IN THE SUPREME COURT OF THE STATE OF NEVADA

DEANGELO R. CARROLL, Appellant, v. THE STATE OF NEVADA, Respondent.	)	No. 64757

MOTION FOR LEAVE TO FILE APPELLANT'S REPLY BRIEF IN EXCESS OF TYPE-VOLUME LIMITATION

Pursuant to NRAP 32(a)(7)(D) and the attached Declaration of Counsel, appellant Deangelo R. Carroll moves for leave to file an Appellant's Reply Brief in excess of the type-volume limitations of NRAP 32(a)(7)(A)(ii).

DATED: April 6, 2015.

/s/ Mario D. Valencia

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DECLARATION
(NRS 53.045)

I, MARIO D. VALENCIA, am a duly licensed attorney in the State of Nevada.

Except by court order, a reply brief shall not exceed 15 pages in length or shall contain no more than 7,000 words or 650 lines of text. NRAP 32(a)(7)(A)(ii); NRAP 32(a)(7)(D).

On November 21, 2014, the court granted, in part, Carroll's motion for leave to file an opening brief in excess of the type-volume limitation. Pursuant to the court's order, Carroll was permitted to file an opening brief that did "not exceed 19,000 words." On December 4, 2014, Carroll filed an opening brief that complied with the court's order. The opening brief consisted of 18,986 words.

On February 3, 2015, the State filed a motion for leave to file an answering brief in excess of the type-volume limitation. The court granted the State's motion. The State's answering brief is about 1,000 words (a little less) over the 14,000 words type-volume limitation.

Carroll has raised six issues on appeal, many of which require a thorough discussion of the facts and the law. These include review of

the voluntariness of a confession, determination of custody, and the sufficiency of the evidence. Carroll has sought to respond to the State's arguments and representations in as concise a manner as possible, without sacrificing depth, scope, or accuracy. *See* NRAP 32(a)(7)(D)(i). However, in order to fully develop the facts, to respond to the arguments in the State's answering brief, and to correct many misrepresentations and inaccuracies the State makes about the record, it has been necessary to prepare a Reply Brief containing 8,540 words. *See* Exhibit 1 (Appellant's Reply Brief). Thus, Carroll respectfully requests the court grant this motion and allow him to file a Reply Brief that is slightly more than 1,500 words over the type-volume limitation.

I hereby declare under penalty of perjury that the foregoing is true and correct.

DATED: April 6, 2015.

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on April 6, 2015. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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EXHIBIT 1

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IN THE SUPREME COURT FOR THE STATE OF NEVADA

DEANGELO R. CARROLL, Appellant, v. THE STATE OF NEVADA, Respondent.	No. 64757

Appeal

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

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

I.

ARGUMENT

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

Deangelo maintains the detectives gave him a promise of leniency—that he would not go to jail if he told the truth—rendering his statement involuntary. *See Opening Brief* at 43–49. The basis for this claim is an exchange that occurred about 24 minutes into his interrogation. *See, e.g.*, 12 AA 2487–92. So it should be relatively straightforward to determine whether Deangelo received a promise of leniency. You just need to look at the video or transcript, and see if what Deangelo was told was enough to overbear his will. *See, e.g.*, *Lynumn v. Illinois*, 372 U.S. 528, 534 (1963).

This renders the State's response all the more troubling. The immediate problem, visible without consulting the record, is that the State quotes only one sentence to argue that Deangelo wasn't concerned about going to jail generally. Instead, the State claims Deangelo was only concerned about being taken to jail *that evening*. *State's Brief* at 16–17. That is just the start.

The problem is that the State is inventing facts not in the record, and misrepresenting others that are. While others will be mentioned later, another particularly egregious example stands out. The State prominently quotes Deangelo as saying: "I'm an accessory to murder and now my fuckin' family life's gonna [sic] be fuckin' ruined behind this shit. Now I might fuckin' go to prison." *State's Brief* at 18 (citing 12 AA 2528). The State twice cites it to assert that Deangelo knew there was no promise. *State's Brief* at 18 & 23.

In context, the quote shows nothing of the sort. After Deangelo told the police an accurate account of what happened, including his part in it, police asked Deangelo how much he was paid for his participation. Deangelo swore he was only paid $100. 12 AA 2527–28. The police then asked: "How'd you feel about that?" 12 AA 2528. Deangelo replied:

> Felt shitty about it, you know I'm saying I didn't even wanna take it from him. He's like man, no, here take it, you helped me out. I was like no, because now I'm an accessory to murder and now my fuckin' family life's gonna be fuckin' ruined behind this shit. Now I might fuckin' go to prison for somethin' I, I didn't even do.

12 AA 2528. Deangelo was not acknowledging a present risk of punishment. He just described how he felt in the past.

In fact, Deangelo's whole demeanor after he was told that he was not going to jail, but going home, shows a person that didn't have a fear of punishment as long as he told the truth. He understood that by telling the truth and helping out, as the police required in exchange for the promise, he would be allowed to stay with his family.

To underscore why, one simply needs to turn to the exchange where the promise was given. After Deangelo had finished telling the story that had been given to him, the officers told him that there were problems with his account. Among other things, they told Deangelo they had phone records that placed him in the area where the victim was found: "So we're the police, so we put a call in to Nextel and we're like where are these cell sites happening? And they're right off suh- Sunrise Mountain." 12 AA 2489.[1] This prompted Deangelo to admit he had been in the area, but he still said the he had not met up with TJ that night. 12 AA 2490–91.

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[1] This was a lie, *see* 3 AA 644, or, per *Sherriff v. Bessey*, an intrinsic falsehood. 112 Nev. 322, 326, 914 P.2d 618, 620 (1996).

Then the critical exchange begins. Because the State has tried to distort its context, it is reproduced in full:

Carroll:	I just, *I don't wanna get in trouble*, you know what I'm saying, I got a kid at home.
MM:	Okay. Okay. Let me just ___. Listen, listen. Okay, listen to me.
Carroll:	Yes, sir.
MM:	Okay. Maybe you're with somebody, okay, just think of this. Maybe you're with somebody, alright. *We're looking for witnesses* as well as the person that did this, okay. I know you have more to tell us. Detective Wildemann knows that you have more to tell us.
Carroll:	How, how do I know that I'm fuckin' gonna be protected if I fuckin' say anything?
MM:	Listen, listen.
Carroll:	*I'm fuckin' scared for my life here.*
MM:	Listen. You're gonna be protected. I promise you, okay. We're gonna protect you one hundred percent and if you tell us now that you're in fear of your family, guess what? We'll make phone calls, we'll move you, okay, but listen. All we want from you is for you to tell us the truth. You talk to us now and tell us.
Carroll:	But am I gonna- *my question is if I tell you guys what happened, am I going to jail?*
MM:	You, listen-
Carroll:	*That's what I wanna know.*

> MM: 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 and if you tell us the truth, start to finish.

12 AA 2491–92 (emphasis added).

Throughout this exchange, Deangelo repeatedly emphasized that his concern is getting in trouble with the law and going to jail. He did not, as the State asserts, "fear for the safety of his family, and his own safety in jail." *State's Brief* at 19. Those are fears the police, like the State now, projected on him. But, that was not the nature of his fear.

After he was offered protection, Deangelo didn't respond: "Thank you, but there's one more thing. Am I going to jail *tonight*?" He made clear what his exact concern was: "[A]m I going to jail? . . . That's what I wanna know." 12 AA 2491. Only when he was led to believe that he wasn't—"I'm gonna take you back"—did Deangelo begin to implicate himself.

Nor was Deangelo merely concerned with catching a ride home, another argument in the State's brief. At least twice the State asserts Deangelo didn't own any vehicle and instead only used the club van to get around. *State's Brief at* 18 & 19. That fact does not appear anywhere in the record. On the contrary, the record indicates Deangelo *did* have his own car.[2]

When Deangelo asked if he was going to jail, he wasn't worried about a temporary reprieve from incarceration, or even just a ride across town. This distinguishes this case from *Barren* and *Franklin*, two cases where there were no promises of leniency. *See State's Brief* at 19–20 (citing *Barren v. State*, 99 Nev. 661, 669 P.2d 725 (1983); *Franklin v. State*, 96 Nev. 417, 610 P.2d 732 (1980)). Nor was there anything ambiguous about Deangelo's concern, or the response he received. The police did not suggest a possibility of leniency, but promised it by telling

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[2] First, the club van was in the shop the night of his interrogation; yet Carroll drove to the Palomino Club that night. 12 AA 2480. And, the following morning, Carroll *drove* another witness to the homicide office. 1 AA 42. Second, when Carroll was making recordings for the police, he met them "in his vehicle." 8 AA 1692; *see also* 1 AA 59–60; 12 AA 2445, 2462.

Deangelo he wouldn't go to jail. So the comparison to *Brust* is also inapposite. *See State's Brief* at 20–21 (citing *Brust v. State*, 108 Nev. 872, 839 P.2d 1300 (1992)).

As for the State's discussion of other factors in the totality of the circumstances, they do not alter the conclusion. It doesn't matter that his interrogators offered Deangelo water, or left the door open, or made sure he was comfortable. *See State's Brief* at 22.[3] Neither does it matter that the interview was "only" two and a half hours long, or that Deangelo did not assent to everything the police said. *Id.* For this claim, the decisive fact is that Deangelo was led to believe there would be no consequences if he told what happened.

This conclusion is consistent with numerous cases cited in the opening brief. They all are adamant that you can't entice someone to confess with a false promise of leniency and call the results voluntary. *See Opening Brief* at 47–48. And these cases aren't outliers. This is established doctrine, "crystalized" in the U.S. Constitution. *Bram v.*

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[3] As discussed below, the State description of the environment, the circumstances, and what happened at Deangelo's interrogation are inaccurate and belied by the record.

United States, 168 U.S. 532, 543 (1897). Long ago the Supreme Court declared that "a confession, in order to be admissible, must be free and voluntary: that is, must not be extracted by any sort of threats or violence, nor obtained by any *direct or implied promises*, however slight, nor by the exertion of any improper influence." *Id.* at 542–43 (emphasis added); *accord Franklin*, 96 Nev. at 421, 610 P.2d at 735 (a confession "must not be extracted by any . . . direct or implied promises, however slight") (quoting *Bram*). Why is quite simple:

> The reason for the rule proscribing confessions obtained by false promises is not so much the likelihood of false confession as it is the unworthiness of the method used, which is deemed to impinge upon the constitutional guaranty of due process and the constitutional prohibition against self-incrimination.

People v. Anderson, 101 Cal.App.3d 563, 573 (1980).

That reasoning applies here. The police gave Deangelo an implied promise that he wouldn't face punishment if he talked. That implied promise was the key to getting Deangelo to incriminate himself. For that reason, Deangelo's statement must be suppressed and his conviction reversed, even without reaching the remaining arguments. *See Lynumn*, 372 U.S. at 537–38.

B. Custody requires a consideration of the totality of the circumstances

The question of whether someone is in custody for *Miranda* purposes requires courts to look at the totality of the circumstances. *See, e.g.*, *Rosky v. State*, 121 Nev. 184, 191, 11 P.3d 690, 695 (2005). The State also recognizes this as the standard for evaluating custody. *See State's Brief* at 25. Despite that, the State's argument for why Deangelo was not in custody proceeds with a divide-and-conquer approach. Again and again, the State mentions certain circumstances, then, comparing them in isolation to some other case, asserts that the situation wasn't custodial. This is the State's first major mistake.

The State's second major mistake is to repeatedly emphasize that Deangelo accompanied the police voluntarily, *see State's Brief* at 23, 27, 29, 30, & 36, and that Deangelo answered questions voluntarily. *State's Brief* at 26, 29, 30–31, 37. But not once does the State address the problem that Deangelo only "voluntarily" went with police because he was told to do so by Mr. H. 12 AA 2562–63. Likewise, his "voluntary" answers to police questions were the answers he was told to give, 12 AA

2566–67, or the answers he gave only after he was told he would not go to jail.

The third major mistake concerns the State's cavalier approach to the record. In some instances, it plays fast-and-loose with the facts in order to establish its rebuttal. In others, it emphasizes facts that have no significance. These errors are addressed as follows.

1. Intimidating location

The State begins by fussing over whether or not police chose to interview Deangelo at the homicide office because it was more intimidating than other locations. *State's Brief* at 26. The State also fusses that neither detective actually described the office as intimidating, only that it could be. *Id.* at 26–27. While it is true that Detective McGrath hedged his answer, saying that situation would be intimidating "[i]n some cases," 8 AA 1713, Detective Wildemann testified clearly that the homicide office would be "a more intimidating place to question a witness." 7 AA 1482. Only when asked whether the whole *situation* would be intimidating did Detective Wildemann begin to equivocate. 7 AA 1486.

The State emphasizes that the homicide office "was not a large building, and at the time of the interview, was nearly empty." *State's Brief* at 26. But the size of the office itself is fairly insignificant compared to the condition in the room Deangelo spent almost all his time in. That hot little room is the real oppressive factor. It only fits "three people, four people, you know, tops." 8 AA 1712. And during almost all questioning, three people were in the room—Deangelo and two detectives.

2. The focus on Deangelo

The State argues that Deangelo was merely a person of interest, not a focus of investigation for *Miranda* purposes, and that should weigh against a determination that he was in custody. *State's Brief* at 27–28.

The State cites a Nevada case for the proposition that a person "is not in custody when the police are simply asking questions in a fact-finding investigative stage, or where the defendant is merely a person of interest." *State's Brief* at 28 (citing *Taylor v. State*, 114 Nev. 1071, 1082, 968 P.2d 315, 323 (1998)). But the State drops the word "only," a

modifier this Court used to qualify those statements. In other words, a person is not is custody "where police officers *only* question an individual on-scene regarding the facts and circumstances of a crime or ask other questions during the fact-finding process, or where the individual questioned is merely the focus of a criminal investigation." *Taylor*, 114 Nev. at 1082, 968 P.2d at 323 (emphasis added, but internal citations omitted). Absent formal arrest, the test remains whether "there has been a restraint on freedom of movement of the degree associated with a formal arrest so that a reasonable person would not feel free to leave." *Id.*

As for the State's citation to *Avery v. State*, 122 Nev. 278, 129 P.3d 664 (2006), it is unavailing. Since *Avery* was decided, this Court has repeatedly identified "whether the investigation has focused on the subject" as a factor relevant to determining if a person is in custody despite formal arrest. *See, e.g.*, *Casteel v. State*, 122 Nev. 356, 361, 131 P.3d 1, 4 (2006); *Davis v. State*, Case No. 61529, Order Reversing and Remanding (Nev. June 24, 2014) (unpublished). So *Avery* cannot mean that focus is irrelevant. Indeed, *Avery* itself cites focus as relevant. What the State has done is conflate "focus" as indicia of custody with

"focus" as employed in the *Miranda* decision. The *Avery* court distinguishes the two itself. 122 Nev. 278, 287, 129 P.3d 664, 670 (2006).

3. Other objective indicia of custody

a. Deangelo "voluntarily" accompanied police

This was mentioned above already, but to reiterate: Deangelo only agreed to speak with police because he was told to do so by Mr. H. 12 AA 2562–63. And he was told to do so after the police approached Mr. H and told him that they wanted to speak with Deangelo. 7 AA 1389–92. In light of all the circumstances, which include Deangelo's limited intelligence and personality disorder, *see Opening Brief* at 5–8, Deangelo's "decision" to accompany police doesn't militate against a finding of custody.

b. Formal arrest not obligatory

Yes, Deangelo was not under formal arrest. If he were, this discussion would be moot. But the reason why Deangelo wasn't under formal arrest should be kept in mind. Because he was told to, Deangelo agreed to speak with officers, so there was no need to arrest him. After they told him he would not go to jail and Deangelo fully implicated

himself, the police did not arrest him immediately because it would have ruined the chance to use Deangelo to incriminate the others involved.

c. *Deangelo was not free to leave the police dominated interrogation*

The State claims that Deangelo "was left unaccompanied in the interview room on multiple occasions, and that on each occasion the door was left open." *State's Brief* at 30 (citing 12 AA 2508, 2535). The State also claims that the atmosphere wasn't police dominated because "detectives went out of their way to make sure that [Deangelo] was comfortable." *State's Brief* at 31.[4]

Neither claim has any support in the record.

The first instance of the detectives showing "concern" for Deangelo's comfort occurs literally one minute into the interrogation when Wildemann asks Deangelo if he is comfortable. 12 AA 2463. At that time, Deangelo barely had time to settle into his seat.

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[4] The Opening Brief and the State's Brief addressed these two factors separately. However, because the factual details the State raises in its argument on both factors almost completely overlap, the two factors are addressed together in this reply.

The second instance of "concern," and first "unaccompanied moment" cited by the State, occurs about 45 minutes in. The interrogating officers decide that *they're* going to take a break to confer among themselves:

MM:	I'm gonna pause this, okay.
MW:	Yeah. Pause it. We'll be back. Hold on, let me tell you the time. What time is it, Mike?
MM:	Ah, I got, ah, 2208.
MW:	Okay.
MM:	We'll be right back. Relax. Drink some water. You know what, let me tell you something . . .
Carroll:	Hey, do one of you got a smoke. Can I just smoke a cigarette?
MM:	I don't have a smoke, but we will see what we can do to try and find one. But listen to me. You did probably the greatest thing for your family you've ever done.
Carroll:	I just want to go home and be with my family.
MM:	Okay, Okay, we will be back in a minute.
Carroll:	I don't want anyone at work to fuckin know about _____
MM:	Okay, we will do whatever we can, but we are going to need to take the van, Alright?
	[10 minutes pass with door *closed*]

MW:	Alright, you good on water, or you want some more?
Carroll:	_____
MW:	You want some more?
MM:	*I'll get it*, right now. You want to leave that door open, it's pretty hot in there.
MW:	Yeah, it's hot in here.

12 AA 2507–08 (emphasis added); Video Ex. 243 at 45:45–55:55. So it was only after the detectives returned that the door was left open; for their comfort. And the only thing the detectives went out of their way to do was to make sure Deangelo knew he couldn't leave—not even to get his own water.

The third example of "concern," and second unaccompanied moment, again centers on another moment when detectives take a break for themselves:

MM:	Okay. [to Wildemann] Let's go digest this. [to Deangelo] *Just hang*, okay. Okay? Drink your water. _____ for a second.
MW:	*Sit tight*, okay?
MM:	Okay. Okay? *Drink your water*. _____ for a second.

12 AA 2535 (emphasis added). Because Deangelo asked, the door wasn't completely closed. It was left *slightly* cracked open as he sat for the next 15 minutes. 12 AA 2535; Video Ex. 243 at 1:23:05–1:37:55.

The final example of "concern," and Deangelo's final unaccompanied moment, came at the very end of the interrogation. Detective Vaccaro told Deangelo as the two detectives were leaving the room: "Alright, we're going to be back in a minute. Drink your water and relax. Loosen your tie." 12 AA 2577. They then closed the door and left Deangelo to sit alone for at least 13 minutes, when the recording ends, and possibly longer. Video Ex. 243 at 2:20:20–2:34:03

The State believes the "unaccompanied" moments described above render this case analogous to *Rosky*. In *Rosky*, no custody was found because, among other things, "the defendant took an unaccompanied ten minute break at the suggestion of the officers." *State's Brief* at 30. But the State doesn't mention that the *Rosky* defendant took his break *outside* the police station. 121 Nev. at 193, 111 P.3d at 696. In stark contrast, Deangelo never left the interrogation room, not to go to the bathroom or a water fountain. He was repeatedly instructed to sit, stay put, hang out. And before leaving for their second "break," detectives

took Deangelo's cell phones, to ensure that he couldn't contact anyone. 12 AA 2507. *Rosky* just doesn't compare to what happened here.

Moreover, nothing that happened during the interrogation, including the moments cited by the State, showed detectives going out of their way to make sure Deangelo was comfortable. If anything, detectives showed Deangelo that they expected him to stay put and deal with whatever they threw at him.

Were this any other situation, this "concern" for Deangelo's comfort would be extreme rudeness. When police are the ones calling the shots, it's an atmosphere of domination.

d. Deangelo cooperated because he believed that he would avoid punishment if he did

The State emphasizes Deangelo's cooperation, his willingness to answer questions, even volunteer information as indicia that the situation was noncustodial. *State's Brief* at 30–31. But in context, this makes sense: Deangelo's willingness to help out and give a story other than the one Mr. H told him to tell only came after he was given a promise of leniency: "You *truthfully* tell us what happened [and] I'm gonna take you back. I'm gonna *promise* you that." 12 AA 2492

(emphasis added). With that conditional promise hanging over his head, of course Deangelo is going to appear cooperative.

e. The existence of strong-arm tactics does not depend on Deangelo's reaction to them

There are several problems with the State's argument that the police did not use strong-arm tactics, but one jumps to the front. Throughout its argument, the State asserts that Deangelo's response to certain tactics shows they weren't oppressive. *See State's Brief* at 32–35. But that is not the measure. The oppressiveness of a tactic doesn't hinge on the reaction of its target. That's especially true here. Deangelo's intelligence, his personality disorder, and the promise of leniency are together enough to explain his demeanor.

The State also blunders defending the false evidence detectives claimed they had. Referring to the faked cell-records, the State cites *Silva v. State* for the view that this sort of deception "is *least likely* to invalidate a confession." *State's Brief* at 34 (citing *Silva*, 113 Nev. 1365, 1369, 951 P.2d 591, 594 (1997)). But *Silva* is concerned with voluntariness, a matter conceptually distinct from custody. In contrast, this Court has tied deception with strong-arm tactics as relevant to

determining whether an interrogation was custodial. *See, e.g.*, *Rosky*, 121 Nev. at 192, 111 P.3d at 696.

As for the State's concession that Detective Vaccaro wasn't "as congenial" as Wildemann or McGrath, that is an understatement. Vaccaro said things like, "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.

The State also complains that describing the gun residue test as "'worthless' is based on a misreading of the testimony at trial." *State's Brief* at 34. Yet the State's witness, in response to a jury question on the same topic, explained that "the test would be ineffective." 7 AA 1512. It was advanced merely as a ploy.

Taken as a whole, the police conduct speaks for itself. Trying to paint this as a cordial chat doesn't work.

f. Not arresting Deangelo is not determinative

The State places serious stock in the fact that Deangelo wasn't arrested at the end of the interview. *State's Brief* at 35–36. But there's no mystery why he wasn't. The police wanted to get Mr. H and the

others implicating themselves on tape. They already feared that the interrogation might make that unviable. 12 AA 2577.

The State also stresses that Deangelo "was not only free to leave at the end of the interview, but was indeed driven home." *State's Brief* at 35–36. But the State doesn't reconcile this "freedom" with what happened next. Escorted by four police officers in two cars, Deangelo first helped them collect the discarded van tires. The officers then went to Deangelo's house where he was not allowed to walk into his own house alone, nor allowed to talk to anyone other than to tell Rontae that he needed to talk to the police. The officers then brought *both* Deangelo and Rontae back to the police station where Deangelo was forced to sit while they interviewed Rontae. *See Opening Brief* at 30–31, 53–54.

This isn't Officer Friendly giving a stranded citizen a ride to his house, leaving him on his porch with a handshake and kind words. Throughout that night, including *after* the end of Deangelo's interrogation, police treated him as if he was in custody. Their actions leave little doubt that if Deangelo wasn't needed to get the bigger fish, he would have immediately been placed in handcuffs.

4. Questioning occurred over an intense two-hour period

The State downplays the length of the interview, as if sitting for two and half hours, facing questions for two hours of that, is inconsequential. And that's not even considering the post-interrogation custody. The State also criticizes the portrayal of the interrogation as a tag-team effort against Deangelo because "only" three detectives were involved, and one was present for the entire interview. *State's Brief* at 36. But the State doesn't explain how the back-and-forth that did occur, where one detective would press Deangelo on an issue, then the other detective a different one, is itself anything other than a tag-team, 2-on-1 tactic.

The State would instead rely on Detective Wildemann's description of the interview as determinative—he testified that "his style was non-confrontational." *See State's Brief* at 36. But the law requires an "objective look at all of the circumstances surrounding the interrogation," not the subjective description of a participant. *See Rosky*, 121 Nev. at 191, 111 P.3d at 695. With video and transcript, the circumstances speak for themselves. There's no need to take Wildemann's word for it.

The State rounds out its argument by repeating already discredited claims: "detectives went out of their way to make sure that [Deangelo] was comfortable," and they left Deangelo "unattended, without restraint, and with the door open, on multiple occasions." *State's Brief* at 36–37. Those are refuted above. But the use of the word unattended is jarring as Deangelo's every move was observed and recorded.

5. The State has failed to show Deangelo wasn't in custody

The circumstances of this case can be summarized as follows. After playing a peripheral part in TJ's death at the direction of Mr. H, Mr. H. instructs Deangelo to talk to the police about those events after they approach Mr. H at his club. The homicide detectives haul Deangelo in their vehicle late at night to their offices, where they place Deangelo to sit, in front of a hidden camera, for at least 2.5 hours. Under repeated questioning, and confronted with the specter of made-up evidence, Deangelo begins to crack. Fearing punishment if he tells the truth, Deangelo asks if he will go to jail if he tells them what happened. The police tell him that he won't.

Deangelo then begins to implicate himself, and yet there is no relent. Instead he's accused of lying, minimizing his role, is alternately told that his confession is the greatest thing he's ever done and is called a punk. At the end of it all, the police have a complete account of Deangelo's involvement.

The State has tried to make it sound like the situation was much nicer than it was. The State paints a picture in which the detectives were nice to Deangelo, they cared for him, and made him feel like he was free to walk right out of the room despite the fact that they kept shutting him in. But that picture is belied by the record.

While Deangelo was not under formal arrest at the time, the situation he was in, when viewed objectively, was the equivalent. A reasonable person in the suspect's position would *not* feel at liberty to terminate the interrogation and leave. *See Rosky*, 121 Nev. at 191, 111 P.3d at 695. And it's no surprise why Deangelo would not feel free to walk out: even at trial, years later, one detective testified he wasn't sure they would have allowed Deangelo to stop the interrogation and leave. 7 AA 1487–88.

The police should have informed Deangelo of his rights prior to interrogating him, not half way through. His statement was admitted in error.

6. The State doesn't refute Seibert

The State's only argument that *Seibert* doesn't apply here—that Deangelo's mid-interview *Miranda* warnings are invalid—is that Deangelo was not in custody. *See Missouri v. Seibert*, 542 U.S. 600 (2004). But as demonstrated in the Opening Brief and sustained above, Deangelo was. So the effect of the mid-interview warnings is for naught.

7. Deangelo's waiver of his Miranda *rights was ineffective*

The State contends the validity of Deangelo's waiver cannot be reached at all because it was not raised below. *State's Brief* at 40. But the rule is not so strict. When an "issue presents a constitutional question that can be resolved as a matter of law," it can be addressed on appeal, even if not raised below. *See Carrigan v. Comm'n on Ethics of State*, 129 Nev. ___, 313 P.3d 880, 887 n.6 (2013). That is the situation here.

The State also argues any ineffective waiver is irrelevant because Carrol was not in custody. *State's Brief* at 41. That argument fails for the reasons already stated.

The State's core argument is that Deangelo's low IQ, personality disorder, the cavalier fashion in which he was told his rights, and everything else raised in Deangelo's original argument, *see Opening Brief* at 63–69, do not render his waiver unknowing or involuntary. *See State's Brief* at 40–41. But the State is again resorting to divide-and-conquer. Rather than consider the issue as a whole, it finds it sufficient to argue that one factor or another is insufficient. But that isn't the proper approach. *See Moran v. Burbine*, 475 U.S. 412, 421 (1986). The State has failed in its burden to show that the waiver was knowing and voluntary.

C. The recordings should not have been admitted

1. Deangelo's challenge is not precluded by the invited error doctrine

First things first: the invited error doctrine is not an issue here. The State argues twice that Deangelo is "estopped" from raising an objection on appeal because he "participated" in the error. *See State's*

Brief at 48–49, 51–52. But he *didn't* participate in it. His counsel objected to the recordings coming in, and he objected to the transcripts coming in. *See* 8 AA 1594–604. Only after they were admitted—after the error occurred—did Deangelo's trial counsel try to use them to Deangelo's advantage.

Apparently the State believes that's enough to estop Deangelo from raising the error. But that's inconsistent with this Court's cases on the subject.

To begin with, look at *Carter v. State*, the case the State cites for estoppel. There the defendant didn't object when the State sought admission of evidence that he used illegal drugs and supplied them to others. 121 Nev. 759, 769, 121 P.3d 592, 599 (2005). Nevertheless, he challenged that admission on appeal. But when this Court examined the record, it discovered that the defendant had himself already elicited evidence of illegal drug use before the alleged error occurred. *Id.* In other words, the defendant brought the drug use up independently of the State.

This is consistent with other estoppel cases. For example, in *Jones v. State*, the defendant was estopped from raising an alleged error—the

admission of a description that caused him to be stopped—because he was the one who elicited the details of that description. 95 Nev. 613, 617, 600 P.2d 247, 250 (1979). Similarly, the defendant in *Rhyne v. State* was estopped from complaining about the testimony of a witness when he, over the objections of his counsel, "invited the error by asking the district court to allow him to call the witness." 118 Nev. 1, 7–9, 38 P.3d 163, 167–68 (2002).

In all of these cases, there is a common component: a defendant does something to cause the latter-objected-to evidence to be admitted. This places these cases comfortably in the realm of the invited error doctrine. That doctrine "precludes a party from raising on appeal errors that the party induced or provoked the court or the opposite party to commit." *Clark County Sch. Dist. v. Richardson Constr., Inc.*, 123 Nev. 382, 388–89, 168 P.3d 87, 91–92 (2007).

In contrast, the State wants an invited error doctrine on steroids. In effect, it would preclude a party from making the best of an adverse ruling or problematic evidence. Because the invited error doctrine applies outside criminal cases, the State's position would force every

litigant to ignore such evidence, even when they could argue that the evidence favors their position. That's an absurd result.

And it's a result this Court has rejected. Reliance on an error is not enough. A party must *provoke* or *induce* the error. *See Garcia v. Prudential Ins. Co. of America*, 129 Nev. ___, 293 P.3d 869, 972 n.4 (2013); *accord Pratt v. Nelson*, 164 P.3d 366, 372–75 (Utah 2007) (invited error generally requires an affirmative act). But that did not occur here.

2. "Context" doesn't salvage the admissibility of the recordings

In a bit of a twist, the State has conceded that *none* of what Deangelo said on the wire recordings is admissible for the truth of what he said. Instead, according to the State, Deangelo's statements are admissible to provide *context* for the statements of everyone else on the recordings. *See State's Brief* at 46–47.

Yet that is not how they were used. The State repeatedly relied on Deangelo's statements for the truth of what they asserted. For example, at one point during its case, the State emphasized the following exchange:

Deangelo: You know what I'm saying I did everything you guys asked me to do you told me to take care of the guy and I took care of him.

Anabel: OK ____ listen listen.

Deangelo: I'm not . . .

Anabel: ____ talk to to the guy not fucking take care of him ____ god damn it I fucking called you

Deangelo: Yeah and when I talked to you on the phone Ms. Anabel I said I specifically said I said if he is by himself do you still want me to do him in. You said yeah.

12 AA 2442 (quoted at 8 AA 1744–45).

After having its witness, Detective McGrath, read this exchange, the State asked:

Q: Did you tell Deangelo Carroll to tell Anabel, Hey, when I talked to you on the phone, you specifically said if he's alone, do him in? Did you tell him to say that?

A: No.

8 AA 1745.

During its closing argument, the State hammered home the point it was trying to make: "So don't fall into the trap of thinking that everything that's incriminating that comes out of those recordings was

just spoon fed through Deangelo by the cops." 9 AA 1861. *See* 8 AA 1741–45. So, no, Deangelo's statement weren't just used for context.

Nor was it possible that the jury received Deangelo's statements as context, even if they were so instructed. The State argued that there was a plan to kill TJ, just as Deangelo was describing on the tapes. Talk about a confusion of the issues.

More significantly, however, the State's concession leaves the rest of the statements—the statements of everyone *but* Deangelo—in a precarious position: they must be admissible, lest there be nothing to offer context to. This is where the State's argument runs into serious trouble.

First, the State has done nothing to allay the fact that when he helped police make the recordings, Deangelo had withdrawn from the conspiracy.[5] The State's cited cases miss the mark. It doesn't matter

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[5] Despite much searching, counsel could find no Nevada case detailing what steps a person must take to withdraw from a conspiracy. But certainly active cooperation with the police to capture incriminating statements from the remaining conspirators suffices. *Cf. United States v. Lothian*, 976 F.2d 1257, 1261 (9th Cir. 1992) ("To withdraw from a conspiracy a defendant must either disavow the unlawful goal of the

that Deangelo wasn't charged as a conspirator in the new conspiracies documented on the wires, nor that he was relaying statements as a non-conspirator. *State's Brief* at 48 (citing *Carr v. State*, 96 Nev. 238, 239, 607 P.2d 114, 116 (1980); *Fish v. State*, 92 Nev. 272, 275–76, 549 P.2d 338, 340–41 (1976)).

What matters is that Deangelo was no longer a coconspirator, a point the State does not refute. And NRS 51.035(3)(e) defines as non-hearsay only statements "by a coconspirator." Speaking of the near-identical federal rule, the Seventh Circuit has said:

> There is nothing in the rule about withdrawal, and of course a conspiracy could continue, and statements be made in the course and furtherance of it, after a particular member had withdrawn. But then it would not be a co-conspirator's statement; it would be a former co-conspirator's statement.

United States v. Patel, 879 F.2d 292, 293 (7th Cir. 1989). If a defendant effectively withdraws from a conspiracy, "the declarations of co-conspirators uttered after the date of his withdrawal would not be

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conspiracy, affirmatively act to defeat the purpose of the conspiracy, or take definite, decisive, and positive steps to show that the defendant's disassociation from the conspiracy is sufficient.") (internal changes omitted).

admissible against him." *United States v. Mardian*, 546 F.2d 973, 978 n.5 (D.C. Cir. 1976). This principle is echoed in a host of cases in which defendants fail to withdraw. *See, e.g.*, *United States v. Ciresi*, 697 F.3d 19, 27 (1st Cir. 2012); *United States v. Walls*, 70 F.3d 1323, 1327 (D.C. Cir. 1995); *United States v. Zarnes*, 33 F.3d 1454, 1468 (7th Cir. 1994); *Patel*, 879 F.2d at 293–94; *State v. Lobato*, 588 So.2d 1378, 1384–86 (La. Ct. App. 1991); *United States v. Cardall*, 885 F.2d 656, 668 n.22 (10th Cir. 1989); *United States v. Abou-Saada*, 785 F.2d 1, 7–8 (1st Cir. 1986).

Because Deangelo withdrew from the conspiracy by aligning himself with the police, he was no longer a conspirator when Anabel and Little Lou were recorded. Under the hearsay statute, those statements should not have been admitted.

But that is just the first reason. The second is that the statements recorded on the wires aren't in furtherance of the conspiracy. This was a point emphasized in the opening brief, particularly in regard to Anabel's statement about a "Plan B." *See Opening Brief* at 77. The State's rebuttal is a short *nuh-uh*. Its whole argument is this one sentence: "Here, the statements were made in the furtherance of the conspiracy, given that they were made to bring Hidalgo, Louis, and [Anabel]

Espindola up to speed with the events, and to avoid detection." *State's Brief* at 48.

The State may wish to reconsider its position. If it was really necessary, for example, for Anabel to inform everyone after the fact what the plan was, then how was there a conspiracy to begin with? How could Deangelo, Counts, Anabel, and the Hidalgos conspire to kill TJ if Anabel had to bring everyone up to speed *after* the fact? If that were so, the State should expect fresh post-conviction petitions from all these other "conspirators."

More seriously, though, this characterization doesn't hold up. This wasn't Anabel bringing anyone up to speed. And if she were minimizing everyone's involvement and blaming Deangelo for screwing things up, these aren't statements in furtherance of the conspiracy. If anything, Anabel's statements are more aptly characterized as efforts to shift blame for the situation. Such statements aren't admissible as coconspirator statements. *See United States v. Blakey*, 960 F.2d 996, 998 (11th Cir. 1992).

As for the statements about what should be done to avoid detection, those aren't in furtherance of the alleged conspiracy to kill

TJ. While a conspiracy can extend to "affirmative acts of concealment" that are "an integral part of the conspiracy," *see Foss v. State*, 92 Nev. 163, 167, 547 P.2d 688, 691 (1976), a conspiracy doesn't continue in perpetuity. The *Foss* court cited favorably two cases that support that very principle. *Id.* (citing *Dutton v. Evans*, 400 U.S. 74 (1970); *State v. Davis*, 528 P.2d 117 (Or. App. 1974)). One of those cases, the *Davis* decision, explains the point well:

> This is not to say that a perpetual conspiracy to forever avoid detection can be inferred from agreement to do a criminal act. The distinction must be drawn between (1) those affirmative acts of concealment directly related to the substantive crime of a nature within the contemplation of the conspirators, and (2) those general acts of concealment, by silence or by reaction to police activity, which occur after the primary objectives of the conspiracy have been achieved and the acts directly in furtherance of those objectives have been performed.

528 P.2d at 119.

This distinction mentioned above is important here. The State alleged a conspiracy to kill TJ, and statements in furtherance of *that* conspiracy could potentially come in. But that conspiracy was at an end, and a new one had begun. All the discussion of killing witnesses was

not an integral part of the conspiracy to kill TJ. The wires themselves reflect that this sort of action wasn't contemplated in the original conspiracy. Indeed, it only became an issue after Deangelo, on instructions from the police, told Anabel and Little Lou that Rontae and JJ were thinking about ratting. 12 AA 2449.

This says nothing of the remaining evidentiary problems with this other-conspiracy evidence. Contrary to the State's assertions, the statements, particularly those that discussed future actions, weren't relevant for proving Deangelo's mental state. *See State's Brief* at 42–46. Yes, trial defense counsel tried to employ some in that way, but relevance cannot be judged from an attorney's efforts to make the best of wrongly-admitted evidence. *See* 9 AA 1867. Deangelo's statements can't show anything, as they were only admitted for context, or so the State says. And the statements of others, particularly when they're goaded by Deangelo over imaginary dangers, simply cannot reveal Deangelo's own mental state.

To the extent Anabel's and Little Lou's statements could be somehow found to illuminate Deangelo's mental state, it is still outweighed by the danger of unfair prejudice. This is particularly true

when it comes to the "other conspiracy" statements. The danger is demonstrated by how the State employed these statements at trial. Over and over again, the State pointed to the new conspiracy to kill as evidence that Deangelo and the rest had conspired to kill before. *See* 9 AA 1855–60; *e.g.* 18 AA 1857 ("Could you have KC kill them too, meaning also, in addition, clearly indicating the prior intent and the formation of an intent to kill TJ."). This is propensity evidence in a conspiracy package.

The tapes should not have been admitted and it was plain error for the district court to admit them.

3. The recordings were fundamentally unfair

The State faults Deangelo for only citing one case in support of his contention that using the tapes was a violation of his due process. According to the State, the Court should decline to even consider the issue. *State's Brief* at 50.

To that, the response is simple. First, and fortunately, this situation is quite rare. Very few cases exist where police induce a defendant to confess with a false promise of leniency, take the

defendant up on his offer to record the others involved in a crime, instruct the defendant to induce the others to make the most incriminating statements possible, then use those statements against the defendant. Finding similar, reported cases is like finding the proverbial needle in a haystack.

Second, Deangelo's citation is very apropos. To label the issue here as concerning only "the introduction of a coconspirator's statement," is brash oversimplification. As described above, it was much more than that. So while the issue at the center of *Lisenba v. California* was an allegation of torture, the case nevertheless forbids the use of *any* evidence that would be fundamentally unfair, no matter its veracity. *See* 314 U.S. 219, 236 (1941).

And it's for that reason that the State's citations to *Jamal v. Van de Kamp* is for naught. The State cited that Ninth Circuit case for the proposition that a constitutional violation only occurs where "there are *no* permissible inferences the jury may draw from the evidence." *State's Brief* at 49 (quoting *Jamal*, 926 F.2d 918, 920 (9th Cir. 1991)). Besides not being mandatory authority, that Ninth Circuit holding is inexplicably at odds with the due process standard set out in *Lisenba*.

The Supreme Court case forbids even the use of *true* evidence if it would be fundamentally unfair, yet obviously a jury could draw all sorts of permissible inferences from true evidence.

Under the circumstances of this case, using the tapes against Deangelo breached the norms of due process, and that is so regardless of what inferences a jury could draw.

4. Counsel's argument is not evidence

The State argues that using the tapes didn't force Deangelo to testify or forego the opportunity to explain his statements because that task was accomplished through other witnesses and through argument. *State's Brief* at 51. Not so.

First, while the jury was given *some* background on how the recordings were produced, the prosecution witness asserted that he only gave Deangelo tips on what to do, not what facts to bring up. 8 AA 1730. In turn, the prosecution relied on that to imply that Deangelo was revealing the truth in his statements on the recordings. *See, e.g.*, 8 AA 1741–45. So no testimony explained just how candidly Deangelo was speaking.

That leaves the argument of Deangelo's attorney to do the task. But, consistent with the law, the jury was instructed that "[s]tatements, arguments and opinions of counsel are not evidence in the case." 9 AA 1982. Counsel's argument did not remedy the problem.

5. Making the best of the tapes does not mean Deangelo's substantial rights weren't implicated

The State offers only one argument for why Deangelo's substantial rights weren't implicated. It returns to the proposition that the recordings can't be bad because Deangelo's trial counsel used their content to argue that Deangelo wasn't culpable. *State's Brief* at 51–52. But that logic doesn't follow. Making lemonade from the lemons of bad evidence doesn't mean the evidence was good. Deangelo's substantial rights were implicated by the admission of the tapes.

D. The record, in context, does not support Deangelo's first-degree murder conviction

The State's sufficiency arguments are built upon a faulty premise. While the evidence must be viewed in the light most favorable to the jury's verdict, there is no license to take evidence out of context or

invent details that do not exist. But again that is what the State has done.

1. Others' intent does not matter

For Deangelo to be guilty of first-degree murder, he must have intended TJ's death as a deliberate, willful, and premeditated murder. *See, e.g.*, *Opening Brief* at 84–85. Nevertheless, the State spends much of its brief focusing on what Mr. H wanted, as reported by Deangelo. *State's Brief* at 54–55. That is irrelevant.

So, to bridge the gap, the State brings in Deangelo's statements about his own motives. But they are taken out of context. Although he wanted to prove his loyalty to Hidalgo, Deangelo didn't say he agreed to participate in a murder to do so. 12 AA 2528. And while he did relay the assignment to Counts, he did so because he didn't want to be the one to beat up TJ. The murder was Counts going too far. 12 AA 2549–50.

Neither do Deangelo's actions show guilt. For example, the State claims Deangelo brought JJ and Rontae along so that nobody could blame him for the shooting. *State's Brief* at 2521–22. But this was just another instance of Deangelo's confused story telling. They were only

important as witnesses because they "*saw* him shoot him, you know I'm saying." 12 AA 2522 (emphasis added to past tense verb).

2. Deangelo did not distract TJ

The State argues that there is sufficient evidence for the lying-in-wait theory because Deangelo "distracted" TJ so that Counts could get the drop on him. *State's Brief* at 56. But there is nothing in the record about Deangelo distracting TJ. That's an invention of the State.

Both elements for this theory, as well as the first-degree theory, are absent. Deangelo's murder conviction must be reversed.

E. The record, in context, also doesn't support the deadly-weapon enhancement

The State's argument for why Deangelo knew a gun would be used is just like its other sufficiency arguments: a mix of out-of-context statements, misconstrued statements, intentions attributable only to others, and so forth. *See State's Brief* at 59.

So, no, Deangelo did not hire Counts to kill, despite what Mr. H may or may not have wanted. He didn't argue over who was going to shoot TJ—he told JJ *not* to shoot. 12 AA 2522. And again, while he did

have JJ and Rontae along, he emphasized their value as witnesses *after* Counts' unanticipated shooting, not before. *Id.*

As for Deangelo's off-hand statement that he knew that Counts *carried* a gun, it doesn't show that Deangelo had any knowledge that Counts *intended to use* it on TJ. *See Opening Brief* at 91.

Again, there is insufficient evidence to show that Deangelo should be convicted of the deadly weapon enhancement.

F. Cumulative error

Only one thing needs to be said in reply to the State's cumulative error argument. The State insists that there couldn't be cumulative error, in part, because "several of the alleged errors were not even sufficient to draw an objection at trial." *State's Brief* at 60. But that has no bearing on the analysis. Just because trial counsel fails to object to something, it doesn't necessarily mean that no error occurred. As successful ineffective assistance of counsel claims show, sometimes trial counsel simply fail to object because they were not aware of an error.

II.

Conclusion

The State has failed to rebut Deangelo's claims that his statement and the recordings were improperly admitted at trial, and that there was insufficient evidence to convict him of first-degree murder and the deadly-weapon enhancement. For those reasons, as argued above and in the Opening Brief, this Court should reverse Deangelo's convictions and vacate his sentence.

DATED: April 6, 2015.

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III.

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 8,540 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: April 6, 2015.

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IV.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY AND AFFIRM that this document was filed electronically with the Nevada Supreme Court on April 6, 2015. Electronic service of the foregoing document shall be made in accordance with the Master Service List as follows:

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