IN THE SUPREME COURT OF THE STATE OF NEVADA

DEANGELO CARROLL, Appellant, v. THE STATE OF NEVADA, Respondent.	Electronically Filed May 30 2019 01:17 p.m. Elizabeth A. Brown Clerk of Supreme Court SUPREME COURT CASE NO. 78081 District Court Case No. C212667-4

APPELLANT'S OPENING BRIEF

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Appeal from Order Denying Petition for Writ of Habeas Corpus
Eighth Judicial District Court, Clark County

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ATTORNEY FOR APPELLANT

RESCH LAW, PLLC d/b/a
Conviction Solutions
Jamie J. Resch
Nevada Bar Number 7154
2620 Regatta Dr., Suite 102
Las Vegas, Nevada, 89128
(702) 483-7360

ATTORNEYS FOR RESPONDENT

CLARK COUNTY DISTRICT ATTY.
Steven B. Wolfson
200 Lewis Ave., 3rd Floor
Las Vegas, Nevada 89155
(702) 455-4711

NEVADA ATTORNEY GENERAL
Aaron Ford
100 N. Carson St.
Carson City, Nevada 89701
(775) 684-1265

RULE 26.1 DISCLOSURE

Pursuant to Rule 26.1, Nevada Rules of Appellate Procedure, the undersigned hereby certifies to the Court as follows:

1. Appellant Deangelo Carroll is an individual and there are no corporations, parent or otherwise, or publicly held companies requiring disclosure under Rule 26.1;

2. Appellant Deangelo Carroll is represented in this matter by the undersigned and the law firm of which counsel is the owner, Resch Law, PLLC, d/b/a Conviction Solutions. Appellant was represented below at trial by Daniel Bunin, Esq. and Thomas Ericsson, Esq., and on direct appeal by Mario Valencia, Esq.

DATED this 30th day of May, 2019.

RESCH LAW, PLLC d/b/a Conviction Solutions

By: _____
JAMIE J. RESCH
Attorney for Appellant

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I. JURISDICTION

This is an appeal from the denial of a post-conviction petition for writ of habeas corpus in State v. Deangelo Carroll, Case No. C212667. The written amended judgment of conviction was filed on March 23, 2011. 9 AA 1930. The trial court's order denying post-conviction relief was filed January 18, 2019. 13 AA 2646. A timely notice of appeal was filed on January 31, 2019. 13 AA 2671. This Court has appellate jurisdiction over the instant appeal under NRS 34.575(1), NRS 34.830, NRS 177.015(1)(b) & NRS 177.015(3).

II. ROUTING STATEMENT (RULE 17)

It appears this matter is not presumptively assigned to the Court of Appeals, as it is a post-conviction appeal which arises from a Category A felony. See NRAP 17(b)(1).

III. ISSUES PRESENTED FOR REVIEW

A. Whether trial or appellate counsel provided constitutionally ineffective assistance including by: 1) Failing to move to suppress wiretap evidence as derivative of a Miranda violation, 2) Failing to impeach a key prosecution witness, 3) Failing to properly present and address a Batson challenge, 4) Failing to challenge prosecutorial misconduct, 5) Failing to challenge custodian of records witnesses who testified as experts, or 6) Failing to challenge a flight instruction.

B. Whether the cumulative effect of errors throughout the trial and appeal process require reversal of the convictions and sentences.

IV. STATEMENT OF THE CASE

Appellant Deangelo Carroll ("Carroll") was charged with murder with use of a deadly weapon and conspiracy to commit murder. 1 AA 1. The incident which led to these charges occurred on May 19, 2005, and resulted in Timothy Hadland being shot and killed.

The state filed notice of its intent to seek the death penalty against Carroll. 1 AA 5. The case was extensively litigated for several years before it proceeded to trial in 2010. 1 AA 173. The jury ultimately did return guilty verdicts on all charges, including first degree murder. 7 AA 1519. However, after a two-day penalty phase hearing, the jury sentenced Carroll to life with the possibility of parole for the murder. 9 AA 1921.

No timely direct appeal was filed. Instead, with assistance from counsel, Carroll filed a post-conviction petition that alleged he had been deprived of his direct appeal. 10 AA 1932. After litigation and an appeal, a further order from the trial court found that Carrol had in fact been deprived of a direct appeal. 10 AA 1981. An opening brief was filed on

December 4, 2014. 11 AA 2313. However, on April 7, 2016, this Court affirmed the convictions and sentences in a published opinion. 13 AA 2581.

On May 10, 2017, Carroll filed a proper person petition for writ of habeas corpus. 10 AA 1989. Counsel was appointed, and a supplemental petition filed on August 31, 2018. The trial court ultimately denied the petition and supplement without an evidentiary hearing. 13 AA 2646. This appeal followed.

V. STATEMENT OF FACTS

The facts required to understand the claims in this appeal include facts from the events leading up to and at trial, facts related to Carroll's statements to police and his agreement to wear a wire, and facts from a co-defendant's trial that concern a key state witness.

Overview of the allegations:

As indicated in the charging document, Carroll was charged with murder and conspiracy to commit murder. This Court already summarized the pertinent facts concerning the allegations, which are as follows:

> On May 19, 2005, police discovered Timothy J. Hadland's body on Northshore Road near Lake Mead. Along with

Hadland's body, police found advertisements for the Palomino Club. Hadland was fired from his job at the Palomino Club a week before his death. Palomino Club management recruited Carroll to "knock[] off" Hadland because Hadland was spreading negative rumors about the club.

Carroll was also an employee at the Palomino Club. Carroll used the club's van to promote the club by handing out flyers to cab drivers and tourists. On the night of Hadland's murder, Carroll drove the club's van with two other men, Rontae Zone and Jayson Taoipu, who occasionally assisted him. Carroll recruited Kenneth Counts for this assignment because Carroll knew Counts would "take care of" someone for money.

Carroll, Zone, Taoipu, and Counts went to an area near Lake Mead, and Carroll called Hadland. When Hadland noticed the Palomino Club's van, Hadland parked his car in front of the van and walked to the driver's side where Carroll was sitting. As Hadland and Carroll talked, Counts exited the van through the side door, snuck around to the front, and fired two shots into Hadland's head. Counts then jumped back into the van and ordered Carroll to return to town.

Carroll drove directly to the Palomino Club and told club management what occurred. Louis Hidalgo, Jr., the general manager of the club, directed other employees to give Carroll $6,000 in cash to pay Counts. Carroll gave the money to Counts, who then left in a cab. The next morning, at Hidalgo's direction, Carroll bought new tires for the van and disposed of the old tires at two separate locations.

> The evening after Hadland's murder, homicide detectives contacted Carroll at the Palomino Club, as Carroll's phone number was the last phone number on Hadland's phone. When detectives asked to speak with Carroll, he agreed, and the detectives drove Carroll to the homicide office for questioning. Carroll sat in a small room at a table with his back to the wall, while the detectives sat between him and the exit. The detectives did not give Carroll Miranda warnings before questioning him, but they informed Carroll that he was speaking with them voluntarily. Eventually, Carroll implicated himself, Palomino Club management, and Counts in Hadland's murder.
>
> Carroll then volunteered to wear a recording device to corroborate his story by speaking with the Palomino Club management. The detectives strategized with Carroll before he spoke with the management each time. The information on those recordings allowed the State to charge three members of Palomino Club management for their roles in Hadland's murder.

13 AA 2582-83.

This Court found that Carroll implicated himself in the murder as part of his confession to police. 13 AA 2599. However, this Court also found on direct appeal that "the district court erred by not suppressing Carroll's statements." 13 AA 2600. The trial court erred by failing to suppress both Carrol's pre-Miranda statements, and any statements Carroll made after he was read his rights. 13 AA 2602. However, citing unspecified "other power

evidence," this Court found the erroneous admission of Carroll's statements to police was harmless. 13 AA 2602.

Aside from the confession, there were only two other sources of evidence of Carroll's guilt: The wiretap evidence, and testimony from Rontae Zone who was present at the time Hadland was shot and killed. Both of those sources of evidence are explored below.

The wiretap evidence:

Prior to trial, counsel did file a motion to suppress. 1 AA 11. However, that motion was limited exclusively to suppressing Carroll's statements to police and did not request that the court consider suppressing the recordings made by Carroll in conjunction with law enforcement.

On direct review, this Court was asked to consider whether the admission of the recordings at trial violated Carroll's constitutional rights. 12 AA 2401. However, because the issue was not raised below, review was requested for plain error. 12 AA 2401. Second, Carroll argued on appeal that the admission of the wiretaps at trial was unconstitutional because:

The recordings were "fundamentally unfair evidence," they violated Carroll's right not to be a compelled witness against himself, and the recordings violate Carroll's "substantial rights." 12 AA 2403-04. This Court rejected these arguments, and related arguments based on relevance and other rules of evidence. 13 AA 2584-2591.

The underlying evidence on the recording was extremely damaging to Carroll. As the record of his interview with police shows, Carroll offered to wear a wire as a method of proving his story, not for the purpose of protecting his own self-interests. 1 AA 110-152. Carroll ended up wearing a recording device two times, and it was explained it did not transmit live audio but simply recorded whatever it could from the environment. 6 AA 1217.

For the first recording, Carroll entered Simone's Autoplaza, which was a business controlled by the Hidalgos. At that time, Carroll met with Anabel and Luis Hidalgo, III (sometimes known as "Little Lou"). 6 AA 1219. For the second recording, Carroll returned to the Autoplaza the next day and again met with Anabel and Little Lou. 6 AA 1220. This time, however, Carroll was

searched for devices and the recording device was locked in a bathroom during Carroll's visit. 6 AA 1220.

The contents of the recordings were played at trial. However, the contents were also discussed by the detectives involved in the case. As the evidence showed, Carroll is heard on the recording to say "Hey, what's done is done. You wanted him fucking taken care of. We took care of it." 6 AA 1256. Anabel responded to this by saying "Why are you saying that shit? What we really wanted was for him to be beat up…" 6 AA 1257. Carroll stated that they all needed to stick together, at which point Anabel advised him on what he might say if approached by police. 6 AA 1257.

Further into the recording, Carroll is heard to respond to Anabel's question about how the incident happened with this response: "We were going to call it quits and fucking KC got mad and I told you he went fucking stupid and fucking shot, dude, nothing we could fucking do about it." 6 AA 1258.

Evidence from the second recording showed that Carroll told Anabel and Little Lou "I did everything you guys asked me to do. You told me to

take care of this guy and I took care of him." 6 AA 1269. Anabel is then heard to interject that she tried many times to call Carroll to ensure he knew just to talk to Hadland. Carroll refuted this by saying "Yeah, when I talked to you on the phone, Ms. Anabel, I said specifically – I said if- if he is by himself, do you still want me to do him in? You said, Yeah." 6 AA 1270.

The damaging nature of the recording was emphasized repeatedly by the State during closing argument. During rebuttal, for example, the prosecutor specifically mentioned where Carroll stated "You wanted him done, we did him." 7 AA 1462. The rebuttal also focused on the exchange where Carroll was recorded noting that if Hadland was alone that Anabel and Little Lou still wanted him killed. 7 AA 1464. The State played audio of Carroll's recorded voice **at least twenty-three** times during its closing argument. 7 AA 1376-1387.

Rontae Zone evidence:

The other key source of evidence against Carroll was the testimony of Rontae Zone. At trial, Zone testified that Carroll told him Hadland was to be "dealt with" and that Zone later saw Carroll give a gun to one of the co-

defendants. 4 AA 790-91. Zone was explicit that the purpose of all this was for Hadland "to be murdered." 4 AA 791. Zone also explained that "Deangelo told me that Little Lou said that Mr. H (the senior Hidalgo) wanted him dead." 4 AA 796.

Zone generally described how he, Carroll, and the two others traveled to the eventual shooting scene. 4 AA 801-803. Zone explained that when Hadland arrived, Counts snuck around to the other side of Hadland's car at which time Zone heard two gunshots. 4 AA 806. Counts then returned to the vehicle and they all sped off. 4 AA 806. They returned to Las Vegas, and took the van they had all traveled in to a carwash. 4 AA 810. The next day, Carroll slashed the tires on the van and purchased four replacement tires. 4 AA 811.

Carroll was the last of the initial co-defendants to be tried. During Kenneth Counts's trial, which occurred two years prior to Carroll's trial, Zone testified in a largely similar fashion with one key difference: Rontae Zone's (the not-charged, inculpating witness) credibility was completely undermined by the testimony of Rontae's ex-boyfriend, Calvin Williams.

During Counts's trial, defense counsel asked Rontae if he knew a Calvin Williams. Rontae responded that he did not know any such person. 11 AA 2233 Then counsel further asked if he had a relationship with Calvin Williams for a year, which Rontae responded that he did not know who Calvin Williams was. 11 AA 2233. Then counsel further inquired if Rontae had ever gotten into an argument with Calvin where he told Calvin, "I'll put two in your heard like I did the guy at Palomino Club?" 11 AA 2234. Rontae responded, "Man, that's nonsense." 11 AA 2234. Then counsel asked Rontae if he ever told Calvin Williams that "I'll get away with it like I did with the Palomino Club." 11 AA 2234. Defense counsel confirmed with Rontae that he had in fact lied to police multiple times before. 11 AA 2235

Later in Counts' trial, defense counsel brought Calvin Williams to testify. Williams testified that he and Rontae used to date starting in January of 2005. 11 AA 2302-2303. During an argument with Rontae at the Budget Suites, Rontae threatened Williams because another guy had called Williams's phone, and Rontae suspected Williams of cheating on him. 11 AA 2304 Williams stated that Rontae got mad, pulled out his gun and told

Williams, "If you want to play me, I'll play you." "I'll put two in your head like I did that fool from the Palomino Club." 11 AA 2305

On cross, the State asked Williams how the defense got this information. 11 AA 2308. Williams stated that he told Mr. Counts about this information, after Williams understood that Mr. Counts was in prison for the Palomino incident. 11 AA 2310. This critical testimony entirely rebutted Rontae's key testimony that DeAngelo and Kenneth were the only ones mainly involved with the murder, and eventually aided in the acquittal of Kenneth Counts on the charge of murder.

Unfortunately, none of this helpful information was utilized during Carroll's trial. Carroll was ultimately convicted and sentenced to consecutive terms of life in prison with the possibility of parole.

VI. SUMMARY OF ARGUMENT

The person who the State contends shot and killed Hadland was acquitted of murder. Yet, Carroll was convicted of murder for his alleged role in those events. Trial counsel should have given serious consideration

to what the evidence against Carroll was, and appropriate ways to respond to it.

Trial counsel did challenge Carroll's statements to police. Although the trial court allowed them into evidence during the trial, this Court has already held that was error. If the statements to police were removed from the equation, the State's case against Carroll relied almost entirely on the wiretap evidence and Rontae Zone. Counsel acted ineffectively by failing to challenge those two areas of evidence, because strong challenges to both were available and the case against Carroll would have been significantly weakened if even one of those pieces of evidence had been excluded.

In addition, counsel were also ineffective in addressing jury selection issues, prosecutorial misconduct, and other areas during the trial proceedings. These errors, alone or cumulatively, were prejudicial as there was a reasonable probability of a more favorable verdict or sentence had the errors not occurred. As a result, the convictions and sentences should be set aside and a new trial and/or sentencing ordered.

VII. ARGUMENT

Ineffective assistance claims present mixed questions of law and fact and are subject to independent review. State v. Love, 109 Nev. 1136, 1139, 865 P.2d 322, 323 (1993); Kirksey v. State, 112 Nev. 980, 923 P.2d 1102, 1107 (1996). A claim of ineffectiveness of counsel requires a showing that counsel acting for the defendant was ineffective, and that the defendant suffered prejudice as a result—defined as a reasonable probability of a more favorable outcome. Strickland v. Washington, 466 U.S. 668 (1984). To prove ineffective assistance of appellate counsel, a petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice meaning the omitted issue would have a reasonable probability of success on appeal. Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102 (1996). Appellate counsel need not raise every non-frivolous issue on appeal. Jones v. Barnes, 463 U.S. 745, 751 (1983). Still, ineffectiveness may be found where counsel presents arguments on appeal while ignoring arguments that were stronger. Suggs v. United States, 513 F.3d 675, 678 (7th Cir. 2008).

These errors deprived Carroll of his right to effective assistance of counsel under the United States and Nevada Constitutions.

A. Trial and appellate counsel provided constitutionally ineffective assistance throughout the trial and on appeal.

Carroll's substantive claims all fall under the broad category of ineffective assistance of counsel. All concern the actions of trial counsel, and some also involve appellate counsel. Any individual claim presented below was significant enough to undermine confidence in Carroll's conviction and would justify relief in the form of a new trial.

Failing to move to suppress wiretap evidence as derivative of a Miranda violation

Trial and/or appellate counsel were ineffective for failing to suppress testimonial evidence or, in the alternative, physical evidence obtained in violation of Petitioner's Miranda rights. There simply is no question: Carroll's statements to police were given in violation of the rights afforded to him under Miranda v. Arizona, 384 U.S. 436 (1966). 13 AA 2582. That being the case, trial counsel or appellate counsel should have recognized the necessity to further request that the wiretap evidence also be excluded.

Trial counsel made no such request at all. Meanwhile, appellate counsel sought exclusion of the wiretap evidence on various grounds but 1) was hampered by plain error review due to a lack of objection by trial counsel, and 2) did not request exclusion based on the Miranda violation. Trial counsel and/or appellate counsel failed to seek to suppress the evidence that directly resulted from the wiretap, which arguably was the only uncontroverted evidence against Carroll.

The Supreme Court held that testimonial, self-incriminating evidence must be suppressed in light of Miranda violations. United States v. Patane, 542 U.S. 630 (2004). In a factually similar case, a defendant was interrogated while in police custody and police requested defendant's cooperation in contacting defendant's alleged cocaine supplier. Kessler v. State, 991 So.2d 1015, 1017 (Fla. App. 2008). There, the Defendant agreed to contact his source for cocaine and then made phone calls to him. Id. The calls were recorded by the police with the defendant's consent, but without adequate Miranda warnings either before the taped call or before the interrogation. Id. The State cited Patane to argue that the "fruit of the

poisonous tree" doctrine does not apply to Miranda violations. Id. at 1020. However, the Kessler court found that was an incorrect and overly-broad interpretation of the holding in Patane. Id.

Applying Patane, the Kessler court held that failure to complete Miranda warnings may require suppression of physical or non-testimonial evidence derived from the violation. Id. Further, the court even clarified, that exclusion of testimonial evidence continues to be the proper remedy for a Miranda violation. Id. citing Patane, 542 U.S. at 641-642. The Kessler court found that the defendant's phone call to his alleged cocaine source is a "testimonial act from which an incriminating inference can be drawn," because the jury could infer that the defendant must be involved in cocaine trafficking because he has a cocaine supplier who is readily accessible. Id. at 1021. For example, "by permitting the police to record the phone conversation, the defendant furnished incriminating evidence out of his own mouth. The evidence he secured for the state did not just implicate the supplier, but himself as well. This is precisely the type of incriminating

testimonial communication which the Miranda rule was designed to address." Id.

Thus, the Kessler court determined that a tape-recorded conversation constituted incriminating testimonial evidence and therefore, suppression of the tape-recorded conversation was consistent with Patane's holding. Id. Numerous other state courts have reached a similar conclusion. See State v. Farris, 109 Ohio St.3d 519, 849 N.E.2d 985 (2006); Commonwealth v. Martin, 444 Mass. 213, 827 N.E.2d 198 (2005); State v. Peterson, 181 Vt. 439, 923 A.2d 585 (2007); State v. Knapp, 285 Wis.2d 86, 700 N.W.2d 899 (2005); State v. Vondehn, 348 Ore. 462, 236 P.3d 691 (2010); State v. Pebria, 85 Haw. 171, 938 P.2d 1190 (1997); State v. McCain, 2015 Ariz. App. Unpub. LEXIS 707 (2015); State v. Carroll, 2008 Minn. App. Unpub. LEXIS 1248 (2008).

Of those states, Oregon, Vermont, Massachusetts, Ohio, and Wisconsin have explicitly held their own constitutions provide a broader self-incrimination privilege than the Supreme Court's interpretation of the federal self-incrimination privilege in United States v. Patane. See 542 U.S.

630 (suggesting physical evidence must not necessarily be suppressed in light of a Miranda violation). In addition to testimonial evidence, these states exclude any physical evidence that is obtained through Miranda-violative interrogations.

For example, the Supreme Court of Ohio stated that under its own constitution, evidence obtained in violation of Miranda should be suppressed:

> "In the areas of individual rights and civil liberties, the United States Constitution, where applicable to the states, provides a floor below which state court decision may not fall. As long as state courts provide at least as much protection as the United States Supreme Court has provided in its interpretation of the federal Bill of Rights, state courts are unrestricted in according greater civil liberties and protections to individuals and groups."

State v. Farris, 109 Ohio St. 3d at 529.

The Farris court held that it would be contrary to public policy to allow evidence obtained as the direct result of statements made in custody with the benefit of Miranda, because to allow this evidence would "encourage law-enforcement officers to withhold Miranda warnings and would thus weaken [Ohio's Constitution]." Id. at 529.

The Supreme Court of Oregon similarly reasoned that "When the police violate [Oregon's Constitution] by failing to give required Miranda warnings, the State is precluded from using physical evidence that is derived from that constitutional violation to prosecute a defendant." State v. Vondehn, 348 Ore. 462, 476-77. Other states have held physical evidence obtained in direct relation to a Miranda violation is inadmissible based on the fruit of the poisonous tree doctrine. See State v. McCain, 2015 Ariz. App. Unpub. LEXIS 707 (where information obtained during a Miranda-violative interrogation about the location defendant's house which led to the discovery of inculpating physical evidence was suppressed, due to the evidence being fruit of the poisonous tree).

By way of one more example, in McCain, the police obtained information regarding the location of defendant's house through a Miranda-violative interrogation, which was suppressed at trial. Even after the suppression of the statements, the police still introduced inculpatory evidence found at the location of McCain's home.

The McCain court held that this evidence should have been suppressed in addition to the suppressed statements, because the introduction of this evidence bolstered the credibility of the state's most significant witness. Id. at *12. "If courts allowed the state to use the evidentiary fruits of unlawful interrogation, officers would have no incentive to refrain from repeating that misconduct in the future." Id. at *8. The court found the evidence might have had a substantial impact on the verdict and rewarded police officers for the Miranda violation, and therefore the court reversed the defendant's convictions and sentences and remanded the case for a new trial. Id.

Here, Carroll's commitment to wear the wire that produced incriminating, testimonial evidence occurred during his Miranda-violative interrogation, and therefore, counsel should have argued to suppress the fruits of that wire recording. Like the defendant in Kessler, Carroll was in the custody of police when he voluntarily agreed to wear a wire. Put another way, the offer to wear a wire was entirely a function of being interrogated in violation of Miranda. Just as this Court already found

Carroll would not have given damning statements to the police had he been properly advised of his rights, it can likewise be said Carroll never would have agreed to wear a wire if police had alerted him the evidence obtained through that recording would primarily be used against him.

The wire was devastatingly incriminating for Carroll, because Carroll stated that he "[took] care of the guy." Similar to the inculpatory conversation in Kessler that implicated that defendant Carroll also "furnished incriminating evidence out of his own mouth." As this Court already noted, "Unfortunately for Carroll, there was evidence on the tapes to support both his position that this was never meant to be a killing, and the State's position, that it was." 13 AA 2585. Therefore, "this is precisely the type of incriminating testimonial communication which the Miranda rule was designed to address." Kessler, 991 So.2d at 1021.

The introduction of this evidence not only directly harmed Carroll, but also bolstered the credibility of Rontae Zone, the state's most significant witness. Zone's testimony could have been easily countered, as described

below, and therefore, the only evidence left to convict Carroll would have been Zone's less-than-credible testimony.

Trial and/or appellate counsel should have argued to suppress the testimonial statements on the wiretap under Patane or, in the alternative, those statements or the recording itself under the Nevada Constitution and the numerous States which have held that physical evidence obtained in violation of Miranda must be suppressed at trial. Trial and/or appellate counsel was ineffective for failing to raise this argument, because the Patane decision had been out for years before the start of Carroll's trial, and therefore, counsel could have and should have known of its existence. There is no evidence to suggest that counsel at any level ever considered this argument, and therefore, the decision not to make these arguments was a function of not knowing the law as opposed to a strategic decision.

The prejudice suffered by Carroll due to this failure is obvious. Absent the confession itself, which this Court held was inadmissible, additional sources of evidence against Carroll were limited. The wiretap was, far and away, the most damning piece of evidence against Carroll – as

evidenced by not just the statements on it but the numerous times the State stopped its closing argument to play pieces of audio from it. The State simply did not have a case against Carroll without the wiretap evidence.

The admission of the wiretap contents in this case violated the United States Constitution and Nevada Constitution because those contents were obtained via an illegally obtained confession. Without the illegal confession, there simply was no offer to wear a wire and thus, no wiretap evidence. Counsel were collectively ineffective in failing to raise this challenge and relief should be granted in the form of a new trial where the wiretap evidence, along with the confession itself, are suppressed at the time of trial.

Failing to impeach a key prosecution witness

"An attorney's failure to present available exculpatory evidence is ordinarily deficient, unless some cogent tactical or other consideration justified it." Pavel v. Hollins, 261 F.3d 210, 220 (2nd Cir. 2001), quoting

Griffin v. Warden, 970 F.2d 1355, 1358 (4th Cir. 1992); Reynoso v. Giurbino, 462 F.3d 1099, 1112 (9th Cir. 2006).

In Carroll's case, Rontae Zone testified against Carroll as explained earlier herein. That testimony was very damaging to Carroll, and the State relied on it during its closing argument, noting that Rontae told police "it was going to be a murder." 7 AA 1455. This was, in fact, consistent with Rontae's trial testimony in that he specifically testified Carroll wanted someone "dealt with" which meant "murdered." 4 AA 789-791. Rontae admitted that he saw a gun and that Rontae himself was given bullets by Carroll before the murder. 4 AA 791

However, two years prior to Carroll's trial, Rontae testified at Counts' murder trial, and a very different series of events unfolded. Rontae was confronted with testimony that clearly established he was a lot more than an innocent bystander to a murder. Instead, powerful evidence was admitted by witness Williams that Rontae, in fact, directly participated in the murder as a shooter. 11 AA 2305 That testimony likely led to the

outcome in Counts' murder trial; the individual the State has always alleged was the shooter was in fact acquitted of the shooting altogether.

Impeaching Rontae with these statements therefore had a proven record of being a successful trial tactic. Trial counsel in the instant case, however, was apparently utterly unaware that this powerful impeachment evidence existed. The fact the prior testimony – at a criminal trial and under oath – existed at all provided a more than ample good faith basis for trial counsel to extensively cross-examine Rontae about the fact Rontae was the confessed shooter. However, not a single question to that extent was put forth to Rontae by Carroll's attorneys. Further, if Rontae had been asked about the statements and denied them, it would appear that Williams' testimony from Counts' trial could have been offered into evidence at Carroll's trial. Lobato v. State, 120 Nev. 512, 519, 96 P.3d 765 (2004) (Discussing generally when extrinsic impeachment evidence is admissible); NRS 51.315, 51.325 (admissibility of prior statements by witness who is unavailable to testify). Of course, if Mr. Williams were

available as a witness, he could have been called directly during the defense case in chief.

Further, if the fact there was evidence Rontae was the shooter, was not exculpatory enough, impeachment on this issue could also have included making it clear to Carroll's jury that Rontae previously committed perjury right in front of Counts' jury. That is, Rontae specifically denied being the shooter or even knowing Mr. Williams. 11 AA 2233-2234 There was fertile ground to be explored with respect to whether Rontae had any qualms about committing perjury, and specifically the kind where one lies directly to a jury during a trial.

In denying this claim, the trial court disregarded evidence that if a conspiracy existed, it was one where Hadland was to be beaten up rather than murdered. 13 AA 2640-41. While the trial court acknowledged that was the theory of defense, it found no relevance to Zone's prior testimony. 13 AA 2643. But as was argued below, the relevance was that there was support for Carroll's "we were just going to beat him up" defense, and evidence in the form of Rontae's prior testimony to support that it was

Rontae who went rogue and unknown to the other co-defendants, murdered Hadland. 13 AA 2643. This evidence comes directly from Rontae Zone's own sworn testimony in the prior trial. 11 AA 2305.

The State presented Rontae as a witness against Carroll and then argued Rontae's testimony to the jury as evidence of Carroll's guilt. In so doing, the State in the first instance relied on testimony it knew was false and therefore committed prosecutorial misconduct as described further herein. But the instant claim concerns trial counsel's complete failure to understand how Counts was acquitted of murder while being the only person accused of firing a weapon during the incident. The answer is the key witness against Counts was Rontae Zone and his credibility was destroyed by evidence that he is a perjurer and murderer.

There is no excuse for trial counsel's failure to marshal those facts on Carroll's behalf, and in fact no evidence to suggest counsel in the present case was even aware of this evidence. Thus, a decision not to confront Rontae Zone with the impeachment evidence was a function of lack of preparation by counsel and not some ultimate strategy. Further, evidence

that the shooter went rogue and that Carroll never conspired to commit murder was wholly consistent with Carroll's theory of defense and therefore should not have been disregarded. The writ should be granted and a new trial ordered.

Failing to properly present and address a Batson challenge

Trial and appellate counsel failed to properly argue a challenge on Carroll's behalf under Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986) Specifically, the exclusion of Juror Overton pursuant to a State's peremptory challenge was in fact challenged by trial counsel as purposeful discrimination. However, the trial court (and State) both felt that since this was the first such allegation by defense counsel, that no "pattern" could be shown and therefore defense counsel could not even meet its initial burden of proof under Batson.

To determine whether illegal discrimination has occurred, a three-prong test is applied: (1) the defendant must make a prima facie showing that discrimination based on race has occurred based on the totality of the circumstances, (2) the prosecution then must provide a race-neutral

explanation for its peremptory challenge, and (3) the district court must determine whether the defendant in fact demonstrated purposeful discrimination. Batson, 476 U.S. at 96-98; Diomampo v. State, 124 Nev. 414, 422-23, 185 P.3d 1031, 1036 (2008)

"The second step of this process does not demand an explanation that is persuasive, or even plausible." Purkett v. Elem, 514 U.S. 765, 767-68, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995). The race-neutral explanation "is not a reason that makes sense, but a reason that does not deny equal protection." Id. At 769. "Where a discriminatory intent is not inherent in the State's explanation, the reason offered should be deemed neutral." Ford v. State, 122 Nev. 398, 132 P.3d 574, 577 (2006) (citing Kaczmarek v. State, 120 Nev. 314, 333, 91 P.3d 16, 29 (2004)). However, "[a]n implausible or fantastic justification by the State may, and probably will, be found [under the third prong of Batson to be pretext for intentional discrimination." Ford v. State, 132 P.3d at 578.

The relevant factors in determining whether a race-neutral justification for a peremptory challenge is merely pretextual are:

> (1) the similarity of the answers to voir dire questions given by [minority] prospective jurors who were struck by the prosecutors and answers by [nonminority] prospective jurors who were not struck, (2) the disparate questioning by the prosecutors of [minority] and [nonminority] prospective jurors, (3) the use by the prosecutors of the "jury shuffle," and (4) evidence of historical discrimination against minorities in jury selection by the district attorney's office.

Ford v. State, 122 Nev. 398, 405, 132 P.3d 574, 578-79, citing Miller-El v. Dretke, 545 U.S. 231, 233-34, 125 S.Ct. 2317, 2325-39, 162 L.Ed.2d 196 (2005); Diomampo v. State, 124 Nev. at 422-23 n.18.

In making its determination, the trial court may examine whether the State's proffered justifications make sense and whether the State's reasons could be applied to other non-minority jurors who were allowed to serve on the jury. Miller-el v. Dretke, 545 U.S. 231, 241 (2005). "If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at Batson's third step." Id. at 241. Likewise, the trial or appellate court may conduct a comparative analysis between kept and removed jurors to determine

discriminatory intent. Nunnery v. State, 127 Nev. 749, 784, 263 P.3d 235 (2011).

In this case, during jury selection, the trial court noted that of four potential African-American jurors, two were excused, the defense preempted one, and the State preempted one. 3 AA 549. The defense challenged the excusal by the State as discriminatory. However, the trial judge refused to even consider the challenge, stating that before a challenge could even be made "you have to show a pattern and practice." 3 AA 546. The State compounded this incorrect statement of the law by agreeing with the court. 3 AA 546, 549. (Prosecutor stating, "I don't think we should be required to put it on the record").

Defense counsel thereafter failed to inform the trial court that evidence of a pattern was not required in order to challenge the State's use of preemptory challenges, and appellate counsel failed to raise the excusal of the juror as an issue on appeal.

Here, the trial court refused to even consider the challenge because it found there could not be a "pattern" of discrimination based on the first

such exercised strike. The State compounded the error by agreeing with the Court, and defense counsel offered no meaningful response. What should have instead happened would be for defense counsel to be familiar with authority which holds that the defense does not have to wait for a series of discriminatory strikes before making a Batson challenge. Batson itself basically says as much. Id. at 96-97 (Illustrative examples of proof at step one include pattern, disparate questioning, or consideration of "all relevant factors"). However, other courts have subsequently explored the issue in much greater depth and explicitly held that a pattern of strikes is not required. United States v. Vasquez-Lopez, 22 F.3d 900, 902 (9th Cir. 1994).

Counsel could further have advanced the argument that, while a pattern need not have been shown, there was a least an inference of purposeful discrimination as evidenced by the fact the juror should have been a strongly pro-prosecution witness. She had worked in law enforcement as a corrections officer in New York City. 2 AA 316 She was in favor of the death penalty and could consider (at the time) all punishment

options including death. 2 AA 317. The juror further expressed an opinion that prosecutors should have loved: that "the recidivism rate is ridiculous." 2 AA 318.

The excusal of a juror who otherwise would be considered a favorable juror for the prosecution satisfies the prima facie step-one inquiry under Batson. People v. Allen, 115 Cal.App.4th 542, 550 (2004); People v. Bolling, 79 N.Y.2d 317, 591 N.E.2d 1136 (1992). Juror Overton was a former law enforcement officer who thought crime rates are too high. By this metric, she was a great juror for the State, which raises at least the inference that her exclusion was based on an impermissible factor such as race. Counsel was ineffective for failing to advance an argument under Batson based on something other than pattern. Likewise, appellate counsel was ineffective for failing to raise the trial court's denial of the Batson challenge as an issue on appeal, as the trial court's finding that a pattern was required wasn't even correct under Batson itself.

The State ultimately did not provide, and the trial court never ruled on, whether there was a race neutral explanation for excusing the juror. To

be fair, there is an explanation in the record that the juror was viewed by the State as either not taking the case seriously, or being a "wildcard." 3 AA 550-551 However, both the prosecution and court noted that they felt the defense would likely have struck the juror based on her law enforcement experience. 3 AA 551 The Court never asked for any defense argument whatsoever in response to these comments about the juror by the State. The trial court's failure to even perform the final step under Batson, i.e. failure to receive, much less evaluate, proof of purposeful discrimination, is reason alone for the writ to be granted. United States v. Hill, 146 F.3d 337, 342 (6th Cir. 1998).

It isn't clear that any of the State's supposed demeanor-based concerns, if those are in fact found to be in satisfaction of the State's obligations under Batson, have any support in the record. At best, the trial court described the juror as "a character." 3 AA 551. But the State's claim that the juror was concerned about being reimbursed for parking, or curious about the functioning of courtroom staff, are not "sufficiently specific" in light of the juror's sworn statements on the record regarding

her law enforcement background and disdain for repeat offenders to overcome the prima facie allegation of discriminatory intent. Brown v. Kelly, 973 F.2d 116, 121 (2d. Cir. 1992). Therefore, if either trial or appellate counsel had raised a legally supported claim under Batson, relief would have been granted and a new trial ordered. Here, the writ should be granted and a new trial ordered based on counsels' failure to litigate this meritorious Batson claim.

None of the above discussion breaks new ground. That is, Batson itself and cases that followed it have all long explained that a "pattern" of discrimination is not required before a trial court may consider a challenge to a peremptory strike. This was, yet again, fully explained in this Court's more recent decision of Cooper v. State, 432 P.3d 202, 134 Nev. Adv. Rep. 104 (2018) (Granting a new trial where Batson inquiry inappropriately terminated by trial court during step one). Obviously, trial and appellate counsel could not have relied directly on Cooper as it is a 2018 case. But, Cooper announces no new rule, and instead applies longstanding Supreme Court and Nevada Supreme Court authority to reiterate the longstanding

rule that the first step inquiry is not demanding and certainly not limited to cases where a pattern has been shown. Id. at 205-206, citing Johnson v. California, 545 U.S. 162 (2005).

At the hearing on the post-conviction petition, the trial court doubled-down on its denial of this claim based on a lack of pattern:

> I would note on the Batson challenge, the State did state their race-neutral reasons on the record, and the Court noted, perhaps I didn't articulate it very well, that there's one African American that had been dismissed, and so there was no pattern, but they also stated the race-neutral reason. So it's denied for those reasons.

13 AA 2643.

The trial court's denial of this claim continues to require a pattern before consideration of a Batson claim. But this, again, is inconsistent with the holding of Batson itself which places no limitation on how the initial inference of purposeful discrimination is made. Second, while the State provided some discussion of its reasons for the strike, the trial court never ruled on those reasons and never provided the defense an opportunity to respond to them. 3 AA 551.

This truncated Batson-inquiry was incompatible with the Supreme Court and this Court's many decisions regarding how an appropriate Batson inquiry should be handled. Therefore, both trial and appellate counsel were ineffective in failing to present the trial court or this Court with these authorities, and if they had relief would have been granted under Batson. Because error under Batson is structural, the relief in such a case is a new trial and that is what Carroll requests here. Cooper, 432 P.3d at 207.

Failing to challenge prosecutorial misconduct

When reviewing acts of alleged prosecutorial misconduct, a determination is made whether the prosecutor's conduct was improper. If so, it is reviewed for harmless error, which "depends on whether the prosecutorial misconduct is of a constitutional dimension." Valdez v. State, 196 P.3d 465 at 476. If it is of a constitutional dimension, then the conviction must be reversed unless the State demonstrates, beyond a reasonable doubt, that the error did not contribute to the verdict. Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967,

overruled on other grounds by Brecht v. Abrahamson, 507 U.S. 619, 623 (1993); Tavares v. State, 117 Nev. 725, 732, 30 P.3d 1128, 1132 (2001). "If the error is not of constitutional dimension, [the Nevada Supreme Court] will reverse only if the error substantially affects the jury's verdict." Valdez, 196 P.3d at 476; Tavares, 117 Nev. At 732, 30 P.3d at 1132.

Habeas relief can be appropriate where trial counsel fails to object to instances of prosecutorial misconduct. Zapata v. Vasquez, 788 F.3d 1106 (9th Cir. 2015). There, the Ninth Circuit noted the misconduct included the prosecutor's false arguments, which "manipulated and misstated the evidence." Id. at 1114. As the court further noted, "trial counsel's silence, and the judge's consequent failure to intervene, may have been perceived by the jury as acquiescence in the truth of the imagined scene." Id. at 1116.

Here, there were several instances of prosecutorial misconduct during the State's closing argument. First, the State argued: "As a matter of legal analysis alone, he can be guilty of nothing less than second-degree murder. But it would be a travesty of justice if you did anything less than the truth, the absolute truth." 7 AA 1451. This argument contained several levels of

misconduct. First, the phrase "travesty of justice" is highly inflammatory and other courts have held its use to be misconduct. Williams v. Henderson, 451 F.Supp. 328, 332 (E.D.N.Y. 1978). Second, arguing that the "truth" was limited to the State's version of events constituted improper vouching and/or an improper attack on the defense. United States v. Alcantara-Castillo, 788 F.3d 1186, 1191 (9th Cir. 2015).

Second, the State argued that the defense "seem[ed] to imply that Mr. Pesci and myself should have charged Rontae Zone with murder or something else but Deangello Carroll, he's innocent, was the words I heard." 7 AA 1454. The State further commented on Zone's testimony that he was a spectator who "didn't want to help" commit the crime, and generally that there was no basis to prosecute Rontae. 7 AA 1454. The prosecutors in the instant case were the exact same prosecutors from Counts' trial. Therefore, even if defense counsel failed to figure out that Rontae Zone admitted to committing the murder himself, the State certainly knew that fact.

In Zapata, the Ninth Circuit noted the misconduct also included the prosecutor's false arguments, which "manipulated and misstated the evidence." Zapata at 1114. As the court further noted, "trial counsel's silence, and the judge's consequent failure to intervene, may have been perceived by the jury as acquiescence in the truth of the imagined scene." Id. at 1116. Further, that the statements were made during rebuttal was particularly egregious. Id. ("By reserving the remarks for rebuttal, the prosecution insulated them from direct challenge"). In other words, the State is prohibited from presenting the jury with evidence or impressions that it knows to be false. Alcorta v. Texas, 355 U.S. 28 (1957).

Here, the State knew that any argument that there was no basis to charge Rontae with any crime, and/or that there was no evidence Rontae was anything other than a bystander was false, because the State was well aware of evidence from Counts' trial that said otherwise. The State further argued that Rontae's statement to police was the truth. 7 AA 1455. Again, his testimony at a minimum was not the whole truth, as there was powerful evidence of which the State was aware that suggested Rontae himself had

committed the murder. The State's arguments about Rontae's testimony created a false narrative that Rontae was believable and that no evidence suggested Rontae was lying about Carroll's involvement in the case, when in fact there was very clear evidence to the contrary.

Third, in the only instance of misconduct that trial counsel objected to, the State argued that the victim might have shot himself, and relatedly that involuntary manslaughter required a finding that the killing was "an accident." 7 AA 1465. The trial judge sustained the objection to the shot himself comment, but did not rule on the accident argument. As a result, the State repeated its argument that involuntary manslaughter requires an accident. 7 AA 1466

The argument that the victim would have to have killed himself for the jury to acquit Carroll of first degree murder was improper and the objection to it properly sustained. As a result, appellate counsel was ineffective in failing to raise it (or any other) instance of misconduct on direct appeal. As explained in Zapata, the State may not create a narrative hypothetical which it knows did not occur.

Further, a prosecutor commits misconduct by misstating the law to the jury. People v. Sanchez, 228 Cal.App.4th 1517, 1532 (2014). This Court has already held that "Nevada law defines involuntary manslaughter as 'the killing of a human being, without any intent to do so, in the commission of an unlawful act, or a lawful act which probably might produce such a consequence in an unlawful manner.'" King v. State, 105 Nev. 373, 376, 784 P.2d 942 (1989). The word "accident" appears nowhere in that definition, and there are instead several complex elements which the State would have to prove beyond a reasonable doubt before someone could be convicted of involuntary manslaughter. The State's argument that involuntary manslaughter could not apply unless the killing was an "accident" was a false statement of the law and misled the jury as to the theory of defense. The trial court should have sustained the objection to that argument, and appellate counsel should have challenged the trial court's failure to sustain the objection on direct appeal.

Fourth, the prosecutor ended his argument with "…you'll be able to determine the truth because there's at least one person in this room that

knows that he intended to kill Timothy Hadland, and I submit to you if you're doing your job, you'll come back here and you'll tell him that you know too." 7 AA 1467. It is error for the prosecutor to tell the jury they have a duty to convict the defendant. Anderson v. State, 121 Nev. 511, 118 P.3d 184 (2005), United States v. Sanchez, 176 F.3d 1214, 1224 (9th Cir. 1999). Replacing the word "duty" with "job" does not affect the message any – the State here instructed the jury they were required to reject Carroll's version of events. This argument was improper and counsel were ineffective in failing to challenge it.

Individually or collectively, these instances of misconduct were sufficient to undermine confidence in the jury's verdict. Trial and appellate counsel were ineffective to the extent they failed to challenge these instances of misconduct either during the trial or on direct appeal. The writ should be granted and a new trial ordered.

Failing to move to exclude improperly noticed cellular phone expert witness testimony

The State noticed a custodian of records as an expert witness regarding cellular communications. 1 AA 9. That witness proceeded to testify at trial about several scientific and technical topics concerning cellular phones. 6 AA 1134-1137. At no time did trial counsel object to the witness testifying, nor did appellate counsel raise an issue concerning the admission of this evidence at the time of trial.

Trial counsel was ineffective for failing to object to this testimony and the same should never have been admitted via an unnoticed lay witness. See NRS 174.234; Grey v. State, 124 Nev. 110, 178 P.3d 154 (2008) (due process violated by improper notice of expert witness).

Here, the State's use of custodian of records witnesses as "experts" gave the jury the false impression that said witnesses were in fact experts in their field, when in reality their sole function as witnesses was to explain billing records. But the witnesses testified to much more than just how the bills were generated and interpreted, such as testimony about towers,

triangulations, and cell phone technology. Such testimony plainly required the use of a properly noticed expert witness, which was not present here. The expert witness notice in fact failed to include the name or CV of any so-called expert. As such, trial counsel should have known that, at most, the witness would only be testifying as to the authenticity of records. The instant the testimony went beyond that narrow topic, which it did almost immediately, trial counsel should have objected. Relatedly, appellate counsel should have challenged the admission of this testimony on direct appeal.

Had trial counsel objected to this testimony it is reasonably probable that Carroll would have enjoyed a more favorable outcome. Burnside v. State, 131 Nev. Adv. Op. 40, 352 P.3d 627, 637 (2015), citing United States v. Yeley-Davis, 632 F.3d 673 (10th Cir. 2011) (error to admit testimony that was beyond the common knowledge of jurors without proper expert notice). The writ should be granted and a new trial ordered based on this error.

Failing to challenge flight instruction

Trial counsel objected to the flight instruction in this case, arguing that there was "literally no evidence of flight." 7 AA 1331.The trial court overruled the objection, noting that the State was free to argue that Carroll "could have called 9-1-1 and said, oh, my God, my friend just got shot. 7 AA 1331 The jury was therefore given a flight instruction that advised it to decide whether evidence of flight showed consciousness of guilt and the significance to be attached to that circumstance. 7 AA 1509. On direct appeal, appellate counsel did not raise this issue despite the fact it had been preserved below.

Flight instructions are to be used "sparsely." Headspeth v. United States, 86 A.3d 559, 564 (D.C. 2014). If an instruction is considered, the trial court "'must fully apprise the jury that flight may be prompted by a variety of motives and thus of the caution which a jury should use before making the interest of guilt from the fact of flight.'" Id. In Nevada, it is error to give a flight instruction merely because the defendant left the scene of the crime. Potter v. State, 96 Nev. 875, 619 P.2d 1222 (1980).

Under the State's position, the flight instruction would not be used sparsely, but instead would be used in every case where the defendant was captured someplace other than at the scene of the crime. Such a position is entirely at odds with this Court's prior ruling in Potter and the purpose of the flight instruction itself. Here, there was no evidence of "flight" other than, as the trial court already acknowledged, the fact that Carroll did not stick around the scene of the crime.

It is perhaps unsaid, but obviously woven into Potter that if leaving the scene of a crime is not flight, likewise it is not flight to simply fail to turn oneself over to the police. The trial court's belief that Carroll "fled" by not calling 911 after the shooting is itself at odds with Potter. There was no evidence upon which the flight instruction could be given and therefore appellate counsel was ineffective in failing to challenge it. Had it been challenged, this Court would surely have found its use to be error. Further that error was prejudicial because this was a close case that already featured ample improperly admitted evidence, and it would have taken very little to tilt the scales of justice in Carroll's favor.

Therefore, this Court should order that the writ be granted and that Carroll receive a new trial based on counsel's ineffectiveness regarding the flight instruction.

B. The cumulative effect of counsel's errors warrants reversal of the convictions and sentences.

"The cumulative effect of errors may violate a defendant's constitutional right to a fair trial even though errors are harmless individually." Valdez v. State, 196 P.3d at 481 quoting Hernandez v. State, 118 Nev. 513, 535, 50 P.3d 1100,1115 (2002). When evaluating a claim of cumulative error, these factors are considered: "(1) whether the issue of guilt is close, (2) the quantity and character of the error, and (3) the gravity of the crime charged." Valdez, 196 P.3d at 481 quoting Mulder v. State, 116 Nev. 1, 17, 992 P.2d 845, 854-55 (2000); Rose v. State, 123 Nev. 24, 163 P.3d 408, 419 (2007).

This Court has also recognized the sum total of counsel's failures may justify post-conviction relief if the result of the trial is rendered unreliable. Buffalo v. State, 111 Nev. 1139, 1149, 901 P.2d 647 (1995) (Holding that, "Defense counsel's failure to investigate the facts, failure to call witnesses,

failure to make an opening statement, failure to consider the legal defenses of self-defense and defense of others, failure to spend any time in legal research and general failure to present a cognizable defense rather clearly resulted in rendering the trial result 'unreliable'").

Here, the cumulative effect of alleged errors including improperly admitted wiretaps, the unimpeached testimony of Rontae Zone, and multiple instances of prosecutorial misconduct, and all the other errors alleged herein, had a combined effect that rendered the trial fundamentally unfair. These errors must be considered in conjunction with the very large error found on direct appeal regarding admission of Carroll's statement. As a result, relief should be granted in the form of a new trial.

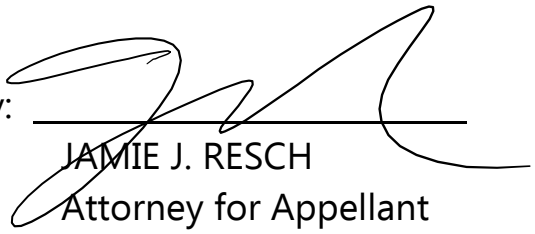
This Court should therefore grant relief on a cumulative error claim and remand the matter for a new trial.

VIII. CONCLUSION

For all these reasons, Carroll requests this Honorable Court grant relief on his claims above and order a new trial.

DATED this 30th day of May 2019.

RESCH LAW, PLLC d/b/a Conviction Solutions



By: _____
JAMIE J. RESCH
Attorney for Appellant

RULE 28.2 ATTORNEY CERTIFICATE

1. 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, including 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 upon is 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.

2. I further 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 2016 in 14-point font of the Ebrima style.

3. I further certify 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 proportionally spaced, has a typeface of 14 points or more, and contains 10,319 words.

DATED this 30th day of May 2019.

RESCH LAW, PLLC d/b/a Conviction Solutions

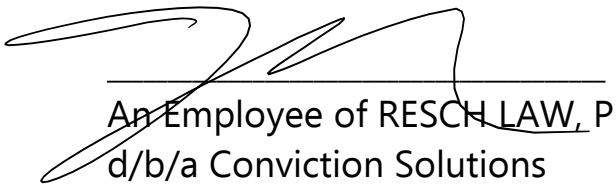
By: _____
JAMIE J. RESCH
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on May 30, 2019. Electronic service of the foregoing document shall be made in accordance with the master service list as follows:

STEVEN WOLFSON
Carroll County District Attorney
Counsel for Respondent

AARON FORD
Nevada Attorney General



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