

IN THE SUPREME COURT FOR THE STATE OF NEVADA

DEANGELO R. CARROLL,
Appellant,
v.

THE STATE OF NEVADA,
Respondent.

No. 64757

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Appeal

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

APPELLANT'S OPENING BRIEF

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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 after 40 years served, was entered June 4, 2010. 11 AA 2408–12. The judgment of conviction was entered September 8, 2010, and an amended judgment was entered March 23, 2011. 11 AA 2419–20, 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

¹ “AA” stand for Appellant’s Appendix. The number before and after “AA” represents the volume number and the page number cited in the appendix. For example, the above citation to “9 AA 2000–01” means Volume 9 of Appellant’s Appendix at pages 2000–01.

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 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

On May 31, 2005, Deangelo was charged by criminal complaint with conspiracy to commit murder and murder with a deadly weapon. 1 AA 140–42.

His preliminary hearing was scheduled for June 13, 2005. 1 AA 1. At that time, Deangelo waived his right to a preliminary hearing. 1 AA 3–4.

On June 20, 2005, Deangelo was charged by Information 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.

Deangelo eventually sought review of the State's notice via writ in this court. *See Nevada Supreme Court Case No. 50576*. After this Court granted the writ in part, *see Order Granting Petition, Case No. 50576* (Nev. Sep. 24, 2008), the State filed an amended notice of intent to seek the death penalty on October 20, 2008. 2 AA 382.

On April 30, 2010, Deangelo filed a motion to suppress his statement to the homicide detectives in this case. 3 AA 493. On May 11, 2010, the district court held a hearing on the motion — but not an evidentiary hearing. 3 AA 646. The court denied the motion later that same day in 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 its last amended information against Deangelo. 8 AA 1587. The guilt phase concluded on May 25, 2010. The penalty phase of the trial commenced on June 2, 2010 and concluded on June 4, 2010.

C. The disposition below

On May 25, 2010, Deangelo was found guilty of conspiracy to commit murder and murder in the first-degree with use of a deadly weapon. 9 AA 2000–01.

On June 4, 2010, 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 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 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 profoundly impacted Deangelo. 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. 11 AA 2278. He is “functional” but “four out of five people have higher IQs” than his. 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 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 2280–81.² 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 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.

² Dr. Roitman explained a personality disorder this way:

In order to really make a diagnosis the personality has to be pretty distorted *It gets to be a disorder when it interferes with function, otherwise it's just a characteristic.*

11 AA 2281 (emphasis added).

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 [put] 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”³) 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.*

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

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 508, 510. For the first three months he worked “under the table” before he was put on the official payroll. *Id.* Deangelo was only hired at the club because he was “good friends” with Little Lou. 12 AA 2576. But once he was hired, Deangelo’s “been cool with Mr. H ever since.” *Id.*

At the club, Deangelo did whatever was needed—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: going out on the strip and

passing out flyers⁴ to cab drivers and “VIP passes to people.” 3 AA 511–13.

Deangelo “derived his identity from the Palomino Club.” 11 AA 2287. 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, but they were also close friends. 3 AA 509, 519; 6 AA 1208. TJ was known for

⁴ The flyers listed the Palomino Club’s payout rates. Payout rates are how much a club pays cabbies for each person they bring to the club. 7 AA 1543. The rates varied from as low as \$3 or \$4 a person to as high as \$30 or \$40 a person. 7 AA 1543–44.

always having superb marijuana and the two would often smoke it in TJ's car during 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 told Anabel that 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 Arial⁵ 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

⁵ Arial's real name is Michelle Schwanderlik. 1 AA 41.

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 only hear TJ's side of the conversation. 6 AA 1206, 1223–24. When he got off the phone, TJ told Paijit he was meeting Deangelo to get some marijuana. 6 AA 1207, 1227. After TJ left, 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. A hat was lying on top of the body and a gold chain lying across the chin. 6 AA 1188. Near the body was a car, some advertisement cards from the Palomino Club, and capsule for a pneumatic tube. 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 examined the phone and found that the last phone call received was from Deangelo. 8 AA 1641. McGrath gave this information to Wildemann. 7 AA 1385.

Wildemann returned to the homicide office to research the number Deangelo called from. *Id.* He came up with Anabel's name and found out she worked at the Palomino Club. 7 AA 1387–88.

Meanwhile, Lake Mead park rangers told the detectives on scene 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 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 for 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.* He told the detectives to return 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 entered the club. *Id.* He called Arial over and she led the two detectives 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's description had entered 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 told Deangelo that his call was the last TJ received and that he wanted to discuss the call and his relationship with TJ. *Id.* Wildemann asked Deangelo to "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. *Id.* On the way, the detectives were very careful about what they said because they didn't want Deangelo "to prepare" for the interview. 7 AA 1394–95.

At trial, Wildemann admitted they could have questioned Deangelo at the Palomino Club or at Deangelo's house (it was nearby). 7 AA 1481–82. But 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.” *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). 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 room was uncomfortably hot. 12 AA 2508, 2535, 2538. Wildemann admitted that a reasonable person would feel “pretty intimidated” 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 recording audio with a 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.⁶ 7 AA 1397–98. The audio tape, on the other hand, only captured "certain conversations."⁷ 7 AA 1398.

⁶ In 2005, the detectives used VCRs to record interviews. 7 AA 1397. 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 (hereinafter "Video Ex. 243"). 7 AA 1397, 1424–25. The district court clerk has been ordered to transmit ex. 243 to this Court.

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 transcript, however, does not include everything that's on the video recording. *Compare* Video Ex. 243 with 12 AA 2463–577.

⁷ Prior to trial, the State provided Deangelo with a copy of the transcript the Las Vegas Metropolitan Police Department (Metro) 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 ex. 246, which contains most (but not all) of

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 or that he was free to terminate the interview and 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 and smoke a cigarette, free to go home on his own. Early in the interview, the detectives asked for 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.⁸ They did not give it back. *See* Video Ex. 243 at 16:30. Later on, 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

what’s on the video recording of Deangelo’s interview. Video Ex. 243 contains the entire interview.

⁸ The times provided indicate the time from the beginning of the video. So, for example, the above citation is to Video Ex. 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.

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 buying weed from TJ

The first story Deangelo told the detectives about what happened that night centered on marijuana. There were two major versions of this story. In this account, Deangelo and TJ had several conversations about getting together to smoke some weed, but that didn’t happen because TJ was camping and Deangelo and his wife were home caring for their sick son. *See* 3 AA 511–42. After being told that toll booth cameras located at Lake Mead captured everything day and night, and that cell site records gave away Deangelo’s location (none of which was true, *see* 3 AA 644), 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. When they exited at Las Vegas Boulevard, 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.⁹ 3 AA 511, 515, 566–68. They were driving around in the club’s white 1996 Chevy Astro van. 3 AA 525, 528, 564. After promoting for a while, they went to Deangelo’s house. 3 AA 564, 593, 628.

While at home, Deangelo received a call from Little Lou. Little Lou told Deangelo to go to the club and to bring two garbage bags and a

⁹ “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 events. 7 AA 1472. Rontae was living with Deangelo. 6 AA 1268. JJ was Rontae’s friend. 3 AA 611.

baseball bat because they had to go take care of something. 3 AA 562–63, 566, 593–94. Little Lou didn’t say 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 went to the club by himself. 3 AA 566, 583, 594. When he arrived, he was called into Mr. H’s office where Anabel, “Miss A,”¹⁰ and Mr. H were waiting. 3 AA 562–67, 580, 594. Little Lou wasn’t there yet. 3 AA 594.

Mr. H told Deangelo he wanted TJ taken care of — “hurt bad.” 3 AA 567. TJ had been stealing from the club. 3 AA 565. And after he was fired, TJ was badmouthing the club. 3 AA 562, 594. That hurt business, something Mr. H wouldn’t allow. 3 AA 562, 565. He wanted the issue handled 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 said he would pay this other person but didn’t say how much. 3 AA 567, 606.

¹⁰ Deangelo never said who “Miss A” was, but it’s likely a reference to Arial, the office manager. 1 AA 41.

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 Kenneth Counts only as "KC" or "K". 3 AA 576. KC is a gang member, a Blood, 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 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. But Deangelo had to take him to wherever TJ was, not just give him directions, so that Deangelo wouldn't "snitch on him." 3 AA 574.

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. 3 AA 600, 631.

Sometime thereafter, Deangelo picked up Rontae and JJ in the club's Astro van and drove for gas. 3 AA 571, 629. From there they

drove to KC's house. 3 AA 571–73, 629. Deangelo went up to the door to get KC but he was getting his hair cut so Deangelo waited “out front.” 3 AA 629. When KC finished, 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 agreed 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 arrived at the stop sign (around 11:35 or 11:40), they tried calling TJ but couldn't — no reception. 3 AA 576–77. So they drove back out and called TJ again, who confirmed 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 of the van to pee. 3 AA 578, 613, 617–18. Meanwhile, 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.¹¹ 3 AA 578, 609, 613–14, 617. TJ then got out of his car and walked back towards the van.¹² 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, moved 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 shot

¹¹ 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.

¹² According to Deangelo, TJ was so drunk that he “staggered” to the van. 3 AA 578, 616.

TJ twice, instead of beating him up like he was supposed to.¹³ 3 AA 579, 588–89, 601–02, 604, 613–16, 620, 630. Deangelo, Rontae and JJ hadn’t seen KC’s gun that night until he pulled it out and shot TJ. 3 AA 589, 602–03. KC had hid 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 to help TJ. 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.* But quickly KC jumped back in the van and was pointing the gun at Deangelo, Rontae and JJ, yelling at them: “drive mother fucker, drive,” and “get me the fuck up out these mountains.” 3 AA 579, 589, 613, 616, 618.

In shock, Deangelo 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 Henderson to the 95, then to the club. 3 AA 579, 619–20.

¹³ Deangelo described the gun as a chrome .357 with a long extended barrel and a black pistol grip. 3 AA 602.

At the club, Rontae and JJ stayed in the van, while Deangelo and KC went upstairs to Mr. H's office. 3 AA 579, 583, 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 leave, 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 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 that he reluctantly accepted. 3 AA 581–82. He used the money to buy breakfast for Rontae and JJ (who weren't paid anything) and his family, to buy a fan, and get a haircut. 3 AA 584–85, 612, 628.

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 initially lied, Mr. H came up with the first story and instructed Deangelo to tell it. 3 AA 624–26.

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

1. Deangelo locates tires and witnesses

When the interview ended, the detectives had Deangelo take them to find the old tires. They took two separate vehicles. 1 AA 42. Deangelo rode in the car McGrath drove with another unnamed detective. 1 AA 42; 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 recovering the tires, the detectives drove Deangelo home. 7 AA 1398. But the detectives weren't done with Deangelo; they wanted to pick up Rontae so they could interview him at the homicide office. 1 AA 42; 7 AA 1399. Deangelo therefore was not allowed to walk into his house unescorted. 1 AA 42.

Deangelo introduced Rontae to the detectives and told him to go with them and tell the truth or they were all going to jail. 6 AA 1315–16; 8 AA 1646–47. Deangelo wasn't allowed to “sit and talk” with Rontae. 8 AA 1647. Soon, the detectives came out of the house, but with Rontae *and* Deangelo. 1 AA 42. They road back to the homicide office in

separate cars: Deangelo in McGrath's, and Rontae in detectives Long and Wildemann's. *Id.* Back at the homicide office, detectives interviewed Rontae, and when they finished, they dropped him and Deangelo back home. *Id.* During the drop off, Wildemann instructed Deangelo to bring JJ in "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 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, McGrath was typing up a search warrant for KC's residence because the police were preparing to move on him. 1 AA 42; 8 AA 1648. 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. 3 AA 571–73. He described the house KC lived in, who lived with him, and the cars he owned. 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 at 1676 E. Street was, in fact, KC’s house. 7 AA 1412; 8 AA 1648–49.

Using the information Deangelo provided, the detectives got 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 warrants. 7 AA 1412; 8 AA 1649.

While they were executing the search warrant on KC’s house, Deangelo called Detective Wildemann’s cell phone and told him he was watching the raid from 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” to record his conversations. 7 AA 1416–17.

Detective McGrath turned to an acquaintance in the FBI, Special Agent Brent Shields, for help with a recorder. 8 AA 1691. Agent 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 checking that Deangelo was unarmed, McGrath and Shields put the recorder on Deangelo. 8 AA 1691–92.

The recorder was a little pager that they put on Deangelo’s belt. 8 AA 1754, 1756. It was turned on by pressing a small button with a paper clip, after which it recorded continuously. 8 AA 1696. It was only a recording device; it did not transmit. 8 AA 1691, 1728.

In the detectives’ opinion, there was no question Deangelo was working for them. 8 AA 1726. They knew Deangelo was risking his life by helping them. 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 should do and say to elicit incriminating responses from Anabel, Little Lou and Mr. H. 8 AA 1726, 1729–30. For instance, McGrath instructed Deangelo to tell them that the KC, Rontae, and JJ wanted more money. 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 a nearby golf place. 8 AA 1692–93. Deangelo gave McGrath and Shields the recording device as well as \$1,400 cash and a bottle of Tanqueray gin that Anabel and Little Lou gave him during the meeting. 8 AA 1693.

The recording Deangelo made was very helpful to the State's case. It reveals that Anabel gave Deangelo the money to quiet the other defendants, and Little Lou gave him the gin to mix with rat poison to

get rid of the others. 12 AA 2447, 2458–61. But more importantly, it reveals what the plan for TJ had been:

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]¹⁴ 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

¹⁴ 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.*

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 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 in again to gather more evidence against Anabel and Little Lou and, if possible Mr. H. 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 met with Deangelo, discussed a little strategy, then sent him back into Simone's with the recorder for more evidence. 1 AA 48; 8 AA 1694–95, 1726, 1729.

When Deangelo came out, he again gave the recorder 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 the first recording, the second contains incriminating evidence, but once again Anabel emphasizes that the plan was not to kill TJ, only to beat him up. 12 AA 2442–43.

F. Deangelo’s help leads to the conviction of everyone — including Deangelo

Because of Deangelo’s initial 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 charge Anabel, Little Lou and Mr. H. 1 AA 48–49; 7 AA 1418; 8 AA 1730, 1736–38. And ultimately, as shown below, it lead to some sort of conviction against everyone.

But despite helping the detectives build cases against everyone else after they promised him he would be okay if he did, Deangelo was arrested along with the rest. 1 AA 136, 146.

1. JJ and Anabel plead out

JJ’s case was the first to conclude. In June 2007, he agreed to plead guilty to conspiracy to commit murder and voluntary manslaughter with a deadly weapon. 1 AA 240–47. In exchange, he agreed to testify against the other defendants. 1 AA 232–234. After he

testified in KC's trial, JJ was sentenced in March 2008. 2 AA 367–68. He received a sentence of up to 120 months, but that sentence was immediately suspended and instead JJ was placed on probation for five years. *Id.*

Anabel was the next to cut a deal. In February 2008, she agreed to plead guilty to voluntary manslaughter with use of a deadly weapon. 2 AA 324–33. Part of the plea was apparently an agreement to testify for the State. *See* 2 AA 441–46. And she did testify against the Hidalgos and Deangelo. *See, e.g.,* 2 AA 400–30. In February 2011, she was finally sentenced to a term of 24 to 72 months, but was given credit for 1,379 days (about 3.77 years). 11 AA 2421.

2. *Counts and the Hidalgos go to trial*

Counts, of course, did not plead. He took his case to trial around February 2008. He was found guilty of conspiracy to commit murder but *not* guilty of the murder itself. 2 AA 342–43. In March, 2008, he was sentenced under the small habitual criminal statute to 96 to 240 months. 2 AA 348.

The Hidalgos did not plead, either. The State agreed not to seek the death penalty against the pair so that it could try them together. *See* 2 AA 387–88. At the end of their trial in February 2009, Hidalgo, Jr. was found 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 431–33. Hidalgo, III was found guilty of those same two crimes as well as two counts of solicitation to commit murder. *Id.* The two were sentenced in June 2009, and each received a sentence that required at least 20 years in prison and a maximum of *life*. 2 AA 447–82.

3. *The long course of Deangelo’s proceedings*

Deangelo’s case was the last one to be brought to trial, despite the fact that he was charged at the same time as Counts, Anabel, and Hidalgo, III. 1 AA 140–42. Certainly part of that delay is attributable to the State’s decision to seek the death penalty against Deangelo—a decision that entailed extra preparation for trial as well as litigation over the validity of that decision. *See, e.g.,* Nevada Supreme Court Case

No. 50576 (Deangelo's writ seeking to strike the death penalty aggravators).

On May 17, 2010, Deangelo's trial finally began. 4 AA 656. On May 24, the jury was instructed and both sides gave their closing arguments. 9 AA 1803–34. Just after 2 p.m., the jury recessed to deliberate. 9 AA 1943. And just after 2 p.m. the next day, the jury returned a guilty verdict on both counts: conspiracy to commit murder and murder with a deadly weapon. 9 AA 1995–96, 2000–01.

The penalty phase of Deangelo's trial began June 2, 2010. 10 AA 2004. On June 3, after hearing additional testimony, the jury recessed to deliberate the penalty question. 11 AA 2399. The next afternoon they returned the penalty verdict. 11 AA 2403. It 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 a multitude of 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. Consequently, the jury determined “the mitigating circumstances outweigh any aggravating circumstance” and recommended a *life* sentence with the possibility of parole after 40 years. 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.*

And 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 responded, “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 inculcated 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) (threats or promises make a confession involuntary unless the State can prove otherwise); *Conner v. State*, 982 S.W.2d 655, 661 (Ark. 1998) (if a false promise induced a confession, “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) (same).

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 asked 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. 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 attached to the 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, they said they were investigating "one of his employees" and asked for Deangelo's records. 7 AA 1389–90.

When detectives brought Deangelo in, 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. 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, even his decision to talk to police wasn’t his own; he was told to do so by Mr. H. *See, e.g.*, 12 AA 2552-57.

And, as already argued, Deangelo’s responses were not voluntarily given. They were the product of coercion —promises of leniency in exchange for a 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 cell phones. 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 around. 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.

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 get evidence against others by bringing in other witnesses and wearing a wire. Had Deangelo been arrested, none of that would have been possible. *See, e.g.*, 9 AA 1936–37. But as soon as they finished using him, Deangelo was in cuffs.

d. The length and form of questioning

The length and form of questioning, too, supports a finding that Deangelo was in custody.

Starting at around 9:30 p.m., Deangelo was interrogated over about two and a half hours.¹⁵ 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.

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. Despite no formal arrest, Deangelo was 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.

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

The trial court made no findings or conclusions in support of its decision to deny Deangelo's motion to suppress, so it's impossible to

¹⁵ McGrath testified at the preliminary hearing that they questioned Deangelo for four hours. 1 AA 41.

state the grounds for its decision. However, the court's decision cannot be supported by the *Miranda* warnings given *after* Deangelo had confessed.

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 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, 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. 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. 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 looked to the detectives’ authority to determine what he should do. *See* 11 AA 2285, 2305.

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); *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. Then the 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 mentioned, 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.* The same worry and the same evasion were repeated 35 minutes later when Vaccaro asked Deangelo to sign a waiver:

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

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 — *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 is 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).¹⁶ 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.

¹⁶ 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. 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 argument. 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

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 intentional-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 lessened the actual intent required, it placed other burdens on the State. Beyond intending to kill or harm, to be guilty of 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 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. 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. Thus Deangelo cannot be guilty of first-degree murder under lying-in-wait. 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 failed to prove that enhancement against Deangelo.

1. Standard of review

This argument shares the same standard of proof as the preceding argument. Under the Fifth Amendment, there is insufficient evidence to support a conviction where the prosecution has not produced the minimum threshold of evidence. *Thompson*, 125 Nev. at ___, 221 P.3d at 714. 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 already described, Deangelo did not intend for TJ to be killed. Repeatedly 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 Deangelo also affirmed that a gun *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. The gun was hidden under KC’s sweater and Deangelo didn’t see it that night until KC pulled it out and shot TJ. 3 AA 589, 602–03.

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 guilt and the quantity and character of the error are intertwined, so they must be considered together. The evidence of Deangelo’s guilt is his statement and the recordings he made. The only other evidence against Deangelo was the testimony of Rontae Zone, but his testimony could never support a conviction. *See, e.g.*, 6 AA 1327–28. For Deangelo to have received a fair trial, the admission of his statements and the recordings 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).

In sum, given the stakes of this case, and the seriousness of the errors leading to Deangelo's conviction, if they should be found harmless separately, together they should be found serious enough that his convictions are reversed.

VI.
CONCLUSION

The Court should reverse Deangelo's convictions and sentences.

DATED: December 3, 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 18,986 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: December 3, 2014.

/s/ Mario D. Valencia
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Counsel for Deangelo R. Carroll

VIII.
CERTIFICATE OF SERVICE

I HEREBY CERTIFY AND AFFIRM that this document was filed electronically with the Nevada Supreme Court on December 3, 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