

ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEVADA

LUIS HIDALGO, III and
ANABEL ESPINDOLA,

Petitioners,

vs.

THE EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA, IN
AND FOR THE COUNTY OF CLARK, THE
HONORABLE DONALD M. MOSLEY,
DISTRICT JUDGE

Respondents,

THE STATE OF NEVADA,
Real Party in Interest.

Case No. 48233

FILED

NOV 14 2006

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**ANSWER TO PETITION FOR WRIT OF MANDAMUS
OR, IN THE ALTERNATIVE, WRIT OF PROHIBITION**

JONELL THOMAS, ESQ.
Nevada Bar No. 477 1
616 South 8th Street
Las Vegas, Nevada 89101
(702) 471-6565

Counsel for Anabel Espindola

DAVID ROGER
Clark County District Attorney
Nevada Bar #002781
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500

DOMINIC P. GENTILE
Nevada Bar No. 1923
3960 Howard Hughes Pkwy, #850
Las Vegas, Nevada 89109

Counsel for Luis Hidalgo III.

GEORGE J. CHANOS
Nevada Attorney General
100 North Carson Street
Carson City, Nevada 89701-4717

Counsel for Real Party in Interest

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4 LUIS HIDALGO, III and
5 ANABEL ESPINDOLA,
6
7 Petitioners,

8 vs.

9 THE EIGHTH JUDICIAL DISTRICT
10 COURT OF THE STATE OF NEVADA, IN
11 AND FOR THE COUNTY OF CLARK, THE
12 HONORABLE DONALD M. MOSLEY,
13 DISTRICT JUDGE

14 Respondents,

15 THE STATE OF NEVADA,
16 Real Party in Interest.

Case No. 48233


17 **ANSWER TO PETITION FOR WRIT OF MANDAMUS**
18 **OR, IN THE ALTERNATIVE, WRIT OF PROHIBITION**

19 COMES NOW, the State of Nevada, Real Party in Interest, by DAVID
20 ROGER, District Attorney, through his deputy, JAMES TUFTELAND, on behalf of
21 the above-named respondents and submits this Answer to Petition for Writ of
22 Mandamus in obedience to this Court's order filed October 20, 2006 in the above-
23 captioned case. This Answer is based on the following memorandum and all papers
24 and pleadings on file herein.

25 Dated this 9th day of November, 2006.

26 DAVID ROGER
27 Clark County District Attorney

28 BY


JAMES TUFTELAND
Chief Deputy District Attorney
Nevada Bar #000439
Attorney for Respondent

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**MEMORANDUM OF
POINTS AND AUTHORITIES**

STATEMENT OF FACTS

Just before midnight on May 19, 2005, the Las Vegas Metropolitan Police Department (LVMPD) received a 9-1-1 call concerning a homicide on North Shore Road near Lake Mead (Reporter's Transcript of the Preliminary Hearing (hereinafter "RTP"), 146). Upon arrival, they found the body of Timothy Hadland lying in the middle of the road with an apparent gunshot wound to the head. (RTP, 151). A later autopsy would reveal that the victim suffered two gunshot wounds to the head. (RTP, 157).

Evidence Connects the Palomino Club to the Murder

Just south of the body were several flyers from a strip club in North Las Vegas called the Palomino Club. Approximately thirty feet in front of the body, Hadland's Kia Sportage SUV was found. (RTP, 152). Inside, police located a cell phone. (RTP, 153). On May 19, 2005, at approximately 11:27 p.m., the phone received a direct Nextel connect from a number identified as "Deangelo." (RTP, 154). Based on an interview with Hadland's girlfriend, "Deangelo" was determined to be Defendant Deangelo Carroll.

During the course of the investigation, police learned that the number identified on the cell phone as Deangelo was registered to Defendant Anabel Espindola, (Espindola). The listed address was Simone's Auto Plaza, 6770 Bermuda, Las Vegas, Nevada. (RTP, 158). A computer search revealed that Espindola was a key employee at the Palomino Club. (RTP, 159).

Due to the fact that much of the information was linked to the Palomino Club, detectives contacted the owner of the club, Luis Hidalgo, Jr. (Mr. H.), the owner of the club. (RTP, 160). Mr. H. asked that detectives return when the floor manager, Ariel, could help them. (RTP, 162). From Ariel, police learned that Deangelo Carroll was a current employee of the Palomino Club. (RTP, 163). Police also learned that

1 Hadland was a former employee. (RTP, 163). While detectives were interviewing
2 Ariel, Defendant Carroll arrived at the club. (RTP 164). Defendant Carroll agreed to
3 accompany detectives to the police station where he provided a taped statement. (RTP
4 164).

5 The Phone Call and Offer

6 During his interview with police, Defendant Carroll explained that prior to
7 arriving at work on May 19, 2005 he received a call from Luis Hidalgo III.¹
8 Defendant Hidalgo told Carroll to bring two garbage bags and a baseball bat. (Exhibit
9 1, 58). Upon arrival at the Palomino Club, Carroll was called into the office by Mr.
10 H. In the presence of Espindola, Mr. H. explained that the victim "was puttin' bad
11 shit on his club and didn't like, so he tried to tell us, what, what, what he said is if you
12 guys don't knock him out, at first he wanted us to beat him up, then he said that he
13 wanted T.J.² knocked off." (Exhibit 1, 56). Mr. H explained that Hidalgo was very
14 upset with the victim and wanted Carroll to "go take care of T.J." (Exhibit 1, 88).
15 Additionally, Mr. H was offering cash for the people who actually killed T.J. (Exhibit
16 1, 61).

17 During the ride to the lake, Espindola contacted Carroll and told him "if [T.J's]
18 by himself, then do him, if he isn't by himself, then just fuck him up, fuck him up and
19 fuck up whoever's with him. (Exhibit 1, 92). Thereafter, the victim was lured to a
20 remote location and executed by Kenneth Counts. After the killing, Counts demanded
21 \$6000.00 for his services. Espindola provided the money to Carroll to pay Counts.

22 Carroll indicated that the motive behind killing T.J. was the allegation that T.J.
23 was stealing from the club. (Exhibit 1, 59). Carroll received \$100 for his
24 participation.

25 Rontae Zone is a nineteen year old friend of Deangelo Carroll. (R.T. 16). In
26 May 2005, Rontae began working with Carroll as a flyer boy for the Palomino Club.

27 ¹ Also known as "Little Lou"

28 ² T.J. is the victim Timothy Hadland.

1 (RTP, 17). A flyer boy passes out flyers and pamphlets to cab stops. The flyers
2 come in a variety of colors. (RTP, 18). Rontae worked with Defendant Carroll
3 approximately four (4) to five (5) times. In order to distribute the flyers, Defendant
4 Carroll drove a white Chevy Astro van. On the first night, Rontae worked with
5 Defendant Carroll and his cousin, Michael. (RTP, 19). Rontae received twenty
6 dollars (\$20) for his services. After work was over, Rontae stayed at Defendant
7 Carroll's home. (RTP, 20).

8 On May 19th, Rontae and Defendant Carroll were joined by "J.J.," later
9 identified as Defendant Jayson Taoipu. (RTP, 25). While out promoting, Defendant
10 Carroll told Rontae and Jayson that "Mr. H" wanted Defendant Carroll to kill
11 someone. (RTP, p. 26). Rontae told Defendant Carroll that he was not willing to
12 participate and specifically told him he would not participate. (RTP, 27). Defendant
13 Taoipu, on the other hand, stated that he was willing to do it. (RTP, 28). Based upon
14 that, Defendant Carroll gave Defendant Taoipu a .22 caliber revolver. Defendant
15 Carroll tried to give Rontae the bullets to the gun, but Rontae wanted nothing to do
16 with it and gave the bullets back to Defendant Taoipu. (RTP, 29).

17 Thereafter, the group went out to promote and pass out flyers. After passing
18 out flyers, the group returned to Defendant Carroll's house. (RTP, 30). After a while,
19 Defendant Carroll said it was time to go back to work. Concerned that he did not
20 want to be involved in anything illegal, both Rontae and his girlfriend asked
21 Defendant Carroll what they were leaving to do. (RTP, 31). Defendant Carroll told
22 Rontae that they were only going to promote. The three, Rontae, Defendant Taoipu,
23 and Defendant Carroll got into the white Chevy Astro Van. When they left,
24 Defendant Carroll began driving to the west side, near E Street. (RTP, 31). On the
25 way, Defendant Carroll told Defendant Taoipu and Rontae that "Mr. H's" son,
26 Defendant Hidalgo, wanted the victim dead too, and that Defendant Carroll should
27 grab baseball bats and trash bags. (RTP, 34).

1 Defendant Carroll stopped the van on E Street across the street from Defendant
2 Carroll's mom's house. (RTP, 35). Defendant Carroll got out of the van and went
3 into the house. Defendant Carroll spent approximately ten minutes inside the house.
4 When he exited, he had "KC," later identified as Defendant Kenneth Counts, with
5 him. Defendant Counts and Carroll got into the van. (RTP, 37). Defendant Carroll
6 was driving, Defendant Taoipu was in the front passenger seat, Defendant Counts was
7 in the rear passenger side seat and Rontae was behind the driver. (RTP, 40). From
8 the west side, Defendant Carroll drove the van toward Lake Mead. As he was driving,
9 Defendant Carroll was talking to the victim, Timothy Hadland, on the phone. (RTP,
10 38). During this time period, the group smoked marijuana.³

11 While smoking the marijuana, Defendant Counts asked Rontae if he had a
12 "burner," referring to a gun. (RTP, 59). Rontae told Defendant Counts that he did not
13 have one. Defendant Counts then asked Defendant Taoipu if he had a gun however,
14 Rontae did not hear Defendant Taoipu's response. (RTP, 60).

15 The Murder

16 As the van drove down the hill to the lake, Timothy began to approach them in
17 his Kia Sportage. When Defendant Carroll saw Timothy, he pulled the van over and
18 parked. Timothy did a U-turn and pulled in front of the van by about thirty (30) feet.
19 (RTP, 62). Timothy then got out of his vehicle and walked back to the van. (RTP,
20 64). As Timothy approached the van, Defendant Counts "sneaked" out the sliding
21 passenger door of the van. (RTP, 66). As he was sliding out of the van, Rontae saw
22 Defendant Counts holding a black .357 firearm. After creeping out of the van,
23 Defendant counts crept quietly around the front of the van, snuck up behind Timothy,
24 raised up and shot Timothy as he was standing at the driver's side window. (RTP,
25 68). After Timothy fell, Defendant Counts fired another round into him when he hit
26

27 ³ It was at this point in the testimony where Defendant Counts', Hidalgo's and Espindola's attorneys demanded that the
28 Court advise Rontae his rights and appoint counsel. After the appointment of Special Public Defender Randy Pike,
Rontae continued his testimony as he wasn't the part of any conspiracy.

1 the ground. (RTP, 69). After returning to the van, Defendant Counts instructed
2 Defendant Carroll to drive. (RTP, 71). Defendant Carroll drove away.

3 Payment at the Palomino

4 As they were driving away, Defendant Counts confronted Defendant Taoipu
5 about why he did not shoot. Defendant Taoipu said he was going to shoot, however
6 Defendant Carroll was in the way. (RTP, 72). Thereafter, Defendant Counts asked
7 Rontae where he lived. Defendant Carroll drove the van back to the Palomino Club.

8 Once back at the Palomino, Defendant Carroll and Counts entered the club.
9 (RTP, 73). After about thirty (30) minutes, Defendant Counts exited the club and left
10 in a cab. Thereafter, Defendant Carroll left the club and told Rontae and Defendant
11 Taoipu that Defendant Counts got paid. (RTP, 75). Thereafter, Defendant Carroll,
12 Taoipu and Rontae left and stayed at Defendant Carroll's house.

13 The next morning, Defendant Taoipu drove the van to a tire shop while
14 Defendant Carroll followed in another vehicle. (RTP, 77). Defendant Carroll stabbed
15 the tires on the van and had the tire shop replace the tires. (RTP, 78). Defendant
16 Carroll paid and told Rontae that Defendant Espindola had given him a hundred
17 dollars (\$100) to replace the tires. (RTP, 79).

18 Later in the day, Defendant Carroll went to Simone's Auto Plaza. (RTP, 84).
19 Defendant Taoipu and Rontae went with him. At Simone's Auto Plaza, Defendant
20 Carroll met with "Mr. H." (RTP, 95). The group then left in the Palomino Shuttle.
21 (RTP, 96). Thereafter, Defendant Carroll went to work. (RTP, 99). The next time
22 Rontae saw Defendant Carroll, he was with homicide detectives. Defendant Carroll,
23 in the presence of homicide detectives, told Rontae to tell the truth.

24 Confirmation of Deangelo and Rontae's Story

25 Defendant Jayson Taoipu was located and interviewed. Taoipu confirmed most
26 of the information provided by Defendant Deangelo Carroll; including calling the
27 attack on T.J. a hit ordered by Mr. H; indicating that Defendant Luis Hidalgo, III
28 called Defendant Deangelo Carroll and told him to bring garbage bags and baseball

1 bats; confirming that Defendant Anabel Espindola called Defendant Deangelo Carroll
2 as they were driving to the lake; and that Defendant Kenneth Counts and Deangelo
3 Carroll were paid for their participation in the murder.

4 After interviewing Rontae and Defendant Taoipu, detectives set out to identify,
5 locate and arrest "KC." Detectives knew from the description of where he was
6 located that "KC," lived at 1676 E Street. (RTP, 167). Based upon this information, a
7 search warrant was drafted for the residence. During the execution of the search
8 warrant, "KC" was not located at 1676 E Street. (RTP, 171). During the execution
9 of that warrant, detectives received information from Defendant Carroll that
10 Defendant Counts was across the street at 1677 E Street. Contact was made with the
11 occupants of 1677 E Street, however, efforts to contact Defendant Counts were
12 unsuccessful. Therefore, a second search warrant was drafted and executed at that
13 residence. (RTP, 172). After entry, Defendant Counts was found hiding in the attic.
14 (RTP, 176). It took several hours and use of explosive devices to eventually get him
15 out of the attic. Eventually, a hole in the ceiling had to be cut to extricate Defendant
16 Counts. (RTP, 178).

17 After Defendant Counts was removed, a search was conducted of 1677 E
18 Street. During the search, a black satchel containing several one hundred dollar
19 (\$100) bills was found along with Defendant Counts' identification in front of a
20 couch. (RTP, 181). Underneath the couch, in approximately the same general area as
21 the satchel, were more money, some peach cigars as well as several VIP card from the
22 Palomino Club.

23 Hidalgo and Espindola Solicit Carroll to Kill Co-conspirators

24 After the search, detectives once again met with Defendant Carroll. (RTP,
25 183). Defendant Carroll consented to wear a body recorder and he was provided one
26 on May 23rd. (RTP, 184). After placing the body recorder on Defendant Carroll,
27 Defendant Carroll was surveilled as he entered Simone's Auto Plaza. After a while,
28 Defendant Carroll exited Simone's Auto Plaza and was surveilled back to his meeting

1 with detectives. (RTP, 186). At that time, the body recorder was collected and
2 analyzed. In addition, Defendant Carroll was in possession of fourteen hundred
3 dollars (\$1400) in cash as well as a bottle of Tanqueray.

4 An enhanced version of the body recording was admitted at the preliminary
5 hearing. (RTP, 250). On the recording, Defendant Espindola, Defendant Carroll and
6 Defendant Hidalgo discuss the crime as well as request Defendant Carroll to kill
7 Defendant Taoipu and Rontae Zone. In one part, Defendant Espindola indicates that
8 Defendant Carroll was supposed to beat the victim. In another section, Defendant
9 Hidalgo asks Defendant Carroll whether "KC" would be willing to kill Taoipu and
10 Rontae:

11 **DEANGELO:** Who

12 **LITTLE LOU:** The people who are gonna rat.

13
14 **DEANGELO:** They're gonna fucking work deals for themselves, they're
15 gonna get me for sure cause I was driving, they're gonna get KC because
16 he was the fucking trigger man. They're not gonna do anything else to
the other guys cause they're fucking snitching.

17 **LITTLE LOU:** Could you have fucking KC kill them too, we'll fucking
18 put something in their food so they die rat poison or something

19 **DEANGELO:** We can do that to

20 **LITTLE LOU:** And we'll get KC last.

21
22 **DEANGELO:** It's gonna be impossible to find KC to kill these, He ain't
23 even at his house, KC fucking got his shit and fucking packed up shop I
24 don't know where the fuck KC is.

25 **ANABEL:** Here's the thing, we can take care of KC too _____ KC is
26 asking for money, right ok, but here is the thing he's the mother fucking
27 shooter, people can pinpoint him _____
28

1 (State's Return to Writ Exhibit 2). Afterward, Defendant Hidalgo told Defendant
2 Carroll to put rat poisoning in a bottle of Tanqueray gin and have Defendant Taoipu
3 and Rontae drink it.⁴ Moreover, Defendant Espindola provided money to Defendant
4 Carroll to keep Defendant Taoipu and Rontae quiet as well as money for Defendant
5 Carroll himself. Defendant Hidalgo told Defendant Carroll if he goes to prison for the
6 crime, Defendant Hidalgo will buy Defendant Carroll's family United States' savings
7 bonds to help pay for his family.

8 **Plan B and a Cover-up**

9 The next day, May 24th, detectives decided to place another body recorder on
10 Defendant Carroll and he was sent back into Simone's Auto Plaza. (RTP, p. 190).
11 When he left Simone's Auto Plaza, he had approximately eight hundred dollars
12 (\$800) in cash which was recovered from him. After Defendant Carroll left Simone's
13 Auto Plaza, detectives waited for the other suspects to leave before executing various
14 search warrants. (RTP, 191). The first suspect to leave was Defendant Hidalgo.
15 After leaving, Defendant Hidalgo was stopped by a patrol officer. (RTP, 192). After
16 that he was contacted by detectives and a special agent of the Federal Bureau of
17 Investigation and Defendant Hidalgo agreed to accompany them to the homicide
18 offices for an interview. (RTP, 193). After receiving his Miranda warnings,
19 Defendant Hidalgo was interviewed for several hours. (RTP, 210).

20 Sometime thereafter, Defendant Espindola left Simone's Auto Plaza with "Mr.
21 H." (RTP, 211). Eventually, she was brought down to the homicide offices and read
22 her Miranda warnings. (RTP, 212). Thereafter, Defendant Espindola admitted that
23 she had spoken to Defendant Carroll on the two previous days at Simone's Auto
24 Plaza. (RTP, 215).

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28 ⁴ A transcript of this conversation, recorded May 23, 2005 will be presented at trial.

1 The recording from the May 24th encounter at Simone's Auto Plaza where
2 Defendant's Espindola, Carroll and Hidalgo can once again be heard discussing the
3 crime, was admitted into evidence.

4 During this recording, Defendant Espindola tries to explain how she tried to call
5 Defendant Carroll and change the plan from killing the victim to only beating the
6 victim:

7 **DEANGELO:** You know what I'm saying I did everything you guys
8 asked me to do you told me to take care of the guy and I took care of him

9 **ANABEL:** OK ____ listen, listen

10 **DEANGELO:** I'm not...

11 **ANABEL:** ____ talk to him not fucking take care of him _____ god
12 damn it I fucking called you

13 **DEANGELO:** Yeah and when I talked to you on the phone Ms. Anabel I
14 said I specifically said I said if he is by himself do you still want me to
15 do him in. You said yeah

16 **ANABEL:** I _____

17 **DEANGELO:** if he is with somebody you said if he is with somebody
18 then just beat him up

19 **ANABEL:** I said go to plan B fucking Deangelo and Deangelo you're
20 just minutes away ____ I told you no I fucking told you no, and I kept
21 trying to fucking call you but you turned off your mother fucking phone

22 **DEANGELO:** I never turned off my phone

23 **ANABEL:** I couldn't reach you

24 **DEANGELO:** I never turned off my phone, my phone was on the whole
25 fucking night Ms. Anabel
26
27
28

1 ANABEL: Shh... I couldn't fucking reach you as soon as ___spoken
2 ___knew where you fucking were I fucking tried calling you again and I
3 couldn't fucking reach you.

4 (State's Return to Writ Exhibit 2). After this discussion, Defendant Espindola got
5 more money for Defendant Carroll. Moreover, Defendant Espindola told Defendant
6 Carroll to deny everything and that if she is ever contacted; she is just going to deny
7 any knowledge.

8 During the subsequent search of Simone's Auto Plaza, numerous items were
9 located which were relevant to the investigation. In room six (6), numerous pieces of
10 identification in the name of Defendant Hidalgo were located. In addition, thousands
11 of dollars in United States' saving bonds were located, all in the name of Defendant
12 Hidalgo, along with a variety of bottles of liquor. In Defendant Espindola's office, a
13 check made out to Defendant Carroll for twenty-four (24) hours of work was located.
14 (RTP, 318).

15 During the recording of May 23rd, Defendant Espindola told Defendant Carroll
16 why he is getting a check for twenty-four hours:

17 ANABEL: Right, _____ fill out your time card from last week cause I
18 didn't get it, _____ your time card last week, 3 days Monday,
19 Tuesday, Wednesday, 8 hours a day that's 24 hours, I'm gonna give you
20 a check for that **because obviously there gonna be asking to see our**
21 **records** so It'll be much easier that way I can prove you were there
22 because Thursday you weren't there because that was the day all the shit
23 happened _____ Friday

24 Thursday of the week before was the day that Timothy Hadland was killed. In
25 addition, inside a common area of Simone's Auto Plaza, a handwritten note was
26 located which stated, "**Maybe we are being under surveill. Keep you mouth**
27 **shut!!**" (RTP, 315). Outside Simone's Auto Plaza, the white Chevy Astro van was
28 located. (RTP, 319).

1 **Notice of Intent to Seek the Death Penalty**

2 On July 6, 2005, Notices of Intent to Seek the Death Penalty were filed against
3 all four charged Defendants. As to Defendants Espindola and Hidalgo, there were
4 three aggravating circumstances alleged. The first two aggravating circumstances
5 alleged were:

6 The murder was committed by a person who, at any time before a penalty
7 hearing is conducted for the murder pursuant to NRS 175.552, is or has
8 been convicted of a felony involving the use or threat of violence to the
9 person of another and the provisions of subsection 4 do not otherwise
apply to that felony, to-wit: Solicitation to Commit Murder. . .

10 See NRS 200.033(1). The basis for these two aggravating circumstances was that
11 both Defendants solicited Defendant Deangelo Carroll to kill Witness Rontae Zone
12 and Defendant Jayson Taoipu. The final aggravating circumstance alleged was:

13 The murder was committed by a person, for himself or another, to
14 receive money or any other thing of monetary value

15 See NRS 200.033(6). The basis for this aggravating circumstance is that this is
16 clearly a case of murder for hire in which both the people doing the hiring as well as
17 the people receiving the money are subject to the aggravating circumstance.
18

19 **POINTS AND AUTHORITIES**

20 **I**

21 **DEFENDANTS ARE NOT ENTITLED TO A WRIT OF**
22 **MANDAMUS AS DEFENDANT HAS AN ADEQUATE**
 REMEDY AT LAW

23 A writ of mandamus will issue when the petitioner has no plain, speedy and
24 adequate remedy at law. NRS 34.170; *See also* Scrimmer v. Eighth Judicial Dist. Court,
25 998 P.2d 1190, 1193 (2000). It is within the discretion of the court to determine if
26 such writ will be considered. *Id.*; *see also* State ex rel. Dep't Transp. v. Thompson, 99
27 Nev. 358, 662 P.2d 1338 (1983). This Court has generally declined to entertain
28 petitions for writ of mandamus and prohibition review of district court decisions

1 where such decisions were appealable. Ashokan v. State, Dept. of Ins., 109 Nev. 662,
2 856 P.2d 244 (1993). NRS 177.045 provides "Upon the appeal, any decision of the
3 court in an intermediate order or proceeding, forming part of the record, may be
4 reviewed. Moreover, NRS 177.055 requires an automatic and mandatory review of a
5 death sentence by the Nevada Supreme Court. This court must review whether the
6 evidence supports the finding of an aggravating circumstance or circumstances. NRS
7 177.055(c). Therefore, because defendants have two adequate remedies available at
8 law, this petition should be dismissed.

9 II

10 DEFENDANTS ARE NOT ENTITLED TO A WRIT OF 11 MANDAMUS WHERE DEFENDANT HAS FAILED 12 TO SHOW THAT THE TRIAL COURT 13 ARBITRARILY OR CAPRICIOUSLY ABUSED ITS 14 DISCRETION

15 The Court should not grant a writ of prohibition or a writ of mandamus in the
16 instant case as the Respondent has neither acted outside his authority, nor abused his
17 discretion. Nevada Revised Statute 34.420 states:

18 The writ of prohibition is the counterpart of the writ of mandate. It
19 arrests the proceedings of any tribunal, corporation, board or person from
20 exercising judicial functions, when such proceedings are without or in
21 excess of the jurisdiction of such tribunal, corporation, board or person.

22 A writ of prohibition does not serve to correct errors; its purpose is to prevent courts
23 from transcending the limits of their jurisdiction in the exercise of judicial but not
24 ministerial power. Olsen Family Trust v. District Court, 110 Nev. 548, 551, 874 P.2d
25 778, 780 (1994); Low v. Crown Point Mining Co., 2 Nev. 75 (1866). However, "a
26 writ of prohibition must issue when there is an act to be 'arrested' which is 'without or
27 in excess of the jurisdiction' of the trial judge." Houston Gen. Ins. Co. v. District
28 Court, 94 Nev. 247, 248, 78 P.2d 750, 751 (1978); Ham v. Eighth Judicial District
Court, 93 Nev. 409, 412, 566 P.2d 420, 422 (1977); *See also* Goicoechea v. District

1 Court, 96 Nev. 287, 607 P.2d 1140 (1980); Cunningham v. District Court, 102 Nev.
2 551, 729 P.2d 1328 (1986).

3 The object of a writ of prohibition is to restrain inferior courts from acting
4 without authority of law in cases where wrong, damage, and injustice are likely to
5 follow from such action. Olsen Family Trust, 110 Nev. at 552, 874 P.2d at 781;
6 Silver Peaks Mines v. Second Judicial District Court, 33 Nev. 97, 110 P. 503 (1910).
7 Petitions for extraordinary writs are addressed to the sound discretion of the Court,
8 and may only issue where there is no plain, speedy, and adequate remedy at law.
9 NRS 34.330; Jeep Corp. v. Second Judicial Dist. Court, 98 Nev. 440, 442-443, 652
10 P.2d 1183, 1185 (1982).

11 A writ of mandamus will issue to enforce “the performance of an act which the
12 law enjoins as a duty especially resulting from an office . . . or to compel the
13 admission of a party to the use and enjoyment of a right . . . to which he is entitled and
14 from which he is unlawfully precluded by such inferior tribunal.” NRS 34.160.

15 Mandamus will not lie to control discretionary action unless it is manifestly
16 abused or is exercised arbitrarily or capriciously. Office of the Washoe County DA v.
17 Second Judicial Dist. Court, 5 P.3d 562, 566 (2000). Thus a writ of mandamus will
18 issue to control a court’s arbitrary or capricious exercise of its discretion.” Id. citing
19 Marshall v. District Court, 108 Nev. 459, 466, 836 P.2d 47, 52 (1992); City of Sparks
20 v. Second Judicial Dist. Court, 112 Nev. 952, 954, 920 P.2d 1014, 1015-1016 (1996);
21 Round Hill Gen. Imp. Dist. V. Newman, 97 Nev. 601, 637 P.2d 534 (1981).

22 In the present case, the district court neither abused its discretion nor acted
23 outside of its authority in denying Defendant’s motion to strike. Rather, the court
24 properly limited its authority and aptly noted. “As to the intent to kill, there is
25 evidence pro and con. **Each side has their theory which is what trials are about. I**
26 **don’t think its incumbent on me; I don’t think it’s my prerogative to prejudge this**
27 **evidence** when there is sufficient evidence for the bindover and that’s the test at this
28 juncture.” Reporter’s Transcript, September 8, 2006 (Mosley, J.)(emphasis added).

III
**THE CHARGES AGAINST DEFENDANT'S SUPPORT THE
NOTICE OF INTENT TO SEEK THE DEATH PENALTY AS THE
QUESTION OF WHETHER DEFENDANTS CONSPIRED TO
COMMIT FIRST DEGREE MURDER IS A QUESTION FOR THE
JURY**

Defendants Hidalgo and Espindola argue that the Eighth Amendment to the United States Constitution precludes the imposition of the death penalty as Defendants Hidalgo and Espindola did not intend that a killing take place or intend that lethal force be employed. The case law is clear that if a person does not kill and never intended that a killing occur or deadly force be employed, then that Defendant is not eligible for the death penalty. See Enmund v. Florida, 458 U.S. 782, 797 (1982); Tison v. Arizona, 481 U.S. 137 (1987); and Doleman v. State, 107 Nev. 409, 418, 812 P.2d 1287, 1292-3 (1991). Unfortunately for Defendants Hidalgo and Espindola, even viewing the evidence in a light most favorable to the Defendants, both of them at the very least joined a conspiracy where they intended that deadly force would be used.

However, this argument is moot after this Court's decision in Bolden v. State, 121 Nev. ___, 124 P.3d 191 (2005). Prior to Bolden, (which was decided after the commencement of these proceedings), entering a conspiracy to commit a Battery With a Deadly Weapon which resulted in one (1) co-conspirator committing First Degree Murder, all co-conspirators would have been liable for 1st Degree Murder even though they did not meet all of the specific intent requirements. This is due to the fact that the killing would be the natural and probable consequences of the conspiracy. In that situation, there would be a possibility that a defendant not specifically intending to kill would fact the death penalty. Under the current state of the law, that factual scenario is impossible, because the state will be required to prove a specific intent to kill.

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1 **A. Evidence of Conspiracy to Use Lethal Force**

2 Defendant Hidalgo specifically told Defendant Deangelo Carroll to come to
3 work with baseball bats and garbage bags to beat T.J. As Rontae Zone testified at the
4 preliminary hearing, “Well, he said that [Petitioner Hidalgo, III] wanted him dead
5 also.” (RTP, 34). Defendant Hidalgo’s own father, Mr. H, indicated that Defendant
6 Hidalgo was very upset and wanted Defendant Carroll to “go take care of T.J.” In
7 addition, on the recordings, Defendant Hidalgo expresses that he wants to hire
8 Defendant Kenneth Counts to kill Zone and Taoipu **“TOO.”** Thereafter, he provided
9 Defendant Deangelo Carroll the method by which he is to have these two killed, i.e.,
10 rat poisoning in a gin bottle.

11 The evidence that Defendant Espindola intended for T.J. to be killed is even
12 stronger. Defendant Espindola was present when Mr. H instructed Defendant
13 Deangelo Carroll to kill T.J. While Defendant Carroll was driving the executioner to
14 the scene of the murder, Defendant Espindola called Defendant Carroll. It was at this
15 point that Defendant Espindola learned that T.J. was not at home as the original plan
16 contemplated but out at the lake with potential witnesses. Upon learning this
17 information, Defendant Espindola told Defendant Carroll, “If [T.J.’s] by his self, then
18 do him, if he isn’t by his self, then just fuck him up ____, fuck him up and fuck up
19 whoever’s with him.” This information was confirmed by Defendant Espindola on
20 the surreptitious recording when Defendant Carroll confronted her with this statement,
21 Defendant Espindola stated, “I told you to go to plan B!” Later in the recordings,
22 Defendant Espindola confirmed that her concern with killing T.J. in public was:

23 Well the bastards fucking right what about it, what about everything
24 might as well to lose it all, and if I lose the shop and I lose the club I
25 can’t help you or your family... God Damn it _____ your not that
26 stupid you were playing with the _____ in the car you should have
27 fucking turned back **YOU HAD TOO MANY FUCKING EYES ON**
28 **YOUR ASS WHAT THE FUCK WERE YOU THINKING?**

1 (State's Return to Writ Exhibit 2, p. 14). There is absolutely no question that both
2 Defendants Espindola and Hidalgo intended deadly force to be utilized. Whether they
3 intended to kill is a question for the jury.

4 B. Specific Intent to Kill is a Jury Question

5 It is well settled that it is the responsibility of the jury, not the court, to assess
6 the weight of the evidence and credibility of the witnesses. McNair v. State, 108 Nev.
7 53, 56, 825 P.2d 571, 573 (1992). The question of whether a defendant has formed
8 the requisite intent to kill is a question for the jury. Zessman v. State, 94 Nev. 28, 573
9 P.2d 1174 (1978).

10 In Sharma v. State, 118 Nev. 648, 56 P.3d 868 (2002), this Court examined the
11 theory of aiding and abetting as a basis for criminal liability, in relation to the "natural
12 and probable consequence doctrine." In Sharma, this Court disavowed the natural and
13 probable consequence doctrine since it permitted a defendant to be convicted of a
14 specific intent crime where that defendant did not actually possess the statutory intent
15 to commit that particular offense. Id. The Court reasoned: "[I]n order for a person to
16 be held accountable for the specific intent crime of another under an aiding or abetting
17 theory of principal liability, the aider or abettor must have knowingly aided the other
18 person with the intent that the other person commit the charged crime." Sharma v.
19 State, 118 Nev. 648, 655, 56 P.3d 868, 872 (2002). In other words, for a defendant to
20 be found guilty of a specific intent crime of another, under an aiding or abetting
21 theory of liability, the defendant must have knowingly aided the other person with
22 intent that the other person actually commit the charged crime. The focus is on
23 whether a defendant who aids and abets has the specific intent to carry out the specific
24 criminal act which occurs.

25 In Bolden v. State, 121 Nev. ___, 124 P.3d 191 (2005), the Court extended its
26 holding in Sharma to defendants charged under a theory of coconspirator liability.⁵

27 ⁵ In the present case, the information was filed prior to the Bolden decision. However, the State recognizes that Bolden
28 requires a jury finding that co-conspirator possessed the requisite intent.

1 This Court held that to prove a specific intent crime, under a vicarious co-conspirator
2 liability theory, the "State must show that the defendant actually possessed the
3 requisite statutory intent" to commit that particular offense. Bolden, 124 P.3d at 200-
4 01. The Court cited Sharma and stated:

5 [O]ur overarching concern in Sharma centered on the fact that the
6 natural and probable consequences doctrine regarding accomplice
7 liability permits a defendant to be convicted of a specific intent crime
8 where he or she did not possess the statutory intent required for the
9 offense. We are of the view that vicarious coconspirator liability for the
10 specific intent crimes of another, based on the natural and probable
11 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.

12 Bolden, 124 P.3d at 200.

13 In short, a defendant cannot be held liable for his cohort's specific intent crime,
14 unless the defendant had the requisite intent to aid that individual in the commission
15 of the charged crime. However, the Court limited its holding to specific intent crimes
16 only. The Court reasoned that:

17 The mental state required to commit a general intent crime does not raise
18 the same concern as that necessary to commit a specific intent crime.
19 General intent is "the intent to do that which the law prohibits. It is not
20 necessary for the prosecution to prove that the defendant intended the
21 precise harm or the precise result which eventuated." On the other hand,
22 **specific intent is "the intent to accomplish the precise act which the
law prohibits." To hold a defendant criminally liable for a specific
intent crime, Nevada requires proof that he possessed the state of
mind required by the statutory definition of the crime.** Although we
23 affirm Bolden's conviction for the general intent crimes of home
24 invasion and robbery, we conclude that in future prosecutions, **vicarious
coconspirator liability may be properly imposed for general intent
crimes only when the crime in question was a "reasonably
foreseeable consequence" of the object of the conspiracy.**

27 Bolden v. State, 124 P.3d 191, 201 (Nev. 2005) (emphasis added).
28

1 Defendants argue that to the extent that their clients only intended to harm but
2 not kill Timothy Hadland, they can not be subject to the death penalty. Whether
3 Defendant's intended to kill or harm is a question for the jury. If Defendants did not
4 intend to kill Timothy Hadland, they would only be guilty of the general intent crime
5 of Second Degree Murder, and as such, not eligible for the death penalty. As the
6 district court noted, this is "what trials are about."⁶

7
8 **IV**
9 **THE NOTICE OF INTENT TO SEEK THE DEATH PENALTY**
10 **SPECIFICALLY ASSERTS THE FACTS WHICH MAY BE**
11 **UTILIZED TO ESTABLISH THAT THE CRIME WAS A**
12 **MURDER INVOLVING A PECUNIARY GAIN.**

13 **A. The Aggravating Nature of the Crime Supports the Aggravating**
14 **Circumstance**

15 Defendants assert that the State has failed to assert how it intends to prove that
16 the murder involved pecuniary gain for Hidalgo and Espindola. While the Notices of
17 Intent to Seek the Death Penalty do clearly spell out that information, it isn't relevant
18 to determining whether information was contained in the Notices to support the
19 aggravating circumstance. Defendant references many cases, laws and court rules,
20 however, once again misses the facts in arguing to this Court that there aren't specific
21 facts contained in the notice upon which the State will rely. See SCR 250(4)(c).

22 Initially, Defendants argue that the notice of intent is defined by a statute which
23 requires certain language in Informations and Indictments. See NRS 173.075. How
24 that statute is relevant to the discussion is never explained. Next, Defendants argue
25 that cases related to Informations and Indictments somehow control the language
26 necessary for a Notice of Intent to Seek an Indictment. In fact, statutorily, no notice

27 ⁶ Defendants also assert that the beating being discussed was merely a simple battery which flies in the face of all of the
28 evidence against both Defendants. Defendant Hidalgo, III specifically ordered deadly weapons to be used, and the force
described by Defendant Espindola was "fuck him up, fuck him up and fuck up whoever's with him." That is certainly
contemplating more force than a simple battery. However, should a jury agree, they would have the option of
involuntary manslaughter; however remote the possibility.

1 need be provided if, as here, the aggravating circumstance is based upon the
2 aggravating nature of the crime itself. See NRS 175.552(3) (...The State may
3 introduce evidence of additional aggravating circumstances as set forth in NRS
4 200.033, **other than the aggravated nature of the offense itself**, only if it has been
5 disclosed to the defendant before the commencement of the penalty hearing).
6 However, Supreme Court Rule 250 requires that even where the aggravator is based
7 on the crime itself, notice must be provided to Defendant. However, Defendant has
8 confused the requirements of SCR 250(4)(c) with the notice requirement which is
9 found in SCR 250(4)(f) which requires a detailed list of evidence be submitted at least
10 fifteen (15) days prior to trial.

11 Additionally, Defendants misapprehend the Notice of Intent to Seek the Death
12 Penalty. Defendants assert that the Notice provides theories of criminal liability
13 which do not support an intent to kill. Pursuant to SCR 250(4)(C), theories are not in
14 the Notice but “allege(s) with specificity the facts on which the state will rely to prove
15 each aggravating circumstance.” The State alleged that it will prove that they hired
16 Deangelo Carroll to “beat or kill” T.J. Hadland because those are the facts. They were
17 to kill him if he was alone, or beat him severely if he was will someone else. If the
18 trial reaches the point where a penalty phase occurs, then the State will have proven
19 beyond a reasonable doubt that Petitioners held the specific intent to kill.

20 The aggravating circumstance upon which the State is relying is that this was a
21 situation where there was a murder for hire as well as where some of the participants
22 were seeking financial gain from the killing. NRS 200.033(6) states that an
23 aggravating circumstance is appropriate where, “The murder was committed by a
24 person, for himself or another, to receive money or any other thing of monetary
25 value.”

26 **B. The Murder was a “Contract Type Killing”**

27 Here, Defendants appear to be arguing that they should not be subject to the
28 death penalty because they had the financial ability to pay another person to do their

1 dirty work. In this case, Defendants argue that Kenneth Counts should face the death
2 penalty for a murder conceived, solicited, planned, and purchased by the Defendants.

3 This court has held that the offer to pay a person to assist in the commission of
4 a murder is sufficient to support the aggravating circumstance of NRS 200.033(6).
5 Wilson v. State, 99 Nev. 362, 664 P.2d 328 (1983). In Wilson, **Defendant offered to**
6 **pay** two other conspirators \$3500.00 to assist in the murder of an undercover police
7 officer. Id. Pursuant to their agreement **Defendant gave** two co-conspirators
8 \$3500.00 for stabbing the victim. Id. The court stated, "Under these circumstances,
9 we find that the killing of Hoff was in the nature of a 'hired gun' situation; therefore
10 we decline to consider whether the issue is **limited** to contract-type killings." Id.
11 (emphasis added). Although Wilson physically participated in the murder, whereas
12 the defendants in this case coordinated the crime from a distance, this is a distinction
13 without a difference. In this case, as in Wilson, the defendants procured the murder
14 by paying money to the person who physically committed the crime. Clearly, this is a
15 contract-type killing. Therefore, they are eligible for the death penalty under NRS
16 200.033(6).

17 In addition, other courts have held that where a person is convicted of murder-
18 for-hire, the one who does the hiring is subject to the financial gain aggravating
19 circumstance in a capital case.⁷ People v. Padilla, 11 Cal 4th 891, 906 P.2d 388
20 (1995); *See also*, State v. Austin, 87 S.W.3d 447 (Tenn. 2002)(holding that Gunman's
21 and accomplice's testimony that defendant hired the gunman to kill the murder victim
22 established that defendant employed another to commit the murder for remuneration
23 or the promise of remuneration, as aggravating circumstance at capital murder
24 sentencing). *See also*, Harris v. State, 632 So.2d 503 (where a defendant has been
25 convicted of the capital offense of murder for hire, even though that person was the
26 hirer and was convicted of the offense as an accomplice pursuant to the complicity

27
28 ⁷ California's financial gain aggravator reads "The murder was intentional and carried out for financial gain." Cal. Penal Code 190.2(1).

1 statute, the aggravating circumstance that the capital offense was committed for
2 pecuniary gain is established as a matter of law). In fact, the California Supreme
3 Court has held that it's financial gain statute, does not require that the murderer
4 receive a direct financial gain as long as a financial gain is received by someone. *See*
5 People v. Michaels, 49 P.3d 1032 (Cal. 2002).

6 **C. The Legislature Intended the Person who Conceived and Planned a**
7 **Contract Killing to Face the Death Penalty**

8 The Nevada financial gain statute that provides one of the circumstances that
9 aggravate First Degree Murder states, "The murder was committed by a person, for
10 himself or another, to receive money or any other thing of monetary value." NRS
11 200.033(6). When the language of the statute is plain, its intention must be deduced
12 from the language and the court has no right to go beyond it. State v. Colosimo, 122
13 Nev. ___, 142 P.3d 352 (2006). Where the language of the statute is susceptible of a
14 sensible interpretation, it is not to be controlled by extraneous considerations. Id.
15 When a statute is susceptible to reasonable but inconsistent interpretations, the statute
16 is ambiguous and the court will resort to statutory interpretation to discern legislative
17 intent. State v. Kopp, 118 Nev. 199, 43 P.3d 340 (2002). A statute should be
18 construed in light of public policy and the spirit of the law, and the interpretation
19 should avoid an absurd result. Id. Moreover, this court has consistently held that it
20 will resolve any doubt concerning the legislature's intent in favor of what is
21 reasonable versus what is unreasonable. Id.

22 Here, it is clear that the Nevada Legislature intended to include murder for hire
23 in the narrow class of crimes eligible for the death penalty. However, they did not
24 differentiate between the payer and the payee. Nor did they attempt to exclude the
25 payer. In subsections (a) and (b) of NRS 200.033(4), the legislature qualified the
26 general language of the statute to specifically exclude a person who did not either kill,
27 attempt to kill, or have reason to know that a life would be taken or lethal force would
28 be used from facing the death penalty. Clearly, this represents a decision by the

1 legislature to further narrow the class of defendants eligible for the death penalty. In
2 NRS 200.033(6) no such exclusion exists. Therefore, it is clear that the legislature
3 intended that any person who is found culpable in a murder for hire be subject to the
4 death penalty.

5 Finally, it would be absurd to conclude that the Nevada Legislature intended to
6 punish the hit man greater than the affluent person who conceived, planned, and
7 organized the murder. In the case that halted capital punishment in the United States,
8 Justice Douglas observed, "One searches our chronicles in vain for the execution of
9 any member of the affluent strata of our society." Furman v. Georgia, 408 U.S. 238,
10 252, 92 S.Ct. 2726, 2733 (1972)(Douglas, J. concurring). This court has heard
11 countless appeals that assert that the death penalty is disproportionately applied to the
12 socioeconomically disadvantaged. To determine that those who can afford to hire a
13 hit man can escape punishment would result in a disproportionate and disparate
14 treatment between individuals based solely on their economic status.

15 **D. Defendants' Motive was Pecuniary Gain**

16 The State need not prove, although there is support for it in the evidence, that
17 the motive for the murder was for Defendants Espindola and/or Hidalgo to receive
18 money. The State need only prove that there was pecuniary gain by **someone** in the
19 murder. Here, Kenneth Counts received \$6000.00 to kill the victim. Moreover, the
20 evidence demonstrates that Mr. H. wanted T.J. killed because he was hurting the
21 business of the Palomino Club. Both Defendants Espindola and Hidalgo agreed and
22 participated in the killing to help support the business, its owner and employees, of
23 which Defendants are all three. Moreover, both Defendants evidence knowledge
24 during the surreptitious recordings that they knew that people were getting paid, and
25 in fact, made several payments themselves. Therefore, Defendant should be denied
26 relief.

V
**SOLICITATION TO COMMIT MURDER IS A
FELONY INVOLVING THE USE OR THREAT OF
VIOLENCE TO THE PERSON OF ANOTHER**

A. NRS 200.033(2) is not Vague or Ambiguous

Defendants argue that because Justice Maupin stated in a dissenting opinion that NRS 200.033(4) is vague and ambiguous, it must mean that a statute less specific must also be vague and ambiguous. Unfortunately, Defendants missed the import of Justice Maupin's conclusions. Justice Maupin, of which he eventually got a majority on the Court in McConnell v. State, 120 Nev. ___, 102 P.3d 606 (2004), was concerned that NRS 200.033(4) removed the intent requirement for a First Degree Murder conviction. As such, NRS 200.033(4) was unconstitutionally vague and ambiguous because it allowed the execution of someone who did not have the requisite intent to be eligible for the death penalty, as well as did not narrow the category of individuals who did have such intent. Such a concern does not underlie NRS 200.033(2) because none of the factors which concerned Justice Maupin are part of NRS 200.033(2).

NRS 200.033(2) is premised on the fact that it is relevant to sentencing whether or not an individual was violent in an isolated incident or whether there was violence in the past or present:

In general, "[a] defendant's character and record are relevant to the jury's determination of the appropriate sentence for a capital crime." Pellegrini v. State, 104 Nev. 625, 630, 764 P.2d 484, 488 (1988). Accordingly, a murder is aggravated if it is committed by an individual previously convicted of a felony involving the use or threat of violence to the person of another. NRS 200.033(2). Such a conviction **evinces a propensity for violence** and is relevant to a determination of the appropriate sentence; more than one such conviction is likewise relevant.

Riley v. State, 107 Nev. 205, 808 P.2d 551 (1991)(emphasis added). Certainly, a rule promulgated to determine whether a person has a propensity for violence is not

1 unconstitutionally vague or ambiguous. Moreover, it significantly limits the number
2 of people eligible for the death penalty as this circumstance isn't usually tied to the
3 facts underlying the murder charge.

4 **B. Solicitation To Commit Murder Is Clearly A Crime Involving The**
5 **Threat of Violence To A Person**

6 Defendant argues that merely asking someone to kill another person is not a
7 threat of violence against the person who may be killed based upon the request. They
8 assert "solicitation is a crime of communication, not violence, and the nature of the
9 crime solicited does not transform the crime of solicitation into an aggravating
10 circumstance." *citing State v. Ysea*, 956 P.2d 499 (Ariz. 1998)(superseded by statute
11 as stated in *State v. Martinez*, 999 P.2d 795 (2000)).

12 NRS 199.500 expressly categorizes the punishment for solicitation by the
13 nature of the crime solicited. The statute provides "A person who counsels, hires,
14 commands, or otherwise solicits another to commit murder, if no other criminal act is
15 committed as a result of the solicitation, is guilty of a category B felony." NRS
16 199.500(2). In contrast, a person who solicits another to commit kidnapping or arson
17 is guilty of a gross misdemeanor in the same circumstances. NRS 199.500(1).
18 Examples of other crimes punishable as a Category B felony include: Robbery, NRS
19 200.380(2); Burglary, NRS 205.060(2); Kidnapping, NRS 200.310; First Degree
20 Arson, NRS 205.005; and Home Invasion, NRS 205.067. Notably, these crimes are
21 identified in NRS 200.033(4) as crimes involving the threat or use of violence. Other
22 crimes which are deemed to be Category B felonies include: Aggravated Stalking,
23 NRS 200.575⁸; Mayhem, NRS 200.280; and Battery with the Intent to Kill, NRS
24 200.400. Clearly, the categorization of solicitation to commit murder along with these
25

26
27 ⁸ A person who commits the crime of stalking and in conjunction therewith threatens the person with the intent to
28 cause him to be placed in reasonable fear of death or substantial bodily harm commits the crime of aggravated
stalking.

1 crimes against a person⁹ which all manifest the threat or use of violence, demonstrates
2 the legislature's belief that the solicitation to kill another person is a crime of
3 violence.

4 As discussed above, NRS 200.033(2) was enacted so that individuals who have
5 a higher propensity to engage in dangerous violent activity are more eligible for the
6 death penalty. See Riley v. State, 107 Nev. 205, 808 P.2d 551 (1991). In addition,
7 NRS 200.033(2)(a) makes it an aggravating circumstance if you are guilty of another
8 murder. Obviously, the conception, planning, and hiring of another person to commit
9 the murder does not militate the propensity for violence. The mere fact that a person
10 has the resources to use a "hired gun" as a weapon of violence, rather than pulling the
11 trigger themselves does not speak to that person's lack of violent propensities.
12 Rather, it speaks to financial resources to carry out the threat.

13 If a person solicits another to commit murder, and the solicitation is carried out,
14 then NRS 200.033(2) would demand an aggravating circumstance. However,
15 Defendants assert that that the interruption of the crime by police which prevented the
16 murder from occurring entitled them to a finding that they should not face an
17 aggravating circumstance. Clearly, the solicitation to commit murder manifests a
18 criminal intent to kill and an inherent danger to society, regardless of whether the act
19 of murder is carried out by the person solicited. As such, agreeing that Solicitation to
20 Commit Murder is not a felony involving a threat to a person would lead to an
21 unreasonable application of NRS 200.033(2) and defeat its purposes.

22 Notwithstanding, Defendants argue to this Court that non-binding Florida and
23 Arizona cases support the proposition that Solicitation To Commit Murder is not a
24 violent felony, while analysis of those cases clearly distinguishes them from the
25 instant matter. In Lopez v. State, 864 So.2d 1151 (Fla.App.2d Dist. 2003), an
26

27 ⁹ The State notes that other crimes, which are not crimes against a person, are categorized as category B felonies. These
28 crimes are not relevant as they manifest other legislative goals. i.e.; protection of financial interests, protection of certain
industries.

1 intermediate appellate Florida state court interpreted a Florida state statute that
2 defined the violent habitual criminal allegation to mean that, Solicitation To Commit
3 Murder did not qualify under the catch-all provision. To support their conclusion, the
4 Lopez court relied upon Elam v. State, 636 So.2d 1312 (Fla.1994). In Elam, the
5 Florida Supreme Court ruled that Florida law required actual force inherent in the
6 crime which is aggravated. The Elam court reasoned that actual force is not a
7 necessary component of a solicitation, and then even a solicitation to do a violent act
8 didn't qualify under Florida law.

9 The Nevada Supreme Court has rejected requiring force to be inherent in the
10 aggravating crime. See Weber v. State, 121 Nev. ___, 119 P.3d 107 (2005). In
11 Weber, Defendant had been convicted of a Sexual Assault. The Supreme Court noted
12 that a Sexual Assault as defined in Nevada does not require actual force inherent in its
13 commission. However, because of the implied force, the Sexual Assaults did qualify
14 for use as prior violent felonies. The implication of the Nevada Supreme Court as well
15 as the purpose behind the statute, NRS 200.033(2), would appear to require
16 Solicitation to Commit Murder to be a prior violent conviction.

17 Moreover, in reviewing all of the authority relied upon by Florida, it doesn't
18 appear that any other jurisdiction has referenced, let alone followed the referenced
19 cases. Other States allow for a conviction for Solicitation to Commit Murder to be
20 used as a prior felony conviction involving the threat of force on a person for purposes
21 of an aggravating circumstance. See, e.g., Woodruff v. State, 846 P.2d 1124, 1143
22 (Okla.Cr.1993) and People v. Edelbacher, 47 Cal.3d 983, 1032, 254 Cal.Rptr. 586, 616
23 (Cal.,1989).¹⁰

24 Likewise, Defendants' reliance of Ysea is misplaced. In Ysea, the Arizona
25 Supreme Court examined whether defense counsel was ineffective when he
26 recommended to the defendant that he plead guilty to avoid a possible death sentence.

27
28 ¹⁰ Federal law also considers solicitation to commit murder a prior violent felony based on the federal habitual criminal
statute 18 U.S.C. § 924(e). See U.S. v. Kaluna, 192 F.3d 1188 (C.A.9 HI.1999).

1 Ysea, at 501. The court held that it was unreasonable, in 1986, for counsel to believe
2 that a prior solicitation conviction could serve as an aggravating factor. Id. The Ysea
3 court noted that its case law required that “to constitute an aggravating circumstance,
4 the prior conviction must be for a felony *which by its statutory definition* involves
5 violence or a threat of violence to another person. Id. at 502 (emphasis in original).
6 At the time, Arizona’s solicitation statute¹¹ only referred to non-specific felony and
7 misdemeanor crimes. A.R.S. 13-1002. In Nevada, the solicitation statute clearly
8 delineates the crime solicited to be murder. NRS 199.500(2).

9 In addition, the Ysea court noted that the crime solicited, aggravated assault, is
10 not always a crime of violence because it may be committed recklessly or negligently
11 and without either the intention or knowledge about injuring anyone. Therefore, an
12 attorney’s assumption that aggravated assault was automatically a crime of violence
13 was not supported by any authority. Ysea, at 503. However, in this case, it cannot be
14 credibly maintained that murder is not a crime of violence.

15 Further, the Arizona statute of solicitation is distinct from the Nevada statute
16 and this particular case in one glaring respect. Hidalgo and Espindola did not merely
17 communicate their desire to kill Taoipu and Zone; they “hired” the person to commit
18 murder. Under every definition of the word “hire” there is a payment of money for a
19 particular service. See The American Heritage Dictionary of the English Language, 4th
20 Ed; Merriam Webster’s Dictionary of Law; Blacks Law Dictionary, 8th Ed. The
21 service in this case is the commission of murder. The act of hiring the person was not
22 complete until the payment of money was made.

23 Finally, this Court, unlike the Ysea court, is not limited to the statutory
24 definition of the crime to determine whether the crime is a crime of violence. Dennis
25 v. State, 116 Nev. 1075, 13 P.3d 434 (2000); (holding that second degree arson was a
26

27 ¹¹ The Arizona statute read, “A person commits solicitation if, with the intent to promote or facilitate the commission of
28 a felony or misdemeanor, such person commands, encourages, requests, or solicits another person to engage in specific
conduct which would constitute a felony or misdemeanor or which would establish the other’s complicity in its
commission.” A.R.S. 13-1002.

1 crime involving the threat of violence where the state presented documentary
2 evidence and the testimony of victims.); *cf. Redeker v. Eighth Judicial District*, 122
3 Nev. ____, 127 P.3d 520, 526 (2006)(holding that second degree arson was not an
4 aggravating circumstance where there was no evidence presented to support the
5 “threat” of violence). In criminal law, a threat requires actual intent: “a threat
6 includes almost any kind of expression of *intent* by one person to do an act against
7 another person, ordinarily indicating an *intention* to do harm.” *Id.* (emphasis in
8 original). The question of whether a defendant has formed the requisite intent is a
9 question for the jury. *Zessman v. State*, 94 Nev. 28, 573 P.2d 1174 (1978).

10 The facts of the present case demonstrate Defendants’ specific intention to
11 harm the victims, Taoipu and Zone. First, the Defendants solicited an individual who
12 had only days before committed a violent murder based upon their solicitation. They
13 suggested that he use the same triggerman that he had used in the prior homicide.
14 They provided their hit man with an instrumentality to cause the death of the victims.
15 Thereafter, they paid their hit man for his services. In addition, they told their hit man
16 that if the witnesses talked, Mr. H would kill everyone, providing substantial
17 motivation over and above that associated with remuneration for their hit man to
18 complete the job. Clearly, the jury could conclude that, in this case, the solicitation to
19 commit murder constituted a threat of violence.

20 **C. The Status of the Person Solicited is not Relevant**

21 Defendants additionally argue that because they did not know that the person
22 they were soliciting to kill two people was working for the police; they should receive
23 a benefit from their ignorance. Such an argument would not give effect to the
24 purposes behind NRS 200.033(2), and is unsupported by hundreds of years of
25 jurisprudence in this country. Mistake of fact is not a defense to a crime unless it
26 negates a state of mind. *See* Model Penal Code Sec. 2.04(1)-(2); *Adler v. State*, 95
27 Nev. 339, 594 P.2d 725 (Nev.1979). The mere fact that they believed they were
28 actually hiring a hit man as opposed to an agent of the police does not in any manner

1 negate their intent. Moreover, as discussed above, it is the Defendants propensity for
2 violence which allows for the convictions to be used as aggravating circumstances,
3 not whether the violence in fact occurred. Therefore, to agree with Defendants would
4 allow for Defendants who got lucky to receive a different sentence than Defendants
5 that got unlucky. Nothing in any of the jurisprudence of capital cases suggests that
6 embracing such a construction would further the objects of the sentencing scheme.

7 Finally, Defendants argue that this Courts holding in Myatt should be extended
8 to the crime of Solicitation to Commit Murder. In Myatt, this Court held that an
9 informant is a feigned accomplice and therefore cannot be a coconspirator. Myatt v.
10 Nevada, 101 Nev. 761, 763, 710 P.2d 720, 722 (1985). Myatt is not relevant in this
11 case. Conspiracy requires an agreement between two or more people for an unlawful
12 purpose. Id. Solicitation to Commit Murder does not require an agreement.
13 Therefore, the status of the person solicited is irrelevant. Therefore, Defendants
14 arguments should be rejected.

15 VI

16 **DEFENDANT HIDALGO'S PETITION SHOULD NOT BE** 17 **CONSIDERED AS MR. GENTILE IS NOT DEFENDANT** 18 **HIDALGO'S ATTORNEY OF RECORD AND DUE TO A** 19 **CONFLICT OF INTEREST CANNOT REPRESENT** 20 **DEFENDANT HIDALGO**

21 **A. Attorney Gentile is not Defendant Hidalgo's Attorney of Record**

22 At all times in District Court, Defendant Hidalgo has been represented by
23 Robert Drascovich and Steven Stein. (Respondent's Appendix (hereinafter RA) 18,
24 108). At no time, prior to the instant petition has Mr. Gentile represented Defendant
25 Hidalgo. A review of the District Court record does not reflect that Defendant
26 Hidalgo has substituted counsel of record. Thus, it does not appear that Mr. Gentile
27 represents the interests of Defendant Hidalgo.
28

1 **B. Attorney Gentile may not represent Mr. H and Defendant Hidalgo**
2 **Due to a Conflict of Interest**

3 Moreover, it is clear that Mr. Gentile could not effectively represent Defendant
4 Hidalgo due to a conflict of interest. The newly enacted Nevada Rule of Professional
5 Conduct Rule 1.7 states:

6 (a) except as provided in paragraph (b) a lawyer shall not represent a
7 client if the representation involves a concurrent conflict of interest. A
8 concurrent conflict of interest exists if:

9 (1) The representation of one client will be directly adverse to
10 another client; or

11 (2) There is a significant risk that the representation of one or more
12 clients will be materially limited by the lawyer's responsibilities to
another client, a former client, or a third person or by a personal
interest of the lawyer.

13 (b) Notwithstanding the existence of a concurrent conflict of interest
14 under paragraph (a), a lawyer may represent a client if:

15 (1) The lawyer reasonably believes that the lawyer will be able to
16 provide competent and diligent representation of each affected
client;

17 (2) The representation is not prohibited by law;

18 (3) The representation does not involve the assertion of a claim by
19 one client against another client represented by the lawyer in the
same litigation or other proceeding before a tribunal; and

20 (4) Each affected client gives informed consent, confirmed in
writing.

21 Rule 1.10(a) prohibits lawyers associated in the same firm from representing a client
22 when any one of them practicing alone would be prohibited from doing so by Rules
23 1.7, 1.9, or 2.2, unless the prohibition is based on a personal interest of the prohibited
24 lawyer and does not present a significant risk of materially limiting the representation
25 of the client by the remaining lawyers in the firm. The facts of this case indicate that
26 Mr. Gentile's representation of Defendant Hidalgo is a concurrent conflict of interest
27
28

1 which detrimentally affects the rights of Defendant Hidalgo. Those facts are as
2 follows.

3 On May 24, 2005, Petitioner Hidalgo, III, was arrested and questioned about his
4 involvement concerning the murder for hire plot. While dodging most of the
5 questions presented, he did tell Detectives that they should speak to his father, Luis
6 Hidalgo, Jr. (hereinafter "Mr. H"). When contacted, Mr. H referred all questions to
7 his attorney, Dominic Gentile. Since the inception of the case, Attorney Gentile has
8 represented the interests of Mr. H.¹² (RA 25-31).

9 On May 26, 2005, Attorney Gentile caused a letter to be served on the Las
10 Vegas Metropolitan Police Department indicating that he was the counsel for Mr. H
11 and requested that all contacts be made through him. (RA 25) On May 27th, he
12 followed up the letter with one to the Office of the District Attorney. (RA 26). In that
13 letter, Attorney Gentile indicated that all of the members of his firm, Attorney Jerome
14 DePalma, Attorney William Gamage, and Attorney Albert Lasso could be contacted
15 concerning the representation of Mr. H. In June of 2005, Attorney Gentile and his
16 firm undertook to recover items which were seized pursuant to a search warrant at the
17 places of business run by Mr. H, the Palomino Club and Simone's Auto Body.
18 (RA 28-31).

19 Initially, Petitioner Luis Hidalgo, III was represented by Attorney Robert
20 Drascovich who had been retained and appeared at Petitioner Hidalgo, III arraignment
21 in Justice Court and throughout the proceedings. (RA 18-24) Once the case was
22 bound over to District Court, and the Notice of Intent to Seek the Death Penalty was
23 filed in District Court, Petitioner requested and the Court granted him the additional
24 counsel of Attorney Steven Stein. At no point has Attorney Dominic Gentile
25 represented the interests of Petitioner Hidalgo, III in Justice or District Court and no
26

27
28 ¹² Although, there is some evidence to suggest that Mr. H paid the legal fees for Hidalgo, III and Espindola.

1 substitution of counsel has been filed with the District Court. However, Attorney
2 Dominic Gentile and his firm have continued to represent their client, Mr. H, in the
3 proceedings.

4 In case there was any doubt about Mr. Gentile's representation of Mr. H, his
5 payment for his services have been widely publicized. On August 28, 2006, the Las
6 Vegas Sun ran an article concerning the Palomino Club. In the article, a paragraph
7 states:

8 The Palomino's latest ownership shift took place when Dominic Gentile
9 assumed ownership of the club back in March, as payment for defending
10 previous owner Luis Hidalgo Jr. {Mr. H}, who was accused of being a
11 co-conspirator in the murder of Timothy Hay (sic) Hadland (Adam
12 Gentile {Dominic Gentile's son} leases the business from his father and
13 is the club's point man). The 4.9-acre parcel property includes the club
14 Lacy's (which is the same building as the Palomino) and the Satin Saddle
15 just north of the main building.

16 (RA 32).

17 In this case, Mr. H, although not currently charged, may be prosecuted in the
18 future for his role in the conspiracy to murder Timothy Hadland. Defendant
19 Hidalgo's statement on the recordings confirms that he knew that his father had
20 ordered the execution and attempted to help his father by eliminating the witnesses.

21 ANABEL: to put him on retainer just in case OK just in case
22 cause like I said if we fucking hold our ground and
23 we don't say a mother fucking thing I'm telling
24 you I know cause I have to get Luis {Mr. H} back
25 on track cause if I don't we're all fucked.

26 LITTLE LOU:¹³ He's all ready to close the doors and everything
27 and hide go into exile and hide.

28 ¹³ Defendant Hidalgo, Luis Hidalgo III.

1 ANABEL: well the bastards fucking right what about it, what
2 about everything might as well lose it all, and if I
3 lose the shop and I lose the club I can't help you
4 or your family... God Damn it _____ your not
5 that stupid you were playing with the _____ in
6 the car and you should have fucking turned back
7 you had too many eyes on your ass what the fuck
8 were you thinking?

8 LITTLE LOU: _____ doing something stupid like that, I told you
9 to take care of this _____ dude _____ the fucking
10 time _____ KC _____ how do you know this guy

11 DEANGELO: from my mom

12 LITTLE LOU: Shh _____

13 DEANGELO: _____ aint nobody see him

14 ANABEL: _____ phone number, right

15 DEANGELO: Calls my moms house and my mom calls me all I
16 got is a cell phone number for KC that's all I have.

17
18 (State's Return to Writ Exhibit 2, p 12). Clearly, Defendant Hidalgo's best argument
19 in this case is that his father, Mr. H, was the person who conceived the conspiracy to
20 murder Timothy Hadland and that he, Defendant Hidalgo, did not become involved
21 until after the homicide took place.¹⁴ It is beyond obvious that a lawyer representing
22 the interests of Defendant Hidalgo cannot possibly represent the best interests of Mr.
23 H, a potential defendant in the same crime.

24 It is well-settled that the Sixth Amendment requires that a criminal defendant
25 enjoy the right to effective assistance of counsel. Strickland v. Washington, 466 U.S.

26
27 ¹⁴ Although this argument would have to overcome the evidence that Defendant Hidalgo called Deangelo Carroll prior to
28 the murder and ordered him to work with baseball bats and garbage bags, a conflict-free defense attorney may be able to
formulate an argument which addresses this issue.

1 668, 104 S.Ct. 2052 (1984). Counsel is presumed to be ineffective where he is
2 burdened by an actual conflict of interest. Id. at 689.

3 In those circumstances, counsel breaches the duty of loyalty, perhaps the
4 most basic of counsel's duties. Moreover, it is difficult to measure the
5 precise effect on the defense of representation corrupted by conflicting
6 interests. Given the obligation of counsel to avoid conflicts of interest
7 and the ability of trial courts to make early inquiry in certain situations
8 likely to give rise to conflicts, see, e.g., Fed.Rule Crim. Proc. 44(c), it is
reasonable for the criminal justice system to maintain a fairly rigid rule
of presumed prejudice for conflicts of interest.

9 Id. A court is obliged to consider the ramifications of a possible conflict when
10 counsel has represented a potential prosecution witness. Wheat v. United States, 486
11 U.S. 153, 108 S.Ct. 1692 (1988). In Wheat, the defendant was a mid-level co-
12 conspirator in a drug conspiracy. Id. at 154. Following an acquittal on some charges
13 and a guilty plea on others by one co-conspirator (Gomez-Barajas), and the guilty plea
14 and sentencing of another co-conspirator (Bravo), Wheat proceeded to trial. Wheat
15 requested the assistance of the same attorney that represented Bravo and Gomez-
16 Barajas.

17 The government objected to the representation based on two possible conflicts.
18 Id. at 155. First, because Gomez-Barajas had not been sentenced, he was free to
19 withdraw his plea. If so, Wheat would likely have been called as a witness against
20 him at any subsequent trial. Id. at 156. Thus, the attorney would be prevented from
21 cross-examining Wheat and thereby from effectively representing Gomez-Barajas. Id.

22 The government's second objection was the attorney's representation of Bravo.
23 Id. at 156. In this regard, the government had contacted the attorney and requested
24 that Bravo be made available to testify against Wheat and in exchange agreed to
25 modify its position at the time of sentencing. In the likely event that Bravo was called
26 to testify, the attorney's position in representing both men would forbid him from
27
28

1 cross-examining Bravo in any meaningful way. By failing to do so, he would also fail
2 to provide Wheat with effective assistance of counsel.

3 Although the defendant in Wheat suggested that the provision of waivers by all
4 affected defendant would cure any problems created by multiple representation, the
5 Supreme Court rejected this argument. Id. at 160. Courts have an independent
6 interest in ensuring that criminal trials are conducted within the ethical standards of
7 the profession and that legal proceedings appear fair to all that observe them. Id. at
8 160. Not only the interest of a criminal defendant, but the institutional interest in the
9 rendition of just verdicts in criminal cases may be jeopardized by unregulated multiple
10 representation. Id.

11 For this reason, the Court has imposed a duty on trial courts, when alerted by
12 objection from one of the parties, to ensure that criminal defendants receive a trial that
13 is fair and does not contravene the Sixth Amendment. Id. at 161; Glasser v. United
14 States, 315 U.S. 60 (1942). Because of the potential for later ineffective assistance of
15 counsel claims which may arise from the granting of a defendants request for multiple
16 representation,¹⁵ the Supreme Court held that where a court justifiably finds an actual
17 conflict of interest, it may decline a proffer of waiver, and insist that defendants be
18 represented separately. Id. at 162. "To preserve the protection of the Bill of Rights
19 for hard-pressed defendant, we indulge every reasonable presumption against the
20 waiver of fundamental rights." Id. citing Glasser, *supra*. As the Court aptly noted:

21 When a trial court finds an actual conflict of interest which impairs the
22 ability of the criminal defendant's chosen counsel to conform with the
23 ABA Code of Professional Responsibility, the court should not be
24 required to tolerate an inadequate representation of the defendant. Such
25 representation not only constitutes a breach of professional ethics and
26 invites disrespect for the integrity of the court, but it is also detrimental to
the independent interest of the trial judge to be free from future attacks

27
28 ¹⁵ Citing United States ex rel Tonaldi v. Elrod, 716 F.2d 431 (7th Cir. 1983); United States v. Vowteras, 500 F.2d 1210
(2nd Cir.).

1 over the adequacy of the waiver or the fairness of the proceedings in his
2 own court and the subtle problems implicating the defendant's
3 comprehension of the waiver.

4 Similar to the instant case, the Supreme Court noted that the attorney who
5 wished to represent the three defendants was not confronted with coequal defendants
6 in a straightforward criminal prosecution. Instead, the three co-conspirators were of
7 varying stature in a complex drug distribution scheme. Id. at 163-164. In the present
8 case, the conspiracy is much more complex, the punishment is much more severe, and
9 the distinction between the co-conspirators is much wider. Evidence links Mr. H to
10 the conspiracy to kill Timothy Hadland. He is the father of Defendant Hidalgo and
11 the boyfriend of Defendant Espindola. The same lawyer may not represent both
12 parties as either party may have an incentive to either testify against the other, or
13 present a defense antagonistic to the point of being "mutually exclusive" between the
14 parties.¹⁶

15 Even if this court were to hold that the representation may be waived by
16 Defendant Hidalgo and Mr. H, there is no evidence that such waiver exists, or more
17 importantly that Defendant Hidalgo knowingly and intelligently waived this right to
18 conflict free counsel. The United States Constitution requires that the waiver of a
19 constitutional right be a knowing, intelligent act done with sufficient awareness of the
20 relevant circumstances and likely consequences. Brady v. United States, 397 U.S.
21 742, 748, 90 S.Ct. 1463 (1970).

22 California's Second District Court of Appeals declined to extend Wheat,
23 holding that a court abridges defendant's right to counsel when it removes retained
24 counsel in the face of defendant's willingness to make an informed an intelligent
25 waiver of his right to be represented by conflict-free counsel Alcocer v. Superior
26 Court, 254 Cal.Rptr. 72 (1989). However, the Alcocer Court set forth a standard to be
27 applied where a potential conflict of interest exists. Before permitting a defendant to

28 ¹⁶ For a definition of antagonistic defenses which are "mutually exclusive," see Marshall v. State, 118 Nev. 642, 56 P.3d 376 (2002)

1 waive his right to conflict-free counsel, the court must set forth the basis for its
2 conclusion of possible conflict of interest between defendant and attorney. Alcocer,
3 at 77. The court must advise the defendant that his attorney may not be able to
4 effectively and adequately represent him and inform the defendant that he may not
5 receive a fair trial if the attorney should continue to represent him. Id. Then the court
6 must appoint independent counsel to confer with the defendant regarding conflict. Id.

7 Moreover, the court should inquire whether the defendant understands the
8 conflict or potential conflict with his present counsel; the effect on his representation
9 and inquire whether defendant has elected to keep his present counsel solely because
10 of financial reasons; and if so, inform him that counsel will be appointed he is
11 financially unable to retain an independent attorney.¹⁷ Id. Finally, and most
12 importantly, defendant must be informed that his voluntary waiver of the right to
13 conflict-free counsel is a waiver of the right to appeal the ineffective assistance of
14 counsel insofar as it involves conflict. Id.

15 Likewise, the other party represented by the same counsel should be apprised of
16 the potential ramifications of the conflict of interest created by his counsel's
17 representation of the defendant and afford the potential witness the opportunity to
18 object to representation of the defendant by his attorney. Id. at 79; *See also United*
19 *States v. James*, 708 F.2d 40, 46 (2d Cir. 1983).

20 Here, there is no indication that either Defendant Hidalgo or Mr. H has given
21 informed consent to the dual representation. Likewise, the protections afforded by the
22 Alcocer canvass have not been offered to either. Therefore, the continued
23 representation of both by Attorney Gentile may materially disadvantage Defendant
24 Hidalgo and Luis Hidalgo, Jr.

25
26
27
28 ¹⁷ The Alcocer Court outlines the specific script that should be used by the court.

1 **C. Attorney Gentile Cannot Effectively Represent Defendant Hidalgo**
2 **because he is paid by Defendant Hidalgo's father and employer**

3 The Nevada Rules of Professional Conduct provide, "A lawyer shall not permit
4 a person who recommends, employs, or pays the lawyer to render legal services for
5 another to direct or regulate the lawyer's professional judgment in rendering such
6 legal services." Rule 5.4(c). Courts have recognized the inherent dangers that arise
7 when a defendant is represented by a lawyer hired by a third party, particularly when
8 the third party is the operator of an alleged criminal enterprise. One risk is that the
9 lawyer will prevent his client from obtaining leniency by preventing the client from
10 offering testimony against his former employer or from taking other actions contrary
11 to the employer's interest. Wood v. Georgia, 450 U.S. 261, 101 S.Ct. 1097 (1981).

12 In Wood, the employees of an adult movie theater were charged under the
13 Georgia obscenity law. Each was fined \$5000.00 and placed on probation. Shortly
14 thereafter, defendants' probation was revoked because the defendants failed to pay the
15 fines. Each faced a jail sentence. The defendants were represented by a lawyer paid
16 by their employer. Each defendant was told that any fines or bonds would be paid by
17 their employer. Although defendants' employer had paid previous fines, they refused
18 to pay the fines in this case.

19 The Wood Court recognized that the employer had an interest in the case
20 independent of the interests of the defendants. In Wood, the interest of the employer
21 was to establish a legal precedent, but that interest could only be satisfied by
22 sacrificing the liberty of the defendants. Id. at 270, 101 S.Ct. at 1103. The Court
23 found the potential for injustice as a result of the conflict of interest to be inherent in
24 this type of arrangement. Quoting a New Jersey Supreme Court case, the Wood Court
25 stated,

26 A conflict of interest inheres in every such situation... It is inherently
27 wrong to represent both the employer and the employee if the employee's
28 interest may, and the public's interest will, be advanced by the disclosure

1 of his employer's criminal conduct. For the same reasons, it is also
2 inherently wrong for an attorney who represents only the employee to
3 accept a promise to pay from one whose criminal liability may turn on
the employee's testimony.

4 Id. at 271, 101 S.Ct. at 1103, *quoting In Re Abrams*, 266 A.2d 275, 278 (N.J. 1970).

5 In the present case, Defendant Hidalgo's best defense may be to implicate his
6 father and employer, Luis Hidalgo, Jr. (Mr. H). Because there is substantial evidence
7 that Mr. H is involved in this case and Attorney Gentile is paid by Mr. H, Defendant
8 Hidalgo may not receive effective assistance of counsel due to the clear conflict of
9 interest. Therefore, Attorney Gentile should not be permitted to represent Defendant
10 Hidalgo in this case.

11 **D. Attorney Gentile And Other Members Of His Firm May Be**
12 **Witnesses Against Defendants**

13 The District Court file reflects that Attorney Gentile, or his employees, have
14 been utilizing orders for contact visits between co-conspirators based upon ex-parte
15 orders. On June 13, 2005, the day of the preliminary hearing, Petitioner Hidalgo, III
16 by way of Affidavit by Robert Drascovich filed an Ex Parte Motion to Allow Contact
17 Visit with the justice of the peace. The grounds for the motion were as follows:

18
19 6. That I need to confer with my client in the presence of his father, Luis
20 Hidalgo, Jr. and William Gamage, his father's attorney, in order to
21 effectively and thoroughly prepare for said upcoming Preliminary
Hearing;

22 7. That in order for the Detention Center to grant us all access at the
23 same time, I need an Order authorizing same.

24 (RA 35). The Order was filed the same day. On June 14th, the day after the
25 preliminary hearing and the bindover to District Court, the contact visit was
26 conducted. (RA 38-42).

27 On June 20, 2005, an Ex Parte Application for Contact Visit was filed by
28 Petitioner Espindola through her attorney, Christopher Oram. (RA 43). That

1 application requested that Mr. H be allowed to have a contact visit with Petitioner
2 Espindola to discuss "the businesses," and Attorney Oram indicated that as an officer
3 of the Court, he would not allow communication between the two co-conspirators.
4 The Court signed an order the same day indicating, "the undersigned and Mr. Luis
5 Hidalgo be granted a contact visit with Ms. Anabel Espindola #1849750, in the Clark
6 County Detention Center." (RA 43). On June 24, 2005, pursuant to that order,
7 Petitioner Espindola met with Attorney Christopher Oram, Mr. H, and Mr. H's
8 lawyer, William Gamage. (RA 50-53).

9 The District Court file reflects that on August 10, 2005, Petitioner Espindola
10 once again filed an Ex Parte Application for Contact Visit. (RA 54) In that motion,
11 Petitioner Espindola states:

12 The undersigned would respectfully request a contact visit with Ms.
13 Espindola, the undersigned, Mr. Luis Hidalgo, Jr., and his counsel. Mr.
14 Hidalgo, Jr.'s counsel will accompany him. Additionally, Mr. Luis
15 Hidalgo, Jr., would have no problem submitting to any search as the
16 Clark County Detention Center would deem necessary. However, the
17 undersigned would respectfully request only Ms. Espindola, the
18 undersigned, Mr. Luis Hidalgo, Jr., and his counsel be allowed in the
19 contact room and that no jail personnel be permitted into the contact
20 room. The undersigned makes this request as there will be discussions
regarding the case and attorney client privilege information will be
discussed. Mr. Hidalgo, Jr. is a witness in the case and this visit is
imperative to prepare for Ms. Espindola's case.

21 (RA 55). While no order could be found regarding this application, a contact visit
22 between Petitioner Espindola, Dominic Gentile and Christopher Oram occurred on
23 August 12, 2005 noting "per copy of court order dated 8/09/05, original not on file,
24 OK per Lt. Crees." (RA 58). At the time of the visit, an officer in the detention
25 center noticed something peculiar and wrote the following report:

26 I was advised that the inmate had an attorney contact visit. When I went
27 to the C/D side door, there were three males wearing visitor badges. I
28 recognized two of them as attorneys that had been in and out of the jail

1 frequently. I asked about the third male dressed in a yellow shirt, and
2 one of the attorneys stated that he was on a court order to see them. He
3 stated that we have a copy of this court order. I had assumed the man to
4 be an interpreter for them. When I was letting them out of the visit room
5 the inmate was talking to the same man telling him that some item was in
6 his file cabinet. I spoke with one of the attorneys on the way out, and he
7 stated that the gentleman was not an interpreter; he was just on the court
8 order for visitation. I talked to Karen at post 10, and she stated that these
9 gentlemen only had a single copy of a court order, and that Lt. Creese
10 had ok'd the visit. I asked Inmate Espindola who he was, and she was
11 evasive. She first stated that he was co-counsel, and later stated that she
12 did not know him. Inmate had previously been seen by myself to be
13 speaking to this man, as previously stated.

14 (RA 60). Additionally, on August 10, 2005, an Order Granting Ex Parte Application
15 for Contact Visit was filed authorizing "the undersigned and Mr. Luis Hidalgo, Jr.,
16 and his counsel be granted a contact visit with Ms. (sic) LUIS HIDALGO, III
17 #1849634, in the Clark County Detention Center. This visit will be conducted with no
18 jail personnel present." (RA 63-64). Clark County Detention Center Records reflect
19 that Petitioner Hidalgo, III was visited by Mr. H and Dominic Gentile on August 12,
20 2005; however, it does not appear that Petitioner Hidalgo, III's counsel was present.¹⁸
21 (RA 65-67).

22 On October 24, 2005, once again, an Ex Parte Application for Contact Visit
23 was filed by Petitioner Espindola. (RA 83-88). However, the order which
24 accompanies that request was filed on October 21, 2005. (RA 70). Additionally, the
25 attorney who signed the order on behalf of Petitioner Espindola's attorney is Paola
26 Armeni, Bar Number 8357. (RA 70). A review of Nevada's Legal Directory lists a
27 Paola Armeni #8357 as an attorney with Gentile, LTD.¹⁹ On October 22, 2005, a
28

¹⁸ Moreover, no evidence of an ex parte application was found in the district court file.

¹⁹ Nevada Legal Directory, p. 12. See also RA 25-31, listing associate of the Gentile firm.

1 contact visit was conducted between Petitioner Espindola, Mr. H, Dominic Gentile,
2 and Christopher Oram pursuant to "COURT ORDER DATED 10-21-05." (RA 73).

3 On October 26, 2005, similarly, an Ex Parte Application for Contact Visit was
4 filed by Petitioner Hidalgo.²⁰ Once again; however, the order which accompanies that
5 request was filed on October 21, 2005. Additionally, the attorney who signed the
6 order on behalf of Petitioner Espindola's attorney is Paola Armeni, Bar Number 8357.
7 (RA 76). On October 22, 2005, a contact visit was conducted between Petitioner
8 Hidalgo, III, Mr. H, Dominic Gentile, and Robert Drascovich "per Ct. Order." (RA
9 77).²¹

10 On December 8, 2005, Defendant Hidalgo filed another Ex Parte Application
11 for Contact Visit based upon the same reasons previously stated. (RA 94) On
12 December 9, 2005, a similar motion was filed by Petition Espindola. (RA 90).
13 However, it doesn't appear an order was ever issued from the request or a contact visit
14 conducted.

15 Notwithstanding, on March 3, 2006, two Orders Granting Ex Parte Application
16 for Contact Visit were filed on behalf of both Defendants. (RA 97, 104) On March 5,
17 2006, Petitioner Hidalgo, III had a contact visit with Mr. H, Dominic Gentile, and
18 Robert Draskovich. (RA 106-109) On March 10, 2006, Petitioner Espindola had a
19 contact visit with Mr. H, Christopher Oram, and Paola Armeni. (RA 101-103)

20 It is axiomatic that a lawyer may not act as an advocate at a trial in which the
21 lawyer is likely to be a necessary witness. N.R.P.C. Rule 3.7(a). Moreover, a lawyer
22 may not act as an advocate in a trial in which another lawyer is likely to be called as a
23 witness if precluded from doing so under Rule 1.7 of 1.9 (relating to conflicts of
24 interest). N.R.P.C. Rule 3.7(b). In the present case, Attorney Gentile and his
25

26 ²⁰ This is the first Ex Parte Application which could be located filed by Petitioner Hidalgo, III. This contains almost a
27 mirror of the language from the August 10, 2005 application by Petitioner Espindola.

28 ²¹ Several of the orders in the instant matter appear to have been signed before the applications were filed. The State is
at a loss to understand how that happened.

1 associates have engaged in conversations in which Defendants were a party. Those
2 conversations always had a third party, Mr. H, present. As such, those conversations
3 are not privileged. Nevada Tax Commission v. Hicks, 73 Nev. 115, 310 P.2d 852
4 (1957).

5 The attorney-client privilege is narrowly circumscribed to shield from
6 disclosure only those communications from a client to an attorney made in confidence
7 and for the purpose of securing legal advice. NRS 49.095 defines the general rule of
8 attorney-client privilege. A client has the privilege to refuse to disclose and to prevent
9 any other person from disclosing confidential communications: (1) between himself or
10 his representative and his lawyer or his lawyer's representative; (2) between his
11 lawyer and the lawyer's representative; or (3) made for the purpose of facilitating the
12 rendition of professional legal services to the client, by him or his lawyer to a lawyer
13 representing another in a matter of common interest.

14 Therefore, Defendants' communications with attorneys which were not made
15 for the purpose of facilitating legal advice are not privileged. Courts have extended
16 this privilege to protect the confidentiality of communications passing from one party
17 to an attorney for another party where the joint defense effort or strategy has been
18 decided upon and undertaken by parties and their respective counsels. See United
19 States v. Schwimmer, 892 F.2d 237, 243 (2d Cir. 1989). The joint defense privilege is
20 not a stand alone doctrine, but is rooted solely within and is based upon the attorney-
21 client privilege. Id. As with all claims of privilege, the joint defense privilege
22 requires that the communication was given in confidence and that the client
23 reasonably understood it to be so given. Id. at 244. The privilege only extends to
24 communications between one client to a joint defendant client's lawyer or agent. Id.
25 The privilege does not extend to communications between joint defendants.

26 For a joint-defense privilege to apply, it is necessary that the "joint defense
27 effort or strategy has been decided upon and undertaken by parties and their
28 respective counsels." United States v. Austin, 416 F.3d 1016 (9th Cir. 2005). Here,

1 because Mr. H is not charged with this crime, no joint defense effort is necessary.
2 Moreover, even if a joint defense was available, the statements made by a co-
3 defendant to other co-defendants are not privileged. Further, communications
4 between a client and an attorney for the purpose of relaying information to a third
5 party are not confidential and not protected by the attorney-client privilege. United
6 States v. Bergonzi, 216 F.R.D. 487 (N.D. Cal. 2003). Thus, the presence of Mr. H
7 during the conversations between Defendant Hidalgo and Attorney Gentile vitiates
8 any potential claims of privilege. Therefore, both Attorney Gentile and Luis Hidalgo,
9 Jr. may be called as a witness to testify about the statements made by Defendant
10 Hidalgo.

11 **E. A Substantial Risk of Prejudice to Defendant Hidalgo Exists is**
12 **Attorney Gentile Continues to Represent Him in This Case.**

13 Clearly, the representation of Defendant Hidalgo by Attorney Gentile is
14 prohibited by a conflict of interest. Attorney Gentile represents the father and
15 employer of Defendant Hidalgo. There is a substantial risk that Defendant Hidalgo
16 will not receive effective assistance of counsel due to his representation by a person
17 whose criminal liability may turn on Defendant Hidalgo's defense strategy. Because
18 Defendant Hidalgo has not waived his right to conflict-free counsel, and the court has
19 not determined whether such waiver would be valid under these circumstances, there
20 is a substantial risk that a guilty verdict in this case would be subject to appeal and
21 reversal due to Attorney Gentile's representation. Therefore, this petition must be
22 dismissed and an order directing Attorney Gentile not to represent any defendant in
23 this case must be issued.

24 **CONCLUSION**


25 Defendant's petition for an extraordinary writ should be dismissed as there is an
26 adequate remedy available at law. The Notices of Intent to Seek the Death Penalty
27 were timely filed, listed the aggravating circumstances supported by the evidence, and
28 referenced with specificity the facts which support the allegations. The question of

1 whether Defendants' possessed the requisite intent to commit First Degree Murder is a
2 question of fact to be determined by the jury. The conception, planning, and
3 coordination of a murder-for-hire plot, accompanied by hiring of a hit man and
4 payment of funds to the contracted killer is clearly a threat of violence. As such, the
5 district court did not abuse its discretion or exceed its authority in allowing the jury to
6 determine, based on the facts of the case, whether the Defendants should face the
7 death penalty for the killing of another person. Therefore, this Court should deny
8 Defendant's petition.

9 Dated November 9, 2006.

10 DAVID ROGER
11 Clark County District Attorney
12 Nevada Bar # 002781

13 BY


14 JAMES TUFTLAND
15 Chief Deputy District Attorney
16 Nevada Bar #000439

17 Office of the Clark County District Attorney
18 200 Lewis Avenue
19 Post Office Box 552212
20 Las Vegas, Nevada 89155-2212
21 (702) 671-2500
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Dominic P. Gentile
Nevada Bar # 001923
3960 Howard Hughes Pkwy.
Las Vegas, NV 89109
Attorney for Petitioner Hidalgo

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Judge Donald Mosley
Department XIV
Clark County Courthouse
200 Lewis Avenue
Las Vegas, Nevada 89101

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