IN THE SUPREME COURT OF THE STATE OF NEVADA

DEANGELO CARROLL, Appellant, v. THE STATE OF NEVADA, Respondent.	Case No. 78081

RESPONDENT'S ANSWERING BRIEF

Appeal From Denial of Petition for Writ of Habeas Corpus
Eighth Judicial District Court, Clark County

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ROUTING STATEMENT

This appeal is appropriately retained by the Supreme Court pursuant to NRAP 17(b)(3) because it is a post-conviction appeal that involves a conviction for an offense that is a category A.

STATEMENT OF THE ISSUE(S)

Whether the district court did not err in denying Appellant's post-conviction habeas petition.

STATEMENT OF THE CASE

On June 20, 2005, Deangelo Reshawn Carroll (hereinafter "Appellant")—along with four (4) co-defendants, Kenneth Counts, Luis Hidalgo, Anabel Espindola,

and Jayson Taoipu—were charged by way of Information with one (1) count of Conspiracy to Commit Murder and one (1) count Murder with Use of a Deadly Weapon for the murder of Timothy Hadland. I Appellant's Appendix ("AA") 001–04. Co-defendants Hidalgo and Espindola were also charged with two (2) counts of Solicitation to Commit Murder for procuring Appellant to kill Rontae Zone and co-defendant Taoipu. I AA 003–04.

On April 30, 2010, Appellant filed a Motion to Suppress, seeking to exclude his statements to the police. I AA 011–17. On May 4, 2010, the State filed an Opposition. I AA 153–63. On May 11, 2010, the district court denied Appellant's Motion. I AA 164–72.

Appellant proceeded to trial on May 17, 2010. I AA 173. At trial, Appellant was represented by Dan Bunin, Esq. and Thomas Ericsson, Esq. I AA 173. On May 24, 2010, after six days of trial, the jury returned a verdict of guilty as to Count 1 – Conspiracy to Commit Murder and Count 2 – Murder in the First Degree. VII AA 1519–20. After a two-day penalty hearing, on June 4, 2010, the jury returned a special verdict of life without the possibility of parole on Count 2. IX AA 1921.

On August 12, 2010, Appellant was sentenced to the following: as to Count 1 – life with the possibility of parole after a minimum of forty (40) years; and as to Count 2 – life with the possibility of parole after a minimum of twenty (20) years, plus an equal and consecutive term of life with the possibility of parole after a

minimum of twenty (20) years for Use of a Deadly Weapon, Count 2 to run consecutive to Count 1. IX AA 1929. Appellant received one thousand nine hundred and four (1,904) days credit for time served. IX AA 1929. The Judgment of Conviction was filed on September 8, 2010. IX AA 1928–29. An Amended Judgment of Conviction was filed on March 23, 2011, correcting the sentence on Count 1 to indicate a maximum of one hundred twenty (120) months with a minimum parole eligibility of thirty-six (36) months. IX AA 1930–31. Appellant did not file a direct appeal.

Appellant filed a Petition for Writ of Habeas Corpus (Post-Conviction) ("First Petition") on December 29, 2011. X AA 1932–67. The district court issued Findings of Fact, Conclusions of Law and Order on July 30, 2012, finding that Appellant had been denied appellate relief. X AA 1971–72. Thus, the district court directed the court clerk to file a Notice of Appeal on Appellant's behalf, which was filed on May 1, 2013. X AA 1973.

However, this Court remanded the case back to the district court on August 23, 2013, because Appellant had only raised his denial-of-appeal claim in his First Petition, which was untimely; and the district court had not specifically determined that there was good cause to overcome the procedural bars. X AA 1974–79. Upon remand, the district court held another evidentiary hearing on October 21, 2013, to examine the good cause to excuse the untimeliness of Appellant's First Petition. X

AA 1984. On January 3, 2014, the district court entered its Findings of Fact, Conclusions of Law and Order, finding good cause. X AA 1981–87. The district court directed the court clerk to file a second Notice of Appeal on Appellant's behalf, which was filed on January 6, 2014. X AA 1988.

On April 7, 2016, this Court issued a published opinion affirming Appellant's conviction on the merits. Carroll v. State, 132 Nev. __, 371 P.3d 1023 (2016). Remitter issued on October 21, 2016. XIII AA 2610.

Appellant filed a pro per Petition for Writ of Habeas Corpus ("Second Petition") and a Motion for Appointment of Counsel for Investigation Purposes in Post-Conviction NRS 171.188 NRS 178.397 on May 10, 2017. X AA 1989–2043. The State filed its Response on July 13, 2017. X AA 2044–70. Appellant filed a Reply on August 7, 2017. X AA 2071–104. Appellant filed his Supplement to Petition for Writ of Habeas Corpus ("Supplement") through counsel on August 31, 2018. X AA 2105–51. The State filed its Opposition on October 30, 2018. XIII AA 2611–35. The district court held a hearing on December 4, 2018. XIII AA 2646. Denying the Second Petition, the district court issued Findings of Fact, Conclusions of Law and Order on January 18, 2019. XIII AA 2646–70. Appellant filed a Notice of Appeal on January 31, 2019. XIII AA 2671–72.

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STATEMENT OF THE FACTS

The following are the facts as determined by this Court in its published opinion affirming the judgment of conviction:

> 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[1] 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.

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

SUMMARY OF THE ARGUMENT

The district court did not err in denying Appellant's Second Petition because Appellant cannot establish he received ineffective assistance of trial or appellate counsel. First, counsel did move to suppress the recording from the wire Appellant voluntarily wore to assist police. Counsel was not ineffective for not moving to suppress specifically based on the "fruit of the poisonous tree" because such arguments would have been futile; despite the fact that Appellant was in custody when he spoke to police, he volunteered—in the hopes of receiving a benefit—to

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

assist police by wearing a recording device. Second, any impeachment of witness Zone with would not have led to Appellant's acquittal because the identity of the shooter—whether Zone or Counts—was irrelevant; Appellant, himself, was liable as a conspirator. Because the issue was irrelevant and might even have confused the jury, counsel was not ineffective. Third, trial counsel did in fact object to the State's preemptory challenge of a juror, and the trial court completed all three steps in analyzing the allegedly race-motivated challenge. Because any further challenge would have been futile, counsel was not ineffective. Fourth, none of the comments of which Appellant complains meet the standard for prosecutorial misconduct. Because an objection or issue on appeal would have had no chance of success, counsel was not ineffective. Fifth, Appellant relies upon a change in the law that counsel could not have predicted to support his argument that counsel should have moved to exclude cellular phone expert testimony. Because counsel cannot be held deficient for failure to predict the future, and because there was no prejudice, counsel was not ineffective. Sixth, the flight instruction was not improper because evidence of flight was admitted. Because counsel did in fact object at trial and was overruled, and because the argument would have had no chance of success on appeal, counsel was not ineffective. Finally, cumulative error does not apply to post-conviction, ineffective counsel analysis; and even if it did, there are no errors to cumulate.

Accordingly, this Court should affirm the district court's denial of the Second Petition.

ARGUMENT

THE DISTRICT COURT DID NOT ERR IN DENYING APPELLANT'S POST-CONVICTION HABEAS PETITION

"A claim of ineffective assistance of counsel presents a mixed question of law and fact, subject to independent review." Evans v. State, 117 Nev. 609, 622, 28 P.3d 498, 508 (2001). Though this Court reviews the district court's application of the law to those facts de novo, it gives deference to a district court's factual findings in habeas matters. State v. Huebler, 128 Nev. 192, 197, 275 P.3d 91, 95 (2012), cert. denied, 133 S. Ct. 988 (2013).

In his Second Petition, Appellant alleged six instances of ineffective assistance of counsel that he renews in this appeal.[2] Appellant's Opening Brief ("AOB") at 13–49. 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

[2] To the extent Appellant attempts to raise substantive complaints and not just ineffective assistance of counsel claims, these are outside the scope of a petition for writ of habeas corpus and are waived as not being brought on direct appeal. NRS 34.724(2)(a); NRS 34.810(1)(b); Evans, 117 Nev. at 646–47, 29 P.3d at 523; Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994), disapproved on other grounds, Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999).

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).

"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.

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).

With regard to ineffective assistance on appeal, there is a strong presumption that appellate counsel's performance was reasonable and fell within "the wide range of reasonable professional assistance." See United States v. Aguirre, 912 F.2d 555, 560 (2nd Cir. 1990) (citing Strickland, 466 U.S. at 689, 104 S.Ct. at 2065). Federal courts have held that a claim of ineffective assistance of appellate counsel must satisfy the two-prong test set forth by Strickland, 466 U.S. at 687–88, 694, 104 S.Ct. at 2065, 2068; Williams v. Collins, 16 F.3d 626, 635 (5th Cir. 1994); Hollenback v. United States, 987 F.2d 1272, 1275 (7th Cir. 1993); Heath v. Jones, 941 F.2d 1126, 1130 (11th Cir. 1991). In order to satisfy Strickland's second prong, the defendant must show that the omitted issue would have had a reasonable probability of success on appeal. See Duhamel v. Collins, 955 F.2d 962, 967 (5th Cir. 1992); Heath, 941 F.2d at 1132.

Furthermore, this Court has held that all appeals must be "pursued in a manner meeting high standards of diligence, professionalism and competence." Burke v. State, 110 Nev. 1366, 1368, 887 P.2d 267, 268 (1994). In Jones v. Barnes, 463 U.S. 745, 751, 103 S.Ct. 3308, 3312 (1983), the Supreme Court recognized that part of professional diligence and competence involves "winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." Id. at 751–52, 103 S.Ct. at 3313. In particular, a "brief that raises every colorable issue runs the risk of burying good arguments . . . in a verbal mound made up of strong and weak contentions." Id. 753, 103 S.Ct. at 3313. The Court also held that, "for judges to second-guess reasonable professional judgments and impose on appointed counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy." Id. at 754, 103 S.Ct. at 3314.

A. **Neither trial counsel nor appellate counsel were ineffective for failing to pursue suppression of the wire tape recordings.**

Appellant claims trial and appellate counsel were both ineffective for failing to pursue suppression of physical and/or testimonial evidence regarding the wire Appellant voluntarily wore to assist police. AOB at 14–23. However, counsel did in fact move to suppress this evidence. Further, despite the fact that Appellant was in custody when he spoke to police, he then volunteered—in the hopes of receiving a benefit—to assist police by wearing a recording device. Thus, any motions

specifically arguing "fruit of the poisonous tree" / violations of Miranda v. Arizona, 384 U.S. 436, 86 S Ct. 1602 (1966), would have been futile. Therefore, counsel was not ineffective.

As an initial matter, to claim that counsel was ineffective for failure to move to suppress the wire tape recordings is disingenuous. Appellant admits that "appellate counsel sought exclusion of the wiretap evidence on various grounds" but argues that counsel was ineffective for not raising Miranda-based arguments, specifically. AOB at 14, 22; see also Carroll, 132 Nev. at __, 371 P.3d at 1027–31; XIII AA 2638 (post-conviction counsel admitting that counsel "certainly tried to suppress the wiretap but not on that basis"). Counsel's strategic decision to argue for suppression using other methods is virtually unchallengeable. Dawson v. State, 108 Nev. 112, 117, 825 P.2d 593, 596 (1992). Further, there is a strong presumption that appellate counsel made a sound professional judgment to pursue stronger arguments, and this Court should not second-guess appellate counsel's strategy in arguing on direct appeal that the wire tape recordings should have been suppressed through different means. Barnes, 463 U.S. at 751, 103 S.Ct. at 3312–13.

However, even on the merits, Appellant's "fruit of the poisonous tree" argument is without merit. After being read his Miranda rights, Appellant initiated the request to wear a wire to assist police and then wore it voluntarily. Thus, any argument that the wire tape recording was fruit of the poisonous tree and/or that it

resulted from a Miranda violation would have been futile. See Ennis v. State, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006) (holding that counsel cannot be ineffective for failure to make futile arguments).

In Appellant's statement to police on May 19, 2005, after implicating himself in the murder, Appellant was read his rights and asked if he understood them, to which he responded "yes." I AA 109. Detectives had Appellant sign a Miranda card to ensure that he understood his rights. Id. "The police promised Appellant they would take him home at the conclusion of the interview, which they did. The police also promised Appellant they would attempt to prove his version of events was true, which they did by making the recordings with [Appellant's] coconspirators." Carroll, 132 Nev. at __, 371 P.3d at 1031. To that end, Appellant—not police—suggested that Appellant wear a recording device to corroborate his story. I AA 110. Then, on May 24, 2005, Appellant wore a wire while he spoke with his co-conspirators at the Palomino Club. Carroll, 132 Nev. at __, 371 P.3d at 1027.

It must be noted that this Court has already examined the wire tape recordings and established law of the case surrounding their admissibility. Where an issue has already been decided on the merits by this Court, the ruling is law of the case, and the issue will not be revisited. Pellegrini v. State, 117 Nev. 860, 884, 34 P.3d 519, 535 (2001); see also McNelton v. State, 115 Nev. 396, 990 P.2d 1263, 1276 (1999), Hall v. State, 91 Nev. 314, 315–16, 535 P.2d 797, 798–99 (1975); Valerio v. State,

112 Nev. 383, 386, 915 P.2d 874, 876 (1996); Hogan v. Warden, 109 Nev. 952, 860 P.2d 710 (1993). A defendant cannot avoid the doctrine of law of the case by a more detailed and precisely focused argument. Hall, 91 Nev. at 316, 535 P.2d at 798–99; see also Pertgen v. State, 110 Nev. 557, 557-58, 875 P.2d 316, 362 (1994).

In affirming the Judgment of Conviction, this Court held that the wire tape recordings were not so unduly prejudicial as to outweigh their probative value, that they were not inadmissible hearsay, that they were made in furtherance of a conspiracy, and that did not violate Appellant's right against self-incrimination. Carroll, 132 Nev. at __, 371 P.3d at 1027–31. This Court also held that despite the fact that the district court erred in admitting Appellant's inculpatory statements to police, that error was harmless beyond a reasonable doubt because of the overwhelming evidence against Appellant. Id. at __, 371 P.3d at 1031–35. Thus, the admissibility of the wire tape recordings, and the harmlessness of any Miranda violation, is law of the case.

Appellant relies upon other jurisdictions' interpretations of United States Supreme Court precedent in arguing that the wire tape recordings should have been suppressed. United States v. Patane, 542 U.S. 630, 646, 124 S. Ct. 2620, 2631 (2004). However, Patane specifically held that suppression of physical evidence resulting from a Miranda violation is *not* required. Id. Appellant's argument that trial and appellate counsel should have relied upon it to challenge the wire tape recordings

is thus without merit. AOB at 15–16. Though some states have suppressed such evidence, the holding of the Florida case Appellant analyzes is distinguishable from Appellant's case. The Florida appellate court suppressed wiretap evidence resulting from police request for the defendant's cooperation in contacting a drug dealer. Kessler v. State, 991 So.2d 1015 (Fla. App. 2008). Conversely, Appellant himself requested to wear a wire; he was not accommodating a request by police. I AA 110.

Moreover, Nevada is not subject to other states' holdings as described by Appellant. Nevada has never held that "[its] own constitution[] provide[s] a broader self-incrimination privilege than the Supreme Court's interpretation [in Patane] of the federal self-incrimination privilege." AOB at 17. Ohio and Oregon have specifically articulated these additional protections. State v. Vondehn, 348 Ore. 462, 476–77 (2009); State v. Ferris, 109 Ohio St.3d 519, 529 (2006). But Nevada has never suggested that physical evidence, such as the wire tape recordings, may be suppressed based on a Miranda violation. Therefore, Appellant is asking for a new interpretation of Nevada law. As counsel cannot be found ineffective for failing to anticipate a change in the law, this argument is without merit. Nika v. State, 124 Nev. 12772, 1289, 198 P.3d 839, 851 (2008); Doyle v. State, 116 Nev. 148, 156, 995P.2d 465, 470 (2000).

Finally, the United States Supreme Court has indicated that a Miranda warning—even given in an untimely manner—may cure fruit of the poisonous tree issues. Oregon v Elstad, 470 U.S. 298, 105 S. Ct. 1285 (1985). The Court stated:

> A suspect who has responded to uncoercive questioning by a police officer while in custody and without being given Miranda warnings is not thereby disabled from waiving his rights and confessing after he has been given the requisite Miranda warnings, and *his confession is not, solely on account of the prior, unwarned admission, rendered inadmissible as "fruit of the poisonous tree"*; the relevant inquiry is whether, in fact, the second statement was also voluntarily made in view of the surrounding circumstances and the entire course of police conduct with respect to the suspect.

If a confession, on account of a prior un-Mirandized admission, is not inadmissible as fruit of the poisonous tree, physical evidence resulting from conduct after a Miranda warning has been issued—such as voluntarily given wire tape recordings—cannot be said to be fruit of the poisonous tree. Here, there was in fact a Miranda warning, just before Appellant volunteered to wear a wire for police. I AA 109–10. Because counsel cannot be found ineffective for failing to file a futile motion to suppress wire tape recordings legally obtained by police—evidence Appellant volunteered, after being read his Miranda rights—counsel was not ineffective. Ennis, 122 Nev. at 706, 137 P.3d at 1103. Thus, the district court did not err in denying this claim.

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B. Trial counsel was not ineffective for failure to impeach Zone.

Appellant claims trial counsel was ineffective for not impeaching witness Zone with the same impeachment evidence with which Zone had been confronted at co-defendant Counts's trial. AOB at 23–28. But the assertion that the impeachment of Zone with Williams's testimony would have brought about the same result as in Counts's trial is naked speculation that the district court properly found was suitable only for summary denial under Hargrove. 100 Nev. at 502, 686 P.2d at 225. Unlike Counts—who was charged with being the actual shooter—Appellant was charged under a theory of conspiracy. The facts of the moment of Hadland's murder, including who actually pulled the trigger, were not truly at issue in Appellant's case. The question was: What was Appellant's intent with regard to the killing? Zone's testimony was not particularly probative of Appellant's intent.

As the district court correctly noted in the hearing on the underling Second Petition, "the focus of the two trials was different in terms of [Appellant] being sort of the mastermind, in a way, of this." XIII AA 2638. Thus, "if Mr. Zone was the shooter, that would refute the evidence *against Mr. Counts*, as opposed to [Appellant] *whose role was different* in this whole thing." XIII AA 2639 (emphasis added). And as the district court found, evidence at trial more than demonstrated Appellant's role and his intent that someone shoot and kill the victim. XIII AA 2657.

Appellant, himself, states in the wire tape recordings that he "took care of"—i.e. killed—the victim, as co-defendant Espindola asked him to do. See Docket No. 64757, Vol. 12, Direct Appeal Appendix at 2442–43 (Wire Transcript, State's Exhibit 244). Appellant also discusses facilitating payment—and that the shooter was not happy with the $6,000 paid to him. See Docket No. 64757, Vol. 12, Direct Appeal Appendix at 2444–62 (Wire Transcript, State's Exhibit 245). Co-defendant Espindola specifically states in this same recording that "if something happens to him [the shooter] we all fucking lose. Every fucking one of us." Id. Thus, not only does Appellant implicate himself by discussing with his co-defendants that he knew there was going to be a murder; at least one co-defendant confirms that "all" of them knew enough to be implicated in the murder. Appellant's intent was also established by several circumstantial facts, including the isolated location of the murder. VII AA 1360.

As the district court succinctly found below, who the shooter was "was irrelevant" to liability for the murder. XIII AA 2642. That issue—which was all Zone's prior testimony might have been probative of—had nothing to do with whether Appellant intended that the victim be killed. Thus, counsel cannot be said to be unreasonable for not bogging down the jury with the issue.

Appellant attempts to force relevance out of Zone's prior testimony, suggesting that it supported an interpretation that Zone "went rogue and unknown to

the other co-defendants, murdered Hadland." AOB at 27. However, the district court correctly found that the theory that the conspiracy was to beat Hadland up rather than murder him "was clearly presented" by the defense. XIII AA 2640. Even at the hearing before the district court, Appellant only alleged that "*perhaps* [Zone] so called went rogue" and murdered Hadland. XIII AA 2641 (emphasis added). Neither at that hearing nor on appeal does Appellant quote any of Zone's prior testimony that he alleges would support this theory. Thus, Appellant has not established that Zone's testimony from Counts's trial would have led to the jury believing the "rogue killer" theory.

Further, Appellant does not even argue how the lack of impeachment evidence prejudiced him. He cannot establish, for example, that impeaching Zone would have led to his acquittal. Again, the conviction rested not on who shot the victim but on what Appellant intended, and there was more than sufficient evidence of Appellant's intent that Hadland be murdered. Appellant has not, and cannot, demonstrate that impeaching Zone would have in any way undermined the copious evidence of Appellant's involvement and intent. Counsel was not ineffective. Thus, the district court did not err in denying this claim.

C. Trial and appellate counsel were not ineffective for not further challenging the trial court's denial of a Batson challenge.

Appellant claims that trial counsel was ineffective in handling the Batson challenge. AOB at 28–37; Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712 (1986).

However, as any further challenge beyond the objection counsel offered at trial would have been futile, this claim is without merit.

In Batson, the United States Supreme Court held that the use of peremptory challenges to remove potential jurors on the basis of race is unconstitutional under the Equal Protection Clause of the United States Constitution. Id. at 89, 106 S.Ct. at 1719. Adjudicating a Batson challenge is a three-step process: (1) the defendant must make a prima facie showing that racial discrimination has occurred based upon the totality of the circumstances, (2) the prosecution then must provide a race-neutral explanation for its peremptory challenge or challenges, and (3) the district court must determine whether the defendant in fact demonstrated purposeful discrimination. Baton, 476 U.S. at 94, 106 S.Ct. at 1721; Watson v. State, 130 Nev. 764, 774, 335 P.3d 157, 165 (2014)

In step one, a defendant alleging that members of a cognizable group "have been impermissibly excluded from the venire may make out a prima facie case of purposeful discrimination by showing that the totality of the relevant facts give rise to an inference of discriminatory purpose." Batson, 476 U.S. at 94–95, 106 S. Ct. at 1721. In deciding whether or not the requisite prima facie case has been made, a court may consider the "pattern of strikes" exercised or the questions and statements made by counsel during the voir dire examination. Id. at 96–97, 106 S.Ct. at 1723.

Only after the movant has established a prima facie case of intentional discrimination is the proponent of the strike compelled to proffer a race-neutral explanation. "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, 1771 (1995). The neutral explanation "is not a reason that makes sense, but a reason that does not deny equal protection." Id. at 769, 115 S.Ct. at 1771. "Unless a discriminatory intent is inherent in the State's explanation, the reason offered will be deemed race neutral." Id. at 768, 115 S.Ct. at 1171 (internal citations omitted).

Step three comes down to credibility: "the district court must determine whether the explanation was a mere pretext and whether the opponent successfully proved racial discrimination." King, 116 Nev. at 353, 998 P.2d at 1175. This can be measured by "how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy." Miller-El v. Cockrell, 537 U.S. 322, 324, 123 S.Ct. 1029, 1032 (2003).

This Court "review[s] the district court's ruling on the issue of discriminatory intent for clear error." Conner v. State, 130 Nev. __, __, 327 P.3d 503, 508 (2014). "'The trial court's decision on the ultimate question of discriminatory intent represents a finding of fact of the sort accorded great deference on appeal.'" Walker, 113 Nev. at 867-68, 944 P.2d at 771–72 (quoting Hernandez v. New York, 500 U.S. 352, 364, 111 S.Ct. 1859, 1868 (1991) (plurality opinion)). The reason for such a

standard is the trial court is in the position to best assess whether from the "totality of the relevant facts" that racial discrimination is occurring. Hernandez, 50 U.S. at 363, 111 S. Ct at 1868. Further, this Court has emphasized that the burden is on the opponent of the strike in step three to develop a pretext for the explanation at the district court level. Hawkins v. State, 127 Nev. 575, 577, 256 P.3d 965, 967 (2011).

Appellant's counsel issued a Batson challenge regarding the State's preemptory challenge of Prospective Juror No. 092. III AA 546–51. However, Appellant's assertion that 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" is not born out by the record. AOB at 31–32. As the district court noted at the hearing on the underlying Second Petition, the trial court completed all steps required in a Batson challenge. XIII AA 2643. Thus, the case Appellant cites for the first time in this appeal is inapplicable. Cooper v. State, 134 Nev. __, 432 P.3d 202 (2018) (discussing a Batson challenge that had been inappropriately terminated during step one).

First, the trial court noted the Batson challenge, discussing that there was in fact no pattern of discrimination and next that it was unusual that there had been four African-American potential jurors in the box. III AA 546–51. Of these, as the trial court noted, two were excused; one via preemptory challenge by the State and one for cause by the defense. Id. Then, the trial court continued to the second step of the

Batson framework. III AA 550. That is, the court did not "require a pattern before consideration of [Appellant's] Batson claim" but rather allowed all steps of the challenge to take place *despite* the lack of pattern demonstrated. AOB at 36. In that second step, the trial court permitted the State to place on the record its race-neutral explanation: the State challenged Potential Juror 092 because "her behavior in th[e] courtroom is an example of what appeared to be someone who wasn't taking the situation very seriously at all," and because her questionnaire answers suggested that the defense would have had reason to strike her for cause. III AA 550. Third, the trial court weighed the credibility of the State's reasons. Id. Appellant's claim that "the trial court never ruled on those reasons" is absolutely belied by the record. AOB at 36; Hargrove. 100 Nev. at 502, 686 P.2d at 225. Indeed, based on the totality of circumstances, the trial court agreed with the State's assessment of Potential Juror No. 092 as "a character" and the juror was dismissed. Id. Because the Court followed all steps required of a Batson challenge, any further challenge by counsel would have been futile; and thus, counsel was not deficient. Ennis, 122 Nev. at 706, 137 P.3d at 1103.

Further, Appellant cannot establish prejudice. In fact, counsel made a virtually unchallengeable strategic decision to let the Batson challenge go—since, as Appellant points out himself, Prospective Juror No. 092 appeared to be a good juror for the State. Dawson, 108 Nev. at 117, 825 P.2d at 596; AOB at 32. The questioning

of this juror, which lasted for almost twenty (20) pages of the transcript, revealed that she was a retired New York corrections officer who believed that "the laws are not strict enough," who might have been "making a point" with her verdict. II AA 316–34. Any "inference" that the State's challenge was the result of purposeful discrimination was mollified by the State's clarification—helpful for this analysis, as certain of the juror's overly-jovial mannerisms would not have been clear from a cold transcript alone—that this juror simply did not take the responsibility seriously. AOB at 34; III AA 550. Possessed of all this information, and reassured that the State did in fact have a race-neutral reason for challenging the juror, trial counsel and appellate counsel were not unreasonable for making the strategic choice to drop the issue of the Batson challenge—particularly after the trial court had gone through all three steps of the Batson challenge. Thus, the district court did not err in finding that counsel was not ineffective.

D. Neither trial counsel nor appellate counsel were ineffective for failure to object to prosecutorial misconduct.

Appellant claims trial and appellate counsel were ineffective for not challenging various instances of so-called prosecutorial misconduct. AOB at 37–43. However, Appellant cannot establish ineffective assistance of counsel because the underlying claims of prosecutorial misconduct are meritless.

This Court employs a two-step analysis when considering claims of prosecutorial misconduct. Valdez v. State, 124 Nev. 1172, 1188, 196 P.3d 465, 476

(2008). First, the Court determines if the conduct was improper. Id. Second, the Court determines whether misconduct warrants reversal. Id. As to the first factor, argument is not misconduct unless "the remarks . . . were 'patently prejudicial.'" Riker v. State, 111 Nev. 1316, 1328, 905 P.2d 706, 713 (1995) (quoting, Libby v. State, 109 Nev. 905, 911, 859 P.2d 1050, 1054 (1993)). Notably, "statements by a prosecutor, in argument . . . made as a deduction or conclusion from the evidence introduced in the trial are permissible and unobjectionable." Parker v. State, 109 Nev. 383, 392, 849 P.2d 1062, 1068 (1993) (quoting, Collins v. State, 87 Nev. 436, 439, 488 P.2d 544, 545 (1971)). Further, the State may respond to defense theories and arguments. Williams v. State, 113 Nev. 1008, 1018–19, 945 P.2d 438, 444–45 (1997), receded from on other grounds, Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000).

With respect to the second step, this Court will not reverse if the misconduct was harmless error, which depends on whether it was of constitutional dimension. Valdez, 124 Nev. at 1188, 196 P.3d at 476. Error of a constitutional dimension requires impermissible comment on the exercise of a specific constitutional right, or if in light of the proceedings as a whole, the misconduct "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Id. at 1189, 196 P.3d at 477. If the error is not of a constitutional dimension, the Court will reverse only if the error substantially affected the jury's verdict. Id.

Importantly, a defendant is entitled to a fair trial, not a perfect one, and therefore "a criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone[.]" United States v. Young, 470 U.S. 1, 11, 105 S.Ct. 1038, 1044 (1985). Accord, Leonard, 117 Nev. at 81, 17 P.3d at 414. "[W]here evidence of guilt is overwhelming, even aggravated prosecutorial misconduct may constitute harmless error." Smith v. State, 120 Nev. 944, 948, 102 P.3d 569, 572 (2004) (citing King v. State, 116 Nev. 349, 356, 998 P.2d 1172, 1176 (2000)). In determining prejudice, a court considers whether a comment had: 1) a prejudicial impact on the verdict when considered in the context of the trial as a whole; or 2) seriously affects the integrity or public reputation of the judicial proceedings. Rose, 123 Nev. at 208–09, 163 P.3d at 418.

Where a defendant fails to offer a contemporaneous objection, an appellate court will only review claims of prosecutorial misconduct for plain error. Hernandez v. State, 118 Nev. 513, 525, 50 P.3d 1100, 1109 (2002). Plain error asks whether an error is "so unmistakable that it reveals itself by a casual inspection of the record." Patterson, 111 Nev. at 1530, 907 P.2d at 987 (internal citations omitted); Sterling, 108 Nev. at 394, 834 P.2d at 402. In determining whether an error is plain, a court must consider "whether there was 'error,' whether the error was 'plain' or clear, and whether the error affected the defendant's substantial rights. Additionally, the

burden is on an appellant to show actual prejudice or a miscarriage of justice." Green, 119 Nev. at 545, 80 P.3d at 95 (footnote omitted).

Here, the specific instances raised by Appellant are insufficient to meet the high standard for reversal due to prosecutorial misconduct. Appellant complains that the State's closing argument contained the phrases "it would be a travesty of justice if you did anything less than the truth, the absolute truth." AOB at 38–39; VII AA 1451. Defense counsel did not object to this statement, meaning that this issue could only be analyzed on appeal for plain error. Hernandez, 118 Nev. at 525, 50 P.3d at 1109. Of course, counsel had a good reason for not objecting. The prosecutors were appropriately responding to defense counsel's argument for involuntary manslaughter. Williams, 113 Nev. at 1018–19, 945 P.2d at 444–45. Specifically, the State responded to defense counsel's argument about justice. Defense counsel stated in closing argument that Appellant "is guilty. He is absolutely guilty of something, and that's what we're asking you to do. Find him guilty of what he should have been charged with in the first place. He conspired to commit battery, commit a manslaughter. That's what your instructions tell you you must do. *This is justice in this case*." VII AA 1450–51 (emphasis added). In other words, the defense commented on what it viewed to be "justice." The State then responded with what it believed justice would be, given the evidence it presented. This is not improper. Appellant has not argued that this comment affected his substantial rights, nor that

there was actual prejudice or a miscarriage of justice. Green, 119 Nev. at 545, 80 P.3d at 95. Thus, trial counsel was not unreasonable for not objecting; and appellate counsel was not ineffective for not raising the issue on appeal when there was no plain error in the comment.

Next, Appellant complains that the State did not reveal that Zone may or may not have been the actual shooter. AOB at 39. Again, trial counsel did not object, and so this issue could only be analyzed for plain error on appeal. Hernandez, 118 Nev. at 525, 50 P.3d at 1109. Regardless, Appellant's premise that there was evidence that Zone was more than a bystander is flawed. Appellant's argument that the impeachment of Zone during Counts's trial led to Counts's acquittal—implying that the jury believed that Zone was actually the shooter—is mere speculation insufficient for post-conviction. Hargrove. 100 Nev. at 502, 686 P.2d at 225. As the district court discussed during the hearing on the underlying Second Petition, courts cannot speculate as to the jury's rationale. XIII AA 2639. Indeed, the jury may have believed the impeachment evidence against Zone. Or, Counts could have been acquitted for another reason. Appellant cannot know why the jury acquitted Counts. That the State did not reference the hearsay statements of Zone's ex-partner in Appellant's trial does not indicate that it was somehow presenting evidence that it "kn[ew] to be false." Alcorta v. Texas, 355 U.S. 28, 30, 78 S. Ct. 103, 105 (1957). The State had no way of evaluating whether Williams's testimony was actually

true—let alone that it was a "basis to charge [Zone] with any crime." AOB at 40. Thus, it had no obligation to present that evidence to the jury. Appellant cannot argue that the State's conduct affected his substantial rights, or that there was actual prejudice or a miscarriage of justice. Green, 119 Nev. at 545, 80 P.3d at 95. Trial counsel made the reasonable, strategic decision not to confuse the jury with this issue.

Further, any misconduct related to Zone amounts to nothing more than harmless error, because, as discussed *supra*, the issue in Appellant's case was not who the shooter was but whether Appellant had conspired for the victim to be murdered. Appellant does not, and cannot, show that the so-called failure to paint Zone as the actual shooter either substantially affected the jury's verdict or so infected the trial with unfairness that Appellant was denied due process. Valdez, 124 Nev. at 1188, 196 P.3d at 476–77. Whether Zone or Counts was the shooter is irrelevant to whether Appellant himself was involved in this conspiracy. Thus, because the evidence of Appellant's guilt in the conspiracy was overwhelming—and in fact, defense counsel admitted during closing that Appellant "conspired to commit battery, commit a manslaughter"—the way the State handled Zone's testimony was at most harmless error. XIII AA 1450; Smith, 120 Nev. at 948, 102 P.3d at 572. Accordingly, Appellant cannot show that trial or appellate counsel's failure to raise

this issue prejudiced him in any way. Thus, there was no ineffective assistance of counsel.

Next, Appellant complains that the prosecutor argued that a verdict of involuntary manslaughter would not be justice and that involuntary manslaughter is "an accident." AOB at 41. It should first be noted that Appellant's claim that the prosecutor argued that "the victim would have had to have killed himself for the jury to acquit [Appellant] of first degree murder" misconstrues the State's actual argument. Id. In fact, the prosecutor made a single comment about this case not being involuntary manslaughter *such as* in a case where the victim is a child who shoots himself with a gun a defendant has left lying around. XIII AA 1465. This was in no way "a narrative hypothetical which [the State] knows did not occur." AOB at 41. It was a figure of speech made for comparative purposes.

Regardless, the trial court did actually sustain defense counsel's objection to the statement that involuntary manslaughter would not be justice and admonished the jury regarding the statement about accidents. XIII AA 1465–66. Appellant does not explain why appellate counsel should have raised these objections on appeal. Indeed, the trial court's sustaining the first objection means that it is presumed that the jury properly disregarded the comment. Leonard v. State, 117 Nev. 53, 66, 17 P.3d 397, 405 (2001) (holding that jurors are presumed to follow instructions given to them). Further, the trial court admonished the jury regarding the related comments

about involuntary manslaughter and accidents, explaining that "this is just [the State's] commentary on what he thinks [defense counsel] argued or what he remembers. It's your collective recollection of what [defense counsel] said and what [defense counsel]'s argument is that should control what you think about this." XIII AA 1465–66.

In other words, the trial court correctly explained that the prosecutor did not offer an "incorrect" account of the law; he merely commented on what would be required to find Appellant guilty of involuntary manslaughter. The law on involuntary manslaughter indicates that such a killing is done "without any intent to do so." NRS 200.070. Thus, the prosecutor did not act improperly in using the shorthand "accident." There was no improper statement. And because the trial court correctly remedied any effect of the prosecutor's first comment, neither trial nor appellate counsel were unreasonable for not taking further steps. Moreover, Appellant cannot establish prejudice based on the sustained objection. Thus, there was no ineffective assistance of counsel.

Fourth and finally, Appellant complains that the prosecutor "t[old] the jury they have a duty to convict the defendant." AOB at 42–43. This is a vast leap from the prosecutor's actual statements. He argued:

> I think it's your duty to go back there and look at the evidence. Go back there, go through the wire recording, go through the physical evidence. Ask yourself how he can't be guilty of a deadly weapon

> when you know he gave Jay Jay [the shooter] a .22. Ask yourself how he can be guilty of less than first-degree murder when he acknowledges and everybody acknowledges that the order was a killing. That's your duty. And I submit to you that if the group of 12 of you go back to that room and actually look at the evidence in this case, actually focus on the evidence not what we're saying, look at what the evidence is, that 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 [Appellant] that you know too.

VII AA 1466–67.

Again, trial counsel did not object, so appellate review would have been limited to plain error. Hernandez, 118 Nev. at 525, 50 P.3d at 1109. And taken in context, there is no unmistakable error on casual inspection of the prosecutor's comment. Patterson, 111 Nev. at 1530, 907 P.2d at 987. In fact, it was very similar to a comment already examined by this Court; the phrase "I submit to you that there's at least one person in this room who knows beyond a shadow of a doubt who killed [the victim]" was not improper when it "followed a summation of evidence" and "reflects the prosecutor's conclusions based on the evidence." Taylor v. State, 132 Nev. __, __, 371 P.3d 1036, 1046 (2016). Similarly, the comment that if the jury is "doing their job"—i.e. examining the evidence, which the prosecutor requested multiple times in the preceding sentences that the jury do—they will tell Appellant that he had the intent to kill followed a summation of the evidence and reflects the prosecutors' conclusions thereof.

The prosecutor's comment here is not egregious, such as that made in the case Appellant cites: "he needs to be convicted—he's endangering people—he's certainly endangering his child--do his child and all of us a favor--do your duty in this case--find that he's guilty." Anderson v. State, 121 Nev. 511, 517, 118 P.3d 184, 187 (2005). The comment in Anderson was a clear command that the jury side with the State. It explicitly stated that the jury's "duty" was to "find that he's guilty." Id. Here, the prosecutor merely commented on the evidence, saying that the State believed that if the jury examines the evidence (i.e. "doing their job") they will convict. It is certainly a stretch to read this prosecutor's statement as a command to convict.

Even if this was misconduct, it is Appellant's burden to demonstrate that his substantial rights were affected by the comment, which he cannot do. Green, 119 Nev. at 545, 80 P.3d at 95 (footnote omitted). Thus, neither trial nor appellate counsel were unreasonable for not objecting to this single comment. There was no ineffective assistance of counsel regarding any instance of so-called prosecutorial misconduct. Thus, the district court did not err in denying this claim.

E. Neither trial nor appellate counsel were ineffective for failure to challenge the treatment of custodian of records witnesses as experts.

Appellant claims trial and appellate counsel were both ineffective for not challenging the treatment of custodian of record who testified as experts regarding cellular phone communications technology. AOB at 44–45. However, because

Appellant relies upon a change in the law that counsel could not have predicted—as it occurred after his trial—and because Appellant cannot show prejudice, this claim is without merit.

State's witness Joseph Trawicki, a records custodian for Sprint, offered testimony about what information Sprint maintains: what cell tower a phone connects with, "who's calling who, what time, day," and how long those records are kept. VI AA 1134–37. Appellant seems to contend that counsel's so-called failure to object failed to predict that years in the future, this Court would find that relatively simple information about cell phone towers and signals would be deemed expert testimony: that is, that counsel's failure to predict the future denied him the benefit of Burnside v. State, 131 Nev. __, 352 P.3d 627 (2015), cert. denied, __ U.S. __, 136 S.Ct. 1466 (2016). Of course, counsel cannot be found ineffective for failing to anticipate a change in law. Nika, 124 Nev. at 1289, 198 P.3d at 851; Doyle, 116 Nev. at 156, 995 P.2d at 470. Counsel's lack of objection was reasonable, given the law at the time.

Further, Appellant has not argued prejudice based on the lack of objection. As in Burnside, Appellant "has not explained what he would have done differently had proper notice been given, and he did not request a continuance. See NRS 174.295(2)." 131 Nev. at __, 352 P.3d at 637. Finally, Appellant cannot demonstrate prejudice because of the overwhelming evidence of his guilt. See Carroll, 132 Nev.

at __, 371 P.3d at 1031–35. Thus, the district court did not err in finding that counsel was not ineffective.

F. Appellate counsel was not ineffective for failure to challenge the flight instruction.

Appellant claims appellate counsel was ineffective for not raising an objection to the flight instruction. AOB at 46–48. However, Appellant cannot establish ineffective assistance of counsel because the underlying claim that the flight instruction was improper is meritless.

This Court has held that "[f]light instructions are valid only if there is evidence sufficient to support a chain of unbroken inferences from the defendant's behavior to the defendant's guilt of the crime charged." Jackson v. State, 117 Nev. 116, 121, 17 P.3d 998, 1001 (2001); United States v. Feldman, 788 F.2d 544, 555 (9th Cir. 1986). "A defendant's conduct, such as flight from a scene of the crime, generally is considered a party admission, and will be admitted if the actions have probative value." Turner v. State, 98 Nev. 103, 106, 641 P.2d 1062, 1065 (1982). The giving of a flight instruction is not reversible error if evidence of flight has been admitted. Potter v. State, 96 Nev. 875, 875–76, 619 P.2d 1222, 1222 (1980).

Here, counsel objected to the flight instruction at trial. VII AA 1330–31. The district court overruled that objection. Id. This was not reversible error, because evidence of flight had been admitted. Potter, 96 Nev. at 875–76, 619 P.2d at 1222. Specifically, even without Appellant's confession to police that he watched the

victim be shot and merely drove away from the scene without reaching out for help, the wire tape recordings revealed that Appellant actually took the shooter from the scene to get paid. See Docket No. 64757, Vol. 12, Direct Appeal Appendix at 2442–43 (Wire Transcript, State's Exhibit 244); see also VII AA 1330. The district court correctly pointed out that if this had actually been an accident—if Appellant had not meant for the victim to be killed, as he claimed—then it certainly points to "consciousness of guilt" that he did not reach out to law enforcement and instead went immediately about his daily life. VII AA 1330–31. Thus, appellate counsel was reasonable in not arguing the issue.

Further, there is no prejudice because Appellant cannot demonstrate a likelihood that this argument would have won on appeal. District courts have "broad discretion" to settle jury instructions. Cortinas v. State, 124 Nev. 1013, 1019, 195 P.3d 315, 319 (2008). This Court generally reviews jury instruction decisions for an abuse of discretion. Crawford v. State, 121 Nev. 746, 748, 121 P.3d 582, 585 (2003). The district court properly utilized its discretion in finding that the flight instruction was warranted given the evidence of flight and the State's theory of the case. Thus, the district court did not abuse its discretion—and the argument that the flight instruction constituted an abuse of discretion would have had no chance of success on appeal. Accordingly, the district court did not err in finding that there was no ineffective assistance of counsel.

G. Cumulative error is inapplicable.

Finally, Appellant claims that "cumulative errors" by trial and appellate counsel entitle him to relief. However, since Appellant fails to show any instances of error, his argument regarding cumulative error is without merit. Even if there is an instance of error, the issue of guilt was not close, and so relief is not warranted.

This Court has not endorsed application of its direct appeal cumulative error standard to the post-conviction Strickland context. McConnell v. State, 125 Nev. 243, 259, 212 P.3d 307, 318 (2009). Nor should cumulative error apply on post-conviction review. Middleton v. Roper, 455 F.3d 838, 851 (8th Cir. 2006), cert. denial, 549 U.S. 1134, 1275 S. Ct. 980 (2007) ("a habeas petitioner cannot build a showing of prejudice on series of errors, none of which would by itself meet the prejudice test.")

Nevertheless, even where available a cumulative error finding in the context of a Strickland claim is extraordinarily rare and requires an extensive aggregation of errors. See, e.g., Harris By and through Ramseyer v. Wood, 64 F.3d 1432, 1438 (9th Cir. 1995). In fact, logic dictates that there can be no cumulative error where the defendant fails to demonstrate any single violation of Strickland. See Turner v. Quarterman, 481 F.3d 292, 301 (5th Cir. 2007) ("where individual allegations of error are not of constitutional stature or are not errors, there is 'nothing to cumulate.'") (quoting Yohey v. Collins, 985 F.2d 222, 229 (5th Cir. 1993)); Hughes v. Epps, 694 F.Supp.2d 533, 563 (N.D. Miss. 2010) (citing Leal v. Dretke, 428 F.3d

543, 552-53 (5th Cir. 2005)). Because Appellant has not demonstrated any claim warrants relief under Strickland, there is nothing to cumulate. Therefore, Appellant's cumulative error claim should be denied.

Assuming arguendo that this Court applies a cumulative error analysis to the Strickland claims and then does find any error, Appellant fails to demonstrate cumulative error sufficient to warrant reversal. In addressing a claim of cumulative error, the relevant factors are: 1) whether the issue of guilt is close; 2) the quantity and character of the error; and 3) the gravity of the crime charged. Mulder v. State, 116 Nev. 1, 17, 992 P.2d 845, 854–55 (2000). As discussed above, the issue of guilt was not close, as this Court has specifically found that the evidence against Appellant was "overwhelming." Carroll, 132 Nev. at __, 371 P.3d at 1031–36. Further, even assuming that some or all of Appellant's claims have merit, he has failed to establish that, when aggregated, any errors deprived him of a reasonable likelihood of a better outcome at trial. Therefore, even if counsel was in any way deficient, there is no reasonable probability that Appellant would have received a better result but for the alleged deficiencies. Further, even if Appellant had made such a showing, he has certainly not shown that the cumulative effect of these errors was so prejudicial as to undermine this Court's confidence in the outcome of Appellant's case. Therefore, his claim of cumulative error is without merit.

/ / /

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's denial of the Second Petition.

Dated this 24th day June, 2019.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either proportionately spaced, has a typeface of 14 points of more, contains 9,864 words.
3. **Finally, I hereby certify** that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 24th day June, 2019.

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on 24th day June, 2019. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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