IN THE SUPREME COURT OF THE STATE OF NEVADA

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

RESPONDENT'S ANSWERING BRIEF

Appeal From Judgment of Conviction
Eighth Judicial District Court, Clark County

MARGARET A. MCLETCHIE, ESQ.
Nevada Bar #010931
McLetchie Shell LLC
701 East Bridger Ave., Suite 520
Las Vegas, Nevada 89101
(702) 728-5300

Counsel for Appellant

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500
State of Nevada

ADAM PAUL LAXALT
Nevada Attorney General
Nevada Bar #012426
100 North Carson Street
Carson City, Nevada 89701-4717
(775) 684-1265

Counsel for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

ROUTING STATEMENT 1

STATEMENT OF THE ISSUE(S) 1

STATEMENT OF THE CASE 2

STATEMENT OF THE FACTS 5

SUMMARY OF THE ARGUMENT 23

ARGUMENT 24

I. TRIAL COUNSEL'S PERFORMANCE WAS NOT DEFICIENT BASED ON ALLEGED CONFLICTS OF INTEREST 24

II. COUNSEL MADE A REASONABLE STRATEGIC DECISION IN AGREEING TO CONSOLIDATE 42

III. THE COURT PROPERLY FOUND APPELLATE COUNSEL WAS NOT DEFICIENT 47

IV. THE COURT PROPERLY FOUND NO CUMULATIVE ERROR 52

V. THE COURT PROPERLY DENIED HIDALGO AN EVIDENTIARY HEARING 53

CONCLUSION 55

CERTIFICATE OF COMPLIANCE 56

CERTIFICATE OF SERVICE 57

TABLE OF AUTHORITIES

Page Number:

Cases

Blanton v. North Las Vegas Mun. Ct.,
103 Nev. 623, 633, 748 P.2d 494, 500 (1987) 40

Burke v. State,
110 Nev. 1366, 1368, 887 P.2d 267, 268 (1994) 48

Chartier v. State,
124 Nev. 760, 765, 191 P.3d 1182, 1185 (2008) 44, 45

Clark v. State,
108 Nev. 324, 326, 831 P.2d 1374, 1376 (1992) 28, 32, 42

Coleman v. State,
109 Nev. 1, 3, 846 P.2d 276, 277 (1993) 27

Cooper v. Fitzharris,
551 F.2d 1162, 1166 (9th Cir. 1977) 26

Cuyler v. Sullivan,
446 U.S. 335, 350, 100 S. Ct. 1708, 1719 (1980) 28

Doleman v State,
112 Nev. 843, 846, 921 P.2d 278, 280 (1996) 26

Donovan v. State,
94 Nev. 671, 675, 584 P.2d 708, 711 (1978) 26

Duhamel v. Collins,
955 F.2d 962, 967 (5th Cir. 1992) 48

Edwards v. Emperor's Garden Rest.,
122 Nev. 317, 330, n.38, 130 P. 3d 1280, n.38 (2006) 34

Ellison v. California State Auto. Ass'n,
106 Nev. 601, 603, 797 P.2d 975, 977 (1990) 41

Ennis v. State,
122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006) 27, 47
Evans v. State,
117 Nev. 609, 622, 28 P.2d 498, 508 (2001) 24
Evitts v. Lucey,
469 U.S. 387, 396-97, 105 S. Ct. 830, 835-37 (1985) 48
Ford v. State,
105 Nev. 850, 853, 784 P.2d 951, 953 (1989) 49
Gibbs v. United States,
865 F. Supp. 2d 1127, 1133 n.3 (M.D. Fla. 2012), aff'd, 517 Fed. App'x. 664 (2013) 39
Hall v. Luebbers,
296 F.3d 685, 692 (8th Cir. 2002) 52
Hargrove v. State,
100 Nev. 498, 502, 686 P.2d 222, 225 (1984) 27, 33, 34, 36, 46, 54
Harrington v. Richter,
562 U.S. 86, 88, 131 S. Ct. 770, 778 (2011) 25
Harris By and Through Ramseyer v. Wood,
64 F.3d 1432, 1438 (9th Cir. 1995) 52
Harvey v. State,
96 Nev. 850, 619 P.2d 1214 (1980) 27
Heath v. Jones,
941 F.2d 1126, 1130 (11th Cir. 1991) 48
Hidalgo v. Eighth Judicial Dist. Court,
124 Nev. 330, 333, 184 P.3d 369, 372 (2008) 31
Hollenback v. United States,
987 F.2d 1272, 1275 (7th Cir. 1993) 48

Holloway v. Arkansas,
435 U.S. 475, 98 S. Ct. 1173 (1978) 27, 29
Jackson v. Warden, Nevada State Prison,
91 Nev. 430, 432, 537 P.2d 473, 474 (1975) 25
Jones v. Barnes,
463 U.S. 745, 751, 103 S. Ct. 3308, 3312 (1983) 48
Jones v. State,
111 Nev. 848, 853, 899 P.2d 544, 547 (1995) 44
Kirksey v. State,
112 Nev. 980, 987, 923 P.2d 1102, 1107 (1997) 25, 48
Knipes v. State,
124 Nev. 927, 935, 192 P.3d 1178, 1183 (2008) 51
Lara v. State,
120 Nev. 177, 179, 87 P.3d 528, 530 (2004) 24, 48
Mann v. State,
118 Nev. 351, 356, 46 P.3d 1228, 1231 (2002) 54
Mannon v. State,
98 Nev. 224, 226, 645 P.2d 433, 434 (1982) 28
Marshall v. State,
118 Nev. 642, 646, 56 P.3d 376, 378 (2002) 44, 45, 54
McConnell v. State,
125 Nev. 243, 250 n.17, 212 P.3d 307, 318 n.17 (2009) 52
McMann v. Richardson,
397 U.S. 759, 771, 90 S. Ct. 1441, 1449 (1970) 25
McNelton v. State,
115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999) 27

Means v. State,
120 Nev. 1001, 1011-1012, 103 P.3d 25, 32-33 (2004) 25
Mickens v. Taylor,
535 U.S. 162, 173, 122 S. Ct. 1237, 1244-45 (2002) 27, 28, 31
Middleton v. Roper,
455 F.3d 838, 851 (8th Cir. 2006), cert. denied, 549 U.S. 1134, 127 S. Ct. 980 (2007) 52
Mulder v. State,
116 Nev. 1, 17, 992 P.2d 845, 854-5 (2000) 52
Nix v. Whiteside,
475 U.S. 157, 165, 106 S. Ct. 988, 993 (1986) 31
Padilla v. Kentucky,
559 U.S. 356, 371, 130 S. Ct. 1473, 1485 (2010) 25
Rowland v. State,
118 Nev. 31, 44, 39 P.3d 114, 122 (2002) 44, 45
Ryan v. Eighth Judicial Dist. Ct.,
123 Nev. 419, 426, 168 P.3d 703, 708 (2007) 29, 30
Strickland v. Washington,
466 U.S. 668, 104 S. Ct. 2052 (1984) 24, 25, 26, 27, 36, 43, 48, 52
United States v. Aguirre,
912 F.2d 555, 560 (2nd Cir. 1990) 48
United States v. Almeida,
341 F.3d 1318, 1326 (11th Cir. 2003) 39
United States v. Baker,
256 F.3d 855, 860 (9th Cir. 2001) 28
United States v. Henke,
222 F.3d 633, 637 (9th Cir. 2000) 37, 40, 41

United States v. Levy,
25 F.3d 146, 155 (2d Cir. 1994) 28
United States v. Ray,
731 F.2d 1361, 1365 (9th Cir. 1984) 29
United States v. Reeves,
2011 U.S. Dist. LEXIS 139127, *42 (D.N.J. Dec. 2, 2011) 39
United States v. Stepney,
246 F. Supp. 2d 1069, 1085 (N.D. Cal. 2003) 37
Williams v. Collins,
16 F.3d 626, 635 (5th Cir. 1994) 48
Zafiro v. United States,
506 U.S. 534, 539, 113 S. Ct. 933, 938 (1993) 45

Statutes

NRS 174.165 44
NRS 34.735(6) 27
NRS 34.770 53
NRS 51.035 50

Other Authorities

NRPC 1.8(a) 31, 32, 33, 34

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

RESPONDENT'S ANSWERING BRIEF

Appeal from Judgment of Conviction
Eighth Judicial District Court, Clark County

ROUTING STATEMENT

Respondent adopts Appellant's Routing Statement.

STATEMENT OF THE ISSUE(S)

1. Whether counsel's performance was not deficient based on alleged conflicts of interest.
2. Whether counsel made a reasonable strategic decision in agreeing to consolidate.
3. Whether the court properly found appellate counsel was not deficient.
4. Whether the court properly found no cumulative error.
5. Whether the court properly denied an evidentiary hearing.

STATEMENT OF THE CASE

On February 13, 2008, the State filed an Indictment charging Appellant Luis Hidalgo, Jr., aka, Luis Alonso Hidalgo ("Hidalgo") as follows: Count 1 – Conspiracy to Commit Murder (Felony – NRS 200.010, 200.030, 199.480); and Count 2 – Murder With Use of a Deadly Weapon (Felony – NRS 200.010, 200.030, 193.165). 3 Petitioner's Appendix (PA) 262-65.[1] On March 7, 2008, the State filed a Notice of Intent to Seek Death Penalty. 3 PA 271-73. The State filed an Amended Indictment on May 1, 2008, which changed the language of the Indictment but did not modify the substance of the counts against Hidalgo 3 PA 300-02. The State filed an Amended Notice of Intent to Seek Death Penalty on June 18, 2008. 3 PA 303-06.

On June 25, 2008, the State filed a Motion to Consolidate Case No. C241394 into Case No. C212667, seeking to join Hidalgo's case with that of his son, Luis Hidalgo, III ("Little Lou"), a coconspirator in the murder. 3 PA 307-17. On

[1] The State notes that the appendix Hidalgo has attached often has two sets of bates numbers per page, and the numbers are not identical. Further, it is unclear *which* numbers Hidalgo is using as he seems to alternate between each. For instance, his Opening Brief Page 3 cites to the Amended Information on "3 PA 239-41." This appears to correspond to the larger HID PA bates number in volume 3, because the smaller PA bates numbers in Volume 3 do not begin until page 256 and the Amended Information is found on the larger HID PA bates number. However, on Page 4 of the Opening Brief, Hidalgo cites to "5 PA0750-51" to support a factual assertion. In Volume 5, HID PA00750 (also numbered PA0825) does not contain the facts it is cited for. HID PA00682 (also numbered PA0750) does. For clarity, the State cites *only* to the smaller bates number. Additionally, the State uses PA to refer to the index for consistency with Appellant's brief.

December 8, 2008, the Hidalgo defendants jointly filed an Opposition to the Motion to Consolidate. 3 PA 320 – 4 PA 537. The State filed a Response on December 15, 2008. 4 PA 538-46. On January 16, 2009, Hidalgo withdrew his Opposition to the Motion to Consolidate, the State withdrew its Notice of Intent to Seek Death Penalty, and the District Court issued an Order Granting State's Motion to Consolidate. 4 PA 568-69.

The joint trial of the Hidalgo defendants began on January 27, 2009. 2 PA 177.[2] On February 17, 2009, the jury returned the following verdict as to Hidalgo: Count 1 – Guilty of Conspiracy to Commit a Battery With a Deadly Weapon or Battery Resulting in Substantial Bodily Harm; and Count 2 – Guilty of Second Degree Murder With Use of a Deadly Weapon. 18 PA 2941-47.

On March 10, 2009, Hidalgo filed a Motion for Judgment of Acquittal, or in the Alternative, a New Trial. 19 PA 3097-3114. The State filed its Opposition on March 17, 2009. 19 PA 3115-26. Hidalgo filed a Reply to the State's Opposition on April 17, 2009. 19 PA 3128-45. Hidalgo filed his Supplemental Points and Authorities on April 27, 2009. 19 PA 3149-57. On May 1, 2009, the Court deferred its ruling on the Motion for Judgment of Acquittal and invited additional briefing on

[2] The State cites to the Odyssey record Hidalgo included because Hidalgo's Appendix does not include the first four days of trial wherein voir dire was conducted. 5 PA 607. As no claims relate to the voir dire proceedings, the date trial began is included only for the Court's information.

the Motion. 2 PA 240-41. On June 23, 2009, the court found insufficient evidence to warrant upsetting the jury verdict and denied Hidalgo's Motion for Judgment of Acquittal, or in the Alternative, a New Trial. 2 PA 244-45. On the same date, the matter proceeded to sentencing. 19 PA 3197-3224.

On June 23, 2009, Hidalgo was adjudged guilty and sentenced as follows: Count 1 – 12 months in the Clark County Detention Center; and Count 2 – life imprisonment in the Nevada Department of Corrections with parole eligibility beginning after 120 months, plus an equal and consecutive term of 120 months to life for the deadly weapon enhancement, Count 2 to run concurrent with Count 1. 19 PA 3115-26. Hidalgo was given 184 days credit for time served. Id. The Judgment of Conviction was filed on July 10, 2009.[3] 19 PA 3227-28.

Hidalgo filed a Notice of Appeal on July 16, 2009. 19 PA 3229-30. This Court issued its Order of Affirmance on June 21, 2012. 21 PA 3514-24. On July 27, 2012, this Court issued an Order Denying Rehearing. 21 PA 3532. This Court issued an Order Denying En Banc Reconsideration on November 13, 2012. 21 PA 3580-81. Remittitur issued on April 10, 2013.

On December 31, 2013, Hidalgo filed a Petition for Writ of Habeas Corpus

[3] An Amended Judgment of Conviction was filed on August 18, 2009, to reflect that on Count 1, Hidalgo was adjudged guilty of Conspiracy to Commit Battery with a Deadly Weapon or Battery resulting in Substantial Bodily Harm, rather than Conspiracy to Commit Battery with a Deadly Weapon. 2 PA 182.

("Petition"), a Memorandum of Points and Authorities In Support of Petition for Writ of Habeas Corpus ("Memorandum"), a Motion to Proceed in Forma Pauperis, and a Motion for Appointment of Counsel.[4] On January 21, 2014, the Court appointed post-conviction counsel. 2 PA 251. On February 4, 2014, Margaret A. McCletchie, Esq., confirmed as counsel. 22 PA 3881.

On February 29, 2016, Hidalgo, through counsel, filed a Supplemental Memorandum of Points and Authorities in Support of Petition for Writ of Habeas Corpus (Post-Conviction) ("Supplement"). 1 PA 1-47. The State responded on May 18, 2016. 22 PA 3709-85. On August 11, 2016, the district court denied both Hidalgo's petition for writ of habeas corpus and request for an evidentiary hearing. 22 PA 3799-3810. The findings of fact and conclusions of law was filed on September 19, 2016. 22 PA 3812-61. Hidalgo filed a notice of appeal on October 3, 2016.

STATEMENT OF THE FACTS

In May of 2005, Hidalgo owned the Palomino Club (Palomino or the club), Las Vegas's only all-nude strip club licensed to serve alcohol. 10 PA 1497. On the afternoon of May 19, 2005, Hidalgo's romantic partner of eighteen (18) years, Anabel Espindola (Espindola), received a phone call from Deangelo Carroll

[4] Hidalgo does not appear to have included the pro per Petition for Writ of Habeas Corpus in the Appendix, but appears to appeal only some of the issues included in the Supplemental Petition for Writ of Habeas Corpus.

(Carroll); Carroll was an employee of the Palomino serving as a "jack of all trades" handling promotions, disc jockeying, and other assorted duties. 10 PA 1497-98; 1507-09. Espindola was the Palomino's general manager and handled all of the club's financial and management affairs. 10 PA 1485, 1496-97. During the call, Carroll informed Espindola that the victim in this case, T.J. Hadland (Hadland), a recently fired Palomino doorman, had been "badmouthing" the Palomino to taxicab drivers. 10 PA 1499, 1507-09; 16 PA 2640. A week prior to this news, Little Lou informed Hidalgo that Hadland falsified Palomino taxicab voucher tickets to generate unauthorized kickbacks from the drivers. 10 PA 1500-04.[5] In response, Hidalgo ordered that Hadland be fired. 10 PA 1504-05.[6]

The Palomino was not in a good financial state and Hidalgo was having trouble meeting the $10,000.00 per month payment due to Dr. Simon Sturtzer from

[5] The Palomino paid cash bonuses to taxi drivers for each person a driver dropped off. 10 PA 1500-01. The club accomplished this by having a doorman, such as Hadland, provide a ticket or voucher to the driver, which reflected the number of passengers (customers) dropped off. Id. Apparently, Hadland was inflating the number of passengers taxi drivers dropped off in exchange for the driver agreeing to kick back to Hadland some of the bonus paid out by the club for these phantom customers. 10 PA 1503-04.

[6] Hidalgo also received prior reports that, at other times, Hadland was selling Palomino VIP passes to arriving customers in exchange for cash, which deprived the taxicab drivers of bonuses for bringing customers to the club, and diverted the passes from their intended purpose of attracting patrons local to the club. 11 PA 1726-27; 14 PA 2311-12; 15 PA 2526-27. This practice created a problem for the club because taxi drivers would begin disputing their entitlement to be paid bonuses. 11 PA 1727; 14 PA 2312.

whom he purchased the club in early 2003. 10 PA 1484-1493, 1544; 11 PA 1661. Taxicab drivers are a critically important form of advertising for strip clubs generally. 13 PA 2159. Because of the Palomino's location in North Las Vegas, revenue generated through taxicab drop-offs was very important to the club's operation. 13 PA 2159-60. Due to a legal dispute among the area strip clubs regarding bonus payments to taxicab drivers, all payments were suspended during the period encompassing May 19-20, 2005; the Palomino was the only club permitted to continue paying taxi drivers for dropping off customers. 6 PA 992-93.

When Espindola took Carroll's call, she was at Simone's Auto Body, which was a bodyshop/collision repair business also owned by Hidalgo and managed by Espindola.[7] 10 PA 1475-79. After taking Carroll's call, Espindola informed Hidalgo and Little Lou of Carroll's news about Hadland disparaging the club. 10 PA 1509-11. Little Lou became enraged and began yelling at Hidalgo, demanding of Hidalgo: "You're not going to do anything?" and stating "That's why nothing ever gets done." 10 PA 1511. Little Lou told Hidalgo, "You'll never be like Rizzolo and Galardi. They take care of business." Id.; 16 PA 2640.[8] He further criticized Hidalgo by pointing out that Rizzolo had once ordered an employee to beat up a strip club

[7] Financially, Simone's was breaking even at the time of this case's underlying events, but the business never turned a profit. 10 PA 1481-82, 1496.

[8] Frederick John "Rick" Rizzolo was the owner of a Las Vegas strip club known as Crazy Horse Too, and Jack Galardi is the owner of Cheetah's strip club as well as a number of other clubs in Atlanta, Georgia. 10 PA 1512-13.

patron. 10 PA 1513.[9] Hidalgo became angry, telling Little Lou to mind his own business. Id. Little Lou again told Hidalgo, "You'll never be like Galardi and Rizzolo," and then stormed out of Simone's heading for the Palomino. Id.

Visibly angered, Hidalgo walked out of Espindola's office and sat on Simone's reception area couch. 10 PA 1523. At approximately 6:00 or 7:00 PM, Espindola and a still visibly-angered Hidalgo drove from Simone's to the Palomino. 10 PA 1524-25. Once at the Palomino, Espindola went into Hidalgo's office, which was her customary workplace at the club. 10 PA 1531. Approximately half an hour later, Carroll arrived at the club and knocked on the office door, which Hidalgo answered. Id. Hidalgo and Carroll had a short conversation, then walked out the office together. 10 PA 1531-32. A short time later, Hidalgo came back into the office and directed Espindola to speak with him out of earshot of Palomino technical consultant, Pee-Lar "PK" Handley, who was nearby. 10 PA 1533. Hidalgo instructed Espindola to call Carroll and tell Carroll to "go to Plan B." 10 PA 1534.

Espindola went to the back of the office and attempted to contact Carroll by "direct connect" (chirp) through her and Carroll's Nex-tel cell phones. 10 PA 1537.

[9] Hidalgo had previously enlisted his own employee, Carroll, to physically harm the boyfriend of Hidalgo's daughter whom the boyfriend had caused to use methamphetamine; Espindola later intervened to stop Carroll from harming the boyfriend. 12 PA 1933-34. This evidence came in after Hidalgo attempted to suggest to the jury that he was unlike Gillardi and Rizzolo. 12 PA 1916-1932. The evidence was not admitted as to Little Lou. 12 PA 1935-36.

Carroll called Espindola back through a land-based telephone line, and Espindola instructed Carroll that Hidalgo wanted Carroll to "switch to Plan B." Id.; 16 PA 2642. Carroll protested that "we're here" and "I'm alone" with Hadland, and he told Espindola that he would get back to her. 7 PA 1117; 10 PA 1537-40. Espindola and Carroll's phone connection was then cut off. 10 PA 1540. At that point, Espindola knew "something bad" was going to happen to Hadland. Id. She attempted to call Carroll back, but could not reach him. Id. Espindola returned to the office and informed Hidalgo that she had instructed Carroll to go to "Plan B," after which Hidalgo left the office with Handley. 10 PA 1541.

Earlier in the day, May 19, 2005, at approximately noon, Carroll was at his apartment with Rontae Zone (Zone) and Taoipu, who were both "flyer boys" working unofficially for the Palomino. 6 PA 934-35. Zone and Taoipu worked alongside Carroll and performed jobs Carroll delegated to them in exchange for being paid "under the table" by Carroll. 6 PA 927-28; 932. Zone and Taoipu would pass out Palomino flyers to taxis at cabstands. 6 PA 927. Zone lived at the apartment with Carroll, Carroll's wife, and Zone's pregnant girlfriend, Crystal Payne. Id.; 6 PA 948-49. Zone and Taoipu had been friends for several years. 6 PA 931.

While at the apartment, Carroll informed Zone and Taoipu that Little Lou had told him Hidalgo wanted a "snitch" killed. 6 PA 934-35; 7 PA 1133, 1180. Carroll asked Zone if he would be "into" doing something like that, and Zone responded

"No," he would not. 6 PA 935. Carroll also asked the same question of Taoipu who indicated he was "down," i.e., interested in helping out. 6 PA 935-36. Later when Taoipu and Zone were in the Palomino's white Chevrolet Astro Van with Carroll, Carroll told them that Little Lou had instructed Carroll to obtain some baseball bats and trash bags to use in aid of killing the person. 6 PA 936. After the initial noontime conversation about killing someone on Hidalgo's behalf, Zone observed Carroll using the phone, but he could not hear what Carroll was talking about. 6 PA 943. At some point after the noon conversation and after Zone observed him using the phone, Carroll informed Zone and Taoipu that Hidalgo would pay $6,000.00 to the person who actually killed the targeted victim. 6 PA 942-43.

A couple hours later while the three were still in the van, Carroll again discussed on the phone having an individual "dealt with," i.e., killed, although Zone did not know the specific person to be killed. 6 PA 938, 984; 7 PA 1067, 1182. Carroll produced a .22 caliber revolver with a pearl green handle and displayed it to Zone and Taoipu as if it were the weapon to be utilized in killing the targeted victim. 6 PA 938-39. Carroll attempted to give the revolver to Zone who refused to take it. 6 PA 939. Taoipu was willing to take the revolver from Carroll and did so. Id. Carroll also produced some bullets for the gun and placed them in Zone's lap, but Zone

dumped the bullets onto the van's floor where Taoipu picked them up and put them in his own lap. 6 PA 938-39.[10]

The three then proceeded back to Carroll's apartment where Carroll instructed Zone and Taoipu to dress in all black so they could go out and work promoting the Palomino. 6 PA 940-41. The three then used the Astro van to go out promoting, returned briefly to Carroll's apartment for a second time, and again left the apartment to go promoting. Id. On this next trip, however, Carroll took them to a residence on F Street where they picked up Kenneth "KC" Counts (Counts). 6 PA 944. Zone had no idea they were traveling to pick up Counts whom he had never previously met. Id. Once at Counts' house, Carroll went inside and emerged ten minutes later accompanied by Counts who was dressed in dark clothing, including a black hooded sweatshirt and black gloves. 6 PA 944-45. Counts entered the Astro van and seated himself in the back passenger seat next to Zone who was seated in the rear passenger seat directly behind the driver. 6 PA 945-46. Taoipu was seated in the front, right-side passenger seat. 6 PA 946.

At the time, Zone believed they were headed out to do more promoting for the Palomino. 6 PA 947. As Carroll drove onto Lake Mead Boulevard, Zone realized they were not going to be promoting because there are no taxis or cabstands at Lake

[10] Carroll would attempt a second time, unsuccessfully, to give the bullets to Zone when they were back at Carroll's apartment. 7 PA 1101.

Mead. Id. Carroll told Zone and the others that they were going to be meeting Hadland and were going to "smoke [marijuana] and chill" with Hadland. 6 PA 948.[11] Carroll continued driving toward Lake Mead. 6 PA 947.

On the drive up, Zone observed Carroll talking on his cell phone and he heard Carroll tell Hadland that Carroll had some marijuana for Hadland. 6 PA 950; 7 AA 1117; 13 PA 2142-43. Carroll was also using his phone's walkie-talkie function to chirp. 6 PA 953; 13 PA 2141-45. Little Lou chirped Carroll and they conversed. 7 PA 1179. Carroll spoke with Espindola who told him to "Go to Plan B," and then to "come back" to the Palomino. 7 PA 1117; 11 PA 1849, 1861. Zone recalled Carroll responding "We're too far along Ms. Anabel. I'll talk to you later," and terminated the conversation. 7 AA 1117. After executing a left turn, Carroll lost the signal for his cell phone and was unable to communicate with it, so he began driving back to areas around the lake where his cell phone service would be reestablished. 6 PA 953-54.

Carroll was able to describe a place for Hadland to meet him along the road to the lake. 6 PA 955. Hadland arrived driving a Kia Sportage sport utility vehicle (SUV), executed a U-turn, and pulled to the side of the road. 6 PA 955-56; 7 PA 1180. Hadland walked up to the driver's side window where Carroll was seated and

[11] Zone had been smoking marijuana throughout the day; on the ride to Lake Mead, Zone, Carroll, Counts, and Taoipu smoked one "blunt" or cigar of marijuana. 6 PA 950-51.

began having a conversation with Carroll; Zone and Taoipu were still seated in the rear right passenger's seat and front right passenger's seat, respectively. 6 PA 957. As Carroll and Hadland spoke, Counts opened the van's right-side sliding door and crept out onto the street, moving first to the front of the van, then back to its rear, and back to its front again. 6 PA 957-58. Counts then snuck up behind Hadland and shot him twice in the head. 6 PA 958; 7 PA 1181-82. One bullet entered Hadland's head near the left ear, passed through his brain, and exited out the top of his skull. 6 PA 909-14. The other bullet entered through Hadland's left cheek, passed through and destroyed his brain stem, and was instantly fatal. Id.

One of the group deposited a stack of Palomino Club fliers near Hadland's body. 5 PA 718; 7 PA 1200. Counts then hurriedly hopped back into the van and Carroll drove off. 6 PA 959. Counts then questioned both Zone and Taoipu as to whether they were carrying a firearm and why they had not assisted him. 6 PA 959-60. Zone responded that he did not have a gun and had nothing to do with the plan. 6 PA 960. Taoipu responded that he had a gun, but did not want to inadvertently hit Carroll with gunfire. Id.

Carroll then drove the four through Boulder City and to the Palomino, where Carroll exited the van and entered the club. 6 PA 961. Carroll met with Espindola and Hidalgo in the office. 10 PA 1541-42. He sat down in front of Hidalgo and informed him "It's done," and stated "He's downstairs." 10 PA 1542-43; 16 PA

2643. Hidalgo instructed Espindola to "Go get five out of the safe." 10 PA 1543. Espindola queried, "Five what? $500?," which caused Hidalgo to become angry and state "Go get $5,000 out of the safe." Id.; 16 PA 2643; see also 15 PA 2539-41. Espindola followed Hidalgo's instructions and withdrew $5,000.00 from the office safe, a substantial sum in light of the Palomino's financial condition. 10 PA 1543-45. Espindola placed the money in front of Carroll who picked it up and walked out of the office. 10 PA 1544-45. Alone with Hidalgo, Espindola asked Hidalgo, "What have you done?," to which Hidalgo did not immediately respond, but later asked "Did he do it?" 10 PA 1545-46.

Ten minutes after entering the Palomino, Carroll emerged from the club, got Counts, and then went back in the club accompanied by Counts. 6 PA 961. Counts then emerged from the club, got into a yellow taxicab minivan driven by taxicab driver Gary McWhorter, and left the scene. 6 PA 962, 994-95; 7 PA 1181.[12] Carroll again emerged from the Palomino about thirty minutes later and drove the van first to a self-serve car wash and then back to his house, all the while accompanied by Zone and Taoipu. 6 PA 962-63, 966-69. Zone was very shaken up about the murder and did not say much after they returned to his and Carroll's apartment. 6 PA 963.

[12] Counts had to go back into the Palomino to obtain some change because McWhorter did not have change for the $100.00 bill Counts tried to pay him with. 6 PA 995.

The next morning, May 20, 2005, Espindola and Hidalgo awoke at Espindola's house after a night of gambling at the MGM. 10 PA 1547-49. Hidalgo appeared nervous and as though he had not slept; he told Espindola he needed to watch the television for any news. 10 PA 1549-50. While watching the news, they observed a report of Hadland's murder; Hidalgo said to Espindola, "He did it." 10 PA 1550. Espindola again asked Hidalgo, "What did you do?" and Hidalgo responded that he needed to call his attorney. Id.

Meanwhile, that same morning, Carroll slashed the tires on the van and, accompanied by Zone, used another car to follow Taoipu who drove the van down the street to a repair shop. 6 PA 964; 7 PA 1125; 13 PA 2095-96. Carroll paid $100.00 cash to have all four tires replaced. 6 PA 964. Carroll, Zone, and Taoipu subsequently went to a Big Lots store where Carroll purchased cleaning supplies, after which Carroll cleaned the interior of the Astro van. 6 PA 966-67. Carroll, Zone, Taoipu, Zone's girlfriend, Carroll's wife and kids, and some other individuals ate breakfast at an International House of Pancakes restaurant later that day; Carroll paid for the party's breakfast. 6 PA 967; 7 PA 1107-10, 1183. At some point also, Carroll, accompanied by Zone, went to get a haircut. 7 PA 1081-82.

Carroll then drove himself, Zone, and Taoipu in the Astro van to Simone's where Hidalgo, Little Lou, and Espindola were present. 6 PA 967-68. Carroll made Zone and Taoipu wait in the van while he went into Simone's; Carroll emerged about

thirty minutes later and directed Zone and Taoipu inside where they sat on a couch in Simone's central office area. Id. While at Simone's, Zone observed Carroll speaking with Hidalgo in between trips to a back room, and he also observed Carroll speaking with Espindola. 6 PA 971, 975-76; 7 PA 1177-78, 1190. Carroll then went into a back room of Simone's, but emerged later to direct Zone and Taoipu into the bathroom. Carroll expressed disappointment in Zone and Taoipu for not involving themselves in Hadland's murder, and he told them they had missed the opportunity to make $6,000.00. 6 PA 969-70. He informed Zone and Taoipu that Counts received $6,000.00 for his part in Hadland's murder. 6 PA 971. After Carroll, Zone, and Taoipu left Simone's, Carroll told Zone that Hidalgo had instructed Carroll that the "job was finished and that [they] were just to go home." 7 PA 1190-91.

Las Vegas Metropolitan Police Department (LVMPD) detectives identified Carroll as possibly involved in the murder after speaking with Hadland's girlfriend, Paijik Karlson, and because his name showed as the last person called from Hadland's cell phone. 7 PA 1203; 13 PA 2086. On May 20, 2005, Detective Martin Wildemann spoke with Hidalgo and inquired about Carroll, requesting any contact information Hidalgo might have for Carroll; Hidalgo told Detective Wildemann he had no contact information for Carroll and that Wildemann should speak with one of the Palomino managers, Ariel aka Michelle Schwanderlik, who could put the detectives in touch with Carroll. 13 PA 2089.

At approximately 7:00 PM, the detectives returned to the Palomino where they found Carroll who agreed to accompany them back to their office for an interview. 7 PA 1208-09; 13 PA 2089-90. After the interview, the detectives took Carroll back to his apartment where they encountered Zone who agreed to come to their office for an interview. 13 PA 2095-96. Carroll then told Zone within earshot of the detectives: "Tell them the truth, tell them the truth. I told them the truth." 7 PA 1211-12. Zone recalled Carroll also saying: "If you don't tell the truth, we're going to jail." 6 PA 974. Zone interpreted Carroll's statements to mean that Zone should fabricate a story that tended to exculpate Carroll, himself, and Taoipu. 7 PA 1128-29. Zone gave the police a voluntary statement on May 21, 2005. 13 PA 2096. Also on that day, Carroll brought Taoipu to the detectives' office for an interview. 7 PA 1220 - 8 PA 1221; 13 PA 2097.

Meanwhile on May 21, 2005, Hidalgo and Espindola consulted with attorney Jerome A. DePalma, Esq., and defense attorney Dominic Gentile, Esq.'s investigator, Don Dibble. 14 PA 2227-28. The next morning, May 22, 2005, a completely distraught Hidalgo said to Espindola, "I don't know what I told him to do." 10 PA 1579. Espindola responded by again asking Hidalgo, "What have you done?" to which Hidalgo responded, "I don't know what I told him to do. I feel like killing myself." Id. Espindola asked Hidalgo if he wanted her to speak to Carroll and Hidalgo responded affirmatively. 10 PA 1580; 16 PA 2652. Espindola arranged

through Mark Quaid, parts manager for Simone's, to get in touch with Carroll. 10 PA 1580-81.

On the morning of May 23, 2005, LVMPD Detective Sean Michael McGrath and Federal Bureau of Investigation (FBI) agent Bret Shields put an electronic listening device on Carroll's person; the detectives intended for Carroll to meet at Simone's with Hidalgo and the other co-conspirators. 8 PA 1246-47. Prior to Carroll arriving at Simone's, Hidalgo and Espindola engaged in a conversation by passing handwritten notes back and forth. 10 PA 1594-95. In this conversation, Hidalgo instructed Espindola that she should tell Carroll to meet Arial and resign from working at the Palomino under a pretext of taking a leave of absence to care for his sick son. 10 PA 1583; see also 16 PA 2652. He further instructed Espindola to warn Carroll that if something bad happens to Hidalgo then there would be no one to support and take care of Carroll. Id. After the conversation, Espindola tore the notes up and flushed them down a toilet in the women's bathroom at Simone's. 10 PA 1595.

When Carroll arrived at Simone's, Espindola directed him to Room 6 where he met with Little Lou. 10 PA 1582. Espindola joined them and asked Carroll if he was wearing "a wire," to which Carroll responded, "Oh come on man. I'm not fucking wired. I'm far from fucking wired," and he lifted his shirt up. 18 PA 2958; 10 PA 1585; 11 PA 1852. Hidalgo was present in his office at Simone's while the

three met in Room 6. 10 PA 1581; 12 PA 1951-52. In the course of the conversation among Carroll, Espindola, and Little Lou, Espindola informed Carroll: "Louie is panicking, he's in a mother fucking panic, cause I'll tell you right now…if something happens to him we all fucking lose. Every fucking one of us." 18 PA 2959. Little Lou informed Carroll that "[Hidalgo]'s all ready to close the doors and everything and hide go into exile and hide." 18 PA 2968. Espindola emphasized the importance of Carroll not defecting from Hidalgo:

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

18 PA 2960.

Carroll, who had been prepared by detectives to make statements calculated to elicit incriminating responses, initiated the following exchange:

> Carroll: Hey what's done is done, you wanted him fucking taken care of we took care of him…
> Espindola: Why are you saying that shit, what we really wanted was for him to be beat up, then anything else, _____mother fucking dead.

Id.[13]

[13] The audio recordings of Carroll's conversations are of poor quality and inaudible portions are indicated by blanks.

Carroll also stated to Little Lou: "You [] not gonna fucking[…] what the fuck are you talking about don't worry about it…you didn't have nothing to do with it," to which Little Lou had no response. 18 PA 2967.

Espindola again emphasized that Carroll should not talk to the police and she would arrange an attorney for him:

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

Id.

Little Lou also instructed Carroll to remain quiet and what Carroll should tell police if confronted: "[whispering]_____don't say shit, once you get an attorney, we can say_____TJ, they thought he was a pimp and a drug dealer at one time_____I don't know shit, I was gonna get in my car and go promote but they started talking about drugs and pow pow." 18 PA 2965. He also promised to support Carroll should Carroll go to prison for conspiracy:

> Little Lou: …How much is the time for a conspiracy_____
> Carroll: [F]ucking like 1 to 5 it aint shit.
> Little Lou: In one year I can buy you twenty-five thousand of those [savings bonds],___thousand dollars___one year, you'll come out and you'll have a shit load of money_____I'll take care of your son I'll put em in a nice condo_____

18 PA 2971.

During this May 23rd wiretapped conversation, Little Lou also solicited Zone and Taoipu's murder. In response to Carroll's claims that Zone and Taoipu were demanding money and threatening to defect to the police, Little Lou proposed killing both young men:

> Carroll: They're gonna fucking work deals for themselves, they're gonna get me for sure cause I was driving, they're gonna get KC because he was the fucking trigger man. They're not gonna do anything else to the other guys cause they're fucking snitching.
> Little Lou: Could you have KC kill them too, we'll fucking put something in their food so they die rat poison or something.
> Carroll: We can do that too.
> Little Lou: And we get KC last.
> 18 PA 2964.
> …
> Little Lou: Listen____You guys smoke weed right, after you have given them money and still start talking they're not gonna expect rat poisoning in the marijuana and give it to them_____
> Espindola: I'll get you some money right now.
> Little Lou: Go buy rat poison____and take_____back to the club…Here, [d]rink this right.
> Carroll: [W]hat is it?
> Little Lou: Tanguerey, [sic] you stir in the poison_____
> Espindola: Rat poison is not gonna do it I'm telling you right now_____
> Little Lou: [Y]ou know what the fuck you got to do.
> Espindola:_____takes so long_____not even going to fucking kill him.

18 PA 2970.

At the end of the meeting, Espindola stated she would give Carroll some money and promised to financially contribute to Carroll and his son, as well as arrange for an attorney for Carroll. 18 PA 2972. After the meeting, Carroll provided

the detectives $1,400.00 and a bottle of Tanqueray, which he stated were given to him by Espindola and Little Lou, respectively. 8 PA 1249-50.[14]

On May 24, 2005, the detectives again outfitted Carroll with a wire and sent him back to Simone's. 8 PA 1254-55. After Carroll's unexpected arrival, Espindola again directed him to Room 6 where the two again meet with Little Lou while Hidalgo was present in the body shop's kitchen area. 10 PA 1589-91. During the conversation, Carroll and Espindola engaged in an extended colloquy regarding their agreement to harm Hadland:

> Carroll: You know what I'm saying, I did everything you guys asked me to do. You told me to take care of the guy; I took care of him.
> Espindola: O.K. wait, listen, listen to me (Unitelligible)
> Carroll: I'm not worried.
> Espindola: Talk to the guy, not fucking take care of him like get him out of the fucking way (Unintelligible). God damn it, I fucking called you.
> Carroll: Yeah, and when I talked to you on the phone, Ms. Anabel, I specifically I specifically said, I said "if he's by himself, do you still want me to do him in."
> Espindola: I I…
> Carroll: You said Yeah.
> Espindola: I did not say "yes."
> Carroll: You said if he's with somebody, then beat him up.
> Espindola: I said go to plan B, -- fucking Deangelo, Deangelo you just told admitted to me that you weren't fucking alone I told you 'no', I fucking told you 'no' and I kept trying to fucking call you and you turned off your mother fucking phone.
> Carroll: I never turned off my phone.
> Espindola: I couldn't reach you.

[14] Espindola would later testify Hidalgo gave her only $600 to give to Carroll, which she did in fact give to Carroll on the 23rd. 10 PA 1583-85; 11 PA 1821-22, 1871-73.

> Carroll: I never turned off my phone. My phone was on the whole fucking night.
> …
> Carroll: Ms. Anabel
> Espindola: I couldn't fucking reach you, as soon as you spoke and told me where you were I tried calling you again and I couldn't fucking reach you.

18 PA 2975-76.

At some point in this May 24 meeting, Espindola left the room to go speak with Hidalgo. 10 PA 1593. She informed Hidalgo that Carroll wanted more money and Hidalgo instructed her to give Carroll some money. 10 PA 1596-97. After Carroll returned from Simone's, he gave the detectives $800.00, which Espindola had provided to him. 8 PA 1255.[15] After Carroll's second wiretapped meeting, detectives took Little Lou and then Espindola into custody for the murder of Hadland. 9 PA 1312.

SUMMARY OF THE ARGUMENT

Hidalgo's Petition for Writ of Habeas Corpus was properly denied. Hidalgo failed to demonstrate that counsel was encumbered by an actual conflict of interest in any of his various claims, relying instead on mere speculation. Hidalgo improperly second-guessed trial counsel's negotiations to remove the risk of execution in

[15] If Carroll had these amounts of cash on him prior to detectives sending him out on the surveillance operations, Detective McGrath would have noticed because that amount of currency would have made Carroll's wallet much bigger. 9 PA 1305-07. Espindola testified at trial that she thinks she gave Carroll $500.00 on the 24th. 11 PA 1697.

exchange for consolidating cases with the same witnesses, operative facts, and underlying criminal activity. Hidalgo's appellate counsel was properly chose not to raise a meritless issue on appeal. Finally, the district court properly denied Hidalgo's cumulative error claim where there was no error, and properly denied an evidentiary hearing when Hidalgo could not articulate any specific fact an evidentiary hearing would discover that would be helpful to his case. Because the district court properly dismissed Hidalgo's Petition for Writ of Habeas Corpus, this Court should affirm that dismissal.

ARGUMENT

I.

TRIAL COUNSEL'S PERFORMANCE WAS NOT DEFICIENT BASED ON ALLEGED CONFLICTS OF INTEREST

"A claim of ineffective assistance of counsel presents a mixed question of law and fact, subject to independent review." Evans v. State, 117 Nev. 609, 622, 28 P.2d 498, 508 (2001). "However, the district court's purely factual findings regarding [claims] of ineffective assistance of counsel are entitled to deference on subsequent review by this court." Lara v. State, 120 Nev. 177, 179, 87 P.3d 528, 530 (2004).

Claims of ineffective assistance of counsel are analyzed under the two-pronged test articulated in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984), wherein the defendant must show: (1) that counsel's performance was deficient, and (2) that the deficient performance prejudiced the defense. Id. at 687,

104 S. Ct. at 2064. "A court may consider the two test elements in any order and need not consider both prongs if the defendant makes an insufficient showing on either one." Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1997).

"Surmounting Strickland's high bar is never an easy task." Padilla v. Kentucky, 559 U.S. 356, 371, 130 S. Ct. 1473, 1485 (2010). The question is whether an attorney's representations amounted to incompetence under prevailing professional norms, "not whether it deviated from best practices or most common custom." Harrington v. Richter, 562 U.S. 86, 88, 131 S. Ct. 770, 778 (2011). Further, "[e]ffective counsel does not mean errorless counsel, but rather counsel whose assistance is '[w]ithin the range of competence demanded of attorneys in criminal cases.'" Jackson v. Warden, Nevada State Prison, 91 Nev. 430, 432, 537 P.2d 473, 474 (1975) (quoting McMann v. Richardson, 397 U.S. 759, 771, 90 S. Ct. 1441, 1449 (1970)).

The court begins with the presumption of effectiveness and then must determine whether the defendant has demonstrated by a preponderance of the evidence that counsel was ineffective. Means v. State, 120 Nev. 1001, 1011-1012, 103 P.3d 25, 32-33 (2004). The role of a court in considering alleged ineffective assistance of counsel is "not to pass upon the merits of the action not taken but to determine whether, under the particular facts and circumstances of the case, trial counsel failed to render reasonably effective assistance." Donovan v. State, 94 Nev.

671, 675, 584 P.2d 708, 711 (1978) (citing Cooper v. Fitzharris, 551 F.2d 1162, 1166 (9th Cir. 1977)).

In considering whether trial counsel was effective, the court must determine whether counsel made a "sufficient inquiry into the information . . . pertinent to his client's case." Doleman v State, 112 Nev. 843, 846, 921 P.2d 278, 280 (1996) (citing Strickland, 466 U.S. at 690–91, 104 S. Ct. at 2066). Then, the court will consider whether counsel made "a reasonable strategy decision on how to proceed with his client's case." Doleman, 112 Nev. at 846, 921 P.2d at 280 (citing Strickland, 466 U.S. at 690–91, 104 S. Ct. at 2066). Counsel's strategy decision is a "tactical" decision and will be "virtually unchallengeable absent extraordinary circumstances." Doleman, 112 Nev. at 846, 921 P.2d at 280.

This analysis does not indicate that the court should "second guess reasoned choices between trial tactics, nor does it mean that defense counsel, to protect himself against allegations of inadequacy, must make every conceivable motion no matter how remote the possibilities are of success." Donovan, 94 Nev. at 675, 584 P.2d at 711 (citing Cooper, 551 F.2d at 1166 (9th Cir. 1977)). In essence, the court must "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland, 466 U.S. at 690, 104 S. Ct. at 2066. However, counsel cannot be deemed ineffective for failing

to make futile objections, file futile motions, or for failing to make futile arguments. Ennis v. State, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006).

In order to meet the second "prejudice" prong of the test, the defendant must show a reasonable probability that, but for counsel's errors, the result of the trial would have been different. McNelton v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694, 104 S. Ct. at 2068.

Claims asserted in a petition for post-conviction relief must be supported with specific factual allegations, which if true, would entitle the petitioner to relief. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). "Bare" or "naked" allegations are not sufficient, nor are those belied and repelled by the record. Id.; see also NRS 34.735(6).

A defendant has a constitutional right under the Sixth Amendment to the effective assistance of counsel unhindered by conflicting interests. Holloway v. Arkansas, 435 U.S. 475, 98 S. Ct. 1173 (1978); Coleman v. State, 109 Nev. 1, 3, 846 P.2d 276, 277 (1993); Harvey v. State, 96 Nev. 850, 619 P.2d 1214 (1980). Where the trial court is unaware of the potential conflict of interest, to establish a claim of ineffective assistance of counsel based on a conflict of interest, a defendant must show that the conflict of interest adversely affected his attorney's performance. Mickens v. Taylor, 535 U.S. 162, 173, 122 S. Ct. 1237, 1244-45 (2002). "[U]ntil a

defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance." Cuyler v. Sullivan, 446 U.S. 335, 350, 100 S. Ct. 1708, 1719 (1980). An actual conflict of interest which adversely affects a lawyer's performance will result in a presumption of prejudice to the defendant. Id.; Mickens, 535 U.S. at 166, 122 S. Ct. at 1237. Mannon v. State, 98 Nev. 224, 226, 645 P.2d 433, 434 (1982).

The United States Supreme Court has defined an actual conflict under the Sixth Amendment as "a conflict of interest that adversely affects counsel's performance." Mickens, 535 U.S. at 172, 122 S. Ct. at 1244. Quoting the Second Circuit's definition of an actual conflict as defined in United States v. Levy, 25 F.3d 146, 155 (2d Cir. 1994), the Ninth Circuit Court of Appeals has stated:

> An attorney has an actual, as opposed to a potential, conflict of interest when, during the course of the representation, the attorney's and the defendant's interests diverge with respect to a material factual or legal issue or to a course of action.

United States v. Baker, 256 F.3d 855, 860 (9th Cir. 2001). Similarly, in Clark v. State, 108 Nev. 324, 326, 831 P.2d 1374, 1376 (1992), this Court defined an actual conflict as one where the personal interests of the attorney are in clear conflict with that of the client, such as in dual representation situations or in instances when the attorney has a personal interest in the outcome of his client's case such that it adversely affects his representation. Id.

Conflicts relating to dual representation can be waived. "Under the Sixth Amendment, criminal defendants 'who can afford to retain counsel have a qualified right to obtain counsel of their choice.'" Ryan v. Eighth Judicial Dist. Ct., 123 Nev. 419, 426, 168 P.3d 703, 708 (2007) (quoting United States v. Ray, 731 F.2d 1361, 1365 (9th Cir. 1984)). However, this interest, in cases of dual representation, often conflicts with the right to conflict-free counsel. Id.

Despite this potential conflicts between the right to choose retained counsel and the right to conflict-free counsel, "[b]ecause there can be a benefit in a joint defense against common criminal charges, there is no per se rule against dual representation." Ryan v. Eighth Judicial Dist. Ct., 123 Nev. 419, 426, 168 P.3d 703, 708 (2007) (citing Holloway v. Arkansas, 435 U.S. 475, 482-83, 98 S. Ct. 1173 (1978)). And, on balance of the two conflicting interests, "there is a strong presumption in favor of a non-indigent criminal defendant's right to counsel of her own choosing . . . [and] [t]his presumption should rarely yield to the imposition of involuntary conflict-free representation." Id. at 428, 168 P.3d at 709. That being said, "when a defendant knowingly, intelligently, and voluntarily waives her right to conflict-free representation, she also waives her right to seek a mistrial arising out of such conflicted representation. Further, the waiver is binding on the defendant throughout trial, on appeal, and in habeas proceedings. Thus, the defendant cannot subsequently seek a mistrial arising out of the conflict that he waived and "cannot .

. . be heard to complain that the conflict he waived resulted in ineffective assistance of counsel." Id. at 429, 168 P.3d at 710.

In Ryan, this Court directed district courts, in assessing joint representation cases, to conduct extensive canvasses to (1) determine whether each of the defendants have made a knowing, intelligent, and voluntary waiver of their right to conflict-free representation; and (2) advise each defendant that a waiver of the right to conflict-free representation means that they cannot seek a mistrial or raise claims of ineffective assistance of counsel based on any conflict caused by the dual representation. There is also a third requirement, imposed on defense counsel – attorneys must advise the defendants of their right to consult with independent counsel to advise them on the potential conflict of interest and the consequences of waiving the right to conflict-free representation, and must advise the clients to seek the advice of independent counsel before the attorney engages in the dual representation. Id. at 430, 168 P.3d at 710-11. If the clients choose not to seek the advice of independent counsel, the clients must expressly waive the right to do so before agreeing to any waiver of conflict-free representation. Id.

Before going into Hidalgo's specific arguments relating to counsel's potential conflict, the State notes that, prior to Little Lou's representation by separate counsel, this Court determined that Gentile's pre-arrest representation of Hidalgo and Little Lou did not create a conflict of interest. Hidalgo v. Eighth Judicial Dist. Court, 124

Nev. 330, 333, 184 P.3d 369, 372 (2008) ("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.").

A. Counsel and Hidalgo's Fee Agreement, Involving the Purchase of Bermuda Sands LLC by Counsel, Was Not Improper

Hidalgo first claims that Mr. Gentile rendered ineffective assistance due to a conflict of interest relating to Hidalgo's agreement to sell his interest in Bermuda Sands LLC to Gentile in exchange for legal representation. Appellant's Opening Brief ("AOB") 36-39. Hidalgo claims that Gentile committed an ethical violation by allegedly violating Nevada Rule of Professional Conduct ("NRPC") 1.8(a).

First, and most importantly, even *if* Hidalgo could show a violation under the Nevada Rules of Professional Conduct by Gentile, it is irrelevant to a claim of ineffective assistance due to an actual conflict of interest under the Sixth Amendment. Nix v. Whiteside, 475 U.S. 157, 165, 106 S. Ct. 988, 993 (1986) ("[B]reach of an ethical standard does not necessarily make out a denial of the Sixth Amendment guarantee of assistance of counsel."). Nor do the Nevada Rules of Professional Conduct, by their plain language, create an independent basis for relief in a criminal case. The rules are not meant to be used in litigation outside the context of a bar complaint. NRPC 1.0A(d). Hidalgo is required to show that any conflict of interest "adversely affect[ed] counsel's performance," Mickens, 535 U.S. at 172,

122 S. Ct. at 1244, and were in clear conflict with his interests, Clark, 108 Nev. at 326, 831 P.2d at 1376.

Hidalgo cannot demonstrate a violation of NRCP 1.8(a). Hidalgo has testified that *he* offered to enter a property transaction to pay the fee for legal representation of him, Little Lou and Espindola. Sealed Petitioner's Appendix ("SPA") 158-63.[16] Hidalgo consulted independent counsel, Mark Nicoletti, who he had known previously and had used for business transactions, and Nicoletti drafted the fee agreement. Id. The agreement was to transfer Hidalgo's interest in the LLCs controlling the club and owning the property, as well as the note on the property, in exchange for Gentile's representation and the legal fees of Espindola and Little Lou. Id. Hidalgo entered into this business transaction knowingly and voluntarily, with advice from independent counsel, and proposed the transaction himself in order to pay for legal fees. Hidalgo was a sophisticated businessman who conducted an arms-length transaction with Gentile in order to secure his representation. Both parties assumed risks but obtained benefits in the transaction – Hidalgo assumed the risk that he was paying less for the property than fair market value, in exchange for an open line of credit to fund his, Little Lou's and Espindola's defenses, while Gentile assumed the risk that the property would be unprofitable or that legal fees would

[16] The Sealed Petitioner's Appendix likewise has two sets of Bates stamps. See footnote 1, p. 2, supra. For clarity, the State uses the "Sealed PA" Bates stamp number, and not the "HID PA SEALED" number.

exceed the value of the property. Accordingly, the testimony at the evidentiary hearing alone satisfies the rule and shows that the transaction was entirely fair.

Also, the terms of the agreement were fair. That the property was not subjected to a valuation is irrelevant. Hidalgo's allegation that this transaction was unfair because the property was undervalued is a bare, naked assertion that should be summarily rejected by this Court as it was in district court. Hargrove, 100 Nev. at 502-03, 686 P.2d at 225.

Further, Hidalgo received benefit from the fee agreement beyond legal representation. Prior to Hadland's murder, the Palomino was not in a good financial state and Hidalgo had trouble meeting the $10,000.00 per *week* payment due to Dr. Simon Sturtzer (through Windrock LLC) from whom he purchased the club in early 2003. 10 PA 1484-93, 1544; 11 PA 1661. Gentile, through an LLC, acquired the note on which Hidalgo was obligated to pay. Accordingly, Hidalgo was relieved from an obligation to pay the exorbitant weekly payment due on the note that he had trouble making even before the murder mired the Palomino Club in scandal.

Not only did Hidalgo fail to demonstrate a violation of NRPC 1.8(a), he makes only a bare allegation that any supposed violation adversely affected counsel's performance. AOB 38. At most, Hidalgo questions whether the *fee paid* is fair, and he failed even to demonstrate that the fee arrangement was deficient. At no point did he demonstrate deficient performance in his defense based on the allegedly improper

fee arrangement. As such, the district court dismissed this claim. The district court found that Hidalgo made a reasonable decision to hire a "very good" criminal defense attorney through creative financing, 22 PA 3802, and properly denied Hidalgo's ineffective assistance of counsel claim because he demonstrated neither a violation of NRCP 1.8(a) nor that any alleged conflict adversely affected counsel's performance. 22 PA 3832-36. This decision should be affirmed.

B. Counsel's Alleged Failure to Fully Fund Little Lou's and Espindola's Defenses Fails to Show a Conflict of Interest or Ineffective Assistance

Hidalgo next claims that Gentile's "apparent failure" to fully fund Little Lou's and Espindola's defenses prejudiced him, because "Espindola's belief that Mr. Gentile was not paying for her defense led to her decision to testify against Hidalgo and his son." AOB 39.

Hidalgo provides no authority for the proposition that Gentile was required under the Sixth Amendment of the United States Constitution to monetarily placate Hidalgo's co-conspirators so as to induce them not to testify. This Court need not address arguments that are not supported with precedent. Edwards v. Emperor's Garden Rest., 122 Nev. 317, 330, n.38, 130 P. 3d 1280, n.38 (2006) (court need not consider claims unsupported by relevant authority). Hidalgo does not even demonstrate that counsel *did* fail to fund Espindola's defense. Instead, the claim is specifically belied by the record. Hargrove, 100 Nev. at 502-03, 686 P.2d at 225. During the evidentiary hearing on the issue of dual representation, Mr. Gentile, as

an officer of the court, stated that Espindola was distraught by the loss of JoNell Thomas to the defense team. While Oram represented that Espindola wanted certain investigation done, Gentile recommended that they not yet spend funds on penalty-phase investigation, considering that this Court had not yet ruled on the mandamus issue concerning the alleged aggravating circumstances. SPA 138. He also represented that Oram was paid $60,000 for his work. Id. Gentile disbursed money, when it became available, to the other attorneys, not to himself. Id. at 139. These representations belie the claim that Espindola's defense was underfunded. Instead, Espindola was concerned about the independence of Oram and the fact that Hidalgo held the power of the purse. Id. at 106-07. She also was dissatisfied when Jonell Thomas left the case and believed that it was for a lack of financing (however, Ms. Thomas in fact left the case after taking a position with the Clark County Special Public Defender). Id. at 107-08. Hidalgo's *control* of the financing of her defense, rather than the funding itself, was what she was concerned about. She wanted independent counsel, not a puppet who acceded to the demands of Gentile and Hidalgo. She wanted assurances that her attorney was acting in her best interest rather than Hidalgo's or Little Lou's. Therefore, counsel did not cause Espindola to testify against Hidalgo.

Further, the Joint Defense Agreement informed Hidalgo that any member of the Joint Defense Agreement could become a witness in the criminal case. SPA at

34, 38-39. It also informed Hidalgo that any member could withdraw from the agreement. Id. at 39. Finally, it explicitly informed Hidalgo that each client had independent counsel and each counsel had a duty to represent his or her client zealously, even if this meant advising the client to cooperate with the State. Id. at 40.

Accordingly, Defendant cannot show a causal connection between the alleged failure to fund Espindola's defense and the deficiency and prejudice prongs as required by Strickland – Espindola and Oram acted in Espindola's best interest, rather than Hidalgo's, in securing the negotiation, and the negotiation was not fueled by vindictiveness or resentment toward Defendant. This claim was properly dismissed.

Hidalgo provides nothing but a naked assertion in relation to the funding of Little Lou's defense. AOB 40. Hidalgo fails to show that the defense was underfunded, and fails to show how any failure to fund his son's defense prejudiced him, especially considering that father and son proceeded to trial together. Pursuant to Hargrove, this claim was properly dismissed. Hargrove, 100 Nev. at 502-03, 686 P.2d at 225.

/ / /

/ / /

/ / /

C. Espindola's Alleged Participation in the Joint Defense Agreement and Her Subsequent Decision to Turn State's Evidence Did Not Create an Irreconcilable Conflict of Interest

Hidalgo claims that the Joint Defense Agreement and Espindola's ultimate decision to testify against him and Little Lou created an irreconcilable conflict of interest. AOB 41-45. This claim is meritless.

Hidalgo merely speculates that "Espindola's counsel undoubtedly participated in joint defense meetings, during which Mr. Gentile could have gleaned information which prevented him from effectively cross-examining Espindola when she testifies as a State's witness" and "[i]t is possible that Mr. Gentile had learned information during the joint defense meetings which would have provided fertile ground for impeachment." AOB 43. While Hidalgo points to specific meetings between he, Oram, Espindola, and Gentile, he does not establish that the subject matter of these meetings constituted fodder for cross-examination. In fact, the substance of these meetings appear to be the funding requests outlined above and instruction for Espindola not to speak with DeAngelo Carrol, which would not be important for cross-examination.

Second, Hidalgo waived any conflict of interest that could be asserted in the event a co-defendant testified. Even after the Ninth Circuit decided United States v. Henke, 222 F.3d 633, 637 (9th Cir. 2000), courts bound by its precedent have found that conflicts of interest arising from an agreement may be waived. In United States v. Stepney, 246 F. Supp. 2d 1069, 1085 (N.D. Cal. 2003), the United States District

Court for the Northern District of California found appropriate the following waiver provision, taken from the American Law Institute-American Bar Association model joint defense agreement:

> Nothing contained herein shall be deemed to create an attorney-client relationship between any attorney and anyone other than the client of that attorney and the fact that any attorney has entered this Agreement shall not be used as a basis for seeking to disqualify any counsel from representing any other party in this or any other proceeding; and no attorney who has entered into this Agreement shall be disqualified from examining or cross-examining any client who testifies at any proceeding, whether under a grant of immunity or otherwise, because of such attorney's participation in this Agreement; and the signatories and their clients further agree that a signatory attorney examining or cross-examining any client who testifies at any proceeding, whether under a grant of immunity or otherwise, may use any Defense Material or other information contributed by such client during the joint defense; and it is herein represented that each undersigned counsel to this Agreement has specifically advised his or her respective client of this clause and that such client has agreed to its provisions.

The court specifically noted the advantages of this sort of provision:

> Under this regime, all defendants have waived any duty of confidentiality for purposes of cross-examining testifying defendants, and generally an attorney can cross-examine using any and all materials, free from any conflicts of interest. This form of waiver also places the loss of the benefits of the joint defense agreement only on the defendant who makes the choice to testify. Defendants who testify for the government under a grant of immunity lose nothing by this waiver. Those that testify on their own behalf have already made the decision to waive their Fifth Amendment right against self-incrimination and to admit evidence through their cross-examination that would otherwise be inadmissible.
>
> The conditional waiver of confidentiality also provides notice to defendants that their confidences may be used in cross-examination, so that each defendant can choose with suitable caution what to reveal to the joint defense group. Although a limitation on confidentiality

> between a defendant and his own attorney would pose a severe threat to the true attorney-client relationship, making each defendant somewhat more guarded about the disclosures he makes to the joint defense effort does not significantly intrude on the function of joint defense agreements.

Id. at 1085-86; see also United States v. Almeida, 341 F.3d 1318, 1326 (11th Cir. 2003) ("We hold that when each party to a joint defense agreement is represented by his own attorney, and when communications by one co-defendant are made to the attorneys of other co-defendants, such communications do not get the benefit of the attorney-client privilege in the event that the co-defendant decides to testify on behalf of the government in exchange for a reduced sentence."); United States v. Reeves, 2011 U.S. Dist. LEXIS 139127, *42 (D.N.J. Dec. 2, 2011) (accepting a waiver of conflict of interests in a joint defense agreement).[17]

The Joint Defense Waiver provided for a waiver to the same effect. Hidalgo and his co-defendants agreed that, in the event that one of them became a witness for the State, that would *not* create a conflict of interest so as to require disqualification. SPA at 38. The Agreement acknowledged that each client was informed that if a member defected, his or her counsel could be in possession of

[17] Citation to Reeves is permissible pursuant to Rule 32.1(a) of the Federal Rules of Appellate Procedure, which prohibits a court from restricting citation to "federal judicial opinions, orders, judgments, or other written dispositions that have been … issued on or after January 1, 2007." Accord Gibbs v. United States, 865 F. Supp. 2d 1127, 1133 n.3 (M.D. Fla. 2012), aff'd, 517 Fed. App'x. 664 (2013) (although an unpublished opinion is not binding, it is persuasive authority).

information previously shared, including confidences. Id. The Agreement specified that nothing in it was intended to create an attorney-client relationship and information obtained pursuant to the Agreement could not be used to disqualify a member of the joint defense group. Id. Hidalgo then knowingly and intelligently waived *any* conflict of interest that might otherwise be available based upon the sharing of information pursuant to the Agreement. He was advised of the risks but determined that the benefits of the Agreement outweighed the risks. Id. Thus, this agreement constituted a knowing and voluntary waiver of any claim of a conflict of interest based on Espindola's previous membership within the joint defense group. Hidalgo cannot now claim that there was an irreconciliable conflict of interest, because his informed choice to enter the Joint Defense Agreement extinguished any claim of such.

While Henke is merely persuasive, see Blanton v. North Las Vegas Mun. Ct., 103 Nev. 623, 633, 748 P.2d 494, 500 (1987) (decisions of federal courts not binding), and Nevada courts have not determined whether a Joint Defense Agreement can create an attorney-client relationship between a lawyer and another member of the joint defense agreement, the case is nonetheless distinguishable. Notably, a limited attorney-client relationship was *implied* from the joint defense agreement in Henke. Here, however, the plain language of the joint defense agreement provided that *no such relationship was created* from the joint defense

group. "[A]bsent some countervailing reason, contracts will be construed from the written language and enforced as written." Ellison v. California State Auto. Ass'n, 106 Nev. 601, 603, 797 P.2d 975, 977 (1990). There is no reason the law should imply an attorney-client relationship when Hidalgo has explicitly agreed that no such relationship existed. Further, in Henke, the parties asserted confidentiality and threatened legal action if confidences were not protected. Henke, 222 F.3d at 638. In contrast, here the Agreement waived all conflicts of interest and acknowledged that information obtained during joint defense meetings could be in the hands of a defecting member should he or she choose to testify. Finally, the court in Henke relied on the fact that the confidential information *had* in fact been exchanged, and distinguished cases where joint defense meetings would not create a conflict of interest:

> There may be cases in which defense counsel's possession of information about a former co-defendant/government witness learned through joint defense meetings will not impair defense counsel's ability to represent the defendant or breach the duty of confidentiality to the former co-defendant. Here, however, counsel told the district court that this was not a situation where they could avoid reliance on the privileged information and still fully uphold their ethical duty to represent their clients.

Henke, 222 F.3d at 638. Hidalgo has not shown that his counsel obtained confidential information from the joint defense meetings. Thus, he cannot establish a conflict of interest, even under Henke, that would have disqualified Gentile from representing him.

Finally, Hidalgo again fails to satisfy the Sixth Amendment test for determining an actual, rather than a potential, conflict of interest, as he fails to show that counsel's performance was hindered. Clark, 108 Nev. at 326, 831 P.2d at 1376. Mr. Gentile vigorously cross-examined Espindola. He questioned Espindola's motives to testify, including the possibility of the death penalty, her mother's illness, and Defendant's infidelity. 11 PA 1758-78, 1802-03. Further, he specifically asked her about joint defense meetings and meetings that lead to the joint defense. He questioned Espindola about a meeting where Gentile and Oram were present and where Espindola listened to the Carroll recordings. 11 PA 1737. He questioned Espindola about the meeting with his partner, Jerry DePalma, Esq., and questioned her veracity when she claimed that she said nothing of substance to DePalma that day. 11 PA 1741-43. He cross-examined her about another meeting between him and her, along with Defendant and Oram, directly citing the Agreement. 11 PA 1791-92. Gentile was in no way hindered in his cross-examination by the Agreement, and Hidalgo failed to meet his burden of showing an actual conflict of interest. Accordingly, this claim was properly denied.

II.
COUNSEL MADE A REASONABLE STRATEGIC DECISION IN AGREEING TO CONSOLIDATE

Hidalgo next complains that counsel rendered ineffective assistance by agreeing to consolidation. AOB 45-53.

This Court rejected Little Lou's claim regarding his counsel's conceding the consolidation motion in his appeal from the denial of his habeas petition. 22 PA 3782-85. While Little Lou's claim was raised on different grounds, concerning the exclusion of evidence he claims would have been admitted were the cases not tried together, this denial is persuasive. Id.

Hidalgo acknowledges the consolidation decision was made in exchange for the State's withdrawal of its Notice of Intent to Seek the Death Penalty. AOB 46. This bargain was clearly a reasonable strategy decision. After lengthy efforts to remove execution as a possible punishment, including writ proceedings before this Court, Gentile's concession won the war by taking death off the table and sparing Hidalgo the ultimate punishment. While Hidalgo now states that "[t]he 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," he speaks with the benefit of hindsight – at the time, the threat of the death penalty was real, and efforts to strike all statutory aggravators had fallen short. AOB 46. Hidalgo argues that only 14% of death-eligible defendant's receive the death penalty. AOB 49. Even assuming, *arguendo*, that this is accurate, a 14% chance of death is hardly insignificant, and is approximately the same as playing Russian Roulette. Counsel can reasonably decide to jointly try a case rather than gamble with his client's life. The Strickland standard does not ask counsel to act with clairvoyance – it asks

counsel to act reasonably at the time the decision in question is being made. At the time counsel stipulated to consolidation, the death penalty remained a possibility, and counsel's decision was well-reasoned.

In addition, the decision was a sound one, considering that the Motion to Consolidate would likely succeed.[18] In order to promote efficiency and equitable outcomes, Nevada law favors trying multiple defendants together. Jones v. State, 111 Nev. 848, 853, 899 P.2d 544, 547 (1995). As a general rule, defendants who are indicted together shall be tried together, absent a compelling reason to the contrary. Rowland v. State, 118 Nev. 31, 44, 39 P.3d 114, 122 (2002). "A district court should grant a severance only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." Chartier v. State, 124 Nev. 760, 765, 191 P.3d 1182, 1185 (2008) (quoting Marshall v. State, 118 Nev. 642, 646, 56 P.3d 376, 378 (2002)); see also NRS 174.165.

Severance is generally proper in two instances. The first is where the codefendants' theories of defense are so antagonistic that they are "'mutually exclusive" such that "'the core of the codefendant's defense is so irreconcilable with

[18] Hidalgo appears to complain of efforts to move this case to the same department as Little Lou's case. AOB 45-46. This decision was reasonable in light of Hidalgo's initial desire to have the same attorney as Little Lou. In addition, Hidalgo cannot show any prejudice, as the State could have sought consolidation even absent the case being sent to the same department.

the core of the defendant's own defense that the acceptance of the codefendant's theory by the jury precludes acquittal of the defendant." Chartier, 124 Nev. at 765, 191 P.3d at 1185 (quoting Rowland, 118 Nev. at 45, 39 P.3d at 122-23) (alteration omitted). The second instance is "where a failure to sever hinders a defendant's ability to prove his theory of the case." Id. at 767, 191 P.3d at 1187.

Even when one of the above situations are presented, a defendant must also show that there is "a serious risk that a joint trial would compromise a specific trial right . . . or prevent the jury from making a reliable judgment about guilt or innocence." Marshall, 118 Nev. at 647, 56 P.3d at 379 (quoting Zafiro v. United States, 506 U.S. 534, 539, 113 S. Ct. 933, 938 (1993)). To show prejudice from an improper joinder "requires more than simply showing that severance made acquittal more likely; misjoinder requires reversal only if it has a substantial and injurious effect on the verdict." Chartier, 124 Nev. at 764-65, 191 P.3d at 1185 (quoting Marshall, 118 Nev. at 647, 56 P.3d at 379). Further, "some level of prejudice exists in a joint trial, error in refusing to sever joint trials is subject to harmless-error review." Id.

Hidalgo alleges that he suffered spill-over prejudice. AOB 47-51. However, there was no such effect. While he claims that "more" evidence implicated Little Lou than him, Carroll's conversations with Espindola and Espindola's testimony implicate Hidalgo and would have been entirely admissible at a trial where he was

the sole defendant. Espindola's testimony served as the connection between Little Lou's actions and Hidalgo's orders, as she established that Hidalgo had ordered Carroll to switch to "Plan B." 10 PA 1534. While Hidalgo tries to undercut Espindola's testimony as "circumstantial at best," this testimony was damning, specific, and showed that Hidalgo was part of the conspiracy. There was no spill-over prejudice that would warrant severance, and Hidalgo was proven equally culpable within the conspiracy so as to make any lack of severance benign.

Hidalgo also complains that the State's offer to remove the death penalty in exchange for consolidation make it "evident that the State either lacked the confidence that death would be imposed, or had significant motive to try the cases together." AOB 49. The State did have significant motive to try the cases together – judicial and prosecutorial economy. The State's willingness to trade the possibility of imposition of the death penalty reflects the reality that Hidalgo would likely not want to risk the death penalty more than the State wanted the opportunity to execute him.

Hidalgo's claim that counsel may have conceded to consolidation based on a personal interest is a bare and naked claim fit only for denial. Hargrove, 100 Nev. at 502-03, 686 P.2d at 225; Section I(A), supra.

Hidalgo also claims that his defense was antagonistic to his son's, but they were not. AOB 51-53. Both closing arguments claimed that neither defendant joined

the conspiracy or aided and abetted Carroll in killing Hadland. 17 PA 2835-2914. At no point in the argument did Little Lou's counsel claim that Hidalgo had joined the conspiracy and Little Lou had not.

Hidalgo focuses on evidence implicating Little Lou, but this evidence equally implicated him, along with Espindola's testimony, and would have been admissible were Hidalgo tried alone. Hidalgo's complaints about the father-son relationship resulting in guilt by association are mere speculation and were insufficient to show antagonistic defenses or spill-over warranting severance. Finally, Hidalgo's claim that Little Lou's defense team "would essentially be tasked with defending Hidalgo at the expense of their client's child," clearly cannot establish prejudice to *Hidalgo*, considering that he would be the beneficiary of such divided attention. AOB 53.

Consolidation was warranted, and counsel's efforts to prevent it would have been futile. Ennis, 122 Nev. at 706, 137 P.3d at 1103. Instead of losing the Motion to Consolidate outright, counsel instead secured Hidalgo a windfall by conceding the Motion and removing death as a sentencing option. These tactics were entirely reasonable in light of the threat of execution, and should be respected by this Court. This claim was properly denied.

III.
THE COURT PROPERLY FOUND APPELLATE COUNSEL WAS NOT DEFICIENT

Appellate counsel is not required to raise every issue that Defendant felt was

pertinent to the case. The United States Supreme Court has held that there is a constitutional right to effective assistance of counsel in a direct appeal from a judgment of conviction. Evitts v. Lucey, 469 U.S. 387, 396-97, 105 S. Ct. 830, 835-37 (1985); see also Burke v. State, 110 Nev. 1366, 1368, 887 P.2d 267, 268 (1994). To claim ineffective assistance of appellate counsel, the defendant must satisfy the two-prong test of deficient performance and prejudice set forth by Strickland. Williams v. Collins, 16 F.3d 626, 635 (5th Cir. 1994); Hollenback v. United States, 987 F.2d 1272, 1275 (7th Cir. 1993); Heath v. Jones, 941 F.2d 1126, 1130 (11th Cir. 1991).

There is a strong presumption that counsel's performance was reasonable and fell within "the wide range of reasonable professional assistance." See United States v. Aguirre, 912 F.2d 555, 560 (2nd Cir. 1990). All appeals must be "pursued in a manner meeting high standards of diligence, professionalism and competence." Burke, 110 Nev. at 1368, 887 P.2d at 268. Finally, in order to prove that appellate counsel's alleged error was prejudicial, a defendant must show that the omitted issue would have had a reasonable probability of success on appeal. Duhamel v. Collins, 955 F.2d 962, 967 (5th Cir. 1992); Heath, 941 F.2d at 1132; Lara v. State, 120 Nev. 177, 184, 87 P.3d 528, 532 (2004); Kirksey, 112 Nev. at 498, 923 P.2d at 1114.

The defendant has the ultimate authority to make fundamental decisions regarding his case. Jones v. Barnes, 463 U.S. 745, 751, 103 S. Ct. 3308, 3312 (1983).

However, the defendant does not have a constitutional right to "compel appointed counsel to press nonfrivolous points requested by the client, if counsel, as a matter of professional judgment, decides not to present those points." Id. In reaching this conclusion the United States Supreme Court has recognized the "importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." Id. at 751-752, 103 S. Ct. at 3313. In particular, a "brief that raises every colorable issue runs the risk of burying good arguments . . . in a verbal mound made up of strong and weak contentions." Id. at 753, 103 S. Ct. at 3313. The Court also held that, "for judges to second-guess reasonable professional judgments and impose on appointed counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy." Id. at 754, 103 S. Ct. at 3314. This Court has similarly concluded that appellate counsel may well be more effective by not raising every conceivable issue on appeal. Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).[19]

A. Counsel Was Not Deficient For Not Raising Claims of Error Relating to the "Hearsay" During Zone's Testimony

Hidalgo contends that counsel should have raised as a claim of error the Court's overruling the objection to Zone's testimony concerning Carroll's statement

[19] The State notes that Hidalgo's counsel is also aware of this because this Appeal does not raise every issue denied in Hidalgo's Petition for Writ of Habeas Corpus.

to him while in presence of the police. AOB 54-58. The statement was, "if you don't tell the truth, we're going to jail." 6 PA 973-74. Defendant also notes that Detective McGrath testified to the same statement, that Carroll told Zone, "tell them the truth, tell them the truth. I told them the truth." 7 PA 1211-12.

Hearsay is defined as an out-of-court statement "offered in evidence to prove the truth of the matter asserted." NRS 51.035. Hidalgo claims the statement was "clearly to establish the credibility of Zone's own testimony." AOB 56. That is not the test – the test is whether the statement is offered in evidence to prove the truth of the matter asserted. NRS 51.035. The truth of the matter of Carroll's statement, as testified to by Zone, is that if Zone did not tell the truth, Zone and Carroll would go to jail. That was not relevant to the State's case, nor was it relevant to the jury's determination of the Hidalgo's guilt. Instead, as revealed during cross-examination by Little Lou's counsel, the statement was shown relevant for its effect on the listener (Zone), because Zone interpreted the statement to mean Zone should fabricate a story that tended to exculpate Carroll, himself, and Taoipu. 7 PA 1128-30. It was *not* introduced to show that Zone's testimony was truthful, as Hidalgo states, but rather to explain why Zone was hesitant to tell the truth at first. Id. at 97. Because the statement was not introduced for the truth of the matter asserted, it was non-hearsay and entirely admissible.

The second statement, as testified to by McGrath, comprises of two commands ("tell them the truth") and one declarative statement ("I told them the truth"). The commands are in the imperative form, and of necessity *assert nothing*. They do not operate to state a fact, but rather encourage the listener to do something. Thus, the statements were non-hearsay and were clearly introduced for their effect on Zone. While the final statement is in declarative form, and asserts that Carroll told the truth, it was not relevant for that purpose – again, it was relevant to the effect on the listener (Zone) and that it encouraged him to withhold the true story at first. Therefore, none of these statements constituted hearsay.

Even if they did constitute hearsay, their admission was harmless, especially in light of Espindola's testimony which established that Carroll was acting pursuant to Hidalgo's directions when he killed Hadland. Knipes v. State, 124 Nev. 927, 935, 192 P.3d 1178, 1183 (2008) (to warrant reversal, evidentiary error must have substantial and injurious effect or influence on the jury's verdict). Because any error would not have warranted reversal, briefing the issue would have been futile and expended space which could be used for issues with a greater likelihood of success. Therefore, Defendant cannot show deficient performance or prejudice and this claim must be denied.

/ / /

/ / /

IV.
THE COURT PROPERLY FOUND NO CUMULATIVE ERROR

While this Court has noted that some courts do apply cumulative error in addressing ineffective assistance claims, it has not specifically adopted this approach. See McConnell v. State, 125 Nev. 243, 250 n.17, 212 P.3d 307, 318 n.17 (2009). However, the Eighth Circuit Court of Appeals has concluded that "a habeas petitioner cannot build a showing of prejudice on a series of errors, none of which would by itself meet the prejudice test." Middleton v. Roper, 455 F.3d 838, 851 (8th Cir. 2006), cert. denied, 549 U.S. 1134, 127 S. Ct. 980 (2007) (quoting Hall v. Luebbers, 296 F.3d 685, 692 (8th Cir. 2002)).

Even if the Court applies cumulative error analysis to Hidalgo's claims of ineffective assistance, Hidalgo fails to demonstrate cumulative error warranting reversal. A cumulative error finding in the context of a Strickland claim is extraordinarily rare and requires an extensive aggregation of errors. See, e.g., Harris By and Through Ramseyer v. Wood, 64 F.3d 1432, 1438 (9th Cir. 1995). Because Hidalgo fails to demonstrate that any claim warrants relief under Strickland, there is nothing to cumulate.

Hidalgo fails to demonstrate cumulative error sufficient to warrant reversal. In addressing a claim of cumulative error, the relevant factors are: (1) whether the issue of guilt is close; (2) the quantity and character of the error; and (3) the gravity of the crime charged. Mulder v. State, 116 Nev. 1, 17, 992 P.2d 845, 854-5 (2000).

As demonstrated by the facts *supra*, the evidence against Hidalgo was strong and eliminates the possibility of prejudice from any alleged failure by counsel. Further, even assuming that some or all of Hidalgo's allegations of deficiency had merit, he has failed to establish that, when aggregated, the errors deprived him of a reasonable likelihood of a better outcome. Therefore, even if counsel was in any way deficient, there is no reasonable probability that Hidalgo would have received a better result but for the alleged deficiencies. Further, even if Hidalgo had made such a showing, he has certainly not shown that the cumulative effect of these errors was so prejudicial as to undermine the Court's confidence in the outcome of his case. Therefore, Hidalgo's cumulative error claim was properly denied.

V.
THE COURT PROPERLY DENIED HIDALGO AN EVIDENTIARY HEARING

NRS 34.770 determines when a defendant is entitled to an evidentiary hearing:

> 1. The judge or justice, upon review of the return, answer and all supporting documents which are filed, shall determine whether an evidentiary hearing is required. A petitioner must not be discharged or committed to the custody of a person other than the respondent *unless an evidentiary hearing is held.*
> 2. If the judge or justice determines that the petitioner is not entitled to relief and an evidentiary hearing is not required, he shall dismiss the petition without a hearing.
> 3. If the judge or justice determines that an evidentiary hearing is required, he shall grant the writ and shall set a date for the hearing.

This Court has held that if a petition can be resolved without expanding the

record, then no evidentiary hearing is necessary. Mann v. State, 118 Nev. 351, 356, 46 P.3d 1228, 1231 (2002); Marshall v. State, 110 Nev. 1328, 1331, 885 P.2d 603, 605 (1994). A defendant is entitled to an evidentiary hearing if his petition is supported by specific factual allegations, which, if true, would entitle him to relief unless the factual allegations are repelled by the record. Marshall, 110 Nev. at 1331, 885 P.2d at 605; Hargrove, 100 Nev. at 503, 686 P.2d at 225 (holding that "[a] defendant seeking post-conviction relief is not entitled to an evidentiary hearing on factual allegations belied or repelled by the record"). "A claim is 'belied' when it is contradicted or proven to be false by the record as it existed at the time the claim was made." Mann, 118 Nev. at 354, 46 P.3d at 1230 (2002).

Here, an evidentiary hearing was unwarranted because the petition was resolved without expanding the record. Mann, 118 Nev. at 356, 46 P.3d at1231; Marshall, 110 Nev. at 1331, 885 P.2d at 605. Hidalgo's claims are bare/belied by the record, and otherwise fail to sufficiently allege ineffective assistance of counsel. The district court already held an evidentiary hearing on potential conflicts of interest and there is a sufficient record to deny the claims alleging a conflict of interest presented in the Hidalgo's Petiton and Supplement. Therefore, no evidentiary hearing was warranted in order to deny such claims. Hargrove, 100 Nev. at 503, 686 P.2d at 225.

Further, the Court heard arguments regarding the necissity for an evidentiary hearing and Hidalgo was unable to articulate *any* specific facts that warranted an evidentary hearing. 22 PA 3799-3810. At most, Hildagio was curious about some facts that, even if proved, did not demonstrate ineffective assistance of counsel. Accordingly, Hidalgo's request for an evidentiary hearing was properly denied.

CONCLUSION

Based on the foregoing, the State respectfully requests that this Court affirm the dismissal of Hidalgo's Petition and all Supplements thereto.

Dated this 29th day of August, 2017.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY */s/ Jonathan E. VanBoskerck*
JONATHAN E. VANBOSKERCK
Chief Deputy District Attorney
Nevada Bar #006528
Office of the Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500

CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either proportionately spaced, has a typeface of 14 points of more, contains 13,899 words.
3. **Finally, I hereby certify** that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 29th day of August, 2017.

Respectfully submitted

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY */s/ Jonathan E. VanBoskerck*
JONATHAN E. VANBOSKERCK
Chief Deputy District Attorney
Nevada Bar #006528
Office of the Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500

CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on 29th day of August, 2017. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

ADAM PAUL LAXALT
Nevada Attorney General

MARGARET A. MCLETCHIE, ESQ.
Counsel for Appellant

JONATHAN E. VANBOSKERCK
Chief Deputy District Attorney

/s/ J. Garcia
Employee, Clark County
District Attorney's Office

JEV/John Niman/jg