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.

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APPELLANT'S OPENING BRIEF

APPEAL FROM JUDGMENT DENYING POST-CONVICTION HABEAS CORPUS

Eighth Judicial District
State of Nevada

THE HONORABLE VALIERIE ADAIR, PRESIDING

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I. STATEMENT OF THE CASE AND ROUTING STATEMENT

After a lengthy jury trial, Petitioner herein, Luis Alonzo Hidalgo III ("Little Lou") was tried and convicted of a four-count indictment charging conspiracy to commit murder, second degree murder with use of a deadly weapon, and two counts of solicitation to commit murder. Petitioner was sentenced to 120 months to life with an equal and consecutive term pursuant to NRS 193.165, with other sentences to run concurrently thereto. (AAv12: 2793-94) This Court entered an Order of Affirmance on June 21, 2012 (AAv12: 2798-2808). After an unsuccessful Petition for Writ of Certiorari to the United States Supreme Court, this Court issued its Remittitur on April 17, 2013. (AAv1: 7)

Petitioner filed a Petition for Writ of *Habeas Corpus* on January 2, 2014. (AAv1: 1[1]) The original Petition alleged three grounds for relief: 1) 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 of second degree murder on a conspiracy theory. Alternatively,

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[1]The records of the court below indicate that the Petition was filed on January 22, 2014. (AAv1: 7) Those records are incorrect, although for this Court's purpose is, it does not matter. The Order to Respond indicates it was filed on January 2, 2014, and the Petition itself was dated December 20, 2013 (AAv1: 40).

counsel failed to file a motion after verdict within seven days per NRS 175.381(2) to strike the deadly weapon enhancement. (AAv1: 14-26); 2) Counsel failed and refused to tender a jury instruction that out-of-court statements made by co-conspirators could not be considered against the Petitioner if the statements themselves were the only evidence of the Petitioner's participation in the conspiracy leading to his murder conviction. (AAv1: 26-32); 3) Counsel failed to object to Instructions Nos. 19, 20 and 22, which permitted the jury to return a guilty verdict as to second degree murder on the finding of general intent and absence of malice. (AAv1: 33-40)

Subsequently, by stipulation and order, Petitioner filed a Supplemental Petition for Writ of *Habeas Corpus* (Post-Conviction), where he continued those three grounds and added two more: 4) 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 (AAv1: 76-80); 5) 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. (AAv1: 81-86)

In the district court's hearing on the issue of whether to grant an evidentiary hearing, the court below decided that an evidentiary hearing should held at least on Grounds IV and V. (AAv12: 2825)

However, at the beginning of the hearing the court below clarified that the evidentiary hearing really was only as to Ground IV (Id. at 2831-2837). At the conclusion of the hearing, the court summarily denied the Writ Petition from the bench. (Id. at 2876-78) Subsequently, the court below entered its written Finding of Fact, Conclusions of Law and Order on March 12, 2015, with Notice of Entry thereof on March 16, 2015. (AAv12: 2880; 2881-2890) Within days, Petitioner filed his Notice of Appeal. (AAv12: 2891-93) This Court has jurisdiction pursuant to NRS 34.575.

ROUTING STATEMENT: Because this was a conviction for a second degree murder, a category A felony, and a resulting life sentence after a jury trial, and because this is an appeal from denial of *habeas* after an evidentiary hearing, jurisdiction presumptively remains with the Nevada Supreme Court. NRAP 17(b). Additionally, however, this case involves questions of first impression: 1) Does the rule of Moore attend to a conspiracy that does not involve the use of a deadly weapon, when the conspiracy theory is the underpinning for the crime; 2) Does a set of jury instructions allowing for conviction of second degree murder without

proof of malice serve unconstitutionally to lower the State's burden of proof; 3) Should the jury be instructed to disregard proof of participation in a conspiracy, consistent with United States Supreme Court authority and consistent Circuit Court of Appeals authority, where the sole proof consists of out-of-court statements made by co-conspirators without any proof of action corroborating the statements; 4) Should NRS 51.325 be construed consistently with Fed. R. Evid. 804, in order to honor a criminal defendant's Sixth Amendment Right to present a defense?

II. STATEMENT OF FACTS

Appellant does not take issue with the State's recitation of the facts at AAv1: 93-106. To wit:

In May of 2005, Appellant (hereinafter "Little Lou") worked for his father, Luis Hidalgo, Jr. (hereinafter "Mr. H."), at the Palomino Club (hereinafter "Palomino" or "The Club"). The Club is Las Vegas' only all-nude strip club licensed to serve alcohol. (AAv5: 1224) Mr. H. owned the Palomino and Little Lou served as one of its managers. (Id.) On the afternoon of May 19, 2005, Mr. H.'s romantic partner of 18 years. Anabel Espindola (hereinafter "Espindola"), received a telephone call from one Deangelo Carroll (hereinafter "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 1224-25, 1234-36) Espindola was The Palomino's general manager and handled all of the club's financial and management affairs. (Id. at 1212, 1223-24)

During the call, Carroll informed Espindola that the victim in this case, one T.J. Hadland ("Hadland"), a recently fired Palomino doorman, had been "badmouthing" The Palomino to taxicab drivers. (Id. at 1226, 1234-36; AAv9: 2323) Per Espindola, a week prior to this news, she overheard a conversation wherein Little Lou informed Mr. H. that Hadland was falsifying Palomino taxicab voucher tickets in order to generate unauthorized kickbacks from the drivers. (AAv5: 1227-31) A day or two later, Mr. H. ordered Hadland fired. (Id. at 1231-32)

The Palomino paid cash bonuses to taxi drivers for each person a driver dropped off. (AAv5: 1226-27) The club accomplished this by having a doorman, such as Hadland, provide a ticket of voucher to the driver, reflecting the number of passengers (customers) dropped off. (Id.) Apparently, Hadland was inflating the number of passengers that taxi drivers dropped 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 1230-31)

Per Espindola, Mr. H. had also received prior reports that, at other times,

Hadland was selling Palomino's 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. (AAv6: 1446-47; AAv9: 2010-11; AAv9: 2216-17) This practice created a problem for the club because taxi drivers would begin disputing their entitlement to be paid bonuses. (See: AAv6: 1447; AAv9: 2010-11)

The Palomino was not in a good financial shape 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: AAv5: 1211-1220; AAv6: 1271; AAv6: 1381) Taxicab drivers are a critically important form of advertising for strip clubs as a general rule. (See: AAv8: 1865) 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 1865-66) 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 taxicab drivers for dropping off customers. (See: AAv3: 745-46)

At the time Espindola took Carroll's call, she was at Simone's Autobody, which was a body shop/collision repair business also owned by Mr. H. and

managed by Espindola. (See: AAv9: 1202-06) Financially, Simone's was breaking even at the time of the case's underlying events, but the business never turned a profit. (Id. at 1208-09, 1223) After taking Carroll's call, Espindola informed Mr. H. and Little Lou of Carroll's news about Hadland disparaging the club. (Id. at 1236, 1238) Upon hearing the news, Appellant became enraged and began yelling at his father, demanding of Mr. H.: "You're not going to do anything?" And stating "That's why nothing ever gets done." Appellant told his father, "You'll never be like Rizzolo and Gilardi. They take care of business." (Id.; AAv10: 2323)[2] Per Espindola, Appellant further criticized his father by pointing out that Rizollo once ordered an employee to beat up a strip club patron. (Id. at 1240) In response, Mr. H. became angry, telling Little Lou to mind his own business. (Id.) Little Lou again told his father, "you'll never be like Gilardi and Rizollo," and then stormed out of Simone's, heading for The Palomino. (Id. at 1240-41)

Visibly angered, Mr. H. walked out of Espindola's office and sat on Simone's reception area couch. (AAv5: 1250) At approximately 6 or 7 p.m., Espindola and a still visibly - angered Mr. H. drove from Simone's to The

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[2]Frederick John "Rick" Rizollo was the owner of a Las Vegas strip club known as Crazy Horse Two. Jack Gilardi is the owner of Cheetah's strip club as well a number of other clubs in Atlanta, Georgia. (See: AAv5: 1239-40)

Palomino. (AAv6: 1251-52) Once at The Palomino, Espindola went into Mr. H.'s office, which was her customary workplace at the club. (Id. at 1257) Approximately half an hour later, Carroll arrived at the club and knocked on the office door, which Mr. H. answered. (Id. at 1258) Mr. H. and Carroll had a short conversation, and then walked out the office door together. (Id. at 1258-59) 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 1258) Mr. H. instructed Espindola to call Carroll and tell Carroll to "go to Plan B." (Id. at 1259)

Per Espindola, she 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 1264) Carroll called Espindola back, and Espindola instructed Carroll that Mr. H. wanted Carroll to "switch to Plan B." (AAv4: 858; AAv6: 1264; AAv10: 2325) Carroll protested that "we're here" and "I'm alone" with Hadland, and he told Espindola that he would get back to her. (AAv6: 1258, 1264-67) Espindola and Carroll's phone connection was then cut off. At that point, Espindola believed "something bad" was going to happen to Hadland. (Id. at 1267) She attempted to call Carroll back, but could not reach him. (Id.) Espindola then return to the office and informed Mr. H. that she had instructed Carroll to "go to Plan B." (Id.

at 1268)

Earlier in the day of 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: AAv3: 682-83) Zone and Taoipu worked along side Carroll and performed jobs Carroll delegated to them in exchange for being paid "under the table" by Carroll. (Id. at 675-76, 680) Zone and Taoipu would pass out Palomino flyers to taxis at cabstands. (Id. at 675) Zone lived at the apartment with Carroll, Carroll's wife, and Zone's pregnant girlfriend. (Id. at 675-76) Zone and Taoipu were close friends. (Id. at 679)

While at the apartment, Carroll told Zone and Taoipu that Little Lou had told him that Mr. H. wanted a "snitch" killed. (AAv3: 682-83; AAv4: 874, 921) Carroll asked Zone if he would be "into" doing something like then, and Zone responded "no," he would not. (See: AAv3: 683) Carroll asked the same question of Taoipu, who indicated he was "down," that is, interested in helping out. (Id. at 683-84) 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. at 683-84) After the initial noon time 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 691) 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 would actually kill the targeted victim. (Id. at 690-91)

A couple of hours later while the three were still in the van, Carroll again discussed on the phone having an individual "dealt with," which Zone interpreted to mean "killed", although Zone did not know the specific person to be killed. (Id. at 686, 732; AAv4: 808, 923) 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: AAv3: 686-87) 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 place 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 687-88)

The three 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 688-89) The three 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 692) Zone had no idea they were traveling to pick up Counts, whom he had never previously met. (Id.) Once at Counts' house, Carroll went inside the house and emerged ten minutes later accompanied by Counts, who was dressed in dark clothing, including a black hooded sweat shirt and black gloves. (Id. at 692-93) 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 692-94) Taoipu was seated in the front, right-side passenger seat. (Id. at 694)

At the time, Zone believed they were headed out to do more promoting for The Palomino. (Id. at 698) As Carroll drove onto Lake Mead Blvd., 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 696) Carroll continued driving toward Lake Mead. (Id. at 695)

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 698; AAv4: 858; AAv8: 1848-49) Carroll was also using his phone's walkie-talkie function to "chirp." (AAv3: 701; AAv8: 1848-51) Appellant "chirped" Carroll and they conversed. (AAv4: 920) Carroll then spoke with Espindola, who told him to "go to Plan B" and then to "come back" to The Palomino. (AAv4: 858; AAv7: 1569, 1581) Zone recalled Carroll responding "we're too far along, Ms. Anabel. I'll talk to you later," and terminated the conversation. (See: AAv4: 858) 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 could be reestablished. (See: AAv3: 701-02)

Carroll was able to describe a place for Hadland to meet him along the road to the lake. (Id. at 703) Hadland arrived driving a Kia Sportage sport utility vehicle ("SUV"), executed a U-turn, and pulled to the side of the road. (Id. at 703-04; AAv4: 921) 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 right rear passenger seat and front right passenger's seat, respectively. (See: AAv3: 705) 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. at 705-06)

Counts then snuck up behind Hadland and shot him twice in the head. (Id. at 706; AAv4: 921-23) One bullet entered Hadland's head near the left ear, passed through his brain, and exited it out the top of his skull. (See: AAv3: 657-62) The other bullet entered through Hadland's left cheek, passed through and destroyed his brain stem, and was instantly fatal. (Id.)

One of the group deposited a stack of Palomino Club fliers near Hadland's body. (See: AAv2: 473; AAv4: 941) Counts then hurriedly hopped back into the van and Carroll drove off. (See: AAv3: 707) Counts then questioned both Zone and Taoipu as to whether they were carrying a firearm and why they had not assisted him. (Id. at 710-11) Zone responded that he did not have gun and had nothing to do with the plan. (Id. at 711) Taoipu responded that he had a gun, but did not want to inadvertently hit Carroll with gunfire. (Id.)

Carroll then drove the four back to The Palomino, where Carroll exited the van and entered the club. (Id. at 709) Carroll met with Espindola and Mr. H. in the office. (See: AAv6: 1453-54) He sat down in front of Mr. H. and informed him "it's done," and stated "he's downstairs." (Id. at 1454-55; AAv7: 1668) Mr. H. instructed Espindola to "go get five out of the safe." (See: AAv6: 1453-54) Espindola queried "five what? $500.00?," which caused Mr. H. become angry and state "go get $5,000.00 out of the safe." (Id; AAv9: 2229-31; AAv9: 2326)

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: AAv3: 666-68) 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 668-69)

Ten minutes after entering The Palomino, Carroll emerged from the club, retrieved Counts, and then went back in the club accompanied by Counts. (See: AAv3: 709) Counts then emerged from the club, got into a yellow taxicab minivan and left the scene. (Id. at 710; 742-43; AAv4: 922) Carroll again emerged from The Palomino 30 minutes later and drove the van first to a self-serve carwash and then back to his house, all the while accompanied by Zone and Taoipu. (See: AAv3: 710-11; AAv4: 814-17) Zone was very shaken up about the murder and did not say much after they return to his and Carroll's apartement. (See: AAv3: 711)

The next morning, May 20, 2005, Espindola and Mr. H. awoke at Espindola's house after a night of gambling at the MGM. (See: AAv6: 1274-76) 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 1276-77) While watching the

news, they observed a report of Hadland's murder; Mr. H. said to Espindola, "he did it." (Id. at 1277) 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: AAv3: 712; AAv4: 866; AAv8: 1801-02). Carroll paid $100.00 cash to have all four tires replaced. (See: AAv3: 712) Carroll, Zone, and Taoipu subsequently went a Big Lot store where Carroll purchased cleaning supplies, after which Carroll cleaned the interior of the Astro van. (Id. at 714-15)

Carroll made Zone and Taoipu wait in the van while he went in to Simone's; Carroll emerged about 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 719, 723-24; AAv4: 918-19, 931) Carroll then went in to 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 told them they had missed the opportunity to make $6,000.00. (See:

AAv3: 717-18) He informed Zone and Taoipu that Counts received $6,000.00 for his part in Hadland's murder. (Id. at 718) 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: AAv4: 931-32)

Las Vegas Metropolitan Police Department (LVPD) 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: AAv4: 944; AAv8: 1867) 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 1795)

At approximately 7 p.m., the detectives returned to The Palomino, where they found Carroll. Carroll agreed to accompany them back to their office for an interview. (See: AAv4: 949-50; AAv6: 1269-70) After the interview, the detectives took Carroll back to his apartment, where they encountered Zone. Zone agreed to come to their office for an interview. (See: AAv8: 1801-02) Carroll then told Zone within earshot of the detectives: "Tell them the truth, tell them the

truth. I told them the truth." (See: AAv4: 952-53) Zone recalled Carroll also saying: "If you don't tell the truth, we're going to jail." (See: AAv3: 722) Zone interpreted Carroll's statements to mean Zone should fabricate a story tending to exculpate Carroll, himself and Taoipu. (See: AAv4: 869-70) Zone gave the police a voluntary statement on May 21, 2005. (See: AAv8: 1802) Also on that day, Carroll brought Taoipu to the detective's office for an interview. (See: AAv4: 961-62; AAv8: 1803)

Meanwhile, on May 21, 2005, Mr. H. and Espindola consulted with attorney Jerome A. DePalma, and defense attorney Dominic Gentile's investigator, Don Dibble. (See: AAv8: 1933-34) The next morning, May 22, 2005, a completely distraught Mr. H. said to Espindola: "I don't what I told him to do." (See:AAv6: 1306) Espindola responded by again asking Mr. H.: "What have you done?" to which Mr. H. responded, "I don't what I told him to do. I feel like killing myself." (Id.) Espindola asked Mr. H. if he wanted to speak to Carroll and Mr. H. responded affirmatively. (Id. at 1307; AAv10: 2336)

Espindola arranged through Mark Quade, parts manager for Simone's, to get in touch with Carroll. (See: AAv6: 1307-08) On the morning of May 23, 2005, LVMPD Detective Sean Michael McGrath and Federal Bureau of Investigation (FBI) Agent Bret Shields put an electronic listing device on Carroll's

person; the detectives intended for Carroll to be at Simone's with Mr. H. and the other "co-conspirators." (See: AAv4: 987-88) Prior to Carroll arriving at Simone's, Mr. H. and Espindola engaged in a conversation by passing handwritten notes back and forth. (See: AAv6: 1321-22)

In this conversation, Mr. H. instructed Espindola that she should tell Carroll to meet Ariel and resign from working at The Palomino under a pretext of taking a leave of absence to care for his sick son. (Id. at 1310; AAv10: 2335) He further instructed Espindola to warn Carroll that if something bad happened 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. (AAv6: 1322)

When Carroll arrived at Simone's, Espindola directed him to room 6 where he met with Little Lou. (Id. at 1309) 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. (AAv6: 1312; AAv7: 1572) Mr. H. was present in his office at Simone's while the three met in room 6. (AAv7: 1493; AAv8: 1664-65) In the course of the conversation among Carroll, Espindola, and Little Lou, Espindola informed Carroll: "Louie is panicking, he's in a motherfucking panic, cause I'll tell right now..., if something

happens to him we all fucking lose. Every fucking one of us." (AAv1: 147) Little Lou informed Carroll that "Mr. H.'s already to close the doors and everything and hide, go into exile and hide." (Id. at 155) Espindola emphasized the importance of Carroll not defecting from Mr. H.:

> "Yeah but. . . if the cops can't go nowhere with you, the shit's gonna have to, fucking end, they gonna have to go someplace else, they're still gonna dig. They're 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: AAv1: 148)

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 fuckin 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, ____ motherfucking dead. (See: AAv1: 148) 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:AAv1: 151)

Espindola again emphasize 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 is stick to your motherfucking story _____ stick to your fucking story. Cause I'm telling you right now it's a lot easier for me to try to get a fucking a 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 kid's salvation and everything else. . . . it's all gonna depend on you." (See: AAv1: 155)

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 ____ T.J., they thought was an 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 powpow." (See: AAv1: 153)

He also promise to support Carroll should Carroll go to prison for conspiracy:

"Little Lou: . . . how much is the time for a conspiracy -

Carroll: Fucking like 1 to 5 that ain't shit.

Little Lou: In one year, I can buy you 25,000 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 him in a nice condo _____." (See: AAv1: 158)

During this May 23 wire tapped conversation, Little Lou also solicited Zone and Taoipu's murder. In response to Carroll's claims at 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 K.C. 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 K.C. kill them too, will fucking put something their food so they die, rat poison or something.

Carroll: We can do that too.

Little Lou: And we get K.C. last." (See: AAv1: 152)

"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, drink this right.

Carroll: What is it?

Little Lou: Tanqueray, you stir in the poison _____

Espindola: Rat poison is not gonna do it, I'm telling you right now _____

Little Lou: You know what the fuck you gotta do.

Espindola: _____ take so long _____ not even going to fucking kill him." (See: AAv1: 157)

Little Lou appeared at one time to criticize Carroll for deviating from what Little Lou had told him to do and instead enlisting Counts. See: Specifically, he said: "Next time you do something stupid like that, I told you should have taken care of _____ all the fucking time _____ K.C. _____ priors, how do

you know this guy?" (AAv1: 156) Then Little Lou said, "okay _____ but kill this fucking guy. _____ but kill this fucking guy. _____ get rid of the damn conspiracy _____ ."(See: AAv1: 157; 187) At the end of the meeting, Espindola stated she would give Carroll some money and promised financially to contribute to Carroll and his son, as well as arrange for an attorney for Carroll. (See: AAv1: 159) 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: AAv4: 990-91) Espindola would later testify Mr. H. gave her only $600.00 to give to Carroll, which he did in fact give to Carroll, on the 23rd. (See: AAv6: 1316-18; AAv7: 1541-42; 1581-83)

On May 24, 2005, the detectives again outfitted Carroll with a wire and sent him back to Simone's. (See: AAv4: 995-96) After Carroll's unexpected arrival, Espindola again directed him to room 6 where the two again met with Little Lou while Mr. H. was present in the body shop's kitchen area. (See: AAv6: 1319-20) During the conversation, Carroll and Espindola engaged in an extensive colloquy regarding the 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; and I took care of him.
>
> Espindola: Okay, 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 dammit, I fucking called you.

Carroll: Yeah, and when I talked to you on the phone, Ms. Anabel, 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 motherfucking phone.

Carroll: I never turned off my phone." (See: AAv1: 105)

At some point in this May 24 meeting, Espindola left the room to go speak with Mr. H. (See: AAv6: 1320) She informed Mr. H. that Carroll wanted more money and Mr. H. instructed her to give Carroll some money. (Id. at 1323-24) After Carroll returned from Simone's, he gave the detectives $800.00, which Espindola had provided to him. (See: AAv4: 996) After Carroll's second wire tapped meeting, detectives took Little Lou and then Espindola into custody for the murder of Hadland. (See: AAv4: 787)

As stated above, that is the State's recitation of facts. That is the State's best case. We don't disagree with any of that. However, the State left out a few things, to wit:

1. Per Zone, he never got ahold of any bats or trash bags, and never saw Taoipu or Carroll do the same. (AAv3: 691)

2. Numerous witnesses testified to Carroll's character as "a fount of untrustworthy information." Detective Wildemann, who spoke with Carroll right after the murder, said that Carroll gave at least three different stories, some of which were inconsistent with Zone's version. (AAv8: 1796-1801, 1802) And Michelle Schwanderlik aka "Ariel", testified that typically Carroll "would lie all the time." (Id. at 1895-96) Likewise, Margaret Johnson, a dancer at the club, knew Carroll there and was of the opinion that he is not trustworthy. (Id. at 1910-12) Pee-Lar Handley testified that "Plan B" simply meant paying cabs whether or not they had VIP passes - that is, "starting the slate clean." (AAv9: 2048) "Plan A" on the other hand simply meant keeping everything the way it was. viz. the VIP passes. (Id. at 2066) Zone described Carroll as the type who "boasts, and makes things bigger than they are." (AAv4: 790) He is the type who "makes stuff up." (Id.) Simply put, Carroll is not trustworthy. (Id. at 834) Detective McGrath testified that Carroll indicated that the murder weapon was actually intended to

shoot another person, but that person was in custody at the time of the shooting. (AAv5: 1092-93) Carroll also told Detective McGrath that Counts kept his drugs on Carroll's property in a popcorn can; but the police searched the area and found no such thing. (Id. at 1094-95) Carroll also told McGrath that they were going to call it quits, but Counts got "mad and stupid," and there was nothing they could do about it. McGrath personally did not believe that story. (Id. at 1118) Even so, McGrath did not tell Carroll to "lie" about Carroll's statement that Little Lou had nothing to do with the murder. (Id. at 1134) McGrath had no idea whether that statement was true or false. (Id. at 1179-80) As it was, the records did not reveal any attempts by Carroll to "chirp" the Appellant on the date of the murder. (Id. at 1149)

3. Espindola testified that on May of 2005, Gilardi had been indicted in federal court, and Rizzolo had well - known legal problems. Accordingly, being like these two was probably not "a good idea", and as of May 19, Mr. H. did not behave like them (AAv6: 1427-28)

4. She further testified that normally, when people at the club were suspected of stealing, they were given a corrective interview. (AAv5: 1245-46)

5. Espindola testified that the Appellant did not make any important decisions regarding the club; that was the responsibility of her and Mr. H..

Basically, the Appellant's job was to open the club, make the popcorn, let the dancers in and turn on the television. (AAv7: 1553) To her knowledge, there was no agreement between the Appellant and Mr. H. on May 19 that involved T.J. Hadland. (Id. at 1547-48)

III. STATEMENT OF ISSUES

Were the Appellant's 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 impinged based upon the following, singly or in cumulation thereto:

A. When counsel did not tender an instruction to the jury, directing the jury not to find a deadly weapon enhancement if the jury were to find Appellant guilty of second degree murder on a conspiracy theory, absent evidence of use of a weapon as part of the conspiracy?

B. When counsel failed and refused to tender an instruction that out-of-court statements made by co-conspirators may not be considered against the defendant if the statements themselves are the only evidence of the defendant's participation in the conspiracy?

C. When counsel failed to object to Instructions 19, 20, and 22, allowing a second degree murder verdict to be returned based on a finding of general intent

without malice, and failed to tender instructions 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)?

D. When counsel did not seek a "Morales" severance (i.e., a bifurcation) in the middle of trial in order to gain the admission of Jayson Taoipu's testimony from the Counts trial?

E. When counsel failed to file a Motion to Sever the Trials of the Solicitation of Murder Counts, which occurred after the murder of Hadland, from the Murder and Conspiracy to Murder Counts?

IV. ARGUMENT

A. STANDARD OF REVIEW

The court reviews the grant or denial of habeas corpus relief de novo, and likewise reviews the trial court's conclusions of law de novo. Gallego v. McDaniel, 124 F.3d 1065, 1069 (9th Cir. 1997), *cert. denied*, 524 U.S. 917, 922 (1998).

However, findings of fact of the district court that are supported by substantial evidence and are not clearly wrong are entitled to deference when reviewed on appeal. Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

In a post-conviction habeas petition, this Court evaluates claims of

ineffective assistance of counsel under the standard of Strickland v. Washington, 466 U.S. 668 (1984). That is, within the context of a strong presumption that counsel's conduct might be considered sound strategy, a habeas petitioner must demonstrate his counsel's performance was deficient, falling below an objective standard of reasonableness, and trial counsel's deficient performance prejudiced the defendant. To establish prejudice, the Petitioner must show that but for counsel's errors, there is a reasonable probability that the outcome would have been different. Means v. State, 120 Nev. 1001, 1011, 103 P.3d 25, 31-32 (2004). A habeas petitioner must prove the disputed factual allegations underlying his ineffective assistance of counsel claim by a preponderance of the evidence. Means, 120 Nev. at 1012-13, 103 P.3d at 33.

The Petition and this appeal really are legalistic in nature. When the subject at hand concerns objecting to instructions that define the crime or tendering instructions the refine the theory of the case, or failing to tender objections to instructions that make it easier for the state to obtain a judgment of conviction than otherwise, there isn't a whole lot that trial counsel can really say. That is likewise true for the failure to file motions.

If we are correct in our legal analysis, then it follows that the failure to object to erroneous instructions, and/or the failure to tender accurate instructions,

either or both of which make the State's job in obtaining a conviction easier than it should be, as a matter of law cannot be attributed to a reasonable strategy. As noted by the Ninth Circuit in Lankford v. Arave, 468 F.3d 578 (9th Cir. 2006), the point of Strickland v. Washington, *supra* is that an attorney has a duty to bring to bear such skill and knowledge as will render the trial a *reliable adversarial testing process*. Lankford, 468 F.3d at 583 citing Strickland, 466 U.S. at 668. Failing to object to an erroneous jury instruction, or tendering an erroneous jury instruction that makes the state's job easier in obtaining a conviction, cannot be considered to be a "strategic decision" to forego one defense in favor of another; rather, that action results from a misunderstanding of the law. Lankford, 468 F.3d at 584, citing United States v. Span, 75 F.3d 1383, 1390 (9th Cir. 1996). When counsel does not object to or invites a jury instruction that misstates state law and makes it easier for the jury to convict his client, counsel unwittingly undermines the very "adversarial testing process" he is supposed to protect. Lankford, 468 F.3d at 585. And that is so, even where counsel is shown otherwise to be dutiful and conscientious. (Id.)

Certainly, Messers Arrascada and Adams were most dutiful and conscientious in representing Appellant; but we are all human, and this is the kind of case where one slip-up from an otherwise effective advocate can be the fatal

cause of a miscarriage of justice.

Typically, when the charge is that counsel failed to object to an erroneous jury instruction that makes it easier for the State to obtain a conviction, counsel's response would be: Had he been aware of the unconstitutional nature of the instruction, he would have lodged an objection to it. Such a response does not meet the state's burden in establishing effective assistance of counsel. See: Cox v. Donnelly, 432 F.3d 388, 390 (2d. Cir. 2005) [*habeas* mandated].

As noted in Everett v. Beard, 290 F.3d 500, 509-15 (3d. Cir. 2002), *cert denied*, 537 U.S. 1107 (2003), wherein the Third Circuit held that trial counsel was prejudicially ineffective in failing to object to a jury instruction that permitted a first degree murder conviction without proof of an intent to kill, the state of law is central to an evaluation of counsel's performance at trial. A reasonably competent attorney patently is required to know the state's applicable law, so the parties' focus upon the state of law at the time of the defendant's trial is not misplaced. Everett, 290 F.3d at 509.

Further, counsel's status as a reasonably competent attorney is not strictly confined to the law as enunciated by the decision of the jurisdiction's highest court. More is expected from a reasonably competent attorney, especially one in a major criminal case, than merely to parrot supreme court cases. A law student can

do as much. Instead, a reasonably competent attorney will have reason to rely on authority, especially favorable authority, even if it had not yet been enunciated by the state's supreme court or even by the United States Supreme Court. Everett, 290 F.3d at 513. Accord: Gray v. Lynn, 6 F.3d 265, 268-69 (5th Cir. 1993) [failing to object to an erroneous instruction defining the crime cannot be considered to be within the wide range of professional competence].

The same principles apply to a jury instruction that sets forth a theory of the case based upon the defense's presentation of evidence. Counsel is ineffective in not presenting an accurate theory of the case instruction when he presents such evidence. See: Pirtle v. Morgan, 313 F.3d 1160, 1169 (9th Cir. 2002), *cert denied*, 539 U.S. 916 (2003), citing United States v. Span, *supra*. The issue ultimately is whether the jury had a legal framework in which to place the exculpatory testimony. Pirtle, 313 F.3d at 1171, and cases cited therein. Ineffectiveness in this context does not mean that effective counsel certainly would have secured an acquittal. 313 F.3d at 1169. Rather, it means that counsel would have caused proper, correct statements of the law to be given as jury instructions, such that there is a reasonable probability that the jury, following the correct instructions, would have acquitted. (Id.)

The same principles also hold true for instructions that would have to clarify

findings that the jury would have to make to in order to convict. Luchenburg v. Smith, 79 F.3d 388, 392-93 (4th Cir. 1996) [affirming grant of *habeas*]. As noted by the Fourth Circuit, if trial counsel's response is that he thought the instruction given accurately stated the law, when in fact it did not, then he has not made a "reasonable tactical choice." Failure to become informed of the governing law affecting his client cannot be considered a "reasonable strategy." Luchenburg, 79 F.3d at 392-93. When an instruction does not clarify for the jury the circumstances by which a reasonable jury could find the defendant not guilty, the instructions render his trial fundamentally unfair, and trial counsel's failure to object is constitutionally deficient. Luchenburg, Id.

The same type of analysis goes towards failing to file a meritorious pre-trial or during - trial motion. Where a favorable plea bargain that would cause a reasonable defendant to forebear filing such a motion is not on the table, there certainly is no downside to filing such a motion. In that instance, there cannot be a "strategy" that could be deemed "reasonable" to justify the failure to file such a motion. As noted by the Seventh Circuit in Gentry v. Sevier, 597 F.3d 838 (7th Cir. 2010), wherein the Seventh Circuit held that counsel was prejudicially ineffective by virtue of failing to file a meritorious motion to suppress pre-trial, while second -guessing strategic decisions in hindsight generally is not a

meritorious basis to find an effective assistance of counsel, a decision not to seek suppression of material evidence based on a violation of the defendant's Fourth Amendment Rights is beyond the pale of objectively reasonable strategy. There cannot be a strategic benefit in that instance that would accord to the defendant by reason of his trial counsel's failure to seek suppression of the evidence. Gentry, 597 F.3d at 851-52.

In the opinion of the undersigned, adjudication of this appeal rests on the "prejudice" prong of Strickland v. Washington, *supra*, meaning that but for trial counsel's errors, there is a reasonable probability that the outcome would have been different; and the way in which the Court determines that is to view the entire record before the jury, and weigh that against what is presented in the *habeas* hearing, in determining the strength of the State's case. The stronger the case, the less likely a *habeas* petitioner will be able to establish prejudice, and of course vice versa. See: Brown v. State, 110 Nev. 846, 849-50, 851-52, 877 P.2d 1071, 1073, 1074 (1994) [prejudice not established].

All of these basic principles inform how the Court should decide this appeal, especially on a record like this where the evidence against this Appellant in support of the murder charge is so underwhelming and precious - thin.

B. APPELLANT'S 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 WERE IMPINGED WHEN COUNSEL DID NOT TENDER AN INSTRUCTION TO THE JURY, DIRECTING THE JURY NOT TO FIND A DEADLY WEAPON ENHANCEMENT IF THE JURY WERE TO FIND APPELLANT GUILTY OF SECOND DEGREE MURDER ON A CONSPIRACY THEORY, ABSENT EVIDENCE OF USE OF A WEAPON AS PART OF THE CONSPIRACY.

Neither the transcript at AAv10: 2367-2469 nor the jury instructions actually given at AAv11: 2609-63 reveal that counsel tendered a jury instruction, directing the jury not to find Petitioner guilty of a deadly weapon enhancement if it found Appellant guilty of second degree murder on a conspiracy theory. Obviously, on these facts a rational jury could not have found Appellant of first degree murder on an aiding and abetting theory, since there is no evidence that Appellant even knew Counts, much less communicated the desire to kill Hadland to Counts. And the verdict in this case reveals that the jury determined that the Appellant was guilty of conspiracy to commit battery with a deadly weapon or battery with intent to cause substantial bodily harm, and guilty of second degree murder with the use of a deadly weapon. (AAv12: 2787-88)

Based upon Instructions Nos. 31 and 33, the jury was instructed that if it found the Appellant guilty of murder of the second degree, it must determine

whether or a not a deadly weapon was used in a commission of the crime; and the deadly weapon enhancement could be found even if the Appellant did not personally himself use the weapon, as long as the unarmed defender had "knowledge" that the deadly weapon would be used. (AAv12: 2642, 2644) Instruction No. 19 advised the jury that murder in the second degree could be a general intent crime; and the Appellant could be liable under either a conspiracy theory or an 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 or abetting. (AAv12: 2630) 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 in the common design. The instruction again charged that battery is a general intent crime, as is second degree murder. (AAv12: 2633)

Based upon the rationale of Fiegehen v. State, 121 Nev. 293, 113 P.3d 305 (2005), the fact that the jury found Appellant guilty of conspiracy to commit a battery, rather than conspiracy to commit murder, and also found Appellant 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 No. 31 and 33. 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 Appellant just as liable as it would be if he committed the offense, meaning that 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, 117 Nev. 659, 662-63, 27 P.3d 447, 450 (2001) a deadly weapon at sentencing enhancement cannot apply to a conviction for conspiracy. The rationale is that in Nevada, 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 Appellant

responsible for Counts' use of the weapon.

Alternatively, the point could have raised after verdict within seven days on an NRS 175.381(2) motion; and had counsel filed such a motion, the Court would have 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 filing a timely NRS 175.381(2) motion on this point.

The State's position was that, even though Moore has never been overruled, Appellant was not found guilty of "conspiracy to commit murder," but rather, second degree murder; and second degree murder is subject to the deadly weapon enhancement, even if the theory underlying second degree murder is a conspiracy theory.

Respectfully, on the facts of this case, that position cannot fly in light of Brooks v. State, 124 Nev. 203, 180 P.3d 657 (2008). A jury must be instructed that an unarmed defender cannot "use" a deadly weapon, necessary for the enhancement, when another offender fires the gunshot, if the unarmed defender does not have knowledge that the co-defender has fired the gun and did not use the fact of the gunshot to further his own criminal objective. Brooks, 124 Nev. at 206-

10, 180 P.3d at 659-62.

In other words, had the facts of this case been that Counts and this Appellant conspired between each other to shoot Hadland, with Counts being the shooter, then the State's position arguably would have merit. However, those are not the facts at all. There is no evidence in this record that Counts and Appellant ever met, much less talked about anything. There is no evidence in this record that Luis Hidalgo, III knew before the fact that Kenneth Counts was going to "take care of T.J." by shooting him.

The State and the court below's answer to that was that this jury was given a Brooks instruction, AAv12: 2884. But Jury Instruction No. 33 (AAv11: 2664) is a rewording of Brooks in the light most favorable to the State, and is ambiguous on when the Defendant has to gain actual knowledge of the accomplice's use of the deadly weapon in order to be culpable under NRS 193.165. Moreover, it says nothing on whether the accomplice's use of the weapon must accomplish the defendant's criminal design. Not only does Instruction 33 not pass muster under Moore, it also doesn't pass muster under Brooks.

In Nevada a district court cannot impose a deadly weapon enhancement per NRS 193.165 based upon the defendant's participation in a conspiracy - especially here, a conspiracy to commit a battery. NRS 193.165 applies only where a deadly

weapon is used **in conscious furtherance of a criminal objective.** Buschauer v. State, 106 Nev. 890, 895-96, 804 P.2d 1048, 1049-50 (1990) [deadly weapon enhancement inapplicable to involuntary manslaughter]. If the criminal objective, as the jury found viz. Count I, is to engage in a battery causing substantial bodily harm without use of a deadly weapon, and if the conspiracy is completed upon the making of an agreement to that end, a deadly weapon as a matter of law cannot be used in conscious furtherance of that objective. That is the upshot of Moore, and it applies fully to this situation.

The State argued and the court below found at AAv12: 2884 that counsel saved his error by filing an NRS 175.382(2) Motion for Judgment of Acquittal. Counsel did that, but did not argue therein a lack of a Moore instruction or a Moore violation. (See: AAv12: 2789-2792) A theory of ineffective assistance of counsel can be based upon the filing of a motion but on the wrong theory. See: Hernandez v. Cowan, 200 F.3d 995, 999-1000 (7th Cir. 2000) [counsel was ineffective in filing a severance motion, but on the wrong theory, ignoring a meritorious theory of severance which would have been apparent to counsel from a prior suppression motion hearing].

Clearly, the judgment Denying Petition for Writ of *Habeas Corpus* should be reversed at least to this extent, i.e., with directions to impose an amended

judgment of conviction eliminating the sentence for the deadly weapon enhancement.

C. APPELLANT'S 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 WERE IMPINGED WHEN COUNSEL FAILED AND REFUSED TO TENDER A JURY INSTRUCTION THAT OUT-OF-COURT STATEMENTS MADE BY CO-CONSPIRATORS MAY NOT BE CONSIDERED AGAINST THE DEFENDANT IF THE STATEMENTS THEMSELVES ARE THE ONLY EVIDENCE OF THE DEFENDANT'S PARTICIPATION IN THE CONSPIRACY. COUNSEL ALSO FAILED TO RAISE THE ISSUE HEREIN ON DIRECT APPEAL AS AN ASSIGNMENT OF PLAIN ERROR.

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

"Whenever there is slight evidence that a conspiracy existed, and 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 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." (AAv11: 2651)

Not only did counsel vigorously object to this instruction, he made it his first issue on appeal. (See: AAv1: 227-38) Indeed, had this conviction occurred in federal court, the giving of this instruction would have constituted reversible error for the reasons counsel argued, pursuant to United States v. Ammar, 714 F.2d 238, 249 (3d. Cir. 1983) and United States v. Tracy, 12 F.3d 1186, 1199 (2d. Cir. 1993). 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 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). For whatever reason, this 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[3], but Ohio v. Roberts was abrogated by Crawford.[4]

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 is in furtherance of a conspiracy does not, in and of itself, implicate the Confrontation Clause of the Sixth Amendment. But while the outcome of Bourjaily was correct based on its facts[5], Crawford makes clear that testimonial hearsay statements are subject to the Confrontation Clause, whether or not such statements also fall within a 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 Clause analysis does not turn on whether the co-

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[3]483 U.S. at 182.

[4]541 U.S. at 60-69.

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

conspirator's out-of-court statement is made to the police or not.[6] 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.

Certainly, post - Crawford, no reasonable interpretation of the Confrontation Clause will allow admissibility of hearsay statements of a co-conspirator who is an unavailable witness, when the circumstances make the statement anything but inherently reliable. See: People v. Valles, ___ P.3d ___, 213 WL2450721 at 78-9 (Colo. App. 2013), and cases cited therein. 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 Appellant constitutes critical evidence in adjudicating his guilt. Additionally, Carroll's statements in that regard were controverted by Luis Hidalgo, Jr., and Anabel Espindola, and indeed by Mr. Carroll himself post-murder. Otherwise, what we have in this case worthy of 10 years to life imprisonment are Appellant's statements such as "take

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

care of business, like Gallardi and Rizzolo" [whatever that means]; "get the bats and bags"] [again, whatever that means]; "go Plan B" [again, whatever that means]; "Mr. H. wants someone "dealt with" [again, whatever that means]; and post-murder, "use rat poison (on Zone and Taiopu)." There is simply no evidence of any "rat poison," "bats or bags," or "action similar to that use by Rizzolo and Gallardi" in this case whatsoever. Simply put: Appellant did nothing that proximately resulted in Hadlund's death. Under no circumstances can Carroll's out-of-court statements be deemed inherently reliable.

In federal court, post Bourjaily, out-of-court statements made by co-conspirators may not be considered against defendant if the statements themselves are the only evidence of the defendant's participation in the conspiracy. See: United States v. Padilla, 203 F.3d 156, 162 (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).

Thus, a proper instruction to tender and to give to the jury would have read:

> "Out-of-court statements made by co-conspirators may not be considered against the Defendant if the statements themselves are the only evidence of the Defendant's participation in the conspiracy. 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 the Defendant (Luis A.Hidalgo, III) were members. However, if you find that there is no evidence independent of those statements that the

said Defendant joined the conspiracy [to batter or kill or otherwise harm T.J. Hadlund], you are instructed to disregard those statements."

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

Certainly, one cannot credibly argue that appellate counsel made the above argument in his Opening Brief. In fact, at page 23 thereof, he said:

> "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." (AAv1: 234)

In other words, Appellant "conceded" that evidence of a conspiracy could be based on statements alone. In fact, before that on the same page, appellate counsel stated:

> "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 co-conspirators statements for all purposes in this determination as to whether there has been proof beyond a reasonable doubt that the Defendant is guilty of conspiracy**." (Id.)

Our position here is that appellate counsel was absolutely wrong on the law

in those regards, and that error significantly prejudiced this Appellant.

McDowell does not address the specific challenge to Instruction No. 40 being made here, and neither did trial or appellate counsel.

Trial counsel candidly admitted that he could not remember a reason for not making the above-referenced argument and simply had to defer to the jury instructions themselves and the settling of the jury instructions. (AAv12: 2852-54) But relative to instruction settlement, AAv10: 2434-2444 reveals the argument made on direct appeal, not this argument. Certainly, however, and consistently with the standard of review stated above, a "strategy" of lowering the State's burden of proof and making it easier to convict than should be as a matter of law, cannot be deemed a "reasonable" strategy; rather, it is the "absence of strategy" which creates the grist for the successful post-conviction *habeas* mill.

Quite candidly, the trial court's response to this issue at AAv12: 2885 is a non-sequitur; it simply does not address the legal questions posed by this issue. And to say "Defendant cannot identify which statements the jury would have disregarded" if correctly instructed reveals a blatant and reckless disregard for this record. We will make it simple: All of Them. See: pp. 43-44, 7, and 9 above. Neither this Appellant nor Carroll, Counts, Espindola, Hidalgo, Jr., Zone or Taoipu did anything in reliance upon them. Why? Because: a) the statements

were stupid; b) Appellant may not have said them!

Whether singly or in cumulation with the other deficiencies herein, the Court must deem itself constrained to reverse the denial of *habeas corpus* with directions.

D. APPELLANT'S 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 WERE IMPINGED WHEN TRIAL COUNSEL FAILED TO OBJECT TO INSTRUCTIONS 19, 20 AND 22 AND FAILED TO TENDER INSTRUCTIONS THAT MORE PRECISELY DEFINED THE JUDGE - MADE CONCEPTS OF "VICARIOUS LIABILITY FOR A SECOND DEGREE MURDER," CONSISTENTLY WITH THE STATUTORY ELEMENTS OF NRS 200.030(2) AND 200.020(2).

Without objection, the trial 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 deliberated specific intent to kill.

Murder in the Second Degree **may be a general intent crime**. As such, a Defendant **may be** may [sic] liable under conspiracy theory or aiding and 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." (AAv11: 2630)

Instruction No. 20 read as follows:

"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 acts constituting the offense or 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." (Id. at 2631)

Instruction No. 22, also not objected to, read as follows:

"Where several parties join together in a common design to commit any lawful 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." (Id. at 2633)

The transcript of settlement of jury instruction reveals a consensus on the correctness of those instructions (See: AAv10: 2413-23), notwithstanding the trial prosecutor's "vehement objection."

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 Appellant 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 Appellant 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.

Essentially, what these three unobjected - to instructions told the jury was this: If the jury found that the Appellant joined a conspiracy to batter Hadland, even if the Appellant was not considered a "co-conspirator" by the other conspirators, even if the Appellant did nothing in furtherance of the conspiracy to batter or to murder Hadland, and even if the Appellant'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

even raised as plain error on direct appeal. Both trial and appellate counsel were prejudicially ineffective in failing to so argue, whether singly or in cumulation with the other deficiencies herein.

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. 14th 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 trial 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 and accurately enough in depicting and defining the circumstances upon which a defendant can be vicariously liable for a 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 State's simple response is that per Hancock v. State, 80 Nev. 581, 583, 397 P.2d 181, 182 (1964) and Poole v. State, 97 Nev. 175, 178-79, 625 P.2d 1163, 1165 (1981), Second Degree Murder is a general intent offense; therefore, Instructions Nos. 19 and 22 did not prejudice Appellant, but if anything helped him in creating an aura of ambiguity.

Hancock and Poole actually hold that Second Degree Murder is not a specific intent offense, meaning, to return a guilty verdict to Second Degree Murder a jury need not find a specific intent to kill. The vice of that holding would be the thought: "If Second Degree Murder is not a specific intent crime,

then it must be a general intent crime. End of story."

No - beginning of story. What the State overlooks and what Instructions Nos. 19, 20 and 22 leave out is that murder in either degree requires proof of malice. Per the basic definitions of NRS 200.010, 200.020(2) and 200.030(2), Second Degree Murder requires proof of implied malice. That means the proof must establish either that no considerable provocation appears, or that all circumstances of the killing establish an abandoned and malignant heart.

But Instructions Nos. 19 and 22 say nothing regarding proof of malice. They simply allow a Second Degree Murder conviction on the "possibility" of a finding of general intent. I.e., per those instructions, if Appellant joined a conspiracy to commit a non-lethal battery on Hadlund, and if Hadlund died in a manner foreseeable to any of the co-conspirators, and Appellant knew the wrongfulness of his agreement to commit a non-lethal battery, the *mens rea* of Second Degree Murder based on a conspiracy theory would be proven. That is the major point of this ground: That theory of law is wrong. It allows a conviction for Second Degree Murder without proof of the defendant's malice.

So, consistent with Prettyman and Hickles, the jury would have to find specifically the "conspiracy to batter" that demonstrated an abandoned and malignant heart which Petitioner supposedly joined. They were not asked to do

so, and it is far from intuitively obvious what conspiracy that might have been.

Second Degree Murder really is defined the same way throughout the country. The "intent" involved in Second Degree Murder is the intentional engaging in acts that establish 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." That is, the defendant must intend to commit an act with knowledge that his acts create a strong probability of death or great bodily harm to the victim. See: State v. Carrasco, 172 P.3d 611, 613 (N.M. App. 2007). Where the evidence does not support a finding either of an intent to kill, an intent to inflict great bodily harm or an act with willful and wanting disregard for the lethal consequence of the act, and the act results in the death of the victim, generally the result is a conviction of manslaughter, but not second degree murder. See: People v. Langworthy, 331 N.W.2d 171, 178-80 (Mich. 1982).

Nowhere in Instructions Nos. 19, 20 or 22 was the jury told this. And that fact makes this case indistinguishable from Ho v. Carey, 332 F.3d 587, 592 (9th Cir. 2003) citing People v. Zerillo, 223 P.2d 223, 229-30 (1950). There, the

Ninth Circuit mandated *habeas* in a Second Degree Murder conviction, where the jury instruction advised that a defendant could be found guilty based on general intent, without fully and accurately describing the concept of implied malice. Since the jury was not instructed on an essential element of the offense accurately, such constituted a constitutional violation. Ho, 332 F.3d at 592-93, citing United States v. Gaudin, 515 U.S. 506 (1995).

It would have simple in Instructions Nos. 19 and 22 to ensure that the jury refer back to the implied malice instruction(s) and insist that the jury find malice, consistently with the conspiracy they identified, before returning a verdict to Second Degree Murder. In Instructions Nos. 19 and 22, however, all the jury had to do is find a conspiracy with the general intent to commit a battery, without finding implied malice. These instructions were as defective as the instruction in Ho, which caused the Ninth Circuit to mandate *habeas*. The same result should attend here.

But in addition, 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-

34 (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 Statute; 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 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 Cannibus Buyer's Co-Op, 532 U.S. 483, 494 n. 7 (2001).

Therefore, it is not enough to say that the crime of the defendant committed (in Rose, assault with a deadly weapon; here, conspiracy to commit a battery) could hypothetically have the death of the victim as its natural and probable consequence; the jury must be instructed that, to return a second degree murder guilty verdict, the defendant's acts in, 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 argued that since Rose and Ramirez post-date this 2009 trial, counsel cannot be deemed prejudicially ineffective for failing to present such a jury instruction and to present such objections. The State overlooks two things:

First, Rose and Ramirez are not cases that "came out of the blue." Rather, Rose is based on Labastida v. State, 115 Nev. 298, 986 P.2d 443 (1999), a case that predated this trial *by ten years*. See: Labastida, 115 Nev. at 305-07, 307-08, 986 P.2d at 447-49, 449. So, call it a Labastida instruction if you must; but a Labastida instruction certainly would have directed a reasonable jury to acquit the Appellant of murder. The "act" of "running off one's mouths to co-conspirators, who ignored that person" simply cannot under any reasonable view be deemed as an "affirmative act that harms the victim"; nor can it be deemed as "the immediate

and direct causal relationship between the illegal act and the death of the victim." To any reasonable jury, the fact that the defendant's words *were ignored* by the co-conspirators broke the chain of "immediate and direct causal relationship," in the absence of evidence of any type of independent relationship between Appellant and Counts.

Second, the State's position overlooked Brooks v. State, *supra*. There, this Court held that the defendant was entitled to an instruction advising the jury that absent an agreement to cooperate in achieving a criminal purpose, the mere knowledge of, acquiescence in, or approval of that purpose did not establish the defendant's participation in the criminal conspiracy. Brooks, 124 Nev. at 211, 180 P.3d at 662. Appropo to the case at bar, however, this Court noted that a proposed instruction on the theory of the case that is a rewording of the element of the offense may not be refused because the legal principle it espouses may be inferred from other instructions. Brooks, 124 Nev. at 211, n. 31, 180 P.3d at 662, n. 31, and cases cited therein.

That is, it simply will not do to say that the jury could have figured out the "immediate and direct causal relationship" requirement as an inference from other instructions. Clearly, counsel's theory at trial was that Appellant did not engage in a criminal conspiracy that, insofar as he knew and intended, had T.J. Hadland's

death as its reasonable and natural consequence. A Rose/Ramirez instruction or, if you prefer, a Labastida instruction, not only would it brought the point home perfectly, but would have stated accurately the third requirement of the judge - made rule of felony second degree murder.

The trial court's response to this Ground can be summarized thusly: 1) Instructions 19, 20 and 22 accurately state the laws. 2) Counsel prepared them. 3) Rose and Ramirez post-dated this trial. (AAv12: 2886-88) But Rose and Ramirez are based on Labastida, which predated this trial; and per the Standard of Review, the fact that counsel prepared such instructions does not excuse the ineffectiveness, but exemplifies it.

Whether singly or in cumulation with the other deficiencies herein, reversal of the denial of *habeas* must be the order of the day.

E. APPELLANT'S FIFTH, SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO A FAIR TRIAL, TO DUE PROCESS OF LAW, AND TO EFFECTIVE ASSISTANCE COUNSEL AT TRIAL WERE IMPINGED WHEN COUNSEL DID NOT SEEK A "MORALES" SEVERANCE IN THE MIDDLE OF TRIAL IN ORDER TO GAIN THE ADMISSION OF JAYSON TAOIPU'S TESTIMONY FROM THE COUNTS TRIAL.

Kenneth Counts' trial was severed from the Appellant's, and was held in February of 2008. On day 5 the State called Taoipu as its witness. (AAv11: 2666) Undoubtedly, the State called Taoipu because of this testimony: He testified that

Carroll told him that his boss told him that they needed to do a job for someone and they needed to go make a "hit," meaning they had to kill someone. (Id. at 2670) Thus, Carroll went into his closet, grabbed his .22 revolver, and gave it to Taoipu. (Id. at 2671) Later, Carroll said "my boss wants us to do a hit, but I don't want to do it. I'm going to get somebody else." (Id. at 2676) Later that evening Carroll picked up a man wearing all black. (Id. at 2678) Carroll introduced him to Taoipu as "K.C." [meaning Kenneth Counts]. (Id. at 2680) Carroll said he was supposed to hit a guy named "T.J.." (Id. at 2681) The problem was that T.J. "was talking too much about the Palomino Club." (Id. at 2682) Although Carroll's plan was to kill T.J. at his home, that changed when Carroll called T.J. and discovered he was at Lake Mead. (Id. at 2683-84) Carroll called T.J. and put him on a speaker, also known as a "chirp", where they talked about meeting at the lake in order to "smoke a blunt." (Id. at 2686-87) When Hadland approached the van, Counts got out, walked around, and shot him twice. (Id. at 2691-93) Carroll then sped off, first running over Hadland's body. (Id. at 2693)

Towards the end of direct examination the State brought up this area of inquiry:

"Q: Alright, going back, just kind of backtracking a little bit, did you ever

hear any conversations about baseball bats or garbage bags?

A: Yes, sir.

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

A: We heard it before we went to go pick up K.C.. **DeAngelo told us that he called Anabel and Anabel was talking about baseball bats and trash bags.**

Q: Okay. Was that information passed on to you?

A: Yes, sir." (AAv11: 2702)

Otherwise, Mr. Taoipu said not one word about this Appellant; and Carroll's reference to "the boss" can fairly be implied as either Ms. Espindola or Luis Hidalgo, Jr. ("Mr. H.").

As the Court is aware, trial counsel attempted to get this evidence in, but the trial court rejected it. (See: AAv1: 247-53) As noted at AAv1: 249, Taoipu's testimony contradicted Zone's, who testified that it was this Appellant who made the "bats and bags" statement; and that statement was the only testimonial evidence presented by the State that arguably demonstrated Appellant's participation in a conspiracy prior to the killing of T.J. Hadland.

This Court rejected that assignment of error on the basis that the issues in Counts' trial and Appellant's trial were not substantially the same, and thus, the State had no motive in the Counts trial to impeach Taoipu's statement. (AAv12:

2804)

The theory of Ground IV of the Supplemental Petition is that counsel was prejudicially ineffective in failing to seek a severance of his trial from Luis Hidalgo, Jr. in the middle of trial, when he attempted to present the out-of-court testimony of an unavailable witness, Taoipu, and counsel for "Mr. H." objected on the grounds that the testimony was inculpatory and prejudicial to him. (AAv1: 76)

In the Reply to the Opposition to the Supplemental Petition, Appellant noted that he was entitled to relief on this Ground, but probably not in Nevada. As noted at AAv1: 249, the reason the trial court would not allow the evidence in, over Mr. H's objection, was because it would "open the door to other statements that Jason Taoipu made in his trial testimony that indicate that Little Lou was involved and gave the orders" and because it would be prejudicial to "Mr. H.."

Understandably, this Court did not uphold the trial judge's discretion on that ground, as it is plainly wrong and abusive.

In the first place, this 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.

Secondly, as we have seen the ruling is factually wrong. Carroll's hearsay statements, as Taoipu remembered them, did not tie to "Little Lou," but rather, to "Mr. H.." We should all be able to agree that the trial judge was simply wrong in that regard.

However, and unfortunately, this Court's ruling in the Order of Affirmance cannot be reconciled with Fed. R. Evid. Rule 804(b)(1)(B). Since Taoipu was the State's trial witness in the Counts trial, his motive for testifying would not have changed had he been a live witness in this case. The question is whether Taoipu's testimony had "sufficient indicia of reliability" to be admitted, not whether it was critical or important to the State's case against Counts. See: United States v. Mohawk, 20 F.3d 1480, 1488 (9th Cir. 1994) [reversed on other grounds]; United States v. Collins, 478 F.2d 837, 838-39 (5th Cir. 1973); United States v. Ciak, 102 F.3d 38, 43-44 (2d Cir. 1996).

This becomes critical because the doctrine of law of the case is not absolute, but this Court has discretion to revisit the wisdom of prior legal conclusions, if this Court determines that such action is warranted. Bejarano v. State, 122 Nev. 1066, 1074, 146 P.3d 265, 271 (2006), and cases cited therein. And, this Court

generally will find federal court decisions construing the Federal Rules of Evidence to be persuasive authority in construing identical provisions under the NRS. See: Hallmark v. Eldridge, 124 Nev. 492, 498, 189 P.3d 646, 650 (2008); L.V. Dev. Associates v. Eighth Judicial District Court, 130 Nev. Ad. Op. 37, 325 P.3d 1259, 1264 (2014), and cases cited therein; Tomlinson v. State, 110 Nev. 757, 761-62, 878 P.2d 311, 313-14 (1994).

Excluding this testimony implicates Appellant's Fifth, Sixth, and Fourteenth Amendment rights to a fair trial and to due process of law in two ways. First, as we have seen, Appellant's prosecutor solicited Taoipu's testimony on the subject of who said "bring the bats and bags." Had the prosecutor believed that testimony to be false, he had a sworn, constitutional duty to correct it and to elicit the truth. Napue v. Illinois, 360 U.S. 264, 270 (1959); United States v. Price, 566 F.3d 900, 910 n.11 (9th Cir. 2009). Here, Mr. Pesci did not seek to correct Taoipu (or Zone in Appellant's trial). Therefore, Taoipu's testimony was not knowingly false, any more than Zone's later testimony was not knowingly false. The jury should have been the one to assess witness credibility.

Secondly, the presentation of Taoipu's previously sworn, cross-examined testimony was an intractable part of Appellant's Sixth Amendment right to present his defense. See: Chambers v. Mississippi, 410 U.S. 284, 302 (1973); Chia v.

Cambra, 360 F.3d 997, 1004-07 (9th Cir. 2004) [exclusion of declarant's out-of-court statements exonerating defendant violated his Sixth Amendment rights and unreasonably applied Chambers]. In federal *habeas corpus*, the court will not rely upon the "adequate and independent state grounds" theory of procedural default, so as to avoid review of the federal constitutional issue, where a state law did not clearly support the existence of the alleged procedural requirement. See: Ulster County Court v. Allen, 442 U.S. 140, 150-51 (1979); Ford v. Georgia, 498 U.S. 411, 424 (1991) [procedural hurdle invoked by state does not even remotely satisfy the requirement that an adequate and independent state procedural rule bar entertainment of constitutional claims, unless the bar was established and regularly followed by the time it was applied.] Simply put, if Taoipu's former sworn testimony comes in under Fed. R. Evid. Rule 804(b)(1)(B), as it must, and if this Court has never (consistently with S.C.R. 123) construed NRS 51.325 in a manner inconsistent with the federal courts' construction of the said federal rule, as it has not, and if that evidence is critical to the defense case - as it most certainly is here - then we have a Sixth Amendment violation and a grant of federal *habeas*. We beseech this Honorable Court not to let this case go that far!

Otherwise, the Court needs to look at the practical reality of how this issue arose. It arose in the middle of trial, and the driving force behind depriving

Appellant of his Sixth Amendment right to present his defense is that the evidence rightfully would have been damaging to Mr. H., as we have discussed. The remedy would have been a severance pursuant to Morales v. State, 122 Nev. 966, 969-70, 143 P.3d 463, 465-66 (2006), also known as a "bifurcation." That is, the remedy was to allow Mr. H. to finish his case; have the jury deliberate and reach a verdict just as to him; then, without discharging the jury, have this Appellant thereafter present the sworn testimony of Mr. Counts, and then present the cause to the same jury for return of a second verdict re. the Appellant before the jury's discharge.

Under the circumstances, the failure to sever or "bifurcate" would be at least as prejudicial as it was in Buff v. State, 114 Nev. 1237, 1244-45, 970 P.2d 564, 568-69 (1998) and Chartier v. State,124 Nev. 760, 766-68, 191 P.3d 1182, 1186-87 (2008). In Buff, this Court held that the failure to sever a joint trial into separate trials denied one defendant his constitutional right to a fair trial, by precluding him from introducing his co-defendant's initial statement to the police exonerating that defendant. We see no practical difference between the Buff situation and this one!

And to his credit, neither did trial counsel. Trial counsel admitted at the evidentiary hearing that although prior to trial not seeking a severance co-

defendant of trials was a strategy in order to avoid the death penalty notice filed against this Appellant (See: AAv12: 2842-44), he very much wanted Mr. Taoipu's testimony before the jury, since the above quoted area exonerated Appellant and therefore was exculpatory for him. (Id. at 2844-45) He did not see anything in the transcript of Taoipu's testimony which would have been damaging to Appellant's defense (Id. at 2845-46). He did not consider seeking a severance in the middle of trial in order to get Taoipu's testimony in (Id. at 2847-48), and in hindsight he regrets that he did not do so. (Id. at 2850)

Certainly, the fact that pre-trial a severance motion is not made, is made and denied, or is made but then waived, does not end the counsel and the court's duty to seek and/or to order a severance when one becomes necessary. Marshall v. State, 118 Nev. 642, 646, 56 P.3d 376, 379 (2002), citing Zafiro v. United States, 506 U.S. 534, 537 (1993) ["continuing duty at all stages of the trial to grant a severance if prejudice appears"].

Equally as clear, a theory of ineffective assistance of counsel can attend to counsel who fails to file or make a severance motion that is meritorious. See: Hernandez v. Cowan, 200 F.3d 995, 998-1000 (7th Cir. 2000).

Since the court below did not spell out why it was denying relief on Ground Four at AAv12: 2888, rebuttal is futile.

For these reasons, then, Appellant is entitled to relief on this Ground, singly or in cumulation with other grounds. Hopefully, the strength of the other grounds asserted herein, however, will cause this Court no reason to reach this Ground.

F. APPELLANT'S FIFTH, SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO A FAIR TRIAL, TO DUE PROCESS OF LAW, AND TO EFFECTIVE ASSISTANCE OF COUNSEL TRIAL WERE IMPINGED WHEN TRIAL COUNSEL FAILED TO FILE A MOTION TO SEVER THE TRIALS OF THE SOLICITATION OF MURDER COUNTS, WHICH OCCURRED AFTER THE MURDER OF HADLAND, FROM THE MURDER AND CONSPIRACY TO MURDER COUNTS.

First off, the trial court made it very clear that had trial counsel filed a Motion to Sever the Counts in the Indictment for Trial, she would have denied it. (See: AAv12: 2833-2837) Therefore, this issue is straightforward: If the Motion would have had merit, counsel was ineffective in not filing it. Hernandez v. Cowan, *supra*. If the Motion had no merit, then counsel was not ineffective. So, we start from there.

As noted above, the evidence in support of Appellant's participation in the murder of Hadland is precious thin. It consists entirely of impeached evidence of statements Appellant supposedly made, which were not in any way acted upon.

In contrast, the evidence of Appellant's guilt of solicitation of murder of the two witnesses after Hadland's murder, caught on tape and with Appellant

presenting no evidence to controvert Ms. Espindola, was overwhelming. Based upon how NRS 199.500(2) has been interpreted, the evidence against Appellant on Counts III and IV is simply indefensible.

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 as 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, 57 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 victim is irrelevant].

In reversing a murder conviction in Tabish v. State, 119 Nev. 293, 72 P.3d 584 (2003), this 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 incidence occurring days apart motivated by different concerns are not part of a common scheme or plan. 119 Nev. at 303-04, 72 P.3d 590-91, and cases cited therein.

3) The failure to sever is prejudicial if the evidence on one count is relatively strong and relatively weak on the other. 199 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, and cases cited therein.

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: Honkanen 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 state and the court below argued and held that the evidence would have been cross - admissible on the theory of "motive" (See: AAv12: 2888-89), thereby distinguishing Tabish - but that begs the question: "Relative to motive to do what?"

Motive is the impetus that supplies the reason for a person to commit a criminal act. United States v. Benton, 637 F.2d 1052, 1056-57 (5th Cir. 1981). Evidence of other crimes may be admitted to show that the defendant had a reason to commit the act charged, and from this motive, it may be inferred that the defendant did commit the act charged. See: United States v. Holley, 23 F.3d 902, 912-13 (5th Cir. 1994).

That leads to the first problem: Events occurring after the charged crime do not, beyond propensity evidence, explain why the defendant committed the offense, unless it explains the desire to hide the charged offense. See: Richmond v. State, 118 Nev. 924, 932-33, 59 P.3d 1249, 1255 (2002).

Clearly, the fact that Appellant [unsuccessfully] solicited the murder of the witnesses, Zone and Taoipu, after the fact does not explain why he joined a conspiracy to batter Hadland, with Hadland's death resulting, before the fact. The

core issue is: Does it explain the desire to hide the charged offense?

And the State's problem in that regard is quite plain: Based upon the intercepted statements between Anabel Espindola and DeAngelo Carroll, Appellant had nothing to do with the murder. Therefore, logically, Appellant's motive in soliciting the murder of the witnesses had to do with covering up **his father's crime**!

Neither party has located a case to cite to the Court on whether an uncharged act that post dates a charged act can be admitted on the issue of the charge of the defendant's motive to cover up someone else's criminal participation. But logically, it makes no sense! If motive is supposed to be the impetus that supplies the reason for the charged offender's criminal activity, then a motive to cover up someone else's criminal activity is logically immaterial to the proposition.

Put another way, if Appellant were facing trial only on the charges of conspiracy and murder, his "motive" after the fact to cover up his father's participation in the murder would not have been relevant to any issue in Appellant's murder trial. Therefore, the solicitation evidence would certainly have been excluded as more prejudicial than probative.

The second problem with admitting the post - charge conduct of soliciting

murders of the witnesses attends to all cases wherein "motive" is the asserted reason for admissibility. The "motive" in question has to be based on something other than propensity evidence. In other words, we cannot say that the solicitation evidence is relevant to Appellant's motive to murder Hadland, because he has a propensity of seeking to kill people who get in his way. That theory makes the evidence flatly inadmissible per Mortensen v. State, 115 Nev. 273, 281, 986 P.2d 1105, 1110 (1999).

And when evidence is admitted on that type of theory, the closer the uncharged misconduct comes to the charged misconduct, the more prejudicial it becomes. Prior instances of the same crime are not admissible to establish motive, because use of such evidence is based upon the forbidden inference that the defendant had the propensity to respond to stimulus by committing the charged (and uncharged) act(s). See: United States v. Varoudakis, 233 F.3d 113, 120 (1st Cir. 2000); United States v. Utter, 97 F.3d 509, 514 (11th Cir. 1996). And see: United States v. Oreira, 29 F.3d 185, 190 (5th Cir. 1994) [evidence that narcotics dog alerted on deposit of cash did not prove defendant's "motive" in a structuring of currency transaction to avoid reporting requirements].

An example of the principle at hand is United States v. Brown, 880 F.3d 1012 (9th Cir. 1989). There the defendant was charged with first degree murder of

a postal employee and use of a firearm during the commission of a felony. The defense was that the defendant lacked the specific intent required to commit first degree murder. The prosecution introduced evidence that three months prior, the defendant shot a gun into a woman's house. She was unrelated to the postal employee, who was shot to death in his home. The prosecution also presented an incident that seven years prior, the defendant used the same kind of gun to "strong arm" a man, unrelated to the postal worker, to retrieve a different gun.

The prosecution contended the two uncharged incidences were admissible to rebut the defense's claim of lack of motive.

In reversing the conviction, the Ninth Circuit noted that since motive is not an element of the offense, the prior bad act evidence must show motive that is relevant to establish the defendant's specific intent to commit the charged murder. Brown, 880 F.2d at 1014-15. There, the evidence established at most the defendant's propensity for violence, as the acts could not be linked as the reason for killing the postal worker. (Id. at 1015) Therefore, the uncharged misconduct was inadmissible.

Here, the conspiracy to batter was only as to Hadland, not as to Zone or Taoipu. If Appellant was not involved in that conspiracy, as he and Carroll contend, then he had no motive to do harm either to Zone or to Taoipu. There was

no reason for Appellant to get rid of witnesses for himself, since Appellant did nothing to cause Hadland's death. At worst, the solicitation evidence establishes Appellant's propensity to "talk violent smack." But "talking violent smack," by itself cannot be the foundation of a murder prosecution, absent action evidencing an intent to engage in violence. See: Childs v. State, 109 Nev. 1050, 1052, 864 P.2d 277, 278 (1993).

By its verdict the jury overlooked this basic point. But the most likely reason why is they confused Appellant's intent to do harm to Zone and Taiopu with an intent to kill or do harm to Hadland. Had the trials been severed, a reasonable jury would not have been so confused, and likely would have returned a not guilty verdict viz. Counts I and II.

V. CONCLUSION

It is regrettable to have to lay the blame of this case at the feet of trial and appellate counsel, who in very many ways did a thoroughly conscientious and commendable job in defending Appellant. But the Court has to take a step back and look at the bigger picture. This Appellant is serving a sentence structure of 20 years to life imprisonment based upon what he said - which was ignored by his so-called co-conspirators - as opposed to what he did. This man did **nothing**! How can this Court in all good conscience tolerate a status quo of a young man like this

spending at least 20 years in prison for doing nothing?

The system of justice is broken. However we get there, it really needs to be fixed.

DATED this 29 day of May, 2015.

Respectfully submitted,

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Richard F. Cornell

IN THE SUPREME COURT OF THE STATE OF NEVADA

★ ★ ★ ★ ★ ★

LUIS HIDALGO, III,
Appellant,
vs.

THE STATE OF NEVADA,

Respondent.
_____/

Case No. 67640

ATTORNEY'S CERTIFICATE

I, RICHARD F. CORNELL, hereby certify as follows, pursuant to NRAP 28(e), and NRAP 32(a)(8):

I have read this Appellant's Opening Brief before signing it; to the best of my knowledge, information and belief, the Brief is not frivolous or interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

The Brief complies with all applicable Nevada Rules of Appellate Procedure, including the requirements of NRAP 28(e) that every factual assertion in the brief regarding matters in the record is supported by appropriate references

to the record on appeal.

Further, I certify that the document complies with the formatting requirements of Rule 32(a)(4)(6). Specifically, the brief is 2.0 spaced; it uses a mono-spaced type face which is Times New Roman 14-point; it is in a plain style; and the margins on all four sides are at least one (1) inch.

The Brief also meets the applicable page limitation of Rule 32(a)(7), pending grant of the accompanying Motion for Leave to File Oversized Brief. It is 75 pages in length and it contains 17,625 words.

DATED this 29 day of May, 2015.

Respectfully submitted,

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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:

Mark DiGiacomo
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DATED this 26th day of May, 2015.

Marianne Tom-Kadlic
Legal Assistant to Richard F. Cornell