ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEVADA

FILED

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KENNETH J. COUNTS,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 51549

## FAST TRACK RESPONSE

1. **Name of party filing this fast track response:** The State of Nevada

2. **Name, law firm, address, and telephone number of attorney submitting this fast track response:**

Nancy A. Becker
Clark County District Attorney's Office
200 Lewis Avenue
Las Vegas, Nevada 89155
(702) 671-2750

3. **Name, law firm, address, and telephone number of appellate counsel if different from trial counsel:** Same as (2) above.

4. **Proceedings raising same issues:** None

5. **Procedural history.**

Kenneth Counts (Hereinafter "Counts") was arrested for Murder on May 21, 2005. On June 20, 2005, Counts was charged by Information with Count 1: Conspiracy to Commit Murder (Felony – NRS 200.010, 200.030, 193.165); and Count 2: Murder With Use of a Deadly Weapon (Felony – NRS 200.010, 200.030, 193.165). Appellant's Appendix ("AA"), Vol. 1, pg. 171-74.

On July 7, 2005, the State filed a Notice of Intent to Seek the Death Penalty based on the aggravating circumstance that the murder was committed in order to receive money or anything of monetary value. AA, Vol. 1, 175-77. This notice was amended on December 12,

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2005, to include the further aggravating circumstance that the murder was committed by a person under sentence of imprisonment. AA, Vol. 2, 402-04.

A jury trial commenced on January 29, 2008 and ended on February 7, 2008. AA, Vol. 9, 1991, 4003. On February 8, 2008, Counts was found guilty of Count 1 Conspiracy to Commit Murder. AA, Vol. 16, 4070-73. On February 11, 2008, the State filed an habitual criminal notice under NRS 207.010. AA, Vol. 16, 4074.

On March 11, 2008, a Motion for New Trial and Request for Evidentiary Hearing was heard. AA, Vol. 17, 4102. The district court denied the motion finding that statements made by Anabel Espindola ("Espindola") contained in the declaration of arrest of a co-defendant, Luis Hidalgo, Jr. (aka Mr. "H.") were not exculpatory for Counts, and contained no Brady material. AA, Vol. 17, 4108. The district court further held that neither the declaration, nor detective notes regarding an interview with Espindola, contained exculpatory or impeachment material and the information contained in the declaration of arrest did not support Counts' motion for a new trial. AA, Vol. 17, 4105-4110.

On March 21, 2008 Counts was adjudged an habitual criminal and sentenced to a minimum term of ninety-six (96) months and a maximum term of two-hundred forty (240) months with one thousand twenty-nine (1029) days credit for time served. AA, Vol. 17, 4115-31.

The Judgment of Conviction was filed on March 31, 2008. On May 7, 2008 Counts filed a Notice of Appeal. AA, Vol. 17, 4147. On April 30, 2008 Defendant filed the instant appeal. The State responds as follows.

**6. Statement of facts.**

On May 19, 2005, Timothy Hadland's ("Hadland") body was found lying in the roadway at North Shore Road East of Lake Mead Boulevard. AA, Vol. 11, 2660. A cell phone was inside the victim's car and there were flyers to the Palomino Strip Club near the victim's body. AA, Vol. 11, 2711, 2674.

Deangelo Carroll ("Carroll") worked at the Palomino for Mr. Hidalgo, Jr. ("Mr. H") where he did various jobs including distributing flyers. AA, Vol. 12, 2872, 2874-75; AA

Vol. 13, 3089-90. Rontae Zone ("Zone") and Jayson Taoipu ("Taoipu") were coworkers of Carroll's who helped him pass out fliers. AA Vol. 12, 2813; AA Vol. 13, 3050. On the day of the murder, May 19, 2005, Carroll had a conversation with Zone and Taoipu and asked them if they were willing to commit murder, because someone at the club had done something wrong. AA Vol. 12, 2818, 2820. Later that day, Carroll dropped Zone and Taoipu off at Carroll's house and departed. AA Vol. 12, 2823. That night, Carroll picked up Zone and Taoipu in a white Chevrolet Astro van. AA Vol. 12, 2824; AA, Vol. 13, 3062. While they were in the van, Carroll informed Zone and Taoipu that Mr. H's son Louis Hidalgo III ("Little Lou") told him that Mr. H would pay to have someone killed. AA, Vol. 12, 2824. Sometime between 10:30 and 11:00 p.m., Carroll, Zone, and Taoipu picked up Counts from his home. AA, Vol. 13, 3059-3061. Carroll was inside Counts' house for about fifteen minutes before both men got into the van to drive out to where Hadland was located. AA, Vol. 12, 2829-30. While in the van, Carroll called Hadland and set up a meeting at Lake Mead to drop off some marijuana. AA, Vol. 12, 2833.

During the drive, Carroll gave Count, Zone, and Taoipu details about the circumstances under which they were to kill Hadland. AA, Vol. 13, 3066. When they arrived at Lake Mead, Hadland got out of his car and approached Carroll, who was driving the van. AA, Vol. 12, 2838. Counts sneaked out of the van with a gun. AA, Vol. 12, 2843. Counts then came around the front of the van and shot Hadland two times in the head. AA, Vol. 12, 2843; AA, Vol. 11, 2630-2634. After the first shot put Hadland on the ground, Counts shot the victim a second time. AA, Vol. 12, 2843-2844. Counts then jumped back in the car and the Defendants sped off. AA, Vol. 12, 2844.

After the shooting Carroll drove everyone back to the Palomino. AA, Vol. 12, 2845. Carroll and Counts entered the Palomino, where Counts complained about what he was to be paid, and ultimately was given $6000. AA, Vol. 12, 2847-48. After receiving the money Counts left in a cab. AA, Vol. 12, 2847.

On May 21, 2005 Las Vegas Metro SWAT located Counts to take him into custody. Counts fled from police and hid in an attic. AA, Vol. 12, 2952; AA, Vol. 12, 2957. Police

repeatedly identified themselves and told Counts to come out but he did not comply. AA, Vol. 12, 2959. Police had to cut a hole in the ceiling to apprehend him. AA, Vol. 12, 2959-2962.

In addition to the testimony of Zone and Taoipu, the State presented evidence that Palomino Club VIP cards containing Carroll's and Counts' fingerprints were found in Counts' home. Five Hundred Dollars ($ 500.00) in one hundred dollar bills was also found and one of the bills contained Carroll's fingerprint. AA, Vol. 13, 3215-3240. The State also presented evidence from a cab driver who picked up a fare on May 20, 2005 at 12:31 A.M. from the Palomino Club on May 20, 2005 and took the male passenger to a house at 508 Wyatt. The passenger stated he was an electrician. When the cab driver asked for a name and number because he needed an electrician, the fare gave the driver a card with the name Omar and a phone number. AA, Vol. 13, 3163-3171; Vol. 14, 3458. Counts' home, 1676 E Street, is located around the corner from Wyatt and Counts worked as an electricians' apprentice from time to time for a family friend named Omar. AA, Vol. 14, 3412-3416; Vol. 15, 3577. The State also introduced evidence that a series of Nextel telephone transactions occurred between Carroll's, Espindola's, Hadland's and Mr. H's phones between 10:30 p.m. and midnight on May 19, 2005 and one call between Counts' and Espindola's phones between 11:00 p.m. and midnight. Finally the jury heard a series of tapes, and transcripts were admitted, involving post-murder conversations between Carroll, Mr. H, Espindola and Little Lou discussing Hadland's murder and what to do about police investigations.

**7. Issues on appeal.**

1. The sufficiency of the evidence to sustain a verdict of guilty as to Count 1 – Conspiracy to Commit Murder.
2. Whether the district court erred in denying Counts' motion for a new trial based on allegedly undisclosed *Brady* material.
3. The validity of Mr. Counts' sentence enhancement as an habitual criminal.

**8. Legal Argument, including authorities:**

## I. THE EVIDENCE WAS SUFFICIENT TO SUSTAIN A VERDICT OF GUILT ON CONSPIRACY TO COMMIT MURDER

Counts submits that the evidence submitted at trial shows that there was never any conspiracy between Counts and any of the other individuals involved in the events, and that at most it shows only a conspiracy between Carroll, Little Lou, Mr. H, Espindola, Taiopu, and Zone. To augment his argument, Counts points out that he was acquitted on the Murder charge.

The standard of review for sufficiency of the evidence upon appeal is whether the jury, acting reasonably, could have been convinced of the defendant's guilt beyond a reasonable doubt. Edwards v. State, 90 Nev. 255, 258-259, 524 P.2d 328, 331 (1974). In reviewing a claim of insufficient evidence, the relevant inquiry is "whether, after reviewing 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." Origel-Candid v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998).

To prove a conspiracy to commit murder, the State must show an agreement between two or more persons to unlawfully kill a human being. Thomas v. State, 114 Nev. 1127, 1143, 967 P. 2d 1111, 1122 (1998); NRS 200.010. The primary focus is the agreement; association alone cannot support a conspiracy. See Peterson v. Sheriff, 95 Nev. 522, 598 P.2d 623 (1979). "Mere knowledge or approval of, or acquiescence in, the object and purpose of a conspiracy without an agreement to cooperate in achieving such object or purpose does not make one a party to conspiracy." State v. Arredondo, 746 P.2d 484, 487 (Ariz. 1987).

The crime of conspiracy, by its very nature, however, is a crime clothed in secrecy and is very seldom proved by direct evidence. Thus, the existence of a conspiracy is "usually established by inference from the conduct of the parties." Gaitor v. State, 106 Nev. 785, 790 n.1, 801 P.2d 1372, 1376 n. 1 (1990) (quoting State v. Dressel, 513 P.2d 187, 188 (N.M. 1973). "[A]ny action sufficient to corroborate the existence of the agreement and to show that it is being put into effect is sufficient to support the conspiracy." State v. Verive, 627 P.2d 721, 732 (Ariz. App. 1981). "A coordinated series of acts" furthering the underlying

offense will support the inference that an agreement was effected. Thomas, 114 Nev. at 1143, 967 P. 2d at 1122, Gaitor, 106 Nev. at 790 n. 1, 801 P.2d at 1376 n. 1; see also Isbell v. State, 97 Nev. 222, 226, 626 P.2d 1274, 1276 (1981).

A reasonable inference of an agreement between Counts, Taoipu, the Palomino defendants and Carroll can be made from the conduct of the parties, as well as the series of acts that led to Hadland's murder. Zone testified that Carroll told him and Taoipu that Mr. H would pay to have someone killed. Immediately following this Carroll meets in private with Counts. Carroll then drives Counts to meet with Hadland, and distracts Hadland. While Hadland is distracted Counts sneaks around and catches Hadland off guard, shooting him in the head once while Hadland is on his feet, and then shooting him again in the head while Hadland lies helpless on the ground. This series of events, coupled with the conduct of the parties, clearly supports a reasonable inference of an agreement to murder Hadland and that Counts became part of the conspiracy when recruited by Carroll.

Counts claims his acquittal on the murder charge demonstrates why the evidence is insufficient to support the conspiracy charge. This argument fails. In situations where a verdict is seemingly inconsistent in its treatment of the charges it is not irrational or illogical to require the defendant to bear the "burden of conviction on the counts on which the jury convicted." Bollinger v. State, 111 Nev. 1110, 1117, 901 P.2d 671, 676 (1995) (citing United States v. Powell, 469 U.S. 57, 69, 105 S.Ct. 471, 479 (1984)). A jury may conclude as such in order to grant a form of clemency to the defendant. Id. The case law makes clear that there is no merit in Counts' argument that acquittal on the murder charge proves insufficient evidence on the charge of conspiracy through the inconsistency of the two verdicts.

## II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING COUNTS' MOTION FOR A NEW TRIAL

In the middle of Counts trial, co-defendant Espindola entered a plea of guilty to one count of voluntary manslaughter. Counts and his counsel were present when Espindola entered her plea, but took no action to contact her attorney, Christopher Oram. AA, Vol. 17, 4105-4106. Prior to the plea, Espindola met with detectives and prosecutors to give a proffer

of her knowledge of the circumstances surrounding Hadland's death. No taped statement was given, but detectives took notes during the interview. AA, Vol. 17, 4107-4108. Counts was aware of these notes because the notes were the subject of a *Brady* request by Mr. H and Little Lou's counsel, Domenic Gentile. AA, Vol. 14, 3446-3450, 3510-3511. Counts apparently also requested to see the notes, but the State opposed the request, indicating the notes contained no exculpatory or impeachment material relating to Counts. Counts never sought, as did Little Lou and Mr. H, an *ex camera* review of the notes as they applied to his case. Id.

Subsequently, the detectives prepared a declaration for arrest/summons regarding Mr. H. This document was obtained by Counts post-trial and was the basis for Counts motion for new trial. AA, Vol. 16, 4087-4096. Counts argued that statements made by co-defendant Espindola, as reflected in the declaration, contained Brady material which the State had an obligation to disclose. Counts claimed that Espindola's timeline differs from that set forth by Zone in his testimony and would therefore be impeachment material, and that the statement given by Espindola clearly shows that no conspiracy existed between Espindola and Counts. Counts still did not request an *ex camera* review of the materials. AA, Vol. 4077-4086. The State opposed the motion, noting that nothing in the declaration, or in the detective notes, contained impeachment or exculpatory material.

The standard of review for denial of a Motion for New Trial based on newly discovered evidence is abuse of discretion. Sanborn v. State, 107 Nev. 399, 406, 812 P.2d 1279, 1284 (1991).

It is a well-established principle of law that the prosecution has an obligation to disclose to the defense evidence in its possession that is both favorable to the accused and material to guilt or punishment. Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194 (1963). "[T]here are three components to a Brady violation: (1) the evidence at issue is favorable to the accused; (2) the evidence was withheld by the state ...; and (3) prejudice ensued, i.e., the evidence was material." Mazzan v. Warden, 116 Nev. 48, 66, 993 P.2d 25, 36 (2000) The Supreme Court again addressed this issue in United States v. Bagley, 473 U.S. 667, 682, 105

S.Ct. 3375, 3383 (1985) stating that "[E]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." However, Brady does not require the State to disclose evidence which is available to the defendant from other sources, including diligent investigation by the defense. Steese v. State, 114 Nev. 479, 495, 960 P.2d 321, 331 (1998).

Espindola has been a named co-defendant of Counts since June 20, 2005. Espindola entered her plea in front of Counts' attorneys and certainly they could have communicated with Espindola through her attorney who was present throughout the proceedings. Obviously diligent investigation on the part of the defense could have provided Counts with Espindola's version of events.

Counts has had multiple opportunities to define the alleged inconsistencies between Zone and Espindolas' chronologies; in his Motion for New Trial and Request for Evidentiary Hearing, at the bench during the hearing regarding Counts' motion, as well as here in this instant brief. AA, Vol. 16, 4077-96; AA Vol. 17, 4102-12. He has failed to do so. In addition to being mere "bare" allegations, they are simply untrue. Zone and Espindola's timelines are not inconsistent, and by virtue of their consistency Espindola's statements contain no "material" evidence which would have produced a reasonable probability of a more favorable outcome for Counts.

Zone testified that Carroll went to the Palomino Club on the morning of May 19, 2005. When Carroll came back from the Club, around noon, he told Zone and Taoipu that the owner of the club wanted someone taken care of. AA, Vol. 12, 2810-2861. Zone and Taoipu also testified that Carroll made several phone calls on the afternoon of May 19th. The declaration indicates Espindola told detectives Carroll talked to Mr. H by phone and indicates the time of the calls to be 4:58 p.m. and 7:27 p.m. Nothing in the declaration is inconsistent with Zone's testimony. Moreover, Espindola's statements could only have been admitted by calling Espindola, something the district court found Counts could not do without risking the admission of additional inculpatory information. AA, Vol. 17, 4102-4110.

Counts' additional assertion that Espindola's statement shows no conspiracy existed between Espindola and Counts misses the point of the State's argument entirely. As the district court pointed out, the State did not need to prove Espindola and Counts met and discussed anything – nor was that the State's theory. The State was alleging Counts joined an existing conspiracy when recruited by Carroll and Counts was aware that individuals associated with the Palomino were going to pay to have Hadland killed. This is exactly what the State proved. Espindola's statements, as evidenced in the declaration, simply indicated that when she was present, she only heard discussions about beating Hadland, but Carroll met separately with Mr. H and it was only after the fact that she found out Mr. H. wanted Hadland killed. Again, this is neither exculpatory nor impeachment evidence. Moreover, the district court, having reviewed the detective notes *in camera*, as a result of Mr. Gentile's request, indicated the notes contained no exculpatory or impeachment evidence and offered to preserve the notes under seal. No request was made by Counts to do this.

The district court did not abuse its discretion in denying the motion for new trial.

## III. COUNTS WAS PROPERLY ADJUDICATED AS AN HABITUAL CRIMINAL

Small habitual criminal treatment is defined by NRS 207.010(1)(a) which states that,

> a person convicted in this state of: . . . any felony, who has previously been **two times convicted**, whether in this state or elsewhere, of any crime which under the laws of the **situs** of the crime or of this state would amount to a felony, ... is a habitual criminal and shall be punished for a category B felony by imprisonment in the state prison for a minimum term of not less than 5 years and a maximum term of not more than 20 years.
> (Emphasis Added).

Committing three felonies does not automatically make someone an habitual criminal. Clark v. State, 109 Nev. 426, 428 851 P.2d 426, 427 (1993). A court must do more than find truth in the allegation of three prior felonies, it must adjudicate habitual criminal status. Id. at 427, 851 P.2d at 427. Stale or trivial past offenses may fall outside of the predicate offenses that may be used to support a finding of habitual criminality. Sessions v. State, 106 Nev. 186, 191, 789 P.2d 1242, 1245. However, in

Sessions the Court makes a distinction between crimes that occurred 20-30 years ago, and crimes that occurred 8-19 years ago; where the former is seen as too remote, and the latter is seen as appropriate to support a finding of habitual criminality. Id. (citing Curry v. Slansky, 637 F.Supp. 947, 951-52 (D.Nev.1986)).

Counts at the time of sentencing had previously been convicted of two felonies in California, and had an active warrant in California as a result of violating probation from a 1999 narcotics conviction. In addition to the two felonies out of California, Counts had been charged with additional narcotics and firearms possession felonies in Nevada, which were pled down to one gross misdemeanor. AA, Vol. 17, 4116-18.

Counts having twice been convicted of felonies prior to the instant case, was clearly eligible for habitual criminal treatment under the statute. Nothing in the statute indicates that the age of the prior offenses is a factor for consideration, and the case law on this point clearly weighs against Counts. The serious nature of the underlying offenses is reflected in their designation as felonies.

Speculation that one of the offenses may not have been a felony in Nevada is irrelevant according to the language of the statute as well as the trial judge's acknowledgement that the disputed predicate felony was a felony in Nevada at the time it was committed. While Counts was not in fact found guilty on Count 2 – Murder, he was found guilty of Count 1 – Conspiracy to Commit Murder, a felony in the state of Nevada.

**9. Preservation of the Issue.**

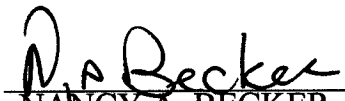
The State concedes that the issues are properly before this Court.

## VERIFICATION

I recognize that pursuant to NRAP 3C I am responsible for filing a timely fast track response and the Supreme Court of Nevada may sanction an attorney for failing to file a timely fast track response, or failing to raise material issues or arguments in the fast track response, or failing to cooperate fully with appellate counsel during the course of an appeal. I therefore certify that the information provided in this fast track response is true and complete to the best of my knowledge, information and belief. Dated this 8th day of July, 2008.

Respectfully submitted,

DAVID ROGER
Clark County District Attorney

BY 

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## CERTIFICATE OF MAILING

I hereby certify and affirm that I mailed a copy of the foregoing Fast Track Response to the attorney of record listed below on this 8th day of July, 2008.

Kristina Wildeveld, Esq.
1100 S. 10th Street
Las Vegas, Nevada 89101

BY Marjie English
Employee, District Attorney's Office

BECKER/Vieta-Kabell/english