IN THE SUPREME COURT OF THE STATE OF NEVADA

LUIS HIDALGO, JR., Appellant, vs. THE STATE OF NEVADA, Respondent.	Case No. 71458

APPELLANT'S OPENING BRIEF

Appeal from Eighth Judicial District Court, Clark County

The Honorable Valerie Adair, District Judge

District Court Case No. 08C241394

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

JURISDICTIONAL STATEMENT

This is an appeal from the denial of a post-conviction petition for writ of habeas corpus. The district entered Findings of Fact and Conclusions of Law denying Appellant Luis Hidalgo, Jr.'s petition on September 19, 2016. (22 PA3812-3861[1].) Hidalgo submitted a timely notice of appeal on October 3, 2016. (22 PA3862-3864); *see also* Nevada Rule of Appellate Procedure ("NRAP") 4(b)(1)(A) (mandating that a notice of appeal by a defendant or petitioner in a criminal case shall be filed with the district court clerk within 30 days after the entry of the judgment or order being appealed). This appeal is subject to this Court's jurisdiction pursuant to Nev. Rev. Stat. § 34.575.

ROUTING STATEMENT

This case is presumptively retained by the Supreme Court because it is an appeal from the denial of post-conviction relief pursuant to an order filed by the district court. *See* Nevada Rule of Appellate Procedure 17(a)(2).

[1] Citations to Petitioner's Appendix ("PA") are to both volume and page number(s). Hence, "12 PA3812-3861" refers to volume 22 of the Petitioner's Appendix at pages 3812 through 3861. Hidalgo has also submitted a portion of his appendix in this matter under seal. Citations to the sealed appendix will be labelled "SPA."

ISSUES PRESENTED FOR REVIEW

1. Whether trial counsel's multiple substantial conflicts of interest deprived Mr. Hidalgo of effective assistance of counsel.

2. Whether trial counsel provided ineffective assistance of counsel at the pretrial litigation stage by conceding to the State's motion to consolidate Mr. Hidalgo's case with the cases of his co-defendants.

3. Whether trial counsel provided ineffective assistance of counsel by failing to investigate and use available evidence to effectively impeach the credibility of Anabel Espindola, one of the co-defendants in this matter who became the State's chief witness.

4. Whether appellate counsel was ineffective for failing to challenge the admission of prejudicial hearsay at trial.

5. Whether Mr. Hidalgo's conviction and sentence are constitutionally infirm due to the cumulative effect of trial counsel's deficient performance.

6. Whether the district court erred in denying Mr. Hidalgo's petition for a writ of habeas corpus without conducting an evidentiary hearing.

I. STATEMENT OF THE CASE

This is an appeal from the denial of Appellant Luis Hidalgo, Jr.'s[2] post-conviction petition for a writ of habeas corpus. The State charged Hidalgo by way of an Amended Indictment dated May 1, 2008, with Conspiracy to Commit Murder and Murder with Use of a Deadly Weapon. (3 PA 239-41.) Following a fourteen-day jury trial, Hidalgo was convicted of one count of Conspiracy to Commit Battery with a Deadly Weapon or Battery Resulting in Substantial Bodily Harm, and one count of Second Degree Murder with Use of a Deadly Weapon. (18 PA3061-62 (judgment of conviction); *see also* 18 PA3065-66 (amended judgment of conviction).) These convictions stem from Hidalgo's alleged participation in the murder of Timothy Hadland on May 19, 2005. The case involved multiple co-defendants, several of whom received far shorter sentences in exchange for cooperating with the State.

In his Petition for Writ of Habeas Corpus (Post-Conviction),[3] Hidalgo asserted several claims for relief related to the ineffective assistance of counsel. Hidalgo asserted that trial counsel had several conflicts of interest that rendered his

[2] Mr. Hidalgo's son, Luis Hidalgo, III, was a co-defendant in this case. To avoid confusion, the statement of facts and argument in this brief refer to Mr. Hidalgo as "Hidalgo" and his son as "Hidalgo III."

[3] (*See generally* 1 PA0001-0047 (Supplemental Petition for Writ of Habeas Corpus (Post-Conviction).)

representation fundamentally ineffective, failed to provide effective assistance of counsel during the pretrial stages of litigation, and failed to provide effective assistance of counsel on appeal. Hidalgo also asserted trial counsel's multiple failings, taken cumulatively, deprived him of his Sixth Amendment right to adequate representation. Following briefing, the district court denied Hidalgo's request for an evidentiary hearing, entering an order on September 19, 2016 denying all of his claims. (22 PA3812-3861.) This appeal follows.

II. STATEMENT OF FACTS

A. The Death of Timothy Hadland

At approximately 9:00 to 10:00 p.m. on May 19, 2005, Timothy Hadland was camping at Lake Mead with his girlfriend, Paijit Karlson, when he received a walkie-talkie call on his cell phone. (5 PA0742, 0747-48, 0750.) After the call, Hadland told Karlson he was going to meet "Angelo," a co-worker at Hadland's former place of employment, the Palomino Club (the "Club"). (5 PA0748-49.) Hadland told Karlson he was meeting "Angelo" to obtain marijuana. (5 PA0749.)

Karlson became concerned after Hadland failed to return, and attempted to call him several times. (5 PA0750-51.) At approximately 11:30 p.m. that evening, picnickers discovered Hadland's body on North Shore Road near Lake Mead. (5 PA0711-12, 0717-18.) Hadland had sustained two gunshot wounds to his body, one

of which was on the left side of his cheek. (6 PA0908-09.) Thirty-three advertisement cards from the Club were found next to Hadland's body. (5 PA0793.)

At the time of trial in this matter, co-defendant Rontae Zone testified he was present at Hadland's shooting death. (6 PA 0958.) Zone testified he was a relatively recent friend of co-defendant Deangelo Carroll in May of 2005. (6 PA0927.) On May 19, 2005, Zone was residing with Carroll, along with Carroll's wife and Zone's "baby's mother." (6 PA0928.) Zone was working with Carroll passing out Palomino Club flyers to cab companies. (*Id*.) During this employment, Carroll paid Zone under the table. (6 PA0932.)

At approximately noon on May 19, 2015, Zone was with Carroll and "JJ" [co-defendant, Jason Taoipu] in a white Astro van registered in the name of Anabel Espindola when Carroll informed them both that "Mr. H [Hidalgo] wanted someone killed." (6 PA0932; PA0935-36.) However, Zone admitted Carroll only said that Hidalgo wanted to have the person "dealt with." (6 PA0938.) Zone further admitted Carroll had never used the word murder and that "dealt with" was the only terminology used. (6 PA0984.) Zone admitted he learned all this information from Carroll and did not speak directly to Hidalgo (7 PA1045.) At this point, Carroll asked Zone and Taoipu whether they wanted to be involved in the killing. (6 PA0935-36.) Zone said no, while Taoipu stated he was "down." (*Id*.) Zone testified that he was

somewhat skeptical of the proposition, as he knew Carroll to be a "big talker" and someone who wasn't trustworthy. (7 PA1049, 1094.)

Zone, Carroll, and Taoipu then went to Carroll's house to put on the black pants and shirts they wore when promoting the Club. (6 PA0940.) The three men next traveled to a home on F Street to pick up "KC" [co-defendant Kenneth Counts]. (6 PA0944.) Zone had not met KC prior to this night. (6 PA0944.) The four men then drove to Lake Mead. (6 PA0947.) Not long after entering the Lake Mead area, the conversation resumed regarding killing Hadland. (6 PA0949.) It was Zone's understanding that Carroll had told Hadland on the phone that they were going to smoke marijuana and "chill." (6 PA0950.) He also heard Carroll on the phone with co-defendant Anabel Espindola, wherein Espindola told Carroll "go to plan B" and Carroll responded "we're too far along Ms. Anabel." (7 PA1117.) Eventually Zone spotted Hadland driving toward them in a Kia Sportage, which he parked on the side of the road. (6 PA0955-56.)

Carroll then parked the Astro Van and relieved himself on the side of the road while Hadland got out of his car. (6 PA0956.) Carroll came back into the car and talked with Hadland at the window. (6 PA0957.) While this was going on, Counts exited the sliding door of the Astro van, approached Hadland, and shot him in the head. (6 PA0958.) After the shooting, Counts quickly hopped in the van and Carroll

drove off. (6 PA0959.) Counts then asked Zone and Taoipu why they did not assist him. (6 PA0960.)

The four men then drove to the Club, where Carroll parked and went inside, leaving Zone, Counts, and Taoipu in the van. (6 PA0961.) About ten minutes later, Carroll retrieved Counts and brought him into the club. (*Id.*) Eventually Counts came out of the club, got in a cab, and left. (6 PA0962.) Carroll came out of the club thirty minutes later. (*Id.*) Zone, Carroll, and Taoipu then went to Carroll's house. (6 PA0963.)

The next morning, the three men drove to Simone's Auto Plaza, a business Hidalgo owned. (6 PA0967.) Zone and Taoipu waited outside while Carroll went inside. (6 PA968.) Carroll went into the back and allegedly briefly spoke to Hidalgo (6 PA0969, 0971.) Carroll allegedly told Zone after the incident that "Mr. H was going to pay $6,000.00 to the man" that killed Hadland. (6 PA0942.) Later, Carroll told Zone they would not be paid, and chastised Taoipu and Zone for not participating. (6 PA0969-71) but that Counts would get $6,000.00. (*See id*.)

B. The Investigation

Las Vegas Metropolitan Police Department ("LVMPD") Sergeant Michael McGrath responded to the crime scene on North Shore Road on May 19, 2005. (7 PA1194.) He was able to identify a Kia Sportage as belonging to Hadland's girlfriend. (7 PA1201.) McGrath located Hadland's cell phone on the driver's seat

floorboard. (7 PA1202.) He opened the phone and noted that a recent call was displayed with the name "Deangelo" and a Nextel number. (*Id.*) McGrath was able to later identify the caller as Carroll. (7 PA1205.)

At approximately 7:00 to 7:30 a.m. on May 20, 2005, McGrath accompanied Detective Marty Wildemann to the Club to meet with "Arial," the office manager, to obtain Carroll's address and phone number. (7 PA1207.) Carroll had also arrived at the club. (7 PA1208.) Wildemann and McGrath asked Carroll to accompany them to the homicide office and he voluntarily compiled. (7 PA1209.) When interviewed, Carroll gave three different statements about the course of events on May 19. (11 PA1735.) When interviewed, Zone's story was allegedly consistent with the third version of Carroll's account. (7 PA1212; 11 PA1741.)

McGrath then developed a plan to "have Mr. Carroll meet with the people that owned the Club and record a conversation with those people to determine the accuracy as to what had happened that night." (7 PA1214.) On May 23, 2005, McGrath contacted FBI Special Agent Bret Shield to obtain a recording device for Carroll to wear while meeting with Hidalgo (8 PA1245-46.) Shield and McGrath met with Carroll at approximately 2:35 p.m. that same day to place the device and prep Carroll. (8 PA1246-47.) McGrath specifically told Carroll he wanted to hear Hidalgo on tape. (8 PA1248.) After the surveillance team witnessed Carroll enter and later leave Simone's, McGrath and Shield met with Carroll and recovered the

recording device, $1,400.00, and a bottle of gin. (8 PA1249.) McGrath admitted that recording was poor quality. (8 PA1253.)

At trial, the surreptitious recording was played to the jury. (8 PA1274.) Due to differences between the State's and Hidalgo III's defense counsel's interpretation of the content on the recordings, two transcripts were provided to the jury to aid their understanding of the communications. (8 PA1260, 1274.) On both transcripts of the May 23, 2005 recording, Carroll can be heard speaking with Espindola and Hidalgo III (18 PA2956-2972, 2983-3012.) Although the quality of the tape was so poor that there were a number of blank lines on the transcript, Carroll could be heard asking for money to give the people that were with him because they were threatening to go to the police. (PA 2799-2800.) Espindola responded she did not know where she was going to get the money, but that she had "maybe six bills." (18 PA2959.) Espindola stated:

> . . . if the cops can't go no where with you, the shits gonna have to, fucking end, they gonna have to go someplace else, they're still gonna dig. They are gonna keep digging they're gonna keep looking they're gonna keep on, they're gonna keep on looking. Louie [Hidalgo][4] 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.

(18 PA2960.)

[4] Although it is unclear from the name "Louie" if Espindola is referring to Hidalgo or Hidalgo III, Espindola testified she was referring to Hidalgo (10 PA1470.)

Espindola also said "Why are you saying that shit, what we really wanted was for him to be beat up, then anything else, _____ motherfucking dead." (18 PA2960.) Espindola continued to try and calm Carroll down, and emphasized the importance of Carroll taking care of this problem:

> If you go to jail for this shit I'm telling you, when the heat goes down everybody's fucked. The club is gone, the shop is gone, anybody who can take care of your family is fucking gone, he is the only one that can fucking say to take care of everybody… He's it.

(18 PA2961.) Espindola also said she was going to give Carroll some money to "maintain" himself. (18 PA2962.) Espindola then returned to berating Carroll:

> You should of fucking turned your ass around, before this guy….knowing that you had people in the fucking car that could pinpoint you, that this motherfucker had his wife, you should of motherfucking turned around on the road, don't give a fuck what KC said, you know what bad deal turn the fuck around.

(18 PA2963.)

Hidalgo III then asked Carroll "could you have fucking KC kill them too, we'll fucking put something in their food so they die rat poison or something." (18 PA2964.) Later Hidalgo III talked about giving Carroll a bottle of Tanqueray and said something to the effect of "you stir in the poison." (18 PA2970.) Shortly after that comment, the recording ends. At no point can the voice of Hidalgo be heard.

After listening to the May 23 recording, McGrath decided to send Carroll back to Simone's on May 24. (8 PA1254.) After sending him in for the second time, McGrath recovered $800.00 in cash and another recording from Carroll. (8 PA1255.)

The second recording was of better quality, but contained approximately twenty-eight minutes of blank tape. (8 PA1257.) This recording was also played for the jury. It memorialized a conversation between Carroll and Espindola. (8 PA2974, 2978.) In this conversation, Carroll informed Espindola he needed money to get his wife and child out of town. (8 PA2974-75.) Carroll supported his plea for money by stating he did everything that was asked of him and that he "took care of him"—presumably referring to Hadland. Espindola responded stating "___talk to the guy not fucking take care of him ____god damn it I fucking called you." (8 PA2975.) Espindola went on:

> I said to go to plan B fucking Deangelo and Deangelo you're just minutes away___I told you no I fucking told you no, and I kept trying to fucking call you but you turned off your mother fucking phone.

(*Id.*)

At this point, Hidalgo III apparently entered the room to ask what was happening. (8 PA2976.) Carroll informed Hidalgo III that KC was threatening to kill his wife and child and that he wanted more money. (*Id.*) Espindola then states:

> All I telling you is denial cause I'm fucking saying and I already said I don't know shit I don't know shit fucking I don't know a mother fucking thing and that's how I got to fucking play it. And that's how I told everybody else to play it_____

(*Id*.) Once again, at no point is Hidalgo on the tape.

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C. The Indictment of Hidalgo's Co-Defendants

On June 20, 2005, Counts, Hidalgo III, Espindola, and Carroll were charged via Information in Eighth Judicial District Court Case No. C212667 with murder and other charges related to Hadland's death. (2 PA0055-58.) On July 6, 2005, the State filed Notices of Intent to Seek the Death Penalty against all defendants. (2 PA0059-62.) At this time, Christopher Oram was Espindola's attorney of record and Robert Draskovich was representing Hidalgo III. (2 PA0063, 0068.)

After attempting to strike the Notices of Intent to Seek the Death Penalty against both Espindola and Hidalgo III at the District Court level, those defendants brought a Petition for Writ of Mandamus, or in the Alternative, Writ of Prohibition against the District Court. (2 PA0069-0116.) The documents filed in that proceeding indicate attorney Jonell Thomas was filing on behalf of Espindola and attorney Dominic Gentile was filing for Hidalgo III. (*Id.*) While the arguments raised in that petition are only tangentially related to the instant petition, the State raised the issue of a potential conflict in Gentile's representation of Hidalgo III while apparently simultaneously representing Hidalgo, Hidalgo III's father. (2 PA0099--0114.)

In its Answer, the State first noted that:

> At all times in District Court, Defendant Hidalgo [III] has been represented by Robert Draskovich and Steven Stein…. At no time, prior to the instant petition has Mr. Gentile represented Defendant Hidalgo. A review of the District Court record does not reflect that Defendant Hidalgo has substituted for counsel of record.

(2 PA0099.) The State further noted Gentile had represented to LVMPD as early as May of 2005 that his office represented Hidalgo (2 PA0101.)

Although the State noted Hidalgo had not yet been charged, it predicted that Hidalgo would eventually be charged with conspiracy to murder Hadland. (2 PA0101.) Citing these circumstances, the State argued that: (1) Gentile's contemporaneous representation of both Hidalgo III and Hidalgo was an impermissible conflict of interest due to antagonistic defenses; (2) Gentile could not effectively represent Hidalgo III while being paid by Hidalgo; (3) Gentile was a potential witness in this case; and (4) there was substantial risk of prejudice to Hidalgo III due to this conflict. (2 PA0099-0114.) In making this argument, the State argued ***"it is beyond obvious that a lawyer representing the interests of Defendant Hidalgo cannot possibly represent the best interests of Mr. H [Hidalgo] in the same crime."*** (2 PA0103.) (emphasis added.)

In response, Hidalgo III claimed that Hidalgo had executed a waiver of conflict, which was filed under seal with this Court. (2 PA0175; SPA043-51.) On December 27, 2007, the Court granted the petition. (2 PA0146.) The opinion was withdrawn on February 21, 2008 and the Court granted a Petition for rehearing. (*Id.*) In its May 29, 2008 opinion, the Court addressed the State's conflict argument in a footnote:

> In response to the State's argument that counsel for petitioner Luis Hidalgo III has an impermissible conflict of interest due to his

> representation of Hidalgo's father in an unrelated matter, Hidalgo has moved this court to file certain exhibits under seal. Cause appearing, we grant the motions. Based on the affidavits submitted by Hidalgo, his counsel, and Hidalgo's father, we perceive no current or potential conflict sufficient to warrant counsel's disqualification at this time. See RPC 1.7. The State may renew its motion below in the future, however, if such a conflict arises.

(2 PA0148.)

On February 4, 2008, shortly before the Court granted rehearing, Espindola pleaded guilty to Voluntary Manslaughter with Use of a Deadly Weapon. (2 PA134-45.) As part of her guilty plea agreement, Espindola agreed to cooperate with the prosecution in the "State of Nevada v. Kenneth Counts, Deangelo Carroll, and Luis Hidalgo III, and any other suspect concerning the MURDER WITH USE OF A DEADLY WEAPON of TIMOTHY HADLAND…" (2 PA0142-45.) Shortly after Espindola's Agreement to Testify was executed, Hidalgo was indicted on charges related to Hadland's murder. (3 PA0262-65.)

D. The District Court Addresses the Possible Conflict of Interest Created By Gentile's Contemporaneous Representation of Hidalgo and Hidalgo III.

Following Hidalgo's Indictment, on February 13, 2008, the district court conducted a closed hearing in Hidalgo III's case regarding a potential conflict of interest in Gentile's contemporaneous representation of both Hidalgos. (SPA063-221.) The hearing was conducted in response to the State's motion to have conflict-free counsel appointed to Hidalgo III. (SPA064.) After the hearing, Hidalgo III

continued to be represented by Gentile. (2 PA0201-02.)

Gentile represented Hidalgo at his February 20, 2008 arraignment. (3 PA0266-70.) Gentile agreed to transfer the case to Department 21, where both Espindola and Hidalgo III were being tried. (*Id.*) Subsequently, the State filed its Notice of Intent to Seek the Death Penalty noting one aggravator: "the murder was committed by a person, for himself or another, to receive money or any other thing of monetary value…" (3 PA0271-73.)

During an April 1, 2008 bail hearing, Gentile represented he received Bermuda Sands LLC, a corporation owned by Hidalgo, as his fee, subject to a mortgage. (3 PA0292.) He further stated that as part of the deal with Hidalgo, he would use Bermuda Sands LLC as security for a bond. (PA 231-232.) The Court ultimately granted Hidalgo bail in the amount of $650,000.00 with a condition of house arrest. (3 PA0294.)

On June 25, 2008, the State moved to consolidate Hidalgo's case with Hidalgo III's case. (3 PA0307-17.) At a July 22, 2008 status check on the motion to consolidate, Gentile represented he would continue to represent both Hidalgo and Hidalgo III unless the cases were consolidated. (2 PA0201-02.) At a November 20, 2008 hearing, prior to the defendants filing an Opposition to the Motion to Consolidate, Gentile brought attorneys Chris Adams and John Arrascada to the Court and represented they would be substituting in as counsel for Hidalgo III. (2

PA0203-04.) Gentile further represented the substitution was due to the "issues that can be raised between Hidalgo III and Hidalgo and because of the Nevada Supreme Court's narrow mandate in their ruling." (*Id.*)

Ironically, and despite new counsel confirming for Hidalgo III, the defense for Hidalgo and Hidalgo III submitted a Joint Opposition to the Motion to Consolidate on December 8, 2008. (3 PA0320-4 PA0537.) The Hidalgos argued the consolidation should be denied because: (1) special consideration should be made for capital defendants; (2) the Eighth Amendment right to individual sentencing requires severance; (3) Hidalgo would be prejudiced by Hidalgo III's additional charges of solicitation to commit murder against witnesses; (4) a joint penalty trial would prejudice Hidalgo's "lingering doubt" mitigation strategy; (5) joining a weaker case (Hidalgo's) with a stronger case (Hidalgo III's) would prejudice Hidalgo; (6) the potential conflict between the defendants Sixth Amendment rights pursuant to *Bruton*[5] and the Eighth Amendment right to mitigation; and (7) antagonistic defenses. (3 PA0326-50.)

On January 7, 2009, the State filed a Motion to Remove Gentile as Attorney for Defendant Hidalgo, or in the Alternative, to Require Waivers after Defendants have had True Independent Counsel to Advise Them. (4 PA0547-67.) The State argued Gentile's contemporaneous representation created a real conflict that could

[5] *Bruton v. United States*, 391 U.S. 123 (1968).

not be waived. (4 PA0554-65.) Further, the State argued that prior waivers in this case were insufficient to protect the record. (4 PA0563-65.) At a January 16, 2009 hearing on the matter, the State represented the parties had reached an agreement regarding the conflict issue and that Notices of Intent to Seek the Death Penalty against both Hidalgos would be withdrawn. (2 PA0209-10.) At this hearing, the Court also granted the State's Motion to Consolidate. (*Id.*; *see also* 4 PA0568-69.)

E. The Testimony of Anabel Espindola

Anabel Espindola pleaded guilty to voluntary manslaughter with use of a deadly weapon prior to trial. (10 PA1612.) In the plea agreement, the State agreed to give no recommendation as to sentencing, but stipulated to house arrest conditioned on her giving testimony and a videotaped deposition. (10 PA1613-16.)

Trial began on January 27, 2009 and lasted until February 17, 2009. (4 PA571-18 PA2948.) Espindola testified she met Hidalgo when she was working for him in the San Francisco Bay Area. (10 PA1469.) Almost immediately after the working relationship began, she and Hidalgo became romantically involved. (10 PA1472.) In 1999, she moved to Las Vegas with Hidalgo (10 PA1471.)

When Hidalgo established Simone's Auto Body in Las Vegas, Espindola was the business administrator. (10 PA1479.) In or around 2000-2001, Hidalgo got involved with the Club, which was owned by Dr. Simon Stertzer. (10 PA1484.) Hidalgo became general manager, and Espindola bookkeeper. (10 PA1485.)

Espindola was aware that Stertzer paid $13 million for the club at the time of purchase. (*Id.*)

The title to the club passed to Hidalgo in approximately 2004. (10 PA1486.) Stertzer did not want the "publicity" of owning the club and executed a note for $13 million, to be paid back to him in weekly $10,000.00 increments. (10 PA1488.) Money that was not paid to Stertzer was kept in Bermuda Sands LLC, a holding account for the Club as well as Satin Saddle and Lacy's, two other clubs included in the purchase. (10 PA1489.)

By April of 2005, Espindola was the Club's general manager. Hidalgo was owner, and Hidalgo III was manager. (10 PA1497.) The Club also employed Carroll for promotions and Hadland as front door man. (10 PA1498.) Approximately one week before Hadland's death, Espindola allegedly overheard a conversation between Hidalgo and Hidalgo III regarding Hadland. (10 PA1500.) Hidalgo III allegedly told Hidalgo that Hadland was falsifying tickets for cab driver promotions and getting a kickback. (10 PA1500, 1503.) Hidalgo's response to this information was that Hadland needed to be watched. (10 PA1504.) Later, Hidalgo told Espindola that Hadland needed to be fired and directed her to issue his final check. (10 PA1505.)

On the afternoon of May 19, 2005, Carroll called Espindola and alleged Hadland had badmouthed the Club at another gentleman's club. (10 PA1507-08.) After she got off the phone with Carroll, Espindola discussed the conversation with

Hidalgo and Hidalgo III at Simone's Auto Body. (10 PA1509.) Espindola testified that when she explained what Carroll had told her Hidalgo had no response, while his son, Hidalgo III, became angry. (10 PA1511.) Hidalgo III allegedly yelled at his father about why he wasn't doing anything, and stated that Hidalgo would never be like "Gilardi [sic] and Rizzolo" [other strip club owners] because "they take care of business." (*Id.*) During Hidalgo III's rant he allegedly said Rizzolo had sent one of his employees to beat up a customer. (10 PA1513.) Hidalgo reacted to his son by yelling at him to "mind his own business" (*id.*) and left (10 PA1515).

After Espindola finished her paperwork, she left Simone's Auto Body with Hidalgo, who she claimed was still angry, and they traveled to the Club. (10 PA1524-25.) Later that day, Espindola was working in the Club office with Hidalgo when Carroll knocked on the door. (10 PA1531.) Hidalgo let Carroll in and they walked out of the office together. (*Id.*) After a half an hour, Hidalgo returned to the office and gave Espindola instructions unrelated to Hadland, while another employee, "PK," was present. (10 PA1532.) Hidalgo asked Espindola to follow him to the kitchenette and told her to call Carroll and tell him to go to "plan B." (10 PA1533-34.) Espindola claimed she told him she would do it, despite apparently not knowing what the term "plan B" referenced. (10 PA1534.) Espindola then chirped Carroll on his Nextel phone and he returned the call on her regular phone. (10 PA1535.) She told Carroll to go to plan B and he allegedly responded, "I'm already here." (10

PA1537.) Espindola once again told Carroll to go to "plan B," at which point the phone call disconnected. (*Id.*) Espindola then told Hidalgo she had fulfilled his request to inform Carroll to go to plan B, which Hidalgo responded to by calmly walking out of the office with PK. (10 PA1541.)

Espindola testified that later, she and Hidalgo were in the office when Carroll came in (10 PA1541-42), sat down in front of Hidalgo and said, "it's done." (10 PA1542.) Hidalgo then told Espindola to "go get 5 out of the safe." (10 PA1543.) Espindola did so, and placed it in front of Carroll. (10 PA1543-44.) Espindola alleged that Hidalgo told her to put on the news and asked something to the effect of "did he do it?" (10 PA1545-46.)

The following morning at Espindola's home, she and Hidalgo turned on the news and heard there was a death at Lake Mead. (10 PA1550.) Espindola claimed Hidalgo stated "he did it." (*Id.*) Espindola asked Hidalgo what he had done, and he responded by saying he needed to call his attorney. (*Id.*)

On May 21, 2005, Espindola and Hidalgo stayed the evening at the Silverton Casino's hotel because Hidalgo said he did not want to stay at the house. (10 PA1568.) At some point, Hidalgo III visited them in the room and allegedly told his father not to worry and that he had spoken to Carroll and "he won't say anything." (*Id.*)

On May 22, 2005, Espindola met briefly with Gentile after he and Hidalgo had a closed-door meeting. He told Espindola not to speak to Carroll because he may be wearing a wire. (10 PA1574, 1576-77.) The next morning, Hidalgo allegedly told Espindola "I don't know what I told him to do." (10 PA1578-79.) At that point, Hidalgo became distraught and said he felt like killing himself. (10 PA1579.) Espindola asked Hidalgo if he wanted her to talk to Carroll, and he said yes. (10 PA1580.) Hidalgo then allegedly told Espindola to tell Carroll that he needed to resign and not talk to the police or else there would be no one to take care of him. (10 PA1583.)

On May 24, 2005, Espindola once again met with Carroll at Simone's Auto Body and had the conversation which became the subject of the second surreptitious recording. (10 PA1692.) Espindola left the room to speak with Hidalgo and his father Hidalgo Sr. in the kitchen. She informed them that Carroll told her the shooter was making threats. (10 PA1593, 1596.) Espindola then claimed Hidalgo responded by telling Espindola to give him more money. (10 PA1596.) She did not testify to any subsequent conversations with Hidalgo on the matter.

After defense counsel cast doubt on the consistency of Espindola's testimony on cross-examination, the State proffered Espindola's counsel Oram as a witness to allegedly prior consistent statements. Oram testified that he was the attorney retained to represent Espindola in the instant matter. (16 PA2636-37.) He testified that during

his representation of Espindola, he met with her approximately 85 times. (16 PA2638.) Oram testified Espindola told him she had received a phone call from Carroll earlier in the day that Hadland was killed. (16 PA2639.) During this conversation, she received information that she relayed to Hidalgo and Hidalgo III that caused them to have an argument. (16 PA2640.) Espindola allegedly told Oram on numerous occasions that Hidalgo told her to make a phone call and say "go to plan B." (16 PA2642.) Espindola also told Oram that Hidalgo paid Carroll $5,000.00. (16 PA2643.)

F. The Testimony of Other Witnesses Which Contradicted Anabel Espindola's Testimony.

Several witnesses called by the defense cast doubt on Espindola's credibility. Michelle Schwanderlik testified Espindola used to work at the Club, first as a dancer and eventually the office manager under the ownership of Stertzer. (13 PA2179-81.) Schwanderlik recalled that between approximately 7:00 and 8:00 pm on May 19, 2005, the day that Espindola claimed Hidalgo had a closed-door meeting with Carroll, she observed Carroll in her office making copies. (14 PA2189.) At that time Hidalgo called Schwanderlik and told her to bring the "banks" and to bring Carroll upstairs. (14 PA2190.) When they entered the office, Hidalgo began to chastise Carroll for the state of the company van. (14 PA2192.) After Hidalgo's discussion with Carroll, both Schwanderlik and Carroll left the office; Hadland did not come

up during the conversation. (14 PA2193.) She further stated Carroll was never truthful and she had frequently caught him in lies. (14 PA2190.)

Margaret Ann Johnson was a dancer at the Club. (14 PA2205.) Johnson testified she worked with Carroll when he was performing as a DJ. It was her opinion that Carroll was not a trustworthy person. (14 PA2206.) Johnson was also familiar with Hidalgo as the owner of the Club, and she stated that she trusted him. (14 PA2207-08.)

Pee-Lar Handley was an independent contractor working for the Club during the period in question. (14 PA2301.) In May of 2005, he was supervising some operations for the Club and noted that Hadland was frequently disappearing from his post outside the club. (14 PA2308.) As a result, Handley confronted Hadland about his behavior and generated a report that he turned over to Espindola. (14 PA2309-10.) Handley understood that Hadland was subsequently fired. (14 PA2310.)

Handley also testified he was present at the Club late May 19 to early May 20, 2005 when he encountered Carroll. (15 PA23870.) Carroll approached Handley and stated "I messed up, I f-ed up, I need to talk to [Mr.] H, I need to talk to Ms. Anabel." (*Id.*) When asked if Hidalgo used the term "plan B," Handley responded he was aware of Hidalgo using the term plan B in relation to the club promoters. (15

PA2378.) Plan A was to write up an offending promoter and fire them, plan B was to fire all the promoters at once. (*Id.*)

Jerry De Palma was a solo practicing attorney on May 21, 2005 when he met with Hidalgo and Espindola. (14 PA2227.) At that time, DePalma was unclear whether Espindola or Hidalgo was the client. (14 PA2237.) He stated Espindola informed him that a detective was asking questions about an employee at the Club named Deangelo Carroll. (14 PA2231.) De Palma further testified Espindola did most of the talking during the meeting. (*Id.*) During this meeting, De Palma recalled Hidalgo being calm and passive, while Espindola was quite animated and vocal. (14 PA2232.)

At that meeting, Espindola stated that she had overheard Hidalgo telling Carroll "to tell TJ [Hadland] to stop spreading… shit." (14 PA2233.) Espindola further told DePalma that she heard that Carroll had returned that night and said "it's done" and that "one of my homeboys shot him." (*Id.*) In response, Espindola claimed Hidalgo said, "what the fuck you talking about." (14 PA2234.) She further claimed to DePalma that she paid Carroll $5,000.00 because she interpreted Carroll's statements as a threat against them. (14 PA2235.)

Donald Dibble testified he was Attorney Dominic Gentile's private investigator on May 21, 2005 when he was called by Gentile to go to DePalma's office. (14 PA2255.) Dibble understood that he was going to gather information on

a new client. (*Id.*) At that meeting with Hidalgo and Espindola, Dibble recalled Espindola doing most of the talking. (14 PA2257.) She informed DePalma and Dibble that an employee had come into their office and informed him that another person had "gone crazy" and shot an ex-employee of the club in the head. (*Id.*) He further testified Espindola had said that the person who had committed the shooting was demanding money, and that she and Hidalgo had acquiesced out of fear. (*Id.*)

Obi Perez testified that she was incarcerated at the Clark County Detention Center in 2007 and became acquainted with Espindola during that time. (15 PA2446.) She stated that one day in spring of 2007, Espindola returned to her cell after court and was crying. (15 PA2448.) Espindola explained that she was scared that she was going to get the death penalty. (15 PA2449.) Espindola stated she had contacted Carroll to beat up the man who was killed. (15 PA2450.) Espindola did not mention any involvement on the part of Hidalgo or Hidalgo III. (15 PA2449.)

G. The Testimony of Luis Hidalgo

Petitioner Hidalgo testified in his own defense at trial. Hidalgo testified that he was aware of Hadland as an employee, but had very little communication with him. (15 PA2525-26.) Hidalgo stated he was not involved in the firing of Hadland, and did not know about it until a week and a half after it occurred. (15 PA2527.)

When asked about Espindola's testimony that she, Hidalgo, and Hidalgo III had a conversation about Hadland badmouthing the club, Hidalgo stated that this

conversation did not happen. (15 PA2529.) Further, Hidalgo stated he never got into a fight with his son regarding Hadland. (*Id.*) The first time Hidalgo learned Hadland was bad-mouthing the club was from Carroll. (15 PA2530.) Carroll had come into the office and informed Espindola that Hadland was badmouthing the club. Hidalgo responded stating "what is the big deal?" (15 PA2530.) Hidalgo further stated that he was already angry at Carroll for the earlier conversation they had regarding the cleanliness of the club's vehicle. (*Id.*) At most, Hidalgo told Carroll if he wanted to talk to Hadland, he should just tell him to stop. (15 PA2534.) Hidalgo denied ever asking anyone to harm Hadland. (15 PA2536.)

Hidalgo learned Hadland had been harmed when Carroll came into the office and told Hidalgo and Espindola that he "fucked up" and that a person got out of the car and "put a bullet in the guy's head." (15 PA2537-38.) Hidalgo responded by stating "what he fuck did you do," (15 PA2538-39.) Espindola reacted by standing up from the chair, covering her face, and calling Carroll stupid. (15 PA2539.) Carroll then demanded $5,000.00 and informed them that his friend was a Crip gang member that they didn't want to "fuck with." (15 PA2540.) Hidalgo admitted he paid the money out of fear. (15 PA2540-41.) Hidalgo denied he ever instructed Espindola to call Carroll or referred to any "plan B." (15 PA2542-43.) Further he denied ever speaking to Carroll following the May 19 conversation in his office. (15 PA2558.)

H. Facts Regarding Hidalgo's Retention of Attorney Gentile.

1. Hidalgo's Business Assets.

In 2005, Hidalgo owned several business entities which were all registered in the Nevada under the auspices of Hidalgo Enterprises, Inc. (SPA011.) Hidalgo Enterprises fully owned four LLC's: (1) Bermuda Sands, LLC; (2) Palomino Club, LLC; (3) Club Satin Saddle, LLC; and (4) Lacy's, LLC. (*Id.*) At the time, Bermuda Sands owned approximately 4.5 acres of real property along Las Vegas Boulevard. (*Id.*) Among other things, the Club, Club Satin Saddle, and Lacy's were located on the real property owned by Bermuda Sands. (*Id.*) As noted above, Bermuda Sands had acquired these assets from Simon Stertzer in 2004 (10 PA1488), who had executed a $13 million note on the properties through Windrock LLC. (*Id.*; SPA011.)

2. Hidalgo and Espindola Meet With Gentile; Hidalgo Sells His Assets to Gentile to Retain his Legal Services.

As discussed above, days after Hadland's murder, Hidalgo met with DePalma and Gentile's investigator, Don Dibble to discuss potential criminal charges. (SPA102; SPA136.) Espindola went to DePalma's office with Hidalgo (SPA103; SPA136.) Gentile did not participate in the meeting because he was in San Diego, California for trial in an unrelated matter. (SPA136.) After the meeting with DePalma, Hidalgo and Espindola met with Gentile. (*Id.*) Espindola did not

participate in the entire meeting, but during the portion of the meeting she did attend, Gentile gave her legal advice regarding talking to Carroll. (SPA137.)

After police arrested Hidalgo III and Espindola, Hidalgo decided to retain Gentile to represent him if the State decided to charge him in connection with Hadland's murder. (SPA154.) He also wanted to secure representation—with the assistance and direction of Gentile—for Hidalgo III and Espindola. (SPA155; SPA 158.) Shortly thereafter, Hidalgo began selling all his assets to Gentile—or members of Gentile's family.

In or around October 2005, 1848 Note, LLC, an LLC in which Gentile was a principal, entered into a contract with Windrock LLC to acquire the $13 million note for cash and a new promissory note. (SPA011.) Later, in January 2006, Gentile DePalma, Ltd. acquired full ownership of Bermuda Sands. (SPA012; SPA027-33.) Under the terms of the purchase agreement, the purchase price of full interest in Bermuda Sands was only $500,000.00. (SPA025.) The purchase agreement also granted Gentile the right to operate the Palomino Club, the Satin Saddle, and Lacy's, provided that Bermuda Sands entered into ground leases with Palomino Club LLC, Satin Saddle LLC, and Lacy's LLC to allow the LLC to run their respective clubs. (SPA028.)

While Gentile acquired Bermuda Sands from Hidalgo, his son Adam Gentile acquired the LLCs associated with the Palomino Club, the Satin Saddle, and Lacy's.

Through Hidalgo Enterprises, Inc., Hidalgo sold all his interests in Palomino Club LLC, Lacy's LLC, and Satin Saddle, LLC to Hachiman LLC, an LLC owned by Adam Gentile. (SPA022.) Under the terms of the purchase agreement, Hachiman LLC paid Hidalgo Enterprises $10,000.00 for each LLC. (*Id.*)

In both the transaction with Gentile and the transaction with Adam Gentile, Hidalgo was represented by Mark Nicoletti. (2 PA0210; 1 PA046, ¶ 12.) Prior to 2005, Nicoletti had been an attorney with Gordon Silver, a Las Vegas law firm. (1 PA046, ¶ 10.) Nicoletti recalled that in late 2005, Gentile contacted him and informed him that Hidalgo needed to sell all of his businesses to pay for legal representation. (1 PA046, ¶ 11.) No valuations of Hidalgo's significant assets were conducted prior to the sales to Gentile and his son. (1 PA046-47, ¶ 13.)

3. Hidalgo's Legal Retainer and Consulting Agreement with Gentile.

Under the terms of the representation agreement with Gentile, Hidalgo signed over all his interest in Bermuda Sands to Gentile to provide legal representation in this case. (SPA014.) The written agreement also provided that Gentile would be responsible for all fees, costs, and expenses of the legal representation of Hidalgo III and Espindola. (SPA015.) Additionally, the written agreement provided that Gentile would secure bail for Hidalgo III and Espindola if they became eligible. (*Id.*)

Although it was never discussed at the sealed conflict hearing conducted by this Court on February 13, 2008, at the same time Hidalgo sold his business assets

to Gentile, he also entered into a consulting agreement with Gentile. (SPA019-21.) Under the terms of the consulting agreement, Gentile agreed to retain Hidalgo for a thirty-month term as a consultant in the fields of law enforcement, service of process, public records investigation, and other areas. (SPA019.) Under the terms of the consulting agreement, Gentile paid Hidalgo an initial $30,000.00 fee, followed by $10,000.00 per month for each month thereafter for the duration of the term. (SPA019-20.)

4. Joint Defense: Agreement and Dissatisfaction.

Although he was not yet a defendant, in July 2006 Hidalgo entered into a joint defense agreement with Hidalgo III and Espindola. (SPA034-42.) As described above, Gentile was expected to pay for all fees, costs, and expenses associated with the joint defense of Hidalgo and his eventual co-defendants. (SPA014.) From the perspective of Espindola and her counsel, Gentile did not fulfill this obligation. During the sealed February 13, 2008 conflict hearing, Espindola's attorney, Christopher Oram, told the Court that approximately seven to eight months prior to the hearing, Espindola felt that Gentile had failed to fully fund her defense, and that Gentile was exerting too much control over the joint defense. (SPA106-111.) According to Oram, this made Espindola angry. (SPA107; SPA109; SPA111.) This dissatisfaction with Gentile's failure to fund her defense led Espindola to testify as a State witness.

I. Conviction and Appeal.

On February 17, 2009, the jury returned a verdict of Count One: GUILTY of Conspiracy to Commit Battery with a Deadly Weapon or Battery Resulting in Substantial Bodily Harm and Count Two: GUILTY of Second Degree Murder with Use of a Deadly Weapon. (18 PA2941-2947.) On March 10, 2009, Hidalgo filed a Motion for Judgment of Acquittal or, in the Alternative, a New Trial. (19 PA3097-3114.) This Motion was predicated on insufficiency of evidence on the conspiracy to commit battery charge and an objection to jury instruction No. 40 which applied a slight evidence standard to judging the existence of a conspiracy. (19 PA3109-13.) The State filed an Opposition asserting that the motion was untimely and that there was sufficient evidence to support conviction. (19 PA3115-3126.) On June 23, 2009, the Court found sufficient evidence to sustain the conspiracy charges. (2 PA0244-45.)

Hidalgo filed a sentencing memorandum on June 19, 2009 (19 PA3158-96.) On June 23, 2009 (19 PA3197-3224), the court sentenced Hidalgo to twelve months as to Count 1, and a term of 120 months to life as to Count 2. (19 PA3222-23.) The Judgment of Conviction was filed on July 10, 2009. (19 PA3227-28; *see also id. at* 3231-32 (Amended Judgment).)

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J. Hidalgo's Appellate and Post-Conviction Record.

On July 18, 2009, Hidalgo filed his Notice of Appeal. (19 PA3229-30.) In his opening brief, Hidalgo asserted: (1) the district court committed reversible error by instructing the jury that conspiracy could be established by "slight evidence;" (2) there was insufficient evidence to support his conviction; (3) the State's failure to record Espindola's plea negotiation violated his right to due process; (4) his right to confrontation was violated by the admission of statements of an alleged co-conspirator that both sides agreed had withdrawn from the conspiracy; and (5) the district court abused its discretion in denying his motion for a new trial based on juror misconduct. (20 PA3240-3307.)

After briefing (20 PA3308-69; 20 PA3370-3411), on June 21, 2012, the Court filed its Order of Affirmance. (21 PA3514-24.) In denying Hidalgo's claim that the statements of Carroll were improperly admitted as adoptive admissions the Court stated:

> Hidalgo also argues that the district court improperly instructed the jury that Carroll's statement could be considered as "adoptive admission[s]." A review of the record demonstrate that it was Hidalgo who first equated "context" with adoptive admission" and acquiesces throughout trial in treating these two concepts as synonymous. Thus Hidalgo cannot properly raise this argument on appeal." *Carter*, 121 Nev. At 769, 121 P.3d at 599 ("A party who participates in an alleged error is estopped from raising any objection on appeal.")

(21 PA3516, n. 4.)

On July 9, 2012, Hidalgo filed a Petition for Rehearing (21 PA3525-3531), which the Court entered an order denying on July 27, 2012. (21 PA3532.) Subsequently, Hidalgo filed a Petitioner for En Banc Reconsideration on August 10, 2012. (21 PA3533-3545.) After briefing (21 PA3546; 21 PA3547-59), on November 13, 2012, the Court denied the petition for En Banc Reconsideration without addressing the merits. (21 PA3580-81.) Hidalgo subsequently filed a Petition for Writ of Certiorari to the United States Supreme Court, which was denied on May 15, 2013. (21 PA3582.)

On December 31, 2013, Hidalgo filed his pro se Petition for Writ of Habeas Corpus. (21 PA3590-3670.) On February 4, 2014, undersigned counsel confirmed appointment in Hidalgo's case. (22 PA3881.) Hidalgo filed a Supplemental Memorandum of Points and Authorities in Support of Petition for Writ of Habeas Corpus on February 29, 2016. (1 PA0001-0047) ("Supplement"). In his Supplement, Hidalgo asserted that (1) he was denied effective assistance of counsel based on trial counsel's substantial conflicts of interest; (2) he was denied effective assistance of counsel in pretrial stages of litigation; and (3) he was denied effective assistance of counsel during appellate proceedings. (*See generally id.*) Hidalgo also requested an evidentiary hearing and additional discovery to obtain a forensic valuation of the business interests transferred to Gentile, and to conduct depositions of potential witnesses. (*Id.*)

The district court conducted a hearing on August 11, 2016. (22 PA3799-3810.) The district court summarily denied Hidalgo's request for an evidentiary hearing and his petition. (22 PA 3806.) The district court issued findings of fact and conclusions of law denying Hidalgo's petition for a writ of habeas corpus on September 19, 2016. (22 PA 3812-3861.) Hidalgo filed a notice of appeal on October 3, 2016.

III. STANDARD OF REVIEW

"A claim of ineffective assistance of counsel presents a mixed question of law and fact and is therefore subject to independent review" by this Court. *Kirksey v. State*, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996) (citation omitted); *accord Lader v. Warden*, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005).

Claims of ineffective assistance of counsel are evaluated pursuant to the two-part test set forth by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *accord Means v. State*, 120 Nev. 1001, 1011, 103 P.3d 25, 32-33 (2004). To establish ineffective assistance, a petitioner must show (1) counsel's performance was deficient and (2) the petitioner was prejudiced as a result of this performance. *Strickland*, 466 U.S. at 687. As to the first prong, a petitioner must show that counsel's representation fell below an objective standard of reasonableness. *Id.* at 688; *accord Kirksey v. State*, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996). As to the second prong, the petitioner "must then establish that

there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *United States v. Quintero–Barraza*, 78 F.3d 1344, 1348 (9th Cir. 1995) (citing *Strickland*, 466 U.S. at 688–89); *see also McConnell v. State*, 125 Nev. 243, 252, 212 P.3d 307, 313 (2009).

This Court has held that to prevail, a petitioner must "present relevant authority and cogent argument; issues not so presented need not be addressed by this court." *Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987). While judicial review of a lawyer's representation is deferential, a defendant may overcome the presumption that the challenged action should be considered sound strategy by identifying the acts or omissions of counsel that the defendant alleges were not the result of reasonable professional judgment. *Strickland*, 466 U.S. at 690; *accord Foster v. State*, 121 Nev. 165, 169-70, 111 P.3d 1083, 1085-86 (2005).

IV. ARGUMENT

A. Trial Counsel's Multiple Substantial Conflicts of Interest Deprived Hidalgo of Effective Assistance.

"Few aspects of our criminal justice system are more vital to the assurance of fairness than the right to be defended by counsel, and this means counsel not burdened by a conflict of interest." *United States v. Henke*, 222 F.3d 633, 638 (9th Cir. 2000) (per curiam). The Sixth Amendment provides a criminal defendant with

the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 14. 668. Counsel is presumed to be ineffective where he is burdened by an actual conflict of interest. *Id.* at 689. As the Supreme Court explained in *Strickland*:

> In those circumstances, counsel breaches the duty of loyalty, perhaps the most basic of counsel's duties. Moreover, it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests. Given the obligation of counsel to avoid conflicts of interest and the ability of trial courts to make early inquiry in certain situations likely to give rise to conflicts… it is reasonable for the criminal justice system to maintain a fairly rigid rule of presumed prejudice for conflicts of interest.

Id. Here, several conflicts deprived Hidalgo of his constitutional right to effective assistance.

1. Trial Counsel's Purchase of Bermuda Sands LLC from Hidalgo Created an Impermissible Conflict of Interest.

Nevada Rule of Professional Conduct ("NRPC") 1.8(a) provides that:

> A lawyer shall not enter into a business contract with a client or knowingly acquire an ownership, possessory, security or other interest adverse to a client unless:
>
> (1) The transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client.

NRPC 1.8. Yet Gentile entered into a purchase agreement with Hidalgo in which Hidalgo sold his interest in Bermuda Sands LLC to Gentile in exchange for legal representation in the instant matter. According to the purchase agreement, the value of Bermuda Sands was a mere $500,000.00. (SPA027-31.) Upon research of

counsel, it does not appear that either party sought a valuation of Bermuda Sands and its holdings prior to the transaction. (1 PA046-47, ¶ 13.)

The district court found that even if the purchase agreement violated the Nevada Rules of Professional Conduct, it was "irrelevant to a claim of ineffective assistance of counsel," citing the United States Supreme Court's opinion in *Nix v. Whitehead*, 475 U.S. 157, 165 (1986). (22 PA3833.) This interpretation is unduly narrow. In *Nix*, the Supreme Court acknowledged that professional codes are simply "guides" for what is reasonable behavior for an attorney under the *Strickland* standard, holding that:

> When examining attorney conduct, a court must be careful not to narrow the wide range of conduct acceptable under the Sixth Amendment so restrictively as to constitutionalize particular standards of professional conduct and thereby intrude into the state's proper authority to define and apply the standards of professional conduct applicable to those it admits to practice in its courts.

Id. The United States Supreme Court did not hold a breach of an ethical standard was *never* a violation of the Sixth Amendment right to effective assistance of counsel. Rather, the Court in *Nix* was simply wary of giving too much credence to nationwide codes such as the American Bar Association Model Rules, and acknowledged the relative autonomy of the states in setting reasonable practice guidelines for attorneys. *See id.* (holding that the "breach of an ethical standard *does not necessarily* make out a denial of the Sixth Amendment guarantee of assistance of counsel") (emphasis added).

While it is certainly true that a violation of these rules does not constitute *per se* ineffective assistance of counsel in a criminal case, the record here indicated trial counsel's conflict of interest not only ran afoul of the Nevada Rules of Professional Conduct, but also rendered his performance ineffective. The lack of a property valuation of Bermuda Sands violated NRPC 1.8 and created a fundamental conflict of interest. As described above, Bermuda Sands owned approximately 4.53 acres of land in Las Vegas, and also owned the LLC's for several businesses, including the Palomino Club LLC. (SPA011.) At that time, and to this day, the Palomino Club is the only holder of a Special Use Permit in the State of Nevada which allows the facility to serve alcohol under a full liquor license in an all-nude facility. (*Id.*) This fact alone made the Palomino Club LLC, and by extension Bermuda Sands, a uniquely valuable property. Absent a valuation of Bermuda Sands prior to the sale to trial counsel, Hidalgo had no way of knowing if the $500,000.00 value noted in the purchase agreement was a fair and accurate accounting of Bermuda Sands' true value.

Moreover, the concurrent sale of the three LLC's held by Bermuda Sands to an LLC owned by Gentile's son for a mere $30,000.00, as well as Gentile's retention of Hidalgo as a consultant, raises serious questions about whether Gentile had an irreconcilable conflict of interest in this case. The fact that these transactions occurred so close together in time, and the fact that Gentile did not disclose his hiring

of Hidalgo at the February 13, 2008 sealed hearing, created at the very least the appearance of impropriety which deserved further exploration. The district court therefore erred in declining to grant Hidalgo additional discovery and an evidentiary hearing to explore this issue.

2. Attorney Gentile's Apparent Failure to Fully Fund Hidalgo III's and Espindola's Defense Prejudiced Hidalgo.

As discussed above, approximately one year after Hidalgo and his co-defendants entered into the joint defense agreement, Espindola began to doubt that Gentile was fully funding her defense. As Oram explained at the February 13, 2008 sealed hearing, Espindola's growing belief that Gentile was not fully funding her defense led her to become increasingly angry. Thus, it appears that Espindola's belief that trial counsel was not paying for her defense led to her decision to testify against Hidalgo and his son. (SPA106-07 (Oram states that Espindola believed the attorneys were not being financed); SPA108 (same); SPA109 (Oram states that he requested funds for an investigator, but that he was "unable to tell Ms. Espindola that was ever done").)

At the sealed hearing, trial counsel specifically disclaimed Espindola's accusations. (SPA137-139; SPA140.) However, Oram did not have an opportunity to respond.

The district court found that the Sixth Amendment does not require defense counsel to pay "co-conspirators so as to induce them not to testify." (22 PA3836.)

The court's order, however, ignores the fact that trial counsel took it upon himself to fund the defense of Hidalgo III and Espindola in the questionable financial arrangement. When trial counsel failed to fulfill his obligations, he not only made it difficult for those counsel to conduct investigations and generally fund a defense (which ultimately pushed Espindola into accepting a deal), but also created animosity between Hidalgo and Espindola, who were romantically involved prior to their incarceration. While it is certainly not constitutionally mandated that counsel should provide money to potential witnesses, it should be universally recognized that a "reasonable" attorney would not set out to actively antagonize a co-defendant who could become a cooperating witness.

The issue is not that Espindola was induced to tell the truth when trial counsel failed to fund her defense. Rather, the issue is that Espindola was induced to hurt her former lover, whom trial counsel had led her to believe had abandoned her. This is not the behavior of a reasonable attorney, and it likely had an enormous impact on the outcome of Hidalgo's case. Additionally, the district court's order overlooked the fact that trial counsel stood to benefit from not funding the defense of Hidalgo III and Espindola. As discussed above, Hidalgo signed over all his interest in Bermuda Sands to Gentile to provide legal representation for himself, Hidalgo III, and Espindola. (SPA014.) By not funding the defense of Hidalgo III and Espindola,

trial counsel stood to realize an even greater profit than the terms of his representation agreement with Hidalgo contemplated.

This claim warranted further investigation and an evidentiary hearing to address this serious concern. The district court therefore erred in denying this claim.

3. Espindola's Participation in the Joint Defense Agreement and Her Subsequent Decision to Testify as a Witness for the State Created An Irreconcilable Conflict of Interest.

"A joint defense agreement establishes an implied attorney-client relationship with the co-defendant." *United States v. Henke*, 222 F.3d 633, 637 (9th Cir. 2000) (per curiam). (citing *United States v. McPartlin*, 595 F.2d 1321, 1337 (7th Cir. 1979); *Wilson P. Abraham Constr. Corp. v. Armco Steel Corp.*, 559 F.2d 250, 253 (5th Cir. 1977) (per curiam)). Courts generally agree a traditional attorney-client relationship is not established between an attorney and his client's former co-defendant via a joint defense agreement. However, the attorney may nonetheless owe a duty of confidentiality to the former co-defendant. *See United States v. Stepney*, 246 F.Supp.2d 1069, 1080 (N.D. Cal. 2003) ("Courts have consistently viewed the obligations created by joint defense agreements as distinct from those created by actual attorney-client relationships."); *see also In re Gabapentin Patent Litig.*, 407 F.Supp.2d 607, 612 (D. N.J. 2005) (concluding that working together pursuant to a joint defense agreement "could create implied attorney-client or

fiduciary obligations under certain circumstances"); *GTE North, Inc. v. Apache Prods. Co.*, 914 F. Supp. 1575, 1579–80 (N.D .Ill. 1996) (describing the duty).

The Ninth Circuit's opinion in *Henke* is instructive here, and indicates the conflict of interest created by Espindola's decision to testify against Hidalgo impaired Gentile's ability to cross-examine Espindola so much that it rendered his assistance at trial ineffective. In *Henke*, three defendants—Desaigoudar, Henke, and Gupta—were indicted on charges of conspiracy, making false statements, securities fraud, and insider trading. *Henke*, 222 F.3d at 636. Central to the prosecution's theory of the case was that the defendants had advance knowledge of a false revenue reporting scheme and had traded stock because of it. *Id.*

Desaigoudar, Henke, and Gupta had participated in joint defense meetings during which confidential information was exchanged and discussed among their counsel. *Id.* "Communications made during these pre-trial meetings were protected by the lawyers' duty of confidentiality imposed by a joint defense privilege agreement." *Id.* Shortly before trial, Gupta accepted a plea agreement and agreed to testify for the government against Desaigoudar and Henke. *Id.*

Counsel for Desaigoudar and Henke moved for a mistrial and filed motions to withdraw, arguing that their duties of confidentiality owed to Gupta precluded them from effectively cross-examining him. *Id.* The district court disagreed. At trial, counsel for Desaigoudar and Henke "conducted no cross examination [of Gupta] for

fear that the examination would lead to inquiries into material covered by the joint defense privilege." *Id.*

On appeal, the Ninth Circuit reversed. The court found that "a joint defense agreement establishes an implied attorney-client relationship with [co-defendants]" and that "[t]his privilege can also create a disqualifying conflict where information gained in confidence by an attorney becomes an issue." *Id.* at 637. The court continued:

> Just as an attorney would not be allowed to proceed against his former client in a cause of action substantially related to the matters in which he previously represented that client, an attorney should also not be allowed to proceed against a co-defendant of a former client wherein the subject matter of the present controversy is substantially related to the matters in which the attorney was previously involved, and wherein confidential exchanges of information took place between the various co-defendants in preparation of a joint defense.

Id. (quoting *Wilson P. Abraham Const. Corp. v. Armco Steel Corp,* 559 F.2d 250, 253 (5th Cir. 1977)).

Similarly, here, Espindola and her counsel entered into a joint defense agreement with Hidalgo and Hidalgo III. During their joint defense, Espindola's counsel undoubtedly participated in joint defense meetings, during which Gentile could have gleaned information which prevented him from effectively cross-examining Espindola when she testified as a State witness.

In fact, it is likely the potential for this precise conflict of interest began months before the entry of the parties into the joint defense agreement. As the State

has pointed out, as early as June 2005, Gentile and Hidalgo met with Espindola and Oram while Espindola was incarcerated. (2 PA0110.) Later, on August 12, 2005, Espindola met with Oram and Gentile, apparently to discuss her criminal case. (*Id.*) Gentile met with Espindola and her attorney several additional times. (2 PA0111-12.)

As explained above, Espindola's testimony was contradicted by several defense witnesses. Nevertheless, given that the jury convicted Hidalgo, it appears that despite the inconsistencies in Espindola's testimony, the jury found her to be generally credible. Had Gentile been free of the conflict created by his earlier visits with Espindola and Espindola's prior participation in the joint defense agreement, he could have more effectively impeached the State's most critical witness.

Relying on a provision of the joint defense agreement that states that "nothing in this Agreement is intended to create any attorney-client privilege for the purpose of the determination of conflicts of interest" (SPA038), the district court found that there was no attorney-client relationship created by the joint defense agreement. (2 PA3841, 3842 ("[T]he plain language of the joint defense agreement provided that *no such relationship was created* from the joint defense group")) (emphasis in original). However, the agreement additionally contains provisions that are in direct conflict with this statement. For example, the first paragraph of the joint defense agreement specifically states that "any past and future communications" among the

members of the joint defense agreement are "confidential and are protected from disclosure to any third party by the Rules of Non-Disclosure." (SPA035, ¶ 3; *see also* SPA037 (providing that all defense materials must be marked as "PRIVILEGED AND CONFIDENTIAL JOINT DEFENSE COMMUNICATION").) From the record, it is unclear exactly how trial counsel interpreted the contract and what effect it had on his effective defense.

B. Hidalgo Was Denied Effective Assistance of Counsel in Pretrial Stages of Litigation Because Trial Counsel Conceded to the Motion to Consolidate.

Hidalgo was indicted almost two years after his co-defendants were arraigned. (3 PA0262-65.) A review of the record demonstrates that there was simply no evidence to establish Hidalgo was involved in the murder of Hadland, while there was significant evidence adduced against Hidalgo III and Espindola. It was not until Espindola, facing the death penalty and lacking funding for her defense, decided to turn state's evidence and implicate Hidalgo that he was indicted.

Due to the length of time between the co-defendants' case being filed and Hidalgo's arraignment, he was initially assigned a different case number and was arraigned in a different department. (2 PA0266-70.) Hidalgo was therefore beneficially distanced from his co-defendant Hidalgo III. However, at the time of his arraignment, Hidalgo's counsel stipulated with the State to have the case moved into the same department as Hidalgo III and the remainder of the co-defendants. (2

PA0267.) This occurred at a point in time when both Hidalgo and Hidalgo III were being represented by the same counsel. This concession paved the way for the cases to be consolidated by putting both Hidalgos in front of the same court.

When the State eventually move to consolidate, trial counsel initially opposed the Motion, arguing that Hidalgo would suffer from spill over prejudice and the presence of antagonistic defenses. (3 PA0332-43.) However, it appears that, despite the filing of this Opposition, the parties conceded the consolidation motion in exchange for withdrawing the State's Notice of Intent to Seek the Death Penalty. (1 PA0047, ¶¶ 17, 18).

While it may be beneficial to have the death penalty removed as a sentencing possibility in the case of a defendant who had a substantial likelihood of conviction, that is not the case in the instant matter. The case against Hidalgo was weak and relied primarily on the biased testimony of Espindola. However, the prejudicial impact of being tried with Hidalgo III, who was recorded making admissions of participation in not only the murder for hire of Hadland, but also the solicitation of the murder of witnesses, cannot be overborne. The limited impact of the removal of the death penalty is evident in the jury's conviction of both Hidalgos for Second Degree Murder, rather than First Degree Murder, and thus removing the death penalty as a sentencing option. (17 PA 2791, 2883). As such, trial counsel's concession of the Motion to Consolidate was deficient given the presence of both

spillover prejudice and antagonistic defenses that prejudiced the Petitioner was deficient and likely resulted in Hidalgo's conviction.

1. Spill-Over Prejudice Required Severance of Hidalgo and Hidalgo III's Trials.

While it is true that "guilt by association" alone is not sufficient to support severance, severance is warranted when other additional compelling evidence is demonstrated. *See Lisle v. State*, 113 Nev. 679, 941 P.2d 459 (1997). In *Lisle*, the court acknowledged that "the 'spillover" or "rub off theory" involves the question of whether a jury's unfavorable impression of [one] defendant against whom the evidence is properly admitted will influence the way the jurors view the other defendant." *Id.* at 680 (citation omitted).

In *Zafiro v. United States* 506 U.S. 534, 113 S. Ct. 933, 938 (1993), the United States Supreme Court stated that severance should be granted "when there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants or ***prevent the jury from making a reliable judgment about guilt or innocence***." (emphasis added.) The *Zafiro* Court went further, finding that "evidence of a co-defendant's wrongdoing in some circumstances erroneously could lead a jury to conclude that a defendant was guilty." *Id; see also Baker v. United States*, 10 F.3d 1374 (9th Cir. 1993) ("The consequent risk of spillover prejudice cannot be ignored. This risk is particularly acute for comparatively peripheral defendants . . . whose separate trial could [be] concluded in a matter of days or

weeks, but who [may be] required to sit in the courtroom during months of proof involving entirely unrelated conspiracies and substantive offenses.")

The Ninth Circuit has recognized that "a great disparity in the amount of evidence introduced against joined defendants may, in some cases, be grounds for severance." *United States v. Douglas*, 780 F.2d 1472, 1479 (9th Cir. 1986); *see also United States v. Patterson*, 819 F.2d 1495, 1503 (9th Cir. 1987). While courts have a legitimate interest in joint trials for co-defendants, "this interest must never be allowed to eclipse a defendant's right to a fair trial." *United States v. Long*, 905 F.2d 1572, 1581 (D.C. Cir. 1990). In Nevada, the cumulative effect of accumulation of evidence of guilt which comes from being tried with other defendants may indeed become so unfairly prejudicial that severance is warranted. *Chartier v. State*, 124 Nev. 760, 767, 191 P.3d 1182, 1187 (2008).

Here, there was more evidence adduced against Hidalgo III than Hidalgo, The surreptitious recordings were central to the State's case. Hidalgo III can be heard not only acknowledging the acts that were committed against Hadland, but also advocating that the witnesses be killed. (18 PA2956-72; 18 PA2983-3012.) Moreover, Hidalgo III was charged and convicted for the solicitation of tampering with these witnesses. (18 PA2941-48.) These charges were not brought against Hidalgo. In fact, the only evidence presented against Hidalgo to support the conspiracy was Espindola's testimony, which was circumstantial at best.

Compounding this prejudice is the fact that the Hidalgos are father and son, which made it easy for the jury to assume that they acted in concert. The failure of counsel to ensure Hidalgo was not tried with his son was therefore deficient, and likely had a direct impact on the jury's decision to convict Hidalgo.

The district court found that counsel's decision to concede the Motion to Consolidate in exchange for the withdraw of the Notice of Intent to Seek the Death Penalty was a reasonable strategic decision. (22 PA3843-44.) However, the likelihood that Hidalgo would receive the death penalty in this case was remote. In Clark County Nevada, only 14% of death penalty cases result in a death sentence[6]. A reasonable capital defense attorney in Clark County would be aware of the remote possibility that a death sentence would be applied by a jury. Further, it is telling that the State was willing to trade a possible death sentence to try Hidalgo and his son together. From this offer, it is evident that the State either lacked the confidence that death would be imposed, or had significant incentive to try the Hidalgos together.

Moreover, the reasonableness of trial counsel's decision to consolidation is dubious given that he was under an agreement to fund the defense of both Hidalgo and Hidalgo III. If two trials were conducted in this case, the expense of the defense would undoubtedly increase. This cost would presumably be borne by trial counsel,

[6] *See* http://www.deathpenaltyinfo.org/documents/ClarkNVCostReport.pdf at p.11 (last accessed July 24, 2017).

as per the financial agreement, thus giving him personal incentive to concede the Motion to Consolidate.

The district court also found that trial counsel's decision to concede to consolidate was reasonable because the Motion to Consolidate was likely to succeed. (22 PA3844.) This finding is erroneous for two reasons. First, the district court that there was no spillover prejudice due to the extensive evidence against Hidalgo III in comparison to Hidalgo because that evidence would have been admissible against Hidalgo at his trial. (22 PA3844-45.) This conclusion ignores that Hidalgo III was tried and convicted for an additional count regarding an alleged solicitation to murder Carroll. (22 PA2943.) None of the evidence against Hidalgo III on that count would have been admissible against Hidalgo if he were tried alone because it was not relevant. This evidence served to make Hidalgo appear not only guilty of attempting to have Carroll killed, but also suggested the Hidalgos had a motive in killing Carroll; namely, that Carroll could implicate them in Hadland's killing.

Further, Hidalgo was not alleged to have been present during the surreptitious conversations recorded by Carroll and played at trial. As such, the statements made by Carroll on those tapes could arguably only be played at the trial of Hidalgo to provide "context" for the co-conspirators statements. (21 PA3517) (citing *United States v. Hendricks*, 395 F.3d 173, 184 (3d Cir. 2005)). However, those same statements could be admissible against Hidalgo III, who was present for the

recordings, as "adoptive admissions." *Maginnis v. State*, 93 Nev. 173, 175, 561 P.2d 922, 923 (1977); Nev. Rev. Stat. § 51.035(3)(b). The mere fact that the jury was expected to listen to these recordings and apply a different standard of consideration to the same piece of evidence demonstrates the spillover prejudice that Hidalgo suffered as a result of being tried with Hidalgo III.

Second, the district court's finding misconstrues Hidalgo's argument regarding the antagonistic defenses in this case. The district court found that Hidalgo was be the "beneficiary" of his defense team defending his interests over that of his son. (22 PA3846.) However, this finding ignores that trial counsel instituted a joint defense agreement over the interests of Hidalgo. Further, due to the close relationship between the co-defendants, it is likely the jury concluded they acted in collusion. This left the only viable defense for Hidalgo that both father and son were innocent.

Given the numerous issues that a joint trial presented, it is likely that the Motion to Consolidate would have been granted. As such, it was unreasonable for trial counsel to concede the motion for the "benefit" of the notice to withdraw the death penalty. The district court's decision to deny this claim was error.

2. Antagonistic Defenses Required Severance of Hidalgo and Hidalgo III's Trials.

District courts must determine the risk of prejudice from a joint trial based on the facts of each case. *Chartier*, 124 Nev. at 765, 191 P.3d at 1185. (citation omitted).

The United States Supreme Court recognizes inherent prejudice when co-defendants present antagonistic defenses at trial. *See Zafiro v. United States*, *supra* at 938. While the Supreme Court rejected a "bright-line test" for granting severance where antagonistic defenses are present, the court found that when jury instructions and other safeguards cannot minimize the prejudice, or if there is evidence which is admissible against only one defendant, but spills over to the other defendants, justice may require severance. *Id.* In addition, the Court noted that "the risk of prejudice will vary slightly with the facts in each case, the district courts may find prejudice in situations not discussed here." *Id.* The Court has also held that multi-defendant conspiracy prosecutions such as the one here "call for use of *every safeguard* to individualize each defendant in his relation to the mass." *Krulewitch v. United States*, 336 U.S. 440 (1949) (concurring opinion).

The record here indicates Hidalgo and Hidalgo III had antagonistic defenses. Hidalgo's voice was not present on the surreptitious recording, but the voices of his son and girlfriend were present discussing a conspiracy. The obvious defense in this matter would have been that Hidalgo III and Espindola conspired to murder Hadland without the knowledge of Hidalgo. This argument would have explained why Hidalgo was not on the recordings, and why only Espindola testified that Hidalgo spoke to Carroll on the issue. Further, the participation of Hidalgo III would explain why it was his voice on the recording and why Hidalgo III and Espindola provided

money to Carroll. This argument would be contrary to Hidalgo III's argument that he did not have anything to do with the conspiracy.

However, because Hidalgo III and Hidalgo were tried together, Hidalgo was prejudiced by association. Because of their close relationship, the jury likely imputed the criminal activity associated with Hidalgo III to Hidalgo. Further, by trying the Hidalgos together, Hidalgo's defense team was essentially tasked with defending Hidalgo at the expense of their client's child. The joinder of these cases created an impossible situation for Hidalgo that resulted in an inability to present his theory of defense. Consequently, trial counsel's concession to the joinder was deficient and contributed to the Petitioner's conviction.

C. Hidalgo Was Denied Effective Assistance of Counsel During the Appellate Proceedings.

To state a claim of ineffective appellate assistance, a petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice such that the omitted issue would have had a reasonable probability of success on appeal. *Kirksey,* 112 Nev. 980, 998, 923 P.2d 1102, 1113-14. Appellate counsel is not required to raise every nonfrivolous issue on appeal. *Jones v. Barnes,* 463 U.S. 745, 751, 103 S. Ct. 3308, 77 L. Ed. 2d 987 (1983). Rather, this court has held that appellate counsel will be most effective when every conceivable issue is not raised on appeal. *Ford v. State,* 105 Nev. 850, 853, 784 P.2d 951, 953 (1989). Appellate counsel compounded the

significant errors that occurred at trial by failing to adequately brief the following issues on appeal.

1. Appellate Counsel Was Ineffective for Failure to Raise the Admission of Prejudicial Hearsay Statements Made by Carroll That Were Not in Furtherance of the Alleged Conspiracy.

Pursuant to Nev. Rev. Stat. § 51.035, an out-of-court statement offered to prove the truth of the matter asserted is inadmissible at the time of trial. Traditionally, hearsay evidence is inadmissible because it is not subject to the usual tests to show the credibility of the declarant and is lacking in cross-examination to ascertain a declarant's perception, memory and truthfulness. *Moore v. United States*, 429 U.S. 20, 21-22 (1976). In this case, the State was allowed not only to present hearsay testimony of a witness as to text messages he received from another person, but was also allowed to admit into evidence additional text messages which were textbook hearsay.

This Court reviews hearsay errors under a harmless error standard. *Tabish v. State*, 119 Nev. 293, 311, 72 P.3d 584, 595 (2003). A violation of the hearsay rule will not automatically require reversal of a criminal conviction. Where the remaining evidence of guilt is overwhelming, the out-of-court declarant's statement cumulative, and the prejudicial effect of the statement insignificant by comparison so that it is clear beyond a reasonable doubt that the improper admission of the statement was harmless error, the court shall not reverse the conviction. *Summers v. State*, 102 Nev.

195, 202, 718 P.2d 676, 681 (1986). However, reversal is mandated where the evidence of guilt is woven from circumstantial evidence and it is not established beyond a reasonable doubt that the admission of the statement was harmless error. *Id.*

In this case, the following conversation was solicited by the State at the time of trial during the direct examination of Zone:

> Q. All right. Did you have time to talk with Deangelo from when the police got to you and when you went and talked to the police?
>
> A. No.
>
> Q. Did Deangelo tell you what you needed to say to the - -
>
> A. He said one - - he said just - - he said - - his last words to me - -
>
> MR. GENTILE: Objection. Hearsay. This is not in furtherance.
>
> THE WITNESS: Well, quote unquote, his last words to me that he said-
>
> MS. ARMENI: Objection
>
> MR. GENTILE: Objection. Hearsay, Your Honor.
>
> THE COURT: Overruled.
>
> MR. PESCI: I'm sorry your Honor.
>
> THE COURT: I said overruled. Go ahead.
>
> BY MR. PESCI:
> Q. Okay. She's saying you can answer the question.
>
> A. Okay. What came out of his mouth, not what I heard, but what came out of his mouth was, if you don't tell the truth, we're going to jail.

(6 PA0973-74.)

The same hearsay statement was solicited from McGrath during direct examination:

> Q. During the time that he's [Zone] leaving with you, do you hear Deanglo Carroll make any statement to [Zone]?
>
> A. Yes.
>
> Q. What statement does he make?
>
> A. He says, tell them the truth, tell them the truth. I told them the truth.

(7 PA1211-12.)

The State relied on this to establish the credibility of Zone's own testimony. However, this statement was hearsay that had been submitted for the truth of the matter, as the purpose of its admission was to establish that Zone was telling the truth when he testified. Nev. Rev. Stat. § 51.035. Further, the statement does not fall into any hearsay exception, including "a statement by a coconspirator of a party during the course and in furtherance of the conspiracy." Nev. Rev. Stat. § 51.035(e). Carroll's statement was not in furtherance of the alleged conspiracy, as informing Zone to confess would only serve to hamper a conspiracy.

This statement was extremely prejudicial as it essentially bolstered the testimony of Zone, who was the only person to testify that was allegedly present at the scene of the murder. Further, it was Zone that testified that Carroll had told him

Hidalgo "wanted someone killed." (6 PA0932, 0935-36.) Moreover, the issue of the Hidalgo's guilt was close and Zone was the only witness aside from Espindola that tended to implicate him in the conspiracy. Carroll's hearsay statement bolstering Zone's credibility likely had a significant impact on the jury's view of Zone's testimony.

Although trial counsel properly objected to the introduction of the statement when it was introduced through Zone's testimony, counsel failed to brief the issue on appeal. Given the prejudicial impact, and the dearth of evidence implicating Hidalgo, counsel's failure to brief this issue on appeal was deficient.

The district court found that the statements of Zone and McGrath regarding Carroll informing Zone "to tell the truth" were not hearsay under the auspices of Nev. Rev. Stat. § 51.035, and that this testimony was allegedly introduced to demonstrate that Zone was hesitant to tell the truth after Carroll made this statement to him. (22 PA3849.) This finding, is contradicted by the record in this case. The State offered the testimony of both Zone and McGrath. During his testimony, McGrath stated that he interviewed Zone and that his story was allegedly consistent with Carroll's third statement on the matter. (7 PA1212; 9 PA1741.) There was no issue presented at trial that Zone was hesitant to give his statement. As such, there was no reason to introduce testimony regarding his hesitancy.

The more likely reason for the State's introduction of this testimony was to establish Zone was telling the truth because he was told to do so by Carroll. If so, it constituted inadmissible hearsay. *See* Nev. Rev. Stat. § 51.035. Given the importance of Zone' testimony, the admission of hearsay statements that tend to prove his truthfulness cannot constitute harmless error. That Espindola also implicated Hidalgo in her testimony does not render the introduction of these statements harmless, especially considering the questionable motivations for Espindola's testimony. A reasonable attorney would have brought this issue on appeal. The district court's finding was erroneous.

D. The Cumulative Failings By Trial Counsel Deprived Hidalgo of Effective Assistance of Counsel.

Even if no single trial error examined in isolation is sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors may still prejudice a defendant." *United States v. Frederick*, 78 F.3d 1370, 1381 (9th Cir. 1996) (citing *United States v. Green*, 648 F.2d 587 (9th Cir. 1981)); *see also Hernandez v. State*, 118 Nev. 513, 534, 50 P.3d 1100 (2002); *Sipsas v. State*, 102 Nev. 119, 716 P.2d 231 (1986); *Big Pond v. State*, 101 Nev. 1, 3, 692 P.2d 1288, 1289 (1985). "Under traditional due process principles, cumulative error warrants habeas relief only where the errors have 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Parle v. Runnels*, 505 F.3d 922, 927 (9th Circ. 2007) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974); *see also*

Chambers v. Mississippi, 410 U.S. 284, 302–03 (1973) (combined effect of individual errors "denied [Chambers] a trial in accord with traditional and fundamental standards of due process" and "deprived Chambers of a fair trial").

"Cumulative error applies where, 'although no single trial error examined in isolation is sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors may still prejudice a defendant.'" *Mancuso v. Olivarez*, 292 F.3d 939, 957 (9th Cir. 2002) (quoting *United States v. Frederick*, 78 F.3d 1370, 1381 (9th Cir.1996)). "In evaluating a due process challenge based on the cumulative effect of multiple trial errors, a reviewing court must determine the relative harm caused by the errors." *Parle*, 505 F.3d at 927–28. Here, Hidalgo raised several claims that tend to indicate trial counsel was ineffective. At a minimum, taken together, the multiple errors resulted in prejudice and Hidalgo is entitled to post-conviction relief.

E. The District Court Erred in Denying Hidalgo Jr. an Evidentiary Hearing.

The district court summarily denied Hidalgo's request for an evidentiary hearing (22 PA3859-60), concluding Hidalgo's claims were "bare/belied by the record, and otherwise fail to sufficiently allege ineffective assistance of counsel." (22 PA3859.) The court also noted it previously conducted a hearing on potential conflicts of interest. (22 PA3859-60.) This was error.

A petitioner is entitled to a post-conviction evidentiary hearing when he asserts claims supported by specific factual allegations not belied by the record that,

if true, would entitle him to relief. *McConnell v. State*, 125 Nev. 243, 246, 212 P.3d 307, 313 (2009); *see also Byford v. State*, 123 Nev. 67, 68-69, 156 P.3d 691, 692 (2007); *Nika v. State*, 124 Nev. 1272, 198 P.3d 839 (2008); Nev. Rev. Stat. Ann. § 34.770.

The district court ignored key facts that warranted an evidentiary hearing. For example, as discussed above, at the time of the hearing on the potential conflict of interest, trial counsel did not disclose that he had purchased Hidalgo's business assets without any valuation. Trial counsel also did not disclose that he had hired Hidalgo. The court's finding also ignores that the parties are unclear as to how trial counsel apportioned defense funds, what services were performed, what investigation was conducted, or the full effect of trial counsel's withholding of funds. Thus, at a minimum, Hidalgo is entitled to a remand so that the district court can conduct an evidentiary hearing on his claims.

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V. CONCLUSION

Appellant Luis Hidalgo respectfully requests this Honorable Court reverse the district court's denial of his Petition for Writ of Habeas Corpus.

RESPECTFULLY SUBMITTED this the 24th day of July, 2017.

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CERTIFICATE OF COMPLIANCE

Pursuant to Nev. R. App. P. 28.2, I hereby certify that this brief complies with the formatting requirements of Nev. R. App. P. 32(a)(4), the typeface requirements of Nev. R. App. P. 32(a)(5) and the type style requirements of Nev. R. App. P. 32(a)(6) because the Opening Brief has been prepared in a proportionally spaced typeface (14-point Times New Roman font).

I further certify that this Opening Brief complies with the type-volume limitation of Nev. R. App. P. 32(a)(7)(A)(ii) because it contains 13,943 words.

Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular Nev. R. App. P. 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found.

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I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 24th day of July, 2017.

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CERTIFICATE OF SERVICE

I certify that I am an employee of McLetchie Shell LLC and that on this 24th day of July, 2017 the APPELLANT'S OPENING BRIEF was filed electronically with the Clerk of the Nevada Supreme Court, and therefore electronic service was made in accordance with the Master Service List as follows:

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I hereby further certify that the foregoing APPELLANT'S OPENING BRIEF was served by First Class U.S. Mail on July 24, 2017 to the following:

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Appellant

/s/ Pharan Burchfield
Employee, McLetchie Shell LLC