IN THE SUPREME COURT OF THE STATE OF NEVADA

PATRICK NEWELL, Appellant, v. THE STATE OF NEVADA, Respondent.	No. 66552 **E-File**

FAST TRACK STATEMENT

1. **Name of party:** Patrick Newell.

2. **Name of attorney submitting this fast track statement:**

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3. **Name of appellate counsel if different from trial counsel:** Same.

4. **Judicial district, county, and district court docket number of lower court proceedings:** Eighth Judicial District, County of Clark, District Court Case No. C285825.

5. **Name of judge issuing order appealed from:** Jerome Tao.

6. **Length of trial.** Four days.

7. **Conviction(s) appealed from:** Ct. 2 – Battery With Use of a Deadly Weapon Resulting in Substantial Bodily Harm; Ct. 3 – Attempt

Assault With a Deadly Weapon; Ct. 4 – Performance of Act in Reckless Disregard of Persons or Property.

8. **Sentence for each count:** $25 Admin. fee; $150 DNA analysis fee; genetic testing; $3 DNA collection fee; Ct. 2 – 72-180 months in prison; Ct. 3 – 24-60 months in prison; concurrent with Ct. 2 – 468 days CTS; Ct. 1 – Not guilty and Ct. 4 – Dismissed.

9. **Date district court announced decision:** 08/21/14.

10. **Date of entry of written judgment:** 08/29/14.

11. **Habeas corpus:** N/A.

12. **Post-judgment motion:** N/A.

13. **Notice of appeal filed:** 09/19/14.

14. **Rule governing the time limit for filing the notice of appeal:** NRAP4(b).

15. **Statute which grants jurisdiction to review the judgment:** NRS 177.015.

16. **Disposition below:** Judgment upon verdict of guilt.

17. **Pending and prior proceedings in this court:** N/A.

18. **Pending and prior proceedings in other courts:** N/A.

19. **Proceedings raising same issues.** Appellate counsel is unaware of any pending proceedings before this Court which raise the same issues as the instant appeal.

20. **Procedural history.** A Criminal Complaint, filed on October 11, 2012, charged Patrick Newell with: Ct. I: Attempt Murder With Use of a Deadly Weapon; Ct. II: Battery With Use of a Deadly Weapon Resulting in Substantial Bodily Harm; and Ct. III: Assault with a Deadly Weapon. (App pp. 001-002).

On November 26, 2012 an Amended Criminal Complaint was filed charging Patrick Newell with: Ct. I: Attempt Murder With Use of a Deadly Weapon; Ct. II: Battery With Use of a Deadly Weapon Resulting in Substantial Bodily Harm; Ct. III: Assault With a Deadly Weapon and Ct. IV: Performance of Act in Reckless Disregard of Persons or Property. (App. pp. 003-004).

On November 28, 2012 a preliminary hearing was held in Justice Court. At the conclusion of the hearing, Mr. Newell was bound over to District Court on Ct. I: Attempt Murder With Use of a Deadly Weapon; Ct. II: Battery With Use of a Deadly Weapon Resulting in Substantial Bodily Harm; Ct. III: Assault With a Deadly Weapon and Ct. IV: Performance of Act in Reckless Disregard of Persons or Property. (App. pp. 025-169). An Information,

charging Mr. Newell with Ct. I: Attempt Murder With Use of a Deadly Weapon; Ct. II: Battery With Use of a Deadly Weapon Resulting in Substantial Bodily Harm; Ct. III: Assault With a Deadly Weapon and Ct. IV: Performance of Act in Reckless Disregard of Persons or Property was filed in District Court on November 30, 2012. (App. pp. 005-008).

A jury trial was held before the Honorable Jerome Tao, Department 20, beginning on June 16, 2014, and concluding four days later on June 19, 2014. (App. pp. 583-1278). (During the trial, and prior to resting their case, the State filed an Amended Information. The charges remained the same). (App. pp. 310-312). At the conclusion of the deliberation, the jury found Mr. Newell not guilty of Count 1: Attempt Murder With Use of a Deadly Weapon; guilty of Count 2: Battery With Use of a Deadly Weapon Resulting in Substantial Bodily Harm; guilty of Ct. 3 – Attempt Assault with a Deadly Weapon and guilty of Ct. 4 – Performance of Act in Reckless Disregard of Persons or Property. (App. pp. 360-361).

He was sentenced by the court to Ct. 2 – 72-180 months in prison; Ct. 3 – 24-60 months in prison, concurrent with Ct. 2; 468 days CTS; Ct. 1 – Not Guilty, Count 4 Dismissed. (App. pp. 362-363).

A timely Notice of Appeal was filed in this matter on September 19, 2014. (App. pp. 364-367).

21. **Statement of facts.** Patrick Newell did not go to Circle K looking to set someone on fire, he went to get gas and some candy for his wife. App. 1107-08. They were going to watch a movie on television. It was the early morning of hours of October 10th, 2012 and 62 year old Newell's life was about to change.

Everything was started as a normal trip to the gas station---as Newell approached the cashier he did not notice drunken Theodore Berjarno[1] behind him. Video showed that moments earlier Berjarno was drinking a can of malt liquor at the stores slot machines---he was asked to leave. Newell left the line for a moment to get another item and Berjarno approached the cashier, although video did not reveal any purchases. By the time Newell paid Berjarno was already in the parking lot.

It was as Patrick approached his truck, a late model ford with a handicapped plaque that he first noticed a strange man was lurking next to it and peering into the passenger side window. App. 836-39, 1112. Patrick and others would later describe this 35-year-old man as being approximately 5'-8" tall and weighing about 240 pounds. App. 821, 1108. The strange man, Berjarno, smelled of alcohol and was visibly drunk. App. 1112. Concerned

[1] During closing the state argued Berjarno was "... so drunk he doesn't remember being drunk." App 1230.

that the stranger had noticed the keys still in the ignition and the handicap placard hanging from the rear view mirror, Patrick Newell asked from a distance, "can I help you"? App. 1112. It looked like there might be trouble.

Berjarno was initially belligerent towards Patrick asking for ride. When Patrick refused Berjarno demanded a ride in an attempt to coerce Patrick. App. 780, 822-23, 1113. As Newell went to get into his truck, the stranger begins to hang over and lean the vehicle. App. 1112-16. Berjarno also approached Patrick, getting closer and closer causing not only concern for his property but eventually for his life. App. 823-25, 1112-1116. Trying to gain control of the situation Patrick pulls out a small Swiss-Army key ring knife in an attempt to scare off this intruder. App. 779, 815. Witnesses would later testify that they heard Patrick yelling at Berjarno to "get away", asking him to leave over and over again. App. 785, 801-3. This went on for some 15 minutes.

As the situation escalates, Patrick actually seeks help from others, even asking the store clerk to call 9-1-1. App. 1116. An off duty security officer advised the clerk that things were getting "crazy" outside. App. 786. During this panic stricken series of events, Patrick ultimately found himself cornered-- in his words "trapped"--- between his truck and the gas pump. App. 1118. During this exchange the drunken intruder is demanding that Patrick give him

a ride.[2] App. 1128. At some point Newell actually push Berjarno away and Berjarno fell over some curbing.[3] Not deterred in the slightest, Berjarno continues his demands. Newell is Trapped---fearing for his own safety he removes the nozzle from the tank and gasoline sprays onto the face and torso of his aggressor hoping to scare him away. App. 787, 1118. Theodore Berjarno only becomes more incensed as backs up for a moment then begins to scream at Newell. App. 1118. Onlookers tell Berjarno to leave and to just walk away but it is to no avail. App. 788.

Berjarno approaches for a second time, angrier than the first. As things spinning out of control and not knowing when help would arrive, Newell points the nozzle and sprays again hoping all the while that this drunk, belligerent stranger would just leave so that Patrick can escape back to his wife and home. App. 1118-9. In a desperate and terrified act of last resort, Newell retrieves a lighter from his pocket and strikes it. App. 827, 1120. Even the act of lighting the lighter was a warning where Patrick struck the lighter three separate times. App. 788, 827. Patrick now frantic from the situation, warns the strange drunkard who is now menacing and threatening

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[2] The state conceded during closing that Berjarno "...insisted that the defendant give him a ride." App 1230.

[3] The state conceded in closing that given the demands being made by Berjarno the push was justifiable and legal---the state's theory of prosecution was simply that Newell eventually went too far. App. 1264.

towards him, to simply back away. App. 827, 1120. In this attempt to gain distance between this would be attacker the flame ignites Theodore Berjarno. App. 788, 827-28, 1120. Not knowing the extent of any injuries but intent on ensuring that Theodore did not flea before the police arrived, Patrick took out his pocket knife and pointed it at Berjarno instructing him to then remain where he was until authorities arrived and telling him if he doesn't that he will "cut his dick off." App. 811, 1121-22. Newell waits for the police, tells them what happened and is arrested.

22. **Issues on appeal**

A. Did the district court unreasonably restrict Newell's legal right to pursue a justifiable battery defense when it added specific restrictions beyond those found in NRS 200.160?

B. Is attempted assault legally impossible under Nevada law?

23. **Legal argument, including authorities:**

A. The district court unreasonably restricted Newell's legal right to pursue a justifiable battery defense when it added specific restrictions beyond those found in NRS 200.160.

Newell had a right to have the jury instructed upon his theory of the case. **Crawford v. State, 121 Nev. Adv. Rep. 74, 121 P.3d 582 (2005)**; NRS 175.161, so long as a tendered the instruction is pertinent and a correct

statement of the law they must be given upon the request of a party. A necessary corollary to this is the right to have the jury instructed without necessary and/or erroneous restrictions.

In the instant case, Newell requested an instruction which specifically instructed the jury on the significance of his theory of the defense, to wit: Newell's use of deadly force was justifiable to prevent Berjarno from committing felony coercion. **Id. at 587**. The district court agreed that this was clearly Newell's theory of defense and further agreed, over the State's objection, that Newell's was entitled to argue the theory to the jury. App. 1186-7. During the course of the trial the court had the opportunity to view the video tape of the incident and to listen to the various witnesses including Berjarno and Newell.

Newell had testified that he was defending himself when he lit Berjarno on fire. (App. 1112-21). The restrictions inherent upon self-defense[4] made the use of deadly force against an unarmed assailant, even one as persistent and threatening as Berjarno, a difficult proposition. Under Nevada law the use of deadly force in not restricted to those incidence which fall directly in the

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[4]Pursuant to the instructions given, deadly force may only be used when there is 1) "...there is imminent danger that the assailant will either kill him or cause him substantial bodily harm and 2) ".That it is absolutely necessary... for the purpose of avoiding death or substantial bodily injury." App. 342.

confines of traditional self-defense---these are set forth in **NRS 200.160-Additional cases of justified homicide.** Pursuant to NRS 200.275, when the deadly force in question does not result in a fatality the provisions of NRS 200.160 also set forth additional circumstances justifying battery via deadly force. Davis v. State, 130 Nev. Adv. Op. 16, 321 P.3d 867 (2014). Once a person has the right to use deadly force in a justifiable battery there is nothing in the various statutes which limit either the means or manner of deadly force.

By its explicit terms NRS 200.160 allows for the use of deadly force:

> "1. In the lawful defense of the slayer...when there is reasonable ground to apprehend a design on the part of the person slain [or battered] to commit a felony or to do some great personal injury to the slayer...and there is imminent danger of such a sign being accomplished; or
> 2. In the actual resistance of an attempt to commit a felony upon the slayer..."

Two things are of note: 1) this right to use of force to prevent a felony is in addition to the right to self–defense; 2) the language "a design ....to commit a felony or to do some great personal injury..." necessarily contemplates that the concepts of felony and great personal injury are distinct and hence the felon need not be one in which the death or substantial injury of the slayer is purpose.

In the instant matter the Defendant was requested an instruction which informed the jurors that the significance of his "felony coercion" theory of

defense relying upon Davis, supra, and NRS 200.160. If the jury believed that Berjarno's actions and conduct amounted to felony coercion, then Newell's use of deadly force is justifiable battery under the law. The defense offered an instruction that embodied this theory which was ultimately given. App 1181. They proffered the following instruction: "*Justifiable battery is the battery of a human being when there is reasonable ground to apprehend a design on the part of the person battered to commit a felony and there is imminent danger of such a design being accomplished. This is true even if deadly force is used.*" App. 353

The State objected claiming that the evidence supported at most a claim of misdemeanor coercion by Berjarno, to which the defense replied that the threats need not be verbalized and that by his actions Berjarno had demonstrated the clear intention to use physical force and/or the threat of physical force to coerce Newell into giving him a ride---a felony pursuant to NRS 207.190(2)(a). (App 1179; App 1181) The court sided with the defense that there was evidence to support the instruction, stating "If the jury thinks that by cornering him, you know, between the gas station and his car [and that] is a felony coercion, well that's certainly his argument. Yeah, I know, you're saying that's not credible and that's the jury's call." (App 1186-7) Unfortunately the court then added language to the instruction over defense

objection which eviscerate the defense of justifiable battery and took the issue away from the jury's consideration and making the concept indistinguishable from self-defense. App 1185-7. The added language read: "... *The amount of force used to effectuate the battery must be reasonable and necessary under the circumstances. Deadly force cannot be used unless the person battered poses a threat of serious bodily injury.*" Id; App 353.

Davis, supra, made clear that a defendant is entitled to instructions on justifiable use of deadly force in instances similar to the case at bar. That said **Davis** did not specifically decide whether the specific limitations to use of deadly force for self-defense are applicable when the deadly force is used to defend against the commission of a felony, although it did point out "The plain language of these statutes does not differentiate between the types of felonies from which a person may defend himself." **Davis**, P. 3d at 873.

Whether the law makes such a distinction is critical to the case at bar because there evidence was uncontested that Berjarno was belligerent in demanding a ride from Newell to the point that the state conceded during rebuttal that the use of force was justified when Newell pushed Berjarno in an attempt his attempts to stop his persistent demands. App 1264. Due to the additional language added by the court Newell had to establish not only that Berjarno was attempting a felony coercion, but also that he posed a threat of

serious bodily injury and that the force used was "...reasonable and necessary under the circumstances." Felony coercion occurs "Where physical force or the immediate threat of physical force is used..." and there is no requirement the physical threat be of such magnitude that it raises the specter of "serious bodily injury." Under the courts instructions, Newell had subject himself physical confrontation and threat and could not use deadly force unless the threat was so substantial that "serious bodily injury" was suspected. Further, addition of the phrase "...reasonable and necessary..." placed the jury in the position of deciding whether there was a less restrictive means of stopping Berjarno's felony activity---could Newell have just ran away? How about just driving off with Berjarno holding onto his vehicle? Could he have fought his way into the driver's seat without serious injury? If so then the use of force wasn't justified pursuant to the court's added language because it was not "necessary."

So why did the court add the language? Like the court in Davis, the district court looked the clear language of the statue and concluded that there must be more than is written. As support for adding the additional language to instruction in question, the court relied upon **State v. Weddell**, 117 Nev. 651, 27 P.3d 450 (2011). App. 1185 The court noted "On its face, the language used in Davis suggest that they want to create a distinction [between

the use of force against a fleeing felon and the use of force to prevent a felony], but that distinction, frankly, makes no sense." App. 1183

The court further opined "...you know, as you can tell, this is an issue I've thought about because it comes up. It just doesn't make any sense. And I'm not even sure that's what the Supreme Cut was thinking of. Sometimes they use loose language and they clarify it. The whole thing, if you read it literally, doesn't make any sense whatsoever." 1184 Actually this court's decisions in Davis and Weddell are easily reconciled.

Weddell was decided almost exclusively upon the fact that legislature had specifically removed from statute the common law rule allowing the use of deadly force by a private citizen to arrest any fleeing felon irrespective of what the underlying felony may be. If anything Weddell supports the proposition that the court should not have *sua sponte* added limiting language to a statute without a clear indication of legislative intent. The definition of the justifiable battery, including the use of deadly force to prevent the commission of a felony, remains clearly codified by NRS 200.160 and there is no limitation that, "The amount of force used to effectuate the battery must be reasonable and necessary" nor that the rule can only be used as a defense when "...the person battered poses a threat of serious bodily injury." If the latter additional requirement imposed by the court were the law there would

be no need for NRS 200.160 defining "additional instance of justifiable homicide"[5] as self-defense would already apply. The limitations on the use of deadly force in self-defense are not present when the force is used to prevent a person from committing a felony, hence the court erred when it, " ...basically copied for the other instructions---it must be reasonable and necessary under the circumstances"

This Court reiterated in **Crawford**, supra, that instructions imposing a burden of proof upon a defendant to negate an element of a charged offense are improper, but that is essentially what happened. **121 P.3d at 751.** The trial court's additional language forced Newell to establish not only that the deadly force was used not only to prevent Berjarno from committing felony, but also that Berjarno posed a threat of "substantial bodily injury" and that the force used was necessary to prevent not just the felony in question but also the injury. Other instructions emphasized the problem stating that "justifiable battery is the battery...when there is a reasonable ground to apprehend a design on the part of the person injured to do some great personal injury to the person inflicting the injury" App 350 In other words, Newell could not use deadly force to prevent a felony unless his life and limb was in danger of

[5] And, pursuant to Davis, supra, and NRS 200.275, additional instance justifying the use of deadly force.

significant injury---if it was only a low level beating that Berjarno had in mind the Newell just had to take it. The instructions were wrong and prevented the jury from considering the key issue in the case---did Patrick Newell have reasonable ground to apprehend a design on the part of Theodore Berjarno to commit felony coercion?

By failing to give the requested instruction, the trial court deprived Defendant Newell of his right to a fair trial under the Due Process Clause of the Fourteenth Amendment to the United States Constitution; and also deprived him of his Sixth Amendment right to a jury trial, inasmuch as that right includes the right to trial by a jury which has been provided accurate, clear and complete instructions on the defense theory of the case.

Trial errors are subject to harmless-error review. **Patterson v. State, 298 P.3d 433, 439 (2013).** An error is harmless if this Court determines beyond a reasonable doubt that the error did not contribute to the defendant's conviction. **Hernandez v. State, 124 Nev. 639, 653, 188 P.3d 1126, 1136 (2008).** It is not clear in the case at bar whether the jury reached the same verdict had they been correctly instructed on the law: 1) the jury acquitted on the charge of attempted murder, finding that Newell lacked the specific intent to kill necessary for the attempted murder charge; (2) even if the jurors believed that Newell was defending against Berjarno's attempt to committed

the felony of coercion they were forced to find him guilty unless established that the amount of force used was absolutely necessary under the circumstances and Berjarno posed an actual threat of not just committing a felony but also of it resulting serious bodily injury.

As an additional factor, the state ceased upon the court's erroneous instructions and argued both additional requirements must be met for Newell to claim justifiable battery and convoluted the concept of justifiable battery set forth in NRS 200.160 with limitations inherent in a claim of self-defense. App1261-1265 The court even allowed the4 state to argue over defense object that the use of deadly force must be "absolutely necessary." App 1230

There is no way to conclude beyond a reasonable doubt that the trial court's modification of this instruction did not contribute, at least partially, to Newell's conviction. In light of the trial court's failure to give an adequate "significance" jury instruction, the judgment of conviction on the felony Battery with Substantial Bodily Harm must be reversed and the case remanded to district court for conducting a new trial on this charge.

B. Attempted assault is legally impossible under Nevada law.

"An act done with the intent to commit a crime, and tending but failing to accomplish it, is an attempt to commit that crime. " **NRS 193.330** When assault was still defined by common law, this court Nevada recognized that

the crime of assault is, in and of itself, an attempt battery. **State v. Huber, 38 Nev. 253, 148 P. 562, 565 (1915)** "Attempt" is an essential element in an assault. **Id. at 566.** The very nature and purpose of "attempt" being an essential element to the crime of assault, is that it is the failure to accomplish the design of battery that distinguishes the two crimes as being separate and distinct. In subsequent cases this Court reaffirmed that assault as an unlawful attempt coupled with present ability to commit a violent injury on the person of another. **Wilkerson v. State, 87 Nev. 123, 482 P.2d 314 (1971).**

Presently, the legislature has provided the governing definition and meaning to be attributed to the use of the term "assault" as it is to be applied within the State of Nevada. Assault means (1) unlawfully attempting to use physical force against another person; or (2) intentionally placing another person in reasonable apprehension of immediate bodily harm". **NRS 200.471.**

It is the second prong upon which the State constructs its argument for justification of the proposed amended charge. App. 998. The State was ultimately concerned that the evidence as presented had failed to show that Berjarno "...was even aware that the Defendant was waving a knife at his penis"---in short the state conceded that they had failed to establish the "reasonable apprehension of immediate bodily harm" element of assault and requested to amend the charge to an attempt assault. App. 998. Recognizing

that the authorities were split on the matter, the court allowed the amendment over defense objection. App. 995; App. 1004; App. 1014. The question for this court is whether the crime of attempt assault exists under Nevada law.

"An act done with the intent to commit a crime, and tending but failing to accomplish it, is an attempt to commit that crime. " NRS 193.330 When assault was still defined by common law, this court Nevada recognized that the crime of assault is, in and of itself, an attempt battery. **State v. Huber, 38 Nev. 253, 148 P. 562, 565 (1915)** "Attempt" is an essential element in an assault. Id. at 566. The very nature and purpose of "attempt" being an essential element to the crime of assault, is that it is the failure to accomplish the design of battery that distinguishes the two crimes as being separate and distinct. In subsequent cases this Court reaffirmed that assault as an unlawful attempt coupled with present ability to commit a violent injury on the person of another. **Wilkerson v. State, 87 Nev. 123, 482 P.2d 314 (1971).**

Presently, the legislature has provided the governing definition and meaning to be attributed to the use of the term "assault" as it is to be applied within the State of Nevada. Under NRS 200.471(1)(a): "Assault means (1) unlawfully attempting to use physical force against another person; or (2)

intentionally placing another person in reasonable apprehension of immediate bodily harm."

The State was ultimately concerned that the evidence as presented had failed to show that Berjarno "...was even aware that the Defendant was waving a knife at his penis." Further there was no evidence that Newell did more than threaten Berjarno so that he would remain present for the police---no evidence of an additional attempt to use actual physical force. In short the state conceded that they had failed to establish the "reasonable apprehension of immediate bodily harm" element of assault and requested to amend the charge to an attempt assault. App. 998. Recognizing that the authorities were split on the matter, the court allowed the amendment over defense objection. App. 995; App. 1004; App. 1014. The question for this court is whether the crime of attempt assault exists under Nevada law. Under Nevada law there is no such thing as an attempt to achieve an unintended result. **Bailey v. State, 100 Nev. 562, 688 P.2d 320 (1984)**. This principle clearly precludes conviction for attempt assault under NRS 200.471(1)(a)(1), a point conceded by the state. (App. 998) Does the principle also preclude a conviction for attempt assault pursuant to NRS 200.471(1)(a)(2)? The defense respectfully submits that it must.

Numerous courts have held the crime of attempted assault is legal impossibility. See Attempt to Commit Assault as Criminal Offense, 93 A.L.R.5th 683 (citing Patterson v. State, 192 Ga. App. 449, 385 S.E.2d 311 (1989); State v. Presley, 758 So. 2d 308, 93 A.L.R.5th 795 (La. Ct. App. 3d Cir. 2000); Dabney v. State, 159 Md. App. 225, 858 A.2d 1084 (2004); State v. Hemmer, 3 Neb. App. 769, 531 N.W.2d 559 (1995); State v. Clarke, 198 N.J. Super. 219, 486 A.2d 935 (App. Div. 1985); State v. Barksdale, 181 N.C. App. 302, 638 S.E.2d 579 (2007); State v. Wilson, 218 Or. 575, 346 P.2d 115, 79 A.L.R.2d 587 (1959). Other courts have reached a different result. Id. citing Guertin v. State, 854 P.2d 1130 (Alaska Ct. App. 1993); State v. Scheck, 106 Conn. App. 81, 940 A.2d 871 (2008), certification denied, 286 Conn. 918, 945 A.2d 979 (2008); Ott v. State, 648 N.E.2d 671 (Ind. Ct. App. 1995); Spencer v. State, 264 Kan. 4, 954 P.2d 1088 (1998); State v. Green, 238 Neb. 475, 471 N.W.2d 402 (1991); People v. Gittens, 279 A.D.2d 291, 719 N.Y.S.2d 230 (1st Dep't 2001)

CONCLUSION

Based on the foregoing, this Honorable Court should reverse on the first issue and reverse and remand for a new trial regarding the second issue.

24. **Preservation of issues:** As to the first issue, Newell requested an instruction which specifically instructed the jury on the significance of his

theory of the defense, to wit: Newell's use of deadly force was justifiable to prevent Berjarno from committing felony coercion. App. 587. The district court denied the instruction as proposed. App. 1186-7.

Regarding the second issue, it was addressed by the court, which recognized that the authorities were split on the matter. The court allowed the amendment over defense objection. App. 995; App. 1004; App. 1014.

25. **Issues of first impression or of public interest:** Yes. Both issues are of first impression.

Respectfully submitted,

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

By *<u>/s/ Scott L. Coffee</u>*

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VERIFICATION

1. I hereby certify that this fast track statement 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:

This fast track statement has been prepared in a proportionally spaced typeface using Times New Roman in 14 font size;

2. I further certify that this fast track statement complies with the page or type-volume limitations of NRAP 3C(h)(2) because it is either:

[X] Proportionately spaced, has a typeface of 14 points or more, and contains 4, 871 words.

3. Finally, I recognize that pursuant to NRAP 3C I am responsible for filing a timely fast track statement and that the Supreme Court of Nevada may sanction an attorney for failing to file a timely fast track statement, or failing to raise material issues or arguments in the fast track statement, or failing to cooperate fully with appellate counsel during the course of an appeal. I therefore certify that the information provided in this fast track statement is true and complete to the best of my knowledge, information and belief.

DATED this 15th day of December, 2014.

PHILIP J. KOHN
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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 15th day of December, 2014. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

CATHERINE CORTEZ MASTO
STEVEN S. OWENS

SCOTT L. COFFEE
HOWARD S. BROOKS

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

PATRICK NEWELL
NDOC No. 1126400
c/o High Desert State Prison
P.O. Box 650
Indian Springs, NV 89018

BY */s/ Carrie M. Connolly*
Employee, Clark County Public
Defender's Office