IN THE SUPREME COURT OF THE STATE OF NEVADA

DEANGELO CARROLL,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

Supreme Court Case No: 78081

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WRIT

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Attorney for Petitioner

FILED

DEC 29 2 19 PM '11

CLERK OF THE COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

* * * *

THE STATE OF NEVADA,

Plaintiff,

vs.

DEANGELO RESHAWN CARROLL,

Defendant.

Case No: C212667
Dept No: XXI

Date of Hearing: April 24, 2012
Time of Hearing: 9:30 a.m.

(Not a Death Penalty Case)

PETITION FOR WRIT OF HABEAS CORPUS

(POST-CONVICTION)

1. Name of institution and county in which you are presently imprisoned or where and how you are presently restrained of your liberty: **Ely State Prison, P.O. Box 607, Carson City, Nevada, 89702.**

2. Name and location of court which entered the judgment of conviction under attack: **Eighth Judicial District, Las Vegas, Nevada, Clark County**

3. Date of judgment of conviction: **September 8, 2010**

4. Case Number: **C212667**

5. (a) Length of sentence: **Count 1 - minimum of 36 months and a maximum of 120 months in Nevada Department of Corrections; and Count 2 - Life with a possibility of parole after a Minimum of Twenty (20) Years, plus an Equal and Consecutive term of Life with a possibility of parole after Twenty (20) Years.**

. . . .

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Petition for Writ of Habeas Corpus
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(b) If sentence is death, state any date upon which execution is scheduled:

N/A

6. Are you presently serving a sentence for a conviction other than the conviction under attack in this motion? Yes___ No __X__

If "yes", list crime, case number and sentence being served at this time: _____

_____

7. Nature of offense involved in conviction being challenged: **Count I: Conspiracy to Commit Murder (Felony), in violation of NRS 200.010, 200.030, 193.165; and Count II: First Degree Murder with Use of a Deadly Weapon (Category A Felony), in violation of NRS 200.010, 200.030, 193.165.**

8. What was your plea? (check one)

(a) Not guilty __X___ (c) Guilty but mentally ill _____

(b) Guilty _____ (d) Nolo contendere _____

9. If you entered a plea of guilty or guilty but mentally ill to one count of an indictment or information, and a plea of not guilty to another count of an indictment or information, or if a plea of guilty or guilty but mentally ill was negotiated, give details: **N/A**

10. If you were found guilty after a plea of not guilty, was the finding made by: (check one)

(a) Jury __**X**___

(b) Judge without a jury _____

11. Did you testify at the trial? Yes _____ No __X___

12. Did you appeal from the judgment of conviction?

Yes _____ No __X____

13. If you did appeal, answer the following:

(a) Name of court:

(b) Case number or citation:

(c) Result:

(d) Date of result:

. . . .

14. If you did not appeal, explain briefly why you did not:

Appointed counsel failed to file a timely appeal.

15. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications or motions with respect to this judgment in any court, state or federal? Yes_____ No __X____

16. Are you filing this petition more than 1 year following the filing of the judgment of conviction or the filing of a decision on direct appeal? If so, state briefly the reasons for the delay. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 ½ by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.)

No.

17. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack? Yes _____ No ___X____

If yes, state what court and the case number:

18. Give the name of each attorney who represented you in the proceeding resulting in your conviction and on direct appeal:

Trial:
Daniel M. Bunin, Esq.
BUNIN & BUNIN, LTD.
500 North Rainbow Blvd., Suite 300
Las Vegas, Nevada 89106
Nevada Bar No. 5239

Thomas A. Ericsson, Esq.
ELLSWORTH, MOODY & BENNION CHTD.
7881 W. Charleston Blvd., #210
Las Vegas, Nevada 89117
Nevada Bar No. 4982

19. Do you have any future sentences to serve after you complete the sentence imposed by the judgment under attack:

Yes _____ No __X____

. . . .

. . . .

20. State concisely every ground on which you claim that you are being held unlawfully. Summarize briefly the facts supporting each ground. If necessary you may attach pages stating additional grounds and facts supporting same.

Ground One : Prior Counsel's Performance Fell below an Objective Standard of Reasonableness as guaranteed to him under the 1st, 6th, and 14th Amendments to the United States Constitution.

Ground Two: Prior Trial Counsel Failed to File a Timely Direct Appeal.

Ground Three: Trial Counsel Failed to File a Pre-Trial Motion to Have the Bench Conferences Recorded.

Ground Four: Petitioner's Prior Counsel and His Investigator Failed to Conduct Pre-trial Discovery or Pretrial Investigation and Failed to File Any Pretrial Motions.

Ground Five: Petitioner's Prior Counsel Failed to Provide a Meaningful Defense at the Time of Trial.

Ground Six: Mr. Carroll's Conviction is Invalid and Violates the Due Process of Law under the 5th, 9th, and 14th Amendments to the United States Constitution because the State Could Not Prove Every Element of the Charged Offenses Against Him Beyond a Reasonable Doubt.

Ground Seven: Mr. Carroll's Conviction and Sentence Are Invalid due to Trial Court's Failure to Record Critical Proceedings, under the under the 1st, 5th, 6th, 8th and 9th Amendments to the United States Constitution.

Petitioner's prior counsel made errors so serious that he was not functioning as the counsel guaranteed to him by the Sixth Amendment. The deficient performance of Petitioner's prior counsel prejudiced his defense and deprived him of a fair trial. The errors made by Petitioner's prior counsel during the preparation for trial, during the actual trial itself, and on Petitioner's appeal, were so serious and prejudicial, that his Sixth Amendment right to assistance of counsel was violated and he was denied the fundamental right to a fair trial.

In the instant matter, based on the above-referenced grounds and violations of Petitioner's constitutional rights, he is entitled to post-conviction relief.

Supporting Facts: **See Attached "Memorandum of Points and Authorities"**

WHEREFORE, Petitioner prays that the court grant petitioner relief to which he may be entitled in this proceeding.

DATED this 29th day of December, 2011.

STEVEN B. WOLFSON, CHTD.

By: _____
PATRICK E. McDONALD, ESQ.
Nevada Bar No. 3526
601 South Seventh Street
Las Vegas, Nevada 89101
Attorney for Defendant

VERIFICATION

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

PATRICK E. MCDONALD, ESQ., being first duly sworn, deposes and says:

That he is the attorney for Defendant, DEANGELO CARROLL, the defendant in the above-entitled action; that she has read the foregoing Petition, knows the contents thereof, that the same are true and correct to the best of his knowledge, information and belief, except for those matters therein stated on information and belief, and as for those matters believes them to be true; that the Defendant authorized him to commence this Petition for Writ of Habeas Corpus (Post Conviction).

_____
PATRICK E. McDONALD, ESQ.

SUBSCRIBED AND SWORN to before me this 29th day of December, 2011.

_____
NOTARY PUBLIC in and for said County and State

KRISTA BARGER
Notary Public
State of Nevada
Appt No. 04-90633-1
My Appt. Expires Jul 28, 2012

. . . .

. . . .

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MEMORANDUM OF POINTS AND AUTHORITIES

I.

STATEMENT OF THE CASE

On May 19, 2005, at 2344 hours, according to police reports, Ismael Madrid called the Las Vegas Metropolitan Police Department to report a man lying in the roadway at North Shore Road east at Lake Mead Blvd. Patrol officers and medical personnel were dispatched to North Shore Road and East Lake Mead. Officer J. Lafreniere arrived and observed the man, who was later identified as Timothy Hadland, lying in the road with a gunshot wound to the head. Medical units arrived and confirmed Hadland had no signs of life and was dead. Officer Lafreniere informed LVMPD dispatch that there was a vehicle directly east of Timothy Hadland's body. The vehicle was a silver colored, Kia Sportage, with Nevada registration 803SHR. The Kia Sportage's front driver and passenger windows were down, the engine was running and the lights were on.

Detective G. King arrived and assumed control of the crime scene. The roadway at North Shore Road and East Lake Mead Blvd. was closed and the crime scene was secured. Detective King contacted Lt. Monahan at the Homicide section, who contacted Detective J. Vaccaro, Detective M. McGrath, Detective M. Wildemann, and Detective T. Kyger who responded to North Shore Road and E. Lake Mead Blvd.

Upon arrival Detectives Kyger and Wildemann were assigned to interview witnesses and Detective McGrath conducted the crime scene investigation. Detective McGrath observed Timothy Hadland lying face up on the asphalt approximately 30 feet east of a silver Kia Sportage with Nevada registration 803SHR. The vehicle was registered to Mark and Paijit Karlson at 8032 Glowing Water Street in Las Vegas, Nevada.

McGrath allegedly observed several advertisement flyers for the "Palomino Club" in the roadway approximately four feet from Timothy Hadland's body. Detective McGrath observed a Nextel cellular telephone on the driver's side floorboard. Detective McGrath recovered the cellular telephone from the vehicle and observed several "missed phone calls." A wallet with identification in the name of Timothy Hadland was located in the rear compartment of the vehicle. The vehicle was

. . . .

sealed with LVMPD evidence stickers and towed to the LVMPD Crime Lab. No cartridge casings or bullets were located at the crime scene.

On May 20, 2005, at approximately 0900 hours, Detective McGrath and Detective Vaccaro attended the autopsy of Timothy Hadland at the Clark County Coroner's Office. The autopsy was performed by Dr. Telgenhoff, who determined the cause of death was multiple gunshot wounds to the head and the manner of death homicide. Several bullet fragments were recovered from the body of Timothy Hadland, which were impounded by CSA L. Morton.

Homicide detectives allegedly used the cellular telephone to identify family members and associates of Timothy Hadland. Detectives accessed the call history of the victim's cell phone, and learned that the last person to allegedly have called Timothy Hadland's phone was "Deangelo" at 11:27 p.m. "Deangelo" was identified by name in tile pre-programmed cell phone directory. A records check of Deangelo's telephone number showed the subscriber to the telephone was Hidalgo's Auto Body Works. The billing is addressed to Anabel Espindola at 6770 Bermuda Road, Las Vegas, Nevada. A records check in scope showed Annabel Espindola has a work card as general manager for the Palomino Club in North Las Vegas.

Det. T. Aiken discovered a person by the name of Deangelo Carroll has a work card for employment at the Palomino Club. The records check of the murder victim, Timothy Hadland, showed he also worked at the Palomino Club.

Detectives contacted Allena Hadland, the daughter of Timothy Hadland. Allena told detectives Timothy was camping at Lake Mead with his girlfriend, Paijit Karlson. Detective Wildemann and Detective Kyger met with Paijit Karlson at the Lake Mead camp site. Paijit informed detectives that Timothy Hadland had allegedly left the campground at approximately 11:30 p.m. to meet Deangelo and two other persons. She said Timothy Hadland was driving her silver Kia Sportage when he left the campsite. She further stated "Deangelo" worked at the Palomino Club.

Detective Wildemann and Detective Kyger contacted Luis Hidalgo, the owner of the Palomino Club. Luis Hidalgo allegedly informed detectives Deangelo Carroll was an employee of the Palomino Club, but he did not have an address or telephone number for Carroll. Hidalgo told detectives to return after 7:00 p.m. and meet with Ariel, who managed the business.

Detective McGrath and Detective Wildemann returned to the Palomino Club at 7:30 p.m. and spoke with Michelle Schwanderlik, also known as "Ariel." She informed McGrath she was a Floor Manager at "the Club" (the Palomino Club) and worked for "Mr. H." She told detectives "Mr. H" was Luis Hidalgo the owner of the Palomino Club. She informed detectives Deangelo Carroll was working at "the Club" on May 19, 2005 and May 20, 2005. Ariel did not see Carroll between the hours of 11:00 p.m. on the 19th of May and 12:20.a.m. on the 20th.

During the interview with Ariel, Petitioner, Deangelo Carroll arrived and agreed to speak with homicide detectives. Detectives McGrath and Wildemann drove Petitioner to the Homicide office where he was interviewed. Petitioner was allegedly read his Miranda Rights, he stated he understood and agreed to give a tape recorded statement.

The following information was allegedly provided by Petitioner. Petitioner worked at the Palomino Club for Mr. Hidalgo. He performed various jobs for Mr. Hidalgo including handing out pamphlets and flyers to cab drivers and other potential customers. Petitioner allegedly told detectives that Rontae Zone and Jayson Taoipu assisted him in passing out flyers for the Palomino Club.

On May 19, 2005, Petitioner was contacted by Luis Hidalgo Jr., also known as "Little Lou." Luis Hidalgo, III is the son of "Mr. H" (Mr. Hidalgo) and manager of the club. "Little Lou" told Petitioner to come to "the Club" and bring baseball bats and garbage bags. Petitioner went to the Palomino Club and spoke with "Mr. H" (Mr. Hidalgo). "Mr. H" (Mr. Hidalgo) said he wanted to hire someone to "take care of" Timothy Hadland. Hadland was a previous employee of the Palomino. Club and was "bad mouthing" the Club. Hadland had a lot of contact with cab drivers and was spreading rumors about "Mr. H"and "the Club." The Palomino Club was losing thousands of dollars in business. "Mr. H," told Petitioner to find someone to kill Timothy Hadland. "Mr. H" said he would pay anyone who killed Hadland.

Petitioner and Jayson allegedly drove to 1676 "E" Street in a white Chevy Astro Van. The van was a vehicle which was provided by "Mr. H." Petitioner met with "KC," who lives at 1676 "E" Street with his wife and kids. Petitioner told "KC" that "Mr. H" was looking to hire someone to kill someone. "KC" told Petitioner he would do it. Petitioner and Taoipu allegedly drove back to Petitioner's apartment and picked up Rontae Zone. On May 19, 2005, at approximately 11 :00 p.m.,

Petitioner, Zone, and Taoipu returned to 1676 "E" Street and met with "KC." "KC" entered the white Astro Van. "KC" was wearing a black "hoodie" sweatshirt, black pants, and black gloves. Petitioner used his cellular telephone to contact Timothy Hadland. Hadland allegedly told Petitioner he was camping at Lake Mead with his girlfriend.

Petitioner told Hadland he would drive out to the Lake and meet at the stop sign. The stop sign would be at the end of the road after going through the E. Lake Mead toll booth. While driving to the meet Hadland, Petitioner, Taoipu, Zone and "KC" all talked about killing Hadland. The plan was that Petitioner would contact Hadland, and "KC" and Taoipu would shoot Hadland. During the drive out to meet Hadland, Petitioner allegedly received a telephone call from Annabel Espindola. Espindola told Petitioner that "Mr. H" said, "if Hadland was alone, then go through with the plan." However, if Hadland was not alone, he should not go through with the plan.

Petitioner turned east on North Shore Road and observed Hadland driving west on North Shore Road. Petitioner allegedly spoke with Hadland on his cell phone and both vehicles stopped on the side of the road. Hadland, who was driving the silver Kia Sportage, drove past Petitioner's vehicle and made a U-turn in the road. Hadland drove east, parked in front of Petitioner's white Astro Van and got out of his Kia Sportage. Hadland walked up to meet Petitioner, who was seated in the driver's seat of the van. "KC" exited the van from the rear passenger's side door, walked to the front of the van and shot Hadland two times. Hadland fell to the ground and "KC" jumped back into the van, and yelled for Petitioner to "drive." Petitioner allegedly turned around and they drove south, ultimately driving into Henderson, before driving to the Palomino Club. "KC" and Petitioner entered the Palomino Club, and Petitioner went into Mr. Luis Hidalgo, Sr.'s office and met with Anabel Espindola and Mr. Hidalgo, Sr. Petitioner told "Mr. H," "it's done and "KC" wants his six thousand dollars," "Mr. H" told Espindola to get the money. Espindola went into the back room and came back with the money, which she allegedly handed to Petitioner. Petitioner then handed the money to "KC," who exited the club and left in a taxi cab. "Mr. H" and Anabel Espindola then devised a story that Petitioner should use if the police contacted him.

Sometime between 3:30 pm and 7:30 pm, Petitioner allegedly received a telephone call from "Mr. H" who told him that the police had been to the Palomino Club looking for him. He also

revealed to Petitioner that the detectives were driving a White Expedition. Detectives McGrath and Wildemann asked Petitioner for more details on "KC." Petitioner allegedly explained that "KC" was a member of a criminal gang from California called "Black Pee Stone."

Through further investigation, detectives identified "KC" as possibly being Kenneth Counts. Petitioner was allegedly shown a photograph of Kenneth Counts, and he positively identified Counts as the person he knows as "KC" and the person who shot Hadland.

On May 21, 2005, Detectives McGrath and Wildemann spoke with Rontae Zone. Zone admitted to driving in the Chevy van along with Petitioner, "KC" and Taoipu. Zone also confirmed that the plan was devised amongst the four to kill Hadland, and that he knew that "KC" was going to shoot Hadland. He confirmed they drove to 1676 "E" Street, where Counts (KC) was picked up prior to the shooting. Zone recognized the firearm as a .357 revolver, which would explain the absence of shell casings at the murder scene, since revolvers do not eject spent casings like semi-automatic handguns do. Zone told detectives that he personally witnessed "KC" shoot Hadland twice in the head. It should be noted that these statements were made to the police against his own penal interests, and tend to demonstrate his credibility.

On May 21, 2005, Detectives Wildemann and Vaccaro spoke with Jayson Taoipu. Taoipu also confirmed that he was allegedly in the Chevy van along with Petitioner, "KC" and Zone, and that they drove to Lake Mead specifically for the purpose of killing Hadland. He observed Counts (KC) shoot Hadland with a large revolver two times. He confirmed Counts (KC) was picked up at 1676 "E" Street prior to the shooting. Taoipu knew Counts (KC) was going to shoot Hadland, because the four of them had discussed how the shooting was to take place as they drove towards the Lake.

On May 23, 2005, at approximately 1030 hours, Detective Marty Wildemahn allegedly received a telephone call from Petitioner. Petitioner said he spoke with Luis Hidalgo III, who told him to pick up the Palomino shuttle bus and drive it to Simone's. Petitioner was instructed to telephone Mark Quad, the parts manager of Simone's, at 860-6382 when he was ready to pick the shuttle up. On May 23, 2005, at approximately 1400 hours, Detective M. McGrath and FBI Special Agent Brett Shields met with Petitioner. The purpose of the meeting was to conduct a tape recorded

conversation with Luis Hidalgo, "Mr. H," Anabel Espindola, and Luis Hidalgo III. Petitioner allegedly telephoned Quad and told him he was ready to drive the shuttle bus to Simone's. Petitioner was outfitted with a recording device and surveilled directly to Simone's Auto Plaza at 6770 Bermuda Road. He entered the business through the garage. After approximately thirty minutes, Petitioner exited the business and met with Special Agent Shields and Detective McGrath. Petitioner allegedly handed Special Agent Shields a 750 milliliter bottle of "Tangueray" gin and fourteen hundred dollars of US currency. Special Agent Shields and Detective McGrath debriefed Petitioner.

The following information was allegedly provided by Petitioner. Petitioner drove directly to Simone's and entered the business. He met with Anabel Espindola, who told him to go to room # 6, Luis Hidalgo III's office. Petitioner walked to Luis' office, knocked on the door and entered after being greeted by Luis Hidalgo III. Hidalgo told Petitioner the telephones and room were bugged. Hidalgo disconnected the telephone and spoke in a whisper. Espindola entered the office and asked Petitioner to remove his clothing. Espindola and Luis wanted to know if Petitioner was wearing a "wire." Petitioner removed all of his clothing except his underwear. After confirming Petitioner was not wearing a wire, Espindola and Hidalgo spoke in a whisper throughout the conversation with Petitioner.

Luis had a large sword and was swinging it from side to side during this meeting. Luis told Petitioner that if he told the police what happened, he would cut him up. Luis told Petitioner that if he should have to go to jail, Luis would purchase "bonds" and give his wife a place to sleep. Luis said the bonds would increase and his wife could live in the condo, while he was in jail. Espindola told Petitioner that "Mr. H" was already talking to a lawyer and that they would pay for his lawyer, should he get arrested. Petitioner allegedly told them that "KC," and the "two others," referring to Jayson Taoipu and Rontae Zone, wanted more money. Espindola gave Petitioner one thousand dollars to keep the "two others" quite and told Petitioner the four hundred was for him.

Luis Hidalgo III handed Petitioner a bottle of "Tangueray" gin. Espindola and Hidalgo discussed killing Zone and Taoipu. They told Petitioner to put rat poison in the gin and give it to them Espindola said, "that won't kill them." Hidalgo told Petitioner to put rat poison in a "blunt," referring a marijuana cigarette. Hidalgo and Espindola believed that if they smoked the cigarette,

they would die. Espindola told Petitioner to get to the Palomino Club and resign. Espindola told him that he would still get money each week from them. Petitioner could come back to work at "The Club" in a few months once the police stopped nosing around. Petitioner exited the business and met with Special Agent Shields and Detective McGrath.

Special Agent Shields allegedly removed the recording device from Petitioner. McGrath and Shields listened to the conversation. It was confirmed that the entire conversation was conducted in a whisper and all of the information provided by Petitioner in this debriefing was determined to be accurate.

Petitioner, Deangelo Carroll, was arrested, along with Co-Defendants, Luis Hidalgo, Jr., Kenneth Jay Counts, Luis Alonso Hidalgo III, Anabel Espindola and Jayson Taoipu and was charged with Conspiracy to Commit Murder (Felony - N.R.S. 200.010, 200.030, 193.165); Murder with Use of a Deadly Weapon (Felony N.R.S. 200.010, 200.030, 193.165).

A Preliminary Hearing was held in Boulder City Justice Court on June 13, 2005, at which time Petitioner waived his right to the hearing and agreed for the charges to be bound over to District Court to answer the above charges.

A Jury Trial was held from May 17, 2010 to May 25, 2010, after which Petitioner was adjudged guilty of the above crimes. On August 12, 2010, Petitioner was sentenced for the crimes of Count 1 - Conspiracy to Commit Murder and Count 2 - Murder with Use of a Deadly Weapon. The Court sentenced Petitioner as follows: COUNT 1 - Minimum of Thirty-six (36) Months in the Nevada Department of Corrections with a Maximum term of One-hundred Twenty (120) Months; Count 2 - Life with the Possibility of Parole after serving a Minimum of Twenty (20) Years plus an Equal and Consecutive term of Life with the Possibility of Parole after serving Twenty (20) Years, Count 2 to Run Consecutively to Count 1, with 1,904 days credit for time served.

After Petitioner was convicted, he requested counsel to file an appeal on his behalf. Defense counsel never filed a notice of appeal. On December 16, 2010, a hearing was held on Petitioner's Request for Appointment of Appellate Counsel re: violation of Defendant's Lozado Rights. The Court removed Mr. Bunin as counsel and ordered that the undersigned take the appointment as counsel for Petitioner.

The above Judgment and Conviction was modified to correct Petitioner's original Sentence on March 15, 2011, pursuant to a Motion to Amend Judgment of Conviction. The Amended Judgment reflected that COUNT 1 Modified to One Hundred Twenty (120) Maximum with a Minimum Parole Eligibility of Thirty-six (36) Months.

II.

ARGUMENT

This Court has jurisdiction to hear this Petition under its inherent authority as set forth in Warden, Nevada State Prison v. Peters, 83 Nev. 298, 429 P.2d 549 (1967), wherein the Court stated, "The trial court has inherent jurisdiction to vacate or modify its orders and judgments." (Emphasis added).

A. PRIOR COUNSEL'S PERFORMANCE FELL BELOW AN OBJECTIVE STANDARD OF REASONABLENESS AS GUARANTEED TO HIM UNDER THE 1ST, 6TH, AND 14TH AMENDMENTS TO THE UNITED STATES CONSTITUTION

Allegations of ineffective assistance of counsel, be it trial counsel or appellate counsel, are properly raised in first time post conviction petitions for a writ of habeas corpus. Thomas v. State, 120 Nev. 37, 83 P.3d 818, 822 (2004). Issues, aside from claims of ineffective assistance of counsel, that are raised for the first time in a post conviction proceeding are allowed only if the petitioner can show good cause for failing to raise such claims in a prior proceeding, and that the petitioner will be prejudiced if not allowed to raise such claims. State v. Williams, 93 P.3d 1258, 1260 (Nev. 2004); NRS 34.810. To show good cause, the petitioner must demonstrate that something external to the defense prevented the new claims from being asserted. Id. Prejudice may be shown when the failure to bring the claims causes errors of constitutional dimensions. Id. at 1260-1261.

The errors made by Petitioner's prior counsel during the preparation for trial, during the actual trial itself, and on Petitioner's appeal, were so serious and prejudicial, that his Sixth Amendment right to assistance of counsel was violated and he was denied the fundamental right to a fair trial.

The United States Supreme Court in Strickland v. Washington,466 U.S. 668, 104 S.Ct. 2052 (1984) established the standards for a court to determine when counsel assistance is so ineffective

that it violates the Sixth Amendment of the U.S. Constitution. Strickland laid out a two-pronged test to determine the merits of a defendant's claim of ineffective assistance of counsel:

A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the Defendant must show that counsel's performance was deficient. This requires a showing that counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment. Second the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction resulted from a breakdown in the adversary process that renders the result unreliable.

In a long line of cases that includes Powell v. Alabama, 287 U.S. 45, 53 S. Ct. 55, 77 L.Ed. 158 (1932), Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938), and Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), this Court has recognized that the Sixth Amendment right to Counsel exists, and is needed, in order to protect the fundamental right to a fair trial.

For that reason, the Court has recognized that "the right to counsel is the right to the effective assistance of counsel." McMann v. Richardson, 397 U.S. 759, 771, n. 14, 90 S.Ct. 1441, 1449, n. 14, 25 L.Ed.2d 763 (1970). Counsel, however, can also deprive a defendant of the right to effective assistance, simply by failing to render "adequate legal assistance," Cuyler v. Sullivan, 446 U.S., at 344, 100 S. Ct., at 1716. Id., at 345-350, 100 S. Ct., at 1716-1719.

The Sixth Amendment of the United States Constitution guarantees that an accused person shall "have the Assistance of Counsel for his defense." The United States Supreme Court has clearly defined when the assistance of counsel becomes ineffective and an accused person is denied this right. In Strickland v. Washington, 466 U.S. 668 (1984), the Court established a two-prong test for determining ineffective assistance of counsel at trial. See also Porter v. McCollum, 130 S. Ct. 447, 175 L. Ed. 2d 398 (2009). To prevail under Strickland, a defendant must demonstrate both that his "counsel's performance was deficient" and "that the deficient performance prejudiced the defense." Id. at 687. To satisfy the second prong of Strickland, a defendant must show that his trial counsel's

performance prejudiced his defense such that he suffered actual prejudice and that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694. This test has also been adopted in Nevada. See Hurd v. State, 114 Nev. 182, 953 P.2d 270 (1998). Further, trial counsel's actions must be based on reasonable strategic decisions. Strickland, 466 U.S. at 691.

In the instant matter, Petitioner's prior counsel failed to properly prepare a meaningful defense at the trial. Petitioner's prior counsel made errors so serious that he was not functioning as the counsel guaranteed to him by the Sixth Amendment. The deficient performance of Petitioner's prior counsel prejudiced his defense and deprived him of a fair trial.

Mr. Carroll's trial counsel, Daniel M. Bunin and Thomas A. Ericsson, made a series of errors that so undermined the proper functioning of the adversarial process that the outcome of Mr. Carroll's proceedings cannot be relied upon as have produced a just result.

B. PRIOR TRIAL COUNSEL FAILED TO FILE A TIMELY DIRECT APPEAL

According to N.R.A.P 3(c)(2) "[t]rial counsel shall file the notice of appeal, rough draft transcript request form, and fast track statement and consult with appellate counsel for the case regarding the appellate issues that are raised." This "fast track" rule establishes that trial counsel must file an appeal for cases that do not involve a life sentence like the instant case. When counsel fails to file a timely "fast track" appeal, the proper mechanism for relief is to file an appeal pursuant to Lozada. Lozada v. State, 110 Nev. 349, 354, 871 P.2d 944, 947 (Nev. 1994) (citations omitted).

In the instant case, the Petitioner explicitly advised his prior counsel that he wished to appeal the decision. No appeal was filed on the Petitioner's behalf.

The Nevada Supreme Court has held that Strickland prejudice "may be presumed on claims based on the ineffective assistance of counsel when a petitioner has been deprived of the right to appeal". Id. at 356. The United States Supreme Court has also presumed prejudice when an attorney fails to file an appeal. Rodriguez v. U.S., 395 U.S. 327 (1969). To remedy this situation, the Court has determined that "the appropriate remedy would be to allow [a defendant] an opportunity to raise in a petition for a writ of habeas corpus any issues which he could have raised on direct appeal."

Lozada, 110 Nev. at 359. Accordingly, Petitioner incorporates the claims that should have been raised in his direct appeal in this post-conviction writ for habeas corpus.

C. TRIAL COUNSEL FAILED TO FILE A PRE-TRIAL MOTION TO HAVE THE BENCH CONFERENCES RECORDED

Numerous portions of these proceedings were closed to the public in the form of off-the-record bench conferences. The off-the-record bench conferences and conversations were never transcribed. Petitioner is informed and believes, and therefore alleges, that during these unrecorded conferences, the trial judge took material, substantial actions, including ruling on evidentiary matters and establishing courtroom procedure and scheduling. Such proceedings are integral parts of a criminal case.

Without a full and complete record of the bench conferences, Petitioner is foreclosed from challenging the rulings that cam out of these conferences on Constitutional grounds. Prior counsel's failure to file a Pretrial Motion to have bench conferences recorded caused substantial harm to Petitioner.

D. PETITIONER'S PRIOR COUNSEL AND HIS INVESTIGATOR FAILED TO CONDUCT PRE-TRIAL DISCOVERY OR PRETRIAL INVESTIGATION AND FAILED TO FILE ANY PRETRIAL MOTIONS

In the instant matter, prior counsel's failure to conduct any pretrial discovery as part of his duty to provide Petitioner with a fair defense, and the error made by counsel were so serious and prejudicial, that Petitioner's Sixth Amendment right to assistance of counsel was violated and he was denied the fundamental right to a fair trial.

Further, neither the investigator nor Petitioner's prior counsel conducted crucial investigations and interviews in preparation for his defense. More specifically, Joseph Walls, a crucial witness was never interviewed. Mr. Walls would have provided testimony that Petitioner did not pay for breakfast at IHOP, and thus would have swayed the jury as to the credibility of the testimony provided by Rontae Zone.

In State v. Love, 109 Nev. 1136, 865 P.2d 322 (1993), Rickey Edward Love ("Love") was found guilty of first degree murder with the use of a deadly weapon. The State's case was based solely upon circumstantial evidence, and the key witness was a jailhouse informant. Defense counsel

decided not to call any alibi witnesses on Love's behalf, and several of those potential witnesses later testified that they were not even contacted before the trial. After an evidentiary hearing, the district court held that respondent had received ineffective assistance of counsel, based upon a totality of the circumstances, emphasizing that counsels' failure to interview personally the potential alibi witnesses and counsels' subsequent decision not to have those witnesses testify at Love's trial prejudiced Love and constituted ineffective assistance of counsel. The District Court stated:

The totality of facts here: a) failure by relatively inexperienced counsel, b) to call potential witnesses, c) coupled with the failure to personally interview the witnesses so as to make an intelligent tactical decision, d) making an alleged "tactical decision" on a misrepresentation (apparently) of other witnesses' testimony, making an alleged "tactical decision" to not put on evidence when that decision seems illogical (one could have had the favorable testimony of State witnesses showing lack of motive and alibi witnesses) leads this Court to conclude in a case with little direct evidence of guilt that not only were counsel ineffective but that the errors of counsel were so serious as to "deprive the Defendant of a fair trial, a trial whose result is reliable" and therefore to prejudice him.

The State appealed the district court's determination. However, the Supreme Court held that the district court did not err in granting respondent's petition for post conviction relief.

To state a claim of ineffective assistance of counsel that is sufficient to invalidate a judgment of conviction, a Petitioner must demonstrate that trial counsel's performance fell below an objective standard of reasonableness, and that counsel's deficiencies were so severe that they rendered the jury's verdict unreliable. See Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984), cert. denied, 471 U.S. 1004 (1985). Sanborn v. State,107 Nev. 399; 812 P.2d 1279; 1991.

In Sanborn, Appellant was convicted by a jury of first degree murder with use of a deadly weapon and sentenced to two consecutive terms of life without the possibility of parole. Thereafter Sanborn filed a petition for post conviction relief and a motion for a new trial. Both were denied. In these consolidated appeals, Sanborn challenges his conviction and the denial of his post trial

. . . .

petitions for relief. A review of the record by the Nevada Supreme Court revealed prejudicial error requiring a new trial. The decision by the District Court was reversed and remanded.

Focusing on counsel's performance as a whole, and with due regard for the strong presumption of effective assistance accorded counsel by this court and Strickland, we hold that Sanborn's representation indeed fell below an objective standard of reasonableness. Trial counsel did not adequately perform pretrial investigation, failed to pursue evidence supportive of a claim of self defense, and failed to explore allegations of the victim's propensity towards violence. Thus, he "was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Strickland, 466 U.S. at 687. Moreover, the court concluded that counsel's failures were so severe that they rendered the jury's verdict unreliable. Had the jury been properly presented with the evidence apparently available to support Sanborn's claim of self defense, the outcome may very well have been different. Thus, counsel's efforts both before and during trial were sufficiently deficient "to deprive the defendant of a fair trial." Id. Accordingly, as discussed in greater detail below, Sanborn has stated a claim of ineffective assistance of counsel that warrants reversal of his conviction.

First, Sanborn contends that because of counsel's inadequate pretrial investigation and failure to present trial evidence regarding Papili's violent tendencies, Sanborn's own testimony was strongly devalued by the absence of corroborative evidence that would have been presented by diligent and effective counsel. In support of his position, Sanborn insists that, before trial, he had provided his attorney with a list of potential witnesses who were prepared to testify concerning Papili's aggressive behavior, his custom of carrying a gun, and his willingness to threaten its use. Sanborn further avers that these witnesses were in the courtroom, prepared to testify; and that he was led to believe that his theory of self defense would be pursued by his counsel.

The Supreme Court rejected the state's claim that counsel's failure to present a defense was sound trial strategy. There was sufficient evidence to present a self defense claim. In pursuing such a claim, evidence of the victim's general character would have been admissible. NRS 48.045(1)(b). Moreover, evidence of acts of violence by the victim, known by Sanborn prior to the homicide, would have been admissible to show Sanborn's state of mind on the issue of self defense. Burgeon v. State, 102 Nev. 43, 714 P.2d 576 (1986).

Second, Sanborn claimed that evidence and testimony were available which would have demonstrably refuted the state's contention that his wounds were self inflicted. He also contends that if such proofs had been presented, the remaining inference would have been that his wounds were inflicted by Papili, thus supporting his claim that he acted in self defense. He persuasively argues that counsel's failure to develop this evidence resulted in the jury hearing only the state's erroneous conclusion that a press contact firing leaves no residue. Particularly because the undeveloped evidence belatedly produced from an actual test firing would have directly contradicted the state's untested opinion evidence, Sanborn was denied the effective assistance of counsel on this critical aspect of his defense. Sanborn's defense was clearly prejudiced by his counsel's failure to develop and present evidence which would have corroborated Sanborn's testimony and discredited the state's expert witness. Because of counsel's lack of due diligence, Sanborn was deprived of the opportunity to present testimony material to his defense, and the Supreme Court was therefore unable to place confidence in the reliability of the verdict. See Strickland v. Washington, 466 U.S. 668, 687 (1984). In the instant matter, Petitioner's prior counsel failed to conduct any pretrial discovery, failed to interview crucial witnesses which would have corroborated Petitioner's story and refuted the state's evidence, and as such, he was denied the effective assistance of counsel on this critical aspect of his defense, and was clearly prejudiced by his counsel's failure to develop and present evidence.

E. PETITIONER'S PRIOR COUNSEL FAILED TO PROVIDE A MEANINGFUL DEFENSE AT THE TIME OF TRIAL

Petitioner contends that his prior counsel failed to provide a meaningful defense at trial. The performance of Petitioner's prior counsel did not meet the standards in the role of defense counsel, nor was his assistance within the range of competence demanded of attorneys in criminal cases.

1. Prior Counsel Failed to Subpoena Lay Witnesses for Impeachment, Character Witnesses and Relevant Witnesses to Provide Petitioner with a Meaningful Defense

In Warner v. State, 102 Nev. 635, 729 P.2d 1359; 1986 Appellant inmate challenged an order of the Fifth Judicial District Court, Mineral County (Nevada), which denied his petition for post-conviction relief. The inmate was convicted of sexual assault and lewdness with a child under 14 years of age. He was concurrently sentenced on the sexual assault charge to life imprisonment

without the possibility of parole until he served at least 10 years and on the lewdness charge to 10 years.

The inmate argued that he was denied the effective assistance of counsel before and during trial. At trial, the State presented the testimony of only two witnesses, the alleged victim, the inmate's 11-year-old stepdaughter, and his wife. The only witnesses with any personal knowledge of the events in question were the stepdaughter and possibly her seven-year-old brother. There was no physical evidence of the alleged incidents, and the stepdaughter was never given a medical examination. Trial counsel failed to investigate the background of the complaining witnesses, never attempted to interview the stepdaughter, did not request that she be given a physical examination, and did not request that she undergo a psychological examination although she admitted at trial that she lied on occasion. Trial counsel did not present any witnesses in support of the inmate's character, contact three possible witnesses, or present any evidence or witnesses on his behalf in support of a more lenient sentence. The court reversed and concluded that trial counsel's failure to investigate and lack of preparation for trial left the inmate without a defense at trial.

The court reversed the inmate's judgment of conviction and remanded the case for a new trial. On appeal, appellant contends that he was denied the effective assistance of counsel before and during trial, and therefore was denied his right to a fair trial. The court agreed, and accordingly reversed and remanded the case for a new trial.

In Warner, at appellant's trial, the state presented the testimony of only two witnesses, the alleged victim (appellant's eleven-year-old stepdaughter, Dee) and appellant's wife. The only witnesses with any personal knowledge of the events in question were Dee, appellant, and possibly Dee's seven-year-old brother, Arthur. There was no physical evidence of the alleged incidents; Dee was never given a medical examination.

Appellant primarily contends that his trial counsel did not conduct an adequate investigation before trial. At the postconviction hearing below, trial counsel, a deputy public defender, admitted that he did not consult with any other attorneys in the public defender's office about the case, even though the potential sentence was as serious as that for a murder case. Although he was encouraged to make use of the public defender's full-time investigator, he declined to do so. Trial counsel

admitted that it would have been important to investigate the background of the complaining witnesses, Dee and her mother, but he failed to do so. He never attempted to interview Dee. He did not request that Dee be given a physical examination. Although Dee admitted at trial that she lies on occasion, trial counsel did not request the district court to order Dee to undergo a psychological examination to determine whether Dee was being truthful.

Trial counsel did not present any witnesses in support of appellant's character, although appellant's credibility and the credibility of the alleged victim were central issues in the case. Appellant provided trial counsel with a list of three possible witnesses, but counsel did not contact them. Nor did trial counsel interview appellant's employer and co-workers. Under the facts of this case, the court concluded that trial counsel failed to conduct an adequate investigation before trial.

Appellant next contended that trial counsel failed to prepare for the presentation of two defense witnesses, appellant's son, Arthur, and deputy sheriff Teri Everett. The court agreed with this contention. It is not clear why trial counsel presented these witnesses. Arthur's testimony was of little value, and the deputy sheriff's testimony was actually damaging to the defense.

Finally, the court noted that at appellant's sentencing, trial counsel failed to present any evidence or witnesses on his behalf in support of a more lenient sentence.

The Warner court held: "In the present case, since there was no physical evidence of the alleged lewdness and sexual assault, and apparently no witnesses to any of the alleged incidents, the outcome depended primarily upon whether the jury believed Dee or appellant. Trial counsel neglected this crucial area of concern. Counsel's failure to investigate and lack of preparation for trial left appellant without a defense at trial. Under the circumstances of the present case, we conclude that trial counsel's performance was so deficient as to render the trial result unreliable. Accordingly, we conclude that appellant was denied his Sixth Amendment right to the effective assistance of counsel. See Strickland v. Washington, 466 U.S. 668 (1984). Appellant's judgment of conviction is reversed, and this matter is remanded to the district court for further proceedings.

A defendant's right to assistance of counsel is satisfied only when such counsel is effective. Powell v. Alabama, 287 U.S. 45, 71 (1932). Effective counsel does not mean errorless counsel, but rather counsel whose assistance is "[w]ithin the range of competence demanded of attorneys in

criminal cases." McMann v. Richardson, 397 U.S. 759, 771 (1970). While Nevada law presumes that counsel has fully discharged his duties, and will recognize the ineffectiveness of counsel only when the proceedings have been reduced to a farce or pretense, Warden v. Lischko, 90 Nev. 221, 223, 523 P.2d 6, 7 (1974), it is still recognized that a primary requirement is that counsel ". . . conduct careful factual and legal investigations and inquiries with a view to developing matters of defense in order that he may make informed decisions on his client's behalf both at the pleading stage . . . and at trial. . . ." In re Saunders, 472 P.2d 921, 926 (Cal. 1970). If counsel's failure to undertake these careful investigations and inquiries results in omitting a crucial defense from the case, the defendant has not had that assistance to which he is entitled. In re Saunders, supra; People v. Stanworth, 522 P.2d 1058 (Cal. 1974). Further, in People v. White, 514 P.2d 69, 71-72 (Colo. 1973), the court noted that the American Bar Association Standards for Criminal Justice set forth minimum standards by which the assistance of counsel may be judged. The following sections of The Defense Function Standard are of particular relevancy here: 1.1(b) (Role of the Defense Counsel), 3.2 (Interviewing of Client), and 4.1 (Duty to Investigate).

The performance of Petitioner's prior counsel did not meet the standards in the role of defense counsel, nor was his assistance within the range of competence demanded of attorneys in criminal cases. Not only did he fail to conduct careful factual and legal investigations and inquiries with a view to develop matters of defense in order that he may make informed decisions on his client's behalf, but he failed in his performance at trial as well.

Prior counsel failed to Subpoena lay witnesses or character witnesses who could have provided favorable testimony and evidence for Petitioner's defense. Further, prior counsel failed to subpoena relevant witnesses who would have testified that Petitioner did not buy breakfast at the IHOP as was alleged by Rontae Zone. This witness would have provided testimony and evidence that would have shown that Rontae Zone gave false and perjured testimony at the trial in this matter. Prior counsel, in essence, did not present Petitioner's side of the story, nor did he object or challenge any of the state's arguments to preserve the record for appeal.

In Buffalo v. State, 111 Nev. 1139; 901 P.2d 647 (1995), Defendant was convicted of battery with the use of a deadly weapon, mayhem, and sexual assault and sentenced to life imprisonment.

In his petition for post-conviction relief, defendant claimed that his defense attorney spent less than two hours in preparing for the trial and did not investigate the facts. The trial court denied the petition. The supreme court reversed the convictions and remanded for a new trial, holding that defendant's counsel, without performing any legal research, took an incorrect position that sexual gratification was an element of the crime of sexual assault and ignored evidence that defendant had acted in self-defense to protect himself and his female companion from an attack. Defense counsel's tactical decision not to permit defendant to testify at trial was not supported by any reason. 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 to others, and failure to spend any time in legal research denied defendant effective assistance of counsel as guaranteed by the Sixth Amendment of the United States Constitution and article 1, section 8 of the Nevada Constitution, and resulted in rendering the trial result "unreliable." The Supreme Court reversed Buffalo's three judgments of conviction.

Buffalo relied on the case of Warner v. State, 102 Nev. 635, 729 P.2d 1359 (1986). Warner was also a case in which the defendant was left without any defense. The defendant in Warner, like Buffalo, was charged with sexual assault and faced a sentence of life imprisonment. Also, as in the present case, only the actual participants in the charged assault had knowledge as to the events, and counsel failed to investigate the facts. Based upon the mentioned factors, the Supreme Court held in Warner that lack of preparation for trial left appellant without a defense at trial. As in Brown, the supreme court concluded that trial counsel's performance was so deficient as to render the trial result unreliable. Accordingly, appellant was denied his Sixth Amendment right to the effective assistance of counsel.

The lack of preparation and failure to call relevant witnesses in essence, left Petitioner without a defense at trial.

2. Prior Counsel Failed to Obtain Records, Interview and Subpoena Witnesses and Investigate Exculpatory Evidence

Prior counsel failed to subpoena witnesses who would have testified as to the events which occurred on or about May 19, 2005. By prior counsel's failure to procure evidence and favorable

witnesses, Petitioner suffered substantial prejudice. Further, prior counsel failed to even ascertain addresses, or to subpoena witnesses provided by Petitioner who would have testified as to the credibility of Rontae Zone. By prior counsel's failure to procure evidence and favorable witnesses, or to investigate exculpatory evidence, Petitioner suffered substantial prejudice.

In Buffalo v. State, 111 Nev. 1139, 901 P.2d 647 (1995). Defendant appealed a judgment of the Third Judicial District Court, Churchill County (Nevada), which denied defendant's petition for post-conviction relief after he was convicted of battery with the use of a deadly weapon, mayhem, and sexual assault. Defendant claimed that his attorney did not competently defend him and that he was, in effect, provided with no defense to the criminal charges.

Defendant was convicted of battery with the use of a deadly weapon, mayhem, and sexual assault and sentenced to life imprisonment. In his petition for post-conviction relief, defendant claimed that his defense attorney spent less than two hours in preparing for the trial and did not investigate the facts. The trial court denied the petition. The court reversed the convictions and remanded for a new trial, holding that defendant's counsel, without performing any legal research, took an incorrect position that sexual gratification was an element of the crime of sexual assault and ignored evidence that defendant had acted in self-defense to protect himself and his female companion from an attack. Defense counsel's tactical decision not to permit defendant to testify at trial was not supported by any reason. 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 to others, and failure to spend any time in legal research denied defendant effective assistance of counsel under U.S. Const. amend. VI and resulted in rendering the trial result "unreliable."

The court reversed defendant's convictions for battery with the use of a deadly weapon, mayhem, and sexual assault and remanded the case for a new trial because he was denied the effective assistance of counsel guaranteed him by the Sixth Amendment and the Nevada Constitution.

As in Buffalo, prior counsel's failure to investigate exculpatory evidence caused him substantial prejudice and rendered his trial result "unreliable."

3. Prior Counsel Failed to Maintain Contact with Petitioner

During the course of prior counsel's representation of Petitioner, there was little to no contact between them. Letters sent by Petitioner were most often unanswered. Petitioner did not have any opportunity to discuss his defense, or how he wished his defense to be handled with his prior counsel. In the four and one-half years Petitioner was incarcerated, he only received visits from his prior counsel on three (3) or possibly four (4) occasions, would seem less than sufficient for an individual who is facing charges which carry a sentence of life imprisonment, or even death.

Had it not been for the ineffective assistance and error made by prior counsel at the time of trial, the outcome could have been different.

4. Petitioner's Prior Counsel Failed to Object to Known Perjured, False or Inaccurate Testimony

Petitioner further contends that he received ineffective assistance of counsel during trial as counsel did not object to false, inaccurate and perjured testimony. A defense attorney is expected to provide a meaningful defense at trial. The performance of Petitioner's prior counsel did not meet the standards in the role of defense counsel, nor was his assistance within the range of competence demanded of attorneys in criminal cases. Prior counsel, who should have objected to such testimony preserve the record, remained silent.

The testimony of Rontae Zone was filled with false accusations and obvious inconsistencies, which Petitioner's prior counsel failed to object to in order to preserve the record for appeal.

Clearly, the performance of Petitioner's prior counsel did not meet the standards in the role of defense counsel, nor was his assistance within the range of competence demanded of attorneys in criminal cases.

5. Prior Counsel Failed to Provide Petitioner with Discovery

Post-conviction counsel failed to provide Petitioner with any of the discovery he received from the State in this matter. As a result, Petitioner had no idea of the evidence which was being used against him, nor did he have any way of assisting his prior counsel in his defense by not being provided with the same.

This falls below the professional standard for attorneys. See N.R.P.C. 1.1, 1.3, and 1.4.

The acts and omissions by trial counsel were either not the result of tactic or strategy, and were instead the result of lack of knowledge, lack of investigation or misunderstanding about the law and/or the facts of the case. To the extent that trial counsel's actions were the result of tactic and strategy, those decisions were unreasonable. Each instance of ineffective assistance of counsel set forth above warrants a reversal of the judgment of conviction.

The cumulative impact of trial counsels' numerous errors rendered Petitioner's trial fundamentally unfair. Trial counsel failed to render reasonably effective assistance of counsel and Petitioner was prejudiced by his counsel's actions. In cases where "there are a number of errors at trial," "a balkanized, issue-by-issue harmless error review" is inappropriate. U.S. v. Frederick, 78 F.3d 1370 at 1381 (9th Cir. 1996), (quoting U.S v. Wallace, 848 F.2d 1464, 1476 (9th Cir. 1988)). The cumulative effect of the errors must be considered. There is a reasonable probability that, absent trial counsel's deficiencies, the outcome of the trial might well have been different. See Strickland v. Washington, 466 U.S. 668 (1984).

6. **Prior Counsel Failed to File Any Pretrial Motions**

Prior counsel failed to file any meaningful pretrial motions on behalf of Petitioner or to even join the motions filed by co-defendants' counsel.

On September 11, 2007, Petitioner's Co-Defendants filed a Motion for Discovery to the State. The State alleged that they had provided audio and video tapes and had more that they would provide discovery by the end of the week. The Court ordered the motion granted, however, Petitioner's counsel failed to join in that motion.

On February 14, 2008, Petitioner's Co-Defendants filed Motions as follows: Motion for Disclosure, Motion for Audibility Hearing and Transcript Approval, Motion to Suppress Custodial Statements, Motion for Disclosure of the Existence/Motion to Compel Production of Handwritten Notes, however, Petitioner's counsel failed to join in these motions.

On March 30,2010, Petitioner, himself, filed a Motion to Dismiss Counsel due to his ineffective assistance. At that time, Mr. Bunin advised Petitioner wished to withdraw his motion. After much hesitation, Petitioner allowed counsel to remain and his motion was withdrawn.

On May 11, 2010, Petitioner's counsel filed an opposition to Motion for Discovery Re:

Expert Testimony and Motion in Limine Re: Expert Testimony. Prior counsel, Mr. Erickson argued the opposition to State's Motion for Discovery; under the rules, doctors have to turn over their reports to other doctors and not lay personnel. The court ordered that reports can be released to a licensed physician. Mr. Erickson informed the Court that he would provide them to the State by May 12, 2010. As to Petitioner's Motion to Suppress, the Court informed parties that a ruling would be made following an in-camera review of briefs, transcript and the DVD. After reviewing the transcript, DVD and Petitioner's interview, the court found no need for an Evidentiary Hearing on the Motion to Suppress. Prior counsel should have filed a motion to reconsider and requested that an Evidentiary Hearing be held on Petitioner's Motion to Suppress.

On December 16, 2010, Mr. Bunin was removed as counsel and the undersigned was appointed in his place. Petitioner's prior counsel failed to file any meaningful Pretrial motions or to join in the co-defendants motions, thereby causing substantial prejudice to Petitioner.

F. MR. CARROLL'S CONVICTION IS INVALID AND VIOLATES THE DUE PROCESS OF LAW UNDER THE 5TH, 9TH, AND 14TH AMENDMENTS TO THE UNITED STATES CONSTITUTION BECAUSE THE STATE COULD NOT PROVE EVERY ELEMENT OF THE CHARGED OFFENSES AGAINST HIM BEYOND A REASONABLE DOUBT.

A criminal charge be proven beyond a reasonable doubt in order to satisfy the rigors of the Constitution. In re Winship, 397 U.S. 358, 362 (1970). Such proof is required as a safeguard of due process. Id. In this case, the State could not prove every element of the charges beyond a reasonable doubt and Mr. Carroll's conviction and sentence must be vacated because they violate the protections of due process under the law.

A. Conspiracy to Commit Murder

The statute which governs the elements to substantiate a charge of Conspiracy are outlined in NRS 199.480, which states in relevant part that a conspiracy has been committed when:

> 3. Whenever two or more persons conspire:
>
> (a) To commit any crime other than those set forth in subsections 1 and 2, and no punishment is otherwise prescribed by law;
>
> (b) Falsely and maliciously to procure another to be arrested or proceeded against for a crime;
>
> (c) Falsely to institute or maintain any action or proceeding;

(d) To cheat or defraud another out of any property by unlawful or fraudulent means;

(e) To prevent another from exercising any lawful trade or calling, or from doing any other lawful act, by force, threats or intimidation, or by interfering or threatening to interfere with any tools, implements or property belonging to or used by another, or with the use or employment thereof;

(f) To commit any act injurious to the public health, public morals, trade or commerce, or for the perversion or corruption of public justice or the due administration of the law; or

(g) To accomplish any criminal or unlawful purpose, or to accomplish a purpose, not in itself criminal or unlawful, by criminal or unlawful means,

The slight evidence standard required to prove the admissibility of the extra-judicial statements of co-conspirators was expressed in McDowell v. State, 103 Nev. 527, 746 P.2d 149 (1987) and Fish v. State, 92 Nev. 272, 274-75, 549 P.2d 339, 340 (1976).

The "slight evidence" standard is not a proper instruction on the requisite burden of proof for the actual criminal charge of conspiracy. In re Winship, 397 U.S. 358, 362 (1970) ("proof of a criminal charge beyond a reasonable doubt is constitutionally required"). The jury was instructed that the State only had to show proof beyond a reasonable doubt that Petitioner was guilty of conspiracy to commit murder. There was a specific instruction given to the jury that they were required to find that Petitioner acted with specific intent to commit murder. There was an additional instruction given that the jury was required to find that Petitioner acted with specific intent to commit battery. As Petitioner committed neither of these offenses, the elements required to prove that Petitioner had specific intent were not met.

In order to prove a specific intent crime "the State must show that the defendant possessed the requisite statutory intent". Bolden, 121 Nev. at 908, 124 P.3d at 200-01. Additionally, the Bolden court abandoned the natural and probably consequences doctrine as being inconsistent with Nevada statues requiring proof of a specific intent. Id.

NRS 200.030 Degrees of murder; penalties.

1. Murder of the first degree is murder which is:

(a) Perpetrated by means of poison, lying in wait

or torture, or by any other kind of willful, deliberate and premeditated killing;

(b) Committed in the perpetration or attempted perpetration of sexual assault, kidnapping, arson, robbery, burglary, invasion of the home, sexual abuse of a child, sexual molestation of a child under the age of 14 years, child abuse or abuse of an older person or vulnerable person pursuant to NRS 200.5099;

(c) Committed to avoid or prevent the lawful arrest of any person by a peace officer or to effect the escape of any person from legal custody;

(d) Committed on the property of a public or private school, at an activity sponsored by a public or private school or on a school bus while the bus was engaged in its official duties by a person who intended to create a great risk of death or substantial bodily harm to more than one person by means of a weapon, device or course of action that would normally be hazardous to the lives of more than one person; or

(e) Committed in the perpetration or attempted perpetration of an act of terrorism.

2. Murder of the second degree is all other kinds of murder.

3. The jury before whom any person indicted for murder is tried shall, if they find the person guilty thereof, designate by their verdict whether the person is guilty of murder of the first or second degree.

4. A person convicted of murder of the first degree is guilty of a category A felony and shall be punished:

(a) By death, only if one or more aggravating circumstances are found and any mitigating circumstance or circumstances which are found do not outweigh the aggravating circumstance or circumstances, unless a court has made a finding pursuant to NRS 174.098 that the defendant is a person with mental retardation and has stricken the notice of intent to seek the death penalty; or

(b) By imprisonment in the state prison:

(1) For life without the possibility of parole;

(2) For life with the possibility of parole, with eligibility for parole beginning when a minimum of 20 years has been served; or

(3) For a definite term of 50 years, with eligibility for parole beginning when a minimum of 20 years has been served.

Ê A determination of whether aggravating circumstances exist is not necessary to fix the penalty at imprisonment for life with or without the possibility of parole.

5. A person convicted of murder of the second degree is guilty of a category A felony and shall be punished by imprisonment in the state prison:

(a) For life with the possibility of parole, with eligibility for parole beginning when a minimum of 10 years has been served; or

(b) For a definite term of 25 years, with eligibility for parole beginning when a minimum of 10 years has been served.

6. As used in this section:

(a) "Act of terrorism" has the meaning ascribed to it in NRS 202.4415;

(b) "Child abuse" means physical injury of a nonaccidental nature to a child under the age of 18 years;

(c) "School bus" has the meaning ascribed to it in NRS 483.160;

(d) "Sexual abuse of a child" means any of the acts described in NRS 432B.100; and

(e) "Sexual molestation" means any willful and lewd or lascivious act, other than acts constituting the crime of sexual assault, upon or with the body, or any part or member thereof, of a child under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions or sexual desires of the perpetrator or of the child.

Here, the facts are not nearly egregious as facts that have previously been found to support a conviction for murder. The alleged victim met Petitioner willingly in order to obtain marijuana. Moreover, Petitioner never physically touched the victim, nor did he point, handle, or use any weapon on the victim. Petitioner never committed any act which caused the death of the victim. The elements in establishing the "corpus delecti" of murder have not been met.

In establishing the corpus delicti of murder two elements must be established: (1) The fact of death; and (2) the criminal agency of another responsible for that death, Tertrou v. Sheriff, Clark County, 89 Nev. 166, 509 P.2d 970, 1973 Nev. LEXIS 459 (1973).; there must be sufficient evidence to establish the corpus delicti independent of confessions and possibly admissions. Hooker v. Sheriff, Clark County, 89 Nev. 89, 506 P.2d 1262, 1973 Nev. LEXIS 429 (1973).

. . . .

. . . .

In Hooker, Defendant sought review of an order of the Eighth Judicial District Court, Clark County (Nevada), which denied his pre-trial petition for a writ of habeas corpus. Defendant had been charged with the murder of his wife, a violation of Nev. Rev. Stat. § 200.010.

Ordered to stand trial for the murder (NRS 200.010) of his wife, appellant sought pre-trial habeas relief in the district court. Appealing from an order denying that relief, his sole contention is that the evidence introduced before the magistrate was insufficient to establish probable cause. The supreme court agreed. The court reversed the order and ordered that defendant be freed from custody unless within a reasonable time the State elected to bring a new charge.

The death of a human being may be brought about by any one of four means: (1) natural causes; (2) accident; (3) suicide; or (4) criminal means.

In establishing the corpus delicti of murder two elements must be established (1) the fact of death; and (2) the criminal agency of another responsible for that death. Beasley v. Lamb, 79 Nev. 78, 80, 378 P.2d 524 (1963).

If a criminal complaint is filed charging a person with the death of another and a preliminary hearing is held, (1) probable cause to believe that a crime has been committed; and (2) probable cause to believe that the person charged committed it must be proved by sufficient legal evidence. NRS 171.206.

In Hooker, the fact of death was conceded by both parties. However, the appellant contends that evidence is totally lacking to establish that the death was caused by the criminal agency of another. The State's own witness testified that the gunshot wound could have been self inflicted. The only connection, established by the prosecutor, between the accused and the alleged homicide is the appellant's spontaneous statement. Even if we were to assume such statement to be incriminating, standing alone, it does not meet the test. There must be "sufficient evidence to establish the corpus delicti independent of confessions and possible admissions, . . ." Azbill v. State, 84 Nev. 345, 351, 440 P.2d 1014, 1018 (1968); Hicks v. Sheriff, 86 Nev. 67, 464 P.2d 462 (1970).

Once the corpus delicti is determined to have been proved by sufficient evidence, confessions and admissions may be considered in establishing probable cause to show that it was the particular defendant charged who was the criminal agency causing the death. In re Kelly, 28 Nev. 491, 83 P.

223 (1905). In Hooker, the court found that there was no evidence independent of the appellant's spontaneous declaration to indicate that the criminal agency of another was responsible for the death. Proof of the corpus delicti could have been established by direct evidence, People v. Watters, 259 P. 442 (Cal. 1927); partially by direct and partially by circumstantial evidence or totally by circumstantial evidence. State v. Ah Chuey, 14 Nev. 79 (1879); State v. Loveless, 17 Nev. 424, 30 P. 1080 (1883); People v. Clark, 233 P. 980 (Cal.App. 1925); Hartman v. State, 206 S.W.2d 380 (Tenn. 1947); People v. Scott, 1 Cal.Rptr. 600 (Cal.App. 1959). None of these avenues were utilized by the state. The evidence before the magistrate was insufficient to establish probable cause of the corpus delicti of murder.

Accordingly the court reversed the order of the lower court, and ordered that appellant be freed from custody unless within a reasonable time the state elects to bring a new charge.

In the case at bar, the State did not present evident sufficient to support the elements to establish the corpus delicti of murder, (1) the fact of death; and (2) the criminal agency of another responsible for that death. Petitioner should not be required to stand trial for the count of Murder as the State failed to provide evidence supporting all of the elements of the alleged offense.

NRS 200.010 "Murder" defined. Murder is the unlawful killing of a human being:

1. With malice aforethought, either express or implied;

2. Caused by a controlled substance which was sold, given, traded or otherwise made available to a person in violation of chapter 453 of NRS; or

3. Caused by a violation of NRS 453.3325.

Ê The unlawful killing may be effected by any of the various means by which death may be occasioned.

There was no evidence presented beyond a reasonable doubt that Petitioner, with malice aforethought, either express or implied, committed the unlawful killing of a human being.

To constitute crime there must be unity of act and intent. In every crime or public offense there must exist a union, or joint operation of act and intention, or criminal negligence. N.R.S. 193.190. Intention is manifested by the circumstances connected with the perpetration of the offense, and the sound mind and discretion of the person accused. N.R.S. 193.200.

Therefore, probable cause must have been shown that Petitioner possessed intent to commit the crimes he has been charged with. There was insufficient evidence presented which supported any criminal intent by Petitioner.

Intent is an essential element to support a charge. If no such intent is shown, then the charge cannot stand as no showing of intent was made. Consequently, at the trial in this matter, the jury should have been instructed that Petitioner had intent to commit criminal acts.

As to the charge of Conspiracy to Commit Murder, the State failed to present any evidence supporting this elements of this offense and therefore failed to show probable cause that Petitioner possessed intent to commit conspiracy to commit murder.

B. Murder with Use of a Deadly Weapon

N.R.S. 193.165 Additional penalty: Use of deadly weapon or tear gas in commission of crime; restriction on probation.

> 1. Except as otherwise provided in NRS 193.169, any person who uses a firearm or other deadly weapon or a weapon containing or capable of emitting tear gas, whether or not its possession is permitted by NRS 202.375, in the commission of a crime shall, in addition to the term of imprisonment prescribed by statute for the crime, be punished by imprisonment in the state prison for a minimum term of not less than 1 year and a maximum term of not more than 20 years. In determining the length of the additional penalty imposed, the court shall consider the following information:
>
> (a) The facts and circumstances of the crime;
>
> (b) The criminal history of the person;
>
> (c) The impact of the crime on any victim;
>
> (d) Any mitigating factors presented by the person; and
>
> (e) Any other relevant information.
>
> Ê The court shall state on the record that it has considered the information described in paragraphs (a) to (e), inclusive, in determining the length of the additional penalty imposed.
>
> 2. The sentence prescribed by this section:
>
> (a) Must not exceed the sentence imposed for the crime; and
>
> (b) Runs consecutively with the sentence prescribed by statute for the crime.
>
> 3. This section does not create any separate offense but provides an additional

penalty for the primary offense, whose imposition is contingent upon the finding of the prescribed fact.

4. The provisions of subsections 1, 2 and 3 do not apply where the use of a firearm, other deadly weapon or tear gas is a necessary element of such crime.

5. The court shall not grant probation to or suspend the sentence of any person who is convicted of using a firearm, other deadly weapon or tear gas in the commission of any of the following crimes:

(a) Murder;

(b) Kidnapping in the first degree;

(c) Sexual assault; or

(d) Robbery.

6. As used in this section, "deadly weapon" means:

(a) Any instrument which, if used in the ordinary manner contemplated by its design and construction, will or is likely to cause substantial bodily harm or death;

(b) Any weapon, device, instrument, material or substance which, under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing substantial bodily harm or death; or

(c) A dangerous or deadly weapon specifically described in NRS 202.255, 202.265, 202.290, 202.320 or 202.350.

It is the burden of the State to prove beyond a reasonable doubt that Petitioner committed the offenses he has been charged with and moreover that he had specific intent to commit any of these crimes. Detective Wildemann testified at trial that there was never any testing done of Petitioner's hands which would indicate that he ever fired a gun, or that he committed the offense of Murder With a Deadly Weapon. **(TT - Day 4 at Page 15)**. A portion of Detective Wildemann's testimony follows:

BY MR. DiGIACOMO:

Q. And, Detective, that's the end of the videotape portion, correct?

A. Yes.

Q. There was some discussion early on when Detective Vaccaro enters the room about a box.

A. Yes.

Q. Do you know what was going on there?

A. Those are gunshot residue kits that we can do. They're actually like a field test that we're able to do on a person if we think they might have fired a handgun recently. And when I say recently, I mean within the last three hours or so.

Q. Okay. So -- well, first let me ask you: Did you ever do a gunshot residue test on Mr. Carroll?

A. No.

Q. Why not?

A. The time had elapsed. It was far later and he had washed his hands.

Q. So then why'd you bring the box in?

A. I think that was something Jimmy wanted to do. It was also a tactic that we use sometimes just to see if somebody might change their story about if they shot a gun or not. Sometimes they look at that, they know the test is coming, they better tell the truth.

As the test was never conducted on Petitioner, clearly the elements to support the charge of Murder with a Deadly Weapon have not been met. The elements of this charge were not proven beyond a reasonable doubt. The District Court erred in adjudging Petitioner guilty after the jury verdict and the conviction should be overturned.

G. MR. CARROLL'S CONVICTION AND SENTENCE ARE INVALID DUE TO TRIAL COURT'S FAILURE TO RECORD CRITICAL PROCEEDINGS, UNDER THE UNDER THE 1ST, 5TH, 6TH, 8TH AND 9TH AMENDMENTS TO THE UNITED STATES CONSTITUTION

The Trial Court Failed to Record Critical Portions of the Proceedings. Numerous portions of these proceedings were closed to the public in the form of off-the-record bench conferences. The off-the-record bench conferences and conversations were never transcribed. The trial judge additionally failed to take any other measures to effectuate the public interest in observation and comment on these judicial proceedings. Petitioner is informed and believes, and therefore alleges, that during these unrecorded conferences, the trial judge took material, substantial actions, including ruling on evidentiary matters and establishing courtroom procedure and scheduling. Such proceedings are integral parts of a criminal case.

The failure of the trial judge to secure an adequate record of these proceedings violated

Petitioner's constitutional rights, as well as those of the public to free and open proceedings. The trial judge's failure also violated Petitioner's rights under international law, which guaranteed every person a fair and public hearing by a competent, independent, and impartial tribunal.

The failure of trial counsel to request the transcription of these proceedings violated Petitioner's constitutional rights which guarantee him the right to effective assistance of counsel in securing a fair and open trial as well as a record of the proceedings against him.

These constitutional violations were prejudicial per se; no showing of specific prejudice is required in order to obtain relief for a violation of the public trial guarantee. The trial judge's failure to secure a complete record substantially and adversely affected Petitioner's constitutional rights. Prosecutors' cannot show, beyond a reasonable doubt, that the courtroom closures did not affect Petitioner's conviction and sentence.

III.

CONCLUSION

For the reasons stated above, this Court should issue a writ of habeas corpus and vacate Petitioner's sentence, and grant him a new trial.

DATED this 14th day of December, 2011.

STEVEN B. WOLFSON, CHTD.

By: _____
PATRICK E. McDONALD, ESQ.
Nevada Bar No. 3526
601 South Seventh Street
Las Vegas, Nevada 89101
Attorney for Petitioner

ROC
PATRICK E. McDONALD, ESQ.
Nevada Bar No. 3526
STEVEN B. WOLFSON, CHTD.
601 South Seventh Street
Las Vegas, Nevada 89101
Tel: (702) 385-7227
Fax: (702) 385-5351
Attorney for Defendant

DISTRICT COURT

CLARK COUNTY, NEVADA

* * * *

THE STATE OF NEVADA,

Plaintiff,

vs.

DEANGELO RESHAWN CARROLL,

Defendant.

Case No: C212667
Dept No: XXI

Date of Hearing: April 24, 2012
Time of Hearing: 9:30 a.m.

(Not a Death Penalty Case)

RECEIPT OF COPY

RECEIPT OF COPY of **PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)** is hereby acknowledged this 29 day of Dec, 2011.

DISTRICT ATTORNEY

ORIGINAL

FILED

AUG 3 1 45 PM '12

CLERK OF THE COURT

NEO
PATRICK E. McDONALD
MCDONALD ADRAS LLC
Nevada State Bar No. 3526
601 South Seventh Street
Las Vegas, Nevada 89101
(702) 385-7227

DISTRICT COURT
CLARK COUNTY, NEVADA

* * *

THE STATE OF NEVADA,

Plaintiff,

vs.

DEANGELO CARROLL,

Defendant.

Case No.: C212667
Dept. No.: XXI

NOTICE OF ENTRY OF ORDER

YOU WILL PLEASE TAKE NOTICE that on the 30th day of July, 2012, an Finding of Fact, Conclusions of Law and Order was entered in the above-entitled action, a copy of which is attached hereto.

DATED this 2nd day of August, 2012.

MCDONALD ADRAS LLC

PATRICK E. McDONALD, ESQ.
Nevada Bar No. 3526
601 South Seventh Street
Las Vegas, Nevada 89101

RECEIVED
AUG 02 2012
CLERK OF THE COURT

05C212667 – 4
NEOJ
Notice of Entry of Order
1920961

CERTIFICATE OF MAILING

I hereby certify that I am an employee of MCDONALD ADRAS LLC., and that on the 2nd day of August, 2012, I dully deposited for mailing, first class mail, postage prepaid thereon, in the United States Mail at Las Vegas, Nevada, a true and correct copy of the foregoing Notice of Entry of Order, addressed to the following at their last known address:

Clark County District Attorney
200 Lewis Avenue
Las Vegas, NV 89155

An Employee of
MCDONALD ADRAS LLC.

ORD
McDonald Adras, LLC
PATRICK E. MCDONALD, ESQ.
Nevada Bar No. 3526
601 South Seventh Street
Las Vegas, Nevada 89101
Telephone: (702) 385-7227
Facsimile: (702) 385-5351
Attorney for Petitioner

DISTRICT COURT

CLARK COUNTY, STATE OF NEVADA

THE STATE OF NEVADA, Plaintiff, vs. DEANGELO CARROLL Defendant.	CASE NO: C212667 DEPT NO. XXI DATE OF HEARING: TIME OF HEARING:

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This matter having come on for hearing, at the above date and time, that Defendant, DEANGELO CARROLL, was not present but was represented by PATRICK E. MCDONALD, ESQ., and the Plaintiff represented by the CLARK COUNTY DISTRICT ATTORNEY, the Court issues the following Findings of Fact, Conclusions of Law, and Order.

I. **FINDINGS OF FACT.**

Based upon the pleadings on file in this matter, the Court issues the following findings of fact:

1. That there was a failure to file an appeal on the Defendant's behalf by counsel.

2. That the Defendant's right for appeal was denied and therefore should be granted at this level.

///

II. **ORDER.**

Based upon the foregoing findings of fact:

IT IS HEREBY ORDERED that Defendant Deangelo Carroll will be given relief at this level regarding an appeal.

IT IS FURTHER ORDERED that Mr. McDonald is to prepare the Order and submit it to the court.

IT IS FURTHER ORDERED that the Court Clerk's Office is to file an appeal on behalf of the defendant.

IT IS FURTHER ORDERED that the Court will contact Drew Christensen's office to notify him of Attorney McDonald's desire to remain counsel at the appellate level verses there being new counsel appointed by the Court.

IT IS FURTHER ORDERED that the State is to prepare an order to transport in the event of the Defendant's presence being required for any future court dates following the status check.

DATED and DONE this 27th day of July, 2012.

VALERIE ADAIR

THE HONORABLE ADAIR VALERIE

Respectfully Submitted
MCDONALD ADRAS, LLC

PATRICK E. McDONALD, ESQ.
Nevada Bar No. 3526
601 S. Seventh Street
Las Vegas, Nevada 89101
(702) 385-7227
Attorney for Defendant

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CLERK OF THE COURT

NOASC

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

vs.

DEANGELO R. CARROLL,

Defendant,

Case No: 05C212667-4
Dept No: XXI

NOTICE OF APPEAL

Notice is hereby given that the Defendant above named, hereby appeals to the Supreme Court of Nevada from the Judgment of Conviction (Jury Trial) entered in this action on September 8, 2010.

STEVEN D. GRIERSON, CLERK OF THE COURT

Heather Ungermann, Deputy Clerk

CERTIFICATE OF MAILING

I hereby certify that on this 1 day of May 2013, I placed a copy of this Notice of Appeal in:

The bin(s) located in the Regional Justice Center of:
Clark County District Attorney's Office
Attorney General's Office – Appellate Division

☑ The United States mail addressed as follows:

Deangelo R. Carroll # 1056956
P.O. Box 650
Indian Springs, NV 89070

Mario D. Valencia
1055 Whitney Ranch Dr., Suite 220
Henderson, NV 89014

☑ This appeal was electronically submitted to the Clerk of the Supreme Court.

Heather Ungermann, Deputy Clerk

IN THE SUPREME COURT OF THE STATE OF NEVADA

DEANGELO R. CARROLL,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

Supreme Court No. 63115
District Court Case No. C212667

FILED
AUG 2 3 2013
CLERK OF COURT

CLERK'S CERTIFICATE

STATE OF NEVADA, ss.

I, Tracie Lindeman, the duly appointed and qualified Clerk of the Supreme Court of the State of Nevada, do hereby certify that the following is a full, true and correct copy of the Judgment in this matter.

JUDGMENT

The court being fully advised in the premises and the law, it is now ordered, adjudged and decreed, as follows:

"ORDER this matter REMANDED to the district court for proceedings consistent with this order."

Judgment, as quoted above, entered this 23rd day of July, 2013.

IN WITNESS WHEREOF, I have subscribed my name and affixed the seal of the Supreme Court at my Office in Carson City, Nevada this August 19, 2013.

Tracie Lindeman, Supreme Court Clerk

By: Sally Williams
Deputy Clerk

05C212667-4
CCJR
NV Supreme Court Clerks Certificate/Judgn
2859843

IN THE SUPREME COURT OF THE STATE OF NEVADA

DEANGELO R. CARROLL,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 63115

FILED

JUL 23 2013

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY R. Malsie
DEPUTY CLERK

ORDER OF REMAND

This is an appeal under NRAP 4(c) from a judgment of conviction, pursuant to a jury verdict, of conspiracy to commit murder and murder with the use of a deadly weapon. Eighth Judicial District Court, Clark County; Valerie Adair, Judge.

The State has filed a motion to dismiss the appeal on the ground that the district court erroneously granted appellant Deangelo R. Carroll's claim that he was deprived of his right to a direct appeal. Specifically, the State contends that Carroll raised his appeal-deprivation claim in an untimely post-conviction petition and therefore it is procedurally barred under NRS 34.726(1). *See* NRAP 4(c)(1). Carroll opposes the motion to dismiss the appeal.

The judgment of conviction in this case was filed on September 8, 2010. Carroll filed his post-conviction petition on December 29, 2011. Because Carroll filed his post-conviction petition more than one year after the entry of the judgment of conviction, the petition is procedurally barred.

NRS 34.726(1). To raise a claim in an untimely or successive post-conviction petition, petitioner bears the burden of pleading and proving specific facts that establish good cause and prejudice to overcome the procedural bars. *State v. Bennett*, 119 Nev. 589, 599, 81 P.3d 1, 8 (2003).

While we agree with the district court that Carroll was deprived of his right to a direct appeal due to ineffective assistance of counsel, as counsel's testimony at the evidentiary hearing supports that finding, an appeal-deprivation claim is nevertheless subject to the procedural default rules. *See State v. Eighth Judicial Dist. Court (Riker)*, 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005) ("Application of the statutory procedural default rules to post-conviction habeas petitions is mandatory."); *Hathaway v. State*, 119 Nev. 248, 252, 253-54, 71 P.3d 503, 506, 507 (2003). And, although a claim of ineffective assistance of counsel may excuse a procedural default, that claim must not itself be procedurally defaulted. *Hathaway*, 119 Nev. at 252, 71 P.3d at 506. Rather, a claim must be raised within a reasonable time after discovering it to satisfy good cause. *Id.* at 253, 71 P.3d at 506. The record is bereft of any findings indicating when Carroll learned that no direct appeal had been filed or whether his post-conviction petition was filed within a reasonable time thereafter. Therefore, we remand this matter to the district court for the limited purpose of conducting an evidentiary hearing on the applicable procedural bars and entering the necessary written factual findings and legal conclusions concerning whether Carroll

established good cause to excuse the delay in filing his post-conviction petition. Accordingly, we

ORDER this matter REMANDED to the district court for proceedings consistent with this order.[1]

_____, J.
Hardesty

_____, J.
Parraguirre

_____, J.
Cherry

cc: Hon. Valerie Adair, District Judge
Mario D. Valencia
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

---

[1]This is our final disposition of this appeal. If the district court determines on remand that Carroll demonstrated cause for his procedural default, the district court shall comply with NRAP 4(c)(1)(B). If the district court determines that Carroll cannot demonstrate cause for his procedural default, the district court shall enter an order denying the petition, including findings of fact and conclusions of law. If the petition is denied, Carroll may file a notice of appeal consistent with NRAP 34.575.

CERTIFIED COPY
This document is a full, true and correct copy of the original on file and of record in my office.
DATE: August 8th, 2013
Supreme Court Clerk, State of Nevada
By _____ Deputy

IN THE SUPREME COURT OF THE STATE OF NEVADA

DEANGELO R. CARROLL,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

Supreme Court No. 63115
District Court Case No. C212667

REMITTITUR

TO: Steven D. Grierson, Eighth District Court Clerk

Pursuant to the rules of this court, enclosed are the following:

Certified copy of Judgment and Opinion/Order.
Receipt for Remittitur.

DATE: August 19, 2013

Tracie Lindeman, Clerk of Court

By: Sally Williams
Deputy Clerk

cc (without enclosures):
Hon. Valerie Adair, District Judge
Mario D. Valencia
Clark County District Attorney
Attorney General/Carson City

RECEIPT FOR REMITTITUR

Received of Tracie Lindeman, Clerk of the Supreme Court of the State of Nevada, the REMITTITUR issued in the above-entitled cause, on AUG 2 3 2013.

HEATHER UNGERMANN
Deputy District Court Clerk

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CLERK OF THE COURT

NEO

DISTRICT COURT
CLARK COUNTY, NEVADA

DEANGELO R. CARROLL,

Petitioner,

vs.

THE STATE OF NEVADA,

Respondent,

Case No: 05C212667-4
Dept No: XXI

NOTICE OF ENTRY OF FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

PLEASE TAKE NOTICE that on January 3, 2014, the court entered a decision or order in this matter, a true and correct copy of which is attached to this notice.

You may appeal to the Supreme Court from the decision or order of this court. If you wish to appeal, you must file a notice of appeal with the clerk of this court within thirty-three (33) days after the date this notice is mailed to you. This notice was mailed on January 6, 2014.

STEVEN D. GRIERSON, CLERK OF THE COURT

Teodora Jones, Deputy Clerk

CERTIFICATE OF MAILING

I hereby certify that on this 6 day of January 2014, I placed a copy of this Notice of Entry in:

The bin(s) located in the Regional Justice Center of:
Clark County District Attorney's Office
Attorney General's Office – Appellate Division-

☑ The United States mail addressed as follows:

Deangelo R. Carroll # 1056956
P.O. Box 650
Indian Springs, NV 89070

Mario D. Valencia, Esq.
1055 Whitney Ranch Dr., Ste. 220
Henderson, NV 89014

Teodora Jones, Deputy Clerk

ORDR
MARIO D. VALENCIA
Nevada Bar No. 6154
1055 Whitney Ranch Dr., Ste. 220
Henderson, NV 89014
T. (702) 940-2222
F. (702) 940-2220
valencia.mario@gmail.com
Counsel for Mr. Carroll

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, v. DEANGELO R. CARROLL Defendant.	CASE NO. 05-C212667-4 DEPT. NO. XXI

FINDINGS OF FACTS, CONCLUSIONS OF LAW AND ORDER

Date of Hearing: October 21, 2012
Time of Hearing: 9:30 a.m.

This Cause is again before this Court, the Honorable Valerie Adair presiding, on remand from the Nevada Supreme Court. The State is represented by Giancarlo Pesci, Chief Deputy District Attorney for Clark County. The petitioner-defendant, DeAngelo R. Carroll, is present and represented by Mario Valencia.

In a prior proceeding, this Court determined that Carroll was deprived of his right to a direct appeal due to ineffective assistance of counsel and so granted Carroll's post-conviction petition seeking to restore his right to a direct appeal. The State challenged this decision before the Supreme Court. After considering the

challenge, the Supreme Court determined that further factual findings were necessary to support this Court's decision. Specifically, the Supreme Court requested further findings to make clear whether Carroll had good cause for submitting his petition more than one year after the entry of the judgment of conviction.

To satisfy the Supreme Court's request, this Court has conducted an additional evidentiary hearing. After considering briefs, the testimony of witnesses, the arguments of counsel, and other evidence available, this Court makes the following findings of fact and conclusions of law.

Findings of Facts and Conclusions of Law

1. At the time he was convicted and sentenced, Carroll was represented by Dan Bunin and Thomas Ericsson.
2. Carroll requested that Bunin and Ericsson appeal his conviction, and the latter said that they would.
3. On September 8, 2010, the judgment of conviction was entered.
4. Because of a misunderstanding between the two attorneys, both Bunin and Ericsson assumed the other would file the notice of appeal within the necessary time.
5. After the period to file a timely notice of appeal had passed, Bunin and Ericsson realized no notice had been filed. They contacted the Court to let it know of the lapse, and to suggest that different counsel be appointed to determine whether there could be an appeal under *Lozada*.
6. In a hearing on December 16, 2010, Bunin and Ericsson were released as counsel, and Patrick McDonald was appointed to investigate and pursue any appeal deprivation claim, as well as any and all other post-conviction claims,

that Carroll may have. The written order appointing McDonald was entered on December 17, 2010.

7. Despite his repeated attempts to contact them, Carroll was unable to reach Bunin or Ericsson, and neither attorney contacted Carroll to inform him that no appeal had been taken.

8. Carroll first learned that Bunin and Ericsson were no longer his attorneys, and that McDonald had been appointed in their place, in a letter he received around January 20, 2011.

9. Because of restrictions on telephone access in prison, Carroll's first opportunity to contact McDonald was not until the third week of February 2011. When Carroll did contact McDonald, McDonald informed him that no notice of appeal had been filed. During that phone call, Carroll informed McDonald that he wanted to pursue an appeal, and he had discussed this with Bunin and Ericsson.

10. McDonald had extraordinary difficult obtaining Carroll's file from Bunin and Ericsson. The criminal case against Carroll began in June 2005, so his file consisted of several file-boxes. Furthermore, Bunin and Ericsson never discussed the appeal deprivation claim with McDonald, as shown by their testimony at the June 4, 2012 evidentiary hearing.

11. McDonald needed the complete file to fully evaluate Carroll's appeal deprivation claim and investigate why Bunin and Ericsson did not file a notice of appeal, as well as to investigate and present any other claims Carroll might have. Failing to pursue all valid post-conviction claims would be a violation of McDonald's duty to Carroll, as any claims McDonald failed to pursue could potentially face procedural bars.

12. While McDonald was seeking Carroll's complete file, he repeatedly informed

this Court of his progress and requested filing extensions, which were granted. This included a request that was submitted on August 26, 2011. This Court held a hearing on that request on August 30, 2011, shortly before the one year mark from the entry of the judgment of conviction. At the hearing, this Court instructed McDonald to continue his efforts to collect the complete case file and set the matter for status check two weeks after. On September 13, 2011, after more than a year had passed since the entry of the judgment of conviction, McDonald still had not received the complete file. This Court then granted McDonald another extension of time to file Carroll's petition.

13. On November 1, 2011, this Court set the final due date for Carroll's petition: January 3, 2012.

14. On December 29, 2011, McDonald filed Carroll's post-conviction petition, which included the appeal-deprivation claim.

15. Throughout his time as counsel to Carroll, McDonald's professional performance was hindered by personal problems. Not long after filing Carroll's petition, McDonald was suspended from practicing law in the state of Nevada.

16. Carroll has good cause to excuse the delay if he believed his counsel was pursuing his direct appeal, if his belief was objectively reasonable, and if he filed his post-conviction petition within a reasonable time after he should have known that his counsel was not pursuing his direct appeal. *See Hathaway v. State*, 119 Nev. 248, 252, 253–54, 71 P.3d 503, 507–08 (2003)

17. On the first point, did Carroll believe that his then-counsel, Bunin and Ericsson, were pursuing a direct appeal on his behalf? This Court finds that he did.

18. Carroll testified convincingly that he believed Bunin and Ericsson were pursuing his appeal after he was sentenced.

19. On the second point, was Carroll's belief that Bunin and Ericsson were pursuing an appeal on his behalf objectively reasonable? This Court finds that it was.

20. Carroll's belief is confirmed as objective by his former counsel, who both testified that they told him they would pursue an appeal on his behalf. Furthermore, Bunin testified that he did not notify Carroll when he discovered no notice of appeal had been filed. Ericsson testified that he had no memory either way. While Carroll did attempt to contact Bunin and Ericsson to find out the status of his appeal, he never succeeded due to the inherent restrictions of incarceration. Finally, given the nature of Carroll's conviction for first-degree murder and sentence, any reasonable person would expect an appeal to be forthcoming.

21. On the third point, was Carroll's post-conviction petition filed within a reasonable time after he should have known his counsel was not pursuing his direct appeal? This Court finds that it was.

22. The earliest Carroll should have known his counsel was not pursing his direct appeal was when he was notified of that fact by McDonald. There is some uncertainty whether the initial letter from McDonald was sufficient to put Carroll on notice, or if Carroll only knew that a post-conviction petition was necessary after he talked with McDonald via telephone. Either way, Carroll should have known that a petition was necessary by late January 2011 to late February of 2011.

23. Under either date, the petition, submitted to this Court on December 29, 2011, was filed within a reasonable time. This Court finds that the petition

was filed in a reasonable time on several, separate grounds.

24. First, the 10-to-11 month period, standing alone, is reasonable. *See Wilson v. State*, 127 Nev. Adv. Op 68, 267 P.3d 58 (2011) (a petition filed November 21, 2005 is timely when claim became available to petitioner on December 29, 2004).

25. Second, this Court finds the petition was filed in a reasonable time in light of the circumstances attending the petition's preparation. Specifically, the time is reasonable in light of the difficulty McDonald had gathering Carroll's complete file, the necessity of preparing a petition with more than one issue, the professional difficulties suffered by McDonald, and the blamelessness of Carroll.

26. Finally, the Court finds the petition was filed in a reasonable time because this Court approved McDonald's request to file Carroll's petition by January 3, 2012. If the briefing schedule established by this Court allowed the petition beyond a reasonable time period, it would mean this Court affirmatively misled the petitioner. *See, e.g., Sossa v. Diaz*, No. 10-56104, 2013 WL 4792941 (9th Cir. Sept. 10, 2013); *Prieto v. Quarterman*, 456 F.3d 511, 513–15 (5th Cir. 2006). To avoid that result, the briefing schedule and due date established by this Court must establish a reasonable time for filing the petition.

Order

This Court has found that Carroll has good cause to excuse the delay in filing his petition, and has expressed the basis for that finding in this order. This Court has previously determined, and the Supreme Court has affirmed, that Carroll has a valid appeal-deprivation claim. Therefore, consistent with the Supreme Court's order, this Court enters the following orders.

It is ORDERED that Carroll's petition be granted.

It is ORDERED that DeAngelo Carroll be given a right to pursue an appeal.

It is ORDERED that the district court clerk prepare and file within 5 days of the entry of this order a notice of appeal from the judgment of conviction and sentence consistent with NRAP 4(c)(1)(B)(iii).

It is ORDERED that Mario D. Valencia remain Carroll's counsel on appeal.

DATED this 20 day of ~~November~~ December, 2013.

Valerie Adair
District Court Judge JC

Submitted by:

/s/ Mario D. Valencia
MARIO D. VALENCIA
Nevada Bar No. 6154
1055 Whitney Ranch Dr., Ste. 220
Henderson, NV 89014
Counsel for Carroll

Reviewed and Approved by:

/s/ Giancarlo Pesci
GIANCARLO PESCI
Chief Deputy District Attorney
Regional Justice Center
200 Lewis Avenue
Las Vegas, NV 89155-2212

/s/ Marc DiGiacomo
MARC DIGIACOMO
Chief Deputy District Attorney
Regional Justice Center
200 Lewis Avenue
Las Vegas, NV 89155-2212

Counsel for the State of Nevada

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CLERK OF THE COURT

NOASC

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

vs.

DEANGELO R. CARROLL,

Defendant,

Case No: 05C212667-4
Dept No: XXI

NOTICE OF APPEAL

Notice is hereby given that the Defendant above named, hereby appeals to the Supreme Court of Nevada from the Amended Judgment of Conviction (Jury Trial) entered in this action on March 23, 2011.

STEVEN D. GRIERSON, CLERK OF THE COURT

Heather Ungermann, Deputy Clerk

CERTIFICATE OF MAILING

I hereby certify that on this 6 day of January 2014, I placed a copy of this Notice of Appeal in:

The bin(s) located in the Regional Justice Center of:
Clark County District Attorney's Office
Attorney General's Office – Appellate Division

☑ The United States mail addressed as follows:

Deangelo R. Carroll # 1056956
P.O. Box 650
Indian Springs, NV 89070

Mario D. Valencia
1055 Whitney Ranch Dr., Ste. 220
Henderson, NV 89014

☑ This appeal was electronically submitted to the Clerk of the Supreme Court.

Heather Ungermann, Deputy Clerk

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Document Complies with NRS 239.030

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Deangelo R Carroll #1056956
PO Box 650
Indian Springs, NV 89070-0650
Pro-se

CLERK OF THE COURT

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF Clark

Deangelo Carroll
Petitioner,

v.

Brian Williams Warden HDSP.
Respondent.

Case# C-212667-4
XXI

PETITION FOR WRIT OF HABEAS CORPUS (POSTCONVICTION) NRS Chap 34 et seq. 28USC 2254 (See attached documents under Judicial notice NRS Chap 47. et seq Feb 2017)

Now Comes Petitioner Deangelo Carroll in Pro-se to file this Writ of Habeas Corpus Pursuant to Haines v Kerner 404 US 519.520 (72) "Pro-se Liberally Construed."

Ineffective Assistance of Counsel is raised under USCA 6.14 As well as a Lack of Subject matter Jurisdiction which may be raised at Anytime Landreth v Malik 221 P3D 1265 (2009) Freytag v Commir 501 US 868, 870 111SCT 2631, 2648 (91) As well as Plain errors. and abuse of discretion Claims.

The Count Clark is requested to Supplement distribution Through Electronic Service.

Given to Prison official's for Mailing on April 26th 2017

Deangelo R. Carroll
D.R. Carroll

PETITION

1. Name of institution and county in which you are presently imprisoned or where and how you are presently restrained of your liberty: High Desert State Prison Clark Co Nev

2. Name and location of court which entered the judgment of conviction under attack: Eighth Judicial District Court Las Vegas NV

3. Date of judgment of conviction: 3-23-2011

4. Case number: C-212667

5. (a) Length of sentence: CT-1 36-120 months CT-2 20 years to Life with equal And Consecutive for Weapon

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(b) If sentence is death, state any date upon which execution is scheduled:....

6. Are you presently serving a sentence for a conviction other than the conviction under attack in this motion? N/A

Yes ..... No .....

If "yes," list crime, case number and sentence being served at this time: .....

.....

.....

7. Nature of offense involved in conviction being challenged: Murder, Conspiracy, Deadly weapon

8. What was your plea? (check one)

(a) Not guilty ✓.....

(b) Guilty .....

(c) Guilty but mentally ill .....

(d) Nolo contendere .....

9. If you entered a plea of guilty or guilty but mentally ill to one count of an indictment or information, and a plea of not guilty to another count of an indictment or information, or if a plea of guilty or guilty but mentally ill was negotiated, give details: N/A

.....

10. If you were found guilty or guilty but mentally ill after a plea of not guilty, was the finding made by: (check one)

(a) Jury X.....

(b) Judge without a jury .....

11. Did you testify at the trial? Yes .....(No).....

12. Did you appeal from the judgment of conviction? (Yes)..... No .....

13. If you did appeal, answer the following:

(a) Name of court: NV SUP CT

(b) Case number or citation: 371 P.3D 1023 132 NV ADV OP 23

(c) Result: AFFIRMED 10-21-2016 on rehearing

(d) Date of result: 10-21-16 Remittitur

(Attach copy of order or decision, if available.)

11-18 omitted as not Applicable

19. Are you filing this petition more than 1 year following the filing of the judgment of conviction or the filing of a decision on direct appeal? If so, state briefly the reasons for the delay. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 1/2 by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.) .....

.....

20. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack? Yes ..... (No) .....

If yes, state what court and the case number: .....

.....

21. Give the name of each attorney who represented you in the proceeding resulting in your conviction and on direct appeal: .....

on direct Appeal: MARIO D Valencia 1055 Whitney Ranch # 220 Henderson NV - 89104.

22. Do you have any future sentences to serve after you complete the sentence imposed by the judgment under attack? Yes ..... (No) .....

If yes, specify where and when it is to be served, if you know: .....

.....

23. State concisely every ground on which you claim that you are being held unlawfully. Summarize briefly the facts supporting each ground. If necessary you may attach pages stating additional grounds and facts supporting same.

(24)

Petition is Submitted under Penalty of Perjury Pursuant to 28USC 1738 NRS 208165 on this date. _____ that it is Prepared with assistance of fellow inmate Steven BRAUNSTEIN #64697 I certify attached exhibits as true Correct Unredacted Versions thereof.

Petitioner raises Subject matter Jurisdiction hereafter

Dated. April 24 2017

Deangelo R. Carroll
D. R. Carroll

Prepared by Steven Braunstein

(25) Petitioner challenges Subject matter Jurisdiction, (1) being on Federal Property. the event was in Federal Jurisdiction and (2) the Statutes used by the State have No enactment Clause, and are Void. as charged in the Information Violating USCA 1,3,4,5,6,8,9,10,13,14

(a) Subject matter Jurisdiction may be raised at anytime by any Party (or) even by the Court itself. at any State even after final Judgment is entered Arbaugh v Y&H Corp 126 SCT 1235, 1240 (2006) for a Court to act when it has no Jurisdiction is Ultra Vires. Ruhrgas AG v Marathon Oil Co 526 US 574, 583 119 SCT 1563 (99)

(b) When a Party Suggest Absence of Subject matter Jurisdiction from the onset, he not only Questions the ORIGINAL trial, but the Sentence imposed. FRCRP 35 US v Cotton 535 US 625, 630-122 SCT 1781 (2002) Coldwell v State 118 NV 807 (2002), additionally Subject matter Jurisdiction is never Waived, of forfeited, as it involves the Court's Power, to hear A CASE. And Thus the Conviction is Void.. Ie: 535 US 630 Csibi v Fustos 670 F2D 134, 136 (N3) (9CIR92) Landis v Second Judicial Dist CT 460 P2D 163, 167 85 NV 585 (NV69) ex Parte Davis 33 NV 309 110 P. 1131, 1132 (NV 1910)

---

(26) (a) The alleged Crime occurred in Federal Jurisdiction at Lake Mead National Park Jurisdiction as a Separate Sovereign. And the Eighth Judicial District court did not recieve Permission to Prosecute, From the Federal Agency.

(b) The Statutes used have No enactment Clause as required by the Nevada Constitution art IV § 23 in their Promulgation. As ALL age old Laws were repealed. by the State revision Commission in 1963. And never reenacted

And Under due Process one may only be Convicted of a Crime, that has Properly been enacted Prior to Crime. As Listed in the Charging Instrument, of the State. And As Such is invalid. Conviction.

And as Stated, the Eighth Judicial District Court, has No Jurisdiction. And a Fraud, was instituted on the Court by the Clark County District Attorney's office. (ie Steve Wolfson) from the Onset. which Cannot be Waived or defaulted. As it involves the Court's Power to hear Case or Controversy. Steel Co v. Citz for a better env't 523 US 89. "After Previous repeal"

▲ issue ▲ _____

Fact: The Nevada Constitution remains the Preeminent rule of Law of authority in Nevada See Nevada Const art 6 § 2 which States:

"No Justice Shall Perform any function other than that Pertaining to their own elected Judicial office See Comm on Ethics 125 NV 292. (infra)

But it was Violated by (3) three Justices of the Nevada Supreme Court Justice Milton B Badt, EDGAR EATHER. And Charles Merrill whom together Performed a Quasi - Legislative function in ruling that the State revision Commission Cease to exist and be abolished effective July 1st 1963. and that their authority be transferred to the Director of the State revision Commission, hereafter "SRC"

Director Russell W McDonnell acting as legislative Counsel used a Joint Concurrent resolution #1, #2 to repeal all the Statutes of Nevada. And Create the Nevada revised Statutes as Law thereafter.

** (Emphasis) Murder was repealed in Nevada. And never Legislatively Put back into Law. **

Continuing: This was done by what was then bootstrapping the Joint Concurrent resolution with Memorials and Congratulations dubbed Senate bill #2 which was used from it's inception to Create the NRS Statutes.

What's important to note is that Joint Concurrent resolution #1, #2 Violate the Nevada Constitution under article 4 § 17 and) article 4 § 23

The Sections above are Very defines Such as:

Section 17 deals with the Single Subject rule. which Prevents Commingling of Multiple Subject matters and/ Section 23

Which Voids the Concurrent resolution, number #1, #2 by not Containing the requisite mandatory enactment Language, and Cannot represent the Law of this State. Ex Parte Mantell and Rolfen 47NV95 216 P. 509.

The enacting Clause for every Law "shall" be as follows:

"The People of the State of Nevada, represented in the State Senate and assembly do enact as follows";

▲▲ - That No Law "shall" be enacted except by bill — ▲▲

NV Const art IV § 23.

This has previously been before the Nevada Supreme Court and said that the enacting Clause is Mandatory. And must be included in every Law Created by the Legislature. Nothing Can become Law without it. IF it does not Contain Such enactment Language on it's face.

The Joint Concurrent resolution does not Contain Such Language and thus Constitutionally fails. See NHP v State 107 NV 547. 549 on Certification from the Ninth Circuit. which Cites Rogers v State 10 NV 250 (NV 1875)

Additionally, the Joint Concurrent resolution also fails to Comply with Joint house rule #7. (which is the only way a Joint Concurrent resolution could be used) JSR-3

Resolution #1 #2 also fails to Comply with Chapter 385 Sec(2) @ Pg 733 and Sec(4) @ Pg 734. in identifying the Copy. of the engrossed bill SB #2 as ORIGINAL, duplicate or triplicate, and the same applies to the resolution itself.

And. as the 1951 attorney General Opinion #85. States: Such Process is not a Lawful Process. And was not even signed by the Governor.

But over a Period of time. Since the action occurred the Judges, Lawyers, and Legal Community Scholars. of the (3) three branches. of the State Government, have all operated on the Presumption of Law, by thinking the "NRS" Statutes were Lawfully and Constitutionally Created, with the

... Laws Lawfully enacted, "But that's Simply not true!"

"The Legislature MAY not delegate it's Power to legislate" Sheriff v LUGMAN 101 NV 149, 153 697 P2D 107, 110 (85) NV Const art 3 §1 also Panama refining Co v RYAN 293 US 388, 421 55 SCT 241 (1935) (Similarly noting Legislative Power Vested with Congress)

Nevada Constitution art 3 §1 defines the Separation of Powers. between the Legislature, executive, and JUDICIARY branches.

Enactment of Laws is a Legislative duty. The executive branch enforces the Laws. And the JUDICIARY determines Case or Controversy. North Lake tahoe Fire v Washoe County Commrs 310 P3D 583 (NV 2013)

Nevada's Constitution MIRRORS the Separation of Powers expressed in the US Constitution.. Comm'n on ethics v Hardy 125 NV 285, 292.

The Nevada Constitution expressly Prohibits One (1) branch of Government from IMPINGING on the others functions ie@ 125 NV 291 NV Const art 3 §1 which States; .... No Person charged with the exercise of Powers PROPERLY belonging to One of the other departments, "shall" exercise any function Pertaining to any of the others.. EXCEPT in Cases expressly directed or Permitted by the Constitution of Nevada.

The Legislature is the only branch of Goverment with the Power to enact Laws and define a Crime. Sheriff Clark County v LUGMAN 101 NV 149, 698 (1985) (This naturally includes how the Law operates)

That Presumption of Law is now displaced with the Knowledge of Law, "As a Public admission," And estoppel based on the Prior rulings, And reasons disclosed herein; that: All Statutes enacted before 1957 have been Repealed (Sec. 3)

This is irrefutable evidence and factual Proof that when Laws fail, they are Unlawful And Unconstitutional And there is No Ministerial duty to enforce them. Ex Parte Young 28 SCT 441 209 US 123, 130 3-23-1908 And the

State Court's, ultimately Lost Jurisdiction, when the "abe old Law of Murder was repealed" and never Legally reenacted, which is a Lack of Subject matter Jurisdiction which Can be raised at anytime. Steel Co v Citz for a better envt 523 US 89. (1998) it also appears that the Promulgation of every Statute, also Suffers from the Same issue. "Emphasis"

The fact that the aforementioned resolutions were never ratified by a Vote of the Citizenery of Nevada by a Proper election, renders the Joint Concurrent resolution, and hence the NRS's Void ab initio as unlawful and unconstitutional. _____

Restated. Once the Statutes were removed, they Could not be Legally reinstated except by the legislature. And, with that never occurring. the Judgment and Sentence in this Case Are Void, and must be Vacated, as filed. in the State information.

"There is no Hyperthetical Jurisdiction", hence the Judgment of the Court, averring a Violation of any State Law." is Ultra Vires." See Generally. Laver et al v District Court 62 NV 78 140 P2D 953 (1943) US v Cotton 535 US 630 (2002)

The above, as Stated in the Nevada Constitution is a Promise implied by the Legislature of Nevada. And is Legally enforced, in Any Court of Nevada. FRCivP 12(b)(2) and works as Judicial estoppel. USA v Romero 114 F3D 141 1997 US APP LX 12270. Ashe v Swenson 397 US 436, 443 (1970)

There is a Liberty interest created by the Nevada Constitution and State Legislative Wording, in the documents, that are Supposed to be Stored by the Secretary of State, in his office, but were denied as being there, and Located in the State Library, And archive.

Under Full disclosure, the trial Court Could not Save the Legislature as was done, See Generally. US v Ganderson 511 US 39, @ 68. 114 SCT 1259 (1994) Stating (Federal Court Cannot Save Congress) Whatever the Court was to do must have been on Vivified Law. US v Chambers 291 US 217, 223 (12-5-1934) (Once repealed not further Proceedings may be had.) Ex Parte Young 209 US 123, 134. (3-23-1908)

... ex Parte M. W. Rosenblatt 19NV439 14.P.298(1887)

Laws must be encased in the armor wrought by the Legislature, in A Prior Session as result of it's deliberations Woods v Georgia 370US375.383 (HN4-7) 82SCT1364(6-25-1962) Bridges v California 314US252.261 62SCT190 ( ) Hamm v Rockhill 379US306. 85SCT384(64)

With No enactment Clause for Any "Statute charged in the States information of June 20th 2005 See NV Const art IV §23 State v S.T Swift 10NV176 (1875) Ex Parte Rosenblatt 19NV439 14.P. 298(1887)

Thus with the repeal of all Laws in 1957. There was No reenactment of the Age old Law MURDER. and this Court in evaluating the following Claims, must:

(1) Prove a Valid enactment Clause in it's Promulgation when enacted. (2) Must rule according to the Legal landscape as it existed, when the information was filed as a matter of Subject Jurisdiction. Graham v Collins 506US461 @ 468. 113SCT892.193) Lambrix v Singletary 520US518.527, 117SCT1517(97) State v Second Judicial District Court 124NV564. 188 P.3D 1079.

The Promulgation of Statute's NRS 200.010 - NRS 200.030 NRS and NRS 193.165 HAD no enactment wording; AS Required by the Nevada Constitution. (48th Session 1957 Chap 2) @ pg1, 2.

Additionally Wherein the US Supreme Court has made a Clear on Point rulings, this Court is "without" any Legal Subject matter to Rule differently under the Nevada Constitution, NV Const art 1§1. In other words, it is Contrary to well established Precedent before this trial..

State concisely every ground for which you claim that the state court conviction and/or sentence is unconstitutional. Summarize briefly the facts supporting each ground. You may attach up to two extra pages stating additional grounds and/or supporting facts. You must raise in this petition all grounds for relief that relate to this conviction. Any grounds not raised in this petition will likely be barred from being litigated in a subsequent action.

GROUND 1

I allege that my state court conviction and/or sentence are unconstitutional, in violation of my 1st 6th 14 USCA Amendment right to Effective Assistance of Counsel, based on these facts:

Allegations here Presented, are that trial And Appellate Counsel were Ineffective as Presented in this Application for Habeas Corpus Thomas v State 120 NV 37. 83 P3D 815, 822. (2004) Strickland v Washington 466 US 668 104 SCT 2052 (84)

"Strickland" laid out a two Part test, to determine if Counsel was ineffective, (1) That Counsel was deficient, in his Performance, And the error's So Serious, That Counsel was not functioning, as Guaranteed Under the Sixth Amendment, and that Prejudice resulted. against defense

In a Long Line of Cases Such as Powell v Alabama 287 US 45 53 SCT 55 (1932) Johnson v Zerbst 304 US 458 58 SCT 1019 (1938) and Gideon v Wainwright 372 US 335 83 SCT 792 (63) recognized the Sixth Amendment right to Counsel exists, and was needed for a fair trial. McMann v Richardson 397 US 759. 771 (N14) 90 SCT 1441 -1449 (N14) (70) And Counsel here never Provided adequate assistance at trial Cuyler v Sullivan 446 US 344 100 SCT 1716

"Strickland" has been adopted in Nevada. Hurd v State 114 NV 182 953 P2D 270 (98)

TRIAL Attorneys Daniel M Bunin and Thomas A Ericsson Failed to raise the Following...

Exhaustion of state court remedies regarding Ground 1: Direct Appeal 132 NV Adv Op in 32 10-21-16 Remittitur

(a) while the APPellate attorney raised "MIRANDA" issues due to trial attorney's error. the remedy was denied by the APPellate Court of NEVADA. by addressing an issue on rehearing that; was too tenuous to be reasonable. Violating due Process. under USCA 1.3.4.5.6.8.9.10.13.14.

The above denial was CLEARLY unreasonable, as raised below. See e9; RE Moran 203US96 27SCT25 ( ) Knewel v Egan 338US442 45SCT532. ( ) Goto v Lane 265US393 44SCT525

The NEVADA Supreme Court opinion, (attached) admits that there was a Siezure by LVMPD, and Defendant Couldn't leave from Custody Violating USCA4. Tennessee v Gardner 471US1 105SCT1694(85) but neither the trial attorney's nor APPellate Counsel Patrick McDonald, (or) finally MARIO A Valencia, never federalized the 4th amendment, in their documents to the APPellate Court.

Nor. did they address the Complete denial of NRS171.123 without evidence, You must be released within "1 hour," of being detained.

The NEVADA Supreme Court opinion 64754 finalized (10-21-2016) Confirms a multi hour Custody before admission. Violating MIRANDA v ARIZONA 384US436(84) also California v Hodari D. 499US621, 628 (1991)

But the Court's admission is now Law of the Case ACLU et al v MASTO et al 670F3D1046, 1065 (9CIR 2012) admits the termination of movement, through means intentionally APPLIED Brower v County of Inyo 489US593, 597 109SCT1378(89) Knowingly restrained of freedom to Personally walk away began the illegal detainment, and Seizure, after the 1 hour, NRS171.123, et seq. and became Unconstitutional Process. that Should have been raised by Trial Counsel. US Briggs v Pomer 922US873, 878. 95SCT2574.(75) this was Clearly Ineffective.)

The motion to Supress filed. was not forces into a APPealable order. this was ineffective (5-11-2010) this Violated due Process. As Trial Counsel was not Protecting Petitioners Rights under State or Federal Law Violating USCA 5, 6, 8, 14

Counsel Should have filed for a Separate hearing, on the initial hearing As a Constitutional Right. An evidentiary hearing on the Confession, as fruit of Illegal detention, which Should have been excluded from the trial from the Onset. Lanier v South Carolina 474US2 106SCT297(85) the Statement used Should never have been before the JURY. and was Unconstitutional. Gordon v Duran 895F2D610, 613 (9CIR 90) Locks v Sumner 702F3D1031, 1038 (9CIR 83) Missouri v Siebert 542US600 124SCT2601 (2004)

"The above is not harmless error" and Should have been Properly briefed, for Appellate review by Appellate Counsel. for federal review if necessary 28USC2254

"Detention" was clearly Contrary to U.S Supreme Court rulings. Defendant asked to Leave Custody of Police and terminate Questioning: but was disallowed by LVMPD. TRIAL Counsel was ineffective, in not Seeking a Separate Evidentiary hearing Pretrial, to Stop use of Statements Pretrial as inadmissible. "in Chief"

The use of two Step interrogation Procedure used by LVMPD officers; Martin Wildemann., Michael McGrath Jimmy VACCARO with assistance of theresa KYGER. at the State, didn't Give any MIRANDA WARNING, until there was Self implication. Then Giving MIRANDA v ARIZONA WARNING And recording Statement, was a Mid Stream Procedure Contrary to US Supreme Court rulings. Missouri v Seibert

Further, it Appears there was a Conspiracy between all Court officers at trial to IGNORE "MIRANDA" which has "never been repealed" or Called into Question and remains Law: Abostini v Felton 521 US 203, 207, 237 117 SCT 1997. (97) State of Co v Khan 522 US 3, 26 118 SCT 275 (1997)

Additionally, it Violated due Process. by the Courts officers to avoid the US Supremacy Clause US Const art VI (CL-2) which dramatically Limited the Court's authority at trial.

How the Appellate Court ruled was due to Appellate Counsel's failure to brief or Anticipate evidence issues, that are Unreasonable Lockyer v Andrade 538 US 63, 75 123 SCT 1166 (2003) when Put against identical on Point Citations. of the U.S Supreme Court.

"An Unconstitutional act is not Law". ex Parte M.W. Rosenblatt 19 NV 439, 14 P. 298 (1887) Ex Parte Young 209 US 123, 130 (1908)

Here both trial And Appellate Counsel were ineffective when neither filed a motion to "Vacate Judgment". or obtain all records or interview or subpoena witnesses.

An Evidentiary hearing, And Right to object to use the Confession is a Constitutional right established by.. US v Batista 868 F.2D 1089, 1092 (9 Cir 89) & tying Jackson v Denno 378 US 368, 394, 84 SCT 1774 (64)

Brown v Allen 344 US 443 73 SCT 397. ( ) made Clear that the use of a Coerced Confession in a State Criminal trial, is a Challengable issue Pursuant to Habeas Corpus Proceeding. USCA. 1, 3, 4, 5, 6, 8, 9, 10, 13, 14

The State decision is Clearly Contrary to US Supreme Court decisions: And a wrong So fundamental that, it makes the whole Process / Proceeding a "Mere Pretense" of a trial and render the Conviction and Sentence wholly Void. Moore v Dempsey. id @ 261 US 86. 43 SCT 265 ( ) And thus this Case Proceeding Vitiated, is now being Challenged. And Counsel at trial And APPEAL where Shown here were both Ineffective And in not raising Correct issues. failed to raise in an APPropriate manner for review if needed Brown v MISSISSIPPI 297 US 278, 286. 56 SCT 461 ( )

The Nevada Supreme Court opinion. that Confession Procured was Harmless error. is Problematic Specifically not raised by Counsel.

▲▲ In addition to the Interview Confession which was Coerced Counsel Should have Specifically Federalized the (5th) fifth Amendment right to avoid Self Incrimination. ▲▲ USCA 1, 5, 6, 8, 14

(b) Counsel on APPeal, Never raised the fact, in denying Counsel the Police eventually took (2) Phones AWAY. to Prevent a Call to any attorney. EDWARDS v ARIZONA 451 US 477, 484 101 SCT 1880 (1981) (holding the right to Counsel Present at Custodial Interviews) NV Const art 1 § 8

while Counsel addressed Calling a PARENT, the issue is far more Sinister. And deeper. As Published in the APPellate opinion.

while the State has admitted restraint was Custodial interrogation the inquiry Viewed objectively, Started with a "KIDNAPPING" where a Person Could not walk AWAY After (1) One hour, .. NRS 171.123, et seq. People v Ochoa 966 P2d 442 (1998)

The State's opinion references 9PM till after MIDNIGHT when it was actually much earlier. when Custody began. by telling Defendant Know investigation Focused on him People v Stansbury 889 P2D 588 (95)

PLAIN ERROR FRCrP 52(b)

MISSOURI v Siebert 124 SCT 2601. referencing "MIRANDA" holds that the (5th) fifth Amendment Privilege Against Self Incrimination Prohibits admission into evidence of Statements, Given without a Prior WARNING id @ 384 US 444. Stanley v Schriro 598 F.3D 612, 618 (9th 2010)

The WORDS "Prior WARNING" are the key. And has A Substantial And Injurious effects on the Jury.. meeting Standard of . . .

See also Brecht v Abramson 507 US 619. 113 SCT 1710 (93) also, Bennett v Mueller 322 F3D 573.581 (9CIR2003) (Federal error Prior to any ruling by Court addressable)

NSC # 64757 Public Ruling Opinion

Nevada Supreme Court's ruling Seems to Suggest that NRS 171.123 And the 4th Amendment, Can be IGNORED, and not allow a Person to Leave after 1 hour, which is not the Law. and Should have been raised by both trial and Appellate Counsel, on Appeal Properly Federalized USCA 1, 3, 4, 5, 6, 8, 9, 10, 13, 14

The Right to be left all alone was well established at the time of arrest. Pub Utilities v Pollack 343 US 451. 468 72 SCT 813 (52) (Douglas J) (To Live in Privacy is Sacred to all of us) Kellender v Lawson 461 US 352. 360 103 SCT 1850. 1855 (N9) (1983)

This Should have been raised, in a Pretrial Habeas by Counsel and appeal, by Appellate Counsel. which had a Likely Chance of changing the result. Missouri v Siebert (infra)

With the repeal of NRS 200.010 - 200.030. the Law was Never reenacted by the Legislature. nor is there a Promulgation that enacts the Law. This includes NRS 193.165 and as Such the trial Court Lacked Subject matter Jurisdiction.

By the Court acting as it did, the Court acted as a Social reconstructionist, where it Knew there was no Support in the State Law. itself, and has been recognized by the Nevada Supreme Court in NHP v State 107 NV 547. 549 (Supra) but then ruling that US Supreme Court decisions don't APPLY. Violating NV Const art 1 § 2

(c)

Failure of the trial Court to Sub Appellate OPTICS

TRIAL Counsel Failed to Secure, or Subpoena actual tapes of arrest Scene. at Club, 6th Police Video. of official detainment timeline. which would have Shown FRISK and removal of Phone in Violation of USCA 4.14

It's also well Known Police record transport Conversation to Police Station all without any evidence whatsoever.

No MIRANDA WARNING being Given, ALL Statements were inadmissible "ante" to it. Missouri v Siebert 542 US 610..

(d) TRIAL Counsel did absolutely no investigation to Set the Scene for the APPellate Court; Violating USCA 1.5.6.8.14

This is An Ambigious issue; when the State's Highest Court Stated;

"We AGAIN remind the District Court's duty, to enter a Proper order with Factual Findings, and Legal Conclusions when ruling on motions to Supress in order to facilitate APPellates review -

The trial Court during trial allowed Pre miranda Statements because the Court did not make factual findings Pertaining to the Scene, and action Setting Circumstances Surrounding the in Custody interrogation. We "Cannot" Give deference to any Such findings, but then denies, "MIRANDA" relief overall, Such as, admitted, is now Law of the Case And a Federal Ambiguity. Coleman v thompson 111 SCT 2546.(91)

TRIAL Counsel's duty was to Get important Parts of record and Police evidence, on record for APPeal, by requesting a evidentiary hearing. Lanier v South Carolina (SUPRA) Missouri v Siebert (SUPRA) Brown v Mississippi 297 US 278. (Counsel failed to Subpoena either LAY or Professional witness on Procedure at trial)

Grounds I (E)

During trial, And AGAIN on APPeal Counsel at briefing State, did not address, whether Statement by Petitioner, was PreJUDICIAL. Yet the NEVADA SUPreme Court Justices, and the Prosecutor Claimed, "it was harmless beyond reasonable doubt" APPellate Counsel Should have filed a formal objection under FRCrP 60(b) that the Statement was Waived by the Prior briefing, and the State Could not raise Such an Issue at this Late Stage Puckett v US 556 US ____ 2009 US LX 2330 (3-25-2009)

It was not argued or briefed in any brief, trial Court or APPellate and Subject to issue Preclusion, or estoPPel Ashe v Swenson 397 US 436, 443 (1970) And was only brought up for the First time in oral Argument, APPellate Counsel Should have objected, at that Proceeding as WAIVED by the State.

Additionally Counsel on APPeal, Should have addressed the "other Powerful evidence" Statement AS A "BRADY" Violation as it wasn't before Any Court, And WAS Ineffective. See

... Brady v Maryland 373 US 83.87 83 SCT 1194 (1963)

The Nevada Supreme Court's Statement is now Law of the Case. This is a Profound admission, in the Public record FRCIVP 44(a)(c) And Prejudicial to the Petitioner, and A Violation of due Process USCA1,3.4.5.6,8.9.10,13,14 and

---

In Addition to fraud. There was a lack of research to Speed disposition at the Cost of the Defendant. to bring the State's own Version of facts into existence. (or)

That, the Statement is a Conspiracy between the Court officers. when:

(a) the State had an affirmative duty to disclose to the defendant this evidence Cited by the Appellate Court, which is not Part of the trial Court record (or)

(b) the Nevada Supreme Court admits a "Bruton Violation" Bruton v US 391 US 123 88 SCT 1620. (68) (it must be a Private Statement Given directly to the Court) as there is nothing in the official record, of the Court reporter 28 USC 753(b)

The Appellate Court through a Process of opinion is indoctrinating and acculturating on a false Statement or belief. (that becomes fact by Subtly attempting to orient the future readers thinking) These facts must now be investigated through An evidentiary hearing.

The above Graphically illustrate One of the breads And butter Principles that Appellate Courts Govern over review of trial Court's that find facts And Appellate Court's do not.. Mancusco v Olivarez 292 F.3D 939. 944. (9CIR 2002)

This raises Another issue the Court Cannot render a holding on the merits of a Question it Lacks Jurisdiction to enter. Ex Parte Smith 126 P. 655, 671 (NV 1912) Firestone tire and Rubber v Risjord 449 US 368.379 101 SCT 669 (81)

The Writ Should be Granted. Where trial Counsel did not interview a Single person, Prior to trial And Violates ABA Standards 1.1 (b) Role of defense Counsel (3.2) interview Client (4.1) duty to investigate (or) even interview Client Prior to trial.

(b) Ground TWO: Denial to Right of Counsel at all States, Right to Confront witnesses AGAINST him. Right to Compel witness in defense, and Right to a Public trial Violation USCA 1, 3, 4, 5, 6, 8, 9, 10, 13, 14 And 1st Amendment right to Audience, under due Process

Supporting FACTS (Tell your story briefly without citing cases or law.): (Grounds 1 fully Set forth here)

In the APPellate Courts opinion, it States "other Powerful evidence" was Considered, Given the fact NOT Specific findings were made by the trial Court, And it was not Presented at trial, This denied Petitioner the Right to a Public trial Presley v Georgia 558 US 209. 130 SCT 721 (2010) Waller v GEORGIA 467 US 39, 48 104 SCT 2210 (84) And Right to Present witnesses in defense, Washington v Texas 388 US 14, 19 87 SCT 1920 (67) which includes the right to Present a Complete defense. Crane v Kentucky 476 US 683, 690 106 SCT 2142.

"This other Powerful evidence" NSC "64757 @ Pg 23 Carroll v State 371 P3D 1023 (4-7-16) not Presented at trial, denied right to Jury trial on that evidence, And was a denial of Counsel for which there was No on the record WAIVER per Strickland v Washington 466 US 668 (84)

The APPellate ruling on MIRANDA Rights, as being Proper when never read to the defendant, "but told to SIGN A Card and then he was AWARE." "Is to take AWAY ALL remedy of enforcement of Civil rights, And the RIGHT itself, which is not within the Power of the State" Ponderter v Greenhow 114 US 270, 303 (1885) with APPROVAL EX Parte Young 209 US 123, 134 (1908)

"This other Powerful evidence" States in OPINION, WAS never before a JURY or Audience Violating USCA1, 14. First Nat'l bank of Boston v Bellotti 435 US 765, 783 98 SCT 1407, 1409, 1419 (78) AS it didnt Come from the witness Stand, with full JUDICIAL Protections, Such AS right to Confrontation

Grouns 2 (a)

Right to Crose examination, or of Right to Counsel.
Parker v Gladden 385 US 363-365 87 SCT 468 (66) (Per Curiam)
Crawford v Washington 541 US 36, 68 124 SCT 1368 (2004)
Turner v Louisiana 379 US 466, 472 85 SCT 546 (65)

This other Powerful evidence was not Presented at trial, on the records, in the trial Court, which naturally denies Counsel for defense at a Critical Stabe. US v Cronic 466 US 648, 659 104 SCT 2039, (84)
Holloway v Arkansas 435 US 475, 489 98 SCT 1173 (78) Penson v Ohio 488 US 75, 88 109 SCT 346, (88)

It Appears that there is a Violation of due Process, where Covat assumed Waiver of Counsel. on a Silant record. Burgett v texas 389 US 109, 114 88 SCT 258 (67) Johnson v Zerbst 304 US 458, 465 58 SCT 1019, (1938)

Ano. All Portions of trial were not recorded or any Investigation by trial or Appellate Counsel. As there was No Physical evidence directly attributable to Appellant.

Further trial Counsel Failed to Provide Any Discovery or trial documents Per NRS 7.055 See NRPC 1.1 - 1.3 - 1.4

The Nevada Supreme Court's Balkanized issue by issue harmless error review is Clearly inappropriate US v Frederick 78 F3D 1370, -1381 (9CIR96) Cumulative effect must be Considered, especially where to Pretrial defensive motions were filed on Any issue. Strickland 466 US 669.

(c) Ground THREE: TRIAL Counsel was ineffective, when not clearly having Jury instructed on elements of Murder, which also Should have been raised by Appellate Counsel resulting in a Violation of due Process USCA 1.3.4.5.6.8.9.10.13.14

Supporting FACTS (Tell your story briefly without citing cases or law.):

Under Felony Murder rule, Certain elements must be defines for the Jury. * Trial Counsel did not research this issue *

Under the State's theory, a Co Conspirator, And Accomplice have established liability. As Part of Natural And Probable Consequences doctrine but in this Case, the act was too attenuated, to Show that there was Some Showing of Specific intent to aide murder (or) there was Specific Knowledge that the murder as charged would occur. Wayne R Lafave & Austin W Scott JR Crim Law § 6.8(b) @ PG590 (2ed 86)

Here the error was unmistakable, and is Apparent from the record "upon Casual inspection." Patterson v State 111 NV 1525, 1530 907 P.2D 984, 987 (95) The Prosecution had to Prove every element Charged in the Crime alleged, as black letter of the Law, which the defendant does not have to Prove. Barone v State 109 NV 778, 780 858 P2D 27, 28 (93)

* No Physical evidence *

Deliberation as an element is distinct, AND is called mens rea for first degree murder. The Jury was instructed that the Killing resulted from Malice aforethought, either express or implied NRS 200.010 - 200.030 et seq.

But no where did the State Prove on the record that the Petitioner "Possessed a Specific intent to Kill." McCurdy v State 107 NV 275, 809 P.2D 1265 (91) Appellate Counsel Should have raised that the trial Counsel was ineffective in not addressing this in the Open Murder Charge, files by the State...

.. Prior to trial in a motion to Limine.

Further. The arguments of the Prosecutor, injecting his Personal beliefs and opinions at trial, Should have been objected to at trial, which was ineffective under USCA6. A reading of the transcripts; closing arguments. Constituted Prosecutorial misconduct. See Generally AESOPh v State 102 NV 316 721P.2D 379. (86)

TRIAL Counsel, in failing to file the direct APPeal, has Caused extensive briefing, And the above Should have been raised in the "LOZADA APPeal" Further under Murder Statutes as Stated above malice express, or implied was never Proven AGAINST Petitioner.. USCA 6.14

The intent to Kill, was not Proven as an element. And never Given the JURY to deliberate on. it was implied through the ConseQuences of Another.

No where in the JURY instructions was the JURY asked to find the accused Counseled, advised or encouraged, to do the murder to Anyone (ie: Kennath Counts, #) This denied a fair trial.. EX Poete Willoughby 14 NV 451 (1880)

The Petitioners Federal Constitutional right to due Process was Violated by the use of JURY instructions that relieved the State of it's burden of Proving every element of First degree Murder. And ConsPiracy NRS 199.480 USCA1.3.4.5.6.8.9.10.13.14

"willfulness" "deliberation" and "Premeditation" was never Proven beyond a reasonable doubt. because the State never "defined" these elements for the JURY.. fact finders AS was ConsPiracy

— No TRIAL Counsel research whatsoever Prior to trial —

But as raised under #25 PG 6.7 The enactment Clause on NRS 200.010 - 200.030 were rePealed under SB 1, 2 of 1957 And never reenacted, As the Following Promulgation, under the Statute Revision Commission. deleted the necessary wording, that was required to make it LAW. once all Prior Statute's were rePealed.

Why all this PunctiliousNess? because it Proves both trial And APPellate Counsel were ineffective is not raising this issue to Any higher Court. of State APPellate System. Violating due Process And right to a fair review USCA1.3.4.5.6.8.10.13.14

(d) Ground FOUR: TRIAL AND APPELLATE COUNSEL WERE INEFFECTIVE WHEN NOT ACTUALLY ADDRESSING LIBERTY INTEREST UNDER USCA1.14 WHERE TIME SERVED WAS NOT CORRECTLY ACCOUNTED FOR BY THE COURT VIOLATING DUE PROCESS, LIBERTY USCA 1.3.4.5.6.8.9.10.13.14

Supporting FACTS (Tell your story briefly without citing cases or law.):

THE ORIGINAL JUDGMENT WAS FILED SEPTEMBER 8TH 2010, THAT GRANTED 1,904 DAYS TIME SERVED FOR THE SENTENCES IMPOSED. (SEE ATTACHED CHARTING INFORMATION)

BUT THE JUDGMENT WHEN "AMENDED" WHICH WAS ACTUALLY A FIRST AND ONLY, * MATHOOD V PATTERSON 130 SCT 2788 2010 US LX 5258 (2010) BRAUNSTEIN V COX ET AL 2012 US DIST LX 118662 8-22-2012 (DOC 37) * WAS STILL INCORRECT WHERE THE COURT DIDN'T ACCOUNT FOR 27 DAYS TIME SERVED IN COUNTY JAIL. (AGAIN NO TRIAL OR APPELLATE INVESTIGATION)

NEVADA OPINIONS MAKE CLEAR ALL TIME SERVED MUST BE ACCOUNTED FOR UNDER NRS 176.055 NRS 176.105 ADDITIONALLY:

* UNRECORDED PROCEEDING *

* PETITIONER WAS NOT PRESENT *

WHEN THE MARCH 23, 2011 JUDGMENT WAS ISSUED AS A PUBLIC ADMISSION, THE NEW JUDGMENT DID NOT PERMIT PETITIONER TO BE PRESENT, AND ARGUE FOR ALL TIME SERVED WHICH WAS A FULL RESENTENCING. AS A LAST AND FINAL JUDGMENT, THAT IS CONTROLLING. TREINIES V SUNSHINE MINING CO 308 US 66, 60 SCT 44 (1939) ROBBI V FIVE PLATTERS 838 F2d 318, 322 (9CIR 88) MILLER V ADERHOLD 288 US 206, 210 53 SCT 325 ( ) HILL V WAMPLER 298 US 460 56 SCT 760 ( )

IN A LEGAL SENTENCE, THE JUDGMENT WAS ONLY FINAL WHEN SIGNED BY A JUDGE AND FILED BY A CLERK NRS 176.105(2) BUT THE MARCH 23RD 2011 JUDGMENTS OMITS 163 DAYS TIME SERVED BETWEEN THE 2010, AND 2011 JUDGMENTS, WHICH SHOULD HAVE TOTALED 2067 DAYS...

: time Served. at a minimum. (other County Jail time is not accounted for.)

Trial Counsel failed to file a direct Appeal. or even Petition Court to Correct it's Sentencing document which had obvious err's. but in the Court's wisdom it was Clerical error. This is An Opinion Caused by Complete lack of Counsel At Sentencing. Judgment entry. Petitioner avers the March 23rd 2011 Judgment is new. issued on misinformation. Compromising a Liberty interest. (And) "Sentencing by mailbox". Fabia v Thomas 106 Fs2d 572.588. (Dal. 2000) US DIST LX 10402. Mempa v Rhay 389 US 128 88 SCT 254 (67) US v Behrens 375 US 152 (1963)

State law is a Contract And enforceable Years later NRS 176.055 NRS 176.105. And failure to Correct would later be addressable Under 28 USC 2241 if not Corrected.. due to ineffective Counsel. USCA 6.14

In this matter County Jail time Credit before the ORIGINAL Sentencing Judgment issued, in 2010. by not having Petitioner Present. A Liberty interest is Compromised Under USCA 6.14 The above Statutes are Concentric State v Second Jud Dist Court 121 NV 413. 116 P.3d 834 (2005) (Credit for time Served Can be Raised Years later)

(There is 23 days owed. And thus Judgment Cannot be Final.) (From County Jail Presentence)

Because the Judgment, issued in 2011, was well after Petitioner went to Prison there Could be No arguments for time Served, to Shorten Sentence US v Gunning 401 F.3d 1145 (2005) Bordona v US 375 US 52 84 SCT 21 (63) / Confrontation issue)

The above Amounts to a "two tier" resentencing without defendant or Counsel being Present by increasing time Served without a Jury. Ludwig v Massachusetts 96 SCT 2781. 427 US 618 ( ) Specifically. As Stated in US v Alleyne 133 SCT 2151 (infra) ("Anything in excess of minimum. in Count-1, is a Jury trial right").

* Habeas Should be Granted. for a evidentiary hearing *

The Strickland Standard. of Counsel's failure to be Present at final Sentencing. is in Conflict with the Court's Process. where a defendant must also be Present for which harmless err does not APPLY. and the States action is Clearly Unreasonable. in not extending the Governing Principle. described here USCA1, 3. 4. 5. 6, 8. 9. 10, 13, 14

See Generally Mitchell v ESPARZA 540 US 12. 18 124 SCT 7 (2003) US v Manning 212 F3D 835 (2000) (Generally)

There are 3 exceptions, that avoid the final Judgment rule See Calderon v Thompson 523 US 538. 557 118 SCT 1489, 1501 (98) FRCIVP 60 (1-6)

The First, Second, and Sixth, reasons APPLY to this matter. but it evolves into Something far more Precipitious and telescoped, That has a long and troubled history, in the District Court

Obviously. the 2010 Judgment, was incorrect, and Unnoticed by the District Judge Valerie Adair. which required a "New" Judgment be issued March 23RD 2011. but was done in Absentia of both Defendant And Counsel MAYWOOD v Patterson (SUPRA)

This AGAIN Caused An Omission of NRS 199.480(1)(b) under Count-1. but Also as a 2-10 year Statute the Court minimized the Sentence to 36 months,

But this denied a Jury trial Right under Alleyne v US 133 SCT 2151, (2013) explaining APPrendi v New Jersey 530 US 466 (2000) USCA 1, 5, 6, 8, 9, 14

- And, done because all Proceedings not recorded, -

Interestingly. the Judgment remained Wrong. through Attorney Patrick McDonald, And Attorney Mario D Valencia on APPeal. "Conspiracy Statute not on Judgment" AS are All time Served days.

Both. of the above denied a liberty interest, Violating due Process. because there was No Notice Zinnerman v Birch 494 US 113, 125 110 SCT 975. (90) of denial of State Law.

An evidentiary hearing Should be Granted And the Writ Granted.

WHEREFORE, petitioner prays that the court grant petitioner relief to which he may be entitled in this proceeding.

EXECUTED at Indian Springs NV, on the 24 day of the month of April, 2017

Deangelo R. Carroll
Signature of Petitioner

VERIFICATION

Under Penalty of Perjury, the undersigned declares that he is the petitioner named in the foregoing petition and kmows the contents thereof, and that the pleading is true of his own knowledge, except as to those matters stated upon information or belief, and as to such matters, he believes them to be true. I Also Certify Attached exhibits.

Deangelo R. Carroll
Signature of Petitioner

CERTIFICATE OF SERVICE

I, Deangelo Carroll, hereby certify pursuant to N.R.C.P. Rule 5(b), that a true and correct copy of the foregoing Petition for Writ of Habeas Corpus addressed to the following persons:

8th JUD Dist Court
200 Lewis Ave LV NV
89155

Steven Wolfson DA
Same.

Petitioner Request electronic Service also by Court Clerk NEFR 9E).

DATED this 24 day of April, 2017

Deangelo R. Carroll
Signature of Petitioner
D Carroll

JOC

ORIGINAL

FILED

2010 SEP -8 A 11:58

CLERK OF THE COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

05C212667-4
JOC
Judgment of Conviction
926784

THE STATE OF NEVADA,

Plaintiff,

-vs-

DEANGELO RESHAWN CARROLL
#1678381

Defendant.

CASE NO. C212667-4

DEPT. NO. XXI

JUDGMENT OF CONVICTION

(JURY TRIAL)

The Defendant previously entered a plea of not guilty to the crimes of COUNT 1 – CONSPIRACY TO COMMIT MURDER (Felony), in violation of NRS 200.010, 200.030, 193.165, and COUNT 2 – MURDER WITH USE OF A DEADLY WEAPON (Category A Felony), in violation of NRS 200.010, 200.030, 193.165; and the matter having been tried before a jury and the Defendant having been found guilty of the crimes of COUNT 1 – CONSPIRACY TO COMMIT MURDER (Felony), in violation of NRS 200.010, 200.030, 193.165, and COUNT 2 – FIRST DEGREE MURDER WITH USE OF A DEADLY WEAPON (Category A Felony), in violation of NRS 200.010, 200.030, 193.165; thereafter, on the 12th day of August, 2010, the Defendant was

09-07-10P02:58 RCVD

present in court for sentencing with his counsels, DAN BUNIN, ESQ. and THOMAS ERICSSON, ESQ., and good cause appearing,

THE DEFENDANT IS HEREBY ADJUDGED guilty of said offenses and, in addition to the $25.00 Administrative Assessment Fee, $150.00 DNA Analysis Fee including testing to determine genetic markers, the Defendant is SENTENCED to the Nevada Department of Corrections (NDC) as follows: AS TO COUNT 1 – LIFE with the possibility of Parole after serving a MINIMUM of FORTY (40) YEARS; and AS TO COUNT 2 - LIFE with a possibility of parole after serving a MINIMUM of TWENTY (20) YEARS, plus an EQUAL and CONSECUTIVE term of LIFE with a possibility of parole after TWENTY (20) YEARS for Use of a Deadly Weapon; with ONE THOUSAND NINE HUNDRED FOUR (1,904) DAYS Credit for Time Served.

DATED this 7th day of ~~August~~ September, 2010

Valerie Adair

VALERIE ADAIR
DISTRICT JUDGE

ORIGINAL

FILED
MAR 2 3 2011
CLERK OF COURT

AJOC

DISTRICT COURT

CLARK COUNTY, NEVADA

05C212667-4
AJOC
Amended Judgment of Conviction
1308499

THE STATE OF NEVADA,

Plaintiff,

-vs-

DEANGELO RESHAWN CARROLL
#1678381

Defendant.

CASE NO. C212667-4

DEPT. NO. XXI

AMENDED JUDGMENT OF CONVICTION

(JURY TRIAL)

The Defendant previously entered a plea of not guilty to the crimes of COUNT 1 – CONSPIRACY TO COMMIT MURDER (Felony), in violation of NRS 200.010, 200.030, 193.165, and COUNT 2 – MURDER WITH USE OF A DEADLY WEAPON (Category A Felony), in violation of NRS 200.010, 200.030, 193.165; and the matter having been tried before a jury and the Defendant having been found guilty of the crimes of COUNT 1 – CONSPIRACY TO COMMIT MURDER (Felony), in violation of NRS 200.010, 200.030, 193.165, and COUNT 2 – FIRST DEGREE MURDER WITH USE OF A DEADLY WEAPON (Category A Felony), in violation of NRS 200.010, 200.030, 193.165; thereafter, on the 12th day of August, 2010, the Defendant was present in court for sentencing with counsels, and good cause appearing,

03-21-11P02:09 RCVD

2

THE DEFENDANT WAS THEREBY ADJUDGED guilty of said offenses and, in addition to the $25.00 Administrative Assessment Fee, $150.00 DNA Analysis Fee including testing to determine genetic markers, the Defendant was SENTENCED to the Nevada Department of Corrections (NDC) as follows: AS TO COUNT 1 – LIFE with the possibility of Parole after serving a MINIMUM of FORTY (40) YEARS; and AS TO COUNT 2 - LIFE with a possibility of parole after serving a MINIMUM of TWENTY (20) YEARS, plus an EQUAL and CONSECUTIVE term of LIFE with a possibility of parole after TWENTY (20) YEARS for Use of a Deadly Weapon; with ONE THOUSAND NINE HUNDRED FOUR (1,904) DAYS Credit for Time Served.

THEREAFTER, on the 15th day of March, 2011, the Defendant was not present in court but represented by his counsel, PATRICK MCDONALD, ESQ., pursuant to Defendant's Motion to Amend Judgment of Conviction, and good cause appearing to amend the Judgment of Conviction; now therefore,

IT IS HEREBY ORDERED the Defendant's sentence to be amended to reflect COUNT 1 MODIFIED to ONE HUNDRED TWENTY (120) MAXIMUM with a MINIMUM Parole Eligibility of THIRTY-SIX (36) MONTHS.

DATED this 21st day of March, 2011

Valerie Adair

VALERIE ADAIR
DISTRICT JUDGE

IN THE SUPREME COURT OF THE STATE OF NEVADA

DEANGELO R. CARROLL,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

Supreme Court No. 64757
District Court Case No. C212667

REMITTITUR

TO: Steven D. Grierson, Eighth District Court Clerk

Pursuant to the rules of this court, enclosed are the following:

Certified copy of Judgment and Opinion/Order.
Receipt for Remittitur.
Original State's Exhibit 243

DATE: October 21, 2016

Elizabeth A. Brown, Clerk of Court

By: Joan Hendricks
Deputy Clerk

cc (without enclosures):
Hon. Valerie Adair, District Judge
Mario D. Valencia
Clark County District Attorney
Attorney General/Carson City

RECEIPT FOR REMITTITUR

Received of Elizabeth A. Brown, Clerk of the Supreme Court of the State of Nevada, the REMITTITUR issued in the above-entitled cause, on _____.

_____
District Court Clerk

EXHIBIT____

EXHIBIT____

132 Nev., Advance Opinion 23

IN THE SUPREME COURT OF THE STATE OF NEVADA

371 P.3D 1023

DEANGELO R. CARROLL,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 64757

FILED

APR 07 2016

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

Appeal from an amended judgment of conviction for conspiracy to commit murder and first-degree murder with a deadly weapon. Eighth Judicial District Court, Clark County; Valerie Adair, Judge.

Affirmed.

Mario D. Valencia, Henderson,
for Appellant.

Adam Paul Laxalt, Attorney General, Carson City; Steven B. Wolfson, District Attorney, and Marc P. DiGiacomo and Jonathan E. VanBoskerck, Chief Deputy District Attorneys, Clark County,
for Respondent.

BEFORE PARRAGUIRRE, C.J., DOUGLAS, AND CHERRY, JJ.

OPINION

By the Court, CHERRY, J.:

In this opinion, we focus on whether the district court erred when it admitted Deangelo Carroll's inculpatory statements to the police. Carroll was not advised of his rights pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966), and he claims he was subject to a custodial interrogation.

The State of Nevada claims that *Miranda* warnings were not necessary because Carroll spoke with the police voluntarily. We conclude that the district court erred in denying Carroll's motion to suppress his statements to police because police subjected Carroll to a custodial interrogation without advising him of his *Miranda* rights. Nonetheless, we conclude that the error was harmless beyond a reasonable doubt, so we decline to reverse these convictions.

FACTS AND PROCEDURAL HISTORY

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 window 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 the 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 these recordings allowed the State to charge three members of Palomino Club management for their roles in Hadland's murder.

After the detectives finished obtaining information and evidence from Carroll, they arrested him. The State's information charged Carroll with conspiracy to commit murder and murder with use of a deadly weapon.

After seven days of trial, the jury returned a guilty verdict on all charges. The jury subsequently returned its penalty verdict and recommended a sentence of life with the possibility of parole. The district court ultimately sentenced Carroll to 36-120 months on the conspiracy conviction, life with the possibility of parole after 20 years for the first-degree murder conviction, and life with the possibility of parole after 20 years, consecutive, for the deadly weapon enhancement.

DISCUSSION

On appeal, Carroll argues that: (1) the wire recordings should not have been admitted against him at trial because they were not relevant, were prejudicial, consisted of inadmissible hearsay, and violated his right against self-incrimination; (2) the district court erred when it admitted his statements to the detectives because the detectives violated *Miranda* and coerced his statement; (3) there was insufficient evidence to support the convictions for conspiracy to commit murder, first-degree murder, and the deadly weapon enhancement; and (4) cumulative error warrants reversal.

Wire recordings

Whether the relevance of the recordings was substantially outweighed by unfair prejudice

Carroll argues that the district court abused its discretion by admitting wire tape recordings because they were not relevant to his guilt or innocence and were unfairly prejudicial.[1] He explains he was playing a

[1]The State's argument that because Carroll referenced the recordings in his closing argument, he cannot attack their relevance now is unpersuasive. No defendant should be expected to ignore damning evidence against him even if he disagrees with its admissibility.

role fed to him by detectives, so a juror could not discern which statements Carroll fabricated and which statements the detectives fed him.

Carroll did not object based on relevance or prejudice; thus, this court reviews for plain error. *Baltazar-Monterrosa v. State*, 122 Nev. 606, 614, 137 P.3d 1137, 1142 (2006). Under the plain error standard, this court only reverses a decision if the error affects the appellant's substantial rights. *Rimer v. State*, 131 Nev., Adv. Op. 36, 351 P.3d 697, 715 (2015).

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." NRS 48.015. Evidence that is not relevant is simply inadmissible. NRS 48.025. Even if relevant, evidence "is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues or of misleading the jury." NRS 48.035.

Here, Carroll's argument that the recordings were not relevant is without merit. Even under Carroll's account of the facts, the purpose of the recordings was to get the managers of the Palomino Club to corroborate Carroll's claim that he was supposed to beat up Hadland, not kill him. If the recordings accomplished exactly what Carroll wanted, they would have made it less probable that Carroll intended for Hadland to die. 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.

Carroll's argument that the tapes' probative value was substantially outweighed by their unfairly prejudicial effect also fails. The central issue of this case was Carroll's intent before and during the

shooting. Any evidence allowing the jurors to ascertain his intent is extremely probative. Further, the jury heard the proper context for Carroll's statements—that the tapes were made as part of the investigation, Carroll wore the wire to get incriminating information from the other players, and his statements were fabrications. Because the probative value was great, and the danger of unfair prejudice or confusion was mostly, if not completely, explained away, we conclude that the district court did not commit plain error when it admitted the tapes.

Because Carroll is unable to demonstrate plain error, we conclude that the district court did not plainly err when it admitted the recordings at trial. We so conclude because relevancy is a very broad standard and the tapes could prove Carroll's intent. Also, because Carroll's intent was the primary issue at trial, the probative value is not substantially outweighed by the unfairly prejudicial effect.

Whether Carroll's statements were inadmissible hearsay

Carroll argues his statements on the recordings were not his own but those of a state actor. He further argues that it would be absurd for the police to feed a person lines, then use those lines against that person at trial. The issue before us is whether the wire recordings were inadmissible hearsay.

Carroll did not object at trial based on hearsay, thus, this court reviews only for plain error. *Baltazar-Monterrosa*, 122 Nev. at 614, 137 P.3d at 1142.

Hearsay is any out-of-court statement offered to prove the truth of the matter asserted. NRS 51.035. Hearsay is generally inadmissible, unless there is a statutory exception. NRS 51.065(1). A party's own statement offered against that party is not hearsay. NRS 51.035(3)(a). Also, a party's statement offered to provide context to

another person's statement, rather than for its own truth, is not hearsay. *Wade v. State*, 114 Nev. 914, 917-18, 966 P.2d 160, 162-63 (1998), *opinion modified on denial of reh'g*, 115 Nev. 290, 986 P.2d 438 (1999).

Carroll's argument that his statements were inadmissible hearsay is not supported by the evidence. The State offered the statements to provide context to those of the Palomino Club managers. Further, had the State offered Carroll's statements for their truth, they would still be admissible as statements of a party pursuant to NRS 51.035(3)(a). Carroll claims the detectives told him what to say, but the evidence at his trial showed the detectives simply assisted with general subject matter; Carroll decided what to say and how to say it. Carroll's recording device could not transmit live audio, so the detectives could not communicate with Carroll while he recorded. Accordingly, we conclude that the wire recordings were admissible because there is no evidence before this court at this time indicating the police directly instructed Carroll what to say. We also conclude that the recordings were admissible because Carroll's statements were not offered to prove their truth.

Whether the statements of the managers of the Palomino Club were made in furtherance of the conspiracy

Carroll argues the statements of the Palomino Club's managers on the wire recordings were not admissible because the statements were not made in furtherance of the conspiracy. Carroll further claims that because he withdrew from the conspiracy by acting as the State's agent, the statements were not made by coconspirators and were inadmissible.

A statement made by a member of a conspiracy, made during the course of and in furtherance of the conspiracy and offered against another member of the conspiracy, is not hearsay. NRS 51.035(3)(e).

Furtherance of the conspiracy is not limited to the commission of the crime; it also applies to attempts to avoid detection. *Holmes v. State*, 129 Nev., Adv. Op. 59, 306 P.3d 415, 422 (2013). At the time the statement is made, the defendant need not be a member of the conspiracy. *See McDowell v. State*, 103 Nev. 527, 529-30, 746 P.2d 149, 150 (1987) (stating that NRS 51.035(3)(e) requires "that the co-conspirator who uttered the statement be a member of the conspiracy at the time the statement was made." The statute "does not require the co-conspirator against whom the statement is offered to have been a member at the time the statement was made."); *see also United States v. Patel*, 879 F.2d 292, 294 (7th Cir. 1989) (holding "that for withdrawal to limit a conspirator's liability and . . . his exposure to statements by co-conspirators, mere cessation of activity is not enough [ ];" the defendant must take affirmative steps by "either the making of a clean breast to the authorities, or communication of the abandonment in a manner calculated to reach co-conspirators" (internal quotations and citations omitted)).

While avoiding detection and arrest are in furtherance of a conspiracy, the conspiracy does not continue endlessly. *State v. Davis*, 528 P.2d 117, 119 (Or. Ct. App. 1974). This court has not identified a bright-line test to determine when an act of concealment may be considered in furtherance of a conspiracy. In *Davis*, however, the Oregon Court of Appeals distinguished between:

> (1) those affirmative acts of concealment directly related to the substantive crime of a nature within the contemplation of the conspirators, and
>
> (2) those general acts of concealment, by silence or by reaction to police activity, which occur after the primary objectives of the conspiracy have been achieved and the acts directly in furtherance of those objectives have been performed.

Id. In considering this distinction, the Oregon court determined that disposing of evidence was still in furtherance of the conspiracy, but concealing evidence upon arrest was less definitive. *Id.*

Here, Carroll's argument that he was no longer a coconspirator is without merit. This court has ruled that the defendant need not be a member of the conspiracy at the time the statement was made, so long as the declarant was part of the conspiracy when the statement was made and the defendant was a part of the same conspiracy at some point. *See McDowell*, 103 Nev. at 529-30, 746 P.2d at 150. Although Carroll was assisting the police at the time of the wire recording, the Palomino Club managers believed they were still trying to avoid detection. Therefore, the district court did not err when it determined the managers were Carroll's coconspirators pursuant to NRS 51.035(3)(e). Moreover, Carroll did not make his withdrawal known to his coconspirators. Lastly, we cannot conclude that he truly made a "clean breast" to authorities because he told multiple stories to the detectives in order to minimize his culpability. *See Patel*, 879 F.2d at 294.

Carroll's argument that the statements were not made in furtherance of the conspiracy is likewise unsuccessful. Carroll cited *Davis*, but the Oregon Court of Appeals did not decide whether post-arrest statements were in furtherance of the conspiracy; thus, *Davis* does not help Carroll here. *Davis*, 528 P.2d at 119. Here, the managers made their statements prior to arrest. We conclude that these statements were admissible because even if Carroll had withdrawn from the conspiracy, the other members had not. Thus, the managers' statements were in furtherance of the conspiracy.

Whether the club managers' statements violated Carroll's right against self-incrimination

Carroll argues the admission of the managers' statements violated his right against self-incrimination because he had to choose between forfeiting his right to explain the statements or his right to not testify. Carroll concludes this violated his substantial rights because the State referenced his fabricated statements as proof that he intended to kill Hadland rather than to orchestrate a battery. We conclude Carroll's constitutional rights were not violated because these statements did not force him to testify and both parties provided the proper context to the statements.

When the district court admitted the wire recordings, Carroll did not object based on his right against self-incrimination. Although Carroll did not preserve the self-incrimination issue for appeal, because it is a constitutional issue, we may address it. *See McCullough v. State*, 99 Nev. 72, 74, 657 P.2d 1157, 1158 (1983).

Both the United States and Nevada Constitutions protect a defendant in a criminal action from being compelled to testify against himself. U.S. Const. amend. V, § 3; Nev. Const. art. 1, § 8.

Carroll complains that the admission of the wire recordings put him between the proverbial rock and a hard place in deciding whether to testify. However, the same may be said about essentially every incriminating piece of evidence the State offers in any criminal prosecution. Facing such a difficult decision to testify does not violate a defendant's constitutional rights. *See Dzul v. State*, 118 Nev. 681, 693, 56 P.3d 875, 883 (2002) ("[T]he Fifth Amendment does not insulate a defendant from all difficult choices that are presented during the course of criminal proceedings . . . ." (internal quotations omitted)). Because Carroll

did not testify and was still able to put the recordings in the proper context, he fails to demonstrate that his constitutional right against self-incrimination was violated. Therefore, we conclude that the district court did not abuse its discretion when it admitted Carroll's or his coconspirators' statements from the wire recordings. *See McCullough*, 99 Nev. at 74, 657 P.2d at 1158; *Chavez v. State*, 125 Nev. 328, 339, 213 P.3d 476, 484 (2009) ("We generally review a district court's evidentiary rulings for an abuse of discretion.").

Police interrogation

Whether police coerced Carroll's statement

Carroll asserts the police coerced his statement by promising him leniency if he implicated himself in Hadland's murder. The question for our consideration is whether the police promised Carroll leniency when they promised to take him home and, if so, whether this promise coerced his statement.

"'[T]he totality of the circumstances'" is the primary consideration for determining voluntariness. *Blackburn v. Alabama*, 361 U.S. 199, 206 (1960) (quoting *Fikes v. Alabama*, 352 U.S. 191, 197 (1957)). This court has held that "[t]he question in each case is whether the defendant's will was overborne when he confessed." *Passama v. State*, 103 Nev. 212, 214, 735 P.2d 321, 323 (1987). The trial court should consider factors such as: "the youth of the accused; his lack of education or his low intelligence; the lack of any advice of constitutional rights; the length of detention; the repeated and prolonged nature of questioning; and the use of physical punishment such as the deprivation of food or sleep." *Id.*

Trial courts should also consider police deception in evaluating the voluntariness of a confession. *Sheriff, Washoe Cty. v. Bessey*, 112 Nev. 322, 325, 914 P.2d 618, 619 (1996). Deception by police does not

automatically render a confession involuntary. *Id.* at 325, 914 P.2d at 620. Police subterfuge is permissible if "the methods used are not of a type reasonably likely to procure an untrue statement." *Id.*

In looking at the totality of the circumstances based on the *Passama* factors, we conclude that the police did not coerce Carroll's statement. Police did not take advantage of Carroll through his youth, a lengthy detention, repeated and prolonged questioning, or physical punishment. Thus, these factors weigh in the State's favor. As previously discussed, the police did not advise Carroll of his *Miranda* rights, which weighs in Carroll's favor. Evidence at trial revealed Carroll has below-average intelligence, but a detective testified that during the interrogation, he did not observe any indicators that Carroll was cognitively disabled. Therefore, this factor does not weigh for or against the State. Accordingly, the *Passama* factors do not show police overcame Carroll's will when they interrogated him.

The use of falsehoods during the interrogation also does not show police overcame Carroll's will. Carroll complains the police promised him leniency and that he would not go to jail. However, the record does not indicate any such promises. The police promised Carroll they would take him home at the conclusion of the interview, which they did. The police also promised Carroll they would attempt to prove his version of events was true, which they did by making the recordings with Carroll's coconspirators. While Carroll may have misunderstood the detectives' statements as a promise of leniency, the promise of taking Carroll home at the end of the interrogation and trying to prove his story were not impermissible falsehoods that would render Carroll's statements involuntary and entitle him to a new trial. *See id.* Accordingly, we

conclude that the detectives' promises to take Carroll home did not constitute a promise of leniency and did not coerce his statement.

Whether Carroll was in custody for Miranda purposes

Carroll also claims that police violated his *Miranda* rights. The question presented is whether Carroll was in custody for purposes of *Miranda* and, if so, whether he properly received *Miranda* warnings.

"[A] trial court's custody and voluntariness determinations present mixed questions of law and fact subject to this court's de novo review." *Rosky v. State*, 121 Nev. 184, 190, 111 P.3d 690, 694 (2005). This court explained the manner in which it reviews these decisions:

> The proper inquiry requires a two-step analysis. The district court's purely historical factual findings pertaining to the "scene- and action-setting" circumstances surrounding an interrogation [are] entitled to deference and will be reviewed for clear error. However, the district court's ultimate determination of whether a person was in custody and whether a statement was voluntary will be reviewed de novo. . . .
>
> For this standard of review to function properly, "trial courts must exercise their responsibility to make factual findings when ruling on motions to suppress."

Id. at 190-91, 111 P.3d at 694-95 (quoting *In re G.O.*, 727 N.E.2d 1003, 1010 (Ill. 2000)). "[W]here the trial court's determination that a defendant was not improperly induced to make the statement [to police] is supported by substantial evidence, . . . such a finding will not be disturbed on appeal." *Barren v. State*, 99 Nev. 661, 664, 669 P.2d 725, 727 (1983).

Initially, we take issue with the district court's failure to issue an order containing findings of fact and conclusions of law. *See Rosky*, 121 Nev. at 191, 111 P.3d at 695 (explaining that "trial courts must exercise

their responsibility to make factual findings when ruling on motions to suppress" (internal quotations omitted)). In the instant case, the district court denied Carroll's pretrial motion without making factual findings or conclusions of law. We again remind the district courts of their duty to enter a proper order with factual findings and legal conclusions when ruling on motions to suppress in order to facilitate appellate review. The trial court did not make any "factual findings pertaining to the 'scene- and action-setting' circumstances surrounding [the] interrogation," *see id.* at 190, 111 P.3d at 694, so we cannot give deference to any such findings.

Miranda warnings are "required when a suspect is subjected to a custodial interrogation." *Archanian v. State*, 122 Nev. 1019, 1038, 145 P.3d 1008, 1021 (2006). A defendant's statements made during a custodial interrogation may be admitted at trial only if *Miranda* rights were administered and validly waived. *Koger v. State*, 117 Nev. 138, 141, 17 P.3d 428, 430 (2001). A defendant is "in custody" under *Miranda* if he or she has been formally arrested or his or her freedom has been restrained to "the degree associated with a formal arrest so that a reasonable person would not feel free to leave." *State v. Taylor*, 114 Nev. 1071, 1082, 968 P.2d 315, 323 (1998). Custody is determined by the totality of the circumstances, "including the site of the interrogation, whether the objective indicia of an arrest are present, and the length and form of questioning." *Id.* at 1081-82, 968 P.2d at 323. An individual is not in custody for *Miranda* purposes if the police are merely asking questions at the scene of the crime or where an individual questioned is merely the focus of a criminal investigation. *Id.* at 1082, 968 P.2d at 323 (internal citations omitted).

Site of the interrogation

First, the site of the interrogation indicates Carroll was in police custody when he gave his statement. A detective testified that although Carroll drove himself to the Palomino Club, the police drove Carroll in an official police vehicle to the homicide office to conduct the interrogation. The detective admitted they could have questioned Carroll at the Palomino Club where they found him, or at Carroll's residence, which was a short walk from the club, and still have been able to make an audio recording of the questioning. However, the detective stated the homicide office is a "more intimidating place to question a witness." The detective also testified that the interrogation room was small and had only one door. He explained that Carroll sat behind a desk with his back toward the wall furthest from the door. The detective also explained that he and another detective sat on the other side of the desk, closest to the door.

This environment suggests that Carroll was in custody. Police drove him to the homicide office for questioning, so Carroll could not terminate the interrogation or leave the homicide office unless the detectives agreed and gave him a ride home. Moreover, the detectives deliberately intimidated Carroll by taking him to the homicide office instead of questioning him at a more convenient location.

Additionally, the arrangement of the room suggests Carroll was in custody. By seating Carroll in a very small room, the furthest from the door, and putting a desk and two police detectives between him and the exit, Carroll was physically precluded from leaving the room unless the detectives stood, moved, and allowed him to leave. Accordingly, the site of the interrogation suggests Carroll was in custody at the time of the interrogation.

This case is distinguishable from *Silva v. State*, 113 Nev. 1365, 951 P.2d 591 (1997). In *Silva*, we relied upon *California v. Beheler*, 463 U.S. 1121, 1125 (1983), and concluded that questioning the suspect at a police station "does not automatically mean that he was in custody." *Silva*, 113 Nev. at 1370, 951 P.2d at 594. "Silva was questioned for approximately one to two hours and was allowed to speak with his sister when he requested." *Id.* at 1369, 951 P.2d at 594. We also noted that the record did not show that police withheld food or drink from Silva and that the police did not promise him anything. *Id.* Based on the totality of the circumstances, we concluded that the site of the interrogation did not create a custodial interrogation. *Id.* at 1370, 951 P.2d at 594.

Here, however, the circumstances are different. Police did not allow Carroll to use his telephone when he said he needed to make a call so he could confirm that he did not kill Hadland, and police actually took Carroll's telephone away from him. Police also told Carroll to "sit tight" and did not take him home when he said that he wanted to go home. The detectives also promised Carroll that they would confirm his claim that he did not murder Hadland and was acting under the direction of the Palomino Club management. Thus, we cannot reach the same conclusion we reached in *Silva*.

Objective indicia of arrest

Objective indicia of arrest comprise the following:

> (1) whether the suspect was told that the questioning was voluntary or that he was free to leave; (2) whether the suspect was not formally under arrest; (3) whether the suspect could move about freely during questioning; (4) whether the suspect voluntarily responded to questions; (5) whether the atmosphere of questioning was police-dominated; (6) whether the police used

> strong-arm tactics or deception during questioning; and (7) whether the police arrested the suspect at the termination of questioning.

Taylor, 114 Nev. 1071, 1082 n.1, 968 P.2d 315, 323 n.1.

First, although the detectives testified that Carroll was not under arrest when they interrogated him and that Carroll was not handcuffed or in any way restrained, the objective indicia of arrest likewise indicate Carroll was in police custody when he gave his statement. The interrogating detectives did not tell Carroll he was free to leave. At the beginning of the interrogation, a detective informed Carroll he was not under arrest "right now" and noted that Carroll was speaking with him and another detective voluntarily. However, the record does not reflect that police informed Carroll he could refuse to speak with them or terminate the interrogation at any time if he wished. Police did not provide Carroll with *Miranda* warnings until the interrogation was two-thirds finished and he implicated himself in Hadland's murder. Additionally, Carroll repeatedly informed the detectives that he wanted to go home before making implicating statements, but the detectives ignored his requests. Thus, this factor weighs in Carroll's favor.

Second, as previously indicated, police informed Carroll he was not under formal arrest when he was questioned. Thus, this factor weighs in the State's favor.

Third, as also indicated previously, the record shows the interrogation room was very small and likely prevented Carroll from moving freely when he was questioned. The room was arranged with one small table and three chairs. Also, there was only one door, and the detectives seated Carroll furthest from the door. He also could not leave the room without asking the detectives to move and allow him to leave.

Additionally, detectives did not let Carroll outside the interrogation room; they instructed him to "sit tight." Thus, Carroll could not move about freely during questioning and this factor weighs in Carroll's favor.

Fourth, the transcript of Carroll's statement to police shows Carroll voluntarily responded to the detectives' questions, although he did not respond honestly until the detectives promised to protect him and take him home after the interrogation. Nevertheless, Carroll repeatedly voiced his apprehension in speaking candidly to the detectives. When a detective accused Carroll of not being honest with them, Carroll told the detective he did not want to get into trouble because he had a child at home. When another detective told Carroll they knew he was not telling them the whole story, Carroll told them he feared for his life and feared he could go to jail. Carroll also repeatedly asked if he would be allowed to go home and repeatedly said he wanted to go home, but detectives did not terminate the interview and take Carroll home. Thus, this factor weighs in Carroll's favor.

Fifth, the detectives dominated the atmosphere when they interrogated Carroll. Two detectives questioned Carroll throughout the interrogation; not one of the three questioning detectives ever spoke with Carroll alone. Additionally, when Carroll asked the detectives if he could make a telephone call to confirm his story, the detectives refused and took Carroll's phone from him. Similarly, the detectives transported Carroll to the homicide office, and they did not take him home when he expressed a desire to go home. Thus, this factor clearly and overwhelmingly weighs in Carroll's favor.

Sixth, a detective deceived Carroll when he claimed police obtained Carroll's cellular phone records indicating Carroll was near the

scene of the crime when it occurred. The detectives did not tell Carroll any other blatant lies to secure his statement. Strong-arm tactics, however, are evident throughout the interrogation. The detectives transported Carroll from his place of employment to the homicide office, instead of a more convenient or more comfortable location, questioned him in a small room, and took his phone from him. These tactics indicated custody.

The detectives also used the tactic of promising Carroll that they would take him home after the interrogation and prove his story about how Hadland was killed if he told them the truth. This tactic was successful. Prior to making this promise, Carroll did not incriminate himself in Hadland's murder. After the detective made this promise to Carroll, Carroll implicated himself in the murder. And detectives testified that the last detective to question Carroll intentionally used threatening interrogation techniques. Thus, this factor weighs in Carroll's favor.

Last, a detective testified that at the end of the interrogation, the detectives took Carroll home—he was not arrested at that time. Thus, this factor weighs in favor of the State.

In sum, only two of seven factors weigh in the State's favor, one factor does not weigh for or against the State, and four of the factors weigh in Carroll's favor. Accordingly, objective indicia of arrest suggest Carroll was in custody at the time of the interrogation.

Length and form of questioning

At 9:25 p.m., detectives questioned Carroll for approximately two and one-half hours, excluding breaks. The detectives met Carroll at the Palomino Club and took him from his place of employment and questioned him until almost midnight. Furthermore, a detective testified that one purpose of the breaks was to let Carroll "kind of go a little bit

crazy." Moreover, a third detective joined the original two because the third detective was more aggressive than the first two detectives. Such a scenario belies the detective's trial testimony that they questioned Carroll as a witness, not a suspect. Had detectives truly questioned Carroll as a witness, they likely would have done so at a more convenient, less intimidating location, such as at the Palomino Club where they contacted him, or at his home, which was near the club, rather than the police station across town. And if the police had simply questioned Carroll as a witness and not as a suspect, the detectives would likely not have taken breaks to let Carroll's mind "go crazy" or found a need to use a third, more aggressive detective. Therefore, the length and form of questioning suggest Carroll was in custody at the time of the interrogation.

The detectives chose not to provide *Miranda* warnings until the last of the three detectives began questioning Carroll, which was after he had already made inculpatory statements. Although Carroll was not formally under arrest, he was in custody and should have received *Miranda* warnings. *See Archanian*, 122 Nev. at 1038, 145 P.3d at 1021-22. We therefore conclude that the district court erred by not suppressing Carroll's statements.

Post-Miranda statements

We additionally conclude that Carroll's statement to police after he received the *Miranda* warnings should have been suppressed pursuant to the Supreme Court's holding in *Missouri v. Seibert*, 542 U.S. 600, 611-12 (2004). In *Seibert*, like here, police delayed recitation of the *Miranda* warnings until the defendant confessed to the crime. *Id.* at 604-05. After the defendant confessed, police provided the requisite warnings and obtained a signed waiver of rights. *Id.* at 605. Police then re-questioned the defendant using the admissions she made before receiving

the warnings. *Id.* The Court determined the midstream warnings "could [not] have served their purpose" and ruled the post-warning statements were inadmissible. *Id.* at 617. The Court explained the consideration a reviewing court must undertake in determining if post-warning statements are admissible:

> The threshold issue when interrogators question first and warn later is thus whether it would be reasonable to find that in these circumstances the warnings could function "effectively" as *Miranda* requires. Could the warnings effectively advise the suspect that he had a real choice about giving an admissible statement at that juncture? Could they reasonably convey that he could choose to stop talking even if he had talked earlier? For unless the warnings could place a suspect who has just been interrogated in a position to make such an informed choice, there is no practical justification for accepting the formal warnings as compliance with *Miranda*, or for treating the second stage of interrogation as distinct from the first, unwarned and inadmissible segment.

Id. at 611-12.

The instant case is indistinguishable from *Seibert*. We conclude that the midstream warnings did not properly advise Carroll that he could terminate the interrogation despite his previous inculpatory statements. Carroll's post-warning statements were simply a repetition of his pre-warning statements. The detectives told him that they would take him home and that he would not go to jail if he told them the whole truth. Although police recited the *Miranda* warnings, Carroll was just as dependent upon police to take him home and just as fearful he would go to jail after he received the warnings as he was before. Despite the short break in questioning, Carroll was subjected to a single, continuous course of questioning during which the detectives chose to withhold the *Miranda*

warnings. Therefore, the district court should have suppressed Carroll's post-*Miranda* statement to police.

However, we conclude that although the district court erred in admitting Carroll's statement into evidence at trial, the State has shown that the error was harmless. *See Boehm v. State*, 113 Nev. 910, 916, 944 P.2d 269, 273 (1997) (applying harmless error analysis to a statement admitted at trial in violation of *Miranda*). Aside from Carroll's inculpatory statements to the police, the district court properly admitted other powerful evidence of his guilt. Thus, our review of the record convinces us that this error is harmless beyond a reasonable doubt.

Sufficiency of the evidence

We have reviewed Carroll's argument that the State did not present sufficient evidence to convict him of conspiracy or murder because the State failed to show he intended for Counts to kill Hadland. We conclude that this argument is without merit. The evidence at trial supported a finding that Carroll knew the order was to kill Hadland and that Carroll recruited Counts so he did not have to kill Hadland himself. This is sufficient to convict on both charges. *See Doyle v. State*, 112 Nev. 879, 894, 921 P.2d 901, 911 (1996) ("A person who knowingly does any act to further the object of a conspiracy, or otherwise participates therein, is criminally liable as a conspirator."), *overruled on other grounds by Kaczmarek v. State*, 120 Nev. 314, 91 P.3d 16 (2004).

Cumulative error

Lastly, Carroll argues that cumulative error denied him of a fair trial, even if the specific errors, standing alone, are insufficient for a new trial. We disagree. The sole error was the district court's denial of Carroll's motion to suppress his statement to police because police violated *Miranda*. We determined this error was harmless beyond a reasonable

doubt, and one error cannot cumulate. *See United States v. Sager*, 227 F.3d 1138, 1149 (9th Cir. 2000) ("One error is not cumulative error.").

As we previously explained, the district court erred when it admitted Carroll's statement to police because Carroll was in custody for *Miranda* purposes and the police failed to provide *Miranda* warnings before Carroll made inculpatory statements. However, based on the overwhelming evidence establishing Carroll's involvement in Hadland's murder, we conclude the district court's error in admitting Carroll's statement was harmless beyond a reasonable doubt. Even without his statements to police, the remaining evidence was sufficient to sustain his convictions.

Accordingly, we affirm the judgment of the district court.

Cherry, J.
Cherry

We concur:

Parraguirre, C.J.
Parraguirre

Douglas, J.
Douglas

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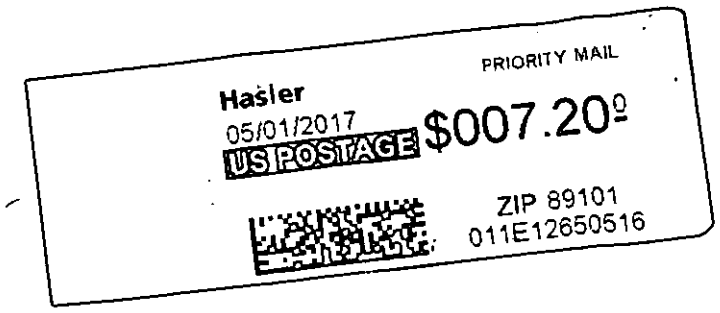

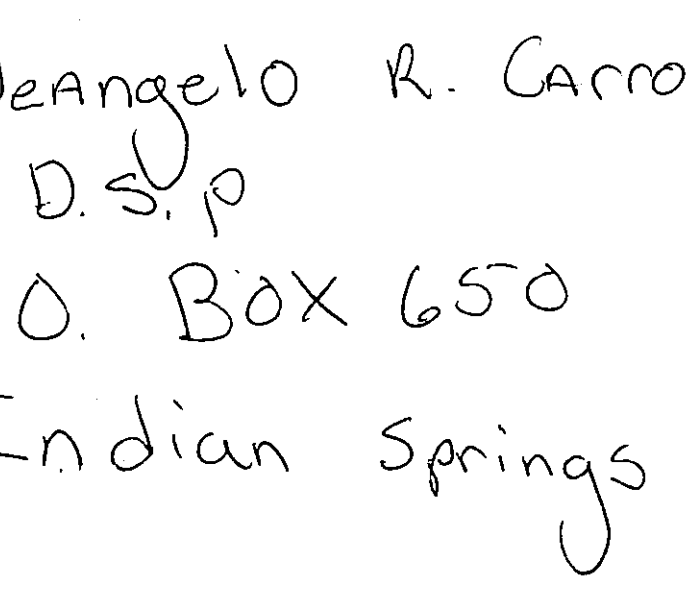

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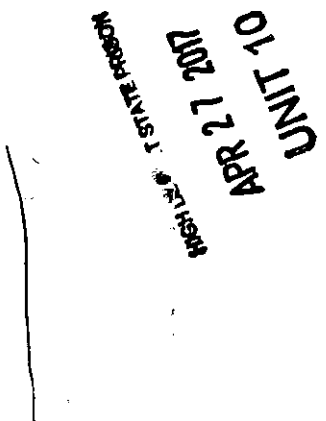

Eighth Judicial District court
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DISTRICT COURT
CLARK COUNTY, NEVADA

DEANGELO RESHAWN CARROLL,
#1678381

Petitioner,

-vs-

THE STATE OF NEVADA

Respondent.

CASE NO: 05C212667-4

DEPT NO: XXI

STATE'S RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION) AND OPPOSITION TO MOTION FOR THE APPOINTMENT OF COUNSEL

DATE OF HEARING: August 17, 2017
TIME OF HEARING: 9:30 A.M.

Comes now, the State of Nevada, by Steven B. Wolfson, Clark County District Attorney, through JONATHAN VANBOSKERCK, Chief Deputy District Attorney, and hereby submits the attached Points and Authorities in Response to Deangelo Carroll's Petition for Writ of Habeas Corpus (Post-Conviction) and in Opposition to Carroll's Motion for the Appointment of Counsel.

This Response and Opposition is made and based upon all the papers and pleadings on file herein, the attached points and authorities in support hereof, and oral argument at the time of hearing, if deemed necessary by this Honorable Court.

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POINTS AND AUTHORITIES

STATEMENT OF THE CASE

On June 20, 2005, the State charged Deangelo Reshawn Carroll ("Petitioner") by way of Information as follows: COUNT 1 – Conspiracy to Commit Murder (Felony – NRS 200.010, 200.030, 193.165); COUNT 2 – Murder with Use of a Deadly Weapon (Felony – NRS 200.010, 200.030, 193.165); and COUNT 3 – Solicitation to Commit Murder (Felony – NRS 199.500).

On April 30, 2010, Petitioner filed a Motion to Suppress, seeking to exclude his statements to the police. On May 4, 2010, the State filed its Opposition to Petitioner's Motion to Suppress. On May 11, 2010, the Court denied Petitioner's Motion.

Petitioner's jury trial began on May 17, 2010. On May 21, 2010, the State filed its Fifth Amended Information, dropping COUNT 3 from the original Information. The guilt phase of Petitioner's trial ended on May 25, 2010, with the jury returning a verdict of Guilty on both counts. Specifically, the jury found Petitioner guilty of Conspiracy to Commit Murder and of First Degree Murder with Use of a Deadly Weapon. On May 25, 2010, the jury sentenced Petitioner, on the murder charge, to life in prison with the possibility of parole after a minimum of 40 years.

On August 12, 2010, Petitioner was sentenced. Recognizing Petitioner's unique role in the crime, the Court sentenced Petitioner to 36 to 120 months in prison for Conspiracy to Commit Murder. Further, the Court imposed the sentence of life in prison with parole eligibility after 40 years, to run consecutive to COUNT 1.[1] The Judgment of Conviction was filed on September 8, 2010.[2]

Following the entry of the Judgment of Conviction, Petitioner informed his trial counsel that he wished to pursue a direct appeal. Because of a breakdown in communication between Petitioner and trial counsel, a Notice of Appeal was not timely filed. Upon discovery of this,

[1] Petitioner's sentence on the charge of First Degree Murder was composed of a term of life with parole eligibility after 20 years plus an equal and consecutive term for the deadly weapon enhancement

[2] An Amended Judgment of Conviction was filed on March 23, 2011, correcting a clerical error.

new counsel was appointed to determine whether an untimely appeal could be pursued. New counsel had difficulty obtaining the complete file and did not discuss the post-conviction claims with trial counsel. On October 21, 2013, the Court found that Petitioner had good cause to excuse the untimeliness of his first habeas petition. On January 3, 2014, the District Court entered its Findings of Fact, Conclusions of Law and Order directing the court clerk to file a Notice of Appeal on behalf of Petitioner. The Notice of Appeal was filed January 6, 2014. On April 7, 2016, the Nevada Supreme Court issued a published opinion affirming the judgment. Carroll v. State, 132 Nev. __, 371 P.3d 1023 (2016). Remitter issued on October 21, 2016.

On May 10, 2017, Petitioner filed the instant Petition for Writ of Habeas Corpus (Post-Conviction). The State responds as follows.

STATEMENT OF FACTS

The following are the facts as determined by the Nevada Supreme Court in its published opinion affirming the judgment:

> 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 window 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 the 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[3] 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 these recordings allowed the State to charge three members of Palomino Club management for their roles in Hadland's murder.
>
> After the detectives finished obtaining information and evidence from Carroll, they arrested him. The State's information charged Carroll with conspiracy to commit murder and murder with use of a deadly weapon.

Carroll, 132 Nev. at __, 371 P.3d at 1026-27.

ARGUMENT

This Court should deny the Petition because the claims raised within are either waived under NRS 34.810(1)(b), consist of nothing more than bare allegations, or are otherwise without merit. The Court should likewise deny Petitioner's motion seeking the appointment of counsel given that Petitioner fails to establish any of the relevant criteria outlined in NRS 34.750.

I. The Petition Raises Claims That Are Either Waived Under NRS 34.810(1)(b)(2), Unsupported By Facts, Or Otherwise Without Merit.

The Petition raises both substantive claims and claims of ineffective assistance of counsel. While the Petition ostensibly raises four grounds for relief, Petitioner raises several discrete arguments within, all of which are either unsupported by facts or otherwise without

[3] Miranda v. Arizona, 384 U.S. 436, 86 S Ct. 1602 (1966).

merit. Moreover, preceding these four grounds for relief are two substantive claims, which should be deemed waived under NRS 34.810(1)(b)(2).

A. The Substantive Claims Preceding The Grounds For Relief Are All Waived Under NRS 34.810(1)(b)(2).

Petitioner raises two discrete claims before setting out his four grounds for relief. First, Petitioner argues that this Court lacks jurisdiction because the crimes at issue occurred on federal property. Petition at 4. Second, Petitioner argues that this Court lacks jurisdiction because the statutes under which he was convicted are unconstitutional. Id. These claims, however, are substantive claims that should have been raised on direct appeal and should thus be deemed waived under NRS 34.810(1)(b)(2). NRS 34.810(1)(b)(2) maintains that "[t]he court shall dismiss a petition if the court determines that . . . [t]he petitioner's conviction was the result of a trial and the grounds for the petition could have been . . . [r]aised in a direct appeal or a prior petition for a writ of habeas corpus or post-conviction relief . . . unless the court finds both cause for the failure to present the grounds and actual prejudice to the petitioner." (emphasis added); see also NRS 34.724(2) (stating that a post-conviction petition is not a substitute for the remedy of a direct review); Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994), disapproved of on other grounds by, Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999) (explaining that "claims that are appropriate for a direct appeal must be pursued on direct appeal, or they will be considered waived in subsequent proceedings")).

i. Petitioner's Claim That This Court Lacks Jurisdiction Because The Crimes He Committed Occurred On Federal Property Is A Substantive Claim That Is Waived Under NRS 34.810(1)(b)(2).

Petitioner first claims that this Court lacks jurisdiction because the crimes he committed occurred on federal property. Petition at 4. Petitioner then avers that this Court "did not receive permission to prosecute from the federal agency." Id.

This claim, however, is a substantive claim that should have been raised on direct appeal and should thus be deemed waived under NRS 34.810(1)(b)(2). See also NRS 34.724(2); Franklin, 110 Nev. at 752, 877 P.2d at 1059.

Moreover, Petitioner cannot establish either good cause for delay or prejudice. As for cause, Petitioner cannot establish good cause for delay because the facts relevant to this claim—i.e., the knowledge that the crimes occurred on federal property—have been available since the offenses occurred. Petitioner also cannot establish prejudice because the underlying claim is meritless. See NRS 171.010; Pendleton v. State 103 Nev. 95, 734 P.2d 693 (1987) ("The only way in which the United States could attain exclusive jurisdiction involves an affirmative cession of jurisdiction by the State of Nevada and an affirmative acceptance of jurisdiction by the United States." (citing Fort Leavenworth R.R. Co. v. Lowe, 114 U.S. 525 (1885).) Here, Petitioner has failed to present any evidence that Nevada has ceded exclusive jurisdiction over the lands in question to the United States. That being the case, Petitioner's jurisdictional argument fails.

ii. Petitioner's Claim That This Court Lacks Jurisdiction Because The Nevada Revised Statutes Are Unconstitutional Is A Substantive Claim That Is Waived Under NRS 34.810(1)(b)(2).

Petitioner next claims that this Court lacks jurisdiction because the statutes under which he was convicted are unconstitutional. To the extent that Petitioner raises a substantive challenge to the constitutionality of the Nevada Revised Statutes, Petitioner's claim has been waived by failing to raise it on direct appeal. NRS 34.810(1)(b)(2); NRS 34.724(2)(a); Franklin, 110 Nev. at 752, 877 P.2d at 1059. Petitioner fails to address good cause or prejudice pursuant to Nevada law to overcome the procedural default. See NRS 34.810(3).

But, in any event, Petitioner cannot establish that the Nevada Revised Statutes in their entirety are unconstitutional. It is well-established that "[s]tatutes are presumed to be valid, and the challenger bears the burden of showing that a statute is unconstitutional." Halverson v. Secretary of State, 124 Nev. 484, 487, 186 P.3d 893, 896 (2008); Nevadans for Nevada v. Beers, 122 Nev. 930, 939, 142 P.3d 339, 345 (2006); Sheriff. v. Burdg, 118 Nev. 853, 857, 59 P.3d 484, 486 (2002).

"One of the settled maxims in constitutional law is that the power conferred upon the Legislature to make laws cannot be delegated to any other body or authority." Banegas v. State

Industrial Insurance System, 117 Nev. 222, 227, 19 P.3d 245, 248 (2001) (quoting Nev. Const. Art. 3, § 1). However, it is likewise settled that no such delegation occurs where the legislature does not delegate its power to actually make laws. See Villanueva v. State, 117 Nev. 664, 668, 27 P.3d 443, 446 (2001); State v. Shaughnessy, 47 Nev. 129, 217 P. 581, 583 (1923); Marshall Field & Co. v. Clark, 143 U.S. 649, 12 S. Ct. 495 (1892).

> The Statute Revision Commission was created by--
>
> enactment, by the 45th Session of the Legislature of the State of Nevada, of chapter 304, Statutes of Nevada 1951 (subsequently amended by chapter 280, Statutes of Nevada 1953, and chapter 248, Statutes of Nevada 1955), which created the Statute Revision Commission and authorized the Commission to undertake, for the first time in the state's history, a comprehensive revision of the laws of the State of Nevada of general application.

Legislative Counsel's Preface to the Nevada Revised Statutes, available at http://www.leg.state.nv.us/Division/Research/Library/Documents/HistDocs/Preface.pdf. This committee was charged with compiling and revising the existing Statutes of Nevada:

> [T]o the end that upon the convening of the 1957 legislature Nevada Revised Statutes was ready to present for approval. By the provisions of chapter 2, Statutes of Nevada 1957, Nevada Revised Statutes, consisting of NRS 1.010 to 710.590, inclusive, was "***adopted and enacted as law of the State of Nevada***."

Foreword to the Nevada Revised Statutes, available at https://www.leg.state.nv.us/Division/Research/Library/Documents/HistDocs/Foreword.pdf (emphasis in original); see also Legislative Counsel's Preface to the Nevada Revised Statutes ("This bill, Senate Bill No. 2 . . . was passed without amendment or dissenting vote, and on January 25, 1957, was approved by Governor Charles H. Russell.").

Petitioner alleges that the presence of three Nevada Supreme Court justices on the Statute Revision Commission violated Art. 3, § 1, without any actual showing that this was an improper delegation of legislative power to the judicial branch. See Petition at 5. A bill may originate in either house, Nevada Constitution Art. 4, § 16, at which point it must pass through the procedures enumerated in Art. 4, § 18, and be signed by the governor, Art. 4, § 35, before it may become a law. Petitioner—who has the burden of demonstrating unconstitutionality—presents no authority holding that a statute may not be drafted, revised, or compiled by an

extra-legislative body before it originates in a house of the legislature. Moreover, as the Commission took no part in any of the steps enumerated in Art. 4, it did not actually make any law. Consequently, no improper delegation of legislative authority occurred where Senate Bill No. 2 originated in the Senate, was presented to the Legislature, and was duly adopted, signed, and enacted. As such, the Nevada Revised Statutes are not unconstitutional.

Petitioner also alleges at great length that the Nevada Revised Statutes are unconstitutional because they have no enactment clause. See Petition at 4-9. While it is well-established that the laws of Nevada must include an enacting clause, the Nevada Revised Statutes do not have the same requirement, as they are not laws enacted by the legislature. Instead, the Nevada Revised Statutes consist of *previously enacted laws*, which have been classified, codified, and annotated by the Legislative Counsel. See NRS 220.120. Thus, the reason the Nevada Revised Statutes are referenced in criminal proceedings is because they "constitute the official codified version of the Statutes of Nevada and may be cited as *prima facie* evidence of the law." NRS 220.170(3) (emphasis added). Further, the content requirements for the Nevada Revised Statutes, as laid out in NRS 220.110, do not require the enacting clause to be republished in them. See NRS 221.110. Therefore, the lack of an enacting clause in the Nevada Revised Statutes does not render them unconstitutional.

B. The Ineffective-Assistance-Of-Counsel Claims Raised in Ground One Either Consist Of Bare, Naked Allegations or Are Otherwise Without Merit.

Petitioner raises six claims of ineffective assistance of counsel. Such claims 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); Molina v. State, 120 Nev. 185, 190, 87 P.3d 533, 537 (2004).

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"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 a 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, 1011-12, 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)).

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).

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Not only must the petitioner show that counsel was incompetent, but he must also demonstrate that but for that incompetence the results of the proceeding would have been different:

> In assessing prejudice under Strickland, the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently. Instead, Strickland asks whether it is reasonably likely the results would have been different. This does not require a showing that counsel's actions more likely than not altered the outcome, but the difference between Strickland's prejudice standard and a more-probable-than-not standard is slight and matters only in the rarest case. The likelihood of a different result must be substantial, not just conceivable.

Harrington, 562 U.S. at 111-12, 131 S. Ct. at 791-92 (internal quotation marks and citations omitted); accord McNelton v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999) (noting that a defendant must show a reasonable probability that, but for counsel's errors, the result of the trial would have been different).

Importantly, when raising a Strickland claim, the defendant bears the burden to demonstrate the underlying facts by a preponderance of the evidence. Means, 120 Nev. at 1012, 103 P.3d at 33. "Bare" or "naked" allegations are not sufficient to show ineffectiveness of counsel; claims asserted in a petition for post-conviction relief must be supported with specific factual allegations which if true would entitle petitioner to relief. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

i. Petitioner's Claim That Counsel Was Ineffective For Failing To Federalize The Alleged Fourth Amendment Violation Is Without Merit.

Petitioner claims that counsel was ineffective for failing to "federalize[ ] the 4th Amendment in their documents to the Appellate Court" when the Nevada Supreme Court in its published opinion affirming the judgment "admit[ed] that there was a seizure by LVMPD and [he] couldn't leave from custody." Petition at 11. Petitioner, however, cannot establish ineffective assistance because he cannot show that he will be denied a more favorable standard of review in a federal habeas proceeding. Browning v. State, 120 Nev. 347, 365, 91 P.3d 39, 52 (2004).

ii. Petitioner's Claim That Counsel Was Ineffective For The Failure To Raise NRS 171.123 Is Without Merit.

Petitioner next claims that counsel was ineffective for failing to raise NRS 171.123. Petition at 11. In so arguing, Petitioner betrays a misunderstanding of this statute. NRS puts a one-hour limit on a Terry[4] stop. See State v. Lisenbee, 116 Nev. 1124, 1128, 13 P.3d 947, 950 (2000) ("The Nevada codification of Terry is found in NRS 171.123(1)."); see also Stuart v. State, 94 Nev. 721, 722, 587 P.2d 33, 34 (1978) (citing Terry, 392 U.S. at 1, 88 S. Ct. at 1868). NRS 171.123 was not applicable here. The record clearly reflects that Petitioner's contact with the police was voluntary:

> Q: Once you come into contact with Mr. Carroll and he shakes your hand, can you describe for us the conversation you have with Mr. Carroll?
>
> A: Yeah. I let him know that we're doing an investigation regarding a friend of his or a person that was employed by the name of TJ and I let him know that, you know, his phone was one of the last calls to TJ and that I'd like to speak to him regarding his relationship and their conversation that they had on the phone.
>
> Q: And what's Mr. Carroll's reaction?
>
> A: He is more than willing to speak with us.

Transcript of Proceedings: Jury Trial – Day 3, May 19, 2010, at 250. Further, the Nevada Supreme Court in its published opinion affirming the judgment recognized that Petitioner's initial contact with the police was voluntary. See Carroll, 132 Nev. at __, 371 P.3d at 1027. That being the case, it would have been futile for counsel to have raised NRS 171.123. And because counsel cannot be deemed ineffective for failing to raise futile arguments, this Court should reject Petitioner's claim that counsel was ineffective for failing to raise NRS 171.123. See Ennis, 122 Nev. at 706, 137 P.3d at 1103.

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[4] Terry v. Ohio, 392 U.S. 1, 30, 88 S. Ct. 1868, 1884 (1968).

iii. Petitioner's Claim That Counsel Was Ineffective For Failing To Secure A Written Order From The Denial Of The Motion To Suppress Is Without Merit.

Petitioner next claims that counsel was ineffective for failing to demand that the Court put into writing its denial of his motion to suppress. Petition at 11. Petitioner, however, cannot establish ineffective assistance of counsel because he cannot establish that he was prejudiced by this failure.

To be sure, the Nevada Supreme Court chided this Court for failing to issue an order containing factual findings and conclusions of law:

> Initially, we take issue with the district court's failure to issue an order containing findings of fact and conclusions of law. See Rosky, 121 Nev. at 191, 111 P.3d at 695 (explaining that "trial courts must exercise their responsibility to make factual findings when ruling on motions to suppress" (internal quotations omitted)). In the instant case, the district court denied Carroll's pretrial motion without making factual findings or conclusions of law. We again remind the district courts of their duty to enter a proper order with factual findings and legal conclusions when ruling on motions to suppress in order to facilitate appellate review. The trial court did not make any "factual findings pertaining to the 'scene-and action-setting' circumstances surrounding [the] interrogation," see id. at 190, 111 P.3d at 694, so we cannot give deference to any such findings.

Carroll, 132 Nev. at __, 371 P.3d at 1031-1032. Nonetheless, despite the Court's failure to reduce its findings of fact and conclusions of law into writing (and counsel's failure to challenge this), the Nevada Supreme Court was able to adjudicate the issue on appeal. See id. at __, 371 P.3d at 1032-36. If anything, counsel's "failure" to demand this of the Court worked to Petitioner's advantage. Because the Court failed to make any such findings, Petitioner was able to argue the issue on appeal without having to challenge such findings, which would have received deference from the appellate court.

iv. Petitioner's Claim That Counsel Was Ineffective For Failing To Secure An Evidentiary Hearing On The Issue Of His Confession To The Police Is Without Merit.

Petitioner next claims that counsel was ineffective for failing to secure an evidentiary hearing on the issue of whether his confession was a product of an illegal detention. Petition at 11. The record reflects, however, that Petitioner's trial counsel made a good-faith attempt

to secure an evidentiary hearing at the hearing held on May 11, 2010. See Reporter's Transcript of Hearing RE: State's Motion for Discovery, RE: Expert Testimony and Motion in Limine, RE: Defendant's Motion to Suppress, May 11, 2010, at 6. That an evidentiary hearing was ultimately not held was due to this Court determination that such a hearing was not necessary, not because counsel failed to ask for one.

But, in any event, Petitioner cannot prove that he was prejudiced by the lack of an evidentiary hearing. In its published decision affirming Petitioner's judgment, the Nevada Supreme Court held that any error in admitting Petitioner's statement was harmless:

> However, we conclude that although the district court erred in admitting Carroll's statement into evidence at trial, the State has shown that the error was harmless. See Boehm v. State, 113 Nev. 910, 916, 944 P.2d 269, 273 (1997) (applying harmless error analysis to a statement admitted at trial in violation of Miranda). Aside from Carroll's inculpatory statements to the police, the district court properly admitted other powerful evidence of his guilt. Thus, our review of the record convinces us that this error is harmless beyond a reasonable doubt.

Carroll, 132 Nev. at __, 371 P.3d at 1035. The Nevada Supreme Court's finding of harmless error precluded Petitioner from establishing that he was prejudiced by the lack of an evidentiary hearing.

v. Petitioner's Claim That Counsel Was Ineffective Tor Failing To Challenge The Interrogation Procedure Is Without Merit.

Petitioner next claims that counsel was ineffective for failing to challenge "[t]he use of [the] two step interrogation procedure used by LVMPD officers." Petition at 12. Petitioner, however, once again fails to establish ineffective assistance of counsel because he cannot establish that he was prejudiced by counsel's failure to challenge this specific procedure. As noted above, in its published decision affirming Petitioner's judgment, the Nevada Supreme Court held that any error in admitting Petitioner's statement was harmless. Carroll, 132 Nev. at __, 371 P.3d at 1035. This finding precludes Petitioner from establishing that he was prejudiced by counsel's failure to challenge the "the two step" interrogation procedure employed by the police.

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vi. Petitioner's Claim That Counsel Was Ineffective For Failing To Bring Up The Conspiracy To Ignore Miranda Warnings Consists Of Nothing More Than A Bare, Naked Allegation.

Petitioner next claims that "it appears there was a conspiracy between all Court officers at trial to ignore Miranda." Petition at 12. Accordingly, counsel was ineffective for not bringing this to light. See id. Petitioner's allegation that there was such a "conspiracy" is a bare, naked allegation. Thus, the claim of ineffective assistance of counsel premised on such a bare allegation is suitable for summary denial. Hargrove, 100 Nev. at 502, 686 P.2d at 225.

vii. Petitioner's Attempt To Re-Litigate Whether His Confession Was Coerced Is Governed By Law Of The Case.

After Petitioner's nonsensical claim that there was a conspiracy to ignore Miranda, Petitioner goes on to argue that his confession was coerced. See Petition at 12-13. This Court should reject Petitioner's attempt to re-litigate whether his confession was coerced on the basis that the Nevada Supreme Court has already addressed this issue and rejected Petitioner's claim:

> In looking at the totality of the circumstances based on the Passama factors, we conclude that the police did not coerce Carroll's statement. Police did not take advantage of Carroll through his youth, a lengthy detention, repeated and prolonged questioning, or physical punishment. Thus, these factors weigh in the State's favor. As previously discussed, the police did not advise Carroll of his Miranda rights, which weighs in Carroll's favor. Evidence at trial revealed Carroll has below-average intelligence, but a detective testified that during the interrogation, he did not observe any indicators that Carroll was cognitively disabled. Therefore, this factor does not weigh for or against the State. Accordingly, the Passama factors do not show police overcame Carroll's will when they interrogated him.
>
> The use of falsehoods during the interrogation also does not show police overcame Carroll's will. Carroll complains the police promised him leniency and that he would not go to jail. However, the record does not indicate any such promises. The police promised Carroll they would take him home at the conclusion of the interview, which they did. The police also promised Carroll they would attempt to prove his version of events was true, which they did by making the recordings with Carroll's coconspirators. While Carroll may have misunderstood the detectives' statements as a promise of leniency, the promise of taking Carroll home at the end of the interrogation and trying to prove his story were not impermissible falsehoods that would render Carroll's statements

> involuntary and entitle him to a new trial. See id. Accordingly, we conclude that the detectives' promises to take Carroll home did not constitute a promise of leniency and did not coerce his statement.

Carroll, 132 Nev. at __, 371 P.3d at 1030-31. The Nevada Supreme Court's ruling on this issue is the law of the case, and this Court is bound by it. See State v. Loveless, 62 Nev. 312, 317, 150 P.2d 1015, 1017 (1944) (quoting Wright v. Carson Water Co., 22 Nev. 304, 308, 39 P. 872, 873-74 (1895)) ("The decision (on the first appeal) is the law of the case, not only binding on the parties and their privies, but on the court below and on this court itself. A ruling of an appellate court upon a point distinctly made upon a previous appeal is, in all subsequent proceedings in the same case upon substantially the same facts, a final adjudication, from the consequences of which the court cannot depart."). As explained by the Nevada Supreme Court in Hall v. State, 91 Nev. 314, 316, 535 P.2d 797, 799 (1975), "[t]he doctrine of the law of the case cannot be avoided by a more detailed and precisely focused argument subsequently made after reflection upon the previous proceedings." See also Pellegrini v. State, 117 Nev. 860, 879, 34 P.3d 519, 532 (2001) (citing McNelton v. State, 115 Nev. 396, 414-15, 990 P.2d 1263, 1275 (1999)) ("Under the law of the case doctrine, issues previously determined by this court on appeal may not be reargued as a basis for habeas relief.").

viii. Petitioner's Claim Attacking The Nevada Supreme Court's Published Decision Is Without Merit.

Petitioner next claims that "[t]he Nevada Supreme Court opinion that [the] confession procured was harmless error is problematic." Petition at 13. Petitioner thus attempts to entice this Court into reversible error by encouraging it to sit as an appellate court over the decision of the Nevada Supreme Court.

Article 6, § 6 of the Nevada Constitution invests this Court with "appellate jurisdiction in cases arising in Justice Courts and such other inferior tribunals as may be established by law." Only the Nevada Supreme Court has "appellate jurisdiction . . . on questions of law alone in all criminal cases." Nevada Const., Art. 6, § 4. The district courts "lack jurisdiction to review the acts of other district courts." State v. Sustacha, 108 Nev. 223, 225, 826 P.2d 959, 960 (1992); accord Rohlfing v. District Court, 106 Nev. 902, 803 P.2d 659 (1990) (district

courts have equal and coextensive jurisdiction and thus the various district courts lack jurisdiction to review acts of other district courts).

While the district courts have jurisdiction to adjudicate petitions for habeas corpus relief, Nev. Const. Art. 6, § 4, such jurisdiction is limited, in relevant part, to petitions claiming that a conviction or sentence is constitutionally infirm or in violation of state law. NRS 34.724(1). However, habeas is not "a substitute for . . . the remedy of direct review of the sentence or conviction." NRS 34.724(2)(a). The limitations on the authority of the district courts to entertain habeas relief are strictly enforced by the Nevada Supreme Court. McConnell v. State, 125 Nev. 243, 212 P.3d 307 (2009) (challenge to lethal injection protocol is not cognizable in a post-conviction petition for writ of habeas corpus as it is a challenge to the manner in which death will be carried out rather than the validity of the judgment or conviction); Warden v. Owens, 93 Nev. 255, 563 P.2d 81 (1977) (district court may not order relief in habeas corpus proceeding that is beyond its power or authority); Sanchez v. Warden, 89 Nev. 273, 510 P.2d 1362 (1973) (post-conviction proceedings are not intended as a substitute for appeal and as such failure to challenge identification procedure on appeal waived the issue for purposes of post-conviction review).

ix. Petitioner's Claim That Counsel Was Ineffective For Failing To Raise On Appeal The Fact That The Police Took Two Phones Away From Him Is Without Merit.

Petitioner's next claim of ineffective assistance of counsel consists of his allegation that counsel failed to raise on appeal the fact that the police took two phones away from him. Petition at 13. This allegation, in turn, is tied into Petitioner's claim that his statement to the police should not have been admitted. See id. at 13-14. Petitioner, however, once again fails to establish ineffective assistance of counsel because he cannot establish that he was prejudiced by counsel's failure to raise this issue on appeal. As noted above, in its published decision affirming Petitioner's judgment, the Nevada Supreme Court held that any error in admitting Petitioner's statement was harmless. Carroll, 132 Nev. at __, 371 P.3d at 1035. This finding precludes Petitioner from establishing that he was prejudiced by counsel's failure to raise on appeal the fact that two of Petitioner's phones were taken away.

x. Petitioner's Claim That Counsel Was Ineffective For Failing To Argue That Petitioner Had The Right To Be Left Alone Is Without Merit.

Petitioner next claims that counsel was ineffective for failing to argue that he had "[t]he right to be left alone." Petition at 14. As with the previous allegation, this allegation is also tied into Petitioner's claim that his statement to the police should not have been admitted. This claim fails on two grounds.

First, as noted above, the record clearly reflects that Petitioner's contact with the police was voluntary. See Transcript of Proceedings: Jury Trial – Day 3, May 19, 2010, at 250. The Nevada Supreme Court's published opinion affirming the judgment recognized that Petitioner's initial contact with the police was voluntary. See Carroll, 132 Nev. at __, 371 P.3d at 1027. That being the case, it would have been futile for counsel to have raised the argument that Petitioner had the "right to be left alone." And because counsel cannot be deemed ineffective for failing to raise futile arguments, this Court should reject Petitioner's claim that counsel was ineffective for failing to raise this argument. See Ennis, 122 Nev. at 706, 137 P.3d at 1103.

Second, as noted above, in its published decision affirming Petitioner's judgment, the Nevada Supreme Court held that any error in admitting Petitioner's statement was harmless. Carroll, 132 Nev. at __, 371 P.3d at 1035. This finding precludes Petitioner from establishing that he was prejudiced by counsel's failure to argue that he had the "right to be left alone."[5]

xi. Petitioner's Claim That Counsel Was Ineffective For Failing To Acquire Video From The Arrest Scene And The Police Video Of His Detention Is Without Merit.

Petitioner next claims that counsel was ineffective for failing "to secure or subpoena actual tapes of arrest scene at club or police video of official detainment timeline, which would have shown frisk and removal of phone." Petition at 14. As with so many of Petitioner's others allegations, this allegation is also tied into Petitioner's claim that his confession should not have been admitted. And once again, the Nevada Supreme Court's decision on the issue

[5] Before raising his next claim of ineffective assistance of counsel, Petitioner digresses and renews his argument that the statutes under which he was convicted were unconstitutional because of the lack of an enactment clause. Petition at 14. This argument has already been addressed above. See supra at 6-8.

precludes Petitioner from establishing that counsel's failure here has prejudiced him. In its published decision affirming Petitioner's judgment, the Nevada Supreme Court held that any error in admitting Petitioner's statement was harmless. Carroll, 132 Nev. at __, 371 P.3d at 1035. This finding precludes Petitioner from establishing that he was prejudiced by counsel's failure to obtain the video of the arrest scene or the police video of his detention.

xii. Petitioner's Claim That Counsel Was Ineffective For Failing To Address How He Was Prejudiced From Admission of His Statement Is Without Merit.

Petitioner next claims that appellate counsel was ineffective for not "address[ing] whether the statement by Petitioner was prejudicial." Petition at 15. Putting aside the obvious fact that admission of a self-incriminating statement is inherently prejudicial, the record belies Petitioner's claim that counsel did not argue as to the prejudicial effect of his statement. Of the 108-page Opening Brief filed in Petitioner's direct appeal, Petitioner's appellate counsel argued at great length regarding the inadmissibility of Petitioner's self-incriminating statements. See Appellant's Opening Br., Docket # 64757, filed December 4, 2014, at 43-60.

As to Petitioner's claim that counsel "should have filed a formal objection under FRCP 60(b)," this Court should find that Petitioner's reliance on Fed. R. Civ. Pro. 60(b) is misguided for the very reason that he is relying on a *federal* rule in these state proceedings. That said, NRCP 60(b)—the corresponding state rule—mirrors Fed. R. Civ. Pro. 60(b) in many respects and to the extent this Court construes this claim as one raising a NRCP 60(b) complaint, the State will respond accordingly. In short, Petitioner's reliance on Rule 60(b) is misplaced given that it is a rule of civil procedure that is inapplicable to a criminal proceeding and is not an appropriate means to collaterally attack a conviction.

NRCP 60(b) allows a civil litigant to seek relief from a judgment based upon mistake, inadvertence, excusable neglect, newly discovered evidence and/or fraud. The function of NRCP 60(b) in the criminal context is performed by NRS 176.515 and Chapter 34. NRS 176.515 allows a court to grant a new trial under limited circumstances. Chapter 34 permits collateral attacks on a judgment of conviction in certain situations. Thus, NRCP 60(b) has no role to play in a post-conviction challenge to a judgement of conviction since the field has

been pre-empted by NRS 176.515 and NRS Chapter 34. See NRS 34.780(1); State v. Powell, 122 Nev. 751, 757, 138 P.3d 453, 457 (2006); Mazzan v. State, 109 Nev. 1067, 863 P.2d 1035 (1993).

Therefore, Petitioner's claim under NRCP 60(b) is not properly before this Court since NRCP 60(b) is not cognizable in a post-conviction collateral attack on a judgment of conviction. As such, this Court should summarily deny relief.

xiii. Petitioner's Claim That Counsel Was Ineffective For Failing To Allege A Brady[6] Violation On The Basis Of The Nevada Supreme Court's Reference To "Other Powerful Evidence Of Guilt" Is Without Merit.

Petitioner next makes the nonsensical assertion that counsel was ineffective for failing to allege a Brady violation on the basis of the Nevada Supreme Court's reference to "other powerful evidence of guilt." Petition at 15-16. Petitioner, in essence, takes issue with the language employed by the Nevada Supreme Court in finding that admission of his statement was harmless error. See Carroll, 371 P.3d at 1035 ("Aside from Carroll's inculpatory statements to the police, the district court properly admitted other powerful evidence of his guilt."). The Nevada Supreme Court was simply pointing out other evidence that was admissible in the case that was highly indicative of Petitioner's guilt such that the admission of Petitioner's inculpatory statements were harmless. Petitioner's implication that the Nevada Supreme Court was referring to some other, undisclosed evidence in violation of Brady is nothing more than a bare, naked assertion suitable for summary denial. Hargrove, 100 Nev. at 502, 686 P.2d at 225.

xiv. Petitioner's Claim That Counsel Failed To Research Consists Of Nothing More Than A Bare, Naked Allegation.

Petitioner next complains that "there was a lack of research to speed disposition at the costs of the defendant." Petition at 16. Again, this is nothing more than a bare, naked allegation suitable for summary denial. Hargrove, 100 Nev. at 502, 686 P.2d at 225.

/ / /

/ / /

[6] Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194 (1963).

xv. Petitioner's Claim That There Was A Conspiracy And Evidence Undisclosed To Him Consists Of Nothing More Than Bare, Naked Allegations.

Petitioner next claims there was "a conspiracy between the court officers" to withhold Brady information. See Petition at 16. Petitioner again seems to be referencing the Nevada Supreme Court's reference to "other powerful evidence of guilt." See id. at 15. But, as noted above, the Nevada Supreme Court was referencing other *admissible* evidence in the case that was highly indicative of Petitioner's guilt; it was not, as Petitioner implies, referring to some other, undisclosed evidence in violation of Brady. Petitioner's related allegation that there was some conspiracy to keep material, exculpatory evidence from him is nothing more than a bare, naked allegation suitable for summary denial. Hargrove, 100 Nev. at 502, 686 P.2d at 225.

xvi. Petitioner's Claim That Counsel Was Ineffective For Failing To Interview Any Witnesses Is Belied By The Record.

The final claim raised in Ground One is Petitioner's claim that counsel was ineffective for failing to interview any witnesses prior to trial. Petition at 16. Petitioner's claim is, in essence, a claim that counsel was ineffective for a failure to investigate further.

As explained by the Nevada Supreme Court, "defense counsel has a duty 'to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.' " State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993) (quoting Strickland, 466 U.S. at 691, 104 S. Ct. at 2066). Moreover, a defendant who contends his attorney was ineffective because he did not adequately investigate must show how a better investigation would have rendered a more favorable outcome probable. Molina v. State, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004). The defendant "must allege with specificity what the investigation would have revealed and how it would have altered the outcome of the trial." United States v. Green, 882 F.2d 999, 1003 (5th Cir. 1989).

Here, Petitioner has failed to allege with any level of specificity what a better investigation would have revealed and how it might have altered the outcome of the trial. Petitioner has not even alleged whom he believes counsel should have interviewed or investigated further. This Court should thus deny Petitioner's claim that counsel was

ineffective for failing to interview any witnesses, which consists of nothing more than a naked allegation.

C. The Claims Raised In Ground Two Are Without Merit.

In Ground Two, Petitioner raises a number of claims, some of which are completely nonsensical and others of which lack any support in the record. First, Petitioner argues that the Nevada Supreme Court's reference to "other powerful evidence of guilt" denied him his right to a public trial. Petition at 17. Again, Petitioner seems to be under the impression that the Nevada Supreme Court was referencing undisclosed evidence that was never presented to the jury. This, however, is not the case. As noted in several instances above, the Nevada Supreme Court was referencing other admissible evidence in the case that was highly indicative of Petitioner's guilt; it was not, as Petitioner implies, referring to some other, undisclosed evidence that was never presented to the jury.

Second, to the extent Petitioner renews his arguments regarding his failure to be Mirandized, any such re-litigation is precluded by virtue of the Nevada Supreme Court's finding that any error regarding this was harmless error. See Carroll, 371 P.3d at 1035.

Third, Petitioner alleges that there were portions of the trial that were not recorded. This, however, is yet another bare, naked allegation suitable for summary denial. Hargrove, 100 Nev. at 502, 686 P.2d at 225.

Last, Petitioner alleges that the cumulative effect of the alleged errors "must be considered." Petition at 18. Any such cumulative effect was indeed considered by the Nevada Supreme Court, which rejected the argument:

> As we previously explained, the district court erred when it admitted Carroll's statement to police because Carroll was in custody for Miranda purposes and the police failed to provide Miranda warnings before Carroll made inculpatory statements. However, based on the overwhelming evidence establishing Carroll's involvement in Hadland's murder, we conclude the district court's error in admitting Carroll's statement was harmless beyond a reasonable doubt. Even without his statements to police, the remaining evidence was sufficient to sustain his convictions.

Carroll, 132 Nev. at __, 371 P.3d at 1036. The Nevada Supreme Court's ruling on this issue is the law of the case, and this Court is bound by it. See Loveless, 62 Nev. at 317, 150 P.2d at 1017; Hall, 91 Nev. at 316, 535 P.2d at 799; Pellegrini, 117 Nev. at 879, 34 P.3d at 532 (2001).

D. The Claims Raised In Ground Three Are Without Merit.

In Ground Three, Petitioner raises yet more claims that are either unsupported by the record or otherwise unmeritorious. First, Petitioner argues that counsel was ineffective for failing to ensure that the jury was properly instructed on the elements of murder. Petition at 19. The record reflects that the jury received the following instructions on first-degree murder:

> Murder of the first degree is murder which is perpetrated by means of any kind of willful, deliberate, and premeditated killing. All three elements--willfulness, deliberation, and premeditation--must be proven beyond a reasonable doubt before an accused can be convicted of first-degree murder.
>
> Willfulness is the intent to kill. There need be no appreciable space of time between formation of the intent to kill and the act of killing.
>
> Deliberation is the process of determining upon a course of action to kill as a result of thought, including weighing the reasons for and against the action and considering the consequences of the action.
>
> A deliberate determination may be arrived at in a short period of time. But in all cases the determination must not be formed in passion, or if formed in passion, it must be carried out after there has been time for the passion to subside and deliberation to occur. A mere unconsidered and rash impulse is not deliberate, even though it includes the intent to kill.
>
> Premeditation is a design, a determination to kill, distinctly formed in the mind by the time of the killing.
>
> Premeditation need not be for a day, an hour, or even a minute. It may be as instantaneous as successive thoughts of the mind. For if the jury believes from the evidence that the act constituting the killing has been preceded by and has been the result of premeditation, no matter how rapidly the act follows the premeditation, it is premeditated.
>
> The law does not undertake to measure in units of time the length of the period during which the thought must be pondered before it can ripen into an intent to kill which is truly deliberate and premeditated. The time will vary with different individuals and under varying circumstances.
>
> The true test is not the duration of time, but rather the extent of the reflection. A cold, calculated judgment and decision may be arrived at in a short period of

> time, but a mere unconsidered and rash impulse, even though it includes an intent to kill, is not deliberation and premeditation as will fix an unlawful killing as murder of the first degree.

Instructions to the Jury, filed May 25, 2010, Instruction Nos. 8-9. These instructions together constitute a verbatim recitation of the instruction set out by the Nevada Supreme Court in Byford. Compare id. with Byford v. State, 116 Nev. 215, 236-237, 994 P.2d 700, 713-715 (2000). Accordingly, the record reflects that the jury was properly instructed on the elements of first-degree murder. That being the case, Petitioner's claim of ineffective assistance of counsel, which is predicated on Petitioner's erroneous assertion that the jury was not properly instructed on first-degree murder, necessarily fails.

Petitioner, however, then seems to go on to attack the sufficiency of the evidence underlying his conviction. See Petition at 19-20. For one, such a substantive claim is a direct-appeal claim not cognizable in the instant habeas proceeding. See NRS 34.724(2); see also NRS 810(1)(b)(2). But, in any event, Petitioner did raise a sufficiency-of-the-evidence argument on direct appeal, and the Nevada Supreme Court rejected this argument:

> We have reviewed Carroll's argument that the State did not present sufficient evidence to convict him of conspiracy or murder because the State failed to show he intended for Counts to kill Hadland. We conclude that this argument is without merit. The evidence at trial supported a finding that Carroll knew the order was to kill Hadland and that Carroll recruited Counts so he did not have to kill Hadland himself. This is sufficient to convict on both charges. See Doyle v. State, 112 Nev. 879, 894, 921 P.2d 901, 911 (1996) ("A person who knowingly does any act to further the object of a conspiracy, or otherwise participates therein, is criminally liable as a conspirator."), overruled on other grounds by Kaczmarek v. State, 120 Nev. 314, 91 P.3d 16 (2004).

Carroll, 132 Nev. at __, 371 P.3d at 1035.

Last, Petitioner alleges that the prosecutor trying the case interjected "his personal beliefs and opinions" in argument to the jury. Petition at 20. Petitioner, however, fails to support this assertion with any record cites or any other specific facts. Accordingly, Petitioner's allegation that the State interjected personal opinion in its argument to the jury is

nothing more than a bare, naked allegation suitable for summary denial.[7]

E. The Claims Raised In Ground Four Are Without Merit.

In Ground Four, Petitioner raises two discrete claims. First, he argues that counsel was ineffective for the failure to argue on appeal that Petitioner did not receive the correct credit for time served. Petition at 21-22.

The record reflects that Petitioner was incarcerated on May 24, 2005, and remained incarcerated at all times up until sentencing, which took place on August 12, 2010. See Criminal Bindover, filed June 17, 2005; Reporter's Transcript of Hearing RE: Sentencing, August 12, 2010. Thus, Petitioner spent 1,906 days incarcerated at the time he was sentenced. To be sure, the Judgment of Conviction filed on September 8, 2010, reflects that Petitioner received 1,904 days—2 days shy of what he was entitled to.[8] That, however, is nowhere close to the additional 27 days Petitioner alleges he is entitled to. In fact, this number of 27 days seems to be derived from the time period that elapsed between the sentencing date (August 12, 2010) and the date on which the Judgment of Conviction was entered (September 8, 2010). Petitioner thus seems to be under the mistaken assumption that the time period that elapses between sentencing and the filing of the Judgment of Conviction needs to be reflected as "credit for time served" in the Judgment of Conviction. That is not the case.

Pursuant to NRS 176.055, "the court may order that credit be allowed against the duration of the sentence, including any minimum term or minimum aggregate term, as applicable, thereof prescribed by law, for the amount of time which the defendant has actually spent in confinement *before conviction*." (emphasis added). Here, Petitioner was "convicted" when the Court adjudged him guilty and sentenced him on August 12, 2010. Thus, it was on August 12, 2010, that Petitioner's term of imprisonment commenced. See NRS 176.335; Grant v. State, 99 Nev. 149, 150, 659 P.2d 878, 878 (1983) ("A term of imprisonment begins on the date sentence is imposed."). Any credit after this date would not qualify as "presentence"

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[7] Towards the end of Ground Three, Petitioner once again renews his argument that the statues under which he was convicted were unconstitutional because of the lack of an enactment clause. Petition at 20. Again, this argument is without merit for the reasons discussed above. See supra at 6-8.

[8] And should the Court wish to correct this, it can do so by way of Amended Judgment of Conviction.

credit. See Griffin v. State, 122 Nev. 737, 741-45, 137 P.3d 1165, 1167-70 (2006). Accordingly, the Court properly excluded the 27 days that elapsed between August 12, 2010 (i.e., the date of sentencing), and September 8, 2010 (i.e., the date on which the Judgment of Conviction was entered).

Petitioner, under the same mistaken assumption, further argues that the Amended Judgment of Conviction entered on March 23, 2011, "omit[ted] 163 days time served between the 2010 and 2011 judgments." Petition at 21. Again, Petitioner fails to understand that the end point for calculating "credit for time served" is the date of sentencing, not the date on which the judgment is filed. That being the case, the Court properly excluded the time that elapsed from September 8, 2010, to March 23, 2011.

Petitioner then goes on to argue that his due process was violated because he was not present at the hearing held on March 15, 2011, in which the Court granted Petitioner's Motion to Amend Judgment of Conviction, agreeing to correct a typographical error in the original Judgment of Conviction. Pursuant to NRS 178.388, "the defendant must be present at the arraignment, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence." See Rose v. State, 123 Nev. 194, 207, 163 P.3d 408, 417 (2007).

When this Court held a hearing on Petitioner's Motion to Amend Judgment of Conviction, it was regarding a clerical error in the original Judgment of Conviction brought to the Court's attention by Petitioner's counsel.[9] This Court should reject the notion advanced by Petitioner that correcting such a clerical error constitutes a critical stage in which Petitioner needed to be present. For one, it is outside the scope of NRS 178.388, which only covers the time period spanning from Petitioner's arraignment to the time of sentencing. Secondly, the record reflects that Petitioner's counsel was present at this hearing and was competently able to reflect Petitioner's interest in the latter's absence. Moreover, Petitioner cannot show how he was prejudiced by the Court's grant of the Motion, in his absence, which ultimately resulted

[9] The original Judgment of Conviction inaccurately reflected that Petitioner was sentenced as to Count 1 to a term of imprisonment of life with a possibility of parole after serving a minimum of 40 years when, in fact, Petitioner was sentenced to a fixed term of 36 to 120 months.

in the correction—to his benefit—of a clerical error in the original judgment of conviction.

II. Petitioner Is Not Entitled To Counsel In This Matter, And The Appointment Of Counsel Under NRS 34.750 Is Not Warranted.

In Coleman v. Thompson, 501 U.S. 722 (1991), the United States Supreme Court ruled that the Sixth Amendment provides no right to counsel in post-conviction proceedings. In McKague v. Warden, 112 Nev. 159 (1996), the Nevada Supreme Court similarly observed that "[t]he Nevada Constitution . . . does not guarantee a right to counsel in post-conviction proceedings, as we interpret the Nevada Constitution's right to counsel provision as being coextensive with the Sixth Amendment to the United States Constitution." McKague specifically held that with the exception of NRS 34.820(1)(a) [entitling appointed counsel when petition is under a sentence of death], one does not have "[a]ny constitutional or statutory right to counsel at all" in post-conviction proceedings. Id. at 164.

However, NRS 34.750 permits the district court to appoint counsel in certain circumstances:

> 1. A petition may allege that the petitioner is unable to pay the costs of the proceedings or to employ counsel. If the court is satisfied that the allegation of indigency is true and the petition is not dismissed summarily, the court may appoint counsel to represent the petitioner. In making its determination, the court may consider, among other things, the severity of the consequences facing the petitioner and whether:
>
> (a) The issues presented are difficult;
> (b) The petitioner is unable to comprehend the proceedings; or
> (c) Counsel is necessary to proceed with discovery

The Nevada Supreme Court has recently "stress[ed] that the decision whether to appoint counsel under NRS 34.750(1) is not necessarily dependent upon whether a pro se petitioner has raised claims that clearly have merit or would warrant an evidentiary hearing." Renteria-Novoa v. State, 133 Nev. __, __, 391 P.3d 760, 762 (2017).

The State does acknowledge that the sentence in this case is severe: Petitioner is serving a life sentence. Nonetheless, the issues presented are not particularly difficult, and it does not seem to be the case that Petitioner is unable to comprehend the proceedings. Moreover, there

is no discovery that needs to be conducted here for which the appointment of counsel is necessary. Therefore, this Court should deny motion seeking the appointment of counsel.

CONCLUSION

Based on the foregoing, the State respectfully requests that this Court deny the Petition for Writ of Habeas Corpus (Post-Conviction) and Motion for Appointment of Counsel.

DATED this 13th day of July, 2017.

Respectfully submitted,

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

BY /s/ Marc DiGiacomo for
JONATHAN VANBOSKERCK
Chief Deputy District Attorney
Nevada Bar #006528

CERTIFICATE OF MAILING

I hereby certify that service of the above and foregoing was made this 14th day of July, 2017, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

DEANGELO CARROLL, #1056956
H.D.S.P.
P.O. BOX 650
INDIAN SPRINGS, NV 89070-0650

BY: /s/ J. Georges
Secretary for the District Attorney's Office

JV/AV/jg/MVU

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Deangelo R Carroll
P.O box 650 # 1056956
Indian Springs NV 89070

pp
DA

EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY NEVADA.

Deangelo R Carroll
Petitioner

-VS-

State of Nevada
Respondent

CASE* 05C 212667-4
DEPT* XXI
~~Hearing date August 17, 2017~~

Sur reply to State's Response to Habeas Corpus filed JULY 13, 2017 NRS 34 et SEQ FRCIVP 8a NRCIVP 8a.

Pro se Litigant. Deangelo Carroll, now Comes to this Court, Pursuant to Haines v Kerner 404 US 519, 520 (72) "Pro-se Liberally Construed" to file this Sur reply. to States' objection to Habeas Corpus

Petitioner SETS forth "Jurisdiction" which may be raised at anytime. and is never waived or forfeited US v Cotton 535 US 625, 630 122 SCT 1781 (2002) and may be raised, where the Court appears to Lack Subject matter. as a "Nexus issue" Burton v Wilmington Parking Authority 365 US 715, 81 SCT 856 (61). where the CRIME was Charted, as occurring on Federal Property. the State Lacked Jurisdiction over Conviction. Smith v Williams 2012 US DIST-Lexis 102013. (7-23-12). (Apartment owned by Federal agency exclusive Jurisdiction is of Federal Government, not State)

Hence the well Known rule, that Jurisdiction, must be actual, not HYPOTHETICAL Ruhrgas AG v Marathon oil Co 526 US 374, 577 119 SCT 1563, ( ) also Steel Co v. Citz for a better env't 523 US 83, 94 118 SCT 1003 (98)

The State Attempts to Raise issues of Voluntariness, that are Contrary to the Appellate Courts ruling, which is Law of the Case. Citing "MIRANDA" v Arizona 384 US 436. 86 SCT 1602 (66)

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Reply to State Argument Points and Authorities.

The Petition, raises Claims that are not waived under NRS 34.810 (1)(b)(2) And are Supported in the record, by the Appellate decision, and have merit by admission.

Petitioner agrees by States admission @ Pg 4 Line 25,26 of it's July 13, 2017 filing, "that Ineffective assistance is being Raised"

That's a Profound, admission because in Nevada, and many other US States,* You Cannot raise, An Ineffective assistance Claim on direct Appeal, And must be raised in "Habeas Corpus" for Presentation to the State, ("First requirement.") Sandoval - Gonzalez v Williams et al 2009 US DIST LX 104389. Citing Doe v Bryan 102 NV 523. 728 P2D 443 (86) and others. also: 28 USC 2254.

USCA 1, 3, 4, 5, 6, 8, 9, 10, 13, 14

Further, Since this is an Original timely Application it is Apparent that State Counsel doesn't Know the Law he Practices under, Kimmelman v Morrison 477 US 365. 365 106 SCT 2574. (1986) (Generally)

A: Substantive Claims, of Jurisdiction are not waived, Under State Law, NRS 34.810(1)(b)(2)

In the State dicta, The Crime Location is indeed alleged on "Federal Property." The State relies on State law NRS 34.810 (1)(b)(2) which does not Specifically address the issue. (See Cover Page (1) as fully Set forth here)

When the State fails to Cite how Jurisdiction, is not available at Anytime, it has waived the argument FRCivP 8(b)(6) Maresoca v State 103 NV 669, 673 748 P2d 3, 6. (1987) Antonin Scalia & Bryan A Garner Reading Law the Interpretation of texts 170, 185 (2013) FDC Rule 7-3. Knowles v Mirzayance 556 US 111 (2009) Villanueva v State 27 P3D 443. 117 NV 664 (NV 2001) NRCivP 8(d)

* Jackson v State 291 P.3D 1274 2012 NV Lexis 110 (12-6-2012)

B (cont)

Convictions, under non existent Law, are addressable by this Court. A Law that the Prosecution relies on, is but an APPLICATION or enforcement of Law, and if the Prosecution Continues, a Law must Continue to Vivify it. US v Chambers 291 US 217, 226 54SCT 434

(A)(i) Crime is alleged to have occurred in the Lake mead, Federal Park Neither NRS 34.810(1)(b)(2) Nor NRS 34.724(2) "address Jurisdiction."

(See Pg1. As fully Setforth here.) The State Seems to aver, that Lack of Subject matter Jurisdiction Can be WAIVED by AGreement of the Parties, or IGNORed by the Court, That is not the LAW. US v Meyer 439F3D855 (2006)

Nor Can "Jurisdictional defects" be Procedurally defaulted. Ex Parte Rosenblatt 14 P. 298, 299 (NV 1887) Ex Parte Siebold 100 US 371, 377 (1880) Mitchell v State 149 P3D 33, - 36 (NV 2006) Arbaugh v Y&H Corp 546 US 500, 514, 126 SCT 1235 (2006)

NRS 34.810 (1)(b)(2) is not APPLICABLE As this is a "First" Habeas Submitted in a timely fashion which abolishes the State's Position under NRS 34.724 (2)

The States Substantive Claim argument, CARRIES with it, aroma of "Bovine Variety". The Crime alleged to have occurred on Federal Property, is a Jurisdictional issue, which does not have, to Prove "Prejudice" as Presented. Ex Parte Rosenblatt (Supra) Coleman v Thompson 501 US 722, 750 (91)

(A)(ii) The State's Position, under NRS 34.810(3) is misguided.

Non existence of Valid Law Can be addressed at any time. Petitioner in No WAY Challenged "every Law" in the Statutes, only the LAWS in the CHARGING Information here. with Specificity. And Once the old LAWS were Repealed, in the action STATE AG Opinion 85 7-25-51 It's IMPLIED by States Position that there is only an ASSUMPTION,

That the law is Valid, is Problematic

A Compilation is merely an arrangement and Classification, of the Legislatures acts with No Change in Language. (See Scope and effect of Nevada revised Statutes attached)

The Legislative Counsel's Preface admits that the revision, involved the "elimination" of thousands of needless, words and redundant expressions. (See attached A)

Why this Punctiliousness.? a revision Contemplates redrafting and Simplification, of the entire body of law. See Fidelity & Columbia trust v Meek 171 S.W.2d 41. 43-44 (1943)

It is a Complete restatement of law and requires enactment by the Legislature to be effective, and upon Enactment, it becomes Law itself, replacing former Statutes. And thus a Committee of Lawyers have recreated the Laws of the State.

The Practice of introducing the revision of Statutes as a Single bill, "Sending it through the Same Process as any other bill obviously, is a issue, wherein, there Can be no Comprehensive measure of adequate Consideration, and it is almost as difficult for the Committee to do so. H Walker Law making in the U.S. @ Pg 272

As a Presumption, by respondant that laws are Valid, (July. 13, 2017 Line 22. Pg 6) "The wording change was not done by the State Legislature. id @ Pg 8. Δ State AGO 8.5-1951 Δ

The Nevada Constitution. Provisions, in the State of Nevada, requiring An enactment Clause, in any Statute is Mandatory And that omisson thereof renders, Any Statute, An hence any revision Void. See NV Const Sec 3, of article XIX, which Provides "The enacting Clause of "ALL" bills Proposed by the initiative "Shall be": The People of the State of Nevada do enact as follows:

Δ It is too Late now for the State to deny Nevada v Rogers 10 NV 250 21 Am Rep 738 that held that "the enacting Clause of every Law, is Required. Δ

The New. Senate bill 1.2, by admission was adopted by Charles N. Russell, which is of importance. And Significant.

The laws under that bill have no declaration of an enacting Clause, authority. which As a Custom and usage is of Great Antiquity. And A Compulsory observance

founded on Sound reason. See Casie v Robbins 6 NV 416. @ 421, 422. 131 P2D 516, 517, 518 Nov 30 1942.

AGAIN, in Law Passed by the Legislature, without an enacting Clause, raises a Question:

Can the State Agents Avoid the State's Constitutional enactment Clause as a requisite to a Valid Law. See: NV Const art IV § 23 See 24/32 25/32 attached.

As to the State's fodder the Answer is No!

Petitioner Agree's that, there is a Settled maxim, that the Legislature's Power to make Law Cannot be delegated to any other body or Authority. Banegas v State Ind Ins Sys 19 P3D 245, 248 (2001) NV Const art 3 § 1

Yet isn't this what the State's Published Law Preface admits, has happened? See attached ____

The State admits, that the State Legislature, Gave the Statute revision Commission, Authority, to revise ALL the State's Law. (State's July 13, 2017 brief at Pg 7.)

Interestingly, neither Agency is in the Nevada Constitution, but as Stated in the Nevada Constitution art 4 § 18, the Copy obtained, by Petitioner, Shows that it was recorded "without the Governor's SIGNATURE" NV Const art 4 § 35

This Court is requested to take Judicial notice of distributed Copy, from the Nevada archives, NRS Chap 47. et seq FRE 201 See attached ex -

AGAIN, the Preface is an admission, that the Commission modified the ORIGINAL Laws, even then, there is documentation that ALL Laws, were Repealed, Cannot now be denied,

Further, the State Law's, cited by the State, had their enactment Authorization, "deleted" before Promulgation. See NRS 220.120, NRS 220.170(3) NRS 220.110 NRS 221.110, which the Nevada Constitution Requires! by Supremacy Clause. State of Nevada v S.T. Swift 10 NV 176 (1875)

IF the Court's abnegate a Constitutional requirement that would Constitute breech of Law, as mentioned in Nevada v Rogers 10 NV 250, 255 (1875) (152 Years old) and Still Current.

(5)/37

Additionally Nevada Constitution art 4, § 18 and art 4 § 35 There are requirements not mentioned by the Social Reconstructionists (ie: respondents)

"That even though Passed by the Legislature, it was "not" signed by the House Presiding officers on each side nor was it signed by the Governor. needed for enactments Ruling Case Law (Vol 25) Statutes § 133 (P6884) Citing LRA 1915 B (P61065) which is Mandatory!

The Publication, without the enacting Clause is "No" Promulgation. AND there is no federal Common Law to Cover the Specific Statutes Cited. US v Britton 108 US 199. 206 (1882) US v Eaton 144 US 677. 687 (1891) Jerome v US 318 US 101 @ 104 (1942)

The repeal of all Prior Laws Prior to SB 1, 2 were repealed. And the intent of the Legislature, must Control this Court not only in the Construction of the "bills"; but the reasoning Thorp v Schooling 7 NEV 15 State v Ross 20 NV 61. also MAYNARD v Newman 1 NV 271

The bluster, by the respondent is. base Ans Nolan. where he doesn't Support his Position with documents. nor does he have any First HAND Knowledge to Any facts, advanced. He's encouraging treason against Nevada Constitution!

B Ground 1

The "Strickland" Claims, Presented, were "not" Federalized". The States reliance on Browning v State is misplaced. 120 NV 347. 365 (2004)

(i) while "MIRANDA" was federalized. Just by it's Citation. "other issues were not". which would bar federal review. which should have been done on direct Appeal.

Further, once the Claim is made, And Properly Presented the Defendant can make Any argument in Support of that Claim. CLARK v ARIZONA 126 SCT 2709. (AZ 2006) but to do that, it must be MADE in this APPLICATION,.

Further, An Investigatory Stop. is Commonly Considered A Federal issue under the fourth 4th Amendment. See Johnson etal v City of Cincinatti 310 F.3d 484. 493 (6 Cir 2002)

B (ii)

NRS 171.123 is a State Law Right. And Counsel was ineffective in not raising this issue.

What is Presented is that. The State had "1" One hour Limit on what the State wants to Call a Terry Stop, This admission is Appreciated, As the US Supreme Court has Called this a Fourth Amendment issue. Terry v ohio 392 US1, 30 88 SCT 1868, 1884 (1968)

But what the State IGNORES is that. "The State OPINION, Admits there was a want to leave Police Custody" Carroll v State 371 P3D 1023 4-7-2016

This invokes the Right to be Left alone, As a Liberty interest. Public Util Comm v Pollak 343 US 451, 468 72 SCT 813 (1952) (General 14) See also Kolender v Lawson — 461 US 352, 360 103 SCT 1850, 1855 (N9) (1983)

The Police, in this Case failed to follow "State Law" directly, as well as Federal Law, under "MIRANDA" which is a Federal Liberty interest. Hicks v Oklahoma 447 US 343, 346 100 SCT 2227 (1980)

Once the Failure to Set the OPTICS or Custody time was raised. ▲ There was "No" factual finding of actual Custody time, or transportation recording, So ALL issues Are Subject to NARRATION. @ Carroll At 13-14

In this Case "Respondent has no Personal Knowledge And his Statement is not admissible"!

* Ground 1 facts in Habeas brief Should be Considered fully Set forth here. *

(B) (iii)

The Claim of Ineffective Counsel for Failing to Secure a Written order from denial of motion to Suppress, denied, an Appealable issue: USCA. 5.6.8.14

The Appealable order request was not filed, because the State and County Pay attorneys Very Little to handle Such Serious matters. And Compromised the Representation in this Case.. (why else would the Court Seal Payments to Counsel. And not turn over the record for Appeal.) But more Puzzling, and interesting are the

States Stock responses.

Without the record, the State Law is meaningless because, Petitioner Cannot Show arguments, that the "right to terminate Interrogation" was denied, and without that record, Petitioner Cannot Show error's of Counsel, and the denial, of rights, to, Leave Police Custody Michigan v Mosely 423US96 96SCT321 (75)

▲ Further, the record, Cannot be now regenerated nor can those issues be Appealed, nor can federal relief be Sought on those issues, which is Clearly ineffective, Lafler v Cooper 132 SCT 1376, 1388 (3-21-2012) Citing Kimmelman v Morrison 477US365 106SCT2574 (86) USCA 5th/14 ▲

" The denial of an Appeal, effectively, Allowed the MIRANDA Violation information to be Presented to the JURY, and effectually denied due Process, as a Guarantee "that a man Should be tried and Convicted only in accordance with Valid Laws of the Land." North Carolina v Pearce 395US711, 739, (1969) (Black J Concurring in Part, dissenting in Part).

There also is the "Chiding" from the Appellate Court, that is nothing more, that a "Wink" "Wink", that, this "federal issue" will not addressed, and is effectively, a denial of review, under Standards of "Strickland" 466US694, and effectively Shows a Conflict of interest, actually affecting the adequacy of representation at trial, Cuyler v Sullivan 446US335, 349 100SCT1708 (1980) (This action by Counsel eviserated the right to Appeal the issue) Ie: No record. (but the Court fails to Consider the Critical Question of how a defendant can make a Showing of Prejudice in this Case)

Dispite the State's Position Counsel was ineffective in not Seeking A Writ of Mandamus. From the Appellate Court.

Further, the other Powerful evidence the State Spoke of in its OPINION doesn't exist JULY 13 2017 Pg 13 (Line 12) And the evidentiary hearing, would have Clarified this.

B (IV) Counsel had every right And duty to Seek a Writ of MANDAMUS from the Appellate Court. to order the District Court to enter An Appealable decision This was ineffective assistance. USCA6.14

"The Court determined a hearing WASn't necessARY." JULY 13 2017. Pg 13. Line 4.

The State then goes on to SAY. that the "Nevada District Court admitted "other Powerful evidence of Guilt."

Under the Supremacy Clause. and there being no noted. Standing NEVADA Law. under any Statute. "MIRANDA" Requires 4 WARNINGS be Given. to ensure a defendant. IS APPRISED of his fifth Amendment RIGHTS before Custodial interrogation. id @ 384 US 444.

The State Court. didn't want on the record. that No Warnings were Given at ALL. as admitted in Carroll V State

But to be Sure. this other "Powerful evidence. had No Confrontation. or Cross examination AGAINST it." as admitted by the State. there's no record of what it WAS. See Generally. MESSMORE V FOGLIANI 82 NV 153 413 P.2d 306 (1966)

Harmless error Can't APPLY in this Situation. USCA 1. 4. 5. 6. 8. 14 due Process. Violation.

B (V) Counsel WAS Ineffective. in failing to Challenge Interrogation Procedure

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"MIRANDA" WAS the Standing Law at the time of this TRIAL. And it requires the use of Law Standards in Control At the time of the charged Crime. After it's enactment ACLU et al V Masto et al 670 F3D 1046 1065. (9 CIR 2012) Weaver V Graham 450 US 24, 29. 101 SCT 960 (81) US V Chambers 291 US 217, 223 (1934)

"Carroll" was decided well after. the Charged Counts Are the rulings Are ex Post facto. Petitioner Submits ALL Habeas CLAIMS as fully Set forth here 5-10-2017 (Pg 12)

B (vi) Conspiracy to Ignore Miranda

"Miranda" was well established. And Judicial estoppel Precludes a ruling Contrary to US Supreme Court rulings Messinger v Anderson 225 US 436 (1912)

Further: "Constitutional Law" takes Precedent over State Law. James v Kentucky 466 US 341, 104 SCT 1830 (1984)

IF the Law was clear. and the Governing Principle. (it's not realistic to claim. all the Court's officers were not aware of it.) ie:- overt Conspiracy -

The Nevada. Supreme Court. chiding the District Court. Clearly Proves. that it's rulings were an abuse of discretion, on erroneous Views of Law. See Phelps v Alameida 569 F.3D 1120, 1131 9 Cir (6/25/09) Gonzalez v Crosby 545 US 524 125 SCT 2641 (2005)

The Bare And Naked allegation Can't Stand against Nevada's Published. opinion.

(B) (vii)

Court's often Look to their own opinions. as reasoning under Federal Law. that clearly establishes that's Simply not the Case.

While, it's true the State Court addressed the Confession. it did so under Federal Law rulings "not State." Miranda", and while the State respondents Runs for Cover, Under Law of the Case. No Court is Precluded from reconsidering or Correcting. An admitted erroneous ruling. briefed by the Appellate Court. as, it did in this Case. to Correct a manifest injustice, Such as Lack of Jurisdiction or Intervening Authority. Polities v US 364 US 426. 432 (1960) Patterson v Alabama 294 US 600. 607 (1935) Generally.

Additionally. the respondent admits that a "New" Judgment. is needed due to Lack of attention to time Served, Prior to either Judgments. issued, the Last being Controlling Briones v Sunshine Mining Co. 308 US 66 60 SCT 44 (39)

Hence Law of the Case. is not an inexorable Command, in this Case. Kimball v Callahan 590 F2D 768. 771 9 Cir (79)

B (iii) AGAIN. to Present the ISSUES to Federal Court ALL ISSUES must be RAISED in the State Courts PROPERLY FEDERALIZED.

The Habeas Proceeding is the Proper Place for this. Further, whatever "SPRINGS" the State may set, for those endeavoring to assert rights that are federal. They Cannot be defeated Under the Name of Local Practice. Davis v Wechsler 263 US 22. 24. 44 SCT 13.

MIRANDA" WAS well established Clearly defined Law. At the time of the trial Courts ruling. And that WAS n't done In this CASE. Greene v Fisher 132 SCT 38. 43 (2011) As verified by APPellate Courts ruling.

As an admission. The State doesn't Argue that Counsel, at trial And on APPeal WASn't Ineffective Given the State "Chiding"

B (IX) The Police Prevented Petitioner from Calling for LEGAL Counsel. Further, there being NO WARRANTS ISSUED. This WAS CLEARLY an UNLAWFUL SEIZURE USCA Y.

The FACT Presented is that, the Petitioner WAS denied the Rights to Call Counsel or Anyone else. And the "KIDNAPPING" is now meritorious. where there WAS NO addressing this Gimcrack of A. Point. This is not HARMLESS. The Question here, is, does a Putative Defendant have to make officers Aware he wants to Call Counsel, when he has a Phone In his HAND. And it is taken, So a Call Can't be made. This is SURELY PREJUDICIAL And the RIGHT to Call an ATTORNEY WAS MADE MEANINGLESS

B (xi) VOLUNTARY Contact is A MISNOMER. The Police were WAITING for Petitioner, which INVOKES NRS 171.123 USCA 1.3.4.5.6.8.9.10.13.14

The above Statute is a Liberty Interest under State Law. And AS the State SUPreme Court admits

B.(ix)(cont)

Being Placed Into a Police Car in Preparation to Question WAS Custody. And the Clock began the minute Contact WAS MADE.

Here the Liberty interest of Putative Defendant Placed Substantive Limitations on official discretion Olim v WAKINEKONA 461 US 238, 249, 103 SCT 1741, 1747, (1983) See Also Hewitt v Helms 459 US 460, 472 (1983) (the Statute Language is Mandatory. In Connection with Required Specific Substantive Predicates) Pearson v Muntz 606-F3D 606, 610 (9CIR 2010)

State Law is an entitlement. And with the extreme record denied. the finding is not based on an recorded Proceedings.

Counsel's failure to Seek Video of arrest or Work Video of detainment is Ineffective And Stands As briefed on MAY 10th 2017 brief @ Pg 14.

The State WAS "Chided" for not Setting the OPTICS for review. That is now the "LAW of the Case" In whatever Ambiguous form, it's Cited.

B(xii) As to State's Argument About FRCIVP 60. It's a Folly, And a WASTE of effort NEVADA LAWS of Civil Procedure are based in Large Part on Federal Law.

As Such they Are Persuasive authority, In whatever Strong Position they are Presented. See Executive MGMT v Ticor title 38 P.3D 872 118 NV 46 (2002)

NRCP 60(b) And FRCIVP 60(b) both Contain the Section (6) exception relief, (Sec 6) As a Grand reservoir of Rights to a Judge.

Petitioner Submits ~~ALL~~ "Arguments on Pg 15 is fully Setforth here.

The Court's attention is drawn to the fact that ALL the Issues Presented are now to be Considered meritorious when not addressed. @ Pg 15

B (xiii) The other Powerful evidence Statement is Ambiguous At best, And there is No evidence In the record. USCA1.5.6.14

Respondents Can't identify whats SPECIFIC evidence, is being refered to, And is an Ambiguity Since it's not in the records.

This is TREASON. AGAINST 28USC2254 as a Congressional enactments.

It was never before the trial Courts in ANY form or fashion. And argument, is Submitted As fully Set forth here on MAY 10, 2017 brief.

B (XIV)

Trial Counsel did no investigation. or interviewed any PARTY. This is ineffective.

With the lack of record before the Courts how and what record WAS reviewed

ALL briefed Claims are deemed Submitted here of MAY 10, 2017. And deemed admitted were no SPECIFICALLY rebutted. with documents or Citations.

As Stated above respondent has No first HAND Knowledge of events or record And is SimPly Presenting hearsay..

B (XV) Petitioner reaffirms the MAY 10, 2017 Submission as fully Set forth here And relies on ALL documents In this Case As fully And Completely Verified.

Respondent is SimPly Putting hearsay before the Courts, as he has No firsthand Knowledge, Additionally, Just making that Statement, without documentation is an unverified Statement. See Cooper v McDaniel 2013 US DIST - LX 45894 DCNV. This So Called evidence is not in a JURY instruction, OR even before the JURY, AS A Proof issue. That MUST Come before them, BY a Witness in a Public Courtroom where there is full Protections with Right to Confrontation And Cross examination. Parker v Gladden 385 US 363.364 (66) (Per Curiams)

there. Petitioner's due Process rights are being Violated by Respondents Statements with absolutely no Personal Knowledge. And No Supporting affidavits of the facts or documents to Support the State's Position.

B (xvi) There was "No" investigation. not that Any investigation wasn't enough.

Trial Counsel was ineffective, when "No" Preperation was done. No investigator funds Sought. And No Warrants Sought to Get Video records. of any of the Scene's where the event's occurred, and by the time this Got to trial, ALL that evidence was destroyed. That being Said:

The respondents Position is not stated on Pg 16 and hence he's trying to Put a "Spin on a brick"

Petitioner Submits Pg 16 As fully Setforth here. And the State's failure to respond to Points, are now deemed admitted. The whole argument. is based on the Appellate Court's Ruling.

c

Nevada Supreme Court's Opinion of one thing, excludes any other Statement.

The Same Statement is Presented As a defense. Yet it Can't Produce a Single Jury instruction of other evidence relied Upon. Further Nevada Supreme Court Opinions, of evidence, doesn't explain what it's referring to: In other words Vague. And taciturn doesn't explain. A legitimate Question,

What was this Powerful evidence "not in the record"? This is Apparently overlooked. in the Appellate Court, and Can best be described as artisanal. but this must now be Proved. by the State.

(All Points raised in Habeas Corpus Are fully incorporated here)

The Appellate Court's decision is a Stark example, of an unfortunate trend of resolving Cases at a threshold, while obscuring the Underlying rights And interests of Defendants, with interests at Stake, Here the

Appellate Court waxes eloquent, on the blend of Prudential, and Constitutional Considerations that Combine to Create a misguided Standing in Juras Prudence. Generally Valley Forge v Americans United 454 US 464, 490 (1982) but no one Can Say for Sure, and in fact not one word is Said, what was actually Considered. and the right Petitioner Seeks to enforce. And dispite the Pat recitation of the district attorney deputy of the Carroll v State decision the Opinion Utterly fails, except by the Sheerest form of "ipse dixit"

IF the State Can't Say what this evidence is, which is not in the official record, the Conviction is totally devoid of evidentiary Support. And Unconstitutional Under due Process Cole v Arkansas 333 US 196, 68 SCT 514 In re Winship 397 US 358, 364 90 SCT 1068 (70)

As to unrecorded Portions of trial, All one has to do is Look at the docket sheet, And Judgments in this Case. Counsel did not have defendant Present at All Proceedings. where breaks were taken And Petitioner not brought back to Court. but trial Proceedings Continued.

D Count III

Jury instructions. do not establish that Petitioner intended to Kill it's Simply not in the instructions. The State uses Standard reply. Statements.

But, as the respondent notices And doesn't Counter reply. The elements of NRS 200.010 - 200.030 et seq were never Given the Jury to deliberate on..

For a Conviction to be Lawful. And Constitutional All of the Statutes elements must be Given the Jury to deliberate on. which WAS not done. Further, the Conspiracy Statute, was Parsed to Secure a Conviction. elements were missing from both Statute's.

Further. The State doesn't Address the repeal of the murder Statute. in Senate bill 112. which now must

be considered meritorious, where the State does not Consider documents from the State archives.. Judicial notice of attachments NRS 47 et seq FRE201

Where these erroneous reliance on Statute's Presented have elements by Law that must be Given to the Jury as a whole. but this works as Judicial estoppel. which were removed from the Jury's Consideration. which begs the Question:

Aren't all the elements to be Given the Jury.? See US v Caldwell 989 F.2d 1056 (9-93) Apprendi v NJ 530US466.476 (June 26 2000) US v O'Brien 560US 218. 130 SCT 2169 (2010)

Here. the Question is not whether Guilt may be Spelt out on the record. but whether the Guilt was found by a Jury according to Procedures. and Standards Appropriate for CRIMINAL TRIALS. Ballenbach v US 326US 607.614 66SCT 402 (46)

The State doesn't dispute that the Jury was never Given the elements required by Statute NRS 200.010 - 200.030 that requires:

Petitioner advised or encouraged anyone to murder anyone (ie: Kenneth Counts) This infected the entire trial as the Printed Jury instructions did not express the Law to be Upheld. Gallego v McDaniel 124 F.3D 1065.1076 (9-97) Berra v US 351 US 131. 134-140 76 SCT 685 (1956)

The Statutes alleged elements are a Guide Post for the Court and not Given in their entirety. And the State Cannot Say they were Constitutionally adequate or Sufficient. As Law of the Case. US v Wells 519US 482.487 117SCT 921(97) Rosana v State 113NV 375 934 P.2D 1045(N9) 97NVLX 42(97)

(E) omissions of NRS 176.105(2) by respondent. Are now deemed admittes.

NRS 176.105(2) Clearly State: A Judgment is not final. Until SIGNED by the JUDGE And filed by the Clerk"

Here the View Presented by the respondent. is that all time Serves. between the First And Second Judgment is Somehow Lost!

First off. The ORIGINAL JUDGMENT WAS WRONG. When not Pronounced Correctly. And defense Counsel was deficient in allowing it. That's not Clerical error. but JUDICIAL error. That Last And final JUDGMENT WAS restated in it's entirety. And a New Judgment Maswood v Patterson 130 SCT 2788. 2792. (2010) There is no Nevada Law on Amended Judgments.

There is no other Agency in Law to Account for time Served not Granted, That is the Court's Jurisdiction, under NRS 176.055.

When, the Court replaces a Judgment by whatever designation, the Court Prefers, it still "New" because the Court must Correct the error.

The term of Sentence is immaterial, and in this Situation, the issue is from Arrest date, to the final filed Judgment being reissued, in the future.

Should the Court refuse to enforce a Valid Law it would extend Litigation under a 42 USC 1983. See

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But first, a Proper Calculation must be done with Verified documents of the LVMPD.

The Second Version of Judgment being incorrect was An admitted "Justice by Mailbox" Fatir v Thomas 106 F3rd 572, 588 (Del 2000) And as a Last And final Version is admittedly incorrect. (July 13, 2017 @ Pg 24 Footnote)

Collaterally, Counsel was Ineffective in not Arguing for time Served. And the Correction, in the Second Judgment is indeed a two tier Resentencing Caused by the Court itself. Not Some Clerical Err. As States.

IF

Petitioner Deandallo Carroll, moves for Counsel, in this matter. As this was Prepared by a fellow inmate with Knowledge of Law. And Submits all documents attached for the Court's Consideration to Counter the Fraud Presented by Patti Foster Jonathan Vanboskerck #6528

Additionally, to Correct the Judgment, Counsel must be appointed for Defendant As the Past Counsel is removed. And time Served as well as Jury recess, (elements need to be Compared to Statutes of State) need to be investigated.

Under AEDPA of 1996, when the Court, fails to have an evidentiary hearing, "which requires Counsel", Answere to make (1) evidentiary findings, that would be An Unreasonable determination of facts. Phelps v Woodford 267 F.3d 966 (9th Cir 2001)

▲ Prepared by a fellow inmate: SIGNATURE Attached hereto ▲

Declaration of Deangelo Carroll

28 USC 1746 NRS 208.165

I declare: That All Statements Are true And Correct to my knowledge:

That the State Archive: delivered the documents Attached hereto:

That I rely on these documents for truth of matter Asserted:

That: this was Prepared with the assistance of Steven Brandon #64697

And That I am over 18 Years of Age Am willing to testify. That the facts are true

Under Penalty of Perjury NRS 208.165

7-30-17.

#64697

Pre Parer.

Deangelo Carroll

CERTIFICATE OF SERVICE

I, Deangelo Carroll, hereby certify that I am the petitioner in this matter and I am representing myself in propria persona.

On this 30 day of July, 2017, I served copies of the Reply 28USC2254

in case number: 05-C-212667-4 and placed said motion(s) in U.S. First Class Mail, postage pre-paid: Eighth Judicial District Court

Address: 200 Lewis Ave LVNV 89155

Sent to: Also Steven Wolfson DA Same Address LVNV 89155

Prepared by fellow inmate Steven Baumstein #64697.
Under Penalty of Perjury NRS 208.165 28USC1746
7-30-17. S. Baumstein

DECLARATION UNDER PENALTY OF PERJURY

The undersigned declares under penalty of perjury that he is/the petitioner in the above-entitled action, and he, the defendant has read the above CERTIFICATE OF SERVICE and that the information contained Actual AS Submission Duo Attachments therein is true and correct. 28 U.S.C. §1746, 18 U.S.C. §1621.

Executed at High Deserts State Prison

on this 30 day of July, 2017.

Deangelo Carroll 1056956
DOP#

D Carroll.

PETITIONER -- In Proper Person

FOREWORD

By the provisions of chapter 304, Statutes of Nevada 1951, amended by chapter 280, Statutes of Nevada 1953, and chapter 248, Statutes of Nevada 1955, the legislature of the State of Nevada created the statute revision commission comprised of the three justices of the supreme court, authorized such commission to appoint a reviser of statutes to be known as the director of the statute revision commission, and charged the commission to commence the preparation of a complete revision and compilation of the laws of the State of Nevada to be known as Nevada Revised Statutes. Reference is made to chapter 220 of Nevada Revised Statutes for the further duties and authority of the statute revision commission relating to the preparation of Nevada Revised Statutes, the numbering of sections, binding, printing, classification, revision and sale thereof.

The commission employed as director Russell W. McDonald, a member of the State Bar of Nevada, who, with his staff, undertook and performed this monumental task with such methods, care, precision, completeness, accuracy and safeguards against error as to evoke the highest praise of the commission and the commendation of the bench and bar of the state.

As the work progressed, Mr. McDonald submitted drafts of chapter after chapter as recompiled and revised, and the members of the commission individually and in conference meticulously checked all revisions. In the vast majority of cases these revisions were promptly approved. Many required further conferences with the director. Some were modified and redrafted. As the several chapters were returned with approval to the director, they were in turn delivered to the superintendent of state printing for printing, to the end that upon the convening of the 1957 legislature Nevada Revised Statutes was ready to present for approval. By the provisions of chapter 2, Statutes of Nevada 1957, Nevada Revised Statutes, consisting of NRS 1.010 to 710.590, inclusive, was "adopted and enacted as law of the State of Nevada."

STATUTE REVISION COMMISSION

MILTON B. BADT
EDGAR EATHER
CHARLES M. MERRILL

20/32 117" 13

710 AA 2090 EO

LEGISLATIVE COUNSEL'S PREFACE

1. Long sections were divided into shorter sections. The division of long sections facilitates indexing and reduces the complications and expense incident to future amendment of the statutes.

2. Whole sections or parts of sections relating to the same subject were sometimes combined.

3. Sentences within a section, and words within a sentence, were rearranged, and tabulations were employed where indicated.

4. Such words and phrases as "on and after the effective date of this act," "heretofore," "hereinafter," "now," and "this act" were replaced by more explicit words when possible.

5. The correct names of officers, agencies or funds were substituted for incorrect designations.

The general types of revisions to be made by the reviser, as well as the broad policies governing the work of revision, were determined by the statute revision commission at frequent meetings. Precautions were taken to ensure the accomplishment of the objectives of the program without changing the meaning or substance of the statutes.

Upon completion of the revision of the text of the statutes in December 1956, the commission turned to the solution of a vital problem: Would it recommend the enactment of the revised statutes or would it request the legislature merely to adopt the revised statutes as evidence of the law? The commission concluded that the enactment of the revised statutes as law, rather than the mere adoption thereof as evidence of the law, would be the more desirable course of action. Accordingly, *Nevada Revised Statutes* in typewritten form was submitted to the 48th session of the legislature in the form of a bill providing for its enactment as law of the State of Nevada. This bill, Senate Bill No. 2 (hereafter referred to in this preface as "the revision bill"), was passed without amendment or dissenting vote, and on January 25, 1957, was approved by Governor Charles H. Russell.

On July 1, 1963, pursuant to the provisions of chapter 403, Statutes of Nevada 1963, the statute revision commission was abolished, and its powers, duties and functions were transferred to the legislative counsel of the State of Nevada.

SCOPE AND EFFECT OF NEVADA REVISED STATUTES

Nevada Revised Statutes, including the supplementary and replacement pages, constitutes all of the statute laws of Nevada of a general nature enacted by the legislature. All statutes of a general nature enacted before the regular legislative session of 1957 have been repealed. See section 3 of chapter 2, Statutes of Nevada 1957, immediately following this preface.

The revised statutes were the result of 7 years of labor by the statute revision commission and its editorial staff addressed to the problem of eliminating from the accumulation of 95 years of legislation those provisions no longer in force and restating and compiling the remainder in an understandable form. This involved elimination of duplicating, conflicting, obsolete and unconstitutional provisions, and those provisions that had been repealed by implication. It involved a complete reclassification, bringing together those laws and parts of laws which, because of similarity of subject matter, properly belonged together, and an arrangement of the laws within each class in a logical order. It involved the elimination of thousands of needless words and redundant expressions. It was a labor involving almost infinite detail, as well as the problems of classification and the general plan of arrangement.

The Commission & not the Legislature decided.

NO Governors veto or otherwise.

23. Enacting clause; law to be enacted by bill.

The enacting clause of every law shall be as follows: "The people of the State of Nevada represented in Senate and Assembly, do enact as follows," and no law shall be enacted except by bill.

NOTES TO DECISIONS

This constitutional provision is mandatory and an act not in the proper form is void and unenforceable. State ex rel. Chase v. Rogers, 10 Nev. 250, 1875 Nev. LEXIS 24 (Nev. 1875).

This section is an imperative mandate of the people in their sovereign capacity to the Legislature, requiring that all laws to be binding upon them shall, upon their face, express the authority by which they were enacted, and an act which does not show such authority upon its face is not a law. State ex rel. Chase v. Rogers, 10 Nev. 250, 1875 Nev. LEXIS 24 (Nev. 1875).

Each of the words are necessary in the enacting clause.

The words "represented in senate and assembly," expressive of the authority which passed the law, are as necessary as the words "the people" or any other words of the enacting clause. State ex rel. Chase v. Rogers, 10 Nev. 250, 1875 Nev. LEXIS 24 (Nev. 1875).

OPINIONS OF ATTORNEY GENERAL

The enacting clause is mandatory.

A joint resolution adopted by both houses cannot become a valid law if it does not contain the enacting clause required by this section. AGO 85 (7-25-1951).

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front desk of the House of origin of the amendment. If the amendment proposes to add or remove a Legislator as a primary joint sponsor or non-primary joint sponsor, the statement must be signed by that Legislator. If the amendment proposes to add or remove a standing committee as a joint sponsor, the statement must be signed by the chair of the committee. A copy of the statement must be transmitted to the Legislative Counsel if the amendment is adopted.

6. An amendment that proposes to add or remove a primary joint sponsor or non-primary joint sponsor may include additional proposals to change the substantive provisions of the bill or resolution or may be limited only to the proposal to add or remove a primary joint sponsor or non-primary joint sponsor.

[Statutes of Nevada R 1979, 1964; A 1999, 3849; 2005, 2956]

PUBLICATIONS

Rule No. 6. Ordering and Distribution.

1. The bills, resolutions, journals and histories will be provided electronically to the officers and members of the Senate and Assembly, staff of the Legislative Counsel Bureau, the press and the general public on the Nevada Legislature's website.

2. Each House may order the printing of bills introduced, reports of its own committees, and other matter pertaining to that House only; but no other printing may be ordered except by a concurrent resolution passed by both Houses. Each Senator is entitled to the free distribution of four copies of each bill introduced in each House, and each Assemblyman and Assemblywoman to such a distribution of two copies. Additional copies of such bills may be distributed at a charge to the person to whom they are addressed. The amount charged for distribution of the additional copies must be determined by the Director of the Legislative Counsel Bureau to approximate the cost of handling and postage for the entire session.

[Statutes of Nevada 1920-21, 410; A 1977, 1657; 1979, 1964; 1983, 2108; 1991, 2476; 2011, 3756]

RESOLUTIONS

Rule No. 7. Types, Usage and Approval.

1. A joint resolution must be used to:

(a) Propose an amendment to the Nevada Constitution.

(b) Ratify a proposed amendment to the United States Constitution.

(c) Address the President of the United States, Congress, either House or any committee or member of Congress, any department or agency of the Federal Government, or any other state of the Union.

2. A concurrent resolution must be used to:

(a) Amend these Joint Standing Rules, which requires a majority vote of each House for adoption.

(b) Request the return from the Governor of an enrolled bill for further consideration.

(c) Request the return from the Secretary of State of an enrolled joint or concurrent resolution for further consideration.

(d) Resolve that the return of a bill from one House to the other House is necessary and appropriate.

(e) Express facts, principles, opinion and purposes of the Senate and Assembly.

(f) Establish a joint committee of the two Houses.

(g) Direct the Legislative Commission to conduct an interim study.

3. A concurrent resolution or a resolution of one House may be used to memorialize a former member of the Legislature or other notable or distinguished person upon his or her death.

4. A resolution of one House may be used to request the return from the Secretary of State of an enrolled resolution of the same House for further consideration.

to this section, the director has the power to provide the procedure and the standards to be observed in the purchase of the materials and supplies.

Respectfully submitted,
W. T. MATHEWS, *Attorney General.*

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85. Constitutional Law—A Senate Joint Resolution Is Not a Law Within the Meaning of the Constitution.

CARSON CITY, July 25, 1951.

HON. HUSTON MILLS, *State Highway Engineer, Carson City, Nevada.*

DEAR MR. MILLS: Reference is hereby made to your letter of July 19, 1951, wherein you state the following matter and propounded an inquiry thereon:

> The 45th Nevada Legislature, during its session, passed Senate Joint Resolution No. 7, which provides for the appointment of a three-man board consisting of one legislative representative from each legislative house, and one highway technician, to become a part of the Western Interstate Committee on Highway Policy Problems to study and make recommendations concerning uniform action on matters affecting highway safety, etc.
>
> The resolution provides that such members shall be allowed per diem and traveling expenses, not to exceed $500 for each member in any one 12-month period, and that the per diem and traveling expenses shall be paid from the State Highway Fund.
>
> We request your opinion as to the constitutionality of the Act. Can the Legislature appropriate money from the State Highway Fund by resolution?

OPINION

An examination of Senate Joint Resolution No. 7 discloses that in the closing paragraph thereof it was sought to make an appropriation of $500 for each member of the board provided for in the resolution in any one 12-month period and which appropriation was made from the State Highway Fund. The question is, was a constitutional appropriation of public moneys made by such provision in the resolution?

Section 19, Article IV, of the Constitution provides: "No money shall be drawn from the treasury but in consequence of appropriations made by law."

Section 23, Article IV, provides: "The enacting clause of every law shall be as follows: 'The People of the State of Nevada, represented in Senate and Assembly, do enact as follows,' and no law shall be enacted except by bill."

Section 35, Article IV, provides, inter alia: "Every bill which may have passed the legislature shall, before it becomes a law, be presented to the governor. If he approve it, he shall sign it; but if not, he shall return it with his objections, to the house in which it originated."

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The Legislature then, under such constitutional provision, may pass the bill over the Governor's veto. This section contains other provisions not material here.

An examination of the record discloses that Senate Joint Resolution No. 7 was never presented to the Governor for his signature. It simply became an adopted resolution of the two houses of the Legislature and in this respect does not constitute a law.

Further, even if such joint resolution could be deemed a law, yet there is a fatal defect which prevents it from being a law as intended by the Constitution and that is the fact that such joint resolution does not contain the enacting clause required on every law, as above pointed out. The Supreme Court in State v. Rogers, 10 Nev. 250, held that the omission of the words "senate and" from the enacting clause of an Act of the Legislature rendered the Act unconstitutional and void. The Court in passing upon the matter said:

> Our Constitution expressly provides that the enacting clause of every law shall be "The people of the State of Nevada, represented in senate and assembly, do enact as follows." This language is susceptible of but one interpretation. There is no doubtful meaning as to the intention. It is, in our judgment, an imperative mandate of the people in their sovereign capacity to the legislature, requiring that all laws to be binding upon them shall, upon their face, express the authority by which they were enacted, and as this act comes to us without such authority appearing upon its face, it is not a law.

The Constitution requiring that no money shall be drawn from the treasury but in consequence of appropriations made by law and Senate Joint Resolution No. 7 not being a law within the meaning of the Constitution, it is our opinion that no valid appropriation of money has been made by the adoption of such resolution.

Respectfully submitted.

W. T. MATHEWS, *Attorney General.*

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86. Public Employees Retirement Act as to Continuous Service Construed in a Particular Case.

CARSON CITY, July 25, 1951.

MR. KENNETH BUCK, *Executive Secretary, Public Employees Retirement Board, Carson City, Nevada.*

DEAR MR. BUCK: This will acknowledge receipt of your letter in this office July 24, 1951, as to the interpretation of continuous service for purposes of retirement under the Public Employees Retirement Act in the case of a certain employee of the State Department of Agriculture. The correspondence relative to this matter which was submitted with your letter is returned herewith.

STATEMENT

As shown by the correspondence submitted, an employee of the Nevada State Department of Agriculture has been in such employ for

Resolutions and Memorials

Senate Concurrent Resolution No. 1—Committee on Judiciary

FILE NO. 1

SENATE CONCURRENT RESOLUTION—Providing that the official engrossed copy of Senate Bill No. 2 may be used as the enrolled bill.

WHEREAS, The provisions of sec. 8 of chapter 3, Statutes of Nevada 1949, as amended by chapter 385, Statutes of Nevada 1955, provide that the official engrossed copy of a bill may by resolution be used as the enrolled bill; now, therefore, be it

Resolved by the Senate of the State of Nevada, the Assembly concurring, That the official engrossed copy of Senate Bill No. 2 shall be used as the enrolled bill as provided by law.

Assembly Concurrent Resolution No. 1—Committee on Judiciary

FILE NO. 2

ASSEMBLY CONCURRENT RESOLUTION—Expressing congratulations and gratitude to Russell West McDonald upon completion and enactment of Nevada Revised Statutes.

WHEREAS, The 48th session of the legislature of the State of Nevada, by unanimous vote of the members thereof, has enacted into law the Nevada Revised Statutes as the law of the State of Nevada to supersede all prior laws of a general, public and permanent nature; and

WHEREAS, Nevada Revised Statutes constitutes a complete revision and reorganization of all general statutes enacted during the 95 years that Nevada has existed as a state and territory, and is the first such revision in the history of our state; and

WHEREAS, The preparation of Nevada Revised Statutes was a monumental undertaking requiring a degree of intelligence, knowledge, technical ability and dedication possessed by few men; and

WHEREAS, The State of Nevada was fortunate that the Justices of the Supreme Court of the State of Nevada, in their capacity as the Statute Revision Commission, were able to secure as director of the commission Russell West McDonald, a native-born Nevadan, educated in the public schools of our state, a Rhodes scholar and a graduate of Stanford Law School, who was eminently qualified in all respects to perform the tremendous task imposed upon him; and

WHEREAS, The enactment of Nevada Revised Statutes marks the culmination of nearly 6 years of exceptionally devoted public service on the part of Russell West McDonald as statute reviser and legislative bill drafter; now, therefore, be it

Resolved by the Assembly of the State of Nevada, the Senate concurring, That the legislature of the State of Nevada hereby extends

Exhibit "2"

to Russell West McDonald its most hearty congratulations upon the completion and enactment of Nevada Revised Statutes and expresses to him its gratitude and that of the people of the State of Nevada for the years of selfless, dedicated and devoted effort which he has contributed in the public service to the preparation of Nevada Revised Statutes; and be it further

Resolved, That a copy of this resolution, signed by all of the members of the 48th session of the Nevada legislature, be duly certified by the secretary of state of the State of Nevada and be transmitted forthwith to Russell West McDonald.

Assembly Concurrent Resolution No. 2—Committee on Legislative Functions

FILE NO. 3

ASSEMBLY CONCURRENT RESOLUTION—Memorializing the late United States Senator and governor, Edward P. Carville.

WHEREAS, The people of our state suffered a tremendous loss on the 27th day of June, 1956, by the passing of the beloved and esteemed Edward P. Carville; and

WHEREAS, Edward P. Carville, affectionately known as "Ted," was a native of Mound Valley, the son of a pioneer Nevada family, was educated in the schools of this state, and was a graduate of Notre Dame University; and

WHEREAS, Few persons have ever held so many high offices of honor and trust as the late "Ted" Carville, who, in addition to his role as a civic leader and outstanding attorney, served with distinction as district attorney, district judge, United States District Attorney, and finally as our governor and United States Senator, and his industriousness, selfless dedication and integrity were the keys to his success as a lawyer and public servant and will forever remain as a radiant example for our future statesmen; now, therefore, be it

Resolved by the Assembly of the State of Nevada, the Senate concurring, That we express this day our profound sorrow and condolences to the family of the late Senator Carville and tender them our deepest sympathy, and that we further acknowledge to them the irreparable loss which the calling of the late Senator Carville means to this state and nation; and be it further

Resolved, That the written form of this resolution be given such permanency as is possible for us to give by spreading it upon a memorial page of the journals of the assembly and the senate of this day in memory of and as a solemn tribute to Edward P. Carville; and be it further

Resolved, That a duly certified copy of this resolution be prepared by the secretary of state of the State of Nevada and be transmitted forthwith to the bereaved family of the deceased.

[redacted] Nevada Revised Statutes as the law of the State of Nevada to supersede all prior laws of a general, public and permanent nature.

AN ACT to revise the laws and statutes of the State of Nevada of a general or public nature; to adopt and enact such revised laws and statutes, to be known as the Nevada Revised Statutes, as the law of the State of Nevada; to repeal all prior laws and statutes of a general, public and permanent nature; providing penalties; and other matters relating thereto.

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Enactment of Nevada Revised Statutes. The Nevada Revised Statutes, being the statute laws set forth after section 9 of this act, are hereby adopted and enacted as law of the State of Nevada.

Sec. 2. Designation and Citation. The Nevada Revised Statutes adopted and enacted into law by this act, and as hereafter amended and supplemented and printed and published pursuant to law, shall be known as Nevada Revised Statutes and may be cited as "NRS" followed by the number of the Title, chapter or section, as appropriate.

Sec. 3. Repeal of Prior Laws. Except as provided in section 5 of this act and unless expressly continued by specific provisions of Nevada Revised Statutes, all laws and statutes of the State of Nevada of a general, public and permanent nature enacted prior to January 21, 1957, hereby are repealed.

Sec. 4. Construction of Act.

1. The Nevada Revised Statutes, as enacted by this act, are intended to speak for themselves; and all sections of the Nevada Revised Statutes as so enacted shall be considered to speak as of the same date, except that in cases of conflict between two or more sections or of any ambiguity in a section, reference may be had to the acts from which the sections are derived, for the purpose of applying the rules of construction relating to repeal or amendment by implication or for the purpose of resolving the ambiguity.

2. The provisions of Nevada Revised Statutes as enacted by this act shall be considered as substituted in a continuing way for the

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Exhibit "A"

2. All laws, rights and obligations set forth in subsection 1 of this section shall continue and exist in all respects as if Nevada Revised Statutes had not been adopted and enacted.

3. The repeal of prior laws and statutes provided in section 3 of this act shall not affect any act done, or any cause of action accrued or established, nor any plea, defense, bar or matter subsisting before the time when such repeal shall take effect; but the proceedings in every case shall conform with the provisions of Nevada Revised Statutes.

4. All the provisions of laws and statutes repealed by section 3 of this act shall be deemed to have remained in force from the time when they began to take effect, so far as they may apply to any department, agency, office, or trust, or any transaction, or event, or any limitation, or any right, or obligation, or the construction of any contract already affected by such laws, notwithstanding the repeal of such provisions.

5. No fine, forfeiture or penalty incurred under laws or statutes existing prior to the time Nevada Revised Statutes take effect shall be affected by repeal of such existing laws or statutes, but the recovery of such fines and forfeitures and the enforcement of such penalties shall be effected as if the law or statute repealed had still remained in effect.

6. When an offense is committed prior to the time Nevada Revised Statutes take effect, the offender shall be punished under the law or statute in effect when the offense was committed.

7. No law or statute which heretofore has been repealed shall be revived by the repeal provided in section 3 of this act.

8. The repeal by section 3 of this act of a law or statute validating previous acts, contracts or transactions shall not affect the validity of such acts, contracts or transactions, but the same shall remain as valid as if there had been no such repeal.

9. If any provision of the Nevada Revised Statutes as enacted by this act, derived from an act that amended or repealed a preexisting statute, is held unconstitutional, the provisions of section 3 of this act shall not prevent the preexisting statute from being law if that

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provisions of the prior laws and statutes repealed by section 3 of this act.

3. The incorporation of initiated and referred measures is not to be deemed a legislative reenactment or amendment thereof, but only a mechanical inclusion thereof into the Nevada Revised Statutes.

4. The various analyses set out in Nevada Revised Statutes, constituting enumerations or lists of the Titles, chapters and sections of Nevada Revised Statutes, and the descriptive headings or catchlines immediately preceding or within the texts of individual sections, except the section numbers included in the headings or catchlines immediately preceding the texts of such sections, do not constitute part of the law. All derivation and other notes set out in Nevada Revised Statutes are given for the purpose of convenient reference, and do not constitute part of the law.

5. Whenever any reference is made to any portion of Nevada Revised Statutes or of any other law of this state or of the United States, such reference shall apply to all amendments and additions thereto now or hereafter made.

Sec. 5. Effect of Enactment of NRS and Repealing Clause.

1. The adoption and enactment of Nevada Revised Statutes shall not be construed to repeal or in any way affect or modify:

(a) Any special, local or temporary laws.

(b) Any law making an appropriation.

(c) Any law affecting any bond issue or by which any bond issue may have been authorized.

(d) The running of the statutes of limitations in force at the time this act becomes effective.

(e) The continued existence and operation of any department, agency or office heretofore legally established or held.

(f) Any bond of any public officer.

(g) Any taxes, fees, assessments or other charges incurred or imposed.

(h) Any statutes authorizing, ratifying, confirming, approving or accepting any compact or contract with any other state or with the United States or any agency or instrumentality thereof.

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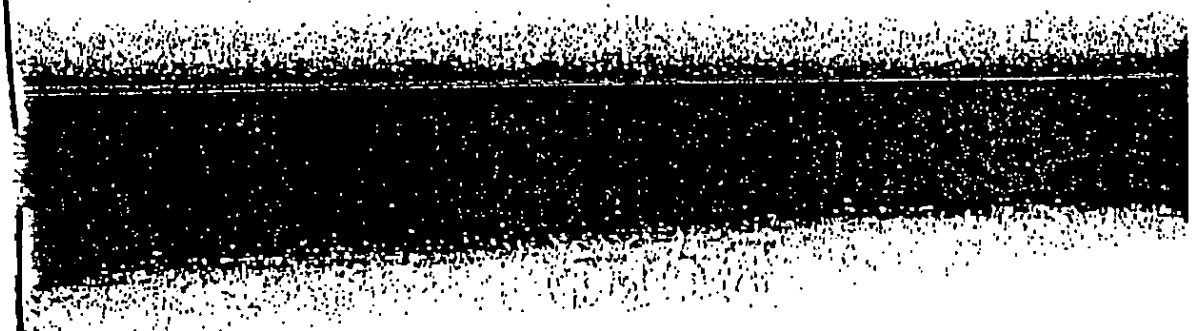
appears to have been the intent of the legislature or the people.

Sec. 6. Severability of Provisions. If any provision of the Nevada Revised Statutes or amendments thereto, or the application thereof to any person, thing or circumstance is held invalid, such invalidity shall not affect the provisions or application of the Nevada Revised Statutes or such amendments that can be given effect without the invalid provision or application, and to this end the provisions of Nevada Revised Statutes and such amendments are declared to be severable.

Sec. 7. Effective Date. This act, and each and all of the laws and statutes herein contained and hereby enacted as the Nevada Revised Statutes, shall take effect upon passage and approval.

Sec. 8. Omission From Session Laws. The provisions of NRS 1.010 to 710.590, inclusive, appearing following section 9 of this act shall not be printed or included in the Statutes of Nevada as provided by NRS 218.500 and NRS 218.510; but there shall be inserted immediately following section 9 of this act the words: "(Here followed NRS 1.010 to 710.590, inclusive.)"

Sec. 9. Content of Nevada Revised Statutes. The following laws and statutes attached hereto, consisting of NRS sections 1.010 to 710.590, inclusive, constitute the Nevada Revised Statutes:



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ENACTMENT Clause

✓

Sec. 5. Effect of enactment of NRS and repealing clause.

1. The adoption and enactment of Nevada Revised Statutes shall not be construed to repeal or in any way affect or modify:

(a) Any special, local or temporary laws.

(b) Any law making an appropriation.

(c) Any law affecting any bond issue or by which any bond issue may have been authorized.

(d) The running of the statutes of limitations in force at the time this act becomes effective.

(e) The continued existence and operation of any department, agency or office heretofore legally established or held.

(f) Any bond of any public officer.

(g) Any taxes, fees, assessments or other charges incurred or imposed.

(h) Any statutes authorizing, ratifying, confirming, approving or accepting any compact or contract with any other state or with the United States or any agency or instrumentality thereof.

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AA 2102

2. All laws, rights and obligations set forth in subsection 1 of this section shall continue and exist in all respects as if Nevada Revised Statutes had not been adopted and enacted.

3. The repeal of prior laws and statutes provided in section 3 of this act shall not affect any act done, or any cause of action accrued or established, nor any plea, defense, bar or matter subsisting before the time when such repeal shall take effect; but the proceedings in every case shall conform with the provisions of Nevada Revised Statutes.

4. All the provisions of laws and statutes repealed by section 3 of this act shall be deemed to have remained in force from the time when they began to take effect, so far as they may apply to any department, agency, office, or trust, or any transaction, or event, or any limitation, or any right, or obligation, or the construction of any contract already affected by such laws, notwithstanding the repeal of such provisions.

5. No fine, forfeiture or penalty incurred under laws or statutes existing prior to the time Nevada Revised Statutes take effect shall be affected by repeal of such existing laws or statutes, but the recovery of such fines and forfeitures and the enforcement of such penalties shall be

effected as if the law or statute repealed had still remained in effect.

6. When an offense is committed prior to the time Nevada Revised Statutes take effect, the offender shall be punished under the law or statute in effect when the offense was committed.

7. No law or statute which heretofore has been repealed shall be revived by the repeal provided in section 3 of this act.

8. The repeal by section 3 of this act of a law or statute validating previous acts, contracts or transactions shall not affect the validity of such acts, contracts or transactions, but the same shall remain as valid as if there had been no such repeal.

9. If any provision of the Nevada Revised Statutes as enacted by this act, derived from an act that amended or repealed a preexisting statute, is held unconstitutional, the provisions of section 3 of this act shall not prevent the preexisting statute from being law if that appears to have been the intent of the legislature or the people.

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Eighth Judicial District Court
Att: Court Clerk
200 Lewis Ave DistrictCTclerk

HIGH DESERT STATE PRISON
JUL 31 2017
UNIT 12

SUPP

RESCH LAW, PLLC d/b/a Conviction Solutions
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Attorney for Petitioner

DISTRICT COURT

CLARK COUNTY, NEVADA

DEANGELO R. CARROLL, Petitioner, vs. THE STATE OF NEVADA, Respondent.	Case No.: C212667-4 Dept. No: XXI **SUPPLEMENT TO PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)** Date of Hearing: Nov. 15, 2018 Time of Hearing: 9:30 a.m.

1. Name of institution and county in which you are presently imprisoned or where and how you are presently restrained of your liberty: **High Desert State Prison, Clark County, Nevada**.

2. Name and location of court which entered the judgment of conviction under attack: **Eighth Judicial District Court, Dept. VI, 200 Lewis Avenue, Las Vegas, NV 89101.**

3. Date of judgment of conviction: **September 7, 2010.**

4. Case number: **C212667-4**

5(a). Length of sentence: **Count 1: Life with the possibility of parole after serving a minimum of 40 years; Count 2: Life with a possibility of parole after serving a minimum of**

20 years, plus an equal and consecutive term of life with a possibility of parole after twenty years for use of a deadly weapon; with 1904 days credit for time served.

5(b). If sentence is death, state any date upon which execution is scheduled: **N/A.**

6. Are you presently serving a sentence for a conviction other than the conviction under attack in this motion? **No.**

If "yes," list crime, case number and sentence being served at this time: **N/A.**

7. Nature of offense involved in conviction being challenged: **Count 1: Conspiracy to commit murder; Count 2: First degree murder with use of a deadly weapon.**

8. What was your plea? (check one)

(a) Not guilty _X_

(b) Guilty __

(c) Guilty but mentally ill __

(d) Nolo contendere ___ (Alford)

9. If you entered a plea of guilty or guilty but mentally ill to one count of an indictment or information, and a plea of not guilty to another count of an indictment or information, or if a plea of guilty or guilty but mentally ill was negotiated, give details: **N/A**

10. If you were found guilty or guilty but mentally ill after a plea of not guilty, was the finding made by: (check one) **N/A.**

(a) Jury __.

(b) Judge without a jury __.

11. Did you testify at the trial? Yes ____ **No __X__**

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12. Did you appeal from the judgment of conviction? **Yes _X_** No __

13. If you did appeal, answer the following:

(a) Name of court: **Nevada Supreme Court**

(b) Case number or citation: **66266**

(c) Result: **Denial of relief was affirmed.**

(d) Date of result: **April 7, 2016.**

(Attach copy of order or decision, if available.)

14. If you did not appeal, explain briefly why you did not: **N/A**

15. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications or motions with respect to this judgment in any court, state or federal? **Yes_X_** No __

16. If your answer to No. 15 was "yes," give the following information:

17. Has any ground being raised in this petition been previously presented to this or any other court by way of petition for habeas corpus, motion, application or any other post-conviction proceeding? If so, identify: **Any grounds which are the same were never addressed by the trial court. See #18 below.**

(a) Which of the grounds is the same:

(b) The proceedings in which these grounds were raised:

(c) Briefly explain why you are again raising these grounds. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 1/2 by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length).

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18. If any of the grounds listed in Nos. 23(a), (b), (c) and (d), or listed on any additional pages you have attached, were not previously presented in any other court, state or federal, list briefly what grounds were not so presented, and give your reasons for not presenting them. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 1/ 2 by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length). **Briefly: On December 29, 2011, a counseled petition was filed in which Carroll alleged he was deprived of a direct appeal, along with other substantive grounds for relief such as ineffective assistance of counsel. The Court only ever ruled on the depravation claim, finding that Carroll was deprived of a direct appeal. See Orders dated July 30, 2012; January 3, 2014. The Court never addressed any other claims. As such, the instant proceedings are supplemental to those original proceedings and any claims asserted in the instant supplement relate back to the original proceedings and thus are neither untimely nor successive. It is noted the Nevada Rules of Appellate Procedure expressly provide that the date of decision of the untimely appeal by the Nevada Supreme Court governs the timeliness of the action and procedural bars apply only from that point on. See NRAP 4(c)(4).**

19. Are you filing this petition more than 1 year following the filing of the judgment of conviction or the filing of a decision on direct appeal? **No. Direct appeal was decided on October 27, 2016. Proper person petition to which this supplement relates was filed May 10, 2017.**

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20. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack? Yes__ **No __X_** If yes, state what court and the case number:

21. Give the name of each attorney who represented you in the proceeding resulting in your conviction and on direct appeal: **Trial: Dan Bunin, Thomas Ericsson. Direct appeal: Pat McDonald, Mario Valencia.**

22. Do you have any future sentences to serve after you complete the sentence imposed by the judgment under attack? Yes___ **No _X_**

If yes, specify where and when it is to be served, if you know: **N/A.**

23. State concisely every ground on which you claim that you are being held unlawfully. Summarize briefly the facts supporting each ground. If necessary you may attach pages stating additional grounds and facts supporting same.

(a) Ground One: **Petitioner asserts that his right to Due Process and/or right to effective assistance of counsel as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and/or under state law or the Nevada Constitution were violated when trial and/or appellate counsel were ineffective for failing to suppress physical evidence, or in the alternative, testimonial evidence obtained in violation of Miranda.**

Supporting Facts (Tell your story briefly without citing cases or law):

Summarizing a very long story, it is noted here that on direct appeal Carroll's entire statement to police was found to be illegally obtained and improperly admitted into evidence at the time of trial. SUPP 448-449. The Nevada Supreme Court ultimately denied relief on a

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request for a new trial based on that error because it found the error harmless; noting "other powerful evidence of his guilt." SUPP 449. The Nevada Supreme Court did not specify what that other powerful evidence was, but as explored throughout this petition the only substantial evidence against Carroll was his own statement to police, evidence derived from a wire Carroll offered to wear during the illegal police interrogation, and testimony from Rontae Zone which is the subject of further claims herein. As just noted, it is already clear the interrogation evidence was improperly admitted at trial.

Ground One is a claim that the wiretap evidence, which itself was derivative of the illegal interrogation, should have been suppressed under the "fruit of the poisonous tree" doctrine, and would have been had trial or appellate counsel so argued. Unfortunately, while various attempts were made to suppress the wiretap evidence, at no time did trial or appellate counsel specifically argue that the wiretap evidence should be suppressed because it was the product of an illegal interrogation. If they had, there would have been a reasonable probability of a more favorable outcome because the State's case was exceptionally less compelling absent the confession and wiretap evidence, and would have been nonexistent absent Mr. Zone's testimony which is addressed further herein. Trial and appellate counsel were therefore ineffective and this Court should order relief in the form of a new trial where both the interrogation itself and evidence derived from it, i.e. the wiretap, would be suppressed.

(b) Ground Two: **Petitioner asserts that his right to Due Process and/or right to effective assistance of counsel as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and/or under state law or the Nevada Constitution were violated when trial counsel failed to impeach witness Zone.**

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Supporting Facts (Tell your story briefly without citing cases or law):

Aside from the confession and wiretap evidence, the State's case largely depended on the testimony of witness Rontae zone. Trial counsel was grossly unprepared to deal with Mr. Zone's testimony and failed to impeach Zone with critically important evidence.

Moreover, trial counsel should easily have known about said critical evidence. Carroll's co-defendant was Kenneth Counts. The State had long alleged that Counts was the actual shooter at the time of the murder. Counts went to trial some two years prior to Carroll, and Zone was a witness at that trial. Reasonably competent counsel would have taken the time to attend that trial, and/or at a minimum get familiar with Zone's testimony from it. The reason this would be important is that, likely to the surprise of all involved, Counts was acquitted of murdering the victim.

The reason for the verdict in that case could likely be traced to Zone, who was present at the time of the murder and testified about his observations concerning Counts and Carroll. What could have happened between the two trials?

Very simply, at Count's trial, Mr. Zone was annihilated on cross-examination and during the defense case, as Zone denied that he personally pulled the trigger or that he ever told anyone that he had. However, the defense in Count's case then presented the testimony of Calvin Williams, Zone's boyfriend, who testified that Zone had in fact admitted to him that he shot the victim in the instant case. Absolutely none of this critical evidence found its way into Carroll's trial: Mr. Williams was not called as a defense witness and Zone was not even so much as asked about any of these important events. Carroll was prejudiced by the failure to impeach Zone's testimony, because there is a reasonable probability of a better outcome and/or that he

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too would have been acquitted of murder had his attorneys realized just how bad a witness Rontae Zone was based on Zone's previous testimony.

(c) Ground Three: **Petitioner asserts that his right to Due Process and/or right to effective assistance of counsel as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and/or under state law or the Nevada Constitution were violated when trial and appellate counsel failed to properly challenge the trial court's denial of a Batson challenge.**

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. TT, Day 2, p. 75. 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." TT, Day 2, p. 72. The State compounded this incorrect statement of the law by agreeing with the court. 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.

Had either trial or appellate counsel properly raised the issue, the trial or Nevada Supreme Court would have been compelled to find structural error. It is well-established that there is no requirement that multiple jurors be discriminated against before a challenge to the State's use of preemptory challenges can be made. Had the proper challenge been made, the State's exclusion of Juror Overton would have been found to be the product of purposeful

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discrimination. Because these types of errors are structural in nature, relief should be granted in the form of a new trial.

(d) Ground Four: **Petitioner received ineffective assistance of trial and appellate counsel in violation of his rights as guaranteed by the Fifth, Sixth or Fourteenth Amendments to the United States Constitution and/or under state law or the Nevada Constitution due to the failure to challenge, object to, refer to, or raise on appeal as error the repeated references during trial to "custodian of witness" type witnesses as "experts," and/or to require the State to prove cellular phone testimony via an expert witness.**

Prior to trial, the State attempted to designate a representative from Sprint/Nextel as an expert witness. See Supplemental Notice of Expert Witnesses filed April 19, 2010. However, that designation did not include any reports or resumes, and did not even identify an actual individual. Instead, the designation specifically identified only "COR," which is believed to be short for custodian of records.

At trial, Joseph Trawicki testified on behalf of Sprint, and that testimony went well beyond providing mere recordkeeping. Rather, Mr. Trawicki explained the functioning of both wireless-to-wireless walkie-talkie features of Nextel phones along with testimony about cellular phones, signal strength, and wireless communication protocols. See TT, Day 5, pp. 19-22. At no time did trial counsel object to this improperly noticed expert testimony, nor did appellate counsel challenge its admission on direct appeal.

Had such a challenge been raised, it would have been sustained. The testimony at issue required an actual expert in the first instance, not a custodian of records. No such expert was

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ever noticed. Therefore the testimony should have been excluded and had it been, there would have been a reasonable probability of a more favorable outcome.

(e) Ground Five: **Petitioner received ineffective assistance of trial counsel and appellate counsel in violation of his rights as guaranteed by the Fifth, Sixth or Fourteenth Amendments to the United States Constitution and/or under state law or the Nevada Constitution due to trial counsel's failure to object to repeated instances of prosecutorial misconduct and/or appellate counsel's failure to raise the instances on direct appeal.**

There were several instances of prosecutorial misconduct during the State's closing argument. Most were not objected to by trial counsel, and none were raised on direct appeal by appellate counsel. Had trial or appellate counsel objected, there is a reasonable probability of a more favorable outcome, as the jury would either have been instructed not to consider the inappropriate and inflammatory arguments by the State, or a new trial would have been ordered by the trial court or Nevada Supreme Court.

(f) Ground Six: **Petitioner received ineffective assistance of appellate counsel in violation of his rights as guaranteed by the Fifth, Sixth or Fourteenth Amendments to the United States Constitution and/or under state law or the Nevada Constitution due to appellate counsel's failure to challenge the flight instruction on direct appeal.**

Trial counsel objected to the jury being given an instruction regarding flight. TT, Day 6, p. 4. The Court overruled the objection and gave the instruction. On direct appeal, no issue was raised concerning the trial court's decision to give an instruction regarding flight. Such a challenge should have been made, as trial counsel was correct: There was no evidence from which a flight instruction should have been given in this matter. There is a reasonable

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probability of a more favorable outcome had the flight instruction been challenged on direct appeal.

(g) Ground Seven: **Petitioner's conviction and sentence violate the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and Article I, section 8 of the Nevada Constitution because the cumulative effect of the errors alleged in this petition deprived him of his federal constitutional rights, including, but not limited to, his rights to due process of law, equal protection, confrontation, the effective assistance of counsel.**

Supporting Facts (Tell your story briefly without citing cases or law):

Petitioner has set forth separate post-conviction claims and arguments regarding numerous errors, and each one of these errors independently compels reversal of the judgment or alternative post-conviction relief. However, even in cases in which no single error compels reversal, a defendant may be deprived of due process if the cumulative effect of all errors in the case denied him fundamental fairness. Taylor v. Kentucky, 436 U.S. 478, n. 15; Harris v. Wood, 64 F.3d 1432, 1438-1439 (9th Cir. 1995); United States v. McLister, 608 F.2d 785, 791 (9th Cir. 1979).

Petitioner submits that the errors alleged in this petition and those which should have been raised on direct appeal to the Nevada Supreme Court require reversal both individually and because of their cumulative impact. As explained in detail in the separate claims and arguments on these issues, the errors in this case individually and collectively violated federal constitutional guarantees under the Fifth, Sixth, Eighth, and Fourteenth Amendments, as they individually and collectively had a substantial and injurious effect or influence on the verdict, judgment and sentence and are moreover prejudicial under any standard of review.

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The Nevada Supreme Court already found at least one error arising from the extensive use of Carroll's statements to police during the trial. If that error is considered in conjunction with the errors asserted in this petition, it is clear Petitioner's trial was fundamentally unfair. Absent the use of the wiretap evidence and/or if Rontae had been properly impeached with his prior testimony, the State's case would have been exponentially weaker.

See Supplemental Points and Authorities provided herewith for additional argument in support of all claims.

WHEREFORE, Petitioner prays that the court grant petitioner relief to which petitioner may be entitled in this proceeding.

DATED this 31st day of August, 2018.

Submitted By:

RESCH LAW, PLLC d/b/a Conviction Solutions

By: _____
JAMIE J. RESCH
Attorney for Petitioner

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VERIFICATION

I, JAMIE J. RESCH, ESQ., declare under penalty of perjury as follows:

That I am the attorney of record for Petitioner / Defendant Deangelo Carroll; that I have read the foregoing supplement and know the contents thereof; that the same are true and correct to the best of my knowledge, information and belief, except for those matters stated therein on information and belief, and as to those matters, I believe them to be true; that Petitioner/Defendant personally authorized me to commence this Supplemental Petition for Writ of Habeas Corpus.

I declare under penalty of perjury that the foregoing is true and correct.

8-31-18
Executed on

Signature

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CERTIFICATE OF SERVICE

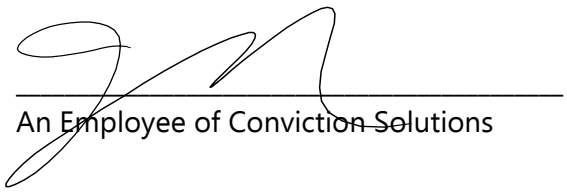
I hereby certify that I am an employee of Resch Law, PLLC d/b/a Conviction Solutions and that, pursuant to N.R.C.P. 5(b), on August 31, 2018, I served a true and correct copy of the foregoing Supplemental Petition for Writ of Habeas Corpus (Post-Conviction) via first class mail in envelopes addressed to:

Clark County District Attorney
200 Lewis Ave.
Las Vegas, NV 89155

Mr. Deangelo Carroll #1056956
High Desert State Prison
PO BOX 650
Indian Springs, NV 89070

and via Wiznet's electronic filing system, as permitted by local practice to the following person(s):

Steven B. Wolfson
Clark County District Attorney
PDMotions@ClarkCountyDA.com



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MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

Deangelo Carroll ("Carroll") was charged with murder and other serious offenses related to the shooting death of his friend, Timothy Hadland. At no time did the State allege that Carroll fired a weapon: co-defendant Kenneth Counts was instead alleged to be the shooter. However, Kenneth Counts was acquitted of murder in connection with the shooting, long before Carroll's trial began.

The defense here never disputed that Carroll was present for the shooting, but instead challenged the State's theory Carroll had knowingly participated in it. The evidence that Carroll was a knowing participant consisted largely of three things: Carroll's statements to police, evidence derived from a wire that Carroll wore after his statements to police, and testimony from Rontae Zone, who was also present at the time of the murder. There are glaring issues with each of these three pieces of evidence, starting with the fact that on direct appeal Carroll's entire statement to police was found to be illegally obtained and improperly admitted at trial. The conviction was affirmed, however, presumably based on the other two pieces of evidence that illuminated Carroll's state of mind surrounding the murder.

As explained herein, those remaining pieces of evidence also had significant problems. The wiretap should never have been admitted at trial, as it was purely a product of the illegally obtained confession. However, neither trial nor appellate counsel ever moved for its suppression on that basis. Had that, it too would have been ruled inadmissible and the

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foundation for the conviction and sentence substantially eroded. Additionally, Rontae's credibility was utterly destroyed at Kenneth Count's trial, in that direct evidence of Rontae's involvement as a gunman in the murder was presented. That evidence was never presented in Carroll's case, and that failure allowed the State to use, and improperly argue, Rontae's testimony as evidence of Carroll's guilt.

Absent the wiretap evidence and Rontae's testimony, there is no murder case against Carroll. The writ should be granted with the matter remanded for a new trial where the State would be barred from using the illegally obtained wiretap evidence.

II.

PROCEDURAL BACKGROUND

On May 31, 2005, Carroll was charged with the crimes of: conspiracy to commit murder, murder use of a deadly weapon, and solicitation to commit murder by the Justice of the Peace in the Boulder Township of Clark County, Nevada. See Bindover – Deangelo Reshawn Carroll 6-17-05, p. 2. Four others were similarly charged for crimes allegedly occurring between May 19, 2005 and May 24, 2005 within Clark County, Nevada, including: Kenneth Counts, Luis Alonso Hidalgo, Anabel Espindola, and Jayson Taoipu. See Bindover – Deangelo Reshawn Carroll 6-17-05, p. 2. On May 19, 2005, Timothy Hadland's body was found with two gunshot wounds at North Shore Road East and Lake Mead Blvd.

On June 13, 2005, a preliminary hearing was conducted for the co-defendants by the Justice of the Peace in the Justice Court of the Boulder City Township. See Preliminary Hearing, 1. Mr. David Figler, Esq. and Mr. Daniel Bunin, Esq. represented Carroll during the Preliminary

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Hearing and subsequent trial. See Preliminary Hearing, 5. See Preliminary Hearing, 9. Carroll was the only defendant of the five to waive his preliminary hearing.

On July 6, 2005, and again on October 20, 2008, the State filed a Notice of Intent to Seek Death Penalty. See Amended Notice of Intent to Seek Death Penalty filed October 20, 2008. Carroll was the last of the defendants to go to trial.

On March 18, 2010, Carroll filed a pro se Motion to Dismiss Counsel. See Pro Se Motion to Dismiss Counsel. Carroll stated the following reasons for wanting to dismiss Daniel Bunin from his case: (1) Mr. Bunin's failure to regularly communicate or visit, (2) Mr. Bunin's failure to investigate Carroll's written requests for investigation, and (3) Mr. Bunin's failure to inform Carroll of the actual evidence against him. See Carroll's Pro Se Motion to Dismiss Counsel. At the hearing to discuss this Motion, Carroll withdrew his motion. See Hearing to Dismiss Counsel and Appoint Alternate Counsel.

On April 30, 2010, Carroll's counsel filed a Motion to Suppress specifically Carroll's confession to the police, which did not address the wiretap evidence subsequently obtained by police. See Carroll's Motion to Suppress. While this motion explains in depth the clear Miranda violations of the confessions, this motion makes no argument to suppress the self-incriminating/physical evidence of the wire that resulted from the confession—arguably, the only uncontroverted evidence against Carroll. The district court denied Carroll's Motion to Suppress, and the evidence was submitted to the jury.

Eventually, on May 25, 2010, a jury convicted Carroll of Conspiracy to Commit Murder, and Murder with use of a deadly weapon after the introduction of Carroll's statements to the

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police and the product of Carroll's recorded conversation at Simone's Auto Plaza. See Jury Trial Verdict, 3.

Carroll filed a Petition for Writ of Habeas Corpus on December 28, 2011, because counsel failed to file a notice of appeal on Carroll's behalf. On June 4, 2012, the district court conducted an evidentiary hearing regarding appellate counsel's untimeliness. See Transcript of Proceedings, June 4, 2012 Evidentiary Hearing. During the evidentiary hearing, Patrick McDonald, Carroll's counsel at the time, argued that a miscommunication had occurred that led to Carroll's Notice of Appeal to never be filed. Despite this misstep, McDonald stated that he wanted to remain on the case and did not want the district court to appoint new counsel. See Transcript of Proceedings, June 4, 2012 Evidentiary Hearing. On July 30, 2012, the district court granted Carroll's appeal-deprivation claim, then the State appealed this order to the Supreme Court.

On March 14, 2013, Patrick McDonald withdrew as Carroll's counsel due to the dissolution of the law firm of McDonald Adras, McDonald's medical condition, and due to personal reasons. See McDonald's Motion to Withdraw filed March 14, 2013. Mario Valencia was subsequently appointed. On July 23, 2013, the Supreme Court remanded the case back to the district court for a limited evidentiary hearing on Carroll's appeal deprivation. See Supreme Court Order and Remand filed August 23, 2013. On October 21, 2013, during the evidentiary hearing, the district court ordered Carroll's petition be granted and that Carroll be given a right to pursue an appeal.

On April 7, 2016, the Nevada Supreme Court issued a published opinion, in which it affirmed the denial of all claims raised on direct appeal. In so doing, the Court did hold that

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Carroll's statements to police were illegally obtained and had to be suppressed in their entirety. SUPP 449. However, citing unspecified "other powerful evidence," the Nevada Supreme Court found this error harmless beyond a reasonable doubt. SUPP 449.

On May 10, 2017, Carroll filed a petition for writ of habeas corpus in proper person. Counsel was subsequently appointed and this supplemental petition filed on Carroll's behalf.

A more specific look at some of the evidence admitted at trial may be of assistance in understanding the claims presented herein.

Confessions:

Detectives Wildemann and Kyger contacted Luis Hidalgo, the owner of the Palomino Club, after TJ Hadland's girlfriend stated that TJ told her he was going to meet with DeAngelo and two other persons. See Carroll's Motion to Supress filed April 30, 2010, Exhibit A, Arrest Report, 2. (hereinafter "Arrest Report"). She further explained that TJ told her that DeAngelo worked at the Palomino Club. See Arrest Report, 2. Luis Hidalgo informed the detectives that DeAngelo Carroll was an employee of the Palomino Club but did not have his contact information. See Arrest Report, 2. The Detectives went to the Palomino and while they were interviewing the Floor Manager, Carroll arrived and agreed to speak to the Detectives. See Arrest Report, 2. However, instead of speaking with the Detectives at the Club, the Detectives drove Carroll to the Homicide office where he was interviewed. See Arrest Report, 2. There was no Miranda warning from the Club to the Homicide office.

During the taped interview, Carroll was questioned for several hours, and he gave inconsistent statements that were against his interest. The detectives kept accusing Carroll of lying, and therefore, Carroll kept amending his statement. See Carroll's Motion to Suppress filed

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April 30, 2010, Exhibit B (hereinafter "Carroll's Statement"). In his transcribed statement, Carroll is not read his Miranda rights until half-way through the interview. See Carroll's Statement, 85.

The detectives claimed that Carroll volunteered to speak to them about this case; however, Carroll was not interviewed at home or at work, where he allegedly volunteered. See Arrest Report, 2. He was forced to go to the Homicide office to give his statement. Further, Carroll was not allowed to drive to the homicide office by himself. He was told he had to ride with Detectives McGrath and Wildemann to the station. See Arrest Report, 2. Once at the homicide office, Carroll was interviewed in a small room with only Carroll and detectives present and between him and the only exit. . Under these circumstances, Carroll did not believe that he was free to leave without first giving a statement as confirmed by the Supreme Court of Nevada. SUPP 444-445.

During the course of the interview, Carroll made inconsistent statements that were against his interest. Detectives accused Carroll of lying during the interview, and he kept amending his statement. See Carroll's Statement, 56. Initially, Carroll stated that he had called TJ to inquire about getting some marijuana from him. See Carroll's Statement, 12. However, the Detectives were unsatisfied with this answer and pressed Carroll to tell the truth. See Carroll's Statement, 33. Carroll asks the Detectives "How, how do I know that I'm fuckin' gonna be protected if I fuckin' say anything?" and follows that with "I'm fuckin' scared for my life here." See Carroll's Statement, 35. The Detectives again pressure Carroll for the truth, and Carroll asks "But am I gonna—my question is if I tell you guys what happened, am I going to jail?" Instead of the Detectives truthfully answering the question and providing Carroll his Miranda warnings, then Detectives tell Carroll that if he truthfully tells them what happened, then they represented

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that they would take him home and mentioned nothing about what would happen after they took him home. See Carroll's Statement, 36. Finally, 85 pages in to the interrogation, where Carroll made inconsistent and incriminating statements, Detectives read Carroll his Miranda rights, and immediately after state "Okay. Ah, the fact is we wanna talk to you about this last account that you gave us where you talked about Mr. H." See Carroll's Statement, 85. On the same page of the statement as the end of the Miranda warnings, Carroll tells the detectives that he can prove what he is saying if the detectives "put a wire" on him. See Carroll's Statement, 86. The offer to wear a wire was a direct result of the Miranda violations and should have been argued by trial and appellate counsel.

The Nevada Supreme Court ultimately stated that the district court erred in denying Carroll's Motion to Suppress his incriminating statements to the police, because the police subjected Carroll to custodial interrogation without advising him of his Miranda rights. SUPP 446. Finally, when the Detectives did Mirandize Carroll, the Detectives just further questioned Carroll with his pre-Miranda statements. Therefore, the Supreme Court noted that the midstream Miranda warnings did not properly advise Carroll that he could terminate the interrogation despite his previous inculpatory statements. SUPP 448.

The Wire:

After finally being read his rights, Carroll immediately stated that he would wear a wire to prove his story to the detectives who told him many times that they did not believe his story. Carroll's Statement, 86. For the next 41 pages, Carroll repeatedly mentioned wearing a wire for the intention of proving his story, not to preserve his interests. Carroll's Statement 86-142.

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Then, on May 24, 2005 Detective McGrath and and FBI Special Agent Brett Shields placed a wire on Carroll, and then he went to Simone's Auto Plaza. See Arrest Report, 4. The purpose of the wire was to conduct a tape-recorded conversation between Carroll and the other co-defendants without their knowledge. See Arrest Report, 4. Carroll told co-defendant Anabel "You know what I'm saying I did everything you guys asked me to do you told me to take care of the guy and I took care of him." FBI Transcript of Recording at Simone's May 24, 2005, 2 (hereinafter "FBI Recording"). Anabel replied that she asked him to talk to the guy not take care of him, and she said she even called Carroll. Then, Carroll stated, "Yeah and when I talked to you on the phone Ms. Anabel I said I specifically said I said if he is by himself do you still want me to do him in. You said yeah." Anabel denied that statement. Anabel proceeded to tell Carroll that she tried to call him multiple times, but could not reach him. She told Carroll to go to Plan B. FBI Recording, 2. This extremely prejudicial evidence against Carroll did not prove his story and certainly did not exculpate Carroll in any way. Had Carroll been properly informed of his Miranda rights, then he would not have agreed, much less volunteered for something so detrimental to his case.

Exculpatory Testimony: (Rontae)

DeAngelo was the last of the initial co-defendants to be tried. During Kenneth Counts's trial, which occurred two years prior to DeAngelo's trial, the trials were largely similar, except 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. SUPP 80. Then counsel further asked if he had

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a relationship with Calvin Williams for a year, which Rontae responded that he did not know who Calvin Williams was. SUPP 80. 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?" SUPP 81. Rontae responded, "Man, that's nonsense." SUPP 81. Then counsel asked Rontae if he ever told Calvin Williams that "I'll get away with it like I did with the Palomino Club." SUPP 81. Defense counsel confirmed with Rontae that he had in fact lied to police multiple times before. SUPP 82.

Later in Counts's trial, defense counsel brought Calvin Williams to testify. Williams testified that he and Rontae used to date starting in January of 2005. SUPP 149-150. 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. SUPP 151. 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." SUPP 152.

On cross, the State asked Williams how the defense got this information. SUPP 155. Williams stated that he told Mr. Counts about this information, after Williams understood that Mr. Counts was in prison for the Palomino incident. SUPP 157. 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.

During Carroll's trial, which occurred two years later, defense counsel either declined or never-attempted to present Williams's testimony or rebut Rontae's testimony. Defense counsel

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did question Rontae about lying to the police, but never asked Rontae about Williams's exculpatory testimony.

III.

GROUNDS FOR RELIEF

Due to the ineffective assistance of trial and appellate counsel, Petitioner's sentence is constitutionally infirm, and Petitioner should receive relief in the form of vacating petitioner's sentence and remanding the case for a new trial.

GROUND ONE

Petitioner asserts that his right to Due Process and/or right to effective assistance of counsel as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and/or under state law or the Nevada Constitution were violated when trial and/or appellate counsel were ineffective for failing to suppress physical evidence, or in the alternative, testimonial evidence obtained in violation of Miranda.

An ineffective assistance of counsel claim has two components. First, the petitioner must show counsel's performance was deficient, and second, must show the deficient performance prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 678 (1984). This requires the petitioner to show the result of the proceeding probably would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id. at 694. The Nevada Supreme Court has further 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

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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 time in legal research and general failure to present a cognizable defense rather clearly resulted in rendering the trial result 'unreliable'"). Thus, relief can be granted when even one error by counsel constitutes constitutionally ineffective assistance of counsel, or, where the cumulative effect of errors violates due process. Parle v. Runnels, 505 F.3d 922, 927 (9th Cir. 2007).

To prove ineffective assistance of counsel, a petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness and resulting prejudice such that the omitted issue would have a reasonable probability of success on appeal. Kirksey v. State, 112 Nev. 980, 998, 923 P.3d 1102 (1996). Appellate counsel is not required to 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 clearly stronger. Suggs v. United States, 513 F.3d 675, 678 (7th Cir. 2008).

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. While trial counsel suppressed the actual confessions made in violation of Miranda, trial counsel and/or appellate counsel failed to seek to suppress the evidence that directly resulted therefrom, which arguably was the only uncontroverted evidence against Carroll. The Supreme Court held in United States v. Patane that testimonial, self-incriminating evidence must be suppressed in light of Miranda violations. 542 U.S. 630 (2004).

While it could be argued that physical evidence may not be subject to suppression in the circumstances set forth in Patane, several state courts have declined to follow that approach.

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Kessler v. State, 991 So.2d 1015 (Fla. App. 2008). In the factually similar Kessler case, the defendant was interrogated while in police custody and police requested defendant's cooperation in contacting defendant's alleged cocaine supplier. Id. at 1017. 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.

The Kessler court stated that the Patane court held that failure to complete Miranda warnings does not 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. "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

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testimonial evidence and therefore, suppression of the tape-recorded conversation was consistent with Patane's holding. 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 tape-recorded conversation. Like the defendant in Kessler, Carroll was in the custody of police when he voluntarily agreed to wear a wire in an effort to prove his story, not to defend himself. The wire was devastatingly incriminating for Carroll, because Carroll stated that he "[took] care of the guy." Co-defendant Anabel further inculpated Carroll during this conversation by stating that Carroll was not supposed to "take of the guy" and she called him numerous times to keep him from doing so. Similar to the inculpatory conversation in Kessler that implicated himself, Carroll also "furnished incriminating evidence out of his own mouth." Even the Nevada Supreme Court found, "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." SUPP 432. Therefore, "this is precisely the type of incriminating testimonial communication which the Miranda rule was designed to address." Kessler, 991 So.2d at 1021.

Multiple states have further held that physical evidence obtained in violation of Miranda must be excluded as either in violation of the state's constitution regarding self-incrimination or fruit of the poisonous tree. 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.

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McCain, 2015 Ariz. App. Unpub. LEXIS 707 (2015); State v. Carroll, 2008 Minn. App. Unpub. LEXIS 1248 (2008).

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 (where the Supreme Court held that 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.

In State v. Farris, the Supreme Court of Ohio stated that evidence seized due to the admissible statements might be admissible under the Fifth Amendment of the United States Constitution but was not admissible under Article I § 10 of Ohio's Constitution. 109 Ohio St.3d 519, 529. The Farris court stated,

> "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."

Id. at 528.

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.

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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).

Here, the wire recording, and Carroll's statements on it, are necessarily fruit of the poisonous tree, because the wire was a direct derivative of the suppressed Miranda-violative statements. 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." 2015 Ariz. App. Unpub. LEXIS 707, *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.

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Here, the police obtained Carroll's permission to use a wire through a Miranda-violative interrogation, where the statements should have been suppressed. The introduction of this evidence bolstered the credibility of Rontae Zone, the state's most significant witness. Zone's testimony could have been easily countered, as described herein, and therefore, the only evidence left to convict Carroll would have been Zone's less-than-credible testimony. Even though policy and law was on Petitioner's side in this matter, trial and/or appellate counsel failed to meaningfully argue either with respect to this issue.

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 ever considered this argument, and therefore, could not have strategically decided not to pursue this route.

The prejudice suffered by Carroll due to this failure is obvious. Absent the confession itself, which the Nevada Supreme 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. See generally, TT, Day 6. The State simply did not have a case against Carroll without the wiretap evidence.

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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.

GROUND TWO

Petitioner asserts that his right to Due Process and/or right to effective assistance of counsel as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and/or under state law or the Nevada Constitution were violated when trial counsel failed to impeach witness Zone.

"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." TT, Day 6, p. 128. This was, in fact, consistent with Rontae's trial testimony in that he specifically testified Carroll wanted someone

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"dealt with" which meant "murdered." TT, Day 3, pp. 131-133. Rontae admitted that he saw a gun and that Rontae himself was given bullets by Carroll before the murder. TT, Day 3, p. 133.

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. SUPP 152. 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.

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Further, if the fact there was evidence Rontae was the shooter were 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. SUPP 80-81. 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.

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. The writ should be granted and a new trial ordered.

GROUND THREE

Petitioner asserts that his right to Due Process and/or right to effective assistance of counsel as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and/or under state law or the Nevada Constitution were violated when trial and appellate counsel failed to properly challenge the trial court's denial of a Batson challenge.

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Next, Carroll contends that trial and appellate counsel failed to properly argue a challenge on his behalf under Batson v. Kentucky, 476 U.S. 79 (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.

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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).

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

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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. Baston 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. TT, Day One, p. 144. She was in favor of the death penalty and could consider (at the time) all punishment options including death. TT, Day One, p. 145. The juror further expressed an opinion that prosecutors should have loved: that "the recidivism rate is ridiculous." TT, Day One, p. 146.

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 Baston based on something other than pattern. Likewise, appellate

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counsel was ineffective for failing to raise the trial court's denial of the Baston 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." TT, Day Two, pp. 76-77. However, both the prosecution and court noted that they felt the defense would likely have struck the juror based on her law enforcement experience. TT, Day Two, p. 77. 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 Baston, 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." TT, Day Two, p. 77. 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,

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the writ should be granted and a new trial ordered based on counsels' failure to litigate this meritorious Batson claim.

GROUND FOUR

Petitioner received ineffective assistance of trial and appellate counsel in violation of his rights as guaranteed by the Fifth, Sixth or Fourteenth Amendments to the United States Constitution and/or under state law or the Nevada Constitution due to the failure to challenge, object to, refer to, or raise on appeal as error the repeated references during trial to "custodian of witness" type witnesses as "experts," and/or to require the State to prove cellular phone testimony via an expert witness.

The State noticed a custodian of records as an expert witness regarding cellular communications. That witness proceeded to testify at trial about several scientific and technical topics concerning cellular phones. See TT, Day 5, pp. 19-22. 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

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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 Petitioner 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.

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GROUND FIVE

Petitioner received ineffective assistance of trial counsel and appellate counsel in violation of his rights as guaranteed by the Fifth, Sixth or Fourteenth Amendments to the United States Constitution and/or under state law or the Nevada Constitution due to trial counsel's failure to object to repeated instances of prosecutorial misconduct and/or appellate counsel's failure to raise the instances on direct appeal.

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 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

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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." TT, Day 6, p. 124. 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." 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. TT, Day 6, p. 127. 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." 788 F.3d 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.

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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). 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. TT, Day 6, p. 128. 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." TT, Day 6, p. 138. 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. TT, Day 6, p. 139.

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

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on direct appeal. As explained in Zapata, the State may not create a narrative hypothetical which it knows did not occur. No one at Carroll's trial ever remotely suggested that the killing was anything other than a murder; the defense simply suggested Carroll was not the murderer and did know a murder would occur.

Further, a prosecutor commits misconduct by misstating the law to the jury. People v. Sanchez, 228 Cal.App.4th 1517, 1532 (2014). The Nevada Supreme 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." TT, Day 6, p. 140. 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"

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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. The writ should be granted and a new trial ordered.

GROUND SIX

Petitioner received ineffective assistance of appellate counsel in violation of his rights as guaranteed by the Fifth, Sixth or Fourteenth Amendments to the United States Constitution and/or under state law or the Nevada Constitution due to appellate counsel's failure to challenge the flight instruction on direct appeal.

Trial counsel objected to the flight instruction in this case, arguing that there was "literally no evidence of flight." TT, Day 6, p. 4. 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." TT, Day 6, p. 4.

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).

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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 Nevada Supreme 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 inconsistent 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, the Nevada Supreme Court would surely have found its use to be error and in a case that already featured ample improperly admitted evidence, it would have taken very little to tilt the scales of justice in Carroll's favor.

GROUND SEVEN

Petitioner's conviction and sentence violate the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and Article I, section 8 of the Nevada Constitution because the cumulative effect of the errors alleged in this petition deprived him of his federal constitutional rights, including, but not limited to, his rights to due process of law, equal protection, confrontation, the effective assistance of counsel.

In this petition and in the briefing on direct appeal, Petitioner has set forth separate post-conviction claims and arguments regarding numerous errors, and he submits that each one

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of these errors independently compels reversal of the judgment or alternative post-conviction relief. However, even in cases in which no single error compels reversal, a defendant may be deprived of due process if the cumulative effect of all errors in the case denied him fundamental fairness. Taylor v. Kentucky, 436 U.S. 436, 487, and fn. 15; Harris v. Wood 64 F.3d 1432, 1438-1439 (9th Cir. 1995); United States v. McLister 608 F.2d 785, 791 (9th Cir. 1979).

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.

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IV.

CONCLUSION

For each of the reasons set forth herein, Petitioner submits that he is entitled to an evidentiary hearing and/or relief on his claims herein.

Wherefore, petitioner prays this Court (1) grant a new trial, (2) grant an evidentiary hearing, and/or (3) grant any other relief to which petitioner may be entitled.

DATED this 31st of August, 2018.

Submitted By:

RESCH LAW, PLLC d/b/a Conviction Solutions

By: _____
JAMIE J. RESCH
Attorney for Petitioner

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IN THE SUPREME COURT OF THE STATE OF NEVADA

DEANGELO CARROLL, Appellant, v. THE STATE OF NEVADA, Respondent.	Supreme Court Case No. 78081

APPELLANT'S APPENDIX

CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 30th day of May, 2019. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

Steven Wolfson, Clark County District Attorney's Office
Aaron Ford, Nevada Attorney General
Jamie J. Resch, Resch Law, PLLC d/b/a Conviction Solutions

By:_____
Employee, Resch Law, PLLC d/b/a Conviction Solutions