

IN THE SUPREME COURT OF THE STATE OF NEVADA

LUIS HIDALGO, JR.,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

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Case No. 71458

APPELLANT'S REPLY BRIEF

Appeal from Eighth Judicial District Court, Clark County

The Honorable Valerie Adair, District Judge

District Court Case No. 08C241394

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I. INTRODUCTION

In its Answering Brief (“AB”), the State dedicates several pages of its argument to examining the permissibility of dual representation and the law on conflict waivers. (AB pp. 28-30.) Although this argument is quite different from the State’s pre-trial position that the dual representation of Appellant Luis Hidalgo, Jr. (“Hidalgo”) and his son, Luis Hidalgo III (“Hidalgo III”) created a conflict of interest (*see, e.g.*, 4 PA0479-498¹), it is of little moment. In this case, Hidalgo has not asserted that trial counsel’s concurrent representation of Hidalgo and his co-defendants, Hidalgo III and Anabel Espindola (“Espindola”), created a conflict of interest. Rather, as detailed in Hidalgo’s Opening Brief (“OB”), trial counsel created numerous conflicts of his own doing.

First, trial counsel entered into a specious financial arrangement, ostensibly to provide representation for Hidalgo, Hidalgo III, and Espindola, which ultimately profited only trial counsel. Second, trial counsel did not follow this financial agreement, underfunding the defense of Hidalgo III and Ms. Espindola and damaging Hidalgo’s defense, which likely resulted in Espindola’s decision to testify against Hidalgo. Finally, trial counsel orchestrated a joint defense agreement which

¹ Citations to Petitioner’s Appendix (“PA”) are to both volume and page number(s). Hence, “4 PA0479-498” refers to volume 4 of the Petitioner’s Appendix at pages 0479 through 498. Hidalgo also submitted a portion of his appendix in this matter under seal. Citations to the sealed appendix will be labelled “SPA.”

likely hampered his ability to fully cross-examine Ms. Espindola at the time of trial and/or resulted in the disclosure of confidential information to the State. Thus, trial counsel's pursuit of his own financial interests created an actual conflict of interest that adversely affected his representation of Hidalgo.

In addition to creating conflicts of interest, trial counsel was ineffective for creating and entering into a joint defense agreement that hamstrung his ability to cross-examine Espindola when she eventually became a defense witness—a move precipitated by trial counsel's failure to fund Espindola's defense. Trial counsel also provided ineffective assistance by conceding the motion to consolidate, and by failing to raise a claim on direct appeal regarding the admission of hearsay statements from witnesses Rontae Zone and Sean McGrath.

Even if these individual violations taken in isolation did not result in prejudice, Hidalgo presented sufficient evidence during the post-conviction proceedings below that, considered cumulatively, these errors resulted in prejudice. The State asserts that under the cumulative error test set forth by the Court in *Mulder v. State*, 116 Nev. 1, 992 P.2d 845 (2000), Hidalgo cannot demonstrate cumulative error because “the evidence against [him] was strong and eliminates the possibility of prejudice from any alleged failure by counsel.” (AB, pp. 52-53.) The State's argument, however, ignores that the evidence against Hidalgo was largely circumstantial. Given the circumstantial nature of the State's case, trial counsel's

multiple deficiencies in representation cumulatively prejudiced Hidalgo. Finally, contrary to the State’s assertions, Hidalgo presented sufficient facts which warranted an evidentiary hearing on his post-conviction petition.

II. ARGUMENT

A. Trial Counsel’s Fee Arrangement with Hidalgo Created a Conflict of Interest.

Adopting the district court’s findings, the State asserts that trial counsel’s alleged violation of the Nevada Rules of Professional Conduct (“NRPC”) is “irrelevant to a claim of ineffective assistance of counsel due to a conflict of interest.” (AB, p. 31.) Like the district court (22 PA3833), the State relies on the United States Supreme Court’s opinion in *Nix v. Whitehead*, 475 U.S. 157 (1986) for this proposition. As discussed in Hidalgo’s Opening Brief (OB pp. 37-38), the district court and the State interpret *Nix* too narrowly. While a violation of a state’s rules of professional conduct is not a per se violation of a client’s Sixth Amendment right to effective assistance of counsel, the facts that trial counsel’s conduct here potentially violated NRPC 1.8(a)² indicates that trial counsel acted inappropriately

² Nevada Rule of Professional Conduct (“NRPC”) 1.8(a) provides that:

A lawyer shall not enter into a business contract with a client or knowingly acquire an ownership, possessory, security or other interest adverse to a client unless:

(1) The transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and

according to the standards that the State of Nevada has determined are reasonable for an attorney.

As discussed in the Opening Brief, Hidalgo's Bermuda Sands LLC owned approximately 4.53 acres of land in Las Vegas, as well as LLCs for multiple businesses, including the Palomino Club LLC. (OB 38; SPA011.) Pursuant to the purchase agreement between trial counsel and Hidalgo, Bermuda Sands and its holdings were listed (without any valuation or documentation) as being worth only \$500,000.00. (SPA027.)

The State asserts that the lack of valuation of Bermuda Sands is irrelevant in part because Hidalgo allegedly "received a benefit from the fee agreement beyond legal representation." (AB, p. 33.) According to the State, because the fee agreement relieved Hidalgo of paying the note on the Palomino Club, he received a benefit from the questionable fee arrangement with trial counsel. This argument, however, cuts against the State's assertion that there was no prejudicial conflict of interest. Indeed, if Hidalgo was in such dire financial straits, trial counsel's fee arrangement could be construed as opportunistic and predatory: Hidalgo was in both financial and legal difficulties, and trial counsel offered to represent him in exchange for assuming ownership of a potentially lucrative LLC and its assets. Thus, the district court erred

transmitted in writing in a manner that can be reasonably understood by the client.

in denying Hidalgo an evidentiary hearing on this issue. *See United States v. Hearst*, 638 F.2d 1190, 1195 (9th Cir. 1980) (holding that the district court erred in denying the petitioner a hearing on her post-conviction claims that her trial counsel pursued his own financial interests rather than her interests in acquittal).

The lack of recordkeeping by trial counsel also demonstrates that the district court erred in denying Hidalgo's request for an evidentiary hearing. The case file obtained from trial counsel is devoid of documents addressing or itemizing the billing for the defense of Hidalgo or his co-defendants. (22 PA3797.) This lack of documentation of how trial counsel's financial transaction with Hidalgo translated into actual legal expenditures weighs in favor of crediting Espindola's belief that her attorneys were underfunded. At the very least, this unconventional arrangement warrants further discovery and an evidentiary hearing to determine its impact on Hidalgo's defense.

B. Trial Counsel's Failure to Fund the Defense of Hidalgo's Co-Defendants Demonstrates a Conflict of Interest and Ineffective Assistance of Counsel.

Again echoing the district court's findings, the State argues that the Sixth Amendment does not require defense counsel to pay "co-conspirators to induce them not to testify." (*Compare* AB, p. 34 and 22 PA836.) Like the district court, the State's argument ignores that trial counsel agreed, pursuant to the aforementioned purchase agreement, defense of Hidalgo III and Espindola. (*See* SPA033.) Trial counsel's

failure to provide the necessary funding for Hidalgo III's and Espindola's defenses not only made it difficult for their counsel to conduct investigations and generally fund a defense. This led to animosity between Hidalgo and Espindola, and ultimately pushed Espindola into testifying against the other defendants in exchange for a plea deal. As noted in Hidalgo's Opening Brief, there is no constitutional mandate that trial counsel should provide money to possible witnesses to secure their silence. But it is beyond purview that, to protect his client's interests, competent counsel would avoid antagonizing potential cooperating witnesses.

As related by Espindola's trial counsel Christopher Oram at the February 13, 2008 conflict hearing, Espindola "felt that her case was not being financed." (SPA108.) Mr. Oram testified that in every capital case he had every participated in, he "always have had [his] clients psychologically evaluated" and always had the assistance of an investigator. (SPA109.) Mr. Oram explained that Espindola "became increasingly angry about the fact that there was no investigator on the case," and asked him enough times that he was forced to write trial counsel to request "three or \$4,000" to retain one. (*Id.*) Despite his efforts to obtain the funding from trial counsel, Mr. Oram testified that he "was unable to tell Ms. Espindola that that was ever done." (*Id.*)

Trial counsel denied these allegations, asserting that "the real money that came into this case, all of it was disbursed to every lawyer but me." (SPA139.)

Absent documentation such as itemized hourly billing statements, invoices, or ledger entries reflecting the alleged disbursements to the defense attorneys, it is difficult to say with any degree of certainty that this statement is true. Additional discovery and an evidentiary hearing were therefore necessary to answer these significant factual questions. Thus, the district court erred in denying Hidalgo's requests for both discovery and an evidentiary hearing on his post-conviction claims.

C. Counsel was Ineffective for Creating a Joint Defense Agreement.

Both at the district court and in his Opening Brief (OB, pp. 41-45), Hidalgo contended that trial counsel was unreasonably restrained from effective cross-examination of Espindola due to the implied attorney-client privilege that such agreements create. *See U.S. v. Henke*, 222 F.3d 633, 637 (9th Cir. 2000). The State attempted to counter this argument by pointing to a provision of the joint defense agreement that states that “nothing in this Agreement is intended to create any attorney-client privilege for the purpose of the determination of conflicts of interest.” (AB at p. 39 (citing SPA038).) As discussed in Hidalgo's Opening Brief, however, the agreement also contains provisions which conflict with this statement, including a provision which deems “any past and future communications” among the members of the joint defense agreement confidential (SPA035 at ¶ 3), and a provision requiring defense materials to be marked confidential. (SPA037.) From the record, it is unclear exactly how trial counsel interpreted the contract and whether it had an

adverse effect on his defense.

In any event, what is at issue here is not about contract law. What is at issue is whether trial counsel's entry into this joint defense agreement constituted ineffective assistance of counsel, and whether his continued representation of Hidalgo after Espindola became a witness for the State constituted ineffective assistance of counsel. If the State's contention that trial counsel proceeded as if there were no conflict is correct, then his decision to enter into the joint defense agreement was flawed at best. Essentially, the State appears to suggest that trial counsel entered a joint defense with Hidalgo's co-defendants—during which he revealed trial strategy and the confidences of his client—without the minimum protection of attorney-client privilege if a co-defendant decided to cooperate with the State. Such an agreement could not be in the best interest of his client, and undoubtedly contributed to Hidalgo's conviction through Espindola's testimony.

The record shows that Espindola provided “evidence” to the State in exchange for a plea agreement. However, the exact extent of that information and whether she obtained this information under the auspices of the joint defense agreement is unclear—a fact that the State highlights. (AB, p. 41.) Contrary to the State's argument, however, the lack of precise facts regarding the information exchanged during the joint defense meetings does not weigh in favor of the district court's denial of this claim. (AB, p. 42.) Rather, this lack of information demonstrates

precisely why further discovery and an evidentiary hearing on the matter was required, and underscores the district court's error.

D. Trial Counsel's Decision to Concede the Motion to Consolidate was Unreasonable.

In its Answer, the State claims trial counsel's decision to concede the Motion to Consolidate in exchange for the withdraw of the Notice of Intent to Seek the Death Penalty was a reasonable strategic decision. (AB, p. 43.) However, as set forth in the Opening Brief, the likelihood that Hidalgo would receive the death penalty in this case was remote. Trial counsel, as a reasonably qualified attorney practicing in capital defense, should have been aware of such. (*See* OB, p. 49 and n.6.)

The State also claims that the Motion to Consolidate was likely to succeed. (AB, p. 44.) Aside from the fact that it seems unlikely that the State would take the death penalty off the table in exchange for conceding a Motion that was likely to succeed, the State's arguments are conclusory at best. First, the State claims that there was no spill-over prejudice due to the extensive evidence against Hidalgo III in comparison to Hidalgo because that evidence would have been admissible against Hidalgo at his trial. (AB, pp. 45-46.) However, the State ignores the fact that Hidalgo III was tried and convicted for an additional count regarding an alleged solicitation to commit the murder of DeAngelo Carroll; Hidalgo was not charged with that crime. (3 PA0262-64.) None of the evidence against Hidalgo III on that count would have been admissible against Hidalgo if he had been tried alone, because it was

plainly not relevant.

Second, Hidalgo was not alleged to have been present during the surreptitious conversations recorded by Carroll and played at trial. As such, the statements made by Carroll on those tapes could arguably only be played at the trial of Hidalgo to provide “context” for the co-conspirators statements. (21 PA3517); *See also United States v. Hendricks*, 395 F.3d 173, 184 (3d Cir. 2005.) However, those same statements could be admissible against Hidalgo III—who was present for the recordings—as “adoptive admissions.” *See Maginnis v. State*, 93 Nev. 173, 175, 561 P.2d 922, 923 (1977); NRS 51.035(3)(b); *see also* 18 PA3077.³ The mere fact that the jury was expected to listen to these recordings and apply a different standard of consideration to the same piece of evidence demonstrates the spill-over prejudice that Hidalgo suffered as a result of being tried with Hidalgo III.

Second, the State misconstrues Hidalgo’s argument regarding the antagonistic defenses in this case. The State claims that Hidalgo would be the “beneficiary” of his defense team defending his interests over that of his son. (AB, p. 47.) However, this argument ignores that trial counsel instituted a joint defense agreement contrary

³ At the time of trial on the matter, trial counsel repeatedly conflated the terms “adoptive admission” and “context” regarding the admissibility of these statements. While Hidalgo attempted to address this issue on appeal, the Court refused to consider the matter because Attorney Gentile had acquiesced to the use of the term “adoptive admission.” (21 PA3516, n. 4.) This error was raised by Hidalgo in his pro se Petition for Writ of Habeas Corpus. (21 PA3611-13.)

to Hidalgo's interests. Further, this argument coldly assumes that the State does not recognize the difficulty inherent in a parent implicating their child in a murder to defend themselves. Finally, due to the close familial relationship between the co-defendants, it is likely the jury concluded that Hidalgo and his son acted in collusion. Given this strong presumption, counsel is likely to conclude that the only defense for Hidalgo was the argument that both father and son were innocent.

Given the numerous prejudicial issues that a joint trial presented in this case, it is unlikely that the Motion to Consolidate would have been granted. As such, it was unreasonable for trial counsel to concede the motion for the "benefit" of the notice to withdraw the death penalty. Thus, the district court erred in denying this claim.

E. Appellate Counsel was Deficient for Failing to Brief the Hearsay Issue on Appeal.

The State argues that the statements of Rontae Zone and Detective McGrath regarding Mr. Carroll informing Mr. Zone "to tell the truth" are not hearsay under the auspices of Nev. Rev. Stat. § 51.035, and that this testimony was allegedly introduced to demonstrate that Mr. Zone was hesitant to tell the truth after Carroll made this statement to him. (AB, p. 50.) However, this interpretation is not supported by the record. At the time of trial, the State offered the testimony of both Mr. Zone and Detective McGrath. During his testimony, Detective McGrath stated that he interviewed Mr. Zone and that his story was allegedly consistent with Mr. Carroll's

third statement on the matter. (7 PA1212; 11 PA1741.) There was simply no issue presented at trial that Mr. Zone was hesitant to give his statement. As such, there is no reason to introduce testimony regarding his hesitancy. Rather, as discussed in Hidalgo’s Opening Brief, this testimony was likely introduced by the State for the purposes of establishing Mr. Zone was telling the truth, which would render the testimony inadmissible hearsay. Nev. Rev. Stat. § 51.035. Thus, a reasonable attorney would have raised this issue on appeal.

F. The Cumulative Errors Committed by Trial Counsel Warrant Post-Conviction Relief.

As the State notes (AB p. 52), in evaluating a cumulative error claim, this Court considers “(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, 854–55 (2000) (citing *Leonard v. State*, 114 Nev. 1196, 1216, 969 P.2d 288, 301 (1998)); *see also Parle v. Runnels*, 505 F.3d 922, 928 (9th Cir. 2007) (“In evaluating a due process challenge based on the cumulative effect of multiple trial errors, a reviewing court must determine the relative harm caused by the errors. If the evidence of guilt is otherwise overwhelming, the errors are considered ‘harmless’ and the conviction will generally be affirmed.”) (citations omitted). Thus, in determining whether the combined effect of multiple errors rendered a criminal defense “far less persuasive” and had a “substantial and injurious effect or influence” on the jury’s verdict, the strength of the prosecution’s case must be

considered because “a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support.” *Strickland v. Washington*, 466 U.S. 668, 696 (1984).

Applying the *Mulder* factors, the record of this case supports a finding of cumulative error. Contrary to the State’s assertions (AB, p. 53), its case against Hidalgo was relatively thin. Unlike his co-defendants Hidalgo III and Espindola, Hidalgo was not caught on surreptitious recordings discussing Timothy Hadland’s murder or the possible murder of Deangelo Carroll or any other criminal activity. The State’s strongest evidence against Hidalgo was Espindola’s testimony. However, as set forth in the Opening Brief, several defense witnesses cast doubts on the veracity of Espindola’s testimony. (OB, pp. 22-25.) Indeed, the fact that the State did not indict Hidalgo until almost two years after his co-defendants were arraigned (*see* 3 PA0262-65) indicates its case against him was not as strong as the State asserts.

Because the case against Hidalgo was comparatively weak, the errors committed by trial counsel weigh all the more heavily in favor of a finding of cumulative error. Despite the weak nature of the evidence against Hidalgo, trial counsel repeatedly tied Hidalgo’s fate to that of his more culpable co-defendants: trial counsel entered into a joint defense agreement, and then conceded the motion to consolidate. In so doing, trial counsel created a situation where the stronger

evidence against Hidalgo's co-defendants tainted the jury's perception of Hidalgo. Trial counsel then compounded his errors by failing to fully fund Hidalgo III and Espindola's defense attorneys, which provoked Espindola to cooperate with the State. These errors by trial counsel, combined with the other errors discussed above, prejudiced Hidalgo. Thus, the district court erred in denying this claim.

G. Hidalgo Was Entitled to an Evidentiary Hearing and Discovery.

A post-conviction habeas petitioner is entitled to a post-conviction evidentiary hearing when he asserts claims supported by specific factual allegations not belied by the record that, if true, would entitle him to relief. *McConnell v. State*, 125 Nev. 243, 246, 212 P.3d 307, 309 (2009). In this case, Hidalgo has raised several specific factual allegations that are not contradicted by the record. If these allegations are true, Hidalgo has a cognizable claim for ineffective assistance of counsel.

The State argues Hidalgo was not entitled to an evidentiary hearing because his petition was resolved without expanding the record. (AB, p. 54.) According to the State, the district court's prior hearing on the potential conflict of interest posed by trial counsel's joint representation were sufficient to address Hidalgo's post-conviction conflict of interest claims. (*Id.*) This argument, however, elides the number of critical unknown facts regarding trial counsel's representation of Hidalgo.

For example, as noted above, there is no record of how trial counsel disbursed funds to the other members of the joint defense team or what services were

performed for Hidalgo and his co-defendants. The exact nature of the financial agreement between trial counsel and Hidalgo is also unclear. This sort of information is critical to determining whether trial counsel provided Hidalgo with constitutionally adequate representation. Additionally, the State fails to consider that the record is unclear regarding trial counsel's concession to the Motion to Consolidate, and whether it was sound strategy for appellate counsel to omit the hearsay issue on appeal. Consequently, the district court's decision to deny Hidalgo's request for an evidentiary hearing was error.

III. CONCLUSION

For these reasons, and for the reasons set forth in his Opening Brief, Appellant Luis Hidalgo, Jr. respectfully requests this Honorable Court reverse the district court's denial of his Petition for Writ of Habeas Corpus and remand this matter to the district court for further proceedings.

RESPECTFULLY SUBMITTED this the 12th day of October, 2017.

/s/ Margaret A. McLetchie

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CERTIFICATE OF COMPLIANCE

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

I further certify that this Reply Brief complies with the type-volume limitation of Nev. R. App. P. 32(a)(7)(A)(ii) because it contains 4,085 words.

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

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

DATED this 12th day of October, 2017.

/s/ Margaret A. McLetchie

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CERTIFICATE OF SERVICE

I certify that I am an employee of McLetchie Shell LLC and that on this 12th day of October, 2017 the APPELLANT'S REPLY BRIEF was filed electronically with the Clerk of the Nevada Supreme Court, and therefore electronic service was made in accordance with the Master Service List as follows:

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I hereby further certify that the foregoing APPELLANT'S REPLY BRIEF was served by First Class U.S. Mail on October 12th, 2017 to the following:

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