ORDR

EIGHTH JUDICIAL DISTRICT

CLARK COUNTY, NEVADA

#54544

Roy McDowell,

Petitioner,

vs.

Nevada Department of Corrections,

Respondent

Case No.: C069269

Dept. No.: XII

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

DATE OF HEARING: August 27, 2009
TIME OF HEARING: 8:30 AM

THIS CAUSE having come on for hearing before the Honorable Michelle Leavitt, District Judge, on the 27th day of August, 2009, the Petitioner not being present, proceeding in Forma Pauperis, the Respondent being represented by DAVID ROGER, District Attorney, by and through Frank Ponticello, Chief Deputy District Attorney, and the Court having considered the matter, including briefs, transcripts, no arguments of counsel, documents on file herein, now therefore, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. On October 11, 1985, Petitioner was found guilty by a jury of Conspiracy to Commit Burglary, Conspiracy to Commit Robbery, Conspiracy to Commit Murder, Burglary, Robbery with Use of a Deadly Weapon, and two counts of Murder with Use of a Deadly Weapon.

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2. On November 27, 1985, Petitioner was sentenced as follows: Count I, Conspiracy to Commit Burglary – one (1) year in the Nevada State Prison; Count II, Conspiracy to Commit Robbery – six (6) years in the Nevada State Prison, concurrent to Count I; Count III, Conspiracy to Commit Murder – six (6) years in the Nevada State Prison, concurrent with Count II; Count IV, Burglary – ten (10) years in the Nevada State Prison, concurrent with Count III; Count V, Robbery with Use of a Deadly Weapon – fifteen (15) years plus an equal and consecutive term of fifteen (15) years in the Nevada State Prison, concurrent with Count IV;[1] Count VI, First Degree Murder with Use of a Deadly Weapon – life with the possibility of parole plus an equal and consecutive term of life with the possibility of parole, consecutive to Count V; Count VII, First Degree Murder with Use of a Deadly Weapon – life with the possibility of parole plus an equal and consecutive term of life with the possibility of parole, consecutive to Count VI. Petitioner received three hundred and forty two (342) days credit for time served.

3. Petitioner directly appealed his conviction on October 28, 1985, and the Nevada Supreme Court affirmed the conviction on October 19, 1987, with remittitur issuing on November 10, 1987.

4. On August 14, 2000, Petitioner filed his first petition for a writ of habeas corpus, which was denied on September 28, 2000. The Court issued a written order of denial on October 19, 2000. Petitioner's second petition for a writ of habeas corpus was filed February 11, 2001, and denied on October 4, 2001, with a written order issuing on October 18, 2001.

[1] Sentencing on Count V was amended on June 15, 1988, to denominate the offense Robbery with Use of a Deadly Weapon.

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5. Petitioner filed the instant third petition on March 3, 2009, contending that, in *Polk v. Sandoval*, 503 F.3d 903 (9th Cir. 2007), the United States Court of Appeals for the Ninth Circuit held for the first time that Nevada's "*Kazalyn*" jury instruction for premeditated murder violates due process. Further, he contends the Ninth Circuit's subsequent *Chambers v. McDaniel* decision, 549 F.3d 1191 (9th Cir. 2008), applied *Polk* retroactively. Petitioner concludes he was deprived of due process by being convicted for First Degree Murder based on the unconstitutional *Kazalyn* jury instruction, which conflated the mental state elements of "willful," "deliberate," and "premeditated." Procedurally, he contends that his failure to challenge the jury instruction earlier is excused by the recent change in the law.

6. On March 25, 2009, Petitioner filed a "First Amended Petition for Writ of Habeas Corpus," which asserted he was convicted of aiding and abetting specific intent crimes, and those convictions violate the Nevada Supreme Court's decisions in *Sharma v. State*, 118 Nev. 648 (2002), and *Mitchell v. State*, 122 Nev. 1269 (2006). Petitioner contends the trial court instructed the jury it could convict Petitioner pursuant to an aiding and abetting mode of liability, but failed to instruct that it must find Petitioner possessed the specific intent that the principal or target offense be committed.[2] To excuse any procedural default in failing to bring this

[2] Petitioner incorrectly asserts he was convicted pursuant to a jury instruction incorporating the "natural and probable consequences" doctrine. Petitioner's Supplemental Memorandum of Points and Authorities filed on March 25, 2009, p. 9. The record reveals no such instruction was given. *See* Jury Instruction No. 32-33. Moreover, the doctrine was only incorporated into the aiding and abetting jury instruction in 2000 with the Court's *Garner v. State*, 116 Nev. 770 (2000), decision. Nevertheless, *Sharma* and *Mitchell*'s logic applies to Petitioner's case at a prima facie level because his jury was not instructed it must find Petitioner aided and abetted with the specific intent the target crimes be committed. *See Sharma*, 118 Nev. 648, 655-656 (2002).

claim earlier, Petitioner invokes the fundamental miscarriage of justice (actual innocence) exception to procedural default.

7. On June 16, 2009, this Court ordered the State to file a return, and, on July 7, 2009, the State filed its Response and Motion to Dismiss the petition. The State contends the petition is time barred under NRS 34.726, and Petitioner procedurally defaulted his *Sharma* claim by failing to file a petition within one year of *Mitchell* applying *Sharma*'s holding retroactively. As to Petitioner's challenge to the *Kazalyn* jury instruction on premeditated First Degree Murder, the State argues *Byford v. State*, 116 Nev. 215 (2000), which invalidated the *Kazalyn* instruction, does not apply retroactively. Finally, the State contends the petition is barred by statutory laches.

CONCLUSIONS OF LAW

1. NRS 34.726(1), governing "Limitations on time to file...," requires that a petition for a writ of habeas corpus "must be filed within 1 year after entry of the judgment of conviction or, if an appeal has been taken from the judgment, within 1 year after the Supreme Court issues its remittitur." Late-filing of a petition may be excused from procedural default if the Petitioner can establish good cause for delay in bringing the claim. *Id.* Good cause for late-filing consists of a showing that: (1) "delay is not the fault of the petitioner"; and (2) "dismissal of the petition as untimely will unduly prejudice the petitioner." *Id.* at (1)(a)-(b).

2. NRS 34.810(2) provides:

> A second or successive petition must be dismissed if the judge or justice determines that it fails to allege new or different grounds for relief and that the prior determination was on the merits or, if new and different grounds are alleged, the judge or justice finds that the

failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

3. A petitioner may file a successive petition if he can demonstrate: (1) good cause for failure to present the claim or for presenting the claim again, *and* (2) actual prejudice. NRS 34.810(3).

4. A petitioner fails to establish actual prejudice or that "a fundamental miscarriage of justice will result from failure to consider his claims" where his claims "were already decided on the merits in earlier proceedings." *Mazzan v. Warden, Nevada State Prison*, 112 Nev. 838, 842-843 (1996). Additionally, the law of the case doctrine precludes consideration of those claims. *Id.*

5. NRS 34.800 establishes a laches bar requiring dismissal where the delay in filing a petition prejudices the State in trying to respond to the petition or in its ability to conduct a retrial of the petitioner. Prejudice to the State is presumed where more than five years have elapsed between filing of a judgment of conviction or resolution of a direct appeal and filing of the petition. NRS 34.800(2). The statute does not mandate dismissal if Petitioner can demonstrate any prejudice caused to the State's ability to respond to the petition is excused because he "could not have had knowledge [of the claims] by the exercise of reasonable diligence before the circumstances prejudicial to the State occurred." NRS 34.800(1)(a). Likewise, prejudice to the state's ability to retry the petitioner is excused where he demonstrates "that a fundamental miscarriage of justice has occurred in the proceedings resulting in the judgment of conviction or sentence." NRS 34.800(1)(b).

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6. The instant petition is Petitioner's third attempt at obtaining state collateral, post-conviction relief. NRS 34.810(2) requires dismissal of a second or successive habeas petition if "it fails to allege new or different grounds for relief and that the prior determination was on the merits..." Petitioner has the burden of pleading and proving specific facts that demonstrate: (a) good cause for the petitioner's failure to present the claim or for presenting the claim again; and (b) actual prejudice. Petitioner's *Byford-Polk* claim only became viable on September 11, 2007, when the Ninth Circuit issued its decision.[3] Petitioner's *Sharma-Mitchell* challenge to the natural and probable consequences jury instruction only became a viable legal argument on December 21, 2006, when the Nevada Supreme Court issued its *Mitchell v. State* decision, which announced the retroactive application of *Sharma v. State*;

7. Petitioner has good cause for not asserting his *Byford-Polk* and *Sharma-Mitchell* claims in his prior habeas petitions because those decisions had not been announced. Nevertheless, Petitioner procedurally defaulted his *Byford-Polk* claim by failing to file his petition prior to September 11, 2008, one year after *Polk* was decided and in which it purported to apply *Byford* retroactively. Likewise, Petitioner procedurally defaulted his *Sharma-Mitchell* claim by failing to file his petition prior to December 21, 2007, one year after *Mitchell* was decided. The Nevada Supreme Court has expressly determined NRS 34.726's one-year

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[3] The State claims "the underlying argument and authority relied upon in *Polk* has always been available to Defendant and, therefore does not the [*sic*] provide Defendant with any new claim." State's Response at 6:11-13. This argument is unavailing because, prior to *Polk*, the Nevada Supreme Court's *Garner* decision expressly foreclosed the possibility of arguing *Byford* applies retroactively. The State's view of claim accrual would charge habeas petitioner's with procedural default where they failed to anticipate reversal, or at least criticism of, binding Nevada Supreme Court authority. And, conversely, this approach to claim accrual would encourage petitioners to assert claims unsupported in the well-settled jurisprudence of the Court.

limitations period applies to successive habeas petitions. *Pellegrini v. State*, 117 Nev. 860 (2001) ("We now specifically hold that NRS 34.726 applies to successive petitions.");

8. Although time-barred and successive without a showing of good cause for delay, the Court considers the merits of Petitioner's *Sharma-Mitchell* claim because it raises the possibility Petitioner is actually innocent of aiding and abetting specific intent crimes. This procedural conclusion finds special support in *Mitchell v. State*, 122 Nev. 1269 (2006), the authority upon which Petitioner challenges his conviction. In *Mazzan v. Whitley*, 112 Nev. 838 (1996), the Court adopted the federal approach to a miscarriage of justice (actual innocence) exception to procedural default in habeas litigation.[4] In assessing whether the petitioner defaulted his *Sharma* claim, *Mitchell* applied the actual innocence exception to procedural default:

> Even when a petitioner cannot show good cause sufficient to overcome the bars to an untimely or successive petition, habeas relief may still be granted if the petitioner can demonstrate that "a constitutional violation has probably resulted in the conviction of one who is actually innocent." "'[A]ctual innocence' means factual innocence, not mere legal insufficiency." The conviction of a petitioner who was actually innocent would be a fundamental miscarriage of justice sufficient to overcome the procedural bars to an untimely or successive petition.
> 122 Nev. at 1273-1274.

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[4] *See Mazzan*, 112 Nev. at 842 ("Judicial review of Mazzan's claims for relief would nevertheless be required if Mazzan demonstrated that failure to consider them would result in a fundamental miscarriage of justice. *See* [*Coleman v. Thompson*, 501 U.S. 722, 750 (1991)] (holding that where a state prisoner defaults federal claims in state court, federal habeas review is barred "unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice")); *see also Murray v. Carrier*, 477 U.S. 478, 496 (1986) ("where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default"); *Engle v. Isaac*, 456 U.S. 107, 135 (1982); *Harris v. Reed*, 489 U.S. 255, 262 (1989)."

Mitchell explicitly found that reversal of a conviction based on *Sharma* implicates the actual innocence exception to procedural default: "Mitchell lacked the requisite specific intent to kill; *thus, he was actually innocent* of attempted murder with the use of a deadly weapon, and we vacate his conviction of that charge." *Id.* at 1277 (emphasis added). This also rebuts the laches-based presumption of prejudice asserted by the State;[5]

9. Conversely, there is no applicable basis for excepting Petitioner's *Byford-Polk* claim from procedural default. The Nevada Supreme Court has not determined the actual innocence exception applies to *Byford* claims, and federal jurisprudence addressing the exception does not support its application here. The United States Supreme Court has held that a claim of actual innocence requires the petitioner to put forth new evidence not presented at trial and which shows him to be factually innocent:

> As we have stated, the fundamental miscarriage of justice exception seeks to balance the societal interests in finality, comity, and conservation of scarce judicial resources with the individual interest in justice that arises in the extraordinary case...To be credible, such a claim requires petitioner to support his allegations of constitutional error with new reliable evidence-whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence-that was not presented at trial. Because such evidence is obviously unavailable in the vast majority of cases, claims of actual innocence are rarely successful.
> *Schlup v. Delo*, 513 U.S. at 324.[6]

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[5] Along with the limitations period and successiveness bars, *Mitchell* considered and rejected the laches argument asserted here by the State. *See Mitchell*, 122 Nev. at 1274.

[6] *See also Schlup*, 513 U.S. at 329 ("The meaning of actual innocence as formulated by *Sawyer*, and *Carrier* does not merely require a showing that a reasonable doubt exists in the light of the new evidence, but rather that no reasonable juror would have found the defendant guilty. It is not the district court's independent judgment as to whether reasonable doubt exists that the standard addresses; rather the standard requires the district court to make a probabilistic determination about what reasonable, properly instructed jurors would do. Thus, a petitioner does not meet the threshold requirement unless he persuades the district court that, *in light of the new evidence*, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt.") (emphasis added).

10. Nevertheless, even assuming Petitioner's *Byford-Polk* claim could be saved from procedural default, it lacks merit. The Nevada Supreme Court has specifically rejected Petitioner's claim that use of a *Kazalyn* jury instruction deprives a defendant of due process or other constitutional rights.[7] In *Byford v. State*, the Nevada Supreme Court abandoned the *Kazalyn* premeditation murder jury instruction, and required the district courts to apply a new instruction emphasizing the independence of each mental element, particularly the requirement that a defendant have deliberated prior to the killing. Byford 116 Nev. at 235-235.[8] The Court reasoned the *Kazalyn* instruction failed to emphasize the autonomous importance of premeditated murder's "willful," "deliberate," and "premeditated" mental state sub-elements, and that the instruction deemphasized the requirement of deliberation and deliberate action, which distinguishes first-degree premeditated murder from second-degree murder. *Id.* at 235 ("By defining only premeditation and failing to provide deliberation with any independent definition, the *Kazalyn* instruction blurs the distinction between first- and second-degree murder. *Greene*'s

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[7] Jury Instruction No. 18 provided at Petitioner's trial included the *Kazalyn* formulation of premeditation.

[8] The jury instruction at issue in *Kazalyn v. State* instructed the following regarding the intent element of premeditated first-degree murder:

> Premeditation is a design, a determination to kill, distinctly formed in the mind at any moment before or at the time of the killing.
> Premeditation need not be for a day, an hour or even a minute. It may be as instantaneous as successive thoughts of the mind. If the jury believes from the evidence that the act constituting the killing has been preceded by and has been the result of premeditation, no matter how rapidly the premeditation is followed by the act constituting the killing, it is willful, deliberate and premeditated murder.

Additionally, the instruction for second degree murder was the following:

> Malice aforethought does not imply deliberation or the lapse of any considerable time between the malicious intention to injure another and the actual execution of the intention but denotes rather an unlawful purpose and design in contradistinction to accident and mischance.
> *Kazalyn v. State*, 108 Nev. 67, 75-76 (1992).

further reduction of premeditation and deliberation to simply 'intent' unacceptably carries this blurring to a complete erasure."). Notably, the Court's decision, while setting out a specific jury instruction in future cases, did not find a constitutional error entitling the defendant to a new trial or other relief. In fact, the erroneous *Kazalyn* instruction did not even feature in the Court's cumulative error analysis when determining if all the errors in aggregate (independent of and not including the *Kazalyn* instruction) deprived the defendant of his constitutional fair trial rights. *See id.* at 240.

11. Subsequently, in *Garner v. State*, 116 Nev. 770 (2000) *overruled on other grounds by Sharma v. State*, 118 Nev. 648 (2002), *and by Nika v. State*, 124 Nev. ___, 198 P.3d 839 (2008), the Nevada Supreme Court revisited *Byford v. State* and clarified its invalidation of the *Kazalyn* instruction does not apply retroactively to older cases, and use of the instruction in prior cases does not constitute constitutional error.[9] The Court stated "[*Byford*] does not hold that giving the *Kazalyn* instruction constituted error, nor does it articulate any constitutional grounds for its decision...Instead, the opinion relies on and gives effect to the relevant statutory language in NRS 200.030(1)(a)" *Id.* at 788. The Court emphasized giving a *Kazalyn* instruction is not a "plain" or constitutional error:

> [C]ontrary to Garner's characterization of *Byford*, the opinion does not hold that giving the *Kazalyn* instruction was error or violated any constitutional rights. Indeed, we affirmed the appellant's conviction in *Byford* notwithstanding the use of the *Kazalyn* instruction. To the extent that our criticism of the *Kazalyn* instruction in *Byford* means

[9] *Garner v. State*, 116 Nev. 770, 789 (2000) ("*Byford* does not invoke any constitutional mandate in directing that its new instructions be given in future cases, so there is no constitutional requirement that this direction have any retroactive effect...Nor do the new instructions required by *Byford* have any retroactive effect on convictions which are not yet final: the instructions are a new requirement with prospective force only.").

> that the instruction was in effect to some degree erroneous, the error was not plain. Before *Byford* was decided, our case law was divided on this issue, and several opinions of this court supported use of the instruction.
> *Id.* at 788.

12. In *Polk v. Sandoval*, the Ninth Circuit purported to invalidate *Garner v. State*'s holding that *Byford* does not apply retroactively. Polk 503 F.3d 903 (9th Cir. 2007). In *Polk*, the district court gave a *Kazalyn* instruction, but the Nevada Supreme Court, relying on *Garner*, found the instruction amounted to harmless error. The district court instructed the jury that a finding of premeditation means a murder was "willful, deliberate, and premeditated," thus conflating all of those distinct mental elements into one. *Id.* at 910-911. The Ninth Circuit granted Polk's petition for habeas corpus, finding that his "constitutional right to due process was violated by the use of the *Kazalyn* instruction because it relieved the State of its burden of proving every element of first-degree murder beyond a reasonable doubt." *Id.* at 909. Moreover, it reasoned the Nevada Supreme Court's holding that the *Kazalyn* instruction was not a per se constitutional error ignored the instruction's violation of the defendant's federal constitutional due process rights elaborated in a line of cases holding due process is violated by jury instructions relieving the State of its burden to prove an essential element of a crime. *Id.* at 911.[10]

13. The court further held the district court's giving of the *Kazalyn* instruction was not harmless error. The weak evidence of Polk's alleged deliberation rendered the erroneous *Kazalyn* instruction a prejudicial error; the court stated: "In

[10] *See Polk*, 503 F.3d at 911 ("The [Nevada Supreme Court] failed to analyze its own observations from *Byford* under the proper lens of *Sandstrom*, *Franklin*, and *Winship*, and thus ignored the law the Supreme Court clearly established in those decisions--that an instruction omitting an element of the crime and relieving the state of its burden of proof violates the federal Constitution.").

light of the State's exceptionally weak evidence of deliberation, we simply cannot conclude that the *Kazalyn* error was harmless. Since we are left 'in grave doubt' about whether the jury would have found deliberation on Polk's part if it had been properly instructed, we conclude that the error had a substantial and injurious effect or influence on the jury's verdict." *Id.* at 913. The court reasoned, but for the error, Polk may have been convicted only of second-degree murder. *Id.* at 912.[11] After *Polk*, the Ninth Circuit decided *Chambers v. McDaniel*, 549 F.3d 1191 (9th Cir. 2008), which also determined a trial court's giving of the *Kazalyn* instruction deprived the defendant of due process. *Id.* at 1199-1200.

14. In *Nika v. State*, 124 Nev. ___, 198 P.3d 839 (2008), the Nevada Supreme Court clarified the line of cases addressing the *Kazalyn* instruction, and specifically addressed *Polk*. The Court concluded: "*Byford* has no retroactive application on collateral review." *Id.* at 850. The Court clarified that *Byford* represented a change in the law, and the *Polk* court was incorrect to assume *Byford* reaffirmed a pre-existing rule because "the *Kazalyn* instruction correctly reflected the law before *Byford*." *Id.* at 848. Thus, *Byford* applied to cases on direct appeal at the time the decision was issued by the Court, but not to cases previously decided. *Id.* at 850. The Court disavowed *Garner* to the extent it held *Byford* did not apply retroactively to cases on direct appeal at the time of the decision. *Id.* at 850, 859. Moreover, the Court expressly held that "*Byford* has no retroactive application on

[11] *Id.* at 912 ("The evidence against Polk was not so great that it precluded a verdict of second-degree murder. The State's evidence on deliberation was particularly weak. The State points to only three pieces of evidence: (1) Polk had threatened and fought with Hodges about two months before the murder, (2) there was a loud argument at the scene of the murder shortly before gunshots were heard; and (3) Polk borrowed a bulletproof vest on the evening of the murder, which witnesses testified that he wore.").

collateral review." *Id.* at 850 (citing *Rippo v. State*, 122 Nev. 1086, 1096-97 (2006); *Evans v. State*, 117 Nev. 609, 643 (2001) (emphasis added)).

15. *Nika* further explained *Byford* "was a matter of interpreting a state statute, not a matter of constitutional law." *Id.* Because *Byford* was a statutory construction decision, not a constitutional decision, it does not apply retroactively. *Id.* at 850-851. The Court emphasized that the interpretive question of how to define the intent element of first-degree murder has been answered differently throughout the United States and those "different decisions demonstrate that the meaning ascribed to these words is not a matter of constitutional law." *Id.* In light of *Nika v. State*, *Byford*'s holding is inapplicable to Petitioner's case and does not afford him a basis for relief.

16. Petitioner's *Sharma-Mitchell* claim also lacks merit. *Sharma* held the following: "[I]n order for a person to be held accountable for the specific intent crime of another under an aiding and abetting theory of principal liability, the aider or abettor must have knowingly aided the other person with the intent that the other person commit the charged crime." 118 Nev. at 655 (2002). In the case of specific intent crimes, the Court discarded the natural and probable consequences doctrine because "it permits conviction without proof that the accused possessed the state of mind required by the statutory definition of the crime," and holds a defendant liable based on mere foreseeability. *Id.* at 654. It is important to note that *Sharma* only restricted the natural and probable consequences doctrine in regard to specific intent crimes. *Id.* ("Having reevaluated the wisdom of the doctrine, we have concluded that its general application in Nevada to specific intent crimes is unsound…");

17. The Court must conclude that *Sharma* and *Mitchell* do not provide a basis for granting Petitioner relief from his convictions. First, Petitioner's conviction for Robbery with Use of a Deadly Weapon is not affected by *Sharma* because the Court's holding only applies to what is required for a defendant to be "held accountable for the *specific intent crime* of another under an aiding and abetting theory of principal liability." *Id.* at 655 (emphasis added). As explained below, Robbery is not a specific intent crime. *See* Chappell v. State, 114 Nev. 1403, 1408 (1998) ("The [Robbery] statute does not require that the force or violence be committed with the specific intent to commit robbery.") Thus, *Sharma* is inapplicable to Petitioner's conviction for Robbery with Use of a Deadly Weapon;

18. As to the specific intent crimes charged, Petitioner's conviction for First Degree Murder With Use of a Deadly Weapon is supported by his conviction for the predicate felony of Robbery with Use of a Deadly Weapon, independently of any showing that he premeditated, deliberated, and willfully intended that his confederates kill the victim. Robbery is a general intent crime. *See, e.g., Daniels v. State*, 114 Nev. 261, 269 (1998) ("Robbery is a general intent crime, so Daniels' claimed incapacity to form specific intent would not shield him from culpability for robbery and concomitant culpability for first-degree murder under the felony murder rule."). "[T]he commission of a felony and premeditation are merely alternative means of establishing the single *mens rea* element of first degree murder." *Holmes v. State*, 114 Nev. 1357, 1363-64 (1998) (citing *Schad v. Arizona*, 501 U.S. 624,

630-45 (1991) (plurality opinion)). Petitioner's jury was instructed as to the felony murder rule. *See* Jury Instruction No. 18.

19. Finally, Petitioner's conviction for Conspiracy to Commit Burglary, Conspiracy to Commit Robbery, and Conspiracy to Commit Murder are not vitiated by *Sharma* because the jury's verdict on those Counts was supported by evidence consistent with commission as a principal rather than mere aiding and abetting. Conspiracy is a specific intent crime. *Garner v. State,* 116 Nev. 770, 786 (2000), *overruled on other grounds by Sharma v. State,* 118 Nev. 648 (2002). While the question has not been addressed in Nevada, numerous federal Circuit Courts of Appeal have determined a person may be liable for conspiracy based only on aiding and abetting.[12] The record in this case, however, reveals the jury was provided with more than sufficient evidence that Petitioner was directly involved in forming the agreements to commit Robbery, Burglary, and Murder. *See* Trial Transcript at 1770:3-1771:10; 1773:18-1775:3; 1776:6-14; 1785:23-1787:16. Thus, he was liable under a theory of committing conspiracy as a principal, as opposed to being held responsible only on a theory of accomplice liability through aiding and abetting. Because the jury was presented with alternative theories of liability (and evidence supporting those theories), the record belies Petitioner's claim that it is more

[12] The Ninth Circuit has determined a person may be held liable for aiding and abetting a conspiracy, including aiding and abetting the formation of a conspiracy. *U.S. v. Portac, Inc.*, 869 F.2d 1288 (9th Cir. 1989), *cert. denied,* 498 U.S. 845 (1990); *see also id.* (citing *U.S. v. Lane*, 514 F.2d 22 (9th Cir. 1975)); *see also Cook v. United States*, 354 F.2d 529 (9th Cir. 1965) (upholding as supported by sufficient evidence defendant's conviction for aiding and abetting conspiracy to smuggle marijuana). Several other U.S. Circuit Courts of Appeal have held a person can be liable for aiding and abetting a conspiracy. *See United States v. Oreto*, 37 F.3d 739, 751 (1st Cir. 1994), *cert denied*, 513 U.S. 1177 (1995) (noting that "most if not all courts to consider the issue have held that a defendant may be convicted of aiding and abetting a conspiracy."); *U.S. v. Galiffa*, 734 F.2d 306, 310 (7th Cir. 1984) (concluding that "if one can aid and abet a robbery, one can also aid and abet a conspiracy, which is a separate offense in and o itself."); *U.S. v. Walker*, 621 F.2d 163, 166 (5th Cir. 1980) (rejecting the view that one cannot aid and abet a conspiracy because both are "inchoate offenses").

probable than not a jury would not have convicted him but for the court's failure to instruct the jury it must find Petitioner possessed the specific intent that the target crimes be committed.

ORDER

THERFORE, IT IS HEREBY ORDERED that the Petition for Writ of Habeas Corpus (Post-Conviction) shall be, and it is, hereby DENIED.

MICHELLE LEAVITT
DISTRICT COURT JUDGE 11.9.09
DEPARTMENT XII

CERTIFICATE OF MAILING

I hereby certify that on the date filed, I placed a copy of the Order for Petition for Writ of Habeas Corpus in the U.S. Mail, postage prepaid to:

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Lovelock Correctional Center
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