IN THE SUPREME COURT OF THE STATE OF NEVADA

Electronically Filed
Mar 02 2011 03:27 p.m.
Tracie K. Lindeman

KENNETH COUNTS,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 57217

RESPONDENT'S APPENDIX
VOL. II

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Docket 57217 Document 2011-06488

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on March 2, 2011. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

CATHERINE CORTEZ MASTO
Nevada Attorney General

STEVEN S. OWENS
Chief Deputy District Attorney

I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage pre-paid, addressed to:

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Las Vegas, Nevada 89101

BY */s/ eileen davis*
Employee, District Attorney's Office

SSO/Patrick Burns/ed

IN THE SUPREME COURT OF THE STATE OF NEVADA

FILED

KENNETH COUNTS A/K/A KENNETH JAY COUNTS, II,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

Supreme Court No. 51549

2009 APR 24 P 2:47

District Court Case No. C212667

CLERK OF THE COURT

CLERK'S CERTIFICATE

STATE OF NEVADA, ss.

I, Tracie Lindeman, the duly appointed and qualified Clerk of the Supreme Court of the State of Nevada, do hereby certify that the following is a full, true and correct copy of the Judgment in this matter.

JUDGMENT

The court being fully advised in the premises and the law, it is now ordered, adjudged and decreed, as follows: "ORDER the judgment of the district court AFFIRMED."

Judgment, as quoted above, entered this 27th day of March, 2009.

IN WITNESS WHEREOF, I have subscribed my name and affixed the seal of the Supreme Court at my Office in Carson City, Nevada, this 21st day of April, 2009.

Tracie Lindeman, Supreme Court Clerk

By: A. Ingerson
Deputy Clerk

SUPREME COURT STATE OF NEVADA

09-7779

IN THE SUPREME COURT OF THE STATE OF NEVADA

KENNETH COUNTS A/K/A KENNETH JAY COUNTS, II,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 51549

FILED

MAR 27 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

Appeal from a judgment of conviction, pursuant to a jury verdict, of conspiracy to commit murder. Eighth Judicial District Court, Clark County; Valerie Adair, Judge.

INTRODUCTION

This case arises out of the killing of Timothy Hadland, a former employee of the Palomino night club. During the police investigation, another employee, Deangelo Carroll, confessed to his involvement in the planning and execution of the murder and wore a wire during conversations with other co-defendants, including the Palomino's owner, Luis Hidalgo (a.k.a. Mr. H) and the Palomino's manager, Anabel Espindola. Eventually, the State charged numerous individuals in the killing, including appellant Kenneth Counts. The State charged Counts with one count of conspiracy to commit murder and one count of murder and filed a notice of intent seeking the death penalty. After an eight-day capital murder trial, the jury acquitted Counts of murder, but convicted him of conspiracy to commit murder. The State then sought habitual criminal status for Counts. Counts filed a motion for a new trial, but the district court denied his motion. The district court then sentenced Counts to a maximum term of 240 months with minimum parole eligibility after

96 months. The district court ordered the sentence to run consecutive to Count's California time, and it credited Counts with 1,029 days served.

On appeal, Counts raises the following challenges: (1) insufficient evidence supports the conviction of conspiracy to commit murder, (2) the State improperly withheld Brady material, (3) the district court erred in denying Counts' motion for a new trial, (4) the district court erred when it applied habitual criminal status, and (5) cumulative errors warrant reversal. For the following reasons, we conclude that there is no error in the district court's trial and sentencing proceedings.

The parties are familiar with the remaining facts and procedures of this case and we do not discuss them except as necessary for our disposition.

DISCUSSION

Sufficient evidence supports the conviction

Counts argues that no rational trier of fact could find him guilty of conspiracy to commit murder. We disagree.

When reviewing a conviction for sufficient evidence, this court determines whether any rational trier of fact could find the essential elements of a crime beyond a reasonable doubt, and it views all evidence in the light most favorable to the prosecution. Origel-Candido v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998).

The essential elements of conspiracy to commit murder are (1) an agreement between two or more persons (2) to commit murder. See Thomas v. State, 114 Nev. 1127, 1143, 967 P.2d 1111, 1122 (1998) (describing conspiracy in general). Conspiracies are difficult to prove and often rely on inferences as opposed to direct proof. Id. Thus, a coordinated series of acts furthering murder is sufficient to infer an agreement and,

therefore, a conspiracy. See id. Murder is the unlawful killing of another with either express or implied malice aforethought. NRS 200.010(1).

In Peterson v. Sheriff, 95 Nev. 522, 598 P.2d 623 (1979), this court found there was sufficient evidence to convict a defendant of conspiracy to commit murder when the evidence was a diagram of the intended murder victim's house in one defendant's handwriting and a meeting between the two defendants and an undercover officer where the parties discussed the contract price. Id. at 524, 598 P.2d at 624.

Here, the following evidence is sufficient to infer an agreement between Carroll and Counts to commit the murder of Hadland: (1) Carroll and Mr. H had a discussion at the Palomino nightclub; (2) Carroll told Rontae Zone, the State's witness, that Mr. H would pay to have someone killed; (3) after Carroll spoke with Zone he met with Counts; (4) Carroll picked up Counts on the way to meet Hadland; (5) while Carroll distracted Hadland, Counts crept out of the vehicle and fired two shots into Hadland's head; and (6) upon returning to the Palomino, Mr. H gave Carroll $5,000 to pay Counts. Viewing the evidence in the light most favorable to the State, we conclude that there is sufficient evidence for a rational trier of fact to find, beyond a reasonable doubt, the essential elements of conspiracy to commit murder.

We reject Counts' contention that his conviction should be overturned because the jury did not convict him of murder for two reasons. First, in Bollinger v. State, 111 Nev. 1110, 901 P.2d 671 (1995), this court declined to provide relief for inconsistent verdicts because the defendant is given the benefit of acquittal and, therefore, he must "'accept the burden of conviction on the counts on which the jury convicted.'" Id. at 1117, 901 P.2d at 675 (quoting United States v. Powell, 469 U.S. 57, 69 (1984)). This

court recognized that a jury can extend clemency by acquitting a defendant of a murder charge while convicting him of conspiracy to commit murder. See id. (applying the rationale to the jury's finding of aggravating factors in the murder of one victim but not the other). Second, as the facts discussed above demonstrate, there is substantial evidence to support Counts' conviction for conspiracy to commit murder. Id. at 1117, 901 P.2d at 676. As a result, there is sufficient evidence to uphold the conviction.

Brady claim

Counts argues, pursuant to Brady v. Maryland, 373 U.S. 83 (1963), that the State had an obligation to disclose all evidence that is material to guilt or punishment, but it failed to provide the defense with Anabel Espindola's statements that were incorporated in an arrest warrant for Mr. H. The State did not enter the statement into evidence, but it used it to impeach Counts. We disagree because there was no Brady evidence to disclose.

Both parties recognize "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Id. at 87. Whether the evidence is material is a mixed question of law and fact, and therefore this court reviews de novo the district court's ruling. Mazzan v. Warden, 116 Nev. 48, 66, 993 P.2d 25, 36 (2000). In reviewing the undisclosed evidence, we review the evidence as a whole. Id.

Nevada's Brady analysis requires disclosure by the State if the following three factors exist: (1) the evidence is favorable to the defendant; (2) the State withheld the evidence, either intentionally or inadvertently; and (3) the evidence is material. Id. at 67, 993 P.2d at 37. Below, we

address each of these three factors in turn and conclude that none of these factors are satisfied.

The evidence was not favorable

Here, the district court held that the undisclosed evidence was not exculpatory, and therefore we review the evidence to determine if it is favorable to the defendant. The relevant portion of the arrest warrant attributed the following information to the Espindola interview: (1) Carroll called Espindola's cell phone at 16:58 and 19:27; (2) Carroll privately met with Mr. H; (3) later, Mr. H told Espindola to call Carroll and tell him to "go to plan B;" (4) Carroll responded to Espindola's phone call on Counts' cell phone; (5) later that night, Carroll returned saying "it's done, he needs to get paid," and Mr. H told Espindola to get $5,000 to pay "him." We conclude that this evidence does not appear favorable to Counts because Espindola's statements support Zone's testimony that Counts is the person Carroll used to kill Hadland and the person Mr. H paid for the killing. Further, Counts never formally requested to review the interview notes, even though he was aware of the notes through Brady requests by Mr. H and his son and co-defendant, Little Lou. Therefore, we conclude that the district court properly held that the evidence did not contain favorable evidence.

The State did not withhold evidence because the evidence was discoverable through other sources

We also conclude that Espindola's statements, including the timing of the phone calls, were discoverable through diligent investigation by the defense. "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). Here, Counts could have questioned Espindola before

trial or put her on the stand during trial. In addition, Counts and his counsel were present when Espindola entered her guilty plea, but did not directly contact Espindola's attorney, Christopher Oram. However, Counts did attempt to contact Oram through another attorney, but the district court did not find that contacting the other attorney constituted diligent investigation because Counts' attorney never attempted to call Oram directly. We agree that the defense counsel's attempt was not diligent because counsel could have directly contacted Oram. Finally, Counts could have obtained the phone records through his own diligent investigation. Because Counts could have independently obtained the information, the State was not required to disclose the evidence.

The evidence was not material

We also conclude that the evidence was not material. "In Nevada, after a specific request for evidence, a Brady violation is material if there is a reasonable possibility that the omitted evidence would have affected the outcome." Mazzan, 116 Nev. at 66, 993 P.2d at 36. Zone testified to the following facts: (1) around noon, Carroll asked him and another person if they were interested in committing a murder; (2) about three hours later, Carroll said Mr. H needed someone dealt with; (3) later that evening Carroll drove to Counts' house and went inside for about 15 minutes, then the two came out together; (4) Counts was wearing all black, including a hooded sweatshirt and gloves; (5) upon arriving at Lake Mead, Counts asked if Zone had a gun; (6) Counts had his own gun; and (6) Counts quietly crept out of the van and shot Hadland. Counts asserts that the timing of the phone calls in Espindola's statement conflicts with Zone's testimony. We disagree. The two evidentiary sources do not appear to conflict because the times stated in Espindola's statement and the phone calls are within the time period to which Zone testified.

Therefore, we conclude that Espindola's statements would not have affected the outcome.

In sum, Espindola's statements are not Brady evidence because they are unfavorable to Counts, they were discoverable by the defense, and they are not material because there is no reasonable likelihood it would have affected the result.

Newly discovered evidence

Counts argues that the State improperly withheld exculpatory information, and therefore the district court erred when it denied his motion for a new trial. Specifically, Counts argues he is entitled to a new trial because newly discovered evidence demonstrates that the State's main witness, Zone's, testimony differed from evidence obtained by the State in Espindola's statement and in phone records obtained by the State as a result of Espindola's statement. We disagree.

Under NRS 176.515(1), a district court may grant a new trial on the basis of newly discovered evidence, and this court reviews the district court's decision for an abuse of discretion. Sanborn v. State, 107 Nev. 399, 406, 812 P.2d 1279, 1284 (1991). Establishing the basis for a new trial on newly discovered evidence requires the following: the evidence must be (1) newly discovered; (2) material to the defense; (3) undiscoverable through reasonable diligence; (4) non-cumulative; (5) reasonably affect the result; and (6) the best evidence the case admits. Id. at 406, 812 P.2d at 1284-85.

As discussed above, we conclude that the evidence Counts claims entitles him to a new trial is not material to the defense, was reasonably discoverable through a diligent investigation, and would not affect the result. Thus, we conclude that the evidence was not newly

discovered and the district court properly denied Counts' motion for a new trial.

The district court properly applied habitual criminal status to Counts

Counts makes two arguments regarding his status as a habitual criminal. First, the State improperly sought habitual criminal status. Second, the district court erred in ordering habitual criminal treatment of Counts because it did not employ the required weighing or come to a "just and proper" determination. We conclude that both arguments lack merit.

First, Counts provides no evidence or supporting case law that the State improperly sought the habitual criminal status, and therefore we decline to address the issue. See In re Discipline of Schaefer, 117 Nev. 496, 510, 25 P.3d 191, 200 (2001).

Second, this court reviews a district court's decision to impose habitual criminal status for abuse of discretion. Clark v. State, 109 Nev. 426, 428, 851 P.2d 426, 427 (1993). Under NRS 207.010(1)(a), a district court can impose habitual criminal status under the following circumstances: (1) the defendant has two prior convictions; (2) the convictions are in Nevada or another state; and (3) those convictions are felonies in Nevada or the other state.

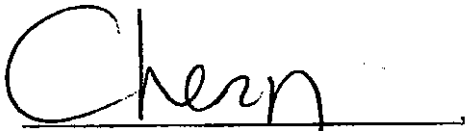
In this case, Counts had two prior felony convictions in California, and an active warrant in California for his probation violation. Counts' first felony conviction was in 1996. After receiving probation, Counts fled California to Nevada and Nevada law enforcement arrested him for selling drugs and having a stolen gun in a car. Nevada authorities reduced the charges to a gross misdemeanor so Counts could return to California for a second felony drug conviction in 1999. Counts again fled California to Nevada. The fact that the first conviction was 12 years old

and the second conviction was 8 years old does not make the convictions too stale to support a finding of habitual criminal status. We therefore conclude that NRS 207.010(1)(a) applies, and the district court properly imposed habitual criminal status on Counts because he had two prior felony convictions in California.

There are no cumulative errors

Counts' final argument is that cumulative errors in the trial and sentencing proceedings warrant reversal. Since we conclude there are no errors in the district court's trial and sentencing proceedings, there is no cumulative error. Accordingly, we

ORDER the judgment of the district court AFFIRMED.



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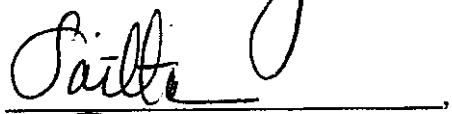

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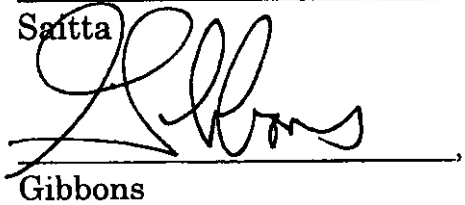

_____, J.
Gibbons

cc: Hon. Valerie Adair, District Judge
Kristina M. Wildeveld
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk

IN THE SUPREME COURT OF THE STATE OF NEVADA

KENNETH COUNTS A/K/A KENNETH JAY COUNTS, II,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

Supreme Court No. 51549

District Court Case No. C212667

REMITTITUR

TO: Edward A. Friedland, Clark District Court Clerk

Pursuant to the rules of this court, enclosed are the following:

Certified copy of Judgment and Opinion/Order.
Receipt for Remittitur.

DATE: April 21, 2009

Tracie Lindeman, Clerk of Court

By: A. Ingersoll
Deputy Clerk

cc (without enclosures):
Hon. Valerie Adair, District Judge
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Kristina M. Wildeveld

RECEIPT FOR REMITTITUR

Received of Tracie Lindeman, Clerk of the Supreme Court of the State of Nevada, the REMITTITUR issued in the above-entitled cause, on APR 24 2009.

HEATHER LOFQUIST
Deputy District Court Clerk

ORIGINAL

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FILED

JUL 9 9 38 AM '10

CLERK OF THE COURT

RPLY
MICHAEL H. SCHWARZ, ESQ.
Nevada Bar No. 5126
626 South 7th Street
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Attorney for Petitioner

DISTRICT COURT

CLARK COUNTY, NEVADA

KENNETH COUNTS,

Petitioner,

vs.

DWIGHT NEVAN, WARDEN, HIGH DESERT CORRECTIONAL CENTER,

Respondent,

and,

STATE OF NEVADA,

Real Party in Interest.

CASE NO: C-212667

DEPT. NO: XXI

LAW OFFICES OF MICHAEL H. SCHWARZ
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REPLY TO STATE'S OPPOSITION TO POINTS AND AUTHORITIES IN SUPPORT OF POST-CONVICTION WRIT

COMES NOW, the Petitioner, KENNETH COUNTS, by and through Counsel, MICHAEL H. SCHWARZ, ESQ., and submits the following Reply to the State's Opposition to Counsel's Points and Authorities in Support of Petitioner's Post-Conviction Writ of Habeas Corpus. These Points and Authorities are based upon the papers and pleadings on file and any oral argument deemed necessary at the time of the hearing on the Writ.

. . .

RECEIVED
JUL 09 2010
CLERK OF THE COURT

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REBUTTAL POINTS AND AUTHORITIES

I.

THE STATE IS IN ERROR REGARDING THE RAISING OF CLAIMS IN A POST CONVICTION WRIT WHICH WERE NOT RAISED ON DIRECT APPEAL.

First and foremost, it should be noted that "ineffective assistance of counsel" claims CANNOT be raised on direct appeal.[1] That is a claim which is almost never raised on direct appeal. So simply the State is blatantly incorrect in their position. Second of all, ANY claim can be raised in a Post Conviction Writ which was not raised on direct appeal, IF IT IS RAISED WITHIN THE CONTEXTUAL PARADIGM OF AN INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM. In the instant case, if these issues were not raised on direct appeal then it was the ineffectiveness of appellate counsel for not raising them. Although, perhaps not framed in the opening brief, Counsel is specifically telling this Court that it was his intention in raising these issues that they were being raised within this context. Therefore, since the issue of ineffective assistance of counsel cannot be raised until post conviction writ relief is sought, where then are these issues cognizable? Again, the State's position is untenable and just simply incorrect. Therefore, NONE of the Petitioner's Writ of Habeas Corpus issues can be procedurally barred and must remain viable.

. . .

. . .

. . .

. . .

[1]Except under very specific circumstances.

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II.

THE PETITIONER HAS MET HIS BURDEN IN *STRICKLAND* AS TO TRIAL AND APPELLATE COUNSEL'S DEFICIENT PERFORMANCE AND THE PREJUDICE THAT HE HAS SUFFERED.

a.

THE STATE'S POSITION REGARDING TRIAL COUNSEL'S FAILURE TO OBJECT TO THE STATE SEEKING HABITUAL TREATMENT ON ALTERNATIVE GROUNDS DOES CONSTITUTE INEFFECTIVE ASSISTANCE OF COUNSEL AND IS UNTENABLE.

The State's argument that the use of prior felony convictions for enhancement purposes is governed by a "different standard" than misdemeanors[2] is not just highly irregular, it is simply unconstitutional upon its face. That would mean that an individual who was convicted in the Justice or Municipal Court have greater protections for a less serious crime. Justice Court's are required, just as the District Courts are to conduct a ***Faretta*** Canvas before letting an individual represent himself. So how are misdemeanors any different than felony charges? This is a fraudulent dichotomy. Simply, this is an affront to an equal protection of the law argument and, what the State is really saying is that in felony cases the State is entitled to an irrebuttable presumption as to the constitutionality of the proceedings. All irrebuttable presumptions in criminal cases are unconstitutional. ***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).

It is interesting how the State's position fundamentally denies the Petitioner the presumptions that he is entitled to in **NRS 47.250(3) AND (4),** which state in pertinent part that:

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[2] The only possible application that this dichotomy may have is for municipal courts that do not conduct recordings of their proceedings. These are few and far between, because the municipal courts have found that the City has a greater chance of prevailing on an appeal if the proceedings are recorded, due to the heightened standard of review.

(3) That evidence willfully suppressed would be adverse if produced.

And

(4) That higher evidence would be adverse from inferior being produced.

What this essentially means is that the State's failure to produce the documentation, under the alleged position that misdemeanors are different than felonies, to show the Petitioner's priors then the Petitioner is entitled to the above presumptions and the records produced by the State are then not entitled to the statutory presumption that they might otherwise be entitled to. Although the State could make the argument that this is necessary because judges in misdemeanors are not as thorough as district court judges, Counsel would argue back that this is simply not true. Counsel is currently handling a district court case where a defendant was allowed to represent himself without an appropriate ***Faretta*** Canvas. Is it not fundamentally unfair that the State is statutory allowed a presumption regarding the existence of the Petitioner's priors for the purposes of the Habitual Criminal Charge in **NRS 207.016.** How then is the State entitled to a presumption under a statute and the Petitioner is not? In ***Hollander v. State***, 82 Nev. 345, 345 (1966), the Court stated that, "a certified copy of a felony conviction is *prima facie* evidence of conviction of a prior felony." **NRS 207.016(5)**. Also, the Nevada Supreme Court in ***Dressler v. State***, 107 Nev. 686, 819 P.2d 1288 (1991) held that:

> "[O]nce the state produces **certified copies** of prior judgments of conviction which do not, on their face, raise a presumption of constitutional infirmity, the district court is entitled to rely on those convictions for enhancement purposes unless the defendant is able to prove by a preponderance of the evidence that the prior convictions are constitutionally infirm." See.(Emphasis added)

However, in the instant case, no certified copies were ever provided to Defense Counsel. So even though the State allegedly produced all of the things that they said they did, including Judgments of Conviction, if they were not certified it does not matter what the documents said. Documents such as these provide nothing in the way of evidence to prove the Habitual Criminal Status. And, how would the Petitioner know whether or not they were certified? He has no way of knowing other than the court or the prosecutor stating they are. If trial counsel is not provided with a copy of these "certified copies,"

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this is fundamentally an ex parte communication with the Court. So what if the State provided mere photostatic copies in discovery, that has nothing to do with what was provided to the court. The Petitioner's trial counsel was entitled to exactly what the court received. Since Petitioner's counsel did not receive certified copies, the State's failure or refusal to provide them with "exactly" what the trial court received was an ex parte communication on their part and improper.

Just because the State submitted documents, which may or may not be correct regarding the Petitioner's criminal record, if they were not "certified" then the State is not entitled to a presumption of correctness and has not met their evidentiary burden. To find the Habitual Criminal Status under these circumstances not only violates the Petitioner's rights under the Statutes, but violates his due process rights as well. One thing is for sure, the Petitioner has an absolute right to due process, to wit:

> "**That the right to procedural due process is 'absolute**,' and 'the law recognizes the importance to organized society that those right be scrupulously observed.' ***Carey v. Piphus***, 435 U.S. 247, 266-67, 98 S.Ct. 1042, 1054, 55 L.Ed.2d 252 (1978). 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.)

See also, ***Clements v. Airport Authority of Washoe County***, 69 F.3d 321 (9th Cir. 1995).

Trial counsel should have immediately challenged the State's evidence and made them prove that their copies were certified. Petitioner's counsel would submit that without certified copies the State was not entitled to the presumption of correctness of the record. Therefore, whether or not the prior convictions submitted had JOC's which showed that the Petitioner was represented by counsel is immaterial, because if they were not certified then the State was not entitled to the presumption of correctness.

An issue completely ignored by the State is the evidentiary presumption that the Petitioner was entitled to under **NRS 47,250(4)**, where when the State provides the lower or inferior evidence than he is entitled to the presumption that the higher evidence would be adverse to the inferior. Under this

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presumption how could the State possibly have met their burden of proof on the Habitual Criminal Charge? Simply, they could not. Therefore, a finding based upon the State's evidence was simply improper and it is the State's fault that they have exposed the sentencing Court to this undignified position - not the Petitioner's. How, therefore, could this *faux pax* by trial/sentencing counsel not have been ineffective?

B.

THE PETITIONER'S TRIAL COUNSEL AND HIS APPELLATE COUNSEL BOTH FAILED TO RECOGNIZE THE FACT THAT THE STATE MUST NOTICE THE HABITUAL CRIMINAL ENHANCEMENT ALLEGATION IN THE CHARGING DOCUMENT.

The allegations set forth by Post-Conviction Counsel are that the State, after failing to convict the Petitioner for murder, became furious and then immediately sought retaliation against the Petitioner in the form of filing the Habitual Criminal Enhancement. This is based upon the fact that the Habitual Criminal Enhancement was noticed to the Petitioner only after the Petitioner's trial had concluded in his being found guilty of Conspiracy to Commit Murder and acquitted of murder. Although the State argues falsely that they may notice the Petitioner at any time during or after trial of their seeking the Habitual Criminal Status for enhancement purposes, it is the Petitioner's position that they couldn't be more wrong and neither case law, statutory law, or the common law (which all the courts of the state are required by statute to follow) support the State's position.

The Petitioner will begin with ***Parkerson v. State***, 100 Nev. 222, 678 P.2d 1155 (1984), where the Nevada Supreme Court holds that,.

> As we have consistently held, habitual criminality is not a crime but a status. Although **an allegation that a defendant falls with 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* ***Schnieder 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).

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Id. at 222. (Emphasis added)

The ***Parkerson*** court 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 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)

The Court spoke again in ***Roberts v. State***, 120 Nev. 300, 89 P.3d 998 (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**. 6 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 7 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. 8 "A sentencing enhancement is . . . an additional penalty for the primary offense." 9 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.

See also ***Lewis v. State***, where the Nevada Supreme 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)

The Nevada Supreme 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**.

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As a result, the Nevada Supreme Court reversed Lewis' enhancement for lack of notice and re-sentenced him to the maximum allowed for the underlying offense - which was 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 resworn, 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.

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 on the bench is that the English Common Law is 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 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**.

Nevada's Supreme Court 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)

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Unlike in ***Darnell v. State***,[3] ***infra***, Counts asserts and does not waive the State's departure from the COMMON LAW method of notification of an enhancement in the charging document. 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 1.30** and the English Common Law practices which were adopted by the 13 Colonies and all subsequent states who joined the union, including Nevada who's Legislature has acknowledged this fact by codifying it in the Nevada Revised Statutes.

This very powerful Statute has been routinely overlooked by jurists through out the State. Due perhaps to the sole fact that most lawyers or jurists have not studied or been exposed to much Common Law. Although this is a sad commentary, it does not diminish the fact that the English Common Law is "**the rule of decision in all the courts of this State**."

C.

THE STATE IS REQUIRED UNDER THE DISCOVERY STATEMENTS TO PROVIDE THE PETITIONER AND HIS COUNSEL WITH COPIES OF ANYTHING THAT THEY INTENDED ON USING IN COURT.

It is just unfathomable that the State really thinks that they can walk into court, on the day of sentencing, and just start presenting documents to the court in support of their position without ever having given a "certified copy" to the opposing counsel? Is it not a requirement that discovery ongoing?

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[3] 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

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Therefore, it was incumbent upon the State to provide this information, in other words, exactly the same information that they have provided to the Court - before sentencing, not at sentencing. The State's allegations that they provided the Petitioner's trial counsel with this information early on in the discovery for trial is simply insufficient for a finding of compliance with this rule.

D.

THE FACT THAT TRIAL/SENTENCING COUNSEL'S FAILURE TO INVESTIGATE THE PRIORS SUBMITTED BY THE STATE IS ONLY MAGNIFIED BY THE FACT THAT THE STATE DID NOT PRODUCE THESE DOCUMENTS EXCEPT AND UNTIL THE SENTENCING HEARING.

Trial/sentencing counsel did not object to several errors which were in the documents submitted to the Court and was prevented from doing so by the State's conduct (their abject failure to provide adequate copies in advance). However, lest we forget the fact that a Habitual Criminal finding is not axiomatic merely upon the showing of three (3) or more prior felony convictions. The court must still weigh those convictions as to "type" and "severity" so that a determination can be made as to whether or not the Petitioner's crimes are relevant to a finding of Habitual Criminality. The holding in ***Tilcock v. Budge***, 538 F.3d 1138 (9th Cir. Nev. 2008), speaks volumes as to just how prejudicial this is and how this perfectly dovetails into the ineffectiveness of his trial/sentencing/appellate counsel (In ***Tilcock***, the Court stated, "We can think of nothing strategic about failing to object at sentencing to categorically non-qualifying convictions. . .").

Counsel failed to request a continuance so that he could investigate the prior convictions to make an informed determination as to whether or not they were non-qualifying. Only then could trial/sentencing counsel have made a decision to object that was both informed and purposeful. Counsel did not object because counsel was completely in the dark.[4] There is nothing in the record either that

[4] Although second chair at his trial did make some statements about the correctness of the priors, no

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shows that trial/sentencing counsel conferred with the Petitioner regarding the information contained in the fugitive document (prior convictions) submitted to the court. Clearly error.

E.

THE DOCTRINE OF THE LAW OF THE CASE IS INAPPLICABLE TO THE CASE AT BAR.

Black's Law Dictionary (5th Ed. 1979), defines "law of the case" as,

> Term "law of the case" as generally used, designates the principle that if an appellate court has passed on a legal question and remanded the case to the court below for further proceedings, the legal question thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case **where the facts remain the same**. ***Allen v. Michigan Bell Tel. Co.***, 61 Mich. App. 62, 232 N.W.2d 302, 303. (Emphasis added)

The doctrine of the "law of the case" is a ***general*** principle or rule of law. "It is a doctrine of discretion not a command to the courts." ***Little Earth of the United Tribes, Inc., vs. U.S. Dept. Of HUD***, 807 F.2d 1433, 1440 (8th Cir. 1986), citing to ***Arizona v. California***, 460 U.S. 605, 618, 103 S.Ct. 1382, 1391 (1983). ***Arizona v. California***, *supra*, states that the "[l]aw of the case directs a court's discretion, it does not limit the tribunal's power. ***Southern R. Co. V. Clift***, 260 U.S. 316, 319, 43 S.Ct. 126, 126, 67 L.Ed. 283 (1922); ***Messenger v. Anderson***, 225 U.S. 436, 444, 32 S.Ct. 739, 7409, 56 L.Ed. 1152 (1912)." See also n. 8 in ***Arizona v. California***, where the court states,

> "Under law of the case doctrine, as now most commonly understood, **it is not improper for a court to depart from a prior holding if convinced that it is clearly erroneous and would work a manifest injustice**."
> 103 S.Ct. at 1391. (Emphasis added.).

The doctrine of the law of the case has long been accepted in Nevada law. ***Wright v. Carson***

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attempt was made to produce any evidence to counter the record and certainly trial counsel (whether through second chair or not) completely failed to produce a "preponderance of evidence" to overcome the presumption of correctness that the State states that they were entitled to enjoy. In counsel's book either you are pregnant or you are not. There is no in between. So even though some statements were made alleging errors, these statements had no weight because they did not constitute a "preponderance of the evidence," which is required to set aside any error in the State's submitted priors. Therefore, the mere stating of incorrectness is *prima facie* evidence of counsel's grossly inadequate attempt at making an adequate objection and speaks volumes toward ineffectiveness.

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Water Co., 22 Nev. 304, 39 P. 872 (1895). As early as 1895, in ***Wright, supra***, the Nevada Supreme Court held that once an issue was adjudicated by a first appeal, that adjudication is the law of the case in subsequent proceedings. *See, also* ***Andolino v. Nevada***, 99 Nev. 346 (1983). The law of the case is the **same for civil cases as it is for criminal**. In ***State v. Loveless***, 62 Nev. 312, 315 (1944), a murder case, our Nevada Supreme Court, after citing to several civil cases regarding the doctrine of "the law of the case", continued by stating, "The rule is the same in criminal cases."

The Supreme Court in ***LoBue v. Nevada***, 92 Nev. 529 (1976), held that

> "Where a judgment is reversed by an appellate court, the judgment of that court is final upon all questions decided and those questions are no longer open to consideration. The Court to which the cause is remanded can take only such proceedings as conform to the judgment of the appellate tribunal." (Emphasis added.)

However, the court continued in ***LoBue v. Nevada***, 92 Nev. 529 (1976), and said,

> The law of the first appeal is the law of the case on **all subsequent appeals in which the facts are substantially the same**.
>
> (Emphasis added.).

The U.S. Court of appeals for the Ninth Circuit held in ***U.S. v. Estrada-Lucas***, 651 F.2 1261 (1980) that,

> Decision of law in a case, once made, becomes the law of the case and should not change absent **clear error in the original ruling** or **a change in relevant circumstances**.

Here the facts and circumstances are not substantially the same. First of all, a Post-Conviction Writ, cannot be included within the term "all subsequent appeals." This is not an appeal and it is the only place that the quintessential element being discussed - Ineffective Assistance of Counsel - can be raised. Therefore, any error, which resulted in trial, sentencing or appellate counsels' ineffectiveness can be raised, as long as it is raised within the contextual paradigm of ineffective assistance of counsel. So, quite simply, the "Law of the Case" does not apply.

Further, every court, at every level has held that the Law of the Case is not required to be applied rigidly . See the U.S. Court of appeals, for the Ninth Circuit, in ***Handi Inv. Co. v. Mobil Oil Corp.***, 653 F.2d 391 (1981), where they held that the "Law of the Case" is not a command upon the court.

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> Although "law of the case" is not an inexorable command, prior decision of legal issues should be followed unless there is **substantially different evidence at subsequent trial**, new controlling authority, or **prior decision was clearly erroneous and would result in injustice**. (Emphasis added.).

The "Law of the Case" doctrine is a **flexible rule of decision that is not to be applied rigidly**, rather, it is within the discretion of trial court to digress from the law of the case as established by it. ***In re Crystal Palace Gambling Hall, Inc.***, 36 BR 947 (Bkrtcy.App.Nev. 1984).

Nevada and federal case law (9th circuit and/or U.S. Supreme Court decisions) show that "the law of the case" is not an inflexible standard which must be applied in all cases, holding rather that the "law of the case" doctrine is not to be applied woodenly. ***U.S. v. Imperial Irrigation Dist.***, 559 F.2d 509, modified 595 F.2d 524, rehearing 595 F.2d 525, certiorari granted ***California v. Yellen***, 100 S.Ct. 479, 444 U.S. 978, 62 L.Ed.2d 405, ***Imperial Irr. Dist. v. Yellen***, 100 S.Ct. 479, 444 U.S. 978, 62 L.Ed.2d 405, and ***Bryant v. Yellen***, 100 S.Ct. 479, 444 U.S. 978, 62 L.Ed.2d 405, reversed in part, vacated in part 100 S.Ct. 2232, 447 U.S. 352, 65 L.Ed.2d 184, rehearing denied 101 S.Ct. 25, 448 U.S. 911, 65 L.Ed.2d 1172, rehearing denied 101 S.Ct. 26, two cases, 448 U.S. 911, 65 L.Ed.2d 1172.

Most, if not the majority, of the cases in Nevada set forth language similar to ***Cord v. Cord***, 89 Nev. 210 (1982), citing to ***Lobue v. State, ex rel Dept. Hwys***, 92 Nev. 529, 554 P.2d 258 (1976), wherein the court stated,

> The law of the first appeal is the law of the case on all subsequent appeals **in which the facts are substantially the same**.
>
> (Emphasis added.).

See also, ***Breliant v. P.E.C.***, 12, Nev. ____ (May 30, 1996); ***Geissel v. Galebraith***, 105 Nev. 101 (1989); ***State v. Alper***, 101 Nev. 493, 496 (1985); ***State Engineer v. Curtis Park***, 101 Nev. 30 (1985); ***Andolino v. Nevada***, 99 Nev. 346 (1983); ***Cord v. Cord***, 98 Nev. 814 (1980); ***LoBue v. Nevada***, 92 Nev. 529 (1976); ***Hall v. Nevada***, 91 Nev. 314 (1975). One of the more recent Nevada cases dealing with the "law of the case" (***Masonry v. Jolley***, 113 Nev. ____, (July 1, 1997)) sets forth that the district court judge

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was correct in reconsidering a previously heard matter which by technical terms had become the "law of the case." Our Nevada Supreme Court held in ***Jolley*** that the "law of the case" need not be applied because the holding of the previous judge was *clearly erroneous*.

In the case at bar: trial, sentencing and appellate counsel all failed to raise the issues raised herein by Post-Conviction Counsel. These issues were not decided and therefore would not fall into the category of the Law of Case anyway. The State is mistaken and although they ask that it be applied rigidly or woodenly, in reality they are asking this Court to view it as having an elastic property which may be stretched to a post-conviction proceeding where issues are being addressed under the ineffective assistance of counsel claim, wherein, any issue which was not addressed by previous counsel which may have prejudiced the Petitioner and deprived him of a fair trial or sentencing must be allowed.

The State's position regarding the Law of the Case, at best, is only applicable to the facts which occurred at trial and have no application to the facts that occurred at sentencing. Since ineffective assistance of counsel cannot be raised on direct appeal and can only be raised in post-conviction proceedings, the Law of the Case cannot apply as long as the issues raised are raised within the contextual paradigm of ineffective assistance of counsel. Therefore, the Law of the Case is completely and totally inapplicable.

F.

Whether Or Not Trial Counsel Properly Objected To Defendant's Treatment Under The Habitual Criminal Statute.

Counsel has adequately addressed this issue above. Where the most important consideration regarding this issue is that the objection had to be made with a showing of a preponderance of evidence. Again, this so-called objection was emasculated by the fact that there was no attempt by trial counsel to present evidence which would overcome the presumption that the State allegedly obtained. Therefore, their objection was meaningless within the context of the presumption enjoyed by the State. So, any objection made without supporting it with a "preponderance of evidence" amounted to merely a tempest

in a tea cup. Trial counsel's objection was meaningless for all intents and purposes, other than the fact that it allowed for argument on the issue on appeal. Which, appellate counsel failed to do. Therefore, the objection by trial counsel was a non-event.

G.

DEFENSE COUNSEL COULD NOT HAVE POSSIBLY INVESTIGATED THE PETITIONER'S PRIOR CONVICTIONS AND ANY OBJECTIONS MADE UNSUPPORTED BY A PREPONDERANCE OF THE EVIDENCE WERE MEANINGLESS.

Regarding trial counsel's investigation of the Petitioner's record, Post-Conviction Counsel can only say that if he had investigated the Petitioner's record he would have prepared the appropriate materials which would have provided a "preponderance of evidence" to set aside the presumption that the State alleges that they were entitled to. Since we see none in the record being presented by trial counsel his objection fell on the deaf ears of the law. Trial Counsel knew or should have known that if there was some impropriety with the Petitioner's record at sentencing that it was incumbent upon him to provide evidence to overcome the presumption. Trial counsel merely made a very brief statement, which again, was meaningless.

Further, the fact that there was no strenuous objection by trial counsel to the sentencing court's consideration of the fact that the Petitioner had "failed to stay out of trouble" is not only a ridiculous argument but literally makes the argument for ineffective assistance of counsel for the Petitioner. The sentencing judge is not at liberty to use the "failure to stay out of trouble" issue under the habitual criminal enhancement statute. This issue is only applicable to probation, parole or the underlying sentence itself. In fact, the State has completely ignored the decisions of the courts regarding the habitual criminal status which is achieved on the misdemeanor level through repeated fraudulent criminal conduct. On the Felony level, it is achieved through criminal conduct that is an on going threat to the public. The kind of charges that are encompassed within this set are crimes of violence or crimes

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committed with dangerous or deadly weapons. The Petitioner's record is not replete any such charges. Again, the mere presence of three (3) prior felonies is insufficient for a finding of habitual criminality.

It is clear that the appropriate factors were not weighed by the court during sentencing and, as related in the Petitioner's Opening Points and Authorities, the court only engaged in bean counting and nothing more. The relevance of failing to stay out of trouble is not one of the judicial markers that can be considered for enhancement. It may have been relevant during the Petitioner's underlying sentence but it certainly had no place for consideration for the enhancement status or penalty. The State's position is simply incorrect.

H.

WHETHER THE DISTRICT COURT PROPERLY SENTENCED THE PETITIONER UNDER THE HABITUAL CRIMINAL STATUTE.

The State's argument regarding this topic constitutes the greatest support for the Petitioner's argument for ineffective assistance of Counsel, in that, the State helpfully points out that the Petitioner's appellate counsel did not support his improper habitual criminal status argument with either case law or supporting evidence. Clearly, if this is not the greatest support for the Petitioner's ineffective assistance of counsel claim, then there is none. The State makes the statement in their Opposition to Defendant's Writ of Habeas Corpus regarding the improper habitual criminal sentence issue. They state that it "was unsupported by evidence or case law, thus it declined to address this issue." *See* **State's Opposition; P. 13, lis. 14-17.** However, there is more than one flaw with the State's argument regarding the Law of the Case and the most glaring is that the Nevada Supreme Court must decide the issue - not ignore it. In the instant case, the State's argument is that the issue before this Court, raised within the contextual paradigm of ineffective assistance of counsel, regarding the improper status and sentence of a habitual offender has been heard and decided by the Nevada Supreme Court - it was not. The important question is, "Why was this issue not heard?" The appropriate answer to that is clearly,

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"Because the Petitioner's appellate counsel was ineffective."

Clearly, if the claim of ineffective assistance of counsel cannot be brought up except by Post-Conviction Writ, then when a petitioner makes an ineffective assistance of counsel claim that has to do with a issue not properly raised at the Nevada Supreme Court then the Petitioner is denied the remedy of the Post-Conviction Writ. So, which way is it? The State cannot use a "Law of the Case" argument against an ineffective assistance claim - they are mutually exclusive of each other. If this is not true then the State's argument effectively neuters any the Post-Conviction ineffective assistance of counsel claim not raised on direct appeal. One of the claims of ineffective assistance of counsel is when appellate counsel does not raise issues that are relevant and germane to the clients freedom or his rights.

I.

THE STATE'S CONVOLUTED NOTION OF WHETHER OR NOT THE PETITIONER WAIVED HIS RIGHT TO RAISE AN ISSUE ON POST-CONVICTION BECAUSE HE DIDN'T RAISE IT ON DIRECT APPEAL.

Although the State is obviously speaking in generalities regarding this issue, the Petitioner is not. This "general" statement of the law may be "generally" true, but this "generality" is inapplicable within the contextual paradigm of ineffective assistance of counsel. As stated above, in rebuttal Argument H, when arguing an issue within the contextual paradigm of ineffective assistance of counsel, the law of the case and/or the failure to raise an issue on direct appeal have no application and the two are mutually exclusive of the other. Since the issue of ineffective assistance of counsel cannot be raised except by Post-Conviction Writ of Habeas Corpus, then neither Law of the Case nor, waiver by default of appellate counsel are applicable. In fact, both of these issues may be the sum and substance of the ineffective assistance of counsel claim.

It would be a bit sophomoric to assume that these general bars to raising an issue in post-conviction proceedings apply to ineffective assistance of counsel claims. This would mean that the ineffective assistance of counsel claim would be totally emasculated and useless. What then, would be

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the point of post-conviction relief? The answer is none. So, literally, what the State is advocating is that Post-conviction Writs of Habeas Corpus be rendered void.

J.

A BRIEF DISCUSSION REGARDING THE CONSTITUTIONALITY OF NRS 207.016.

[This Statute Violates the Petitioner's Due Process Rights And Is Therefore Null and Void]

Although **NRS 207.016** permits the State to file a Habitual Criminal after the defendant is convicted under **NRS 207.010, 207.012** and **207.014**; it should be noted that **NRS 207.010** (3x convicted felon) and **NRS 207.014** (habitually fraudulent felon) do not apply to the Petitioner. Although **NRS 207.12** (habitual felon) may possibly apply to the Petitioner, this statute requires that the Petitioner **have been convicted at least two times** of the various crimes set forth in **SUBSECTION 2**. There appears to have been no determination made by the sentencing court that it applied through the list of **39** prior felony convictions that are set forth in that statute, those being set forth as follows:

199.160	=	Murder of innocent person through use of perjury
199.330	=	Attempts of crimes
199.500	=	Solicitation for murder
200.030	=	Murder
200.310	=	Kidnaping
200.340	=	Aiding and Abetting kidnaping
200.336	=	Sexual Assault
200.380	=	Robbery
200.390	=	Attempts to kill
200.400	=	Battery w/ attempt to commit a crime
200.410	=	Duels & challenges
200.450	=	Challenge to fight
200.460	=	False imprisonment
200.463	=	Involuntary servitude, purchase or sale of person
200.464	=	Recruiting, etc., for involuntary servitude, purchase or sale of person
200.465	=	Assuming rights of ownership over another person
200.467	=	Trafficking in persons
200.468	=	Trafficking in persons for illegal purpose
200.508	=	Abuse or neglect of children
200.710	=	Minor in pornography
200.720	=	Promoting sexual performance involving minor
200.230	=	Lewdness w/ minor < 14 years of age

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200.450	=	Sex w/ dead body
202.178	=	Poison or adulteration of food, medicine, etc.
202.270	=	Destruction of building by explosive
202.780	=	Transport or receipt of explosives
202.820	=	Use or poss of an explosive during commission of a felony
202.830	=	Use of an explosive to destroy property
205.010	=	1st degree arson
205.060	=	Burglary w/ use or poss of firearm
205.067	=	Home Invasion
205.075	=	Burglary with poss or use of explosive
205.400	=	Racketeering
212.090	=	Prisoner escape
453.3325	=	Use of narcotics in child's presence
453.3335	=	Failure to obtain medical attention for drug overdose
484.219	=	Duty stop @ accident w/ Death
484.3795	=	DUI resulting in death
484.37955	=	Vehicular homicide

Where is the judicial determination that the Petitioner had been convicted twice of any one of the above crimes? There has been no judicial determination in this regard.

Further, **NRS 207.012(3)** requires that a hearing be held, **IF** the Petitioner denies any previous conviction charged. Did trial/sentencing counsel for the Petitioner deny the allegations of the previous convictions? No, he did not. Therefore, there was no hearing by the sentencing court. However, even if trial/sentencing counsel did request a hearing, the statute section must be held to be a denial of due process because of the section that states specifically that, "At such a hearing, the defendant *may not challenge the validity* of a previous conviction." This sentence makes the entire statute unconstitutional on its face and is a denial of the Petitioner's due process rights.

Since there is nothing in the record [the transcript] that shows that the sentencing court made a determination that the Petitioner had previously been convicted twice of the list of 39 felonies that he must have been convicted of twice, then the finding of habitual felon by the sentencing court was clearly, clearly in error. Because of this most egregious error, the Habitual Criminal Status attributed to him by the sentencing court must be reversed and the Petitioner must be re-sentenced on the underlying sentence only or simply released.

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K.

CUMULATIVE EFFECT OF ERRORS

a. Is the sum greater than the whole?

This case appears to be a case where ***Big Pond v. State*** would apply. In this case it can truly be said that the devil is in the details. Here we have a plethora of errors which, quite frankly, amount to a serious question as to whether or not the Petitioner's sentencing was actually Constitutionally infirm. It is Counsel's position that the errors are too numerous and too important to be held as harmless error. Let's look at these errors. **FIRST**, the State does not charge the Petitioner in the charging document with the Habitual Criminal Status - resulting in no notice; **SECOND, NRS 1.030** states that the Common Law of England shall be the rule of all of the courts in the State; **THIRD**, according to the United States Supreme Court, the Common Law of England requires that all enhancement statutes be set forth in the charging document; **FOURTH**, the State does not charge the Petitioner with Notice of their intent to invoke the Habitual Criminal Status on him until "AFTER" he acquitted of the murder charge; **FIFTH**, the invocation of the Habitual Criminal Status after the Petitioner is acquitted of murder and, instead, being found guilty of conspiracy to commit murder, appears on its face to be nothing more than sour grapes and retaliation by the State; **SIXTH**, the State does not provide Petitioner's trial counsel with the same documents that they submit to the court to prove up the enhancement - a violation of the discovery rules. Instead, the State attempts to cure their misfeasance by stating that, "Hey, we gave them the information during trial discovery." This may or may not be true. However, the fact remains that the Petitioner and his trial/sentencing counsel were entitled to a copy of "exactly" what was presented to the court to prove up the enhancement status. This they were denied and, in counsel's opinion constituted an ex parte communication. Since trial counsel was not provided with the exact documents that were sought to be used for enhancement purposes, they could not be adequately prepared; **SEVENTH**, trial

counsel was unprepared[5]. Without receiving copies of the documents submitted to the sentencing court, far enough in advance to properly review them, then how could trial counsel be adequately prepared; **EIGHTH**, trial counsel failed to request a continuance so that he could actually obtain a copy of the records submitted to the court and so that he could have time to adequately review them with the Petitioner; **NINTH**, the only habitual criminal statute that would apply, **NRS 207.012** (habitual felon) requires that the Petitioner have been previously, twice, convicted of one of the list of 39 felonies. Since the sentencing transcript does not bear out that there was a determination under this statute of this, then it didn't happen; **TENTH**, trial/sentencing counsel never denied the priors and never requested a hearing to present evidence on the Petitioner's behalf (Because he wasn't prepared. How could he be when he never got a copy of the convictions that were submitted to the court); **ELEVENTH**, considering the cumulative errors in 1-10, the Petitioner is now sitting in prison on an illegal sentence. Has the Petitioner been prejudiced by the State's conduct? We are not talking about dry cleaning here. We are talking about a man's life. We are talking about the RULE OF LAW, not about whether some guy deserves to be where he is or not.

Or is this just Harmless Error? But really, isn't holding something to be "harmless error" really the same thing as saying it is "excusable neglect" on the State's part? Petitioner's Counsel has provided

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[5] Being "prepared" (which is another way of saying "effective") means that trial counsel must be ready to overcome the statutory presumption that the State receives when it submits certified copies. This means that trial/sentencing counsel cannot merely object and tell the court that a portion of the Petitioner's record is incorrect. According to statute, the presumption is not overcome except and until the Petitioner's counsel supports his objection to the record by a "preponderance of evidence." Thus, the BURSTING BUBBLE THEORY on presumptions does not apply here, where, under that theory, the presumption is popped by presenting a mere scintilla of evidence (such as an objection). That being said, if trial/sentencing counsel was not ready to provide the court with a "preponderance of evidence" in support of the Petitioner's position that the record was in error, then, trial/sentencing counsel was, strictly speaking, not prepared and, therefore, ineffective. Never being served with an "exact copy" of the documents submitted to the court and not even seeing them during sentencing, does not facilitate trial/sentencing counsel's ability to be prepared. In fact, if anything, the State's tactics must be viewed with the intent to ambush or blind side defense's ability to perform adequately at sentencing. Thereby crippling the defense and preventing any success by the Petitioner on the merits.

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what he believes are 10 separate violations of the Petitioner's right to a fair and constitutional sentencing. Clearly, the issue regarding the improper finding of the Habitual Criminal status is a clear violation of the Petitioner's statutory rights. Adding together all of the mistakes that were made by trial, sentencing and appellate counsel, it is Post-Conviction Counsel's position that ***Big Pond*** must be applied in this case.

CONCLUSION

By way of analogy, this case is like the question: "If a tree falls in a forest and nobody hears it, does it make a sound?" The problem with this question is before an answer can be formulated, one must define the term "sound." If "sound" is defined as the generation of a frequency, which may pass through air, earth or water, then answer is that it does in fact make a sound. However, if "sound" is defined as a generated frequency reaching a human ear and being identified as a "sound" by that human ear, then it may not make a "sound," if a human is not within an auditory distance.

In this case, we have statutes, constitutions and procedural rules - we call them laws. These laws define what is required of the courts, the (State) prosecution and a defendant. Now the question before this Court is, "Will this Court allow the State to manipulate the definitions and meanings of the law, which are clearly spelled out, in their attempt to support a position that requires that these laws be either ignored or inextricably bent beyond the breaking point?" It is Post-Conviction Counsel's position that if this Court aligns itself with the State's position, it would require this Court to ignore the RULE OF LAW and embrace MORAL RELATIVISM[6]. It is most unfortunate that it is the nature of man to embrace moral

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[6] Moral Relativism is the position that moral or ethical propositions do not reflect objective and/or universal moral truths, but instead make claims relative to social, cultural, historical or personal circumstances. In Moral Relativism there are no absolute, concrete rights and wrongs. Rather, intrinsic ethical judgements exist as *abstracta*, differing for each perception of an ethical outlook. **WIKIPEDIA**, retrieved from the internet on 03-24-09. **Author's note:** Because of Moral Relativism, modern philosophers state that, "There is no absolute truth." But if that is true, then is that not an absolute truth in and of itself? So we can only conclude that there is absolute truth and, apparently, only those individuals that are so intellectually egocentric, that they believe they have become sorcerers who can bend

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relativism, because that's what man's heart tells him to do. But when engaging in the affairs of man, can we really afford to conduct ourselves in this manner? Is not "moral relativism" why most people find themselves standing up when the court says, "Will the defendant please rise?" It is a path that as a civilization we cannot afford to follow. Others have done so with onerous results. Under moral relativism anything can be rationalized as morally correct: murder, theft, violating an individual's constitutional or statutory rights, etc. The list is limitless.

In this case, the Court is free to ignore these multitudinous violations, and really, why shouldn't it? It is far more convenient to ignore the law and convince one's self that maybe if a person ignores a sound - he didn't really hear it. Maybe, if we ignore the sound altogether we can convince ourselves that the tree didn't really even fall after all. Most unfortunately, this kind of thinking is rewarded because it furthers the goals of the State. But if this is the reality that we live in, then isn't it really all about the conviction - not the rights of the individual, which the Courts are sworn to uphold and protect? We really have to ask ourselves, "Can we afford to live in such a reality?" If this is the kind of judicial system that WE live under, how is our government any different from that of a third world despot?

The RULE OF LAW must prevail, it is necessary and required for ordered liberty to exist in our State. One of our Founding Fathers, John Adams, said it best when he addressed this very issue stating,

> "No man will contend that a nation can be free that is not governed by **fixed laws**. All other government than that of permanent known laws is the government of **mere will**...." (1787).
>
> (Emphasis added.)

Here, the RULE OF LAW requires this Honorable Court to consider these issues as valid and relevant because they are coming before this Court within the appropriate contextual paradigm of Ineffective Assistance of Counsel. "Good Government," is a government that does not place itself above

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reality to suit their own self-serving conclusions, believe there is not. It is obvious therefore, that it is simply because of the inherent arrogance of human beings, in general, which has resulted in this type of intellectual dishonesty, that this type of horrifically twisted intellectual masturbation even exists.

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the law or view the law in *abstracta* through its own personal perception or ethical outlook, which ignores or negates the clear and definitive meaning of the laws of our State.

For all of the above and foregoing reasons the Petitioner's Writ must be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned, hereby acknowledge that on the 9th day of July, 2010, that I personally

☐ Deposited the above and foregoing REPLY TO STATE'S OPPOSITION TO PETITIONER'S POINTS AND AUTHORITIES ON PETITIONER'S POST CONVICTION WRIT, in a postage prepaid envelope, in the United States Mail and addressed as follows:

DAVID ROGER, DISTRICT ATTORNEY
POST-CONVICTION DIVISION
200 LEWIS AVENUE
LAS VEGAS, NEVADA 89155

Their last known address(es).

☒ Hand delivered a copy to the Counsel of the opposing party at the above stated address.

☐ Fax'ed a copy of the above and foregoing Motion to the other party and/or his Counsel of record at: (702) .

An associate of the law office of Michael H. Schwarz, Esq.

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