> S.Ct. 1354. Additionally, in two recent Tenth Circuit cases, [United States v. Townley, 472 F.3d 1267, 1273 (10th Cir.2007)] and United States v. Ramirez, 479 F.3d 1229, 1249 (10th Cir.2007), **the court found that Crawford did not overrule Bourjaily and adhered to the Bourjaily rule that a court need not independently inquire into the reliability of co-conspirator statements** admissible under Rule 801(d)(2)(E).

Id. (emphasis added). The court noted that Ramirez involved recorded conversations between co-conspirators which were properly found to not be testimonial, and thus not subject to the confrontation clause. Id. (citing Ramirez, 479 F.3d at 1248). The court in Baines, then went on to conclude that a statement made between co-conspirators, relating to the address for picking up drugs, was not testimonial and therefore not subject to the confrontation clause or Crawford protections. Baines, 486 F. Supp. 2d at 1298-1300.

It did conclude, however, that later statements separately made by members of the conspiracy to a border patrol agent, that the two vehicles were traveling together, while they were detained, were testimonial because a reasonable person in that position would objectively foresee that his or her statement to a uniformed officer at a border patrol checkpoint might be used later in the prosecution of a crime. Id. (citing Crawford, 541 U.S. at 53, 124 S.Ct. 1354; United States v. Vieyra-Vazquez, No. 05-2281, 205 Fed.Appx. 688, 691, 2006 U.S.App.LEXIS 28220, at *7 (10th Cir. Nov. 13, 2006) (unpublished) (statement to border patrol agent offered to prove the truth of the matter asserted is testimonial because made in response to custodial interrogation); United States v. Gonzalez-Marichal, 317 F.Supp.2d 1200, 1202 (S.D.Cal.2004) (statement by witness to border patrol agent is testimonial and not admissible under Crawford); comparing United States v. Heijnen, No. CR 03-2072 JB, 2006 WL 1228949, **3-4, 2006 U.S.Dist. LEXIS 29182, at *10-13 (D.N.M. Feb. 16, 2006) (unpublished) (identifying multiple circuit cases finding a co-conspirator statement does not violate the Confrontation Clause)). Another exception to the general rule that the confrontation clause does not apply to co-conspirator statements was established in United States v. Lombardozzi, 491 F.3d 61, 75 (2d Cir. 2007), as cited by Little Lou. See Supplement, pg. 22. However, that case involved a plea allocution and clearly involved a testimonial statement that was not made in the course of, and in furtherance of, the

conspiracy. Lombardozzi, 491 F.3d at 75; see also Walker v. State, 406 S.W.3d 590, 596 (Tex. App. 2013) (petition for discretionary review refused (July 24, 2013)) (holding that a confidential informant's statements made knowingly and directly to officers describing prior criminal activity are subject to confrontation clause treatment); compare NRS 51.035(3)(e) (which provides that statements are not hearsay if it is a "[s]tatement by a coconspirator of a party during the course and in furtherance of the conspiracy").

Similar to Ramirez and the admissible statement between co-conspirators in Baines, the court in Walker v. State, 406 S.W.3d 590, 597, concluded that statements made by the defendant to a confidential informant co-conspirator about undiscovered methamphetamine in an impounded vehicle were not testimonial and not subject to the confrontation clause. Walker, 406 S.W.3d 590, 597 (citing United States v. Saget, 377 F.3d 223 (2nd Cir.2004), which found that where "a coconspirator disclosed statements implicating both himself and the defendant to a confidential informant," and did so to someone he though was an ally thus the statements were not testimonial and not subject to the confrontation clause).

Therefore, as demonstrated above the cases cited by Little Lou demonstrate the opposite of his argument because they show that none of the statements made between co-conspirators during the course, and in furtherance of, a conspiracy are subject to the confrontation clause. See McDowell v. State, 103 Nev. at 529-530, 746 P.2d at 150; Bourjaily, 483 U.S. at 181-184, 107 S. Ct. at 2782-2783; Roberts, 448 U.S. at 63, 100 S.Ct. at 2537; Crawford, 541 U.S. at 51-68, 124 S. Ct. at 1364-1374; Baines, 486 F. Supp. 2d at 1298-1300; Ramirez, 479 F.3d at 1249; Walker, 406 S.W.3d at 597. Therefore, under the facts of the instant matter any argument based on the confrontation clause that Jury Instruction No. 40 was improper or that the now proffered jury instruction (Supplement, pg. 19) should have been given is meritless and would have been futile. See generally Statement of Facts, supra (Defendant's failure to identify and provide citations to any specific statements of co-conspirators prevents the State from responding with more detail). Therefore, trial counsel cannot be deemed ineffective for not making a futile offering of a duplicitous instruction. Ennis, 122 Nev. at 706, 137 P.3d at 1103. Likewise, appellate

counsel was not required to raise this frivolous argument on appeal and cannot be deemed ineffective for failing to do so. Foster, 121 Nev. 165, 170, 111 P.3d 1083, 1087; Ford, 105 Nev. 850, 853; Jones, 463 U.S. 745, 751-752, 103 S.Ct. 3308, 3312-3313.

Furthermore, Little Lou also fails to demonstrate prejudice from the actions of either trial or appellate counsel. Little Lou fails to allege, with specificity, facts which would entitle him to relief because he fails to identify which statements, if any, he feels the jury would have disregarded and/or that the district court should not have admitted and fails to provide any citations to the record of this case such that the State could understand and respond to his allegations. Hargrove, 100 Nev. at 502, 686 P.2d at 225; NRS 34.735(6). These bare and naked allegations are not entitled to relief. Id. Little Lou merely concludes that if the instruction had been offered it would have been given and the jury would not have convicted him of second degree murder, or if rejected he would have been successful on appeal. See Supplement, pgs. 24-25. However, conclusory claims without specific factual allegations and reasoning are not entitled to relief. Colwell, 118 Nev. 807, 812, 59 P.3d 463, 467. For the reasons set forth above regarding the futile and frivolous nature of his allegations in Ground 2, Little Lou cannot demonstrate prejudice and show a reasonable probability that, but for counsel's alleged errors, the result of the trial would have been different. McNelton, 115 Nev. at 403, 990 P.2d at 1268; Strickland, 466 U.S. at 687-689, 694, 104 S. Ct. at 2064-2066, 2068; Kirksey, 112 Nev. at 988, 825 P.2d at 1107. He also cannot demonstrate that the allegedly omitted issues would have had a reasonable probability of success on appeal." Foster, 121 Nev. at 170, 111 P.3d at 1087.

Regardless, independent evidence did establish Little Lou's participation in the conspiracy, thus Jury Instruction No. 40 was proper and the evidence properly admitted; even if Jury Instruction No. 40 was in error it would have been a harmless error because Little Lou's own statements established his participation. Nay, 123 Nev. at 333-334, 167 P.3d at 435. For example, after taking Carroll's call, Espindola informed Mr. H and Little Lou of Carroll's news about Hadland disparaging the club. Id. at 45, 47. Upon hearing the news, Little Lou became enraged and began yelling at Mr. H, demanding of Mr H: "You're

not going to do anything?" and stating "That's why nothing ever gets done." Id. Little Lou told Mr. H, "You'll never be like Rizzolo and Galardi. They take care of business." Id.; RT Jury Trial, Day 12, pg. 288. He further criticized Mr. H by pointing out that Rizzolo had once ordered an employee to beat up a strip club patron. Id. Mr. H became angry, telling Little Lou to mind his own business. Id. Little Lou again told Mr. H, "You'll never be like Galardi and Rizzolo," and then stormed out of Simone's heading for the Palomino. Id.

Little Lou was also recorded on the tape saying that once Carroll got an attorney "**we** can say _____ TJ, they thought..." and promised to support Carroll if he went to prison for conspiracy. See Exhibit 1, pg. RA 59, 65. When he solicited Zone and Taoipu's murders to prevent their witness testimony he said "...have KC **kill them too, we'll** fucking put something in their food so they die rat poison or something...**[w]e** get KC last." See Exhibit 1, pg. RA 58. Little Lou also appeared at one point to criticize Carroll for deviating from what Little Lou had told him to do and instead enlisting Counts. See Exhibit 1, pg. RA 63 at 22:15. Little Lou said "Next time you do something stupid like that. **I told you, you should have taken care of** ___ all the fucking time ___. Piece of cake, cause he ___ priors. How do you know this guy?" See Exhibit 1, pg. RA 63; Exhibit 2, pg. RA 98 (emphasis added). Then Little Lou said "Ok ____ kill this fucking guy. ____ **get rid of the damn conspiracy.** _____" See Exhibit 1, pg. RA 64; Exhibit 2, pg. RA 102 (emphasis added).

Therefore, Ground 2 must be denied because Little Lou cannot establish: 1) that his counsel's representation fell below an objective standard of reasonableness, and 2) that but for counsel's errors, there is a reasonable probability that the result of the proceedings would have been different. Strickland, 466 U.S. at 687-688, 694, 104 S.Ct. at 2065, 2068; Lyons, 100 Nev. at 432, 683 P.2d at 505; Williams v. Collins, 16 F.3d 626, 635 (5th Cir. 1994); Hollenback v. United States, 987 F.2d 1272, 1275 (7th Cir. 1993); Heath v. Jones, 941 F.2d 1126, 1130 (11th Cir. 1991; Foster, 121 Nev. at 170, 111 P.3d at 1087.

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D. Ground 3: Little Lou Fails to Demonstrate Ineffective Assistance of Counsel Because Counsel's Conduct Did Not Fall Below An Objective Standard of Reasonableness

Little Lou fails to demonstrate that trial and appellate counsels' conduct fell below an objective standard of reasonableness by not objecting to Jury Instructions Nos. 19, 20, 22, not arguing that a People v. Prettyman instruction should have been given, and not arguing that the jury should have been instructed pursuant to Rose/Ramirez that the jury was to determine that the underlying felony was the proximate cause of the death. See Supplement, pgs. 25-32.

First, Little Lou's claims are partially belied by the record. Hargrove, 100 Nev. at 502-503, 686 P.2d at 225. Little Lou alleges that trial counsel failed to object to Jury Instructions Nos. 19, 20, and 22. See Supplement, pg. 25. The record reflects that counsel for Little Lou and Mr. H worked together to prepare their own proposed jury instructions. See Proposed Verdict Forms Not Used (Defendants Luis A. Hidalgo III and Luis A. Hidalgo Jr.'s Proposed Jury Instructions), filed in open court, February 12, 2009. Similarly, defense counsel worked together when objecting to jury instructions in such a manner that the record demonstrates that an objection made by either Mr. H's counsel or Little Lou's counsel was intended to, and understood by the parties and the court, to be made on behalf of both defendants. See RT Jury Trial, Day 13, pgs. 2-104. As such, the record also indicates that one or both sets of counsel did object to Jury Instructions Nos. 19 and 22; the only one at issue here that they did not object to was Jury Instruction No. 20. See RT Jury Trial, Day 13, pgs. 47-57. The court and the parties then worked together to draft comprehensive and correct instructions tailored to the facts and charges of this case. Id. As noted above, this is the exact practice endorsed by the Nevada Supreme Court because the court because the court bears the ultimate responsibility for ensuring correct jury instructions. Crawford, 121 Nev. at 754-755, 121 P.3d at 588-589; see also Argument §II(A), supra.

Second, counsels' representation did not fall below an objective standard of reasonableness given the objections, non-objection to Jury Instruction No. 20, the resulting instructions given at trial as Jury Instructions Nos. 19, 20, and 22, and the issues raised on

appeal because the jury instructions were correct statements of Nevada law and the jury's duties resulting therefrom.[2] See Rose, 123 Nev. at 205, 163 P.3d at 415; Doleman, 107 Nev. at 416, 812 P.2d at 1291; Crawford, 121 Nev. at 754, 757, 121 P.3d at 589, 591; Barron, 105 Nev. at 773, 783 P.2d at 448; Strickland, 466 U.S. at 687-688, 694, 104 S.Ct. at 2065, 2068; Lyons, 100 Nev. at 432, 683 P.2d at 505; Williams v. Collins, 16 F.3d 626, 635 (5th Cir. 1994); Hollenback v. United States, 987 F.2d 1272, 1275 (7th Cir. 1993); Heath v. Jones, 941 F.2d 1126, 1130 (11th Cir. 1991); Foster, 121 Nev. at 170, 111 P.3d at 1087. Furthermore, both in district court, and on appeal, it is counsels' decision on which defenses, objections, and/or arguments to raise and counsel acted reasonably. Wainwright, 433 U.S. 72, 93, 97 S. Ct. 2497, 2510; Rhyne, 118 Nev. 1, 8, 38 P.3d 163, 167; Foster, 121 Nev. 165, 170, 111 P.3d 1083, 1087; Ford, 105 Nev. 850, 853; Jones, 463 U.S. 745, 751-752, 103 S.Ct. 3308, 3312-3313. These decisions are almost unchallengeable, and presumed to be effective assistance. Dawson, 108 Nev. 112, 117, 825 P.2d 593, 596; Doleman, 112 Nev. 843, 848, 921 P.2d 278, 280; Strickland, 466 U.S. at 689, 104 S.Ct. at 2065; Aguirre, 912 F.2d 555, 560; Strickland, 466 U.S. at 689, 104 S.Ct. at 2065.

Specifically, Jury Instructions No. 19 and 22 correctly stated that second degree murder can be a general intent crime. See Poole v. State, 97 Nev. 175, 178-79, 625 P.2d 1163, 1165 (1981) (holding that no specific intent is involved in second degree murder); Hancock v. State, 80 Nev. 581, 583, 397 P.2d 181, 182 (1964) (holding that general intent instructions are appropriate for second degree murder, voluntary manslaughter, and involuntary manslaughter). Jury Instructions Nos. 19 and 22, also correctly instructed the jury that under a conspiracy theory or aiding and abetting theory of liability a defendant was liable for the reasonably foreseeable natural and probable consequences of general intent crimes. Bolden v. State, 121 Nev. at 914, 922-923, 124 P.3d at 195, 201; Sharma v. State, 118 Nev. 648, 652-58, 56 P.3d 868, 870-74 (2002). The Nevada Supreme Court noted that, "General intent is 'the intent to do that which the law prohibits. It is not necessary for the

[2] As Little Lou was not convicted of First-Degree Murder and his Supplement does not address the portions of the instructions referring thereto, in the interest of judicial economy the State will also exclude those portions from its arguments. See Supplement, pgs. 25-32.

prosecution to prove that the defendant intended the precise harm or the precise result which eventuated.'" Id. Jury Instruction No. 22 correctly distinguished that a defendant is only liable as a co-conspirator for the offenses he specifically intended to be committed. Id. Jury Instruction No. 20 correctly instructed the jury regarding liability for crimes via aiding and abetting based on Nevada law and statutes. Bolden v. State, 121 Nev. 908, 914, 124 P.3d 191, 195 (2005) (interpreting Sharma v. State, 118 Nev. 648, 56 P.3d 868 (2002). The second paragraph of the instruction contained the exact language approved of in Bolden. Id. The first, third, and fourth paragraphs were consistent with Bolden and NRS 195.020. Therefore, counsels' representation did not fall below an objectively reasonable level.

Third, Little Lou fails to demonstrate that his counsels' representation fell below an objective standard of reasonableness because it would have been futile to offer a Prettyman instruction in district court and frivolous to raise a claim on appeal that it should have been offered. Strickland, 466 U.S. at 687-688, 694, 104 S.Ct. at 2065, 2068; Lyons, 100 Nev. at 432, 683 P.2d at 505; Williams v. Collins, 16 F.3d 626, 635 (5th Cir. 1994); Hollenback v. United States, 987 F.2d 1272, 1275 (7th Cir. 1993); Heath v. Jones, 941 F.2d 1126, 1130 (11th Cir. 1991; Foster, 121 Nev. at 170, 111 P.3d at 1087. Specifically, a Prettyman instruction would have been rejected both in district court and on appeal as duplicitous because it was adequately addressed by the other instructions. Rose, 123 Nev. at 205, 163 P.3d at 415; Crawford, 121 Nev. at 754, 121 P.3d at 589.

In People v. Prettyman, 14 Cal. 4th 248, 926 P.2d 1013 (1996) the defendant was charged with Murder in the first and second degrees as an aider and abettor. Id. The prosecution only alleged a regular aiding and abetting theory for those too charges; however, the court sua sponte instructed the jury on the California equivalent of Second Degree Felony Murder which makes a person liable for the natural and probable consequences (untargeted crime) of a crime which they aid and abet (target crime). Id. When the court offered this instruction it merely stated that the defendant could be held liable for the natural and probable consequences of any uncharged offenses without identifying the underlying uncharged offense/target crime. Id. The court found an error because without a target crime

alleged the jury could not determine if the uncharged conduct that was aided or abetted was even criminal as to provide a basis for the second degree felony murder conviction. Id. The court noted that previous cases had merely centered on sufficiency of the evidence and that:

> ...the courts generally had no difficulty in upholding a murder conviction, reasoning that the **jury could reasonably conclude that the killing of the victim (sic) death was a "natural and probable consequence" of the assault** that the defendant aided and abetted. (People v. Martinez (1966) 239 Cal.App.2d 161 [48 Cal.Rptr. 521]; People v. Cayer (1951) 102 Cal.App.2d 643 [228 P.2d 70]; People v. Le Grant (1946) 76 Cal.App.2d 148 [172 P.2d 554]; People v. King (1938) 30 Cal.App.2d 185 [85 P.2d 928]; People v. Bond, supra, 13 Cal.App. 175; see also People v. Montano (1979) 96 Cal.App.3d 221, 226-227 [158 Cal.Rptr. 47] [**attempted murder** of rival gang member **was natural and probable consequence of defendant's suggestion** that members of his gang **beat up** rival gang members]...

Prettyman, 14 Cal. 4th at 262, 926 P.2d 1013 (emphasis added). However, in Prettyman the error was found to be harmless because the jury convicted on first degree murder. Id. at 276.

In People v. Hickles, 56 Cal. App. 4th 1183, 66 Cal. Rptr. 2d 86 (1997), the prosecution's theory was that the defendant either aided or abetted a plan to murder the victim or aided and abetted a plan to assault and/or "beat up" the victim. Id. However, "[t]he jury was instructed on premeditated first degree murder (CALJIC No. 8.20), unpremeditated second degree murder (CALJIC No. 8.30), and implied malice second degree murder based on an intentional act dangerous to human life (CALJIC No. 8.31)." Id. at 1192-1193, 66 Cal. Rptr. 2d at 91. The jury was instructed on traditional aiding and abetting for the first two charges and derivative accomplice liability/second degree felony murder for the last theory. Hickles, 56 Cal. App. 4th 1183, 66 Cal. Rptr. 2d 86. The court found error because the verdict indicated that the jury convicted based upon the theory that the defendant was liable for the death as a natural and probable consequence of a target crime which he aided and abetted but they had not been instructed on what target crimes were alleged; therefore, the court was concerned that the verdict could have been based on a target offense which was not actually criminal conduct such as an argument, rather than aiding and abetting a plan to assault, batter, and cause great bodily injury to the victim. Id.

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In the instant matter, the jury instructions specifically provided that if the Defendant was convicted using the second degree felony murder theory it was a natural and foreseeable consequence of a conspiracy to commit one of the intended (target/underlying) crimes of battery with use of a deadly weapon, battery resulting in substantial bodily harm, or battery, or a conspiracy to kill the victim Timothy Hadland. See Jury Instruction No. 3. The jury instructions also informed the jury that to convict on first degree murder there had to be an underlying conspiracy and specific intent of Little Lou to kill Hadland. See Jury Instructions Nos. 6-25. The jury instructions further instructed the jury that to convict on second degree murder charge there had to be an underlying conspiracy to commit the target/intended crime of battery with a deadly weapon or battery resulting in substantial bodily harm, and finally that if the conspiracy was to commit battery they could only convict on involuntary manslaughter. See Jury Instructions Nos. 6-25. Therefore, a Prettyman instruction would have been rejected both in district court and on appeal as duplicitous because it was adequately addressed by the other instructions. Rose, 123 Nev. at 205, 163 P.3d at 415; Crawford, 121 Nev. at 754, 121 P.3d at 589.

Fourth, Little Lou fails to demonstrate that his counsels' representation fell below an objective standard of reasonableness concerning his arguments regarding proof of an abandoned and malignant heart and Ramirez/Rose instructions. Strickland, 466 U.S. at 687-688, 694, 104 S.Ct. at 2065, 2068; Lyons, 100 Nev. at 432, 683 P.2d at 505; Williams v. Collins, 16 F.3d 626, 635 (5th Cir. 1994); Hollenback v. United States, 987 F.2d 1272, 1275 (7th Cir. 1993); Heath v. Jones, 941 F.2d 1126, 1130 (11th Cir. 1991; Foster, 121 Nev. at 165, 111 P.3d at 1083. Little Lou comments that he believes that all second degree murder convictions require a finding of implied malice through circumstances establishing an abandoned and malignant heart, and seems to allege that counsel was ineffective for allowing the jury instructions to instruct on the theory of second degree felony murder without requiring specific proof of an intent to do something which demonstrates an abandoned and malignant heart. See Supplement, pgs. 29-30. However, as summarized in Ramirez v. State,

126 Nev. Adv. Op. 22, 235 P.3d 619, 621 (2010), Nevada has long permitted a second degree murder conviction based on a theory of felony murder:

> We first recognized the substantive offense of second-degree felony murder in Sheriff v. Morris, 99 Nev. 109, 659 P.2d 852 (1983). In Morris, we concluded that Nevada's involuntary manslaughter statute, NRS 200.070, when read in conjunction with Nevada's murder statute, NRS 200.030(2), permitted the offense of second-degree murder under the felony-murder rule. See id. at 113, 117–18, 659 P.2d at 856, 858–59.

Id. Like first degree felony murder which allows for the omission of premeditation and deliberation from a first degree murder conviction due to the "heinous character" of the enumerated felonies, second degree felony murder satisfies the implied malice/abandoned and malignant heart requirement by applying to involuntary killings during unlawful acts which naturally tend to destroy the life of a human being or involuntary killings during the prosecution of other felonious intent. See Sheriff, Clark Cnty. v. Morris, 99 Nev. 109, 112-17, 659 P.2d 852, 855-58 (1983); see also Labastida v. State, 115 Nev. 298, 306, 986 P.2d 443, 448 (1999) (holding "...this court held that NRS 200.070 in conjunction with NRS 200.030(2) permits a charge of second degree felony murder, and that malice supporting a second degree murder conviction can be implied in such a case"); NRS 200.030; NRS 200.070. Therefore, counsels' representation did not fall below an objective standard of reasonableness at trial or on appeal on this basis because the jury instructions were correct statements of Nevada law and the jury's duties resulting therefrom. See Rose, 123 Nev. at 205, 163 P.3d at 415; Doleman, 107 Nev. at 416, 812 P.2d at 1291; Crawford, 121 Nev. at 754, 757, 121 P.3d at 589, 591; Barron, 105 Nev. at 773, 783 P.2d at 448; Strickland, 466 U.S. at 687-688, 694, 104 S.Ct. at 2065, 2068; Lyons, 100 Nev. at 432, 683 P.2d at 505; Williams v. Collins, 16 F.3d 626, 635 (5th Cir. 1994); Hollenback v. United States, 987 F.2d 1272, 1275 (7th Cir. 1993); Heath v. Jones, 941 F.2d 1126, 1130 (11th Cir. 1991; Foster, 121 Nev. at 170, 111 P.3d at 1087.

Little Lou also fails to demonstrate that counsels' representation fell below an objective standard of reasonableness for failing to offer a Ramirez/Rose instruction, telling the jury that they must find that there was an immediate and direct causal relationship

between the action of Little Lou and the death of Hadland, or arguing on appeal that one should have been offered because neither attorney had a duty to do so under the state of Nevada law at the time of this case. The court must "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland, 466 U.S. at 690, 104 S.Ct. at 2066. Little Lou's verdict was rendered and filed on February 17, 2009. Little Lou's Judgment of Conviction was filed July 10, 2009. As noted in Rose, the Nevada Supreme Court first required a jury instruction on issue of a direct causal relationship in Ramirez:

> But the Legislature has not specified the felonies that can be used for purposes of second-degree felony murder, and absent such clear direction, we are convinced that the merger doctrine has a worthwhile place in restricting the scope of the second-degree felony-murder rule to avoid the potential for "untoward" prosecutions that has led us to restrict the rule in other ways. See Ramirez, 126 Nev. at ——, 235 P.3d at 622 (requiring that the felony supporting second-degree felony murder be inherently dangerous and that there be a direct causal relationship between defendant's actions and victim's death)...

Rose v. State, 127 Nev. Adv. Op. 43, 255 P.3d 291, 297-298 (Nev. 2011) (noting that Ramirez also created a new rule whereby the jury was to make the determination of whether a felony was inherently dangerous rather than the court making that determination, and finding that after Rose the merger doctrine would apply and the jury would also make the determination as to whether a felony qualified for merger as an assaultive felony).[3] Nevada applies new rules of state law retroactively to cases pending on appeal, before a conviction is final on direct appeal, only where the issue was preserved for appeal in the district court. Richmond v. State, 118 Nev. 924, 928-29, 59 P.3d 1249, 1252 (2002). Ramirez v. State, 126

[3] While discussed in Morris, the Nevada Supreme Court did not discuss the jury instructions and referred to the requirement for a direct causal relationship along with the requirement that the underlying felony be inherently dangerous together, thus implying that they were determinations for the court when it stated, "...our holding today is limited to the narrow confines of this case wherein we perceive an immediate and direct causal relationship [...] a felony which would support the application of this second degree felony murder rule, would have to be one which is inherently dangerous when viewed in the abstract." 99 Nev. at 118, 659 P.2d at 852. Likewise in Labastida v. State, the Nevada Supreme Court analyzed a jury instruction on second degree felony murder which did not instruct the jury to make a determination about either a direct causal relationship or whether the felony was inherently dangerous and did not find it in error; rather, the Court found insufficient evidence because the defendant was convicted of child neglect, not child abuse, and thus as a matter of law the underlying crime could not support a conviction under felony murder due to both requirements. 115 Nev. at 305-308, 986 P.2d at 447-449. Ramirez was the first to require that these two factors both be addressed by the jury. 126 Nev. Adv. Op. 22, 235 P.3d at 622; Rose, 127 Nev. Adv. Op. 43, 255 P.3d at 297-298.

Nev. Adv. Op. 22, 235 P.3d 619 (2010), was issued by the Nevada Supreme Court on July 1, 2010, and Rose v. State, 127 Nev. Adv. Op. 43, 255 P.3d 291 (Nev. 2011), was issued by the Nevada Supreme Court on July 21, 2011. Therefore, trial counsels' representation did not fall below an objective standard of reasonableness because at the time of trial, and prior to, he had no reason or duty to offer a Rose/Ramirez jury instruction. Strickland, 466 U.S. at 690, 104 S.Ct. at 2066. Appellate counsels' representation likewise did not fall below an objective standard of reasonableness because the issue was not preserved for appeal because it was not available to trial counsel; therefore, appellate counsel was prohibited from challenging it retroactively on appeal. Strickland, 466 U.S. at 690, 104 S.Ct. at 2066; Richmond, 118 Nev. at 928-29, 59 P.3d at 1252.

Similarly, Little Lou cannot demonstrate prejudice to satisfy the second portion of the Strickland test because he cannot show a reasonable probability that, but for counsel's alleged errors, the result of the trial would have been different because the basis for his claims on this ground did not exist at the time of his trial. McNelton, 115 Nev. at 403, 990 P.2d at 1268; Strickland, 466 U.S. at 687-689, 694, 104 S. Ct. at 2064-2066, 2068; Kirksey, 112 Nev. at 988, 825 P.2d at 1107. He also cannot demonstrate that the allegedly omitted issues would have had a reasonable probability of success on appeal," because his claims would have been barred from retroactive application even if raised on appeal. Foster, 121 Nev. at 170, 111 P.3d at 1087; Richmond, 118 Nev. at 928-29, 59 P.3d at 1252. Furthermore, the district court found it appropriate to offer the jury instructions and charge in this matter, thus it confirmed that the underlying felony, conspired to or aided and abetted by Little Lou, had a direct causal relationship to Hadland's death; therefore, Little Lou cannot show that offering an instruction that said the same thing would have likely resulted in a different outcome at trial or on appeal. See generally Ramirez, 126 Nev. Adv. Op. 22, 235 P.3d 619; Rose, 127 Nev. Adv. Op. 43, 255 P.3d 291; McNelton, 115 Nev. at 403, 990 P.2d at 1268; Strickland, 466 U.S. at 687-689, 694, 104 S. Ct. at 2064-2066, 2068; Kirksey, 112 Nev. at 988, 825 P.2d at 1107; Foster, 121 Nev. at 170, 111 P.3d at 1087.

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Furthermore, Little Lou cannot demonstrate prejudice on his other allegations in this ground because, as demonstrated above, Jury Instructions Nos. 19, 20, and 22, were correct statements of Nevada law and a Prettyman instruction would have been futile in district court and frivolous as a claim on appeal. See Argument §II(C), supra. Thus, Little Lou cannot show that absent the alleged errors he would have likely obtained a different outcome at trial or on appeal. McNelton, 115 Nev. at 403, 990 P.2d at 1268; Strickland, 466 U.S. at 687-689, 694, 104 S. Ct. at 2064-2066, 2068; Kirksey, 112 Nev. at 988, 825 P.2d at 1107; Foster, 121 Nev. at 170, 111 P.3d at 1087. Therefore, Ground 3 must be denied.

III. GROUND 4: LITTLE LOU FAILS TO DEMONSTRATE INEFFECTIVE ASSISTANCE OF COUNSEL BECAUSE THE FILING OF A MOTION SEEKING SEVERANCE FROM CO-DEFENDANT MR. H WOULD HAVE BEEN FUTILE

Little Lou fails to demonstrate that his trial counsel erred in not filing a motion for severance from co-defendant, Mr. H, during trial when Mr. H sought to admit Taoipu's testimony from the Counts trial. See Supplement, pgs. 33-37. Trial counsels' actions did not fall below an objective standard of reasonableness, and counsel was not ineffective, because filing a motion for severance would have been futile because it would have been properly denied by the district court. Ennis, 122 Nev. at 706, 137 P.3d at 1103.

In order to promote efficiency and equitable outcomes, Nevada law favors trying multiple defendants together. Jones v. State, 111 Nev. 848, 853, 899 P.2d 544, 547 (1995). A defendant is only entitled to a severed trial if he presents facts that sufficiently demonstrate that a joint trial would result in substantial prejudice. Rowland v. State, 118 Nev. 31, 44, 39 P.3d 114, 122 (2002) (citing NRS 174.165). "Generally, where persons have been jointly indicted they should be tried jointly, absent compelling reasons to the contrary." Id., 39 P.3d at 122 (quotation omitted). Further, the court not only considers the potential prejudice to the defendant, but also prejudice to the State "resulting from two time-consuming, expensive and duplicitous trials." Id., 39 P.3d at 122 (quotation omitted); see also Lisle v. State, 113 Nev. 679, 688-89, 941 P.2d 459, 466 (1997) (overruled on other

grounds by Middleton v. State, 114 Nev. 1089, 1117 n.9, 968 P.2d 296, 315 n.9 (1998)) (quoting United States v. Andreadis, 238 F. Supp. 800, 802 (E.D.N.Y.1965)).

Courts will find a compelling reason to try cases separately when it appears that a joint trial will be unduly prejudicial to one defendant. See Bruton v. United States, 391 US 123 (1968); NRS 174.165. "A district court should grant a severance only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." Chartier v. State, 124 Nev. 760, 765, 191 P.3d 1182, 1185 (quoting Marshall v. State, 118 Nev. 642, 646, 56 P.3d 376, 378 (2002)). Further, as the Nevada Supreme Court has long recognized that "some level of prejudice exists in a joint trial, error in refusing to sever joint trials is subject to harmless-error review." Chartier, 124 Nev. at 764-65, 191 P.3d at 1185. Accordingly, to show prejudice from an improper joinder "requires more than simply showing that severance made acquittal more likely; misjoinder requires reversal only if it has a substantial and injurious effect on the verdict." Id. (quoting Marshall, 118 Nev. at 647, 56 P.3d at 379).

The only ground Little Lou now alleges counsel should have based a motion for severance on is the denial of his attempt to admit the testimony of Taoipu; he concedes that Mr. H and he shared a similar and compatible defense throughout trial. See Supplement, pgs. 33-37. However, the denial of his attempt to admit that prior testimony, in which Taoipu said on one occasion that Espindola instead of Little Lou called Carroll and told him to bring bats and trash bags, was addressed on appeal. See Hidalgo, III v. State, Docket No. 54272, Order of Affirmance (June 21, 2012). Therein, the Nevada Supreme Court upheld the district court's exclusion of Taoipu's prior testimony and ruled that the prior testimony was inadmissible due to evidentiary rules, not prejudice against one of the co-defendants. Id. at 6-7. Specifically, the Nevada Supreme Court ruled that the statement failed to meet the third part of the test under NRS 51.325 because the issues on which the testimony was presented were not substantially the same. Id. Therefore, the statement would have been inadmissible in separate trials, just as it was in a joint trial. Id. The Nevada Supreme Court

also determined that the State would have been able to admit any relevant portion of Taoipu's prior testimony pursuant to NRS 47.120 once the defense opened the door. Id. at fn. 5.

Where an issue has already been decided on the merits by the Nevada Supreme Court, the Court's ruling is law of the case, and the issue will not be revisited. Pellegrini v. State, 117 Nev. 860, 34 P.3d 519 (2001); see McNelton v. State, 115 Nev. 396, 990 P.2d 1263, 1276 (1999); Hall v. State, 91 Nev. 314, 315-16, 535 P.2d 797, 798-99 (1975); see also Valerio v. State, 112 Nev. 383, 386, 915 P.2d 874, 876 (1996); Hogan v. Warden, 109 Nev. 952, 860 P.2d 710 (1993). "The doctrine of the law of the case cannot be avoided by a more detailed and precisely focused argument subsequently made after reflection upon the previous proceedings." Hall, 91 Nev. at 316, 535 P.2d at 799. Under the law of the case doctrine, issues previously decided on direct appeal may not be reargued in a habeas petition. Pellegrini v. State, 117 Nev. 860, 888, 34 P.3d 519, 538 (2001) (citing McNelton v. State, 115 Nev. 396, 414-15, 990 P.2d 1263, 1275 (1999)).

Therefore, this Court can assume that the statement would not have been admissible regardless of joint or separate trials. As such, Little Lou cannot demonstrate here that a joint trial was at any point was unduly or substantially prejudicial as to warrant a successful motion to sever. Rowland, 118 Nev. 31, 44, 39 P.3d 114, 122; Bruton States, 391 US 123; Chartier, 124 Nev. at 765, 191 P.3d at 1185; NRS 174.165. Therefore, trial counsel cannot be deemed ineffective for not making a futile motion to sever.[4] Ennis, 122 Nev. at 706, 137 P.3d at 1103. Likewise, for the reasons set forth above, Little Lou cannot demonstrate prejudice and show a reasonable probability that, but for counsel's alleged errors, the result of the trial would have been different. McNelton, 115 Nev. at 403, 990 P.2d at 1268; Strickland, 466 U.S. at 687-689, 694, 104 S. Ct. at 2064-2066, 2068; Kirksey, 112 Nev. at 988, 825 P.2d at 1107. Thus, Ground 4 must be denied.

[4] Furthermore, trial counsel did seek to have all testimony stricken which referred to bats and bags. See RT Jury Trial, Day 13, pgs. 108-109. While the court denied this request, the record demonstrates that counsel took action in an effort to protect his client's interest as a result of the court's denial of his attempt to admit Taoipu's prior testimony. Id. Trial counsel "has the immediate and ultimate responsibility of deciding if and when to object, which witnesses, if any, to call, and what defenses to develop." Wainwright, 433 U.S. at 93, 97 S. Ct. at 2510; Rhyne, 118 Nev. at 8, 38 P.3d at 167. Therefore, trial counsel's actions did not fall below an objective standard of reasonableness. Strickland, 466 U.S. at 687-688, 694, 104 S.Ct. at 2065, 2068; Lyons, 100 Nev. at 432, 683 P.2d at 505

IV. GROUND 5: LITTLE LOU FAILS TO DEMONSTRATE INEFFECTIVE ASSISTANCE OF COUNSEL BECAUSE THE FILING OF A MOTION SEEKING SEVERANCE OF COUNTS 3 & 4 WOULD HAVE BEEN FUTILE

Little Lou fails to demonstrate that his trial counsel erred in not filing a motion for severance of COUNTS 3 & 4 and appellate counsel was ineffective for not raising the issue on appeal. See Supplement, pgs. 33-37. Counsels' actions did not fall below an objective standard of reasonableness, and counsel was not ineffective, because filing a motion for severance would have been futile because it would have been properly denied by the district court and would have been a frivolous argument on appeal. Ennis, 122 Nev. at 706, 137 P.3d at 1103; Foster, 121 Nev. 165, 170, 111 P.3d 1083, 1087; Ford, 105 Nev. 850, 853; Jones, 463 U.S. 745, 751-752, 103 S.Ct. 3308, 3312-3313.

NRS 173.115 controls the joinder of offenses and provides as follows:

> **NRS 173.115 Joinder of offenses.** Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are:
> 1. Based on the same act or transaction; or
> 2. Based on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

NRS 173.115 (emphasis in original). Where evidence of one charge would be cross-admissible evidence at a separate trial on another charge, then both charges may be tried together and need not be severed. Mitchell v. State, 105 Nev. 735, 738, 782 P.2d 1340, 1342 (1989) (citing Robinson v. United States, 459 F.2d 847, 855 (D.C.Cir.1972)); see also Griego v. State, 111 Nev. 444, 449-50, 893 P.2d 995, 998-99 (1995) (abrogated on other grounds by Koerschner v. State, 116 Nev. 1111, 13 P.3d 451 (2000). Cross-admissibility is recognized under the "connected together" language of NRS 173.115. Weber v. State, 121 Nev. 554, 573, 119 P.3d 107, 120-21 (2005). NRS 48.045(2) controls the admission of other crimes, wrongs, and bad acts and acts as a test for whether counts would hypothetically be cross-admissible in separate trials:

> Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. **It may, however, be admissible for other purposes, such as proof of motive, opportunity,**

> **intent, preparation, plan, knowledge, identity, or absence of mistake or accident.**

NRS 48.045(2) (emphasis added); see also Weber v. State, 121 Nev. 554, 573, 119 P.3d 107, 120-21 (2005). "To admit such evidence, [the Nevada Supreme Court has] held that it must be relevant, be proven by clear and convincing evidence, and have probative value that is not substantially outweighed by the risk of unfair prejudice." Weber v. State, 121 Nev. 554, 573, 119 P.3d 107, 120 (2005) (citing Butler v. State, 120 Nev. 879, ——, 102 P.3d 71, 78 (2004); Tinch v. State, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064–1065 (1997)). "'To establish that joinder was [unfairly] prejudicial 'requires more than a mere showing that severance might have made acquittal more likely.' Rather, the defendant carries the heavy burden of showing an abuse of discretion by the district court." Weber v. State, 121 Nev. 554, 574-75, 119 P.3d 107, 121 (2005) (internal citations omitted). NRS 48.035(3) may also serve as a basis for cross-admissibility and provides:

> Evidence of another act or crime which is so closely related to an act in controversy or a crime charged that an ordinary witness cannot describe the act in controversy or the crime charged without referring to the other act or crime shall not be excluded, but at the request of an interested party, a cautionary instruction shall be given explaining the reason for its admission.

NRS 48.035(3) (emphasis added); see also Weber v. State, 121 Nev. 554, 574, 119 P.3d 107, 121 (2005); Bellon v. State, 121 Nev. 436, 444, 117 P.3d 176, 181 (2005).

"The motive exception [of NRS 48.045(2) is] applicable where the charged crime was motivated by a desire to hide the prior bad act." Richmond v. State, 118 Nev. 924, 933, 59 P.3d 1249, 1255 (2002). "'[D]eclarations made after the commission of the crime which indicate consciousness of guilt, or are inconsistent with innocence, or tend to establish intent may be admissible.'" Bellon v. State, 121 Nev. 436, 444-45, 117 P.3d 176, 181 (2005) (citing Abram v. State, 95 Nev. 352, 356, 594 P.2d 1143, 1145 (1979)). In Bellon the Nevada Supreme Court did not admit threats against officers who arrested the Defendant for extradition, but only because the threats related to his frustration at being caught not the underlying crime. Bellon, 121 Nev. at 444-445, 117 P.3d at 181. Threats of violence against

witnesses in a case are admissible, even where highly inflammatory and not communicated to the witness, because they indicate consciousness of guilt, are inconsistent with innocence, and tend to establish intent. Abram, 95 Nev. 352, 356-357, 594 P.2d 1143, 1145 (allowing testimony of a fellow inmate whom the defendant told that he was "going to get" a witness and her child for turning "state's evidence" against him.) "Evidence that after a crime a defendant threatened a witness with violence is directly relevant to the question of guilt. Therefore, evidence of such a threat is neither irrelevant character evidence nor evidence of collateral acts requiring a hearing before its admission." Evans v. State, 117 Nev. 609, 628, 28 P.3d 498, 512 (2001) (citing Abram, 95 Nev. at 356–57, 594 P.2d at 1145). Violence, threats or attempts of violence, against witnesses following a crime exhibit a desire to conceal the initial crime and are admissible evidence which is probative of guilt of the underlying crime, consciousness of guilty, intent, and identity. Weber v. State, 121 Nev. 554, 573-74, 119 P.3d 107, 121 (2005) (allowing the joinder of counts involving a long-running crime of sexual abuse, the murder of two family members the day after the crime, and the attempted murder of a third family member approximately 10 days later at a funeral); see also Homick v. State, 108 Nev. 127, 139-40, 825 P.2d 600, 608 (1992) (allowing the admission of threats against witnesses who view jewelry which implicated the defendant as involved in a murder); Powell v. State, 108 Nev. 700, 707-08, 838 P.2d 921, 925-26 (1992) (vacated on other grounds by Powell v. State, 511 U.S. 79, 114 S. Ct. 1280, 128 L. Ed. 2d 1 (1994) and Powell v. Nevada, 511 U.S. 79, 114 S. Ct. 1280, 1281, 128 L. Ed. 2d 1 (1994)) (allowing the admission of evidence of threats to murder the victim's younger sister if she did not lie about the crime as proof of defendant's intent to kill the victim under both NRS 48.045(2) and NRS 48.035(3)).

Here, Little Lou was charged in COUNTS 3 & 4 for soliciting the murders of two witnesses who were involved in the crimes charged in COUNTS 1 & 2. See Jury Instruction No. 3. Therefore, as demonstrated above, the evidence of this solicitation would have been admissible in separate trials even if the counts were separated because it was relevant to his guilt, participation/identity, consciousness of guilt, motive, and intent for the crimes charged

in COUNTS 1 & 2. See NRS 48.045(2); see also Weber v. State, 121 Nev. 554, 573, 119 P.3d 107, 120-21; Bellon v. State, 121 Nev. 436, 444-445, 117 P.3d 176, 181; Richmond v. State, 118 Nev. 924, 933, 59 P.3d 1249, 1255; Abram v. State, 95 Nev. 352, 356-57, 594 P.2d 1143, 1145; Evans v. State, 117 Nev. 609, 628, 28 P.3d 498, 512; Homick v. State, 108 Nev. 127, 139-40, 825 P.2d 600, 608; Powell v. Nevada, 511 U.S. 79, 114 S. Ct. 1280, 1281. Defendant concedes that there was overwhelming evidence of his solicitation, thus it was proven by more than clear and convincing evidence. See Supplement, pg. 39; Statement of Facts, supra (discussing audio recording of Little Lou discussing rat poison and soliciting the murders); RT Jury Trial, Day 7, pgs. 218-219; See Exhibit 1, pgs. RA 58, 64. Finally, the probative value was not substantially outweighed by the danger of unfair prejudice because Little Lou's defense was that he was not part of the conspiracy; therefore, it was very probative of his identity, motive, participation, guilt, and consciousness of guilt for COUNTS 1 & 2, as demonstrated above.[5] See Supplement, pg. 41. Furthermore, the evidence of COUNTS 1 & 2 was cross-admissible pursuant to both NRS 48.045(2) and NRS 48.035(3) because it was evidence of motive for COUNTS 3 & 4, and was so closely related that witnesses could not describe the solicitation charges without discussing the crimes in COUNTS 1 & 2 because the purpose of the solicitation was to eliminate witnesses of the crimes in COUNTS 1 & 2. See Jury Instruction No. 3; NRS 48.035(3); Weber v. State, 121 Nev. 554, 574, 119 P.3d 107, 121 (2005); Bellon v. State, 121 Nev. 436, 444, 117 P.3d 176, 181 (2005); Richmond v. State, 118 Nev. 924, 933, 59 P.3d 1249, 1255; Abram v. State, 95 Nev. 352, 356-57, 594 P.2d 1143, 1145; Evans v. State, 117 Nev. 609, 628, 28 P.3d 498, 512; Homick v. State, 108 Nev. 127, 139-40, 825 P.2d 600, 608; Powell v. Nevada, 511 U.S. 79, 114 S. Ct. 1280, 1281. Thus, joinder of the charges was proper because the evidence was

[5] Defendant's citation to Hokanen v. State, 105 Nev. 901, 902, 784 P.2d 981, 982 (1989) is distinguishable and inapplicable because the Nevada Supreme Court held there that a prior bad act of child abuse was improperly admitted to a trial involving one (1) count of child abuse (joinder of counts was not an issue) because the defendant conceded his identity, intent, motive, etc. and only defended the charge on the basis that the harm was not as severe as the State alleged and was appropriate punishment. Id. Likewise, Defendant's citation to Rosky v. State, 121 Nev. 184, 196-198, 111 P.3d 690, 698-699 (2005), is distinguishable and inapplicable because there a prior bad act of improper sexual contact with another minor victim was admitted in a case of sexual assault and indecent exposure (joinder of counts was not an issue); the Nevada Supreme Court ruled that it was improperly admitted because it was not part of a common scheme or plan because it occurred eight (8) years earlier and was not evidence of *modus operandi* because both crimes were crimes of opportunity and did not have a similar signature as to establish identity, further the defendant admitted his identity but disputed his actions during his interaction with the victim. Id.

cross-admissible. See Mitchell v. State, 105 Nev. 735, 738, 782 P.2d 1340, 1342, Griego v. State, 111 Nev. 444, 449-50, 893 P.2d 995, 998-99.

For the reasons set forth above regarding the futile and frivolous nature of his allegations in Ground 5, Little Lou also cannot demonstrate prejudice and show a reasonable probability that, but for counsel's alleged errors, the result of the trial would have been different. McNelton, 115 Nev. at 403, 990 P.2d at 1268; Strickland, 466 U.S. at 687-689, 694, 104 S. Ct. at 2064-2066, 2068; Kirksey, 112 Nev. at 988, 825 P.2d at 1107. He also cannot demonstrate that the allegedly omitted issues would have had a reasonable probability of success on appeal." Foster, 121 Nev. at 170, 111 P.3d at 1087. In fact, Little Lou's counsel requested clarification from the trial court on this point, at which time the court and parties stated:

> THE COURT: Here's what I ruled. The wire, Little Lou's knowledge of the crime and his discussion can be evidence of the conspiracy. You know, his interest in trying to do away with the coconspirators can be evidence of Little Lou's involvement and motive in the conspiracy. It is not evidence of Mr. Hidalgo, Jr.'s involvement in the conspiracy and cannot be argued by the State as evidence of Mr. Hidalgo's involvement in the conspiracy.
>
> MR. DIGIACOMO: Just the solicitation portions of it. That's what you ruled.
>
> THE COURT: Right. Just the solicitation part.
>
> MR. DIGIACOMO: And we understand that and - -
>
> THE COURT: To me, that shows Little Lou's knowledge of the crime and why is he so concerned about killing the coconspirators if he wasn't involved in the crime in the first place. Now, obviously you can argue - -
>
> MR. ARRASCADA: It's a jury question.

See RT Jury Trial Day 13, pgs. 41-42. Thus, the record demonstrates that the court would not have granted a motion to sever.

Therefore, Ground 5 must be denied because Little Lou cannot establish: 1) that his counsel's representation fell below an objective standard of reasonableness, and 2) that but for counsel's errors, there is a reasonable probability that the result of the proceedings would have been different. Strickland, 466 U.S. at 687-688, 694, 104 S.Ct. at 2065, 2068; Lyons, 100 Nev. at 432, 683 P.2d at 505; Williams v. Collins, 16 F.3d 626, 635 (5th Cir. 1994); Hollenback v. United States, 987 F.2d 1272, 1275 (7th Cir. 1993); Heath v. Jones, 941 F.2d 1126, 1130 (11th Cir. 1991; Foster, 121 Nev. at 170, 111 P.3d at 1087.

CONCLUSION

Based on the foregoing, the State respectfully requests that Little Lou's Petition for Writ of Habeas Corpus (Post-Conviction) and Supplemental Petition for Writ of Habeas Corpus (Post-Conviction) be DENIED.

DATED this 16th day of July, 2014.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #

BY _____ FOR
H. LEON SIMON
Chief Deputy District Attorney
Nevada Bar #000411

CERTIFICATE OF SERVICE

I certify that on the 16th day of July, 2014, I e-mailed a copy of the foregoing State's Response To Defendant's Supplemental Petition For Writ Of Habeas Corpus (Post-Conviction), to:

RICHARD F. CORNELL, Esq.
rcornlaw@150.reno.nv.us

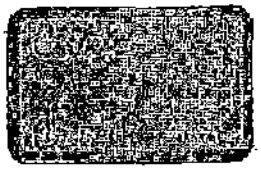
BY _____
R. JOHNSON
Secretary for the District Attorney's Office

SK/HLS/rj/M-1

EXHIBIT 1

5/23/05
fBird CD

Time	Dialog
	[Intro from Agent]
	Okay. This is S. A. Brett W. Shields. The date today is 5/23 of '05. Uh, be making a consensually recorded conversation. The um, time now is approximately 2:35 p.m. ____ this will be the uh…
	[The guy in the truck, the guy in the truck right there. He looked dead at you,]
	That's alright. Be reference to Las Vegas Case File 70-A-LV, and it's a new case here, uh, dealing with the Palomino club. Recording device remains activated from this point forward.
	[Long event of road noise…DEANGELO riding in car to destination for approx: 24 minutes]
00:00:01	**Female1**: What's up dude?
00:00:02	**DEANGELO**: What Up
00:00:05	**Female1**: _____ can you give me another white bag?
00:00:07	**Female2**: Yeah… ____ Where
00:00:12	**Female1**: Now you know _____
00:00:14	**DEANGELO**: Where's where's your brother at?
00:00:17	**[Noise from CI walking]**
00:00:35	**DEANGELO**: Rico



00:01:18 **Male 1**: He told us that uh ___ involved, in fine arts, so uh I'll be ___ which uh I'm not able to go ____ about. I'm under contract not to. But yeah if you're interested in having the ____ [CROSSTALK] _____ we'll be more than happy to go ahead and book you an appointment

00:01:44 [Noise from **DEANGELO** walking ... TV on in background]

00:02:10 **[KNOCKING]**

00:02:29 **DEANGELO**: Deangelo

00:02:57 [COUGHING]

00:03:01 **LITTLE LOU**: What's up dude?

00:03:02 **DEANGELO**: Shit dog... Man.... am I supposed to come back to work today or what?

00:03:11 **LITTLE LOU**: Shut up, Where's Annabelle at?

00:03:12 **DEANGELO**: She's up in the front

00:03:13 **LITTLE LOU**: Did she tell you to come back here and talk to me.

00:03:16 **DEANGELO**: She told just to come to room 6.

00:03:18 **[Loud noises ...followed by whispering]**

00:03:45 **DEANGELO**: He said six thousand wasn't enough, he said he wants more money for fucking doing this dude in, or he's gonna fucking turn us.

00:03:51 **DEANGELO**: dude, I'm not trying to go to jail dude I got a little son... what the fuck.

00:03:59 **DEANGELO**: Dude's been calling my house, for two days now he called yesterday and he called today. He's talking about

he wants more fucking money… what are we gonna do about that? Dude that did the shooting he wants more fucking money. And then fucking on top of that.

00:04:24 **[Loud noise over speech]**

00:04:36 **DEANGELO**: Oh come on man. I'm not fucking wired, I'm far from fucking wired, …Dudes been calling my house __and then the two other guys that were _____ gonna go to the cops, cause they didn't get paid, they feel like they got played.

00:04:59 **DEANGELO**: and now they're accessory after the fact

00:05:03 **ANABEL**: _____ what is his intentions, just to come back and try to get you to get any more money. _____

00:05:18 **DEANGELO**: Nothing he just said that he wants more money…

00:05:21 **ANABEL**: ok, well, _____

00:05:28 **DEANGELO**: this is a fucked up situation

00:05:29 **[More loud noises inaudible speech]**

00:05:54 **ANABEL**: _____ Where is your head at, tell me where is your head at?

00:06:02 **DEANGELO**: I'm good

00:06:02 **ANABEL**: You're fine

00:06:03 **DEANGELO**: I'm Fine

00:06:04 **ANABEL**: alright

00:06:04 **DEANGELO**: I'm just worried about the fucking people I was with me, fucking telling they want fucking money, because they didn't get paid when KC got paid, they're pissed off about it.

And they're threatening to go to the cops; I already had to beat one of them up.

00:06:18 **ANABEL**: OK they're threatening to go the cops and say what?

00:06:22 **DEANGELO**: Fucking, they're gonna fucking tell them everything Ms. Anabel… everything.

00:06:25 **DEANGELO**: Everything was cool until then, fucking when they took me in, they asked me where I was, what vehicle I was driving, I told em what vehicle I was driving, everything, and then now, you know what I'm sayin, this shit's _____, this motherfucker is callin my house, this shit's got me fucking scared, other than that I'm fucking cool… But we have to fucking pay the other two guys to keep their fucking mouths shut.

00:06:55 **ANABEL**: Where the fuck am I supposed to get the fucking money, Listen to what's going on here… _____ Louie is panicking, he's in a mother fucking panic, cause I'll tell you right now… if something happens to him we all fucking lose. Every fucking one of us.

00:07:16 **DEANGELO**: I Know

00:07:17 **ANABEL**: Every one of us fucking loses

00:07:19 **DEANGELO**: We have to get a motherfucker _____, I don't care if it's a hundred dollars, a couple hundred dollars, Ms. Anabel get a motherfucker something to keep they mouth shut.

00:07:25 **ANABEL**: Look if I tell Louie, that these mother fuckers are asking for money and if not they are gonna go to the cops Louie is gonna freak, I… my personal, me personally, have about, ahh shit how much do I have… maybe six bills…I'll fucking give it to you.

00:07:43 **DEANGELO** : Well just give it to me so I can give em something, just to shut em the fuck up, because now, you know

what I'm saying, that's stressing my life out they fucking even told my wife about this shit, now my wife is looking at me like I'm fucking crazy what the fuck am I supposed to do Ms. Anabel.

00:07:55 **[ANABEL Whispering]**

00:08:03 **ANABEL**: Yeah but …if the cops can't go no where with you, the shits gonna have to, fucking end, they gonna have to go someplace else, they're still gonna dig. They are gonna keep digging, they're gonna keep looking, they're gonna keep on, they're gonna keep on looking. [pause] Louie went to see an attorney not just for him but for you as well. just in case. Just in case… we don't want it to get to that point, I'm telling you because if we have to get to that point, you and Louie are gonna have to stick together.

00:08:33 **DEANGELO** : I already know this.., hey

00:08:35 **ANABEL**: KC

00:08:35 **DEANGELO**: Ms. Anabel

00:08:36 **ANABEL**: this motherfucker

00:08:37 **DEANGELO**: Hey what's done is done, you wanted him fucking taken care of we took care of him

00:08:41 **ANABEL**: Listen

00:08:42 **DEANGELO**: Don't worry

00:08:44 **ANABEL**: Why are you saying that shit, what we really wanted was for him to be beat up, then anything else, _____ mother fucking dead.

00:08:51 **DEANGELO**: Hey there ain't nothing we can do to change it now… we ain't got no choice but to fucking stick together, if not we're all gonna go down. I'm not trying to go to prison.

00:09:00 **ANABEL:** _____ If…If it comes to the point where they come and pick you up, just say you know what I told you guys everything I already know, I know nothing more, nothing fucking more, you know what I want to speak to my attorney, _____ have you had an attorney before?

00:09:26 **DEANGELO:** No

00:09:26 **ANABEL:** You don't have one?

00:09:27 **DEANGELO:** No

00:09:27 **ANABEL:** Alright, I'm gonna have to find an in between person to talk to you, somebody I can trust. It might be _____ If a person calls, looks for you she'll say it's Boo: Boo, I'm Boo.

00:09:50 **DEANGELO:** OK

00:09:50 **ANABEL:** Ok then you know you can fucking trust this person _____ steps we're gonna have to fucking take and whatever the fuck they're thinking about the god damn flyer that they fucking flyer they found next to his fucking body.

00:10:04 **DEANGELO:** They found more than a flyer next to him, they found a fucking, we were fucking around at the bank, and you know those fucking canisters? The black canisters that you put the money in, We stole one of those. And it fucking fell out of the van and it had all of our fucking fingerprints on it. And now they're fucking worried fucking going to jail, and they're gonna fucking rat on us if we don't give them something we have to give them something _____

00:10:27 **ANABEL:** Tell them to calm down, cause right now if your not _____ it'll just make matters fucking worse, and you need to be fucking strong _____ If you go to jail for this shit, I'm telling you, when the heat goes down everybody's fucked. The club is gone, the shop is gone, anybody who can take care of your family is fucking gone, he is the only one that can fucking say to take care of everybody…He's it.

00:11:04 **DEANGELO**: So what about work I'm not supposed to come back to work

00:11:07 **ANABEL**: This is what I need you to do

00:11:09 **DEANGELO**: I have to come back to work, to make it look like I'm still at work cause if not then they're gonna fucking suspect something, if they are still watching us.

00:11:17 **ANABEL**: OK listen, I've been, I've been thinking _____

00:11:25 **DEANGELO**: right

00:11:25 **ANABEL**: You son still sick right

00:11:27 **DEANGELO**: Yeah we just took him to the hospital today.

00:11:29 **[COUGHS]**

00:11:31 **ANABEL** : Listen to what I'm going to tell you, I'm going to give you some money so you can maintain yourself. I need you to go in tonight and see Ariel and tell her [background whispering and crosstalk]

00:11:56 **LITTLE LOU**: Really? OK

00:11:59 **ANABEL**: Based on _____, based on the investigation that's going on, it's best for you right now you need to get your head together. This is what you're gonna say _____ I'm pretty mad you know, my resignation_____ I need to take care of my son, I need to spend some time at home, OK your gonna be fine.. This may be for two three months it may be a month I don't know, until this shit kinda fucking fades out In the mean time [Loud Noise] In the mean time, within the week I'm gonna find _____ Someone. There will be _____ whatever the fuck it is so every week you're gonna get fucking paid. We are not going to leave you fucking hanging

00:12:55 **DEANGELO**: Ms. I'm not worried about myself Ms. Anabel. I'm worried about these mother fuckers opening they're mouth. That's all I'm worried about is them opening they're mouth _____ Cause they, how do we, when he when he shot dude he shot him in front of_____ everything _____ alone could put us all away Ms. Anabel. I just need to smoke some weed then I'll be cool Huh

00:13:24 **LITTLE LOU**: _____

00:13:25 **DEANGELO**: Huh

00:13:26 **LITTLE LOU**: _____

00:13:27 **DEANGELO**: You You not gonna fucking what the fuck are you talking about don't worry about it…you didn't have nothing to do with it

00:13:37 **[Coughing from LITTLE LOU]**

00:13:46 **ANABEL**: How…answer me this question_____ [whispering] how could you be so stupid _____ what kind of fucking _____ How could you go through with this shit?_____

00:14:06 **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 _____

00:14:19 **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 had his wife, you should of mother fucking turned around on the road, don't give a fuck what KC said, you know what bad deal turn the fuck around

00:14:36 **ANABEL**: [whispering] _____

00:14:48 **LITTLE LOU**: Ludacris wasn't with you was he?

00:14:49 **DEANGELO**: Huh

00:14:49 **LITTLE LOU**: Ludacris

00:14:50 **DEANGELO**: No

00:14:50 **LITTLE LOU**: Oh

00:14:53 **DEANGELO**: Ludacris don't now nothing about this shit

00:14:54 **ANABEL**: _____What ends up happening if you _____ [whispering]

00:15:05 **DEANGELO**: [whispering]

00:15:07 **DEANGELO**: That's all I can fucking do is _____

00:15:12 **LITTLE LOU**: _____

00:15:16 **DEANGELO**: Who

00:15:17 **LITTLE LOU**: The people who are gonna rat.

00:15:18 **DEANGELO**: They're gonna fucking work deals for themselves, they're gonna get me for sure cause I was driving, they're gonna get KC because he was the fucking trigger man. They're not gonna do anything else to the other guys cause they're fucking snitching.

00:15:34 **LITTLE LOU**: Could you have fucking KC kill them too, we'll fucking put something in their food so they die rat poison or something

00:15:44 **DEANGELO**: We can do that too

00:15:46 **LITTLE LOU**: And we get KC last.

00:15:48 **DEANGELO**: It's gonna be impossible to find KC to kill these, He ain't even at his house, KC fucking got his shit and fucking packed up shop I don't know where the fuck KC is.

00:15:59 **ANABEL**: Here's the thing, we can take care of KC too_____ KC is asking for money, right ok, but here is the thing he's the mother fucking shooter, people can pinpoint him as the shooter __

00:16:11 **DEANGELO**: KC will just kill the other two guys

00:16:13 **ANABEL**: I know but what I'm saying is KC _____

00:16:19 **DEANGELO**: Call his fucking bluff

00:16:20 **ANABEL**: _____ going to jail for fucking shit like this

00:16:25 **DEANGELO**: Exactly

00:16:26 **ANABEL**: OK so he should [CROSSTALK]

00:16:27 **DEANGELO**: I'm not that ain't what I'm worried about I'm worried about the other two. I don't think KC is gonna be dumb enough to fucking sell his self out

00:16:32 **LITTLE LOU**: [whispering] _____ don't say shit, once you get an attorney, we can say _____TJ, they thought he was a pimp and a drug dealer at one time _____ I don't know shit, I was gonna get in my car and go promote but they started talking about drugs and pow pow

00:16:55 **ANABEL**: Did you guys have fucking, were you guys waiting there for this motherfucker _____ OK so you guys were running around with this shit ____and you did not realize it.

00:17:06 **DEANGELO**: I guess it fell out the car when fucking KC got out the van, you know when he got out the van… he slid out the door right there with a bunch of flyers in the dirt and then the fucking canister with our finger prints on it.

00:17:17 **ANABEL:** Shh

00:17:19 **[whispering CROSSTALK]**

00:17:27 **ANABEL:** _____

00:17:38 **DEANGELO:** They let me go it was about probably like 1:30 they let me go, and he goes you can go home when I walked outside the building; there were two metro cops they fucking booked me on some fucking misdemeanor tickets that I got in the van, remember the tickets we got that night and you had to come get the van.

00:17:53 **LITTLE LOU:** _____ the fucking tickets at?

00:17:56 **DEANGELO:** Yeah we all got tickets, we just never fucking paid it and they fucking booked me in county on that shit and then I had got out of jail this afternoon just like eleven o'clock.

00:18:08 **ANABEL:** _____ did these fucking cops _____

00:18:15 **DEANGELO:** _____ never did _____ Thank you for uh, for uh, how did he say, thanks for cooperating with us. We appreciate it. He said well we will be contacting you, that's all he fucking told me then when I walked out side two metro cops then put me in handcuffs. And they fucking kept my Nextel.

00:18:32 **ANABEL:** You know why they keeping your Nextel right

00:18:36 **DEANGELO:** Cause I called TJ from it

00:18:37 **ANABEL:** Let me ask you a question during the time that did you ever did your wife ever call you did you ever call the house about your son.

00:18:46 **DEANGELO:** No

00:18:47 **ANABEL:** That's the one thing you said you did, your wife called

00:18:51 **DEANGELO:** I have to call her from _____ I can't call her from the Nextel it's just a two way radio

00:18:55 **ANABEL:** So you used somebody else phone

00:18:58 **DEANGELO:** Yeah

00:18:58 **ANABEL:** OK

00:18:59 **DEANGELO:** I Just told 'em my wife called the club and I had to go home and with you calling me about 11:45 and asking me where I was.

00:19:08 **[CROSSTALK]**

00:19:08 **ANABEL:** _____all I'm telling you is all I'm telling you is stick to your mother fucking story _____ Stick to your fucking story. Cause I'm telling you right now it's a lot easier for me to try to fucking get an attorney to get you fucking out than it's gonna be for everybody to go to fucking jail. I'm telling you once that happens we can kiss everything fucking goodbye, all of it… your kids' salvation and everything else… It's all gonna depend on you.

00:19:41 **DEANGELO:** Ms. Anabel you already know where I stand on this

00:19:46 **ANABEL:** What happens when they come to you and fucking say OK you know what you know more than what it is, we're putting you in jail for conspiracy what the fuck are you gonna do.

00:19:54 **DEANGELO:** Oh well get my lawyer, I told you what the fuck I knew, I told you everything and if you want to put me in jail go ahead but I want my fucking lawyer.

00:20:03 **ANABEL:** Alright have your wife get in contact with, see if she can find any um… cause I'm gonna go ahead and talk to this guy as well and this mother fucker I'm telling you he's fucking outrageous. He's gonna want you I Know he's gonna

want you to go ahead and rat the other guys out and there aint no fucking way and I'll tell you what everybody is gonna fucking die, we're all gonna be under the fucking trigger. So I'm telling ya have your wife start looking for a fucking criminal attorney. OK. Get some information on how much he is gonna take for, on

00:20:41 **LITTLE LOU:** to put him on retainer?

00:20:43 **ANABEL:** to put him on retainer just in case OK just in case cause like I said if we fucking hold our ground and we don't say a mother fucking thing I'm telling you right now cause I have to get Louie back on track cause if I don't we're all fucked.

00:21:00 **LITTLE LOU:** He's all ready to close the doors and everything and hide go into exile and hide,

00:21:04 **ANABEL:** For the rest of his fucking life, what about it, what about everything because we will lose it all, and if I lose the shop and I lose the club I can't help you or your family… God Damn it _____ your not that stupid you were playing with the _____ in the car you should have fucking turned back you had too many fucking eyes on your ass what the fuck were you thinking?

00:21:29 **DEANGELO:** I was fucking high, I don't know

00:21:33 **ANABEL:** _____

00:21:34 **DEANGELO:** I was fucking high _____

00:21:36 **LITTLE LOU:** [laughs]

00:21:37 **DEANGELO:** Hey

00:21:39 **LITTLE LOU:** _____

00:21:43 **[CROSSTALK]**

00:21:49 **DEANGELO:** _____ Bubble Gum _____ I can _____ a fucking pair of shoes and then, be like, oh, we need more money

00:22:04 **LITTLE LOU:** _____ they'll go to jail for the rest of their lives too_____

00:22:11 **[Whispering CROSSTALK]**

00:22:15 **LITTLE LOU:** Next time you do something stupid like that, I told you you should have taken care of _____ all the fucking time _____KC ___priors, how do you know this guy

00:22:36 **DEANGELO:** from my mom

00:22:39 **LITTLE LOU:** Shh_____

00:22:41 **DEANGELO:** _____aint nobody see him

00:22:46 **ANABEL:** _____phone number, right

00:22:52 **DEANGELO:** Calls my moms house and my mom calls me all I got is a cell phone number for KC that's all I have

00:22:58 **ANABEL:** Get to get somebody to buy a prepaid phone it cannot be you and cannot be any of your god damn fucking homies can't tell anyone _____get a fucking prepaid _____ tonight when you go to the fucking club _____ two days ago _____ you were fucking held for questioning and shit _____ I'll tell you right now I'm going to tell Louie that you are ___ done. ___look for an attorney_____ you had better keep your mouth shut, _____ cause I'll tell you right now KC would rather have you keep your mother fucking mouth shut than to bring him in too. He is the fucking shooter, I tell you what, he's gonna do fucking time.

00:24:23 **ANABEL:** So we keep our mouths shut, _____ we get you a fucking… your wife finds an attorney, you wife ___ like I said you need a mother fucking prepaid phone so I can call you when I need to talk to you.

00:24:43 **LITTLE LOU**: Listen _____ You guys smoke weed right, after you have given them money and still start talking they're not gonna expect rat poisoning in the marijuana and give it to them _____

00:25:03 **ANABEL**: I'll get you some money right now

00:25:05 **LITTLE LOU**: Go buy rat poison_____and take ____back to the club

00:25:13 **ANABEL**: Go to the club tonight at five. Tell Ariel that you know what right now _____ your gonna have to take time if she wants to fill out a form just put down for personal reasons, that way we let this shit fucking die down _____ nothing happened, you come back everything goes back to normal but, After now we don't discuss this motherfucker again____ This shit fucking ends__ its done _____ Like I said if they yank you up you don't know a mother fucking thing _____

00:25:52 **LITTLE LOU**: Here, Drink this right

00:25:53 **DEANGELO**: what is it?

00:25:53 **LITTLE LOU**: Tanguerey, you stir in the poison_____

00:25:59 **ANABEL**: Rat poison is not gonna do it I'm telling you right now _____

00:26:03 **LITTLE LOU**: you know what the fuck you got to do

00:26:05 **ANABEL**: _____ takes to long _____ not even going to fucking kill him

00:26:11 **[LOUD NOISE followed by either background talking or TV on in background]**

00:26:52 **LITTLE LOU**: _____conspiracy_____

00:27:02 **DEANGELO**: This mother fucker did it _____ don't have a need _____ call me no more there

00:27:06 **LITTLE LOU**: I couldn't call you the phones were tapped _____

00:27:10 **DEANGELO**: _____

00:27:12 **LITTLE LOU**: _____ you see these [whispering] they are looking for _____ wanna tell them _____

00:27:48 **[Coughing]**

00:27:51 **LITTLE LOU**: _____ better start _____ the cops told me _____ they have something else _____ that's what we _____ I was like _____ and I told ya _____ How much is the time for a conspiracy _____

00:28:22 **DEANGELO**: Fucking like 1 to 5 it aint shit

00:28:25 **LITTLE LOU**: In one year I can buy you twenty-five thousand of those, ___ thousand dollars ___ one year, you'll come out and you'll have a shit load of money _____ I'll take care of your son I'll put em in a nice condo _____

00:28:48 **DEANGELO**: I need to move them from that location to another location too many mother fuckers know where I live at

00:28:53 **LITTLE LOU**: Do you need help finding a place

00:28:54 **DEANGELO**: I know a place already know where I want to move to I just need to get out of that apartment

00:28:59 **LITTLE LOU**: Move there now

00:28:59 **DEANGELO**: I don't have the money to move there

00:29:02 **LITTLE LOU**: _____

00:29:06 **DEANGELO**: _____ office

00:29:11 **ANABEL**: I used my money last night in the fucking for change money so I got no change fucking _____ this is it I have no more _____ I got lucky eleven dollars to my name _____

00:29:29 **LITTLE LOU**: Where are the keys to the shuttle bus?

00:29:32 **[LOUD NOISE....Coughing]**

00:30:23 **ANABEL**: What are you gonna do today at 5?

00:30:24 **DEANGELO**: see Ariel and resign_____

00:30:26 **ANABEL**: Right, _____ fill out your time card from last week cause I didn't get it, _____ you know I forgot to turn in my time card last week, 3 days Monday, Tuesday, Wednesday, 8 hours a day that's 24 hours, I'm gonna give you a check for that because obviously there gonna be asking to see our records so It'll be much easier that way I can prove you were there because Thursday you weren't there because that was the day all the shit happened it was Friday

00:30:59 **DEANGELO**: _____ Thursday

00:31:02 **ANABEL**: I'm giving you extra cash anyway just _____ If you need to get a hold of me go through ____ I know but call Mark or I will ...ah... call Mark in case, I will give Mark a number to find a way to give to you which will be a prepaid number which actually I can give to you now. _____ Every week __figure where to go so I can give you at least ____dollars a week so you can go ahead_____take care of your son _____ either way I told you _____ this attorney so we can start paying the payments and shit _____ find out what they can do _____ to be able to pay these people.

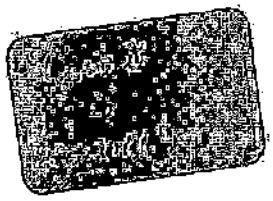
00:32:30 **ANABEL**: _____

00:32:57 **{ DEANGELO walks to car and drives back to destination]**

END

EXHIBIT 2

Disc marked as Audio Enhancement, 050519-3516, Tracks 1&2



Track 1.

DC: Deangelo Carroll
AE: Anabel Espindola
LH3: Luis Hidalgo III
UI: Unidentified

UI: What's up baby?

DC: What up?

Unintelligible conversation

UI: Where's your brother at?

Background noise and footsteps.....

Footsteps cease. Male voice speaking on the phone.

UI: Sort of, I'm getting involved in the fine arts, so uh, but uh, uh, I'm not able to go into detail but I can tell you about it. I'm under contract not to, but yeah if you're interested in having the (unintelligible) you can (unintelligible) go ahead and book an

appointment.

Unintelligible conversation.

02:15 on meter. *Footsteps continue and pause for a knock on a door.*

DC: Deangelo

Male voice speaking Spanish. Footsteps continue.

Loud coughing.

*Substantive conversations begin at **03:02** on meter*

LH3: What's up?

DC: Shit, Dog. Man. Am I supposed to come back to work today or what?

LH3: (Unintelligible) Where's Anabel at?

DC: She's up in the front.

LH3: What she doing? She tell you to come back here and talk to me?

DC: She told me just to come to room 6.

Door Opening

Unintelligible whispering

*Conversation resumes at approximately **03:39.***

LH3: What's going on?

DC: He said $6,000 wasn't enough. He said he wants more money for fuckin' doin' this dude in or he's gonna fuckin' turn us. Dude, I'm not trying to go to jail, Dude. I have a little son. What the fuck? Dude has been calling my house two days now. He called yesterday. He called today. He's talking about he wants more fuckin' money. What are we gonna do about that? Dude that did the shooting, he wants more fuckin' money. And then he (unintelligible) on top of that.

Conversation obscured by noise.

DC: Come on now. I'm not fuckin' wired. I'm far from fuckin' wired. Fuckin', the dude been calling my house for two days (unintelligible) and then the two other guys that were with him (unintelligible) fuckin' go to the cops because they didn't get paid. They feel like they got fucked and now they're accessory

after the act.

AE: (unintelligible) what is their intentions? He fuckin' whacked him because he wanted you to get him more money. What are you gonna do?

DC: Nothin'. He just said that he wants more money.

AE: O.K., well, there ain't no more money.

DC: This is a fucked up situation.

AE: (UNINTELLIGIBLE) Bad day...(unintelligible)

Unintelligible whispering (male voice)

AE: Where is your head at? Tell me. Where is your head at?

DC: I'm good.

AE: You're fine.

DC: I'm fine.

AE: Alright.

06:05

DC: I'm just worried about the fucking people out there was with me, fucking telling 'em, they want fucking money. Because they didn't get paid and KC got paid and they're pissed off about it. And they're threatening to go to the cops. I already had to beat one of them up.

AE: O.K., so they're threatening to go to the cops and say what?

DC: Fuckin' they're gonna fuckin' tell them everything Miss Anabel, Everything. Everything was cool until then. They came tryin' to take me in. They asked me where I was, what vehicle I was driving. I told them what vehicle I was driving, everything and then now, you know what I'm saying, this shits gotta come. These mother fuckers they're calling my house. This shit's got me fucking scared. Other than that I'm fuckin' cool... but we have to fuckin' pay the other two guys to keep their fucking mouth shut.

06:56

AE: Where the fuck am I supposed to get the fucking money? Listen to what's going on here, ok this is what we're gonna do. Louie's in a panic. He is in a

mother fucking panic. Dude, I will tell you right now if something happens to him we all fucking lose. Everyone fucking one of us.

DC: I know, I know.

AE: Every one of us. Fucking loses.

DC: And we have to give the mother fuckers something. I don't care if its a hundred dollars, a couple hundred dollars Miss Anabel, give the mother fuckers something to keep they're mouths shut.

09:26

AE: Look if I tell Louie that these mother fuckers are asking for money, if not, they're going to go to the cops Louie's gonna freak. I, my personal, me personally, I have about... (sigh) shit, how much do I have, maybe six bills – how about if I give it to you.

DC: Well, just give it to me so I can go give them something just to shut them the fuck up. Because, now, you know what I'm saying, they're stressing my wife out; they fucking even told my wife about this shit. Now my wife is looking at me like I'm fucking crazy. What the fuck am I supposed to do, Miss Anabel?

Unintelligible whispering

08:01

AE: Yeah, but the cops can't go nowhere with you. The shits gonna happen but it's never gonna have to go no place. Now they're still gonna dig. They're gonna keep digging, they're gonna keep looking. They're gonna keep on, they're gonna keep fucking looking. Louie went to see an attorney and not just for him but for you as well. Just in case, just in case, we don't want it to get to that point. I'm telling you this because if we have to get to that point you and Louie are gonna have to stick together.

DC: Already know this.

AE: Hey, K.C...

DC: Miss Anabel...

AE: hold on...this motherfucker..

08:34

DC: Hey. What's done is done. You wanted him fuckin' taken care of and we took care of him.

08:44

AE: Listen (sigh)

DC: Don't Worry

AE: Why are you saying that shit? What we really wanted was him fuckin beat up, if anything, we didn't want him fuckin' dead!

DC: There ain't nothing that we can do to change it now. We got no fucking choice but to fucking stick together if not we're all gonna go down, I'm not trying to go to prison.

AE: So we...I'm telling you right now, if, if, it comes to the point where they come and pick you up, just say "you know what, I told you guys everything I already know" and nothing more, nothing fucking more, "you know what, I want to speak to my attorney and see if you're lying." Have you got an attorney before?

DC: No.

AE: You don't have one?

DC:No.

AE: Alright, I'm gonna have to find an in between person to talk to you. Somebody I can trust. It might be... if the person calls, looks for you, she's gonna say it's through -- Boo – I'm Boo,

DC: OK.

AE: OK. Then you know you can fucking trust this person. If this shit starts we're gonna have to fucking pay him. One of the fucked up things about this is that God damn flyer that they fucking found that you fucked up (unintelligible).

DC: They found more than a flyer. They found a fucking...we were fucking around at the bank you know those fucking canisters, the black canisters that you put the money in. We stole one of those and it fucking fell out of the van and had all of our finger prints on it. And now they're fucking worried about fucking going to jail and they're gonna fucking rat on us, if we don't fuckin' give them something, we have to give them something to keep them fucks...

10:27

AE: Look, I'm telling you calm down, cause right now if you're not busted, just thank God it's nothing worse. I need you to be fucking strong. (unintelligible) If you go to jail for this shit, I'm telling you (unintelligible) if the heat goes down, everybody's fucked. Because the club is gone...the shop is gone. Any possibility of you taking care of your family is fucking gone. If, he's the only one that can fucking stay to take care of everybody. He's it.

11:05

DC: So what about work? Am I supposed to come back to work?

AE: This is what I need you to do...

DC: I have to come back to work to make it look like I'm still at work, cause if not they're gonna fucking suspect something if they are still watching us.

AE: O.K., listen to me. I've been, I've been thinking. Your son has been sick, is that correct? He's still sick, correct?

DC: Yeah, we just took them to the hospital today.

Coughing

AE: Listen to what I'm going to tell you. I'm gonna give you some money so you can maintain yourself. I need you to go in tonight to see Ariel and tell her...

DC: (unintelligible – whispering to A.E.)

AE: I know, I know.

DC: (unintelligible- whispering to A.E.)

11:56

LH3: Really? O.K.

AE: Well, let me tell you. Based on what she fucking wrote... based on the investigation that's going on, it's best that you right now you need to get your head together. This is what you're going to say: "Ariel, I'm turning in, you know, my resignation right now I need to take care of my son. I need to spend some time at home." OK, you're going to be fine -- With me you are. In two to three months, maybe a month, I don't know, 'till this shit kinda fucking fades out. In the mean time (obscured by noise)...in the meantime, every week we're going to find (obscured by noise) some where, in the movie theater taped underneath the seat or what ever the fuck it is, so

every week you're gonna get fuckin' paid. I'm not gonna leave you fuckin' hanging.

12:56

DC: Miss...I'm not worried about myself, Miss Anabel, just worried about these mother fuckers opening their mouths. That's all I'm worried about, them opening their mouths up about every fuckin' thing. 'cause they found ...when he shot the dude, he shot him in front of (unintelligible) everybody. Them alone can put us all away, Miss Anabel.

DC: I just need to smoke some weed, then I'll be cool.

LH3: (unintelligible).

DC: Huh,

LH3: (unintelligible)

DC: Huh, You're not gonna fuckin'... what the fuck you talking about? Don't worry about it. You had nothing to do with it.

13:38

Loud male coughing and loud noise.

Unidentifiable whispering.

DC: (unintelligible whispering)

13:56

AE: How...answer me this question, because I told you (unintelligible) how could you be so stupid (unintelligible) let this motherfucker (unintelligible) this motherfucker with a weapon? What kind of a fucking human are you to fucking go through with this shooting and not do something? How come you didn't figure that out?

DC: How were we gonna call it quits? Fucking KC fucking got mad and fucking, I told you he went fuckin' stupid and fucking shot the dude. Not nothing we can fucking do about it. Ain't none of us had no fuckin' pistol.

AE: You should have fucking turned your ass around, before this guy, knowing that he's got people in the fucking car that can pinpoint you. That this mother fucker had his weapon, where you should have mother-fucking turned around on the road, "You know what K.C., bad news. You know what. Bad deal." Turn the fuck around.

14:36

(unintelligible).

LH3: Ludacris wasn't with you, was he?

DC: Who?

LH3: Ludacris.

DC: No. Ludacris can't know anything about this shit.

AE: What ends up happening if you give them some money and they come around, almost doing a fucking harm, that way (unintelligible).

15:04

LH3: (unintelligible) he's going to kill them later (unintelligible).

DC: That's all I can fucking do, there's nothing that I can do.

LH3: (Unintelligible) They're gonna get killed, them guys, too

DC: Who?

LH3: The people who are gonna rat.

DC: They're gonna fuckin' work deals for themselves. They're gonna do me, for sure, because I was driving. They're gonna get K.C. because he was the fucking triggerman. Can't do anything else to the other guys...'cause, 'cause they're fucking snitching.

15:35

LH3: Tell fuckin' KC to kill them too. Or fucking put something in they're food so they die. Rat poison or something?

DC: Can do that too.

LH3: And get K.C. last.

DC: That's gonna be impossible, fuckin' K.C., he ain't even at his house. KC fucking got his shit and packed up shop. I don't know where the fuck K.C. is.

AE: But wait a minute, here's the thing, o.k., we think K.C., we think that K.C., K.C.'s asking for more

money, right? O.K., but, here's the thing. He's the mother-fuckin' shooter. People can pinpoint him, especially (unintelligible).

DC: But K.C. would just kill the other two guys.

16:25

AE: I know, but what I'm saying is K.C. (*Unintelligible*) fucking K.C. (unintelligible).

DC: All he's fucking doing...

AE: (Unintelligible) go ahead and fuckin' go to jail for a fucking shooting...

LH3: Exactly.

AE: Ok so he's trying...

DC: That ain't who I'm worried about. I'm worried about the other two. I don't think KC is gonna be dumb enough to fucking sell himself out.

LH3: DeAngelo...

AE: (unintelligible)

LH3: Don't say shit! It was a drug deal. You can say you were going out there to go promote with him. All of a sudden, TJ, they know he was a pimp and a drug dealer at one time. I don't know shit I was getting in my car to go promote and they started talking about drugs. Pow! Pow!

AE: So you know I'm not fucking with you guys, tell me, mother fucker (unintelligible)... so you guys were running around with this shit they were bound to find you. Didn't you fucking realize that?

17:07

DC: I guess they fell out the car when fucking K.C. got out the van. When he got out the van he slid out the door and there was a bunch fliers in the dirt and then the fucking canister with our fingerprints on it.

AE: Wait a second.

17:33

AE: What did the cops fucking tell you?

DC: I told you, they let me go after it was about 1:30. They let me go. He goes you can go home and when I walked outside the building, there were two

Metro cops. They fucking booked me on some fucking misdemeanor tickets that I got in the van. Remember the tickets we got that night -- when you had to come get the van.

LH3: You got a fuckin' ticket for that?

DC: Yeah. We all got tickets. And I never fucking paid it and they fucking booked me in the County on that shit. And then I had got out of jail fucking Saturday night. It was like eleven o'clock.

LH3: (unintelligible)

AE: What did these fucking cops tell you when you were fucking brought up for questioning?

DC: Hu-uh, They never did ask. They said thank you for uh, for uh, thanks for cooperating with us. We appreciate it, he says, well we will be contacting you. That's all he fucking told me, then when I walked off two metro cops put me in handcuffs and they fucking kept my NEXTEL.

18:33

AE: You know why they're keeping your Nextel, right?

DC: I called TJ from it.

AE: Let me ask you a question during the time that they kept you did you ever, did your wife ever call you? Did you call your house about your son? That's the one thing you say you did. Your wife called.

DC: Called him from a -- can't call from a NEXTEL it's just a two-way radio.

AE: So you used someone else's phone.

DC:When?

AE: (Unintelligible)

DC: I just told them my wife called the club and I had to go home and that you called me at about 11:45 and asked me where I was. I kept telling them (unintelligible).

AE: All I am telling you is, -- all that I'm telling you is to stick to your mother fucking story. Make fucking sure you fucking stick to your fucking story. I'm telling you right now, it's a lot easier for me to try to find you, to get an attorney to get you fuckIng out than it will be for... everybody will go to fucking jail

and I'm telling you once that happens we can kiss everything fucking goodbye. All of it! Your kid's salvation and everything else. It's all gonna depend on you.

19:40

DC: You already know where I stand.

AE: What happens if they come in and they fucking say "Ok, you know what, you know more than what it is, we're putting you in jail for conspiracy." What the fuck are you going to do?

DC: "Hello, get my lawyer, I told you what the fuck I knew. I told you everything and if you wanna put me in jail go ahead but I want my fucking lawyer"

20:04

AE: Alright, have your wife get in contact with – see if she can find any --, ah, 'cause I'm going to go ahead and talk to this guy tomorrow and this mother fucker's charges are fucking outrageous. He's gonna want you, I know he's gonna want you to go ahead wrap these other guys up and there's no fucking way! And I'll tell you what. Everybody's gonna fucking die! We're all gonna fucking be under

the fucking trigger. So I'm telling you have your wife start looking for a fucking, ah, criminal attorney. Ok? Get some information regarding how much he's gonna take for -- on ...to put him on retainer. Just in case. Ok, just in case. And like I said if you fucking are found you don't say a mother fucking thing. I'm telling you right now. 'Cause I have to get Louie back on track, 'cause if I don't, we're all fucked.

LH3: He's already ready to close the doors and everything and hide. Go into exile. Hide.

AE: That's for the rest of your fucking life. What about it? What about everything? You want to lose it all? If I lose the shop and I lose the club, I can't help you or your family.

Loud noise.

AE: (unintelligible, obscured by noise) stupid, you knew why he wouldn't have figured you had guys in the car, you should have turned back. You had too many fucking eyes on your ass. What the fuck were you thinking?

21:29

DC: (unintelligible) I was fucking high, you know,

hey (unintelligible/noise)

LH3: (unintelligible)

DC: (unintelligible)

LH3: (unintelligible)

DC: (unintelligible) what we gonna do? (Unintelligible) go buy a new pair of fucking shoes and then, be like, "oh, we need more money".

LH3: (unintelligible) they'll go to jail the rest of their lives, dude. (unintelligible) do something stupid like that. I told you, you should have taken care of (unintelligible) because of all the fucking time (unintelligible). Piece of cake, cause he (unintelligible) priors. How do you know this guy?

DC: From my mom.

LH3: (unintelligible).

DC: Don't worry about it. I got something to eat, ain't nobody seen me.

LH3: Shit.

AE: How did he get in touch when he said he wanted more money?

22:59

DC: He called my mom's house and my mom called me. All I got is a cell phone number on KC that's all I have.

AE: Get to -- get somebody to buy a prepaid phone. It cannot be you; it cannot be any of your goddamn fucking homeys. Can't tell anyone (Unintelligible)

Loud male coughing and toilet flushing.

AE: Get a fucking prepaid mother fucking phone. (unintelligible) so that you can buy it. Tonight when you go to the fucking club -- why yesterday did you fucking go ...two days ago... to the club and then you were out for questioning? You should of (unintelligible) the cops.

Conversation broken and covered by noise

AE: (unintelligible) these two mother fuckers (unintelligible) fucking panic (unintelligible) I'm telling you right now, you want me to tell Louie that you wanna quit? Done. (unintelligible) keep your

mouth shut in case something happens, 'cause I'll tell you right now, K.C. was not (unintelligible), so keep your mother fucking mouth shut, they'll bring him in too, he's the fucking shooter, I'll tell you what, he's gonna do fucking time.

DC: (unintelligible) mom (intelligible) house.

AE: So, we keep our mouth shut, we maybe get lucky. Your wife can call an attorney (unintelligible) your wife can (unintelligible). Like I said you need a mother fucking prepaid phone.

DC: Uh-huh

AE: So I can go ahead and be able to talk to you.

24:44

LH3: Listen. Do me a favor. You guys smoke weed, right? After you give them the money and start to talking they're not gonna expect poison in the marijuana. Give it to them. (unintelligible). I'll give you some money right now. Go buy rat poison take the rat poison back to the club. (Unintelligible)

DC: (unintelligible)

AE: Meet her at the club tonight at five. Tell Ariel that, you know what, right now, your son is too sick you been to the hospital twice already you're gonna have to take the time if she wants you to fill out a form just put down for personal reasons that's it. That way we let this shit fucking die down.

DC: Uh-Huh

AE: In a couple months if nothing happens, then you come back everything goes back to normal, but after now, we don't fucking discuss this motherfucker again.

DC: Uh-Huh

AE: This shit fucking ends.

DC: Uh huh

AE: This time if they pick you up, you don't know a mother fucking thing.

25:51

LH3: You drink this, right?

DC: What is it?

LH3: Tanqueray. Mix the rat poison into this (Unintelligible).

AE: Rat poison is not going to do it. I'm telling you right now.

LH3: Hey, do what the fuck you gotta do.

AE: Rat poison takes too long. It's not going to fucking kill them.

LH3: Maybe something else.

DC: I don't want to leave them in my house too long

26:30

DC: (unintelligible) that's bullshit, he got paid and we're not gonna get paid (unintelligible)

LH3: OK (unintelligible) kill this fucking guy. (Unintelligible) get rid of the damn conspiracy. (Unintelligible).

DC: Motherfucker, dude, I don't have the nigger call me no more there.

LH3: I ain't gonna call you.

DC: What I'm thinking...

LH3: (unintelligible) remember me asking(Unintelligible) relationship with (unintelligible) (*coughing*) you know me, I'm not gonna say shit (unintelligible) I told you (unintelligible) the cops told me (unintelligible) that's what they're doing right now (unintelligible) and I told you (Unintelligible)

DC: *sniff*

LH3: How much is time for conspiracy?

DC: Fuckin' one to five (unintelligible) I'm not sure.

28:25

LH3: In one year, I can buy you $25,000. (Unintelligible) 25,000 dollars - in one year. Come out and you'll have a shit load of money. Don't worry about it. I'll take care of your son, your wife. I'll put them in a nice condo on the good side of town. I'll give them a car, you know that.

28:47

DC: I need to move them from my location, to another location. Too many mother fuckers know where I live at.

LH3: Did you ever find a place?

DC: I know a place. I already know where I want to move too I just need to get out of that apartment

LH3: Move there now!

DC: I don't have the money to move there.

LH3: Tell me how much it is.

DC: Don't know. I gotta talk to the people at the office

** Door

AE: I used my money last night to fucking use to change money, so I got no change for the fucking club. This is it. I have no more, believe me. I got money, 11 dollars to my name. Here's a grand.

29:30

LH3: Where are the keys to the shuttle bus?

DC:(unintelligible) I'm not sure. There at the club

LH3: (unintelligible) the fucking white van.

30:21

AE: Now, what are you gonna do today at five?

DC: See Ariel and resign.

UI: (unintelligible whispering)

AE: Fill out your time cards for last week. Because I didn't get it. (Unintelligible) I forgot to turn enter in your in time card last week. Three days Monday, Tuesday, Wednesday, 8 hours a day; that's 24 hours. I'm going to give you a check for that, because, obviously they are going to be asking me for any payroll records. So it will be much easier, that way I can prove that you were there, Thursday you weren't there because that wasn't the day that all that all the shit happened, it was Friday.

DC: I was there Thursday.

AE: I'm giving you extra cash anyway (unintelligible). If you need to get hold of me, go through Mark but I know but call Mark or I will, I will call Mark in case, I will give Mark a number to find a way to give to you. That will be a prepaid number, which actually I can give you now. (Unintelligible/noise) information about you working (unintelligible) every week, we'll figure out where to go, so I can give you a few dollars a week so you can go ahead and at least survive and take care of your son. So even though you are not working, your still gonna get fucking paid (unintelligible rustling noise) they come back and they arrest, either way, I told you all I fucking know I advise you to go to an attorney, so we can start making the payments and shit to see what the fuck we can do. We gotta keep the ball rolling to be able to fucking pay these people. (unintelligible)

33:02 Substantive conversation ends.
34:54 Recording ends.

EXHIBIT 3

Disc marked as Audio Enhancement, 050519-3516, Tracks 1&2

Track 2.

DC: Deangelo Carrol
AE: Anabel Espindola
LH: Luis Hidalgo III
UI: Unidentified

Sound of walking and talking
00:45

D.C. Where is Anabel?

L.H. She's Out. Strip.

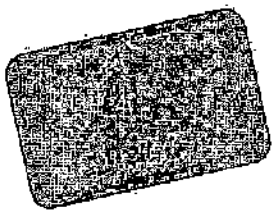
Rustling and whispering

D.C. I want to get my wife the fuck out of here.

Knocking

D.C. I want to get my wife and kid the fuck out of here.

UI: (Unintelligible) about me, yeah..



Knocking

Rustling/door closing

D.C. I need to get my wife and kid out of here.

D.C.: Fucking, I don't want them here (Unintelligible) I want to take them to Jamaica. Ain't nobody. Uh, I didn't want to call because you guys are telling me that the phones are fucking bugged. I want to take my wife and kid the fuck up out of here. The other two are gone.

A.E.: You sure?

D.C.: I'm positive. I watched them get on the bus last night. They're gone. I need money to get my wife and kid up out of here.

A.E.: All right.

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

A.E.: O.K wait, listen, listen to me (Unintelligible)

D.C: I'm not worried

A.E.: Talk to the guy, not fucking take care of him like get him out of the fucking way (Unintelligible). God damn it, I fucking called you

D.C.: Yeah, and when I talked to you on the phone, Ms. Anabel, I specifically I specifically said, I said "if he's by himself, do you still want me to do him in."

A.E.: I I ...

D.C. You said Yeah.

A.E. I did not say "yes".

D.C.: you said If he's with somebody, then beat him up.

A.E.: I said go to plan B,-- fucking Deangelo, Deangelo you just told admitted to me that you weren't fucking alone I told you 'no', I fucking told you 'no' and I kept trying to fucking call you and you turned off your mother fucking phone.

D.C.: I never turned off my phone.

A.E.: I couldn't reach you.

D.C.: I never turned off my phone. My phone was on the whole fucking night.

Unintelligible: Ssshhhh

D.C. Ms. Anabel

A.E.: I couldn't fucking reach you, as soon as you spoke and told me where you were I tried calling you again and I couldn't fucking reach you.

D.C. Man, I just need to get my wife and kid up out of here, you know what I'm saying, everything else is taken care of, they got on the bus last night, there gone and now I need to get my wife and kid the fuck out of the state.

L.H.: So what happened now?

D.C.: Fucking K.C.'s threatening to kill my wife and kid.

L.H.: He thinks she'll snitch?

D.C.: No. He can't snitch; if he snitches he's gonna fucking snitch on himself.

Unidentified: Shhhhhhh!

L.H.: Why does he want to do something to you now?

D.C.: Because he said he isn't getting any more money. I told him, hey you got paid for what the fuck you did.

A.E.: All I'm telling you-is denial – cause I ain't fucking singing, and I already said, I don't know shit, I don't know shit, fucking, I don't know a mother fucking thing and that's how I gotta fucking play it. And thats how I told everybody else to play it. I don't know a mother fucking thing

03:54

D.C.: I understand that.

A.E.: Ok, and that's how it's got to be fuckin played.

D.C.: Well, I need to get my wife and kid out of town. I don't give a fuck about me; I want to get my wife and kid out of town. And I need to do it soon. I didn't mean to come up here like this, Ms. Anabel, but .....

A.E.: Just sit there with Louis (unintelligible)

** Rustling sound and long pause.

A.E: (unintelligible).

** Door closing

D.C.: We're not going to jail, I already talked to the cops. You know what I'm saying? Ain't nobody, kids can't fucking say anything. What the fuck are we worried about? If they still wanted us, Luis, they would have come back and fuckin pulled me in again to talk to me.

05:04

L.H.: (unintelligible)

D.C.: I (unintelligible)

L.H.: (unintelligible)

** Rustling

14:28 – door opens

14:30 – door closes

14:42 whispering heard – unintelligible as to who was speaking and what was said.

16:36	Sound of male sighing.
18:32	Door closing.
27:54	sound of male coughing.
29:30	Knocking or tapping
31:27	Creaking sound
31:35	Movement of some solid object.
32:11	Door opens and closes.
32:45	very faint sound of whispering.
33:17	slam sound
33:53	rustling of clothing over microphone followed by background noise indicating a change of location.
33:28	Sound of car chime
34:36	End of recording.

EXHIBIT 4

0031
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CLERK OF THE COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, vs. LUIS ALONSO HIDALGO, III, #1849634 LUIS HIDALGO, JR. #1579522 Defendants.	CASE NO. C212667 C241395 DEPT. XXI

DEFENDANT LUIS A. HIDALGO III.'S MOTION FOR JUDGMENT OF ACQUITTAL OR, IN THE ALTERNATIVE, A NEW TRIAL

Date of Hearing: March 24, 2009
Time of Hearing: 9:30 a.m.

COMES NOW, Defendant, LUIS HIDALGO, III, by and through his counsel JOHN L. ARRASCADA, ESQ. of the law firm of ARRASCADA & ARRASCADA, LTD. and CHRISTOPHER WAYNE ADAMS ESQ., and pray this Court to enter an Order of Judgment of Acquittal pursuant to NRS 175.381 based upon the insufficiency of the evidence adduced at trial to establish his guilt beyond a reasonable doubt of the offenses created by NRS 199.480(3)(g), NRS 200.010 and NRS 200.030. In the alternative, this Court is requested to enter

an Order for a New Trial on those charges as entry of a judgment of conviction is contrary to the manifest weight of the evidence and to the jury instructions both given and refused and therefore required as a matter of law.

This Motion is brought upon the entire record in this matter including, but not limited to, the transcript of the evidence and arguments adduced at trial which are not as yet available, the Points and Authorities following hereinafter and evidence to be adduced at a hearing on this Motion.

Dated this 10th day of March, 2009.

8357 for

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LUIS A. HIDALGO, III.

NOTICE OF MOTION

YOU, AND EACH OF YOU, will please take notice that the undersigned will bring the above and foregoing Motion on for hearing before this Court on the 24th day of March, 2009, at the hour of 9:30 o'clock A.M. of said day, or as soon thereafter as counsel can be heard in Department No. XXI.

Dated this 10th day of March, 2009.

8357 for

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POINTS AND AUTHORITIES

INTRODUCTION

NRS 175.381 governs when the Court may enter a judgment of acquittal after verdict of guilty. In pertinent part it reads:

> ...
>
> 2. The court may, on a motion of a defendant or on its own motion, which is made after the jury returns a verdict of guilty, set aside the verdict and enter a judgment of acquittal if the evidence is insufficient to sustain a conviction. The motion for a judgment of acquittal must be made within 7 days after the jury is discharged or within such further time as the court may fix during that period.
>
> 3. If a motion for a judgment of acquittal after a verdict of guilty pursuant to this section is granted, the court shall also determine whether any motion for a new trial should be granted if the judgment of acquittal is thereafter vacated or reversed. The court shall specify the grounds for that determination. If the motion for a new trial is granted conditionally, the order thereon does not affect the finality of the judgment. If the motion for a new trial is granted conditionally and the judgment is reversed on appeal, the new trial must proceed unless the appellate court has otherwise ordered. If the motion is denied conditionally, the defendant on appeal may assert error in that denial, and if the judgment is reversed on appeal, subsequent proceedings must be in accordance with the order of the appellate court.

Thus, under the Nevada statutory scheme, in considering a Motion for Judgment of Acquittal the Court must also consider simultaneously a Motion for New Trial. The latter is governed by NRS 176.515, which reads in pertinent part:

> New trial: Grounds; time for filing motion
>
> 1. The court may grant a new trial to a defendant if required as a matter of law or on the ground of newly discovered evidence.
>
> ...
>
> ...
>
> 4. A motion for a new trial based on any other grounds must be made within 7 days after the verdict

or finding of guilt or within such further time as the court may fix during the 7-day period.

The jury returned its verdict on Tuesday, February 17, 2009. By implication it acquitted Luis Alonso Hidalgo III. of Conspiracy to Commit Murder, a felony, instead finding him guilty of the gross misdemeanor offense of Conspiracy to Commit Battery with a Deadly Weapon or Battery Resulting in Substantial Bodily Harm.

It also acquitted him by implication of the charges of First Degree Murder with a Deadly Weapon and First Degree Murder.

The Amended Indictment contained four theories of criminal liability for the Murder alleged in Count Two. Two were clearly rejected by the jury, the first theory "by directly or indirectly committing the acts with premeditation and deliberation or lying in wait" and the fourth theory "by conspiring to commit the crime of murder of Timothy Jay Hadland whereby each and every co-conspirator is responsible for the specific intent crime contemplated by the conspiracy."

Based upon the testimony and exhibits presented at the trial, as a matter of law and logic the jury either found that Luis Alonso Hidalgo III. was vicariously liable for the death of Mr. Hadland on the theory that he (1) aided and abetted a battery with use of a deadly weapon or a battery resulting in substantial bodily harm, under the "procuring Deangelo Carroll to beat.." theory, or, as it announced in its verdict as to Count One, (2) conspired to commit a battery with a deadly weapon or battery resulting in substantial bodily harm "whereby each and every co-conspirator is responsible for the reasonably foreseeable general intent crimes of each and every co-conspirator during the course and in furtherance of the conspiracy."

As will be demonstrated below, neither theory was proven beyond a reasonable doubt in light of the limitations that were imposed by the law of evidence and the Court's rulings on evidence. Moreover, the jury instructions which were given over the objection of the defense (1) created substantial confusion as to the difference between the quantum of evidence necessary to prove the conspiratorial theory of liability and that needed to allow consideration by the jury of statements of co-conspirators, and (2) eliminated the need for the jury to find, as a discrete aspect of the deadly weapon enhancement, that Luis Alonso Hidalgo III. knew that a deadly weapon would be used and had control over its use.

This Court is well aware of the entire proceedings, but a transcript is necessary for an accurate summary of the evidence and currently unavailable, although in the process of being ordered. Moreover, a set of the jury instructions both given and rejected by the Court are not in the court file. Because they are being challenged by this motion, they are essential to its presentation. The references made to the record in this Motion are therefore in the nature of a "bystander's record". A more detailed analysis of the evidence in the case and the effect of the jury instructions will be submitted as a supplement to this motion.

THE EVIDENCE WAS INSUFFICIENT AS A MATTER OF LAW TO SUPPORT A JUDGMENT OF CONVICTION ON THE CHARGE OF CONSPIRACY TO COMMIT A BATTERY WITH A DEADLY WEAPON OR RESULTING IN SUBSTANTIAL BODILY HARM. THEREFORE IT CANNOT ACT AS SUPPORT FOR VICARIOUS LIABILITY AS A CONSPIRATOR FOR SECOND DEGREE MURDER WITH USE OF A DEADLY WEAPON.

The Amended Indictment was directed at a single event - a homicide of Timothy Jay Hadland involving multiple perpetrators at the scene and allegations of the existence of conspirators or aiders and abettors not at the scene. Luis Alonso Hidalgo

III.'s defense was simple and all encompassing - absence of knowledge or intent prior to the acts that brought death to Hadland.

The testimony at trial, at best, established that Hidalgo III heard that Hadland was badmouthing the Palomino Club while in the presence of Anabel Espindola and his father after she had a phone conversation with Carroll earlier in the day while at Simone's Auto Body. Espindola testified that Hidalgo III became upset. Significantly she testified that Hidalgo III had no further discussions with her or his father about Hadland through the rest of the night. She further testified that Hidalgo III was not part of any discussions on this topic at the club and was not present when Caroll came back to the club, and she paid Carroll money. The evidence at trial demonstrated that Hidalgo III. was not present for any conversations, did not pay Carroll and did not participate in the killing of Hadland.

Nowhere in the record is there anything to indicate that the use of a deadly weapon was a part of any agreement to which the defendant was a party nor of any knowledge on his part that one would or even might be employed. The State as a matter of law had to prove that Hidalgo III. had knowledge of a weapon being employed. The record is devoid of any proof that Hidalgo III. had knowledge that a deadly weapon was going to be used. This fact alone warrants, at a minimum, judgment of acquittal regarding the jury verdict of the use of a deadly weapon, and a new trial on all convictions. See Brooks v. State, 180 P.3d 657, 659-662 (Nev. 2008).

A NEW TRIAL IS WARRANTED AS A MATTER OF LAW FOR (1) FAILURE OF THE COURT'S RULINGS AND INSTRUCTIONS TO ENSURE DUE PROCESS OF LAW AND A FAIR TRIAL.

Whether to grant or deny a motion for a new trial is within the trial court's discretion. Rippo v. State, 113 Nev. 1239, 946

P.2d 1017, 1024 (Nev. 1997). A district court will not be overturned for granting a motion for a new trial absent a palpable abuse of discretion." Johnson v. State, 59 P.3d 450, 118 Nev. 787, 59 P. 3d 450, 456 (Nev. 2002).

The district court may grant a motion for a new trial based on an independent evaluation of the evidence because "Historically, Nevada has empowered the trial court in a criminal case where the evidence of guilt is conflicting, to independently evaluate the evidence and order another trial if it does not agree with the jury's conclusion that the defendant has been proven guilty beyond a reasonable doubt." State v. Purcell, 110 Nev. 1389, 887 P.2d 276, 278 (Nev. 1994) (citing Washington v. State, 98 Nev. 601, 604, 655 P.2d 531, 532 (1982) (quoting State v. Busscher, 81 Nev. 587, 589, 407 P.2d 715, 716 (1965)).

So long as the district court notes in its opinion that the evidence as to guilt was conflicting, then states its general impression with regard to each count, as well as its reasons for disagreeing with the jury verdict the conflict is clearly identified. Purcell, 110 Nev. at 1394. Accordingly, the "totality of the evidence" evaluation is the standard for the district court to use in deciding whether to grant a new trial based on an independent evaluation of conflicting evidence. Purcell, 110 Nev. at 1394. In reaching this statement of the proper standard the Supreme Court relied upon State v. Walker, 109 Nev. 683, 685-86, 857 P.2d 1, 2 (Nev. 1993), where it held:

> [A] conflict of evidence occurs where there is sufficient evidence presented at trial which, if believed, would sustain a conviction, but this evidence is contested and the district judge, in resolving the conflicting evidence differently from the jury, believes the totality of evidence fails to prove the defendant guilty beyond a reasonable doubt.

In Walker, the Court drew a distinction between granting a

new trial based on insufficient evidence and granting a new trial based on conflicting evidence. In contrast to conflicting evidence, insufficiency of the evidence occurs where the prosecution has not produced a minimum threshold of evidence upon which a conviction may be based, even if such evidence were believed by the jury. Walker, 109 Nev. at 685, 857 P.2d at 2. The protection against double jeopardy is implicated where a judgment of acquittal is warranted but not where a new trial is ordered. Purcell, 887 P.2d at 279.

As stated above, there was an absence of any evidence implicating Hidalgo III in a conspiracy or a killing. The evidence presented through the State's own witnesses, Anabel Espindola and Rontae Zone was just the opposite. Hidalgo III recognizes that this court may not have the same view of the evidence. However it was never controverted or contested that Espindola on direct and cross examination testified that Hidalgo the III. only had an argument about Hadland with his father and never discussed the matter or did anything about it from the early afternoon forward.

The only arguable inference of Hidalgo III's involvement was Rontae Zone testifying that Carroll said that Lil Lou said bring bats and bags to the club. As this court is aware, Jayson Taoipu testified at the Counts' trial that Anabel Espindola said to bring bats and bags. This court refused to allow Taoipu's testimony to be read to the jury in spite of a finding of unavailability pursuant to NRS 51.055 and relevant as former testimony pursuant to NRS 51.325. The prohibition of presenting this evidence solidified and substantiated the lack of Hidlago III's involvement in any conspiracy and violated his right to due process and a fair trial warranting the granting of a new trial. In the alternative the Taoipu testimony would have created a conflict in the evidence requiring a new trial.

The court's verdict form, submitted over the objection of counsel requires the striking of the deadly weapon enhancement or a new trial on all issues. The verdict form provided to the jury on count one creates an inconsistent and unintelligible verdict.

The court's verdict form grouped the two gross misdemeanor offenses of Conspiracy to Commit Battery With a Deadly Weapon with Battery Resulting In Substantial Bodily Harm. Battery with a deadly weapon requires as a matter of statute the element of a deadly weapon. Battery causing substantial bodily harm by its very nature does not have as an element a deadly weapon. By failing to separate out each separate and individual offense the jury did not and could not reach a determination as to whether a deadly weapon was part of the conspiracy verdict it returned or whether Hidalgo III possessed actual knowledge that a weapon would be used. See Brooks v. State, 180 P.3d 657, 659-662 (Nev. 2008). Thus, the entire verdict is infected with this lack of a clear determination of the nature of any conspiracy. The verdict form violates fundamental fairness and the right to due process. A new trial should be granted.

Dated this 10th day of MARCH, 2009.

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AFFIRMATION
[NRS 239B.030]

I, JOHN L. ARRASCADA, do hereby affirm that the preceding DEFENDANT LUIS A. HIDALGO, III'S MOTION FOR JUDGMENT NOT WITHSTANDING THE VERDICT AND OR IN THE ALTERNATIVE FOR A NEW TRIAL filed in the Eighth Judicial District Court, Case No. C212667, C241395: Does not contain the Social Security number of any person.

ARRASCADA & ARRASCADA, LTD.

8357 for

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of the Law Offices of ARRASCADA & ARRASCADA, LTD., and that on this date, I served a true and correct copy of the attached document in a sealed envelope on those parties identified below:

X	by placing the same in the United States Mail with first class postage prepaid attached thereto,
	by placing the same in the United States Mail via Certified Mail, Return Receipt Requested, with postage prepaid attached thereto,
	via telephonic facsimile transmission to
	Federal Express/Express Mail, or other overnight delivery,
	via hand-delivery

and addressed for delivery to:

Christopher W. Adams, Esq.
The Law Offices of Christopher W. Adams, P.C.
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Clark County District Attorney
Marc Digiacomo
Chief Deputy District Attorney
200 Lewis Avenue
Las Vegas, NV 89155-2211

DATED: This 10th day of March, 2009.

Mary Beth Burge
Employee of Gordon Silver

EXHIBIT 5

IN THE SUPREME COURT OF THE STATE OF NEVADA

LUIS A. HIDALGO, III

Appellant,

v.

Docket No. 54272

STATE OF NEVADA,

Respondent.
_____/

Direct Appeal from a Judgment of Conviction
Eighth Judicial District Court
The Honorable Valerie Adair, District Judge
District Court Case No. C212667/C241394

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

JURISDICTIONAL STATEMENT

This is an appeal from a judgment of conviction filed by Judge Valerie Adair of the Eighth Judicial District Court on June 25, 2009 in which a jury convicted Louis Hidalgo, III, of Count I, Conspiracy to Commit a battery with a deadly weapon or battery resulting in substantial bodily harm; Count II, Second degree murder with the use of a deadly weapon; Count III, Solicitation to commit murder; and Count IV, Solicitation to commit murder. This was the final judgment or verdict in Hidalgo's case. Pursuant to NRS 177.015(4), this Court has jurisdiction to hear this appeal. Hidalgo timely filed his Notice of Appeal on July 16, 2009. See NRAP 4(b)(1)(A).

STATEMENT OF ISSUES

I. The District Court's Instruction 40 to the Jury that the existence of the conspiracy and Little Lou's membership in it could be established by 'slight evidence' requires reversal.

II. The District Court erred when it failed to admit a recorded statement of Carroll, which exculpated Little Lou, for the truth of the matter asserted and as substantive evidence of innocence in violation of Chia v. Cambra, 360 F.3D 997 (9TH Cir. 2004), NRS 51.315, NRS 51.035(3)(b),(d).

III. The District Court erred when it denied the admission of the former testimony of Jayson Taoipu.

IV. Insufficient evidence existed to convict Little Lou because the State's case was entirely dependent upon the testimony of an accomplice.

V. The Prosecutor's intentional failure to memorialize Espindola's plea negotiation proffer requires reversal in this case.

CASE STATEMENT

This is a criminal appeal from a jury verdict convicting Louis Hidalgo, III, of Count I, Conspiracy to Commit a battery with a deadly weapon or battery resulting in substantial bodily harm and Count II, Second degree murder with the use of a deadly weapon. This appeal specifically does not challenge Count III, Solicitation to commit murder; and Count IV, Solicitation to commit murder. Count III and Count IV were specifically determined by the trial court to be a separate and unique conspiracy from Count I and Count II. This brief has common issues with the co-defendant/appellant Luis A. Hidlago Jr., Docket No. 54209. The common issues between Luis A. Hidalgo Jr., Docket No. 54209, and Luis Hidalgo, III are issues I, IV and V of this brief and issues A, B, and C in Luis Hidalgo Jr's opening brief, Docket No. 54209.

FACTUAL STATEMENT

Louis Hidalgo, Jr., "Mr. H," was the owner of a gentlemen's club, the Palomino Club, and an autobody shop named Simone's Autobody. AA, Vol.V.,932.[1] Each of Mr. H's businesses were located in Las Vegas, Nevada. Mr. H.'s girlfriend, Anabel Espindola, "Espindola," was the General Manager/Business Administrator of the Palomino Club. AA, Vol.V,p.932; Vol.VI, 1259-60. In fact, she ran every aspect of the club. AA, Vol.VIII,1803; Vol.IX,1911. Espindola was also the General Manager of Simone's Autobody. AA p.1259. Louis Hidaldgo, III, "Little Lou," was Mr. H's son. Little Lou assisted at the club doing

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[1] AA is the abbreviation for Appellant's Appendix; Vol. is the abbreviation for Volume, which is followed by the page number.

menial jobs and played no part in making business decisions. AA, Vol.VI,1261; Vol.IX, 2004-06.

Espindola testified that on May 19, 2005 while at Simone's, she received a telephone call from Deangelo Carroll, "Carroll," an employee at the Palomino club, who stated that another employee, Timothy Hadland, "TJ," the murder victim in this case, was bad mouthing the Palomino club. AA, Vol.V, 942-43. She testified that after she got off of the telephone, Mr. H and Little Lou were present in her office and she told them what Carroll had stated to her. AA, Vol.V,944-46. She stated that upon receiving this information, Little Lou became very angry with Mr. H because Little Lou believed that Mr. H was not going to do anything to TJ for his actions. AA, Vol.V,946-47. Espindola testified that Little Lou entered into a verbal argument with Mr. H in which Little Lou stated that Mr. H would never be like Gilardi and Rizzolo (two strip club owners with prior legal troubles) because they take care of business. AA, Vol.V, 946-48. She further testified that Mr. H told Little Lou to mind his own business and that Little Lou then left the building. AA, Vol.V,948-49.

Mr. H, however, testified that this meeting between Mr. H, Little Lou, and Espindola never occurred. AA,Vol.IX,1926-27. Mr. H further stated that Little Lou never made any statement to him regarding Gilardi and Rizzolo. AA, Vol.IX,1927. Mr. H did state, however, that he learned of TJ's behavior from Carroll in Mr. H's office at the Palomino Club in the presence of Espindola. AA, Vol.IX,1928-30. Mr. H also testified that Little Lou was not present. AA, Vol.IX,1932. Mr. H testified that Mr. H did not think TJ's actions were a problem. AA, Vol.IX,1931. Mr. H testified that Carroll stated that maybe Carroll should talk to TJ and Espindola told Carroll to talk to him on his own. AA, Vol.IX,1931. Mr. H testified

that upon Carroll leaving his office, he told Carroll something to the effect of tell TJ to stop it or stop spreading shit. AA,Vol.IX,1932.

Espindola testified that after Little Lou left the office at the conclusion of the alleged argument between Mr. H and Little Lou, Little Lou left Simone's and she did not see him again on that night. AA,Vol.V,958; Vol.IV,1255. She further testified that she was with Mr. H for the duration of the evening of May 19, 2005 and Mr. H never spoke to Little Lou, she never spoke to Little Lou that night, and she never saw Mr. H and Little Lou together that night. AA, Vol.V,977; Vol.IV,1255. In addition, she testified that when Little Lou left Simone's after the alleged argument between him and Mr. H, no discussion or agreement was reached between Little Lou and Mr. H to speak to TJ about his bad mouthing the club, to threaten TJ, or to kill TJ. AA,Vol.VI,1255-56.

Espindola further testified that after she left Simone's on May 19, 2005, she went to the Palomino. AA, Vol.V,960. Once at the Palomino, Espindola stated that she and Mr. H were in Mr. H's office when Carroll came in the office and had a discussion which she did not hear because she was not paying attention. AA,Vol.V,966. Next, she testified that Mr. H and Carroll walked out of Mr. H's office and some time later Mr. H returned to his office with Pilar Handley, "PK," who worked with the club as an independent contractor regarding lighting, etc. AA, Vol.V,967-68;Vol.VIII, 1708.

Espindola testified that at this point Mr. H asked her to follow him to the kitchenette area of his office which she did. AA,Vol.V,968. While in the kitchenette area of Mr. H's office, Espindola testified that Mr. H told her to call Carroll and tell him to go to plan B. AA,Vol.V,969. Espindola stated that she called Carroll and told him to go to plan B and that

Carroll stated that "I'm already here," after which the telephone was disconnected. AA,Vol.V,972. She testified that she thought something bad was going to happen to TJ and she tried calling Carroll back but could not get connected. AA,Vol.V,975. She testified that she then went back into Mr. H's office and told Mr. H that she told Carroll to go to plan B but did not say anything else to Mr. H because he then walked out of the office with PK. AA,Vol.V,976.

She claimed that a while later Mr. H came back into the office and Carroll then knocked on the door of his office. AA,Vol.V,976-77. She claimed that she was present when Carroll came into Mr. H's office and that Carroll sat down and looked at Mr. H and said it's done. AA,Vol.V,977. Espindola testified that Mr. H then looked at her and said go get five out of the safe. AA,Vol.V,978. Throughout her testimony Espindola confirmed that Little Lou did not plan any action regarding TJ, did not participate in any action against TJ and did not pay regarding any action against TJ. AA,Vol.VI,1247,1251,1255.

Mr. H testified that he never asked or insinuated to anybody, including Carroll, to have TJ harmed. AA,Vol.IX,1934. He further testified that he never asked Espindola to call Carroll and tell him to go to plan B. AA,Vol.IX,1940. Mr. H testified that he learned that TJ was harmed when Carroll came to his office at the Palomino in the late hours of May 19, 2005 when Espindola was present. AA,Vol.IX,1935-36. While in Mr. H's office, Carroll, who was noticeably disturbed, said to Espindola, "Ms. Anabel, I fucked up, I fucked up" and that the "dude got out of the car and put the bullet in the guy's head." AA,Vol.IX,1936. Mr. H testified that he looked at Carroll and said, "What the fuck did you do?" AA,Vol.IX, 1936-37. He stated that Espindola stood up from the chair, put her hands on her face and said, "Oh my

god" several times and then called Carroll a stupid, stupid man. AA,Vol.IX,1937. Mr. H then stated that Carroll asked for money and stated that the shooter was a gang member. AA,Vol.IX,1937-38. The fact that the shooter was a gang member frightened Mr. H which prompted him to waive his hand for Espindola to get the cash. AA,Vol.IX,1938-39.

PK testified that on the evening of May 19, 2005, he met in Mr. H's office twice. AA,Vol.VIII,1725-26. The first time was with Mr. H, Espindola, and Little Lou regarding the firing of Carroll. AA,Vol.VIII,1780-81. At that meeting, he testified that Little Lou attempted to call Carroll to determine his whereabouts and the location of the club's limousine.[2] AA,Vol.VIII,1780-81. The second meeting was with Mr. H and Espindola in Mr. H's office at the Palomino around 11:00 pm. AA,Vol.VIII,1725. He stated that he never saw Mr. H and Espindola walk into the kitchenette area of his office. AA,Vol.VIII,1727. PK testified that after his meeting with Mr. H and Espindola around 11:00 pm, he saw Carroll, who looked disturbed, at the Palomino. AA,Vol.VIII,1757,1759. PK stated that Carroll stated that he needed to see Espindola and Mr. H because he "fucked up." AA,Vol.VIII,1759. PK also testified that Carroll was with a person named Kenneth Counts, who was determined to be the shooter of TJ, and that two African American young men were outside who were later determined to be Rontae Zone and Jayson Taoipu. AA,Vol.VIII,1786-87. PK testified that he never saw Carroll again that night and did not know where he went in the Palomino. AA,Vol.VIII,1760. PK further testified that when Carroll was looking for Mr. H and

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[2] This is the only phone call throughout the night made by Little Lou to Carroll or any of the conspirators.

Espindola at the Palomino on May 19 he never told PK that he needed to speak to Little Lou. AA,Vol.VIII,1768.

Rontae Zone, a friend of Carroll, who assisted Carroll at his job at the Palomino by passing out fliers with Carroll to promote the Palomino testified on behalf of the State. AA,Vol.II,383-84. On the night of May 19, 2005, Zone was with Carroll and with his friend Jayson Taoipu. AA,Vol.II,384-85. Zone gave many statements in this case, each of which was different. AA,Vol.III,548. Zone testified that during the afternoon hours of May, 19, 2005, Carroll told Zone and Taoipu that "Little Lou was – said that Mr. H wanted someone killed;" however, Zone later stated that the word used was not "killed" but instead "dealt with." AA,Vol.II,391,394. On cross-examination, Zone admitted that he previously testified that the words came from Mr. H to Carroll instead of from Mr. H, to Little Lou, to Carroll. AA,Vol.III,547.

Zone further testified that Carroll told him that Little Lou had spoken about baseball bats and trash bags; however, no baseball bats and trash bags were ever attained. AA,Vol.,392,399. In addition, at a previous court proceeding (the murder trial of Kenneth Counts), Taoipu testified that *Anabel* (Espindola) was the person who commented on baseball bats and trash bags. AA, Vol.XI,2363. Zone further stated that he never personally spoke to Little Lou in person or otherwise and that everything Zone heard regarding statements of Little Lou came from Carroll, and Zone knew that Carroll told lies. AA,Vol.,542-43.

Later that day, Zone stated that they went out promoting in a white Astro van and subsequently picked up Kenneth Counts at his house and drove out to Lake Mead. AA,Vol.II,399-400,403. Zone stated that on the way to Lake Mead, Carroll communicated

with Little Lou; however, the call was about Little Lou telling Carroll to come back to work. AA,Vol.III,628,638. Zone also stated that they were going to meet up with TJ and that he was going to be killed; however, Carroll told TJ that we were coming to smoke marijuana with TJ. AA,Vol.II,405-06. Zone testified that he heard Carroll on the telephone with Espindola and Zone heard Espindola say go to plan B and that Carroll stated that "We're too far along, Ms. Anabel." AA,Vol.III,566. Zone testified that once they arrived at Lake Mead, they met TJ who came up to Carroll's window and engaged in a conversation with Carroll at which time Counts exited the van and shot TJ in the head. AA,Vol.II,412-14.

After the shooting, Zone testified that they drove back the Palomino and Carroll and Counts went inside the club. AA,Vol.II,417. When Counts exited the Palomino he got into a taxi cab. AA,Vol.II,418. Next, Carroll and Zone went to Carroll's house and then took the Astro van out and slashed and removed the tires and Carroll had new tires put on the van and had the van interior cleaned and washed. AA,Vol.II,420-21. Zone testified that they subsequently went to Simone's where Carroll spoke to Mr. H in the back room. AA,Vol.II,423,424,427. Zone also stated that Carroll told Zone and Taoipu that Counts was paid $6000 for the shooting, but that Zone did not learn of this amount or have any conversation regarding this payment until after the shooting of TJ. AA,Vol.II,426;Vol.III,509-10.

After the shooting death of TJ, the police wired Carroll, on two occasions, to go and speak to Mr. H at Simone's. AA,Vol.III,694-97,703,714-15. In an attempt to retrieve incriminating statements, the detectives told Carroll to tell various lies to whoever he spoke to at Simone's. AA,Vol.IV,841-42. On the recordings, the voices of Carroll, Espindola, and

Little Lou were heard. AA,Vol.III,727-29. Various statements of Carroll, Espindola, and Little Lou are heard on the recordings. Specifically, Carroll was heard on the recording saying that Little Lou had nothing to do with it (the murder of TJ). AA,Vol.I,93; Vol.IV,842. Detective McGrath testified that this statement of Carroll was not one of the false statements that he told Carroll to use. AA,Vol.V,842-43.

At trial, both sides had transcripts of the tapes prepared by experts. AA, Vol.III,614. For the first time, four years after the recordings were made, the State argued that a portion of the tape contained Little Lou saying something to the effect of, I told you to take care of TJ. AA,Vol.III,616-24. The Court noted during argument on this issue that it did not hear this statement being made by Little Lou, but over objection allowed the State to argue this new proposition. AA,Vol.III,617.

After the authorities heard the statements on the tapes, Little Lou and Espindola were arrested for the murder of TJ. AA,Vol.I,98. Mr. H was arrested in 2008. AA,Vol.I,1200.

ARGUMENT SUMMARY

The District Court committed structural error in giving Jury Instruction #40 because the Instructions fails to properly set forth the proof required to prove a conspiracy. The District Court erred when it failed to admit a prior recorded statement of Carroll stating that Little Lou had nothing to do with it (the murder of TJ) for the truth of the matter asserted and as substantive evidence. The District Court further erred when it failed to admit the prior testimony of Jayson Taoipu from a former trial, which contained exculpatory information, because the testimony met all of the requirements of NRS 51.325 to be admitted. Additionally, Taoipu's testimony was very probative of Little Lou's innocence. Moreover,

the failure to admit this evidence due to the fact that it would be prejudicial to Mr. H, Little Lou's co-defendant, created a conflict in the defenses of the defendants and violated Little Lou's due process rights to present the necessary evidence to demonstrate his innocence. The District Court also erred by allowing this case to go to the jury because 'accomplice' testimony was not independently corroborated. Finally, Little Lou's due process rights were violated by the State's deliberate failure to record its meetings with Espindola, and by the Court's actions of losing the notes of Detective Wildman which prevented Little Lou from fully presenting a defense.

ARGUMENTS

I. The District Court's Instruction 40 To The Jury That The Existence Of The Conspiracy And Little Lou's Membership In It Could Be Established By 'Slight Evidence' Requires Reversal.

A. Standard of Review

Whether a jury instruction accurately states applicable law is a legal question subject to *de novo* review. See Berry v. State, __ Nev. __, 212 P. 3d 1085, 1091 (2009). A district court's decision settling jury instructions is reviewed for abuse of discretion or judicial error. Judicial error occurs when the court reaches an incorrect result in the intentional exercise of the judicial function, that is, when a judge renders an incorrect decision in deciding a judicial question. See In re Humboldt River System (Marble), 77 Nev. 244, 248, 362, P. 2d 265, 267 (1961).

Jury instructions that tend to confuse or mislead the jury are erroneous. See Culverson v.State, 106 Nev. 484, 488, 797 P. 2d 238, 240 (1990) ("a juror should not be expected to be a legal expert. Jury instructions should be clear and unambiguous."); see also Rowland v.

State, 96 Nev. 300, 302, 608 P. 2d 500 (1980) ("Instructions ...must be given clearly, simply and concisely, in order to avoid misleading the jury"). While structural error such as an unconstitutional burden of proof instruction is self-evident and needs no prejudice analysis, the trial transcript and and/or statement of evidence adduced at trial must be considered where an erroneous instruction is subject to a harmless error analysis. See Carver v. El-Sabawi, M.D., 121 Nev. 11, 14-15, 107 P. 3d 1283, 1285 (2005). The error here was structural, but the record before this Court mandates reversal under either analysis. The evidence against Little Lou for conspiracy to murder TJ was, at most, slight.

The opening language of Instruction #40 articulated the standard that the trial court must apply when deciding admissibility of the evidence. AA,Vol.I,47. Specifically, Jury Instruction #40 stated in pertinent part:

> Whenever there is slight evidence that a conspiracy existed, and that the defendant was one of the members of the conspiracy, then the statements and the acts by any person likewise a member may be considered by the jury as evidence in the case as to the defendant found to be a member, even though the statements and acts may have occurred in the absence and without the knowledge of the defendant, provided such statements and acts were knowingly made and done during the continuance of such conspiracy, and in furtherance of some object or purpose of the conspiracy. This holds true, even if the statement was made by the co-conspirator prior to the time the defendant entered the conspiracy, so long as the co-conspirator was a member of the conspiracy at the time

AA,Vol.I,47.

In objecting, Defense counsel advised the court that instruction #40 did not deal with the substantive law of conspiracy that the jury must apply, but rather the admissibility of evidence - a matter that was the exclusive province of the trial judge. AA,Vol.X,2142-43.

B. The Beyond a Reasonable Doubt Standard of Proof is a Constitutional Imperative

The Due Process Clause of the Fifth Amendment of the United States Constitution "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068 (1970); Labastida v. State, 115 Nev. 298, 303, 989 P. 2d 443, 447(1999). A jury instruction that "creat[es] an artificial barrier to the consideration of relevant defense testimony putatively credible ... reduce[s] the level of proof necessary for the Government to carry its burden [and] ... is plainly inconsistent with the constitutionally rooted presumption of innocence." Cool v. United States, 409 U.S. 100, 104, 93 S.Ct. 354 (1972). When an instructional error consists of an inaccurate description of the burden of proof to be employed, it vitiates all of the jury's findings and violates the Sixth Amendment right to a trial by jury in addition to the Fifth Amendment Due Process clause. It is structural error in the constitution of the trial mechanism which defies harmless error standards and requires automatic reversal. See Sullivan v. Louisiana, 508 U.S. 275, 113 S. Ct. 2078, 2082 (1993).

C. Identical Issues, Separate Roles, Different Standards: Admissibility or Liability?

Throughout the jury trial, Little Lou's defense was that he never joined the conspiracy against TJ and had no prospective knowledge of any impending or intended harm to TJ. There was no dispute that Little Lou did not plan the offenses against TJ, did not participate in the offenses against TJ, and did not pay anyone to commit the offenses against TJ. AA,Vol.VI,1247,1251,1255;Vol.IV,842. Further, Little Lou was not at the scene of the offense or connected to the murder weapon. The State's case relied entirely on accomplice

testimony of purported co-conspirators, including out of court statements by Carroll to Zone, which were a chief component of and essential to the State's case.[3] The challenged instruction that directed the jury to employ a reduced burden of proof on the conspiracy theory was prejudicial.

It has been said that Nevada "jumped the gun" when it adopted the Preliminary Draft of the Federal Rules of Evidence. See Wright & Graham, Federal Practice & Procedure, §5051 (2nd ed.). No other state adopted the Preliminary Draft. No decisions exist interpreting the precise language of the Nevada statutes at issue herein: NRS 47.060, which deals with who initially determines admissibility[4], and NRS 47.070, which concerns the relative roles of the judge and jury when evidence requires additional facts to be proven in order to make the evidence relevant.[5] The judge sits as a fact finder under both provisions.

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[3] Despite making two surreptitious tape recordings of Espindola and Little Lou at the LVMPD's direction, Carroll did not testify at the trial. Both Zone and Espindola testified to Carroll's out of court statements. Zone's testimony against Little Lou was directly contradicted by Taoipu's testimony that the court incorrectly ruled was inadmissible. Espindola's testimony that Little Lou did not plan, participate, or pay regarding the alleged conspiracy exculpated Little Lou. See Argument III below.

[4] NRS 47.070 states that "[p]reliminary questions concerning … the admissibility of evidence shall be determined by the judge, subject to the provisions of NRS 47.070," and, 2. In making a determination the judge is not bound by the rules of evidence provisions of this Title except the provisions of chapter 49 of NRS with respect to privileges.

[5] 1. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the judge shall admit it upon the introduction of evidence sufficient to support a finding of the fulfillment of the condition.
2. If under all the evidence upon the issue the jury might reasonably find that the fulfillment of the condition is not established, the judge shall instruct the jury to consider the issue and to disregard the evidence unless they find the condition was fulfilled.
3. If under all the evidence upon the issue the jury could not reasonably find that the condition was fulfilled, the judge shall instruct the jury to disregard the evidence.

Under the first, the court's ruling is final unless additional predicate facts are necessary to make the evidence relevant, in which case it is preliminary and triggers the second into action. The specific category of evidence at issue *sub judice* is "a statement by a coconspirator of a party during the course and in furtherance of the conspiracy." NRS 51.035-3(e). Where an objection is made to such evidence at the time of its being offered, as it was in this case,[6] NRS 47.060 mandates that the judge alone makes the determination of its admissibility.

This Court has declined the opportunity to adopt the United States Supreme Court's holding in Bourjaily v. United States, 483 U.S. 171, 107 S.Ct. 2775 (1987) on two pertinent points. It has decided that "slight evidence" of the existence of a conspiracy and mutual membership in it of the declarant and the non-offering party is all that is necessary for the judge to admit what would otherwise be excluded hearsay, so long as the statement is made during the course and in furtherance of the conspiracy. See McDowell v. State, 103 Nev. 527, 529, 746 P. 2d 149, 150 (1987) (declining to adopt "preponderance of the evidence" standard).

This Court also requires that before an out-of-court statement by an alleged co-conspirator may be admitted into evidence against a defendant, the existence and membership of the conspiracy must be established by evidence independent of the statement itself. See Wood v State, 115 Nev 344, 349, 990 P.2d 786, 789 (1999); see also Carr v. State, 96 Nev. 238, 239, 607 P. 2d 114, 116 (1980). Thus, unlike Bourjaily, the out of court statements

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[6] A standing objection was allowed by the district court to all out of court statements by persons alleged to be coconspirators. See Hidalgo Jr's record on appeal at 13 ROA 2398, 2478-2488, 2715-2716.. 14 ROA 2493-2500.

themselves may not be considered by the judge in deciding whether NRS 51.035-3(e) conditions have been established.

This Court has never addressed: (1) the jury being instructed to apply the "slight evidence" standard where the judge's decision to admit the evidence requires resolution of the identical issues to be ultimately determined by the jury under a beyond a reasonable doubt standard; and, (2) whether, why or how the jury should be instructed in such an instance. This case presents those issues.

NRS 47.060, when read in light of McDowell, Wood and Carr, in its first paragraph, requires the judge to find that "slight evidence" of the existence of the conspiracy, the defendant's and declarant's membership in it and the statement being made in furtherance of it, is contained in the record, independent of the hearsay itself. All of that deals with the law of admissibility of the evidence. The judge is not concerned at that point as to sufficiency to convict. See Bourjaily v. United States, 483 U.S. 171, 107 S.Ct. 2775, 2778 (1987) ("The inquiry made by a court concerned with [admissibility] is not whether the proponent of the evidence wins or loses his case on the merits, but whether the evidentiary Rules have been satisfied. Thus, the evidentiary standard is unrelated to the burden of proof on the substantive issues"). At that juncture, the judge's use of the lower standard of proof does no violence to the beyond a reasonable doubt standard.

"Once a trial judge makes a preliminary determination under [NRS 47.060 & 47.070] that the requirements of [NRS 51.035-3(e)] have been satisfied, there is no reason to instruct the jury that it is required to make an identical determination independently of the court: whether such a statement can be considered at all is for the court alone to determine." See

United States v. Hagmann, 950 F. 2d 175, 181 n.11 (5th Cir. 1991), cert. denied 506 U.S. 835 (1992), rehearing denied 506 U.S. 982 (1992) (*bracketed material substituted for federal equivalents in original*). Simply stated, a jury cannot be expected to apply the "slight evidence" standard to the identical elements to which they must also apply the beyond a reasonable standard under the substantive law of conspiracy. And the law doesn't ask or demand it of the jury; only the judge.

As the charge to the jury herein invited finding Little Lou vicariously liable for the murder because of membership in the conspiracy by applying a constitutionally impermissible standard, the infectious instruction undermines confidence in the verdict. See Perez v. United States, 968 A.2d 39, 102 (D.C. Ct. App. 2009). Many courts have recognized the impropriety of instructing the jury as to the quantum of proof employed by the trial judge in admitting coconspirators statements.

In United States v. Martinez de Ortiz, 907 F.2d 629 (7th Cir. 1990)(*en banc*) the court addressed the mechanics of deciding the admissibility of such evidence. As here, the defendant conceded that a conspiracy existed, defending on the theory that she was not a member. Unlike the case *sub judice*, the defendant was at hand when the substantive crime occurred and uttered the word "kilo" in the presence of the cooperating witness. The court postulated that while that might be enough to support a conviction, "the case is much stronger with the two kinds of hearsay" that the prosecution introduced. Martinez de Ortiz, 907 F.2d at 631. It held "...the jury does not decide the hearsay question. The question for the jury is one of the substantive law of conspiracy. Conspirators, like agents, are mutual partners. Declarations by others count against the accused only if the accused has joined the conspiracy

personally....Unless her words and deeds place her among the conspirators, other persons statements are (substantively) irrelevant." Martinez de Ortiz, 907 F.2d at 632-33. It explained "the judge's decision is conclusive...the jury may not re-examine the question whether there is 'enough' evidence of the defendant's participation to allow the hearsay to be used." Martinez de Ortiz, 907 F.2d at 633. To do so allows the jury to second guess the judge's decision to admit the statements- to impermissibly sit in review of the judge's legal determination.

By presenting this issue to the jury, it unnecessarily confuses them as to the proper burden of proof of the conspiracy charge in the indictment. Once the judge rules that the prerequisites to NRS 51.035-3(e) have been met, the jury does not revisit the issue and can consider the coconspirator statements for all purposes in its determination as to whether there has been proof beyond a reasonable doubt that the defendant is guilty of conspiracy. See Martinez de Ortiz, 907 F.2d at 634-635. In other words, the statements are not "conditionally relevant," as to the membership in the conspiracy. See NRS 47.070.

In determining whether the alleged conspiracy existed or the defendant was a member, the jury can consider the actions and statements of all of the alleged participants that the judge admitted into evidence. See United States v. Stephenson, 53 F.3d 836, 847 (7th Cir. 1995). In United States v. Bell, 573 F.2d 1040 (8th Cir. 1978), the court held "[a]fter a ruling on the record that the out-of-court declaration is admissible (as a coconspirator's statement) the court may submit the case to the jury. The court should not charge the jury on the admissibility of the coconspirator's statement, but should, of course, instruct that the government is required to prove the ultimate guilt of the defendant beyond a reasonable doubt." 573 F.2d at 1044-1045.

See United States v. Ammar, 714 F.2d 238, 249 (3rd Cir. 1983) (once admitted, coconspirator statements should go to the jury without further instruction); see also United States v. Vinson, 606 F.2d 149, 153 (6th Cir. 1979) (once admitted statements go to jury, judge should not describe to the jury the government's burden of proof on the preliminary question); see also People v. Vega, 413 Mich. 773, 780, 321 N.W.2d 675, 679 (1982) (setting forth that the trial judge must make determination of admissibility, not jury).

D. Vicarious Liability and Conditional Relevancy.

Coconspirator statements are, however, "conditionally relevant" under NRS 47.070 for other purposes. If the jury is satisfied beyond a reasonable doubt that the defendant was a member of the conspiracy, the statements can then be used to determine for which, if any, substantive offenses committed by co-conspirators the defendant may be held vicariously liable. See Martinez de Ortiz, 907 F.2d at 635. That is, the statements are only relevant as to the vicarious liability issue if the defendant has first been found to be a member of the conspiracy beyond a reasonable doubt. See United States v. Collins, 966 F.2d 1214, 1223 (7th Cir. 1992).

Nevada does not follow the doctrine of vicarious liability announced in Pinkerton v. United States, 328 U.S. 640, 66 S.Ct. 1180 (1946), which makes one conspirator liable for a crime committed by another if it was foreseeable and committed in furtherance of the conspiracy. See Bolden v. State, 121 Nev. 908, 921-922, 124 P.3d 191, 199-200 (2005). For specific intent offenses, the accused must have the requisite statutory intent. For general intent offenses, if the offense was a reasonably foreseeable consequence of the object of the conspiracy, the defendant may be criminally liable for his co-conspirators acts even if he did

not intend the precise harm or result.[7] See Bolden, 121 Nev. at 923, 124 P.2d at 201; see also Sharma v. State, 118 Nev. 648, 56 P.3d 868 (2002).

By allowing the jury to consider the "slight evidence" standard for determining membership in the conspiracy, the challenged instruction undermines confidence in the verdict and mandates reversal. Here, the Information charged alternative substantive offenses as objects of the conspiracy. AA Vol.I,1-4 Some were specific intent and some were general intent offenses. The jury returned a verdict of guilty as to a conspiracy to commit battery with a deadly weapon[8] or with substantial bodily harm, both of which are general intent crimes.[9] AA,Vol.I,60-61. It was instructed that it could use either of them as the predicate for finding the defendant guilty of murder in the second degree. AA,Vol.I,30. This allowed the jury to find the predicate conspiracy upon less than a reasonable doubt standard and violated both the due process clause of the Fifth Amendment and the jury trial right of the Sixth Amendment. It deprived the jury of its essential deliberative tool - the applicable law upon which to

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[7] "We caution the State that this court will not hesitate to revisit the doctrine's applicability to general intent crimes if it appears that the theory of liability is alleged for crimes too far removed and attenuated from the object of the conspiracy. " Bolden v. State, 121 Nev. at 923,124 P.3d at 201.

[8] The record is bereft of any evidence that Little Lou knew of any weapon being possessed or used by Carroll or anyone else. The State failed to prove that he had knowledge the armed offender was armed and had the ability to exercise control over the firearm. See Brooks v. State, ___ Nev. ___, 180 P.3d 657, 659 (Nev. 2008).

[9] Little Lou and Mr. H proposed a verdict form that separated battery with substantial bodily harm from battery with a deadly weapon. See Docket No. 54209, Luis A. Hidalgo's Record on Appeal at 24 ROA 4502-4504. Although recognizing the idea as "fine" pretrial, the judge rejected it without announcing her reasons, an independent, additional ground for reversal here. See Allstate Insurance Company v. Miller, __Nev. __, 212 P. 3d 318, 332-333 (Nev. 2009). At sentencing, the judge acknowledged that separating the crimes in the verdict form would have been better. Id. at 25 ROA 4627

evaluate the facts. The danger of confusion and erroneous conviction on the charges that were tied to the conspiracy exacerbates the gravity of the error. See People v. Duncan, 462 Mich. 47, 610 N.W.2d 551 (Mich. 2000).

The decision that "slight evidence" existed of Little Lou's membership in the conspiracy was already made before the jury received the case. The judge made it when she admitted the evidence. Yet, this finding cannot direct a guilty verdict as to a criminal charge no matter how clear the defendant's culpability. Rose v. Clark, 478 U.S. 570, 578, 106 S.Ct. 3101, 3106 (1986). Nor does it cure the problem created by an erroneous or confusing instruction on burden of proof that the jury was also given a correct definition of reasonable doubt. See Collins v. State, 111 Nev. 56, 57-58, 888 P. 2d 926, 927 (1995). The essential connection to a beyond a reasonable doubt factual finding cannot be made where the instructional error consists of a "misdescription" of the burden of proof and the reviewing court can only engage in pure speculation. See Sullivan v. Louisiana, 508 U.S. 275, 281, 113 S.Ct. 2078, 2082 (1993).

Under the circumstances here, the consequences of the erroneous instruction are unquantifiable and indeterminate, and therefore not subject to harmless error analysis. See Wegner v. State, 116 Nev. 1149, 14 P.3d 25, 29-30 (2000). Since the only issues that the jury needed to resolve to convict Little Lou of conspiracy and the general intent objects were the existence of the conspiracy and his membership in it - the same issues that the judge had to resolve to admit the coconspirator statements - the erroneous instruction left no additional facts that needed to be decided by the jury. Therefore, the jury made no other factual findings that can be said with requisite certainty to have been decided beyond a reasonable doubt. It is

structural error mandating reversal and remand. See Powell v. Galaza, 328 F.3d 558, 566 (9th Cir. 2003).

II. The District Court Erred When It Failed To Admit A Recorded Statement Of Carroll, Which Exculpated Little Lou, For The Truth Of The Matter Asserted And As Substantive Evidence Of Innocence In Violation Of Chia v. Cambra, 360 F.3D 997 (9TH Cir. 2004), NRS 51.315, and NRS 51.035(3)(b),(d).

A. Standard of Review

The standard of review regarding the admission of evidence is abuse of discretion and a harmless error analysis applies to hearsay errors. See Tabish v. State, 119 Nev. 293, 311, 72 P.3d 584, 595 (2003).

During Little Lou's trial, Little Lou moved to introduce the recorded statement made by Carroll as Carroll spoke to Espindola and Little Lou the day after the murder of TJ Hadland at Simone's autobody. AA,Vol.III,596-604. Specifically, Carroll was recorded saying to Little Lou in Espindola's presence "What are you worried about. You had nothing to do with this [death of the victim]." AA,Vol.I,93;Vol.IV,842 (emphasis added). Little Lou sought to introduce this statement for the truth of the matter asserted and as substantive evidence. AA,Vol.III,596-604.

The Court originally ruled that the Carroll statement could only be used to impeach Espindola and not as substantive evidence. AA,Vol.III,596-604. The trial court later ruled that the "statements made by Carroll in the tape when Carroll was acting as a police informant or agent or whatever we want to call him cannot be considered for the truth of the matter asserted." AA,Vol.III,596. The District Court's final improper ruling regarding Carroll's exculpatory statement came when the Court issued, over counsel's objection, Jury Instruction

#40 which stated, in relevant part, that the "statements of a co-conspirator after he has withdrawn from the conspiracy were not offered, and may not be considered by you, for the truth of the matter asserted." AA, Vol.I,47. The District Court erred in prohibiting Carroll's exculpatory statement regarding Little Lou's innocence in the homicide of TJ from being admitted for the truth of the matter asserted and as substantive evidence of innocence. The Carroll statement exculpated Little Lou and was both reliable and crucial to the defense. The District Court's ruling denied Little Lou the opportunity to present a full and fair defense as promised by the Due Process Clause in the Fourteenth Amendment of the United States Constitution. This error requires a new trial.

B. Chia v. Cambra, 360 F.3d 997 (9th Cir. 2004).

As recognized by the Ninth Circuit, "[t]he Constitution's guarantee of due process would ring hollow if a criminal defendant...were prevented from presenting reliable, material evidence of innocence at trial, when such evidence lies at the heart of his defense. Inherent within the Constitution's promise of due process lays the cardinal principle that no criminal defendant will be deprived of his liberty absent a full and fair opportunity to present evidence in his defense." Chia v. Cambra, 360 F.3d 997, 1005 (9th Cir. 2004).

In Chia, the defendant was convicted of being a conspirator in the murder of two undercover DEA agents. Chia, who was arrested near the shootout, maintained that he did not join the conspiracy and that his only involvement was in attempting to talk one of the shooters, his good friend Mr. Wang, out of the plot. See id. at 1000. Wang confirmed this information to authorities in four separate out-of-court interviews. See id. at 1001. In the third interview, he specifically told police that Chia did not join the conspiracy and that Chia

tried to talk him out of his involvement. See id. At Chia's trial, Wang invoked his right not to testify and was unavailable to the defense. See id. at 1002. When Chia attempted to introduce the exculpatory statements into evidence, the trial court excluded them as inadmissible hearsay. See id.

In Chia, the Ninth Circuit used a five-part test to analyze when an evidentiary ruling results in a due process violation. See id. at 1004. These factors include: "(1) the probative value of the excluded evidence on the central issue; (2) its reliability; (3) whether it is capable of evaluation by the trier of fact; (4) whether it is the sole evidence on the issue or merely cumulative; and (5) whether it constitutes a major part of the attempted defense." Id. (citing to Miller v. Stagner, 757 F.2d 988, 994 (9th Cir. 1985)).

In analyzing the third statement made by Wang to police, the Ninth Circuit found Wang's statement should have been admitted into evidence under the five-part test: first, this was the only possible evidence of innocence that Chia had at his disposal; second, the statement was reliable as Wang inculpated himself (self-inculpatory statements are inherently reliable) while at the same time exculpating Chia; third, the jury was well suited to make the credibility evaluation of Wang's statement; fourth, since the other conspirators were killed in the shootout with DEA, Wang's statement was the best and only evidence on this point; and, fifth, the excluded evidence was the core of the attempted defense. See id. at 1004-1005.[10]

As the Chia Court quoted, "[s]tate rules [of evidence] are designed not to frustrate justice, but to promote it." Id. at 1004 (quoting Perry v. Rushen, 713 F.2d 1447, 1453 (9th Cir.

[10] The Chia Court also held that the other statements made by Wang should have been admitted under the five-part test. See Chia, 360 F.3d at 1005.

1983)). Since Wang's statements would have substantially bolstered Chia's claims of innocence, the California evidence rules must give way and the conviction was overturned. Id. at 1003.

In Little Lou's case, the trial court refused to admit Carroll's statement under Chia. AA,Vol.III,598-603. The five-part test pronounced in Chia demonstrates that the Court's ruling regarding Carroll's statement that Little Lou had nothing to do with it was in error.

The first prong of the five-part test deals with the "probative value of excluded evidence on a central issue." See Chia, 360 F.3d at 1004. Little Lou's defense at trial was that he did not know about or join a conspiracy to kill TJ. Carroll was at the core of the conspiracy. Carroll procured the gunman, drove the van to the scene of the homicide, lured the victim to the meeting, watched when TJ was shot in the head, and was later present when money was paid to the shooter. The police quickly linked Carroll to the homicide. After being arrested, the police had Carroll wear a hidden wire and sent him into Simone's Autobody to gather incriminating statements from Mr. H about the homicide. Instead, Carroll spoke to Espindola. When Little Lou made a comment, Carroll said to Little Lou, "What are you worried about. You had nothing to do with this [death of the victim]." AA,Vol.I,93. Little Lou had no other witness from whom to obtain this critical evidence. This statement is probative and, if believed, establishes that Little Lou was not a member of the conspiracy, which is the central issue in the case.

The second factor deals with the reliability of the statement. See Chia, 360 F.3d at 1004. Carroll's statement was reliable for many reasons: Carroll had every incentive to spread the blame on others and to make as many cases as possible for the police. His statement

regarding Little Lou; however, affirmed that Little Lou had no responsibility for the homicide. Further, the police prepared Carroll to go in to the meeting to gather incriminating evidence. While they did coach Carroll on how to best to gather evidence, the officer never instructed Carroll to make the statement that Little Lou was not involved in the crime. AA,Vol.IV,842-43. In this context, it makes no sense that Carroll would make this statement unless Little Lou was in fact not a member of the conspiracy. This statement bears sufficient indicia of reliability.

The third factor to consider in the five-part Chia analysis is whether the excluded evidence was capable of evaluation by the trier of fact. See Chia, 360 F.3d at 1004. Had the Carroll statement been admitted as substantive evidence, the jury would have weighed the prosecution theory against the exculpatory Carroll statement. As pointed out in Chia, this is a common task engaged in by juries and could have been engaged in by Little Lou's trial jury. See id. at 1005.

The fourth factor to consider in the five-part Chia analysis is whether it is the sole evidence on the issue or merely cumulative. See id. at 1004. The taped statement by Carroll was the sole evidence that Little Lou was not a member of the conspiracy. The other members of the conspiracy who were at the shooting did not have any interaction with Little Lou. The evidence was not cumulative.

The final factor to consider in the five-part Chia test was whether the excluded evidence constituted a major part of the attempted defense. See id. Similar to Chia, the attempted defense was that Little Lou did not know about or join a conspiracy to kill the

victim and was not guilty of the crimes that the State charged him with. The excluded evidence was the primary evidence regarding his innocence.

As demonstrated above, all five Chia factors support the admission of this critical evidence. It was erroneous for the trial judge to prohibit the jury from considering this evidence for the truth of the matter asserted and as evidence of innocence. This is reversible error. See Chia, 360 F.3d at 1005.

This Court recently dealt with the Chia test in Fields v. State, ___ Nev.___, 220 P.3d 709 (2010). Although the Court properly excluded the evidence in Fields, the Fields' reasoning supports the admission of the Carroll statement. In Fields, hearsay evidence of potential third party guilt was not allowed. The hearsay evidence was not reliable because the witness had been drunk, had a motive to fabricate evidence against the third party, did not come forward with the evidence until more than three years after the event, and the statement was not on tape. See id. at ____, 220 P.3d at 717-16. The reliability of the Carroll statement does not mirror the unreliability of the Fields statement. Instead, the reliability of the Carroll statement was similar to the statement in Chia.

Specifically, Carroll was lucid, police had prepared him to gather incriminating evidence, his only motivation was to record accurate information, the statement was made within days of the incident, and the statement was recorded. Furthermore, in Fields, the witnesses did not implicate themselves like Carroll did. In fact, Carroll placed himself in the heart of the conspiracy to kill the victim when he told Little Lou that Little Lou was not part of it. Throughout the taped conversation, Carroll acknowledged being involved in the homicide of the victim.

C. NRS 51.315

Furthermore, in addition to Chia, the Carroll statement should have been admitted as substantive evidence under NRS 51.315. This rule instructs that "a statement is not excluded by the hearsay rule if: (a) [i]ts nature and the special circumstances under which it was made offer strong assurances of accuracy; and (b) [t]he declarant is unavailable as a witness." NRS 51.315. A witness is unavailable if he invokes his Fifth Amendment right to remain silent. See Thomas v. State. 114 Nev. 1127, 967 P.2d 1111 (1998). Carroll was unavailable to the defense because his trial in this matter was still pending. For the reasons asserted in the reliability prong of Chia, the Carroll statement is cloaked in strong assurances of accuracy. See Johnstone v. State, 92 Nev. 241, 244, 548 P.2d 1362, 1363 (1976).

Further, the statement by Carroll was reliable, material, and would have substantially bolstered Little Lou's defense that he did not know about or join the conspiracy to commit homicide. It was error to prohibit the statement from being considered for the truth of the matter asserted under both the due process clause and the exception to the hearsay rule for unavailable witnesses found in NRS 51.315.

D. NRS 51.035(3)(b),(d)

The District Court ruled that the "statements made by Carroll in the tape when he was acting as a police informant or agent or whatever we want to call him cannot be considered for the truth of the matter asserted." AA,Vol.III,596. When instructing the jury on the Carroll statement, the District Court gave Instruction 40 which included the following:

> The statements of a co-conspirator after he has withdrawn from the conspiracy were not offered, and **may not be considered by you for the truth of the matter asserted.** They were only offered to

> give context to the statements made by the other individuals who are speaking, as or adoptive admissions or other circumstantial evidence in the case. An adoptive admission is a statement of which a listener has manifested his adoption or belief in its truth.

AA,Vol.I,47 (emphasis added).

The District Court erred in misapplying the agent admission doctrine. Such error was not harmless to Little Lou.

An admission by a party is not hearsay and is admissible for the truth of the matter asserted and as substantive evidence under NRS 51.035(3). See State Department of Motor Vehicles and Public Safety v. Kinkade, 107 Nev. 257, 261, 810 P.2d 1201, 1203 (1991). The party admission doctrine extends to statements and admissions made by the party's "agent or servant concerning a matter within the scope of his agency or employment, [and] made before the termination of the relationship." NRS 51.035(3)(d).[11] Statements and admissions by an informant, operating as an agent of the prosecution and within the scope of his agency, are admissible by the defense and against the prosecution under the agency doctrine as substantive evidence. See United States v Branham, 97 F.3d 835, 850-51 (6th Cir. 1996); State v. Worthen, 765 P.2d 839, 849 (Utah 1988).

After the evidence regarding the murder of TJ led law enforcement to Carroll, Carroll began cooperating with law enforcement and became an informant.[12] At the request of law

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[11] Like all parties involved in litigation, admissions by prosecutors or its agents are subject to the party opponent rule. See United States v. Bakshinian, 65 F.Supp 2d 1104, 1105-06 (D. Cal. 1999). No prosecutorial exception was created under Nev. Stat. Ann. § 51.035(3).

[12] At the point Carroll began assisting law enforcement, he had withdrawn from any alleged conspiracy regarding TJ Hadland and was acting as an agent of the prosecution. See U.S. v. Cella, 568 F.2d 1266, 1282 (1977).

enforcement, Carroll wore a body wire and was instructed on how to obtain inculpatory information. AA,Vol.IV,841-43. He then spoke to and recorded Espindola and Little Lou at the May 23, 2005 meeting. AA,Vol.IV,841-43. During this surreptitiously recorded meeting, Carroll stated to Little Lou, "[w]hat are you worried about. You had nothing to do with this [death of the victim]." AA,Vol.I,93; Vol.IV,842. At the time of this statement Carroll was an informant and a state agent, and he was operating within the scope of this agency.

During the trial, the prosecution played the recording to the jury, which included the statement made by Carroll that Little Lou had nothing to do with this crime. AA,Vol.IV,742-44,751-52. The prosecution objected to Little Lou's attempt to make use of the statement for the truth of the matter asserted. AA,Vol.III,603. The District Court refused to allow the Carroll statement to be used as substantive evidence under the party agent doctrine. AA,Vol.IV,596,603. This was error. The error is not harmless because this critically important evidence was not admitted through another source and the evidence was not cumulative. Further, the recorded statement of Carroll supported Little Lou's defense that Little Lou was not involved in the alleged conspiracy and subsequent death of TJ.

The District Court did allow the Carroll statement to be considered as an "adoptive admission" by Espindola.[13] AA,Vol.III,603. However, and critically, the trial judge instructed the jury that the statement "may not be considered by you for the truth of the matter

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[13] The court's theory of admissibility on this limited ground was that Espindola adopted the statement by Carroll through her silence. This ground for admissibility is inappropriate as the adopted admission would be a self-serving statement for her alleged co-conspirator, Little Lou. This is more appropriately admitted as impeachment of Espindola through a prior inconsistent statement under NRS 51.035 (2)(a).

asserted." AA,Vol.I,47; Vol.III,603. A properly admitted adoptive admission is regarded as non-hearsay and substantive evidence under NRS 51.035(3)(b). See Crowley v. State, 120 Nev. 30, 35, 83 P.3d 282, 286 (2004) (prior inconsistent statement is non hearsay and is admitted both as impeachment and substantive evidence). Jury Instruction 40 instructs the jury that it may consider the Carroll statements as an adopted admission but may not consider it for the truth of the matter asserted. AA,Vol.I, p.47. This is an error under Nevada law. This error was not harmless as the evidence was not allowed to be considered as substantive evidence under any theory of admissibility and it was evidence that supported Little Lou's defense that Little Lou was not part of the alleged conspiracy and subsequent death of TJ. Little Lou's convictions must be reversed.

III. The Trial Court Erred In Denying The Admission Of The Former Testimony Of Jayson Taoipu.

A. Standard of Review

The standard of review regarding admission of an unavailable witness's prior testimony is a mixed issue of law and fact. See Hernandez v. State, 124 Nev. 60, 188 P.3d 1126, 1131 (2008). This court has on several occasions addressed admissibility of prior testimony pursuant to NRS 51.325 when the State attempts to admit testimony of unavailable witnesses. See Hernandez, 124 Nev. at ___, 188 P.3d at 1131-1135. This court, however, has never addressed the admissibility of prior testimony when the *Defendant* desires to admit the prior testimony, which includes exculpatory statements made by a witness, against the State. This issue, therefore, appears to be an issue of first impression for this Court.

B. The Former Testimony of Jayson Taoipu Should Have Been Admitted.

Little Lou sought to admit the former testimony of Jayson Taoipu, a witness at the previously held murder trial of Kenneth Counts who was the person who murdered TJ Hadland, against the State for the purposes of demonstrating Little Lou's innocence in the conspiracy to kill TJ Hadland. AA,Vol.IX,1881-90, 2068-73. The District Court erroneously denied the admission of Jayson Taoipu's former testimony.

NRS 51.325, regarding former testimony, states:

> Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of another proceeding, is not inadmissible under the hearsay rule if:
> 1. The declarant is unavailable as a witness; and
> 2. If the proceeding was different, the party against whom the former testimony is offered was a party or is in privity with one of the former parties and the issues are substantially the same.

NRS 51.325.

As stated, Jayson Taoipu testified, under oath, on behalf of the State at the Kenneth Counts murder trial. AA,Vol.XI,2325. At the Counts trial, Taoipu was specifically asked by the prosecutor:

Q All right. Going back, just kind of backtracking a little bit, did you ever hear any conversation about baseball bats or garbage bags?

A Yes, Sir.

Q Tell us what you heard, when you heard it, and who you heard it from.

A We heard it before we went to pick up KC. Carroll told us that he called Anabel and Anabel was talking about baseball bats and trash bags. AA,Vol.XI,2363.

At Little Lou's trial, which occurred subsequent to the Counts trial, another witness, Rontae Zone, testified on behalf of the State. At Little Lou's trial, Rontae Zone testified that Carroll said that Little Lou was the person who said to bring bats and bags down to the club. AA,Vol.II,392,399. Jayson Taoipu's testimony at the Count's trial exculpated Little Lou. Zone's testimony at Little Lou's trial inculpated Little Lou, and was completely contradictory to Taoipu's prior testimony at the Counts trial.

Further, Zone's testimony at Little Lou's trial was the only testimonial evidence presented by the State that arguably demonstrated Little Lou's participation in the conspiracy, prior to the killing of TJ Hadland. In fact, Espindola testified at length that Little Lou did not plan the events regarding TJ, he did not participate in the events leading to TJ's death, and he did not pay anybody for the death of TJ. AA,Vol.VI,1247,1251,1255. The Court, however, denied the admission of Taoipu's former testimony because it "opens the door to other statements that Jason Taoipu made in his trial testimony that indicate that Little Lou was involved and gave the order" and because it would be prejudicial to Mr. H. AA,Vol.IX,2072. The Court's ruling is legally unsound given that all of the prongs of NRS 51.325 regarding former testimony were met. Further, a trial court cannot make or second guess defense counsel's defense tactics.

The first prong of NRS 51.325 that establishes that former testimony is admissible is whether the declarant is unavailable as a witness. The Court properly ruled that Taoipu was unavailable as a witness. As stated in Hernandez, a witness may be unavailable if he or she is " '[a]bsent from the hearing and beyond the jurisdiction of the court to compel appearance and the proponent of his [or her] statement has exercised reasonable diligence but has been unable

to procure his [or her] attendance.'" Hernandez, 124 Nev. at ____, 188 P.3d at 1130-31. This Court has "interpreted the requirement that the State 'exercise reasonable diligence' to mean that the State must make reasonable efforts to procure a witness's attendance at trial before that witness may be declared unavailable." Id. The determination that reasonable diligence was exercised to procure a witness's attendance is based on a factual finding. Id. Further, "the touchstone of the analysis is the reasonableness of the efforts." Id. at ___, 188 P.3d at 1134.

In this case, the Court properly made the factual determination that Jayson Taoipu was unavailable for trial. AA,Vol.IX,2067-68. The Court based its findings on the affidavit of defense investigator Don Dibble, and the representations of counsel that prior to trial and throughout trial they attempted to contact Taoipu at his last known address, through his parents, his probation officer, and the jail once a warrant was issued, all to no avail. AA,Vol.IX,2067-68. The effort made to locate Taoipu before and during trial more than met the reasonableness requirements of Hernandez. See Hernandez, 124 Nev. at ____, 188 P.3d at 1135.

The second prong of NRS 51.325 states that "if the proceeding was different, the party against whom the former testimony is offered was a party or is in privity with one of the former parties and the issues are substantially the same." NRS 51.325(2). Here, the proceedings were different in that Taoipu's testimony was given during the Counts trial which occurred prior to Little Lou's trial. Little Lou offered Taoipu's former testimony against the State at Little Lou's trial. Although the proceedings were different, the State was a party at both trials. In fact, the State was even represented by the same two prosecutors at the Counts

IN THE SUPREME COURT OF THE STATE OF NEVADA

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LUIS HIDALGO, III , **CASE NO. 67640**

Appellant.

v.

THE STATE OF NEVADA,

Respondent.

_____/

APPELLANT'S APPENDIX, VOLUME I

APPEAL FROM JUDGMENT DENYING POST-CONVICTION HABEAS CORPUS

Eighth Judicial District
State of Nevada

THE HONORABLE VALIERIE ADAIR, PRESIDING

Richard F. Cornell, Esq.
Attorney for Appellant
150 Ridge Street
Second Floor
Reno, NV 89501
775/329-1141

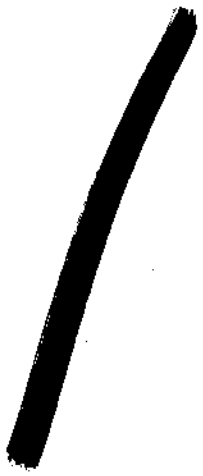
Clark County District Attorney's Office
Appellate Division
Attorney for Respondent
200 Lewis Ave.
Las Vegas, NV 89155
702/671-2500

APPELLANT'S INDEX
Hidgalgo v. State
Case No. 67640

NO.	DESCRIPTION	DATE	PAGES
	VOLUME I		
1	Order and relevant portions of Eighth Judicial District Docket Sheet	2-16-14	1-8
2	Petition for Writ of *Habeas Corpus* (Post-Conviction)	1-02-14	9-43
3	Supplemental Petition for Writ of *Habeas Corpus* (Post-Conviction)	5-09-14	44-87
4	State's Response to Defendant's Supplemental Petition for Writ of *Habeas Corpus* (Post-Conviction)	7-16-14	88-250
	VOLUME II		
	[cont.]		251-319
5	Reply to State's Response to Defendant's Supplemental Petition for Writ of *Habeas Corpus* (Post-Conviction)	9-05-14	320-357
6	Fourth Amended Information	1-26-09	358-361
7	Jury Trial Transcript, Day Five	2-02-09	362-500
	VOLUME III		
	[cont.]		501-587
8	Jury Trial, Day Six	2-03-09	588-750
	VOLUME IV		
	[cont.]		
9	Jury Trial Transcript, Day Seven	2-04-09	751-772

	VOLUME V		
	[cont.]		1001-1031
10	Jury Trial Transcript, Day Eight	2-05-09	1032-1191
11	Jury Trial Transcript, Day Nine	2-06-09	1192-1250
	VOLUME VI		
	[cont.]		
12	Jury Trial Transcript, Day Ten	2-09-09	1377-1500
	VOLUME VII		
	[cont.]		1501-1717
13	Jury Trial Transcript	2-10-09	1718-1750
	VOLUME VIII		
	[cont.]		1751-2000
	VOLUME IX		
	[cont.]		2001-2035
14	Jury Trial Transcript, Day Twelve	2-11-09	2036-2250
	VOLUME X		
	[cont.]		2251-2365
15	Jury Trial Transcript, Day Thirteen	2-12-09	2366-2500
	VOLUME XI		
	[cont.]		2501-2608
16	Instruction to the Jury	2-17-09	2609-2663
17	Transcript of Proceedings: Testimony of Jayson Taoipu in State v. Counts	2-04-09	2664-2750
	VOLUME XII		
	[cont.]		2751-2778

18	Jury Trial Transcript, Day Fourteen	2-17-09	2779-2786
19	Verdict	2-17-09	2787-2788
20	Order Denying Defendant's Motion for Judgment of Acquittal or, in the Alternative, Motion for New Trial	8-04-09	2789-2792
21	Judgment of Conviction (Jury Trial)	7-10-09	2793-2794
22	Luis A. Hidalgo, III's Notice of Appeal	7-16-09	2795-2797
23	Order of Affirmance, no. 54272	6-21-12	2798-2808
24	Transcript of Hearing	9-23-14	2809-2828
25	Transcript of Evidentiary Hearing	12-15-14	2829-2879
26	Notice of Entry of Order; Findings of Fact, Conclusions of Law and Order	3-12-15 3-16-15	2880 2881-2890
27	Notice of Appeal to Supreme Court	3-23-15	2891-2893



CODE ORD

EIGHTH JUDICIAL DISTRICT COURT FOR THE STATE OF NEVADA

AND FOR THE COUNTY OF CLARK

LUIS HIDALGO, III,

Petitioner,

v.

ISIDRO BACA, WARDEN, NORTHERN NEVADA CORRECTIONAL CENTER; AND J. GREG COX, DIRECTOR OF THE NEVADA DEPARTMENT OF CORRECTIONS,

Respondents.

CASE NO. ~~08C241394~~ 05C212667-2

DEPT NO. XXI

ORDER

Petitioner, Luis Hidalgo, III, filed a Petition for Writ of *Habeas Corpus* on January 2, 2014. The Court has reviewed the Petition and has determined that a response would assist the Court in determining whether Petitioner is illegally imprisoned and restrained of Petitioner's liberty. The Respondent shall, within 45

days after the date of this Order, answer or otherwise respond to the Petition and file a return and accordance with the provisions of NRS 34.360 to 34.830, inclusive.

DATED this 20 day of February, 2014.

Valerie Adair

DISTRICT JUDGE

CERTIFICATE OF SERVICE

Pursuant to N.R.C.P. 5(b), I certify that I am an employee of LAW OFFICES OF RICHARD F. CORNELL, and that on this date I caused to be , deposited for mailing in the United States Mail a true and correct copy of the foregoing document, addressed to:

Nancy A. Becker
Chief Deputy District Attorney
Regional Justice Center
200 Lewis Avenue
Las Vegas, Nevada 89155-2211

DATED this 25th day of February, 2014.

Marianne Tom-Kadlic
Legal Assistant to Richard F. Cornell

REGISTER OF ACTIONS
CASE NO. 05C212667-2

The State of Nevada vs Luis A Hidalgo

§ Case Type: **Felony/Gross Misdemeanor**
§ Date Filed: **06/17/2005**
§ Location: **Department 21**
§ Cross-Reference Case Number: **C212667**
§ Defendant's Scope ID #: **1849634**
§ Lower Court Case Number: **05FB00052**
§
§

RELATED CASE INFORMATION

Related Cases
05C212667-1 (Multi-Defendant Case)
05C212667-3 (Multi-Defendant Case)
05C212667-4 (Multi-Defendant Case)
05C212667-5 (Multi-Defendant Case)
08C241394 (Consolidated)

PARTY INFORMATION

		Lead Attorneys
Defendant	**Hidalgo, Luis A** *Also Known As* **Hidalgo III , Luis A**	**Richard F. Cornell** *Retained* 7753291141(W)
Plaintiff	**State of Nevada**	**Steven B Wolfson** 702-671-2700(W)

CHARGE INFORMATION

Charges: Hidalgo, Luis A	**Statute**	**Level**	**Date**
1. CONSPIRACY TO COMMIT A CRIME	199.480	Gross Misdemeanor	01/01/1900
1. MURDER.	200.010	Gross Misdemeanor	01/01/1900
1. DEGREES OF MURDER	200.030	Gross Misdemeanor	01/01/1900
2. MURDER.	200.010	Felony	01/01/1900
2. DEGREES OF MURDER	200.030	Felony	01/01/1900
2. USE OF A DEADLY WEAPON OR TEAR GAS IN COMMISSION OF A CRIME.	193.165	Felony	01/01/1900
3. SOLICITATION TO COMMIT A CRIME.	199.500	Felony	01/01/1900
4. SOLICITATION TO COMMIT A CRIME.	199.500	Felony	01/01/1900

EVENTS & ORDERS OF THE COURT

DISPOSITIONS

01/01/1900 **Plea** (Judicial Officer: User, Conversion)
1. CONSPIRACY TO COMMIT A CRIME
Not Guilty

01/01/1900 **Plea** (Judicial Officer: User, Conversion)
1. MURDER.
Not Guilty

01/01/1900 **Plea** (Judicial Officer: User, Conversion)
1. DEGREES OF MURDER
Not Guilty

01/01/1900 **Plea** (Judicial Officer: User, Conversion)
2. MURDER.
Not Guilty

01/01/1900 **Plea** (Judicial Officer: User, Conversion)
2. DEGREES OF MURDER
Not Guilty

01/01/1900 **Plea** (Judicial Officer: User, Conversion)
2. USE OF A DEADLY WEAPON OR TEAR GAS IN COMMISSION OF A CRIME.
Not Guilty

01/01/1900 **Plea** (Judicial Officer: User, Conversion)
3. SOLICITATION TO COMMIT A CRIME.
Not Guilty

01/01/1900 **Plea** (Judicial Officer: User, Conversion)
4. SOLICITATION TO COMMIT A CRIME.
Not Guilty

06/23/2009 **Disposition** (Judicial Officer: User, Conversion)
1. CONSPIRACY TO COMMIT A CRIME
Guilty

06/23/2009 **Disposition** (Judicial Officer: User, Conversion)
1. MURDER.
Guilty

06/23/2009 **Disposition** (Judicial Officer: User, Conversion)
1. DEGREES OF MURDER
Guilty

06/23/2009 **Disposition** (Judicial Officer: User, Conversion)
2. MURDER.
Guilty

06/23/2009 **Disposition** (Judicial Officer: User, Conversion)
2. DEGREES OF MURDER
Guilty

06/23/2009 **Disposition** (Judicial Officer: User, Conversion)
2. USE OF A DEADLY WEAPON OR TEAR GAS IN COMMISSION OF A CRIME.
Guilty

06/23/2009 **Disposition** (Judicial Officer: User, Conversion)
3. SOLICITATION TO COMMIT A CRIME.
Guilty

06/23/2009 **Disposition** (Judicial Officer: User, Conversion)
4. SOLICITATION TO COMMIT A CRIME.
Guilty

06/23/2009 **Adult Adjudication** (Judicial Officer: User, Conversion)
1. CONSPIRACY TO COMMIT A CRIME
Converted Disposition:
Sentence# 0001:
Minimum 12 Months to Maximum 12 Months
Placement: CCDC
Converted Disposition:
Sentence# 0002: CREDIT FOR TIME SERVED
Minimum 746 Days to Maximum 746 Days
Converted Disposition:
Sentence# 0003: CREDIT FOR TIME SERVED
Minimum 746 Days to Maximum 746 Days

06/23/2009 **Adult Adjudication** (Judicial Officer: User, Conversion)
2. MURDER.
Converted Disposition:
Sentence# 0001: LIFE WITH POSSIBILITY OF PAROLE
Cons/Conc: Concurrent
w/Charge Item: 0001
and Sentence#: 0001
Converted Disposition:
Sentence# 0002: LIFE WITH POSSIBILITY OF PAROLE
Cons/Conc: Consecutive
w/Charge Item: 0004
and Sentence#: 0001

06/23/2009 **Adult Adjudication** (Judicial Officer: User, Conversion)
3. SOLICITATION TO COMMIT A CRIME.
Converted Disposition:
Sentence# 0001:
Minimum 24 Months to Maximum 72 Months
Placement: NSP
Cons/Conc: Concurrent
w/Charge Item: 0004
and Sentence#: 0001

06/23/2009 **Adult Adjudication** (Judicial Officer: User, Conversion)
4. SOLICITATION TO COMMIT A CRIME.
Converted Disposition:
Sentence# 0001:
Minimum 24 Months to Maximum 72 Months
Placement: NSP
Cons/Conc: Concurrent
w/Charge Item: 0007
and Sentence#: 0001

OTHER EVENTS AND HEARINGS

05/01/2000 **Judgment**
VERDICT
05C212667-20671.tif pages

06/17/2005 **Criminal Bindover**
CRIMINAL BINDOVER Fee $0.00
05C212667-20001.tif pages

05/13/2010 **Calendar Call** (9:30 AM) ()
CALENDAR CALL Court Clerk: Denise Husted Reporter/Recorder: Janie Olsen Heard By: Valerie Adair
Parties Present
Minutes
Result: Matter Heard

05/17/2010 **Jury Trial** (9:30 AM) ()
TRIAL BY JURY Court Clerk: Denise Husted Reporter/Recorder: Janie Olsen Heard By: Adair, Valerie
Parties Present
Minutes
Result: Matter Continued

05/18/2010 **Reporters Transcript**
REPORTER'S TRANSCRIPT OF PROCEEDINGS - JURY TRIAL DAY 1 - JURY VOIR DIRE - HEARD 05-17-10 HEARD 05-17-10
05C212667-20858.tif pages

05/18/2010 **Jury Trial** (10:30 AM) ()
TRIAL BY JURY Court Clerk: Denise Husted Reporter/Recorder: Janie Olsen Heard By: Adair, Valerie
Parties Present
Minutes
Result: Matter Continued

05/19/2010 **Reporters Transcript**
REPORTER'S TRANSCRIPT JURY TRIAL DAY 2 JURY VOIR DIRE 05-18-10
05C212667-20860.tif pages

05/19/2010 **Jury Trial** (10:30 AM) ()
TRIAL BY JURY Court Clerk: Denise Husted Reporter/Recorder: Janie Olsen Heard By: Adair, Valerie
Parties Present
Minutes
Result: Matter Continued

05/20/2010 **Order**
ORDER FOR DAILY TRANSCRIPTS
05C212667-20859.tif pages

05/20/2010 **Reporters Transcript**
REPORTER'S TRANSCRIPT JURY TRIAL DAY 3 ON 05-19-10
05C212667-20861.tif pages

05/20/2010 **Subpoena Duces Tecum**
CRIMINAL SUBPOENA - REGULAR - ANABEL ESPINDOLA LOCATED AT 1013 WOODBRIDGE DRIVE LAS VEGAS NV 89108 DRIVE LAS VEGAS NV 89108- RELATED PARTYID: 05C212667_0004
05C212667-20862.tif pages

05/20/2010 **Jury Trial** (9:00 AM) ()
TRIAL BY JURY Court Clerk: Denise Husted Reporter/Recorder: Janie Olsen Heard By: Adair, Valerie
Parties Present
Minutes
Result: Matter Continued

05/21/2010 **Jury List**
DISTRICT COURT JURY LIST
05C212667-20857.tif pages

05/21/2010 **Reporters Transcript**
REPORTER'S TRANSCRIPT OF PROCEEDINGS - JURY TRIAL DAY 4 - HEARD 05-20-10
05C212667-20863.tif pages

05/21/2010 **Proposed Jury Instructions Not Used At Trial**
PROPOSED JURY INSTRUCTIONS NOT USED AT TRIAL
05C212667-20864.tif pages

05/21/2010 **Information**
FIFTH AMENDED INFORMATION
05C212667-20865.tif pages

05/21/2010 **Jury Trial** (10:00 AM) ()
TRIAL BY JURY Court Clerk: Denise Husted Reporter/Recorder: Janie Olsen Heard By: Adair, Valerie
Parties Present
Minutes
Result: Matter Continued

05/24/2010 **Reporters Transcript**
REPORTER'S TRANSCRIPT OF PROCEEDINGS - JURY TRIAL DAY 5 - HEARD 05-21-10
05C212667-20872.tif pages

05/24/2010 **Jury Trial** (9:30 AM) ()
TRIAL BY JURY Court Clerk: Denise Husted Reporter/Recorder: Janie Olsen Heard By: Adair, Valerie
Parties Present
Minutes
Result: Matter Continued

05/25/2010 **Motion**
PENALTY HEARING
05C212667-20866.tif pages

05/25/2010 **Reporters Transcript**
REPORTER'S TRANSCRIPT OF PROCEEDINGS - JURY TRIAL DAY 6 - HEARD 05-24-10
05C212667-20870.tif pages

05/25/2010 **Instructions to the Jury**
INSTRUCTIONS TO THE JURY - INSTRUCTION NO 1
05C212667-20876.tif pages

05/25/2010 **Jury Trial** (9:30 AM) ()
TRIAL BY JURY Court Clerk: Denise Husted Reporter/Recorder: Janie Olsen Heard By: David Wall

5

Parties Present

Minutes

Result: Matter Heard

05/27/2010 **Proposed Jury Instructions Not Used At Trial**
PROPOSED JURY INSTRUCTIONS NOT USED AT TRIAL
05C212667-20869.tif pages

06/02/2010 **Media Request and Order**
MEDIA REQUEST AND ORDER FOR CAMERA ACCESS TO COURT PROCEEDINGS
05C212667-20894.tif pages

06/02/2010 **Proposed Jury Instructions Not Used At Trial**
PROPOSED JURY INSTRUCTIONS NOT USED AT TRIAL
05C212667-20896.tif pages

06/02/2010 **Proposed Jury Instructions Not Used At Trial**
DEFTS PROPOSED JURY INSTRUCTIONS NOT USED AT TRIAL
05C212667-20901.tif pages

06/02/2010 **Motion** (11:00 AM) ()
PENALTY HEARING Court Clerk: Denise Husted Reporter/Recorder: Janie Olsen Heard By: Adair, Valerie

Parties Present

Minutes

Result: Matter Continued

06/03/2010 **Petition**
PTN FOR WRIT OF HABEAS CORPUS (CONTINUED FROM 6/03/10)
05C212667-20893.tif pages

06/03/2010 **Reporters Transcript**
REPORTER'S TRANSCRIPT OF PROCEEDINGS PENALTY PHASE DAY 1
05C212667-20897.tif pages

06/03/2010 **Petition for Writ of Habeas Corpus** (8:30 AM) ()
PTN FOR WRIT OF HABEAS CORPUS Relief Clerk: Susan Jovanovich /sj Reporter/Recorder: Janie Olsen Heard By: Doug Smith

Parties Present

Minutes

Result: Matter Continued

06/03/2010 **Motion** (9:30 AM) ()
PENALTY HEARING Court Clerk: Denise Husted Reporter/Recorder: Janie Olsen Heard By: Adair, Valerie

Parties Present

Minutes

Result: Matter Continued

06/04/2010 **Conversion Case Event Type**
SENTENCING
05C212667-20898.tif pages

06/04/2010 **Verdict Submitted to the Jury But Returned Unsigned**
VERDICT(S) SUBMITTED TO JURY BUT RETURNED UNSIGNED
05C212667-20903.tif pages

06/04/2010 **Judgment**
ENTRY IN ERROR
05C212667-20904.tif pages

06/04/2010 **Verdict**
VERDICT
05C212667-20905.tif pages

06/04/2010 **Verdict**
SPECIAL VERDICT
05C212667-20906.tif pages

06/04/2010 **Verdict**
SPECIAL VERDICT
05C212667-20907.tif pages

06/04/2010 **Instructions to the Jury**
INSTRUCTIONS TO THE JURY - INSTRUCTION NO 1
05C212667-20908.tif pages

06/04/2010 **Reporters Transcript**
REPORTER'S TRANSCRIPT OF PROCEEDINGS - PENALTY PHASE DAY 2 - HEARD 06-03-10
05C212667-20909.tif pages

06/04/2010 **Motion** (9:30 AM) ()
PENALTY HEARING Court Clerk: Denise Husted Reporter/Recorder: Janie Olsen Heard By: Doug Smith

Parties Present

Minutes

Result: Matter Heard

06/08/2010 **Reporters Transcript**
REPORTER'S TRANSCRIPT OF HEARING RE PENALTY PHASE VERDICT 06-04-10
05C212667-20910.tif pages

06/11/2010 **Order**
STIPULATION AND ORDER EXTENDING TIME
05C212667-20911.tif pages

06/23/2010 **Order**
ORDER FOR PRODUCTION OF INMATE KENNETH JAY COUNTS BAC #1017559
05C212667-20913.tif pages

06/28/2010 **Opposition**
STATES OPPOSITION TO DEFTS PETITION FOR WRIT OF HABEAS CORPUS
05C212667-20914.tif pages

06/29/2010 **Request**
EX PARTE MOTION FOR RELEASE OF EVIDENCE

05C212667-20915.tif pages

06/29/2010 **Order**
ORDER RELEASING EVIDENCE
05C212667-20916.tif pages

07/01/2010 **Motion**
PTN FOR WRIT OF HABEAS CORPUS (CONT. 7/1/10)
05C212667-20917.tif pages

07/01/2010 **Petition for Writ of Habeas Corpus** (9:30 AM) ()
PTN FOR WRIT OF HABEAS CORPUS (CONTINUEDFROM 6/03/10) Court Clerk: Dameda Scott Reporter/Recorder: Janie Olsen Heard By: Valerie Adair
Parties Present
Minutes
Result: Matter Heard

07/08/2010 **Receipt**
RECEIPT OF EXHIBITS
05C212667-20919.tif pages

07/09/2010 **Reply**
REPLY TO STATES OPPOSITION TO POINTS AND AUTHORITIES IN SUPPORT OF POST-CONVICTION WRIT POST-CONVICTION WRIT-RELATED PARTYID: 05C212667_0001
05C212667-20920.tif pages

07/15/2010 **Order**
ORDER FOR PRODUCTION OF INMATE KENNETH COUNTS BAC #1017559
05C212667-20921.tif pages

07/27/2010 *CANCELED* **Sentencing** (9:45 AM) (Judicial Officer Adair, Valerie)
Vacated - On In Error
08/12/2010 Reset by Court to 08/12/2010
08/12/2010 Reset by Court to 07/27/2010

08/19/2010 *CANCELED* **Motion** (9:30 AM) (Judicial Officer Adair, Valerie)
Vacated - On In Error
08/19/2010 Reset by Court to 08/19/2010

08/25/2010 **Criminal Order to Statistically Close Case**

11/12/2010 **Transcript of Proceedings**
Transcript of Proceedings Jury Trial - Day 13 - Feb. 12, 2009

02/04/2011 **Order Unsealing File**
Order Unsealing Transcript Filed October 30, 2008

04/17/2013 **NV Supreme Court Clerks Certificate/Judgment - Affirmed**
Nevada Supreme Court Clerk's Certificate Judgment - Affirmed; Rehearing Denied; Petition Denied; Order Denying En Banc Reconsideration.

01/22/2014 **Motion**
Motion for Extension of Time to file Supplemental Petition for Writ of Habeas Corpus (Post-Conviction)

01/22/2014 **Petition for Writ of Habeas Corpus**
Petition for Writ of Habeas Corpus (Post-Conviction)

02/25/2014 **Substitution of Attorney**
Substitution of Counsel

02/26/2014 **Order**
ORDER

02/26/2014 **Notice of Entry of Order**
Notice of Entry of Order

03/11/2014 **Petition for Writ of Habeas Corpus** (9:30 AM) (Judicial Officer Adair, Valerie)
Petition for Writ of Habeas Corpus (Post-Conviction)
Parties Present
Minutes
Result: Hearing Set

05/09/2014 **Supplemental**
Supplemental Petition for Writ of Habeas Corpus (Post-Conviction)

07/16/2014 **Response**
State's Response To Defendant's Supplemental Petition For Writ Of Habeas Corpus (Post-Conviction)

07/28/2014 **Stipulation and Order**
Stipulation and Order Re: Extension of Time to File Reply to Response

09/23/2014 **Hearing** (9:30 AM) (Judicial Officer Adair, Valerie)
Defendnant's Petition for Writ of Habeas Corpus
Parties Present
Minutes
08/21/2014 Reset by Court to 09/23/2014
Result: Hearing Set

10/01/2014 **Waiver**
Waiver of Appearance

10/02/2014 **Order for Production of Inmate**
Order for Production of Inmate Luis Alonso Hidalgo , BAC# 1038133

12/15/2014 **Evidentiary Hearing** (10:00 AM) (Judicial Officer Adair, Valerie)
Parties Present
Minutes
12/08/2014 Reset by Court to 12/15/2014
Result: Denied

FINANCIAL INFORMATION

	Defendant Hidalgo, Luis A			
	Total Financial Assessment			205.00
	Total Payments and Credits			30.00
	Balance Due as of 01/27/2015			**175.00**
03/05/2010	Transaction Assessment			175.00
08/27/2013	Transaction Assessment			30.00
08/27/2013	Payment (Window)	Receipt # 2013-104242-CCCLK	Law Office Alverson, Taylor, Mortensen & Sanders	(30.00)

8

PET
Law Offices of Richard F. Cornell
150 Ridge Street, Second Floor
Reno, NV 89501
Nevada Bar 1553
(775)329-1141
Attorney for Petitioner

EIGHTH JUDICIAL DISTRICT COURT FOR THE STATE OF NEVADA

AND FOR THE COUNTY OF CLARK

LUIS HIDALGO, III,

Petitioner,

v.

ISIDRO BACA, WARDEN, NORTHERN NEVADA CORRECTIONAL CENTER; AND J. GREG COX, DIRECTOR OF THE NEVADA DEPARTMENT OF CORRECTIONS,

Respondents.

CASE NO. 08C241394

DEPT NO. XXI

PETITION FOR WRIT FOR *HABEAS CORPUS* (POST-CONVICTION)

1. Name of institution and county in which you are presently imprisoned or where and how you are presently restrained of your liberty:

Northern Nevada Correctional Center, Carson City, Nevada.

2. Name and location of court which entered the judgment of conviction under attack:

Eighth Judicial District of the State of Nevada, Clark County.

3. Date of judgment of conviction:

June 25, 2009.

4. Case number:

C212667 and C241394, consolidated.

5. a) Length of sentence:

Life imprisonment with a possibility of parole after service of 10 years in the Department of corrections; enhanced by an equal term per NRS 193.165; and concurrent terms of imprisonment for conspiracy to commit a battery with a deadly weapon or battery resulting a substantial bodily harm, and solicitation to commit murder.

b) If sentence is death, . . . :

N/A.

6. Are you presently serving a sentence for a conviction other than the conviction under attack in this petition?

No.

7. Nature of offense involved in conviction being challenged:

Murder in the second degree and deadly weapon enhancement.

8. What was your plea?

Not guilty.

9. If you entered a plea of guilty or guilty by mentally ill to one count of an indictment or information, . . .:

N/A.

10. If you were found guilty or guilty of a mentally ill after a plea of not guilty, who made the finding?

Jury.

11. Did you testify at the trial?

No.

12. Did you appeal from the judgment of conviction?

Yes.

13. If you did appeal, answer the following:

a) Name of court:

Supreme Court of the State of Nevada.

b) Case number or citation:

Docket number 54272.

c) Result:

Order of Affirmance.

d) Date of result:

Order of Affirmance filed June 21, 2012. Order Denying *En Banc* Reconsideration: November 13, 2012. Remittitur issued: April 23, 2013.

14. If you did not appeal, . . . :

N/A.

15. Other than the direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications or motions with respect to this judgment in any court, State or federal?

No.

16. If you answer to no. 15 was "yes," . . .:

N/A.

17. Has any ground being raised in this petition been previously presented to this or any other court by way of petition for *habeas corpus*, motion, application or any other post-conviction proceeding?

No.

18. If any of the grounds listed in NOS. 23(a) et. seq. were not previously presented in any other court, state or federal, list briefly what grounds were not so presented, and give your reasons for not presenting them:

The grounds asserted herein are premised upon ineffective assistance of trial counsel. In Nevada, claims of ineffective assistance of counsel generally are not reviewed on direct appeal. The Nevada Supreme Court has consistently held that the proper vehicle for review of counsel's effectiveness is a post-conviction relief proceeding. See: Pellegrini v. State, 117 Nev. 860, 881-84, 34 P.3d 519, 533-35 (2001) [claims of ineffective assistance of counsel brought in a timely first post-conviction petition for a writ of *habeas corpus* are not subject to dismissal on grounds of waiver, regardless of whether the claims could have been appropriately raised on direct appeal. Trial court error may be appropriately raised in a timely first post-conviction petition in the context of claims of ineffective assistance of counsel, but independent claims based on the same error are subject to waiver bars because such claims could have been presented to the trial court or raised in a direct appeal]. See also: Corbin v. State, 111 Nev. 378, 381, 892 P.2d 580, 582 (1995); Gibbons v. State, 97 Nev. 520, 522-23, 634 P.2d 1214, 1216 (1981).

19. Are you filing this petition more than one year following the filing of the judgment of conviction or the filing of a decision on direct appeal?

Petitioner is filing this within one year of the issuance of the remittitur. See: NRS 34.726(1); Gonzales v. State, 118 Nev. 590, 53 P.3d 901 (2002). Therefore the petition is filed timely.

20. Do you have any petition or appeal now pending in any court, either State or Federal, as to the judgment under attack?

No.

21. Give the name of each attorney who represented you in the proceeding resulting in your conviction and on direct appeal:

John L. Arrascada, Esq., Reno, Nevada; Christopher W. Adams, Esq., Charleston, South Carolina.

22. Do you have any future sentences to serve after you complete the sentence imposed by the judgment under attack?

No.

23. State concisely every ground on which you claim that you are being held unlawfully. Summarize briefly the facts supporting each ground. If necessary you may attach pages stating additional grounds and facts supporting the same:

I.

GROUND I

Petitioner's federal constitutional rights under the Fifth, Sixth and Fourteenth Amendments to due process of law, to a fair trial, and to effective assistance of counsel were impinged in the following regards:

Counsel failed and refused to tender a jury instruction, consistently with Moore v. State, 117 Nev. 659, 662-63, 27 P.3d 447, 450 (2001), directing the jury not to find the existence of the deadly weapon enhancement of NRS 193.165 if the jury were to find the defendant guilty of second degree murder on a conspiracy theory. This Motion is based upon the following facts:

This case involved the murder of Timothy (TJ) Hadland on May 19, 2005 in the late evening hours near Lake Mead. It is undisputed that the killer was one Kenneth Counts. It also cannot seriously be disputed but that the linchpin of the murder case was one De Angelo Carroll, who lured Hadland to the spot where Counts murdered him.

The evidence in support of Petitioner's conviction, particularly as it existed up to the end of Hadland's life, was "conspiracy theory" evidence that consisted essentially of out - of - court statements of co - conspirators.

There also cannot be doubt that the "conspiracy theory" evidence as such was highly controverted.

Lewis Hidalgo, Jr., also known as "Mr. H.," was the owner of a gentleman's club, the Palomino Club, and an autobody shop name Simone's Autobody. Each of Mr. H.'s businesses were located in Las Vegas. Mr. H.'s girlfriend, Anabel Espindola ("Espindola"), was the general manager and business administrator of

the Palomino Club. In fact, she ran every aspect of the club. Espindola was also the general manager of Simone's Autobody. Petitioner was "Mr. H.'s son." Petitioner assisted at the club doing menial jobs and played no part in making business decisions.

Per Espindola, on May 19, 2005 while at Simone's she received a telephone call from Carroll, an employee of the Palomino Club, who stated that Hadland was "badmouthing" the Palomino Club. Per Espindola, after she got off the telephone, Mr. H. and Petitioner were present in her office and she told them what Carroll had stated to her. She stated that upon receiving the information, Petitioner became very angry with Mr. H. because Petitioner believed that Mr. H. was not going to do anything to Hadland for his actions. Espindola testified that Petitioner entered into a verbal argument with Mr. H., in which Petitioner stated that Mr. H. would never be like "Gilardi and Rizzolo" (two strip club owners with prior legal troubles) because "they care of business." Espindola further testified that Mr. H. told Petitioner to mind his own business and that Petitioner then left the building. (That is, if we believe this testimony, Petitioner did not "aid and abet" anything, because his wishes were instantly disregarded.)

Mr. H., however, testified that this meeting between him, Petitioner and Espindola never occurred. Mr. H. further stated that Petitioner never made any

statement to him regarding Galardi and Rizzolo. Mr. H. did testify, however, that he learned that TJ's behavior from Carroll in Mr. H.'s office at the Palomino Club at the presence of Espindola. Mr. H. testified that Petitioner was not present at that time. But Mr. H. testified that he (Mr. H.) did not think Hadland's actions were a problem. Per Mr. H., both he and Espindola suggested to Carroll that Carroll talk to Hadland about it. Specifically, Mr. H. testified that upon Carroll leaving his office, he told Carroll something to the fact to tell Hadland to stop it or stop "spreading shit."

Per Espindola, after Petitioner left the office at that time, he left Simone's and she did not see him again on that night. Further, she was with Mr. H. for the duration of the evening of May 19-20, 2005, and Mr. H. did not speak with Petitioner at that time. Likewise, Espindola did not speak to Petitioner during that time frame, and Espindola never saw Mr. H. and Petitioner together that evening. Further, after Petitioner left Simone's after the so - called argument, no discussion or agreement was reached between Mr. H. and Petitioner to speak to Hadland about his "bad mouthing the club," to threaten Hadland, or to kill Hadland.

Espindola further testified that after she left Simone's on May 19, 2005, she went to the Palomino Club. Once at the Palomino Club, Espindola stated she and Mr. H. were in Mr. H.'s office when Carroll came into the office and had a

discussion which she did not hear because she was not paying attention. She testified that Mr. H. and Carroll walked out of Mr. H.'s office, and sometime later Mr. H. returned to his office with "P.K." Handley, who worked with the club as an independent contract on regarding lighting and other issues.

Espindola testified that this point Mr. H. asked her to follow him to the kitchenette area of his office, which she did. While in the kitchenette area of Mr. H.'s office, Espindola testified that Mr. H. told her to call Carroll and tell him "to go to plan B." Espindola testified that she called Carroll and told him that and Carroll stated, "I'm already here." After that the telephone was disconnected. Espindola thought something bad was going to happen to T.J. and she tried calling Carroll back, but could not get connected. She testified that she then went back into Mr. H.'s office and told Mr. H. that she told Carroll to "go to plan B," but did not say anything else to Mr. H. because he then walked out of the office with Handley.

Handley testified that on the evening of May 19, 2005 he met in Mr. H.'s office twice. The first time was with Mr. H., Espindola, and Petitioner regarding the firing of Carroll. At that meeting, he testified that Petitioner attempted to call Carroll to determine Carroll's whereabouts and the location of the club's limousine. The second meeting was with Mr. H. and Espindola in Mr. H.'s office

at the Palomino Club around 11 p.m.. Handley stated that he never saw Mr. H. and Espindola walk into the kitchenette area of his office. Handley testified that after his meeting with Mr. H. and Espindola around 11 p.m., he saw Carroll at the Palomino Club. Carroll looked disturbed. Carroll stated he needed to see Espindola and Mr. H. because he "fucked up." Handley also testified that Carroll was with Counts, and Rontae Zone and Jason Taoipu were outside. Handley testified he never saw Carroll again that night and did not know where he went in the Palomino Club. Handley further testified that when Carroll was looking for Mr. H. and Espindola on May 19 he never told Handley that he needed to speak to Petitioner.

Espindola claimed that awhile later on May 20, 2005 Mr. H. came back into the office and Carroll then knocked on the door of office. She claimed she was present when Carroll came into Mr. H.'s office and Carroll sat down and looked at Mr. H. and said "it's done." Espindola testified that Mr. H. then looked at her and said "go get five out of the safe." Throughout her testimony, Espindola confirmed that Petitioner did not plan any action regarding Hadland, did not participate in any action against Hadland and did not pay any money regarding any action against Hadland.

Mr. H., on the other hand, testified that he never asked or insinuated to

anybody, including Carroll, to have Hadland harmed. He further testified that he never asked Espindola to call Carroll and tell him to go to "plan B." Mr. H. testified that he learned that Hadland was harmed when Carroll came into his office at the Palomino Club in the late hours of May 19, 2005 when Espindola was present. While in Mr. H.'s office, Carroll, who was noticeably disturbed, said to Espindola, "Ms. Anabel, I fucked up" and that "the dude got out of the car and put the bullet in the guy's head." Mr. H. testified that he looked at Carroll and said, "what the fuck did you do?" He stated that Espindola stood up from the chair, put her hands on her face, and said, "Oh my God" several times and then called Carroll a stupid, stupid man. Mr. H. then stated that Carroll asked for money and stated that the shooter was a gang member. The fact that the shooter was a gang member frightened Mr. H., which prompted him to wave his hand for Espindola to get the cash.

Rontae Zone, a friend of Carroll's, who assisted Carroll at his job at the Palomino Club by passing out fliers with Carroll to promote the Palomino Club, testified on behalf of the State. On the night of May 19, 2005, Zone was with Carroll and with his friend, Taoipu. Zone testified that during the afternoon hours of May 19, 2005, Carroll told Zone and Taoipu that "Little Lou was - said that Mr. H. wanted someone killed"; however, Zone later stated that the word used was not

"killed" but instead "dealt with." On cross-examination, Zone admitted that he previously testified that the words came from Mr. H. to Carroll instead of from Mr. H to Petitioner to Carroll.

Zone further testified that Carroll told him that Petitioner had spoken about baseball bats and trash bags; however, no baseball bats and trash bags were ever obtained.

In other words, again, if we believe this hearsay testimony, Petitioner made suggestions on how to kill Hadland and dispose of his body, but his suggestions were apparently rejected out of hand.

In addition, at a previous court proceeding (the murder trial of Counts), Taoipu testified that Espindola was the person who commented on baseball bats and trash bags. Zone further stated that he never personally spoke with Petitioner, and everything Zone heard regarding statements of Petitioner came from Carroll. Further, Zone knew that Carroll told lies. Carroll's general character as a "liar" was confirmed by the detectives who worked the case.

Later on May 19, 2005, Zone testified that they went out promoting in a white Astro van and subsequently picked up Counts at his home and drove out to Lake Mead. Zone stated that on the way to Lake Mead, Carroll communicated with Petitioner; however, the call was about Petitioner telling Carroll to come back

to work.

Zone also stated they were going to meet up with Hadland and that he was going to be killed; however, Carroll told Hadland that they were coming to smoke marijuana together. Zone testified that he heard Carroll on the telephone with Espindola and Zone heard Espindola say "go to plan B," and Carroll stated, "we're too far along, Ms. Anabel." Zone testified that once they arrived at Lake Mead, they met Hadland, who came to Carroll's window and engaged in a conversation with Carroll. At that time Counts exited the van and shot Hadland in the head.

After the shooting, Zone testified that they drove back to the Palomino Club and Carroll and Counts went inside the club. When Counts exited at the Palomino Club he got into a taxi cab. Next, Carroll and Zone went to Carroll's house and then took the Astro van out and slashed and removed the tires. Carroll had new tires put on the van and had the van interior clean and washed. Zone testified that they subsequently went to Simone's, where Carroll spoke with Mr. H. in the back room. Zone also testified that Carroll told him and Taoipu that Counts was paid $6,000.00 for the shooting. Zone, however, did not learn of this amount or have any conversation regarding this payment until after the shooting of Hadland.

After the shooting death of Hadland, the police wired Carroll on two occasions, and directed him to go and speak with Mr. H. at Simone's. In an

attempt to retrieve incriminating statements, the detectives told Carroll to tell various lies to whomever he spoke to at Simone's. On the recordings, the voices of Carroll, Espindola, and Petitioner were heard. Various statements of Carroll, Espindola, and Petitioner are heard on the recordings. Specifically, Carroll was heard on the recording saying that Petitioner had nothing to do with it (the murder of Hadland). Detective McGrath testified that the statement of Carroll was not one of the false statements that he had instructed Carroll to use.

At trial, both sides had transcripts of the tapes prepared by experts. For the first time, four years after the recordings were made, the State argued that a portion of the tape contained Petitioner stating something to the affect of, "I told you to take care of T.J.." The Court noted during argument on this issue that it did not hear this statement made by Petitioner. However, over objection the Court allowed the State to argue this new proposition.

Jury Instruction No. 15 defined conspiracy meaning an agreement to do something unlawful, whether the object of the agreement is successful or not. Instruction No. 20 defined aiding and abetting, declaring that a person aids and abets the commission of a crime that he knowingly and with criminal intent aids, promotes, encourages or instigates by act or advice, or by act and advice, the commission of such crime with the intention that the crime be committed.

The verdict in this case reveals that the jury determined that the Petitioner was guilty of conspiracy to commit battery with a deadly weapon/battery with intent to cause substantially bodily harm, and guilty of second degree murder with the use of a deadly weapon.

Based upon Instructions No. 31 and 33, the jury was instructed that if it found the Petitioner guilty of murder of the second degree, it must determine whether or not a deadly weapon was used in a commission of the crime; and the deadly weapon enhancement could be found even if the Petitioner did not personally himself use the weapon, as long as the unarmed defender had knowledge that the deadly weapon would be used. Instruction No. 19 advised the jury that murder in the second degree could be a general intent crime; and the Petitioner could be liable under either a conspiracy theory or aiding or abetting theory for murder in the second degree for acts committed by a co - conspirator, if the killing is one of the reasonably foreseeable, probable and natural consequences of the object of the conspiracy or the aiding and abetting. Likewise, Instruction No. 22 advised the jury that where several parties joined together in a common design to commit any unlawful act, each is criminally responsible for the reasonably foreseeable general intent crimes committed in furtherance of the common design. The Instruction again charged that battery is a general intent

crime, as is second degree murder. (See: Ground III, post)

Based upon the rationale of Fiegehen v. State, 121 Nev. 293, 113 P.3d 305 (2005), the fact that the jury found Petitioner guilty of conspiracy to commit a battery, rather than conspiracy to commit murder, and also found petitioner guilty of second degree murder, means that the jury must have alighted on the deadly weapon enhancement based upon the conspiracy theory, as augmented by Instruction Nos. 21 and 23. The jury could not have based this verdict upon an aiding and abetting theory, because pursuant to NRS 195.020, aiding and abetting would make the Petitioner just as liable as it would be if he committed the offense, meaning than on an aiding and abetting theory he would be as guilty as Counts, and thus would have been found guilty of first degree murder.

However, per Moore v. State, *supra*, a deadly weapon sentencing enhancement cannot apply to a conviction for conspiracy. The rationale is that a conspiracy does not require an overt act; the crime (in Nevada) is completed when the unlawful agreement is reached. Therefore, a defendant cannot "use" a deadly weapon to commit a crime which is completed before the deadly weapon has ever been used. Moore, 117 Nev. at 662-63, 27 P.3d at 450.

In this case, the jury was given the opportunity in its verdict to find the defendant guilty of second degree murder without the use of a deadly weapon.

Had defense counsel tendered a "Moore" instruction, i.e., that if the jury found the defendant guilty of a conspiracy to commit battery and guilty of murder on a conspiracy theory, it must not return a guilty verdict as to the deadly weapon enhancement, it is reasonably likely that the jury would not found Petitioner responsible for Counts' use of the weapon.

Alternatively, the point could have been raised after verdict within seven days on an NRS 175.381(2) motion; and had counsel file such a motion, the Court would have been constrained to have granted it and to have entered a judgment of conviction without regard to an NRS 193.165 enhancement.

Accordingly, counsel was prejudicially ineffective in failing to seek the giving of a Moore instruction and/or in failing to file a timely NRS 175.381(2) motion on this point.

II.

GROUND II

Petitioner was deprived of his Fifth, Sixth and Fourteenth Amendment rights to a fair trial, to due process of law, and to effective assistance of counsel (at trial and on direct appeal), in the following regards:

Counsel failed and refused to tender a jury instruction that out - of - court statements made by co - conspirators may not be considered against the Petitioner

if the statements themselves are the only evidence of the Petitioner's participation in the conspiracy. That is, counsel failed and refused to tender an instruction that would read: "The Court has conditionally admitted co - conspirator statements made during and in furtherance of a conspiracy, of which the State charges that both the declarant and Petitioner were members. However, if you find that there is no evidence independent of those statements that the Petitioner joined a conspiracy [to batter or kill or otherwise harm T.J. Hadland], you are instructed to disregard those statements." Counsel also failed to raise the issue herein on direct appeal as an assignment of plain error, although appellate counsel did indirectly reference the point of this ground in the appellate briefs.

The allegations contained in Ground I are incorporated by this reference as though more fully set forth.

Counsel vigorously objected to Instruction No. 40, which read:

> "Whenever there is evidence that a conspiracy existed, and that the Defendant was one of the members of the conspiracy, then the statements and the acts by any person likewise a member maybe considered by the jury as evidence in the case as to the Defendant found to have been a member, even though the statements and acts may have occurred in the absence and without the knowledge of the Defendant, provided such statements and acts were knowingly made and done during the continuance of such conspiracy, and in furtherance of some object or purpose of the conspiracy.
>
> This holds true, even if the statement was made by the co - conspirator prior to the time the Defendant entered the conspiracy, so long as the co -

conspirator was a member of the conspiracy at the time.

The statements of the co - conspirator after his withdrawal from the conspiracy were not offered, and may not be considered by you, for the truth of the matter asserted. They were only offered to give context to the statements made by the other individuals who are speaking, or as adoptive admissions or other circumstantial evidence in the case.

An adoptive admission is a statement of which a listener has manifested his adoption or belief in its truth."

Not only did counsel vigorously object to this instruction, he made it his first issue on appeal. Indeed, had this conviction occurred in federal court, the giving of this instruction would have constituted reversible error pursuant to United States v. Ammar, 714 F.2d 238, 249 (3d Cir. 1983).

However, this instruction was consistent with McDowell v. State, 103 Nev. 527, 529, 746 P.2d 149, 150 (1987). Ordinarily, federal court decisions interpreting the Federal Rules of Evidence are considered as "persuasive authority" in determining the issue at hand, when the issue involves a Nevada Revised Statute NRS counterpart to the Federal Rules of Evidence. See: Hallmark v. Eldridge, 124 Nev. 492, 498, 189 P.3d 646, 650 (2008); Tomlinson v. State, 110 Nev. 757, 761, 878 P.2d 311, 313 (1994); Emil v. State, 105 Nev. 858, 862, 784 P.2d 956, 958-59 (1989). For whatever reason, the Nevada Supreme Court did not overrule McDowell, even though it is inconsistent with Fed. R. Evid. Rule

801(d)(2)(E) as consistently interpreted post-1987, and even though McDowell post - dates United States v. Bourjaily, 483 U.S. 171 (1987).

However, Bourjaily must be reconsidered in light of Crawford v. Washington, 541 U.S. 36 (2004) and Davis v. Washington, 547 U.S. 813 (2006). Crawford and Davis do not overrule Bourjaily; but Bourjaily relies on Ohio v. Roberts in support of its conclusion[1], but Ohio v. Roberts was abrogated by Crawford.[2]

Bourjaily holds that a statement of a co - conspirator to another co - conspirator that truly has been made in the course and scope of and truly in furtherance of a conspiracy does not, in of itself, implicate the Confrontation Clause. But while the outcome of Bourjaily was correct based on its facts[3], Crawford makes clear that testimonial hearsay statements are subject to the Confrontation Clause, whether or not such statements also fall within the hearsay exception. 541 U.S. at 56. See: United States v. Baines, 486 F. Supp.2d 1288, 1299-1300 (D.N.M. 2007).

As noted in United States v. Lombardozzi, 491 F.3d 61, 75-77 (2d Cir.

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[1]483 U.S. at 182, 197 S.Ct. at 2782

[2]541 U.S. at 60-69.

[3]Crawford, 541 U.S. at 68.

2007), the Confrontation Claus analysis does not turn on whether the co - conspirator's out - of - court statement is made to the police or not.[4] That is, even if a statement is admissible under the evidentiary rules, the statement may nevertheless implicate the Sixth Amendment's Confrontation Clause. Walker v. State, ___ S.W.3d ___, 2013 WL1154209 (Tex. App. 2013) at 4*, citing Crawford and other cases.

The Colorado Court of Appeals has engaged in the correct analysis in People v. Balles, ___ P.3d ___, 2013 WL2450721 at 8-9 * (Colo. App. 2013):

When an out - of - court statement made by a co- conspirator who is unavailable for testimony that implicates the defendant is introduced at trial, the Sixth Amendment Confrontation Clause analysis does not turn on whether the statement was made to the police, or when the conspiracy technically ended; it turns on whether the statement was made under circumstances that made the statement inherently reliable. If so, the statement is non testimonial hearsay and is not admissible under the Sixth Amendment. If not, it is testimonial hearsay subject to the rule of Crawford and is thus inadmissible.

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[4]In Lombardozzi, the statement in question was made during the co - conspirator's guilty plea canvas, obviously well after the conspiracy had terminated. The Government conceded that introduction of this evidence violated Crawford.

In this case, virtually every witness who was asked testified that DeAngelo Carroll is inherently an unreliable person. He clearly was an unavailable co - conspirator, and the testimony regarding Carroll's out - of - court statements implicating Petitioner constituted critical evidence in adjudicating Petitioner's guilt. Additionally, Carroll's statements in that regard were controverted by Luis Hidalgo, Jr. (Mr. H.), Anabel Espindola, and indeed, by Mr .Carroll himself post - murder. Otherwise, what we have in this case are Petitioner's statements such as "take care of business, like Gilardi and Rizzolo" [whatever that means]; "get the bats and bags" [again, whatever that means]; "go to Plan B" [again, whatever that means]; "Mr. H. wants someone "dealt with" [again, whatever that means]; and, post - murder, "use rat poison." There is simply no evidence of any "rat poison", "bats or bags," or "actions similar to that used by Rizzolo and Gilardi" in this case whatsoever.

In federal court, post - Bourjaily, out - of - court statements made by co - conspirators may not be considered against the Petitioner if the statements themselves are the only evidence of the Petitioner's participation in the conspiracy. See: United States v. Padilla, 203 F.3d 156, 161 (2d Cir. 2000); United States v. Clark, 18 F.3d 1337, 1341-42 (6th Cir.) *cert denied*, 513 U.S. 852 (1994); United States v. Gordon, 844 F.2d 1397, 1402 (9th Cir. 1998). So, the

above - reference hypothetical jury instruction would be completely in accord with these authorities, as well as United States v. Tracy, 12 F.3d 1186, 1199 (2d Cir. 1993).

Had the above instruction been given, a reasonable juror who followed it would not have convicted Petitioner. Independent of Petitioner's out - of - court statements to co - conspirators (particularly Carroll), there really is no evidence that he joined the conspiracy to kill or even injure Hadland. And, there certainly is no evidence that Petitioner had anything to do with "paying off" Carroll after the fact.

Accordingly, had counsel tendered such an instruction, the Court would have constrained to give it. Alternatively, had the Court not given it, the Nevada Supreme Court, following Bourjaily and the federal cases construing Bourjaily and the Sixth Amendment Confrontation Clause, would have been constrained to reverse based on the refusal to give such hypothetical instruction.

Prejudice may be considered singly with this ground, or in cumulation with the other grounds presented herein.

III.

GROUND III

Petitioner was deprived of his Fifth, Sixth and Fourteenth Amendment

Rights to the Federal Constitution to due process of law, to a fair trial, and to effective assistance of counsel (at trial and on direct appeal), in the following regards:

Without objection, the Court gave Instruction No. 19, which read:

"Murder in the First Degree is a specific intent crime. A defendant cannot be liable under conspiracy and/or aiding and abetting theory for First Degree Murder for acts committed by a co - conspirator, unless the defendant also had a premeditated and deliberate specific intent to kill.

Murder in the Second Degree may be a general intent crime. As such, the defendant may be may [sic] liable under conspiracy theory or aiding or abetting theory for Murder of the Second Degree for acts committed by a co - conspirator if the killing is one of the reasonably foreseeable probable and natural consequences of the object of the conspiracy or the aiding and abetting."

The Court also gave Instruction No. 20, which states:

"Where two or more persons are accused of committing a crime together, their guilt may be established without proof that each personally did every act constituting the offense charged.

All persons concerned in the commission of a crime who either directly and actively commit the act constituting the offense who knowingly and with criminal intent aid and abet in its commission or, whether present or not, who advise and encourage its commission, with the intent that the crime be committed, are regarded by the law as principals in the crime thus committed and are equally guilty thereof.

A person aids and abets the commission of a crime if he knowingly and with criminal intent aids, promotes, encourages or instigates by act or advice, or by act and advice, the commission of such crime with the intention that the crime be committed.

The State is not required to prove precisely which defendant actually committed the crime and which defendant aided and abetted."

The Court also gave Instruction No. 22, which stated:

"Where several parties joined together in a common design to commit any lawful [sic] act, each is criminally responsible for the reasonably foreseeable general intent crimes committed in furtherance of the common design. In contemplation of law, as it relates to general intent crimes, the act of one is the act of all. Battery, battery resulting in substantial bodily harm and battery with a deadly weapon are general intent crimes. Second Degree Murder can be a general intent crime.

Additionally, a co - conspirator is guilty of the offenses he specifically intended to be committed. First Degree Murder is a specific intent crime."

In their totality, these three unobjected-to instructions lowered the State's burden of proof by enabling the State to obtain a second degree murder conviction without proof that the Petitioner engaged in behavior that demonstrated an abandoned and malignant heart, and enabling the State to obtain a second degree murder conviction without proof that the Petitioner engaged in behavior that was the proximate cause of the death of T.J. Hadland.

Although appellate counsel loosely referenced this point in the appellate briefs, counsel did not make this an assignment of error therein or argue it as a matter of plain error.

Petitioner realleges Grounds I and II and incorporates them herein by this reference as though more fully set forth.

Essentially, what these three unobjected - to instructions told the jury was this: If the jury found that the Petitioner joined a conspiracy to batter Hadland, even if the Defendant/Petitioner was not considered a "co - conspirator" by the other conspirators, even if the Defendant/Petitioner did nothing in furtherance of the conspiracy to batter or to murder Hadland, and even if the Defendant/Petitioner's knowledge of the conspiracy was so slight that he could not foresee that someone like Counts (whether or not he knew Counts or knew that Counts was a member of a conspiracy to batter) would kill someone like Hadland, that nevertheless made him a second degree murderer.

But at no time were these instructions objected to or raised even as plain error on direct appeal. Counsel were prejudicially ineffective in failing to so argue.

While Bolden v. State, 121 Nev. 908, 922, 124 P.3d 191, 201 (2005) notes that vicarious co - conspirator liability may be properly imposed for general intent crimes only when the crime in question was a "reasonably foreseeable consequence" of the object of the conspiracy, Bolden also notes that the "vicarious co - conspirator liability" theory may not apply if it appears that the theory of liability is alleged for crimes too far removed and attenuated from the object of the conspiracy.

Bolden is not inconsistent with People v. Prettyman, (1996) 14 Cal. 4th 248, 58 Cal. Rptr.2d 827, 926 P.2d 1013. Prettyman and the follow - up case of People v. Hickles, 66 Cal. Rptr.2d 86 (Cal. App. 1997) require the judge to instruct the jury to identify specifically the potential target offense that the defendant engaged in, and specifically find by special verdict that the offense *actually committed* was a natural and probable consequence of the conspiracy the defendant engaged in. That is, a conviction may not be based on the jury's generalized belief that the defendant intended to assist and/or encourage unspecified "nefarious" conduct. To ensure that the jury would not rely on such a generalized belief as a basis for conviction, the trial court must instruct the jury in effect to return a special verdict identifying and describing each potential target offense supported by the evidence, and specifically find that the actual "vicarious liability offense" was a natural and probable consequence of what the defendant actually agreed to. See: Hickles, 66 Cal. Rptr.2d at 92-93.

Here, the instructions given simply did not go far enough in accurately depicting and defining the circumstances upon which a defendant can be vicariously liable for murder based upon a "conspiracy theory."

First off, it is incomplete and not completely accurate to say that Second Degree Murder "can be" a general intent crime. The hallmark of Second Degree

Murder is implied malice, or circumstances establishing an abandoned and malignant heart. NRS 200.020(2); NRS 200.030(2). Thus, for example, even if a defendant does not act with a specific intent to kill, when he utilizes a handgun in a deadly and dangerous manner, he establishes a malicious lack of concern for human life. See: McCurdy v. State, 107 Nev. 275, 278, 809 P.2d 1265, 1267 (1991); Keys v. State, 104 Nev. 736, 740, 766 P.2d 270, 272 (1988). Thus, Second Degree Murder would require the defendant to intend to do something in a dangerous and deadly manner.

But the unobjected-to instructions allowed the jury to return a second degree murder verdict, even in the absence of any evidence that the Petitioner acted with an abandoned and malignant heart toward Hadland.

Secondly, in the area of "second - degree felony murder", the jury must be instructed that the underlying felony that the defendant has committed, in the manner in which he committed it, was the proximate cause of the death in question. Rose v. State, 127 Nev. Ad. Op. 43, 255 P.3d 291 (2011) [reversed]. And, per Ramirez v. State, 126 Nev. Ad. Op. 22, 235 P. 3d 619, 622-23 (2010), the jury must be instructed that "causation" means there must be an *immediate and direct* causal relationship between the felonious actions of the defendant and the victim's death. That is, per Rose, the underlying felony itself (in that case, assault

with a deadly weapon) does not create the basis for vicarious liability (i.e., "merge" with second degree murder); the issue is whether the defendant committed the underlying felony with the intent commensurate with second degree murder. See: Rose, 295 P.3d at 296-97. Accord: Ramirez, 235 P.3d at 622 n.2.

The law of "vicarious felony second degree murder" and "vicarious second degree murder liability based on a conspiracy theory" must be harmonized. After all, both theories are nowhere contained in the Nevada Revised Statutes; both are judge-made theories that have as their source the definitions of murder in NRS ch. 200. It is basic that defining crimes and fixing penalties are legislative, not judicial functions. United States v. Evans, 333 U.S. 483, 486 (1948). The judiciary should not enlarge the reach of an enactment of crimes by constituting them from anything less than the incriminating components contemplated by the words used in the statute. Morrissette v. United States, 342 U.S. 246, 263 (1952). Courts interpret, rather than author, the criminal code. United States v. Oakland Cannabis Buyers' Co-Op, 532 U.S. 483, 494 n. 7 (2001).

Therefore, it is not enough to say that the crime that the defendant committed (in Rose, assault with a deadly weapon; here, conspiracy to commit battery) could hypothetically have death of the victim as a natural and probable consequence; the jury must be instructed that, to return a second degree murder

guilty verdict, the defendant's acts, in terms of what he actually did and what he actually intended to do, demonstrated an abandoned and malignant heart, and were the immediate and direct cause of the victim's death, and were the natural and probable consequence of death to the victim.

The state of the evidence presented is not only did Petitioner never agree to a conspiracy to murder Hadland, or even to shoot Hadland, but at best signed off on the proposition of "taking care of Hadland," meaning at worst to pull Hadland aside and tell him to shut his mouth, "smacking him around" if necessary to get the message across to shut up. As both Kevin Kelly and Pee - Lar Handley testified, Hadland's activity with the Palomino Club, v.i.p. cards, and tips to cab drivers would not have rationally led to "discipline by murder." And a reasonable jury could conclude that what Petitioner did agree to (if he agreed to anything) would not by itself show a general malignant recklessness or disregard toward Hadland's life.

Thus, if the jury had been given a Prettyman instruction, especially tempered by Rose and Ramirez, a jury understanding the concept likely would not on this evidence have found Petitioner guilty of second degree murder.

Accordingly, trial counsel was ineffective in failing to tender such an instruction as well as failing to object to the above-referenced three Instruction

Nos. 19, 20 and 22, and failing to raise the point of this ground as an assignment of plain error on direct appeal.

The prejudice from counsel's deficiencies may be measured individually, or in cumulation with the other areas of prejudice identified and found by the Court.

WHEREFORE, Petitioner prays that the Court grant Petitioner the relief to which Petitioner may be entitled in this proceeding.

DATED this 20 day of December, 2013.

Luis Hidalgo, III, #1038133
Northern Nevada Correctional Center
P.O. Box 7000
Carson City, NV 89702

By: _____
Luis Hidalgo, III

Prepared by:

LAW OFFICES OF RICHARD F. CORNELL
150 Ridge Street, Second Floor
Reno, NV 89501

By: _____
Richard F. Cornell

VERIFICATION

Under penalty of perjury, the undersigned declares that the undersigned is the Petitioner named in the foregoing Petition and knows the contents thereof; that the pleading is true of the undersigned's own knowledge, except as to those matters stated on information and belief, and as to such matters the undersigned believes them to be true.

Petitioner

Attorney for Petitioner

EIGHTH JUDICIAL DISTRICT COURT
COUNTY OF CLARK, STATE OF NEVADA

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding document, Petitioner for Writ of Habeas Corpus (Post-Conviction) filed in case number:

C212667/C241394

☒ Document does not contain the social security number of any person.

☐ Document contains the social security number of a person as required by:

☐ A specific state or federal law, to wit:

_____
(State specific state or federal law)

-or-

☐ For the administration of a public program

-or-

☐ For an application for a federal or state grant.

-or-

☐ Confidential Family Court Information Sheet
(NRS 125.130, NRS 125.230 and NRS 125B-055)

Date: 1-2-14

(Signature)

Luis Hidalgo, III
(Print Name)

42

CERTIFICATE OF SERVICE

Pursuant to N.R.C.P. 5(b), I certify that I am an employee of LAW OFFICES OF RICHARD F. CORNELL, and that on this date I caused to be , deposited for mailing in the United States Mail a true and correct copy of the foregoing document, addressed to:

Nancy A. Becker
Chief Deputy District Attorney
Regional Justice Center
200 Lewis Avenue
Las Vegas, Nevada 89155-2211

DATED this 2nd day of January, 2014.

Marianne Tom-Kadlic
Legal Assistant to Richard F. Cornell

3

SUPP PET
Law Offices of Richard F. Cornell
150 Ridge Street, Second Floor
Reno, NV 89501
Nevada Bar 1553
(775)329-1141
Attorney for Petitioner

EIGHTH JUDICIAL DISTRICT COURT FOR THE STATE OF NEVADA

AND FOR THE COUNTY OF CLARK

LUIS HIDALGO, III, Petitioner, v. ISIDRO BACA, WARDEN, NORTHERN NEVADA CORRECTIONAL CENTER; AND J. GREG COX, DIRECTOR OF THE NEVADA DEPARTMENT OF CORRECTIONS, Respondents.	CASE NO. 05C212667-2 DEPT NO. XXI

SUPPLEMENTAL PETITION FOR WRIT FOR *HABEAS CORPUS* (POST-CONVICTION)

1. Name of institution and county in which you are presently imprisoned or where and how you are presently restrained of your liberty:

Northern Nevada Correctional Center, Carson City, Nevada.

2. Name and location of court which entered the judgment of conviction under attack:

Eighth Judicial District of the State of Nevada, Clark County.

3. Date of judgment of conviction:

June 25, 2009.

4. Case number:

C212667 and C241394, consolidated.

5. a) Length of sentence:

Life imprisonment with a possibility of parole after service of 10 years in the Department of Corrections; enhanced by an equal term per NRS 193.165; and concurrent terms of imprisonment for conspiracy to commit a battery with a deadly weapon or battery resulting a substantial bodily harm, and solicitation to commit murder.

b) If sentence is death, . . . :

N/A.

6. Are you presently serving a sentence for a conviction other than the conviction under attack in this petition?

No.

7. Nature of offense involved in conviction being challenged:

Murder in the second degree and deadly weapon enhancement.

8. What was your plea?

Not guilty.

9. If you entered a plea of guilty or guilty by mentally ill to one count of an indictment or information, . . .:

N/A.

10. If you were found guilty or guilty of a mentally ill after a plea of not guilty, who made the finding?

Jury.

11. Did you testify at the trial?

No.

12. Did you appeal from the judgment of conviction?

Yes.

13. If you did appeal, answer the following:

a) Name of court:

Supreme Court of the State of Nevada.

b) Case number or citation:

Docket number 54272.

c) Result:

Order of Affirmance.

d) Date of result:

Order of Affirmance filed June 21, 2012. Order Denying *En Banc* Reconsideration: November 13, 2012. Remittitur issued: April 23, 2013.

14. If you did not appeal, . . . :

N/A.

15. Other than the direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications or motions with respect to this judgment in any court, State or federal?

No.

16. If you answer to no. 15 was "yes," . . .:

N/A.

17. Has any ground being raised in this petition been previously presented to this or any other court by way of petition for *habeas corpus*, motion, application or any other post-conviction proceeding?

No.

18. If any of the grounds listed in NOS. 23(a) et. seq. were not previously presented in any other court, state or federal, list briefly what grounds were not so presented, and give your reasons for not presenting them:

The grounds asserted herein are premised upon ineffective assistance of counsel. In Nevada, claims of ineffective assistance of counsel generally are not reviewed on direct appeal. The Nevada Supreme Court has consistently held that the proper vehicle for review of counsel's effectiveness is a post-conviction relief proceeding. See: Pellegrini v. State, 117 Nev. 860, 881-84, 34 P.3d 519, 533-35 (2001) [claims of ineffective assistance of counsel brought in a timely first post-conviction petition for a writ of *habeas corpus* are not subject to dismissal on grounds of waiver, regardless of whether the claims could have been appropriately raised on direct appeal. Trial court error may be appropriately raised in a timely first post-conviction petition in the context of claims of ineffective assistance of counsel, but independent claims based on the same error are subject to waiver bars because such claims could have been presented to the trial court or raised in a direct appeal]. See also: Corbin v. State, 111 Nev. 378, 381, 892 P.2d 580, 582 (1995); Gibbons v. State, 97 Nev. 520, 522-23, 634 P.2d 1214, 1216 (1981).

19. Are you filing this petition more than one year following the filing of the judgment of conviction or the filing of a decision on direct appeal?

Petitioner filed his Petition within one year of the issuance of the remittitur. See: NRS 34.726(1); Gonzales v. State, 118 Nev. 590, 593, 53 P.3d 901, 902 (2002). This Supplemental Petition is filed within the time allotted by the Court on

March 11, 2014. Therefore the Petition was filed timely, and so is this Supplemental Petition. See: State v. Powell, 122 Nev. 751, 756-58, 138 P.3d 453, 457-58 (2006).

20. Do you have any petition or appeal now pending in any court, either State or Federal, as to the judgment under attack?

No.

21. Give the name of each attorney who represented you in the proceeding resulting in your conviction and on direct appeal:

John L. Arrascada, Esq., Reno, Nevada; Christopher W. Adams, Esq., Charleston, South Carolina.

22. Do you have any future sentences to serve after you complete the sentence imposed by the judgment under attack?

No.

23. State concisely every ground on which you claim that you are being held unlawfully. Summarize briefly the facts supporting each ground. If necessary you may attach pages stating additional grounds and facts supporting the same:

I.

GROUND I

Petitioner's federal constitutional rights under the Fifth, Sixth and Fourteenth Amendments to due process of law, to a fair trial, and to effective assistance of counsel were impinged in the following regards:

Counsel failed and refused to tender a jury instruction, consistently with Moore v. State, 117 Nev. 659, 662-63, 27 P.3d 447, 450 (2001), directing the jury not to find the existence of the deadly weapon enhancement of NRS 193.165 if the jury were to find the defendant guilty of second degree murder on a conspiracy theory. This Motion is based upon the following facts:

This case involved the murder of Timothy (TJ) Hadland on May 19, 2005 in the late evening hours near Lake Mead. It is undisputed that the killer was one Kenneth Counts. It also cannot seriously be disputed but that the linchpin of the murder case was one De Angelo Carroll, who lured Hadland to the spot where Counts murdered him.

The evidence in support of Petitioner's conviction, particularly as it existed up to the end of Hadland's life, was "conspiracy theory" evidence that consisted essentially of out - of - court statements of co - conspirators. I.e., there is no evidence that Petitioner was the perpetrator, and really no evidence that he aided and abetted Hadlund's murder.

There also cannot be doubt that the "conspiracy theory" evidence as such

was highly controverted.

Lewis Hidalgo, Jr., also known as "Mr. H.," was the owner of a gentleman's club, the Palomino Club, and an autobody shop name Simone's Autobody. Each of Mr. H.'s businesses was located in Las Vegas. Mr. H.'s girlfriend, Anabel Espindola ("Espindola"), was the general manager and business administrator of the Palomino Club. In fact, she ran every aspect of the club. Espindola was also the general manager of Simone's Autobody. Petitioner was "Mr. H.'s son." Petitioner assisted at the club doing menial jobs and played no part in making business decisions.

Per Espindola, on May 19, 2005 while at Simone's she received a telephone call from Carroll, an employee of the Palomino Club, who stated that Hadland was "badmouthing" the Palomino Club. Per Espindola, after she got off the telephone, Mr. H. and Petitioner were present in her office and she told them what Carroll had stated to her. She stated that upon receiving the information, Petitioner became very angry with Mr. H. because Petitioner believed that Mr. H. was not going to do anything to Hadland for his actions. Espindola testified that Petitioner entered into a verbal argument with Mr. H., in which Petitioner stated that Mr. H. would never be like "Gallardi and Rizzolo" (on information and belief, two strip club owners from Las Vegas with prior legal troubles involving bribery of county

commissioners) because "they care of business." Espindola further testified that Mr. H. told Petitioner to mind his own business and that Petitioner then left the building. (That is, if we believe this testimony, Petitioner did not "aid and abet" anything, because his wishes were instantly disregarded.)

Mr. H., however, testified that this meeting between him, Petitioner and Espindola never occurred. Mr. H. further stated that Petitioner never made any statement to him regarding Gallardi and Rizzolo. Mr. H. did testify, however, that he learned of TJ's behavior from Carroll in Mr. H.'s office at the Palomino Club in the presence of Espindola. Mr. H. testified that Petitioner was not present at that time. But Mr. H. testified that he (Mr. H.) did not think Hadland's actions were a problem. Per Mr. H., both he and Espindola suggested to Carroll that Carroll talk to Hadland about it. Specifically, Mr. H. testified that upon Carroll leaving his office, he told Carroll something to the fact to tell Hadland to stop it or stop "spreading shit."

Per Espindola, after Petitioner left the office at that time, he left Simone's and she did not see him again on that night. Further, she was with Mr. H. for the duration of the evening of May 19-20, 2005, and Mr. H. did not speak with Petitioner at that time. Likewise, Espindola did not speak to Petitioner during that time frame, and Espindola never saw Mr. H. and Petitioner together that evening.

Further, after Petitioner left Simone's after the so - called argument, no discussion or agreement was reached between Mr. H. and Petitioner to speak to Hadland about his "bad mouthing the club," to threaten Hadland, or to kill Hadland.

Espindola further testified that after she left Simone's on May 19, 2005, she went to the Palomino Club. Once at the Palomino Club, Espindola stated she and Mr. H. were in Mr. H.'s office when Carroll came into the office and had a discussion which she did not hear because she was not paying attention. She testified that Mr. H. and Carroll walked out of Mr. H.'s office, and sometime later Mr. H. returned to his office with "P.K." Handley, who worked with the club as an independent contractor on regarding lighting and other issues.

Espindola testified that this point Mr. H. asked her to follow him to the kitchenette area of his office, which she did. While in the kitchenette area of Mr. H.'s office, Espindola testified that Mr. H. told her to call Carroll and tell him "to go to plan B." Espindola testified that she called Carroll and told him that and Carroll stated, "I'm already here." After that the telephone was disconnected. Espindola thought something bad was going to happen to T.J. and she tried calling Carroll back, but could not get connected. She testified that she then went back into Mr. H.'s office and told Mr. H. that she told Carroll to "go to plan B," but did not say anything else to Mr. H. because he then walked out of the office with

Handley.

Handley testified that on the evening of May 19, 2005 he met in Mr. H.'s office twice. The first time was with Mr. H., Espindola, and Petitioner regarding the firing of Carroll. At that meeting, he testified that Petitioner attempted to call Carroll to determine Carroll's whereabouts and the location of the club's limousine. The second meeting was with Mr. H. and Espindola in Mr. H.'s office at the Palomino Club around 11 p.m.. Handley stated that he never saw Mr. H. and Espindola walk into the kitchenette area of his office. Handley testified that after his meeting with Mr. H. and Espindola around 11 p.m., he saw Carroll at the Palomino Club. Carroll looked disturbed. Carroll stated he needed to see Espindola and Mr. H. because he "fucked up." Handley also testified that Carroll was with Counts, and Rontae Zone and Jason Taoipu were outside. Handley testified he never saw Carroll again that night and did not know where he went in the Palomino Club. Handley further testified that when Carroll was looking for Mr. H. and Espindola on May 19 he never told Handley that he needed to speak to Petitioner.

Espindola claimed that awhile later on May 20, 2005 Mr. H. came back into the office and Carroll then knocked on the door of office. She claimed she was present when Carroll came into Mr. H.'s office and Carroll sat down and looked at

Mr. H. and said "it's done." Espindola testified that Mr. H. then looked at her and said "go get five out of the safe." Throughout her testimony, Espindola confirmed that Petitioner did not plan any action regarding Hadland, did not participate in any action against Hadland and did not pay any money regarding any action against Hadland.

Mr. H., on the other hand, testified that he never asked or insinuated to anybody, including Carroll, to have Hadland harmed. He further testified that he never asked Espindola to call Carroll and tell him to go to "Plan B." Mr. H. testified that he first learned that Hadland was harmed when Carroll came into his office at the Palomino Club in the late hours of May 19, 2005 when Espindola was present. While in Mr. H.'s office, Carroll, who was noticeably disturbed, said to Espindola, "Ms. Anabel, I fucked up" and that "the dude got out of the car and put the bullet in the guy's head." Mr. H. testified that he looked at Carroll and said, "what the fuck did you do?" He stated that Espindola stood up from the chair, put her hands on her face, and said, "Oh my God" several times and then called Carroll a stupid, stupid man. Mr. H. then stated that Carroll asked for money and stated that the shooter was a gang member. The fact that the shooter was a gang member frightened Mr. H., which prompted him to wave his hand for Espindola to get the cash.

Rontae Zone, a friend of Carroll's, who assisted Carroll at his job at the Palomino Club by passing out fliers with Carroll to promote the Palomino Club, testified on behalf of the State. On the night of May 19, 2005, Zone was with Carroll and with his friend, Taoipu. Zone testified that during the afternoon hours of May 19, 2005, Carroll told Zone and Taoipu that "Little Lou was - said that Mr. H. wanted someone killed"; however, Zone later stated that the word used was not "killed" but instead "dealt with." On cross-examination, Zone admitted that he previously testified that the words came from Mr. H. to Carroll instead of from Mr. H to Petitioner to Carroll.

Zone further testified that Carroll told him that Petitioner had spoken about baseball bats and trash bags; however, no baseball bats and trash bags were ever discovered or seized.

In other words, again, if we believe this hearsay testimony, Petitioner may have made suggestions on how to kill Hadland and dispose of his body, but his suggestions were apparently rejected out of hand.

In addition, at a previous court proceeding (the murder trial of Counts), Taoipu testified that Espindola was the person who commented on baseball bats and trash bags. Zone further stated that he never personally spoke with Petitioner, and everything Zone heard regarding statements of Petitioner came from Carroll.

Further, Zone knew that Carroll told lies. Carroll's general character as a "liar" was confirmed by the detectives who worked the case.

Later on May 19, 2005, Zone testified that they went out promoting in a white Astro van and subsequently picked up Counts at his home and drove out to Lake Mead. Zone stated that on the way to Lake Mead, Carroll communicated with Petitioner; however, the call was about Petitioner telling Carroll to come back to work.

Zone also stated they were going to meet up with Hadland and that he was going to be killed; however, Carroll told Hadland that they were coming to smoke marijuana together. Zone testified that he heard Carroll on the telephone with Espindola and Zone heard Espindola say "go to Plan B," and Carroll stated, "we're too far along, Ms. Anabel." Zone testified that once they arrived at Lake Mead, they met Hadland, who came to Carroll's window and engaged in a conversation with Carroll. At that time Counts exited the van and shot Hadland in the head.

After the shooting, Zone testified that they drove back to the Palomino Club and Carroll and Counts went inside the club. When Counts exited at the Palomino Club he got into a taxi cab. Next, Carroll and Zone went to Carroll's house and then took the Astro van out and slashed and removed the tires. Carroll had new tires put on the van and had the van interior clean and washed. Zone testified that

they subsequently went to Simone's, where Carroll spoke with Mr. H. in the back room. Zone also testified that Carroll told him and Taoipu that Counts was paid $6,000.00 for the shooting. Zone, however, did not learn of this amount or have any conversation regarding this payment until after the shooting of Hadland.

After the shooting death of Hadland, the police wired Carroll on two occasions, and directed him to go and speak with Mr. H. at Simone's. In an attempt to retrieve incriminating statements, the detectives told Carroll to tell various lies to whomever he spoke to at Simone's. On the recordings, various statements of Carroll, Espindola, and Petitioner are heard. Specifically, Carroll's was heard on the recording saying that Petitioner had nothing to do with it (the murder of Hadland). Detective McGrath testified that said statement of Carroll was not one of the "false statements" that he had instructed Carroll to use.

At trial, both sides had transcripts of the tapes prepared by experts. For the first time, four years after the recordings were made, the State argued that a portion of the tape contained Petitioner stating something to the affect of, "I told you to take care of T.J.." The Court noted during argument on this issue that it did not hear this statement made by Petitioner. However, over objection the Court allowed the State to argue this new proposition.

Jury Instruction No. 15 defined conspiracy meaning an agreement to do

something unlawful, whether the object of the agreement is successful or not. Instruction No. 20 defined aiding and abetting, declaring that a person aids and abets the commission of a crime that he knowingly and with criminal intent aids, promotes, encourages or instigates by act or advice, or by act and advice, the commission of such crime with the intention that the crime be committed.

The verdict in this case reveals that the jury determined that the Petitioner was guilty of conspiracy to commit battery with a deadly weapon/battery with intent to cause substantially bodily harm, and guilty of second degree murder with the use of a deadly weapon.

Based upon Instructions No. 31 and 33, the jury was instructed that if it found the Petitioner guilty of murder of the second degree, it must determine whether or not a deadly weapon was used in a commission of the crime; and the deadly weapon enhancement could be found even if the Petitioner did not personally himself use the weapon, as long as the unarmed offender had knowledge that the deadly weapon would be used. Instruction No. 19 advised the jury that murder in the second degree could be a general intent crime; and the Petitioner could be liable under either a conspiracy theory or aiding or abetting theory for murder in the second degree for acts committed by a co - conspirator, if the killing is one of the reasonably foreseeable, probable and natural consequences

of the object of the conspiracy or the aiding and abetting. Likewise, Instruction No. 22 advised the jury that where several parties joined together in a common design to commit any unlawful act, each is criminally responsible for the reasonably foreseeable general intent crimes committed in furtherance of the common design. The Instruction again charged that battery is a general intent crime, as is second degree murder. (See: Ground III, post)

Based upon the rationale of Fiegehen v. State, 121 Nev. 293, 301-05, 113 P.3d 305, 310-12 (2005), the fact that the jury found Petitioner guilty of conspiracy to commit a battery, rather than conspiracy to commit murder, and also found petitioner guilty of second degree murder, means that the jury must have alighted on the deadly weapon enhancement based upon the conspiracy theory, as augmented by Instruction Nos. 21 and 23. The jury could not have based this verdict upon an aiding and abetting theory, because pursuant to NRS 195.020, aiding and abetting would make the Petitioner just as liable as it would be if he committed the offense, meaning than on an aiding and abetting theory he would be as guilty as Counts, and thus would have been found guilty of first degree murder.

However, per Moore v. State, *supra*, a deadly weapon sentencing enhancement cannot apply to a conviction for conspiracy. The rationale is that a conspiracy does not require an overt act; the crime (in Nevada) is completed when

the unlawful agreement is reached. Therefore, a defendant cannot "use" a deadly weapon to commit a crime which is completed before the deadly weapon has ever been used. Moore, 117 Nev. at 662-63, 27 P.3d at 450.

In this case, the jury was given the opportunity in its verdict to find the defendant guilty of second degree murder without the use of a deadly weapon. Had defense counsel tendered a "Moore" instruction, i.e., that if the jury found the defendant guilty of a conspiracy to commit battery and guilty of murder on a conspiracy theory, it must not return a guilty verdict as to the deadly weapon enhancement, it is reasonably likely that the jury would not have found Petitioner responsible for Counts' use of the weapon.

Alternatively, the point could have been raised after verdict within seven days on an NRS 175.381(2) motion; and had counsel file such a motion, the Court would have been constrained to have granted it and to have entered a judgment of conviction without regard to an NRS 193.165 enhancement.

Accordingly, counsel was prejudicially ineffective in failing to seek the giving of a Moore instruction and/or in failing to file a timely NRS 175.381(2) motion on this point.

II.

GROUND II

Petitioner was deprived of his Fifth, Sixth and Fourteenth Amendment rights to a fair trial, to due process of law, and to effective assistance of counsel (at trial and on direct appeal), in the following regards:

Counsel failed and refused to tender a jury instruction that out - of - court statements made by co - conspirators may not be considered against the Petitioner if the statements themselves are the only evidence of the Petitioner's participation in the conspiracy. That is, counsel failed and refused to tender an instruction that would read: "The Court has conditionally admitted co - conspirator statements made during and in furtherance of a conspiracy, of which the State charges that both the declarant and Petitioner were members. However, if you find that there is no evidence independent of those statements that the Petitioner joined a conspiracy [to batter or kill or otherwise harm T.J. Hadland], you are instructed to disregard those statements." Counsel also failed to raise the issue herein on direct appeal as an assignment of plain error, although appellate counsel did indirectly reference the point of this ground in the appellate briefs.

The allegations contained in Ground I are incorporated by this reference as though more fully set forth.

Counsel vigorously objected to Instruction No. 40, which read:

"Whenever there is slight evidence that a conspiracy existed, and that the

Defendant was one of the members of the conspiracy, then the statements and the acts by any person likewise a member maybe considered by the jury as evidence in the case as to the Defendant found to have been a member, even though the statements and acts may have occurred in the absence and without the knowledge of the Defendant, provided such statements and acts were knowingly made and done during the continuance of such conspiracy, and in furtherance of some object or purpose of the conspiracy.

This holds true, even if the statement was made by the co - conspirator prior to the time the Defendant entered the conspiracy, so long as the co - conspirator was a member of the conspiracy at the time.

The statements of the co - conspirator after his withdrawal from the conspiracy were not offered, and may not be considered by you, for the truth of the matter asserted. They were only offered to give context to the statements made by the other individuals who are speaking, or as adoptive admissions or other circumstantial evidence in the case.

An adoptive admission is a statement of which a listener has manifested his adoption or belief in its truth."

Not only did counsel vigorously object to this instruction, he made it his first issue on appeal. Indeed, had this conviction occurred in federal court, the giving of this instruction would have constituted reversible error pursuant to United States v. Ammar, 714 F.2d 238, 249 (3d. Cir. 1983). But this Ground consists of a different attack on Instruction No. 40, that could and should have been made in addition to the one counsel actually made.

This instruction was consistent with McDowell v. State, 103 Nev. 527, 529, 746 P.2d 149, 150 (1987). Ordinarily, federal court decisions interpreting the

Federal Rules of Evidence are considered as "persuasive authority" in determining the issue at hand, when the issue involves a Nevada Revised Statute NRS counterpart to the Federal Rules of Evidence. See: Hallmark v. Eldridge, 124 Nev. 492, 498, 189 P.3d 646, 650 (2008); Tomlinson v. State, 110 Nev. 757, 761, 878 P.2d 311, 313 (1994); Emil v. State, 105 Nev. 858, 862, 784 P.2d 956, 958-59 (1989). For whatever reason, the Nevada Supreme Court did not overrule McDowell, even though it is inconsistent with Fed. R. Evid. Rule 801(d)(2)(E) as consistently interpreted post-1987, and even though McDowell post - dates United States v. Bourjaily, 483 U.S. 171 (1987).

However, Bourjaily must be reconsidered in light of Crawford v. Washington, 541 U.S. 36 (2004) and Davis v. Washington, 547 U.S. 813 (2006). Crawford and Davis do not overrule Bourjaily; but Bourjaily relies on Ohio v. Roberts, 448 U.S. 56 (1980) in support of its conclusion[1], but Ohio v. Roberts was abrogated by Crawford.[2]

Bourjaily holds that a statement of a co - conspirator to another co - conspirator that truly has been made in the course and scope of and truly in furtherance of a conspiracy does not, in of itself, implicate the Confrontation

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[1]483 U.S. at 182, 197 S.Ct. at 2782

[2]541 U.S. at 60-69.

Clause. But while the outcome of Bourjaily was correct based on its facts[3], Crawford makes clear that testimonial hearsay statements are subject to the Confrontation Clause, whether or not such statements also fall within the hearsay exception. 541 U.S. at 56. See: United States v. Baines, 486 F. Supp.2d 1288, 1299-1300 (D.N.M. 2007).

As noted in United States v. Lombardozzi, 491 F.3d 61, 75-77 (2d Cir. 2007), the Confrontation Claus analysis does not turn on whether the co - conspirator's out - of - court statement is made to the police or not.[4] That is, even if a statement is admissible under the evidentiary rules, the statement may nevertheless implicate the Sixth Amendment's Confrontation Clause. Walker v. State, 405 S.W.3d 590, 596, (Tex. App. 2013), citing Crawford and other cases.

The Colorado Court of Appeals has engaged in the correct analysis in People v. Valles, ___ P.3d ___, 2013 WL2450721 at 8-9 * (Colo. App. 2013): When an out - of - court statement made by a co- conspirator who is unavailable for testimony that implicates the defendant is introduced at trial, the Sixth

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[3]Crawford, 541 U.S. at 68.

[4]In Lombardozzi, the statement in question was made during the co - conspirator's guilty plea canvas, obviously well after the conspiracy had terminated. The Government conceded that introduction of this evidence violated Crawford.

Amendment Confrontation Clause analysis does not turn on whether the statement was made to the police, or when the conspiracy technically ended; it turns on whether the statement was made under circumstances that made the statement inherently reliable. If so, the statement is non testimonial hearsay and is not admissible under the Sixth Amendment. If not, it is testimonial hearsay subject to the rule of Crawford and is thus inadmissible.

In this case, virtually every witness who was asked testified that DeAngelo Carroll is inherently an unreliable person. He clearly was an unavailable witness and a co - conspirator, and the testimony regarding Carroll's out - of - court statements implicating Petitioner constituted critical evidence in adjudicating Petitioner's guilt. Additionally, Carroll's statements in that regard were controverted by Luis Hidalgo, Jr. (Mr. H.), Anabel Espindola, and indeed, by Mr. Carroll himself post - murder. Otherwise, what we have in this case are Petitioner's statements such as "take care of business, like Gallardi and Rizzolo" [whatever that means]; "get the bats and bags" [again, whatever that means]; "go to Plan B" [again, whatever that means]; "Mr. H. wants someone "dealt with" [again, whatever that means]; and, post - murder, "use rat poison." There is simply no evidence of any "rat poison", "bats or bags," or "actions similar to that used by Rizzolo and Gallardi" in this case whatsoever. Simply put: Petitioner did

nothing that proximately resulted in Hadland's death.

In federal court, post - Bourjaily, out - of - court statements made by co - conspirators may not be considered against the Petitioner if the statements themselves are the only evidence of the Petitioner's participation in the conspiracy. See: United States v. Padilla, 203 F.3d 156, 161 (2d Cir. 2000); United States v. Clark, 18 F.3d 1337, 1341-42 (6th Cir.) *cert denied*, 513 U.S. 852 (1994); United States v. Gordon, 844 F.2d 1397, 1402 (9th Cir. 1998). So, the above - referenced hypothetical jury instruction at p. 19 would be completely in accord with these authorities, as well as with United States v. Tracy, 12 F.3d 1186, 1199 (2d Cir. 1993).

Had the above instruction referenced at p. 19 above been given, a reasonable juror who followed it would not have convicted Petitioner of murder. Independent of Petitioner's out - of - court statements to co - conspirators (particularly Carroll), there really is no evidence that he joined the conspiracy to kill or even injure Hadland. And, there certainly is no evidence that Petitioner had anything to do with "paying off" Carroll after the fact.

Accordingly, had counsel tendered such an instruction, the Court would have been constrained to give it. Alternatively, had the Court not given it, the Nevada Supreme Court, following Bourjaily and the federal cases construing

Bourjaily and the Sixth Amendment Confrontation Clause, would have been constrained to reverse based on the refusal to give such a hypothetical instruction.

Prejudice may be considered singly with this ground, or in cumulation with the other grounds presented herein.

III.

GROUND III

Petitioner was deprived of his Fifth, Sixth and Fourteenth Amendment Rights to the Federal Constitution to due process of law, to a fair trial, and to effective assistance of counsel (at trial and on direct appeal), in the following regards:

Counsel failed to object to Instructions 19, 20 and 22 and failed to tender an instruction that more precisely defined the judge - made concepts of "vicarious liability for second degree murder," consistently with the statutory elements of NRS 200.030(2) and 200.020(2).

Without objection, the Court gave Instruction No. 19, which read:

> "Murder in the First Degree is a specific intent crime. A defendant cannot be liable under conspiracy and/or aiding and abetting theory for First Degree Murder for acts committed by a co - conspirator, unless the defendant also had a premeditated and deliberate specific intent to kill.
>
> Murder in the Second Degree may be a general intent crime. As such, the defendant may be may [sic] liable under conspiracy theory or aiding or

abetting theory for Murder of the Second Degree for acts committed by a co - conspirator if the killing is one of the reasonably foreseeable probable and natural consequences of the object of the conspiracy or the aiding and abetting."

The Court also gave Instruction No. 20, which states:

"Where two or more persons are accused of committing a crime together, their guilt may be established without proof that each personally did every act constituting the offense charged.

All persons concerned in the commission of a crime who either directly and actively commit the act constituting the offense who knowingly and with criminal intent aid and abet in its commission or, whether present or not, who advise and encourage its commission, with the intent that the crime be committed, are regarded by the law as principals in the crime thus committed and are equally guilty thereof.

A person aids and abets the commission of a crime if he knowingly and with criminal intent aids, promotes, encourages or instigates by act or advice, or by act and advice, the commission of such crime with the intention that the crime be committed.

The State is not required to prove precisely which defendant actually committed the crime and which defendant aided and abetted."

The Court also gave Instruction No. 22, which stated:

"Where several parties joined together in a common design to commit any lawful [sic] act, each is criminally responsible for the reasonably foreseeable general intent crimes committed in furtherance of the common design. In contemplation of law, as it relates to general intent crimes, the act of one is the act of all. Battery, battery resulting in substantial bodily harm and battery with a deadly weapon are general intent crimes. Second Degree Murder can be a general intent crime.

Additionally, a co - conspirator is guilty of the offenses he specifically

intended to be committed. First Degree Murder is a specific intent crime."

In their totality, these three unobjected-to instructions lowered the State's burden of proof by enabling the State to obtain a second degree murder conviction without proof that the Petitioner engaged in behavior that demonstrated an abandoned and malignant heart, and enabling the State to obtain a second degree murder conviction without proof that the Petitioner engaged in behavior that was the proximate cause of the death of T.J. Hadland.

Although appellate counsel loosely referenced this point in the appellate briefs, counsel did not make this an assignment of error therein or argue it as a matter of plain error. He was prejudicially ineffective in failing to do so.

Petitioner realleges Grounds I and II and incorporates them herein by this reference as though more fully set forth.

Essentially, what these three unobjected - to instructions told the jury was this: If the jury found that the Petitioner joined a conspiracy to batter Hadland, even if the Defendant/Petitioner was not considered a "co - conspirator" by the other conspirators, even if the Defendant/Petitioner did nothing in furtherance of the conspiracy to batter or to murder Hadland, and even if the Defendant/Petitioner's knowledge of the conspiracy was so slight that he could not have foreseen that someone like Counts (whether or not he knew Counts or knew

that Counts was a member of a conspiracy to batter) would kill someone like Hadland, that nevertheless made him a second degree murderer.

Clearly, that is wrong. But at no time were these instructions objected to or raised even as plain error on direct appeal. Both trial and appellate counsel were prejudicially ineffective in failing to so argue.

While Bolden v. State, 121 Nev. 908, 922, 124 P.3d 191, 201 (2005) notes that vicarious co - conspirator liability may be properly imposed for general intent crimes only when the crime in question was a "reasonably foreseeable consequence" of the object of the conspiracy, Bolden also notes that the "vicarious co - conspirator liability" theory may not apply if it appears that the theory of liability is alleged for crimes too far removed and attenuated from the object of the conspiracy.

Bolden is not inconsistent with People v. Prettyman, (1996) 14 Cal. 4th 248, 58 Cal. Rptr.2d 827, 926 P.2d 1013. Prettyman and the follow - up case of People v. Hickles, 66 Cal. Rptr.2d 86 (Cal. App. 1997) require the judge to instruct the jury to identify specifically the potential target offense that the defendant engaged in, and specifically find by special verdict that the offense *actually committed* was a natural and probable consequence of the conspiracy the defendant engaged in. That is, a conviction may not be based on the jury's generalized belief that the

defendant intended to assist and/or encourage unspecified "nefarious" conduct. To ensure that the jury would not rely on such a generalized belief as a basis for conviction, the trial court must instruct the jury in effect to return a special verdict identifying and describing each potential target offense supported by the evidence, and specifically find that the actual "vicarious liability offense" was a natural and probable consequence of what the defendant actually agreed to. See: Hickles, 66 Cal. Rptr.2d at 92-93.

Here, the instructions given simply did not go far enough in accurately depicting and defining the circumstances upon which a defendant can be vicariously liable for second degree murder based upon a "conspiracy theory."

First off, it is incomplete and not completely accurate to say that second degree murder "can be" a general intent crime. The hallmark of second degree murder is implied malice, or circumstances establishing an abandoned and malignant heart. NRS 200.020(2); NRS 200.030(2). Thus, for example, even if a defendant does not act with a specific intent to kill, when he utilizes a handgun in a deadly and dangerous manner, he establishes a malicious lack of concern for human life. See: McCurdy v. State, 107 Nev. 275, 278, 809 P.2d 1265, 1267 (1991); Keys v. State, 104 Nev. 736, 740, 766 P.2d 270, 272 (1988). Thus, second degree murder would require the defendant to intend to do something in a

dangerous and deadly manner in order to establish an "abandoned and malignant heart."

But the unobjected-to instructions allowed the jury to return a second degree murder verdict, even in the absence of any evidence that the Petitioner acted with an abandoned and malignant heart toward Hadland.

Secondly, in the area of "second - degree felony murder", the jury must be instructed that the underlying felony that the defendant has committed, in the manner in which he committed it, was the proximate cause of the death in question. Rose v. State, 127 Nev. Ad. Op. 43, 255 P.3d 291, 297-98 (2011) [reversed]. And, per Ramirez v. State, 126 Nev. Ad. Op. 22, 235 P. 3d 619, 622-23 (2010), the jury must be instructed that "causation" means there must be an *immediate and direct* causal relationship between the felonious actions of the defendant and the victim's death. That is, per the rationale of Rose, the underlying felony itself (in that case, assault with a deadly weapon) does not create the basis for vicarious liability (i.e., "merge" with second degree murder); the issue is whether the defendant committed the underlying felony with the intent commensurate with second degree murder. See: Rose, 295 P.3d at 296-97. Accord: Ramirez, 235 P.3d at 622 n.2.

The law of "vicarious felony second degree murder" and "vicarious second

degree murder liability based on a conspiracy theory" must be harmonized. After all, both theories are nowhere contained in the Nevada Revised Statutes; both are judge-made theories that have as their source the definitions of murder in NRS ch. 200. It is basic that defining crimes and fixing penalties are legislative, not judicial functions. United States v. Evans, 333 U.S. 483, 486 (1948). The judiciary should not enlarge the reach of an enactment of crimes by constituting them from anything less than the incriminating components contemplated by the words used in the statute. Morrissette v. United States, 342 U.S. 246, 263 (1952). Courts interpret, rather than author, the criminal code. United States v. Oakland Cannabis Buyers' Co-Op, 532 U.S. 483, 494 n. 7 (2001).

Therefore, it is not enough to say that the crime that the defendant committed (in Rose, assault with a deadly weapon; here, conspiracy to commit battery) could hypothetically have death of the victim as a natural and probable consequence; the jury must be instructed that, to return a second degree murder guilty verdict, the defendant's acts, in terms of what he actually did and what he actually intended to do, demonstrated an abandoned and malignant heart, and were the immediate and direct cause of the victim's death, and were the natural and probable consequence of death to the victim.

The state of the evidence presented is not only did Petitioner never agree to

a conspiracy to murder Hadland, or even to shoot Hadland, but at best signed off on the proposition of "taking care of Hadland," meaning at worst to pull Hadland aside and tell him to shut his mouth, "smacking him around" if necessary to get the message across to shut up. As both Kevin Kelly and Pee - Lar Handley testified, Hadland's activity with the Palomino Club, v.i.p. cards, and tips to cab drivers would not have rationally led to "discipline by murder" by anyone associated with the Palomino Club. And a reasonable jury could conclude that what Petitioner did agree to (if he agreed to anything) would not by itself show a general malignant recklessness or disregard toward Hadland's life.

Thus, if the jury had been given a Prettyman instruction, especially as tempered by Rose and Ramirez, a jury understanding the concept likely would not on this evidence have found Petitioner guilty of second degree murder.

Accordingly, trial counsel was ineffective in failing to tender such an instruction as well as failing to object to the above-referenced three Instruction Nos. 19, 20 and 22. Appellate counsel was ineffective in failing to raise the point of this ground as an assignment of plain error on direct appeal.

The prejudice from counsel's deficiencies may be measured individually, or in cumulation with the other areas of prejudice identified and found by the Court.

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IV.

GROUND IV

Petitioner's federal constitutional rights under the Fifth, Sixth and Fourteenth Amendments to due process of law, to a fair trial, and to effective assistance of counsel were impinged in the following regards:

Counsel failed to seek a severance of his trial from his co-defendant, Luis Hidalgo, Jr. ("Mr. H"), when he attempted to present the out-of-court testimony of an unavailable witness, Jayson Taoipu, and counsel for "Mr. H." objected on the grounds that the testimony was inculpatory and prejudicial to him.

Petitioner realleges and incorporates Grounds I, II and III herein by this references though more fully set forth.

Petitioner sought to admit the former testimony of Jayson Taoipu, a witness in the previously held murder trial of Kenneth Counts, for the purposes of demonstrating Petitioner's innocence of the charged conspiracy to batter or kill Mr. Hadlund. Taoipu specifically testified that it was Carroll - not Petitioner - who made the statement about "baseball bats" and "trash bags." Absent that statement, the testimony against Petitioner was so precious thin prior to Hadlund's death as to be virtually non-existent. The statement regarding "taking of business like Gallardi and Rizzolo" would make sense if Petitioner were charged with a

conspiracy to bribe a county commissioner; since that obviously was not the charge, the statement simply was immaterial to the within charges.

Mr. H.'s counsel, Dominic Gentile, objected to the admission of Taoipu's testimony, on the basis that it would prejudice him. The court essentially agreed with Mr. Gentile. The "prejudice" could have been solved by a severance of the trials at that point. But counsel did not seek a severance. Instead, counsel essentially allowed the court to make the ruling that the entirety of Taoipu's testimony would not assist Petitioner, even though Petitioner really only wanted that small portion of the testimony into evidence - and that small portion would not have prejudiced Mr. H..

Under the circumstances, a severance of trials would have been at least as appropriate as they were, in reversing convictions, in Buff v. State, 114 Nev. 1237, 970 P.2d 564 (1998) and Chartier v. State, 124 Nev. 760, 191 P.3d 1182 (2008).

In Buff, the Nevada Supreme Court held that the failure to sever a joint trial into separate trials denied one defendant his right to a fair trial, by precluding him from introducing his co-defendant's initial statement to the police exonerating that defendant. Buff, 114 Nev. at 1244-45, 970 P.2d at 568-69.

In Chartier, the court held that the cumulative effect of a joint trial with a co-defendant was so prejudicial as to warrant severance and the district court

abused its discretion by failing to sever the trials. There, not only did the defendant and co-defendant present antagonistic defenses, but the defendant's ability to present his theory of defense that he was not involved in the murders was hindered when the trial court excluded recorded telephone conversations between him and the co-defendant, in which the co-defendant made inculpatory statements. Chartier, 124 Nev. at 766-68, 191 P.3d at 1186-87.

In this case, it will be pointed out that both Petitioner and his co-defendant had similar defenses at the beginning of trial, that neither could be established to be part and parcel of a conspiracy to kill or even batter Hadlund by credible evidence. For that reason, undoubtedly, neither filed a Motion to Sever prior to the beginning of trial.

Nevertheless, defense counsel has a continuing duty to object to a joint trial and must renew it at the close of the prosecution's case, if the theory of prejudice exists at that point, in order to present the severance issue for appeal. United States v. Munoz, 894 F.2d 292, 294-95 (8th Cir. 1990), and cases cited therein [Without continuing objection, the reviewing court has no way of knowing whether the defendant decided to accept the ruling and take his chances that the testimony would not harm his or her case]; Spicer v. State, 12 S.W.3d 438, 444 n. 2 (Tenn. 2000) [Issue preserved when raised in Motion for New Trial, even if not

before then]; State v. Mincey, 636 P.2d 637, 647-48 (Ariz. 1981) [Severance issue waived, even if the motion is filed prior to trial, if not renewed at or before the close of evidence]; People v. Irvin, 990 P.2d 506, 514-15 (Cal.), *cert denied*, 531 U.S. 842 (2000) [same].

It is well settled that *habeas* can be granted based on ineffective assistance of counsel, where counsel fails to make a severance motion that is meritorious. See: Hernandez v. Cowan, 200 F.3d 995, 998-1000 (7th Cir. 2000).

The State noted this problem in traversing Petitioner's argument that the district court erred in refusing to admit the testimony of Taoipu. At p. 31 of its Answering Brief, the State stated:

> "To the extent Little Lou argues his defense was constrained by the court's concern for Mr. H.'s confrontation rights, the State notes that Little Lou never raised this issue in his 32-page, December 12, 2008, joint opposition to the State's Motion to Consolidate his trial with Mr. H.. RA 396-427; indeed he appears to have only first decided on day 12 of the trial that he would seek to have Taoipu's February 4, 2008 testimonial fragment read into the record. Zone testified at Little Lou's June 13, 2005 preliminary hearing that Carroll told him Little Lou made the baseball bat and trash bags comment, which put Little Lou on notice that he would be confronting that evidence at trial. Thus, Little Lou was responsible for constraining his own defense, and he waived and he challenged to the court's consolidation order by failing to assert a ground of appeal challenging it."

For purposes of this ground, Petitioner essentially agrees with the State's winning argument on direct appeal, and asserts that counsel was ineffective in

failing to raise this ground, both in an opposition to the motion to consolidate the trials and repeating the same on day 12 of the trial when severance became a real, live issue.

Respondent also argued on direct appeal that had Taoipu's testimony been introduced, the State would have entitled to attempt to impeach Taoipu with other statements indicating Petitioner "may" have ordered the murder - although, from the record, it is less than clear as to what those "so - called other statements" actually were. In any case, that cannot serve as a reason to find that counsel acted below the standard of reasonable counsel. The Nevada Supreme Court made clear in Rhyne v. State, 118 Nev. 1, 8-9, 38 P.3d 163, 167-68 (2002), that only defense counsel - and not the trial judge, and certainly not the prosecutor - can make the strategic call on which witnesses to call and evidence to present. I.e., with few exceptions, the means of representation - i.e., trial tactics - remain within counsel's control. Certainly, a trial judge cannot decide that "she would not have sought to introduce this evidence" if she were trial counsel, and refuse to admit it for that reason. The same should hold true for the prosecutor.

Prejudice may be considered singly with this ground, or in cumulation with the other grounds presented herein.

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V.

GROUND V.

Petitioner's federal constitutional rights under the Fifth, Sixth and Fourteenth Amendments to due process of law, to a fair trial, and to effective assistance of counsel were impinged in the following regards:

Counsel failed and refused to file a Motion to sever the trial of Counts I and II, conspiracy to commit murder and murder with the use of a deadly weapon, from Counts III and IV, solicitation to commit murder. Trial counsel was prejudicially ineffective in failing to do so. To the extent that appellate counsel could have raised this issue on direct appeal, he failed to do so and was prejudicially ineffective in that regard - even if he could have raised it as a matter of plain error. The allegations contained in Grounds I, II, III and IV are incorporated by this reference as though fully more set forth.

Counts I and II concerned the events of May 19-20, 2005, leading up to and concluding with Mr. Hadlund's murder. Counts III and IV concerned what happened days afterwards, essentially the efforts of "Mr. H." and this Petitioner to "cover up" the events. As to Counts III and IV, the material evidence came from Detective McGrath and Ms. Espindola, and they were to the effect of Petitioner's exhortation to the others to poison Mr. Zone and Mr. Taoipu with rat poison.

As noted above, the evidence in support of Petitioner's participation in the murder of Hadlund is precious thin. It consist of impeached evidence of statements Petitioner supposedly made, which were not in any way acted upon.

In contrast, the evidence of the Petitioner's guilt of solicitation of murder, with Petitioner presenting no evidence to controvert Ms. Espindola, was overwhelming. Based upon how NRS 199.500(2) has been interpreted, the evidence against Petitioner on Counts III and IV is overwhelming.

NRS 199.500(2) does not require payment of consideration in exchange for a solicitation to commit murder, nor does it require corroboration. The crime is complete as soon the request is made; the fact that nobody acts on the solicitation is irrelevant, and the further fact that a subsequent renunciation and withdrawal occurs is likewise irrelevant. Moran v. Schwarz, 108 Nev. 200, 202, 826 P.2d 952, 953 (1992).

Accord: People v. Hood, 878 P.2d 89, 95 (Colo. App. 1994); People v. Superior Court, 157 P.3d 1017, 1024 (Cal. 2007). State v. Ysea, 956 P.2d 499, 503 (Ariz. 1998) [solicitation is a crime of communication, not violence]; State v. DePriest, 907 P.2d 868, 874 (Kan. 1995) [no act in furtherance of the target crime needs to be performed by either person]; State v. Bush, 636 P.2d 849, 853 (Mont. 1981) [intent and knowledge of person solicited is irrelevant].

In reversing a conviction in Tabish v. State, 119 Nev. 293, 72 P.3d 584 (2003), the Nevada Supreme Court noted these abiding principles of law:

1) Ordinarily, the standard of joining or severing counts is within the discretion of the trial judge, and is not reversed absent an abuse of discretion. 119 Nev. at 302, 72 P.3d at 589-90.

2) Per NRS 173.115(2) the transactions alleged in the various counts of an information, when not happening at the same time, must be connected together or constitute part of a common scheme or plan. But incidents occurring days apart motivated by different concerns are not part of a common scheme or plan. 119 Nev. at 303-04, 72 P.3d at 590-91, citing Mitchell v. State, 105 Nev. 735, 737-38, 782 P.2d 1340, 1342 (1989) [harmless error].

3) The failure to sever is prejudicial if the evidence on one count is relatively strong and relatively weak on the other. 119 Nev. at 304-05, 72 P.3d at 591-92.

4) The *res gestae* rule of NRS 48.035(3) does not apply if it is possible to prove one count without proving the other. 119 Nev. at 306-07, 72 P.3d at 595, citing Bletcher v. State, 111 Nev. 1477, 1480, 907 P.2d 978, 980 (1995) and Flores v. State, 116 Nev. 659, 662-63, 5 P.3d 1066, 1068 (2000).

5) Ultimately, where different counts occur on different days as charged, the

issue is whether if uncharged, the theoretically uncharged count would be admissible under NRS 48.045 viz. the charged count, and vice versa - that is, whether they are cross - admissible. 119 Nev. at 307-08, 72 P.3d at 593-94.

In this case, in order to be cross - admissible, not only must the uncharged misconduct be relevant to one of the categories contained in NRS 48.045(2), but that category must be a genuine trial issue. See: Hokanen v. State, 105 Nev. 901, 902, 784 P.2d 981, 982 (1989) [reversed]; Rosky v. State, 121 Nev. 184, 197, 111 P.3d 690, 698 (2005) [reversed in part].

The Petitioner's defense viz. Counts I and II is simple: Petitioner was not a part of a conspiracy to commit any offense against Hadlund that could proximately result in Hadlund's death. The question of what he did after Hadlund's death has no bearing on the evidence (or more accurately, lack thereof) of what he did before and during Hadlund's death. It may be relevant to a motivation to make it more difficult to prove that his father was involved with the murder; but that simply does not make it admissible against him viz. Counts I and II.

Otherwise, the evidence concerning Counts III and IV do not constitute a "common scheme or plan" within the meaning of Rosky, since the "coverup of the murder of Hadlund" was not an integral part of an overarching plan explicitly conceived and executed by this Petitioner. See: Rosky, 121 Nev. at 196.

Moreover, the "coverup" of the murder occurred, obviously, after the murder, but since there is no evidence that Petitioner acted with malice aforethought on May 19-20, and since there is no evidence that his activities were the proximate result of Hadlund's death, anything to do with rat poison sheds no light on Petitioner's so-called motive to commit either battery or murder. See: Richmond v. State, 118 Nev. 924, 932-33, 59 P.3d 1249, 1255 (2002).

Moreover, here, the story of the murder can easily to be told without reference to the story of the "rat poison" occurring days later.

As stated above, the evidence in support of the solicitation was strong - indeed, one might argue undisputed. But as noted throughout, the evidence support of the murder count is somewhere between paper thin and non - existent. For that reason, the failure to sever courts is prejudicial.

Accordingly, counsel was prejudicially ineffective in seeking to sever the trials of Counts III and IV from Counts I and II. Had a reasonable jury heard this case without any reference to what occurred after May 20, 2005, there is a reasonable likelihood that the jury would have been convinced that this "paper thin evidence" was not sufficient to convict Petitioner of any degree of murder.

The prejudice from counsel's deficiencies may be measured individually, or in cumulation with the other areas of prejudice identified and found by the Court

WHEREFORE, Petitioner prays that the Court grant Petitioner the relief to which Petitioner may be entitled in this proceeding.

DATED this ____ day of _____, 2013.

Luis Hidalgo, III, #1038133
Northern Nevada Correctional Center
P.O. Box 7000
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By: _____
Luis Hidalgo, III

Prepared by:

LAW OFFICES OF RICHARD F. CORNELL
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By: _____
Richard F. Cornell

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VERIFICATION

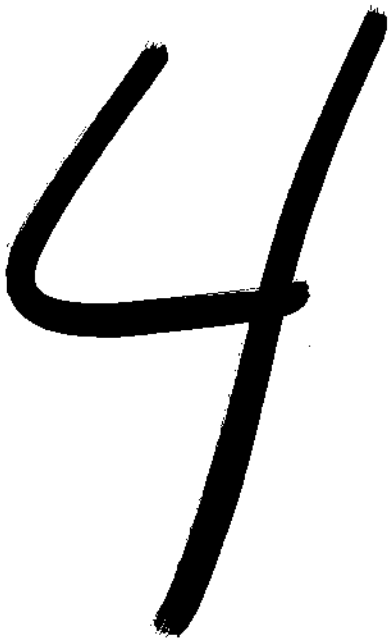
Under penalty of perjury, the undersigned declares that the undersigned is the Petitioner named in the foregoing Petition and knows the contents thereof; that the pleading is true of the undersigned's own knowledge, except as to those matters stated on information and belief, and as to such matters the undersigned believes them to be true.

_____

Petitioner

_____

Attorney for Petitioner



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CLERK OF THE COURT

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DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

LUIS ALONSO HIDALGO,
aka, Luis Alonso Hidalgo III, #1849634

Defendant.

CASE NO: 05C212667-2

DEPT NO: XXI

STATE'S RESPONSE TO DEFENDANT'S SUPPLEMENTAL PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)

DATE OF HEARING: AUGUST 21, 2014
TIME OF HEARING: 9:30 AM

COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through H. LEON SIMON, Chief Deputy District Attorney, and hereby submits the attached Points and Authorities in Opposition to Defendant's Supplemental Petition For Writ Of Habeas Corpus (Post-Conviction).

This Response is made and based upon all the papers and pleadings on file herein, the attached points and authorities in support hereof, and oral argument at the time of hearing, if deemed necessary by this Honorable Court.

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POINTS AND AUTHORITIES

STATEMENT OF THE CASE

LUIS ALONSO HIDALGO, aka, Luis Alonso Hidalgo III (hereinafter "Defendant" or "Little Lou") was charged by way of Second Amended Criminal Complaint on June 3, 2005, in Justice Court Boulder Township, as follows: COUNT 1 – Conspiracy to Commit Murder (Felony – NRS 200.010, 200.030, 199.480); COUNT 2 – Murder With Use of a Deadly Weapon (Felony – NRS 200.010, 200.030, 193.165), and COUNTS 3 & 4 – Solicitation to Commit Murder (Felony – NRS 199.500). On June 20, 2005, Little Lou was charged with the same counts by way of Information. On July 6, 2005, the State filed a Notice of Intent to Seek Death Penalty. Mr. Oram, co-defendant Anabel Espindola's (hereinafter "Espindola") attorney confirmed on behalf of Mr. Draskovich for Little Lou on July 14, 2005. Little Lou and Anabel filed a Petition for Writ of Habeas Corpus (Pre-Trial) on August 3, 2005; a complete copy of the Petition was filed on August 19, 2005. The State filed its Return on August 30, 2005. Little Lou filed his Reply on September 23, 2005. The court denied the Petition on October 6, 2005.

On September 16, 2005, Little Lou filed a Motion to Place on Calendar for the Purpose of Being Appointed Co-Counsel by the Court, seeking to appoint Stephen Stein, Esq. as co-counsel. The Court took the matter under advisement on October 6, 2005, and signed the Order appointing Mr. Stein on October 13, 2005.

Little Lou and Anabel filed a Motion to Strike Notice of Intent to Seek Death Penalty on December 12, 2005. The State filed its Opposition on December 21, 2005. Little Lou filed his Reply on January 5, 2006. Little Lou filed a Notice of Supplemental Authority in Support of Defendant's Motion to Strike on March 15, 2006. The court heard argument and took the matter under advisement on March 17, 2006. The court denied it on August 31, 2006.

On June 15, 2006, Little Lou filed a Notice of Motion and Motion to Strike Death Penalty Based Upon Unconstitutionality. The State filed its Opposition on August 9, 2006. Defendant filed a Reply on August 24, 2006. The court denied it on August 31, 2006.

Little Lou filed a Motion to Strike Death Penalty as Unconstitutional Based on Its Allowance of Inherently Unreliable Evidence on June 15, 2006. The State filed an Opposition to it on August 10, 2006. Defendant filed a Reply on August 24, 2006. The court denied it on August 31, 2006.

Little Lou filed a Motion to Declare as Unconstitutional the Unbridled Discretion of Prosecution to Seek the Death Penalty on June 15, 2006. The State filed its Opposition to it on August 10, 2006. The court denied it on August 31, 2006.

Little Lou filed a Motion to Strike Notice of Intent to Seek Death Penalty Based Upon Unconstitutionality of Lethal Injection on June 15, 2006. The State filed its Opposition to it on August 9, 2006. Defendant filed a Reply on August 24, 2006. The court denied it on August 31, 2006.

Little Lou filed a Motion to Strike Notice of Intent to Seek Death Based Upon Unconstitutional Weighing Equation on June 15, 2006. The State filed its Opposition to it on August 10, 2006. Defendant filed a Reply on August 24, 2006. The court denied it on August 31, 2006.

On December 26, 2006, Dominic P. Gentile, Esq. of Gentile DePalma, Ltd., substituted in as counsel for Little Lou in place of Stephen Stein, Esq.

On July 5, 2007, the State filed a Motion to Conduct Videotaped Testimony of a Witness. Little Lou filed his Opposition on July 12, 2007. The court granted the motion on July 26, 2007.

On November 20, 2007, Paola M. Armeni, Esq., of Gordon & Silver, Ltd., substituted in as counsel for Little Lou in place of Robert Draskovich, Jr., Esq.

On December 27, 2007, the Nevada Supreme Court struck the Notices of Intent to Seek Death Penalty regarding Little Lou and Espindola. See Hidalgo v. Eighth Judicial Dist. Court ex rel. Cnty. of Clark, 124 Nev. 330, 184 P.3d 369 (2008). On January 8, 2008, Little Lou filed a Motion for Severance From Capital Defendant and Order Shortening Time, seeking severance from co-defendant Kenneth Jay Counts. That motion was granted on January 15, 2008.

On January 9, 2008, the State filed an Amended Notice of Evidence in Support of Aggravating Circumstances.

Defendant filed a Motion to Suppress His Custodial Statements on January 7, 2008. The State filed its Opposition on January 24, 2008. On February 14, 2008, the court ruled that the only way it would come in at trial is if the defense opened the door.

On February 5, 2008, the State advised that it would be seeking an Indictment against Luis Hidalgo, Jr. (hereinafter "Mr. H"), Little Lou's father. On February 12, 2008, the State filed a Memorandum of Law Regarding Joint Representation of Co-Defendants which addressed the potential conflict of Mr. Gentile representing both Little Lou and Mr. H. The defense filed a Response on February 13, 2008. On July 22, 2008, Mr. Gentile informed the court that he was willing to continue representing both Mr. H and Little Lou so long as the cases were not consolidated. On November 20, 2008, following a ruling by the Nevada Supreme Court, Little Lou's new counsel – Chris Adams, Esq. and John Arrascada, Esq. – made an appearance. The formal Substitution of Attorneys was filed November 21, 2008.

Little Lou filed a Motion to Dismiss COUNT 1 of the Information, or in the Alternative, Motion to Strike References to COUNTS 3 & 4 Contained Therein on February 20, 2008. On January 23, 2009, pursuant to Little Lou's oral motion, the court ordered the language in COUNT 1 which referred to COUNTS 3 & 4 to be stricken; the court noted that there were two (2) conspiracies. A Fourth Amended Information was filed on January 26, 2009, charging Little Lou as follows: COUNT 1 – Conspiracy to Commit Murder (Felony – NRS 200.010, 200.030, 199.480); COUNT 2 – Murder With Use of a Deadly Weapon (Felony – NRS 200.010, 200.030, 193.165), and COUNTS 3 & 4 – Solicitation to Commit Murder (Felony – NRS 199.500).

On June 25, 2008, the State filed a Motion to Consolidate Case Number C241394 (Mr. H) with Case Number C212667 (Little Lou). Little Lou and Mr. H filed a combined Opposition on December 8, 2008. The State filed its Response on December 15, 2008. On January 16, 2008, the court granted the State's Motion to Consolidate.

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Little Lou filed a Motion to Strike the Amended Notice to seek Death Penalty on December 8, 2008. Little Lou filed an Amended Notice on December 22, 2008. The State filed an Opposition on December 31, 2008. On January 7, 2009, the State filed a Motion to Remove Mr. Gentile or Require Waivers. On January 16, 2009, the parties advised that they had reached an agreement on the conflict issue and that the State agreed to withdraw the Notice of Intent to Seek Death Penalty against both Little Lou and Mr. H.

On January 27, 2009, Little Lou proceeded to trial with Mr. H as his co-defendant. On February 17, 2009, the jury returned a verdict against Little Lou as follows: COUNT 1 – Guilty of Conspiracy to Commit Battery With a Deadly Weapon or Battery Resulting in Substantial Bodily Harm; COUNT 2 – Guilty of Second Degree Murder With Use of a Deadly Weapon; COUNTS 3 & 4 – Guilty of Solicitation to Commit Murder.

Little Lou filed a Motion for Judgment of Acquittal, or in the Alternative Motion for a New Trial on March 10, 2009. The State filed its Opposition on March 17, 2009. Little Lou filed a Reply on April 15, 2009. The court denied the motions by Mr. H and Little Lou on June 23, 2009.

On June 19, 2009, Little Lou filed a Sentencing Memorandum. On June 23, 2009, Little Lou was present for sentencing with counsel and sentenced as follows: COUNT 1 – TWELVE (12) MONTHS in the Clark County Detention Center(CCDC); COUNT 2 – ONE HUNDRED TWENTY (120) MONTHS to LIFE in the Nevada Department of Corrections (NDC), plus an equal and consecutive ONE HUNDRED TWENTY (120) MONTHS to LIFE in the NDC; COUNTS 3 & 4 – TWENTY-FOUR (24) to SEVENTY-TWO (72) MONTHS in the NDC, with all counts running concurrently; Little Lou received ONE THOUSAND FOUR HUNDRED NINETY-TWO (1,492) DAYS credit for time served. Little Lou's Judgment of Conviction was filed on July 10, 2009. Little Lou filed a Notice of Appeal on July 16, 2009.

On June 21, 2012, the Nevada Supreme Court affirmed Defendant's Judgment of Conviction. See Hidalgo, III, v. State, Docket No. 54272, Order of Affirmance (June 21,

2012). Rehearing was denied July 27, 2012; En Banc Reconsideration was denied November 13, 2012. Id. Remittitur issued April 10, 2013.

Little Lou filed a Petition for Writ of Habeas Corpus (Post-Conviction) on January 22, 2014. On March 11, 2014, Little Lou's post-conviction counsel informed the court and State that he needed to file a Supplemental Petition and that the State could file a return to the Supplement rather than the original Petition. Little Lou filed a Supplement on May 9, 2014, which encompassed the three (3) grounds raised in the original Petition. The State responds as follows.

STATEMENT OF FACTS

In May of 2005, Little Lou worked for his father, co-defendant Mr. H, at the Palomino Club (Palomino or the club), which is Las Vegas's only all-nude strip club licensed to serve alcohol. See RT Jury Trial, Day 9, pg. 33. Mr. H. owned the Palomino and Little Lou served as one (1) of its managers. Id. On the afternoon of May 19, 2005, Mr. H's romantic partner of eighteen (18) years, Espindola, received a phone call from Deangelo Carroll (Carroll); Carroll was an employee of the Palomino serving as a "jack of all trades" handling promotions, disc jockeying, and other assorted duties. Id. at 33-34, 43-45. Espindola was the Palomino's general manager and handled all of the club's financial and management affairs. Id. at 21, 32-33. During the call, Carroll informed Espindola that the victim in this case, T.J. Hadland (Hadland), a recently fired Palomino doorman, had been "badmouthing" the Palomino to taxicab drivers. Id. at 35, 43-45; RT Jury Trial Day 12, pg. 288. A week prior to this news, Little Lou had informed Mr. H that Hadland was falsifying Palomino taxicab voucher tickets in order to generate unauthorized kickbacks from the drivers. See RT Jury Trial, Day 9, pg. 36-40. In response, Mr. H ordered Hadland fired. Id. at 40-41.

The Palomino paid cash bonuses to taxi drivers for each person a driver dropped off. Id. at 35-36. The club accomplished this by having a doorman, such as Hadland, provide a ticket or voucher to the driver, which reflected the number of passengers (customers) dropped off. Id. Apparently, Hadland was inflating the number of passengers taxi drivers

dropped off in exchange for the driver agreeing to kick back to Hadland some of the bonus paid out by the club for these phantom customers. Id. at 39-40.

Mr. H had also received prior reports that, at other times, Hadland was selling Palomino VIP passes to arriving customers in exchange for cash, which deprived the taxicab drivers of bonuses for bringing customers to the club, and diverted the passes from their intended purpose of attracting local patrons. See RT Jury Trial, Day 10, pgs. 70-71; RT Jury Trial, Day 11, pgs. 293-294; RT Jury Trial, Day 12, pgs. 181-182. This practice created a problem for the club because taxi drivers would begin disputing their entitlement to be paid bonuses. See RT Jury Trial, Day 10, pg. 71; RT Jury Trial, Day 11, pgs. 293-294.

The Palomino was not in a good financial state and Mr. H was having trouble meeting the $10,000.00 per month payment due to Dr. Simon Sturtzer from whom he purchased the club in early 2003. See RT Jury Trial, Day 9, pg. 20-29, 80; RT Jury Trial Day 10, pg. 5. Taxicab drivers are a critically important form of advertising for strip clubs generally. See RT Jury Trial, Day 11, pg. 148:6-17. Because of the Palomino's location in North Las Vegas, revenue generated through taxicab drop-offs was very important to the club's operation. Id. at 148-149. Due to a legal dispute among the area strip clubs regarding bonus payments to taxicab drivers, all payments were suspended during the period encompassing May 19-20, 2005; the Palomino was the only club permitted to continue paying taxi drivers for dropping off customers. See RT Jury Trial, Day 6, pgs. 158-159.

At the time Espindola took Carroll's call, she was at Simone's Auto Body, which was a body shop/collision repair business also owned by Mr. H and managed by Espindola. See RT Jury Trial, Day 9, pgs. 11-15. Financially, Simone's was breaking even at the time of this case's underlying events, but the business never turned a profit. Id. at 17-18, 32. After taking Carroll's call, Espindola informed Mr. H and Little Lou of Carroll's news about Hadland disparaging the club. Id. at 45, 47. Upon hearing the news, Little Lou became enraged and began yelling at Mr. H, demanding of Mr. H: "You're not going to do anything?" and stating "That's why nothing ever gets done." Id. Little Lou told Mr. H, "You'll never be like Rizzolo and Galardi. They take care of business." Id.; RT Jury Trial,

Day 12, pg. 288. Frederick John "Rick" Rizzolo was the owner of a Las Vegas strip club known as Crazy Horse Too, and Jack Galardi is the owner of Cheetah's strip club as well as a number of other clubs in Atlanta, Georgia. See RT Jury Trial, Day 9, pg. 48-49. He further criticized Mr. H by pointing out that Rizzolo had once ordered an employee to beat up a strip club patron. Id. Mr. H became angry, telling Little Lou to mind his own business. Id. Little Lou again told Mr. H, "You'll never be like Galardi and Rizzolo," and then stormed out of Simone's heading for the Palomino. Id.

Visibly angered, Mr. H walked out of Espindola's office and sat on Simone's reception area couch. Id. at 59. At approximately 6:00 or 7:00 PM, Espindola and a still visibly-angered Mr. H drove from Simone's to the Palomino. Id. at 60-61. Once at the Palomino, Espindola went into Mr. H's office, which was her customary workplace at the club. Id. at 67. Approximately half an hour later, Carroll arrived at the club and knocked on the office door, which Mr. H answered. Id. at 67. Mr. H and Carroll had a short conversation and then walked out the office door together. Id. at 67-68. A short time later, Mr. H came back into the office and directed Espindola to speak with him out of earshot of Palomino technical consultant, Pee-Lar "PK" Handley, who was nearby. Id. at 67. Mr. H instructed Espindola to call Carroll and tell Carroll to "go to Plan B." Id. at 68.

Espindola went to the back of the office and attempted to contact Carroll by "direct connect" (chirp) through her and Carroll's Nex-tel cell phones. Id. at 73. Carroll called Espindola back, and Espindola instructed Carroll that Mr. H wanted Carroll to "switch to Plan B." See RT Jury Trial, Day 7, pg. 86; RT Jury Trial, Day 9, pg. 73; RT Jury Trial, Day 12, pg. 290. Carroll protested that "we're here" and "I'm alone" with Hadland, and he told Espindola that he would get back to her. RT Jury Trial, Day 9, pg. 67, 73-76. Espindola and Carroll's phone connection was then cut off. Id. at 76. At that point, Espindola knew "something bad" was going to happen to Hadland. Id. She attempted to call Carroll back, but could not reach him. Id. Espindola returned to the office and informed Mr. H that she had instructed Carroll to go to "Plan B." Id. at 77.

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Earlier in the day, May 19, 2005, at approximately noon, Carroll was at his apartment with Rontae Zone (Zone) and Jayson Taoipu (Taoipu), who were both "flyer boys" working unofficially for the Palomino. See RT Jury Trial, Day 6, pgs. 95-96. Zone and Taoipu worked alongside Carroll and performed jobs Carroll delegated to them in exchange for being paid "under the table" by Carroll. Id. at 88-89, 93. Zone and Taoipu would pass out Palomino flyers to taxis at cabstands. Id. at 88. Zone lived at the apartment with Carroll, Carroll's wife, and Zone's pregnant girlfriend, Crystal Payne. Id. at 88-89. Zone and Taoipu were close friends. Id. at 92.

While at the apartment, Carroll informed Zone and Taoipu that Little Lou had told him Mr. H wanted a "snitch" killed. Id. at 95-96; RT Jury Trial, Day 7, pg. 102, 149. Carroll asked Zone if he would be "into" doing something like that, and Zone responded "No," he would not. See RT Jury Trial, Day 6, pg. 96. Carroll also asked the same question of Taoipu who indicated he was "down," i.e., interested in helping out. Id. at 96-97. Later, when Taoipu and Zone were in the Palomino's white Chevrolet Astro Van with Carroll, Carroll told them that Little Lou had instructed Carroll to obtain some baseball bats and trash bags to use in aid of killing the person. Id. After the initial noontime conversation about killing someone on Mr. H's behalf, Zone observed Carroll using the phone, but he could not hear what Carroll was talking about. Id. at 104. At some point after the noon conversation and after Zone observed him using the phone, Carroll informed Zone and Taoipu that Mr. H would pay $6,000.00 to the person who actually killed the targeted victim. Id. at 103-104.

A couple hours later while the three (3) were still in the van, Carroll again discussed on the phone having an individual "dealt with," i.e., killed, although Zone did not know the specific person to be killed. Id. at 99, 145; RT Jury Trial, Day 7, pg. 36, 151. Carroll produced a .22 caliber revolver with a pearl green handle and displayed it to Zone and Taoipu as if it were the weapon to be utilized in killing the targeted victim. See RT Jury Trial, Day 6, pg. 99-100. Carroll attempted to give the revolver to Zone who refused to take it. Id. Taoipu was willing to take the revolver from Carroll and did so. Id. Carroll also produced some bullets for the gun and placed them in Zone's lap, but Zone dumped the

bullets onto the van's floor where Taoipu picked them up and put them in his own lap. Id. at 100-101.

The three (3) then proceeded back to Carroll's apartment where Carroll instructed Zone and Taoipu to dress in all black so they could go out and work promoting the Palomino. Id. at 101-102. The three (3) then used the Astro van to go out promoting, returned briefly to Carroll's apartment for a second time, and again left the apartment to go promoting. Id. On this next trip, however, Carroll took them to a residence on F Street where they picked up Kenneth "KC" Counts (Counts). Id. at 105. Zone had no idea they were traveling to pick up Counts whom he had never previously met. Id. Once at Counts's house, Carroll went inside the house and emerged ten (10) minutes later accompanied by Counts who was dressed in dark clothing, including a black hooded sweatshirt and black gloves. Id. at 105-106. Counts entered the Astro van and seated himself in the back passenger seat next to Zone who was seated in the rear passenger seat directly behind the driver. Id. at 105-107. Taoipu was seated in the front, right-side passenger seat. Id. at 107.

At the time, Zone believed they were headed out to do more promoting for the Palomino. Id. at 108. As Carroll drove onto Lake Mead Boulevard, Zone realized they were not going to be promoting because there are no taxis or cabstands at Lake Mead. Id. Carroll told Zone and the others that they were going to be meeting Hadland and were going to "smoke [marijuana] and chill" with Hadland. Id. at 109. Carroll continued driving toward Lake Mead. Id. at 108.

On the drive up, Zone observed Carroll talking on his cell phone and he heard Carroll tell Hadland that Carroll had some marijuana for Hadland. Id. at 111; RT Jury Trial, Day 7, 86; RT Jury Trial, Day 11, pgs. 131-132. Carroll was also using his phone's walkie-talkie function to chirp. See RT Jury Trial, Day 6, at 114; RT Jury Trial, Day 11, pgs. 131-134. Little Lou chirped Carroll and they conversed. See RT Jury Trial, Day 7, 148. Carroll spoke with Espindola who told him to "Go to Plan B," and then to "come back" to the Palomino. See RT Jury Trial, Day 7, pg. 86; RT Jury Trial, Day 10, pg. 193, 205. Zone recalled Carroll responding "We're too far along Ms. Anabel. I'll talk to you later," and terminated the

conversation. See RT Jury Trial, Day 7, pg. 86. After executing a left turn, Carroll lost the signal for his cell phone and was unable to communicate with it, so he began driving back to areas where his cell phone service would be reestablished. See RT Jury Trial, Day 6, pgs. 114-115.

Carroll was able to describe a place for Hadland to meet him along the road to the lake. Id. at 116. Hadland arrived driving a Kia Sportage sport utility vehicle (SUV), executed a U-turn, and pulled to the side of the road. Id. at 116-117; RT Jury Trial, Day 7, pg. 149. Hadland walked up to the driver's side window where Carroll was seated and began having a conversation with Carroll; Zone and Taoipu were still seated in the rear right passenger's seat and front right passenger's seat, respectively. See RT Jury Trial, Day 6, pg. 118. As Carroll and Hadland spoke, Counts opened the van's right-side sliding door and crept out onto the street, moving first to the front of the van, then back to its rear, and back to its front again. Id. 118-119. Counts then snuck up behind Hadland and shot him twice in the head. Id. at 119; RT Jury Trial, Day 7, 150-151. One (1) bullet entered Hadland's head near the left ear, passed through his brain, and exited out the top of his skull. See RT Jury Trial, Day 6, pgs. 70-75. The other bullet entered through Hadland's left cheek, passed through and destroyed his brain stem, and was instantly fatal. Id.

One (1) of the group deposited a stack of Palomino Club fliers near Hadland's body. See RT Jury Trial, Day 5, pg. 112; RT Jury Trial, Day 7, pg. 169. Counts then hurriedly hopped back into the van and Carroll drove off. See RT Jury Trial, Day 6, pg. 120. Counts then questioned both Zone and Taoipu as to whether they were carrying a firearm and why they had not assisted him. Id. at 120-121. Zone responded that he did not have a gun and had nothing to do with the plan. Id. at 121. Taoipu responded that he had a gun, but did not want to inadvertently hit Carroll with gunfire. Id.

Carroll then drove the four (4) back to the Palomino, where Carroll exited the van and entered the club. Id. at 122. Carroll met with Espindola and Mr. H in the office. See RT Jury Trial, Day 9, pgs. 77-78. He sat down in front of Mr. H and informed him "It's done," and stated "He's downstairs." Id. at 78-79; RT Jury Trial, Day 11, pg. 292. Mr. H instructed

Espindola to "Go get five out of the safe." See RT Jury Trial, Day 9, pgs. 77-79. Espindola queried, "Five what? $500.00?," which caused Mr. H to become angry and state "Go get $5,000.00 out of the safe." Id.; RT Jury Trial, Day 12, 194-196, 291. Espindola followed Mr. H's instructions and withdrew $5,000.00 from the office safe, a substantial sum in light of the Palomino's financial condition. See RT Jury Trial, Day 9, pgs. 79-81. Espindola placed the money in front of Carroll who picked it up and walked out of the office. Id. Alone with Mr. H, Espindola asked Mr. H, "What have you done?", to which Mr. H did not immediately respond, but later asked "Did he do it?" Id. at 81-82.

Ten (10) minutes after entering the Palomino, Carroll emerged from the club, retrieved Counts, and then went back in the club accompanied by Counts. See RT Jury Trial, Day 6, pg. 122. Counts then emerged from the club, got into a yellow taxicab minivan and left the scene. Id. at 123, 155-156; RT Jury Trial, Day 7, pg. 150. Carroll again emerged from the Palomino thirty (30) minutes later and drove the van first to a self-serve car wash and then back to his house, all the while accompanied by Zone and Taoipu. See RT Jury Trial, Day 6, pgs. 123-124; RT Jury Trial, Day 7, pgs. 42-45. Zone was very shaken up about the murder and did not say much after they returned to his and Carroll's apartment. See RT Jury Trial, Day 6, pg. 124.

The next morning, May 20, 2005, Espindola and Mr. H awoke at Espindola's house after a night of gambling at the MGM. See RT Jury Trial, Day 9, pgs. 83-85. Mr. H appeared nervous and as though he had not slept; he told Espindola he needed to watch the television for any news. Id. at 85-86. While watching the news, they observed a report of Hadland's murder; Mr. H said to Espindola, "He did it." Id. at 86. Espindola again asked Mr. H, "What did you do?" and Mr. H responded that he needed to call his attorney. Id. Meanwhile, that same morning, Carroll slashed the tires on the van and, accompanied by Zone, used another car to follow Taoipu who drove the van down the street to a repair shop. See RT Jury Trial, Day 6, pg. 125; RT Jury Trial, Day 7, pg. 94; RT Jury Trial, Day 11, 84-85. Carroll paid $100.00 cash to have all four (4) tires replaced. See RT Jury Trial, Day 6, pg. 125. Carroll, Zone, and Taoipu subsequently went to a Big Lots store where Carroll

purchased cleaning supplies, after which Carroll cleaned the interior of the Astro van. Id. at 127-128.

Carroll then drove himself, Zone, and Taoipu in the Astro van to Simone's where Mr. H, Little Lou, and Espindola were present. Id. at 128-129. Carroll made Zone and Taoipu wait in the van while he went into Simone's; Carroll emerged about thirty (30) minutes later and directed Zone and Taoipu inside where they sat on a couch in Simone's central office area. Id. While at Simone's, Zone observed Carroll speaking with Mr. H in between trips to a back room, and he also observed Carroll speaking with Espindola. Id. at 132, 136-137; RT Jury Trial, Day 7, pgs. 146-147, 159. Carroll then went into a back room of Simone's, but emerged later to direct Zone and Taoipu into the bathroom. Carroll expressed disappointment in Zone and Taoipu for not involving themselves in Hadland's murder, and he told them they had missed the opportunity to make $6,000.00. See RT Jury Trial, Day 6, pg. 130-131. He informed Zone and Taoipu that Counts received $6,000.00 for his part in Hadland's murder. Id. at 131. After Carroll, Zone, and Taoipu left Simone's, Carroll told Zone that Mr. H had instructed Carroll that the "job was finished and that [they] were just to go home." See RT Jury Trial, Day 7, pgs. 159-160.

Las Vegas Metropolitan Police Department (LVMPD) detectives identified Carroll as possibly involved in the murder after speaking with Hadland's girlfriend, Paijik Karlson, and because his name showed as the last person called from Hadland's cell phone. See RT Jury Trial, Day 7, pg. 172; RT Jury Trial, Day 11, pg. 150. On May 20, 2005, Detective Martin Wildemann spoke with Mr. H and inquired about Carroll, requesting any contact information Mr. H might have for Carroll; Mr. H told Detective Wildemann he had no contact information for Carroll and that Wildemann should speak with one of the Palomino managers, Ariel aka Michelle Schwanderlik, who could put the detectives in touch with Carroll. Id. at 78.

At approximately 7:00 PM, the detectives returned to the Palomino where they found Carroll who agreed to accompany them back to their office for an interview. See RT Jury Trial, Day 7, pg. 177-178; RT Jury Trial, Day 9, pgs. 78-79. After the interview, the

detectives took Carroll back to his apartment where they encountered Zone who agreed to come to their office for an interview. See RT Jury Trial, Day 11, pgs. 84-85. Carroll then told Zone within earshot of the detectives: "Tell them the truth, tell them the truth. I told them the truth." See RT Jury Trial, Day 7, pgs. 180-181. Zone recalled Carroll also saying: "If you don't tell the truth, we're going to jail." See RT Jury Trial, Day 6, pg. 135. Zone interpreted Carroll's statements to mean Zone should fabricate a story tending to exculpate Carroll, himself, and Taoipu. See RT Jury Trial, Day 7, pgs. 97-98. Zone gave the police a voluntary statement on May 21, 2005. See RT Jury Trial, Day 11, pg. 85. Also on that day, Carroll brought Taoipu to the detectives' office for an interview. See RT Jury Trial, Day 7, pgs. 189-190; RT Jury Trial, Day 11, pg. 86.

Meanwhile on May 21, 2005, Mr. H and Espindola consulted with attorney Jerome A. DePalma, Esq., and defense attorney Dominic Gentile, Esq.'s Investigator, Don Dibble. See RT Jury Trial, Day 11, pgs. 216-217. The next morning, May 22, 2005, a completely distraught Mr. H said to Espindola, "I don't know what I told him to do." See RT Jury Trial, Day 9, pg. 115. Espindola responded by again asking Mr. H, "What have you done?" to which Mr. H responded, "I don't know what I told him to do. I feel like killing myself." Id. Espindola asked Mr. H if he wanted her to speak to Carroll and Mr. H responded affirmatively. Id. at 116; RT Jury Trial, Day 12, pg. 301:10-18. Espindola arranged through Mark Quaid, parts manager for Simone's, to get in touch with Carroll. See RT Jury Trial, Day 9, pgs. 116-117. On the morning of May 23, 2005, LVMPD Detective Sean Michael McGrath and Federal Bureau of Investigation (FBI) agent Bret Shields put an electronic listening device on Carroll's person; the detectives intended for Carroll to meet at Simone's with Mr. H and the other coconspirators. See RT Jury Trial, Day 7, pg. 215-216. Prior to Carroll arriving at Simone's, Mr. H and Espindola engaged in a conversation by passing handwritten notes back and forth. See RT Jury Trial, Day 9, pgs. 130-131. In this conversation, Mr. H instructed Espindola that she should tell Carroll to meet Arial and resign from working at the Palomino under a pretext of taking a leave of absence to care for his sick son. Id. at 119; RT Jury Trial, Day 12, pg. 300:10-18. He further instructed Espindola to

warn Carroll that if something bad happens to Mr. H then there would be no one to support and take care of Carroll. Id. After the conversation, Espindola tore the notes up and flushed them down a toilet. See RT Jury Trial, Day 9, pg. 131.

When Carroll arrived at Simone's, Espindola directed him to Room 6 where he met with Little Lou. Id. at 118. Espindola joined them and asked Carroll if he was wearing "a wire," to which Carroll responded, "Oh come on man. I'm not fucking wired. I'm far from fucking wired," and he lifted his shirt up. See Exhibit 1, pg. RA 52; RT Jury Trial, Day 9, pg. 121; RT Jury Trial, Day 10, 196. Mr. H was present in his office at Simone's while the three met in Room 6. RT Jury Trial, Day 9, pg. 117; RT Jury Trial, Day 10, pgs. 288-289. In the course of the conversation among Carroll, Espindola, and Little Lou, Espindola informed Carroll: "Louie is panicking, he's in a mother fucking panic, cause I'll tell you right now...if something happens to him we all fucking lose. Every fucking one of us." See Exhibit 1, pg. RA 53. Little Lou informed Carroll that "[Mr. H]'s all ready to close the doors and everything and hide go into exile and hide." See Exhibit 1, pg. RA 62. Espindola emphasized the importance of Carroll not defecting from Mr. H:

> "Yeah but...if the cops can't go no where with you, the shits gonna have to, fucking end, they gonna have to go someplace else, they're still gonna dig. They are gonna keep digging, they're gonna keep looking, they're gonna keep on, they're gonna keep on looking. [pause] Louie went to see an attorney not just for him but for you as well, just in case. Just in case...we don't want it to get to that point, I'm telling you because if we have to get to that point, you and Louie are gonna have to stick together."

See Exhibit 1, pg. RA 54.

Carroll, who had been prepared by detectives to make statements calculated to elicit incriminating responses, initiated the following exchange:

> Carroll: Hey what's done is done, you wanted him fucking taken care of we took care of him...
>
> Espindola: Why are you saying that shit, what we really wanted was for him to be beat up, then anything else, _____mother fucking dead.

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See Exhibit 1, pg. RA 54. Carroll also stated to Little Lou: "You [] not gonna fucking[...] what the fuck are you talking about don't worry about it...you didn't have nothing to do with it," to which Little Lou had no response. See Exhibit 1, pg. RA 57.

Espindola again emphasized that Carroll should not talk to the police and she would arrange an attorney for him:

> Espindola: all I'm telling you is all I'm telling you is stick to your mother fucking story_____Stick to your fucking story. Cause I'm telling you right now it's a lot easier for me to try to fucking get an attorney to get you fucking out than it's gonna be for everybody to go to fucking jail. I'm telling you once that happens we can kiss everything fucking goodbye, all of it...your kids' salvation and everything else....It's all gonna depend on you.

See Exhibit 1, pg. RA 61.

Little Lou also instructed Carroll to remain quiet and what Carroll should tell police if confronted: "[whispering]_____don't say shit, once you get an attorney, we can say_____TJ, they thought he was a pimp and a drug dealer at one time_____I don't know shit, I was gonna get in my car and go promote but they started talking about drugs and pow." See Exhibit 1, pg. RA 59. He also promised to support Carroll should Carroll go to prison for conspiracy:

> Little Lou: ...How much is the time for a conspiracy_____
>
> Carroll: [F]ucking like 1 to 5 it aint shit.
>
> Little Lou: In one year I can buy you twenty-five thousand of those [savings bonds],___thousand dollars___one year, you'll come out and you'll have a shit load of money_____I'll take care of your son I'll put em in a nice condo_____

See Exhibit 1, pg. RA 65.

During this May 23rd wiretapped conversation, Little Lou also solicited Zone and Taoipu's murder. In response to Carroll's claims that Zone and Taoipu were demanding money and threatening to defect to the police, Little Lou proposed killing both young men:

> Carroll: They're gonna fucking work deals for themselves, they're gonna get me for sure cause I was driving, they're gonna get KC because he was the fucking

trigger man. They're not gonna do anything else to the other guys cause they're fucking snitching.

Little Lou: Could you have KC kill them too, we'll fucking put something in their food so they die rat poison or something.

Carroll: We can do that too.

Little Lou: And we get KC last.

See Exhibit 1, pg. RA 58.

Little Lou: Listen____You guys smoke weed right, after you have given them money and still start talking they're not gonna expect rat poisoning in the marijuana and give it to them_____

Espindola: I'll get you some money right now.

Little Lou: Go buy rat poison____and take_____back to the club…Here, [d]rink this right.

Carroll: [W]hat is it?

Little Lou: Tanguerey, [sic] you stir in the poison_____

Espindola: Rat poison is not gonna do it I'm telling you right now_____

Little Lou: [Y]ou know what the fuck you got to do.

Espindola:_ ____takes so long_____not even going to fucking kill him.

See Exhibit 1, pg. RA 64.

Little Lou appeared at one point to criticize Carroll for deviating from what Little Lou had told him to do and instead enlisting Counts. See Exhibit 1, pg. RA 63 at 22:15. Little Lou said "Next time you do something stupid like that. **I told you, you should have taken care of** ___ all the fucking time ___. Piece of cake, cause he ___ priors. How do you know this guy?" See Exhibit 1, pg. RA 63; Exhibit 2, pg. RA 98 (emphasis added). Then Little Lou said, "Ok ____ kill this fucking guy. ____ **get rid of the damn conspiracy.** _____" See Exhibit 1, pg. RA 64; Exhibit 2, pg. RA 102 (emphasis added). At the end of the meeting, Espindola stated she would give Carroll some money and promised to financially contribute to Carroll and his son, as well as arrange for an attorney for Carroll. See Exhibit

1, pg. RA 66. After the meeting, Carroll provided the detectives $1,400.00 and a bottle of Tanqueray, which he stated were given to him by Espindola and Little Lou, respectively. See RT Jury Trial, Day 7, pgs. 218-219. Espindola would later testify Mr. H gave her only $600.00 to give to Carroll, which she did in fact give to Carroll on the 23rd. See RT Jury Trial, Day 9, pgs. 124-126; RT Jury Trial, Day 10, pgs. 165-166, 205-207.

On May 24, 2005, the detectives again outfitted Carroll with a wire and sent him back to Simone's. See RT Jury Trial, Day 7, pgs. 223-224. After Carroll's unexpected arrival, Espindola again directed him to Room 6 where the two (2) again met with Little Lou while Mr. H was present in the body shop's kitchen area. See RT Jury Trial, Day 9, pgs. 128-129. During the conversation, Carroll and Espindola engaged in an extended colloquy regarding their agreement to harm Hadland:

Carroll:	You know what I'm saying, I did everything you guys asked me to do. You told me to take care of the guy; I took care of him.
Espindola:	O.K. wait, listen, listen to me (Unintelligible)
Carroll:	I'm not worried.
Espindola:	Talk to the guy, not fucking take care of him like get him out of the fucking way (Unintelligible). God damn it, I fucking called you.
Carroll:	Yeah, and when I talked to you on the phone, Ms. Anabel, I specifically I specifically said, I said "if he's by himself, do you still want me to do him in."
Espindola:	I I...
Carroll:	You said Yeah.
Espindola:	I did not say "yes."
Carroll:	You said if he's with somebody, then beat him up.
Espindola:	I said go to plan B, -- fucking Deangelo, Deangelo you just told admitted to me that you weren't fucking alone I told you 'no', I fucking told you 'no' and I kept trying to fucking call you and you turned off your mother fucking phone.
Carroll:	I never turned off my phone.

See Exhibit 3, pg. RA 73.

At some point in this May 24 meeting, Espindola left the room to go speak with Mr. H. See RT Jury Trial, Day 9, pg. 129. She informed Mr. H that Carroll wanted more money and Mr. H instructed her to give Carroll some money. Id. 132-133. After Carroll returned from Simone's, he gave the detectives $800.00, which Espindola had provided to him. See RT Jury Trial, Day 7, pg. 224. After Carroll's second wiretapped meeting, detectives took Little Lou and then Espindola into custody for the murder of Hadland. See RT Jury Trial, Day 7, pg. 15.

ARGUMENT

I. INEFFECTIVE ASSISTANCE OF COUNSEL IN NEVADA

A. Trial Counsel

The United States Supreme Court in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984), established the standards for a court to determine when counsel's assistance is so ineffective that it violates the Sixth Amendment of the U.S. Constitution. In order to assert a claim for ineffective assistance of counsel the defendant must prove that he was denied "reasonably effective assistance" of counsel by satisfying the two-prong test of Strickland, 466 U.S. at 686-687, 104 S.Ct. at 2063-2064 (1984). See also State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993). Under this test, the defendant must show: (1) that his counsel's representation fell below an objective standard of reasonableness, and (2) that but for counsel's errors, there is a reasonable probability that the result of the proceedings would have been different. Strickland, 466 U.S. at 687-688, 694, 104 S.Ct. at 2065, 2068 (emphasis added); Warden v. Lyons, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984) (adopting Strickland two-part test in Nevada). "A court may consider the two test elements in any order and need not consider both prongs if the defendant makes an insufficient showing on either one." Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1997); Strickland, 466 U.S. at 697, 104 S. Ct. at 2069.

Surmounting Strickland's high bar is never an easy task." Padilla v. Kentucky, 130 S. Ct. 1473, 1485, 176 L. Ed. 2d 284 (2010). The question is whether an attorney's representations amounted to incompetence under prevailing professional norms, "not

whether it deviated from best practices or most common custom." Harrington v. Richter, 131 S.Ct. 770, 778 (2011).

With regard to the first prong, a defendant is not entitled to errorless counsel. "Effective counsel does not mean errorless counsel, but rather counsel whose assistance is '[w]ithin the range of competence demanded of attorneys in criminal cases.'" Jackson v. Warden, 91 Nev. 430, 432, 537 P.2d 473, 474 (1975) (quoting McMann v. Richardson, 397 U.S. 759, 771, 90 S.Ct. 1441, 1449 (1970)). Rather, "'[d]eficient' assistance of counsel is representation that falls below an objective standard of reasonableness." Kirksey, 112 Nev. at 987, 923 P.2d at 1107. What appears by hindsight to be a wrong or poorly advised decision involving tactics or strategy is not sufficient to meet the defendant's heavy burden of proving ineffective counsel. "Judicial review of a lawyer's representation is highly deferential, and a defendant must overcome the presumption that a challenged action might be considered sound strategy." State v. LaPena, 114 Nev. 1159, 1166, 968 P.2d 750, 754 (1998) (quoting Strickland, 466 U.S. at 689, 104 S.Ct. at 2065.)

Based on the above law, the court begins with the presumption of effectiveness and then must determine whether or not defendant has, "establish[ed] the factual allegations which form the basis for his claim of ineffective assistance by a preponderance of the evidence." Means v. State, 120 Nev. 1001, 1013, 103 P.3d 25, 33 (2004). The role of a court in considering allegations of ineffective assistance of counsel, is "not to pass upon the merits of the action not taken but to determine whether, under the particular facts and circumstances of the case, trial counsel failed to render reasonably effective assistance." Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978) (citing, Cooper v. Fitzharris, 551 F.2d 1162, 1166 (9th Cir. 1977))

In considering whether trial counsel was effective, the court must determine whether counsel made a "sufficient inquiry into the information . . . pertinent to his client's case." Doleman v State, 112 Nev. 843, 846, 921 P.2d 278, 280 (1996); citing, Strickland, 466 U.S. at 690–691, 104 S.Ct. at 2066. Once this decision is made, the court will consider whether counsel made "a reasonable strategy decision on how to proceed with his client's case."

Doleman, 112 Nev. at 846, 921 P.2d at 280; citing Strickland, 466 U.S. at 690–691, 104 S.Ct. at 2066. Strategy or decisions regarding the conduct of defendant's case are "virtually unchallengeable absent extraordinary circumstances." Doleman, 112 Nev. 843, 848, 921 P.2d 278, 280 (quoting, Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990)). There is a "*strong presumption* that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 689, 104 S.Ct. at 2065 (Emphasis added). This analysis does not mean that the court "should second guess reasoned choices between trial tactics nor does it mean that defense counsel, to protect himself against allegations of inadequacy, must make every conceivable motion no matter how remote the possibilities are of success." Donovan, 94 Nev. at 675, 584 P.2d at 711. In essence, the court must "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland, 466 U.S. at 690, 104 S.Ct. at 2066.

Counsel cannot be ineffective for failing to make futile objections or arguments. See Ennis v. State, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006). Trial counsel "has the immediate and ultimate responsibility of deciding if and when to object, which witnesses, if any, to call, and what defenses to develop." Wainwright v. Sykes, 433 U.S. 72, 93, 97 S. Ct. 2497, 2510 (1977); see also Rhyne v. State, 118 Nev. 1, 8, 38 P.3d 163, 167 (2002). The Sixth Amendment does not require that counsel do what is impossible or unethical. United States v. Cronic, 466 U.S. 648, 657 n. 19, 104 S. Ct. 2039, 2046 n. 19 (1984). If there is no bona fide defense to the charge, counsel cannot create one and may disserve the interests of his client by attempting a useless charade. Id.

"There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." Strickland, 466 U.S. at 689, 104 S.Ct. at 2065. "Strategic choices made by counsel after thoroughly investigating the plausible options are almost unchallengeable." Dawson v. State, 108 Nev. 112, 117, 825 P.2d 593, 596 (1992) cert. denied, 507 U.S. 921, 113 S.Ct.

1286 (1993) (citing Strickland, 466 U.S. at 690, 104 S. Ct. at 2066); see also Ford v. State, 105 Nev. 850, 784 P.2d 951 (1989).

Even if a defendant can demonstrate that his counsel's representation fell below an objective standard of reasonableness, he must still demonstrate prejudice and show a reasonable probability that, but for counsel's errors, the result of the trial would have been different. McNelton v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999) (citing Strickland, 466 U.S. at 687-89, 104 S. Ct. at 2064-66); see also, Kirksey, 112 Nev. at 988, 825 P.2d at 1107. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. (citing Strickland, 466 U.S. at 694, 104 S. Ct. 2068). In sum, the framework for analysis is as follows:

> ... when a petitioner alleges ineffective assistance of counsel, he must establish the factual allegations which form the basis for his claim of ineffective assistance by a preponderance of the evidence. Next, as stated in Strickland, the petitioner must establish that those facts show counsel's performance fell below a standard of objective reasonableness, and finally the petition must establish prejudice by showing a reasonable probability that, but for counsel's deficient performance, the outcome would have been different.

Means, 120 Nev. at 1013, 103 P.3d at 33.

Furthermore, claims of ineffective assistance of counsel asserted in a petition for post-conviction relief must be supported with specific factual allegations, which if true, would entitle the petitioner to relief. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). "Bare" and "naked" allegations are not sufficient, nor are those belied and repelled by the record. Id. Likewise, NRS 34.735(6) states a petitioner "must allege specific facts supporting the claims in the petition [filed] seeking relief from any conviction or sentence. Failure to allege specific facts rather than just conclusions may cause [the] petition to be dismissed." NRS 34.735(6). "A defendant seeking post-conviction relief is not entitled to an evidentiary hearing on factual allegations belied or repelled by the record." Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984) (citing Grondin v. State, 97 Nev. 454, 634 P.2d 456 (1981)). Additionally, "[a] petitioner for post-conviction relief cannot rely on conclusory claims for relief but must make specific factual allegations that if true would

entitle him to relief. The petitioner is not entitled to an evidentiary hearing if the record belies or repels the allegations." Colwell v. State, 118 Nev. 807, 812, 59 P.3d 463, 467 (2002) (citing Evans v. State, 117 Nev. 609, 621, 28 P.3d 498, 507 (2001)).

B. Appellate Counsel

Effectiveness of appellate counsel is also addressed under the Strickland standard. Foster v. State, 121 Nev. 165, 111 P.3d 1083 (2005). The federal courts have also held that a claim of ineffective assistance of appellate counsel must satisfy the two-prong test set forth by Strickland, 466 U.S. at 687-688, 694, 104 S.Ct. at 2065, 2068; Williams v. Collins, 16 F.3d 626, 635 (5th Cir. 1994); Hollenback v. United States, 987 F.2d 1272, 1275 (7th Cir. 1993); Heath v. Jones, 941 F.2d 1126, 1130 (11th Cir. 1991). There is a strong presumption that appellate counsel's performance was reasonable and fell within "the wide range of reasonable professional assistance." See United States v. Aguirre, 912 F.2d 555, 560 (2nd Cir. 1990); citing Strickland, 466 U.S. at 689, 104 S.Ct. at 2065. "[I]n order to establish prejudice based on deficient assistance of appellate counsel, the petitioner must show that the omitted issue would have had a reasonable probability of success on appeal." Foster, 121 Nev. at 170, 111 P.3d at 1087 (citing Lara v. State, 120 Nev. 177, 183-84, 87 P.3d 528, 532 (2004)); see also Duhamel v. Collins, 955 F.2d 962, 967 (5th Cir. 1992); Heath, 941 F.2d at 1132. "Appellate counsel is not required to raise every non-frivolous or meritless issue to provide effective assistance." Id. (quoting Lara, 120 Nev. at 184, 87 P.3d at 532). "Appellate counsel is entitled to make tactical decisions to limit the scope of an appeal to issues that counsel feels have the highest probability of success." Id. Effective appellate advocacy is not coextensive with a litigation approach that raises every single colorable appellate issue. Ford v. State, 105 Nev. 850, 853 (1989) (citing Jones v. Barnes, 463 U.S. 745, 752, 103 S.Ct. 3308, 3313 (1983)).

Furthermore, the Nevada Supreme Court has held that all appeals must be "pursued in a manner meeting high standards of diligence, professionalism and competence." Burke v. State, 110 Nev. 1366, 1368, 887 P.2d 267, 268 (1994). In Jones, 463 U.S. 745, 751, 103 S.Ct. 3308, 3312, the Supreme Court recognized that part of professional diligence and

competence involves "winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." Id. at 751 -752, 103 S.Ct. at 3313. In particular, a "brief that raises every colorable issue runs the risk of burying good arguments . . . in a verbal mound made up of strong and weak contentions." Id. 753, 103 S.Ct. at 3313. The defendant has the ultimate authority to make fundamental decisions regarding his case. Jones, 463 U.S. 745, 751. However, the defendant does not have a constitutional right to "compel appointed counsel to press nonfrivolous points requested by the client, if counsel, as a matter of professional judgment, decides not to present those points." Id. The Court also held that, "for judges to second-guess reasonable professional judgments and impose on appointed counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy." Id. at 754, 103 S.Ct. at 3314.

II. DEFENSE COUNSEL DID NOT PROVIDE INEFFECTIVE ASSISTANCE OF COUNSEL REGARDING THE JURY INSTRUCTIONS AT LITTLE LOU'S TRIAL

A. District Court's Authority in Settling Jury Instructions

"The district court has broad discretion to settle jury instructions, and [the Nevada Supreme Court] reviews the district court's decision for an abuse of that discretion or judicial error. 'An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason.'" Crawford v. State, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005) (internal citations omitted); see also Brooks v. State, 124 Nev. 203, ——–, 180 P.3d 657, 658–659 (2008). "[H]owever, whether the instruction was an accurate statement of the law is a legal question that is reviewed de novo." Funderburk v. State, 125 Nev. 260, 263, 212 P.3d 337, 339 (2009) (citing Nay v. State, 123 Nev. 326, 330, 167 P.3d 430, 433 (2007)). "'It is not error for a court to refuse an instruction when the law in that instruction is adequately covered by another instruction given to the jury.'" Rose v. State, 123 Nev. 194, 205, 163 P.3d 408, 415 (2007) (quoting Doleman v. State, 107 Nev. 409, 416, 812 P.2d 1287, 1291 (1991)). Defendants are entitled to "specific jury instructions that remind jurors that they may not convict the defendant if proof of a particular element is

lacking' upon request because '[a] positive instruction as to the elements of the crime does not justify refusing a properly worded negatively phrased 'position' or 'theory' instruction.'" Crawford, 121 Nev. at 753, 121 P.3d at 588 (internal citations omitted). "[T]he defense has the right to have the jury instructed on its theory of the case as disclosed by the evidence, no matter how weak or incredible that evidence may be." Crawford, 121 Nev. at 751, 121 P.3d at 586. However, "the conclusion that district courts must provide instructions upon request incorporating the significance of a defendant's theory of the defense does not mean that the defendant is entitled to instructions that are misleading, inaccurate, or duplicitous." Crawford, 121 Nev. at 754, 121 P.3d at 589. A jury may not be given instructions which are a misstatement of law. Crawford, 121 Nev. at 757, 121 P.3d at 591; see also Barron v. State, 105 Nev. 767, 773, 783 P.2d 444, 448 (1989) (while a defendant has a right to a jury instruction on his theory of the case, the instruction "must correctly state the law").

"Jurors should neither be expected to be legal experts nor make legal inferences with respect to the meaning of the law; rather, they should be provided with applicable legal principles by accurate, clear, and complete instructions specifically tailored to the facts and circumstances of the case." Crawford, 121 Nev. at 754, 121 P.3d at 588. "[T]he district court is ultimately responsible for [..] assuring [...] that the jury is [...] fully and correctly instructed. In this, the district court may either assist the parties in crafting the required instructions or may complete the instructions sua sponte." Crawford, 121 Nev. at 754-755, 121 P.3d at 589.

On appeal jury instructions are subject to harmless-error analysis:

> We have explained that "jury instruction errors are subject to a harmless-error analysis if they do not involve the type of jury instruction error which 'vitiates all the jury's findings' and produces 'consequences that are necessarily unquantifiable and indeterminate.' "We conclude that the jury instruction error in this case is amenable to harmless-error review. As we have explained, "[a]n error is harmless when it is 'clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.' "

Nay, 123 Nev. at 333-334, 167 P.3d at 435 (internal citations omitted).

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B. Ground 1: Little Lou Fails to Demonstrate Ineffective Assistance of Counsel Because Actions Seeking a Jury Instruction Under Moore v. State Would Have Been Futile

Little Lou fails to demonstrate that his trial counsel erred in not offering a jury instruction, or filing a NRS 175.381(2) motion, pursuant to Moore v. State, 117 Nev. 659, 662-663, 27 P.3d 447, 450 (2001), arguing that Moore prevented an enhancement under NRS 193.165 for Little Lou's conviction for Second Degree Murder. See Little Lou's Supplemental Petition for Writ of Habeas Corpus (Post-Conviction), filed May 9, 2014, (hereinafter "Supplement"), pgs. 6-17. Little Lou alleges in his Supplement that a jury instruction pursuant to Moore should have been given and instructed the jury "not to find the existence of the deadly weapon enhancement of NRS 193.165 if the jury were to find the defendant guilty of second degree murder on a conspiracy theory." See Supplement, pg. 7. However, trial counsels' actions did not fall below an objective standard of reasonableness, and trial counsel was not ineffective, because the offering of such an instruction or the filing of a NRS 175.381(2) motion would have been futile because it would have been rejected by the district court. Ennis, 122 Nev. at 706, 137 P.3d at 1103.

In Moore v. State the jury found Moore guilty of First Degree Murder With Use of a Deadly Weapon, Robbery With Use of a Firearm, and Conspiracy to Commit Robbery With Use of a Firearm. Moore, 117 Nev. at 660-61, 27 P.3d at 448. Moore was sentenced to equal and consecutive terms on each of the 3 counts pursuant to NRS 193.165, including his conviction for Conspiracy to Commit Robbery. Id. The Nevada Supreme Court concluded and ruled as follows:

> Following the plain import of the term "uses" in NRS 193.165(1), we conclude that it is improper to enhance a sentence for conspiracy using the deadly weapon enhancement. Accordingly, we reverse Moore's sentence in part and remand this case to the district court with instructions to vacate the second, consecutive term of Moore's sentence for conspiracy. We affirm Moore's conviction and sentence in all other respects.

Id. at 663, 27 P.3d at 450. Thus, the Nevada Supreme Court affirmed the With Use of a Deadly Weapon enhancement on the Murder and Robbery convictions and only reversed the equal and consecutive sentence/enhancement on the Conspiracy to Commit Robbery

conviction. Id. Notably, the Nevada Supreme Court stated that "Moore conspired with three others to rob the occupants of an apartment at gunpoint. While carrying out the armed robbery, one of the conspirators shot and killed a man who the conspirators believed was delivering drugs to the apartment." Id. at 660, 27 P.3d at 448.

Therefore, the proposed instruction from Little Lou's Supplement would be an incorrect statement of law because Moore only prohibits a deadly weapon enhancement on a conviction and sentence for a charge of conspiracy, not a conviction for murder on a conspiracy theory of liability.[1] Id. at 663, 27 P.3d at 450; see also Supplement, pg. 7. The district court would have properly rejected such a proposed instruction because it is not required to give jury instructions containing inaccurate or incorrect statements of law. Crawford, 121 Nev. at 754, 757, 121 P.3d at 589, 591; Barron, 105 Nev. 767, 773, 783 P.2d 444, 448; see also Supplement, pg. 7. Furthermore, a jury instruction which properly stated the law in Moore would also have been unnecessary and futile because Little Lou's Conspiracy to Commit Murder charge, COUNT 1, did not include an enhancement for Use of a Deadly weapon. See Jury Instruction No. 3, Verdict (re: Luis Hidalgo, III), pg. 1. Therefore, Little Lou cannot demonstrate that his trial counsel's conduct fell below an objective standard or reasonableness and also cannot demonstrate that there was a reasonable probability that the outcome of the trial would have been different if counsel had offered any Moore instruction or filed a NRS 175.381(2) motion on the same basis. Ennis, 122 Nev. at 706, 137 P.3d at 1103; Strickland, 466 U.S. at 687-688, 694, 697, 104 S.Ct. at 2065, 2068-2069; Lyons, 100 Nev. 430, 432, 683 P.2d 504, 505; Kirksey, 112 Nev. 980, 987, 923 P.2d 1102, 1107; McNelton, 115 Nev. at 403, 990 P.2d at 1268.

Regardless, the jury did not have to be unanimous in their theory of liability for Little Lou's Second Degree Murder conviction, here conspiracy or aiding and abetting. See generally Crawford, 121 Nev. at 750, 121 P.3d at 586; Moore v. State, 116 Nev. 302, 304, 997 P.2d 793, 794 (2000); Walker v. State, 113 Nev. 853, 870, 944 P.2d 762, 773 (1997);

[1] The State is unable to discern how Little Lou is alleging that "the rationale of Fiegehen v. State, 121 Nev. 293, 301-305, 113 P.3d 305, 310-312 (2005)" affects the analysis here. Id.; see also Supplement, pg. 17. Fiegehen merely held that where a jury convictions a defendant of first-degree murder, via a felony-murder theory, as a matter of law, the verdict was sufficient under NRS 200.030(3) even though it did not designate between 1st and 2nd degree murder. Fiegehen, 121 Nev. at 301-305, 113 P.3d at 310-312.

see also Jury Instructions Nos. 3, 12; see also Verdict (re: Luis Hidalgo, III), filed February 17, 2009, pg. 2. Therefore, Little Lou cannot assume that he was convicted of Second Degree Murder With Use of a Deadly Weapon based upon a conspiracy theory of liability rather than an aiding and abetting theory of liability. Therefore even if a motion under NRS 175.281(2) or an instruction pursuant to Moore, as alleged in this Supplement, should have been presented, Little Lou cannot demonstrate prejudice and show a reasonable probability that, but for counsel's alleged errors, the result of the trial would have been different. McNelton, 115 Nev. at 403, 990 P.2d at 1268; Strickland, 466 U.S. at 687-689, 694, 104 S. Ct. at 2064-2066, 2068; Kirksey, 112 Nev. at 988, 825 P.2d at 1107.

Furthermore, trial counsel for Little Lou did in fact file a post-trial Motion for Judgment of Acquittal or, in the Alternative, a New Trial, pursuant to NRS 175.381, which challenged in part the deadly weapon enhancement on the Second Degree Murder With Use of a Deadly Weapon conviction. See Copy of Defendant' Luis A. Hidalgo III.'s Motion for Judgment of Acquittal or, in the Alternative, a New Trial, filed March 10, 2009, attached hereto as Exhibit 4. Counsel also ensured that a proper jury instruction was given based on Brooks v. State, 124 Nev. 203, 180 P.3d 657 (2008), which is the current Nevada law controlling whether an unarmed co-conspirator or aider and abettor is subject to an enhancement for use of a deadly weapon. Id.; see also Jury Instruction No. 33, RT Jury Trial, Day 13, pgs. 65-68.

Therefore, Ground 1 must be denied because Little Lou cannot establish (1) that his counsel's representation fell below an objective standard of reasonableness, and (2) that but for counsel's errors, there is a reasonable probability that the result of the proceedings would have been different. Strickland, 466 U.S. at 687-688, 694, 104 S.Ct. at 2065, 2068; Lyons, 100 Nev. at 432, 683 P.2d at 505.

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C. **Ground 2: Little Lou Fails to Demonstrate Ineffective Assistance of Counsel Because the Offering of the Proffered Jury Instruction and the Raising of These Arguments on Appeal Would Have Been Futile and Meritless**

Little Lou fails to demonstrate that his trial counsel erred in not offering a jury instruction as set forth on page 19 of his Supplement, and that his appellate counsel failed to challenge the district court's failure to offer a similar instruction – that the jury could not consider the co-conspirator statements if they did not find independent evidence that Little Lou was a member of the conspiracy; he also fails to demonstrate that trial and appellate counsel erred by not challenging Jury Instruction No. 40 on a confrontation clause basis. See Supplement, pgs. 18-25. Little Lou's allegations on this ground are convoluted, confusing, and meritless. Id. However, trial and appellate counsels' actions did not fall below an objective standard of reasonableness, and counsel was not ineffective, because the offering of such an instruction or argument would have been futile, rejected by the district court, and a frivolous issue on appeal because the law of the case demonstrates that it would have been denied by the Nevada Supreme Court. Ennis, 122 Nev. at 706, 137 P.3d at 1103; Foster, 121 Nev. 165, 170, 111 P.3d 1083, 1087; Ford, 105 Nev. 850, 853; Jones, 463 U.S. 745, 751-752, 103 S.Ct. 3308, 3312-3313. Furthermore, both in district court, and on appeal, it is counsels' decision on which defenses or arguments to raise and counsel acted reasonably. Wainwright, 433 U.S. 72, 93, 97 S. Ct. 2497, 2510; Rhyne, 118 Nev. 1, 8, 38 P.3d 163, 167; Foster, 121 Nev. 165, 170, 111 P.3d 1083, 1087; Ford, 105 Nev. 850, 853; Jones, 463 U.S. 745, 751-752, 103 S.Ct. 3308, 3312-3313. These decisions are almost unchallengeable, and presumed to be effective assistance. Dawson, 108 Nev. 112, 117, 825 P.2d 593, 596; Doleman, 112 Nev. 843, 848, 921 P.2d 278, 280; Strickland, 466 U.S. at 689, 104 S.Ct. at 2065; Aguirre, 912 F.2d 555, 560; Strickland, 466 U.S. at 689, 104 S.Ct. at 2065.

Specifically, the instruction proposed on pg. 19 of Little Lou's Supplement would have been futile if presented by trial counsel because the district would have properly rejected it as duplicitous and determined that the same points of law were adequately covered by Jury Instruction No. 40. Rose, 123 Nev. 194, 205, 163 P.3d 408, 415. Defendants are

only entitled to negatively phrased theory instructions on the elements of the crime, but they are not entitled to duplicitous instructions. Crawford, 121 Nev. at 751-754, 121 P.3d at 586-589. Nevada has long required independent evidence, beyond the statements of co-conspirators in order to admit statements of co-conspirators; this rule existed even before the ruling in McDowell v. State, 103 Nev. 527, 746 P.2d 149 (1987). Id. (citing Fish v. State, 92 Nev. 272, 549 P.2d 338 (1976); Crew v. State, 100 Nev. 38, 46, 675 P.2d 986, 991 (1984) (citing Carr v. State, 96 Nev. 238, 607 P.2d 114 (1980)). Jury Instruction No. 40, informed the jury that "Whenever there is slight evidence that a conspiracy existed, and that the Defendant was one of the members of the conspiracy, **then** the statements and acts by any person likewise a member maybe considered by the jury,...." See Jury Instruction No. 40 (emphasis added). This instruction, especially in light of McDowell, would have made the proposed instruction duplicitous because both instructions inform the jury that independent evidence must exist beyond the co-conspirator statements of Little Lou's participation in the conspiracy. Id.; see also Supplement, pg. 19.

In so far as Little Lou's Ground 2 allegations could be read argue that the instruction did not make it clear whether the determination of whether there was independent evidence of the conspiracy was a determination for the court and the jury, or just the court, that issue was addressed on direct appeal. See Little Lou's Opening Brief, pgs. 16-27, attached hereto as Exhibit 5; State's Answering Brief, pgs. 17-21, attached hereto as Exhibit 6. The Nevada Supreme Court affirmed Defendant's conviction and found Jury Instruction No. 40 to be a proper statement of the law concerning the admissibility of co-conspirator statements as set forth in McDowell; as demonstrated above that includes the requirement of independent evidence. See Luis A. Hidalgo, III v. State, Docket No. 54272, Order of Affirmance (June 21, 2012). As such, the law of the case controls.

Where an issue has already been decided on the merits by the Nevada Supreme Court, the Court's ruling is law of the case, and the issue will not be revisited. Pellegrini v. State, 117 Nev. 860, 34 P.3d 519 (2001); see McNelton v. State, 115 Nev. 396, 990 P.2d 1263, 1276 (1999); Hall v. State, 91 Nev. 314, 315-16, 535 P.2d 797, 798-99 (1975); see also

Valerio v. State, 112 Nev. 383, 386, 915 P.2d 874, 876 (1996); Hogan v. Warden, 109 Nev. 952, 860 P.2d 710 (1993). "The doctrine of the law of the case cannot be avoided by a more detailed and precisely focused argument subsequently made after reflection upon the previous proceedings." Hall, 91 Nev. at 316, 535 P.2d at 799. Under the law of the case doctrine, issues previously decided on direct appeal may not be reargued in a habeas petition. Pellegrini v. State, 117 Nev. 860, 888, 34 P.3d 519, 538 (2001) (citing McNelton v. State, 115 Nev. 396, 414-15, 990 P.2d 1263, 1275 (1999)). Therefore, trial counsel cannot be deemed ineffective for not making a futile offering of a duplicitous instruction. Ennis, 122 Nev. at 706, 137 P.3d at 1103. Likewise, appellate counsel was not required to raise this frivolous argument on appeal and cannot be deemed ineffective for failing to do so. Foster, 121 Nev. 165, 170, 111 P.3d 1083, 1087; Ford, 105 Nev. 850, 853; Jones, 463 U.S. 745, 751-752, 103 S.Ct. 3308, 3312-3313.

Little Lou also vaguely alleges that trial and appellate counsel should have challenged Jury Instruction No. 40 on the basis that the Nevada Supreme Court should reevaluate the McDowell v. State standard due to the confrontation clause cases of Crawford v. Washington, 541 U.S. 36 (2004) and Davis v. Washington, 547 U.S. 813 (2006) and their alleged effect on United States v. Bourjaily, 483 U.S. 171 (1987). See Supplement, pgs. 21-23. In doing so, Little Lou appears to argue that co-conspirator statements should no longer be admissible because they are either inherently reliable and thus subject to Crawford's confrontation clause requirement of cross-examination or inherently unreliable and thus inadmissible hearsay. See Supplement, pg. 23. However, Defendant misconstrues the holdings in Crawford and the other cases to which he refers.

In McDowell v. State, the Nevada Supreme Court ruled as follows:

> According to NRS 51.035(3)(e), an out-of-court statement of a co-conspirator made during the course and in furtherance of the conspiracy is admissible as nonhearsay against another co-conspirator. Pursuant to this statute, it is necessary that the co-conspirator who uttered the statement be a member of the conspiracy at the time the statement was made. It does not require the co-conspirator against whom the statement is offered to have been a member at the time the statement was made.

> The federal position is consistent with our interpretation. In construing Federal Rule of Evidence 801(d)(2)(E), which is analogous to NRS 51.035(3)(e), the federal courts have consistently held that extra-judicial statements made by one co-conspirator during the conspiracy are admissible, without violation of the Confrontation Clause, against a co-conspirator who entered the conspiracy after the statements were made. See U.S. v. Gypsum, 333 U.S. 364, 68 S.Ct. 525, 92 L.Ed. 746 (1948); U.S. v. Davis, 809 F.2d 1194 (6th Cir.1987).

103 Nev. 527, 529-30, 746 P.2d 149, 150 (1987). In Bourjaily v. United States, the United States Supreme Court similarly concluded that co-conspirator statements did not invoke the protections of the confrontation clause. 483 U.S. 171, 181-184, 107 S. Ct. 2775, 2782-2783. The decision in Bourjaily was based on the confrontation clause test set forth in Ohio v. Roberts, 448 U.S. 56, 63, 100 S.Ct. 2531, 2537 (1980) and concluded that no independent inquiry into the reliability of co-conspirator statements was necessary prior to admission because they qualified under a deeply rooted hearsay exemption. Id. Little Lou alleges that Crawford and Davis somehow change the long-standing rule that co-conspirator statements are not subject to the confrontation clause requirement for cross-examination but his argument is meritless. See Supplement, pgs. 21-23.

In Crawford, the United States Supreme Court replaced the Ohio v. Roberts test for the confrontation clause, which provided that hearsay statements from a declarant were admissible when "it falls under a 'firmly rooted hearsay exception' or bears 'particularized guarantees of trustworthiness.' 448 U.S., at 66, 100 S.Ct. 2531." Crawford, 541 U.S. 36, 60, 124 S. Ct. 1354, 1369. The Court ruled that:

> Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law—as does Roberts, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether. Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination. We leave for another day any effort to spell out a comprehensive definition of "testimonial." Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed.

Crawford, 541 U.S. at 68, 124 S. Ct. at 1374. In its historical review of confrontation clause law, which led to its decision to return to the rule set forth above, the Court noted that the confrontation clause was intended to protect against testimonial statements, or those statements which "would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." Id. at 51-52, 124 S. Ct. at 1364. As such, in that same historical review, the Court noted that without a prior opportunity to cross-examine, the framers did not intend to allow the admission of testimonial hearsay; therefore, the only exceptions/exemptions to the hearsay rule which should continue to be exempt from the confrontation clause were those that existed historically and did not involve testimonial hearsay "for example, business records or **statements in furtherance of a conspiracy.**" Id. at 55-56, 124 S. Ct. 1354, 1366-67. Thus, Crawford specifically excluded co-conspirator statements from the reach of the confrontation clause. Id.

Davis did not address co-conspirator statements made in furtherance of a conspiracy at all, but did further define testimonial statements, in relation to statements made by victims, as follows:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Davis v. Washington, 547 U.S. 813, 822, 126 S. Ct. 2266, 2273-74 (2006). The Court's ruling in Crawford was analyzed in greater detail by United States v. Baines, 486 F. Supp. 2d 1288, 1298-1300 (D.N.M. 2007), as cited by Little Lou. See Supplement, pg. 22. In Baines, that court noted that:

> In Crawford, **the Supreme Court cited a statement in furtherance of a conspiracy as a statement that by its nature is not testimonial.** 541 U.S. at 56, 124 S.Ct. 1354. The Court also noted that the outcome in Bourjaily, 483 U.S. at 181-184, 107 S.Ct. 2775, in which statements made unwittingly by a co-conspirator to an FBI informant, "did not make prior cross-examination an indispensable requirement." 541 U.S. at 58, 124