**IN THE SUPREME COURT OF THE STATE OF NEVADA**

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| DEANGELO CARROLL,<br><br>Appellant,<br><br>v.<br><br>THE STATE OF NEVADA,<br><br>Respondent. | Electronically Filed<br>Jul 05 2019 02:13 p.m.<br>Elizabeth A. Brown<br>Clerk of Supreme Court<br><br>Supreme Court Case No. 78081 |

# APPELLANT'S REPLY BRIEF

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

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## I. ARGUMENT

Carroll would submit that all of his claims for relief are meritorious and this Court would be justified in granting relief on any or all of them. However, this reply has several brief points to make to aid in the Court's review of this matter.

First, the Answering Brief repeatedly contends that Carroll's "offer" to wear a wire was voluntary. Answering Brief, pp. 6, 12. But this plainly cannot be so, because his entire statement to police was determined to be involuntary by this Court on direct appeal. The State also contends trial and appellate counsel could not have been ineffective with respect to suppressing the wire recording, because they tried to do so on grounds other than those presented in this appeal.

But the State's position misses the point here as well. If anything, counsels' failed attempt to suppress the wire recording indicates their knowledge that doing so was important. Counsels' failure to seek suppression under United States v. Patane, 542 U.S. 630 (2004), or the other authorities cited in the opening brief, was not a "strategic" decision at all

but rather a function of lack of legal knowledge. Ample authority from many other jurisdictions would have supported the argument advanced here. Failure to cite persuasive authority from other jurisdictions "indicates deficient performance." United States v. Otero, 502 F.3d 331, 336 (3d. Cir. 2007).

The State further contends that the Miranda warning eventually given to Carroll could have "cured" any fruit of the poisonous tree argument. Again, it bears mention this Court already rejected that exact argument on direct appeal. 10 AA 2038-2040. (Noting "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").

With respect to the ineffectiveness of counsel in questioning Rontae Zone, the State relies heavily on the wire recording to support its theory of the case. This is further proof that any error relating to the admission of the recording evidence was serious - the State had no case without that crucial evidence.

The State contends testimony that Zone was the actual shooter had no relevance to Carroll. But this is mistaken for several reasons. First, the jury was instructed that it could reject "the entire testimony of that witness" if the witness lied about any material fact. 7 AA 1514. It is beyond reasonable dispute that "who was the shooter" was a material fact in this case. Therefore, if Zone had been confronted with prior statements that he was the shooter, and impeached based on those statements, the jury probably would have concluded that he lied about a material fact and disregarded his testimony.

Second, the trial court was incorrect in its assertion that since Carroll was charged under a conspiracy theory, it made no difference who the shooter was. The jury was also instructed that "a co-conspirator is guilty of the offenses he specifically intended to be committed. First Degree Murder is a specific intent crime." 7 AA 1491. It is probable the jury would have had reasonable doubt as to Carroll's guilt if Rontae's statements that he was the shooter had been presented. This is so because those statements rebutted the State's theory of the case as to who the co-conspirators were

and what the object of the conspiracy was. Put another way, no evidence was presented that Carroll conspired with Rontae Zone to have Rontae shoot the victim. If evidence had been presented that Rontae committed the murder, it would have greatly diminished the theory of the case against Carroll.

The two preceding grounds should be considered in conjunction with one another. The wire recording and Rontae's testimony both rely heavily on one another, and the strength of either piece of evidence alone is greatly diminished from their combined effect. This fact is readily observed during the instant proceeding, as the State's answering brief uses the wire recording to bolster Rontae's testimony. Answering Brief, pp. 18-19.

A third ground that bears mention is the claim under Batson v. Kentucky, 476 U.S. 79 (1986). The State's take on what occurred at the trial level is overtly misleading. The State first suggests that the trial court noted "no pattern of discrimination" and then "continued to the second step of the Batson framework." Answering Brief, pp. 23-24.

This Court can certainly make its own determination of the record, but Carroll would suggest what the State says happened is nowhere close to what actually took place. What the trial court actually said about the first step of the process was "As Ms. Overton appears to be an African-American female that I would note my understanding is **before they have to state their race neutral reason, you have to show a pattern and practice.**" 3 AA 546 (emphasis added). To the Court's statement, the prosecutor replied "That's correct." 3 AA 546. But that's not correct, and the Opening Brief explained that the holding of Batson itself says as much. It is Carroll's position that the above cited record is the entirety of the "Batson challenge" to the challenged juror and that said challenge did not even reach step one because the trial court would not allow it based on a lack of pattern evidence and the prosecutor's acquiescence to that position.

To be fair, several minutes later the trial judge did say "I don't know if the State wants to put their reason on the record." 3 AA 549. The prosecutor proceeded to provide some statements about the juror's demeanor. 3 AA 549-550. However, Carroll would again suggest the actual

inquiry under Batson had already terminated so the statements by the prosecutor were not actually for the purpose of responding to the step one inquiry because the step one inquiry was never actually completed.

The Answering Brief contends that the trial court allowed all steps of the inquiry to take place and that the trial court "weighed the credibility of the State's reasons." (Citing 3 AA 550). Answering Brief, p. 24. Again, this Court is invited to review the record. Nowhere on page 550 or any other page does the trial court actually rule on the supposedly-still-ongoing Batson challenge, nor does the trial court ever allow defense counsel any opportunity to challenge the State's alleged demeanor evidence.

The Answering Brief further contends that Carroll cannot show prejudice. This is not true either. Errors that arise under Batson are structural in nature. Cooper v. State, 432 P.3d 202, 134 Nev. Adv. Rep. 104 (2018). In cases of structural error, a habeas petitioner's obligation to show prejudice is satisfied by demonstrating that counsel failed to properly address the claim of underlying structural error. Tamplin v. Muniz, 894 F.3d 1076, 1090 (9th Cir. 2018), United States v. Withers, 638 F.3d 1055, 1065

(9th Cir. 2011).

Here, trial counsel failed to meaningfully respond to the trial court and State's patently incorrect statements that pattern evidence was required before a step one inquiry could be made under Batson. Appellate counsel likewise completely failed to raise this important issue on direct appeal. But it should now be abundantly clear that the trial court's ruling was incorrect under Batson. Therefore, Carroll has been prejudiced by this critical, structural error and is entitled to a new trial due to counsels' ineffectiveness.

Briefly turning to Carroll's claims of prosecutorial misconduct, to which trial counsel did not object, special mention should be made of the claim that the State failed to reveal that it knew of evidence Rontae was the shooter. See Answering Brief, p. 29. The State contends the issue must be reviewed for plain error. But this, and any claim of ineffective assistance of counsel, is not reviewed under the state law plain error doctrine, but rather under the Supreme Court's framework in Strickland v. Washington, 466 U.S. 668 (1984). Under Strickland, the question is whether there was a

reasonable probability of a more favorable outcome – a much more lax standard of review than plain error review.

The State is prohibited from presenting the jury with evidence or impressions that it knows to be false. Alcorta v. Texas, 355 U.S. 28 (1957). Here, the State knew there was evidence Rontae Zone was the shooter, in the form of words that came from Rontae's own mouth. The State's false argument that no such evidence existed is similar to the same kind of misleading argument that resulted in post-conviction relief in Zapata v. Vasquez, 788 F.3d 1106 (9th Cir. 2015). Carroll is therefore entitled to relief in the form of a new trial based on this extremely inflammatory error to which trial counsel made no objection or response.

Whether on these or any of the other claims presented in the opening brief, a new trial should be granted. Carroll's trial was error filled and fundamentally unfair. Because no confidence can be had in the outcome of a case that features so many constitutional-level mistakes, a new trial should be ordered.

## II. CONCLUSION

For all these reasons and those in the opening brief, Carroll requests this Honorable Court grant relief on his post-conviction claims and order that the convictions and sentences be reversed.

DATED this 5th day of July, 2019.

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## RULE 28.2 ATTORNEY CERTIFICATE

1. I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, including NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied upon is found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

2. I further certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point font of the Ebrima style.

3. I further certify this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(c), it is proportionally spaced, has a typeface of 14 points or more, and contains 1,558 words.

DATED this 5th day of July, 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 July 5, 2019. Electronic service of the foregoing document shall be made in accordance with the master service list as follows:

STEVEN WOLFSON
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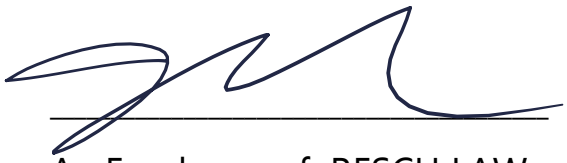

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