ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEVADA

KENNETH COUNTS,

Plaintiff,

vs.

STATE OF NEVADA,

Respondent.

DOCKET NO: 57217

D.Ct. CASE NO: 05-C212667-C

FILED

FEB 11 2011

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY R. Malone
DEPUTY CLERK

AMENDED FAST TRACK STATEMENT

1. Party filing this Statement: KENNETH COUNTS

2. Attorney Submitting Statement: MICHAEL H. SCHWARZ, ESQ.

3. Trial Counsel (if different from Appellate): BRET O. WHIPPLE, ESQ.
KRISTINA M. WILDEVELD, ESQ.

POST CONVICTION COUNSEL: SAME AS APPELLATE

4. Lower Court Description: JURY TRIAL

5. Lower Court Judge appealed from: THE HONORABLE VALERIE ADAIR, J.

6. Length of Trial: 8 DAYS

7. Convictions Appealed from:

COUNT I: CONSPIRACY TO COMMIT MURDER (NRS 200.010, NRS 200.030, NRS 193.165)
COUNT II: HABITUAL CRIMINAL ENHANCEMENT (NRS 207.010)

8. Length of Sentence for Each Count:

COUNT I: MIN. 96 MONTHS / MAX. 240 MONTHS

COUNT II: MIN. 96 MONTHS / MAX 240 MONTHS / RUNNING CONCURRENT.

9. Date of written judgment, order or sentence appealed from: SEPTEMBER 10, 2010

10. Date of Entry or Written judgment or order appealed from: OCTOBER 15, 2010

11. Denial of Writ of Habeas Corpus; date of entry of written judgement by the Court:

(a) Was service by delivery or by mail? ____N/A_____

12. If the time for filing the notice of appeal was tolled by a post-judgment motion?

(a) Specify the type of motion, date of filing of motion: N/A

(b) Date of entry of written order resolving motion: N/A

13. Date of Notice of appeal: NOVEMBER 15, 2010

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14. Specify statute or rule governing time limit for filing the notice of appeal: NRAP 4(b)

15. Specify statute, rule or other authority which grants the Supreme Court jurisdiction to review the judgement or order appealed from: NRAP 4(b).

16. Specify the nature of disposition below: JUDGMENT AFTER HEARING ON WRIT

17. Pending and prior proceedings in this court: NONE THAT COUNSEL IS AWARE OF.

18. Pending and prior proceedings in other courts: NONE THAT COUNSEL IS AWARE OF

19. Proceedings raising same issues. N/A

20. Procedural History: On June 3, 2005, Kenneth Counts, hereinafter "Appellant," was charged by way of a 2nd Amended Criminal Complaint alleging two counts: (1) Conspiracy to commit murder (Felony -- **NRS 200.010, NRS 200.030, NRS 193.165**); and (2) Murder With Use of a Deadly Weapon.(Felony **NRS 200.010, NRS 200.030, NRS 193.165**). Following the preliminary hearing held on June 13, 2005, the court bound the Appellant over to the district court to stand trial. Thereafter, on June 20, 2005, the State filed an Information charging the Appellant with the same two counts contained in the 2nd Amended Criminal Complaint.

On July 7, 2005, the Stated 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. This Notice was amended on December 12, 2005, to include the further aggravating circumstance that the murder was committed by a person under sentence of imprisonment.

A jury trial commenced on January 29, 2008 and ended on February 7, 2008. On February 8, 2008, Appellant was acquitted of the Murder With the use of a Deadly Weapon Charge and convicted of count 1 - the Conspiracy to Commit Murder charge. On February 11, 2008, three days following the Appellant's acquittal on the Murder charge and conviction of the conspiracy to commit murder, the State filed a Habitual Criminal Notice that the State intended to enhance the Appellant's sentence pursuant to **NRS 207.010**.

Appellant's trial counsel filed a motion for a new trial and requested an evidentiary hearing based upon issues regarding perceived ***Brady*** violations. The matter was heard on March 11, 2008 wherein the court made a finding that the declaration of arrest for Luis Hidalgo, Jr., which contained statements of Anabel Espindola, were not exculpatory and therefore contained no ***Brady*** material and contained no impeachment materials. The Motion for a new trial was denied.

On March 21, 2008, at sentencing, the Appellant was adjudged a "habitual criminal" and was 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 (1,029) days credit for time served. The judgement of conviction was filed by the Court on March 31, 2008.

On May 7, 2008, the Appellant filed a notice of appeal. On March 27, 2009, the Nevada Supreme Court affirmed the Appellant's conviction. Remittitur issued on April 21, 2009.

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On January 11, 2010, the Appellant filed a Motion for Relief of Judgment. The State filed its opposition on February 4, 2010. On February 11, 2010, the district court denied the Appellant's Motion. On February 25, 2010, the district court issued an Order Denying Appellant's Pro Per Motion for Relief from Judgment. On March 8, 2010, the Appellant filed a Notice of Appeal.

On April 16, 2010, Appellant timely filed a Post-Conviction Writ of Habeas Corpus, together with his points and authorities in support of same. On April 30, 2010, the Appellant filed Additional and supplemental Points and Authorities in support of same. The State filed their answer on June 28, 2010 and the Appellant filed his reply. The matter came on for hearing on August 19, 2010 and the lower court rendered its decision in a written Order with Findings of Fact and Conclusions of law which was filed on September 10, 2010. The Appellant received the Order by way of Notice of Entry of Order which was filed on October 15, 2010 and delivered by United States mail. The Appellant filed his Notice of Appeal on November 15, 2010 and the matter is now before this Honorable Court.

21. Statement of facts:

On June 3, 2005, Kenneth Counts, hereinafter the "Appellant," was charged by Second Amended Criminal Complaint with Count 1 - Conspiracy to Commit Murder (Felony - **NRS 200.010, NRS 200.030, NRS 193.165**); and Count 2 - Murder With Use of a Deadly Weapon (Felony - **NRS 200.010, NRS 200.030, NRS 193.165**). **[Appendix; P. 1-4]** A preliminary hearing was held on June 13, 2005 and the Justice Court bound the Defendant over to the District Court to answer to the charges. On June 20, 2005, the State filed an Information charging the Appellant with the same two counts set forth in the Second Amended Criminal Complaint. **[Appendix P. 5-7]**

On July 7, 2005, the State filed a Notice of Intent to seek the Death Penalty based on the aggravating circumstance, to wit: the murder was committed by a person under sentence of imprisonment.

A jury trial commenced on January 29, 2008, and ended on February 7, 2008. On February 8, 2008, the Appellant was found guilty of Count 1 - Conspiracy to Commit Murder. On February 11, 2008, the State filed a Habitual Criminal notice pursuant to **NRS 207.010**. **[Appendix P. 12, lis. 12-22; P. 14, lis. 4-15; P. 14, lis. 23-25; P. 15, lis. 1; P. 15, lis. 22-25]**

On March 11, 2008, a Motion for a New Trial and Request for an Evidentiary Hearing were heard.. The district court denied the motion finding that statements made by Anabel Espindola, contained in the declaration of arrest of a co-defendant, Luis Hildalgo, Jr., contained no ***Brady*** material nor was the information contained therein exculpatory for impeachment purposes at the Appellant's trial. The District Court further held that neither the declaration, nor the detective's notice regarding an interview with Espindola, contained exculpatory or impeachment material and the information contained in the declaration of arrest did not support the Appellant's Motion For A New Trial.

On March 21, 2008, at his sentencing hearing, the Appellant was adjudged a 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 (1,029) days credit for time served. **[Appendix P. 22, lis. 6-8; P. 22, lis. 9-13]** The Judgment of Conviction was filed on March 21, 2008.

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On May 7, 2008, the Defendant filed a Notice of Appeal. On March 27, 2009, this Honorable Court affirmed the Appellant's conviction. Remittitur issued on April 21, 2009.

On January 11, 2010, the Appellant filed a Motion for Relief from Judgment. The State filed its opposition on February 4, 2010, the district court denied Defendant's motion. On February 25, 2010, the district court issued an Order Denying Appellant's Pro Per Motion for Relief from Judgment.. On March 8, 2010, the Appellant filed a Notice of Appeal.

On April 16, 2010, the Appellant filed his Post-Conviction Petition for Writ of Habeas Corpus and Points and Authorities in Support of Post-Conviction Writ. **[Appendix P. 25-49]** On April 30, 2010, Appellant filed additional Points and Authorities to his Points and Authorities. **[Appendix P. 50-54]** On June 28, 2010, the State filed their Opposition and the Appellant filed his Reply on July 9, 2010. **[Appendix P. 55-70]** On August 18, 2010 the district court heard the Writ of Habeas Corpus denying it. **[Appendix P. 89-95]** A Notice of Entry of Order was filed on October 15, 2010. **[Appendix P. 96-102]** The Appellant filed a Notice of Appeal on November 15, 2010. **[Appendix P. 103-104]** This appeal follows.

22. Issues on Appeal:

A. CAN ISSUES NOT RAISED ON DIRECT APPEAL BE RAISED IN POST CONVICTION PROCEEDINGS IF RAISED WITHIN THE CONTEXTUAL PARADIGM OF "INEFFECTIVE ASSISTANCE OF COUNSEL?
   i. Does the Law of the Case prohibit the Petitioner from raising appellate counsel's ineffectiveness, which helped create the law of the case, in post-conviction relief deny due process by literally blocking or prohibiting potential ineffective assistance of counsel arguments from being made?
   ii. Was it was error for the lower court to hold that trial counsel's failure to raise certain issues or make certain objections were "futile" or were "waived" due to a failure of appellate counsel to raise on direct appeal?

B. WAS IT ERROR OR AN ABUSE OF DISCRETION TO DENY THE APPELLANT'S WRIT BASED UPON HIS TRIAL AND APPELLATE COUNSEL'S FAILURE TO RAISE ISSUES IN TRIAL OR ON APPEAL RESULTING IN THE APPELLANT'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL?

C. WAS THE TRIAL COURT'S HABITUAL CRIMINAL FINDING DEFICIENT UNDER THE STATUTORY REQUIREMENTS OF NRS 207.016?
   i. Does NRS 207.016 on its face or as applied violate the Appellant's due process rights, rendering the statute null and void?
   ii. Does allowing the State to make the "habitual criminal" charge after an acquittal of the State's primary charge constitute State retaliation and an abuse of Due Process?

23. Legal Argument, including authorities:

A.

THE LOWER COURT COMMITTED ERROR IN HOLDING THAT ISSUES WHICH ARE NOT RAISED ON DIRECT APPEAL CANNOT BE RAISED IN POST-CONVICTION PROCEEDINGS, IF THEY ARE RAISED WITHIN THE CONTEXTUAL PARADIGM OF "INEFFECTIVE ASSISTANCE OF COUNSEL."

i. The Law of the Case prohibition, read strictly, denies the Petitioner their right to raise issues regarding trial or appellate counsel's ineffectiveness on a post-conviction Writ.

ii. It was error for the lower court to hold that trial or appellate counsel's failure to raise

certain issues or make certain objections were "futile" or were "waived."

Before understanding how ineffective assistance of counsel claims are processed by the judicial system in our State, a reference to the history of ineffective assistance of counsel claims must be made. This reference can be found in this Court's own decision in ***Pellegrini v. State***, 117 Nev. 860, 34, P.3d 519 (2001), wherein this Court stated,

> Before the 1980's, this court was generally willing to review claims of ineffective assistance of counsel on direct appeal, *see, e.g.*, ***Donovan v. State***, 94 Nev. 671, 674-75, 584 P.2d 708, 711 (1978), and recognized that such claims could be waived by failure to raise them on direct appeal. *See* ***Lishcke*** , 90 Nev. at 222-223 & n. 1, 523 P.2d at 7 & n.1. As early as 1975, however, we had begun to recognize such claims, if without support of the record, were not appropriate for consideration on direct review. *See* ***Brackenbrough v. State***, 91 Nev. 487, 537 P.2d 1194 (1975). In 1981, we decided ***Gibbons v. State***, 97 Nev. 520, 522-23, 634 P.2d 1214, 1216 (1981), where we declined to consider a claim of ineffective assistance of counsel on direct appeal because it was unclear whether counsel in that case had any basis for his actions which, from the record, were seemingly ineffective. We declared that "the more appropriate vehicle for presenting a claim of ineffective assistance of counsel is through post-conviction relief." ***Id.*** at 523, 634 P.2d at 1216.
>
> In step with our decisions limiting the availability of review on direct appeals of most claims of ineffective assistance of counsel, we also held that such claims, if properly brought for the first time in a post-conviction petition, would not be subject to the post-conviction procedural bar for waiver. ***Bolden v. State***, 99 Nev. 181, 183, 569 P.2d 886, 887 (1983). But this left open the question of whether such claims were waived if they would have been appropriate for resolution on direct appeal without an evidentiary hearing. Ultimately, we adopted a bright-line rule in ***Daniels v. State***, 100 Nev. 579, 580, 688 P.2d 315, 316 (1984)(overruled on other grounds by ***Varwig v. State***, 104 Nev. 40, 752 P.2d 760 (1988). The Legislature subsequently amended the waiver provisions at NRS 177.375 applicable to guilty pleas to reflect that such claims were property brought in a post-conviction petition. *See* 1987 NEV. STAT. CH. 539, §45. at 1231-32.) and held that, "[b]ecause of the usual need for an evidentiary hearing to resolve a claim of ineffective assistance of counsel, the failure to raise the claim on direct does not constitute a wavier of the claim for purposes of post-conviction proceedings.

In ***Pellegrinni*** this Court clarified its previous holdings, referring to it's prior statements in ***Pertgen v. Nevada***, 110 Nev. 554, 875 P.2d 361, 364 (1994), to wit:

> Under certain circumstances, a valid claim of ineffective assistance of appellate counsel may establish good cause such that we may review apparently meritorious issues that should have been raised on direct appeal. Under the unique circumstances of this case, we consider appellants allegations to be sufficient to overcome this significant procedural hurdle. Moreover, the power of this court to address plain error or issues of constitutional dimension *sue sponte* is well established. ***Emmons v. State***, 107 Nev. 53, 60-61, 807 P.2d 718, 723 (1991); See also, ***Edwards v. State***, 107 Nev. 150, 153 n. 4, 808 P.2d. 528, 530 n. 4 (1991)(where appellant presents an adequate record for reviewing serious constitutional issues, this court will address such claims on the merits). Because this case involves the ultimate punishment and because appellant's claims of ineffective assistance of counsel are directly related to the merits of his claims, we will consider appellant's

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claims on the merits in order to determine whether appellant received ineffective assistance of counsel. ***Pertgen***, 110 Nev. At 560, 875 P.2d at 364.

This Honorable Court went on to state in ***Pellegrini*** that,

> This language confuses the waiver analysis as it applies to claims of ineffective assistance of counsel. ***Pertgen*** incorrectly indicated that procedural bars for waiver are applicable to claims of ineffective assistance of counsel initially brought in a first post-conviction proceeding. Ineffective assistance of counsel claims are properly raised for the first time in a timely first post-conviction petition; thus the cause and prejudice analysis is not necessary in determining whether these claims are appropriately considered on the merits.
>
> See ***infra***, page 2, lines 12-28.

As to whether claims for ineffective assistance of counsel can be addressed on direct appeal this Court stated,

> [W]e have generally declined to address claims of ineffective assistance of counsel on direct appeal unless there has already been an evidentiary hearing (***Feazell v. State***, 111 Nev. 1446, 1449, 906 P.2d 727, 729 (1995)) or where an evidentiary hearing would be unnecessary. ***Mazzan v. State***, 100 Nev. 74, 80, 675 P.2d 409, 413 (1984).

This Court has previously stated, without qualification, "this court has consistently concluded that it will not entertain claims of ineffective assistance of counsel on direct appeal." ***Corbin v. State***, 111 Nev. 378, 381, 892 P.2d 580, 582 (1995). Because of the Supreme Court's holdings requiring claims of ineffective assistance of counsel to be brought and addressed in post-conviction, the High Court believed that it was prudent to set a bright-line rule regarding the waiver of these claims. This is exactly what the Supreme Court did in ***Daniels v. State***, 100 Nev. 579, 580, 688 P.2d 315, 316 (1984), overruled on other grounds by ***Varwig v. State***, 104 Nev. 40, 752 P.2d 760 (1988).[1]

In ***Pellegrini***, this Court stated,

> [W]e reaffirm our previous holding in Daniels and specifically hold that claims of ineffective assistance of counsel brought in a timely first post-conviction petition for a writ of habeas corpus are not subject to dismissal on grounds fo waiver, regardless of whether the claims could have been appropriately raised on direct appeal. That being stated, ***Pertgen*** does not stand for a relaxation of the procedural bars for waiver - the issue of ineffective assistance of counsel was appropriately raised in the post-conviction proceeding

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[1] The Legislature subsequently amended the waiver provisions at NRS 177.375 applicable to guilty pleas to reflect that such claims were properly brought in a post-conviction petition. See 1987 NEV. STATE., CH. 539, § 45, at 1231-32.

under review. **The procedural bar is not applicable to the claim**.

And, finally, to put the State's lower court argument to rest is the plain language in ***Pellegrini*** stating,

> ***Pertgen*** failed to make a crucial distinction: trial court error may be appropriately raised in a timely first post-conviction petition in the context of claims of ineffective assistance of counsel, but independent claims based on the same error are subject to the waiver bars because such claims could have been presented to the trial court or raised in a direct appeal. *See* NRS 34.810(1)(b).

The issue of waiver was only applied to ***Pellegini***, in his case because his post-conviction petition was a successive filing, raising the same issues.

Simply put, this Honorable Court has already held that the procedural bar of waiver does not apply to timely filed "first filing" of post-conviction writs. In addition, the language of the Nevada Supreme Court is very clear in ***Pellegrini*** that "trial court error may be appropriately raised in a timely first post-conviction petition in the context of claims of ineffective assistance of counsel, but independent claims based on the same error are subject to the waiver bars because such claims could have been presented to the trial court or raised in a direct appeal." Basically what this Court stated was that any post-conviction claim framed within the contextual paradigm of "ineffective assistance of counsel" is not subject to the normal procedural bars, *e.g.*, "Law of the case" and "waiver."

A Petitioner MUST be able to raise any issue that is framed within the *contextual paradigm* of "ineffective assistance of Counsel" and it must be exempt from the "law of the case" doctrine or the constitutional right to effective assistance of counsel is eviscerated. To hold otherwise would be a blatant denial of the Appellant's 5th, 6th and 14th Amendment rights - both substantive and procedural. The United States Supreme Court stated in ***Carey v. Piphus***, 435 U.S. 247, 266-67, 98 S.Ct. 1042, 1054, 55 L.Ed.2d 252 (1978)

> "That **the right to procedural due process is 'absolute**,' and 'the law recognizes the importance to organized society that those right be scrupulously observed.' [cited omitted] Thus, **the 'absolute' right to adequate procedures stands independent from the ultimate outcome of the hearing**. *See* ***Carey***, 435 U.S. at 266-67, 98 S.Ct. 1054." (Emphasis added.)

Trial or appellate counsel's failures to raise issues considered to be important by post-conviction counsel cannot be considered a waived if the issues are raised within the contextual paradigm of

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"ineffective assistance of Counsel." Is this not the very essence of an ineffective assistance of counsel claim? The failures of trial counsel cannot be raised on direct appeal and it is fairly obvious that ineffective assistance of counsel claims regarding appellate counsel cannot be raised until after the direct appeal is completed. Therefore, of necessity, the procedural bars argued for by the State cannot be applicable on a post-conviction writ.

Therefore, a finding that a failure to raise the issue on direct appeal is a waiver or that raising an issue that has already been insufficiently addressed by Appellate counsel on direct appeal is nothing more than a prima facie denial of procedural, as well as, substantive due process regarding ineffective assistance of counsel claims. The Respondent's argument below **[See Appendix P. 67, lis. 3-28 P. 69]**

B.

IT WAS ERROR OR AN ABUSE OF DISCRETION TO DENY THE APPELLANT'S WRIT BASED UPON HIS TRIAL AND APPELLATE COUNSEL'S FAILURE TO RAISE ISSUES, CONSTITUTING A WAIVER, WHICH WERE THE BASIS OF THE APPELLANT'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL,

Trial or appellate counsel's failures to raise issues considered to be important by post-conviction counsel cannot be considered a waiver if the issues are raised within the contextual paradigm of "ineffective assistance of Counsel." Is this not the very essence of an ineffective assistance of counsel claim? The failures of trial counsel cannot be raised on direct appeal and therefore, of necessity, must available to the Defendant on a post-conviction writ. The failings of appellate counsel cannot be discovered until after the appeal has been denied and it has been reexamined.

Black's Law Dictionary defines "abuse of discretion" as,

> Abuse of discretion is synonymous with a failure to exercise a sound, reasonable, and legal discretion. It is a strict legal term indicating that appellate court is of opinion that there was commission of an error o law by the trial court. It does not imply intentional wrong or bad faith, or misconduct, nor any reflection on the judge but means the clearly erroneous conclusion and judgment - one is that clearly against logic and effect of such facts as are presented in support of the application or against the reasonable and probable deductions to be drawn from the facts disclosed upon the hearing; and improvident exercise of discretion; and error or law. ***State v. Draper***, 83 Utah 115, 27 P.2d 39; ***Ex Parte Jones***, 246 Ala. 433, 20 So.2d 859, 862. A discretion exercised to an end or purpose not justified by and clearly against reason and evidence. Unreasoned departure from considered precedents and settled judicial custom, constituting error of law. ***Beck v. Wings Field,***

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Inc., C.C. A. Pa., 122 F.2d 114, 116, 117. "Abuse of discretion" by trial court is any unreasonable, unconscionable and arbitrary action taken without proper consideration of facts and law pertaining to matter submitted. ***Harvey v. State***, Okl. Cr., 458 P.2d 336, 338.

Therefore, a finding that a failure to raise the issue on direct appeal is a waiver or that raising an issue that has already been insufficiently addressed by Appellate counsel is simply a denial of procedural as well as substantive due process regarding ineffective assistance of counsel claims. Applying law of the case woodenly and waiver of ineffective assistance of counsel claims is an abuse of discretion and therefore the lower court's decision must be reversed.

C.

THE SENTENCING COURT COMMITTED REVERSIBLE ERROR IN NOT LEGALLY SPECIFYING HOW IT CAME TO ITS FINDING OF "HABITUAL CRIMINALITY."

i. **In making its finding the sentencing court denied the Appellant the evidentiary presumption that he was entitled to (under NRS 47.250 (4)) and permitted the State an irrebuttable, unconstitutional, presumption as to correctness of prior convictions.**

ii. **State's Improper Notice of the Habitual Criminal Charge, negates the Entire Process, Violates the Defendant's due process rights and Constitutes Retaliation/abuse of process under color of law.**

It is uncontested that **NRS 207.016** permits the trial court to make a finding of "habitual criminality" in order to enhance the underlying sentence of a defendant. However, in this case the sentencing court's finding is without a legal basis. There are only three ways that a criminal defendant came be found to be a habitual criminal: **(1)** Under **NRS 207.010** the person must be previously convicted of three (3x) previous felonies; **(2)** Under **NRS 207.014** the person must commit multiple felonies which encompass fraud; and although the first two do not apply to the Appellant in this case, number (3) under **NRS 207.012**, which may possibly be the statutory section applied to the Appellant, herein, the Appellant must have been convicted at least twice (2x) of the *various crimes* set forth in **NRS 207.012(2)**. There appears to be no determination by the sentencing court that it found any prior convictions which belonged to the list of 39 types of felony convictions set forth in the statute. **[Appendix P. 96-102]** There was no judicial determination that the Appellant was convicted twice of anyone of these 39 crimes. There being no finding of this, then the trial court erred. The finding of the status of "Habitual Criminal" is not a

judicial adventure in bean counting. The rendering of such a judgement, with very serious consequences, must be the result of sound reasoning.

In addition, it should be noted that **NRS 207.012(3)** sets forth that if a defendant denies any previous conviction charged that **a hearing on same is required**. At the sentencing, although there did not appear to be a vigorous assault on the prior convictions, it should be noted that second chair defense counsel informed the court that at least two of the charges on the Appellant's list of prior convictions were in error - THIS IS THEREFORE A DENIAL and a hearing MUST be held per statute. No independent hearing was held (again, as required by statute), nor did the court inquire any further into defense counsel's allegations of error in the State's submitted record. Unfortuitously, sentencing counsel did not specifically request that an independent hearing be held. But, even if sentencing counsel had asked for a hearing on this issue, **NRS 207.012(3)** states that, "At such hearing, the defendant may not challenge the validity of a previous conviction." The fact that a defendant may not challenge the validity of a previous conviction makes the entire Habitual Criminal statute void and renders the entire statute an absurdity.

The State never gave sentencing counsel a certified copy of the prior convictions. The State alluded to the fact that they have given the sentencing court a copy or the priors or that Defense counsel could have easily obtained this information through the District Attorney's Open File Policy. However, whether or not the Defense received a copy is not the question. The question is was a certified copy received by the defense? Since defense counsel did not see the documents submitted to the court and they did not receive a certified copy themselves, to which they were entitled, then the Appellant should have been entitled to a presumption that the lower evidenced submitted was adverse to the higher. See **NRS 47.250 (4)**.

The State's conduct of allegedly presenting certified copies at the sentencing hearing and not before, essentially strategically positions the State to received the benefit of an IRREBUTTABLE PRESUMPTION that the convictions listed by the State were correct. The State obtains this strategic position of irrebuttable evidence by filing their documents at the 12th hour. The State accomplished this, in this case, even though defense co-counsel pointed out to the court that at least two of the listed convictions were in error. The Court, after receiving this assertion by the defense, should have immediately set a

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hearing It is BLACK LETTER LAW that all irrebuttable presumptions are unconstitutional. *See* ***County Court v. Allen***, 442 U.S. 140 (1979); ***Mullary v. Wilbur***, 421 U.S. 684 (1975); ***Sandstorm v. Montana***, 442 U.S. 510 (1979); ***Francis v. Franklin***, 471 U.S. 307 (1985) and; ***McLean v. Moran***, 963 F.2d 1360 (1992).

As there is nothing in the sentencing record **[Appendix P. 08-24]** that shows that the sentencing court made a determination that the Appellant had been previously convicted of at least two crimes on the list of thirty-nine crimes, then the finding of habitual criminality status was not based on the statute.

However, what we do know from the hearing on the Post-Conviction Writ is that the sentencing judge made it clear through her editorializing, as to how she formulated her findings.

> The Court: . . . I can speculate as to what happened on that and why they convicted him of the conspiracy. I think maybe they were confused about some of law and whether, you know, the liability of coconspirator, the liability of an aider and abettor. I think the State may not have explained that as fully as they would have had they not be relying on the fact that the evidence indicated Mr. Counts was the shooter. I can only speculate as to why they did that, but that would be the court's assumption.
> In any event, **they did find him guilty of conspiracy to commit murder**, . . .
> **[Appendix; P. 91, Lis. 18-25.]**
>
> . . . **which does make him a dangerous person** –
> Mr. Schwarz: Well, yea, Judge but –
> THE COURT: – and, I mean, **maybe you're saying he's not dangerous in his priors. I think that's more a subject for debate**. (Emphasis added)
> **[Appendix; P. 92, lis. 1-4.]**

It is therefore apparent that not only did the sentencing court engage in mere bean counting, without weighing the priors, but it merely concluded that there were three priors felonies and then relied solely on the Appellant's current conviction before her in concluding that the Appellant was a danger to the community. This conclusion was reached without considering the type or nature of prior convictions and just simply assumed that the Appellant's recent conviction was enough to throw the Appellant's hat into the "danger to the community" arena. No matter how you look at this case, the sentencing court's determination of habitual criminality is clearly flawed and does not appear to follow the mind set of this Court's previous decisions on reaching this determination. The sentencing court's Habitual Criminal determination was clearly an abuse of discretion and clear error.

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STATE'S IMPROPER NOTICE OF THE HABITUAL CRIMINAL CHARGE, AD NAUSEAM:

It is the Appellant's position that the failure of the State to notice him in the charging document that the State is seeking to obtain and use, at sentencing, the habitual criminal status is a blatant denial of due process and deprives him of the procedural notice requirement that he is entitled to. Although the Statute does state that the notice may be given after conviction and prior to sentencing (if the appropriate minimum number of days is met), this still does not conform to the procedures required under the common law . This Honorable Court has more than alluded to the precept in numerous decisions that when the habitual criminal status is sought by the State it should be in the charging document. In ***Parkerson v. State***, 100 Nev. 222, 678 P.2d 1155 (1984), this Court held that,

> As we have consistently held, habitual criminality is not a crime but a status. Although an allegation that a defendant falls within the purview of the habitual criminal status is typically included in the charging document, as it was below, such an allegation does not charge a separate, substantive criminal offense, and an habitual criminal proceeding is conducted only to determine whether an enhancement of punishment is warranted for a defendant's status as a recidivist. See ***Schneider v. State***, 97 Nev. 573, 635 P.2d 304 (1981); ***White v. State***, 83 Nev. 292, 429 P.2d 55 (1967); ***Howard v. State***, 83 Nev. 53, 422 P.2d 548 (1967). (Emphasis added.)

This Court in ***Parkerson*** went on to state that,

> . . .. [A]n habitual criminal allegation does not charge a substantive criminal offense. **It is included in the charging document merely to provide notice** to the defendant that the state is seeking enhancement of penalty. *See* NRS 207.010(4),(5). *See also*, ***Oyler v. Boles***, 368, 368 U.S. 448, 452 (1962) (**requiring reasonable notice, as a matter of due process, of a state's intent to seek habitual criminal determination**.)
>
> ***Id.*** at 222. (Emphasis added.)

This Court again spoke in ***Roberts v. State***, 120 Nev. 300, 89 P.3d 988 (2004), stating

> In Lewis [v. State, 109 Nev. 1013, 862 P.2d 1194 (1993)], this court held that, where the State seeks a sentencing enhancement for a simple possession conviction under NRS 453.336(2), **the State must give the defendant formal notice by alleging the prior convictions in the charging document**. [footnote omitted] In so holding, this court reasoned that the Legislature had no rational basis for excluding persons charged with simple possession from the statutory formal notice requirement set forth in NRS 453.348 [footnote omitted] because, like persons charged with more serious controlled substance offenses, persons charged with simple possession were subject to a sentencing enhancement for prior convictions involving controlled substances. [footnote omitted] "A sentencing enhancement is . . . an additional penalty for the primary offense." [footnote omitted] the sentence for simple possession, which is normally a category E felony, is enhanced to a category D felony **if the state alleges the prior controlled substance convictions in the charging document** and the State proves the existence of those convictions prior to sentencing.

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See also ***Lewis v. State***, *supra*, where this Honorable Court held that even in a case where the statutes did not require the written notice of the Habitual Criminal charge on a misdemeanor possession of controlled substance, that due process [the notice requirement] required that the enhancement be set forth in the charging document.

> Appellant contends that the district court erred in sentencing him to serve an enhanced sentence because he did not receive notice in the charging document that he would be subject to an enhanced sentence for prior controlled substance convictions. Generally, pursuant to the current statutory scheme in Nevada, **the state is required to give formal notice in the charging document that it is seeking an enhanced sentence**. . . .
>
> ***Lewis v. State***, 109 Nev. 1013, 1014 (1993) (Emphasis added.)

This Court responded to Lewis' contentions as follows:

> Accordingly, **we conclude that because the appellant did not receive formal notice in the *charging document*** that the State was seeking an enhanced penalty for prior . . . convictions, **the district court erred in imposing an enhanced sentence**.

This Court reversed Lewis' enhancement for lack of notice and re-sentenced him to the maximum allowed for the underlying offense - which was six (6) years.

More importantly, the United States Supreme Court has traced the practice regarding the charging and trial of enhancements back to the COMMON LAW OF ENGLAND in ***Graham v. West Virginia***, 224 U.S. 616 (1912), wherein the Court stated,

> And in ***Reg. v. Shuttleworth***, 3 Car. & K. 375, 376, Lord Campbell thus stated the practice under the statute: '**It is the opinion of all the judges: The prisoner is to be arraigned on the whole indictment, and the jury are to have the new charge only stated to them**; and if no evidence is given as to character, nothing is to be read to the jury of the previous conviction till the jury have given a verdict as to the new charge. The jury, without being re-sworn, are then to have the previous conviction stated to them; and the certificate of it is to be put in, and the prisoner's identity proved.' See 24 & 25 VICT. CHAP. 96, 116.
>
> (Emphasis added)

Accordingly, even historically, Due Process required that the Defendant receive notice for an enhancement charge by being notified in the *seminal charging document* with the Habitual Criminal Enhancement, be arraigned with it and then proceed to trial. The reason why this COMMON LAW practice is so important is that, what has alluded many jurists is that the English Common Law is still binding upon the Courts in Nevada. In fact, this was canonized by the Legislature in **NRS 1.030**, which states as follows:

> APPLICATION OF COMMON LAW IN COURTS.
> **The common law of England**, so far as it is not repugnant to or in conflict with the

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> Constitution and laws of the United States, or the Constitution and laws of this State, **shall be the rule of decision in all the courts of this State**.

This Court, early on, has rendered numerous decisions reiterating this statute, to wit:

> Adoption of the common law of England is not limited to the original 13 states, but is extended to those subsequently acquired states whose creation was brought about by emigration from the original states. ***Hamilton v. Kneeland***, 1 Nev. 40 (1865)

and

> The common law of England was adopted in this country as amended or altered by English statutes in force at the time of emigration of the colonial ancestors. ***Hamilton v. Kneeland***, 1 Nev. 40 (1865)

Unlike ***Darnell v. State***,[2] *infra*, the Appellant, asserted on Post-Conviction Writ and did not waive the State's departure from the COMMON LAW method of notification of an enhancement in the charging document. This is because any failure to raise this issue at trial or on appeal was, in fact, nothing more than the ineffectiveness of his counsel. In ***Darnell***, the Federal District Court held that he had waived his COMMON LAW departure argument because he failed to raise it in his State post-conviction writ. Such is not the case here, where Counts steadfastly asserts his rights both under **NRS 1.030** and the English Common Law practices which were adopted by the 13 Colonies and all subsequent states who joined the union, under the equal footing doctrine, including Nevada who's Legislature has acknowledged this fact by codifying it in the Nevada Revised Statutes.

Based on the above and foregoing, the habitual criminal determination and sentence must be reversed and the Appellant must be re-sentenced by another court to the underlying charge of conspiracy

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[2] Where the defendant contended on his first petition for post-conviction relief that because the appellate court's decision affirming his conviction overturned an earlier Nevada case, it resulted in *ex post facto* criminality as applied to him, and the defendant was aware from the proceedings in the federal court that the state opposed his theory on the ground that relevant statements in an earlier case constituted mere *dicta* and had no precedential value but he made no attempt to present further argument that the conviction also represented a departure from the precedent established by the rule at common law (*see* NRS 1.030), the appellate court declined to entertain the common-law precedent theory on the subsequent petition for post-conviction relief because the defendant offered no satisfactory reason for the failure to raise it while the first petition was before the court. ***Darnell v. State***, 98 Nev. 518, 654 P.2d 1009 (1982), *cited*, ***Darnell v. Swinney***, 638 F. Supp. 526, at 528 (D. Nev. 1986

to commit murder.

24. Preservation of the issues: The issues presented were either objected to in the record or are issues of substantive law, which require no preservation.

25. Issues of First Impressions or of Public Interest . If so explain why? NONE.

VERIFICATION

I recognize that pursuant to **NRAP 3C** I am responsible for filing a timely fast track statement and that the Supreme Court of Nevada may sanction an attorney for failing to file a timely fast track statement, 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 statement is true and complete to the best of my knowledge, information and belief.

Dated this 9 day of February, 2011.

RESPECTFULLY SUBMITTED,

MICHAEL H. SCHWARZ, ESQ.

CERTIFICATE OF SERVICE

I, the undersigned, hereby acknowledge that on the 9th day of February, 2011, that I personally:

☑ Deposited the above and foregoing AMENDED FAST TRACK APPEAL & AMENDED APPENDIX, in a postage prepaid envelope, in the United States Mail and addressed as follows:

DAVID ROGER, DISTRICT ATTORNEY
200 LEWIS AVENUE, 3RD FLOOR
LAS VEGAS, NEVADA 89155

NEVADA ATTORNEY GENERAL
100 N. CARSON STREET
CARSON CITY, NEVADA 89701-4717

☐ HAND DELIVERED A COPY TO THE 3RD FLOOR RECEPTIONIST.

☐ Faxed a copy of the above and foregoing Fast Track Appeal to the Respondent or his Counsel at the fax number below

(702)

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