

IN THE SUPREME COURT OF THE STATE OF NEVADA

2008 JAN -8 PM 4:10

DEANGELO RESHAWN CARROLL

Petitioners,

vs.

THE EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA, IN
AND FOR THE COUNTY OF CLARK,
AND THE HONORABLE VALERIE ADAIR
DISTRICT JUDGE

Respondents,

And

THE STATE OF NEVADA,

Real Party in Interest.

S.Ct. Case No. 50576

D.Ct. Case No. C212667

FILED

JAN 10 2008

**ANSWER TO PETITION
FOR WRIT OF MANDAMUS**

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

DAYVID J. FIGLER
BUNIN & BUNIN LTD.
Nevada Bar # 004264
626 South 3rd Street
Las Vegas, Nevada 89101
(702) 386-0333

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

CATHERINE CORTEZ MASTO
Nevada Attorney General
Nevada Bar No. 003926
100 North Carson Street
Carson City, Nevada 89701-4717
(775) 684-1265

RECEIVED

JAN 10 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
DEPUTY CLERK

Counsel for Appellant

Counsel for Respondent

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

2
3
4
5 DEANGELO RESHAWN CARROLL)

6 Petitioners,)

7 vs.)

8 THE EIGHTH JUDICIAL DISTRICT
9 COURT OF THE STATE OF NEVADA, IN
10 AND FOR THE COUNTY OF CLARK, AND
11 THE HONORABLE VALERIE ADAIR
12 DISTRICT JUDGE)

S.Ct. Case No. 50576

13 Respondents,)

D.Ct. Case No. C212667

14 And)

15 THE STATE OF NEVADA,)

16 Real Party in Interest.)


17 **ANSWER TO PETITION
18 FOR WRIT OF MANDAMUS**

19 COMES NOW, the State of Nevada, Real Party in Interest, by DAVID
20 ROGER, District Attorney, through his deputy, NANCY A. BECKER, 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 November 29, 2007 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 January 8, 2008.

26 DAVID ROGER
27 Clark County District Attorney
28 Nevada Bar # 002781

BY


NANCY A. BECKER
Deputy District Attorney
Nevada Bar #000145
Attorney for Respondent

**MEMORANDUM OF
POINTS AND AUTHORITIES**
STATEMENT OF FACTS

On the evening of May 19, 2005, Timothy Hadland¹ and his girlfriend, Paijit Karlson, had decided to go camping at Lake Mead. See Attached Exhibit 1, Reporter's Transcript of Preliminary Hearing ("RT"), p. 47. They drove Paijit's Kia Sportage and arrived at a camping area around 7:30 p.m. RT, pp. 48, 54-5. Sometime during the evening, TJ received a phone call from Deangelo Carroll. RT, pp. 50-1. After getting off the phone, T.J. told his girlfriend he needed to meet with Carroll but would return shortly. RT, pp. 51-2. That was the last time Paijit saw T.J. alive. RT, p. 55.

At approximately 12:30 a.m. on May 20, 2005, Las Vegas Metropolitan Police Department ("LVMPD") Detective Michael McGrath responded to a call about a possible homicide on North Shore Road near Lake Mead. RT, p. 146. Upon arrival, Detective McGrath observed the body of an unidentified male lying face up in the middle of the road with an apparent gunshot wound to his head. RT, pp. 151, 153. The male was later identified as Timothy Hadland. RT, p. 151. The autopsy revealed that T.J. died from two gunshot wounds to the head. RT, pp. 156-7.

Near T.J.'s body, police found several flyers, scattered about for a strip club in North Las Vegas called the Palomino Club. RT, p. 151. A Kia Sportage SUV was found approximately 30 feet away; inside the SUV, police found a cell phone. RT, pp. 152-3. The last call on the phone had been received at approximately 11:27 p.m. on May 19, 2005. RT, p. 154. The call was a direct Nextel connect from a number identified as "Deangelo." RT, p. 154. Based on an interview with T.J.'s girlfriend, "Deangelo" was determined to be Carroll. RT, pp. 154-5. During the course of the investigation, police learned that the number identified as "Deangelo" was registered to Co-Defendant, Anabel Espindola. RT, p. 158. The listed address for the phone

¹ The victim, Timothy Hadland, was sometimes referred to as "T.J." RT, p. 48.

1 number was Simone's Auto Plaza, 6770 Bermuda, Las Vegas, Nevada. RT, p. 158.
2 A computer search revealed that Espindola was a key employee at the Palomino Club.
3 RT, p. 158-9. T.J. had been a former employee at Palomino Club but had stopped
4 working there about two and a half weeks before his body was discovered. RT, p. 49.

5 Detectives contacted the owner of Palomino Club, Luis Hidalgo, Jr.,² and were
6 told to return to the club later and speak with the floor manager, "Arial," whose real
7 name is Michelle Schwanderlik. RT, pp. 162-3. From Michelle, detectives learned
8 that Carroll was a current employee at the Palomino Club and that T.J. had been a
9 former employee. RT, p. 163. While Detectives were interviewing Michelle, Carroll
10 walked into the club. RT, p. 164. Carroll agreed to accompany the detectives to the
11 police station where he voluntarily gave a taped statement. RT, p. 164.

12 The Phone Call and Offer

13 During his interview with police, Carroll explained that prior to arriving at
14 work on May 19, 2005, he received a call from Luis Hidalgo, III. Hidalgo told Carroll
15 to bring two garbage bags and a baseball bat. See Attached Exhibit 2, Carroll's
16 Voluntary Statement (hereinafter "Vol. Stmt."), 05/19/05, p. 56. Hidalgo also said
17 something to the effect that Carroll had to "take care of _____.³ Vol. Stmt.,
18 05/19/05, p. 57. Upon arrival at the Palomino Club, Carroll was called into the office
19 by Mr. H. In the presence of Espindola, Mr. H explained that the victim "was puttin'
20 bad shit on his club and didn't like, so he tried to tell us, what, what, what he said is if
21 you guys don't knock him out, at first he wanted us to beat him up, then he said that
22 he wanted T.J. knocked off." Vol. Stmt., 05/19/05, p. 56. Mr. H explained that
23 Hidalgo was very upset with the victim and wanted Carroll to "go take care of T.J..⁴
24

25 ² Luis Hidalgo, Jr. was also known as "Mr. H", while his son, Luis Hidalgo, III, was called Little Lou. RT, p. 161. For
26 the sake of simplicity, Luis Hidalgo, Jr. will hereinafter be referred to as Mr. H, and Co-Defendant Luis Hidalgo, III, will
be referred to as Hidalgo.

27 ³ The end of the sentence was garbled and Carroll could not understand what Hildago said.

28 ⁴ Prior to Carroll going to met with Mr. H at the Palomino Club, Carroll had already told Rontae and Taoipu that Mr. H
would pay to have someone killed.

1 Vol. Stmt., 05/19/05, p. 59. Additionally, Mr. H was offering cash for the people who
2 actually killed T.J. Mr. H was angry because T.J. was bad-mouthing the club causing
3 it to lose business. Vol. Stmt., 05/19/05, p. 59. As a result of this conversation,
4 Carroll assumed Hidalgo's previous phone call about "bats and garbage bags" was an
5 indication that Hidalgo wanted T.J. beaten to death. Vol. Stmt., 05/19/05, p. 63.

6 In May, 2005, nineteen year old Rontae Zone began working with Carroll as a
7 flyer boy for the Palomino Club. RT, p. 17. Rontae and Carroll were good friends.
8 RT, p. 20. As a flyer boy, Rontae distributed pamphlets and flyers at cab stops. RT,
9 p. 17. Rontae and Carroll drove around in a white Chevy Astro van distributing
10 flyers. RT, p. 18-9. Rontae worked with Carroll for approximately four or five days,
11 the first time was about three days prior to the murder. RT, pp. 18-9. On the first
12 night, Rontae received twenty dollars (\$20) for his services. RT, pp. 18-9. After
13 finishing work, Rontae went to Carroll's house, located on Yale Street. RT, p. 20.

14 On May 19, 2005, Rontae and Carroll went out promoting again. RT, p. 21.
15 This time, they were joined by "J.J.", who was later identified as Co-Defendant,
16 Jayson Taoipu.⁵ RT, pp. 21, 27. While out distributing flyers, Carroll told Rontae
17 and Taoipu that Mr. H wanted Carroll to kill someone. RT, p. 26. Although Rontae
18 told Carroll he did not and would not participate, Taoipu agreed to help Carroll. RT,
19 pp. 27-8. Carroll then gave Taoipu a .22 revolver. RT, p. 28. Carroll also gave
20 Rontae bullets. RT, p. 29. However, as Rontae did not want to participate in the
21 killing, Rontae gave the bullets to Taoipu. RT, p. 29. After finishing work, Rontae
22 and Taoipu went back to Carroll's house with Carroll. RT, p. 30. After a few hours,
23 Carroll told them it was time to go back to work. RT, p. 31. Carroll, Taoipu and
24 Rontae got back into the white Chevy Astro Van and headed to E Street. RT, p. 34.
25 Carroll told Taoipu and Rontae that he needed to pick up "K.C.", later identified as
26 Co-Defendant Kenneth Count. RT, pp. 31, 174. Carroll said that Mr. H's son, Co-

27 _____
28 ⁵ Co-Defendant Jayson Taoipu is also known as "J.J."

1 Defendant Hidalgo Luis, III, also wanted T.J. dead and that Carroll should grab
2 baseball bats and trash bags. RT, p. 34.

3 Upon arriving on E Street, Carroll went inside Counts' house, which was
4 located across the street from Carroll's mom's house. RT, p. 35. Rontae and Taoipu
5 remained in the van. RT, p. 35. About ten minutes later, Carroll and Counts emerged
6 from the house, got into the van and the four men drove away. RT, pp. 35-6. Carroll
7 was driving the van, Taoipu was in the front passenger seat, and Counts and Rontae
8 were sitting in the rear. RT, p. 40. Carroll drove toward Lake Mead. RT, p. 37.
9 During the ride to the lake, Espindola contacted Carroll and told him "if [T.J.'s] by
10 himself, then do him, if he isn't by himself, then just fuck him up, fuck him up and
11 fuck up whoever's with him.

12 The Murder

13 As Carroll drove the van toward Lake Mead, Carroll called T.J. by cell phone to
14 lure him away from the lake. RT, p. 38. T.J. approached the van. RT, p. 60. He was
15 driving his girlfriend's Kia Sportage. RT, p. 63. T.J. pulled in front of the van and
16 parked. RT, p. 62. He then got out of the Kia Sportage and walked toward the
17 driver's side of the van. RT, pp. 63, 65. As T.J. approached the van, Counts's
18 "sneaked" out the sliding passenger door of the van. RT, p. 66. He was holding a
19 black .357 firearm. RT, p. 66. After creeping out of the van, Counts crept quietly
20 around the front of the van, snuck up behind T.J., pointed the gun at T.J.'s head and
21 shot T.J. as he was standing at the driver's side window. RT, pp. 67-9. Counts shot
22 T.J. in the head twice. RT, p. 69. Counts got back into the van and instructed Carroll
23 to drive. RT, p. 70. Carroll drove away and back to the Palomino Club. RT, pp. 70,
24 72.

25 Payment at the Palomino Club

26 As they were driving away, Counts asked Taoipu why he did not shoot. RT, p.
27 71. Taoipu said he had intended to shoot but Carroll was in the way. RT, p. 72.
28 Once they arrived at the Palomino Club, Carroll and Counts went into the Club;

1 Rontae and Taoipu stayed outside. RT, pp. 72-3. After about thirty minutes, Counts
2 exited the Club, got into a cab and left. RT, p. 73. After another forty-five minutes,
3 Carroll exited the Club. RT, p. 73. Carroll told Rontae and Taoipu that Counts got
4 paid. RT, p. 75. Carroll told the police that Counts was paid \$6000.00 for his
5 services. Vol. Stmt., p. 05/19/05, p. 65. Espindola provided the money to Carroll to
6 pay Counts. Vol. Stmt., p. 05/19/05, p. 65. Carroll received \$100 for his
7 participation. RT, p. 79. Thereafter, Carroll, Rontae and Taoipu left and stayed at
8 Carroll's house. RT, p. 74.

9 The following morning, Taoipu drove the van to a tire shop while Carroll and
10 Rontae followed in another vehicle. RT, p. 76-7. Carroll stabbed all four tires on the
11 van and had the tire shop replace the tires. RT, p. 78. Carroll paid and told Rontae
12 that Co-Defendant Anabel Espindola had given him a hundred dollars (\$100) to
13 replace the tires.⁶ RT, p. 79. The four slashed tires were later recovered by
14 detectives. RT, pp. 168-9. Later in the day, Carroll drove the van to Simone's Auto
15 Plaza with Rontae and Taoipu. RT, pp. 84-5. While at Simone's Auto Plaza, Carroll
16 met with Mr. H. RT, p. 95. Then the group left in a Palomino Shuttle leaving the van
17 behind. RT, p. 96. The van was later recovered in the parking lot at Simone's Auto
18 Plaza during the execution of a search warrant. RT, p. 319.

19 The next time Rontae saw Carroll was in the presence of homicide detectives.
20 RT, p. 99. Based on the information obtained by Carroll during his interview with
21 police, detectives interviewed Rontae and Taoipu. RT, p. 165. Carroll told Rontae to
22 tell the truth or they would go to jail. RT, p. 99.

23 Co-Defendant Taoipu

24 Taoipu was eventually located and interviewed. Taoipu confirmed most of the
25 information provided by Carroll, including calling the attack on T.J. a hit ordered by
26 Mr. H, indicating that Hidalgo called Carroll and told him to bring garbage bags and
27

28 ⁶ According to Carroll's statement to the police, he was given Two Hundred Dollars (\$ 200.00) by Espindola, one hundred for his own use and one hundred to get rid of the tires.

1 baseball bats, confirming that Espindola called Carroll as they were driving to Lake
2 Mead, and that Carroll and Counts were paid for their participation in the murder.

3 Co-Defendant Counts

4 After interviewing Rontae and Taoipu, detectives set out to identify, locate and
5 arrest Counts. RT, pp. 165-7. Detectives knew from the description provided that
6 Counts lived at 1676 E Street. RT, p. 167. A search warrant was obtained and
7 executed for Counts' residence but Counts was not there. RT, pp. 167-8, 171. While
8 executing the search warrant, detectives received additional information from Carroll
9 that Counts was hiding across the street at 1677 E Street. RT, p. 172. A second
10 search warrant was issued for that residence. RT, p. 172. Efforts to contact Counts at
11 1677 E Street were unsuccessful. RT, p. 172. Eventually, Counts was found hiding in
12 the attic and the SWAT team had to cut a hole in the ceiling to extricate Counts. RT,
13 pp. 176-8.

14 After removing Counts from the house, a search was conducted of the 1677 E
15 Street residence. During the search, detectives recovered a black satchel containing
16 several one hundred dollar (\$100) bills and Counts' Nevada identification card. RT,
17 p. 181. Underneath the coach, detectives found more money, peach cigars and several
18 VIP cards from the Palomino Club. RT, pp. 181-2.

19 Hidalgo and Espindola Solicit Carroll to Kill Rontae and Taoipu

20 After the search, detectives once again met with Carroll, who consented to
21 wearing a body recorder. RT, p. 183. On May 23rd, detectives surveilled Carroll as
22 he entered Simone's Auto Plaza wearing the body recorder. RT, pp. 184-5. After
23 leaving Simone's Auto Plaza, Carroll met with detectives and the body recorder was
24 collected and analyzed. RT, p. 186-7. Carroll was also in possession of fourteen
25 hundred dollars (\$1400) and a bottle of high line Tanqueray. RT, p. 251. Thereafter,
26 Carroll was instructed to go to Palomino Club and resign; a second body recorder was
27 placed on Carroll. RT, pp. 187-8.

28 An enhanced version of the body recording was admitted at the preliminary

1 hearing. RT, p. 250. See Attached Exhibit 3, Transcript of 05/23/05 Recording. On
2 the recording, Carroll, Hidalgo and Espindola, discussed the crime as well as
3 requested Carroll to kill Rontae and Taoipu. Transcript, 05/23/05, pp. 7-8. Hidalgo
4 then asked Carroll whether "K.C." would be willing to kill Rontae and Taoipu.

5 DEANGELO: Who

6 LITTLE LOU: The people who are gonna rat.

7
8 DEANGELO: They're gonna fucking work deals for themselves, they're
9 gonna get me for sure cause I was driving, they're gonna get KC because
10 he was the fucking trigger man. They're not gonna do anything else to
the other guys cause they're fucking snitching.

11 LITTLE LOU: **Could you have fucking KC fill them too, we'll**
12 **fucking put something in their food so they die rat poison or**
13 **something.**

14 DEANGELO: We can do that to

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

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

18 ANABEL: Here's the thing, we can take care of KC too – KC is asking
19 for money, right ok, but here is the thing he's the mother fucking shooter,
20 people can pinpoint him –

21 Transcript, 05/23/05, pp. 7-8 (emphasis added). Afterward, Hidalgo told Carroll to
22 put rat poisoning in a bottle of Tanqueray gin and have Rontae and Taoipu drink it.
23 Transcript, 05/23/05, p. 12. Moreover, Espindola provided money to Carroll himself.
24 Transcript, 05/23/05, p. 14. Hidalgo told Carroll if he goes to prison for the crime,
25 Hidalgo will buy Carroll's family United States' savings bonds to help pay for his
26 family. Transcript, 05/23/05, p. 13.

27 The following day, Carroll went back to Simone's Auto Plaza wearing another
28

1 body recorder. RT, p. 190. After leaving the Auto Plaza, the body recorder was
2 collected from Carroll along with eight hundred dollars (\$800). RT, pp. 190, 257. A
3 search warrant was subsequently issued for Simone's Auto Plaza and Palomino Club.
4 RT, p. 190. However, before executing the search warrants, detectives waited for the
5 other suspects to leave. RT, p. 191. The first suspect to leave the Auto Plaza was
6 Hidalgo. RT, p. 191. After leaving, Hidalgo was stopped by a patrol officer and then
7 contacted by detectives. RT, pp. 192-3, 312. Hidalgo agreed to accompany detectives
8 to the homicide office for an interview. RT, p. 193. After receiving his Miranda
9 warning, Hidalgo was interviewed for several hours. RT, pp. 209-10.

10 Sometime thereafter, Espindola left Simone's Auto Plaza with Mr. H. RT, p.
11 211, 312-3. She was eventually brought down to the homicide office as well, and
12 after being read her Miranda rights, she admitted that she had spoken to Carroll earlier
13 in the day as well as the previous day at Simone's Auto Plaza. RT, pp. 211-2, 215.

14 The recording from the May 24th encounter between Carroll, Hidalgo and
15 Espindola, at Simone's Auto Plaza was admitted into evidence during the preliminary
16 hearing. See Attached Exhibit 4, Transcript of 05/24/05 Recording. During the
17 recording, Espindola tried to explain how she tried to call Carroll and change the plan
18 from killing T.J. to only beating him.

19 DEANGELO: You know what I'm saying I did everything you guys
20 asked me to do you told me to take care of the guy and I took care of
21 him.

22 ANABEL: OK – listen, listen

23 DEANGELO: I'm not ...

24 ANABEL: – talk to him not fucking take care of him – god damn it I
25 fucking called you

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

1 ANABEL: I –

2 DEANGELO: if he is with somebody you said if he is with somebody
3 then just beat him up

4 ANABEL: I said go to plan B fucking Deangelo and Deangelo you're
5 just minutes away – I told you no I fucking told you no, and I kept trying
6 to fucking call you but you turned off your mother fucking phone.

7 DEANGELO: I never turned off my phone

8 ANABEL: I couldn't reach you

9 DEANGELO: I never turned off my phone, my phone was on the whole
10 fucking night Ms. Anabel.

11 ANABEL: Shh – I couldn't fucking reach you as soon as – spoken –
12 knew where you fuck were. I fucking tried calling you again and I
couldn't fucking reach you.

13 Transcript, 05/24/05, pp. 1-2. After this discussion, Espindola got more money for
14 Carroll. Espindola told Carroll to deny everything and said that if she were ever
15 contacted, she was just going to deny any knowledge. Transcript, 05/24/05, p. 3.

16 A subsequent search of both the Palomino Club and Simone's Auto Plaza
17 revealed several items which were relevant to the investigation. At the Palomino
18 Club, detectives found paperwork on Carroll and Timothy Hadland, and Carroll's
19 resignation paper signed on May 23, 2005; these items were found in Mr. H's office.
20 RT, p. 219. Detectives also recovered \$105,000.00 in U.S. currency and another
21 \$50,000.00 from a safe located in a closet behind Mr. H's office.

22 At Simone's Auto Plaza, detectives found numerous pieces of identification in
23 the name of Hidalgo, thousands of dollars in United States' savings bonds in the name
24 of Hidalgo and various bottles of liquor. In Espindola's office, detectives found a
25 check made out to Carroll for twenty-four hours of work. RT, p. 318.

26 During the recording of May 23rd, Espindola told Carroll why he was getting a
27 check for twenty-four hours.
28

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

Transcript, 05/23/05, p. 13. Thursday of the week before was the day that Timothy T.J. was killed.

In addition, inside a common area of Simone's Auto Plaza, a handwritten note was located which stated, "Maybe we are being under surveill. Keep your mouth shut!!" RT, p. 315. The white Chevy Astro van was recovered outside Simone's Auto Plaza. RT, p. 319.

The Notice of Intent to Seek the Death Penalty

On June 20, 2005, an Information was filed, charging Carroll with one count of Conspiracy to Commit Murder, one count of Murder with Use of a Deadly Weapon, and two counts of Solicitation to Commit Murder. On July 6, 2005, the State filed a Notice of Intent to Seek Death Penalty against Carroll. See Attached Exhibit 5, Notice of Intent to Seek Death Penalty. The State filed an Amended Notice of Evidence in Aggravation on November 14, 2007. See Attached Exhibit 6, Amended Notice of Evidence in Aggravation.

Unlike Co-Defendant's Hidalgo and Espindola, who were charged with three aggravating circumstances, Carroll was charged with two aggravators. The first of which reads:

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

See NRS 200.033(2)(b). The basis for the aggravating circumstance was Carroll's prior felony conviction for Conspiracy to Commit Robbery committed on May 18,

1 2002. The Notice specifically states that Carroll, in furtherance of the conspiracy,
2 took Steven Blodgett's wallet through violence by beating Blodgett with his fists.

3 The second aggravating circumstance alleged was:

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

6 See NRS 200.033(6). The basis for this aggravating circumstance was that this was
7 either a murder for hire or a murder designed to profit the Palomino Club and, by
8 extension, its principals, or both.

9 **Hidalgo v. Eighth Judicial Dist. Court (123 Nev. Adv. Op. 59)**

10 On December 27, 2007, a decision on Co-Defendant's Hidalgo and Espindola's
11 Petition for Writ of Mandamus was issued wherein this Court held: (1) that
12 Solicitation to Commit Murder was not a violent crime within the meaning of NRS
13 200.033(2)(b) because none of the elements of solicitation required the use of
14 violence to another and the evidence in this case showed the solicitation was
15 accomplished without violence; and (2) that the Notice of Intent as it related to the
16 Murder for Hire did not allege specific facts sufficient to support the aggravating
17 circumstance. Having concluded that no valid aggravators remained as to those
18 defendants, this Court struck the Notice of Intent to Seek the Death Penalty in Hidalgo
19 and Espindolas' cases. See Hidalgo v. Eighth Judicial Dist. Court, 123 Nev. Adv. Op.
20 59, -- P.3d -- (2007).⁷

21 **POINTS AND AUTHORITIES**

22 Carroll contends that the Notice of Intent to Seek the Death Penalty should be
23 stricken for two reasons. First, Carroll alleges that his prior felony conviction does
24 not qualify as a violent crime. Second, Carroll argues that the pecuniary gain
25

26 ⁷ The State is in the process of preparing a Petition for Rehearing in Hidalgo. As such, the arguments put forth herein as
27 to why the notice is sufficient are consistent with the State's position that Hidalgo misapprehends NRS 200.033(6) and
28 SCR 250(4)(c) and misreads the factual statements in the Notice as separate "theories", rather than a series of factual
allegations, which, depending on what the jury finds, would support this was a murder for hire or a murder for pecuniary
gain or both.

1 aggravator does not apply to him, the statute is unconstitutionally overbroad, the
2 language in the notice is insufficient under NRS 250(4)(c) and a violation of the
3 corpus delicti rule.

4 ARGUMENTS

5 I

6 CARROLL IS NOT ENTITLED TO A WRIT OF MANDAMUS

7 A. Carroll Is Not Entitled To A Writ Of Mandamus As Carroll Has An 8 Adequate Remedy At Law.

9 A writ of mandamus will issue when the petitioner has no plain, speedy and
10 adequate remedy at law. NRS 34.170; see also Scrimmer v. Eighth Judicial Dist. Court,
11 998 P.2d 1190, 1193 (2000). It is within the discretion of the court to determine if
12 such writ will be considered. Id.; see also State ex rel. Dep't Transp. v. Thompson, 99
13 Nev. 358, 662 P.2d 1338 (1983). This Court has generally declined to entertain
14 petitions for writ of mandamus and prohibition review of district court decisions
15 where such decisions were appealable. Ashokan v. State, Dept. of Ins., 109 Nev. 662,
16 856 P.2d 244 (1993). NRS 177.045 provides "Upon the appeal, any decision of the
17 court in an intermediate order or proceeding, forming part of the record, may be
18 reviewed. Moreover, NRS 177.055 requires an automatic and mandatory review of a
19 death sentence by the Nevada Supreme Court. This Court must review whether the
20 evidence supports the finding of an aggravating circumstance or circumstances. NRS
21 177.055(c). Therefore, because Carroll has two adequate remedies available at law,
22 this Petition should be dismissed.

23 B. Carroll Is Not Entitled To A Writ Of Mandamus Where Carroll Has 24 Failed To Show That The Trial Court Arbitrarily Or Capriciously Abused Its Discretion.

25 The Court should not grant a writ of prohibition or a writ of mandamus in the
26 instant case as Respondent has neither acted outside his authority nor abused his
27 discretion. NRS 34.420 states:
28

1 The writ of prohibition is the counterpart of the writ of mandate. It
2 arrests the proceedings of any tribunal, corporation, board or person from
3 exercising judicial functions, when such proceedings are without or in
4 excess of the jurisdiction of such tribunal, corporation, board or person.

5 Id. A writ of prohibition does not serve to correct errors; its purpose is to prevent
6 courts from transcending the limits of their jurisdiction in the exercise of judicial but
7 not ministerial power. Olsen Family Trust v. Dist. Court, 110 Nev. 548, 551, 874
8 P.2d 778, 780 (1994); Low v. Crown Point Mining Co., 2 Nev. 75 (1899). However,
9 “a writ of prohibition must issue when there is an act to be ‘arrested’ which is
10 ‘without or in excess of the jurisdiction’ of the trial judge.” Houston Gen. Ins. Co. v.
11 Dist. Court, 94 Nev. 247, 248, 78 P.2d 750, 751 (1978); Ham v. Eighth Judicial Dist.
12 Court, 93 Nev. 409, 412, 566 P.2d 420, 422 (1977); see also Goicoechea v. Dist.
13 Court, 96 Nev. 287, 607 P.2d 1140 (1980); Cunningham v. Dist. Court, 102 Nev. 551,
14 729 P.2d 1328 (1986).

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

19 Mandamus will not lie to control discretionary action unless it is manifestly
20 abused or is exercised arbitrarily or capriciously. Office of the Washoe County DA v.
21 Second Judicial Dist. Court, 5 P.3d 562, 566 (2000). In this case, the district court
22 neither abused its discretion nor acted outside of its authority.

23 II 24 CARROLL’S PRIOR FELONY CONVICTION.

25 A. Carroll’s Prior Conviction For Conspiracy To Commit Robbery 26 Qualifies As A Prior Crime Of Violence

27 Carroll asserts that his prior crime of violence does not qualify as an
28 aggravating circumstance as the crime charged was for conspiracy to commit robbery.
Carroll asserts that his prior felony conviction is akin to the argument presented by

1 Hidalgo and Espindola in their Petition for Writ of Mandamus on the Solicitation to
2 Commit Murder. However, unlike the argument made by Hidalgo and Espindola,
3 Carroll cannot make an argument that his crime was merely a crime of
4 communication. Thus, it is the State's position that Carroll's prior felony conviction
5 does not fall within the purview of this Court's recent decision on Co-Defendant's
6 Hidalgo and Espindola.

7 In the first instance, it is the State's position that by its very definition,
8 conspiracy to commit robbery requires the use of threat or violence and therefore,
9 Carroll's prior violent felony conviction provides a basis for the aggravating
10 circumstance pursuant to NRS 200.033(2). Robbery is defined as:

11 [T]he unlawful taking of personal property from the person of another, or
12 in his presence, against his will, **by means of force or violence or fear**
13 **of injury**, immediate or future, to his person or property, or the person or
14 property of a member of his family, or of anyone in his company at the
time of the robbery.

15 NRS 200.380(1) (emphasis added). Conspiracy is "an agreement between two or
16 more persons for an unlawful purpose. Bolden v. State, 121 Nev. 908, 124 P.3d 191,
17 194 (2005), (citing Doyle v. State, 112 Nev. 879, 921 P.2d 901, 911 (1996), overruled
18 on other grounds by Kaczmarek v. State, 120 Nev. 314, 91 P.3d 16 (2004)). Thus,
19 conspiracy to commit robbery is an agreement to take property by the use or threat of
20 force. As threat is merely an indication of intent, clearly that intent is established by
21 the elements. Combined with the fact that a conspiracy extends beyond the crime of
22 agreement to acts committed in furtherance of the conspiracy such as efforts to
23 conceal the crime, this establishes that at least the "threat" of force is always a
24 necessary element in any conspiracy to commit robbery. However, even if this Court
25 finds that the use of threat or violence is not inherent in the definition of conspiracy to
26 commit robbery, the facts of Carroll's prior felony conviction reveal that Carroll did,
27 in fact, use violence and force in the commission of the robbery, and as such, his prior
28 felony conviction supports an aggravating circumstance under NRS 200.033(2)(b).

1 On May 18, 2002, Carroll committed robbery. On that date, Carroll and an
2 unidentified Hispanic male adult attacked and beat up Stephen Blodgett in an alley on
3 Fremont Street. There were several independent witnesses to the beating. While
4 beating Mr. Blodgett, Carroll removed his wallet from his cowboy boots and fled the
5 area with three (3) one hundred dollar (\$100) bills. As he was fleeing, Carroll jumped
6 a wall. On the other side of the wall were several Clark County Fire Department
7 personnel that witnessed Carroll rifle through the wallet. Shortly thereafter, they saw
8 Mr. Blodgett running up hollering that Carroll had robbed him. During a search
9 incident to arrest, three (3) one hundred dollar (\$100) bills were recovered from
10 Carroll's person.

11 In Weber v. State, 121 Nev. 554, 586, 119 P.3d 107, 129 (2005), this Court
12 rejected requiring force to be a necessary element of the crime for the aggravating
13 crime. The notice of intent to seek the death penalty was supported by 13 aggravating
14 circumstances, four of which were based on sexual assault. Id. Although sexual
15 assault as defined by Nevada statute does not require actual force inherent in its
16 commission, this Court nonetheless upheld the prior felony aggravating circumstances
17 based on sexual assault of a minor. Id. Finding that the victim experienced trauma
18 and violence during the first incident, and subsequently refused to tell anyone about
19 the sexual abuse because she was so scared, this Court concluded that "the totality of
20 this evidence was sufficient for a reasonable jury to infer that the two sexual assaults
21 in question included at least implicit threats of violence, allowing their use as valid
22 aggravators" Id. In the instant case, the facts clearly establish that Carroll used
23 violence and force in committing the robbery. Thus, like Weber, Carroll's prior
24 violent felony supports an aggravating circumstance under NRS 200.033(2)(b).

25 Moreover, Carroll acknowledged and admitted using force in committing the
26 robbery in the Guilty Plea Agreement and during the plea hearing. Carroll committed
27 Robbery. However, as part of his plea negotiations, Carroll pled guilty to one count
28 of Conspiracy to Commit Robbery. Where a crime is such that it may or may not

1 involve crimes of violence, more than the elements may be utilized. Redeker v.
2 Eighth Judicial Dist. Court, 122 Nev. 164, 127 P.3d 520, 526 (2006). In Redeker, 122
3 Nev. at 164, 127 P.3d at 526, this Court explained which secondary sources may be
4 reviewed and held that for purposes of determining whether an aggravating
5 circumstance under NRS 200.033(2)(b) involved the use or threat of violence to
6 person of another, courts may consider the prior felony's statutory definition, charging
7 document, jury instructions, written plea agreement, transcript of plea colloquy, and
8 any explicit factual finding by the trial judge to which the defendant assented but
9 cannot consider police reports or complaint applications; see also Dennis v. State, 116
10 Nev. 1075, 13 P.3d 434 (2000) (holding that second degree arson was a crime
11 involving the threat of violence where the State presented documentary evidence and
12 the testimony of victims).

13 Here, the Information for Carroll's prior felony conviction in C184573
14 specifically read:

15 That DEANGILO CARROL, aka Deangelo Reshawn Carroll, the
16 Defendant(s) above named, having committed the crime of
17 **CONSPIRACY TO COMMIT ROBBERY (Felony – NRS 199.480,**
18 **200.380)**, on or about the 18th day of May, 2002, within the County of
19 Clark, State of Nevada, contrary to the form, force and effect of statutes
20 in such cases made and provided, and against the peace and dignity of the
21 State of Nevada, did then and there meet with others and between
22 themselves, and each of them with the other, willfully, unlawfully, and
23 feloniously conspire and agree to commit the crime of robbery, and in
24 furtherance of said conspiracy, Defendant did take personal property, to-
wit: wallet and contents, including lawful money of the United States,
from the person of STEVEN BLODGETT, or in his presence, by means
of force or violence, or fear of injury to, and without the consent and
against the will of the said STEVEN BLODGETT.

25 See Attached Exhibit 7, Information, case C184573, 06/14/02, pp. 1-2. In addition,
26 Carroll specifically admitted all of the facts contained in the Information in the Guilty
27 Plea Agreement and was sentenced to probation. See Attached Exhibit 8, Guilty Plea
28

1 Agreement, case C184573, 06/18/02, p. 1. Moreover, during the plea canvass, Carroll
2 admitted to committing robbery.

3 COURT: ... What did you do on or about May 18th of this year that
4 caused you to plead guilty to the crime of conspiracy to commit robbery?

5 DEFENDANT: **We attempted to take a wallet, sir.**

6 COURT: **By means of force or fear?**

7 DEFENDANT: **Yes, sir.**

8 COURT: Without the consent and against the will of the owner of that
9 wallet?

10 DEFENDANT: Yes, sir.

11 COURT: Herein Clark County, State of Nevada?

12 DEFENDANT: Yes, sir.

13 COURT: **This is a fictitious plea?**

14 MS. HUA: **Yes, your Honor.**

15 See Attached Exhibit 9, Reporter's Transcript of Plea, case C184573, 06/18/02, pp. 5-
16 6 (emphasis added). Thus, not only did the charging document clearly indicate that
17 Carroll used force or violence upon the person of Mr. Blodgett, Carroll's attorney
18 acknowledged that the conspiracy portion of the plea was fictitious. In other words,
19 Carroll was pleading to committing a robbery but getting sentenced under a
20 conspiracy charge to avoid a harsher punishment. More importantly, **Carroll**
21 **actually acknowledged that he used force and violence** to commit the robbery in
22 the Guilty Plea Agreement and his plea canvass. Thus, Carroll's prior felony qualifies
23 not just under Redeker, 122 Nev. 164, 127 P.3d 520, 526 (2006), but his felony is
24 exactly the type of crime anticipated by this Court in Weber, 121 Nev. at 586, 119
25 P.3d at 129. Accordingly, Carroll's prior felony conviction for Conspiracy to Commit
26 Robbery qualified as an aggravating circumstance under NRS 200.033(2)(b).
27
28

1 **B. NRS 200.033(2) Is Not Constitutionally Overbroad Or Vague.**

2 Carroll argues that because Justice Maupin stated in a concurring opinion in
3 Leslie v. Warden, 118 Nev. 773, 784, 59 P.3d 440, 448 (2002) (Maupin, J.
4 Concurring), that NRS 200.033(4) is vague and ambiguous, it must mean that a statute
5 less specific must also be vague and ambiguous. Unfortunately, Carrolls missed the
6 import of Justice Maupin's conclusions. Justice Maupin was concerned that NRS
7 200.033(4) removed the intent requirement for a First Degree Murder conviction. As
8 such, NRS 200.033(4) was unconstitutionally vague and ambiguous because it
9 allowed the execution of someone who did not have the requisite intent to be eligible
10 for the death penalty, as well as did not narrow the category of individuals who did
11 have such intent. Such a concern does not underlie NRS 200.033(2) because none of
12 the factors which concerned Justice Maupin are part of NRS 200.033(2).

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

16 In general, "[a] defendant's character and record are relevant to the jury's
17 determination of the appropriate sentence for a capital crime." Pellegrini
18 v. State, 104 Nev. 625, 630, 764 P.2d 484, 488 (1988). Accordingly, a
19 murder is aggravated if it is committed by an individual previously
20 convicted of a felony **involving the use or threat of violence to the**
21 **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.

22 Riley v. State, 107 Nev. 205, 808 P.2d 551 (1991) (emphasis added). Certainly, a rule
23 promulgated to determine whether a person has a propensity for violence is not
24 unconstitutionally vague or ambiguous. Moreover, it significantly limits the number
25 of people eligible for the death penalty as this circumstance is not usually tied to the
26 facts underlying the murder charge.

27 //

28 //

III
THE PECUNIARY GAIN AGGRAVATING CIRCUMSTANCE

A. The Aggravating Nature Of The Crime Supports The “Pecuniary Gain” Aggravator As The Murder Was A “Contract Type Killing.”

On July 6, 2005, the State filed a Notice of Intent to Seek Death Penalty against Carroll and Co-Conspirators, Hidalgo and Espindola. The State filed an Amended Notice of Evidence in Aggravation on November 14, 2007. Although the notices between Carroll and Co-Defendant’s differed since Carroll’s Notice of Intent contained the additional aggravating circumstance as discussed in the previous section, supra, the notices were the same with respect to the “pecuniary gain” aggravating circumstance.

Carroll contends that NRS 200.033(6) cannot be applied to him as he was neither the killer nor the person who paid the killer. Carroll also asserts that if the aggravator can be applied to him, then it is unconstitutionally overbroad and fails to perform the narrowing function required by federal law. Next Carroll argues the Notice of Intent is insufficient to satisfy the requirements of SCR 250(4)(c) for the same reasons argued by co-defendants Hidalgo and Espindola in their motion to strike.⁸ Finally Carroll claims that this Court’s corpus delicti law be applied to the aggravator, and there is insufficient evidence to support the aggravator absent Carroll’s own statements.

1. Personal Benefit is not Required by the Pecuniary Gain Aggravator

The pecuniary gain aggravator applies to the facts of the murder itself and not the background of the individual charged with the murder. That is, the aggravator does not require that a defendant be the person who gained, or was intended to gain,

⁸ This Court recently held that the language of the pecuniary gain aggravator failed to comply with SCR 250(4)(c) as it applied to co-defendants’ Hidalgo and Espindola. Hildago v. District Court, 123 Nev. Adv. Op. 59 (2007). The State is filing a petition for rehearing in that case alleging the Court misconstrued the language of NRS 200.033(6) and SCR 250(4)(c). However, even if the Court does not reconsider its decision as it applies to the co-defendants, the notice is sufficient as it applies to defendant Carroll.

1 from the murder, the person who paid for the murder or the actual killer. NRS
2 200.033(6) states:

3 **The murder** was committed by a person, for himself or
4 another, to receive money or any other thing of monetary
5 value.

6 On its face, the plain language of the statute indicates the aggravator applies
7 whenever the murder was perpetrated so that someone could receive money or any
8 monetary gain. It is not ambiguous. If the Legislature intended that the aggravating
9 factor be that the defendant be motivated by financial gain, it could easily have
10 written the statute to say so.

11 In addition, the statute does not require that some type of agreement to pay
12 money be reached prior to the murder or that payment for the murder be made in
13 advance. In fact, the statute does not require that someone actually receive a financial
14 gain from the murder, only that the murder be motivated, in some part, by financial
15 gain.

16 This Court recognized that the aggravator applies to the murder, not the
17 defendant's role in the murder, when it rejected the concept that a murder for hire was
18 not a murder for pecuniary gain. In Wilson v. State, 99 Nev. 362, 376-77, 664 P.2d
19 328, 337 (1983) this Court noted that the defendant need not be the one who gains
20 from the murder, so long as the killer, or someone else, was intended to profit from
21 the murder. The defendant in Wilson offered to pay two other people \$3500.00 to
22 assist in the murder of an undercover police officer. Id. Pursuant to their agreement,
23 the defendant gave the two individuals \$3500.00 for stabbing the victim. Id.

24 In addition, other courts have held that where a person is convicted of murder-
25 for-hire, the one who does the hiring is subject to the financial gain aggravating
26 circumstance in a capital case.⁹ People v. Padilla, 11 Cal 4th 891, 906 P.2d 388 (Cal.
27 1995), overruled on other grounds by People v. Hill, 17 Cal. 4th 800, 952 P.2d 656

28 ⁹ California's financial gain aggravator reads "The murder was intentional and carried out for financial gain." Cal. Penal Code 190.2(1).

1 (Cal. 1998); see also Tenn. v. Austin, 87 S.W.3d 447 (Tenn. 2002) (holding that
2 Gunman's and accomplice's testimony that defendant hired the gunman to kill the
3 murder victim established that defendant employed another to commit the murder for
4 remuneration or the promise of remuneration, as aggravating circumstance at capital
5 murder sentencing); see also Harris v. Ala., 632 So.2d 503 (Ala. Cr. App. 1992)
6 (where a defendant has been convicted of the capital offense of murder for hire, even
7 though that person was the hirer and was convicted of the offense as an accomplice
8 pursuant to the complicity statute, the aggravating circumstance that the capital
9 offense was committed for pecuniary gain is established as a matter of law). In fact,
10 the California Supreme Court has held that it's financial gain statute, does not require
11 that the murderer receive a direct financial gain as long as a financial gain is received
12 by someone. See People v. Michaels, 28 Cal. 4th 486, 49 P.3d 1032 (Cal. 2002).

13 In the instant case, the facts supporting the aggravator contain two theories.
14 First - murder for hire. Carroll, co-defendant Jayson Taoipu and Counts, individually
15 or collectively, killed T.J. for a financial reward they expected to receive from the
16 Palomino Club, Luis Hildago, Jr ("Mr. H."), Luis Hildgo, III ("Hidalgo") or
17 Espindola, again individually or collectively. If the State proves that any one of these
18 people intended to collect a bounty for killing T.J., the aggravator applies to the
19 murder. If Carroll is convicted of first degree murder, it applies to him, regardless of
20 his reasons for participating in the murder.¹⁰

21 Second – murder for gain. The Palomino Club, Mr. H, Hidalgo, or Espindola,
22 individually or collectively, wanted T.J. killed because his activities were negatively
23 impacting the business of the Palomino Club, causing it to lose customers.
24 Eliminating T.J. would increase customers resulting in financial gain. So long as the
25

26 ¹⁰ The State acknowledges that before the jury could consider the death penalty, they would still have to find that Carroll
27 was a major participant in the murder itself, as distinguished from the aggravator, under the holdings of Edmund v.
28 Florida, 458 U.S. 782, 797 (1982) and Tison v. Arizona, 481 U.S. 137 (1987). However there is no requirement that a
defendant be a major participant in the aggravator, i.e. that a defendant be the killer or the person who financially
benefited from the murder.

1 State proves that any one of these entities intended to boost the Palomino Club's
2 revenues by killing T.J., the aggravator applies to the murder and Carroll's motives
3 are irrelevant.

4 For these reasons, the aggravator should not be stricken.

5 2. Narrowing Function

6 Carroll argues in a cursory fashion that a broad interpretation of this aggravator
7 renders it unconstitutional because it fails to perform the narrowing function required
8 by federal constitutional law. Carroll cites no case authority on point, relying solely
9 on the general proposition that a death penalty scheme must have some qualifying
10 concepts centered on the nature of the crime and the background of the perpetrator so
11 that not every murder qualifies for death. Gregg v. Georgia, 428 U.S. 153 (1976). No
12 case is cited for the proposition that an individual aggravator must be narrowly
13 interpreted to be constitutionally proper.

14 This Court has stated that where an aggravator is ambiguous or provides no
15 definition, the Court will be mindful that too liberal or expansive interpretations run
16 the risk of placing Nevada's entire death penalty scheme in jeopardy. Redeker v.
17 Eighth Judicial District Court, 122 Nev. ___, 127 P.3d 520, 526 (2006)(No definition
18 provided for what constitutes a crime of violence, thus court interpretation required).
19 Here, the language of the statute is plain and unambiguous, if murder is committed to
20 provide a financial gain to anyone, the aggravator applies. This is a legislative
21 decision and does not require court interpretation, thus Redeker is inapplicable and
22 this Court has already indicated Nevada's statutory scheme performs the appropriate
23 narrowing function. See McConnell v. State, 120 Nev. 1043, 102 P.3d 606 (2004).
24 Certainly a murder committed for hire or for financial gain is more aggravated than
25 one based on revenge or another highly emotional state. The pecuniary gain
26 aggravator should not be stricken on this basis.

27 //

28 //

1 **3. Notice of Intent Sufficient Under SCR 250(4)(a)**

2 On its face, SCR 250(4)(a) requires that the State “allege all aggravating
3 circumstances which the state intends to prove and allege with specificity the facts on
4 which the state will rely to prove each aggravating circumstance.” It does not speak
5 of theories of criminal culpability, such as conspiracy or aiding/abetting or that a
6 defendant must be personally liable for an aggravator before that aggravator may be
7 applied to a defendant in a given case.

8 Whether an aggravator refers to the circumstances of the crime or the
9 background of the defendant is a statutory/legislative decision. For example, NRS
10 200.033(1), referring to sentence of imprisonment, involves the background of a
11 defendant, not the circumstances of the crime. Whereas NRS 200.033(7) – murder of
12 a peace officer – refers to the circumstances of the crime and specifically states that it
13 cannot be applied to a defendant who did not know or reasonably should have known
14 the victim was a peace officer. No such caveat exists in the pecuniary gain provision.

15 Prior to January 27, 1999, SCR 250 only required the State to list the
16 aggravating circumstances the State intended to present. SCR 250(II)(A)(1) and (2)
17 (ADKT 109, 6/17/93). In 1995, this Court instituted a review of the existing Rule 250
18 provisions. A committee was appointed for this purpose which later became known
19 as the Fondi Commission as it was chaired by the Honorable Michael Fondi from the
20 First Judicial District Court. Based on numerous meetings, the Fondi Commission
21 issued a report on July 24, 1997 detailing its recommendations. After this Court
22 considered those recommendations, the existing version of SCR 250 was repealed and
23 a new version adopted. (ADKT 219, 260 and 261, Order Adopting December 30,
24 1998, Effective date January 27, 1999.) The current language of the rule stems from
25 these proceedings.

26 The new version, SCR 250(4)(a) was intended to address two perceived
27 problems with the administration of Rule 250.
28

1 The first dealt with the inability of defense counsel to challenge the legal
2 sufficiency of the aggravator in pre-trial proceedings – that is, without the factual
3 basis for the aggravator, there was no way to assert that those facts, even if true, did
4 not legally support the aggravating circumstances.

5 The second issue arose with aggravators that involve multiple conduct or
6 “theories” such as the instant aggravator. As the Court notes the language “[t]he
7 murder was committed by a person, for himself or another, to receive money or any
8 other thing of value” incorporates two distinct concepts, murders for hire and murders
9 for gain. Without a factual predicate, it was possible for the defense to believe the
10 State was pursuing one course of conduct or “theory” based upon defense counsel’s
11 interpretation of the discovery, only to find out in the middle of trial that the State had
12 a different interpretation of the facts and their application to the aggravating
13 circumstance. To avoid this, the Rule now requires the State to plead the facts so that
14 defense counsel knows which course of conduct or conducts the State intends to
15 prove. Final Report of the Fondi Commission, ADKT 219, p. 14 (July 24, 1997)

16 Thus SCR 250(4)(a) is a “notice” rule for these purposes. The State must
17 allege facts that give notice of whether the State intends to prove that the aggravator
18 applies because this is a murder for hire or a murder for gain or, if the facts warrant,
19 both. Neither the NRS 200.033(6) nor SCR 250(4)(a) require that the State assert a
20 criminal culpability theory of the defendant’s involvement aggravator, i.e. as a
21 conspirator, aider and abettor, direct actor or that the defendant intended or received
22 pecuniary gain. Rather the State must show that that the murder was committed for
23 monetary value or to achieve a monetary value for some person. Thus the facts
24 required in the notice would be the facts, when taken as a whole, support one or both
25 of these concepts.

26 The instant notice, while not the epitome of clarity, does this. The State uses
27 “and/or” language, together with semi-colons and the word “thereafter” to indicate
28

1 that the allegations are to be read as a whole. The allegations are not theories; they
2 are facts that support the theories, i.e. murder for hire or murder for gain or both.

3 The first clause indicates that persons affiliated with the Palomino Club let it be
4 known, individually or collectively, to Carroll that they wanted Carroll to beat or kill
5 T.J.. The second clause indicates Mr. H offered money to have T.J. beaten or killed,
6 that is, an open ended contract on T.J., leaving it up to the individual or individuals
7 who accepted the contract to decide whether to kill or beat T.J.. The third clause
8 indicates Mr. H was also interested in having T.J. killed to further the business of the
9 Palomino Club. The fourth clause states that Hidalgo told Carroll to come to work
10 with bats and garbage bags. (A fact, if believed by the jury, would be circumstantial
11 evidence that the plan was to beat T.J. to death, hence the need for garbage bags)
12 Read together, these clauses indicate that the State intended to prove that these
13 persons, individually or collectively, intended to pay money to someone to kill T.J.
14 and/or to gain monetary value for the Palomino Club.

15 The fourth clause is followed by the word "thereafter." The Notice then goes
16 on to state that Carroll enlisted Counts and Taoipu to kill T.J., a fact from which a jury
17 could conclude that Carroll, Counts and Taoipu, individually or collectively, were
18 accepting the open-ended contract and killed T.J. to collect the bounty referred to in
19 the first through fourth clauses or to further the business of the Palomino Club.

20 The fifth clause is again followed by the word "thereafter" and indicates Counts
21 shoots T.J.. The sixth clause is preceded by the word "thereafter" and states that Mr.
22 H and Espindola, individually or collectively, give Carroll six thousand dollars to pay
23 Counts. The seventh clause is also preceded by "thereafter" and states Counts
24 received the six thousand dollars. The Seventh Clause also sets forth a series of
25 payments to Carroll by Espindola and Hidalgo, individually or collectively, as well as
26 promises of future payments of salary or savings bonds. The fifth through seventh
27 clauses, when read together, reflect that either Counts or Carroll or both were paid to
28 kill T.J., thus supporting a murder for hire theory.

1 Read as whole, the Notice complies with SCR 250(4)(c). It gives the facts
2 upon which the State intends to rely in proving that persons affiliated with the
3 Palomino Club wanted T.J. beaten or killed and were willing to pay money for either
4 result. Carroll was directed by one or more of those persons to see that this was
5 accomplished. Carroll enlisted the aid of two persons, Counts and Taoipu to help him
6 carry out his orders. Counts fired the shots that killed T.J. and is paid Six Thousand
7 Dollars. Additional sums of money and things of value (savings bonds) are paid or
8 promised to Carroll for accomplishing the murder.

9 Finally the Notice of Intent indicates an additional motive for the killing was to
10 further the business of the Palomino Club thus making defense counsel aware that the
11 State was also intending to prove murder for gain to another person, the Palomino
12 Club.¹¹

13 These are not legal theories, they are factual statements, plead in the alternative
14 because several different individuals took different steps and it does not matter
15 whether the jury believes Hidalgo, Mr. H or Espindola ordered and paid for the
16 murder individually, acting together or acting as agents of the Palomino Club. The
17 State's "theory" is that this was a murder for hire. The State alleged every fact in the
18 alternative that would support this "theory" – i.e. people paid money for T.J.'s
19 murder. The defense is free to argue that the monies were for something else, to keep
20 witnesses silent, to take the rap, etc. It is for the jury to decide what inferences are to
21 be drawn from these facts and whether they prove murder for hire or gain. A Notice
22 is not deficient because the facts are complicated. This Court should not strike the
23 pecuniary gain aggravator for lack of notice.

24 Finally, even if this Court still concludes the Notice of Intent is too confusing
25 and does not give adequate notice under SCR 250(4)(c), then the appropriate remedy
26

27 ¹¹ The State recognizes that this Court in Hidalgo ruled that "further the business" is too vague and does not give notice
28 of how the murder would result in a pecuniary gain to the Palomino Club or any other person. However, as noted below,
the appropriate remedy for a pre-trial challenge relating to inadequate notice is giving the State leave to amend the
notice, rather than striking the aggravator.

1 is to remand the case with instructions to permit the State to amend its notice in
2 accordance with this Court's concerns, not to strike the aggravator. Since the rule is
3 based on the notice concepts derived from case law involving informations or
4 indictments, the same remedy considerations should apply as well.

5 Generally an information or indictment may be amended at anytime if no
6 additional or different offense is charged and no substantial rights are prejudiced.
7 NRS 173.095. Pre-trial complaints about lack of notice can be remedied by the State
8 and so dismissals should be without prejudice or the State should be given leave to
9 amend. This is because there is no prejudice to the defendant in such a case. State v.
10 Hancock, 114 Nev. 161, 955 P.2d 183 (1998). Indeed amendments on a pre-trial basis
11 are generally recognized as the appropriate remedy for lack of notice allegations.
12 State v. District Court, 116, Nev. 374, 997 P.2d 126 (2000). This is especially true
13 when the defense has had notice of the charges or theory of the case and only the
14 specifics of the notice have been challenged. Shannon v. State, 105 Nev. 782, 783
15 P.2d 942 (1989)(amendment permitted to allege different facts in support of same
16 charge).

17 A different standard should not apply to the notice provisions of NRS
18 250(4)(c). The appropriate remedy is to permit the State to amend the Notice of Intent
19 to clean up any confusing language, not to strike the aggravator. Amendment is more
20 in line with the purpose and intent of SCR 250(4)(c) and the reasons for its
21 promulgation.

22 **4. The State need not prove the corpus delicti for an aggravating**
23 **circumstance.**

24 Carroll relies on the corpus delicti rule and contends that the statements made
25 by Carroll to the police cannot be used in support of an aggravating circumstance as
26 Carroll's statements were allegedly uncorroborated. First, it should be noted that
27 Carroll failed to raise this issue below, and as such, it is the State's position that
28 Carroll's failure constitutes a waiver of the issue on appeal. However,

1 notwithstanding Carroll's failure, Carroll's argument is without merit as the corpus
2 delicti rule does not apply to aggravating circumstances.

3 The corpus delicti or "body of the crime" rule is concerned with the elements of
4 the crime; e.g. what must be shown to establish that an offense occurred. Domingues
5 v. State, 112 Nev. 683, 691-2, 917 P. 2d 1364, 1370-1 (1996). The corpus delicti rule
6 requires that the corpus delicti of the crime be established before the defendant's
7 admission may be considered in deciding the defendant's guilt. See Sheriff v.
8 Larsgaard, 96 Nev. 486, 488, 611 P.2d 625, 626 (1980); see also State Dep't of Mtr.
9 Vehicles v. McLeod, 106 Nev. 852, 855, 801 P.2d 1390, 1392 (1990). "The purpose
10 of the corpus delicti rule is to establish that an injury or crime in fact occurred."
11 Domingues, 112 Nev. at 692, 917 P.2d at 1371.

12 Here, Carroll was charged with one count each of conspiracy to commit murder
13 and murder with use of a deadly weapon, and two counts of solicitation to commit
14 murder. Carroll has not yet proceeded to trial. The pecuniary gain aggravating
15 circumstance upon which Carroll complains is a basis by which the State is seeking
16 the death penalty and not part of the corpus delicti. As this Court recently explained:

17 The United States Supreme Court has stated: "Aggravating
18 circumstances are not separate penalties or offenses, but are 'standards to
19 guide the making of [the] choice' between the alternative verdicts of
20 death and life imprisonment." Therefore, **an aggravating circumstance
alleged in a capital proceeding does not constitute a separate crime
that requires a finding of probable cause** under the U.S. or Nevada
constitutions.

21 Floyd v. State, 118 Nev. 156, 166, 42 P.3d 249 (2002) (internal citations omitted)
22 (emphasis added). Accordingly, the financial gain aggravator does not relate to the
23 substantive crime for which Carroll is being charged with, and as such, the corpus
24 delicti rule does not apply.

25 CONCLUSION

26 Carroll's petition for extraordinary writ should be dismissed as there is an
27 adequate remedy available at law.
28

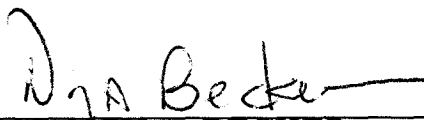
1 Carroll's prior felony conviction for conspiracy to commit robbery is both
2 statutorily and factually different from Co-Defendant's Hidalgo and Espindola's
3 aggravator of solicitation. Unlike Solicitation, which is completed upon the asking,
4 Conspiracy to Commit Robbery requires an agreement to take the property of another
5 by force or threat. Moreover, as admitted and acknowledged by Carroll, himself, at
6 the time of his plea, Carroll used force and violence in robbing the victim.

7 Finally, the pecuniary gain aggravator is applicable to Carroll so long as the
8 State proves monetary gain to some person was at least a partial motivation for the
9 murder. The Notice of Intent complies with SCR 250(4)(c). However if the Court
10 believes the Notice is too confusing, the appropriate remedy is to remand the matter
11 with leave for the State to amend the Notice, not striking the aggravator. As such,
12 the State requests that Carroll's Petition be DENIED.

13 Dated January 8, 2008.

14 DAVID ROGER
15 Clark County District Attorney
Nevada Bar # 002781

16
17
18 BY


NANCY A. BECKER
Deputy District Attorney
Nevada Bar #000145

19
20 Office of the Clark County District Attorney
21 200 Lewis Avenue
22 Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500

CERTIFICATE OF MAILING

I hereby certify and affirm that I mailed a copy of the foregoing Answer to Petition for Writ of Mandamus to the attorney of record listed below on January 8, 2008.

Dayvid J. Figler
Bunin & Bunin Ltd.
626 South 3rd Street
Las Vegas, Nevada 89101

CERTIFICATE OF SERVICE

I hereby certify and affirm that a copy of the foregoing Answer to Petition for Writ of Mandamus was hand delivered to:

Judge Valerie Adair
Department XXI
Regional Justice Center
200 Lewis Avenue
Las Vegas, Nevada 89101

Margie English
Employee, Clark County
District Attorney's Office

BECKER/Moonee Lee/english