

IN THE SUPREME COURT OF THE STATE OF NEVADA

DEANGELO R. CARROLL,) No. 64757

Appellant,)

v.)

THE STATE OF NEVADA,)

Respondent.)
_____)

Electronically Filed
Oct 29 2014 03:44 p.m.
Tracie K. Lindeman
Clerk of Supreme Court

MOTION TO FILE APPELLANT'S OPENING BRIEF
IN EXCESS OF THE TYPE-VOLUME LIMITATION

Pursuant to NRAP 32(a)(7)(D), appellant Deangelo R. Carroll moves for an order permitting the filing of Appellant's Opening Brief in excess of the type-volume limitations of NRAP 32(a)(7)(A)(ii). *See* Exhibit 1 (Appellant's Opening Brief).

This motion is made and based on the affidavit of Mario D. Valencia attached hereto.

DATED: October 29, 2014.

/s/ Mario D. Valencia
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AFFIDAVIT OF MARIO D. VALENCIA

STATE OF NEVADA)
)
COUNTY OF CLARK)

I, MARIO D. VALENCIA, having first been duly sworn, depose
and state that:

1. I am an attorney licensed to practice before all courts in the
State of Nevada.

2. I am the attorney of record for appellant Deangelo R. Carroll
in this case.

3. This was a death penalty case in the district court.

4. The type-volume limitation for an opening brief in a death
penalty case is 37,000 words. *See* NRAP 32(a)(7)(B)(ii). Carroll's
opening brief is nowhere near 37,000 words.

5. However, it's my understanding that for purposes of appeal
Carroll's case is not considered a death penalty case because the jury
ultimately decided not impose the death penalty and instead sentenced
Carroll to life in prison with the possibility of parole after he has served
40 years. If so, the type-volume limitation for Carroll's opening brief is

14,000 words. *See* NRAP 32(a)(7)(A)(ii).

6. Despite my best efforts and diligence to keep the opening brief to 14,000 words or less, I have not been able to do so.

7. This case dates back to 2005. There were six defendants in this case. Two pleaded guilty. The remaining four went to trial. Two were tried together and two separately, resulting in three separate trials in this case. There were more than 750 filings in the district court, more than 140 transcripts, ten related appeals including this one (48233, 50576, 50939, 51549, 54209, 54272, 55608, 57217, 63115, 64757), five banker's boxes of discovery and other materials from trial counsel, and several audio and video recordings to review.

8. Additionally, Carroll's trial attorneys failed to file a notice of appeal after he was convicted and sentenced. Carroll therefore had to go through lengthy post-conviction proceedings to get the right to proceed with this direct appeal.

9. The jurisdictional statement, the statement of the case that includes the procedural history, and the statement of the facts in the opening brief therefore are quite lengthy, totaling about 11,527 words.

10. After reviewing the record and carefully considering what issues should be raised on appeal, Carroll's opening brief presents six issues. Some of these issues allege Carroll's constitutional rights were violated and require a complete review of the evidence in the case. Thus, it was not possible to address all of the issue and the facts relevant to their determination in 2,473 words or less (i.e., 14,000 – 11,527).

11. At least two of the other defendants that took their case to trial also had to seek permission to file opening briefs in excess of the limitations placed by NRAP 32. For example, Luis Hidalgo, Jr.'s opening brief was 60 pages long and his appendix consisted of 25 volumes. Luis Hidalgo, III's opening brief was 51 pages long and his appendix consisted of 11 volumes. The State, however, filed an additional 4 volumes to the appendix in Hidalgo III's appeal. Both defendants filed motions to exceed the page limitation for their openings briefs, which this Court granted. And, those weren't death penalty cases in the district court, and they weren't convicted of first-degree murder like Carroll was.

12. I, like the attorneys for Hidalgo Jr. and Hidalgo III, did the best I could to be as succinct as possible given the size and complexity of this case. Carroll's appendix consists of 12 volumes and the final draft of the opening brief contains 22,121 words.

13. I have edited and re-edited the opening brief numerous times but cannot in good faith take out any more, certainly not 8,121 words (i.e., 22,121 – 14,000), and still competently and adequately address all of the issues on appeal and all of the evidence necessary for their determination.

14. I therefore respectfully request the Court enter an order allowing Carroll to file his opening brief consisting of 22,121 words. *See* Exhibit 1.

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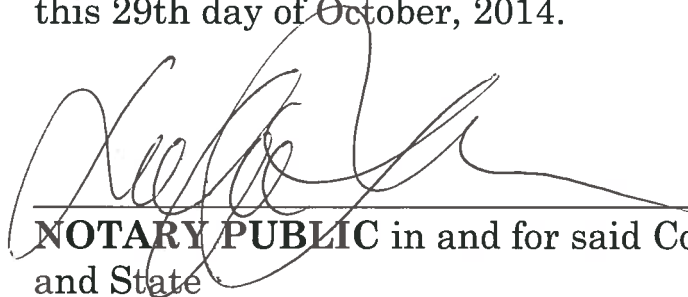
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Further, affiant sayeth naught.


MARIO D. VALENCIA

SUBSCRIBED and SWORN to before me

this 29th day of October, 2014.


NOTARY PUBLIC in and for said County
and State

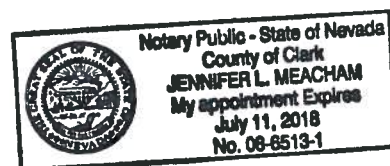


EXHIBIT 1

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IN THE SUPREME COURT FOR THE STATE OF NEVADA

DEANGELO R. CARROLL,
Appellant,
v.

No. 64757

THE STATE OF NEVADA,
Respondent.

Appeal

From the Eighth Judicial District Court
Clark County
The Honorable Valerie Adair, District Judge

APPELLANT'S OPENING BRIEF

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APPELLANT'S OPENING BRIEF

I.

JURISDICTIONAL STATEMENT

The Court has jurisdiction over this appeal pursuant to NRS 177.015(3). This is Deangelo R. Carroll's (Deangelo) direct appeal from the verdict and final judgment in a criminal case.

This was a death penalty case in the district court. The jury's verdict, finding Deangelo guilty of conspiracy to commit murder and murder in the first-degree with use of a deadly weapon, was entered May 25, 2010. 9 AA 2000–01.¹ The jury's verdict, imposing a sentence of *life* in prison with the possibility of parole beginning when a minimum of 40 years has been served, was entered on June 4, 2010. 11 AA 2408–12. The judgment of conviction was entered on September 8, 2010. 11

¹ “AA” stand for Appellant's Appendix. The number before “AA” represents the volume number of the appendix where the document is found. The numbers after “AA” represent the page numbers where the document being cited to is found. For example, the above citation to “9 AA 2000–01” means Volume 9 of Appellant's Appendix at pages 2000–01.

AA 2419–20. An amended judgment was entered on March 23, 2011. 11 AA 2432–33.

Deangelo was originally deprived of his right to a direct appeal through ineffective assistance of counsel. *See* Order, Case No. 63115 (Nev. July 23, 2013). However, the post-conviction petition in which this issue was raised was itself filed out-of-time. *Id.* This Court dismissed Deangelo’s first-restored appeal so the district court could determine whether Deangelo had good cause for the late post-conviction petition. *Id.* The district found that he did and ordered the district court clerk to file a notice of appeal under NRAP 4(c)(1)(B)(iii). 11 AA 2434–40. On January 6, 2014, the clerk did so. 11 AA 2441.

II.

STATEMENT OF THE ISSUES

- A. Was Deangelo's statement rendered involuntary because he was promised that he would not go to jail if he told the truth?
- B. Was Deangelo's statement taken in violation of *Miranda* because he was interrogated in a small room at the homicide office for at least two and half hours and gave a complete confession before he was advised of his rights?
- C. Were the recordings Deangelo helped the police make erroneously admitted against him because his own statements were not admissions, and the statements of others were not in furtherance of the charged conspiracy?
- D. Was there insufficient evidence to support Deangelo's conviction for conspiracy to commit murder and first-degree murder when the State presented no evidence that Deangelo intended for the victim to be killed or that he lied in wait to harm him?
- E. Was there insufficient evidence to support the deadly-weapon enhancement when the State presented no evidence that Deangelo knew a gun would be used?
- F. Were the errors in Deangelo's trial so numerous and significant that, even if they could be found harmless on their own, together they combined to deprive Deangelo of a fair trial?

III.

STATEMENT OF THE CASE

A. Nature of the case

This is Deangelo's direct appeal from the verdict and final judgment in a criminal case.

B. The course of the proceedings

Deangelo was arrested on May 25, 2005 and he made his initial appearance in justice court on May 31, 2005. 1 AA 136, 146.

The Criminal Complaint was filed that same day. 1 AA 140–42. It charged Kenneth Counts, Luis Alonso Hidalgo, III, Anabel Espindola, and Deangelo with conspiracy to commit murder, murder with a deadly weapon, and two counts of solicitation to commit murder. *Id.*

On June 3, 2005, the State filed a Second Amended Criminal Complaint to add a defendant, Jayson Taoipu. 1 AA 137. All of the defendants were charged with the same crimes: conspiracy to commit murder, murder with a deadly weapon, and two counts of solicitation to commit murder. 1 AA 137–39.

The preliminary hearing for Counts, Hidalgo III, Espindola and Deangelo was held on June 13, 2005. 1 AA 1. At that time, Deangelo

waived his right to a preliminary hearing and agreed to face the charges in district court. 1 AA 9–15. The court accepted his waiver. *Id.*

On June 20, 2005, the State filed an Information against Counts, Hidalgo III, Espindola and Deangelo. 1 AA 154. Deangelo was charged with conspiracy to commit murder and murder with a deadly weapon. 1 AA 155–56.

On July 6, 2005, the State filed a Notice of Intent to Seek the Death Penalty against Deangelo. 1 AA 158. They did the same against Counts, Hidalgo III and Espindola.

Taoipu was arrested on November 3, 2005. 1 AA 215–18. His preliminary hearing was December 6, 2005. 1 AA 162. The court bound him over to answer the charges of conspiracy to commit murder and murder with a deadly weapon. 1 AA 191, 202–20. On December 12, 2005, the State filed an Information against Taoipu in district court, charging him with conspiracy to commit murder and murder with a deadly weapon. 1 AA 221–23. The State did not seek the death penalty against Taoipu because he was a minor at the time.

On June 6, 2007, Taoipu entered into a written plea agreement with the State. 1 AA 240–47. That same day, the State filed an

Amended Information against Taoipu, charging him with conspiracy to commit murder and voluntary manslaughter with a deadly weapon. 1 AA 224–26. Pursuant to the plea agreement, Taoipu pleaded guilty to the charges in the Amended Information. 1 AA 240–47. He also agreed to testify against the other defendants, but that part of the plea agreement was sealed. 1 AA 232–234. His sentencing was postponed until after he testified. 1 AA 239.

On August 16, 2007, Deangelo filed a Motion to Strike Death Penalty Aggravators or in the alternative Motion for Continuance and/or Motion for Stay. 2 AA 248. The State filed its opposition to the motion on October 4, 2007. 2 AA 257. On October 9, 2007, the district court held a hearing on the motion. 2 AA 296. On November 14, 2007, the State filed an Amended Notice of Evidence in Aggravation against Deangelo. 2 AA 305. And, on November 27, 2007, the district court entered an order denying Deangelo’s motion to strike the death penalty aggravators. 2 AA 314.

Soon after, Deangelo filed for an emergency stay in this Court and a writ regarding the denial of his motion to strike the death penalty aggravators. *See* Nevada Supreme Court Case No. 50576. That was

followed by a formal petition, asking this Court to strike the death penalty aggravators. This Court stayed the proceedings and directed the State to file an answer to the petition.

On January 9, 2008, the State filed a [Second] Amended Notice of Evidence in Support of Aggravating Circumstances against Deangelo. 2 AA 316–20. The State did the same thing against defendants Counts, Espindola and Hidalgo III.

The next day, the State filed its answer to Deangelo’s petition for a writ of mandamus.

On January 29, 2008, the State filed a Second Amended Information against Counts. 2 AA 321.

On January 30, 2008, Deangelo filed a supplement to his petition for a writ of mandamus.

On February 4, 2008, Taoipu testified for the State in Counts’ trial.

That same day the State filed a Third Amended Information against Espindola, and she entered into a plea agreement with the State. 2 AA 324–33. Espindola agreed to plead guilty to voluntary manslaughter with use of a deadly weapon. 2 AA 324–33. Espindola’s

plea agreement and the Third Amended Information were filed and made public. 2 AA 329. The attachments to the agreement were sealed. *Id.* The sealed documents apparently relate to Espindola's agreement to testify for the State. *See e.g.*, 2 AA 441–46.

On February 8, 2008, the jury in Counts' trial found him guilty of conspiracy to commit murder but *not* guilty of the murder itself. 2 AA 342–43.

On February 13, 2008, the State filed an Indictment against Luis Hidalgo, Jr., Hidalgo III's father. 2 AA 344–47. They charged him with conspiracy to commit murder and murder with a deadly weapon but under a different case number. *Id.*

Counts was sentenced on March 20, 2008. 2 AA 348. He was sentenced under the small habitual criminal statute to 96 to 240 months. *Id.*

Having testified for the State, Taoipu was sentenced on March 25, 2008. 2 AA 367–68. He was sentenced to 48 to 120 months for conspiracy to commit murder and to 16 to 60 months with an equal and consecutive term of 16 to 60 months for voluntary manslaughter with a deadly weapon. *Id.* The sentences were run concurrently. *Id.* The court,

however, suspended the sentences and placed Taoipu on probation for five years. *Id.*

On June 25, 2008, the State moved to consolidate Hidalgo Jr.'s case (C241394) with the other defendants' case (C212667). 2 AA 369.

On September 24, 2008, this Court entered an order granting in part Deangelo's petition for a writ of mandamus. *See Order Granting Petition, Case No. 50576 (Nev. Sep. 24, 2008).* The Court instructed the district court to strike the aggravating circumstance alleging conspiracy to commit robbery as a prior violent felony, and to allow the State to amend its notice of intent to seek the death penalty to "declare the factual allegations supporting the pecuniary gain aggravator in a clear, comprehensible manner; and to further explain its allegations that the victim's murder served to further the business interests of the Palomino Club." *Id.* at 7-8.

On October 20, 2008, the State filed an Amended Notice of Intent to Seek Death Penalty against Deangelo. 2 AA 382.

On January 16, 2009, the district court granted the State's motion to consolidate Hidalgo Jr.'s case (C241394) with this case (C212667). 2 AA 394. That same day, the State withdrew its notices and amended

notices of intent to seek the death penalty against Hidalgo Jr. and Hidalgo III. 2 AA 387.

On January 26, 2009, the State filed a Fourth Amended Information against Hidalgo III. 2 AA 396. He was charged with conspiracy to commit murder, murder with a deadly weapon, and two counts of solicitation to commit murder. *Id.*

On January 27, 2009, the Hidalgos' jury trial began. Espindola testified against them. *See, e.g.*, 2 AA 400–30. On February 17, 2009, the jury found Hidalgo III guilty of conspiracy to commit a battery with a deadly weapon or battery resulting in substantial bodily harm, second-degree murder with a deadly weapon, and two counts of solicitation to commit murder. 2 AA 439–40. They also found Hidalgo Jr. guilty of conspiracy to commit battery with a deadly weapon or battery resulting in substantial bodily harm and second-degree murder with a deadly weapon. 2 AA 431–387.

Hidalgo Jr. and Hidalgo III were sentenced on June 23, 2009. 2 AA 447. Hidalgo, Jr. was sentenced to 12 months for conspiracy to commit battery with a deadly weapon or battery resulting in substantial bodily harm, and to 120 months to *life* with an equal and

consecutive term of 120 months to *life* for second-degree murder with a deadly weapon, with the sentence for the murder running concurrent with that for the battery. 2 AA 475–76, 481–82.

Hidalgo III was sentenced to 12 months for conspiracy to commit battery with a deadly weapon or battery resulting in substantial bodily harm; to 120 months to *life* with an equal and consecutive sentence of 120 months to *life* for second-degree murder with a deadly weapon; to two sentences of 24–72 months for two counts of solicitation to commit murder. The sentences for all four counts were run concurrent. 2 AA 476–77, 479–80.

On April 19, 2010, the State filed its Second Amended Notice of Evidence in Aggravation against Deangelo, regarding the death penalty.² 2 AA 483.

On April 30, 2010, Deangelo filed a motion to suppress his statement to the homicide detectives in this case. 3 AA 493. On May 4, 2010, the State filed its opposition. 3 AA 635. On May 11, 2010, the

² Technically, this was really the third amended notice. 2 AA 305–13, 316–20.

district court held a hearing on the motion to suppress, but it was not an evidentiary hearing. 3 AA 646. Later on that same day, the district court denied Deangelo's motion to suppress by way of a minute order. 3 AA 655.

On May 17, 2010, Deangelo's jury trial began. 4 AA 656. On May 21, 2010, the State filed a Fifth Amended Information against Deangelo. 8 AA 1587. The guilt phase of the trial concluded on May 25, 2010. The penalty phase of the trial commenced on June 2, 2010 and concluded on June 4, 2010. The jury's verdicts are below. *See* Section C, *infra*.

After she testified against Hidalgo Jr., Hidalgo III, and Deangelo, Espindola was sentenced on February 10, 2011. 11 AA 2421. Espindola was sentenced to 24 to 72 months with an equal and consecutive sentence of 24 to 72 months on the only count to which she pleaded guilty: voluntary manslaughter with a deadly weapon. *Id.* She was given credit for 1,379 days. *Id.*

C. The disposition below

On May 25, 2010, the jury found Deangelo guilty of conspiracy to commit murder and murder in the first-degree with use of a deadly weapon. 9 AA 2000–01. The case then proceeded to the penalty phase of the trial.

On June 4, 2010, the same jury found one aggravating circumstance: the murder was committed by a person, for himself or another, to receive money or any other thing of monetary value. 11 AA 2411. But, they also found the following mitigating circumstances:

- Deangelo did not come up with the idea to kill Timothy Hadland
- Deangelo was not the shooter
- Deangelo’s cooperation led to charges being filed against other defendants
- Deangelo has a low IQ
- Deangelo suffers from dependent personality disorder
- Deangelo can still be a significant part of his grandmother’s life
- Deangelo can still be a significant part of his son’s life

- The killing did not involve torture or mutilation of the victim
- The killing was not a case of multiple homicides
- Other persons involved in the offense received punishments significantly lower than the punishment Deangelo is facing

11 AA 2408–11. As a result, the jury determined “the mitigating circumstances outweigh any aggravating circumstance” and imposed a sentence of *life* in prison with the possibility of parole beginning when a minimum of 40 years has been served. 11 AA 2412.

On August 12, 2010, Deangelo was formally sentenced to 36 to 120 months in prison for conspiracy to commit murder (Count 1), and to *life* with the possibility of parole after 20 years, plus an equal and consecutive term of *life* with the possibility of parole after 20 years for first-degree murder with a deadly weapon (Count 2). 11 AA 2417–18. The sentences on counts 1 and 2 were run consecutively. *Id.*

IV.
STATEMENT OF FACTS

A. Deangelo R. Carroll

1. His birth and family relationships

Virginia Carroll (Virginia) has lived at 3024 Alma Drive in North Las Vegas, Nevada for the past 35 years. 11 AA 2254. She has eight children, and her oldest daughter is Thelma Jean Johnson (Thelma). *Id.*

Thelma gave birth to Deangelo Reshawn Carroll (Deangelo) on January 28, 1981. 11 AA 2254; *see also* 3 AA 507–08. But Thelma “didn’t have time for him.” 11 AA 2254. She was “too busy” running around with “her friends,” so Virginia took care of Deangelo and raised him from the day he was born. 11 AA 2254–55. Deangelo still “[l]ong[ed] for his mother,” but “every time they tr[ied] to get back together she wouldn’t treat him well. She had boyfriends and they didn’t treat him well” either. 11 AA 2282–83. Because of her nearly complete absence from his life, Deangelo “never really bonded with his mom and his mom really never bonded with him.” 11 AA 2282.

Deangelo therefore turned to Virginia. 11 AA 2282. Virginia certainly loved Deangelo, 11 AA 2256–57, but when he was growing up

she was very busy herself, raising her own children and running a daycare center to make ends meet, so Deangelo only “got a little piece” of her attention. 11 AA 2282.

As for Deangelo’s father — whoever he is — he was never a part of Deangelo’s life. 11 AA 2255. This too profoundly impacted Deangelo.³ According to Virginia, every time a man came to the house Deangelo “claimed them to be his dad. He wanted them to be his dad.” 11 AA 2256. “He wanted a daddy so bad so he was claiming anybody.” *Id.*

2. *His low IQ and learning disabilities*

Deangelo’s IQ is 82.⁴ 11 AA 2278. He is “functional” but “four out of five people have higher IQs than he” does. 11 AA 2277–78. He lacks “depth in regards to his ability to think and communicate and understand.” 11 AA 2277.

According to Clark County records, Deangelo “has been labeled learning disabled for a long time.” *Id.* He attended “special ed” classes

³ Virginia choked up at trial as she testified about the effects this had on Deangelo and how he felt about it. 11 AA 2255.

⁴ According to Dr. Norton A. Roitman, a psychiatrist, Deangelo’s IQ “would’ve been lower” if he didn’t have “such good verbal skills.” 11 AA 2278.

in school, and yet he failed “a good number” of them and got Ds and Cs in most of the others. 11 AA 2310–12.

3. *Deangelo’s dependent personality disorder*

As a result of the “bad things” that happened to him as a child, Deangelo suffers from post-traumatic stress disorder and a dependent personality disorder. 11 AA 2280–81.⁵ These bad things were: his mother’s rejection; her preference for her friends and boyfriends over Deangelo; the maltreatment Deangelo had from his mother and her

⁵ Dr. Roitman explained a personality disorder this way:

So, you know, I guess the ideal is we all have great personalities, but the fact of the matter [is], we all have characteristics, tendencies, some people are overly sloppy, some people are dramatic. But these traits are not diagnosis.

In order to really make a diagnosis the personality has to be pretty distorted given into a direction [sic]. Now, like one way to explain it is like, you know, that typical Hollywood icon is a narcissist, it’s all about them, multiple relationships, unstable, need attention. That’s a narcissistic personality disorder. *It gets to be a disorder when it interferes with function, otherwise it’s just a characteristic.*

11 AA 2281 (emphasis added).

boyfriends when all he wanted was to be with her; the limited attention and care he received from his loving but busy grandmother; and the complete lack of a relationship or even knowledge of his father. 11 AA 2254–56, 2282–83.

Plus, Deangelo was “picked on a lot,” because he was in “special ed” classes and “wasn’t a success” in school. 11 AA 2283, 2309. These childhood events “make their appearance in adult function.” 11 AA 2281.

People who suffer from dependent personality disorder “are *not* highly charismatic people who take the lead, are innovative, . . . are entrepreneurs, [or] can operate on their own.” 11 AA 2281 (emphasis added).

They’re people who like to be tucked under more like in a submissive role and so have a hard time making decisions, difficulty dealing with rejection . . . They feel insecure a lot of the time, tend to isolate unless they are given a specific set of rules to follow, and really are susceptible to a lot of misery because in the dependent role, you’re not in control. Your life is — depends on who you wind up depending on.

11 AA 2281–82.

Deangelo has always sought a “father figure . . . someone to depend on.” 11 AA 2282. He became a follower, but developed a “tough exterior” to cover up the painful void “on the inside.” 11 AA 2283. Because he “never really got that need fulfilled,” he “never moved out of that . . . stage of development. He’s continued to be dependent like a child.” *Id.*

What’s more, Deangelo’s low IQ negatively impacts his dependent personality disorder. “IQ or intelligence is a tool . . . that can help you problem solve, figure things out, become and stay independent, be able to depend on yourself.” *Id.*

So the dependent tendency, somebody who feels needy all the time, they might, with insight, work around it one way or another. But without intelligence, a high level intelligence, you can’t reflect on yourself, get a sense of who you are, compensate for those tendencies. And so the IQ is another weakness that — that produced, you know, Deangelo in a — in a vulnerable state.

11 AA 2283–84.

4. *How Deangelo started working for the Palomino Club*

In September 1999, Luis Hidalgo, Jr. (Mr. H) opened an auto repair shop on Bermuda, between Sunset and the 215, in Las Vegas,

Nevada called Simone's Autoplaza. 7 AA 1416, 1418; 10 AA 2111–12.

Luis Hidalgo, III (a.k.a. "Little Lou," "Little Luis," "Little Louie"⁶) is Mr. H's son. 7 AA 1415; 10 AA 2111. Anabel Espindola (Anabel) was Mr. H's business partner and mistress. 10 AA 2111–14. She was the manager at Simone's. 10 AA 2114. She did all the hiring and firing, and all of the paperwork. *Id.*

Sometime around 2001 or 2002, a personal friend of Mr. H's, bought the Palomino Club, a strip club, for \$13 million. 2 AA 410–13, 418–20. This friend employed Mr. H as the general manager and Anabel handled the books. 2 AA 418–20. After a year or so, the friend wanted to sell the club, and Mr. H agreed to buy it for \$13 million. 2 AA 420–24. With the sale, Mr. H moved up to owner and Anabel to general manager. 10 AA 2113–14.

Little Lou and Deangelo were friends. 10 AA 2117. Around September 2004, Deangelo started working at the Palomino club. 3 AA

⁶ Deangelo refers to him as Little Louie. *See* 3 AA 593.

510.⁷ For the first three months he worked “under the table” before he was put on the official payroll. *Id.* The “only reason” Deangelo got hired at the Palomino Club is because he was “good friends” with Little Lou. 12 AA 2576. According to Deangelo, once he was hired by the club, he’s “been cool with Mr. H ever since.” *Id.*

Deangelo did whatever they needed him to do at the club. He might drive the shuttle bus, deejay, cash out girls, sell chips, or “work the floor.” 3 AA 512–13. He also did some “promoting” for the club. Promoting involved going out on the strip and passing out flyers⁸ and “VIP passes to people.” 3 AA 511–13.

Deangelo “derived his identity from the Palomino Club.” 11 AA 2287. Because of his disabilities, he had a dependent relationship with

⁷ At the time of his interrogation on May 20, 2005, Deangelo told the detectives he had been working at the Palomino club for about nine months. 3 AA 508, 510.

⁸ According to Deangelo, the flyers had the Palomino Club’s payout rates printed on them. He would take them to the cab stations and cab lines to hand out to the cab drivers to let them know the club’s payout rates. 3 AA 512. Payout rates are how much each club pays drivers for each “fare” they bring to the club. 7 AA 1543. At one point in time, the rate was \$3 or \$4 a head, but the strip clubs got into a bidding war and the rates went up as high as \$30 or \$40 a head. 7 AA 1543–44.

the Hidalgos. *Id.* He saw in Mr. H a father figure, someone who was taking care of him, someone he could trust. 11 AA 2261. Deangelo therefore was willing to do anything they asked of him. 11 AA 2287.

B. Timothy J. Hadland's death

1. Hadland is fired from the club

In 2005, Timothy J. Hadland (TJ) worked as a doorman at the Palomino Club. 6 AA 1204, 1221; 10 AA 2114. His girlfriend was Paijit Karlson. 6 AA 1203–04. She, too, had worked at the Palomino Club as a dancer. 6 AA 1208, 1221.

TJ and Deangelo were coworkers at the Palomino Club. 6 AA 1208; *see also* 3 AA 509. They were also close friends. 3 AA 519. TJ was known for always having superb marijuana and would often smoke it in his car with Deangelo while they were at work. 3 AA 532–33, 607.

While TJ and Deangelo hit it off, the same was not true of TJ and Palomino Club management. TJ talked bad about them and the club. 6 AA 1216. But that wasn't the worst of it.

Around May 11 or 12, 2005, Little Lou provided Anabel with information that showed TJ was stealing from the club. 10 AA 2114–15.

As cab drivers dropped off customers, the club's doorman would give drivers a ticket with the number of customers they brought. 10 AA 2115. The cabbies would then take the ticket to the cab office in the back and get paid a bounty for each admission. *Id.* But TJ was adding fictitious customers to the tickets so that the drivers were getting paid more than they were supposed to. *Id.* The drivers would then kickback some of that extra money to TJ. 10 AA 2115–16. When Anabel found out, she told the office manager Arial⁹ to fire TJ. *Id.*

About a week after he was fired, May 19, 2010, TJ and Paijit decided to go camping at Lake Mead. 6 AA 1204–05. With only them and their three dogs, they drove out to the lake in Paijit's Kia Sportage. 6 AA 1205–06, 1218. They left to camp around 6:00 p.m. and were only going to stay overnight. 6 AA 1205, 1222.

Once at the lake, TJ got a phone call. 6 AA 1206. Paijit could not hear both ends of the conversation, only what TJ was saying. 6 AA 1206, 1223–24. When he got off the phone, TJ told Paijit he was

⁹ Arial's real name is Michelle Schwanderlik. 1 AA 41.

meeting Deangelo to get some marijuana. 6 AA 1207, 1227. After TJ left the campsite, Paijit never saw him again. 6 AA 1211.

2. TJ is found dead

Sometime after 11:30 p.m. that evening, Ishmael Madrid and two friends were driving on North Shore Road, leaving the Lake Mead national recreation area, when they saw a body lying in the middle of the street. 6 AA 1182–84. It was a white male adult. 6 AA 1185. There was a hat lying on top of the body and a gold chain lying across the chin area. 6 AA 1188. Ishmael saw a car parked alongside the road, some advertisement cards from the Palomino Club on the ground in the area of the body, and a plastic tube used for like drive-through banking also on the ground in that area. 6 AA 1188, 1190–91, 1200. At exactly 11:47 p.m., Ishmael called 911. 6 AA 1190; 8 AA 1641–42.

The body lying in the middle of street was TJ's. 7 AA 1527; 8 AA 1639. He was dead, shot twice in the head. 7 AA 1384, 1529–30. The coroner's examination found the death was homicide and revealed that TJ had .07 % alcohol in his blood and marijuana in his system. 7 AA 1538–39.

3. *The investigation into TJ's death soon focuses on Deangelo*

The homicide detectives that responded to the scene were Martin Wildemann, Michael McGrath, Jimmy Vaccaro and Theresa Kyger. 7 AA 1385.

The car parked alongside the road was Paijit's Kia Sportage. 6 AA 1239. There was a cell phone in the car. 6 AA 1239–40. The cell phone was turned over to McGrath. 6 AA 1244; 8 AA 1641. McGrath "went through the cell phone" and found that the last phone call TJ received was from Deangelo. 8 AA 1641. McGrath gave this information to Wildemann. 7 AA 1385.

Wildemann then went back to the homicide office and started doing some research into the identity of the person making the phone call. *Id.* He came up with Anabel's name using the cell phone information he had and, by checking police databases, found she worked at the Palomino Club. 7 AA 1387–88.

Meanwhile, Lake Mead park rangers contacted the detectives on scene and told them about Paijit. 7 AA 1387. The detectives then contacted some of TJ's family who confirmed that TJ and Paijit were

camping out. *Id.* Later that same morning, Wildemann and Kyger returned to the lake and spoke with Paijit. 6 AA ; 1211–13; 7 AA 1387.

Based on the evidence at the crime scene, the cell phone information, the conversation with Paijit, and their investigation linking Deangelo to the Palomino Club and TJ, the detectives' investigation focused on Deangelo as a prime suspect. 1 AA 6; 7 AA 1386–88.

Because the Palomino Club is in North Las Vegas, McGrath contacted a friend with the North Las Vegas Police Department who passed along Mr. H's contact information. 8 AA 1643. McGrath in turn gave it to Wildemann. *Id.*

When Wildemann called Mr. H, he said he was investigating “*one* of his employees.” 7 AA 1389 (emphasis added). Wildemann asked if Mr. H would meet with him so he could “access some records.” *Id.* Around 3 p.m. that afternoon, Wildemann and Kyger met Mr. H at the Palomino Club. 7 AA 1389–90. Again they told Mr. H they were investigating “*a* current employee” of the Palomino Club, and asked him if they could “get some records regarding Deangelo Carroll, meaning an address or a telephone number to contact him by.” 7 AA 1390 (emphasis added). Mr.

H confirmed that he had an employee named Deangelo Carroll but said he didn't have access to any of the records himself. *Id.* Mr. H told the detectives to come back to the club around 7:00 p.m. that evening (May 20, 2005) and talk with Arial, the manager, who could help them. 7 AA 1391.

C. Detectives pick Deangelo up at the club

1. Detectives meet Deangelo and drive him to the homicide office

McGrath and Wildemann returned to the Palomino Club that evening. 7 AA 1391–92. While they were inside, Vaccaro and Kyger watched the club outside. 7 AA 1392.

Mr. H met McGrath and Wildemann as they walked into the club and told them Arial was there. *Id.* He called her over and Arial led the two detectives into the back of the club to a quiet employee area. *Id.*

While they were talking with Arial, Vaccaro called Wildemann's cell phone. *Id.* Wildemann left the meeting and walked out into the hallway to take the call. *Id.* Vaccaro told Wildemann someone "matching Deangelo Carroll's description" was walking into the club. *Id.* Just then, Mr. H walked up and introduced Deangelo. *Id.*

Wildemann told Deangelo they were investigating “a friend of his that was employed there by the name of TJ.” 7 AA 1396. He also told Deangelo that his was one of the last calls to TJ and that he wanted to talk to him about his relationship with TJ and about the conversation they had on the phone. *Id.* Wildemann asked Deangelo if he would “accompany” him to the homicide office so they could talk “in private.” 7 AA 1394. Deangelo agreed to go with them. *Id.*

Wildemann and McGrath took Deangelo to the homicide office in their car, even though Deangelo had driven himself to the Palomino Club that night. *Id.* On the way, the detectives were very careful about what they said because they didn’t want Deangelo “to prepare” for their eventual questions about the homicide. 7 AA 1394–95.

During trial, Wildemann confessed they could have questioned Deangelo at the Palomino Club or at his house (it was nearby). 7 AA 1481–82. But Wildemann testified that he preferred the homicide office because it’s “more intimidating.” *Id.*

2. *A description of the homicide office and interview room*

The homicide office at that time was in an office complex on Charleston and Rainbow. 7 AA 1395. Inside the office was a very small waiting room. *Id.* To get to the interview rooms, Deangelo and the detectives had to go from the waiting room through a “small gate . . . about knee high and take an immediate left.” *Id.* The three went into one of the two rooms. *Id.*

Like the waiting room, the interview room was also very small. 7 AA 1485; *see also* 12 AA 2578–80 (pictures of the room). During a preliminary hearing, Wildemann described it as a six feet by six feet room, possibly smaller. 1 AA 169. There’s only one door in and out of the room. 7 AA 1485. There’s a table in the room. *Id.* The detectives sat Deangelo at the table with his back against the wall. *Id.* Between Deangelo and the door were the table, Wildemann and McGrath. 7 AA 1485. There was no phone or any other way for a witness to communicate with the outside world. 1 AA 170. And the interview room was uncomfortably hot. 12 AA 2508, 2535, 2538. Wildemann admitted that a reasonable person would feel “pretty intimated” in that situation. 7 AA 1487.

3. *The detectives surreptitiously video-record the interview*

The detectives told Deangelo that the interview was being audio recorded, but they did not tell him they were video-recording it as well. 7 AA 1489. It's something they do "surreptitious[ly]." 7 AA 1396. Wildemann was audio recording it with a small digital handheld recorder Deangelo could see, while Vaccaro was video-recording from "a back room." 7 AA 1396–97. The video tape captured everything that happened in the interview room.¹⁰ 7 AA 1397–98. The audio tape, on the other hand, only captured "certain conversations."¹¹ 7 AA 1398.

¹⁰ In 2005, the detectives used VCRs to record interviews. 7 AA 1397. Wildemann testified if one tape ran out, "you had to pull that tape real quick, insert another tape and hit the record button." *Id.* Deangelo's interview spanned more than one video tape. *Id.* Those video tapes were digitized and admitted at trial as State's Exhibit 243. 7 AA 1397, 1424–25. Hereinafter, it is referred to as Video Exhibit 243. A copy of the video has been provided to the Court as part of the record.

The State created a transcript (with time stamps on the left-hand side) of the video recordings. That transcript was admitted into evidence as State's Exhibit 246. 7 AA 1425–26 (the trial transcript shows the State did not provide Deangelo with a copy of this transcript until about "two minutes" before they moved to admit it). The transcript, however, does not include everything that's on the video recording. *Compare* Video Ex. 243 with 12 AA 2463–577.

¹¹ Prior to trial, the State provided Deangelo with a copy of the transcript the Las Vegas Metropolitan Police Department (Metro)

4. *The detectives interrogate Deangelo without Miranda warnings*

The detectives did not Mirandize Deangelo because, in their opinion, he was “not in custody.” 7 AA 1488–89; 8 AA 1645. Yet they never told him he did not have to answer their questions, that he was free to terminate the interview at any time, and that he was free to leave at any time if he wanted. *See, e.g.*, Video Ex. 243.

And in reality, Deangelo wasn’t free — free to make a phone call, free to step out of the room and smoke a cigarette, free to leave and go home on his own. During the interview, the detectives took Deangelo’s Nextel phone and took notes of what they found on it. 12 AA 2478; Video Ex. 243 at 12:00 – 16:33 minutes.¹² They did not give it back. *See* Video Ex. 243 at 16:30 (McGrath puts the phone on the table next to

created of the audio recording. Deangelo attached a copy of that transcript to his motion to suppress. 3 AA 507. That transcript is different than State’s Exhibit 246, which contains most (but not all) of what’s on the video recording of Deangelo’s interview. The Video Exhibit 243 contains the entire interview.

¹² The times provided indicate the time from the beginning of the video. So, for example, the above citation is to the Video Exhibit 243 from 12 minutes from the start to 16 minutes, 33 seconds from the start. The on-screen timestamp for this same period is 21:31:53 to 21:37:36.

Wildemann and they never give the phone back to Deangelo). Later in the interview, Deangelo asked if he could make a phone call, McGrath told him “[n]o, no, no” and asked him for his “other phone.” 12 AA 2507; Video Ex. 243 at 43:30 – 44:50 minutes. When Deangelo placed it on the table, the detectives took it and left the interview room, leaving Deangelo totally cutoff from the world. *See* Video Ex. 243 at 43:30 – 44:50 minutes, 53:40 – 56:00 minutes.

Right before Wildemann and McGrath stepped out of the room the first time, Deangelo asked them, “Can I just smoke a cigarette?” 12 AA 2507. Wildemann and McGrath said they would see what they could do, but then walked out of the room and closed the door. 12 AA 2507–08; Video Ex. 243 at 44:22 – 44:50 minutes. They never let Deangelo leave the room, not for a smoke, not even to get his own water (they would go and get it for him and bring it back). Video Ex. 243 at 44:20 – 44:50, 54:50 – 55:25 minutes (showing Wildemann and McGrath leave the room, close the door, and then ten minutes later come back with a cup of water for Deangelo). They would tell Deangelo things like “we’ll be back” or “we will be back in a minute” and “just hang,” “sit tight” and “drink your water” but they would never let him leave the room. 12 AA

2507–08, 2535, 2677. Knowing he wasn’t allowed to just get up and leave, Deangelo had to ask the detectives if they would at least leave the door cracked a little during one of the breaks when the detectives stepped out because it was so hot in the room. 12 AA 2535; *see also* Video Ex. 243 at 1:23:20 – 1:23:40 (minutes).

Wildemann even testified at trial that he was “not sure” they would have allowed Deangelo to stop the interrogation, get up, and go home. 7 AA 1487–88.

D. Deangelo’s statement during interrogation

1. The initial story about smoking weed with or buying weed from TJ

The first story Deangelo told the detectives about what happened that night (May 19, 2005, the night TJ was shot) centered around marijuana. There were two versions of this story. In the initial account, Deangelo and TJ had several phone conversations about getting together to smoke some weed, but that didn’t happen because TJ was camping at Lake Mead and Deangelo and his wife were at home caring for their sick son. *See* 3 AA 511–42. After being told about toll booths located at Lake Mead that are loaded with cameras that capture

everything that's going on day and night, and about cell site records regarding Deangelo's phone calls to TJ, none of which was true,¹³ Deangelo gave the second account of this story. 3 AA 536–40. Deangelo said he called TJ because his mom's neighbor, a guy Deangelo knew only as "KC," wanted to buy some weed. 3 AA 549–50. TJ told them to meet him out at the lake. 3 AA 550. When they met up, KC shot TJ twice. 3 AA 550–55. He then aimed the gun at Deangelo and told him to "fuckin' drive." 3 AA 555. Deangelo was scared and nervous. 3 AA 556. He made a quick U-turn around TJ's body and drove straight out of the Lake Mead area, through Henderson, and on to the 95. 3 AA 557–58. They then exited at Las Vegas Boulevard and KC jumped out of the van and took off. 3 AA 559.

2. Deangelo then tells the truth about what happened that night

Early in the evening of Thursday, May 19, 2005, Deangelo, Rontae and JJ were working together promoting the Palomino Club.¹⁴ 3 AA

¹³ See e.g., 3 AA 644.

¹⁴ "Rontae" is Rontae Zone and "JJ" is Jayson Taoipu. 6 AA 1268, 1270. Rontae was 18 years old and JJ was 16 years old during these

511, 515, 566–68. They were driving around in a white 1996 Chevy Astro van that belonged to Mr. H. 3 AA 525, 528, 564. After they had been out promoting for a while, they went to Deangelo's house. 3 AA 564, 593, 628.

While they were at his house, Little Lou called Deangelo and told him he needed to go to the club, and asked him to bring two garbage bags and a baseball bat because they had to go take care of something. 3 AA 562–63, 566, 593–94. Little Lou didn't tell Deangelo what it was they needed to take care of, but Deangelo knew something was up and he didn't want to do it. 3 AA 566. This was at about 8:00 p.m. 3 AA 594.

Deangelo left the house by himself — Rontae and JJ did not go with him — and went to the club. 3 AA 566, 583, 594. There's no evidence Deangelo took two garbage bags and a baseball bat to the club. At the club, Deangelo was called into Mr. H's office. 3 AA 564. In there,

events. 7 AA 1472. Rontae was living with Deangelo. 6 AA 1268. JJ was Rontae's friend. 3 AA 611.

he met with Mr. H, Anabel and “Miss A.”¹⁵ 3 AA 562, 567, 580, 594.

Little Lou had not yet arrived at the club. 3 AA 594.

In that meeting, Mr. H told Deangelo he wanted TJ taken care of, “hurt bad.” 3 AA 567. TJ had been stealing from Mr. H and the club. 3 AA 565. And to make matters worse, after he was fired, TJ was spreading rumors and badmouthing the club. 3 AA 562, 594. It was hurting business, and Mr. H isn’t the type of person that isn’t going to do something about it. 3 AA 562, 565. He wanted the issue taken care of that night. 3 AA 570, 597. Deangelo didn’t want to do it, so Mr. H told him to find someone who would. 3 AA 562, 570, 597. Mr. H told Deangelo he would pay this other person but didn’t say how much. 3 AA 567, 606. The meeting lasted about 20 minutes and then Deangelo left the club sometime between 8:30 and 9:00 p.m. 3 AA 566, 597.

From there he went to KC’s house, which was across the street from Deangelo’s mom’s house on E Street. 3 AA 572, 574. He knew Counts only as “KC” or “K”. 3 AA 576. KC is a gang member, a Blood,

¹⁵ Deangelo never specified who “Miss A” is. It’s possible he was talking about Arial, the office manager. 1 AA 41.

from California, who sold drugs. *Id.* Deangelo knew KC was someone who “didn’t give a fuck” and who was more than capable of beating up TJ. 3 AA 565, 597, 601, 604–05. He told KC his boss, meaning Mr. H, would pay him to “take care of” TJ. 3 AA 571, 606. KC said he would do it as long as the money was right. 3 AA 571, 574, 597. He also told Deangelo he had to take him to wherever TJ was, and not just tell him where to go. 3 AA 574. KC believed this would prevent Deangelo from “snitching” on him. *Id.*

Around 11:00 p.m., Deangelo called TJ about getting some weed and found out he was at the lake. 3 AA 569. TJ said he didn’t have any but he knew where they could get some. 3 AA 600. They planned to meet up at the lake, go get some weed, and then return to TJ’s campsite to smoke it. 3 AA 600, 631.

Sometime thereafter, Deangelo picked up Rontae and JJ and drove to a 76 Station to get some gas. 3 AA 629. They were in the Astro van. 3 AA 571. They then drove to KC’s house to pick him up. 3 AA 571–73, 629. Deangelo went up to the house to get KC but he was getting his hair cut so Deangelo waited for him “out front.” 3 AA 629. When KC was done, he walked out of his house and straight into the van. 3 AA

586. He was dressed all in black: black pants, black sweater, black hoodie and black gloves. 3 AA 555, 587, 600, 615.

They then drove out to the lake. Deangelo was driving, JJ was in the front passenger seat, Rontae was in the back seat behind Deangelo, and KC was in the back seat behind JJ. 3 AA 608. As they got closer to the lake, Deangelo called TJ to tell him they were on their way. 3 AA 70. They were supposed to meet TJ at a stop sign inside the lake area because Deangelo had no idea how to get to where TJ was camping, somewhere around mile marker 5. 3 AA 576, 600–01. When they got to the lake, they drove through the toll booth area to the stop sign and tried calling TJ but they couldn't get any reception. 3 AA 576–77. This was at about 11:35, 11:40 p.m. 3 AA 577. So they drove back out and called TJ again, who told them he was on his way. 3 AA 577–78. On hearing that, Deangelo and the rest drove back towards the stop sign but, instead of waiting there, they turned left and drove around for about 5 or 6 minutes until they saw TJ coming toward them. 3 AA 577, 606.

On seeing TJ, they pulled over to the side of the road and Deangelo got out to pee. 3 AA 578, 613, 617–18. As he was peeing, TJ

passed them, made a U-turn, and pulled Paijit's Sportage behind their van. 3 AA 578, 607, 613, 618. Deangelo then got back in the van. 3 AA 578, 613, 618. Rather than stay behind them, TJ moved his vehicle and parked in front of the van. 3 AA 576–77. While this was going on, KC snuck out of the van through the sliding passenger door in the back.¹⁶ 3 AA 578, 609, 613–14, 617. TJ then got out of his car and walked back towards the van.¹⁷ 3 AA 613, 618.

TJ was wearing a tan hat, shorts and sandals, but no shirt. 3 AA 588, 616, 630. He walked up to the driver's side window to talk with Deangelo. 3 AA 578, 588–89, 624. Meanwhile, KC, who had crouched down, made his way to the front of the van. 3 AA 578, 586, 613–14. TJ never saw him because it was dark and KC was wearing all black. 3 AA 615. Just as TJ took off his hat and started talking with Deangelo, KC pulled out a gun and shot TJ twice, instead of beating him up like he

¹⁶ Deangelo told the detectives this is probably how the plastic tube they found by TJ's body fell out of the van. 3 AA 552, 617.

¹⁷ According to Deangelo, TJ was so drunk that he "staggered" to the van. 3 AA 578, 616.

was supposed to.¹⁸ 3 AA 579, 588–89, 601–02, 604, 613–16, 620, 630.

Deangelo, Rontae and JJ didn't see KC with the gun that night until he pulled it out and shot TJ. 3 AA 589, 602–03. KC had been hiding the gun under his sweater. 3 AA 602–03. Deangelo heard the two shots and then TJ drop. 3 AA 589, 615–16.

Deangelo started to get out of the van to help TJ, to see if he was alright. 3 AA 579, 613, 617. That's when the Palomino Club flyers the detectives found around TJ's body fell out of the van. *Id.* By this time, however, KC had jumped back in the van and was pointing the gun at Deangelo, Rontae and JJ, threatening and yelling at them: "drive mother fucker, drive, you ain't fuckin' act like this when we was on our way up here, fuckin' drive" and "get me the fuck up out these mountains." 3 AA 579, 589, 613, 616, 618.

Deangelo, who was in shock, drove up a little bit, made a U-turn around TJ's body and headed back out of the lake area. 3 AA 589, 616–17. They drove past the stop sign and the toll booth, straight through

¹⁸ Deangelo described the gun as a chrome .357 with a long extended barrel and a black pistol grip. 3 AA 602.

Henderson to the 95, got on the 95 and drove to the club. 3 AA 579, 619–20.

When they got to the club, Rontae and JJ stayed in the van. 3 AA 583. Deangelo and KC went into the club upstairs to Mr. H's office. 3 AA 579, 620. KC did not go into Mr. H's office, he stood outside in the hall because Mr. H wouldn't allow him in. 3 AA 579, 621.

Inside the office, Deangelo met with Mr. H and Anabel and told them what had happened: how KC "flipped out" and "shot" TJ, and that he was now demanding to be paid \$6,000. 3 AA 571, 579–80, 620–21. Mr. H responded "fuck . . . I just wanted him hurt," and Anabel said "man, I told you guys only to hurt him." 3 AA 579, 620. KC was in a hurry to get home, however, so he kept banging on the door to the office, yelling "man, hurry the fuck up" and "get me the fuck outta here." 3 AA 586, 620. Anabel didn't want to pay KC, but Mr. H told her "just pay him" so they could get that "mother fucker away from" them. 3 AA 579, 620. So, Anabel went into a back room and came back with the money: \$6,000, all in crisp, new \$100 bills, wrapped in a rubber band. 3 AA 580–81. She gave the money to Deangelo and Deangelo went out and

handed it to KC. 3 AA 571, 581. KC counted the money then jumped in a cab and went home. 3 AA 581, 586.

Mr. H was worried the van might have blood on it so he gave Deangelo \$100 to get the tires changed. 3 AA 625. The next morning, May 20, 2005, Deangelo bought four tires from a Mexican shop on Griswold and Las Vegas Boulevard *Id.* Two of the old tires, he threw into a dumpster down by Van Der Meer, and the other two he threw in a 7-Eleven dumpster on Civic Center and Las Vegas Boulevard 3 AA 626.

When asked if he got paid, Deangelo said Mr. H gave him \$100, which he reluctantly took. 3 AA 581–82. He used the money to buy breakfast for Rontae and JJ (who didn't get paid anything) and his family, to buy a fan, and get a haircut. 3 AA 584–85, 612, 628.

This was the truth. Relying on their promises that, if he told them the truth he wouldn't go to jail and they would protect him and prove his story, Deangelo confessed all of the above to McGrath and Wildemann *before* he was Mirandized. *See* 3 AA 507–90. And, he told them the same thing *after* he was Mirandized. 3 AA 590–634. As to why

he lied to them initially, Deangelo told the detectives that was a story Mr. H came up with and told Deangelo to tell them. 3 AA 624–26.

E. After the interview, Deangelo helped the police gather more evidence

1. Deangelo locates tires and witnesses

During questioning, Detective Vaccaro asked Deangelo if anything happened to the Astro van. 3 AA 624. Deangelo told him the tires were changed. *Id.* When Vaccaro asked him why, Deangelo responded:

Because Mr. H asked if there was any blood or anything on ‘em. I said I’m not sure, I don’t know if there was any blood or anything. He goes, he gave me a hundred dollars, told me to go have all four tires changed and that’s what I did this morning at the car shop.

3 AA 624–25.

After telling them where he got the tires changed, Deangelo told the detectives where he threw away the old tires, which were white-walls. 3 AA 625–26. Two were in a dumpster on Van Der Meer at a tire club, and the other two were in a 7-Eleven dumpster on Civic Center and Las Vegas Boulevard 3 AA 626.

When the interview ended, the detectives had Deangelo take them to the tires. They took two separate vehicles. 1 AA 42. Deangelo rode in the car McGrath was driving. 1 AA 42; 7 AA 1398. There also was “another detective” in the car with McGrath and Deangelo. 7 AA 1398. Wildemann and Detective Long followed in a separate car. *Id.* At each location, they recovered two white-wall tires from the dumpsters. 1 AA 43; 7 AA 1398–99.

After the detectives picked up the four tires, they drove Deangelo to his house. 7 AA 1398. Again, McGrath, another detective and Deangelo were in one car, and detectives Wildemann and Long were following in another. 1 AA 42–43; 7 AA 1398–99.

Deangelo still wasn’t being returned home to be done for the day. Rather, the detectives wanted to pick up Rontae, who was at Deangelo’s house, so they could take him back to the homicide office and interview him. 1 AA 42; 7 AA 1399. Deangelo therefore was not allowed to walk into his house unescorted by detectives. 1 AA 42.¹⁹

¹⁹ There is some confusion on who escorted Deangelo. At Deangelo’s preliminary hearing, it was Long and Wildemann who

Deangelo introduced Rontae to the detectives and told him to go with them and tell them the truth or they were all going to jail. 6 AA 1315–16; 8 AA 1646–47. The detectives did not allow Deangelo to “sit and talk” with Rontae. 8 AA 1647.

The detectives came out of the house with Rontae *and* Deangelo. 1 AA 42. Deangelo got back into McGrath’s car, and Rontae went with detectives Long and Wildemann in their vehicle. *Id.* They went back to the homicide office where the detectives interviewed Rontae. *Id.* After they questioned him, detectives took Rontae and Deangelo back home. *Id.*

When they dropped off Deangelo, Wildemann instructed him to bring “[Jayson] Taoipu to [the homicide] offices for a statement” when he “came in contact with him.” 1 AA 4.

Sure enough, when Wildemann returned to the homicide office the next day (May 21, 2005), he found Deangelo and JJ waiting outside. *Id.* The office was closed because it was a Saturday, so Wildemann had to

escorted Deangelo. 1 AA 42. At trial, McGrath claimed he escorted Deangelo. 8 AA 1646. He further testified that it was he who “saw” Deangelo tell Rontae to tell the truth. 8 AA 1646–47.

let them inside. *Id.* Once in, Deangelo and JJ had to wait “quite a while in the lobby,”—two hours—while Wildemann and Vaccaro got their “notes together and, then, eventually interviewed them.” 1 AA 4–5, 7. JJ’s interview was recorded and used as evidence. 1 AA 5.

2. Deangelo helps capture the shooter Kenneth Counts

While JJ was being questioned, the police were preparing to move on KC. As JJ, was answering questions, McGrath was typing up a search warrant for KC’s residence. 1 AA 42; 8 AA 1648. And it was Deangelo that gave the detectives the ability to do so.

During his interview the day before, Deangelo told the detectives where KC lived and explained in detail how to get there. 3 AA 571–73. He told them KC lived in that house with his wife and children and a bunch of other people, and the types of cars he owned that would be at the house. 3 AA 572.

To confirm Deangelo’s account, McGrath instructed another officer to drive by the described house, survey it, and run the plates of the cars parked outside. The details checked out: the house was in fact KC’s

house. 8 AA 1648. Its address was 1676 E. Street. 7 AA 1412; 8 AA 1648–49.

Based on the information Deangelo provided, the detectives were able to get an arrest warrant for KC and a search warrant for his house. 7 AA 1411–12. Because of the violent nature of the crime, SWAT executed the search warrant on KC’s house. 7 AA 1412; 8 AA 1649. Detectives Wildemann and McGrath, however, participated in the searches. 7 AA 1412; 8 AA 1653.

While they were executing the search warrant on KC’s house at 1676 E Street, Deangelo called Detective Wildemann’s cell phone and told him he was watching the raid at his mom’s house, “literally right across the street.” 7 AA 1412–13. More importantly, Deangelo warned Wildemann they had missed KC, as he had run across the street into another residence. 7 AA 1413. Again based on the information Deangelo provided, the police surrounded the other house — 1677 E Street — while Detective Vaccaro requested a telephonic search warrant. 1 AA 43; 7 AA 1413; 8 AA 1650. Once the detectives got the new warrant, SWAT entered. 7 AA 1413.

SWAT members were in the house for “quite a while.” 7 AA 1414. Eventually they came out with KC. *Id.* KC was sweating heavily and was covered in fiberglass insulation because he had been hiding in the attic “under the insulation.” *Id.* SWAT had to “drop him out of the attic” and taser him because he wasn’t compliant. 7 AA 1414; 8 AA 1659. Wildemann and McGrath then arrested KC for TJ’s murder. 7 AA 1414–15.

3. *The detectives have Deangelo wear a recorder to get incriminating statements from Anabel, Mr. H, and Little Lou*

The detectives “next course” of action was to meet with Deangelo and take all of the other information he had provided to them and “work that towards” getting the other suspects in this case. 1 AA 46. “A method” they used to get the other defendants was to have Deangelo wear a “body recorder” or “interceptive device placed on his body,” which would record conversations. 7 AA 1416–17.

McGrath tried to get one of Metro’s own body recorders, but he couldn’t get in touch with the unit that manages Metro’s equipment. 8 AA 1691. McGrath therefore turned to an acquaintance in the FBI, Special Agent Brent Shields. *Id.* Shields had “a piece of equipment”

McGrath could use, “provided that he [Shields] came with us during the investigation.” *Id.*

On Monday, May 23, 2005, McGrath contacted Deangelo and set up surveillance at Simone’s. 1 AA 46–47; 7 AA 1417; 8 AA 1691.

McGrath told Deangelo to meet him and Agent Shields behind Jerry’s Nugget. 8 AA 1692. After making sure Deangelo did not have any weapons, McGrath and Shields put the recording device on Deangelo. 8 AA 1691–92.

The recording device was in a little pager that they put on Deangelo’s belt. 8 AA 1754, 1756. It did not have an on/off switch. 8 AA 1696. It had to be turned on with a paper clip and then, once it was on, it was on all the time. *Id.* It was a “recording” device — meaning it would record conversations, noise, whatever was going on — but it could not “transmit” what was happening to McGrath and Shields. 8 AA 1691, 1728.

According to the detectives, there was no question Deangelo was working for them. 8 AA 1726. They knew Deangelo’s life was at risk by helping them as he was. 8 AA 1726–27. So, McGrath told Deangelo that, “if something happen[ed] to him inside” Simone’s, he “was to

scream as loud as he can and if he came outside and waived his hands above his head,” then McGrath and Shields would know they needed to “go in and get him.” 8 AA 1691.

McGrath, Shields and Deangelo also discussed strategy, what Deangelo was supposed to do and say to elicit certain responses and to gather evidence against Anabel, Little Lou and Mr. H. 8 AA 1726, 1729–30. For instance, McGrath told Deangelo to tell Mr. H, Anabel and Little Lou that the others involved in this case (i.e. Rontae, JJ and KC) wanted more money “for being there.” 8 AA 1739–40. That of course wasn’t true. 8 AA 1740. It also wasn’t true that KC was threatening Deangelo, *id.*, but Deangelo told Anabel and Little Lou both of these things to elicit responses and gather evidence against them that ultimately proved useful to the detectives. *See e.g.*, 12 AA 2442, 2445–47, 2453, 2458–59. Deangelo then went into Simone’s as instructed. 8 AA 1692.

When he came out, McGrath, Shields and Deangelo met at the Callaway golf place on Las Vegas Boulevard South and Sunset. 8 AA 1692–93. McGrath and Shields got the recording device back from Deangelo, and he gave them \$1,400 and a bottle of Tanqueray gin that

Anabel and Little Lou gave him during the meeting. 8 AA 1693. As the recording indicates, Anabel gave him the money to give to the other defendants because they were allegedly asking for money, and Little Lou gave Deangelo the bottle of Tanqueray so he could put rat poison in the gin and give it to the other defendants to drink. 12 AA 2447, 2458–61

McGrath and Shields took the recording device to the FBI office and downloaded all of the information to a disk. 8 AA 1693–94.

The recording contains incriminating information against Anabel and Little Lou — information about lying to the police, paying Rontae, JJ and KC money to keep quiet about what happened, and their plan to kill those same three. *See* 12 AA 2444–62. The detectives also had the other evidence that was used against Anabel and Little Lou: the Tanqueray bottle and \$1,400. 8 AA 1737.

As to TJ and what they had planned for him, the recording contains the following:

Deangelo: Hey what's done is done, you wanted him fucking taken care of we took care of him.

Anabel: Listen.

Deangelo: Don't worry.

Anabel: Why are you saying that shit, what he [Mr. H]²⁰ really wanted was for him to be beat up, then anything else, _____ mother fucking dead.

...

Deangelo: We were gonna call it quits and fucking KC fucking got mad and I told you he went fucking stupid and fucking shot dude. Not nothing we can fucking do about it.

Anabel: You should have fucking turned your ass around, before this guy . . . knowing that you had people in the fucking car that could pinpoint you, that this motherfucker [TJ] had his wife, you should of mother fucking turned around on the road, don't give a fuck what KC said, you know what bad deal turn the fuck around.

12 AA 2448, 2452. This corroborated what Deangelo said during his interview: that it was never meant for TJ to get shot, the plan was

²⁰ There's no question Anabel is talking about Mr. H. Anabel referred to Mr. H as "Louie." 2 AA 405; 8 AA 1703. That's why right before she says he, meaning Mr. H, wanted TJ beat up not dead, Anabel says that Louie had gone to see an attorney "not just for him but for [Deangelo] as well." 12 AA 2448. And that, if it got to the point where they needed an attorney, "you [Deangelo] and Louie are gonna have to stick together." *Id.*

always just for TJ to get beat up, but KC went off on his own and shot him anyway. *See, e.g.*, 3 AA 101.

After listening to the recording, McGrath decided to send Deangelo back into Simone's to gather more evidence against Anabel and Little Lou and if possible against Mr. H and any other possible suspects. 1 AA 48; 8 AA 1695, 1729, 1739. So, on Tuesday, May 24, 2005, McGrath set up surveillance at Simone's to make sure Mr. H was inside. 8 AA 1695. He then contacted Deangelo, met with him again to discuss strategy (albeit not as much as the first time), put the recording device back on him, and sent him back into Simone's to get more evidence. 1 AA 48; 8 AA 1694–95, 1726, 1729.

Again, when Deangelo came out of Simone's, he gave the recording device to McGrath and Shields. 8 AA 1695–96. He also gave them \$700 or \$800 that Anabel or Little Lou had given him after telling them KC was threatening him and his family and that he needed to get his wife and kid out of town. 8 AA 1704; 12 AA 2442. This of course wasn't true. KC had already been arrested and was in custody. 8 AA 1739–40.

Like they did with the first recording, McGrath and Shields downloaded the information and put it on a disk. 8 AA 1696–97, 1736–

37. That recording also contains incriminating evidence but, once again, Anabel emphasizes that the plan was not to kill TJ; it was to beat him up. 12 AA 2442–43.

4. *Detectives arrest Anabel and Little Lou — and Deangelo*

Because of Deangelo's help, the detectives were able to bring in JJ and KC. Now they were able to go further. With the recordings and other evidence Deangelo helped them collect, the detective were able to arrest (and later, charge and convict) Anabel, Little Lou and eventually Mr. H. 1 AA 48–49; 7 AA 1418; 8 AA 1730, 1736–38. But it didn't end with them.

We know Deangelo had developed a dependent relationship on the Hidalgos. 11 AA 2287. They took care of him and his family and made him feel secure. *Id.*

The Hidalgos knew this and used it (and Deangelo) as much as possible to their advantage. Nowhere is that more evident — at least among the documents in the record — than in the May 23, 2005 recorded conversation Deangelo had with Anabel and Little Lou. Anabel repeatedly reminded Deangelo how important it was that they stick

together and stick to their story because, if “Louie” (Mr. H) went to jail, “[e]very one of us fucking loses.” 12 AA 2448. The Palomino Club would be gone, Simone’s would be gone, and anybody who could take care of Deangelo’s family would be gone. 12 AA 2450. Mr. H was “the only one” that could “take care of everybody . . . He’s it.” *Id.* If Deangelo went to jail, Anabel and Mr. H would hire an attorney to get him out, but if they (the Hidalgos and Anabel) went to jail Deangelo could “kiss everything fucking goodbye, all of it . . . your kid’s salvation and everything else . . . It’s all gonna depend on you [Deangelo].” 12 AA 2255–56. Thus, Deangelo had been willing to do what they asked of him, 11 AA 2287, until the detectives conned him into feeling that same sense of security, protection and loyalty in them.

The detectives told Deangelo that helping them was “probably the greatest thing” he’d ever done for his family. 12 AA 2508. They promised Deangelo they would protect him (“one hundred percent”) and do everything to prove what he told them. 3 AA 541–42. They promised him he was going home, not to jail, because they wanted to keep their word and do as “minimal” as possible to Deangelo. 3 AA 541–42, 544–45, 560, 581.

Deangelo therefore submitted to a different authority; the police. He was acting for them, and as such was willing to do dangerous, unfavorable acts for the police (like bring in Rontae and JJ, help them get KC, wear a recording device on two separate occasions, and help them get Anabel and the Hidalgos), since he was now dependent on them. 11 AA 2285–86.

In exchange for all he did, the detectives arrested Deangelo, 8 AA 1738, charged him with first-degree murder, and sought the death penalty against him. Like the Hidalgos and Anabel, the detectives used Deangelo for their advantage, lied to him, and violated the trust he placed in them to protect him and help him.

For the reasons stated below, Deangelo's convictions and sentences should be overturned.

V.
ARGUMENT

A. Deangelo's statement to the police was coerced and is therefore inadmissible

1. The promise of leniency

Before Deangelo said a word implicating himself in TJ's death, he sought reassurance from the detectives interrogating him. They had accused him of lying. He told them, "I'm just not trying to get in trouble." 12 AA 2490. The detectives pressed him further, and again Deangelo responds, "I just, I don't wanna get in trouble, you know what I'm saying, I got a kid at home." 12 AA 2491. Deangelo said he wanted protection, and for a moment, the detectives thought he was concerned about his physical safety. *Id.*

It is then that Deangelo made his primary concern absolutely clear: "[M]y question is if I tell you guys what happened, am I going to jail?" 12 AA 2491. Of course, at this point, how can the detectives promise him anything? They don't know if Deangelo was just one of their potential "witnesses [or] the person that did this." *Id.* They

shouldn't be able to tell Deangelo that he isn't going to jail without knowing what he had done.

But they did.

In response to Deangelo's question about whether he's going to jail, the next words out of McGrath's mouth were a promise:

Alright. Here's this. Here's this, okay. Look at me. You tell me what happened. You tell Detective Wildemann what happened, alright. You truthfully tell us what happened. I'm gonna take you back. *I'm gonna promise you that.* I'm gonna take you back and if you tell us the truth, right, we're gonna, we'll do everything to prove your story is the truth

12 AA 2491–92 (emphasis added).

With Detective McGrath's promise in hand, Deangelo told them the truth; he confessed.

2. *Standard of review*

Under the Due Process Clause of the Fifth Amendment and the Fourteenth Amendment, a confession is only admissible “if it is made freely and voluntarily, without compulsion or inducement.” *Passama v. State*, 103 Nev. 212, 213–14, 735 P.2d 321, 322–23 (1987). “To determine the voluntariness of a confession, the court must consider the

effect of the totality of the circumstances on the will of the defendant.” *Passama*, 103 Nev. at 214, 735 P.2d at 323 (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 226–227 (1973)). “The question in each case is whether the defendant’s will was overborne when he confessed.” *Id.* (citing *Schneckloth*, 412 U.S. at 225–26).

3. *The detective’s promise induced Deangelo to confess*

In the totality of the circumstances of this case, certain things stand out. Among them is Deangelo’s low IQ and lack of sophistication. Add to that his personality disorder, and his unfamiliarity with the police. Under established case law, these are all relevant factors. *See, e.g., Passama*, 103 Nev. at 214, 735 P.2d at 323.

But the promise McGrath made to Deangelo is “the crucial aspect of the interrogation.” *Cf. id.* at 215, 735 P.2d at 323. Deangelo made clear that before he could say anything he had to know if he would go to jail. Only when he had assurances that he wasn’t would he speak.

This is what this Court has condemned as an extrinsic falsehood. In *Sheriff v. Bessey*, the appellant was challenging the voluntariness of his own confession. 112 Nev. 322, 324, 914 P.2d 618, 619 (1996).

Officers in the case had presented the appellant with a fake lab report, stating it proved he had committed sexual assaults. *Id.* After being presented with the false report, the appellant inculpated himself in the crimes charged. *Id.* The question for this Court was whether the false report was enough, under the circumstance, to make the appellant's incriminating statements involuntary.

Ultimately the answer was no in that case. *See id.* at 329, 914 P.2d at 622. But the reason why is what's important here. In *Bessey*, this Court drew a line between intrinsic falsehoods used to induce a confession, and extrinsic falsehoods. *Id.* at 326, 914 P.2d at 620. *Intrinsic* falsehoods are things like misrepresentations about the existence of eyewitnesses, the strength of physical evidence, or the presence of other forensic evidence tying the defendant to a crime. *Id.* These falsehoods are intrinsic because they touch on and concern the facts of the offense. *Id.* When they are employed, Courts only consider them as part of the totality of the circumstances. *Id.*

In contrast, *extrinsic* falsehoods are lies that go beyond the facts of the case and the strength of the evidence. Examples of such are “assurances of divine salvation upon confession, promises of mental

health treatment in exchange for confession, *assurances of more favorable treatment rather than incarceration in exchange for confession*, [and] misrepresenting the consequences of a particular conviction.” *Id.*, 914 P.2d at 620–21 (emphasis added). When police employ extrinsic falsehoods there is no need to weigh the totality of the circumstances; they are considered “coercive per se” because they are “reasonably likely to procure an untrue statement or to influence the accused to make a confession *regardless of guilt*.” *Id.* (emphasis added).

Similarly, other courts have consistently found that confessions are not voluntary when they hinge on promises of leniency. *See, e.g., Lincoln v. State*, 882 A.2d 944, 958 (Md. Ct. Spec. App. 2005) (“[W]hen a confession is preceded or accompanied by threats or a promise of advantage, those factors are transcendent and decisive, and the confession will be deemed involuntary unless the State can establish that such threats or promises in no way induced it.”) (internal quotations omitted); *Conner v. State*, 982 S.W.2d 655, 661 (Ark. 1998) (“If a police official makes a false promise which misleads a prisoner, and the prisoner gives a confession because of that false promise, then the confession has not been voluntarily, knowingly and intelligently

made.”); *see also* *People v. Westmoreland*, 213 Cal.App.4th 602, 612–14 (2013) (false promise of leniency renders a confession involuntary); *Abram v. State*, 606 So.2d 1015, 1038 (Miss. 1992) (“A confession made after the accused has been offered some hope of reward if he will confess or tell the truth cannot be said to be voluntary.”).

Detective McGrath’s promise was an extrinsic falsehood. It was more than a promise of leniency, though. It was a promise that there would be no jail at all if Deangelo told the truth. And it wasn’t offered just once. Later on, Deangelo asks again, “Am I, am I gonna be able to go home.” 12 AA 2506. Detective McGrath confirmed what he had meant, saying, “Yeah. I’m going to keep my word to you, okay.” 12 AA 2507.

As an extrinsic falsehood, there is no need to weigh the totality of the circumstances. It is coercive per se. But even if that point were in doubt, the transcript still demonstrates that Deangelo’s incriminating statements must be ruled involuntary. Because of his fear of incarceration and his desire “to go home and be with [his] family,” *see* 12 AA 2508, Deangelo didn’t want to say anything. But his reluctance was quickly overcome with a promise of leniency.

Deangelo's statement at the homicide office should have been suppressed. It was obtained in violation of his due process rights, and its erroneous admission so tainted his trial that no harmless error could be found. Deangelo's convictions therefore must be reversed.

B. Deangelo's statement to the police was taken in violation of *Miranda* because, while not formally under arrest, he was nevertheless "in custody" under the law

Although Deangelo was not under "formal" arrest, under the conditions that the interrogation took place, he was nevertheless in custody. Because he was in custody, *Miranda* warnings were required. The failure to give them *before* Deangelo made a confession renders his statement inadmissible.

1. Standard of review and the law regarding custody

This Court reviews a trial court's determination of custody status *de novo*. *Casteel v. State*, 122 Nev. 356, 361, 131 P.3d 1, 4 (2006).

The Fifth Amendment privilege against self-incrimination renders inadmissible a suspect's statements made during custodial interrogation unless the police first provide a *Miranda* warning. *State v. Taylor*, 114 Nev. 1071, 1081, 968 P.2d 315, 323 (1998) (citing *Miranda*

v. Arizona, 384 U.S. 436, 479 (1966)). “‘Custody’ for *Miranda* means a formal arrest *or* restraint on freedom of movement of the degree associated with a formal arrest.” *Rosky v. State*, 121 Nev. 184, 191, 111 P.3d 690, 695 (2005) (emphasis added)

If no formal arrest occurs, courts must inquire whether a reasonable person in the suspect’s position would feel “at liberty to terminate the interrogation and leave.” *Id.* (citing *Thompson v. Keohane*, 516 U.S. 99, 112 (1995)). Courts answer this question by objectively looking at “all of the circumstances surrounding the interrogation.” *Rosky*, 121 Nev. at 191, 111 P.3d at 695 (citing *Stansbury v. California*, 511 U.S. 318, 322 (1994)). Pertinent factors are:

(1) the site of the interrogation, (2) whether the investigation has focused on the subject, (3) whether the objective indicia of arrest are present, and (4) the length and form of questioning.

Id., 121 Nev. at 192, 111 P.3d at 695 (internal citation omitted).

2. *In light of all the circumstances, Deangelo was in custody*

When all of these factors are considered, they point to one conclusion: a reasonable person in Deangelo’s position would *not* feel at

liberty to terminate the interrogation and leave. Thus, Deangelo was “in custody” for purposes of *Miranda*.

a. The intimidating site of Deangelo’s interrogation

Although they could have questioned Deangelo at the Palomino Club, the detectives took Deangelo to the homicide office and questioned him there because it was “more intimidating.” 7 AA 1481–82.

And intimidating it was. The interview room was very small, maybe six feet by six feet. 1 AA 169; 7 AA 1485; 12 AA 2578–80 (pictures of the room). There was only one door into the room, and there was a table against on wall. The detectives sat Deangelo at the table with his back against the wall. *Id.* Between Deangelo and the door were the table, Wildemann and McGrath. *Id.* 1 AA 170. And the room was uncomfortably hot. 12 AA 2508, 2535, 2538. Detective Wildemann testified that a reasonable person would feel “pretty intimidated” in that situation. 7 AA 1487.

b. The investigation focused on Deangelo as a suspect

There’s no question the investigation was focused on Deangelo when they questioned him. 1 AA 5–6; 7 AA 1386–87.

The detectives started on Deangelo's trail based on evidence they found at the crime scene: Palomino Club flyers, cell phone logs, statements from Paijit. 6 AA 1188, 1190–91, 1200, 1207, 1227; 8 AA 1641. And when detectives approached Mr. H at the Palomino Club, they said they were investigating “one of his employees” and asked for records regarding Deangelo. 7 AA 1389–90.

When detectives brought Deangelo in, it was not merely to find out what he knew. He was the focus of their investigation.

c. Objective indicia of arrest were blatant and prevailing

Although not formally under arrest, there is plenty and strong indicia of arrest in Deangelo's case. This Court has provided the following objective indicia of arrest:

- (1) whether the suspect was told that the questioning was voluntary or that he was free to leave;
- (2) whether the suspect was not formally under arrest;
- (3) whether the suspect could move about freely during questioning;
- (4) whether the suspect voluntarily responded to questions;
- (5) whether the atmosphere of questioning was police-dominated;
- (6) whether the police used strong-arm tactics or deception during questioning; and
- (7) whether the police arrested the suspect at the termination of questioning.

Rosky, 121 Nev. at 192, 111 P.3d at 695–96 (citing *State v. Taylor*, 114 Nev. 1071, 1082 n. 1, 968 P.2d 315, 323, n. 1 (1998)). Not all factors have to be present for a finding of custody, as factor number two makes apparent. *Taylor*, 114 Nev. at 1082 n. 1, 968 P.2d at 323 n. 1.

Voluntary questioning and freedom to leave

Deangelo was never told he was free to leave. Instead, when the issue became critical, he was told the opposite. Deangelo asked numerous times if he was going to jail and the detectives responded that *if* he told them the truth, they would take him home. In other words, unless he answered questions and told them what they wanted to know, the detectives were not going to allow him to leave. 12 AA 2491–93, 2507, 2510, 2537, 2573. Indeed, Deangelo fearfully asked if he was going to jail because he understood he could not just walk out of the interrogation room. Video Ex. 243 at 22:05.

Significantly, even after the interrogation “ended,” Deangelo wasn’t sent on his way. First, detectives took him around town to pick up the discarded van tires. 1 AA 42–43; 7 AA 1398–99. Then detectives took Deangelo to his home, where they picked up Rontae. 7 AA 1398. But he wasn’t allowed to enter his home unescorted or talk to Rontae. 1

AA 42–43; 8 AA 1647. In fact, he didn’t even remain at home. His was instead taken back to the homicide office, while they interrogated Rontae. 1 AA 42.

Wildemann even testified at trial he was “not sure” they would have allowed Deangelo to stop the interrogation, get up, and go home. 7 AA 1487–88.

Deangelo did not “voluntarily” respond to questions

Deangelo responded to the detectives’ questions, but he did not do so “voluntarily.” The question of voluntariness must be viewed with an understanding of Deangelo’s low IQ and dependent personality disorder. 11 AA 2271–2317. For example, his decision to even talk to police wasn’t his own. Instead, he was told to do so by Mr. H, his boss and father-figure. *See, e.g.*, 12 AA 2552-57.

And, as argued above in section A, Deangelo’s responses were not voluntarily given. They were the product of coercion — extrinsic promises of leniency or no punishment at all in exchange for Deangelo’s full confession.

No freedom to move

Deangelo could not move about freely during questioning. He was boxed into a corner of a small room with two other grown men. His back was against the wall and a table took up what precious little room was left. When he was questioned, two detectives always sat between him and the door. Whenever the detectives left, they'd leave Deangelo to sit, usually with the door closed.

Police-domination, strong-armed tactics, and deception during questioning

The atmosphere in the small interrogation room could not be more police dominated. Detectives called Deangelo a liar, commanded him and contradicted him. *See, e.g.,* 12 AA 2510–11, 2537. They took away his cellphones. They told him to stay put, not to try to contact anyone, not to leave the room. In short, they used every means to show Deangelo they were in control.

Throughout the interview, the detectives used strong-arm tactics to push Deangelo to answer their questions. They alternately called Deangelo a liar then insisted he tell the truth. At one point, a detective told Deangelo; “we talked about this and we said you need to tell the

truth you looked me in the eye and . . . said you were gonna tell the truth.” 12 AA 2489–90. A minute and a half after that, they again demanded “You truthfully tell us what happened.” 12 AA 2492. They then repeated three times “the whole truth, the whole truth, the whole truth.” 12 AA 2493.

A few minutes later, the detectives said Deangelo was “trying to minimize” and threatened him that “there is going to come a point where we get tired of talking about it.” 12 AA 2508. After a few minutes more, the detective reminded Deangelo that he would stop if he smelled “bullshit,” and that he “smelled a lot earlier.” 12 AA 2511. When Detective Vaccaro introduced himself, he started by explaining that he’d heard a lot of Deangelo’s statements and “I’m not buying your story right now.” 12 AA 2537. Vaccaro went on to mock and dig at Deangelo for thirty minutes. He even straight-out described his attitude towards Deangelo as “confrontational,” saying “I’m not gonna patty-cake you.” 12 AA 2540–41. He then warned Deangelo:

I don’t want you to bull shit me.

. . .

Because I’m not gonna, I’m not gonna stand here and listen to it and if your account of this has one single

hole in it, I swear I'm gonna jam it down your throat.
Do you understand?

12 AA 2541.

As Deangelo started retelling his story, the hard ball tactics
continued:

So you want us to believe then that Mr. H and his, ah,
assistant, Annabelle, have, have gotten enough bad
publicity about the club that they call you and
whatever punks you can bring in to go and do
something to somebody?

...

[W]hy do you guys need to hold hands to go get the
weed?

...

Who was gonna beat him up? Uh, how big is T.J.? T.J.
looks like he can whip your ass.

...

Everybody talking shit to each other and you don't see
the gun until you get out there, so stop lying. Tell me
when you saw the gun earlier than that.

...

So he's worried about you having long hair but doesn't
mind asking you to go out [and] put some lumps on
somebody, right? . . . And Annabelle doesn't mind
calling you and, and telling you go ahead and kill him
if he's out there by himself, right? You must be [a]
heck of a guy to them.

12 AA 2542, 2545–47, 2554.

Police domination occurred in sneaky ways even when they weren't questioning Deangelo. When Deangelo asked for a smoke, Detective McGrath told him, "We will see what we can do to try and find one." 12 AA 2507. Instead, they just left him to stew. And throughout the interrogation, Deangelo's suggestibility was on full display. At each break, they told Deangelo to have a drink of water, and each time, he complied. *See* Video Ex. 243 at 22:07 & 22:44. And before the final break, Vaccaro told Deangelo to drink some water and loosen his tie. Sure enough, as soon as the door closed, Deangelo drank some water and loosened his tie. Video Ex. 243 at 23:43.

This behavior and the accompanying statements were pressure tactics, pure and simple, used to strong-arm Deangelo as they wished. But if this weren't enough, the detectives also repeatedly employed deception to get details from Deangelo.

At the beginning, they aggressively confronted him about denying going to the lake. They told him they had records from cell phone towers that located him at the lake. 12 AA 2488. They possessed no such records. Likewise, detectives threatened to use a gun powder test on his

hands, despite knowing that such a test would be worthless at that point. 8 AA 1763–65.

The most damning and damaging deception, though, was the repeated promise that Deangelo would not go to jail. It's how the detectives got Deangelo talking. 12 AA 2491–92. And it's how they kept him going when he grew worried along the way. 12 AA 2506–09, 2437, 2573. They strung him along with lies to get what they wanted.

The atmosphere of domination, strong-arm tactics, and deception all support a finding that Deangelo was in custody.

Formal arrest is explicably absent

Deangelo was not formally arrested *before* he was questioned.

Deangelo was arrested *after* he was interrogated, but not immediately afterwards. Why? Because the detectives wanted to use Deangelo to gather more evidence against others by bringing in other witnesses and wearing a wire. Had Deangelo been arrested for murder, none of that would have been possible. *See, e.g.*, 9 AA 1936–37. But as soon as he was no longer useful, Deangelo was in cuffs.

d. The length and form of questioning

The last factor this Court must consider is the length and form of questioning. It, too, supports a finding that Deangelo was in custody.

Starting at around 9:30 p.m., Deangelo was interrogated over nearly two and a half hours.²¹ 12 AA 2463, 2577. The questioning was intense, with detectives in tag-team fashion pressing Deangelo for answers and accusing him of lying and minimizing his involvement. Deangelo was denied permission to talk to anyone or get up for a drink.

This and all of these tactics involve a hostile form of questioning causing any reasonable person in Deangelo's position—much less a person of low intelligence and a dependent personality—to not feel “at liberty to terminate the interrogation and leave.” *Rosky*, 121 Nev. at 191, 111 P.3d at 695 (citing *Thompson*, 516 U.S. at 112). Despite the lack of a formal arrest, Deangelo was still in custody during the interrogation. This required the detectives to provide him with *Miranda* warnings before, *not* toward the tail-end of the interrogation. Deangelo's statement to the detectives should have been suppressed.

²¹ McGrath testified at the preliminary hearing that they questioned Deangelo for four hours. 1 AA 41.

3. *The Miranda warning given at the tail-end of the interrogation did not cure the violation of Deangelo's rights*

The trial court failed to enter any findings of fact and conclusions of law in support of its decision to deny Deangelo's motion to suppress, so it's impossible to say for certain on what grounds it based its decision. However, if the court's decision was based on *Miranda* warnings that were given *after* Deangelo was interrogated for more than 90 minutes and had confessed, the district court erred.

a. *The Miranda warning were ineffective because Deangelo had already implicated himself*

In *Missouri v. Seibert*, 542 U.S. 600 (2004), the Supreme Court recognized that "the technique of interrogating in successive, unwarned and warned phases raises a new challenge to *Miranda*." 542 U.S. at 609. Police may choose to question a suspect first with the purpose "to render *Miranda* warnings ineffective by waiting for a particularly opportune time to give them, after the suspect has already confessed." *Id.* at 610.

When a person has been subjected to custodial interrogation, but only given *Miranda* warnings midway through, the question becomes "whether it would be reasonable to find that in these circumstances the

warnings could function ‘effectively’ as *Miranda* requires.” *Seibert*, 542 U.S. at 611.

Could the warnings effectively advise the suspect that he had a real choice about giving an admissible statement at that juncture? Could they reasonably convey that he could choose to stop talking even if he had talked earlier? For unless the warnings could place a suspect who has just been interrogated in a position to make such an informed choice, there is no practical justification for accepting the formal warnings as compliance with *Miranda*, or for treating the second stage of interrogation as distinct from the first, unwarned and inadmissible segment.

Seibert, 542 U.S. at 611.

The detectives interrogated Deangelo in the pattern that had just been condemned by *Seibert*. Deangelo was interrogated extensively for 90 minutes, during which time he first gave the story Mr. H had instructed him to give, and then, after being assured he wouldn’t go to jail, gave a full confession. Only then was Deangelo advised of his rights. Then, to complete the *Seibert* pattern, Detective Vaccaro told Deangelo that he didn’t believe his story, forcing Deangelo to confess anew. Yes, some new details were added, but they were just sides to the main course: Deangelo’s goose was already cooked.

Thus delayed, the *Miranda* warnings were completely ineffective. Under *Seibert*, anything Deangelo said, both before and after, should have been excluded.

b. Deangelo did not knowingly or voluntarily waive his Miranda rights

Before a court may introduce statements made by a suspect in custody and under interrogation, “[t]he government has the burden of proving that the defendant has knowingly and voluntarily waived his *Miranda* rights.” *United States v. Heldt*, 745 F.2d 1275, 1277 (9th Cir. 1984) (internal citations omitted). Although “the State need prove waiver only by a preponderance of the evidence,” *Colorado v. Connelly*, 479 U.S. 157, 168 (1986), “[t]his burden is great” and trial courts “must indulge every reasonable presumption *against* waiver of fundamental constitutional rights.” *Heldt*, 745 F.2d at 1277 (emphasis added). The prosecution satisfies their burden only if it makes two showings:

First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the “totality of the circumstances surrounding the interrogation” reveal

both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived.

Moran v. Burbine, 475 U.S. 412, 421 (1986). Under the totality of the circumstances in this case, Deangelo did not knowingly or voluntarily waive his *Miranda* rights, once they were eventually given.

Deangelo does not possess a requisite level of comprehension that supports the waiver of an abstract right, especially in stressful situations. According to Dr. Roitman, Deangelo “lacks depth in his ability to think and communicate and understand.” 11 AA 2277.

Deangelo’s IQ is 82, placing him among the bottom 20% of the population, and that figure itself is inflated by Deangelo’s uncharacteristic verbal skills. 11 AA 2277–78. Consequently, Deangelo “doesn’t understand some subtleties and abstractions, nuances, you know, the secondary meaning of things.” *Id.*

Deangelo’s interrogation demonstrates his difficulty with abstract concepts. Throughout, when faced with an abstract question, Deangelo answered concretely. When asked if he “had a goal in mind” in calling TJ on the night of the murder, Deangelo answered, apparently attempting to explain some of the *victim*’s goals, “TJ had this dream

about opening up a strip club” 12 AA 2473; *see also* Video Ex. 243 at 21:31. Later Deangelo was asked, “How did you pick K.C?” Deangelo answered, “We went to his house and picked him up.” *Id.* And every time a detective suggested Deangelo might be culpable or that he had rights, Deangelo responded concretely, “does that mean I am going to jail?” *Id.* at 21:47, 22:05, 22:06, 23:00.

Added to this mix is dependent personality disorder. Deangelo’s disorder makes him pathologically dependent on others: he makes no decisions on his own unless given a set of rules and another’s authority to act on them. 11 AA 2281–82, 2286. So, when interrogated, Deangelo depended on the detectives’ authority to resolve the problems of the criminal case he faced. *See* 11 AA 2285, 2305. According to Dr. Roitman, he even took positions potentially harmful to himself to serve the police because of his disorder. 11 AA 2305–09.

A defendant’s mental health and ability are both highly relevant factors in determining the validity of a waiver under the totality of the circumstances. *See Brown v. Horell*, 644 F.3d 969, 979 (9th Cir. 2011); *Sowell v. Bradshaw*, 372 F.3d 821, 831 (6th Cir. 2004); *Tomarchio v. State*, 99 Nev. 572, 575, 665 P.2d 804, 806 (1983) (totality of the

circumstances used to determine validity of waiver). And under the circumstances, Deangelo's waiver was neither knowing nor voluntary.

Because of Deangelo's limited mental capabilities — his inability to grasp abstract concepts — he could not understand the meaning and significance of the *Miranda* rights, even less the consequence of waiving them. This renders his waiver unknowing.

Likewise, Deangelo's waiver was not voluntary. His personality disorder renders him incapable of asserting himself and bucking authority figures. Combine this disorder with the situation in which the supposed waiver took place: a hot, cramped room, under pressure from police officers, after 90 minutes of questioning, and all the rest. Even a person without Deangelo's disorder would be under intense pressure to waive his rights. With his disorder, Deangelo had no chance.

Relevant, too, is the cavalier, misleading fashion in which the *Miranda* warnings were actually given. It is reflected in how Detective Vaccaro broached them. He told Deangelo, "I gotta tell you that I'm not buying your story right now and why I'm telling you that is because I wanna tell you about your rights." 12 AA 2537. In other words—I'm not telling you your rights because you need to hear them, but because I

think you're lying. This same sentiment is expressed in Vaccaro's next statement: "And this is very serious right now. I want you to understand that because I wanna tell you your rights, that it's probably in your best interest right now for you to clear this matter up with us." 12 AA 2538. And the consequence of speaking is expressed in an unusual way: "[A]nything you say *could possibly* be used against you." *Id.*

Taken in abstract, Detective Vaccaro's approach is already troubling. But placed in the context of Deangelo's interrogation, Vaccaro's approach is a travesty.

First, Deangelo has already been told repeatedly that if he tells the truth, he will be fine. He'll be going home, not to jail. *See* 12 AA 2491–92, 2506–07. But the detectives repeatedly threaten to yank that lifeline out of reach by telling Deangelo that they believe he is lying. *See, e.g.,* 12 AA 2510–11 ("I'm gonna stop you if, if I'm startin' to smell bull shit, okay? . . . I'm gonna stop you because I smelled a lot earlier."). Then that pressure is cranked up to eleven. Detective Wildemann brings in the "boss" Vaccaro, the guy "so packed with experience that . . . he's got agencies from around the country calling him on stuff." 12 AA

2535–36. And right off the bat, the “boss” Vaccaro pointedly tells Deangelo that he doesn’t buy his story.

So, when Vaccaro tells Deangelo his rights — “[j]ust like you see people on T.V.” — he’s implying that Deangelo needs them because he’s not telling the truth, not because he’s incriminating himself. *See* 12 AA 2537. And when Vaccaro warns what Deangelo says “could possibly” be used against him, he is implying that if they believe he is lying, the promise they gave him would go away.

The point is that when the detectives finally gave the *Miranda* warnings to Deangelo, they did so in a way that implied that they were only necessary because Deangelo’s promise was in jeopardy. That was Deangelo’s understanding and concern, too. When the *Miranda* rights were brought up, he asked, “Does this mean that I am going to jail?” 12 AA 2537. Detective Vaccaro dodged the question: “No, I did not say that.” *Id.* Deangelo’s same worry, and Vaccaro’s same evasion were repeated 35 minutes later when the interview was wrapping up and Vaccaro asked Deangelo to sign a waiver form.

Deangelo: “Does this mean that I’m going to jail?”

Vaccaro: “No, it doesn’t. At any point in there does it

say you are going to jail?”

Deangelo: “No, sir.”

12 AA 2573.

The combination of Deangelo’s mental condition, the purposefully stressful atmosphere in the interrogation room, and the misleading *Miranda* warnings render any waiver unknowing and involuntary. Even if the *Miranda* warnings were effective despite *Seibert* — which they’re not — the warnings aren’t even effective standing on their own. Again, Deangelo’s statement should have been suppressed.

C. The recordings Deangelo created for the police should not have been admitted against him

After Deangelo gave his statement to the police, and after he helped them take KC into custody, the police approached him once again. The police wanted to take Deangelo up on his plea to prove his relative innocence by wearing a recording device. Deangelo, always eager to help, agreed.

Of course, the police were very much not interested in proving Deangelo’s innocence. They were interested in building cases against others. In that, they had some success. On two consecutive days,

Deangelo wore a wire, and through his probing, managed to record others implicating themselves in TJ's murder.

However, when Deangelo was finally brought to trial, the recordings he was directed to make were used against him. But the introduction of this evidence was erroneous. It entailed egregious violations of multiple rules of evidence.

These errors are not obscure technicalities. They are *plain* errors, obvious problems inherent in the very nature of the recordings. By having Deangelo seek out and egg on incriminating statements from others, and then using the resulting recordings against Deangelo, the conflict with the rules of evidence is the State's own creation.

Beyond that, the admission of the recordings violated Deangelo's constitutional right to due process and his right not to testify.

The admission of the recorded statements was not inconsequential. Because of the emphasis placed upon them, the erroneous admission of the recordings affected Deangelo's substantial rights, requiring that his convictions be reversed.

1. *Admitting the recordings broke several rules of evidence*

Upon casual consideration, the evidentiary problems with using the recordings against Deangelo are quite visible. Each problem, each separate violation of the rules of evidence, is enough to exclude the recordings. Together they stand for a serious breakdown in the adjudicatory process.

a. Standard of review

Generally speaking, a district court's decision to admit or exclude evidence is reviewed for manifest error. *See, e.g., Baltazar–Monterrosa v. State*, 122 Nev. 606, ___, 137 P.3d 1137, 1142 (2006).

Of course, if there is no objection, for example, when evidence is admitted, then this Court will review only for “plain error.” *Id.* During plain error review, this Court must determine whether any error occurred, and, if so, whether it was “plain” or “clear.” *Id.* If such plain error, exists, reversal is appropriate if that error affected a defendant's substantial rights. *Id.* An error affects a defendant's substantial rights if that error was prejudicial. *See Gallego v. State*, 117 Nev. 348, 365, 23 P.3d 227, 239 (2001) abrogated on other grounds by *Nunnery v. State*, 127 Nev. ___, ___ n. 12, 263 P.3d 235, 253 n. 12 (2011); accord *United*

States v. Olano, 507 U.S. 725, 734–35 (1993) (cited approvingly by *Gallegos*).

b. The recordings were not relevant

The first problem is the simplest: the recordings are not relevant, and thus should not have been admitted. Relevant evidence is that which has “any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable.” NRS 48.015. If evidence is not relevant, it is not admissible. NRS 48.025(2).

The recordings were not Deangelo’s effort to explain his role in TJ’s death. Deangelo was not bragging about what he had done, or trying to excuse himself. Instead, at the direction and under the tutelage of the homicide detectives, Deangelo hoped to provoke others into exposing their culpability through subterfuge. Throughout the recordings, there is no sign where truth ends and where exaggeration and outright lies begin.

This flaw, if it can be called just that, is plain. The recordings do not help to determine Deangelo’s culpability, just the culpability of

others. They were irrelevant. For this reason, the recordings should not have been admitted as evidence in this case.

c. The recordings probative value was substantially outweighed by the dangers of unfair prejudice and confusion of the issues

Even if there were some probative value in the recordings, whatever minimal value they have is grossly outweighed by the danger of unfair prejudice. NRS 48.035(1). “Evidence is ‘unfairly’ prejudicial if it encourages the jury to convict the defendant on an improper basis.” *Holmes v. State*, 129 Nev. ___, 306 P.3d 415, 420 (2013) (citing *State v. Eighth Judicial Dist. Court (Armstrong)*, 127 Nev. ___, 267 P.3d 777, 781 (2011)).

Likewise, the supposed probative value of the recordings is grossly outweighed by the recordings’ tendency to confuse the issues. NRS 48.035(1).

When Deangelo made the recordings, he played his part in the detectives’ scheme well. He accused KC of making threats on his life. 12 AA 2445–46. He convinced Anabel to fork over more money to keep KC pacified for the moment. 12 AA 2446. He expressed worry that Rontae and JJ were going to rat on him and KC to work out deals. 12 AA 2452–

53. He pretended to agree with Little Lou's plan to kill those two witnesses to TJ's death. 12 AA 2453. He tried to duck responsibility before Anabel and Little Lou by claiming he was high. 12 AA 2457.

But all of these statements were fabrications, made only to provoke Anabel and Little Lou into incriminating statements. For example, at the time of the recording, KC had already sat in jail for two days, in large part due to Deangelo's help. *See* 8 AA 1705–06, 1740. And by this time, Deangelo had already told Rontae to tell the police what had happened. 8 AA 1730.

In short, Deangelo's statements are an unmapped mix of truth and falsity. Nevertheless, it was left to the jury to pick through that mix unguided and use it to determine Deangelo's culpability. That leads to two related and interconnected dangers.

First, Deangelo's statements encouraged the jury to convict him on an improper basis. Deangelo told audacious and inflammatory lies to induce statements and help the police. He even evinces a willingness to participate in Little Lou's plan to kill witnesses. Of course, this was feigned, but there was no effort to explain to the jury just what was

what. It's essentially the equivalent of admitting other-bad-act evidence, except all of these other acts were a pretense.

Second, the recordings confused the issues for the jury. Lies and truth were presented side-by-side and without distinction. New faux-conspiracies were added into this muddle. This last part is particularly damning as this Court has already condemned mixing uncharged, irrelevant conspiracies into a trial as improper and confusing. *See Fields v. State*, 125 Nev. 776, ___, 220 P.3d 724, 728–30 (2009).

Because the recordings are unfairly prejudicial and because they confuse the issues, it was plain error to admit them.

d. The recordings are inadmissible hearsay

For out-of-court statements to be admissible, they must either be non-hearsay or fit under one of the exceptions to the hearsay rule. *See, e.g.*, NRS 51.025–.065. The recordings do not meet any of the requirements for admission.

As they stand, the only tenable way the recordings are admissible are under the definitions of non-hearsay. Specifically, Deangelo's statements on the recordings would have to be admissions of a party opponent. NRS 51.035(3)(a). The statements of Anabel and others

would only be admissible as statements of coconspirators “during the course and in furtherance of the conspiracy.” NRS 51.035(3)(e). The statements on the recordings do not fit into either category.

First, Deangelo’s statements on the recordings are not his “own statement[s], in either [his] individual or a representative capacity.” *See* NRS 51.035(3)(a). When Deangelo made the recordings, he was acting as an “agent of the state.” *Cf. Holyfield v. State*, 101 Nev. 793, 798–804, 711 P.2d 834, 837–41 (1985) (when a person agrees to foster police efforts to inculcate another, he becomes an agent of the police.) Deangelo’s relation to Anabel and Little Lou was that of a “feigned accomplice.” *Myatt v. State*, 101 Nev. 761, 763, 710 P.2d 720, 722 (1985) (“Svenson was a feigned accomplice; he therefore could not be a co-conspirator.”)

As an agent of the state, the statements he made were not attributable to him. Deangelo was merely giving voice to statements the police wanted Anabel and Little Lou to hear. Were it otherwise, it would lead to absurd results. It just does not make sense that police can ask a person to make specific statements, and when that person complies,

those statements should be attributable to that speaker and not the police.

Turning to the coconspirator statements, for such to be admissible, they must be made “in furtherance of the conspiracy.” NRS 51.035(3)(e). This makes any statements Anabel and Little Lou made indicating Deangelo’s culpability for *past* events inadmissible.

When the recordings were made, Deangelo was not a member of the conspiracy. Instead he was merely a feigned accomplice. Thus, for Anabel’s and Little Lou’s statements to be admissible, they must be “designed to induce that party to join the conspiracy or act in a way that would assist the conspiracy’s objectives.” *See Wood v. State*, 115 Nev. 344, ___, 990 P.2d 786, 789 (1999).

But even if Deangelo were still counted as a member of the conspiracy—even as he was making the recordings on behalf of the police—the statements incriminating him would not come in. At its broadest, statements in furthering a conspiracy can include statements to “induce further participation, prompt further action, reassure members, allay concerns or fears, keep conspirators abreast of ongoing activities, [or] avoid detection.” *Holmes v. State*, 129 Nev. ___, ___, 306

P.3d 415, 422 (2013) (quoting 30B Michael H. Graham, *Federal Practice and Procedure* § 7025, at 289 (interim ed. 2011)); accord *Goldsmith v. Sheriff*, 85 Nev. 295, 306–07, 454 P.2d 86, 93–94 (1969). But “mere conversations or narrative declarations of past events are not in furtherance of the conspiracy.” *Id.*

The requirement that statements be “in furtherance” of a conspiracy shows why key statements from the recordings were inadmissible. For example, in its closing argument the prosecution relied heavily on Anabel’s recorded statement that there was a “plan B.” See 9 AA 1840. But Anabel’s statement about a plan B was a narrative declaration about past events, a declaration prompted by Deangelo’s goad that he did “everything you guys asked me to do.” 12 AA 2442–43. It and other statements by Anabel and Little Lou implicating Deangelo just do not fit the definition of non-hearsay.

In sum, the definitions on non-hearsay unequivocally exclude all of Deangelo’s statements on the wire recordings, as well as the statements of Anabel and Little Lou describing past events. It was thus plain error to admit the recordings.

2. *Admitting the recordings violated Deangelo's constitutional rights*

Besides blatantly breaking several rules of evidence, the admission of the recordings was also unconstitutional. These violations arise from and relate to the same evidentiary problems just mentioned, but are more insidious because they affect bedrock rights.

a. Standard of review

Like the errors based on the rules of evidence, these constitutional errors were not raised to the attention of the district court. However, this Court always has the ability to review constitutional error. *See, e.g., McCullough v. State*, 99 Nev. 72, 74, 657 P.2d 1157, 1158 (1983).

b. The recordings were fundamentally unfair evidence

“The aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence, whether true or false.” *Lisenba v. California*, 314 U.S. 219, 236 (1941).

Ordinarily, the rules of evidence are enough to protect the integrity of the judicial process. Those rules keep out irrelevant evidence, inflammatory evidence, confusing evidence, and other such

evidence that does not lead the factfinder to the truth. If rules of evidence are followed, there is little danger of a constitutional violation.

But that gateway to the truth was ignored in this case. As detailed above, the rules of evidence were manifestly violated when the recordings were submitted. But beyond breaking the rules, the admission violated Deangelo's right to due process.

The recordings were intended to be as incriminatory as possible. Deangelo was working for the police and had been coached by them. *See, e.g.*, 8 AA 1726–27, 1729–30. During both recordings, Deangelo told deliberately provocative lies to get a rise out of his employers. Then, after creating evidence that made him look worse, the detectives turned around and arrested Deangelo despite the promises they had made to him.

Both the process and the result of the detectives' action are unconscionable. The admission of the recordings in these circumstances was fundamentally unfair, and thus violated Deangelo's right to Due Process under the Fifth Amendment and Fourteenth Amendment.

c. *The admission of the recordings violated Deangelo's right not to testify*

It is well settled that a defendant has a constitutional right not to testify. *Harkness v. State*, 107 Nev. 800, 803, 820 P.2d 759, 761 (1991).²² But the admission of the recordings placed Deangelo between a rock and a hard place in relation to that right.

Deangelo had two choices. The first was to take the stand and explain the nature and extent of the lies he was employing on behalf of the police. That would allow the jury to understand just how truly irrelevant the recordings were to determining his culpability. Of course, that approach came with a monstrous catch: by taking the stand, Deangelo would be forced to waive his right not to testify.

The alternative, the choice Deangelo was ultimately left with, was not to testify. Of course, that leaves the jury with the very false impression that Deangelo was speaking candidly on the recordings. Given the prosecution's reliance on the recordings, that impression was damning.

²² This right is so well settled that the decisions of this Court usually concern whether that right has been violated by a prosecutor's comments. That is the concern in the cited opinion above.

3. *The admission of the recordings affected Deangelo's substantial rights*

Under Nevada law, “[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.” NRS 178.602. And as mentioned already, if the error was prejudicial, then it affected a defendant’s substantial rights. *See Gallegos*, 117 Nev. at 365, 23 P.3d at 239.

An error is prejudicial if it “had substantial and injurious effect or influence in determining the jury’s verdict.” *See Tavaros v. State*, 117 Nev. 725, 732, 30 P.3d 1128, 1132 (2001) (quoting *Kotteakos v. United States*, 328 U.S. 750, 779 (1946)). There is no such effect if the reviewing court is “sure that the error did not influence the jury, or had but very slight effect.” *Id.* at n.17 (quoting *Kotteakos*, 328 U.S. at 764).

But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.

Id. (quoting *Kotteakos*, 328 U.S. at 765).

The standard in *Kotteakos* is in accord with this Court's decision in *Anderson v. State*, 121 Nev. 511, 118 P.3d 184 (2005). In *Anderson*, this Court found that an error affected the defendant's substantial rights—the error was prejudicial—even though the evidence was sufficient to sustain a conviction. *Id.* at ___, 118 P.3d at 188–89. It also noted that the error was not passing in nature, but was at the heart of the State's case. *Id.*

These principles illuminate how the erroneous admission of the recordings was prejudicial to Deangelo. They were not a passing part of the State's case; they were at the heart of it. They were played repeatedly through the trial and during the State's closing arguments. *See, e.g.*, 9 AA 1855–59. Transcripts were given to the jury to consider. 8 AA 1700–02.

Furthermore, the State relied heavily on the recordings to prove Deangelo's culpability. For example, to show that Deangelo intended a murder, and not just a battery, the prosecution frequently cited Deangelo's statements to Anabel and her responses. 9 AA 1840–41,

1937–39. Indeed, most of the first recording was played back again during the prosecution’s closing statement. 9 AA 1855–59.

There can be no doubt that the recordings had substantial influence on the jury’s deliberations. It is impossible to conclude that the judgment was not substantially swayed by the error. For that reason, the erroneous admission of the recordings was prejudicial to Deangelo, and his convictions must be reversed.

D. There is insufficient evidence to support the convictions of conspiracy to commit murder or first-degree murder

Throughout his statement, Deangelo is very clear on one point: he didn’t want his friend TJ to die. Yes, his employers wanted TJ “dealt with” — either beat up or maybe killed — but it’s not what Deangelo wanted. Because of the absence of proof on that point, the conspiracy conviction cannot be upheld. For the same reason, Deangelo’s conviction for first-degree murder cannot stand on the theory that the murder was deliberate.

The State charged Deangelo with first-degree murder under two different legal theories. In addition to the just-mentioned theory that the murder was deliberate, the State also argued that Deangelo

committed first-degree murder by lying in wait. But the facts of this case do not support that finding either. So Deangelo's conviction for first-degree murder cannot be upheld.

1. *Standard of review*

"The Due Process clause of the United States Constitution protects an accused against conviction except on proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *Carl v. State*, 100 Nev. 164, 165, 678 P.2d 669, 669 (1984) (citing *In re Winship*, 397 U.S. 358 (1970)).

"Insufficiency of the evidence occurs where the prosecution has not produced a minimum threshold of evidence upon which a conviction may be based." *Thompson v. State*, 125 Nev. 807, ___, 221 P.3d 708, 714 (2009) (quoting *Mejia v. State*, 122 Nev. 487, 492, 134 P.3d 722, 725 (2006)). When reviewing the sufficiency of the evidence, this Court, after looking at the evidence in the light most favorable to the prosecution, asks whether any rational jury could have found all the essential elements beyond a reasonable doubt. *Id.* at ___, 221 P.3d at 714–15. Where there is substantial evidence supporting each element—

“evidence that a reasonable mind might accept as adequate to support a conclusion”—the verdict will not be disturbed. *Id.* at ___, 221 P.3d at 715 (quoting *Brust v. State*, 108 Nev. 872, 874–75, 839 P.2d 1300, 1301 (1992)) (internal quotation omitted).

2. *Deangelo did not have the intent required for conspiracy and deliberate murder*

Deangelo was accused of conspiring to commit murder. Murder is the unlawful killing of another with malice aforethought. *See* NRS 200.010. And a conspiracy is “an agreement between two or more persons for an unlawful purpose.” *Bolden v. State*, 121 Nev. 908, ___, 124 P.3d 191, 194 (2005) (internal citation omitted) (overruled on other grounds by *Cortinas v. State*, 124 Nev. 1013, 195 P.3d 315 (2008)). So for Deangelo’s conspiracy conviction to stand, the prosecution must show that he agreed with others to kill TJ.

Deangelo was also charged with first-degree murder under three different theories: that Deangelo himself committed the murder, that he aided and abetted the murder, and that he conspired to have the murder committed. 8 AA 1588–89. To prove Deangelo guilty of first-degree murder, the prosecution must show that he intended TJ’s death

as a deliberate, willful, and premeditated murder. *See* NRS 200.030(1)(a). While the terms deliberate, willful, and premeditated each carry a separate and distinct meaning, a common factor in them all is that the death must be *specifically* intended. *See, e.g., Byford v. State*, 116 Nev. 215, ___, 994 P.2d 700, 714–15 (2000). This is true even when the theory of the crime involved aiding-and-abetting or conspiratorial liability. *See, e.g., Sharma v. State*, 118 Nev. 648, 652–55, 56 P.3d 868, 870–72 (2002) (aiding and abetting); *Bolden*, 121 Nev. at ___, 124 P.3d at 195 (2005) (extending the principle from *Sharma* to conspiratorial liability).

The prosecution's presentation did not provide evidence that Deangelo conspired to kill TJ, intended that he be killed, deliberately or any other way. Yes, Mr. H. wanted TJ beaten up, and maybe murdered. *See, e.g.*, 12 AA 2510–11, 2514; *see also* 6 AA 1272, 1280. And Mr. H wanted Deangelo to take care of it. 12 AA 2515. But while that is what Mr. H wanted and intended, his motives and intentions cannot be ascribed to Deangelo.

Deangelo's intentions *were* different. Deangelo is consistent and adamant that he never intended to go as far as Mr. H may have wanted.

He was only willing to go along with a plan to have TJ beat up, not murdered, a point he emphasized repeatedly. *See, e.g.*, 12 AA 2532, 2543, 2546–47, 2549, 2551–52. As a matter of fact, Deangelo never told KC that Mr. H wanted TJ killed. 12 AA 2550. Indeed, when KC murdered TJ — instead of beating him up as instructed—Deangelo was left in a state of shock. 12 AA 2536, 2560; *see also* 6 AA 1343–44.

Deangelo’s state of mind can best be summed up with this quote from his statement to the police:

All, all that was said in the whole conversation with K.C. is that Mr. H needed somethin’ handled. . . .

So you know I’m saying it was never, ah, it wasn’t my intention on T.J. dying. T.J. was a good friend of mine. I never had no intentions on harming T.J. in that way. It was just dude fuckin’ got all upset and fuck got out and fuckin’ shot T.J.

12 AA 2550, 2552.

As Deangelo’s explanation indicates, TJ’s death was the result of a hoodlum going out of control. KC didn’t do what he was supposed to. He went too far, killing TJ instead of delivering him the beating that was supposed to teach him a lesson. Of course, that danger was inherent in employing a known gangster to assault someone. But that fact only

means that Deangelo may be guilty of a second-degree murder, not a first-degree murder.

Because the evidence does not show that Deangelo intended that TJ die, he cannot be guilty of conspiracy to commit murder, and thus that conviction must be vacated. And for the same reasons, Deangelo's conviction for first-degree murder cannot stand on the deliberate-murder theory.

3. *There was no "lying in wait"*

Besides accusing Deangelo of first-degree murder under the theory that TJ's murder was deliberate, the State also accused him of first-degree murder under the alternate theory that the murder was accomplished by lying in wait. *See* NRS 200.030(1)(a). This alternate theory was convenient because it did not require the State to show that Deangelo intended to kill TJ — an impossibility, as the previous section showed. Instead, to prove a first-degree murder, the State was only required to show that Deangelo had the intention of “inflicting bodily injury . . . or killing.” *Moser v. State*, 91 Nev. 809, 812, 544 P.2d 424,

426 (1975) (quoting *People v. Atchley*, 346 P.2d 764, 772 (Cal. 1959)) (emphasis added).

Although the lying-in-wait theory lowered the actual intent required, it added other, unique requirements that had to be met. Beyond intending to harm or kill, to be guilty of first-degree murder by lying in wait, a person must watch for, wait for, and conceal himself from his intended victim. *Id.* Those elements are completely absent here. There was no watching and waiting for TJ, and Deangelo and KC were not concealed.

There is no dispute over the essential details of how TJ, Deangelo, KC, and the rest met up on the night of TJ's death. First, Deangelo called TJ and told him that he was looking to buy some weed. 12 AA 2517–18, 2545. But TJ was out camping by the lake, and the only direction TJ could give Deangelo was that he was near “mile marker five.” 12 AA 2546. So instead of trying to find TJ's campsite, TJ and Deangelo agreed to meet by a stop sign. 12 AA 2531. Deangelo, KC, Rontae, and JJ loaded up in the van and headed out towards the lake. 6 AA 1281; 12 AA 2518. But TJ wasn't there when Deangelo and KC arrived at the stop sign, so KC insisted that Deangelo keep driving

towards TJ's campsite. 12 AA 2523. After some driving back-and-forth, Deangelo saw TJ driving down the road toward him. 6 AA 1287, 1339.

When Deangelo saw TJ, he stopped the van he was driving. 6 AA 1340; 12 AA 2555, 2559. After stopping, Deangelo stepped out of the van to relieve himself; meanwhile TJ turned his car around behind the van and stopped it in front. 6 AA 1287, 1291, 1340; 12 AA 2555, 2559. After Deangelo hopped back in the van, TJ stepped out of his car and approached the van to talk to Deangelo. 6 AA 1286, 1291; 12 AA 2555, 2559. As TJ approached, KC got out of the vehicle and attacked. 6 AA 1286–87, 1340–42; 12 AA 2555, 2559.

Missing from this narrative is any watching and waiting. Missing, too, is concealment. Instead, TJ and Deangelo were actively looking for each other. They were expecting each other. Under these facts, the elements of lying in wait are explicitly ruled out. And thus, Deangelo cannot be guilty of first-degree murder under the lying-in-wait theory. With this and the deliberate-murder theory invalidated, Deangelo's conviction for first-degree murder must be vacated.

E. There is insufficient evidence to support the deadly weapon enhancement

Under NRS 193.165, if a deadly weapon is found to have been used in the commission of a crime, the sentence must be enhanced. However, the evidence presented at trial fails to show that enhancement was proven against Deangelo.

1. Standard of review

“The Due Process clause of the United States Constitution protects an accused against conviction except on proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.” *Carl*, 100 Nev. at 165, 678 P.2d at 669 (1984) (citing *In re Winship*, 397 U.S. 358 (1970)).

“Insufficiency of the evidence occurs where the prosecution has not produced a minimum threshold of evidence upon which a conviction may be based.” *Thompson*, 125 Nev. at ___, 221 P.3d at 714 (quoting *Mejia*, 122 Nev. at 492, 134 P.3d at 725). When reviewing the sufficiency of the evidence, this Court, after looking at the evidence in the light most favorable to the prosecution, asks whether any rational jury could have found all the essential elements beyond a reasonable

doubt. *Id.* at ___, 221 P.3d at 714–15. Where there is substantial evidence supporting each element—“evidence that a reasonable mind might accept as adequate to support a conclusion” — the verdict will not be disturbed. *Id.* at ___, 221 P.3d at 715 (quoting *Brust*, 108 Nev. at 874–75, 839 P.2d at 1301) (internal quotation omitted).

2. *The requirements for secondary liability for use of a deadly weapon*

If it is alleged that a defendant himself used a gun while committing a crime, the burden of proof for the enhancement is pretty simple: was the item a deadly weapon, and was it used during the crime? *See, e.g., Moore v. State*, 117 Nev. 659, 661, 27 P.3d 447, 449 (2001).

If the gun is used by someone other than the defendant, the issue gets trickier:

[A]n unarmed offender “uses” a deadly weapon and therefore is subject to a sentence enhancement when the unarmed offender is liable as a principal for the offense that is sought to be enhanced, another principal to the offense is armed with and uses a deadly weapon in the commission of the offense, and the unarmed offender had *knowledge of the use* of the deadly weapon.

Brooks v. State, 124 Nev. 203, 210, 180 P.3d 657, 661 (2008) (internal citations omitted and emphasis added).

3. *Deangelo had no knowledge that KC would use the gun*

As has already been described, Deangelo did not intend for TJ to be killed. Over and over again, he told the detectives that the plan was for KC only to beat him up. *See, e.g.* 12 AA 2532, 2543, 2546–47, 2549, 2551–52. That by itself should be enough.

But on the issue of the gun, Deangelo also affirmed that it *wasn't* to be used: “I didn’t think he would shoot T.J. ’cause at first, he was like yeah, I’m just gonna whoop this fool and then go get paid but then when we got up there, for some reason he got frustrated and he shot him that’s when everything went bad.” 12 AA 2569–70.

Deangelo had no intention that the gun would be used, let alone knowledge that it would. Without proof on that fact, the deadly weapon enhancement must be vacated.

F. The combination of errors that occurred rendered Deangelo’s trial unfair

The numerous errors argued above are all standing by themselves enough to require that Deangelo’s convictions be reversed. However,

should any be found harmless individually, together they warrant reversal.

“The cumulative effect of errors may violate a defendant’s constitutional right to a fair trial even though errors are harmless individually.” *Hernandez v. State*, 118 Nev. 513, 535, 50 P.3d 1100, 1115 (2002). When evaluating a claim that cumulative error has rendered a trial unfair, this Court considers “(1) whether the issue of guilt is close, (2) the quantity and character of the error, and (3) the gravity of the crime charged.” *Mulder v. State*, 116 Nev. 1, 17, 992 P.2d 845, 854-55 (2000).

The issue of guilty and the quality and character of the error are wrapped up in one bundle, so they must be considered together. The evidence of Deangelo’s guilt is his statement and the recordings he made. Beyond that body of evidence, there was only Rontae Zone, but his testimony is not anything that could support a conviction. *See, e.g.*, 6 AA 1327–28. So for Deangelo to have received a fair trial, the admission of his statement must have been fair.

But it wasn’t fair. As demonstrated above, the statement Deangelo gave was not voluntary, nor admissible under *Miranda*: detectives

promised Deangelo he wouldn't go to jail if he told the truth, and despite the custodial interrogation, Deangelo wasn't provided with *Miranda* warnings until he had incriminated himself. Likewise, the admission of the recordings Deangelo made for the police broke both the rules of evidences and infringed Deangelo's right to fair evidence, his right not to testify, and his right to cross-examine his accusers.

As for the gravity of the crime charged, the charges and the resulting sentences are both serious. This is a death penalty case, though death was not imposed. *See* 11 AA 2412. Consequently, the errors that occurred should be assigned "greater significance." *See Garner v. State*, 78 Nev. 366, 375, 374 P.2d 525, 530 (1962).²³

In sum, given the stakes of this case, and the seriousness of the errors leading to Deangelo's conviction, if they should be found

²³ Curiously, this Court has occasionally implied that errors should be given less weight when more serious crimes are charged. *See, e.g., Valdez v. State*, 124 Nev. 1172, ___, 196 P.3d 465, 482 (2008); *Big Pond v. State*, 101 Nev. 1, 3, 692 P.2d 1288, 1289 (1985). Besides being inconsistent with *Garner*, Nevada's seminal case on cumulative error, it is illogical: errors should matter most in a death penalty case, not in an adjudication for jay-walking.

harmless separately, together they should be found serious enough that his convictions are reversed.

VI.
CONCLUSION

The Court should reverse Deangelo's convictions and sentence.

DATED: October 29, 2014.

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VII.

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

[X] This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 Century Schoolbook 14-point font.

2. I further certify that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

[X] Proportionately spaced, has a type face of 14 points or more and contains 22,121 words; or

[] Does not exceed _____ pages.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED: October 29, 2014.

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VIII.
CERTIFICATE OF SERVICE

I HEREBY CERTIFY AND AFFIRM that this document was filed electronically with the Nevada Supreme Court on October 29, 2014. 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 OWENS
Chief Deputy District Attorney

/s/ Mario D. Valencia
MARIO D. VALENCIA