Dominic P. Gentile
State Bar No. 1923
3960 Howard Hughes Pkwy. #850
Las Vegas, Nevada 89109
Attorney for Petitioner LUIS HIDALGO III

JoNell Thomas
State Bar No. 4771
616 South 8th Street
Las Vegas, Nevada 89101
(702) 471-6565
Attorney for Petitioner
ANABEL ESPINDOLA

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

District Court No. C212667

PETITION FOR WRIT OF MANDAMUS OR, IN THE ALTERNATIVE, WRIT OF PROHIBITION

06-21233

Dominic P. Gentile
State Bar No. 1923
3960 Howard Hughes Pkwy. #850
Las Vegas, Nevada 89109
Attorney for Petitioner LUIS HIDALGO III

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State Bar No. 4771
616 South 8th Street
Las Vegas, Nevada 89101
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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. District Court No. C212667 **PETITION FOR WRIT OF MANDAMUS OR, IN THE ALTERNATIVE, WRIT OF PROHIBITION**

Petitioner Luis Hidalgo III, by and through his counsel Dominic P. Gentile, and Petitioner Anabel Espindola, by and through her counsel Christopher Oram and JoNell Thomas, hereby respectfully petition this Court for a Writ of Mandamus, or in the alternative, a Writ of Prohibition pursuant to NRAP 21, Article 6 §4 of the Nevada Constitution, NRS 34.160 and NRS 34.320. Petitioners satisfy the procedural requirements of verification and proof of service. See Exhibits 1 and 2.

Petitioners are defendants in the case of State of Nevada v. Hidalgo, Espindola, et. al., Eighth Judicial District Court, case number C212667. Respondent Judge Mosley was assigned to preside over the case. Petitioners are charged with one count

of first degree murder with use of a deadly weapon, conspiracy to commit murder, and two counts of solicitation for murder. See Exhibit 3 (Information).

The State asserts that on or about May 19, 2005, Kenneth Counts shot and killed Timothy Hadland, while in the company of DeAngelo Carroll, Jayson Taoipu, and Rontae Zone. Exhibit 3. The State's theory is that Counts did so after being recruited by DeAngelo Carroll and that Carroll acted pursuant to a conspiracy with Petitioners Luis Hidalgo III and Anabel Espindola. Id. Petitioner Hidalgo III is the son of Luis Hidalgo, Jr. who was the former owner of the Palomino Club and Petitioner Espindola was a manager of the Palomino Club. DeAngelo Carroll and Timothy Hadland had worked at the Palomino. The State further asserts that after Hadland was killed that Petitioners solicited DeAngelo Carroll, at a time when he was acting as a police agent, to kill Taoipu and Zone. Criminal charges were filed against Petitioners, Counts, Carroll and Taoipu. Charges were not filed against Zone.

Real Party in Interest State of Nevada filed a Notice of Intent to Seek Death Penalty against each of the Petitioners and has asserted the existence of aggravating circumstances of murder for hire and prior conviction of violent offenses. See Exhibit 4 (Notices of Intent).

Petitioners filed in the district court a Motion to Strike the Notices of Intent to Seek Death Penalty, Exhibit 5, in which they argued that the Notices of Intent were invalid as a matter of law because (1) the State failed to set forth a legally cognizable theory as to how the murder for hire aggravating circumstance applied; and (2) solicitation for murder, especially where the alleged solicitation is to a police agent, is not a crime of violence or threat of violence as a matter of law. The State opposed the motion. Exhibit 6. Petitioners replied to the State's opposition and filed a notice of supplemental authority in support of their motion. Exhibits 7 and 8.

Argument on the motion was first heard by the district court on March 17, 2006. Exhibit 9. Subsequent argument was held on August 31, 2006 and September 8, 2006. Exhibits 10 and 11. The district court rejected Petitioners' arguments and denied the motion. Exhibit 11. Petitioners now seek this Court's intervention by way of a petition for extraordinary relief because of the important legal issues presented in this matter.

The State sets forth a theory in its Notice of Intent, under NRS 200.033(6) (murder for hire) that an aggravating circumstance may be established based upon an allegation of intent to commit a battery, even though there is no statutory basis for permitting this theory to be presented to the jury. Despite the clear requirement that the State prove Petitioners acted with specific intent to establish the State's allegation of premeditated murder (there is no felony murder charge), the Notices of Intent set forth theories which do not require proof of the specific intent to kill and are therefore invalid. This aggravating circumstance is also invalid because the State fails to set forth precise details as to its assertions concerning monetary gain.

Likewise, the State's attempt to seek the death penalty based upon the assertion that it will prove at trial that Petitioners solicited another to kill two people, is invalid as a matter of law because solicitation is not a crime involving violence or the threat of violence under NRS 200.033(2).

Petitioners will suffer irreparable harm by having to stand trial for a capital case despite the invalid Notices of Intent to Seek Death Penalty. Because this is currently a capital case, Petitioners are being held without bail and may not be released from custody and are therefore unable to assist their counsel in preparation for their defense in an effective manner. Petitioners and their counsel must spend hundreds of hours preparing for a capital penalty hearing which cannot be lawfully held based upon the State's Notices of Intent to Seek Death Penalty. Further, court resources will be

unnecessarily expended by lengthy proceedings concerning the capital penalty hearing, a lengthy and complicated jury selection process, transcript expenses and other costs incurred by this case which would not be incurred if the Notices of Intent to Seek Death Penalty are dismissed. The Real Party in Interest will suffer no comparable harm as it will also expend far less resources on this case if a determination is made that it's alleged aggravating circumstances are invalid as a matter of law.

"This court may issue a writ of mandamus to compel the performance of an act which the law requires as a duty resulting from an office or where discretion has been manifestly abused or exercised arbitrarily or capriciously. The writ does not issue where the petitioner has a plain, speedy, and adequate remedy in the ordinary course of law. This Court considers whether judicial economy and sound judicial administration militate for or against issuing the writ. The decision to entertain a mandamus petition lies within the discretion of this court." Redeker v. Eighth Judicial Dist. Court (Mosley), 122 Nev. __, 127 P.3d 520, 522 (2006) (citing NRS 34.160, NRS 34.170, Round Hill Gen. Imp. Dist. v. Newman, 97 Nev. 601, 603-04, 637 P.2d 534, 536 (1981); Hickey v. District Court, 105 Nev. 729, 731, 782 P.2d 1336, 1338 (1989); State v. Babayan, 106 Nev. 155, 175-76, 787 P.2d 805, 819 (1990)). "Additionally, this court may exercise its discretion to grant mandamus relief where an important issue of law requires clarification." Redeker, 127 P.3d at 522 (citing State v. Dist. Ct. (Epperson), 120 Nev. 254, 258, 89 P.3d 663, 665-66 (2004)).

Petitioners here have no other plain, adequate or speedy remedy at law to protect their right not to face a capital penalty hearing where there is no legal basis for the State's aggravating circumstances. Moreover, judicial economy and sound judicial administration warrant issuance of the writ and this case presents an opportunity for this Court to clarify an important issue of law. This Court has

recognized that extraordinary relief is warranted under similar circumstances. See e.g. Redeker, 122 Nev. __, 127 P.3d 520 (granting petition for writ of mandamus pretrial based upon invalid aggravating circumstance); Bennett v. Eighth Judicial Dist. Court (McGroarty), 121 Nev. __, 121 P.3d 605 (2005) (granting petition for writ of mandamus based upon invalid amended notice which alleged new aggravating circumstances); State v. Second Judicial Dist. Court (Marshall), 116 Nev. 953, 11 P.3d 1209 (2000) (entertaining petition for writ of mandamus, addressing merits of legal issue and concluding that a district court acted properly in dismissing a notice of intent to seek death penalty which was not timely filed).

Wherefore, based on the foregoing and the accompanying Points and Authorities, Petitioners respectfully request that this Court issue a Writ of Mandamus compelling Respondent to order the dismissal of the State's Notices of Intent to Seek Death Penalty. In the alternative, Petitioners request that this Court issue a Writ of Prohibition precluding the State from proceeding on the invalid Notices of Intent to Seek Death Penalty.

Dated this 12th day of October, 2006

Dominic P. Gentile
JoNell Thomas
Attorneys for Petitioner

POINTS AND AUTHORITIES IN SUPPORT OF WRIT

The Charges

In an Information filed on June 20, 2005 the State charges Luis Hidalgo III, Anabel Espindola, and others as follows: Count 1 – Conspiracy to Commit Murder (of Timothy Jay Hadland) [punishable pursuant to NRS 199.480-1(b) by a term of two years to ten years of incarceration]; Count 2 – Murder with Use of a Deadly Weapon of Timothy Hadland pursuant to NRS 200.030 [on six different and alternative theories of criminal liability, although they are designated as three: (1) directly or indirectly committing the act and/or (2) lying in wait, and/or (3) aiding and abetting the commission of the crime, and/or (4) by conspiring to commit the crime of (a) battery, and/or (b) battery with the use of a deadly weapon, and/or (c) to kill (*sic*) Timothy Hadland]; Count 3 - Solicitation to Commit Murder of Jayson Taoipu; and Count 4 – Solicitation to Commit Murder of Rontae Zone.

The State's Intention to Seek the Death Penalty

On July 6, 2005 the State filed a Notice of Intent to Seek Death Penalty (hereinafter "the Notice of Intent") against each of the Petitioners. Although not a model of linguistic clarity, the Notices of Intent appear to rely upon the following as the statutory aggravating factors that will enable the State to seek the death penalty: (1) that Anabel Espindola and Luis Hidalgo III will be convicted of the Solicitation to Commit Murder of Jayson Taoipu, as alleged in Count 3, prior to the penalty hearing for the State's anticipated conviction of her on Count 2; (2) that Anabel Espindola and Luis Hidalgo III will be convicted of the Solicitation to Commit Murder of Rontae Zone, as alleged in Count 4, prior to the penalty hearing for the State's anticipated conviction of her on Count 2; and (3) the murder alleged in Count 2 was committed by Kenneth Counts for the purpose of someone receiving money or other thing of monetary value.

Just exactly how this last allegation will be supported is difficult to discern from the Notices of Intent themselves, as they contain several somewhat irreconcilable variations and mutations. Counsel for Petitioners' best efforts to understand them leads to a belief that the State contends that DeAngelo Carroll was "procured" to "**beat** and/or kill" Timothy Jay Hadland by Anabel Espindola, and/or Luis Hidalgo III, and/or Luis Hidalgo Jr. (who isn't charged in the Information), all of whom are associated in some manner with the Palomino Club. Whoever did the "procuring", according to defense counsels' divining of the Notices of Intent, somehow the **beating** and/or death of Timothy Jay Hadland was designed to "further" the business of the Palomino Club. Moreover, despite his being the one allegedly "procured" by one or more of the aforementioned persons, DeAngelo Carroll was himself apparently a "serial procurer" and bereft of the competency to "**beat** and/or kill" Hadland himself. He therefore resorted to making a secondary offering to Kenneth Counts and/or Jayson Taoipu. The Notices of Intent alleges that Kenneth Counts, having been "procured" by DeAngelo Carroll, terminated the life of Timothy Jay Hadland by shooting him with a firearm.

The Notices of Intent go on to narrate events that allegedly took place after the by then recent demise of Mr. Hadland. They assert that DeAngelo Carroll, subsequent to the event, was paid $6000 by either Anabel Espindola or Luis Hidalgo Jr. (who is not charged in the Information), or both of them, and that DeAngelo Carroll in turn later transferred all of the money to Kenneth Counts, apparently feeling unworthy of compensation himself or at least not having been motivated in his "procuring" efforts by the acquisition of worldly gain.

Or perhaps not.

The Notices of Intent continue in the disjunctive to assert that maybe what happened is that Anabel Espindola and/or Luis Hidalgo III (who <u>is</u> charged and who

brings this petition along with Anabel Espindola) may have done one or more of the following:

- Anabel Espindola provided $200 to DeAngelo Carroll (we know not when or why from the pleading itself) which he apparently either did not give to Kenneth Counts or the Notices of Intent are silent as to it;

- Anabel Espindola and Luis Hidalgo III provided $1400 and/or $800 to DeAngelo Carroll (we know not when or why from the pleading itself) that he apparently either did not give to Kenneth Counts or the Notices of Intent are silent as to it;

-Anabel Espindola agreed to pay DeAngelo Carroll for twenty-four hours per week of work at the Palomino Club even though he had already terminated his "position" there;

- Luis Hidalgo III offered to provide DeAngelo Carroll and/or his family with United States Savings Bonds.

It is not clear as to whether the foregoing allegations were premised upon a theory that money was paid as consideration for some pre-existing agreement to **beat** and/or kill Timothy Jay Hadland, or whether money was paid or promised out of fear of harm or threat following the killing, or whether the intent of the alleged payments was for something else altogether.

The Notices of Intent To Seek Death Penalty Are Invalid As A Matter of Law

This petition presents two very basic, very straightforward legal questions:

(1) May the State seek the death penalty upon a claim that a defendant paid another to **beat** the victim despite the clear language of NRS 200.033(6) which permits the aggravating circumstance only where "the **murder** was committed by a person, for himself or another, to receive money or any other thing of monetary value."

(2) Is a mere solicitation generally, or spoken to an agent of the police specifically, a felony "involving the use or threat of violence to the person of another" for purposes of NRS 200.033(2)(b).

The district court concluded that the State's Notices of Intent were valid and accepted the State's arguments that these were proper theories by which aggravating circumstances could be established. Petitioners disagree and contend that neither of the State's theories is legally cognizable.

General Principles

Capital punishment is reserved for the most heinous of murders. Not all murders qualify for death as the punishment. "Death is different." The United States Supreme Court has relied upon this principle and has interpreted the Eighth Amendment in that light for thirty years. See Gregg v. Georgia, 428 U.S. 153, 188 (1976); Woodson v. North Carolina, 428 U.S. 280, 303 (1976); Ford v. Wainwright, 477 U.S. 399, 411 (1986); Harmelin v. Michigan, 501 U.S. 957, 994 (1991); Morgan v. Illinois, 504 U.S. 719, 751 (1992) (Scalia, J., *dissenting*); Dobbs v. Zant, 506 U.S. 357, 363 (1993) (Scalia, J., concurring); Simmons v. South Carolina, 512 U.S. 154, 185 (1994) (Scalia, J., *dissenting*); Shafer v. South Carolina, 532 U.S. 36, 55 (2001) (Scalia, J., *dissenting*); Atkins v. Virginia, 536 U.S. 304, 337 (2002) (Scalia, J., *dissenting*); Ring v. Arizona, 536 U.S. 584, 606 (2002); Wiggins v. Smith, 539 U.S. 510, 557 (2003) (Scalia, J., *dissenting*).

This Court also recognizes its "obligation to ensure that aggravators are not applied so liberally that they fail to perform their constitutionally required narrowing function[.]" Redeker v. Eighth Judicial Dist. Court, 122 Nev. __, 127 P.3d 520, 526 & n. 30 (2006) (citing Zant v. Stephens, 462 U.S. 862, 878 (1983) and Arave v. Creech, 507 U.S. 463, 474 (1993)). In interpreting the statute at issue, this Court looks to the plain language of the statute. State v. Colosimo, 122 Nev. __, 142 P.3d

352, __ (2006) (citing State v. Washoe County, 6 Nev. 104, 107 (1870)). If a penal statute is ambiguous, "'rules of statutory interpretation . . . require that provisions which negatively impact a defendant must be strictly construed, while provisions which positively impact a defendant are to be given a more liberal construction.'" Colosimo, 122 Nev. at __, 142 P.3d at __ (quoting Mangarella v. State, 117 Nev. 130, 134, 17 P.3d 989, 992 (2001)).

The State's Murder For Hire Allegations Are Invalid

The State asserts that it may establish the aggravating circumstance of murder for hire, under NRS 200.033(6), based upon the following theories:

> The murder was committed by a person, for himself or another, to receive money or any other thing of monetary value, to-wit by: by [sic] Anabel Espindola (a manager of the Palomino Club) and/or Defendant Luis Hidalgo, III (a manager of the Palomino Club) and/or Luis Hidalgo, Jr. (the owner of the Palomino Club) procuring DeAngelo Carroll (an employee of the Palomino Club) to beat and/or kill Timothy Jay Hadland; and/or Luis Hidalgo, Jr., indicating that he would pay to have a person either beaten or killed; and/or by Luis Hidalgo, Jr. procuring the injury or death of Timothy Jay Hadland to further the business of the Palomino Club; and/or Defendant Luis Hidalgo, II telling DeAngelo Carroll to come to work with bats and garbage bags; thereafter, DeAngelo Carroll procuring Kenneth Counts and/or Jayson Taoipu to kill Timothy Hadland; thereafter, by Kenneth Counts shooting Timothy Jay Hadland; thereafter, Luis Hidalgo, Jr. and/or Anabel Espindola providing six thousand dollars ($6,000) to DeAngelo Carroll to pay Kenneth Counts, thereafter Kenneth Counts receiving said money; and/or by Anabel Espindola providing two hundred dollars ($200) to DeAngelo Carroll and/or by Anabel Espindola and/or defendant Luis Hidalgo, III providing fourteen hundred dollars ($1400) and/or eight hundred dollars ($800) to DeAngelo Carroll and/or by Anabel Espindola agreeing to continue paying DeAngelo Carroll twenty-four (24) hours of work a week from the Palomino Club even though DeAngelo Carroll had terminated his position with the club and/or by Defendant Luis Hidalgo, III offering to provide United States Savings Bonds to DeAngelo Carroll and/or his family.
>
> The basis for this aggravating is the aggravated nature of the crime itself. The evidence upon which the State will rely is the testimony and exhibits introduced during the guilt or penalty phase of the trial, as well as the verdicts from the guilt phase.

Exhibit 4.

This Court has held that based upon Enmund v. Florida, 458 U.S. 782, 797 (1982) and Tison v. Arizona, 481 U.S. 137 (1987), to receive the death sentence, a defendant must have himself killed, attempted to kill, intended that a killing take place, intended that lethal force be employed or participated in a felony while exhibiting a reckless indifference to human life. See Doleman v. State, 107 Nev. 409, 418, 812 P.2d 1287, 1292-93 (1991). In the aiding and abetting context, this is consistent with this Court's holding in Sharma v. State, 118 Nev. 648, 56 P. 3d 868 (2002) that to be guilty of a specific intent offense on an aiding and abetting theory the aider and abettor must have acted with specific intent that the offense be committed. Likewise, in the conspiracy context, the State must prove that the co-conspirator to a specific intent offense acted with specific intent that the offense be committed. Bolden v. State, 121 Nev. ___, 124 P.3d 191, 200 (2005). In this case the State has noticed its intent to seek the death penalty and has alleged the existence of the murder for hire aggravating circumstance upon various theories, several of which do not require a specific intent to murder. Under Sharma, Bolden, and the other authority noted herein, the State's pleading is invalid.

There is no dispute that Petitioners did not physically kill Hadland themselves. Rather, the State seeks to establish their guilt under aiding and abetting and conspiracy theories. The State asserts in its Notices of Intent that the object of the conspiracy was either to "beat" or to "kill" Hadland. That this makes a great difference to the validity of the Notices of Intent is obvious. NRS 200.033(6) provides for an aggravating circumstances only where "the **murder**" was committed to receive money or any other thing of monetary value. There is no provision for beatings or any other action short of murder. Moreover, to "kill" someone is not the equivalent of to "murder" someone. For example, state officials, jurists, police and even juries, enter into

agreements to "kill" people that are not criminal. Persons who are defending themselves from lethal force also fit into that category.

In the district court proceedings and at trial Petitioners will contest the allegation that they wanted Counts or anyone else to beat Hadland. But even accepting this allegation as true, for the purpose of this petition only, even a deliberate battery does not have as a foreseeable consequence, much less an intentional one, of a killing or great bodily harm. Absent it being the purpose of a burglary, battery does not form the basis of a felony-murder under Nevada law. See State v. Contreras, 118 Nev. 332, 46 P. 3d 661 (2002). Serious bodily injury is not inherently foreseeable of a mere battery. State v. Huber, 38 Nev. 253, 148 P. 562, 563 (1915) (where defendant intended only a battery and it resulted in killing of victim who fought back, result is manslaughter). An intentional act or intentional conduct done with no aim to cause death or serious bodily injury will constitute involuntary manslaughter if it creates an extreme risk of death or serious bodily injury and amounts to non-conscious recklessness. Alternatively, an intentional act which causes death is involuntary manslaughter if it is a misdemeanor dangerous in and of itself which is committed in a manner such that appreciable bodily injury to the victim was a reasonably foreseeable result. See Comber v. United States, 584 A. 2d 26, 54 (D.C. 1990). Thus, the "conspiracy to beat" alternative in the Notices of Intent to Seek Death cannot form the basis of the aggravating circumstance as the statutory aggravating circumstance clearly requires the specific intent that a murder, not a beating, be committed.

In the district court, the State attempted to justify its Notices of Intent by arguing that Petitioners intended that lethal force be used because they intended DeAngelo Carroll to commit a battery with a deadly weapon against T.J. Hagland. Exhibit 6, State's Opposition at page 16. Throughout the State's argument it asserted that battery with a weapon involves "deadly force." Id. at pages 16-17. The State

failed, however, to cite to any authority for this broad proposition. Nowhere in NRS 200.033(6) is there any support for the State's assertion that the aggravating circumstance can be established based upon a battery, battery with a weapon, battery with lethal force or any other offense short of murder.

"Lethal force" has not been defined by the Nevada Legislature within the context of NRS 200.033, but it is clear from other statutes that use the term "lethal" is limited to situations where death is caused or contemplated. See NRS 176.355 ("The judgment of death must be inflicted by an injection of a lethal drug."); NRS 202.550 ("It is unlawful for any person to place any lethal bait on the public domain."); NRS 202.443 ("'Delivery system' means any apparatus, equipment, implement, device or means of delivery which is specifically designed to send, disperse, release, discharge or disseminate any weapon of mass destruction, any biological agent, chemical agent, radioactive agent or other lethal agent or any toxin."). There is no statutory basis, or other basis in law, for making the monumental leap that the State jumped to in concluding that intent to commit a battery with a bat is the same as the intent to kill or to use lethal force.[1]

Most critically, the State's theory is not set forth in either the Indictment or the Notices of Intent, but instead was presented by the State in its opposition to the motion to strike the Notices of Intent. Exhibit 6 at page 16-17. There is no rule or statute which permits the State to supplement a Notice of Intent to Seek Death Penalty by presenting new theories and factual contentions in a pleading. Permitting such would

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[1]The State does not assert that Petitioner Espindola had knowledge of or was in any way associated with a bat. Petitioner Hidalgo does not in any way concede that he actually requested that Hadland be hit with bats or placed in garbage sacks. The State does not claim that a bat was ever located or used. These factual issues are not properly considered, however, because they are not alleged in the Notices of Intent.

violate SCR 250(4)(c), which mandates that facts in support of the aggravating circumstances alleged by the State be set forth in the Notice of Intent. "[A] defendant cannot be forced to gather facts and deduce the State's theory for an aggravating circumstance from sources outside the notice of intent to seek death. Under SCR 250, the specific supporting facts are to be stated directly in the notice itself." Redeker, 121 Nev. __, 127 P.3d at 523.

The State's legal analysis in the district court failed to address recent and controlling authority by this Court that is applicable to cases involving specific intent offenses and vicarious liability. In the Motion to Dismiss, Petitioners cited to Sharma v. State, 118 Nev. 648, 56 P. 3d 868 (2002), and noted that to be found guilty of a specific intent offense on an aiding and abetting theory, the aider and abettor must have the same intent as required of the principal. That is, to be convicted of first degree murder and sentenced to death based upon a finding that a defendant aided and abetted and intended that a killing take place or that lethal force will be employed, the State must prove that the defendant specifically intended that the victim be killed or that lethal force be employed against the victim. As noted above, Sharma's holding was reaffirmed and expanded to include co-conspirator liability in Bolden v. State, 121 Nev. __, 124 P.3d 191 (2005). This Court explained its rationale:

> [O]ur overarching concern in Sharma centered on the fact that the natural and probable consequences doctrine regarding accomplice liability permits a defendant to be convicted of a specific intent crime where he or she did not possess the statutory intent required for the offense. We are of the view that vicarious coconspirator liability for the specific intent crimes of another, based on the natural and probable consequences doctrine, presents the same problem addressed in Sharma, and we conclude that Sharma's rationale applies with equal force under the circumstances of the instant case. To convict Bolden of burglary and kidnapping, the State was required to prove under Nevada law that he had the specific intent to commit those offenses. Holding otherwise would allow the State to sidestep the statutory specific intent required to prove those offenses.

Id. at __, 124 P.3d at 200. The State failed to address either Sharma or Bolden despite

their clear applicability to the facts of this case.

The State sets forth the theory in its Notices of Intent that an aggravating circumstance may be established based upon an allegation of intent to commit a battery, even though there is no statutory basis for permitting this theory to be presented to the jury. Despite the clear requirement that the State prove Petitioners acted with specific intent to establish the State's allegation of premeditated murder (there is no felony murder charge), the Notices of Intent set forth theories which do not require proof of the specific intent to kill and are therefore invalid.

This aggravating circumstance is also invalid because it fails to set forth a plain, concise and definite written statement of the essential facts of the aggravating circumstance alleged by the State. The Sixth Amendment to the United States Constitution provides that a criminal defendant is entitled to be informed of the nature and cause of any and all accusations against him. In conformity therewith, NRS 173.075(1) expressly requires that an indictment or information contain a "plain, concise and definite written statement of the essential facts constituting the offense charged." See also Sheriff v. Levinson, 95 Nev. 436, 596 P.2d 232 (1979). The charging document should also contain, when possible, a description of the means by which the defendant committed the offense(s). NRS 173.075(2). This Court first contemplated the mandate of NRS 173.075 in Simpson v. District Court, 88 Nev. 654, 660, 503 P.2d 1225, 1229 (1972). Simpson was charged with murder by way of a Grand Jury Indictment. Simpson's Indictment alleged that she, "... on or about May 27, 1970, did wilfully, unlawfully, feloniously and with malice aforethought kill Amber Simpson, a human being." Id. at 655, 503 P.2d at 1226. At issue was whether Simpson's charges met the pleading requirements of NRS 173.075(2). This Court held that, because the indictment failed to specify the conduct which gave rise to the Simpson's charges, the indictment was insufficient under NRS 173.075. Accordingly,

the Simpson Court issued a permanent writ of prohibition, disallowing further proceedings based on the defective indictment. Id. at 661.

Elaborating on the pleading requirements necessary for an Indictment to meet constitutional muster, the Simpson Court held that:

> "Whether at common law or under statute, the accusation must include a characterization of the crime and such description of the particular act alleged to have been committed by the accused as will enable him properly to defend against the accusation, and the description of the offense must be sufficiently full and complete to accord to the accused his constitutional right to due process of law."

Id. at 660 (quoting 4 R. Anderson, Wharton's Criminal Law and Procedure, Section 1760, at 553 (1957)). This Court further noted that the fact that an accused has access to transcripts of the proceedings before the Grand Jury does not eliminate the necessity that an Indictment be definite. Id. This Court reasoned that such indefinite pleading would necessarily allow the prosecution absolute freedom to change theories at will, thus denying an accused the fundamental rights the Nevada legislature intended a definite Indictment to secure. Id.

The pleading requirement described above is reiterated in Nevada Supreme Court Rule 250, which governs capital offenses. "[A] defendant cannot be forced to gather facts and deduce the State's theory for an aggravating circumstance from sources outside the notice of intent to seek death. Under SCR 250, the specific supporting facts are to be stated directly in the notice itself." Redeker, 122 Nev. at __, 127 P.3d at 523. Here, the State sets forth theories and conclusions, but it fails to allege specific facts in support of those theories and conclusions, as required by SCR 250 and the Due Process clauses of the state and federal constitutions.

Under SCR 250, as well as NRS 173.075, Simpson and Redeker, the instant pecuniary gain aggravator must be dismissed. It contains absolutely no assertion of a factual basis as to how the alleged murder of Timothy Hadland furthered the

business of the Palomino Club. Petitioners are left to guess how the State is going to allege that the business was furthered. A simple allegation with no specificity is not sufficient to put Petitioners on notice. Further, the purpose of the Notice is to provide defendants just that. The pecuniary gain aggravator provides too many variables. With numerous "and/or" combinations, it is impossible for Petitioners and their counsel to know what allegation they are to defend against or exactly who was to "gain." Due to insufficient notice, Petitioners have not received the process due to them under the Nevada statutory scheme or the United States and/or Nevada Constitutions. Absent the requisite factual assertions, the Death Notice is constitutionally defective.

In the district court the State attempted to justify its Notice of Intent by arguing that SCR 250(4)(c) does not mandate the disclosure argued to be required by the Petitioners. Exhibit 6, State's Opposition at page 34. The State was wrong. SCR 250(4)(c) provides the following:

> No later than 30 days after the filing of an information or indictment, the state must file in the district court a notice of intent to seek the death penalty. The notice must allege all aggravating circumstances which the state intends to prove *and allege with specificity the facts on which the state will rely to prove each aggravating circumstance.*

The State argued that it should be relieved of its obligations under SCR 250(4)(c) because SCR 250(4)(f) requires a detailed list of evidence be submitted at least 15 days prior to trial. Exhibit 6 State's Opposition at page 34. The State is wrong in its analysis of this Court's rules. SCR 250(4)(c) specifically addresses aggravating circumstances while SCR 250(4)(f) addresses all evidence to be presented at the penalty hearing, including character or "other" evidence that is not relevant to the alleged aggravators. See Mason v. State, 118 Nev. 554, 561-62, 51 P.3d 521, 525-26 (2002). The State's obligations under subsection (c) are not modified or lessened by its obligations under subsection (f).

In the district court, the State next provided a description of its various theories as to how NRS 200.033(6) applies to Petitioners. Some of these allegations are included in the State's Notice of Intent to Seek Death, while others are not. None of the State's descriptions, however, meet the requirement of SCR 250(c)(4) that the State allege "all aggravating circumstances which the state intends to prove *and allege with specificity the facts on which the state will rely* to prove each aggravating circumstance." The State asserted in the district court, as it did in its Notices of Intent to Seek Death, that Mr. Hadland was killed to further the business of the Palomino Club, but the State failed to offer any theory as to how the Palomino Club's business would or might be furthered by his death. No facts were alleged, no witnesses were identified, and no theory of financial gain was set forth. As a result, the defendants are unable to prepare any meaningful defense to the State's vague allegation. The State's allegations were also non-existent, or at least vague, as to whether the alleged plan to make payments associated with the incident were made prior to or after Mr. Hadland's death, and are non-existent, or at least vague, as to whether payment was intended for a battery or intended for a killing.

The aggravator must be stricken from the State's Notices of Intent to seek death based upon the State's failure to comply with SCR 250(4)(c) and failure to provide the defendants with their constitutional right to adequate notice of the charges against them.

The State's Prior Violent Felony Aggravators Are Invalid

The two aggravating circumstances which allege that Petitioners committed a felony with use or threat of harm are invalid and mut be stricken from the State's Notices of Intent because NRS 200.033 (b)(2) is unconstitutionally vague and ambiguous; and the offense of solicitation for murder, especially when made to a police agent, is not a felony involving the use or threat of violence.

The relevant Eighth Amendment law is well defined. First, a statutory aggravating factor is unconstitutionally vague if it fails to furnish principled guidance for the choice between death and a lesser penalty. See e.g., Maynard v. Cartwright, 486 U.S. 356, 361-364 (1988); Godfrey v. Georgia, 446 U.S. 420, 427-433 (1980). Second, in a "weighing" state, such as Nevada, where the aggravating and mitigating factors are balanced against each other, it is constitutional error for the sentencer to give weight to an unconstitutionally vague aggravating factor, even if other, valid aggravating factors obtain. See e.g. Stringer v. Black, 503 U.S. 222, 229-732 (1992); Clemons, 494 U.S. at 748-752. Third, a state appellate court may rely upon an adequate narrowing construction of the factor in curing this error. See Lewis v. Jeffers, 497 U.S. 764 (1990). Finally, in federal habeas corpus proceedings, the state court's application of the narrowing construction should be reviewed under the "rational fact finder" standard of Jackson v. Virginia, 443 U.S. 307 (1979). See Lewis, 497 U.S. at 781.

Circumstances aggravating first-degree murder are codified in NRS 200.033. Section 2 in pertinent part to this argument states:

> The murder was committed by a person who is or has been convicted of:
> (b) A felony ***involving the use or threat of violence to the person of another*** and the provisions of subsection 4 do not otherwise apply to that felony.

Subsection 4 enumerates the felonies that would constitute the felony murder rule. Specifically this subsection deals with if the murder was committed while engaged or attempting to engage in the following felonies: robbery, burglary, invasion of the home, kidnapping and arson in the first degree. Noticeably absent from this list is battery.

In a concurring opinion in Leslie v. Warden, 118 Nev. 773, 59 P.3d 440 (2002), Justice Maupin voiced his concern over NRS 200.033(4) when he wrote:

> To meet constitutional muster, a capital sentencing scheme "must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." The question is, does the felony aggravator set forth in NRS 200.033(4) genuinely narrow the death eligibility of felony murderers? First, compared to the felony basis for felony murder, NRS 200.033(4) limits somewhat the felonies that serve to aggravate a murder. **But the felonies it includes are those most likely to underlie felony murder in the first place.** Second, the aggravator applies only if the defendant "killed or attempted to kill" the victim or "knew or had reason to know that life would be taken or lethal force used." This is narrower than felony murder, which in Nevada requires only the intent to commit the underlying felony. This notwithstanding, it is quite arguable that Nevada's felony murder aggravator, standing alone as a basis for seeking the death penalty, fails to genuinely narrow the death eligibility...

Id. at 774-775, 59 P.3d at 448.

This Court has never addressed whether NRS. 200.033 (2)(b) is narrowly defined. However, if, as Justice Maupin has written, section (4) of the statute is not genuinely narrow then there is a strong argument that Section (2)(b) is not genuinely narrow. As stated above, Section (4) specifically states that if the murder was committed while the person was engaged in several enumerated felonies then that crime could be used as an aggravator under this section. Unlike Section (4), section (2) (b) does not enumerate any specific felonies. It simply states a felony involving the threat or use of violence. One is left to simply guess what types of felonies fall under this category. Significant to the instant case, this Court has never addressed whether the specific crime of Solicitation for Murder is considered a felony with the use or threat of violence. The statute is unconstitutionally vague both on its face and in its application to this case. Under these circumstances the aggravating circumstances of solicitation to murder are invalid.

The State argued in the district court that "a rule promulgated to determine whether a person has a propensity for violence is not unconstitutionally vague or ambiguous," but failed to address the issue presented: what is the meaning of "use or threat of violence" and does the phrase provide a principled guide for the choice

between death and a lesser penalty as required by Maynard v. Cartwright, 486 U.S. 356, 361-364 (1988) and Godfrey v. Georgia, 446 U.S. 420 (1980)? A statute violates due process if it is so vague that it fails to give persons of ordinary intelligence fair notice of what conduct is prohibited and fails to provide law enforcement officials with adequate guidelines to prevent discriminatory enforcement." Hernandez v. State, 118 Nev. 513, 524, 50 P.3d 1100, 1108 (2002). In Bouie v. City of Columbia, 378 U.S. 347, 350-51 (1964), the United States Supreme Court explained that it is a basic principle that a criminal statute must give fair warning of the conduct that makes it a crime. (Citing United States v. Harriss, 347 U.S. 612, 617 (1954) (cited in Bush v. Gore, 531 U.S. 98 (2000)). "[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." Connally v. General Const. Co., 269 U.S. 385, 391 (1926). "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids." Lanzetta v. New Jersey, 306 U.S. 451, 453 n.3 (1939). While these principles are generally applied to statutes that are vague in the language of the statute itself, they are equally applicable to cases where a statute that is precise on its face has been unforeseeably and retroactively expanded by judicial construction. Bouie, 378 U.S. at 352 (citing Pierce v. United States, 314 U.S. 306, 311 (1941)). Construction of a statute which unexpectedly broadens its application operates precisely like an *ex post facto* law and is therefore barred from retroactive application to pending cases under the due process clause. Id. at 353-54. Thus, even if this Court were to find solicitation to commit murder to be an eligible qualifying felony under NRS 200.033, the ruling could not be applied to this case.

The State summarily announced in the district court that NRS 200.033(2)(b) "significantly limits the number of people eligible for the death penalty as this circumstance isn't usually tied to the facts underlying the murder charge." Exhibit 6, State's Opposition at page 36. The State provided no citation to case authority and no analysis of its conclusion. The State failed to address the fact that a great number of people charged with first degree murder have convictions for prior violent offenses committed before the time of the murder or are charged with violent acts contemporaneously with the murder. Thus, the narrowing criteria is not satisfied.

The State failed to provide any definition of "use or threat of violence," failed to provide any case authority narrowly interpreting this broad language, and failed to establish that this aggravator meets the constitutional requirements of notice and narrowing. Accordingly, it should be stricken from the State's Notice of Intent to Seek the Death Penalty.

In ruling on this issue, the district court first acknowledged that it was not familiar with the briefing on this issue and had not read the Florida cases cited by Petitioners. Exhibit 11 at page 42. Nonetheless, the district court made its ruling after the following exchange:

The Court:	When someone solicits someone else to kill, orally, that's not sufficient?
Mr. Digiacomo:	They say that's not a crime of violence. That's their argument.
The Court:	It's not a crime of violence?
Mr.Digiacomo:	That's what their argument to the Court was.
The Court:	When someone is taped, as we see these living things on tv, where the husband or wife, disgruntled, is trying to contract with someone to kill the other party and they are in a car and it's being taped and they are saying "I want him dead. I want him dead; here's how you do it and here is what you get for it," that's not a crime?

Ms. Thomas That's correct.[2]

The Court: What court in this land came up with that?

Ms. Thomas: The Supreme Court of Arizona, the Supreme Court of Florida.

The Court: That ain't gonna fly here.

Exhibit 11 at pages 42-43.

The aggravating circumstances are also invalid because solicitation to commit murder, both in general and under the facts asserted here, is not a felony involving the use or threat of violence.

NRS 199.500(2) states:

> A person who counsels, hires, commands or otherwise solicits another to commit murder, if no criminal act is committed as a result of the solicitation is guilty of category B felony.

The crime of solicitation is complete once the request is made. Moran v. Schwarz, 108 Nev. 200, 202, 826 P.2d 952, 954 (1992). Unlike other criminal offenses, in the crime of **solicitation,** "the harm *is* the asking -- nothing more need be proven." Id at 203, 826 P.2d at 954 (citing People v. Miley, 158 Cal. App. 3d 25, 34 (Ct. App. 1984)). There need be no real danger of the commission of the completed offense or of the person solicited being receptive to the invitation. It amounts to little more than speaking ones mind about wanting someone killed. Unlike a conspiracy to commit murder, where an agreement to complete the offense is involved, there is no threat of actual harm at the time of the solicitation, even to someone who is not a police operative. In a sense it is "half a conspiracy" or "half a contract", waiting for a willing person to accept or agree to fulfill the wishes of the desirous person.

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[2]Petitioners acknowledge that solicitation for murder is a criminal offense. Clearly from the context, Petitioners' counsel intended her answer of "that's correct" to mean that solicitation for murder is not crime involving violence or the threat of violence within the meaning of the aggravating circumstance.

In Wood v. State, 115 Nev. 344, 350-351, 990 P.2d 786, 790 (1999) this Court held that if a defendant is convicted of conspiracy to commit murder or attempted murder, he cannot be convicted of solicitation to commit murder for the same acts. Noting that when a person solicits another to commit murder and the second person agrees, a conspiracy is formed and NRS 199.480(1) governs, this Court held:

> A conspiracy is a criminal act, which triggers the exclusionary clause in the solicitation statute. In State v. Koseck, 113 Nev. 477, 479, 936 P.2d 836, 837 (1997), we held that, "[w]hen a defendant receives multiple convictions based on a single act, this court will reverse 'redundant convictions that do not comport with legislative intent.'" (Citation omitted.) Based on the exclusionary language contained in NRS 199.500(2), on remand, Wood could be convicted of solicitation to commit murder in these circumstances only if he is not convicted of conspiracy or attempted murder for the attack on Lisa.

See also People v. Vieira, 35 Cal. 4th 264, 106 P. 3d 990, 1009 (Cal. 2005) (holding that conspiracy to commit murder is not a death eligible crime).

In reviewing Nevada case law addressing this aggravating circumstance, there are no cases where solicitation has been considered a "felony with use or threat of use of force." In determining what is a felony with use or threat of violence Nevada has stated the following crimes fall in that category: attempt murder with use of a deadly weapon (Blake v. State, 121 Nev. __, 121 P.3d 567 (2005); Weber v. State, 121 Nev. __, 119 P.3d 107 (2005)), second-degree assault (Dennis v. State, 116 Nev. 1075, 13 P.3d 434 (2000)), attempted assault with a deadly weapon (Rhyne v. State, 118 Nev. 1, 38 P.3d 163 (2002)), aggravated sexual assault (Kaczmarek v. State, 120 Nev. __, 91 P.3d 16 (2004)), sexual assault of a child (Weber), armed robbery (Kaczmarek), robbery (State v. Powell, 122 Nev. __, 138 P.3d 453 (2006)), attempted robbery (Thomas v. State, 120 Nev. __, 83 P.3d 818 (2004), kidnapping (Petrocelli v. Angelone, 248 F.3d 877 (9th Cir. 2001); Weber), second degree arson (Dennis, but see Redeker, 127 P.3d 520 in which this Court found that this offense is not always a crime of violence), battery causing substantial bodily harm (Thomas), escape from

federal custody while threatening a jailer with a shank (State v. Haberstroh, 119 Nev. 173, 69 P.3d 676 (2003)), and battery by a prisoner (Rhyne). None of these are inchoate offenses and the harm or threat of harm is direct and certain to flow from the criminal act itself. They are not crimes that are committed with words but with physical deeds that are clearly and imminently dangerous to a victim who is present at its place of commission. Not so with solicitation. It is noteworthy that both conspiracy to commit murder and solicitation of murder are Class B felonies. In terms of the legislative intent regarding their punishment, they are identical and given substantially lesser punitive treatment than murder and other violent offenses. Likewise solicitation is not considered so inherently likely to lead to a murder that it is a statutory predicate for a felony-murder under NRS 200.033(4).

Other states that have directly addressed this issue have concluded that solicitation for murder does not constitute an aggravating circumstance under statutes similar to and identical to NRS 200.033(2). In Lopez v. State, 864 So. 2d 1151 (Fla. Dist. Ct. App. 2003) the trial court ruled that solicitation to commit murder was encompassed within the catch-all provision of a Florida Statute that permitted enhancement of a sentence for commission of a "felony that involved the use or threat of physical force or violence against an individual." On appeal the Court reversed and remanded for a new sentencing hearing. In holding that violence is not an inherent element of solicitation to commit murder, the Court relied upon Elam v. State, 636 So. 2d 1312 (Fla. 1994) wherein the Supreme Court of Florida **rejected solicitation to commit murder as a violent felony in the context of an analysis of aggravating circumstances to support the imposition of the death penalty**. The Lopez court also relied upon Duque v. State, 526 So. 2d 1079 (Fla. Dist. Ct. App. 1988) wherein the Court held that committing the offense of solicitation to commit murder did not itself involve the use of a firearm, deadly weapon, or intentional violence and thus

solicitation to commit murder is not a felony that involves the use or threat of violence. The Court in Lopez held:

> The gist of criminal solicitation is enticement of another to commit a crime. No agreement is needed, and criminal solicitation is committed even though the person solicited would never have acquiesced to the scheme set forth by the defendant. Thus, the general nature of the crime of solicitation lends support to the conclusion that solicitation, by itself, does not involve the threat of violence even if the crime solicited is a violent crime.

864 So. 2d at 1153. Consideration of Florida law is especially persuasive as to this issue because Nevada's death penalty statute is almost identical to Florida's statute. See Calambro v. State, 114 Nev. 106, 113, 952 P.2d 946, 950 (1998).

In the district court, the State argued that Florida was the only state to adopt Petitioners' position, that Florida's position was not persuasive, and that other states had found solicitation to be a proper basis for the aggravating circumstance. There was no merit to the State's argument. The State cited to Woodruff v. State, 846 P.2d 1124, 1143 (Okl. Cr. App. 1993) in support of its claim that Solicitation is a violent felony. Exhibit 6, State's Opposition at page 38. A review of the Woodruff opinion, however, reveals that the defendant there stipulated that the prior offense was a violent felony and the issue considered by the Oklahoma court concerned double jeopardy implications that are wholly irrelevant here. The Oklahoma court neither considered nor ruled upon the issue presented here. Likewise, in People v. Edelbacher, 766 P.2d 1 (Cal. 1989), another case cited by the State in its opposition, the California Supreme Court stated that a conviction for solicitation for murder was an aggravating circumstance, but it mentioned this as a historical fact and did not address in any way the issue presented here as it was not presented as an issue by the parties to that case.

Contrary to the State's argument below, Florida is not the only State to address this issue. In State v. Ysea, 956 P.2d 499 (Ariz. 1998), the Supreme Court of Arizona squarely addressed this issue:

> [T]he mere solicitation to commit an offense cannot be equated with the underlying offense. The solicitation statute criminalizes conduct that "encourages, requests or solicits another person to engage" in a felony or misdemeanor. See A.R.S. § 13-1002(A). The crime is completed by the solicitation and the "crime solicited need not be committed." W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW 414, 420 (1972) (cited with approval in State v. Johnson, 640 P.2d 861, 864 n.1 (1982)). Thus, solicitation is a crime of communication, not violence, and the nature of the crime solicited does not transform the crime of solicitation into an aggravating circumstance.
>
> . . . .
>
> . . . . [S]olicitation is a preparatory offense, complete upon the act of solicitation itself, and could not have been considered a crime of violence even if the act solicited would have qualified as such a crime.

Ysea, 956 P.2d at 503.

Likewise, the State's citation to Weber v. State, 121 Nev. __, 119 P.3d 107 (2005) was also misplaced. In Weber, this Court noted that there were implicit threats of violence for offenses in which the defendant sexually assaulted a minor child based upon prior incidents where the victim experienced trauma and violence, the defendant was much superior to the victim in physical strength and was older than the victim, and the defendant kicked in the door of the victim's home during the relevant time period.[3] Id. at 129. None of these factors are present here.

The fact remains that there is nothing within the plain language of this statute that suggests the aggravator would be applied to the inchoate offense of solicitation. Although this aggravator has been addressed in 54 published opinions since the reinstatement of the death penalty following Furman and the enactment of NRS 200.033, not a single case has involved a solicitation offense. In an extensive analysis of cases throughout the country that discuss this aggravating circumstance, there is no

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[3]The State's reference to Weber is especially baffling as it involved an actual attack upon a child, which caused actual harm, whereas the mere words at issue here, which were said to a police agent, involved no actual violence or actual threat of violence and no injury or harm was caused to anyone as a result.

discussion of solicitation offenses. See *Sufficiency of Evidence, for Purposes of Death Penalty, to Establish Statutory Aggravating Circumstance That Defendant Was Previously Convicted of or Committed Other Violent Offense, Had History of Violent Conduct, Posed Continuing Threat To Society, And the Like - Post-Gregg Cases, 65 A.L.R.4th 838 (1988) (updated November 2005).* The absence of such discussion, in the context of a thorough 130 page article, suggests that use of solicitation offenses to satisfy this aggravator is rare at best.

It is clear that the act of asking another to perform something is not itself an act that constitutes violence or an imminent threat of harm or violence. A request by one person to another is simply just a request, an exploration of interest. The minute one person makes that request the crime of solicitation has occurred and is finished. The act of asking someone to complete a task does not require a threat of violence. The recipient has the choice to oblige or deny the request. Moreover, on the facts of this case, there was no real threat of violence to anyone. At the time the alleged solicitation occurred, DeAngelo Carroll was a police agent. As such the completed crime of murder or even conspiracy to commit murder could not have occurred as a matter of law. In Sears v. United States, 343 F.2d 139, 142 (5th Cir. 1965), the Court established the rule that, "as it takes two to conspire, there can be no indictable conspiracy with a government informer who secretly intends to frustrate the conspiracy". When two persons merely pretend to agree, the other party, whatever he may believe, is in fact not conspiring with anyone. Although he may possess the requisite criminal intent, there can be no criminal act.

There are certain dangers with the crime of conspiracy. "Such dangers however are non-existent when a person 'conspires' only with a government agent. There is no continuing criminal enterprise and ordinarily no inculcation of criminal knowledge and practices. Preventative intervention by law enforcement officers also is not a

significant problem in such circumstances. The agent, as part of the 'conspiracy,' is quite capable of monitoring the situation in order to prevent the completion of the contemplated criminal plan; in short, no cloak of secrecy surrounds any agreement to commit the criminal acts." United States v. Escobar de Bright, 742 F.2d 1196, 1200 (9th Cir. 1984).

This Court has also held that an informant is a feigned accomplice and therefore cannot be a coconspirator. Myatt v. Nevada, 101 Nev. 761, 763, 710 P.2d 720, 722 (1985). When one of two persons merely pretends to agree, the other party, whatever he may believe, is in fact not conspiring with anyone. Johnson v. Sheriff, Clark County, 91 Nev. 161, 532 P.2d 1037 (1975) (citing Delaney v. State, 51 S.W.2d 485 (Tenn.1932)). There is no conspiracy where the assent was feigned and not real, and that at no time was there any intention to assist in the unlawful enterprise. The danger to society of a conspiracy is not present. The same is true when a solicitation is made to a person unknown to the requester to be a police operative. The situation is feigned and not real. The informant's mere presence frustrates any potential harm that can be done. The fact that Carroll was a police operative and supplying the police with recordings of the discussions makes it clear that nothing would have come out of the alleged request. Therefore, it is clear that solicitation, especially in this context, cannot be considered a crime that involves use or threat of violence.

When the language of a statute is clear, the courts ascribe to the statute its plain meaning and do not look beyond its language. Lader v. Warden, 121 Nev. __, 120 P.3d 1164, 1167 (2005). However, when the language of a statute is ambiguous, the intent of the Legislature is controlling. In such instances, the courts will interpret the statute's language in accordance with reason and public policy. Id. It is a maximum of statutory construction that when the scope of a criminal statute is at issue, ambiguity should be resolved in favor of the defendant. Id. (citing Demosthenes v.

Williams, 97 Nev. 611, 614, 637 P.2d 1203, 1204 (1981)). Here, the language of the statute is not plain and there is no clear indication that it applies to solicitation offenses. There is also nothing in the Legislative history of this aggravator suggesting that it should be applied to solicitation offenses.

Reason and public policy mandate a finding that aggravator is not applicable to solicitation offenses. It is important to remember the purpose of aggravating circumstances. "The Eighth Amendment requires, among other things, that 'a capital sentencing scheme must "genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.'" Loving v. United States, 517 U.S. 748, 755 (1996) (quoting Lowenfield v. Phelps, 484 U.S. 231, 244 (1988), in turn quoting Zant v. Stephens, 462 U.S. 862, 877 (1983)). "A capital sentencing scheme must, in short, provide a 'meaningful basis for distinguishing the few cases in which [the penalty] is imposed for the many cases in which it is not.'" Godfrey, 446 U.S. at 428 (quoting Gregg, 428 U.S. at 188). The question here is not whether solicitation to commit murder is bad or whether it should be a crime or whether a person committing such an offense should be punished. The question here is does inclusion of this inchoate offense, which involved mere words and no agreement, no preparation and no actual violent act further the narrowing requirement of the Eighth Amendment. Reason and public policy demand a finding that such a broad application of this aggravator does not further the purpose of our death penalty scheme and the mandate that it meaningfully select "the worst of the worst." In any event, when the scope of a criminal statute is at issue, ambiguity must be resolved in favor of the defendant. Here, this ambiguity must be resolved by a finding that the aggravator does not apply to solicitation.

CONCLUSION

For the above reasons, each and all of the aggravators in the Notice of Intent to Seek the Death Penalty must be stricken.

Dated this 12th day of October, 2006.

Dominic P. Gentile
JoNell Thomas

State v. Hidalgo
State v. Espindola
District Court Case No. C212667

Index

Exhibit	Date	Document
1	9/22/2006	Verification
2	9/22/2006	Proof of Service
3	6/20/2005	Information
4	7/6/2005	Notices of Intent to Seek Death Penalty for Defendants Hidalgo and Espindola
5	12/12/2005	Motion to Strike Notice of Intent to Seek Death Penalty
6	12/21/2005	State's Oppostition to Defendants Hidalgo's and Espindola's Motion to Strike Notice of Intent to Seek Death Penalty
7	1/5/2006	Reply to State's Opposition to Motion to Strike Notice of Intent to Seek Death Penalty
8	3/15/2006	Notice of Supplemental Authority in Support of Defendant's Motion to Strike Notice of Intent to Seek Death Penalty
9	3/17/2006	Reporter's Transcript of Proceedings
10	8/31/2006	Reporter's Transcript of Proceedings
11	9/8/2006	Reporter's Transcript of Proceedings