that she was strangled to death by a belt. (Vol II 156).

Other injuries were determined to have occurred sometime within the few days prior to her death, including a small abrasion on the forehead, a bruise on the back of one thigh, and a fractured sternum. Changes caused by decomposition of Straumanis's body made determination of the existence of any sexual assault difficult. Testing revealed that Straumanis had a blood alcohol content of 0.37.[8] (Vol II 158-160, 163).

The State charged Petitioner by information with one count of first-degree murder with the use of a deadly weapon and filed a notice of intent to seek the death penalty, alleging four aggravating circumstances: (1) that Petitioner subjected Straumanis to nonconsensual sexual penetration immediately before, during or immediately after the commission of the murder, and (2) a 1979

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[8]Based upon testimony and physical evidence at the scene, it is reasonable to attribute a similar BAC to Petitioner at the time of the alleged killing.

felony conviction for second-degree assault; (3) a 1984 felony conviction for second-degree assault; and (4) a 1984 felony conviction for second-degree arson.

Counsel were appointed to represent Petitioner and arranged to have a psychiatrist conduct a competency evaluation. The psychiatrist who conducted the evaluation concluded that, although Petitioner was "clinically depressed," he was competent to stand trial and assist in his defense.[9]

On April 16, 1999, Petitioner was allowed to enter a guilty plea to first-degree murder with the use of a deadly weapon pursuant to a written plea agreement. There was no bargained-for-exchange. Petitioner pleaded guilty upon advice of counsel, straight-up without a deal.[10] Defense counsel facilitated this plea even though Petitioner was facing the Death Penalty. Moreover, defense counsel facilitated this plea only two days following the State's Notice of Intent to Seek the Death Penalty.

At the time of the entry of plea, Dennis stated that he had only been able to spend about two and one-half to three hours going over the case with his counsel. He further relayed that he and counsel had not discussed pretrial motion work at all. Dennis implied that he had been pushing hard to plead guilty and get to the

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[9]Petitioner herein challenges the finding, on the grounds that being "clinically depressed" and competent to effectively waive fundamental rights are empirically mutually exclusive. Further, Petitioner alleges that trial counsel were ineffective for failing to recognize the same and for failing to seek additional opinions.

[10]Judge Berry even commented that, "it doesn't appear...that you're receiving any benefit whatsoever in exchange for your plea of guilty." (Plea Canvass Transcript (PCT), 21).

death sentence. (AT 38). Counsel admitted that as of the date of the plea, she was still receiving discovery. (AT 52). Counsel admitted that she did not recommend the guilty plea and that the plea was entered against advice of counsel. (AT 47).

The district court canvassed Petitioner, whose statements throughout the plea canvass were those of a "clinically depressed" man who was seeking the State's assistance in committing suicide. Petitioner explained that he did not want to "waste away" in prison for the remainder of his life, and would rather "get it over faster than that." Ultimately, the court accepted Petitioner's plea, somehow finding that Petitioner was competent to enter a plea and that his plea was knowing and voluntary.

In a communication dated December 5, 2000, Pusich admitted that her biggest mistakes on this case were not getting additional professional information about the competence of Dennis and failing to move to suppress the statements Dennis made to police officers. Pusich admitted that she should not have let a person with a death wish who was mentally ill plead guilty. Pusich stated that she let the intelligence of Dennis affect her judgment.

On July 21, 1999, lead defense counsel Maizie Pusich, Chief Trial Deputy for the Washoe County Public Defender's Office authored a note to John Petty, Chief Appellate Deputy for the Washoe County Public Defender's Office indicating that based upon the questions of Judge Cherry and a conversation that she had with Michael Peschetta, (Federal Death Penalty Counsel), she didn't believe that she should have deferred any decisions to a mentally ill person. Pusich indicated that she did not have Dennis re-evaluated after Dennis stopped taking the medications because she didn't want to harm her

mental health issues.

On July 19 and 20, 1999, a penalty hearing was conducted before a Three-judge Panel of the district court. The State presented evidence relating to the facts and circumstances of Straumanis's death, including Petitioner's own statements regarding the crime and evidence in support of the alleged aggravating circumstances.

As the Nevada Supreme Court worded it, Petitioner "agreed to permit" counsel to argue for a sentence less than death and submit a sentencing memorandum along with medical, psychiatric and jail records. However, he expressed to the panel that he did not want to live in prison for the rest of his life, and he declined to present any additional evidence in mitigation or make any further statement in allocution.[11]

The Nevada Supreme Court recognized that Petitioner's medical records together with the panel's questioning of Petitioner show that Petitioner has had a lengthy history of alcohol and substance abuse as well as suicide attempts.[12]

The Nevada Supreme Court also recognized that Petitioner first attempted suicide in 1965 and was hospitalized. In 1995, he began a series of contacts with mental health professionals and was diagnosed with various disorders -- primarily, a chronic depressive disorder. Further, records show that Petitioner was treated for his problems at various facilities by means of prescription drugs and

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[11] Dennis, 13 P.3d at 437. This language not only indicates the clinically depressed state of mind of Petitioner during these proceedings, but it also shows that defense counsel had placed critical decisions in the hands of a mentally ill defendant.

[12] Dennis, 13 P.3d at 437-438.

therapy.[13]

It is also true that Petitioner had previously discontinued his medications, declined further treatment and continued to consume alcohol excessively, against his doctors' advice.

As further proof of his suicidal state of mind, various medical records were submitted from the Veterans Administration, which indicate that only two months prior to killing Straumanis, Petitioner was admitted to the VA Hospital in Reno when he reported to medical staff that he had stopped taking his medications and was trying to drink himself to death.[14]

Finally it was acknowledged that at the time he was admitted to the VA, Petitioner exhibited bizarre behavior, and was talking and answering to himself. Somehow, despite his critical instability, he was discharged from the VA after only eight days.

Despite the presentation of considerable evidence of mental

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[13] The Supreme Court noted:

> Beginning in 1995, Petitioner began a series of hospitalizations and outpatient treatments for various problems including Hepatitis C, alcohol abuse, recurrent depressive disorder, suicidal ideation and attempts, antisocial personality disorder, post-traumatic stress disorder attributed to abuse Petitioner reported suffering as a child, bipolar disorder, and anger management problems. In 1995, Petitioner also reported having audio hallucinations and was diagnosed with having a substance-induced psychotic disorder at the time of one admission for hospitalization. When receiving medical treatment subsequent to 1995, however, Petitioner denied having any hallucinations, and it does not appear that Petitioner's care providers noted any indications to the contrary.

Id., n.4.

[14] Dennis, 13 P.3d at 438.

illness, clinical depression, suicidal behavior, and his own statements requesting the Death Penalty, the Three-judge Panel found that Petitioner made a knowing and voluntary waiver of the right to present further mitigating evidence or make any further statement in allocution.

The Panel then sentenced Petitioner to Death.

Petitioner filed a direct appeal at the State of Nevada. John Petty was counsel representing Dennis at that stage of the case. John Petty admitted in the petition for rehearing that there were factual errors contained in the Supreme Court's Order and that he would have added facts to the record if he knew that the Supreme Court would reweigh the facts.

I. THE STANDARD FOR INEFFECTIVE ASSISTANCE OF COUNSEL.

This is the appropriate place in which to raise the questions regarding the effectiveness of counsel through the forum of a Petition for Writ of Habeas Corpus (Post Conviction). Franklin v. State, 110 Nev. 750, 877 P.2d 1058 (1994). The question of ineffective assistance of counsel should not be considered in a direct appeal from a judgment of conviction. Instead, the issues should be raised, in the first instance, in the district court in a petition for post-conviction relief so that an evidentiary record regarding counsel's performance at trial can be created. Wallach v. State, 106 Nev. 470, 796 P.2d 224 (1990).

In State v. Love, 109 Nev. 1136, 865 P.2d 322 (1993), the Nevada Supreme Court reviewed the issue of whether a defendant had received ineffective assistance of counsel at trial in violation of the Sixth Amendment. The Nevada Supreme Court held that this question is a mixed question of law in fact and is subject to

independent review. The Supreme Court reiterated the ruling of Strickland v. Washington, 466 U.S. 668 (1984).

The Nevada Supreme Court indicated that the test on a claim of ineffective assistance of counsel is that of "reasonably effective assistance" as enunciated by the United States Supreme Court in Strickland. The Court revisited this issue in Warden v. Lyons, 100 Nev. 430 (1984) and Dawson v. State, 108 Nev. 112,825 P.2d 593 (1992). The Nevada Supreme Court has adopted Strickland's two-prong test in that the Defendant must show first that counsel's performance was deficient and second, that the Defendant was prejudiced by this deficiency.

In Smithart v. State, 86 Nev. 925, 478 P.2d 576 (1970), the Nevada Supreme Court held that it will presume that an attorney has fully discharged his duties. Petitioner must prove ineffective assistance of counsel by a preponderance of the evidence.

Petitioner submits that the performance of trial counsel in the instant matter was ineffective, that the guilty plea should be withdrawn, the conviction and subsequent sentence should be set aside by the District Court, and a jury trial granted to the Defendant.

The standard for reviewing claims of ineffective assistance of counsel -- as set forth by the Strickland Court -- is as follows: First, appellant must demonstrate that his trial counsel's representation fell below an objective standard of reasonableness. Second, appellant must show that counsel's deficient performance prejudiced the defense to such a degree that, but for counsel's ineffectiveness, the results of the trial would probably have been different. Davis v. State, 107 Nev. 600, 601-02, 817 P.2d 1169,

1170 (1991) (*citing* Strickland v. Washington, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 104 S.Ct. 2052 (1984)). The Strickland test, also requires a showing of prejudice regarding the error(s) alleged.

Where a defendant enters a guilty plea upon counsel's advice, the voluntariness of the plea depends on whether the advice was within the range of competence demanded of attorneys in criminal cases. The two-part standard adopted in Strickland v. Washington, 466 U.S. 668, for evaluating claims of ineffective assistance of counsel - requiring that the defendant show that counsel's representation fell below an objective standard of reasonableness, and that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different - applies to guilty plea challenges based on ineffective assistance of counsel. In order to satisfy the second, or "prejudice," requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.

Hill v. Lockhart, 474 U.S. 52 (1985) at pp 56-60.

The Nevada Supreme Court has found ineffective assistance of counsel for a wide range of errors or failures, from *failure to properly investigate*, Sanborn v. State, 107 Nev. 399, 812 P.2d 1279 (1991), to *failure to call certain key witnesses*, Doleman v. State, 112 Nev. 843, 921 P.2d 278 (1996), to errors involving *counsel's*

conflict-of-interest, Coleman v. State, 109 Nev. 1, 846 P.2d 276 (1993), to matters as simple as a *counsel's failure to object* to a prosecutor's impermissible comments on defendant's post-arrest silence, Washington v. State, 112 Nev. 1054, 921 P.2d 1253 (1996), or a *counsel's inability to phrase his questions* to a witness so as to elicit proper responses to his attempt to rebut certain inferences made by the State, Knorr v. State, 103 Nev. 604, 607, 748 P.2d 1, 3 (1987).

In addressing an issue on point with the instant case, the Supreme Court of North Carolina determined that prejudice may be presumed where defense counsel improperly concedes his client's guilt. The Nevada Supreme Court responded by holding:

> Although this Court still adheres to the application of the Strickland test in claims of ineffective assistance of counsel, there exist 'circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified.'

Jones v. State, 110 Nev. 730, 877 P.2d 1052, 1057 (Nev. 1994).

The Nevada Supreme Court has explained in more detail how failure to explore certain defenses, or to put on certain witnesses amounts to ineffective assistance of counsel.

In this case, the numerous failures and shortcomings of both trial and appellate counsel resulted in performances that fell below the Strickland standard of reasonableness. Most importantly, but for the gross shortcomings of trial counsel, Petitioner would not

have pled guilty. United States v. McCoy, 215 F.3d 102 (D.C. Cir. 2000). Further, but for the numerous failures of appellate counsel to raise the critical issues addressed herein, the numerous violations of Petitioner's constitutional rights would likely have been remedied before now.

II. CLAIMS OF ERROR.

A. INEFFECTIVE ASSISTANCE CLAIMS.

GROUND ONE: TRIAL COUNSEL WAS INEFFECTIVE FOR ALLOWING PETITIONER TO ENTER INTO A GUILTY PLEA AGREEMENT ON A CHARGE OF CAPITAL MURDER, WITHOUT ANY BENEFIT OF THE BARGAIN, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

Supporting Facts:

There was overwhelming evidence supporting the fact that Petitioner was suffering from chronic mental illnesses. The Statement of Facts, above, is incorporated by reference as if set forth verbatim herein.

Standard of Review.

The question of whether a defendant has received ineffective assistance of counsel is a mixed question of law and fact, and is reviewed *de novo*. Strickland v. Washington, 466 U.S. 668, 698, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984); Chacon v. Wood, 36 F.3d 1459, 1465 (9th Cir. 1994).

Legal Argument.

The American Bar Standards, Guideline 11.6.2, section (B)(2) and commentary:

Counsel should insist that no pleas to an offense for which the death penalty can be imposed will be considered without a written guarantee, binding on the court or other final sentencer, that death will not be imposed.

According to the Strickland standard, in order to prevail upon a claim of ineffective assistance of counsel, the petitioner must show that his attorney's performance was unreasonable ***under prevailing professional norms*** and that he was prejudiced as a result of the deficient performance. It should go without argument that published standards established by the American Bar Association are as good a measure of ***prevailing professional norms*** as anything could ever be. As it turns out, those published prevailing professional norms are the American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, February 1989 (ABA Guidelines). As noted in Commentary to Guideline 1.1, on page 31 of the ABA Guidelines, the United States Supreme Court, Justice Sutherland forewarned:

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of the law. If charged with a crime, ***he is incapable, generally, of determining for himself whether the indictment is good or bad***. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge to adequately prepare his defense, even though he may have a perfect one. ***He requires the guiding hand of counsel at every step in the proceedings against him.*** Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.

Powell v. Alabama, 287 U.S. 45, 68-69, 53 S.Ct. 55, 77 L.Ed. 158 (1932) (emphasis added).

The ABA Guidelines explain that now, "death penalty cases have become so specialized that defense counsel [have] duties and functions definably different from those of counsel in ordinary criminal cases." ABA Guideline 1.1, Commentary.

ABA Guideline 11.6.2 governs the contents of plea negotiations. Section (B)(2) sets forth the "benefits the client might obtain from a negotiated settlement, including inter alia:"

> 1. a guarantee that the death penalty will not be imposed;
> 2. an agreement that the defendant will receive, with the assent of the court, a specified sentence;
> 3. an agreement that the prosecutor will not advocate a certain sentence, will not present certain information to the court, or will engage in or refrain from engaging in other actions with regard to sentencing;
> 4. an agreement that one or more of multiple charges will be reduced or dismissed;
> 5. an agreement that the client will not be subject to further investigation or prosecution for uncharged alleged or suspected criminal conduct;
> 6. an agreement that the client may enter a conditional plea to preserve the right to further contest certain issues affecting the validity of the conviction.

(emphasis added).

The ABA acknowledges that "Plea negotiations in any type of case are difficult to describe, much less standardize...Emotional and political pressures are created that affect the substance and form of bargaining." ABA Guidelines, 11.6.2, Commentary. However, even though it acknowledges certain bright lines cannot be drawn, further in the Commentary to Section 11.6.2, the ABA establishes, in

no uncertain words:

> *Counsel should insist that no plea to an offense for which the death penalty can be imposed will be considered without a written guarantee, binding on the court or other final sentencer, that death will not be imposed.* (Emphasis added).

The Footnote to the above reads even more emphatically:

> "On two occasions to date, counsel in Kentucky capital murder cases have pled their clients guilty, and subsequently put on a penalty hearing in front of the trial court. Both cases resulted in death sentences. Commonwealth v. Bowling, (Rowan Co. Ind. No. 80-CR-043); Commonwealth v. Bevins, (Floyd Co. Ind. No. 82-CR-016). **It is suggested that this is an effective strategy only when the attorney knows without any doubt that no death sentence will result. Any other strategy for entering a guilty plea is ill-advised and should be abandoned."** Dept. of Public Advocacy, KENTUCKY PUBLIC ADVOCATE DEATH PENALTY MANUAL, p. 328-333 (1983).

ABA Guidelines, 11.6.2, Commentary, fn. 2 (underlined emphasis theirs).

ABA Guidelines 11.6.3 governs the Decision to Enter a Plea of Guilty. It has only two Sections:

1. Counsel should inform the client of any tentative negotiated agreement reached with the prosecution, and explain to the client the full content of the agreement along with the advantages, disadvantages and potential consequences of the agreement.
2. The decision to enter or to not enter a plea of guilty should be based solely on the client's best interest.

Commentary:

> In non-capital cases, the decision to enter a plea of guilty rests solely with the client. When the decision to plead guilty is likely to result in the client's death, however, counsel's position is unique. **If no written guarantee can be obtained that death will not be imposed following a plea of guilty, counsel should be extremely reluctant to participate in a waiver of the client's trial rights.** In California at least, a defendant cannot plead guilty over the objection of the attorney, giving counsel

> a tremendous responsibility for the client's life... counsel must strive to prevent a ... client from pleading guilty where there is a likelihood that such a plea will result in a death sentence.

Also, the ABA Guideline, *supra*, states: "Whatever plea agreement is made should be placed fully on the record." *citing* Section 11.6.4. The ABA has recently recommended a moratorium upon the imposition and exercise of the death penalty. As we know, in this matter, there was no plea agreement, in fact, there were, "no negotiations in this case." (ToP, April 21, 1995, p. 2, ll. 19-24; p. 3-4, ll. 24-8). The Commentary to Section 11.6.2 reads, in relevant part:

> **The conditions of any negotiated settlement should be set forth as clearly as possible on the record, to avoid later interpretations disadvantageous to the client.**

Id (emphasis added). The footnote to that Comment, reads:

> In Rickets v. Adamson, 483 U.S. ____; 107 S.Ct. ____; 97 L.Ed.2d 1 (1987) a defendant had pleaded guilty to second degree murder in exchange for testifying against his co-defendants. He later asserted that he had met the conditions of the bargain by testifying at the co-defendants' original trial, and refused to testify at retrial following reversal of the co-defendants' convictions. The defendant's own conviction and prison sentence were then vacated, he was tried for capital murder and sentenced to death.

The United States Supreme Court has discussed the necessity of a bargained-for-exchange in at least one other case. Mabry v. Johnson, 467 U.S. 504, 508, 104 S.Ct. 2543, 2547, 81 L.Ed.2d 437 (1984). In the instant case, Mr. Dennis received no such benefit. The district court acknowledged this when it stated that Dennis was not receiving any benefit in exchange for his plea of guilty. (AT 21). Mr. Dennis's guilty plea is invalid.

The Nevada Supreme Court has not addressed the specific requirement of the bargained-for-exchange. However, many of the Nevada decisions consider the bargain in determining the voluntariness of the plea. For example, in Bunce v. State, 109 Nev. 240, 849 P.2d 327 (1993), the defendant pled guilty pursuant to Alford to a single count of obtaining money by false pretenses. In exchange, the state dropped four counts of forgery which were charged. Bunce, 109 Nev. at 241, 849 P.2d at 328.

Also, in Lyons v. State, 105 Nev. 317, 325, 775 P.2d 219, 220 (1989), the defendant was charged with cheating at gambling and conspiracy to cheat at gambling. Lyons entered an Alford plea in exchange for a charge of obtaining money by false pretenses. The original charges were dropped by the State. Lyons, 105 Nev. at 325, 775 P.2d at 220.

See also Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984), in which the defendant pled guilty to a bomb threat charge under Alford, "to avoid punishment on the more serious charge of transportation of explosives and as a habitual criminal." Hargrove, 100 Nev. at 503, 686 P.2d at 226.

A sister jurisdiction has addressed the issue directly on point and has ruled that three factors must be considered when considering an attempt to withdraw a guilty plea: "(1) the adequacy of the court's interrogation at the time the plea was entered regarding the defendant's understanding of the consequences of the plea; (2) the promptness with which the defendant attempts to withdraw the plea; and (3) *the fact that the plea was the result of a plea bargain in*

which the guilty plea was given in exchange for dismissal of another charge." State v. Ereth, 964 P.2d 26, 29-30, 31 (Mont. 1998), *citing* State v. Enoch, 887 P.2d 175, 177 (1994). *See also* State v. Keys, 973 P.2d 812, 814 (Mont. 1999), in which the Court recognized the requirement of a bargained-for-exchange, and reiterating that:

> **If there is any doubt that a guilty plea was not voluntarily or intelligently made, the doubt must be resolved in favor of the defendant.**

Keys, 973 P.2d at 815.

In a more recent case, State v. Turner, 12 P.3d 934 (Mont. 2000), the Supreme Court of Montana consulted a Fifth Circuit opinion, Kennedy v. Maggio, 725 F.2d 269 (5th Cir. 1984), a case in which defendant pled guilty to avoid the death penalty even though the death penalty was not available. The Fifth Circuit concluded that with regards to the plea, counsel for defendant had given "patently erroneous advice" to the defendant. Turner, 12 P.3d at 945, *citing* Kennedy, 725 F.2d at 272. Therefore, the court concluded that the resulting plea, to avoid a death sentence which was not available, was involuntary. Turner, 12 P.3d at 945, *citing* Kennedy, 725 F.2d at 270.

It cannot be reiterated enough:

> *Counsel should insist that no plea to an offense for which the death penalty can be imposed will be considered without a written guarantee, binding on the court or other final sentencer, that death will not be imposed.*

Commentary to Section 11.6.2, the ABA Guidelines. And:

> It is suggested that this is an effective strategy only when the attorney knows without any doubt that no death sentence will result. Any other strategy for entering a guilty plea is ill-advised and should be abandoned.

ABA Guidelines, 11.6.2, Commentary, fn. 2 (underlined emphasis theirs). These two statements remove all doubt that the conviction and death sentence herein is invalid.

What might pass for adequacy in a non-capital case is not the same thing in a death penalty case. Indeed, the ABA Guidelines tell us that "**Minimum Standards**" for effective assistance are "**Not Sufficient**" in Death Penalty cases. ABA Guideline 11.2. The ABA explained:

> "**Death is different**" and all rules established for the protection of the capital defendant should be strictly enforced. The defense of death penalty cases is an evolving practice and counsel should refer to state and federal death penalty training and practice manuals for preparation and trial of death penalty cases. **When the courts are not likely to provide the proper enforcement of the rules *sua sponte*, attorneys must seek to enforce the rules, or their clients will die.** The minimal level of attorney competence that may be accepted as sufficient in some jurisdictions in non-capital cases can be fatally inadequate in death penalty cases... To ensure that indigent defendants will not die for, and their attorneys will not have to live with, such error, the standards of performance established by the appointing authority under Guideline 11.1 should include requirements that all aspects of representation be intensified in a capital case... **The standards to be established by the appointing authority should be defense standards, not minimum standards which the prosecution or even the courts might be willing to accept.**

ABA Guidelines, 11.2, Comments (emphasis both).

The ABA recognized in footnotes to this Section:

> **Current minimum standards, according to capital attorney David Bruck, have been met if a mirror held under counsel's nose clouds up,** For U.S. Death-Row Inmates, a Lawyer Often Isn't Enough..., Los Angeles Daily Journal, 9/30/86. (Discussing the test for effective assistance of counsel set out in Strickland v. Washington, 466 U.S. 668; 104 S.Ct. 2052; 80 L.Ed.2d 674 (1984)). See also, Tabak, The Death of Fairness: The Arbitrary and Capricious

Imposition of the Death Penalty in the 1980s, XIV N.Y.U. Rev. L. & Soc. Change 797, 805-807 (1986).

ABA Guidelines, 11.2, Comments, fn. 2 (emphasis added).

Also:

> The instant Guidelines follow the logic of at least one court which recognized that courts "must strictly scrutinize counsel's conduct" in death penalty cases, Voyles v. Watkins, 489 F.Supp. 901, 910 (N.D. Miss. 1980)...

Id, fn. 3 (emphasis added).

There is a higher bar set for death penalty lawyers. Only the most experienced, well-trained, well-prepared, and courageous advocates are suited for the job. The job simply demands more.

The federal system requires that a person indicted in federal court for any death-eligible offense is entitled to appointment of two attorneys, one of who must be "learned in the law of capital cases". 18 U.S.C. Section 3005. Minimum experience standards for attorneys appointed in federal capital cases are set forth in 21 U.S.C. Section 848(q). Further detail is available in Volume VII, Chapter VI, section 6.01 of the Judiciary Guide to Policies and Procedures. Highly skilled and experiences counsel is critical at every stage of a death penalty proceedings. It is important from the outset of a case that death qualified counsel be appointed to provide representation to defendants charged with a capital crime.

Therefore, in a death penalty case, effective assistance of counsel means something more than pleading your client straight-up to face the death penalty by a three-judge panel, without the benefit of a plea bargain of any type. Counsel admitted and advised

Petitioner on the record during the plea canvas that the likelihood of a death penalty was higher with a three judge panel than a jury. Counsel knew that Petitioner faced a serious risk of death before the three judge panel and still allowed their client to proceed upon a guilty plea with no benefit to Petitioner for the guilty plea. The plea should be set aside.

GROUND TWO. TRIAL COUNSEL WAS INEFFECTIVE FOR NOT OBJECTING TO THE AGGRAVATING CIRCUMSTANCES PRESENTED BY THE STATE, AS THE PRIOR FELONIES WERE NOT RELEVANT TO THE INSTANT CRIME AND WERE REMOTE IN TIME.

Supporting Facts.

The three-judge panel found that the State had proved three aggravating circumstances against Terry Dennis: three prior felony convictions involving the use or threat of violence to the person of another. *See* NRS 200.033(2)(b). (TPH, 108).

Prior conviction number one: *The 1979 felony assault conviction*: The State presented evidence that in December 1978, Dennis became intoxicated and argued with his girlfriend over his unemployment. The record shows that during the argument, he held her up against a door and put a knife to her neck. Also during the altercation, he cut the palm of her hand with the knife blade.[15]

Prior convictions number two & three:[16] *The 1984 felony assault and felony arson convictions*: The evidence presented by the State showed that in December 1983, Dennis set fire to the exterior of a

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[15] Dennis v. State, 13 P.3d 434, 438 (2000).

[16] These two felonies were improperly separated as two aggravators, as alleged elsewhere in this petition, even though they arose out of the same event.

house (whether intentionally or not). When a person inside became aware of the fire, she contacted the police. The fire damaged the yard and a windowsill.

When confronted by police responding to the arson report, Dennis acted as if he knew nothing of the event. Eventually the situation became confrontational, and Dennis made menacing gestures towards the officers with a knife, Dennis then lunged and thrust his knife at a canine officer, and was then shot by police.[17]

Even though these crimes occurred 15 and 20 years prior to the instant murder, involved completely different scenarios, and completely different victims, the State was able to use each of them as aggravators without objection by trial counsel. At no point did trial counsel move to suppress the use of the prior convictions, address the duplicity found in use of two priors that were part of a plea package as separate enhancements, or take any action to defend against the use of the prior convictions as separate aggravators to justify a death sentence.

Standard of Review.

The question of whether the aggravating circumstances were appropriately identified is a question of fact. Whether the aggravating circumstances were properly applied in the instant case is a mixed question of law and fact. The Court reviews *de novo* all mixed questions of law and fact. Sumner v. Mata, 455 U.S. 591, 597, 71 L. Ed. 2d 480, 102 S. Ct. 1303 (1982).

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[17] 13 P.3d 434, 438-439.

Legal Argument.

There is no question that the same authority that applies to the use of a prior conviction for enhancement of sentencing should apply to the use of a prior conviction as an aggravator.

The Nevada Supreme Court even points out that it may be an abuse of discretion for the court to enter an habitual criminal adjudication when the convictions used to support the adjudication are nonviolent and remote in time. Sessions v. State, 106 Nev.186 789 P.2d 1242 (1990). In Sessions, the felony convictions for enhancement purposes were nine years old. In this case, the convictions date back to 1979 and 1984.

In general criminal cases, even in the case of murder charges not involving the death penalty, evidence of other bad acts is only admissible where three requirements are met: (1) the incident is relevant to the crime charged; (2) the act is proven by clear and convincing evidence; and (3) the evidence is more probative than prejudicial. Cipriano v. State. 111 Nev. 534, 894 P.2d 347, 352.

In Walker v. State, ___ Nev, ___, 997 P.2d 803 (2000), the Nevada Supreme Court reviewed a conviction for first-degree murder in which the victim's adult son was allowed to testify that the defendant had threatened the victim with a firearm on two prior occasions, six and ten years prior to shooting. The Court concluded that the testimony was both irrelevant and more prejudicial than

probative. Walker, 997 P.2d at 807.

Specifically, the Walker Court held that the remoteness in time (six and ten years) of each of the alleged prior incidents made them irrelevant to the Defendant's intent at the time of the shooting in issue. Id. The court made a point of stating that it had consistently held accordingly. Id.

Further, though at first glance the acts seem similar, the Court clarified the strict standard for allowing in such evidence:

> Further, although the prior bad acts involve similar conduct toward the eventual victim in this case, we conclude that there is a crucial distinction between Cheryl's prior conduct and the charged conduct. Namely, Cheryl's prior acts do not involved the firing or attempted firing of the weapon at Anthony. Importantly, Cheryl was tried for first-degree murder, a specific intent crime requiring, in addition to premeditation and deliberation, willful action that we have said requires an intent to kill. *See* Byford v. State, 116 Nev. ____, 994 P.2d 700 (2000). Therefore, because the prior bad acts offered here do not clearly establish an intent to kill, but more accurately show an intent to threaten, the logical relevance of the acts to show Cheryl's later intent is further diminished.

Walker, 997 P.2d at 807 (emphasis added).

Finally, as to the harmfully prejudicial effects of such evidence, the court reiterated that evidence of other bad acts tends to unfairly lessen the State's burden of proof:

> Next, in evaluating whether the probative value of the evidence is substantially outweighed by the danger of prejudice, we reiterate that evidence of prior bad acts may unduly influence the jury and result in a conviction based on the accused's propensity to commit a crime rather

> than on the State's ability to prove all the elements of the crime. *See* Berner, 104 Nev. at 696-97, 765 P.2d at 1145-46. The acts here, Cheryl's twice pointing a gun at Anthony during an argument, clearly cast Cheryl in a negative light, prejudicially suggesting that she has a dangerous and criminal character. We therefore conclude that the danger of prejudice substantially outweighs the probative value of the prior acts.

Walker, 997 P.2d at 807 (emphasis added).

If twice pointing a gun at the same person you eventually shoot and kill is not evidence appropriate for jury review, the prior crimes of Mr. Dennis -- 15 and 20 years earlier -- which were used as aggravating circumstances herein, should not have been considered by the decision-making three-judge panel in the instant case.

Factors in this case are similar to those in two cases where the Nevada Supreme Court concluded that the death penalties were excessive: Haynes v. State, 103 Nev. 309, 739 P.2d 497 (1987), and Chambers v. State, 113 Nev. 974, 944 P.2d 805 (1997).

In Dennis, the Nevada Supreme Court recognized:

> ...Haynes, was a "mentally disturbed person lashing out irrationally, and probably delusional, and striking a person he did not know and probably had never seen before"; and the single aggravating circumstance, a prior felony conviction for armed robbery, was fifteen years old at the time of the crime and committed by Haynes when he was eighteen years old. 103 Nev. at 319, 739 P.2d at 503. We concluded that the case was comparable to Biondi v. State, 101 Nev. 252, 699 P.2d 1062 (1985), where the defendant killed a man in a barroom confrontation among strangers in an emotionally charged atmosphere, and where the only aggravating circumstance was a prior conviction for armed robbery. Haynes, 103 Nev. at 319, 739 P.2d at 503. We noted that in Biondi, we had reduced the death

> sentence to life without the possibility of parole. Id. We finally concluded that Haynes did not deserve the death penalty. Id.

Dennis, 13 P.3d 434, 441.

The similarities in Biondi, Haynes and the case at bar are striking. In the Dennis case, the felonies were exactly fifteen, and twenty years old. Further, Dennis and Straumanis were beyond intoxicated and were engaged in passionate acts when the crime occurred. Moreover, until this encounter, Dennis and Straumanis did not know each other. Neither a knife nor firearm were involved.

Finally, bearing perhaps the most similarities to the instant case is Chambers, *supra*, in which the Nevada supreme Court also determined that the sentence of death was excessive. In doing so, the Court relied on several objective factors, including that Chambers apparently murdered the victim in an intoxicated state during an emotionally charged confrontation. Chambers, 113 Nev. at 985, 944 P.2d at 811-812.

The Court further noted that the only valid aggravating factor in Chambers, prior felony convictions for robberies, referred to crimes that occurred eighteen years before the verdict in question, "hardly shows a pattern of violence sufficient to justify the death penalty." Id. 113 Nev. at 984-85, 944 P.2d at 811.

Even in the federal system when just utilizing a prior conviction for sentencing enhancement, prior convictions upon which

parole began over 15 years ago could not be counted toward criminal history. U.S. v. Gilcrist, 106 F.3d 2997 (9th Cir. 1997).

The same decision must be reached as to the death sentence of Terry Dennis. There is no pattern of violence sufficient to justify the death penalty. Since the prior convictions were offenses so remote in time as to not even count for purposes of federal sentencing, how could they constitutionally apply to enhance this case to a death case?

GROUND THREE: TERRY DENNIS WAS INCOMPETENT TO WAIVE HIS RIGHTS TO A JURY TRIAL, TRIAL COUNSEL WAS INEFFECTIVE FOR FACILITATING THE PLEA, AND THE COURT WAS IN ERROR IN ACCEPTING THE PLEA, IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION.

Supporting Facts.

The record shows that all parties involved deferred to the decisions and desires of a mentally ill defendant to waive his rights to a jury trial and to seek the State's assistance in committing suicide.

Standard of Review.

The question whether a defendant has received ineffective assistance of counsel is a mixed question of law and fact, and is reviewed *de novo*. Strickland v. Washington, 466 U.S. 668, 698, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984); Chacon v. Wood, 36 F.3d 1459, 1465 (9th Cir. 1994).

Legal Argument.

It is not the job of the court or defense counsel to facilitate petitioner's incompetent desire to commit suicide.

A. Standard of Competency

The United States Supreme Court has ruled that the test of any defendant's competency is:

> "whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding - and whether he has a rational as well as factual understanding of the proceedings against him."

Dusky v. U.S., 362 U.S. 402, 80 S.Ct. 788, 789 (1960); see also, Riker v. State, 111 Nev. 1316, 905 P.2d 706 (1995), Calambro v. State, 114 Nev. 961, 900 P.2d 340 (Nev. 1995), and Smith v. State, 110 Nev. 1009, 879 P.2d 60 (1994).

This case is similar to the dissenting opinion found in Riker v. State, 111 Nev. 1316, 905 P.2d 706 (1995). It is virtually undeniable that Dennis was prompted to enter a guilty plea because he was trying to commit suicide. Dennis's comment that he'd just as soon get it over faster than that, i.e., 25 years doddering around prison, demonstrate his suicidal tendency. Dennis even requested that the Court process move toward the end as rapidly as possible. Dennis indicated that the jury trial process was a complete waste of time and money. Defense counsel admitted that if Dennis's desire was to get this over with and to accomplish his sentence of death, a panel was a very expeditious way of accomplishing death. (AT 21, 24, 28).

The totality of the circumstances may be relevant to a

discussion of whether a defendant's confession is voluntary under due process standards. See Mincey v. Arizona, 437 U.S. 385, 401, 98 S.Ct. 2408 (1978); Davis v. North Carolina, 384 U.S. 737, 741-742, 86 S.Ct. 1761 (1966). *The 'totality of the circumstances' test, however, is not applicable in analyzing whether a defendant has relinquished his Fifth Amendment rights against self-incrimination.* See Edwards v. Arizona, 451 U.S. 477, 483, 101 S.Ct. 1880 (1981). Instead, ***in that the purported waiver of a constitutional right is ineffective unless knowingly and intelligently made, the alleged waiver of Miranda rights must be judged under a "knowing and intelligent waiver" standard.*** *See* Miranda v. Arizona, 384 U.S. 436, 475, 88 S.Ct. 1602 (1966). ***The application of this higher standard of review may result in the exclusion of some confessions which might have been voluntary under the lesser 'totality of the circumstances' test.*** *See* Michigan v. Mosely, 423 U.S. 96, 114 S.Ct. 321 (1975) (Brennan, J. Dissenting).

In addition, this court must look beyond the ordinary understanding of competence to reach the true standard required. In short, there is a difference between being *capable* of understanding the proceedings and *actually* understanding them. As the Supreme Court of the United States held recently in Godinez v. Moran, 113 S.Ct. 2680 (1993):

> A finding that a defendant is competent to stand trial...is not all that is necessary before he may be permitted to plead guilty or waive his right to counsel. In addition to determining that a defendant who seeks to plead guilty or waive counsel is competent, a trial court must satisfy itself that the waiver of his constitutional rights is knowing and voluntary.

Id, at 2687. There is a whole separate -- and essential -- level of understanding that is required in the instant case. The Court explained that an individual is clearly incompetent if he "lacks the *ability* to understand" the nature of the proceedings. However, the *knowing and voluntary* standard was designed to determine whether, *under the circumstances*, "the defendant actually *does* understand the significance and consequences" of his actions. Id, at n.12.

The record of the proceedings below demonstrates that the trial court did not comply with the requirement of conducting a hearing adequate to determine if Petitioner's waiver of his constitutional rights were knowing, intelligent and voluntary and if Petitioner had the ability to make a rational choice to forego further proceedings unaffected by any mental disorder, see e.g., Rees v. Peyton, 384 U.S. 312 (1966), and to enter findings accordingly.

> "...whether he has the capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation or on the other hand whether he is suffering from a mental disease, disorder, or defect which may substantially affect his capacity in the premises."

Calambro v. State, 111 Nev. 1015, 900 P.2d 340 (1995); Kirksey v. State, 107 Nev. 499, 814 P.2d 1008 (1991).

> Before the district court accepts the waiver, it must conduct an evidentiary hearing at which defendant is present and represented by counsel, and determine whether the defendant is competent to waive the appeal. Following the evidentiary hearing, the district court must enter in the record formal, written findings regarding the defendant's competence to waive the appeal. This court can then review those findings when it reviews the record to determine the validity of the death sentence.

Id, 814 P.2d at 1010. The necessity of a separate hearing to

determine the question of Dennis's competence is obvious in the circumstances of this case.

Even a casual review of the record should cast doubts upon defendant's competence to make any kind of waiver of his constitutional rights. The evidence in the record is clear that Mr. Dennis has a history of attempted suicide.....

> **Due process requires a court to initiate a competency hearing, on its own motion if necessary, whenever it has or should have a good faith doubt about a defendant's competency to waive constitutional rights.**

Moran v. Godinez, 972 F.2d 263, 265 (9th Cir. 1992), *reversed on other grounds*, ____ U.S. ___, 113 S.Ct. 2680 (1993), adhered to on this ground on remand, 40 F.3d 1567, 1572 (9th Cir. 1994).

According to the court in Moran,

> **A good faith doubt should arise if there is substantial evidence of incompetence.**

Id. In that case, Moran had attempted suicide only a few months before his plea hearing; he stated at the plea hearing that he wanted to fire his attorney so that no mitigating evidence would be introduced; and he discharged his counsel and changed his plea to guilty on all counts. The 9th Circuit held:

> **Given the record in this case, the state court should have entertained a good faith doubt about Moran's competency to make a voluntary, knowing, and intelligent waiver of constitutional rights.**

Id. The court later affirmed this same point, and added:

> **The court should have held an immediate competency hearing. It did not, and as a result Moran's right to procedural due process was violated.** (citation omitted)

Moran, 40 F.3d at 1572. The United States Supreme Court addressed

this same issue in a similar case, Drope v. Missouri, 420 U.S. 162, 95 S.Ct. 896 (1975). In that case, the Court concluded that attempted suicide and other self-destructive behavior were strong factors in raising doubt as to competence. The Court also determined:

> **[E]vidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant in determining whether further inquiry is required, but that even one of these factors standing alone may, in some circumstances, be sufficient.**

Id, 420 U.S. at 180, 95 S.Ct. At 908.

Also on point is Griffin v. Lockhart, 935 F.2d 926 (8th Cir. 1991). The Eighth Circuit determined that the trial transcript revealed statements by the defendant, Griffin, concerning his depression and attempted suicide, which contributed to a doubt about his competency. This and the fact that three doctors were unable to form a consensus opinion about Griffin's competence, caused the court to hold "that a sufficient doubt about Griffin's competency existed."

Further, because no witnesses were called at trial as to Griffin's competence, and "no attempt was made to obtain a more complete report from the medical health center; and the trial court's questioning of Griffin was very limited" the court found:

> **[T]hat due process was violated by the state court's failure to provide an adequate hearing...**

Id, at 930-931. The remedy for such a violation, the court decided, was that

> **Griffin be discharged unless the state of Arkansas gives**

> him a new trial within 120 days after the completion of any procedures necessary to afford Griffin his constitutional rights.

Id, at 931.

Next, in Tiller v. Esposito, 911 F.2d 575 (11th Cir. 1990) Tiller, like Dennis, attempted suicide twice (while in jail awaiting trial). The court used this factor, along with reports from psychiatrists analyzing his irrational behavior, to determine that the trial court should have conducted, *sua sponte*, a competency hearing. The court held:

> We therefore reverse the judgment of the district court and remand this case for a determination of whether an adequate and meaningful *nunc pro tunc* inquiry can be made into the question of whether Tiller was, at the time of the plea hearing, incompetent to plead guilty.

Id, at 576-577.

In Speedy v. Wyrick, 748 F.2d 481 (8th Cir. 1984) defendant's "alleged" suicide attempt was found not to be sufficient to raise reasonable doubt as to competence, where the attempt was known to and considered by a psychiatrist who found defendant competent. The court acknowledged that,

> ...a suicide attempt may evidence a high degree of instability.

Id, at 486. However, the court distinguished Speedy from Drope, supra, because,

> In the instant case, the court-appointed psychiatrist knew of the suicide attempt when he wrote his report. That report did not question Speedy's competence.

Id.

In addition, the question of the defendant's mental state is a difficult one, and adequate inquiry into that issue alone is required before adequate review can be achieved. See Hays v. Murphy, 663 F.2d 1004 (10th Cir. 1981). In Hays, the State relied on one 30-minute interview with Mr. Hays to determine his competency. The court found the one interview to be insufficient:

> **This, we conclude, was clearly inadequate to serve as a basis for such a serious determination.**

Id, at 1011. The court also cast doubt upon the determination of competency, based upon inadequate questioning:

> **Moreover, the substance of the questions asked of Hays during the interview casts doubt on the adequacy of the evaluation for such a critical determination. Except for brief questioning as to Hays's choice not to pursue the appeal process, only 'general' questions were asked of him.**
>
> * * * *
>
> **Furthermore we note that there was an absence of psychological tests and evaluations which are generally utilized for such a critical determination.**

Id, at 1011, n.12, and 1012.

The State has no legitimate interest in carrying out an execution in the absence of the mandatory review required by statute to address constitutional issues, even if the defendant consents to his execution. By way of example, see NRS 200.410 (consensual killing occurring in duel punished as murder) and NRS 449.670(2) (illegal to assist suicide). Neither does the State have a legitimate interest in conducting an execution in the face of a reasonable doubt as to the defendant's competence. Finally, the defendant cannot be executed when there is a doubt as to his

competence. See Pate v. Robinson, supra, 388 U.S. at 384, in which the Court determined that a defendant cannot waive competence examination when the court should have reasonable doubt as to competence.

> With this record we cannot say that Robinson waived the defense of incompetence to stand trial.

While there has been some disagreement among the federal courts as to whether the standard for competence is different for standing trial as compared with pleading guilty, the United States Supreme Court has held:

> A finding that a defendant is competent to stand trial, however, is not all that is necessary before he may be permitted to plead guilty or waive his right to counsel...a trial court must satisfy itself that the waiver of his constitutional rights is *knowing and voluntary*.

Godinez v. Moran, 113 S.Ct. at 2687 (emphasis added). Because pleading guilty, waiving jury trial, and waiving the right to an appeal all involve a waiver of constitutional rights, it follows that each requires that the waiver be "knowing and voluntary."

B. Ineffective assistance of counsel:

Trial defense counsel had an obligation to "zealously defend" her client. In so doing, defense counsel had the obligation to ensure all of Terry Dennis's constitutional rights were protected. The record reflects numerous instances in which defense counsel for Terry Dennis was obviously unclear as to her duty to her client.

For instance, any submission to the arguments of the District Attorney render her representation inadequate as a matter of law. Pusich acquiesced that the use of the belt constituted a deadly

weapon and failed to litigate that issue. *See* Mazzan v. State, 110 Nev. 74, 675 P.2d 409 (Nev. 1984), and Olausen v. State, 105 Nev. 110; 771 P.2d 583 (Nev. 1989).

Counsel had an obligation to ensure that her client was competent to understand and an obligation to seek treatment for her client if he was not competent. In the face of a client seeking the death penalty, refusing offers to assist in his defense, asking to hurry the process along, and being declared by the psychologist to be clinically depressed, counsel had an obligation to seek court assistance in treatment and medication stabilization prior to entry of a plea of any type.

GROUND FOUR: INEFFECTIVE ASSISTANCE OF COUNSEL FOR DEFERRING MATERIAL DECISIONS REGARDING THE CASE, INCLUDING THE DECISION TO PLEAD GUILTY AND WAIVE HIS CONSTITUTIONAL RIGHT TO A JURY TO A MENTALLY ILL DEFENDANT, IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS.

Supporting Facts.

The record shows that trial counsel deferred critical, and material decisions regarding his fundamental constitutional rights -- among others, the rights to a jury trial and to put on mitigating evidence on his behalf -- to the wishes of Mr. Dennis while he was unmedicated, clinically depressed, and mentally unstable.

Standard of Review.

The question whether a defendant has received ineffective assistance of counsel is a mixed question of law and fact, and are reviewed *de novo*. Strickland v. Washington, 466 U.S. 668, 698, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984); Chacon v. Wood, 36 F.3d 1459, 1465 (9th Cir. 1994).

Legal Argument.

The entire legal argument set forth in Ground Three is hereby incorporated as if set forth verbatim and in its entirety herein.

While it is the choice of the client as to the type of plea to enter, this decision must be made on an informed basis. On the date of the plea, discovery was still being delivered to defense counsel. Medical records, military records, and other critical information had not been received by counsel. Petitioner had no business entering a plea to a case carrying the death penalty without full investigation having been completed. Counsel was ineffective for deferring questions of this type to her client at a stage in the proceedings where the client could not perform the task, both due to his infirmity and due to the lack of available information.

Counsel acknowledged her error in a letter to the client. See attached Exhibit "B."

GROUND FIVE. TRIAL COUNSEL WAS INEFFECTIVE FOR ALLOWING DENNIS TO ENTER INTO A GUILTY PLEA TO FIRST DEGREE MURDER WHEN THE FACTS ADMITTED BY DENNIS DO NOT AMOUNT TO FIRST DEGREE MURDER UNDER *BYFORD V. STATE* IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION.

Supporting Facts.

The facts in the instant case indicate a murder was committed: (1) spontaneously during the heat of passion; (2) while extremely intoxicated; and (3) while suffering from "clinical depression." Under the authority of Byford, *infra*, the killing was not premeditated and deliberated. Further, under Finger, 117 Nev. ___, Adv. Op. 48, decided December 4, 2001, ____P.2D____(2001),

Petitioner was suffering from a pre-existing, long-standing, clinically diagnosed mental illness during the course of events and could not have legally formed the requisite intent at the time of the act.

Standard of Review.

The question of whether a defendant has received ineffective assistance of counsel is a mixed question of law and fact, and are reviewed *de novo*. Strickland v. Washington, 466 U.S. 668, 698, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984); Chacon v. Wood, 36 F.3d 1459, 1465 (9th Cir. 1994).

Legal Argument.

In Byford v. State, 116 Nev. Adv. Op. 23, decided February 28, 2000, 994 P.2d 700 (2000), the Nevada Supreme Court recognized that NRS 200.030 requires all three elements of first degree murder, willfulness, deliberation, and premeditation, to be proven beyond a reasonable doubt. Byford, 994 P2d at 713. Specifically as relates to Mr. Dennis's case, the Court explained:

> Deliberation remains a critical element of the *mens rea* necessary for first-degree murder, connoting a dispassionate weighing process and consideration of consequences before acting. "In order to establish first-degree murder, the premeditated killing must also have been done deliberately, that is, with coolness and reflection. (citation omitted)"

Byford, 994 P.2d at 714 (emphasis added).

It is respectfully submitted that the factual assertion by Dennis does not show the "coolness and reflection" required for first degree murder. Instead, it shows one of a crime of passion.

Also, included in the Byford decision is a jury instruction for use by courts in Nevada. The instruction contains the following provision regarding deliberation:

> A deliberate determination may be arrived at in a short period of time. But in all cases the determination must not be formed in passion, or if formed in passion, it must be carried out after there has been time for the passion to subside and deliberation to occur. A mere unconsidered and rash impulse is not deliberate, even though it includes the intent to kill.

Byford, 994 P.2d at 714 (emphasis added).

This language is essential to Mr. Dennis's defense in this case, because it is clear from the facts and from Dennis's factual assertion to the court, that this was a rash act. Id. According to the Court in Byford, such an act "can be ... voluntary manslaughter" but not first degree murder. Byford, 994 P.2d at 714 n. 4. Under these circumstances, Mr. Dennis was wrongly convicted and sentenced for a crime he did not commit under the law.

The Instruction given in Byford has been considered by later Nevada Supreme Court cases and upheld. Since Byford was decided before the Dennis direct appeal, Byford is applicable to this case. *See* Bridges v. State, 116 Nev. Adv. Op. 84, 6 P.3d 1000, 1008 (2000) and Garner v. State, 116 Nev. Adv. Op. 85, 6 P.3d 1013 (2000). However, in Bridges, the Court found that - where the defendant had stalked his ex-girlfriend and her new lover for weeks and had then kidnapped them and taken them to a remote location where he shot the

new lover and buried him in the desert with a shovel he had in the car for the job -- the evidence of premeditation and deliberation was overwhelming and therefore the instruction error was harmless. Bridges, 6 P.3d at 1008. Further, in Garner, the Court found that the defendant's failure to object to the instruction at trial waived the error. Garner, 6 P.3d at 1024-1025.

The instant case is distinguishable because it does not involve a situation in which the there was a failure to offer the proper deliberation instruction at trial. In Mr. Dennis's case, he was not afforded a trial. The essence of the complaints of error herein are that his trial counsel was ineffective for failing to recognize that her client could not be convicted of the crime to which he pleaded guilty (and most importantly not eligible for the death penalty).

Further, even though the Nevada Supreme Court has clarified that its decision regarding the instruction is to be applied prospectively, the Court acknowledged that the decision is not based upon new law. Byford is merely a clarification of past conflicting interpretations of NRS 200.030. *See* Garner, 6 P.3d at 1025 n.9:

> This does not mean, however, that the reasoning in *Byford* is unprecedented. Although *Byford* expressly abandons some recent decisions of this court, it also relies on longstanding statutory language and other prior decisions of this court in doing so. Basically, *Byford* interprets and clarifies the meaning of a preexisting statute by resolving conflicting lines in prior case law. Therefore, its reasoning is not altogether new.

Therefore, under this reasoning, the requirements of the statute existed at the time Dennis unwittingly entered into the guilty plea. At that time, NRS 200.030 still required proof of deliberation, that is, proof that Dennis acted with "coolness and reflection" and that his action was not "a mere unconsidered and rash impulse," as required by the statute. Byford, 994 P.2d at 714-715.

Because Dennis's trial counsel did not recognize this fact, her erroneous advice falls below the standard of effectiveness required by Strickland, *supra*. Because trial counsel was ineffective, Dennis was denied his Fifth, Sixth, Eighth and Fourteenth Amendment rights under the U. S. Constitution.

GROUND SIX: INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL FOR ALLOWING THE PANEL TO CONSIDER THE THREE PRIOR FELONIES AS SEPARATE AGGRAVATORS, WITHOUT OBJECTION, AS TWO WERE CONSIDERED CONCURRENT, IN VIOLATION OF THE EQUAL PROTECTION CLAUSE.

Supporting Facts.

Two of the three convictions used as aggravating circumstances in this case, namely the 1984 arson and assault charges, arose out of a single event. Therefore, to charge these crimes as separate aggravating circumstances is to subject Mr. Dennis to double jeopardy and is fundamentally unfair.

Standard of Review.

The question of whether a defendant has received ineffective

assistance of counsel is a mixed question of law and fact, and are reviewed *de novo*. Strickland v. Washington, 466 U.S. 668, 698, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984); Chacon v. Wood, 36 F.3d 1459, 1465 (9th Cir. 1994).

Legal Argument.

United States Supreme Court case law indicates that statutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty. Aggravating circumstances provide a "'meaningful basis for distinguishing the few cases in which [death] is imposed from the many cases in which it is not,'" Gregg v. Georgia, 428 U.S. 153, 188 (1976), *quoting* Furman v. Georgia, 408 U.S. 238, 313 (1972) (WHITE, J., concurring).

Therefore, the "double counting" of one event in aggravating a murder case to a capital murder case is unconstitutional and must not be allowed to stand.

A number of state courts have invalidated double counting of aggravating circumstances. *See, e. g.*, Cook v. State, 369 So. 2d 1251, 1256 (Ala. 1979); Provence v. State, 337 So. 2d 783, 786 (Fla. 1976); State v. Rust, 197 Neb. 528, 537, 250 N. W. 2d 867, 873, *cert. denied*, 434 U.S. 912 (1977); Glidewell v. State, 663 P. 2d 738, 743 (Okla. Crim. App. 1983).

In the federal system, and as it should be, crimes that are part of a single transaction may not be counted separately in order to enhance sentence under the Armed Career Criminal Act. United States v. McElyea, 158 F. 3d 1016 (1999). The two prior convictions

of Dennis, assault and 2nd degree arson occurred in the same transaction and cannot be separately counted to reach to separate aggravators.

GROUND SEVEN: THE TRIAL COURT ERRED AND TRIAL COUNSEL WAS INEFFECTIVE FOR CONSIDERING RELEVANT TERRY DENNIS' EXPRESSED WISH TO DIE, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION.

Supporting Facts.

In a letter from trial counsel, dated December 29, 2000, Ms. Pusich told Petitioner, "I won't assist in your suicide..." Despite her written acknowledgment that Petitioner's actions were a means of State-assisted suicide, she knowingly assisted him anyway. Trial counsel knew Petitioner was sick, knew that he was not of sound mind to be making such crucial decisions, and facilitated his plea without negotiating a plea bargain. Further, trial counsel did nothing to stabilize Petitioner with medical treatment and appropriate medications prior to either entry of plea or sentencing by the three judge panel.

Next, a court gives absolutely no value, no consideration whatsoever to the fact that any given capital defendant does not wish to die. Neither the State, nor this Court, can point to any capital sentencing scheme which allows the consideration of the same. Even so, in the instant case, considerable deference was granted to the fact that Petitioner wanted to die -- even to the extent that the proceedings were expedited in order to accommodate Petitioner's wish to "get it over faster." (PCT, 21). Had the reverse occurred and Terry Dennis begged the court for his life,

would the decision have been the same? Petitioner's comments about life in prison not being worth living were not relevant evidence for consideration by the three judge panel and should have been disregarded. Dennis's knowledge of life in prison was a coercive factor in the entry of his plea, not a basis for fining the plea voluntary. Trial counsel's deference to the Petitioner's then stated desire to die was improper.

Standard of Review.

The question of whether a defendant has received ineffective assistance of counsel is a mixed question of law and fact, and are reviewed *de novo*. Strickland v. Washington, 466 U.S. 668, 698, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984); Chacon v. Wood, 36 F.3d 1459, 1465 (9th Cir. 1994).

Legal Argument.

The United States Supreme Court has recognized on more than one occasion that the Constitution places special constraints on the procedures used to convict an accused of a capital offense and sentence him to death. *See, e. g.*, Beck v. Alabama, 447 U.S. 625 (1980) (trial judge must give jury the option to convict of a lesser offense); Lockett v. Ohio, 438 U.S. 586, 604 (1978) (jury must be allowed to consider all of a capital defendant's mitigating character evidence); Eddings v. Oklahoma, 455 U.S. 104 (1982) (same). The finality of the death penalty requires "a greater degree of reliability" when it is imposed. Lockett, *supra*, at 604.

GROUND EIGHT: THE BELT WAS NOT USED TO KILL THE ALLEGED VICTIM; THEREFORE, THE DEADLY WEAPON ENHANCEMENT WAS ILLEGAL, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION.

Supporting Facts.

With regards to the instrumentality of death in the instant case, the Nevada Supreme Court recognized the following facts in its Opinion:

> He began strangling Straumanis with a belt. He felt somewhat aroused by Straumanis's struggling, and as she was "fading," he engaged in anal intercourse with her. During the course of the killing, he took the belt off and used his hands to choke her, and then suffocated her by covering her nose and mouth, making sure that she was not breathing and that "it was all done."

Dennis v. State, __ Nev. __, 13 P.3d 434, 436 (2000).

Further supporting the fact that the victim was not killed with the belt, the autopsy was not conclusive that the victim died from the use of the belt. (TPH II, 147-164). From the beginning, Petitioner told police he killed the victim with his hands. (TPH I, 14). He made similar statements during interrogation. (TPH I, 66).

Standard of Review.

When a petitioner claims the evidence was insufficient to support his conviction, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443

U.S. 307, 319, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979).

Legal Argument.

The Legal Argument set forth in Ground Nine, *infra*, is incorporated by reference as if set forth herein verbatim. There was insufficient evidence to demonstrate that the belt was actually utilized as a deadly weapon. In fact, the direct testimony available demonstrates the exact opposite. The belt was not used as a deadly weapon; Mr. Dennis killed the victim with his hands. As such, both trial counsel and appellate counsel were ineffective for failing to address the issue of the use of the belt and seek a new sentencing hearing, as well as dismissal of the deadly weapon claim. It was clear that the deadly weapon was not actually utilized in the killing. If the deadly weapon enhancement had not been found, the sentence of death may not have been imposed by the panel. See additional argument found in Ground Nine.

GROUND NINE: <u>A BELT IS NOT A DEADLY WEAPON; TRIAL COUNSEL WAS INEFFECTIVE FOR CONCEDING THE SAME; NRS 193.165 AS WRITTEN IS UNCONSTITUTIONAL, IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION</u>.

Supporting Facts.

The Supporting Facts listed in Ground Eight are incorporated by reference, as if set forth verbatim herein. For some unknown reason, trial counsel erroneously conceded that the belt was a deadly weapon. (TA, 23).

Standard of Review.

When a petitioner claims the evidence was insufficient to support his conviction, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979).

Legal Argument.

Therefore, to the extent that a belt is not a deadly weapon under the controlling statutory authority and recent case law, Mr. Dennis's sentencing enhancement for the deadly weapon should therefore be reversed.

NRS 193.165 states, in relevant part:

> 1. Except as otherwise provided in NRS 193.169, any person who uses a firearm or other deadly weapon or a weapon containing or capable of emitting tear gas, whether or not its possession is permitted by NRS 202.375, in the commission of a crime shall be punished by imprisonment in the state prison for a term equal to and in addition to the term of imprisonment prescribed by statute for the crime.

In the last legislative session, NRS 193.165 was amended to read, in relevant part:

> 5. As used in this section, "deadly weapon" means:
> (a) Any instrument which, if used in the ordinary manner contemplated by its design and construction, will or is likely to cause substantial bodily harm or death;
> (b) Any weapon, device, instrument, material or substance which, under the circumstances in which it is used,

> attempted to be used or threatened to be used, is readily capable of causing substantial bodily harm or death; or © A dangerous or deadly weapon specifically described in NRS 202.255, 202.265, 202.290, 202.320 or 202.350.

In Zgombic, 106 Nev. 571, 575-576, 798 P.2d 548 (1990), the Court in interpreting the application of NRS 193.165 examined the legislative intent behind the statute:

> The thrust of the penalty enhancement statutes for using a firearm or other deadly weapon is clearly to deter those who are or may be involved in criminal activity from using weapons that are inherently dangerous. It is meant to inform the criminal element and those preparing to engage in criminal activity that they will be subject to a severe additional penalty if they use a gun or a deadly weapon in the commission of a crime.

In this case, the use of the belt was not that of a deadly weapon for which doubling the sentence is likely to prevent possession of that instrument. A belt is a common item of clothing. Mr. Dennis did not use the belt to kill the victim. He used his hands. There is no logical reason to double the punishment in this case. See also Hutchins v. State, 110 Nev. 103, 111, 867 P.2d 1136 (1994). Are pantyhose, scarves, shoe laces or grandma's underwear considered a deadly weapon for enhancement purposes? Any of these methods could have been used by the defendant instead of a belt.

In Zgombic, supra, the court focused on the legislative intent behind the deadly weapon enhancement as a means to deter criminals from carrying arms which have the potential of inflicting death. Zgombic, *supra* at 575. The conclusion is that clearly the

enumerated instruments are weapons and that not all bladed instruments are weapons.

Under the *inherently dangerous* test, more is required than a showing that the instrument could cause death or serious bodily injury when misused but that the instrument be designed as a weapon to be carried and used against human beings.

The deadly weapon enhancement should therefore be reversed. Counsel was ineffective for failing to object to the allegation that Mr. Dennis used a deadly weapon and the prejudice that arose therefrom. Appellate counsel was ineffective for failing to raise said issue in support of a new penalty hearing.

GROUND TEN: <u>INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILURE TO PROPERLY INVESTIGATE AND PREPARE FOR TRIAL, IN VIOLATION OF MR. DENNIS'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS</u>.

Supporting Facts.

Trial counsel for Mr. Dennis was ineffective for failing to properly prepare for trial. There is no record of any essential defense motions in this case, no discovery motions, no motions to suppress, no motions in limine, no attempts to limit the use of prior felony convictions as an aggravator, and nothing related to witnesses or the media. There is precious little evidence that the trial counsel spent any significant time building a defense case. The record shows that trial counsel plead Mr. Dennis to capital

murder before all discovery was even turned over, and therefore, before the investigation was completed.

During the entry of guilty plea, the defendant admitted that there were mental health witnesses that should be investigated. Dennis stated that if he went any further with discussions with the Court that he might as well take the case to trial. The Court did not question further, in spite of Dennis's statements that he might want one. (AT 33-35). Defense counsel admitted that she was continuing to receive discovery. Dennis stated that he had only spent two to three hours with defense counsel. That was not adequate time for a death penalty case decision to enter a guilty plea and face a three-judge panel. (AT 37, 52).

Standard of Review.

The question of whether a defendant has received ineffective assistance of counsel is a mixed question of law and fact, and is reviewed *de novo*. Strickland v. Washington, 466 U.S. 668, 698, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984); Chacon v. Wood, 36 F.3d 1459, 1465 (9th Cir. 1994).

Legal Argument.

An attorney must make reasonable investigation in preparation for trial, or make a reasonable decision not to investigate. Kirksey v. State, 112 Nev. 980, 988, 923 P.2d 1102, 1107 (1997).

> In other words, in order to satisfy the "prejudice" requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on

going to trial.

Kirksey, *supra*.

In the case of Sanborn v. State, 107 Nev. 399, 812 P.2d 1279 (1991), the Nevada Supreme Court reversed a conviction, on the grounds of ineffective assistance of counsel, in which defense counsel failed to perform adequate pre-trial investigation, failed to present evidence regarding the victim's violent tendencies, and thereby failed to pursue an available self-defense theory. The Court reasoned:

> Focusing on counsel's performance as a whole, and with due regard for the strong presumption of effective assistance accorded counsel by this court and Strickland, we hold that Sanborn's representation indeed fell below an objective standard of reasonableness. Trial counsel did not adequately perform pretrial investigation, failed to pursue evidence supportive of a claim of self-defense, and failed to explore allegations of the victim's propensity towards violence. Thus, he "was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Strickland, 466 U.S. at 687, 104 S.Ct. at 2064.

Sanborn, 107 Nev. at 404, 812 P.2d at 1283.

The Court in Sanborn went on to find that if the jury had been presented with evidence of self-defense, the outcome may have been different:

> Had the jury been properly presented with the evidence apparently available to support Sanborn's claim of self-defense, the outcome may very well have been different. Thus, counsel's efforts both before and during trial were sufficiently deficient "to deprive the defendant of a fair trial." Id. Accordingly, as discussed in greater detail below, Sanborn has stated a claim of ineffective assistance of counsel that warrants reversal of his conviction.

Sanborn, 107 Nev. at 404, 812 P.2d at 1283.

Finally, the Court determined that prejudice resulted and the Strickland standard for reversal based upon ineffective assistance was met:

> Sanborn's defense was clearly prejudiced by his counsel's failure to develop and present evidence which would have corroborated Sanborn's testimony and discredited the state's expert witness. Because of counsel's lack of due diligence, Sanborn was deprived of the opportunity to present testimony material to his defense, and we are therefore unable to place confidence in the reliability of the verdict. *See* Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984).

Sanborn, 107 Nev. at 405, 812 P.2d at 1284.

A death penalty conviction was overturned for ineffective assistance of counsel when a lawyer failed to investigate mitigating evidence, that would have shown that the defendant suffered a "nightmarish childhood" and functioned well in prison. Williams (Terry) v. Taylor, 120 S.Ct. 1495 (2000). In Eddings v. Oklahoma, 455 U.S. 104 (1982) a case was reversed when the jury was not allowed to consider defendant's family history as a mitigating factor. In Skipper v. South Carolina, 481 U.S. 393 (1987), the exclusion of evidence that defendant had adjusted well to incarceration was deemed error.

Counsel admitted that discovery was still being received on the date of the guilty plea. Counsel admitted that she had not received necessary records. What was the rush? The justice system has no legitimate interest in executing a defendant who has not received a proper defense.

Had counsel investigated further, she would have known the severity of the mental health issues that plagued her client.

Counsel would have understood that she should have questioned his requests of her and prepared a defense to the death penalty. Supreme Court Rule 250 requires more. Counsel must file appropriate pretrial motions and prepare the case. Counsel was handed the notice of intent to seek the death penalty at the arraignment. Counsel admitted as late as sentencing that information was still coming in on the case. Counsel admitted at the entry of plea that she was still receiving discovery on the case. It was impossible for trial counsel to evaluate a case and prepare pre-trial motions when the discovery had not even been received. the Counsel would not have deferred critical decisions to her client, if she had only understood how truly ill he was. Evidence will be presented on the severity of the mental health issues of Mr. Dennis. **GROUND ELEVEN: TRIAL COUNSEL WAS INEFFECTIVE WHEN SHE FAILED TO MOVE TO SUPPRESS THE ILLEGAL STATEMENT OF TERRY DENNIS, WHICH WAS OBTAINED IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS.**

Supporting Facts.

The actions of Dennis during the police interview lead to the inescapable conclusion that he invoked his rights per Miranda and that he was intoxicated.

For example, Dennis told the police at the onset of the interview: "Fuck You."... "Fucking think... fucking... I ain't saying shit.... What the fuck is this? This is bullshit". Vol I. Page 43. After minutes of obviously saying he wasn't talking, officers then asked if he wanted a lawyer. (Vol I Page 44). Dennis was asked to waive his rights prior to reading the written waiver form. Dennis said he didn't know what he told officers at the

scene. (Vol I Page 45). Dennis advised officers straight out that he was taking Prozac and was under the care of doctors at the VA. (Vol I Page 47). The desperation of Dennis was a key factor during the interview. Dennis stated, "I don't care at this fucking point I couldn't really care about this." (Vol I Page 48).

The interview continued at length. During that time, it is clear that Dennis is in withdrawal. His hands were shaking. He admitted to excessive drinking and having nothing to eat for days. Dennis commented that he was getting shaky from withdrawal. Dennis even had to go to the bathroom and officers did not stop the interview and accommodate his request. (Vol II 136, 173-174, 178-187).

Dennis was not read his Miranda rights until the second interview and approximately one hour into that interview. Officers admitted to speaking with Dennis when the tape recorder was in the off position. There is no record as to what occurred during that time period. The only thing that is obvious is that officers began on tape advising of the Miranda rights, turned off the recorder and when they turned it back on, Dennis waived his rights. Officers even told Dennis that the recorder was off when it was on. Nevada is not a one party consent state. Dennis did not agree to have the comments taped during the time period the cops told him the recorder was off. (Vol I Page 49-51).

The inability of Dennis to understand the seriousness of the process is demonstrated by his comments that he "would rather have a goddamn death penalty than 40 years in prison." Dennis commented

that he did not think he actually did anything wrong. (Vol II 114-116). When asked by officers what should happen to him, he asked "who gives a fuck?" Dennis commented to officers that voices were telling him to do things and that sometimes he would listen and sometimes he would not. (Vol II 118).

In the middle of the interview, Dennis invoked his rights. Dennis stated, "No, I'm all done." Dennis was offered a break. Dennis stated unequivocally that he was all done and did not need any more breaks. In spite of this, the officers continue to interview him for a lengthy period. (Vol II 107).

Toward the end of the interview, Dennis was left alone by officers. The tape continued to run. This portion of the tape demonstrates the inability of Dennis to waive a constitutional right. He talked to himself. Dennis even asked "What the fuck is going on?" (Vol II 178).

Detective Burke's testimony was that Dennis smelled of alcohol and had been drinking a lot. Burke did not provide a written Miranda waiver to Dennis until the second interview. There was a four hour period between the time of detention and the taking of samples for the blood alcohol test. (Vol II 181, 184, 187).

Standard of Review.

The question of whether a defendant has received ineffective assistance of counsel is a mixed question of law and fact, and is reviewed *de novo*. Strickland v. Washington, 466 U.S. 668, 698, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984); Chacon v. Wood, 36 F.3d 1459,

1465 (9th Cir. 1994).[18]

Legal Argument.

As pointed out in the Statement of Facts, the statement taken from Terry Dennis was illegally obtained. Dennis had a Blood Alcohol Content of approximately 0.112 six hours after his statement to police. The blood test was negative for the presence of drugs. This fact leads to the inescapable conclusion that during his statement his BAC was significantly higher at the time of the police interview and that Dennis was intoxicated during questioning and therefore incapable of giving a knowing, intelligent and voluntary statement. Evidence will be presented at the evidentiary hearing on the dissipation of alcohol in the human body. It is anticipated that the expert will testify that a person will process about .10 to .15 per hour. This would mean that at the time of the police interview, Mr. Dennis was over a 0.18.

The failure of trial counsel to move to suppress the illegally obtained statements amounts to ineffective assistance of counsel, in violation of the Fifth, Sixth and Fourteenth Amendments. Prejudice against Dennis is shown because, but for the existence of the illegal statement, Dennis would not have entered a Guilty Plea to the charge. Hill v. Lockhart, 474 U.S. 52 (1985).

The statements of Mr. Dennis were utilized by the State to portray Mr. Dennis as a dangerous, calculated killer. The State, while being guilty of prosecutorial misconduct, referred to Mr.

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[18] There is a separate, two-prong standard of review regarding the waiver issue. See subsection B of this claim of error, *infra*.

Dennis as a "serial killer". This statement was allegedly based upon statements made by Mr. Dennis to the police. Of critical value for review, there has never been another charge of murder or another victim who has surfaced related to Mr. Dennis. All evidence and argument by the State that Mr. Dennis was a serial killer was inadmissible and highly prejudicial. The failure of trial counsel to move to suppress such prejudicial and incredible testimony amounted to ineffective assistance of counsel.

The Nevada Supreme Court in Anderson, *infra*, recognized that in Miranda v. Arizona, *infra*, the U. S. Supreme Court stated:

> **If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel.** This Court has always set high standards of proof for the waiver of constitutional rights, Johnson v. Zerbst, 304 U.S. 458 [58 S.Ct. 1019, 82 L.Ed. 1461] (1938), and we re-assert these standards as applied to in-custody interrogation. 384 U.S. 436, 475, 86 S.Ct. 1602, 1628, 16 L.Ed.2d 694 (1966).

Anderson v. State, 109 Nev. 1129, 1133, 865 P.2d 318, 320 (1993).

The Nevada Supreme Court reminds us that there must be a careful review of the circumstances in each case, to effectively determine issues of voluntary waiver under Miranda:

> ***[T]he Miranda waiver's validity must be determined in each case through an examination of the particular facts and circumstances surrounding that case,*** including the background, experience and conduct of the accused. Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981); see also Rowbottom v. State, 105 Nev. 472, 779 P.2d 934 (1989).

Anderson, *supra*.

Mr. Dennis was in custody during the police interviews. The

question then turns upon the issue of the voluntariness of the statement.

A. Introduction: Two Prong Analysis regarding Waiver of Miranda Rights.

In Colorado v. Spring, 479 U.S. 564, 107 S.Ct. 851, 93 L.Ed.2d 954 (1987) the United States Supreme Court emphasized that the inquiry of whether a waiver is coerced has two distinct dimensions. The Court in Spring cited to Moran v. Burbine, 475 U.S. 412, 421, 106 S.Ct. 1135, 1141, 89 L.Ed.2d 410 (1986). The Court in Moran explained that (1) the waiver "*must have been made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it;*" and (2) the relinquishment of the right "*must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception.*" Id.

If and only if the "totality of the circumstances surrounding the interrogation" reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the Miranda rights have been waived. Id, *quoting* Fare v. Michael C., 442 U.S. 707, 725 [99 S.Ct. 2560, 2572, 61 L.Ed.2d 197] (1979)). *See also* Derrick v. Peterson, 924 F.2d 813, 820 (9th Cir. 1990).

The Nevada Supreme Court has also mandated this two step analysis:

> The "totality of the circumstances" test may be relevant to a discussion of whether a defendant's confession is voluntary under due process standards. See Mincey v. Arizona, 437 U.S. 385, 401, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978); Davis v. North Carolina, 384 U.S. 737, 741- 742, 86 S.Ct. 1761, 1764-1765, 16 L.Ed.2d 895 (1966). The

> *"totality of the circumstances" test, however, is not applicable in analyzing whether a defendant has relinquished his Fifth Amendment rights against self-incrimination.* See Edwards v. Arizona, 451 U.S. 477, 483, 101 S.Ct. 1880, 1884, 68 L.Ed.2d 378 (1981). Instead, in that the purported waiver of a constitutional right is ineffective unless knowingly and intelligently made, the alleged waiver of Miranda rights must be judged under a "knowing and intelligent waiver" standard. See Miranda v. Arizona, 384 U.S. 436, 475, 86 S.Ct. 1602, 1628, 16 L.Ed.2d 694 (1966).

Tomarchio v. State, 99 Nev. 572, 574-577, 665 P.2d 804, 806-807.

Most importantly, the Nevada Supreme Court reminds us:

> The application of this higher standard of review may result in the exclusion of some confessions which might have been voluntary under the lesser, "totality of the circumstances" test. See Michigan v. Mosley, 423 U.S. 96, 114, 96 S.Ct. 321, 331, 46 L.Ed.2d 313 (1975) (Brennan, J., dissenting).

Id.

B. Standard of Appellate Review Regarding Wavier.

Given the two-pronged analysis for determining waiver issues in the Miranda context at the district court level, there must also be a two-step standard of review at the appellate level which correlates with the initial determination of waiver.

The Ninth Circuit Court of Appeals has established that it reviews a district court's rulings on Miranda waivers according to this two-step standard of review. As to the *first step*, the Ninth Circuit has acknowledged that:

> The inquiry as to *knowing and intelligent waiver* is essentially a question of fact. Whether a defendant's waiver was knowing and intelligent is reviewed for clear error.

U.S. v. Doe, 155 F.3d 1070, 1074 (9th Cir. 1998), *citing* Collazo v. Estelle, 940 F.2d 411, 416 (9th Cir.1991) (*en banc*).

Next, as to the *second step*, the Ninth Circuit has determined that:

> an assessment of the voluntariness of a Miranda waiver, like a probable cause or reasonable suspicion determination, is a mixed question of law and fact that we review de novo.

Doe, *supra*, *citing* Collazo, at 415-16.

Further, the Ninth Circuit reasoned that a de novo review on issues of voluntariness was essential to fair judicial process:

> Voluntariness turns on broad legal principles, and without de novo review, we would be unable to properly define these legal principles and maintain a unitary system of law. Indeed, one of the questions presented by this case-whether due process requires parental notification before a juvenile can voluntarily waive his Miranda rights offers a paradigmatic example of the importance of de novo review to defining and clarifying legal principles.

Id.

The Ninth Circuit Court in Collazo, *supra*, further explained the importance of de novo review:

> [W]e find that the voluntariness of a waiver is a mixed question of law and fact that requires de novo review. *A mixed question of law and fact warrants de novo review when "the application of law to fact will require the consideration of legal concepts and involve the exercise of judgment about the values underlying legal principles."* Terrovona v. Kincheloe, 852 F.2d 424, 428 (9th Cir.1988) (quoting United States v. McConney, 728 F.2d 1195, 1202 (9th Cir.) (en banc), cert. denied, 469 U.S. 824, 105 S.Ct. 101, 83 L.Ed.2d 46 (1984)). See also Derrick, 924 F.2d at 822. Thus, as with the voluntariness of a confession, the voluntariness of a Miranda waiver is decided by first examining objectively the methods the police used to produce the waiver. But the calculus shifts when we focus on the *awareness prong*. In this dimension, "we review the question of *whether the defendant's mind was overborne*--i.e., was his waiver knowing and intelligent--for clear error." Derrick, 924 F.2d at 823.

Collazo v. Estelle, 940 F.2d 411, 415-416 (1991).

The Nevada Supreme Court has not clearly articulated the standard of review regarding issues of Miranda waivers. However, it has inferred the same process of review:

> This court examines the facts and circumstances of a case in order to determine whether a defendant has executed a valid waiver of his Fifth Amendment right against self-incrimination after receiving Miranda warnings. Falcon v. State, 110 Nev. 530, 534, 874 P.2d 772, 775 (1994)...
> An effective waiver of one's Fifth Amendment right against self-incrimination must be knowing and intelligent. Miranda, 384 U.S. at 479, 86 S.Ct. 1602; Tomarchio v. State, 99 Nev. 572, 576, 665 P.2d 804, 806-07 (1983). Further, a confession must be made freely and voluntarily, without compulsion or inducement. See Passama v. State, 103 Nev. 212, 213, 735 P.2d 321, 322 (1987).

Taylor v. State, 114 Nev. 1071, 1083-1084, 968 P.2d 315, 324 (1998).

C. Whether the Alleged Waiver Was Knowing & Intelligent.

Because his state of mind during the interrogation does not support a finding that Dennis knowingly and intelligently abandoned his Miranda rights, no evidence of his statements is admissible.

"The record must show, or there must be an allegation in evidence which shows, that an accused was offered counsel but intelligently and understandingly rejected the offer." North Carolina v. Butler, 441 U.S. 369, 99 S.Ct. 1755, 1757 ft. n. 4 (1979), *quoting*, Carnley v. Cochran, 369 U.S. 506, 516, 82 S.Ct. 884, 890.

It is recognized that an express waiver is not necessary:

> The courts must presume that a defendant did not waive his rights; the prosecution's burden is great; but in at least some cases waiver can be clearly inferred from the actions and words of the person interrogated.

Supra, 99 S.Ct. at 1757 (emphasis added).

This case is directly on point with that of Allan v. State, 118 Nev. Adv. Op. No. 2, decided January 22, 2002. In Allan, the Nevada Supreme Court held that the defendant's confession was involuntary as the suspect's ability to exercise his free will was overborne by police coercion. This constituted a violation of the Due Process Clause of the 14th Amendment. The Court noted that the defendant's mental condition is an important factor in the voluntary analysis. In this case, Dennis was intoxicated, in withdrawal, had severe mental health issues and was talking incoherently to himself while the tape was running. Dennis repeatedly stated he was done. Officers refused to acknowledge his statement and continued to interrogate him. Dennis even had to go to the bathroom and was not allowed to do so.

Any minimally trained police officer should have known such pressure in ignoring Dennis's request to stop the questioning was improper and was likely to produce involuntary statement. Henry v. Kernan, 197 F.3d 1021, 1028 (9th Cir. 1999). Officer Burke is not an inexperienced officer.

However, in McDonald v. Lucas, 677 F.2d 518, 520-522 (5th Cir. 1982), the Court noted that "[t]he customary procedure... is to obtain from the suspect an express waiver of his rights through his signature on a printed form. 'Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice.' [Miranda] 384 U.S. at 458, 86 S.Ct.

at 1619."

In McDonald, the defendant refused to sign a written Miranda waiver form, but thereupon easily answered questions propounded to him by the police. The Court rejected the notion that the defendant's apparently-voluntarily engaged in dialog with the police constituted a waiver of Miranda rights, observing:

> A substantive right is only as good as the procedural protections afforded that right. The constitutions of many nations are wonderful showcases of stated rights. But what makes our constitution effective is that our procedural law gives our citizens the key to the storehouse of substantive rights.
>
> * * *
>
> The district court reached a conclusion which translates into this: If the accused understands his rights, is not threatened, is not physically harmed, and speaks, he is no longer entitled to his constitutional safeguards. This is **not the law.** If it were, an accused party would waive his rights simply by answering questions during custodial interrogations.

Supra, 677 F.2d at 520-521; see also, United States v. Collins, 40 F.3d 95, 99 (5th Cir. 1994) (observing that "mere answering of questions is insufficient to show waiver... there must be some affirmative action demonstrating a waiver of... Miranda rights."); contrast United States v. Andaverde, 64 F.3d 1305, 1313-1314 (9th Cir. 1995) (finding Miranda waiver a "close question" but district court not clearly erroneous where defendant initiated interview and at no time did police "exhort" defendant to answer questions).

In Woods v. Clausen, 605 F.Supp. 890, 894-896, (E.D.Ws. 1985), aff'd 794 F.2d 293 (7th Cir. 1986), the Court found no valid waiver of Miranda even though the defendant "intentionally did not cut off

questioning in the hope of learning about the state's case against him. Even if that were true, it would not be sufficient to constitute a waiver." Cf., Koza v. State, 102 Nev. 181, 718 P.2d 671, 674-675 (1986) (reversing for failure to honor defendant's constitutional rights).

Under the facts of the instant case, Dennis's purported waiver of his Miranda rights is tainted by his intoxicated state of mind and certainly cannot be said to be the result of a "free and rational choice," Miranda, 384 U.S. at 464, 86 S.Ct. at 1622, made "in the unfettered exercise of [his] free will," Malloy, 378 U.S at 8, 84 S.Ct. at 1493, and "not caused by improper influences..." Bran v. United States, 168 U.S. 532, 549, 18 S.Ct. 183, 189 (1897).

Therefore, upon complete and thorough review of the record below, and application to the controlling legal authority, this Court must conclude that Dennis did not make a knowing and intelligent waiver of his Miranda rights. The guilty plea must be withdrawn and the decision of the district court must be reversed and remanded.

Since the evidence presented by the State at the penalty phase of the proceedings contained an exhaustive display of the statements made by Mr. Dennis, the Petitioner is entitled to a new penalty phase hearing.

D. Whether Any Alleged Waiver Was Voluntary.

Assuming *arguendo* that a knowing and intelligent waiver is found, it still must be determined whether the alleged waiver was voluntary. The U. S. Supreme Court held that the reading of rights

is "not simply a preliminary ritual." Therefore :

> Whatever the testimony of the authorities as to waiver of rights by an accused, the fact of lengthy interrogation or incommunicado incarceration before a statement is made is strong evidence that the accused did not validly waive his rights. In these circumstances the fact that the individual eventually made a statement is consistent with the conclusion that the compelling influence of the interrogation finally forced him to do so. It is inconsistent with any notion of a voluntary relinquishment of the privilege. Moreover, any evidence that the accused was threatened, tricked, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege. The requirement of warnings and waiver of rights is fundamental with respect to the Fifth Amendment privilege and not simply a preliminary ritual to existing methods of interrogation.

Miranda, 384 U.S. at 476, 86 S.Ct. at 1629.

In Tomarchio, *supra*, the defendant testified, and the district court found, that the defendant sought to bargain for another suspect's release in return for his confession. The interrogating officer then picked up a telephone and said to someone at the other end, "Order Kathleen Reavy's release." The defendant, who was unaware that the other suspect had been released the night before, argued that he was deceived by this ruse. He eventually made a complete videotaped confession, which led to the recovery of the murder weapon and related physical evidence.

Wherefore, the defendant/appellant in Tomarchio sought to suppress the confession and physical evidence on the grounds that the detective's ruse violated his Fifth Amendment rights. The district court denied the motion, finding that appellant had not requested an attorney and that, under a "totality of the circumstances" test, appellant's confession was voluntary. The

Nevada Supreme Court held that the district court erred:

> [I]n the instant case the district court found that Detective McGuckin had engaged in an elaborate "deception" by picking up the telephone and ordering the release of an individual the detective knew was not in custody at the time. **The district court also found that the detective engaged in this charade in order to obtain appellant's confession.** In that the detective intended this conduct to elicit incriminating remarks from appellant, McGuckin's conduct amounted to an interrogation. See Rhode Island v. Innis, 446 U.S. 291, 100 S.Ct. 1682, 1686, 64 L.Ed.2d 297 (1980).

Tomarchio v. State, 99 Nev. 572, 577, 665 P.2d 804, 807 (1983).

As set forth extensively in the Statement of Facts, above, Dennis was coercively interrogated and manipulated. The effect was to wear down the resolve of Dennis and impress upon him the futility of his silence. It presents as the paradigmatic "coercive atmosphere" discussed at length and condemned in Miranda, and which gave rise to that decision. Miranda aptly describes the tactic used by the detectives:

> To highlight the isolation and unfamiliar surroundings, the [interrogation] manuals instruct the police to display an air of confidence in the suspect's guilt and from outward appearance to maintain only an interest in confirming certain details. The guilt of the suspect is to be posited as a fact.
>
> * * *
>
> To be alone with the suspect is essential to prevent distraction and to deprive him of any outside support. The aura of confidence in his guilt undermines his will to resist. He merely confirms the preconceived story the police seek to have him describe.

Miranda v. Arizona, 384 U.S. 436, 450, 455, 86 S.Ct. 1602, 1615, 1617.

> Interrogators describe the point of the first admission as the "breakthrough" and the "beachhead," R. Royal & S.

> Schutt, The Gentle Art of Interviewing and Interrogation: A Professional Manual and Guide 143 (1976), which once obtained will give them enormous "tactical advantages," F. Inbau & J. Ried, Criminal Interrogation and Confessions 82 (2nd ed. 1967).

Supra, 470 U.S. at 328, 105 S.Ct. at 1303 (BRENNAN, J.), dissenting.

In evaluating whether Dennis's statement was made knowingly and voluntarily, "the finder of fact must examine the surrounding circumstances and the entire course of police conduct with respect to the suspect." Id., 105 S.Ct. at 1298; accord, United States v. Wauneka, 770 F.2d 1434, 1440 (9th Cir. 1985); see also, United States v. Polanco, 93 F.3d 555, 560-561 (9th Cir. 1996) (remanding to trial court for proper analysis).

Concerning the voluntariness analysis, the Nevada Supreme Court has explained:

> A confession is admissible only if it is made freely and voluntarily, without compulsion or inducement. Franklin v. State, 96 Nev. 417, 421, 610 P.2d 732, 734-735 (1980); see also Crew v. State, 100 Nev. 38, 675 P.2d 986 (1984). A criminal defendant is deprived of due process of law if his conviction is based, in whole or in part, upon an involuntary confession, and even if there is ample evidence aside from the confession to support the conviction. Jackson v. Denno, 378 U.S. 368, 376 (1964). In order to be voluntary, a confession must be the product of a "rational intellect and a free will." Blackburn v. Alabama, 361 U.S. 199, 208 (1960). A confession is involuntary whether coerced by physical intimidation or psychological pressure. Townsend v. Sain, 372 U.S. 293, 307 (1963).
>
> In recent cases, the United States Supreme Court has reiterated its view that certain interrogation techniques, either in isolation or as applied to the unique characteristics of a particular suspect, are so offensive to a civilized system of justice that they must be condemned under the Due Process Clause of the Fourteenth Amendment. Miller v. Fenton, 474 U.S. 104, 106 S.Ct. 445, 449 (1985); Colorado v. Connelly, ___ U.S.___, 107 S.Ct. 515 (1986). The court had retained this due process focus

even after developing extensive law on the Fifth Amendment privilege against self-incrimination and applying it to the states. See Colorado v. Connelly, ___ U.S. ___, 107 S.Ct. at 520; see also Miranda v. Arizona, 384 U.S. 436 (1966); Malloy v. Hogan, 378 U.S. 1 (1964). The due process requirement that a confession must be voluntary to be admissible is independent of the Fifth Amendment concerns set out in Miranda and its progeny. See Miller v. Fenton, 474 U.S. 104, 106 S.Ct. at 449. The Miller court stated:

> ...[T]he admissibility of a confession turns as much on whether the techniques for extracting the statements, as applied to this suspect, are compatible with a system that presumes innocence and assures that a conviction will not be secured by inquisitorial means as on whether the defendant's will was in fact overborne.

Id., 474 U.S. 104, 106 S.Ct. at 453, emphasis in original.

To determine the voluntariness of a confession, the court must consider the effect of the totality of the circumstances on the will of the defendant. See Schneckloth v. Bustamonte, 412 U.S. 218, 226-227 (1973). The question in each case is whether the defendant's will was overborne when he confessed. *Id.* at 225-226.

Passama v. State, 103 Nev. 212, 213-214, 735 P.2d 321 (1987).

> The ultimate test remains that which has been the only clearly established test in Anglo-American courts for two hundred years: **The test of voluntariness. Is the confession the product of an essentially free and unconstrained choice by its maker?...The line of distinction is that at which governing self-direction is lost and compulsion, of whatever nature or however infused, propels or helps to propel the confession.**

Collazo v. Estelle, 940 F.2d 411, 416 (9th Cir. 1991) (En Banc), *quoting* Culombe v. Connecticut, 367 U.S. 568, 602, 81 S.Ct. 1860 (1961).

It is respectfully submitted that under the facts of the instant case this Honorable Court will be unable to find that Dennis's statements were "voluntary" pursuant to these well-

recognized standards. Further:

> The term "interrogation" under Miranda refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. The latter portion of this definition focuses primarily upon the perception of the suspect, rather than the intent of the police.

Weathers v. State, 105 Nev. 199, 201, 772 P.2d 1294 (1989) (finding a Miranda violation from conduct amounting to "interrogation" similar to that in the instant case, but finding the error harmless), quoting, Rhode Island v. Innis, 446 U.S. 291, 301-302, 100 S.Ct. 1682 (1980) (emphasis in original).

> In this case, unlike Innis, the detective spoke directly to Weathers. Impliedly, at least, he accused Weathers of shooting [the victim], and he confronted Weathers with the eyewitness evidence against him. The detective's remark, "When I am through talking, you can talk," invited Weathers to respond. [The detective] engaged in this kind of approach to Weathers knowing that he was going to arrest Weathers for the homicide based on the evidence the police had previously obtained from the eyewitness... . Instead of first reading Weathers his Miranda rights and allowing Weathers to invoke immediately his right to remain silent, [the detective] confronted Weathers with the evidence. If the detective expected Weathers to remain silent in the face of such confrontation, his expectation was unreasonable. The law recognizes that some kind of reaction, incriminating or otherwise, can be expected from one's being accused of criminal conduct. See Skidmore v. State, 59 Nev. 320, 92 P.2d 979 (1939). The law also recognizes that a person is expected to respond with exculpatory evidence or denial when wrongly accused. Accordingly, [the detective's] statements to Weathers before reading Weathers his rights were the functional equivalent of express questioning, and the trial court improperly admitted Weathers's response into evidence.

Supra, 105 Nev. at 202.

Mr. Dennis was clearly subjected to "interrogation" in the

absence of a valid waiver of his Miranda rights and all statements made by Mr. Dennis must be suppressed. Weathers v. State, supra; see also, United States v. Disla, 805 F.2d 1340, 1347 (9th Cir. 1986); People v. Lowe, 616 p.2d 118, 122 (Colo. 1980); State v. Hawkins, 615 P.2d 1327, 1330-1331 (Wash. App. 1980).

An accused's intoxication may affect the assessment of the voluntariness of a confession elicited from the defendant at that time. The Court should review the intoxication of the defendant at the time of the statement. In this case, Mr. Dennis was too drunk to waive his constitutional rights. He was clearly in a custodial setting. The actions of the Reno Police Officers violated the 5th Amendment, 6th Amendment and due process rights of Mr. Dennis. U.S. v. Guaydacan, 470 U.S. F.2d 1173 (9th Cir. 1972) and U.S. Montoya-Arrubla, 749 F.2d 700 (11th Cir. 1985).

Therefore, a complete review of the record herein, applied to the above legal authority, will show that Mr. Dennis's alleged waiver of Miranda rights was not voluntary. The decision of the District Court should be reversed and remanded. Trial counsel and appellate counsel were ineffective for failing to move to suppress said statements and prevent their consideration by the three-judge panel and the Nevada Supreme Court. The sentencing decision would have been different had the statements of Dennis been excluded.

GROUND TWELVE: TRIAL COUNSEL WAS INEFFECTIVE WHEN SHE FAILED TO MOVE TO REDACT PARTS OF THE ADMITTED (ILLEGAL) STATEMENT OF TERRY DENNIS, IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS.

Supporting Facts.

There is evidence in the record which was presented to the panel that should have been redacted. This evidence consists of an admission by the defendant that he served six months in jail for a spousal battery conviction. Dennis stated that he was accused of having committed this offense but maintained his innocence of the charge. Defense counsel did not move to suppress this suspect evidence and redact it from the confession tape. (Vol II, Page 142-143).

Evidence was admitted via the police confession that a transvestite named Dalton Hirsh died at the residence of Dennis located on Moran Street in Reno. This part of the statement is when Dennis is speaking to himself while no one is visible on the tape. This evidence should have been redacted. (Vol II Page 177-178). This type of evidence was not relevant or credible and was presented to the three-judge panel merely to incite them. The evidence was suspect and should not have been received by the three judge panel.

Standard of Review.

The question of whether a defendant has received ineffective assistance of counsel is a mixed question of law and fact, and is reviewed *de novo*. Strickland v. Washington, 466 U.S. 668, 698, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984); Chacon v. Wood, 36 F.3d 1459, 1465 (9th Cir. 1994).

Legal Argument.

The Legal Arguments from Ground Ten, set forth above, and Ground Thirteen, set forth below in this Petition, are hereby incorporated by reference, as if set forth verbatim herein.

While the district court has wide discretion on issues concerning the granting or revocation of probation, it is only fair that this discretion is not unlimited. See NRS 176A.100, NRS 176A.400, Renard v. State, 94 Nev. 368, 580 P.2d 470 (1978); and Houk v. State, 103 Nev. 659, 747 P.2d 1376 (1987). A district court abuses that discretion when it relies upon impalpable or highly suspect evidence. Silks v. State, 92 Nev. 91, 545 P.2d 1159 (1976) and Creps v. State, 94 Nev. 351, 581 P.2d 842 (1978).

Any evidence or argument related to Mr. Dennis being a serial killer, the death of a transvestite, or a prior unsupported misdemeanor battery was suspect and should not have been received by the Court.

GROUND THIRTEEN: TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO PROPERLY INVESTIGATE POSSIBLE MITIGATING FACTORS AND/OR TO PUT ON WITNESSES AND/OR EVIDENCE IN MITIGATION DURING SENTENCING, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

Supporting Facts.

Defense counsel admitted that she had been unable to obtain copies of the military records of Dennis prior to the penalty phase hearing. Counsel admitted that the records had bearing on the proceeding. She limited her comments to the fact that Dennis was honorably discharged from service. Contained within the medical records is critical evidence of the mental health issues of Dennis and his discharge and treatment plans. Counsel was ineffective for failing to bring critical evidence to the sentencing panel.

Comments that the client was anxious to get this over with do not reduce counsel's obligation to provide effective assistance of

counsel.

Standard of Review.

The question of whether a defendant has received ineffective assistance of counsel is a mixed question of law and fact, and is reviewed *de novo*. Strickland v. Washington, 466 U.S. 668, 698, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984); Chacon v. Wood, 36 F.3d 1459, 1465 (9th Cir. 1994).

Legal Argument.

The failure of trial counsel to investigate, among other things, Dennis's state of mind and the effects of alcohol abuse on his state of mind, as well as mitigation evidence at sentencing, was ineffective and prejudiced Dennis, as it pertains to his sentencing, as well as his guilt.

Defense counsel's failure to promptly investigate and thoroughly to prepare will often deny the accused his constitutional right to the effective assistance of counsel. See Powell v. Alabama, 287 U.S. 45 (1932).

Defense counsel has a duty to reasonably investigate possible mitigating evidence. See Haberstroh v. State, 109 Nev. 22 (1993).

In the case of Sanborn v. State, 107 Nev. 399, 812 P.2d 1279 (1991), the Court determined that prejudice resulted and the Strickland standard for reversal based upon ineffective assistance was met:

> Sanborn's defense was clearly prejudiced by his counsel's failure to develop and present evidence which would have corroborated Sanborn's testimony and discredited the state's expert witness. Because of counsel's lack of due diligence, Sanborn was deprived of the opportunity to

> present testimony material to his defense, and we are therefore unable to place confidence in the reliability of the verdict. *See* Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984).

Sanborn, 107 Nev. at 405, 812 P.2d at 1284.

Further, the Nevada Supreme Court has recognized the right to effective assistance of counsel at sentencing:

> It is well established that "*the sentencing (of the defendant) is a critical stage of the criminal proceeding at which he is entitled to the effective assistance of counsel*." Gardner v. Florida, 430 U.S. 349, 358, 97 S.Ct. 1197, 1205, 51 L.Ed.2d 393 (1977). See also Mempa v. Rhay, 389 U.S. 128, 88 S.Ct. 254, 19 L.Ed.2d 336 (1967); Smith v. Warden, 85 Nev. 83, 450 P.2d 356 (1969).

Cunningham v. State, 94 Nev. 128, 130-131, 575 P.2d 936, 938 (1978).

For example, if mental health records indicate that a psychological evaluation may produce favorable reports sufficient to mitigate a sentence of death, counsel's failure to request such an evaluation is both inadequate and prejudicial. *See, e.g.*, Deutscher v. Whitley, 946 F.2d 1443, 1446 (9th Cir.1991), *vacated*, 506 U.S. 935, 113 S.Ct. 367, 121 L.Ed.2d 279 (1992), *aff'd sub nom.* Deutscher v. Angelone, 16 F.3d 981, 984 (9th Cir.1994); Riley v. State, 110 Nev. 638, 650, 878 P.2d 272, 280 (1994).

In Evans v. Lewis, 855 F.2d 631 (9th Cir.1988), counsel's failure to investigate defendant's mental condition for the purpose of presenting evidence in mitigation of a death sentence was ineffective where the defendant had a prior diagnosis of schizophrenia that could have shown he had an impaired mental state at the time of the crime. Evans, at 636.

In other cases, a trial attorney's failure to investigate or to offer mental health mitigation has been held to constitute ineffective assistance of counsel. *See, e.g.*, Kenley v. Armontrout, 937 F.2d 1298, 1303-1308 (C.A.8), *cert. denied*, Delo v. Kenley, 502 U.S. 964, 112 S.Ct. 431, 116 L.Ed.2d 450 (1991); Thompson v. Wainwright, 787 F.2d 1447, 1451 (CA11 1986), *cert. denied*, Thompson v. Dugger, 481 U.S. 1042, 107 S.Ct. 1986, 95 L.Ed.2d 825 (1987).

Therefore, trial counsel's failure to investigate, among other things, available defenses, Dennis's state of mind and the effects of alcohol abuse on his state of mind and the lack of prescription medications, as well as mitigation evidence was ineffective and prejudiced Dennis as it pertains to his sentencing, as well as his guilt, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments.

GROUND FOURTEEN: INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL FOR ADVISING AND ALLOWING MR. DENNIS TO PLEAD GUILTY EVEN THOUGH THERE WAS A CORPUS DELICTI PROBLEM, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

Supporting Facts.

Trial counsel allowed Petitioner to plead guilty to a capital murder charge, without the benefit of a plea bargain, despite the fact that there was a corpus delicti problem. Though the coroner opined that the cause of death was "most likely by strangulation," the extent of decomposition of the body, and the uncertainty of the

time of the injuries (she opined that the injuries were anywhere from 3 to 7 days old) presented a realistic problem of corpus delicti. (TPH II, 156, 158, 162).

Therefore, outside of Petitioner's alleged confession -- given while intoxicated and while suffering from clinical depression -- the State did not have sufficient corroborating evidence of criminality involved in the death.

Further, trial counsel conceded that a corpus delicti issue existed, as she argued the relevance of corpus delicti during the penalty phase.

These failures rendered trial counsel ineffective, in violation of Petitioner's Fifth, Sixth, Eighth and Fourteenth Amendment rights.

Standard of Review.

The question of whether a defendant has received ineffective assistance of counsel is a mixed question of law and fact, and is reviewed *de novo*. Strickland v. Washington, 466 U.S. 668, 698, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984); Chacon v. Wood, 36 F.3d 1459, 1465 (9th Cir. 1994).

Legal Argument.

A. Relevance of Corpus Delicti Regarding Guilt.

It is well established in Nevada, as well as other jurisdictions, state and federal, that to establish probable cause to bind a defendant over for trial, the State must show: (1) a

crime has been committed and (2) there is probable cause to believe the defendant committed the crime. Sheriff v. Middleton, 921 P.2d 282, 285 (Nev. 1996) *citing* Frutiger v. State, 907 P.2d 158, 160 (1995).

In order to meet the first prong of the above test, the *corpus delicti*, the State must demonstrate (1) the fact of death, and (2) that death occurred by a criminal agency. Middleton, 921 P.2d at 285; Frutiger, 907 P.2d at 160; Azbill v. State, 440 P.2d 1014, 1017 (1968).

As reasoned by the Middleton Court:

> The showing of the corpus delicti is a threshold question. Before a State may prosecute a person for a crime, it must be able to establish probable cause that the crime has been committed. Evidence as to the corpus delicti should ideally be considered before and independently of evidence tending to establish probable cause that the defendant committed the crime.

Middleton, 921 P.2d at 286. The State failed to answer the threshold question adequately. Therefore, there can be no subsequent showing of probable cause, without the prerequisite showing of *corpus delicti*.

Further, it has been long recognized by the Nevada Supreme Court that:

> Confessions and admissions of the defendant may not be used to establish corpus delicti absent sufficient independent evidence.

Middleton, 921 P.2d at 286, *citing* Hooker v. Sheriff, 506 P.2d 1262 (1973).

The benefit of the doubt in this matter must be given to Petitioner, in order to avoid the obvious manifest injustice which

is dangerously inherent in such cases. Corpus Juris Secundum offers the following caution:

> As to the fact of the victim's death, no presumptions can be assumed against the accused, but every presumption is in his favor.

41 C.J.S. Homicide §177.

Other courts have long held the same standards to apply as in the above decisions. *See* State v. Allen, 839 P.2d 291 (Utah 1992) (corpus delicti of murder consists of proof that victim actually died...); State v. Aten, 927 P.2d 210 (Wash. 1996) (corpus delicti or "body of the crime" consists of two elements the state must prove at trial: (1) the fact of death, (2) a causal connection between the death and some criminal act); In re Floodstrom, 277 P.2d 101, 103, (Cal.App. 1955) ("the corpus delicti must be shown to some extent independently of a confession before the accused can be held to answer for a crime"); Castillo v. State, 614 P.2d 756, 758-759 (Alaska 1980) ("a criminal conviction must rest on firmer ground than the uncorroborated confession or admission of an accused"); State v. Weller, 644 A.2d 839, 841 (Vt. 1994) ("extra-judicial confessions, alone and uncorroborated, are insufficient to establish the corpus delicti." -- The question of whether there is sufficient evidence of corroboration of corpus delicti is for court alone.); People v. Kirby, 223 Mich. 440, 194 N.W. 142 (1923) (proof of the unexplained disappearance of the alleged victim is never sufficient in itself to establish the corpus delicti).

B. Relevance of Corpus Delicti During Sentencing.

Death is Different. The Panel should have allowed evidence of

corpus delicti to be introduced at the penalty phase.

Under NRS 175.552, evidence on any matter which the court deems relevant to sentencing is admissible, whether or not the evidence is ordinarily admissible. Flanagan v. State, 107 Nev. 243, 810, P.2d 759 (1991).

The sentencing body may not be precluded from considering relevant mitigation evidence. Failure to allow defendant to introduce evidence which undermines the State's theory is error. Harris v. State, 106 Nev. 667, 779 P.2d 1104 (1990).

Had counsel completed motion work to dismiss the charges based upon the corpus delicti issue, Petitioner would not have pled guilty to the first degree murder charge and received a death sentence.

GROUND FIFTEEN: INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL FOR INEFFECTIVE CROSS EXAMINATION OF WITNESS LANA MILLER, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

Supporting Facts.

Witness Lana Miller was critical to the aggravating factors sought by the State, and to the State's attempt to paint Petitioner as having a violent past. Trial counsel's failure to place the events of December 1983 into proper perspective by asking only seven questions, only three of which had any relevance, was ineffective. (TPH III, 17-18).

Two of the three felonies which were used as aggravators herein arose out of the events of December 1983. Through an effective cross-examination of Lana Miller, trial counsel had the opportunity to show the Panel that Petitioner's motives behind the initial fire were actually altruistic.

Upon information and belief, Petitioner set the fire in a trash can behind the residence, because he was concerned for Lana's well-being. Lana, then 16 years old, was locked inside with a 40 year-old man who was pursuing her sexually. The fire was set to drive the sexual predator out of the house. The fire then accidentally spread to the house, causing damage, and resulting in the arson charge against Petitioner. There was only minor damage to the windowsill area of the exterior of the home and the grass on the lawn. Without this crucial information, and because of his later confrontation with police regarding the fire, Petitioner was painted as a violent madman by the State.

Trial counsel's questions regarding the ages of Lana and the man, as well as one question regarding the fact that Petitioner later married Lana's mother, were as far as she took the examination. (TPH III, 17-18).

Trial counsel's failure to extract all the details of the situation, and her subsequent failure to paint an adequate picture of Petitioner's motivations behind the fire, was ineffective.

Standard of Review.

The question of whether a defendant has received ineffective assistance of counsel is a mixed question of law and fact, and is reviewed *de novo*. Strickland v. Washington, 466 U.S. 668, 698, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984); Chacon v. Wood, 36 F.3d 1459, 1465 (9th Cir. 1994).

Legal Argument.

The Sixth Amendment guarantees an opportunity for meaningful

cross-examination, based upon the Confrontation Clause. *See* Kentucky v. Stincer, 482 U.S. 730, 739, n. 9 (1987).

Indeed, completely inadequate cross-examination by counsel has been held to be ineffective assistance. *See* Mancusi v. Stubbs, 408 U.S. 204, 209, 214-216 (1972); *Cf.* Pointer v. Texas, 308 U.S. 400, 407 (1965).

The Confrontation Clause of the Sixth Amendment to the United States Constitution is applicable to the States, and a primary interest secured by the clause is the right to cross-examination. Drummond v. State, 86 Nev. 4, 463 P.2d 1012 (1970). The object of the right of confrontation is to guarantee the accused the opportunity to test the recollection and sift the conscience of the witness and compel him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand whether he is worthy of belief. Barber v. Page, 390 U.S. 719 (1968). Face to face confrontation is the core value of the right. Coy v. Iowa, 487 U.S. 1012 (1988).

Accordingly, the Nevada Supreme Court has held that counsel was ineffective for his inability to phrase his questions to a witness so as to elicit proper responses to his attempt to rebut certain inferences made by the State, Knorr v. State, 103 Nev. 604, 607, 748 P.2d 1, 3 (1987).

Counsel's failure to adequately cross-examine the key witnesses against the Petitioner constituted ineffective assistance of counsel.

GROUND SIXTEEN: INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL FOR FAILURE

TO HIRE INDEPENDENT EXPERTS, INCLUDING A PATHOLOGIST TO GIVE A PRECISE CAUSE OF DEATH AND/OR AN EXPERT ON ALCOHOL ABUSE AND MENTAL HEALTH ISSUES, IN VIOLATION OF PETITIONER'S FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

Supporting Facts.

Despite the uncertainty regarding the autopsy, and several other indicators that Petitioner was engaging in bravado with police when recounting his version of the events, as well as other indicators that Petitioner did not accurately remember the events, due to his intoxication, trial counsel did not hire independent experts.

Critical to the defense would have been Petitioner's state of mind during the alleged events. Trial counsel failed to hire any experts regarding substance abuse, and the state of mind of Petitioner.

Further, trial counsel did not seek independent pathological inspection of the deceased, the cause of death, and the possibility that a BAC of .37 could have been a possible cause of death, or at least an intervening factor.

Petitioner has a lengthy history of mental health problems. An expert witness will testify at the evidentiary hearing regarding PTSD, and other mental health issues suffered by Petitioner. This will allow the Court to fully understand that treatment and therapy answers exist.

At the evidentiary hearing, evidence will be presented by expert testimony on issues of the cause of death, the consumption of alcohol and mental health issues.

Standard of Review.

The question of whether a defendant has received ineffective assistance of counsel is a mixed question of law and fact, and is reviewed *de novo*. Strickland v. Washington, 466 U.S. 668, 698, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984); Chacon v. Wood, 36 F.3d 1459, 1465 (9th Cir. 1994).

Legal Argument.

The Legal Argument from Ground Ten is incorporated by reference as if set forth verbatim herein.

GROUND SEVENTEEN: INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL FOR FAILURE TO WITHDRAW AS COUNSEL IN THE FACE OF AN IRRECONCILABLE CONFLICT, IN VIOLATION OF PETITIONER'S FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

Supporting Facts.

The record shows that trial counsel had a personal conflict with her continuing representation of Petitioner.

Standard of Review.

The question of whether a defendant has received ineffective assistance of counsel is a mixed question of law and fact, and is reviewed *de novo*. Strickland v. Washington, 466 U.S. 668, 698, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984); Chacon v. Wood, 36 F.3d 1459, 1465 (9th Cir. 1994).

Legal Argument.

A conflict of counsel violates the Sixth Amendment; prejudice to the client is presumed and need not be shown.

It is well established that the right to effective assistance of counsel carries with it "a correlative right to representation

that is free from conflicts of interest." Wood v. Georgia, 450 U.S. 261, 271, 101 S.Ct. 1097, 1103, 67 L.Ed.2d 220 (1981). Indeed, the Sixth Amendment guarantees a criminal defendant the right to conflict-free representation. Clark v. State, 108 Nev. 324, 831 P.2d 1374 (1992); Coleman v. State, 109 Nev. 1, 3, 846 P.2d 276, 277 (1993).

The right to counsel's undivided loyalty is a critical component of the right to assistance of counsel; when counsel is burdened by a conflict of interest, she deprives her client of his Sixth Amendment right as surely as if she failed to appear at trial. *See* Holloway v. Arkansas, supra, 435 U.S., at 490, 98 S.Ct., at 1181 ("The mere physical presence of an attorney does not fulfill the Sixth Amendment guarantee when the advocate's conflicting obligations have effectively sealed his lips on crucial matters").

For this reason, a defendant who shows an actual conflict need not demonstrate that his counsel's divided loyalties prejudiced the outcome of his trial. Cuyler v. Sullivan, 446 U.S. 335, 349-350, 100 S.Ct. 1708, 1718-1719, 64 L.Ed.2d 333 (1980).

The right to conflict-free counsel is simply too important and absolute "to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." Glasser v. United States, 315 U.S. 60, 76, 62 S.Ct. 457, 467, 86 L.Ed. 680 (1942); *accord*, Cuyler v. Sullivan, *supra*, 446 U.S., at 349, 100 S.Ct., at 1718. "We should be no more willing to countenance nice calculations as to how a conflict adversely affected counsel's performance. The conflict itself demonstrate[s] a denial of the

'right to have the effective assistance of counsel.' " Cuyler v. Sullivan, *supra*, at 349, 100 S.Ct., at 1719 (*quoting* Glasser v. United States, *supra*, 315 U.S., at 76, 62 S.Ct., at 467).

The Nevada Supreme Court has ruled:

> **Where an attorney's loyalty to a defendant in a criminal case is diluted by that attorney's obligation to others, the defendant's Sixth Amendment right to effective assistance of counsel is not satisfied.**

Coleman, 109 Nev. at 3, 846 P.2d at 277.

Trial counsel had a personal and ethical conflict regarding her representation. The Nevada Supreme Court has found defense counsel to be ineffective whenever "[a]n actual conflict of interest which adversely affects a lawyer's performance," is present. Coleman, *supra*; Clark v. State, 108 Nev. 324, 326, 831 P.2d 1374, 1375 (1992). The Court has repeatedly held that prejudice is presumed in these cases. See Clark, *supra*; Coleman, *supra*; Mannon v. State, 98 Nev. 224, 645 P.2d 433 (1982); Harvey v. State, 97 Nev. 477, 634 P.2d 1199 (1981); Harvey v. State, 96 Nev. 850, 619 P.2d 1214 (1980).

It is obvious from the language of these cases that in situations of ethical obligation which create conflicts of interest in the representation of a client: (1) the attorney can no longer provide effective assistance of counsel under the Sixth Amendment; (2) that the attorney must bring the matter before the court; and (3) the court has an obligation to remedy the situation.

The United States Supreme Court has recognized that where a

court has denied counsel's request to be replaced because of a conflict of interest, a showing of prejudice is not required in order to obtain a reversal, as prejudice to the defendant is presumed. Flanagan v. United States, 465 U.S. 259, 268, 104 S.Ct. 1051, 1056, 79 L.Ed.2d 288 (1984), *citing* Holloway v. Arkansas, 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978).

The United States Supreme Court has recognized that where a court has denied counsel's request to be replaced because of a conflict of interest, a showing of prejudice is not required in order to obtain a reversal, as prejudice to the defendant is presumed. Flanagan v. United States, 465 U.S. 259, 268, 104 S.Ct. 1051, 1056, 79 L.Ed.2d 288 (1984), *citing* Holloway v. Arkansas, 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978).

Sixth Amendment Right to Counsel Extends to Sentencing.

The Sixth Amendment right to counsel at a sentencing hearing has been established. Mempa v. Rhay, 389 U.S. 128, 134- 35, 88 S.Ct. 254, 257, 19 L.Ed.2d 336 (1967). The recognition of this right involved the acknowledgment that sentencing is one of "the various stages in a criminal proceeding." Id. at 134, 88 S.Ct. at An accused's intoxication may affect the assessment of the voluntariness of a confession elicited from the defendant at that time. The Court should review the intoxication of the defendant at the time of the statement. The actions of the officers violated the 5th Amendment, 6th Amendment and due process rights of Dennis. U.S. v. Guaydacan, 470 U.S. F.2d 1173 (9th Cir. 1972) and U.S. Montoya-Arrubla, 749 F.2d 700 (11th Cir. 1985). 256.

See also the Nevada Supreme Court:

> It is well established that "*the sentencing (of the defendant) is a critical stage of the criminal proceeding at which he is entitled to the effective assistance of counsel*." Gardner v. Florida, 430 U.S. 349, 358, 97 S.Ct. 1197, 1205, 51 L.Ed.2d 393 (1977). See also Mempa v. Rhay, 389 U.S. 128, 88 S.Ct. 254, 19 L.Ed.2d 336 (1967); *Smith v. Warden*, 85 Nev. 83, 450 P.2d 356 (1969).

Cunningham v. State, 94 Nev. 128, 130-131, 575 P.2d 936, 938 (1978).

Clearly, counsel could not provide effective assistance of counsel to her client. She had an absolute obligation to seek court permission to withdraw to prevent an appearance that the client was actually following the advice of counsel in seeking a death sentence. Counsel should have moved to withdraw from representation in order to demonstrate to Petitioner that he was not acting rationally or in his own best interests. Failure to do so was improper.

GROUND EIGHTEEN: BUT FOR THE INDIVIDUAL AND COLLECTIVE FAILURES OF TRIAL COUNSEL, TERRY DENNIS WOULD NOT HAVE ENTERED THE GUILTY PLEA AGREEMENT WITH THE STATE; THEREFORE, THE INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL HAS PREJUDICED DENNIS IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

Supporting Facts.

Petitioner hereby incorporates by reference all Supporting Facts from all claims of ineffective assistance of counsel in the instant Petition, as if set forth herein verbatim.

Standard of Review.

The question of whether a defendant has received ineffective assistance of counsel is a mixed question of law and fact, and is reviewed *de novo*. Strickland v. Washington, 466 U.S. 668, 698, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984); Chacon v. Wood, 36 F.3d 1459,

1465 (9th Cir. 1994).

Legal Argument.

Said failures, individually and collectively, constituted ineffective assistance of counsel by trial counsel, in violation of Terry Jess Dennis's Fifth, Sixth, Eighth and Fourteenth Amendment rights. *See also* Earl v. State, 111 Nev. 1304, 904 P.2d 1029, 1034 (1995); Lay v. State, 110 Nev. 1189, 1199, 886 P.2d 448, 454 (1994); Aesop v. State, 102 Nev. 316, 322, 721 P.2d 379 (1986); Pertgen v. State, 110 Nev. 554, 875 P.2d 36, 368 (Nev. 1994) and Homick v. State, 112 Nev. 304, 913 P.2d 1280 (1996).

All Legal Arguments set forth in all claims of Ineffective Assistance of Counsel within the instant Petition are incorporated by reference as if set forth verbatim herein.

B. STATE, JUDICIAL & LEGISLATIVE ERRORS:

GROUND NINETEEN: THE THREE-JUDGE PANEL IS UNCONSTITUTIONAL BASED UPON THE CONSTITUTIONAL SEPARATION OF POWERS.

Legal Argument.

In a study of 19 capital cases in Nevada, from 1979-1991, this court found:

> It is an extreme rarity for a three-judge panel to deliver a sentence other than death. A three-judge panel sentenced the defendant to death in *eighty-nine percent* of the cases.

Beets v. State, 107 Nev. 957, 821 P.2d 1044, 1057 (Nev. 1991). Given the sentencing history of three-judge panels, this counsel fails to see any positive benefits arising from waiving a jury trial in a capital case by pleading guilty and going before a three-judge panel. This type of action seems to deprive the criminal defendant

of his Sixth Amendment right to effective counsel before a word has been spoken on the record.

The legislative creation of the three-judge panel, under NRS 175.552 is unconstitutional under the doctrine of separation of powers. As the Illinois Supreme Court recently found:

> **That the creation of a special three-judge panel is an attempted exercise of judicial authority by the Legislative branch. The sole power to create courts lies in the judiciary.**

Rice v. Cunningham, 336 N.E.2d 1, 3 (Ill. 1995) The court further found:

> **The statute and procedures of [the Illinois statute] are so vague that they fail to set proper standards by which a court can sentence a defendant to the death penalty.**

Id.

The above quoted authority, along with the obvious confusion of the judges who sat on this panel, and the arbitrary and capricious nature of the imposition of the aggravating factors in Mr. Dennis''s case, should serve to render the creation of the three-judge panel in this state unconstitutional, along with the decision herein.

GROUND TWENTY: THE THREE-JUDGE PANEL PROCEDURE FOR IMPOSING A SENTENCE OF DEATH IS UNCONSTITUTIONAL UNDER THE DUE PROCESS GUARANTEE OF THE FEDERAL CONSTITUTION.

The three judge panel procedure prescribed by Nev. Rev. Stat. § 175.556(1) should not have been followed in this case because it violates the due process clause of the Fourteenth Amendment to the United States Constitution. In Apprendi v. New Jersey, __U.S.__, 2000 WL 807189 (June 26, 2000), the United States Supreme Court unequivocally held: "Other than the fact of a prior conviction, any

fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proven beyond a reasonable doubt." Id. at 13. Citing its previous decision in Jones v. United States, 526 U.S. 227 (1999), the Court held:

> With that exception [of the fact of a prior conviction], we endorse the statement of the rule set forth in the concurring opinions in that case: "[I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt." 526 U.S. at 252-253, 119 S.Ct. I215 (opinion of STEVENS, J.); see also id., at 253, 119 S.Ct. 1215 (opinion of SCALIA, J.).

Id. (footnote omitted).

The concurring opinions of the Court's most conservative justices were equally unequivocal:

> What ultimately demolishes the case for the dissenters is that they are unable to say what the right to trial by jury does guarantee if, as they assert, it does not guarantee - - what it has been assumed to guarantee throughout our history - - the right to have a jury determine those facts that determine the maximum sentence the law allows.
>
> ...
>
> [T]he guarantee that "[i]n all criminal prosecutions, the accused shall enjoy the right to ... trial, by an impartial jury" has no intelligible content unless it means that all the facts which must exist in order to subject the defendant to a legally prescribed punishment must be found by the jury.

Id. at 17 (Scalia, J., concurring) (emphasis supplied).

> In order for an accusation of a crime (whether by indictment or some other form) to be proper under the common law, and thus proper under the codification of the common-law rights in the Fifth and Sixth Amendments, it must allege all elements of that crime; likewise, in order for a jury trial of a crime to be proper, all elements of the crime must be proved to the jury.

> . . .
>
> [A] "crime" includes every fact that is by law a basis for imposing or increasing punishment (in contrast with a fact that mitigates punishment). Thus, if the legislature defines some core crime and then provides for increasing the punishment of that crime upon a finding of some aggravating fact - - of whatever sort, including the fact of a prior conviction - - the core crime and the aggravating fact together constitute an aggravated crime, just as much as grand larceny is an aggravated form of petit larceny. The aggravating fact is an element of the aggravated crime. Similarly, if the legislature, rather than creating grades of crime, has provided for setting the punishment of a crime based on some fact - - such as a fine that is proportional to the value of stolen goods - - that fact is also an element. No multi-factor parsing of statutes, of the sort that we have attempted since McMillan [v. Pennsylvania, 477 U.S. 79 (1986)], is necessary. One need only look to the kind, degree, or range of punishment to which the prosecution is by law entitled for a given set of facts. Each fact necessary for that entitlement is an element.

Id. at 1, 8-19 (Thomas, J., concurring).

Under this analysis, there can be no doubt that the aggravating circumstances prescribed by Nev. Rev. Stat. § 200.033 are "elements" of capital murder. Nev. Rev. Stat. § 200.030 defines the degrees of murder and prescribes the maximum punishments allowed.[19] First degree murder is punishable by various terms of imprisonment, §200.030(4)(b), but it is punishable by death "only if one or more

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[19] Nev. Rev. Stat. § 200.030(4) provides:

A person convicted of murder of the first degree is guilty of a category A felony and shall be punished:

(a) By death, only if one or more aggravating circumstances are found and any mitigating circumstance or circumstances which are found do not outweigh the aggravating circumstance or circumstances; or

(b) By imprisonment in the state prison;

(1) For life without the possibility of parole;

(2) For life with the possibility of parole, with eligibility for parole beginning when a maximum of 20 years has been served; or

(3) For a definite term of 50 years, with eligibility for parole beginning when a minimum of 20 years has been served.

aggravating circumstances are found and any mitigating circumstance or circumstances which are found do not outweigh the aggravating circumstance or circumstances...." §200.030(4)(a) (emphasis supplied). The crucial role of aggravating circumstances as elements of capital-eligible first degree murder is further demonstrated by the last sentence of § 200.030(4): "A determination of whether aggravating circumstances exist is not necessary to fix the penalty at imprisonment for life with or without the possibility of parole."

Thus, under state law, both the existence of aggravating factors, and the determination that the aggravating factors are not outweighed by the mitigating factors, are necessary elements of death eligibility and are necessary to increase the maximum punishment provided for first degree murder from the various possible sentences of imprisonment to death. Under Apprendi, the due process guarantee of the federal Constitution requires those elements to be decided by a jury. Accordingly, the three judge panel procedure, which would allow judges to make those findings, is unconstitutional.

The unconstitutionality of the Nevada procedure is further demonstrated by the distinction drawn in Apprendi between its holding and the holding in Walton v. Arizona, 497 U.S. 639 (1990). In Apprendi, the Court distinguished Walton, holding that the rule it announced would not "render invalid state capital sentencing schemes requiring judges, after a jury verdict holding a defendant guilty of a capital crime, to find specific aggravating factors before imposing a sentence of death." Id. at 16 (citation omitted;

emphasis added). The court relied on the reasoning in Justice Scalia's opinion in Almendarez-Torres v. United States, 523 U.S. 224, 257 n. 2 (1998) (Scalia, J., dissenting):

> "Neither the cases cited, nor any other case, permits a judge to determine the existence of a factor which makes a crime a capital offense. What the cited cases hold is that, once a jury has found the defendant guilty of all the elements of an offense which carries as its maximum penalty the sentence of death. it may be left to the judge to decide whether that maximum penalty, rather than a lesser one, ought to be imposed.... The person who is charged with actions that expose him to the death penalty has an absolute entitlement to jury trial on all the elements of the charge."

Apprendi at 16 (emphasis supplied). Under the Arizona scheme at issue in Walton, the statute provides that the maximum penalty for first degree murder is death. Ariz. Rev. Stat. § 131 105(C)("First degree murder is a class 1 felony and is punishable by death or life imprisonment as provided by § 13-703."); Walton v. Arizona, 497 U.S. at 643.

By contrast, under Nevada law the penalty of death is not the maximum penalty for first degree murder: the statute itself provides that the penalty is not available for first degree murder unless additional elements - - the existence of aggravating circumstances, and the failure of mitigating circumstances to outweigh the aggravating circumstances - - are found. *See* Apprendi at 29 (Thomas, J., concurring) ("If a fact is by law the basis for imposing or increasing punishment - - for establishing or increasing the prosecution's entitlement - - it is an element.") Simply put, a jury's verdict of first degree murder under Nevada law is not "a jury verdict holding a defendant guilty of a capital crime," Id.

at 16, because the statute itself provides that the punishment of death is not available simply on the basis of that verdict, but can be imposed "only if" further findings are made to increase the available maximum punishment.

Under Apprendi, the courts cannot constitutionally proceed to make the findings in this, or any case - - the existence of aggravating factors and the failure of mitigating factors to outweigh aggravating factors - - which are necessary to increase the maximum punishment for the offense to a death sentence. Since findings of these elements of capital murder can constitutionally be made only by a jury, the three-judge panel procedure allowed by Nev. Rev. Stat. § 175.556(1) cannot be given effect under the due process clause.

The Nevada Supreme Court's previous decisions upholding the three judge panel procedure do not control this Court's resolution of this issue. Those decisions did not address or resolve the issue decided in Apprendi. *See, e.g.*, Williams v. State, 113 Nev. 1008, 1017-1018 and nn. 5, 6 (1997); Kirksey v. State, 112 Nev. 980, 1001, 923 P.2d 1102 (1996); Paine v. State, 110 Nev. 609, 617 877 P.2d 1025 (1994); Redmen v. State, 108 Nev. 227, 235-236, 828 P.2d 395 (1992). Since the Nevada Supreme Court's decisions relating to the three judge panel issue did not address the issue decided in Apprendi, they do not control this Court's resolution of the issue here. *E.g.*, Sakamoto v. Duty Free Shoppers. Ltd.,764 F.2d 1285, 1288 (9th Cir. 1985) (decisions not controlling authority on issues not decided); Vegas Franchise v. Culinary Workers, 83 Nev. 422,

424, 433 P.2d 263 (1967) (overruling language in previous decision resting upon "false premise"); Jackson v. Harris, 64 Nev. 339, 183 P.2d 161 (1947) (cases not authority on points "that may be found lurking in the record" when issue not placed before court).[20]

Further, the major principle relied on in the Nevada Supreme Court's decision - - that the federal constitution does not require capital sentences to be imposed by juries, *see* Hill v. State, 102 Nev. 377, 379-380, 724 P.2d 734 (1986) - - does not affect the issue decided in Apprendi: even if a capital sentence can constitutionally be imposed by a judge, under Apprendi all of the elements of a capital crime must be decided by a jury. Since a verdict of guilty of first degree murder does not expose the defendant to the death sentence without findings of additional qualifying factors, those factors are elements of the capital crime and must be found by a jury, whatever the ultimate sentencing body may be.

Finally, however the Nevada Supreme Court might resolve the issue presented here, this Court is bound to follow Apprendi under

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[20]Even if those decisions were on point, the doctrine of stare decisis does not apply when "an intervening Supreme Court decision undermines an existing precedent of the [court] and both cases are closely on point." United States v. Lancellotti, 761 F.2d 1363, 1366 (9th Cir. 1985); *accord* Spinelli v. Gaughan, 12 F.3d 853, 855 n. 1 (9th Cir. 1993); Leggett v. Badger, 798 F.2d 1387, 1389, 1390 (11th Cir. 1986) (district court correctly declined to follow mandate of court of appeals in light of intervening Supreme Court authority); *see also* Litteral v. State, 97 Nev. 503, 505-508, 634 P.2d 1226 (1981) (upholding district court's refusal to instruct on specific intent element of robbery based on language of statute, despite Supreme Court decisions requiring instruction on that element, and disapproving prior decisions). "In such a case, to continue to follow the earlier case blindly until it is formally overruled is to apply the dead, not the living, law." Norris v. United States, 687 F.2d 899, 904 (7th Cir. 1982) (per Posner, J.) The intervening Supreme Court decision in Apprendi, which the Nevada Supreme Court has not yet addressed, prescribes the analysis that this Court must conduct under the Fourteenth Amendment.

the supremacy clause of the United States Constitution:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. Art. VI; Powell v. Nevada, 511 U.S. 79 (1994) (state court cannot refuse to apply federal constitutional retroactivity doctrine); Nev. Const. Art. 1 § 2.

Because the three judge panel cannot constitutionally make the findings of elements necessary to impose a death sentence, this Court should proceed to impose sentence. *See* Nev. Rev. Stats. §175.556(2) ("In a case in which the death penalty is not sought, if a jury is unable to reach a unanimous verdict upon the sentence to be imposed, the trial judge shall impose the sentence."); *cf.* 1977, Nev. Stats. Ch. 585 ("If the punishment of death is held to be unconstitutional by the court of last resort, the substituted punishment shall be imprisonment in the state prison for life without possibility of parole.") This Court cannot induce the waste of judicial resources that would result from holding a full sentencing proceeding before three district judges, when any findings as to the elements making the offense capital - eligible will necessarily be void under Apprendi.

GROUND TWENTY-ONE: DENNIS WAS NOT COMPETENT DURING THE CRIME, HIS EXTREME INTOXICATION AMOUNTED TO TEMPORARY INSANITY UNDER THE AUTHORITY OF FINGER, supra, THE LEGISLATURE'S BAN ON NOT GUILTY BY REASON OF INSANITY PLEAS PREVENTED TRIAL COUNSEL FROM PUTTING ON PETITIONER'S STATE OF MIND, IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION.

Supporting Facts.

As was demonstrated by the intoxication of the victim, the blood alcohol level of Mr. Dennis at the time of his police interview and the mental health issues suffered by Mr. Dennis, Mr. Dennis was not competent at the time of this incident. Expert testimony will be presented on mental health issues.

Legal Argument.

The case of Finger v. State, 117 Nev.____, Adv. Op. 48, decided December 44, 2001, (____ P.3d. _____), held that neither the United States nor the Nevada Constitutions require that legal insanity be procedurally raised as an affirmative defense or by way of a plea of "not guilty by reason of insanity," and that both Constitutions prohibit an individual from being convicted of a criminal offense without possessing the requisite criminal intent to commit the crime. The Nevada Supreme Court concluded that Nevada's statutory scheme would permit an individual to be convicted of a criminal offense under circumstances where the individual lacked the mental capacity to form the applicable intent to commit the crime, a necessary element of the offense. The Court held that such a statutory scheme violated the due process clauses of the United States and Nevada Constitutions.

To affirm the conviction, this Court must find that there are sufficient facts from which a reasonable inference could be drawn to prove each element of the crime. Williams v. State, 87 Nev. 230, 484 P.2d 1088 (1971) and Jiménez v. State, 105 Nev. 337, 775 P.2d 694 (1989). There is no evidence to support a reasonable inference

which supports the ability of Dennis to formulate intent necessary to support this conviction.

Under the facts of this case, Dennis clearly lacked the ability to form the applicable intent to commit the crime of first degree murder. Counsel was ineffective for failing to attack the statutory scheme and protect the due process rights of Dennis. It is anticipated that both defense counsel will admit that their representation in this issue was ineffective. The guilty plea should be set aside, as in Finger, supra, and Dennis should be allowed to start his case over with competent counsel.

GROUND TWENTY-TWO: THE TRIAL COURT ERRED IN IMPERMISSIBLY ALLOWING THE STATE TO SHIFT THE BURDEN OF PROOF TO MR. DENNIS.

Supporting Facts.

Dennis has a lengthy history of mental health issues. In February 1997, he was involuntarily admitted for treatment as he was suicidal. He was diagnosed as schizophrenic, suffering from PTSD, and had been admitted for treatment on three prior occasions. Dennis presented himself for evaluation of homicide-suicidal thoughts. He admitted that he thought of killing his girlfriend and himself. At that time, he was able to understand the wrongfulness of his actions and seek help.

During June of 1996, Dennis was evaluated for certification. He was threatening to harm himself, stated he was going to lose it and kill himself. Comments made by Dennis at this point included a statement that "I'd take a header off the Hilton before I do that again."

In August of 1995, Dennis was found wandering in the area of the morgue. Dennis was hearing voices which tell him to do things he doesn't want to do. He took 50-90 Ativan pills. Dennis was feeling helpless and was suicidal. He was admitted for treatment. He was diagnosed with depressive disorder, antisocial personality disorder, and was suffering from alcohol abuse. Dennis relayed nightmares of being chased by a shadow. Medical records demonstrated at least six prior attempted suicides by Dennis.

In November 1995, Dennis was admitted to NMHI for treatment for a ten day period. The diagnosis was major depression, PTSD, and antisocial traits. He relayed to professionals that his adopted mother and uncle abused him sexually until age 11.

Just prior to this incident, Dennis had been placed in-patient at the Veterans Administration Hospital for treatment as he described the desire to kill a woman. Dennis was deemed to be in need of in-patient care and treated in-patient for eight days. At the time of admission, Dennis was acting bizarre, talking to himself, and stated that he wanted to hurt himself and wanted to pick up a girl with the intent of killing her. Unfortunately, Dennis was prematurely released prior to stabilizing and this crime occurred. Expert testimony will demonstrate that he was not able to understand the nature and consequences of his conduct or that the conduct was wrong. The testimony of Mazie Pusich and John Petty is anticipated to be an admission that they should have litigated the issues revolving around the Finger decision and that this was an error on their part. During the penalty phase hearing, Judge Cherry

stated, "Are you sure you won't reconsider and let her put forth whatever case she feels she should be able to put forth?" ((7-20-99, Vol 1 Page 47). He later commented that it appeared that Dennis wanted to die. Judge Cherry then asked if Dennis would reconsider and let counsel put forth the mitigation evidence. (7-20-99 Vol I Page 48). The latter comments of Judge Cherry were equally distressing. Judge Cherry stated, "Those, since they are coming in pursuant to stipulation, I want the record to reflect that the judges will read and review those, as those documents, I feel confident, had Mr. Dennis allowed defense counsel, would have been introduced with witnesses, as they would have been fleshed out more appropriately, had that been allowed by the defendant. (7-20-99, Vol 1 Page 51). Clearly, the justice system has no right to make a decision for death when it acknowledged a lack of full and proper defense and information.

It appears that Judge Cherry believed that Mr. Dennis had to provide mitigating evidence or the death penalty was an automatic event. It appears that Judge Cherry did not believe the documentary evidence was the equivalent of expert testimony. This is a misunderstanding of the law. The State retains the burden of proof to demonstrate that the aggravators are appropriate for death. Even if Mr. Dennis had not provided adequate evidence of mitigation to outweigh the aggravators, (which Petitioner submits he did), the State must still demonstrate beyond a reasonable doubt that this case is a death penalty qualified case and that the State must still prove the aggravators beyond a reasonable doubt. The burden of proof

does not and cannot shift to the defendant.

It is equally bothersome that Judge Cherry seemed to unfairly determine that written documents were not of value to the sentencing panel. He stated, "I just want to make sure you understand the position that you are putting us in by not offering anything except these written documents. (Vol III 37).

Judge Berry seemed equally as confused. The court made comments that Dennis was waiving the right to present mitigating evidence. Dennis did present mitigation. This was via documentary evidence rather than expert testimony. It is clear that counsel was ineffective for failing to provide the sentencing panel with live expert testimony. The records presented appeared to fall on deaf, predetermined ears. (Vol III 60-61).

Defense counsel repeatedly commented about what her client gave her permission to do in his defense. These actions were inappropriate.

Legal Argument.

The case of Finger v. State, 117 Nev.____, Adv. Op. 48, decided December 4, 2001, (___P.3d ____), has an excellent discussion of the requirement that the State not shift the burden of proof to the defendant. In this case, it was clear that the competence of the Defendant was at issue. It was further demonstrated that Dennis had sufficient evidence to raise a not guilty by reason of insanity defense. The State could not have proven by competent evidence beyond a reasonable doubt that Dennis was able to formulate criminal intent. Dennis did not understand the nature and consequence of his

conduct and that his conduct was wrong. Legal insanity is a defense to the elements of first degree murder. The State's actions shifted the burden of proof to Dennis, in violation of due process rights of Dennis.

Even when raising a claim of self-defense, the State cannot shift the burden of proof to the defendant. In Mullaney v. Wilbur, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975), the Supreme Court held that an instruction placing a burden of proof upon one claiming self-defense was constitutionally infirm under the Due Process Clause and under the High Court's decision in In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). This setting is no different. The actions of the State violate the due process rights of Dennis. He is entitled to withdraw his guilty plea, be appointed new counsel and proceed to enter a not guilty by reason of insanity defense.

GROUND TWENTY-THREE: THE TRIAL COURT ERRED IN ACTUALLY OR CONSTRUCTIVELY ALLOWING MR. DENNIS TO BE DEPRIVED OF MEDICATION TO MAINTAIN A STABLE AND COMPETENT STATE OF MIND, BECAUSE HE WAS INDIGENT, IN VIOLATION OF THE EQUAL PROTECTION CLAUSE, AND THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

A person cannot be deprived of constitutional rights simply because they are unable to pay to obtain said rights. In fact, Mr. Dennis had a right to competent medical care while at the jail. This medical care would have provided him with appropriate prescription medications. These medications were needed in order

for Mr. Dennis to be able to assist counsel and desire to live. Expert testimony will be presented on the appropriate medications, the lack of medications and the affect of same on the ability to Mr. Dennis to make critical decisions. This testimony will overlap with the testimony on PTSD, alcohol abuse, depression and other mental health issues. The legal issue, however, is one of whether the indigence of Mr. Dennis prevented him from being able to assist counsel due to his lack of appropriate prescription medications. Medications that he could not afford without taxpayer assistance.

Dennis will testify that he thought that he had to pay for medications in the Washoe County Jail, that he had no financial resources and that he would have continued with his medications if he knew that they were provided at taxpayer expense. This medication would have stabilized his mental condition to a point where he would not have been clinically depressed and had a death wish. Dennis will testify that due to medications at the prison, he no longer wishes to die and that if he had been taking the medications at the jail, his thought process would have been different. Expert testimony will be presented as to the effect of the proper medications on a person suffering from the illnesses of Dennis.

GROUND TWENTY-FOUR: <u>THE NEVADA SUPREME COURT ERRED IN CONSIDERING THE EVIDENCE OF LANA MILLER'S TESTIMONY, WHICH WAS SPECIFICALLY EXCLUDED BY THE THREE-JUDGE PANEL AND WAS NOT A PART OF THE OFFICIAL</u>

RECORD, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

The direct appeal must be decided and determined by admissible evidence only. The three judge panel made a specific finding that the State had not complied with discovery and struck a portion of evidence relating to witness Lana Miller. In spite of this ruling by the three judge panel, the Nevada Supreme Court reviewed said testimony and utilized that testimony to uphold the conviction of Mr. Dennis.

During the testimony of Lana Miller, the defense objected to a portion of her testimony as it had not been provided in discovery. This objection was sustained by the sentencing panel and stricken from the record. (7-20-99, Vol 1 Page 11). The Nevada Supreme Court then relied upon various portions of the stricken testimony in entering is decision upholding the death sentence.

The Nevada Supreme Court is limited in its review to evidence which is admitted in the record by the trial court. Its reliance upon evidence which was stricken from the record was completely inappropriate. See United States v. Arteaga, 117 F.3d 388 (9th Cir. 1997), which held that evidence that was precluded at trial could not support a conviction on appeal.

GROUND TWENTY-FIVE: THE NEVADA SUPREME COURT PERFORMED NO CONSTITUTIONALLY ADEQUATE REVIEW OF THE WAIVER OF PETITIONER DENNIS' WAIVER OF THE JURY TRIAL, IN VIOLATION OF THE FIFTH, SIXTH AND

FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Supporting Facts.

In the instant case, there has been no constitutionally-adequate review of the waiver of defendant's constitutional rights to a jury trial and to a jury sentencing. There was no adequate competency hearing. The authority of Finger was not available for Petitioner. Therefore, his constitutional ability to present relevant issues regarding his mental health in waiving a jury trial, not to mention his state of mind during the alleged crime, were never before the Panel. Likewise, the Nevada Supreme Court did not review this issue.

Legal Argument.

Constitutionally-adequate review in a capital case, including the mandatory review required by NRS 177.055(2), must take into account the entire record of the proceedings.

Any attempt to conduct the review of the capital sentence in this matter without consideration of all the material considered by the sentencing panel would violate the due process right to fundamentally fair review on an adequate record, the equal protection right to review on the same basis of a complete record afforded to other defendants, and the Eighth Amendment right to a reliable sentence under procedures which must satisfy heightened standards of reliability. Ford v. Wainwright, 474 U.S. 399 (1986)

(plurality).

> It would be odd were we now to abandon our insistence upon unfettered presentation of relevant information, before the final fact antecedent to execution has been found.
>
> Rather, consistent with the heightened concern for fairness and accuracy that has characterized our review of the process requisite to taking of a human life, we believe that any procedure that precludes the prisoner or his counsel from presenting material relevant to his sanity or bars consideration of that material by the fact finder is necessarily inadequate.

Id, at 414. E.g., Dobbs v. Zant, __ U.S. __, 113 S.Ct. 835, 836 (1993) (per curiam), infra; In re Stevens B., 25 Cal.3d 1, 548 P.2d 480, (1979):

> On appeal there must be an adequate record to enable the court to pass upon the questions sought to be raised (citation omitted) This requirement is particularly important where...the sufficiency of the evidence is challenged.

Id, at 484; *see also* Richmond v. Ricketts, 774 F.2d 957 (9th Cir. 1995), wherein the court explained that an "independent review" - as required in a habeas action - must include the entire record.

> The record must show that the district court examined all relevant parts of the state court record. Since it does not, we cannot affirm the dismissal of the habeas petition.

Id, at 961. The court recognized that a review of the "complete state court record:"

> ...is indispensable to determining whether the habeas applicant received a full and fair state court evidentiary hearing resulting in reliable findings.

Id, at 962.

GROUND TWENTY-SIX: PROPORTIONALITY REVIEW IS STILL REQUIRED BY NEVADA SUPREME COURT; PENALTIES IN OTHER CASES ARE RELEVANT; FAILURE TO PROVIDE ADEQUATE PROPORTIONALITY REVIEW IS IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION.

The Nevada Supreme Court improperly determined that it was not mandated to conduct a proportionality review. This is not true. The U.S. Supreme Court has repeatedly commented that proportionality review is required, not only in death cases.

In Enmund v. Florida, 458 U.S. 782 (1982), the U.S. Supreme Court forbade the execution of one who never "took life, attempted to take life, nor intended to take life." The case focused on the personal conduct of the defendant.

In Coker v. Georgia, 433 U.S. 584 (1977), a death sentence for the crime of rape was struck down by the U.S. Supreme Court. See also Lockett v. Ohio, 438 U.S. 586 (1978) and Skipper v. South Carolina, 476 U.S. 1 (1986).

Recently, the Ninth Circuit Court of Appeals has held that a grossly disproportional sentence cannot be imposed by the sentencing court. Andrade v. Attorney General of the State of California, Docket Number 99-55691, filed November 2, 2001, 9th Circuit Court of Appeals.

Further, the Nevada Supreme Court conducted just such a proportionality review when it determined that the death sentence was not appropriate and struck the death penalty sentence of Mr.

Servin in Servin v. State, 117 Nev. Adv. Op. No. 65, decided October 17, 2001, (____P.3d ____).

A full review of the facts of this case demonstrates that the death penalty cannot be imposed. The facts of the murder, background of the defendant, actions of the defendant, and limited aggravating circumstances do not support a warrant of death. Imposition of the death sentence should be reversed.

GROUND TWENTY-SEVEN: PROSECUTORIAL MISCONDUCT FOR DESCRIBING MR. DENNIS AS A "SERIAL KILLER," AS THERE WAS NO EVIDENCE SUPPORTING THAT LABEL, AND THE INFLAMMATORY COMMENTS UNFAIRLY PREJUDICED MR. DENNIS BEFORE THE SENTENCING PANEL, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION.

Supporting Facts.

The State took it upon itself to accuse Dennis of being a "serial killer". There is no evidence in the record of any type which would justify such a statement. One of the key questions on application of the death sentence is that of future dangerousness. The statements of the State on grounds of future dangerousness were prejudicial and based upon suspect evidence. A defendant that was clearly drunk and psychotic made questionable and unsupported statements. The State took those statements out of context and argued improperly for the death sentence.

Standard of Review.

If defense counsel objects to alleged acts of prosecutorial misconduct, the court reviews for harmless error. United States v.

Cabrera, 201 F.3d 1243, 1246 (9th Cir. 2000). If, however, counsel makes no timely objection, the court reviews for plain error. United States v. Sanchez, 176 F.3d 1214, 1218 (9th Cir. 1999).

Legal Argument.

It is a long-established rule of constitutional law that misconduct by the prosecutor can, in some instances, result in a due process violation. The United States Supreme Court has held that improper remarks by a prosecutor could at some point so infect the trial with unfairness as to make the resulting conviction a denial of due process. Sawyer v. Smith, 110 S.Ct. 2822, 2817 (1990), citing Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974), see also, Payne v. Tennessee 111 S.Ct. 2597, 2514 91991) and Floyd v. Meachum, 907 F. 347 3 (2nd Cir. 1990). See also: Standen v. Whitley, 994 F. 1417, cert denied 114 S.Ct. 579 L.Ed.2d 478; Howard v. State, 106 Nev. 713, 800 P.2d 175 (1990) and Jacobs v. State, 101 Nev. 356, 705 P.2d 130 (1988).

In this case, the State knew that Mr. Dennis was intoxicated when he gave statements to the police. The State knew that there was no credible evidence of any type to support Mr. Dennis's bizarre statements during the police interview and yet the State, both in argument and on direct appeal, called Mr. Dennis a serial killer. There was no evidence whatsoever to support said prejudicial act by the State. Defense counsel and appellate counsel were ineffective for failing to address this issue properly.

GROUND TWENTY-EIGHT: NRS 200.033(2) IS UNCONSTITUTIONALLY VAGUE AND/OR OVERBROAD UNDER *WALKER V. STATE*, AS THE PRIOR FELONIES USED AS AGGRAVATORS WERE NOT RELEVANT TO THE INSTANT CRIME AND WERE TOO

REMOTE IN TIME.

Supporting Facts.

The Panel found three aggravating circumstances based upon the three prior felonies introduced by the State. (TPH IV, 108-113). The felonies, one from 1979, the other two from a single event in 1984, were neither relevant to the instant crime, nor were they timely.

Evidence of prior bad acts which were unsupported by any credible evidence were utilized against Dennis. The tape presented to the Court was not redacted. The tape included comments by officers that a transvestite had died at or near the residence of Dennis. These statements left a shadow that Dennis had some responsibility in this matter. Additionally, evidence of a prior misdemeanor battery conviction was brought forth in the tape. There was no conviction. Counsel was ineffective for failing to object to irrelevant and suspect evidence.

Legal Argument.

The evidence was more prejudicial than probative and was not proven by clear and convincing evidence. See Walker v. State, ____Nev, ___, 997 P.2d 803 (2000) and Tinch v. State, 111 Nev. 1170, 946 P.2d 1061 (1997). Counsel failed to insure that only admissible evidence was utilized at the penalty hearing, thus providing Dennis with ineffective assistance of counsel.

C. ERRORS OF APPELLATE COUNSEL:

GROUND TWENTY-NINE: INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL FOR FAILURE TO RAISE ALL CLAIMS OF ERROR LISTED IN THIS PETITION, IN

VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION.

Supporting Facts.

Appellate counsel's Opening Brief on direct appeal to the Nevada Supreme Court was only 16 pages in length. His Reply Brief was 14 pages. Appellate counsel raised one issue on appeal: "Whether imposition of the Death Penalty in this case -- where it was solely predicated upon three (3) prior felony aggravators that each were several years old -- was excessive, given the facts of the case and the character of the defendant." His Legal Argument began on page 11 of the Opening Brief (ending on page 16).

Given the numerous errors set forth herein, it is respectfully argued that Appellate counsel's effort, on its face, was ineffective as a matter of law.

Death Penalty advocates are held to a higher standard of care than all other criminal defense lawyers. Given appellate counsel's many years of experience in the field, his failure to recognize and failure to present the issues herein, before now, is inexcusable.

The waiver of appeal relating to an unanticipated issue has been held to be unenforceable. United States v. Petty, 80 F.3d 1384 (9th Cir. 1996). A vague appeal waiver is void. United States v. Martinez-Rios, 143 F.3d 662 (2nd Cir. 1998). Mr. Dennis did not waive the ability to raise appellate issues to the Nevada Supreme Court. As such, appellate counsel had an obligation to ensure that all appropriate issues were raised to that court and litigated in a proper fashion. Calambro v. State, 114 Nev. 961, 964 P.2d 794

(1998).

Standard of Review.

The question of whether a defendant has received ineffective assistance of counsel is a mixed question of law and fact, and is reviewed *de novo*. Strickland v. Washington, 466 U.S. 668, 698, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984); Chacon v. Wood, 36 F.3d 1459, 1465 (9th Cir. 1994).

Legal Argument.

All legal arguments from all ineffective assistance of counsel grounds set forth above, are incorporated by reference as if set forth verbatim herein.

The constitutional right to effective assistance of counsel extends to a direct appeal. Burke v. State, 110 Nev. 1366, 1368, 887 P.2d 267, 268 (1994). A claim of ineffective assistance of appellate counsel is reviewed in the "reasonably effective assistance" test set forth in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) and Kirksey v. State, 112 Nev. 980, 923 P.2d 1102 (Nev. 1996).

Since Mr. Dennis did not waive his right to appeal, he had a 6th Amendment right to effective assistance of counsel relating to his direct appeal. Various issues have included allegations against counsel for failing to properly address the direct appeal in this matter. It should be noted that Mr. Petty acted both as trial counsel and as counsel on the direct appeal of Dennis.

GROUND THIRTY: INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL FOR HIS ARGUMENTS REGARDING PETITIONER AS A "SERIAL KILLER," WHICH WAS NOT SUPPORTED BY THE RECORD, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH

AND FOURTEENTH AMENDMENTS.

See argument number 28 above. As is readily seen in this case, the aggravators were fairly innocuous in nature. The crimes were remote in time and not directly related to the charge of murder. The panel found a mitigator relating to the mental health of Dennis. Appellate counsel failed to adequately recite a record which would support a proportionality review by the Nevada Supreme Court. Appellate counsel admitted same in his motion for reconsideration to that court. Appellate counsel allowed Dennis to be prejudiced by the prosecutorial misconduct of the State in stating that this ill man was a "serial killer". Dennis's statement was not supported by his stale criminal history. He had a record which was insufficient t demonstrate this level of violence. United States v. Thomas, 155 F. 3d 833 (7th Cir. 1999). No credible evidence of any type was available to support such a bald face prejudicially motivated lie. See Collier v. State, 101 Nev. 473,705 P.2d 1126 (1985).

The documents prepared by appellate counsel appear to coincide with Dennis's statements that he wanted to die. Appellate counsel had no right to abrogate his duty to complete the appeal in an effective manner just because the client had voiced a suicidal death wish.

If counsel really wanted to comply with Dennis's wish that this case be completed quickly and that he be ordered to die in a short time period, counsel should have withdrawn rather than providing Dennis with ineffective assistance of counsel.

It is unconstitutional for the sentencer to rely upon an invalid aggravating factor. The fact that the State believed to be a "serial killer" with no factual support for that belief was an invalid aggravating factor. See Sochor v. Florida, 504 U.S. 527 (1992). The Nevada Supreme Court had the right to invalidate the future dangerousness argument of the State and reweigh the evidence. Appellate counsel was ineffective for failing to demand same. Clemons v. Mississippi, 494 U.S. 738 (1990).

WHEREFORE, Petitioner requests this Court order a hearing on the merits of his Petition for Writ of Habeas Corpus (Post-Conviction) and requests the Court allow him to withdraw his plea in this matter and proceed to trial.

DATED this 13th day of February, 2002.

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EXHIBIT "A"

Supreme Court of Nevada.

Terry Jess DENNIS, Appellant,
v.
The STATE of Nevada, Respondent.

No. 34632.

Dec. 4, 2000.

Defendant was convicted upon guilty plea in the Second Judicial District Court, Washoe County, Janet J. Berry, J., of first-degree murder with the use of a deadly weapon and was sentenced to death. Defendant appealed. The Supreme Court, Becker, J., held that: (1) inquiry into excessiveness of death sentence, while not involving a proportionality review, may involve a consideration of whether various objective factors previously considered relevant to excessiveness in other cases are present; and (2) death sentence was not excessive.

Affirmed.

West Headnotes

[1] Sentencing and Punishment ⚷1705
350Hk1705

Capital sentencing panel's finding of three aggravating circumstances, in form of three prior felony convictions involving use or threat of violence to the person of another, was supported by felony assault conviction for putting knife to victim's neck and then ripping blade through victim's hand, by felony arson conviction for setting on fire a house in which an individual with whom defendant had quarreled was visiting, and by felony assault conviction for lunging with knife at officer who responded to arson report. N.R.S. 177.055, subd. 2, 200.033, subd. 2(b).

[2] Sentencing and Punishment ⚷1668
350Hk1668

[2] Sentencing and Punishment ⚷1700
350Hk1700

[2] Sentencing and Punishment ⚷1702
350Hk1702

Death sentence was not imposed under the influence of passion, prejudice, or any other arbitrary factor, where three-judge sentencing panel considered evidence of charged murder, background and characteristics of defendant, and both the aggravating and mitigating circumstances before concluding that aggravating circumstances outweighed the mitigating and a death sentence was appropriate. N.R.S. 177.055, subd. 2(c).

[3] Sentencing and Punishment ⚷1788(5)
350Hk1788(5)

Supreme Court review a death penalty for excessiveness under death penalty statute considering only the crime and the defendant at hand. N.R.S. 177.055, subd. 2(d).

[4] Sentencing and Punishment ⚷1788(5)
350Hk1788(5)

Inquiry into excessiveness of a death sentence, while not involving a proportionality review, may involve a consideration of whether various objective factors that were previously considered relevant to excessiveness in other cases are present and suggest the death sentence under consideration is excessive. N.R.S. 177.055, subd. 2(d).

[5] Sentencing and Punishment ⚷1676
350Hk1676

[5] Sentencing and Punishment ⚷1705
350Hk1705

[5] Sentencing and Punishment ⚷1709
350Hk1709

[5] Sentencing and Punishment ⚷1712
350Hk1712

Death penalty imposed for first-degree murder with use of deadly weapon was not excessive, despite defendant's mental illness and his intoxication from alcohol at time of crime, where defendant deliberately strangled victim over course of five to ten minutes and made efforts to assure her death, and aggravating circumstances in form of three prior felony convictions showed continuing pattern of violence spread out over time and increasing in severity. N.R.S. 177.055, subd. 2(d).

*435 Michael R. Specchio, Public Defender, and John Reese Petty, Chief Deputy Public Defender, Washoe County, for Appellant.

Frankie Sue Del Papa, Attorney General, Carson City; Richard A. Gammick, District Attorney, and Joseph R. Plater III, Deputy District Attorney,

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Washoe County, for Respondent.

BEFORE THE COURT EN BANC.

OPINION

BECKER, J.:

The State charged appellant Terry Jess Dennis by information with one count of first-degree murder with the use of a deadly weapon for the March 1999, willful, deliberate and premeditated strangulation murder of Ilona Straumanis. The State subsequently filed a notice of intent to seek the death penalty.

On April 16, 1999, Dennis entered a guilty plea, pursuant to a written plea agreement, to first-degree murder with the use of a deadly weapon. A penalty hearing was conducted before a three-judge panel. The panel found that three alleged aggravators (three prior felony convictions involving the use or threat of violence to the person of another) were proved beyond a reasonable doubt. The panel also found two mitigating circumstances existed: Dennis was under the influence of alcohol when he killed Straumanis, and he suffers from mental illness. The panel concluded that the mitigating circumstances did not outweigh the aggravating circumstances and returned a verdict of death.

Dennis argues only that his sentence of death is excessive. We affirm.

FACTS

On the afternoon of March 9, 1999, Dennis, who was fifty-two years old, unemployed and homeless, telephoned the Reno Police Department ("RPD") Dispatch, and told a dispatcher that he had killed a woman and her body was in his room at a local motel. Dennis stated that he was in the same room watching television and would wait for police to arrive. Dennis also stated that dispatchers should send a coroner, as "[t]he bitch ha[d] been dead for three or four days."

An RPD detective responded to Dennis's motel room, contacted Dennis, and asked whether he had any weapons. Dennis stated that he had used his hands to kill the victim and did not have any weapons. He agreed to be interviewed and was transported to the police department.

At the police department, detectives advised Dennis of his *Miranda* [FN1] rights. Dennis waived his rights and agreed to be interviewed. When questioned about the murder, Dennis stated that his memory was unclear on certain details because he had consumed about a fifth of vodka a day for the past week. [FN2]

FN1. *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

FN2. Following the interview, Dennis's blood alcohol level was tested and determined to be .112 and descending. However, Dennis does not dispute the knowing and voluntary nature of his statements.

During the interview, Dennis reported the following. He had been staying at the motel where the murder occurred since March 3, 1999. Two or three nights into his stay, he left his room to go to a local saloon. On his way to the saloon, he met the victim, who *436 was later identified as Ilona Straumanis, a fifty-six-year-old woman. Straumanis had bruises about her eyes and told Dennis that she had been beaten by another man. Straumanis accompanied Dennis to the saloon, and later, to Dennis's motel room. Thereafter and until the murder, both Dennis and Straumanis remained in an intoxicated state, staying in Dennis's room, except for a shared meal out and Dennis's outings to get more alcohol.

On the day he killed Straumanis, he left the room briefly because Straumanis was asking too many personal questions. Upon his return to the room, he and Straumanis engaged in a conversation about whether Dennis had ever killed anyone. Straumanis accused Dennis of being too kind to be capable of killing. Dennis then killed Straumanis, as he and she were "sort of" "making love."

He began strangling Straumanis with a belt. He felt somewhat aroused by Straumanis's struggling, and as she was "fading," he engaged in anal intercourse with her. During the course of the killing, he took the belt off and used his hands to choke her, and then suffocated her by covering her nose and mouth, making sure that she was not breathing and that "it was all done." He was not certain whether he finished the sexual act once she was dead. It took five or ten minutes to kill Straumanis, and Dennis checked her pulse afterward. He felt that he "had to make sure," so he "took [his] time."

After the murder, Dennis covered Straumanis's body and slept in the other bed. Prior to contacting police, Dennis also left the room at times to go to a local

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casino or the store for more liquor.

Dennis admitted that, although he had been drinking heavily prior to the murder and had stopped taking the medications prescribed for his mental health problems, he knew "exactly what [he] was doing" at the time of the murder. He killed Straumanis primarily because she challenged whether he was capable of killing, but also in response to a challenge from Straumanis regarding his sexual performance, which was affected by his drinking, and because he knew that he could kill her--she was "nobody" to him. He explained that he was probably thinking that Straumanis needed to be "put out of her misery" from the time he first met her and realized that she was "pathetic." He stated, "[W]hen I first met her, I had that ... idea that if you know I can talk her into ... coming back to my crib then done deal. Done deal." He saw himself as a "predator" and Straumanis as a "victim," and he felt that killing her was "the thing to do." Dennis had recently "picked up" another woman, intending to do the same thing to her, but she got frightened and left him before he could finish. From that experience he had learned to "[t]ake it a little slower," and he did so with Straumanis, trying to charm her into staying with him. Dennis was determined to kill Straumanis regardless of whether she survived his initial attack. He had been wanting to kill someone for a long time, and he felt at peace with killing Straumanis. Dennis stated that he did not care about anybody, including himself. He knew murder was wrong and did not care. Dennis also told detectives, "[I]f I didn't get stopped this would not be the last time that I would do something like this, because I found it exciting. I actually enjoyed it."

At the conclusion of the interview, detectives formally placed Dennis under arrest.

Meanwhile, another RPD detective searched Dennis's motel room pursuant to a search warrant. There, the detective discovered Straumanis's nude dead body underneath a blanket on one of the two beds in the room. Straumanis's body was found in a prone position with spread legs. A pillow underneath Straumanis's pelvis caused her buttocks to protrude upward. The detective also discovered a leather belt on the floor of the motel room and numerous empty beer and Vodka containers, along with other debris.

An autopsy performed on Straumanis's body on March 10, 1999, showed that she had died between three and seven days earlier as a result of asphyxia due to neck compression, most likely by strangulation. Straumanis's neck bore a rectangular-shaped injury. Other injuries were determined to have occurred sometime within the few days prior to her *437 death, including a small abrasion on the forehead, a bruise on the back of one thigh, and a fractured sternum. Changes caused by decomposition of Straumanis's body made determination of the existence of any sexual assault difficult. Although Straumanis's anus was dilated, there was no evidence of injury to the perianal skin or distal rectum. Testing revealed that Straumanis had a blood alcohol content of 0.37.

The State charged Dennis by information with one count of first-degree murder with the use of a deadly weapon. The State subsequently filed a notice of intent to seek the death penalty, alleging four aggravating circumstances: that Dennis subjected Straumanis to nonconsensual sexual penetration immediately before, during or immediately after the commission of the murder, and that Dennis had been previously convicted of three separate felonies involving the use or threat of violence to the person of another--a 1979 conviction for second-degree assault, a 1984 conviction for second-degree assault, and a 1984 conviction for second-degree arson.

Counsel were appointed to represent Dennis and arranged to have a psychiatrist conduct a competency evaluation. The psychiatrist who conducted the evaluation concluded that, although Dennis was clinically depressed, he was competent to stand trial and assist in his defense.

On April 16, 1999, Dennis entered a guilty plea to first-degree murder with the use of a deadly weapon pursuant to a written plea agreement. The district court thoroughly canvassed Dennis, who stated his desire to plead guilty though he faced a possible death penalty. Dennis explained that he had been in prison twice before and did not consider living in prison to be "living at all." He did not want to "waste away" in prison for the remainder of his life, and would rather "get it over faster than that." Ultimately, the court accepted Dennis's plea, finding that Dennis was competent to enter a plea and that his plea was knowing and voluntary.

On July 19 and 20, 1999, a penalty hearing was conducted before a three-judge panel of the district court. The State presented evidence relating to the facts and circumstances of Straumanis's death, including Dennis's own statements regarding the crime and evidence in support of the alleged aggravating circumstances. The panel was also

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informed that Dennis had a total of nine prior convictions: the three prior felony convictions alleged as aggravators, for which he served approximately two and one-half years in prison, and another older felony conviction for possession of a controlled substance, for which he served two years in prison. Dennis also had five prior misdemeanor convictions.

Dennis agreed to permit counsel to argue for a sentence less than death and submit a sentencing memorandum along with medical, psychiatric and jail records. [FN3] However, he expressed to the panel that he did not want to live in prison for the rest of his life, and he declined to present any additional evidence in mitigation or make any further statement in allocution.

FN3. The State stipulated to the admission of the memorandum and documents offered by the defense to show mitigation.

Dennis's records together with the panel's questioning of Dennis show that Dennis has a lengthy history of alcohol and substance abuse as well as suicide attempts. He first attempted suicide in 1965 and was hospitalized. However, it does not appear that Dennis was diagnosed with or treated for any mental health disorders until thirty years later. In 1995, he began a series of contacts with mental health professionals and was diagnosed with various disorders--primarily, a chronic depressive disorder. [FN4] The same records *438 show that Dennis was treated for his problems at various facilities by means of prescription drugs and therapy. Although he enjoyed periods of improved well being, he repeatedly discontinued his medications, declined further treatment and continued to consume alcohol against his doctors' advice.

FN4. Beginning in 1995, Dennis began a series of hospitalizations and outpatient treatments for various problems including Hepatitis C, alcohol abuse, recurrent depressive disorder, suicidal ideation and attempts, antisocial personality disorder, post-traumatic stress disorder attributed to abuse Dennis reported suffering as a child, bipolar disorder, and anger management problems. In 1995, Dennis also reported having audio hallucinations and was diagnosed with having a substance-induced psychotic disorder at the time of one admission for hospitalization. When receiving medical treatment subsequent to 1995, however, Dennis denied having any hallucinations, and it does not appear that Dennis's care providers noted any indications to the contrary.

Included among the medical records submitted were Veteran's Administration ("VA") records, which indicate that two months prior to killing Straumanis, Dennis was admitted to the VA Hospital in Reno when he reported to medical staff that he had stopped taking his medications and was trying to drink himself to death. He also reported picking up a girl the previous night, taking her to a motel, and having thoughts of killing her. At the time he was admitted, Dennis exhibited bizarre behavior, talking and answering to himself. However, he was discharged from the hospital after eight days. Reports from follow-up visits with VA medical personnel in February and on March 2, 1999, show no indication of any alarming behavior by Dennis and further show that he denied wanting to harm himself or others.

Counsel argued against a death sentence and alleged as mitigating factors that the murder was committed while Dennis was under the influence of extreme mental or emotional disturbance, *see* NRS 200.035(2), as well as numerous other circumstances, *see* NRS 200 .035(7). The panel found that Dennis made a knowing and voluntary waiver of the right to present further mitigating evidence or make any further statement in allocution.

After hearing argument, the panel found that three of the four alleged aggravators were established: the three prior felony convictions. The panel also found two mitigating circumstances: Dennis was under the influence of alcohol when he killed Straumanis, and he suffers from mental illness. The panel concluded that the mitigating circumstances did not outweigh the aggravating circumstances and returned a verdict of death. Dennis timely appealed.

DISCUSSION

Dennis argues only that his sentence of death is excessive. However, where a sentence of death has been imposed, NRS 177.055(2) requires this court to review the record and consider in addition to any errors enumerated on appeal:

(b) Whether the evidence supports the finding of an aggravating circumstance or circumstances;

(c) Whether the sentence of death was imposed under the influence of passion, prejudice or any arbitrary factor; and

(d) Whether the sentence of death is excessive, considering both the crime and the defendant.

We address each of these considerations in turn.

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Whether the evidence supports the three-judge panel's finding of aggravating circumstances

[1] The panel found that the State had proved three aggravating circumstances: three prior felony convictions involving the use or threat of violence to the person of another. *See* NRS 200.033(2)(b).

The record shows that in support of the 1979 felony assault conviction alleged as an aggravator, the State presented police reports, a certified copy of the judgment of conviction from the State of Washington, and testimony from the assault victim. This evidence showed that in December 1978, Dennis became intoxicated, argued with his girlfriend over his unemployment and threatened to kill her. He then held her up against a door and put a knife to her neck. During the altercation, he ripped the knife blade through her hand, saying, "[H]urts, don't it?" Although she managed to escape, the attack left her hand scarred. Police subsequently arrested Dennis at a local barroom frequented by him. He was thereafter convicted of second-degree felony assault and sentenced to a ten-year term of imprisonment, suspended for a five-year term of probation.

In support of the 1984 felony assault and felony arson convictions, each alleged as aggravators, the State presented police reports, certified copies of the judgments of conviction from the State of Washington, and testimony from victims. This evidence showed *439 that in December 1983, Dennis had a personal relationship with a woman, "Bonnie," whose daughter, "Lana," was sixteen years old. Lana and Dennis had been involved in a dispute stemming from an incident when Dennis went on a "rampage" and kicked in the door of Bonnie's home while Lana and her siblings were present. A couple of days after this incident, Lana was at the home of a family friend. As the two were watching television and eating dinner, Dennis lit the home on fire. When Lana became aware of the fire, she contacted police.

When confronted by police responding to the arson report, Dennis acted as if he did not know what had precipitated a police response. He then swung a knife at an officer. Even after surrounded by five officers, he refused to drop the knife, saying that he wanted to make a point. He made menacing gestures with the knife toward each of the responding officers and threatened to stab anybody who tried to take his knife. He challenged the officers to shoot him and challenged a canine officer to let his dog loose so that Dennis could stab the dog. Dennis then lunged and thrust his knife at the canine officer, and was shot. Notably, although Dennis smelled of alcohol at the time of his arrest, the arresting officer reported there was no indication that Dennis was intoxicated or not in control of himself at the time of the assault. Dennis was convicted of one count each of second-degree assault and second-degree arson. He was sentenced to ten years of imprisonment on each count, to be served concurrently with each other, and consecutively to the sentence for the 1979 assault conviction, for which his probation was revoked.

We conclude that this evidence is sufficient to prove each of the three aggravating circumstances found by the panel. *See generally Parker v. State*, 109 Nev. 383, 393, 849 P.2d 1062, 1068 (1993).

Whether the sentence of death was imposed under the influence of passion, prejudice or any arbitrary factor

[2] The panel considered evidence of the crime, the background and characteristics of Dennis, and both the aggravating and mitigating circumstances. The panel then concluded that the aggravating circumstances outweighed the mitigating and a death sentence was appropriate. Our review of the record reveals no evidence that the panel imposed the death sentence under the influence of passion, prejudice or any other arbitrary factor.

Whether the sentence of death is excessive

Dennis contends that his sentence of death is excessive. He asks this court to compare his background, character, crime, and the mitigating and aggravating circumstances found in his case to those of defendants in other first-degree murder cases where we have either affirmed the judgment of death or determined the death penalty to be excessive. He contends that under this comparative review, his death sentence must be vacated because the relevant sentencing factors in his case are most similar to those in two cases where we concluded that the death penalties were excessive: *Haynes v. State*, 103 Nev. 309, 739 P.2d 497 (1987), and *Chambers v. State*, 113 Nev. 974, 944 P.2d 805 (1997).

The State argues that the comparative review sought by Dennis is unnecessary and suggests that such a review is tantamount to proportionality review, which was formerly required by NRS 177.055(2)(d), but was abolished by our Legislature in 1985. *See* 1985 Nev. Stat., ch. 527, § 1, at 1597.

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Thus, we must determine whether the comparative review of death penalty cases has any proper role in our excessiveness analysis under NRS 177.055(2)(d).

From 1977 through 1985, NRS 177.055(2)(d) required that on appeal from a judgment of death, this court must consider "[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases in this state, considering both the crime and the defendant." 1977 Nev. Stat., ch. 585, § 10, at 1545; 1985 Nev. Stat., ch. 527, § 1, at 1597. Proportionality review required "that we compare all [similar] capital cases [in this state], as well as appealed murder cases in which the death penalty was sought but not imposed, and set aside those *440 death sentences which appear comparatively disproportionate to the offense and the background and characteristics of the offender." *Harvey v. State*, 100 Nev. 340, 342, 682 P.2d 1384, 1385 (1984).

However, in 1984, the United States Supreme Court decided *Pulley v. Harris*, 465 U.S. 37, 43-44, 50-51, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984), holding that the Eighth Amendment to the United States Constitution [FN5] does not require a proportionality review of death sentences, *i.e.*, an inquiry into whether the death penalty is unacceptable in a particular case because it is disproportionate to the punishment imposed on others similarly situated. The following year, the Nevada Legislature amended NRS 177.055(2)(d) to repeal the proportionality review requirement. *See* 1985 Nev. Stat., ch. 527, § 1, at 1597. In its current form, NRS 177.055(2)(d) provides only that this court must consider on appeal from a judgment of death "[w]hether the sentence of death is excessive, considering both the crime and the defendant."

FN5. U.S. Const. amend. VIII.

[3] We have recognized that pursuant to the 1985 amendment to NRS 177.055(2)(d), this court no longer conducts proportionality review of death sentences. *See, e.g., Thomas v. State*, 114 Nev. 1127, 1148, 967 P.2d 1111, 1125 (1998), *cert. denied*, 528 U.S. 830, 120 S.Ct. 85, 145 L.Ed.2d 72 (1999); *Guy v. State*, 108 Nev. 770, 784, 839 P.2d 578, 587 (1992). Instead, we review a death penalty for excessiveness considering only the crime and the defendant at hand. *Guy*, 108 Nev. at 784, 839 P.2d at 587.

In dispensing with proportionality review, we have recognized that penalties imposed in other similar cases in this state are "irrelevant" to the excessiveness analysis now required by NRS 177.055(2)(d). *See id.* Nonetheless, we have not entirely abandoned comparative review as part of that analysis. As noted by Dennis, in *Chambers*, 113 Nev. at 984-85, 944 P.2d at 811-12, we considered whether the imposition of a death sentence was warranted based upon comparisons between Chambers and his crime and defendants and crimes in other cases in which we have reviewed judgments of death. Specifically, we compared and found that the circumstances of the crime and defendant in *Chambers* were similar to those in two cases where we had determined the death penalty was excessive: *Haynes* and *Biondi v. State*, 101 Nev. 252, 699 P.2d 1062 (1985). *Chambers*, 113 Nev. at 985, 944 P.2d at 811. We also compared "the circumstances of the murder and the defendant in [*Chambers*] with the circumstances in other cases in which this court has affirmed the death penalty." *Id.* at 984, 944 P.2d at 811. After considering the crime and defendant in *Chambers*, and in light of our comparative review, we ultimately concluded that the sentence of death was excessive. *Id.* at 984- 85, 944 P.2d 805.

[4] Nonetheless, *Chambers* does not stand for the proposition that this court will conduct proportionality review of death sentences as part of the excessiveness analysis despite the Legislature's abolishment of such review. The fact that others guilty of first-degree murder may have received greater or lesser penalties does not mean that a defendant whose crime, background and characteristics are similar is entitled to receive a like sentence. However, as apparent in *Chambers*, our determinations regarding excessiveness of the death sentences of similarly situated defendants may serve as a frame of reference for determining the crucial issue in the excessiveness analysis: are the crime and defendant before us on appeal of the class or kind that warrants the imposition of death? *See* NRS 177.055(2)(d) (court must consider whether sentence of death on appeal is excessive, "considering both the crime and the defendant"). This inquiry may involve a consideration of whether various objective factors, which we have previously considered relevant to whether the death penalty is excessive in other cases, are present and suggest the death sentence under consideration is excessive.

We conclude that, even using as a frame of reference the factors considered relevant to excessiveness in *Chambers* and *Haynes*, the *441 cases upon which Dennis relies, the death penalty is not excessive here.

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In *Haynes*, we relied on several objective factors to determine that the death sentence was excessive, *i.e.*, the killing in that case was " 'crazy' " and "motiveless"; the defendant, Haynes, was a "mentally disturbed person lashing out irrationally, and probably delusionally, and striking a person he did not know and probably had never seen before"; and the single aggravating circumstance, a prior felony conviction for armed robbery, was fifteen years old at the time of the crime and committed by Haynes when he was eighteen years old. 103 Nev. at 319, 739 P.2d at 503. We concluded that the case was comparable to *Biondi v. State*, 101 Nev. 252, 699 P.2d 1062 (1985), where the defendant killed a man in a barroom confrontation among strangers in an emotionally charged atmosphere, and where the only aggravating circumstance was a prior conviction for armed robbery. [FN6] *Haynes*, 103 Nev. at 319, 739 P.2d at 503. We noted that in *Biondi*, we had reduced the death sentence to life without the possibility of parole. [FN7] *Id.* We finally concluded that Haynes did not deserve the death penalty. *Id.*

FN6. Although *Haynes* was decided after the Legislature abolished proportionality review, we nevertheless conducted such a review because the crime in that case was committed two days before proportionality review was abolished. *Haynes*, 103 Nev. at 319 n. 5, 739 P.2d at 504 n. 5.

FN7. In *Biondi*, we vacated the death sentence of the defendant because the penalty was disproportionate to sentences received in similar cases, including the codefendant's case. *Biondi*, 101 Nev. at 258-60, 699 P.2d at 1066-67.

As noted previously, we likewise determined the sentence of death was excessive in *Chambers*, after concluding the case was comparable to *Haynes* and *Biondi*. *Chambers*, 113 Nev. at 984-85, 944 P.2d at 811-12. In doing so, we relied on several objective factors, including that Chambers murdered the victim in a drunken state, which indicated no advanced planning, during an emotionally charged confrontation in which Chambers was wounded and his professional tools were being ruined. *Id.* at 985, 944 P.2d at 811-12. We further noted that the only valid aggravating factor in *Chambers*, prior felony convictions for robberies, "referred to crimes that occurred eighteen years before the verdict in question, when Chambers was eighteen years old," which "hardly shows a pattern of violence sufficient to justify the death penalty." *Id.* at 984-85, 944 P.2d at 811.

[5] Considering Dennis and his crime, we conclude that the objective factors relied on in *Haynes* and *Chambers* do not indicate the death penalty is excessive here. Dennis deliberately strangled Straumanis over the course of five to ten minutes and made efforts to assure her death. Unlike the defendants in *Haynes* and *Chambers*, evidence here shows a high degree of callousness and premeditation by Dennis. Dennis disputes this on appeal, suggesting that the evidence obtained during his interview with RPD should be discounted because much of what he said during his interview was "puffing" and "macho-image making," designed to make detectives take seriously his desire to be put to death. [FN8] However, Dennis's account of the crime is not inconsistent with the physical evidence. No evidence indicates that Dennis exaggerated the willful, premeditated and deliberate nature of the crime or that his callous indifference toward Straumanis was contrived. No evidence shows that the killing was the result of uncontrollable, irrational or delusional impulses or occurred during an emotionally charged physical confrontation. Accordingly, neither Dennis's mental illness nor his being under the influence of alcohol at the time of the crime renders his death penalty excessive. *Cf. DePasquale v. State*, 106 Nev. 843, 803 P.2d 218 (1990) (death sentence not excessive although defendant had history of mental illness); *Geary v. State*, 115 Nev. 79, 977 P.2d 344 (1999) (death sentence not excessive where defendant was in drunken rage when he killed victim), *cert. denied*, 529 U.S. 1090, 120 S.Ct. 1726, 146 L.Ed.2d 646 (2000).

FN8. In support of this, he points to his statements during the interview showing that at the time of the interview, he was suffering the effects of alcohol withdrawal, and his statements exaggerating his prior military experience and falsely indicating that he had killed others before Straumanis.

*442 Further, in this case, the prior felony convictions found as aggravating circumstances demonstrate that Dennis is a dangerous and violent man. There is no indication that these crimes were committed during any physical confrontation or that Dennis was irrational, delusional or unable to control his actions at the time. One of the aggravating prior felonies was committed twenty-one years, and the others, sixteen years, before Straumanis's murder. Unlike the single valid prior felony aggravating

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circumstance in *Haynes* or *Chambers*, here the prior felonies are not isolated instances, but are part of a continuing pattern of violence, spread out over time and increasing in severity. Also, Dennis committed his first prior felony when in his early thirties and committed his second and third prior felonies when in his late thirties. Therefore, these felonies demonstrate Dennis's proclivity for violent crime, and their significance in this respect cannot reasonably be diminished by immature judgment at the time of the crimes.

The record demonstrates that Dennis committed a calculated, cold-blooded and unprovoked killing and has a propensity toward violent behavior. We have affirmed the death penalty in similar cases. *See, e.g., McKenna v. State*, 114 Nev. 1044, 968 P.2d 739 (1998), *cert. denied*, 528 U.S. 937, 120 S.Ct. 342, 145 L.Ed.2d 267 (1999); *see also Leslie v. State*, 114 Nev. 8, 952 P.2d 966, *cert. denied*, 525 U.S. 860, 119 S.Ct. 146, 142 L.Ed.2d 119 (1998); *Pellegrini v. State*, 104 Nev. 625, 764 P.2d 484 (1988). After considering Dennis's contentions on appeal, we conclude that the death penalty is not excessive in this case.

CONCLUSION

Our review of this appeal demonstrates that the evidence supports the finding of aggravating circumstances, the sentence of death was not imposed under the influence of passion, prejudice or any arbitrary factor, and the sentence of death is not excessive, considering Dennis and his crime. Accordingly, we affirm the judgment of conviction and sentence of death.

ROSE, C.J., YOUNG, MAUPIN, SHEARING, AGOSTI and LEAVITT, JJ., concur.

END OF DOCUMENT

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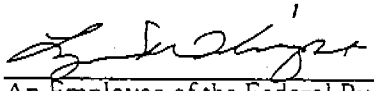
CERTIFICATE OF SERVICE VIA FEDERAL EXPRESS

I hereby certify that on the 6th day of April, 2001, I served a true and correct copy of the PETITION FOR WRIT OF HABEAS CORPUS on the following parties by delivering an envelope containing a copy of the foregoing by Federal Express, addressed as follows:

Attorney General
State of Nevada, Criminal Justice Division
Capitol Complex
100 North Carson Street
Carson City, Nevada 89710-4717

District Attorney, Washoe County
Criminal Justice Division
75 Court Street
P.O. Box 30083
Reno, Nevada 89520-3083



An Employee of the Federal Public Defender

EXHIBIT "B"

Washoe County Public Defender
Michael R. Specchio / Public Defender
Standard of Excellence Since 1969

December 5, 2000

Mr. Terry Dennis, Sr.
P.O. Box 1989, BAC#62144
Ely, NV 89301

RE: Supreme Court opinion and postconviction habeas corpus

Dear Terry:

John is sending you a copy of the Supreme Court's opinion in your case. You may have already received it when you get this letter. It affirms your conviction and sentence. The filing of the opinion triggers some deadlines you must meet.

John and I plan to discuss tomorrow whether a petition for rehearing should be filed by us. Rehearing is normally only granted when two circumstances can be shown 1) that the Court has misunderstood the facts, and 2) that a correct understanding would change the results. The Court bases part of its analysis on a review of an earlier case involving a defendant named Roger Chambers. I also represented Mr. Chambers, and so am familiar with the facts of both your cases. The Supreme Court makes a distinction between your priors and his, which is not consistent with the evidence in your respective cases.

Also, the Court's analysis of your priors is incomplete. One of the most important aspects of the prior involving the alleged arson is missed by the Nevada Supreme Court all together. You suffered sexual abuse as a child, and went to the home of the alleged victim in the arson case to retrieve your girlfriend's 16-year old from the hands of a man over two decades her senior. Further, the Court thinks the house was set on fire, which is clearly not part of the evidence from Washington State. The Court also neglects to recognize that your mental health history spans decades, not just the few years before your arrest in this case.

So, I think the first part of the equation, that the Court must have misunderstood pertinent facts, clearly exists in your

One South Sierra Street, P.O. Box [illegible], Reno, Nevada [illegible]

case. Whether a correction would change their opinion is the part about which I am unsure. That is what John Petty and I will discuss. We will let you know what we conclude, and why.

However, regardless of what we decide, you should file a petition for postconviction habeas corpus relief. Postconviction petitions must be filed within one year of the Court's decision. If you do not file a timely petition, you will be out of luck. The state filing also triggers certain timelines, for Federal relief also. It is critical that you not miss the deadlines. Postconviction petitions are filed often, and the law clerks at the prison should be able to assist you. If you have any trouble at all finding what you need, please let me know, and I will find what you need and get it to you.

Postconviction habeas corpus normally attacks your trial counsel, me. Do it. As I mentioned to you before, I did what I could think of to do to help you. However, there are many experienced, talented attorneys who will tell you that there are probably many things I missed.

In hindsight, my biggest mistake was not getting additional professional information regarding your competency to take the decision-making out of your hands. I should not have let a person who had a death-wish and a lengthy history of mental illness plead guilty, and tell the Court he did not want to live in prison. I should have moved to suppress your statements to police, over your objections. I am not trying to insult you. I know you are a bright person, with a lot more experience living than I have. As I told the Court, however, intelligence and mental illness are not mutually exclusive. I should not have let the fact that you are intelligent (and a little older than I am) influence my judgment.

You do not now, nor have you ever, belonged on death row. Please, take any legal avenue available to you to fight this injustice. You will not hurt me professionally, or hurt my

feelings, by making the necessary and appropriate attacks on your conviction and sentence. But, you will if you give up.

You may contact me, and ask me any questions about your case and how to proceed. My telephone number is the same (775)328-3498. I am normally in Court on Tuesday and Thursday mornings, then at random other times throughout the week. I know you will be frustrated and disappointed by this, please do not give up.

Sincerely,

MICHAEL R. SPECCHIO
Washoe County Public Defender

By Maizie W. Pusich
MAIZIE W. PUSICH
Chief Deputy

cc: John Petty

MEMORANDUM

To: John

Fr: Maizie

Re: Dennis

Da: 7/21/99

John, file is in four binders. The first two have evidence, witness statements and reports, notes, correspondence, etc, in alphabetical order.

The third binder is Terry's medical records. The fourth is research. It starts with the international law information Michael Pescetta sent me and directed me to. With the dismissal of the sex assault aggravator, and the finding of both the alcohol and mental health mitigators, the UN information may be useful. The S.Ct exceprts come from dissents. However, they explain the status of the treaty. Apparently we (the US) took a first step toward approval, then have declined to take the final step.

The Washington statutes were researched to verify that I could not preclude Bonnie Scipper from testifying about 1983. I could not have, but she did not testify.

The cases copied in the file are primarily on the corpus issue.

I have advised Terry that in addition to appeal, he can bring post-conviction. Based upon Judge Cherry's questions to me yesterday, I am confident Pescetta can argue that I should not have deferred to the wishes of a mentally ill person, even if competent. Additonally, I would expect Michael to argue that I was remiss for not having Terry reevaluated after he stopped taking his meds. (I was afraid he would be found competent again, ruining some of my mental health arguments). I told Terry to try whatever it took to save his life. He told me I had hammered that into his head enough. He understood.

I think I e-mailed you the sentencing memo, which quotes and cites both Chambers and Haynes, but if not, and that would be helpful, let me know.

3/14 Cont'd stp
3/21

2000 -1 P1:48
RONALD A. LONGTIN, JR.
BY R. Croney

CODE #2300
RICHARD A. GAMMICK
#001510
P. O. Box 30083
Reno, Nevada 89520-3083
(775)328-3200
Attorney for Respondent

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

IN AND FOR THE COUNTY OF WASHOE

* * *

TERRY JESS DENNIS,

Petitioner,

v. Case No. CR99P0611

THE STATE OF NEVADA, Dept. No. 1

Respondent.

_____/

MOTION TO DISMISS PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)

COMES NOW, the Respondent, by and through counsel, to respectfully request this court to enter an Order dismissing Petitioner's Petition for Writ of Habeas Corpus (Post-Conviction). This Motion is predicated on the accompanying Points and Authorities.

POINTS AND AUTHORITIES

I. FACTS

On April 16, 1999, petitioner pled guilty to first degree murder with a deadly weapon. On July 20, 1999, a three-judge panel sentenced petitioner to die by lethal injection. On

December 4, 2000, the Nevada Supreme Court affirmed petitioner's death sentence. On April 9, 2001, petitioner filed a petition for writ of habeas corpus (post-conviction). On or about February 14, 2002, petitioner filed supplemental claims in support of the petition. The state now moves this court to dismiss the petition for the following reasons.

II. ARGUMENT

ORIGINAL PETITION

GROUND ONE

In his first claim, petitioner alleges that Nevada's use of three-judge panels is unconstitutional. Specifically, petitioner alleges that the use of such panels does not provide for notice or opportunity to participate in the selection of the panel members, that there is no procedure to ensure the impartiality of the panel; and, as a result, the panel is "organized to return a verdict of death." Petitioner also adds that the statutory scheme regarding three-judge panels does not prescribe a method by which the judges are appointed or to examine them as to their impartiality in a given case.

This part of the first claim should be dismissed because it is a series of legal questions that the Nevada Supreme Court has resolved against petitioner. See Kirksey v. State, 112 Nev. 980, 1001, 923 P.2d 1102, 1115 (1996)(rejecting contention that procedure for selection of the three-judge panel is arbitrary and capricious and that the Supreme Court selects judges who are partial to the death sentence); Colwell v. State,

112 Nev. 807, 813-14, 919 P.2d 403, 407 (1996)(rejecting argument that three-judge panel procedure violates "a defendant's right to an impartial tribunal, due process and a reliable sentence by disallowing challenges to the qualifications and selections of panel members and by returning death sentences more often than juries."); Riker v. State, 111 Nev. 1316, 1326, 905 P.2d 706, 712 (1995)(holding that "imposition of the death penalty by a three-judge panel passes constitutional muster[]" and that the decisions of such panels are not "arbitrary and capricious."); Paine v. State, 110 Nev. 609, 618, 877 P.2d 1025, 1030 (1994)(rejecting argument that use of three-judge panel was unconstitutional because defendant had "no opportunity to voir dire the panel and . . . was unable to discover how the panel judges were selected"; also noting that the court does not select judges who are partial to sentences of death); Redmen v. State, 108 Nev. 227, 236, 828 P.2d 395,e 401 (1992)(holding that three-judge panels are constitutional and not arbitrary and capricious); Baal v. State, 106 Nev. 69, 74, 787 P.2d 391, 395 (1990)(same).

Petitioner's propositions regarding three-judge panels have been rejected numerous times. Moreover, petitioner does not allege any particular prejudice in his specific case, even assuming his general assertions to be true. Accordingly, this part of the petition should be dismissed without an evidentiary hearing. See Hill v. Lockhart, 474 U.S. 52, 59 (1985)(habeas petition dismissed where face of the petition did not specify

prejudice).

Petitioner next asserts that the three-judge panel "constitutes a legislatively created court in violation of the separation of powers clause of the Nevada constitution." (Petition, 7a). This argument has likewise been rejected by the Nevada Supreme Court. See Colwell, 112 Nev. at 813, 919 P.2d at 407 (holding that the three-judge panel procedure does not create a special court unconstitutionally encroaching on the judicial power of the district court because "[t]he three-judge panel procedure creates no new power which did not already lie within the power of the district court, namely, the sentencing of criminal defendants."). Accordingly, this claim should be dismissed.

Finally, petitioner asserts that his sentence should have been determined by a jury because a death sentence increases the penalty for first degree murder beyond the prescribed statutory maximum. This is an incorrect analysis of the law. In Apprendi v. New Jersey, 120 S.Ct. 2348 (2000), the Court held that the Constitution requires that any fact that increases the penalty for a crime beyond the statutory maximum, other than a prior conviction, must be submitted to a jury and proven beyond a reasonable doubt. That is not the case here. The death penalty did not increase the penalty for first degree murder beyond the statutory maximum for the simple reason that the death penalty is merely one of the available sentencing options under the first degree murder statute. See NRS 200.030 (4)(penalties for first

degree murder are death, imprisonment for life with or without possibility of parole or definite term of 50 years).

In any event, the Ninth Circuit has noted that Apprendi does not affect capital sentencing cases. See Hoffman v. Arave, 236 F.3d 523, 542 (9th Cir. 2001). In Hoffman, the court observed that "[i]n Walton v. Arizona, the Supreme Court addressed a similar sentencing scheme and held that the presence of an aggravating circumstance in a capital case may constitutionally be determined by a judge rather than a jury. 497 U.S. 639, 647-48, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990). The Supreme Court in Apprendi did not overrule Walton. It wrote:

> Finally, this Court has previously considered and rejected the argument that the principles guiding our decision today render invalid state capital sentencing schemes requiring judges, after a jury verdict holding a defendant guilty of a capital crime, to find specific aggravating factors before imposing a sentence of death.

Apprendi, 120 S.Ct. at 2366 (citing Walton, 497 U.S. at 647-49, 110 S.Ct. 3047; Id. at 709-14, 110 S.Ct. 3047 (Stevens, J. dissenting)).

Thus, this claim should be dismissed.

GROUND TWO

Here, petitioner claims that imposing a conviction and sentence for a capital offense by a judge who is subject to popular election is unconstitutional. "The signers of the Declaration of Independence charged that the King 'obstructed the Administration of Justice by refusing his Assent to Laws for

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establishing Judiciary Powers. He has made Judges dependent on his Will alone for the tenure of their office and the amount and payment of their salaries.'" United States v. Woodley, 751 F.2d 1008, 1018 (9th Cir. 1985)(quoting The Declaration of Independence para. 11-12 (U.S.1776)). "To translate their concern for judicial independence into practice, the Framers included in Article III the requirement that federal judges have permanent tenure and undiminishable compensation." Id. (citing Pittman, The Emancipated Judiciary in America: Its Colonial and Constitutional History, 37 A.B.A.J. 485, 588 (1951)). "The Framers were determined to ensure that federal judges would not be beholden to the executive or the legislature but only to the law and their own consciences." Id. Thus, the appointment process and lifetime tenure of federal judges are characteristics of the federal judiciary only; there is no similar constitutional obligation applicable to the states.

In addition, petitioner does not claim any specific prejudice in his particular case. Accordingly, this claim should be dismissed.

GROUND THREE

Petitioner alleges that his trial counsel failed to provide effective assistance of counsel by allowing petitioner to make tactical choices as to the conduct of the litigation. Petitioner alleges that such choices are not within the defendant's right to choose. This claim should be dismissed.

First, petitioner fails to specify exactly the nature

of the choices that petitioner was allowed to make. "[A] defendant seeking post-conviction relief must raise more than conclusory claims for relief; a defendant must support any claims with specific factual allegations that if true would entitle him or her to relief." Pangallo v. State, 112 Nev. 1533, 1536, 930 P.2d 100, 102 (1996)(post-conviction motion to receive pretrial jail credit denied because motion failed to specify crimes, case numbers, and sentences being served for convictions other than the one for which petitioner sought credit, and motion did not state that pretrial confinement had not been credited toward any of the other convictions). See also Nobles v. Warden, 106 Nev. 67, 787 P.2d 390 (1990)(habeas claim that sentence was based on mistakes of fact contained in presentence report dismissed without evidentiary hearing where appellant failed to identify the alleged errors in the report); Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984)(post-conviction motion to withdraw guilty plea dismissed without evidentiary hearing because appellant's claim that certain witnesses could establish his innocence "was not accompanied by the witness' names or descriptions of their intended testimony.").

Here, petitioner has merely stated that trial counsel permitted petitioner to make choices about the course of the litigation that were non-delegable. Without more, this is an insufficient claim since it in essence fails to demonstrate any prejudice. The claim should be dismissed.

Furthermore, if petitioner means that he is not legally

permitted to decide what defense(s) to use during the litigation, he is wrong. See Johnson v. State, 117 Nev. Adv. Op. No. 8 (February 23, 2001)(holding that it was the defendant's choice whether to assert an insanity defense where the defendant is mentally competent). Petitioner cannot claim his counsel was ineffective for permitting him to plead where petitioner pled against the wishes of his counsel. See Jeffries v. Blodgett, 5 F.3d 1180, 1198 (9th Cir. 1993)("when a defendant preempts his attorney's strategy by insisting that a different defense be followed, no claim of ineffectiveness can be made.").

Petitioner next alleges that his counsel failed to "conduct a complete investigation of petitioner's background and history in order to advise him adequately as the entry of his plea or to conduct the penalty hearing." (Petition, 7d). This claim should be dismissed because petitioner fails to identify what favorable evidence petitioner's counsel could have discovered that had a reasonable probability of effecting a different outcome. See Hargrove, supra.

It is clear that the habeas jurisprudence of this state requires a petition to set forth specific factual allegations that state a claim for relief. Once a prisoner files his petition, any judge should be able to look at the petition and conclude from reading it that the prisoner is entitled to relief, if the judge were to assume that the facts referenced in the petition are true. The reason, of course, for this requirement is to know as early as possible whether significant and scarce

court resources should be devoted to deciding a claim that has potential merit. The specific pleading requirement also gives the State, as the responding party, sufficient notice of what the petitioner contends is defective about his conviction or sentence, which in turn affords the State the opportunity to marshal its resources to rebut the allegations of the petition, if necessary. Accordingly, an evidentiary hearing should never be used as a fishing expedition in which a prisoner hopes to discover a possible claim for relief. In short, an evidentiary hearing is not a substitute for a carefully pleaded petition based on allegations that are well grounded in fact and law. No evidentiary hearing is necessary or even desirable until the petitioner can first show that he is entitled to relief should he be able prove up the allegations of his petition.

Finally, petitioner alleges that his trial counsel failed to investigate and obtain assistance regarding petitioner's mental state at trial and petitioner's ability to make rational choices about the proceedings. For the same reasons expressed above, this claim should be dismissed. Petitioner does not allege that he was unable to make rational choices, and that he required medication in order to rationally participate in the trial proceedings. Further, he does not specifically allege what his counsel could have discovered with additional investigation that would have rendered a different outcome of the trial. The claim should be dismissed.

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SUPPLEMENTAL PETITION

GROUND ONE

In the first claim of the supplemental petition, petitioner asserts his counsel was ineffective for permitting him to plead guilty without the benefit of a plea bargain. This claim must be dismissed because the assumption behind the argument--that it is counsel's function and duty to decide whether a defendant will plead guilty--is wrong as a matter of law. The decision about how a defendant will plead is personal to the defendant: no one but the defendant can decide how he or she will plead. It is his or her right alone to exercise. See Jones v. State, 110 Nev. 730, 737, 877 P.2d 1052, 1056 (1994)("The gravity of the consequences of a decision to plead guilty or to admit one's guilt demands that the decision remain in the defendant's hand."). Thus, as a matter of law, there is nothing wrong about permitting a defendant to plead guilty merely because there is no plea agreement. There is no duty, even in a capital case, that one must plead guilty pursuant to a plea agreement. Once a defendant desires to plead guilty, counsel can do nothing to block the plea, assuming the defendant enters a voluntary, knowing, and intelligent plea and satisfies other requirements relevant to entering a valid plea.

Here, petitioner stated his express desire to plead guilty. He was competent to do so. See Dennis v. State, 116 Nev. ___, ___, 13 P.3d 434, 437 (2000)(noting that the trial court found petitioner "was competent to stand trial and assist

in his defense."). Accordingly, instead of being ineffective for permitting petitioner to plead guilty, counsel was actually obliged to permit petitioner to plead guilty.

Moreover, the record repels the idea that counsel permitted petitioner to plead guilty. Counsel unequivocally told this Court that petitioner's plea was against her advice (Arraignment Transcript, 20, 47). Accordingly, this claim must be dismissed. See Pangallo v. State, 112 Nev. 1533, 1536, 930 P.2d 100, 102 (1996)("the defendant is not entitled to an evidentiary hearing if the factual allegations are belied or repelled by the record.").

GROUND TWO

In this claim, petitioner alleges his counsel should have attacked the prior felonies the three-judge panel used as aggravating circumstances because they were not relevant to petitioner's crime and were remote in time.

This claim must be dismissed for several reasons. First, petitioner is confused about the purpose of prior convictions or bad acts in the guilt phase of trial as opposed to their use at a penalty hearing in a capital case. Normally, bad acts are prohibited from being used to establish character during trial. See NRS 48.045. Bad act evidence may be admissible for other reasons, such as motive, intent, identity, if the act is relevant, proved by clear and convincing evidence, and its probative value is not substantially outweighed by its prejudicial value. See NRS 48.045(2); Tinch v. State, 113 Nev.

1170, 1176, 946 P.2d 1061, 1064-65 (1997). However, once guilt is established, the reason for the prohibition against character evidence disappears and such evidence may then be admitted. See NRS 175.552(3)(in penalty hearing of capital case evidence may be presented on aggravating and mitigating circumstances concerning the offense, defendant, or victim, and on any other matter which the court determines is relevant to the sentence.); McKenna v. State, 114 Nev. 1044, 1058-59, 968 P.2d 739, 748 (1998)(holding that pursuant to NRS 175. 552(3), evidence of defendant's prior bad acts was admissible). Accordingly, the test petitioner references regarding the admission of bad acts in jury trial is inapposite during sentencing hearings.

Nevertheless, the Nevada Supreme Court reviewed the aggravators used in this case and determined they were valid. In fact, the court specifically determined that the cases petitioner now cites in support of the idea that the aggravators were invalid, Haynes v. State, 103 Nev. 309, 739 P.2d 497 (1987), Chambers v. State, 113 Nev. 974, 944 P.2d 805 (1997), are inapposite to the present case. See Dennis v. State, 116 Nev. ___, ___, 13 P.3d 434, 442 (2000)("Unlike the single valid prior felony aggravating circumstance in Haynes or Chambers, here the prior felonies are not isolated instances, but are part of a continuing pattern of violence, spread out over time and increasing in severity. . . . Therefore, these felonies demonstrate Dennis' proclivity for violent crime, and their significance in this respect cannot reasonably be diminished by

immature judgment at the time of the crimes."). Thus, the court in this case found that "the evidence supports the finding of aggravating circumstances[.]" Id. The Supreme Court's pronouncement that the aggravators are valid is now the law of the case and cannot be relitigated. See Valerio v. State, 112 Nev. 383, 386-87, 915 P.2d 874, 876 (1996)(holding that district court's dismissal of habeas claims was correct because supreme court's "prior orders dismissing them constitute the law of the case."). This claim must be dismissed.

GROUND THREE

Here, petitioner asserts he was not competent to waive his rights to a jury trial, his counsel was ineffective for facilitating a guilty plea, and the court erred in accepting the plea. These claims should be dismissed.

This court found petitioner competent before he pled guilty (Arraignment Transcript, 55). The court also found petitioner entered a voluntary, knowing, and intelligent plea. Id. Indeed, this court's canvass of petitioner's guilty plea spans 55 pages. The court also noted petitioner's competency at the penalty hearing (Penalty Hearing Transcript, July 20, 1999, 56). Accordingly, the record repels the idea petitioner was not competent or that the court erred in accepting the plea. As mentioned above, the record also repels the idea counsel facilitated the plea. Accordingly, no evidentiary hearing is required and the claim should be dismissed.

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GROUND FOUR

In this claim, petitioner asserts his counsel was ineffective for allowing petitioner to make critical decisions regarding his case, including the decision to plead guilty, because petitioner was not mentally stable.

As the State has proved above, petitioner was competent. As long as petitioner was competent and desired to plead guilty, and entered a voluntary, knowing, and intelligent plea, it is irrelevant whether he was depressed. Nevertheless, the record also demonstrates counsel did not willingly permit petitioner to plead guilty. Petitioner pled guilty against the advice of his counsel. Thus, since it was petitioner's absolute right to plead, and this court conducted a proper canvass of petitioner, this claim must be dismissed.

GROUND FIVE

Petitioner claims his counsel was ineffective for permitting him to plead guilty to first degree murder because petitioner did not deliberate or premeditate the killing of the victim. Petitioner alleges he killed the victim while he was intoxicated and depressed while in the heat of passion. This claim is frivolous and should be dismissed.

As the Nevada Supreme Court noted, petitioner planned on killing the victim when he first met her, which was several days before the murder. Dennis, 116 Nev. at, 13 P.3d at 436. The Court ruled, after its independent review of the case, petitioner "committed a calculated, cold-blooded and unprovoked

killing and has propensity toward violent behavior." Id. at ___, 13 P.3d at 442. Because the Court has determined petitioner committed first degree murder, that finding is now the law of the case, and may not be relitigated. See Valerio, supra.

GROUND SIX

Petitioner alleges his counsel was ineffective for allowing the three-judge panel to consider two prior felony convictions as separate aggravators because they arose out of a single event. This claim must be dismissed.

First, the Nevada Supreme Court ruled the aggravators are valid. Thus, any argument to the contrary is barred by the law of the case. Second, the 1984 arson and assault convictions, although they arose on the same day, arose under different circumstances. The arson case arose after petitioner set a house on fire. The assault case arose when police officers attempted to arrest petitioner on the arson case and petitioner lunged at an officer with a knife and was shot. Certainly, the two crimes do not involve the same behavior so that they might be deemed redundant. See Servin v. State, 117 Nev. Adv. Op. No. 65 (October 17, 2001)(holding that burglary and home invasion were duplicative aggravators where "both are based on the same facts."). Thus, this claim should be dismissed.

GROUND SEVEN

Here, petitioner claims his counsel and this Court improperly considered petitioner's wish to die. This claim should be dismissed because petitioner fails to support this

conclusory claim with facts that would lead one to believe this Court actually acted consistent with the allegation. In addition, the record repels this allegation. It was petitioner, not his counsel, who wanted petitioner to die and who acted upon that desire. Petitioner unequivocally rejected all attempts to present mitigating evidence (Penalty Hearing Transcript, July 20, 1999, 37, 47, 48, 52, 55, 56, 59, 70). On the other hand, petitioner's counsel expressly argued petitioner should not receive the death penalty for his crime. Id. at 92. Instead of accepting petitioner's desire to receive the death penalty, the court implored petitioner to present mitigating evidence. Id. at 46-47, 72. The reason the court imposed the death penalty is that petitioner committed first degree murder and the aggravating circumstances outweighed the mitigating circumstances. Id. at 109. Because the record clearly repels the assertions of this claim, the court should dismiss it without an evidentiary hearing.

GROUNDS EIGHT AND NINE

Petitioner asserts his sentence should not have been enhanced because he did not use a deadly weapon that actually killed the victim. This claim is frivolous.

NRS 193.165(b) provides that a deadly weapon is "[a]ny weapon, device, instrument, material or substance which, under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing substantial bodily harm or death[.]" Here, petitioner used or attempted to

use the belt in a way that was "readily capable of causing substantial bodily harm or death[.]" NRS 193.165(b). Thus, the belt was a deadly weapon. Petitioner also used the belt "in the commission of [his] crime." NRS 193.165(1). Thus, it does not matter whether petitioner's use of the belt actually caused the death of the victim. Thus, this claim must be dismissed.

Petitioner reasons that under Zgombic v. State, 106 Nev. 571, 798 P.2d 548 (1990), a belt cannot be a deadly weapon because it is not an inherently dangerous weapon. Zgombic, however, no longer defines what constitutes a deadly weapon. NRS 193.165 was modified after Zgombic to reflect the current definition of a deadly weapon. See NRS 193.165(5)(b).

Petitioner also asserts in conclusory fashion that NRS 193.165 is unconstitutional. Since petitioner offers no explanation for this proposition, the claim should be dismissed.

GROUND TEN

Petitioner asserts his counsel failed to properly investigate and prepare for trial. This claim must be dismissed.

Petitioner refused to go to trial against the advice of his counsel (Arraignment Transcript, 21). Where one desires to plead guilty instead of going to trial, counsel has no duty to prepare for trial. Counsel attempted to do more for petitioner, but petitioner refused (Trial Transcript, July 20, 1999, 47, 61). Thus, the record repels the idea counsel had a duty to do any thing more for petitioner. Petitioner cannot claim error where he received the relief--a guilty plea instead of a trial-- he

personally requested. See Rhyne v. State, 118 Nev. Adv. Op. No. 1 (2002)(noting that where defendant requests certain relief, he is estopped from against it as error on appeal). This claim must be dismissed.

Petitioner asserts this Court failed to question him further when he indicated he might want to go trial. This claim is ridiculous. The court continued to question petitioner. Petitioner told the court he wanted to plead guilty (Arraignment Transcript, 40). He told the court he had no other questions and wanted to plead guilty. Id. at 45, 55.

The claim should also be dismissed because petitioner fails to identify what his counsel should have done that would have had a reasonable chance of effecting a different result. Merely alleging counsel should have done more is an insufficient habeas pleading as a matter of law. See Hill v. Lockhart, Hargrove, Nobles.

GROUND ELEVEN

In this ground petitioner alleges his counsel was ineffective for failing to suppress petitioner's statements taken in violation of Miranda. This claim fails because when petitioner pled guilty he waived the right to contest his guilt and all issues attendant thereto. See Webb v. State, 91 Nev. 469, 470, 538 P.2d 164, 165 (1975)("When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional

rights that occurred prior to the entry of the guilty plea.")(quoting Tollett v. Henderson, 411 U.S. 258, 267 (1973)); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984)(no contest plea waives constitutional errors occurring before entry of plea).

Petitioner also asserts his statements were unlawfully used against him at his penalty hearing. Even if petitioner's statements were taken in violation of Miranda, which the State does not concede, the "exclusionary rule is generally inapplicable during sentencing." Del Vecchio v. Illinois Dept. of Corrections, 31 F.3d 1363, 1388 (7th Cir. 1994)(holding that alleged Miranda violation does not prevent admission of confession at sentencing).

GROUND TWELVE

Here, petitioner alleges counsel should have moved to redact petitioner's admission that he served six months in jail for a spousal battery conviction. Petitioner submits this was suspect evidence because he maintained his innocence. This claim should be dismissed because petitioner concedes he admitted that the conviction occurred. The conviction itself, therefore, is proof of the validity of the underlying crime for which petitioner was convicted. The evidence was admissible under NRS 175.552(3).

Petitioner also alleges his statement about another person dying at his residence should have been excluded. He maintains the evidence is not credible. However, since

petitioner does not explain how his counsel could have shown the statement was suspect, petitioner fails to demonstrate any prejudice. The fact that petitioner made the statement is evidence of the reliability of the statement. In any event, there is no apparent prejudice to petitioner from the statement. This claim should be dismissed.

GROUND THIRTEEN

Petitioner claims his counsel was ineffective for failing to present mitigating evidence. However, petitioner does not tell us what mitigating evidence his counsel should have presented. Such conclusory claims must be dismissed. See Nobles, Hargrove.

In addition, the record clearly reveals petitioner waived his right to present mitigating evidence. See Kirksey v. State, 112 Nev. 980, 995, 923 P.2d 1102 (1996) ("However, a defendant may waive the right to present mitigating evidence and defense counsel's acquiescence to such a waiver does not constitute ineffective assistance of counsel."). Thus, this claim must be dismissed.

GROUND FOURTEEN

Petitioner claims his counsel was ineffective for allowing him to plead guilty where the State could not prove the corpus delicti of the crime. As proved above, counsel did not allow petitioner to plead guilty; he insisted on pleading guilty against the advice of counsel. The premise of this claim being false, the claim fails and must be dismissed.

Nevertheless, as a matter of law, the State was quite able to prove the corpus delicti. "It has long been established that the corpus delicti must be demonstrated by evidence independent of the confessions or admissions of the defendant." Sheriff v. Dhadda, 115 Nev. ___, ____, 980 P.2d 1062, 1065 (1999). The rule protects against an accused from being convicted solely upon an uncorroborated confession. Id. However, "[o]nce the State presents independent evidence that the offense has been committed, admissions and confessions may then be used to corroborate the independent proof." Sheriff v. Middleton, 112 Nev. 956, 962, 921 P.2d 282, 286 (1996); see also, Waid v. Sheriff, 88 Nev. 664, 666 504 P.2d 9, 10 (1972)("although admissions may not be the only means of establishing the corpus delicti, they may be used to corroborate or strengthen the proof of the corpus delicti.")(citing Azbill v. State, 84 Nev. 345, 440 P.2d 1014 (1968)); In re Kelly, 28 Nev. 491, 83 P. 223 (1905)(same). The corpus delicti may be proved by direct or circumstantial evidence, or a combination of both. Middleton, 112 Nev. at 962, 921 P.2d at 286. "Once the corpus delicti is determined to have been proved by lawful evidence, confessions and admissions may clearly be considered in establishing probable cause to show that it was the particular defendant charged who was the criminal agency causing the death." Azbill v. State, 84 Nev. 345, 351, 440 P.2d 1014, 1018 (1968). "[T]he order of proof is subject to the sound discretion of the trial court." McIntosh v. State, 86 Nev. 133, 136, 466 P.2d 656, 658 (1970). At a

preliminary hearing, the corpus delicti must be proved only by slight or marginal evidence. Sheriff, Washoe County v. Middleton, 112 Nev. 956, 961-62, 921 P.2d 282, 286 (1996).

Here, the record demonstrates the victim "had died between three and seven days earlier as a result of asphyxia due to neck compression, most likely by strangulation." Dennis, 13 P.2d at 436. This finding certainly leads, by slight or marginal evidence, to a reasonable inference that a death occurred by unlawful human agency. Petitioner's subsequent confession corroborates that finding and may be used to find that it was petitioner who was the human agent responsible for the victim's death. Middleton, supra. Thus, there was no problem with the corpus delicti, and this claim must be dismissed.

GROUND FIFTEEN

In this claim, petitioner asserts his counsel should have cross-examined a Lana Miller about the fire petitioner set to the home Ms. Miller was in. Petitioner asserts he set the fire because there was a man in the home who was sexually pursuing Ms. Miller.

The problem with this claim is that it fails to reveal any prejudice. For example, petitioner does not assert that Ms. Miller, under cross-examination, would have admitted she was under an imminent threat that would have justified burning down her house as petitioner suggests. Without such a showing, the claim must be dismissed. See Lockhart, supra. Further, any assertion that petitioner's actions were justified as a defense

of others was waived when he pled guilty to the crime of arson. See Webb, Lyons, supra.

GROUND SIXTEEN

Petitioner asserts his counsel failed to hire various experts. Again, however, petitioner fails to allege what the alleged experts would have testified to that would have made a difference in petitioner's case. Petitioner should have specifically identified the experts he intends to call and outlined their specific testimony. Because he has not done this, the Nevada Supreme Court has ruled that such a conclusory allegation must be dismissed as a matter of law. See Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984)(post-conviction motion to withdraw guilty plea dismissed without evidentiary hearing because appellant's claim that certain witnesses could establish his innocence "was not accompanied by the witness' names or descriptions of their intended testimony.").

GROUND SEVENTEEN

Here, petitioner alleges his counsel had a conflict. He alleges counsel should have withdrawn "to prevent an appearance that the client was actually following the advice of counsel in seeking a death sentence." The court need not conduct an evidentiary hearing on this issue because the record repels the idea there was an appearance petitioner was following the advice of counsel. As outlined above, counsel clearly told the court several times that petitioner was acting against counsel's

advice. Thus, this claim should be dismissed.

GROUND EIGHTEEN

Petitioner alleges he was deprived of the effective assistance of counsel considering the individual and collective failures of counsel. Petitioner does not allege any new ground. Thus, since counsel was not ineffective on any individual ground, she was not ineffective on a collective basis either. This ground should be dismissed.

GROUND NINETEEN

In this claim, petitioner alleges that a three-judge panel is unconstitutional. Petitioner raises the same claim in the first claim of his original petition. The State has already demonstrated this assertion is without merit. This claim must be dismissed.

GROUND TWENTY

Petitioner contends his sentence is unconstitutional under Apprendi v. New Jersey, 120 S.Ct. 2348 (2000). This is the same claim petitioner makes in the first ground of his original petition, which the State demonstrates above is without merit.

GROUND TWENTY-ONE

Here, petitioner alleges he was not competent at the time he killed the victim. He alleges he was not permitted to present a temporary insanity defense. This claim should be dismissed because the record demonstrates petitioner did not want to present a defense; he wanted to plead guilty. Further, the record clearly demonstrates petitioner knew exactly what he was

doing: he intentionally murdered, with premeditation and deliberation and malice aforethought that lasted over several days, the victim in this case. He knew it was wrong before and after he committed the crime. He admitted as much. In fact, he said the murder was "exciting" and that he would do it again. In addition, petitioner again fails to inform the court what witnesses and testimony he will present that will prove he was temporarily insane. Petitioner merely asserts "[e]xpert testimony will be presented on mental health issues." (Petition, 101). Accordingly, this claim must be dismissed. See Hargrove.

GROUND TWENTY-TWO

In this claim, petitioner asserts the State shifted the burden of proof. It appears petitioner suggests that when this court canvassed petitioner about permitting his counsel to present mitigating evidence, the court was shifting the burden of producing such mitigating evidence to petitioner. Of course, the record clearly shows that the court merely wanted to make sure it really was petitioner's intent to forego the presentation of additional mitigating evidence. Merely because the court recognized that petitioner had the right to present evidence on his behalf does not mean the court put the burden on petitioner of producing mitigating evidence.

Petitioner alleges "Judge Cherry believed that Mr. Dennis had to provide mitigating evidence or the death penalty was an automatic event." (Petition, 104). The record repels this assertion. The record demonstrates Judge Cherry understood that

it was in his discretion to impose the proper penalty (Penalty Transcript, 48, 108-09). The fact that the court found the aggravating circumstances outweighed the mitigating circumstances demonstrates the court was aware of its duty to weigh and consider all the evidence before imposing the death penalty. Judges are presumed to know and follow the law. See Jones v. State, 107 Nev. 632, 636, 817 P.2d 1179, 1181 (1991) ("trial judges are presumed to know the law and apply it in making their decisions.").

Petitioner asserts Judge Cherry unfairly concluded that the written documents petitioner's counsel presented had no value. The quote petitioner references does not support this inference: "I just want to make sure you understand the position that you are putting us in by not offering anything except these written documents." Id. at 37. The comment merely reflects Judge Cherry's concern that petitioner chose to restrict the evidence he chose to present to the three-judge panel. Judge Cherry certainly did not mean that petitioner's documents had no value for the single reason that the three-judge panel found two mitigating circumstances. Thus, the record repels this claim.

Petitioner submits it was error for Judge Berry to conclude petitioner was waiving his right to present all mitigating evidence. Of course, petitioner takes Judge Berry's comment out of context. Judge Berry was only concerned that petitioner chose not to present more than he did.

Petitioner asserts counsel was ineffective for failing

to provide the sentencing panel with live witnesses. Since petitioner voluntarily, intelligently, and knowingly chose this strategy himself, it was proper for his counsel to follow this course of action. See Kirksey, supra.

Petitioner also asserts he did not know that his crime was wrong. This is nonsense. The Nevada Supreme Court opinion in this case adequately demonstrates that petitioner knew exactly what he was doing and that it was wrong.

Finally, petitioner asserts his counsel was ineffective because counsel made references to the scope of petitioner's permission to present evidence. There is no nothing wrong with this, and petitioner fails to present any legal theory by which such conduct was improper.

GROUND TWENTY-THREE

Petitioner claims he was deprived of certain medications while in jail. He appears to claim he was prevented "from being able to assist counsel due to his lack of appropriate prescription medications." (Petition, 107). He alleges he would have followed a different course of action had he been allowed to have such medications.

This claim should be dismissed. As noted above, this court found petitioner competent to proceed (Arraignment Transcript, 11). Petitioner's counsel agreed with the finding of competency. Id. at 12. In addition, the record demonstrates petitioner was on medication at the jail but that he voluntarily decided to quit taking his medications because he felt he no

longer needed them. Id. at 8, 10. Because the record repels petitioner's assertion he was not competent or that he was deprived of medication and would have proceeded differently with medication, this claim must be dismissed.

GROUND TWENTY-FOUR

In this claim, petitioner asserts the Nevada Supreme Court considered evidence that this Court had excluded at the penalty hearing. This claim is frivolous and must be dismissed.

At the penalty hearing the three-judge panel ruled that the State could not present evidence that petitioner hit Lana Miller in the mouth (Transcript of Penalty Hearing, July 20, 1999, 10-16). The Nevada Supreme Court opinion in this case does not reference the battery on Ms. Miller. Since the record repels this claim, it must be dismissed.

GROUND TWENTY-FIVE

Petitioner claims in this ground the Nevada Supreme Court failed to review petitioner's waiver of his right to trial. In an unrelated claim, he also claims there was no adequate competency hearing. These claims should be dismissed.

The trial court conducted an extensive canvass of petitioner when he pled guilty. The Nevada Supreme Court noted "[t]he district court thoroughly canvassed Dennis, who stated his desire to plead guilty though he faced a possible death penalty." Dennis, 13 P.3d at 437. Thus, the Supreme Court did review petitioner's waiver of his right to trial. Nevertheless, even if the Court did not conduct such a review, petitioner can claim no

error since the canvass was correctly done. When petitioner pled guilty, the court advised him of his constitutional rights he was waiving and the consequences of his plea. He was also found to be competent by a physician. This claim should be dismissed.

GROUND TWENTY-SIX

Here, petitioner claims the Nevada Supreme Court must conduct proportionality review. The Court specifically held to the contrary in this case. Dennis, 13 P.3d at 440 ("We have recognized that pursuant to the 1985 amendment to NRS 177.055(2)(d), this Court no longer conducts proportionality review of death sentences."). Because this claim is barred by the law of the case, it must be dismissed.

GROUND TWENTY-SEVEN

Petitioner asserts the state committed misconduct by referring to him as a serial killer. The prosecutor did not refer to petitioner as a serial killer at the penalty hearing. Thus, the record repels this claim. On appeal, the state made the following argument:

> The State submits that Dennis, regardless whether he killed before this case, has now developed into a highly dangerous serial killer: even if he has committed only murder, Dennis has confirmed that he will kill again merely for the exciting pleasure and the ease of being able do so.

(State's Opening Brief, 17).

In other words, the State argued that while petitioner had only killed one person (although he also said in his interview with police that he had killed other people), petitioner also stated

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that he enjoyed the killing and that he would kill again. Thus, from the State's perspective, petitioner has developed the mindset of a serial killer. Since the state's argument was a fair comment on the evidence, there was no error.

GROUND TWENTY-EIGHT

In this claim, petitioner asserts NRS 200.033(2) is unconstitutionally vague. He also asserts the aggravators used in this case were improper.

The Nevada Supreme Court has ruled NRS 200.033 is facially valid. See Petrocelli v. State, 101 Nev. 46, 692 P.2d 503, 509 (1985)("NRS 200.033 is facially constitutional and under our present statutory scheme we have determined that it was applied constitutionally in the instant case.").

The State has previously addressed the validity of the aggravators above. In addition, the Nevada Supreme Court has already determined the aggravators were proper. Thus, under the law of the case, this claim must be dismissed.

GROUND TWENTY-NINE

Petitioner claims his appellate "failed to adequately recite a record which would support a proportionality review by the Nevada Supreme Court." (Petition, 117). Since petitioner offers no factual support for this proposition, the claim must be dismissed. See Pangallo, supra.

Petitioner also asserts his counsel should have objected to the comment about petitioner being a serial killer. This claim has been addressed above.

Petitioner asserts his appellate should have presented a better brief on appeal. However, petitioner offers no specific facts or theory in support of the claim. As such, this claim must be dismissed.

For the foregoing reasons, the petition for writ of habeas corpus (post-conviction) should be dismissed without an evidentiary hearing.

DATED: February 28, 2002.

RICHARD A. GAMMICK
District Attorney

By _____
JOSEPH R. PLATER
Appellate Deputy

CERTIFICATE OF MAILING

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

Karla Kay Butko
1030 Holcomb Ave.
Reno, NV 89502

DATED: March 1, 2002.

ORIGINAL

FILED

RONALD A. LONGTIN, JR., Clerk

By [signature] 01 March 2002 Deputy Clerk

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

TERRY JESS DENNIS,

Petitioner,

VS. Case No. CR99P0611

THE STATE OF NEVADA, Dept. No. 1

Respondent.

_____/

ORDER

Petitioner, TERRY JESS DENNIS (hereinafter, "Dennis"), in pro per, filed a *Petition for Writ of Habeas Corpus* on April 9, 2001. Appointed counsel for Dennis, KARLA K. BUTKO, ESQ., filed a *Points and Authorities in Support of Petition for Writ of Habeas Corpus* on February 14, 2002.

On April 16, 1999, Dennis plead guilty to first-degree murder, with the use of a deadly weapon. A penalty hearing was held before a Three-Judge Panel consisting of the Honorable Janet J. Berry, the Honorable Michael Cherry, and the Honorable Michael Memeo. The Three-Judge Panel found three aggravating circumstances: two prior felonies for assault, and one prior felony for arson. The Panel found two mitigating circumstances: that Dennis was under the influence of alcohol when he killed the victim, and that Dennis suffers from mental illness. However, the Panel found that the mitigating circumstances did not outweigh the aggravating circumstances and sentenced Dennis to death. Subsequently, Dennis appealed the Sentence of Death to the Nevada Supreme Court, which affirmed the decision of the Three-Judge Panel on December 4, 2000.

The Court has reviewed Dennis's Petition and Points and Authorities filed in Support and finds a Response from the State would assist the Court in this matter. Accordingly, the State is hereby ORDERED to file an Answer within 45 days of receipt of this Order.

DATED: This 1st day of March, 2002.

Janet Berry
DISTRICT JUDGE

CERTIFICATE OF MAILING

Pursuant to NRCP 5(b), I certify that I am an employee of the Second Judicial District Court of the State of Nevada, County of Washoe; that on this 15th day of March, 2002, I deposited in the County mailing system for postage and mailing with the United States Postal Service in Reno, Nevada, a true copy of the attached document addressed to:

Karla Butko, Esq.
1030 Holcomb Avenue
Reno, NV 89502

District Attorney
PO Box 30083
Reno, NV 89520

Leona Quilici

Leona Quilici