ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEVADA

LUIS HIDALGO III and **ANABEL ESPINDOLA,** Petitioners, vs. **THE HONORABLE DONALD M. MOSLEY, EIGHTH JUDICIAL DISTRICT COURT JUDGE,** Respondent, and **THE STATE OF NEVADA,** Real Party in Interest.	Supreme Court No. 48233 **REPLY TO STATE'S ANSWER TO PETITION FOR WRIT OF MANDAMUS OR, IN THE ALTERNATIVE, WRIT OF PROHIBITION**

FILED

DEC 2 0 2006

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY _____ DEPUTY CLERK

REPLY TO STATE'S ANSWER TO PETITION FOR WRIT OF MANDAMUS OR, IN THE ALTERNATIVE, WRIT OF PROHIBITION

COMES NOW, Defendant Luis Hidalgo, III by Dominic P. Gentile, Esq. of the Law Offices of Gentile DePalma, Ltd. and submits this Reply to the Answer to Petition For Writ of Mandamus in obedience to this Court's order dated November 27, 2006, in the above captioned case.

This reply is based on the attached Memorandum of Points and Authorities, all papers and pleadings on file, along with any oral argument should this honorable Court deem it necessary.

Dated this 18th day of December, 2006.

The Law Offices of Gentile DePalma, Ltd.

By: _____ FOR

Dominic P. Gentile, Esq.
Attorney for Defendant Luis Hidalgo, III

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06-26070

MEMORANDUM OF POINTS AND AUTHORITIES

SUMMARY OF THE ARGUMENT

This Court should reject the State's arguments that a conflict of interest bars Dominic P. Gentile, Esq. from representing Defendant Luis Hidalgo, III. The issue is not ripe for consideration by this Court. The facts of this case viewed in light of applicable law demonstrate that the likelihood of a serious conflict coming to fruition is insufficient to overcome the presumption in favor of Defendant Luis Hidalgo, III's Right to Counsel of Choice in Mr. Gentile. Defendant Hidalgo's father Luis Hidalgo, Jr. (hereinafter "Mr. H"), has not been charged under the instant case because as Deputy District Attorney Marc Digiacomo advised the court during the preliminary hearing:

> And I guess the last question for this Court is why isn't Mr. H sitting there [pointing towards the in-custody defendant holding area within the courtroom]? And the answer is simple. You have seen the evidence that was presented so far, There isn't Mr. H on a wire somewhere.

(RTP 395-396)(emphasis added)

The prosecution's attenuated rendition of the facts and law supporting their request to disqualify Mr. Gentile is simply a veiled attempt to "pull the wool" over this Court's eyes. No credible evidence exists to support charges against Mr. H for the death of Timothy Hadland or the alleged solicitations to murder the witnesses to that crime. Defendant Deangelo Carroll is the sole source of the few allegations which do exist merely mentioning Mr. H's name. Carroll joined forces with the State early on in their investigation after being caught in lie after lie during his interview with homicide detectives. Because he lacks all credibility and is the source of all references to Mr. H, insufficient evidence exists to even charge him in this case. Thus, at law, the likelihood of a serious potential conflict materializing is insufficient to overcome the presumption in favor of Defendant Hidalgo's Sixth Amendment Right to Counsel. Lastly, the advocate-witness rule violation articulated by the State is also not ripe for review and

fails to meet this Court's standard for the imposition of any form of disqualification at this juncture.

STATEMENT OF FACTS

On or about May 19, 2005 near midnight, Defendant Deangelo Carroll, Rontae Zone, Defendant Kenneth Counts, and Defendant Jayson Taoipu, drove out towards Lake Mead to meet with Timothy Hadland for the purported purpose of buying marijuana. (Petitioner's Reply Appendix (PRA), Exhibit No. 1, page 14). During the course of this meeting, Counts was observed to slip out of their vehicle and maneuver unseen within point blank range of Hadland to allegedly deliver one gunshot wound to his head while Carroll distracted him with conversation at the driver's side window. (RTP, 66)

Metro detectives investigating the incident traced the last phone call to Hadland's telephone to a Nextel phone subscribed to by Defendant Anabel Espindola. (RTP, 158-159) Defendant Espindola managed the Palomino Club and Simones Autobody Shop. (RTP, 158-159). The phone is used for business purposes by employees of the Palomino Club and Simone's Autobody. (PRA Exhibit No. 1, Page 9). On that evening it was used by Defendant Carroll.

On or about May 20, 2005, Carroll instructed Taoipu to drive the van used to go meet Hadland to a tire shop while he (Carroll) followed in another vehicle. (RTP, 77). Carroll stabbed the tires on the van and had the tire shop replace them. (RTP, 78). Carroll paid for the tires with money from his pocket.

On or about May 20, 2005, while Metro detectives were investigating leads at the Palomino Club, Carroll walked up to them and agreed to give a statement. (RTP, 164) The detectives drove Carroll to their offices where he gave an audio and videotaped interview. (RTP, 164) During the entire course of this interview, Carroll gave several different versions of the events leading up to the death of Hadland. (PRA, Exhibit No. 1). His statements lacked such credibility that one of the homicide detectives

characterized him as a liar during testimony at the preliminary hearing. (RTP, 267-269, 278)

Carroll is the source of all alleged incriminating statements regarding Mr. H. Carroll is the person who tried to implicate Mr. H in his crimes to Defendant Taoipu and Zone. (RTP, 26-27). Even Carroll admitted to detectives that he is the only source of information referring to Mr. H as having anything to do with this crime. (Exhibit No. 00, Page 81).

Carroll initially told detectives that he just met up with Hadland to buy marijuana. (PRA, Exhibit No. 1, page 14, and RTP, 54). Soon thereafter, he admitted to them that he was lying. (PRA, Exhibit No. 1, page 34). Next, Carroll told detectives that he met Defendant Counts by his house and that Counts asked him to help him (Counts) get some marijuana. (PRA, Exhibit No. 1, Page 37). Carroll claimed that during the drive, Counts began talking about robbing whoever the marijuana connection was and that he (Carroll) wanted nothing to do with the crime. (Id.). In this version of events, Carroll told detectives that Counts shot Hadland in the head twice without warning and then threatened the occupants of the vehicle if they talked about this drug deal gone bad. (Id.). Carroll then tried to implicate his employers. Id. at Page 55-56). However, as stated, he lacked any independent evidence to back up his claim because he is the source of all allegations against Mr. H and anything that links Defendants Espindola and/or Hidalgo III to having advance knowledge of a homicide in the making. (PRA, Exhibit No. 1, Page 81).

During the May 21, 2005 interview with Zone and his subsequent testimony during the preliminary hearing, he indicates that Carroll is the only source of information linking Mr. H to the alleged crimes in this case. (RTP, 96, 118-120, See also PRA, Exhibit No. 2, Page 54-55). According to Zone, Carroll told him that a "dude needed to get dealt with." (PRA, Exhibit No. 2, Page 6 and 36). In fact Zone implicates Carroll as the one who set the whole thing up. (PRA, Exhibit No. 2, Page 53).

During his May 21, 2005 interview, Taoipu admits that the only information he knows allegedly linking Mr. H to the crime he participated in came from Carroll. (PRA, Exhibit No. 3, Page 4 and 44-45).

Lastly, on or about May 23, 2005, Carroll agrees to wear a body-wire for the purpose of recording his conversations with people at the Palomino Club and Simone's Autobody. (RTP, 184). He was given a predetermined story to induce those he spoke with to make incriminating statements. At no time on the recordings do you hear any statements made by Mr. H, who is never present. (RTP, 395-396). This fact was confirmed by DDA DiGiacomo during closing arguments at the preliminary hearing. (Id.)

On or about May 24, 2005 Carroll again wears a wire and enters Simone's Autobody. (RTP, 190). At no time on the recordings do you hear any statements made by Mr. H, who is again not present. (RTP, 395-396). This fact was confirmed by DDA DiGiacomo during closing arguments at the preliminary hearing. (Id.)

On or about December 18, 2006, Mr. H was contacted by counsel for the purpose of informing him of the facts and circumstances surrounding allowing Mr. Gentile to take over as primary defense counsel for Defendant Hidalgo at the trial court level. Based upon this discussion, Mr. H signed a declaration consenting to the waiver of any potential conflicts of interest and it is hereby incorporated by reference. (PRA, Exhibit No. 4, Attached to ExParte Motion to File Exhibits 4, 5, and 6 Under Seal)

On or about December 18, 2006, Defendant Hidalgo was contacted by counsel for the purpose of informing him of the facts and circumstances surrounding allowing Mr. Gentile to take over as his primary defense counsel, to which he had already orally consented. Based upon this discussion, Defendant Hidalgo signed a declaration consenting to the waiver of any potential conflicts of interest and it is hereby incorporated by reference. (PRA, Exhibit No. 5, Attached to ExParte Motion to File Exhibits 4, 5, and 6 Under Seal).

On or about December 18, 2006, Mr. Gentile executed a declaration for the purpose of advising this Court the facts and circumstances of his representation of Mr.

H and Defendant Hidalgo. As this declaration avers, Mr. Gentile finds no actual conflict of interest to exist at this time. Additionally, at this time, Mr. Gentile writes in his declaration that he finds only a mere possibility of a conflict arising in this case due to the nature of the evidence possessed by the State. (PRA, Exhibit No. 6, Attached to ExParte Motion to File Exhibits 4, 5, and 6 Under Seal). Accordingly, Mr. Gentile's declaration is hereby incorporated by reference.

As of the date of the drafting of this reply (on or before December 18, 2006), Mr. H has not been charged with any crime whatsoever relating to the death of Timothy Hadland.

ARGUMENT

I. THE ISSUE OF DISQUALIFICATION OF COUNSEL WAS NOT RAISED IN THE DEFENDANTS' WRIT AND ACCORDINGLY IS NOT RIPE FOR REVIEW.

The issue of potential conflicts of interest was not raised in the Petition for Writ of Mandamus or, In the Alternative, Writ of Prohibition and is therefore not ripe for review by this court. The trial court in this case has not been given the opportunity to hear this issue and since the United States Supreme Court test regarding a Defendant's Right to Counsel of Choice is a detailed, prospective, and fact intensive task, the trial court is best suited in making that determination.

In T.R. v. State (In re T.R.), 119 Nev. 646 (Nev. 2003) the Nevada Supreme Court explained the necessity of "ripeness" before an issue can be taken up on appeal. T.R., 119 Nev. at 651 and see Herbst Gaming, Inc. v. Heller, 141 P.3d 1224 (Nev. 2006)(following the standard for ripeness established by T.R.). This Court ruled that "while the question of ripeness closely resembles the question of standing, ripeness focuses on the timing of the action rather than on the party bringing the action. T.R., 119 Nev. at 651. The Court found that two factors are weighed in an appellate court's "ripeness" inquiry: (1) "the hardship to the parties of withholding judicial review, and (2) the suitability of the issues for review." Id. In T.R., this Court found the case ripe for

review in part because the record was "sufficiently developed" to allow the Court consider the legal questions at hand. Id. at 561-562.

The Supreme Court of Idaho established a similar ripeness doctrine and includes in their "suitability for review" prong the question of whether the case or controversy is brought "too early". State v. Manley, 127 P.3d 954, 959 (Idaho 2005). To the Idaho court, the purpose of the ripeness requirement is to prevent courts from "entangling themselves in purely abstract disagreements." Id. (citing to Abbott Labs. v. Gardner, 387 U.S. 136, 148 (1967)). The Idaho court found that ripeness requires, among other factors, that "a real and substantial controversy exists (as opposed to hypothetical facts)". Id. (citing to Noh v. Cenarrusa, 137 Idaho 798, 801 (2002); Miles v. Idaho Power Co., 116 Idaho 635, 642 (1989). Accordingly, of paramount importance in making a case ripe for consideration is that there remains no further need for factual development. The Idaho court found the case to be ripe for review largely in part because:

> No new facts would be introduced and the legal issues presented would be unchanged from the present challenge... It is clear that this issue will be before us either now or in the future, and a declaration now of the various rights of the parties will certainly afford a relief from uncertainty and controversy in the future. "Since we are persuaded that 'we will be in no better position than we are now' to decide this question, we hold that it is presently ripe for adjudication."

Manley, 127 P.3d at 959 (citing to Miles v. Idaho Power Co., 116 Idaho 635, 643 (1989)(quoting Duke Power Co. v. Carolina Env. Study Group, 438 U.S. 59, 82 (1978)); see also Weldon v. Bonner County Tax Coalition, 124 Idaho 31, 37 (1993)).

Here, ripeness is clearly lacking. First and foremost, the instant writ has presented no issues regarding this issue for review. Furthermore, as delineated by T.R. and the holding in Manley, the factual development of this case is substantially lacking. As will be seen in later sections of this memorandum, the prospective evaluation necessary in making a conflicts judgment that will stand up to Constitutional muster is fact intensive and rightly reserved to the trial court in the first instance unless this Court wishes to make factual inquiry. The trial court shares in the consequences of the

decision of Mr. H and Defendant Hidalgo and thus is motivated to conduct a thorough inquiry to avoid having its verdict overturned. For this Court to rule on this issue now would require it to make a factual inquiry which it is generally reluctant to do. Moreover, since the issues before this Court are purely those of law and in no manner present a conflict of interest, the State's assertion of potential conflict doesn't apply to the proceedings before this Court. How can a ruling favorable or adverse to the Defendant Hidalgo conflict with the interests of Mr. H? While, it is respectfully submitted that the more appropriate action is to reserve the conflict issue for future trial court action, Petitioners do concede that no authority exists abrogating this Court from taking the conflict issue up sua sponte. All necessary documents have been provided to make that determination. (see PRA, Exhibits 4, 5, and 6). However, as will be shown next, the potential for conflict in this case is insufficient to abrogate Defendant Hidalgo's Right to Counsel of Choice.

II. THE MERE POSSIBILITY OF A CONFLICT IS INSUFFICIENT TO WARRANT THE DISQUALIFICATION OF DEFENDANT HIDALGO'S COUNSEL OF CHOICE UNDER THE STANDARD MANDATED BY THE SIXTH AMENDMENT.

The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. Const. amend. VI. Courts hold that an element of this right is the right of a defendant to choose who will represent him. See Wheat v. U. S., 486 U.S. 153, 159 (1988). Cf. Powell v. Alabama, 287 U.S. 45, 53 (1932)("It is hardly necessary to say that, the right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his own choice").

Thus, the Sixth Amendment right to counsel of choice is grounded not in the requirement that a trial be fair, but that a particular guarantee of fairness be provided to the accused in allowing that she be defended by counsel she believes to be best. U.S. v. Gonzalez-Lopez, 126 S. Ct. 2557, 2562 (2006).

While the Constitutional guarantee of a fair trial is defined ultimately through the several provisions of the Sixth Amendment, the Counsel Clause in substantive part stands alone as an individual guarantee. Strickland v. Washington, 466 U.S. 668, 684-685 (1984). In sum, the right at stake here is the Right to Counsel of Choice, not the right to a fair trial.

While the Right to Counsel of Choice requires deference by the judiciary, Wheat clearly gives latitude to appellate courts in reviewing a trial court's efforts in deciding prospectively whether there is the presence of an "actual conflict" or a "serious potential" for a conflict of interests of such magnitude that intervention is necessary. Wheat, 486 U.S. at 159.

However, the mere possibility of a serious potential conflict is not enough to overcome a defendant's Right to Counsel of Choice. See U.S. v. Trujillo, 302 F. Supp. 2d 1239, 1241-42, 1244 fn. 7 (D. Kan 2004). In fact, disqualification of counsel should be a "measure of last resort" by the trial court. In re Grand Jury Proceedings (Doe), 859 F.2d 1021, 1026 (1st Cir. 1988). On this issue, the Supreme Court of Kentucky had this to say:

> Notwithstanding, disqualification is a drastic measure which courts should be hesitant to impose except when absolutely necessary. See University of Louisville v. Shake, Ky., 5 S.W.3d 107 (1999). Disqualification separates a party from the counsel of its choice with immediate and measurable effect. Here, attorney Franklin has lived through the previous litigation from its inception and has in his memory, or at his fingertips, knowledge of the case no one else could duplicate. Moreover, regardless of the level of competency of a successor attorney, the degree of confidence and trust that has developed between the Knottses and Franklin cannot be replaced.

Zurich Ins. Co. v. Knotts, 52 S.W.3d 555, 560 (Ky. 2001).

In Gonzales-Lopez, the United States Supreme Court followed and amplified the holding in Wheat by making reversal of a guilty verdict the appropriate remedy when a trial court's decision to disqualify counsel was made in error. Gonzales-Lopez, 126 S. Ct. at 2563. The Court required no further analysis of harmlessness or ineffective assistance of counsel. Id. Violation of the Right to Counsel of Choice was sufficient prejudice to the

defendant to warrant reversal of the trial court's verdict. Id. Accordingly, the determination as to the need to override a defendant's Right to Counsel of Choice is a serious one bearing grave consequences if done improperly.

In weighing this decision courts find that the mere possibility of a conflict of interest is insufficient to support a holding of ineffective assistance. Morris v. California, 966 F.2d 448, 455 (9th Cir 1991) and Wheat, 486 U.S. at 164. Under Wheat, the question is whether the presumption in favor of defendant's counsel of choice can be overcome by a showing of an "actual conflict" or by a showing of "serious potential for conflict. Wheat, 486 U.S. at 164. An "actual conflict" must be proved through a factual showing on the record. Willis v. U.S., 614 F.2d 1200, 1203 (9th Cir. 1979). Courts have explained, "while we cannot indulge in nice calculations about the amount of prejudice which results from a conflict of interest . . . neither can we create a conflict of interest out of mere conjecture as to what might have been shown." Id. (quoting Lugo v. U.S., 350 F.2d 858, 859 (9th Cir. 1965); citing Carlson v. Nelson, 443 F.2d 21, 22 (9th Cir. 1971)) and see Gonzales-Lopez, 126 S. Ct. at 2563.

To identify a "serious potential for conflict" the court must peer through a "glass, darkly," and make a prediction as to future events. Wheat, 486 U.S. at 162. The trial court judge must determine whether "the facts and circumstances apparent at the time of its decision demonstrate a substantial potential for a serious conflict of interest." Id. at 167 n.2 (emphasis added); see also Trujillo, 302 F. Supp. At 1253 ("the court must examine the conflict picture as it exists at the time to determine whether a conflict either exists or is probable")(emphasis in original).

In U.S. v. Koon, 34 f.3d 1416 (1994) affirmed in part and remanded 518 U.S. 81 (1996), the Ninth Circuit reviewed a district court's refusal to disqualify counsel for a potential conflict of interest. The Court stated:

> We have expressed "grave doubts" as to whether mere appearances would ever be enough to deprive a criminal defendant of the right to counsel of his choice, U.S. v. Washington, 797 F.2d 1461, 1466 (9th Cir.1986), and we note that the test formulated in Wheat itself directs courts to look for a "serious potential for

> conflict," rather than the mere appearance of conflict. 486 U.S. at 164, 108 S.Ct. at 1700. Here, where Powell had a strong Sixth Amendment right in retaining Stone as his attorney, we conclude that the district court did not abuse its discretion in protecting that right rather than removing what can only be characterized as the possible appearance of a highly attenuated conflict.

Koon, 34 F. 3d at 1438 fn. 18.

A trial court can rely on the good faith statement from defense counsel that no conflict exists. U.S. v. Crespo de Liano, 838 F. 2d 1006 , 1012 (9th cir. 1988) (relied upon and followed by U.S. v. Levy, 25 F. 3d 146, 154 (2d Cir 1994).)

The gist of the State's claim is that Mr. H might be charged or that one of the client's might give testimony against the other which would give rise to a conflict of interest. See State's Answer, Pg. 32-33 and 38. In seeking to disqualify counsel from representing two clients in currently unrelated matters where the State has hopes that one might testify against the other there needs to be a concrete showing that it will happen before the clients' Sixth Amendment Right to Counsel of Choice will be overcome.

In U.S. v. Driscoll, 1994 U.S. Dist. LEXIS 14319 (D. Mass. 1994), the district court was faced with a challenge similar to the one before this Court. There an attorney represented two clients in two different cases. The government argued that counsel would be in a conflict situation if the government persuades one client to cooperate against the other in the separate trial. Driscoll, 1994 U.S. Dist. LEXIS 14319 at 12. The client whose testimony the government sought forcefully stated that she would not cooperate with the government. Id. Defense counsel noted that if the witness changed her mind and decided to cooperate with the government, he would immediately inform the court. Id. at 14.

In denying the government's motion to disqualify, the court relied upon In Re Grand Jury Proceedings, 859 F.2d 1021 (1st Cir.1988). In that case a district court decision to disqualify counsel was reversed. The court held:

> "generally there must be a direct link between the clients of an attorney--or at least some concrete evidence that one client, such as an immunized witness, has information about another client, such as a target of a grand jury investigation--before a right to counsel of choice is barred by disqualification."

In Re Grand Jury, 859 F.2d at 1026.

On this same note, in U.S. v. Trujillo, 302 F. Supp. 1239 (D. Kan. 2004) the court noted:

> The government raises the possibility that [the absence of a conflict] might no longer be true in the event one of these defendants was given the opportunity to resolve his case more favorably in exchange for testimony against one or more of the others. At the time such an event were to occur, it is possible that there would be an actual or probable conflict of interest among defense counsel's clients that would make her continued multiple representation impossible; however, the court must examine the conflict picture as it exists at this time to determine whether a conflict either exists or is probable. The court should not speculate on every theoretical development that could possibly occur in the case until it finds a scenario leading to a conflict and then use such speculation as a basis to deny defendant the counsel he has chosen.

Trujillo, 302 F. Supp. at 1252-53 (emphasis added).

Here, the potential for serious conflict is only a "mere possibility" because Mr. H has not been charged in this case and is not remotely likely to be charged. Both Mr. H and Defendant Hidalgo have signed declarations consenting to Mr. Gentile representing Defendant Hidalgo as primary defense counsel. (See PRA, Exhibit No. 4 and 5). Furthermore, Mr. Gentile has signed a declaration of his actions regarding this representation and his good faith belief that he can ethically represent both Mr. H and Defendant Hidalgo. (See PRA, Exhibit No. 6). This case is over a year and seven months old. As the situation exists now, no actual conflict exists and the potential for serious conflict is negligible. The only evidence suggesting Mr. H had any involvement in this matter comes from a discredited man who is a defendant in this case and admittedly participated in the murder of Hadland. He told police numerous stories in an effort to get out from under the penalty which faces murderers in this state. He knows the stakes are high and said whatever was necessary to get police to direct their attentions

elsewhere. The taped conversations which Carroll made do not implicate Mr. H. The co-conspirators Taiopu, Counts, and Zone have no independent knowledge that Mr. H had anything to do with this crime and have never met him. All that they learned came from Carroll. Mr. H and Defendant Hidalgo have been advised of the potentials for conflict and afterward knowingly and intelligently waived those potential conflicts in favor of placing Mr. Gentile as Defendant Hidalgo's primary defense counsel. Defendant Hidalgo maintains his absolute innocence as to the homicide charges in this case and had an opportunity to implicate his father at his interview by police. He is adamant in his position that he knows of no information to implicate his father in any aspect of this case. Likewise, Mr. H is adamant in his position that he knows of no information which would demonstrate that his son is guilty of any crime other than what is contained on the tape recordings surreptitiously made by Carroll outside of his presence. Neither of them have any information with which to testify against the other. A case for disqualification of counsel for a conflict of interest simply hasn't been established.

III. MR. GENTILE AND MEMBERS OF HIS FIRM ARE NOT "NECESSARY" WITNESSES AND, DUE TO THE OBVIOUS POTENTIAL FOR ABUSE, USE OF THE "LAWYER AS WITNESS" RULE TO SUPPORT COMPLETE DISQUALIFICATION OF COUNSEL HAS ALL BUT BEEN TOTALLY REJECTED BY THE NEVADA SUPREME COURT.

This obvious ploy by the Clark County District Attorney's Office to disqualify Mr. Gentile by simply listing him or members of his firm as witnesses to some innocuous irrelevant conversation is a perfect example of why the Nevada Supreme Court rejected disqualification as a remedy for alleged violations of the lawyer advocate rule. Nevada's new rules of professional responsibility substantively reflect this Court's prior SCR 178 and reads in pertinent part:

/ / /

/ / /

N.R.P.R. 3.7 Lawyer as Witness

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:

(1) The testimony relates to an uncontested issue;

(2) The testimony relates to the nature and value of legal services rendered in the case; or

(3) Disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

In, Dimartino v. Eighth Judicial Dist. Court of Nev., 119 Nev. 119 (2003), the Nevada Supreme Court rejected the abusive use of the Advocate-Witness rule in favor of a more even handed approach to the problem. Dimartino, 119 Nev. at 123. First and foremost, this Court recognized that complete disqualification of an attorney called as a witness, by the plain terms of SCR 178 (Former version of N.R.P.R. 3.7) is not a remedy as it merely prohibits the attorney from appearing as trial counsel. Id. at 121.

The majority view is that a lawyer who is likely to be a "necessary" witness may still conduct pretrial representation legal services. See, e.g., Culebras Enterprises Corp. v. Rivera-Rios, 846 F.2d 94 (1st Cir. 1988) (ruling that lawyers performing substantial pretrial work were not in violation of advocate-witness rule because they did not plan to act as advocates at trial if called as witnesses); U.S. v. Castellano, 610 F. Supp. 1151, 1167 (S.D.N.Y. 1985)(finding that lawyer may conduct all work necessary in the pretrial stage even though the lawyer is likely to be called as a witness); ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 1529 (1989) (lawyer who is expected to be witness at trial may represent client in pretrial phase as long as the client consents after consultation and the lawyer reasonably believes representation will not be adversely affected by the lawyer expected testimony); State Bar of Mich. Comm. on Prof'l and Judicial Ethics, RI-299 (Dec. 18, 1997) (lawyer not disqualified from representing client in pretrial matters even if lawyer might eventually be disqualified from acting as trial counsel).

In Dimartino, Nevada adopted the majority rule because this better reasoned approach recognized that pretrial disqualification was unnecessary to eliminate any confusion and prejudice that could result if an attorney appears before a jury as an advocate and as a witness. Dimartino, 119 Nev. at 122. The case may not go to trial, other evidence may be available in place of the attorney's testimony, or the attorney's client might prefer to have the attorney as an advocate rather than a witness. Id. and See ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 1529 (1989).

Next, this Court found that SCR 178 is virtually identical to, ABA Model Rule of Professional Conduct 3.7. Dimartino, 119 Nev. at 122. The ABA Commission on Ethics and Professional Responsibility interpreted this Model Rule to allow a lawyer expected to testify at trial to represent his client in pretrial proceedings, with consent of the client. The committee only rejected appearances by the advocate requiring her to argue her own veracity to a court or other body. See ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 1529 (1989). This interpretation preserves the Right to Counsel of Choice while protecting the integrity of the judicial proceeding. See Wheat, 486 U.S. 153.

Finally, this Court was wary in allowing a party to wholly disqualify opposing counsel under SCR 178 by simply listing that counsel as a witness and asserting that "disqualification doubts should be resolved in favor of disqualification." Dimartino, 119 Nev. at 122. The Court recognized that the obvious potential for abuse militated against interpreting SCR 178 to permit total disqualification since to do otherwise would invite the rule's misuse as a tactical ploy. See, e.g., Zurich Ins. Co. v. Knotts, 52 S.W.3d 555, 560 (Ky. 2001) (holding that a less stringent standard of prejudice was needed to disqualify opposing counsel as trial advocate when the attorney is testifying on behalf of his own client, because adverse parties may attempt to call opposing lawyers as witnesses simply to disqualify them).

Here, members of Mr. Gentile's firm attended meetings with Mr. H, his son, and Defendant Annabel Espindola. These meetings were conducted in the presence of correctional officers at the Clark County Detention Center. Certainly, and in line with

Dimartino, these individuals could testify to the same information as the attending attorneys. For that reason, they are not "necessary" witnesses and it is not appropriate to vitiate Defendant Hidalgo's Sixth Amendment Right to Counsel of Choice by disqualifying Mr. Gentile under the advocate - witness rule. The State has made no proffer as to what the substance of the testimony would be. Furthermore, disqualifying any counsel at this pretrial stage is premature. The rule clearly permits counsel to remain as advocate in the pretrial phase. Therefore, in light of this Court's ruling in Dimartino , like the above conflict of interest argument, the claim of an advocate witness violation is similarly not ripe for review. This claim is an obvious reproduction of the fears this and other courts voiced regarding the gamesmanship that can be brought to bear by opposing counsel forgetting their duty of candor to the court. Accordingly, this Court should reject the State's advocate-witness claim entirely.

CONCLUSION

Based upon the foregoing, Counsel for Defendant Hidalgo respectfully asks this Court to reject the claims made by the State. The claims relating to potential conflicts of interest and potential violations of the advocate-witness rule are not ripe for review. Furthermore, the facts simply do not present a sufficient probability of a serious conflict. Accordingly, intervention by this Court is inappropriate and unnecessary under the Sixth Amendment standards announced by the United States Supreme Court.

Dated this 18th day of December, 2006.

The Law Offices of Gentile DePalma, Ltd.

By: William H. Gentile For

Dominic P. Gentile, Esq.
Attorney for Defendant Luis Hidalgo, III

CERTIFICATE OF MAILING

I hereby certify and affirm that I mailed a copy of the foregoing REPLY TO STATE'S ANSWER TO PETITION FOR WRIT OF MANDAMUS OR,IN THE ALTERNATIVE, WRIT OF PROHIBITION along with a copy of the PETITIONER'S REPLY APPENDIX to counsel of record listed below on December 18, 2006.

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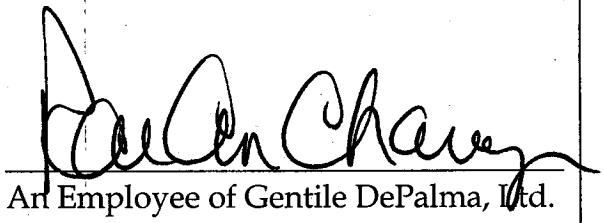
CERTIFICATE OF SERVICE

I certify and affirm that a copy of the foregoing REPLY TO STATE'S ANSWER TO PETITION FOR WRIT OF MANDAMUS OR, IN THE ALTERNATIVE, WRIT OF PROHIBITION along with a copy of the PETITIONER'S REPLY APPENDIX was hand delivered to:

The Honorable Judge Donald Mosely
Department XIV
Eighth Jucial District Court
200 Lewis Avenue
Las Vegas, Nevada 89101



An Employee of Gentile DePalma, Ltd.