

IN THE SUPREME COURT OF THE STATE OF NEVADA

LUIS A, HIDALGO, JR.

Appellant,

vs.

THE STATE OF NEVADA

Respondent.

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CASE NO.: 54209

On Appeal from a Final Judgment of
Conviction entered by The Eighth Judicial
District Court

APPELLANT'S APPENDIX

Volume 3 of 25

(Pages 443 - 577)

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ALPHABETICAL INDEX OF APPELLANT'S APPENDIX

Document	Date Filed	Vol.	Page No.
Amended Indictment (Hidalgo Jr.)	05/01/08	5	00836-00838
Amended Judgment of Conviction (Jury Trial) (Hidalgo Jr.)	08/18/09	25	04665-04666
Amended Notice of Evidence in Support of Aggravating Circumstances (Espindola)	01/09/08	3	00530-00533
Amended Notice of Intent to Seek Death Penalty (Hidalgo Jr.)	06/18/08	5	00846-00849
CD: State's Exhibit 191 ¹	02/04/09	15	02749
CD: State's Exhibit 192A ²	02/04/09	15	02750
CD: State's Exhibit 192B ³	02/04/09	15	02751
CD: Defense Exhibit 1 ⁴	02/11/09	22	04142
Court's Exhibit 2: Transcript of fBird CD	02/05/09	15	02912-02929
Court's Exhibit 3: Transcript of Hawk CD	02/05/09	15	02930-02933
Court's Exhibit 4: Transcript of Disc Marked as Audio Enhancement, 050519-3516, Tracks 1 & 2, Track 2	02/05/09	15	02934-02938
Court's Exhibit 5: Transcript of Disc Marked as Audio Enhancement, 050519-3516, Tracks 1 & 2, Track 1	02/05/09	15	02939-02968
Criminal Complaint (Hidalgo III)	05/31/05	1	00001-00003
Criminal Complaint (Hidalgo Jr.)	02/07/08	3	00574-00575
Emergency Motion for Stay of District Court Proceedings (State)	02/20/08	4	00775-00778
Fourth Amended Information (Hidalgo III)	01/26/09	5	01011-01014
Guilty Plea Agreement (Espindola)	02/04/08	3	00549-00557
Indictment (Hidalgo Jr.)	02/13/08	4	00724-00727
Information (Hidalgo III)	06/20/05	1	00005-00008
Instructions to the Jury	02/17/09	24	04445-04499
Judgment of Conviction (Jury Trial) (Hidalgo Jr.)	07/10/09	25	04656-04657
Minutes (Preliminary Hearing)	06/13/05	1	00004
Minutes (Change of Plea)	02/04/08	3	00558
Minutes (All Pending Motions)	02/05/08	3	00559
Minutes (Trial by Jury)	02/06/08	3	00576

¹ This CD is a copy of the original. The copy was prepared by a Clark County employee at the Regional Justice Center in Las Vegas Nevada. Eight hard copies of the CD are being mailed to the Nevada Supreme Court.

² Id.

³ Id.

⁴ Id.

Document	Date Filed	Vol.	Page No.
Minutes (Sentencing)	02/12/08	3	00577
Minutes (All Pending Motions)	02/14/08	4	00728
Minutes (Arraignment)	02/20/08	4	00779
Minutes (Sentencing)	03/20/08	4	00787
Minutes (Sentencing)	03/25/08	4	00788
Minutes (Decision: Bail Amount)	04/01/08	4	00789
Minutes (All Pending Motions)	04/15/08	4	00799
Minutes (All Pending Motions)	04/17/08	5	00834-00835
Minutes (All Pending Motions)	05/01/08	5	00839-00840
Minutes (All Pending Motions)	06/17/08	5	00844-00845
Minutes (State's Request for Status Check on Motion to Consolidate)	11/20/08	5	00850
Minutes (All Pending Motions)	01/16/09	5	00916
Minutes (Calendar Call)	01/22/09	5	00973-00974
Minutes (Decision)	01/23/09	5	01009
Minutes (State's Request for Clarification)	01/26/09	5	01010
Minutes (Defendant's Motion for Own Recognizance Release for House Arrest)	02/24/09	24	04505
Minutes (Status Check re Sentencing)	06/02/09	24	04594
Minutes (Minute Order re Judgment of Conviction)	08/11/09	25	04664
Minutes (Sentencing)	10/07/09	25	04667
Motion for Judgment of Acquittal Or, In the Alternative, a New Trial (Hidalgo III and Hidalgo Jr.)	03/10/09	24	04506-04523
Motion in Limine to Exclude the Testimony of Valerie Fridland (State)	01/13/09	5	00905-00915
Motion to Conduct Videotaped Testimony of a Cooperating Witness (State)	04/09/08	4	00792-00798
Motion to Strike Notice of Intent to Seek Death Penalty (Hidalgo III and Espindola)	12/12/05	1	00026-00187
Motion to Strike the Amended Notice of Intent to Seek Death Penalty (Hidalgo Jr.)	1/09/09	5	00851-00904
Notice of Appeal (Hidalgo III and Hidalgo Jr.)	07/18/09	25	04658-04659
Notice of Intent to Seek Death Penalty (Hidalgo III)	07/06/05	1	00009-00013
Notice of Intent to Seek Death Penalty (Espindola)	07/06/05	1	00014-00018
Notice of Intent to Seek Death Penalty (Carroll)	07/06/05	1	00019-00023
Notice of Intent to Seek Death Penalty (Counts)	07/06/05	1	00024-00025
Notice of Intent to Seek Death Penalty (Hidalgo Jr.)	03/07/08	4	00784-00786

Document	Date Filed	Vol.	Page No.
Opposition to Defendant Luis Hidalgo, Jr.'s Motion for Judgment of Acquittal Or, In the Alternative, a New Trial (State)	03/17/09	24	04524-04536
Opposition to State's Motion to Conduct Videotaped Testimony of a Cooperating Witness (Hidalgo III)	04/16/08	5	00800-00833
Opposition to State of Nevada's Motion in Limine to Exclude Testimony of Valerie Fridland (Hidalgo III and Hidalgo Jr.)	01/20/09	5	00919-00972
Order Denying Defendants Motion for Judgment of Acquittal Or, In the Alternative, Motion for New Trial	08/04/09	25	04660-04663
Order Denying Defendants Motion to Strike Notice of Intent to Seek Death Penalty	10/03/06	1	00188-00192
Order Directing Answer	10/20/06	3	00514-00515
Order Dismissing Petition	04/09/08	4	00790-00791
Order Granting Motion for Stay	02/21/08	4	00780-00781
Order Granting the State's Motion to Consolidate C241394 and C212667	01/16/09	5	00917-00918
Order Withdrawing Opinion, Recalling Writ, and Directing Answer to Petition for Rehearing	02/21/08	4	00782-00783
Opinion	12/27/07	3	00516-00529
Petition for Writ of Mandamus Or, In The Alternative, Writ of Prohibition (Hidalgo III and Espindola)	10/16/06	2-3	00193-00513
Proposed Jury Instructions Not Used	02/12/09	24	04389-04436
Proposed Verdict Forms Not Used	02/17/09	24	04502-04504
Reply to State's Opposition to Motion for Judgment of Acquittal Or, In the Alternative, a New Trial (Hidalgo III and Hidalgo Jr.)	04/17/09	24	04537-04557
Sentencing Memorandum (Hidalgo III and Hidalgo Jr.)	06/19/09	24	04595-04623
State Petition for Rehearing	01/23/08	3	00534-00548
Supplemental Points and Authorities to Defendant, Luis A. Hidalgo, Jr.'s Motion for Judgment of Acquittal Or, In the Alternative, a New Trial (Hidalgo III and Hidalgo Jr.)	04/27/09	24	04558-04566
Transcript (Defendant, Luis Hidalgo III's Motion for Acquittal Or, In the Alternative, a New Trial; Defendant Luis Hidalgo, Jr.'s Motion for Judgment of Acquittal)	05/01/09	24	04567-04593
Transcript (Defendant's Motion to Amend Record)	01/11/11	25	04668-04672
Transcript (Defendant's Motion for Audibility Hearing and Transcript Approval)	02/05/08	3	00560-00573

Document	Date Filed	Vol.	Page No.
Transcript (Motions)	02/14/08	4	00729-00774
Transcript (Sentencing)	06/23/09	25	04624-04655
Transcript (Calendar Call)	01/22/09	5	00975-01008
Transcript (Grand Jury)	02/12/08	4	00578-00723
Transcript (Jury Trial Day 1: Jury Voir Dire)	01/27/09	6	01015-01172
Transcript (Jury Trial Day 2)	01/28/09	7-8	01173-01440
Transcript (Jury Trial Day 3)	01/29/09	9	01495-01738
Transcript (Jury Trial Day 4)	01/30/09	10-11	01739-02078
Transcript (Jury Trial Day 5)	02/02/09	12	02079-02304
Transcript (Jury Trial Day 6)	02/03/09	13	02305-02489
Transcript (Jury Trial Day 7)	02/04/09	14-15	02490-02748
Transcript (Jury Trial Day 8)	02/05/09	15	02752-02911
Transcript (Jury Trial Day 9)	02/06/09	16	02969-03153
Transcript (Jury Trial Day 10)	02/09/09	17-18	03154-03494
Transcript (Jury Trial Day 11)	02/10/09	19-20	03495-03811
Transcript (Jury Trial Day 12)	02/11/09	21-22	03812-04141
Transcript (Jury Trial Day 13)	02/12/09	23	04143-04385
Transcript (Jury Trial Day 13 (Excerpt))	02/12/09	23	04386-04388
Transcript (Jury Trial Day 14: Verdict)	02/17/09	24	04437-04444
Trial Memorandum (Hidalgo Jr.)	01/29/09	8	01441-01494
Verdict (Hidalgo Jr.)	02/17/09	24	04500-04501
Writ of Mandamus (Hidalgo III)	06/03/08	5	00841-00843

**Petition for Writ of Mandamus Or, In The
Alternative, Writ of Prohibition
(Hidalgo III and Espindola)**

Continued

1 anything else.

2 The aggravator is they were convicted of a crime
3 of violence, which means the jury verdict will be the
4 piece of evidence which would be necessary to establish
5 the aggravating circumstance.

6 There's no conspiracy or aiding and abetting
7 related to that whatsoever.

8 THE COURT: Well, I think it's moot, but I
9 guess I'm going to grant the motion to prohibit the
10 imputing of aggravating circumstances from one defendant
11 to the other.

12 And I realize it's a rather hybrid situation that
13 might occur, and I don't see it occurring here. If it
14 looks like it will occur then, certainly, we can discuss
15 it more fully during the progress of the trial.

16 I'm going to try to avoid that if I can, but if
17 it becomes relevant we can reevaluate.

18 MR. DIGIACOMO: The one granting it meaning
19 that one aggravator that's related to one defendant can't
20 be used against another. It's just their own aggravator
21 they pled?

22 THE COURT: Absolutely.

23 MR. DIGIACOMO: That's fine.

24 THE COURT: Next, motion to strike the
25 seeking of the death penalty based on unconstitutional

1 weighing equation.

2 That's weighing the aggravators and mitigators?

3 MS. THOMAS: Yes, Your Honor. Sometimes the
4 Nevada Supreme Court has required the aggravators to
5 outweigh the mitigators, other times the mitigators to
6 outweigh the aggravators.

7 We had originally raised this in both the federal
8 challenge and the State challenge. But most of that
9 relied upon Kansas versus Marsh. We acknowledge that the
10 supreme Court ruled to the contrary.

11 We do, however, still have issues of due process
12 meaning the protection of the State Constitutional
13 challenge, because the Nevada Supreme Court has flipped
14 off the standard from case to case, and sometimes within a
15 case instead of having one standard apply to all
16 defendants.

17 And, also, we think that there should be a ruling
18 that the State must prove the aggravators outweigh the
19 mitigators under the State Constitution.

20 THE COURT: But that's not the status.

21 What's your thinking?

22 MR. DIGIACOMO: My thinking is that the
23 Nevada Supreme Court surprisingly ruled directly on the
24 issue in Navarro v. State in the Supreme Court.

25 Navarro's primary condition on appeal is that

1 NRS 200.030, Subsection 4 is unconstitutional because it
2 places the burden on the accused through the mitigating
3 circumstances outweigh the aggravating circumstances in
4 order to avoid the imposition of the death penalty.

5 Navarro essentially argued that a 50/50 case when
6 the aggravating and mitigating circumstances are equal,
7 the death penalty should not be imposed. Neither the
8 United States Supreme Court nor this Court has pronounced
9 such a standard, and we see no reason to do so.

10 We accordingly hold that challenged statute is
11 constitutional. It's been directly addressed to be so.

12 THE COURT: Well, I am going to deny the
13 motion. It's been preserved for appeal.

14 Motion to determine admissibility of State's
15 hearsay evidence before trial. I wrote here, "Mini trial
16 before trial."

17 Is that what we're contemplating?

18 MS. THOMAS: Yes, Your Honor. And I've
19 actually been counsel on a case where this Court did
20 exactly that.

21 THE COURT: Who did?

22 MS. THOMAS: This Court in Moore and
23 Flanagan -- or State versus Moore and Flanagan.

24 THE COURT: I did that?

25 MS. THOMAS: In 1985 with Mr. Seaton and

1 Mr. Harmon. The Court held a hearing the day before trial
2 in which the State provided a list here of 25 items of
3 hearsay evidence we intend to introduce.

4 The Court held a hearing in circumstances not
5 unlike this case with multiple defendants, the State
6 claiming that certain hearsay statements were in
7 furtherance of the conspiracy and different hearsay
8 exceptions.

9 And this Court made a ruling, and during that
10 trial some of that hearsay stayed out, some of it came in.
11 But the jury wasn't prejudiced by hearing this first, and
12 the trial went smoother because that determination was
13 made in advance of trial.

14 THE COURT: Well, in 1985 I was very young
15 and inexperienced and I made a lot of mistakes in those
16 days, but I don't think I am going to make another one.

17 It is not that the concept is inappropriate, it's
18 just another layer of process here when we are so
19 desperately trying to acquire trial time for all these
20 cases that we have, and it's not to say this is not
21 important, certainly.

22 But when we put another layer in it's just we
23 don't have the facility to accomplish all of this, in my
24 judgment, with any kind of meaningful result. Because we
25 would have to contemplate what might be hearsay evidence

1 and I don't know where it would end, really.

2 But I guess back in 1985 there were some
3 specifics that they were discussing, because you would
4 have to have specifics.

5 MR. DIGIACOMO: And what's surprising to me
6 is that we had a preliminary hearing where there was the
7 vast majority of the evidence presented that related to
8 the hearsay type of statement.

9 There's been writs on those issues. If there's
10 any specific one they think this Court was either not
11 correct in ruling upon, or the Justice of the Peace was
12 not correct in ruling upon, they could raise that specific
13 one before this Court to litigate the entire trial prior
14 to trial.

15 I agree with the Court it is not something that's
16 appropriate. They are on notice of all of this so they
17 are seriously -- and I know that Ms. Thomas said to me
18 prior to Deangelo Carroll being severed: Hey, are you
19 going to use any of the statements that he offered to the
20 police.

21 And I said I'm not planning to, but who knows
22 what other counsel are planning to, let's just get rid of
23 them to resolve that problem. If there's any specific one
24 they want to address to the Court, then they should be
25 filing a specific motion.

1 MS. THOMAS: Your Honor, we're happy to go
2 through the preliminary hearing testimony, to go through
3 the discovery and write out what we think the problem
4 areas are going to be.

5 The fact is, in ruling on that writ this Court is
6 no way ruled on the admissibility of hearsay evidence.
7 And throughout the prelim you have a Justice of the Peace
8 who was essentially saying I'll rule on that later, I'll
9 rule on it later, I'll pick it up later.

10 There was no briefing on that in furtherance of
11 the conspiracy requirement. There was no thought, there
12 was no analysis to the extent they even had a ruling.

13 All this Court said was writ denied, or the
14 pretrial writ essentially denied. It didn't rule on the
15 admissibility of hearsay evidence. Those issues weren't
16 appropriate.

17 The issue of the writ was, is there probable
18 cause. This Court ruled on that. This Court has not said
19 everything that the DA has introduced at the preliminary
20 hearing is admissible at trial.

21 Those are two difference issues.

22 MR. DIGIACOMO: And, I'm sorry, I don't
23 think I said that. But their entire writ was, there
24 wasn't probable cause because everything the State
25 admitted was hearsay.

1 So the response was, it's not hearsay and here's
2 the reason why it's not hearsay. And the Court found that
3 it was appropriate evidence admitted before the Justice of
4 the Peace and denied the writ.

5 If there's something that they think was
6 incorrect about that analysis, or if I'm mistaken about
7 this, they weren't claiming that that was the problem with
8 the presentation --

9 MR. DRASKOVICH: Mr. Digiacomo is somewhat
10 right but also mistaken, because Your Honor had said these
11 are issues that are appropriate to address at trial. When
12 we approach trial we can address those issues.

13 At this time the writ is denied and that was Your
14 Honor's ruling.

15 THE COURT: Well, I don't think what's being
16 requested is inappropriate. But I cannot escape from my
17 conclusion that the benefit derived is outweighed by the
18 time and resources that it would take.

19 And I just don't want to set a precedent where
20 we're going to start doing these little mini trials before
21 we get to trial. I'm going to deny the request.

22 I need some help with this next one because I
23 think maybe we're using the wrong word here; to prohibit
24 evidence and argument on irrelevant mitigating
25 circumstances.

1 Did you mean to say aggravating circumstances?

2 MS. THOMAS: No, Your Honor.

3 THE COURT: Well, I am totally in the dark
4 then. What do you mean?

5 MS. THOMAS: What we don't want is the
6 Prosecutor standing up there with a blowup of the statute
7 that defines mitigators and to say, well, there was no
8 duress, they're not young and, in essence, turning the
9 statutory mitigators and the absence of those into
10 something to be held against the defendant.

11 Because that's not what mitigators are designed
12 for. Those are for the defendant's benefit. Even the
13 absence of those is nothing that should go to the State's
14 benefit.

15 While we agree the State could stand up there and
16 say, you know, there was no duress here, these are young
17 people, but during the selection phase, not during the
18 liability phase. But during part of the selection
19 criteria that might be a permissible argument.

20 But to mention the statute, to have an exhibit
21 showing the statute, or to in any way suggest that that
22 argument is enforced by statute, that's what we don't
23 want.

24 MR. DIGIACOMO: And I would disagree. I
25 would never put the statute up there and say: Hey, look,

1 the Legislature said duress -- I wouldn't to that.

2 Obviously, I may argue these people weren't under
3 duress, that they didn't grow up in a horrible background,
4 they didn't have a lengthy criminal history. These people
5 just decided to do a horrendous crime.

6 But I would agree with Ms. Thomas, that's
7 probably not appropriate.

8 THE COURT: Are you contemplating some sort
9 of a diagram? Or are you talking about should be able to
10 argue it, period?

11 MS. THOMAS: No diagram, and in their
12 argument should not be able to identify the statute as the
13 source of the authority for the argument.

14 MR. DIGIACOMO: I don't disagree with that
15 at all.

16 THE COURT: Just out of curiosity, does this
17 also go to the aggravators? You can get up and say:
18 Well, there is no danger from one person and all these
19 things.

20 MS. THOMAS: Yes. We can do that. There
21 are different burdens at a penalty phase. The State has
22 an incredible burden.

23 MR. DIGIACOMO: Well, Judge, I'm not
24 agreeing to that. If I can't put up a statute, they can't
25 put up a statute

1 MR. DRASKOVICH: I'm not saying we can put
2 up a statute, but we can argue that there was no
3 aggravator.

4 MR. DIGIACOMO: I can argue the existence of
5 the mitigators, and you can argue the absence of an
6 aggravator.

7 THE COURT: All right. That being said,
8 that will be the status of the matter. There will be no
9 bill billboards and whatnot.

10 Motion to declare NRS 704.206 unconstitutional.
11 That's the jury pool situation, and the argument was made,
12 I believe, that some jurisdictions do it a little
13 differently than smaller jurisdictions because they
14 require that power bills be --

15 Anyway, I don't quite understand why we care what
16 they do in Esmeralda County or some place.

17 MS. THOMAS: Your Honor, it's because it's a
18 State statute and it makes an artificial distinction
19 between rural counties and urban counties. And that
20 distinction, which is not a rational decision without a
21 compelling basis, I suggested warrant strict scrutiny
22 because of the Sixth Amendment rights involved.

23 There is no valid government interest in drawing
24 that distinction between the rural and the urban counties.
25 That's a distinction that shouldn't exist. Clark County

1 should not be limiting itself to DMV motor rolls. It
2 should have the utility lists.

3 And this Court has the authority to tell the
4 power company when Chuck Short asks: We need your rolls,
5 and the power company says: No, we're not giving them,
6 that should not have been the end of the matter.

7 The Judges of this jurisdiction of this county
8 have the authority to tell the power company: Hand that
9 over. You're not entitled to special treatment. We need
10 diverse juries, we need juries from different
11 socioeconomic levels and we're entitled to that
12 information.

13 That's what the Rose Commission on the study of
14 jurors suggests, that the list should be expanded. We
15 should be entitled to a broad jury pool.

16 THE COURT: Isn't this something that should
17 be broached to the Legislature?

18 MS. THOMAS: Your Honor, that's certainly
19 one route and I think the Supreme Court will go that
20 route, but we're not going to postpone this trial until
21 the next legislative session comes around.

22 THE COURT: Well, but there's two issues
23 that come to mind here. Let me suggest them to you and
24 you can respond. First of all, I don't see what the
25 prejudice is, number one.

1 Number two, you said there's no rational basis
2 for that thinking. Arguably, there is. If you're trying
3 to put a trial together in Fallon or something, you're
4 going to have some problems with the number of potential
5 jurors available.

6 Some of them living in rural areas, I mean,
7 you've got a difficulty. Where, obviously, in Clark
8 County there's no shortage of prospective jurors. I think
9 that's the reasoning behind it.

10 You may not agree with it, but I think you should
11 have to say that that is a rational basis.

12 MS. THOMAS: Your Honor, there may not be a
13 shortage of jurors in Clark County, but that doesn't
14 address the diversity of the pool issue. And we should be
15 able to draw from a pool that is just as diverse as those
16 rural counties.

17 There's no reason why the power company should
18 not turn over these rolls, not to me, not to
19 Mr. Digiacomo; to the Jury Commissioner, to Mr. Short, to
20 the Court Administration.

21 Just as the power companies in those rural areas
22 do, Nevada Power should be held to that same standard.

23 THE COURT: Well, what would be the next
24 thing, of course, is the matter would be brought before
25 the Court and the Court determine that it's not

1 constitutional, meaning against. Because of the law, the
2 power company is going to say: Hey, look at the law.

3 MS. THOMAS: Well, that's what I'm asking
4 the Court to do, is to find that statute unconstitutional.

5 THE COURT: So do we hear from everybody
6 else, or are we just going to do this offhand and make
7 this determination?

8 MR. DIGIACOMO: My question for the Court
9 was, and this was basically what my response was, if you
10 find that statute unconstitutional, the only thing that
11 will mean is, they don't have to give their rolls out in
12 the smaller counties.

13 The Legislature granted the Courts the authority
14 to order them to turn over in the smaller counties. If
15 you find that unconstitutional, that means they don't have
16 to do that.

17 There is no statute that authorizes you to order
18 them to turn it over. They're asking you to do something
19 the Legislature should do if it's, in fact, an appropriate
20 thing. I didn't address whether or not it's appropriate
21 because I figured that Nevada Power would probably want to
22 have a discussion about that argument.

23 MS. THOMAS: And I'm talking of sending a
24 copy of this to Nevada Power and we'll bring them in and
25 appeal it.

1 THE COURT: Well, that's fine. My second
2 concern is this matter of lack of prejudice.

3 Why do you think you would have a better, more
4 fair we'll say, for lack of a better term, jury panel if
5 the power bill isn't disclosed and we get people that
6 are -- everyone that subscribes to the power company?

7 MR. THOMAS: Your Honor, it's a more diverse
8 pool. And we cited the study on that because we're not
9 just going to draw people in from one segment of our
10 community. These defendants are entitled to a juror from
11 the community as a whole.

12 And there's a significant portion of the
13 community that is not being addressed in the jury rolls
14 because they don't have a driver's license, or they're not
15 registered to vote, and we want to reach out to the rest
16 of the community.

17 And it's not just me saying this. Justice Rose
18 had that big community. There were representatives from
19 all over. The committee recommended that this be the
20 action taken.

21 And based upon that and based upon -- we don't
22 need a statute to have diverse jury pools. It's a
23 constitutional right. This Court has the inherent
24 authority to recognize that right and to make it happen.

25 THE COURT: Well, my experience has been,

1 and we do this every week, as you know, impanel juries,
2 that we get to a very diverse group. I mean, obviously
3 anything, frankly, come in here.

4 And the other argument against it, and I'm just
5 kind of bantering back and forth, I'm not criticizing
6 anything, you have a good point, but I'm just trying to
7 explore this.

8 You know, one time we had a dog license holder
9 was on the list years ago. But where did you end?
10 There's concealed weapon permit holders. I mean, you can
11 take lists from many, many sources.

12 If your concept is valid, if a person accused
13 deserves a jury pool that is as diverse as possible in the
14 entire community, you're looking for names from the entire
15 community you could use a number of lists going beyond
16 just the power company.

17 But I don't know if that is a requirement that
18 you have every sole in the community on a list, or at
19 least potentially on a list, I don't know why we would
20 have that when we have such a diverse group the way it is.

21 Well, it's something to be preserved. I'm going
22 to deny it.

23 And, again, the questionnaire, I've already
24 indicated my thinking there.

25 So is there anything we have not entertained that

1 we should?

2 MS. THOMAS: Your Honor, there's still the
3 matter that's been under submission for a while now and
4 we're getting to the point where we need to start doing --

5 THE COURT: Good point.

6 MR. STEIN: Correct. We have the target in
7 April.

8 THE COURT: Absolutely. Any other
9 discussion on that point I'll entertain whatever you care
10 to.

11 MS. THOMAS: Your Honor, I think we've fully
12 talked about the motion, and unless the Court has
13 questions I think we're just all pretty anxious for a
14 ruling.

15 THE COURT: Right. And it has gone longer
16 than it should have. The argument has been made, as I
17 recall it, and I have notes here, that there's no
18 insufficient evidence of an intent.

19 Is that, basically, where we are? And,
20 therefore, that aggravator is not available to the State?

21 MR. DRASKOVICH: That was part of it. It
22 also dealt in large part with that laundry list. As you
23 recall, Your Honor, I had to pull the Notice of Intent to
24 Seek the Death Penalty. I have read it a number of times
25 and it's difficult to understand.

1 That was another one of the areas --

2 THE COURT: I'm sorry. What laundry list
3 are we talking about?

4 MR. DIGIACOMO: Their argument that I gave
5 them too much notice. They used to argue we didn't give
6 enough, so then I gave them every piece of fact I could
7 think of that related to that, and now they're saying I
8 gave them too much.

9 MR. DRASKOVICH: Did you happen to notice in
10 the Intent to Seek the Death Penalty, one of the three
11 primary arguments was that that was vague? It was
12 overbroad.

13 And we discussed Redeker a great deal, which was
14 the matter that this Court was waiting for to make its
15 determination.

16 MR. DIGIACOMO: Redeker said there wasn't
17 enough information in that notice so you have to put it
18 all in, which is what we did.

19 THE COURT: Well, are you saying, counsel,
20 that it was so broad that it was really of no significance
21 and you couldn't ferret through it and determine what was
22 actually going to be argued?

23 MR. DRASKOVICH: Yes. And, Your Honor, I
24 know this matter was not on calendar today and I know
25 there was actually a lot to review.

1 Would the Court mind hearing this perhaps and
2 putting this next week with the few motions that are still
3 outstanding?

4 THE COURT: Did Mr. Whipple want to be
5 involved in this particular issue?

6 MR. DRASKOVICH: No, he's not.

7 MS. WILDEVELD: No, he's not, Your Honor.
8 It would be our desire not to do that in part on that day,
9 Your Honor.

10 THE COURT: I'm sorry?

11 MR. DIGIACOMO: Ms. Wildeveld is saying they
12 don't want to be in court with all these lawyers, but they
13 all need to be here because you didn't grant the motion to
14 sever, and they need to be here next Friday too.

15 So there's no question that all the lawyers are
16 going to be here next Friday. But at some point, Judge,
17 we appreciate the ruling, but if the Court feels the need
18 to look at some more evidence.

19 THE COURT: Well, I didn't seize upon this
20 what you call a laundry list, but it's a simple matter and
21 we're going to be here next week so I don't think it makes
22 too much difference.

23 Mr. Digiacomo is correct, we are all going to be
24 here next Friday, I'm assuming, a week from tomorrow.

25 MR. DRASKOVICH: We'll be here, Judge.

1 THE COURT: I don't want to look up and say
2 now we've got to pass it.

3 Is your health going to permit it?

4 MS. WILDEVELD: Yes, Your Honor.

5 THE COURT: Anything further?

6 MR. DIGIACOMO: Just one last thing, Judge.
7 Apparently Mr. Figler left once again before we can
8 address the fact that he hasn't filed any motions.

9 I mean, I'm to the point now where I'm thinking I
10 need to file a motion to have new counsel appointed to
11 Mr. Carroll because he has done nothing, as far as I can
12 tell, and has violated the orders of the Court.

13 So I'm hoping that you can at least order
14 Mr. Figler be back here next Friday to address that issue.

15 MR. STEIN: And I think in addition to that
16 the fact that we have co-counsel on the District
17 Attorney's side who hasn't said anything should be
18 addressed.

19 THE COURT: Who is with Mr. Figler?

20 MR. DIGIACOMO: Mr. Bunin.

21 THE COURT: Well, I anticipate what you're
22 saying, basically, is that you're contemplating
23 ineffective assistance of counsel.

24 MR. DIGIACOMO: I don't know if they're
25 trying to set it up or what's going on. If he's trying to

1 buy a continuance since he's the one set first and he
2 doesn't want to go first, he could have told the Court
3 that.

4 So if he's trying to buy himself one, it puts us
5 in a precarious position where he'll get up there and say:
6 Well, I'll be ineffective, Judge. If you want to make me
7 go you make me go, and at some point we need to address
8 that sooner rather than later.

9 MS. THOMAS: Your Honor, Mr. Figler is not
10 here and he probably shouldn't have left. But at this
11 point I'm going to object on his behalf to anything more
12 being said about his case without him being present.

13 MR. DRASKOVICH: And he wasn't on calendar
14 today anyways.

15 MR. DIGIACOMO: He was supposed to be and he
16 certainly had orders of this Court to file motions. And
17 he was here and he chose to leave after joining in motions
18 that he was here on.

19 THE COURT: Friday, in addition to what I've
20 indicated, we're going to have a status check as to this
21 trial, all counsel, I mean all counsel; Mr. Bunin,
22 Mr. Figure and the entire panel are going to be here.

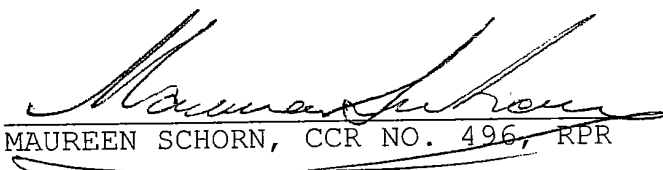
23 And I will indicate this to all present, and I am
24 not singling out anybody. If anyone is operating under
25 the misconception that I will indulge in this scheduling

1 things strategically as to who goes first and who gets a
2 continuance, I would invite them to look at the transcript
3 of the Hells Angels case wherein I took Mr. Kennedy and
4 other individuals from the Public Defender's office task.

5 And I think I left no confusion of how seriously
6 I took that. So if anyone is interested, then they can
7 look and see what the Court's posture is when that sort of
8 thing surfaces.

9 I'll see you all back the 8th. Center a nice
10 weekend.

11
12 ATTEST: Full, true and accurate transcript of
13 proceedings.

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16 MAUREEN SCHORN, CCR NO. 496, RPR
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MAUREEN SCHORN, CCR NO. 496, RPR

EXHIBIT "11"

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DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,)
)
Plaintiff,)
)
vs.) No. C212667
) Dept. No. XIV
KENNETH COUNTS, LUIS HIDALGO,)
ANABEL ESPINDOLA, DEANGELO)
CARROLL,)
)
Defendants.)
_____)

REPORTER'S TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE DONALD M. MOSLEY

September 8, 2006
9:45 a.m.
Department XIV

APPEARANCES:

FOR THE STATE:
MARK DIGIACOMO
MR. GIANCARLO PESCI
Deputy District Attorneys

FOR THE DEFENDANT COUNTS:
MR. BRETT WHIPPLE
MS. KAREN WILDEVELD

OTHER DEFENDANTS' COUNSEL
INDICATED IN TEXT OF RECORD:

Reported by:
Joseph A. D'Amato
Nevada CCR #17

1 THE COURT: Calling C212667, State versus
2 Kenneth Counts, Luis A. Hidalgo, Anabel Espindola and
3 DeAngelo Carroll. The record reflects the presence of
4 counsel, Ms. Wildeveld and Mr. Whipple representing
5 Mr. Counts.

6 Do you wish proceed in the absence of
7 your client, counsel?

8 Excuse me. They are here seated in the
9 back of the courtroom.

10 They are all present I believe; is that
11 correct?

12 [All counsel indicated in the affirmative.]

13 THE COURT: Kenneth Counts is present.

14 Mr. Draskovich, do you wish to proceed
15 without Mr. Stein?

16 MR. DRASKOVICH: Yes, Your Honor.

17 THE COURT: You're representing Mr. Hidalgo?

18 MR. DRASKOVICH: Yes.

19 THE COURT: He is present in custody, as
20 well.

21 Mr. Oram is present with Ms. Thomas
22 representing Anabel Espindola and that Defendant is
23 present in custody.

24 Mr. Figler, is Mr. Bunin with you?

25 MR. FIGLER: No. He's out of the country.

1 THE COURT: Mr. Figler is here representing
2 DeAngelo Carroll who is present in custody.

3 This is a continuation of a hearing we
4 had begun last Friday.

5 We'll take it in the order that the
6 motions appear on calendar.

7 Mr. Bailiff, do we have any copies of
8 this?

9 MS. THOMAS: I believe we had one motion
10 this morning that's not on here.

11 THE COURT: This is Mr. Counts' renewed
12 motion to sever defendants. I guess this is really a
13 motion to reconsider, although not couched in that
14 language.

15 Is there any new evidence that I didn't
16 consider initially, Mr. Whipple and Ms. Wildeveld?

17 MR. WHIPPLE: Your Honor, regarding the
18 motion to sever there's a motion pending before the
19 Court with the remaining defendants whether the death
20 penalty could be considered or not.

21 Obviously the pendency of that motion
22 will be dispositive with regard to our motion to sever,
23 as well.

24 MR. DIGIACOMO: Why is that?

25 THE COURT: I don't understand.

1 MR. WHIPPLE: You have to pursue the death
2 penalty against one.

3 The position would be obviously if we're
4 going to pursue the death penalty against one person
5 they shouldn't be -- it has to be uniform.

6 If they aren't going to be able to be
7 considered against two of the defendants, they shouldn't
8 be able to be considered against our client, as well.

9 THE COURT: On what legal basis do you make
10 the argument?

11 MR. WHIPPLE: It's due process. I believe
12 it's a fairness issue.

13 THE COURT: Well, I'm not inclined to
14 reconsider at this juncture. As you suggested, it may
15 be premature.

16 I'm not saying we can't at some point,
17 if the circumstances dictate. At this juncture I don't
18 see any need to reconsider.

19 Mr. Counts' Motion to Suppress evidence
20 of prior felony convictions.

21 I'm not sure what legal basis there is
22 for that.

23 MR. WHIPPLE: It comes down to a prejudicial
24 versus probative matter.

25 In my reply I pointed out to the Court it

1 comes down to the discretion of the Court.

2 THE COURT: Are you talking about if your
3 client takes the stand?

4 MR. WHIPPLE: Correct, correct.

5 THE COURT: The law is pretty settled in that
6 regard.

7 MR. WHIPPLE: The law allows the court to
8 make that call.

9 If Mr. Counts takes the witness stand
10 and testifies that -- there is a very extraordinary
11 prejudicial effect to have his prior felonies come in.
12 I don't think -- you know, it has nothing to do with
13 what he's charged with, nothing to do with violence.

14 They are simple drug charges. It's
15 extraordinarily prejudicial.

16 I believe if the Court were to take what
17 probative value does it have versus prejudicial value it
18 remains within the discretion of the Court that the
19 Court could strike the fact that that information would
20 come out, if he testified.

21 THE COURT: Traditionally, of course, the
22 thinking behind the law in that regard is that it
23 challenges the veracity of his testimony.

24 What's the State's position?

25 MR. DIGIACOMO: I think Mr. Whipple has it

1 backwards. If it was a violent felony, it would be
2 prejudicial. Then the jury might consider it as
3 character evidence.

4 They are non-violent felonies. They are
5 not prejudicial.

6 The statute says that a felony is
7 relevant to his credibility and the case law says that
8 that felony, even if it's not related to a fraudulent
9 act, is relevant to his credibility.

10 He has two prior felonies. They are
11 both well within the 10 year time period.

12 THE COURT: What are they?

13 MR. DIGIACOMO: Both drug-related.

14 I didn't bring my opposition to the
15 motion. They are both either possession with intent to
16 sell or possession of controlled substance. There might
17 be a sale of a controlled substance.

18 They are both drug-related felony
19 offense.

20 THE COURT: You know, we hear this argument
21 about prejudice. I'm not discounting the propriety of
22 that under certain circumstances. Of course, it can be
23 made with anything.

24 If it hurts the defense or it hurts the
25 prosecution, it's prejudiced against them. I'm not

1 inclined to grant that motion.

2 For the record, I neglected to indicate
3 Mr. Pesci and Mr. DiGiacomo are present for the State.

4 Release of juvenile records.

5 That's Mr. Taoipu and Mr. Zone; is that
6 correct?

7 MR. WHIPPLE: Yes.

8 THE COURT: I believe I would review these
9 in chambers.

10 MR. DIGIACOMO: My understanding is I was
11 willing to submit Mr. Zone's. My position is as to
12 Mr. Taiopuh, he is not a witness.

13 THE COURT: He is not going to be a witness?

14 MR. DIGIACOMO: If at some point he becomes
15 a witness I will submit his juvenile records to your
16 chambers and you can make the determination if there's
17 anything in his juvenile records that need to be
18 released.

19 At this time he's a charged Defendant
20 who is set to go to trial, in fact, after all these
21 other defendants.

22 MR. WHIPPLE: For the record, Mr. Taoipu --
23 taking the State's statement of facts, he's the only
24 other individual that was located in the car with a
25 weapon.

1 That needs to be determined as well.

2 THE COURT: Is he going to be a witness
3 either called by the defense or prosecution?

4 MR. WHIPPLE: At this point that remains to
5 be seen.

6 THE COURT: If it turns out that he is, I
7 suppose we can discuss his record, but it would be moot
8 at this juncture, wouldn't it?

9 MR. WHIPPLE: There is a real issue with
10 regard to propensity. The character evidence on that is
11 we have a right to determine if this person is
12 associated with weapons in the past.

13 If he is, we can make appropriate
14 motions to hear --

15 THE COURT: A LITTLE SLOWER.

16 What you're suggesting is you want to be
17 able to indicate to the jury that Mr. Taoipu is
18 responsible, in some fashion.

19 MR. WHIPPLE: If he has an association with
20 weapons, then absolutely. I'm not saying we will.

21 I think that's something we need to have
22 the opportunity to evaluate and if we choose to bring
23 that motion before the Court then we'll do so. The
24 Court can rule on it at that time.

25 We can't get to first base until we find out

1 that information is in his background.

2 THE COURT: You indicated, I believe,
3 counsel, you didn't have his records; is that right?

4 MR. DIGIACOMO: No.

5 I'm sure that the juvenile division of
6 the District Attorney's Office is in possession of them.
7 We've never requested them to give them or requested an
8 order for their release.

9 If you want those delivered to your
10 chambers, I can have them delivered.

11 I certainly don't believe a propensity
12 of a witness or another person is admissible under the
13 evidence.

14 Propensity evidence is non-admissible
15 with the exception of the character of a victim or a
16 Defendant and then only under opinion and reputation
17 type testimony.

18 The propensity of another individual to
19 commit a crime is never admissible unless there's some
20 claim of self-defense and the guy is the victim.
21 That's the only time propensity evidence ever becomes
22 admissible.

23 I can't imagine what their argument
24 about relevancy of these records could be. It's
25 non-admissible.

1 If he had a gun five, six years ago, it
2 can't be used to establish he may have had a gun on the
3 date in question, because God knows, I would love to use
4 that type of evidence all the time.

5 I'm not allowed to use it.

6 There's no different rule of evidence
7 for the State than there is for the Defendant.

8 MR. WHIPPLE: Of course there is. We have
9 Constitutional protections and we'll follow the
10 statutes.

11 The guidelines allow, under 348.045, the
12 use of character evidence. The guidelines give
13 statutory paramaters which we will follow.

14 We can't make that determination until
15 we look at it.

16 We're not asking the State to deliver
17 the information to us. We're asking them to give it to
18 this Court.

19 The Court can make a determination.

20 All we're asking is to see if there's
21 weapons or, you know, weapons or guns involved and you
22 can take a look at the time line.

23 We're not asking for anything to be
24 disclosed to us.

25 THE COURT: All right. I tend to think it's

1 of no consequence, because I don't think it's
2 admissible.

3 In an abundance of caution, I'll ask for
4 both these individuals' records. I'll look at them and
5 whatever determination ultimately I'll make at the
6 proper time.

7 Motion for reduction of bail or release
8 to house arrest.

9 MR. WHIPPLE: I appreciate the Court
10 allowing me to continue this matter and bring it back.

11 Your Honor, Mr. Counts has no bail
12 setting at this point. What I have done and the reason
13 I asked for the opportunity to speak to you about it is
14 because I attached to the reply photographs of his
15 family.

16 I think that's something the Court can
17 take into consideration when it considers my client's
18 ties on the community.

19 He has spent a considerable time in
20 custody already. All we're asking for is a bail
21 setting.

22 He has every reason in the world to, if
23 he were somehow able to make bail, to stay in the good
24 graces of this Court. The most important thing to him
25 like any other father in this community are his

1 children.

2 I wanted this court to be aware he has a
3 family, he has a wife, he has a large supporting, loving
4 family.

5 I think that's something I asked this
6 court to take into consideration and it should be taken
7 into consideration.

8 With that basis I would feel comfortable
9 in asking for bail.

10 THE COURT: I don't disagree with the fact
11 that it is something to consider. There are other
12 considerations as well.

13 MR. DIGIACOMO: Judge, we have addressed
14 this issue on a number of occasions and we've addressed
15 this issue before the Court.

16 You've denied it before.

17 Since the last time you denied it we
18 found out that not only did the Defendant have previous
19 failures to appear, but we learned that the Defendant
20 was actually an absconder on probation from California
21 at the time he committed the homicide in this particular
22 matter.

23 Set aside the proof is evident and the
24 presumption is great and he is not entitled to any bail
25 whatsoever. After the court's denial the only new

1 evidence you have is more evidence of his likeliness not
2 to appear for trial.

3 I can't imagine imagine the Court
4 considering granting a bail in this matter after knowing
5 that not only is the evidence overwhelming against
6 Mr. Counts, but on top of that that the number of times,
7 one, that he attempted to flee from the police in this
8 case, but also the times that every other time he's had
9 a criminal case there's been failures to appear and/or
10 absconding on probation.

11 Submit it to the Court on that.

12 MR. WHIPPLE: If I can respond to
13 Mr. DiGiacomo's comments that the evidence is
14 overwhelming, show me the outstanding physical evidence,
15 what they are or the co-defendants and individuals who
16 have a reason to be biased that have made some
17 statement.

18 That's the primary evidence in this
19 case. Call it what you will.

20 Their star witnesses have every reason
21 in this world to be lying and to place the blame on
22 another person. They can call it overwhelming evidence.

23 I call it biased evidence, at best.

24 You know, here's the other thing. They
25 forget about all the positive things that my client was

1 doing here while he was out of custody.

2 He's been a little league coach. I can
3 bring in letter after letter of different people who owe
4 him gratitude for taking their children into his care
5 and assisting them in little league and football.

6 I understand he had some issue in
7 California. I'm not going to tell you one way or
8 another. I'm not sure what the status was.

9 While he's been a citizen here in this
10 state he did very, very positive things, among which
11 were raising a family, provide for them and support his
12 children by being involved with their activities.

13 MR. DIGIACOMO: And being arrested for
14 possession of controlled substance with the intent to
15 sell as well as being an ex-felon in possession of
16 firearm.

17 I love the family argument, but he picks
18 up two felony convictions while he's living in
19 California. I don't know how that's possible.

20 Was he doing drugs in California? I'm
21 not sure. Even while he's here he's getting picked up
22 for dealing drugs and for possession of firearm.

23 He's absconded and failed to appear on
24 numerous occasions. He's been extradited back to
25 California, once, previously.

1 MR. WHIPPLE: I filed the motion. I'll
2 take the last chance to reply.

3 We're not asking for an OR. We're not
4 asking for an OR. We're not saying anything to the
5 effect.

6 We're simply asking for bail.

7 THE COURT: Mr. Whipple, you mention his
8 work as a coach for his children and all that. That
9 poses another question that sort of tracks what I
10 discussed with my clerk this morning.

11 Granted, giving credence to the state's
12 argument -- and I tend to give credence to both sides
13 when I'm evaluating their position -- if you give the
14 state's argument credence, a glaring question arose in
15 my mind this morning. I asked my clerk about it.

16 According to the State, Mr. Carroll went
17 to Mr. Counts, his neighbor, and told him about this
18 deal.

19 "Hey, you can make some money if you go
20 shoot somebody."

21 I'm thinking and asked my clerk what in
22 the world would make Mr. Carroll think he could go over
23 to this man or knock on the door and say "Hey, you want
24 to kill somebody and make some money?"

25 That militates against the argument he's

1 a coach and all these wonderful things, at least in
2 Mr. Carroll's mind. Granted, that's one individual.

3 We don't know the dynamic, but to me it
4 was rather -- I was taken aback by the idea here is this
5 neighbor that happens to be entreated by his neighbor to
6 do something like this.

7 You have to wonder what the reason and
8 everything for it was.

9 In any case, the circumstances are such
10 I'm not going to disturb the current status.

11 We have Mr. Stein present now for
12 Mr. Hidalgo, as well.

13 Motion to preclude admission of phone
14 conversations.

15 This has to do with jail calls; is that
16 correct?

17 MR. WHIPPLE: That's correct, judge.

18 THE COURT: I think I understand. I'm not
19 going to preclude you from being heard.

20 I understand you're suggesting this
21 should be disallowed because the inference is present
22 that the caller was calling his wife and alluding to
23 some money under the pillow, et cetera.

24 MR. WHIPPLE: That's correct.

25 THE COURT: I understand that doesn't bode

1 well for your defense, but why is it legally
2 unacceptable?

3 MR. WHIPPLE: At the conclusion of this
4 trial you'll issue a jury instruction that tells the
5 Finder of Fact they are not to speculate.

6 Everything that the State is suggesting
7 in this particular motion that we've addressed in this
8 motion is absolute speculation.

9 They argue that references to a pillow
10 being fluffed in some secret message that my client is
11 asking if money is in a pillow or if money was left in a
12 pillow or if they found money in a pillow.

13 Absolute speculation on the part of any
14 person who listens to those telephone conversations.

15 Furthermore, they start talking about
16 information only my client would have in order to
17 somehow suggest he would only know about this if he were
18 the person involved with this alleged conspiracy.

19 The fact of the matter is police
20 officers told him ahead of time. Their own officers
21 told him what he was being charged with and he makes
22 reference to it in the phone call.

23 They are saying we have it for sure. We
24 know for fact he had to be out there, but how else would
25 he have this information?

1 In their own taped interviews with the
2 police officers they told him what they are alleging
3 against him at this time.

4 He learned it and they are doing an end
5 run and say we gave it to him and now we're going to
6 somehow help him with it, because there's no way he
7 could have learned about this unless he were at the
8 crime scene.

9 THE COURT: You're talking about things
10 other than the pillow reference?

11 MR. WHIPPLE: That's correct.

12 THE COURT: I have not listened to the
13 tapes. I'll tell you that right up front.

14 What do the tapes say, Mr. DiGiacomo?

15 MR. DIGIACOMO: I provided transcripts to
16 our opposition as to the ones that were used at the
17 preliminary hearing.

18 I would have to dispute with
19 Mr. Whipple, because the detective specifically
20 testified at the preliminary hearing that the
21 information concerning DeAngelo Carroll or mention of
22 DeAngelo Carroll or any mention of Mr. Carroll
23 whatsoever occurred, and what happens is as soon as he
24 finds out he's charged with murder he calls his wife and
25 tells her, by way of code we can prove, because he gives

1 the phone number, a description. He says "The guy that
2 drives the white car is on house arrest and here's his
3 mother's phone number."

4 It turns out to be Mr. Carroll's phone
5 number.

6 Mr. Counts was never informed prior to
7 the phone call he was being accused of anything
8 involving DeAngelo Carroll.

9 How does he know that person's name?

10 How does he know to find out what's
11 going on in the murder investigation that he should
12 contact DeAngelo Carroll?

13 There is absolutely no reason for him to
14 know that fact. Additionally, as to the pillow, if you
15 read the transcripts -- and if they want to argue this a
16 husband talking to his wife about the fluffiness of the
17 pillow, then there's nothing prejudicial about it.

18 Let them argue that to the jury. If you
19 read these transcripts, it's clear that he's discussing
20 with her an item that the police missed inside the
21 pillow.

22 Additionally, he starts discussing with
23 her a black hoody, the black hoody is described by
24 [inaudible] son, what he's wearing, and specifically
25 asked during the search did they get the black hoody?

1 "No, they don't have it."

2 He tells his wife "You know what to do
3 with it because the police can't get it."

4 These are clearly evidence of his
5 consciousness of guilt.

6 Is there "I shot Timothy Hadland in the
7 head?"

8 No.

9 If there was, there wouldn't be a lot
10 more to this case. Certainly the jury should be
11 entitled to listen to the evidence and make their
12 determination as to whether or not they think it's
13 relevant.

14 It's an argument Mr. Whipple should be
15 making to the jury, not to the Court.

16 MR. WHIPPLE: This Court has a duty -- that
17 type of information or that type of evidence passes some
18 sort of threshold. It can't be mere speculation.

19 That's exactly -- I mean, Mr. DiGiacomo
20 says it's clear. It may be clear in his mind, because
21 that's what he wants to find.

22 If you read that it talks about a fluffy
23 pillow and nothing more.

24 What is this code they are referring to?

25 Show me the way to break down the code.

1 Show me the person who is a professional or an expert
2 with regard to the code.

3 It's speculation on their part.

4 THE COURT: Let me ask you this, as long as
5 we're speculating, in a sense.

6 Why would someone call their wife from
7 jail and talk about a fluffy pillow?

8 MR. WHIPPLE: Maybe he wanted to make sure
9 his wife was sleeping well.

10 I don't know. It could be innumerable
11 reasons.

12 THE COURT: Here is the thing: You've
13 answered the question yourself, Mr. Whipple, when you
14 said mere speculation, the word "mere" being operative
15 here.

16 Granted, as you know, we instruct the
17 jury they shall not merely speculate. That suggests
18 speculation is based on an absence of evidence.

19 If you have evidence to base your
20 opinion, or you want to call it speculation, that's not
21 mere speculation.

22 What we're talking about is the theory
23 of the State's case and there is evidence that supports
24 that theory.

25 We can challenge how strong it is and

1 all that, but there is no basis to exclude this
2 telephone conversation or conversations.

3 MR. WHIPPLE: Your Honor, if I can ask as a
4 fallback or standby, I recognize that the -- at the end
5 the Court has dictated all motions are to be -- at this
6 point to cease or be completed.

7 Under 47.080 it allows for Offers of
8 Proof. At the time of trial I'd like to have the
9 opportunity to, if we feel it's appropriate to, to
10 address this Court, request that Offer of Proof of what
11 type of information they want to bring in through the
12 telephone.

13 THE COURT: LITTLE SLOWER, please.

14 We've already identified some of it.

15 MR. WHIPPLE: They have already identified
16 some of that information in their motion, but before we
17 just blindly, blindly allow tapes to be played from the
18 Clark County Detention Center recorded conversations I'd
19 ask this Court for an Offer of Proof from the State what
20 that information is, if there's any additional
21 information, and allow us the opportunity to begin to
22 address that issue closer to trial.

23 MR. DIGIACOMO: We've provided them a
24 transcript. We put it in at preliminary. There was
25 additional phone calls after that.

1 We provided those phone calls to them.
2 I'm sure any phone call I intend to play before this
3 jury should be transcribed and certainly those
4 transcripts will be turned over whenever that
5 transcription happens.

6 If they have some objection as to
7 something new that we provide them, that's fine. They
8 have these. I attached them to my -- and I referenced
9 exactly what it is that we're referencing and we talked
10 about it at the preliminary hearing.

11 Certainly I don't think Mr. Whipple
12 would be precluded from objecting to a piece of evidence
13 at trial and certainly he will have transcripts prior to
14 trial of anything additional we intend to offer.

15 If he has any argument as to those, he
16 certainly should be able to raise those.

17 THE COURT: How many phone calls are we
18 talking about?

19 MR. DIGIACOMO: There's hundreds of phone
20 calls. I think there was seven that we played at
21 preliminary.

22 In my listening of the other phone
23 calls, 99 percent of the stuff is conversations
24 unrelated to the homicide.

25 There may be one or two more phone calls

1 which will be transcribed prior to trial, but we haven't
2 gotten that far in trial preparation at this point.

3 THE COURT: Well, I think it's proper that
4 you do reduce whatever you intend to use to a
5 transcript, have it transcribed and given over.

6 My ruling on the motion is going to
7 stand in the sense that I'm not going to preclude the
8 admission of phone conversations as a general
9 proposition at this juncture and don't intend to, in the
10 future, based on what I know of it.

11 This doesn't mean we cannot review the
12 actual evidence. If there's some areas that are perhaps
13 not relevant or perhaps unduly prejudicial or something
14 of this nature you can deal with it then.

15 You should have the benefit of the
16 transcripts so you can review this in advance.

17 MR. WHIPPLE: Thank you.

18 THE COURT: Motion in Limine to preclude
19 admission of evidence of arrest or flight.

20 Your client was found in the attic; is
21 that right?

22 MR. WHIPPLE: He was.

23 THE COURT: If that's not evidence of
24 flight --

25 MR. WHIPPLE: No, it's not.

1 THE COURT: Okay.

2 MR. WHIPPLE: Evidence of flight is trying
3 to retreat, to flee from law enforcement.

4 In this situation there was no trying to
5 get away from law enforcement. The actions that you saw
6 were basically the actions of a person that was acting
7 irrational.

8 That's not evidence of flight.

9 THE COURT: Does he have a mental problem?

10 MR. WHIPPLE: On that particular basis,
11 absolutely. When the police officers surrounded his
12 building and he was absolutely scared. He acted in an
13 irrational manner.

14 It's not evidence of flight.

15 THE COURT: Let me ask you this: Is it not
16 fair to conclude that an attempt to secrete yourself is
17 tantamount to flight for purposes of consciousness of
18 guilt?

19 MR. WHIPPLE: He wasn't trying to secrete
20 himself. Everybody knew he was there.

21 He went paranoid.

22 THE COURT: Everybody knew he was there?

23 MR. WHIPPLE: Law enforcement was aware he
24 was in that house. That's why they were there.

25 That's why they seized it or -- and then

1 went out and got a search warrant.

2 THE COURT: Being in the building is a
3 little different than hiding in the attic, don't you
4 think?

5 MR. WHIPPLE: Actually, I do. It's not for
6 flight or escape.

7 It's for completely irrational behavior,
8 I think.

9 THE COURT: That can be argued.

10 I think the State has the right to argue
11 the opposite, that this is consciousness of guilt.
12 He's hiding from the police.

13 MR. WHIPPLE: Again, I understand. I don't
14 think his actions were a consciousness of guilt.

15 They are actions of an irrational
16 behavior. To allow that to go before a jury is
17 extraordinarily prejudicial, because it wasn't actions
18 of flight or thoughts of guilt.

19 It was irrational behavior.

20 THE COURT: I'm still inclined to think that
21 is subject to that argument. It doesn't preclude the
22 State from arguing the opposite, offhand.

23 Mr. DiGiacomo?

24 MR. DIGIACOMO: Yes.

25 Judge, in the characterization that

1 there was the irrational acts of a Defendant, I don't
2 know. The police go to search your house, you run
3 across the street into your neighbor's house.

4 The police go to your neighbor's house
5 saying they are looking specifically for you. You hide
6 in the attic and after all the cops are there and your
7 wife is calling you to come out the cops are telling you
8 that they are there for a homicide.

9 You continue to hide in an attic when
10 it's 115 degrees outside, refusing the demand of an
11 officer, attempting to avoid arrest.

12 That's admissible for his consciousness
13 of guilt.

14 That's what he did. That's what the
15 case law says. If you're attempting to avoid the arrest
16 the State can present evidence of that avoidance.

17 MR. WHIPPLE: Respond -- and I'll be brief.

18 He wasn't hiding because everybody knew
19 he was there. He wasn't -- he was acting irrational and
20 to allow that irrational behavior to go before a jury
21 without the ability to show it's culpability of guilt,
22 which it's not.

23 Everybody knew he was there. The fact
24 they had to get dogs and tasers and all this activity is
25 absolutely extraordinarily prejudicial.

1 It has nothing to do with culpability or
2 guilt. It has to do with the actions of an irrational
3 man.

4 That is extraordinarily prejudicial.

5 THE COURT: Let me ask you this,
6 Mr. Whipple, by way of analogy. Let's assume the more
7 traditional flight.

8 Say someone gets in their car, drives to
9 Canada some place and they leave notes to the girlfriend
10 and their family that say "I'm out of here. I'm going
11 to Saskatchewan."

12 Does that mean it's still not flight?

13 MR. WHIPPLE: In that situation it is
14 flight. He's trying to avoid lawful arrest.

15 In this situation lawful arrest was
16 unavoidable. It was going to occur.

17 To allow all this extraordinarily
18 prejudicial evidence of sending up dogs, of cutting
19 holes in the roof, of tasers, that's evidence of an
20 irrational individual.

21 It's extraordinarily prejudicial.

22 It's not evidence of flight or of
23 culpability. I recognize that it places upon this Court
24 that decision, but again, it's extraordinarily
25 prejudicial.

1 I mean, you understand that sometimes
2 people act irrational. They act without reason. That's
3 what happened here.

4 Lawful arrest was unavoidable. It was
5 going to occur. The house was surrounded.

6 His activities of going into the attic
7 and then all the activities of trying to bring him down
8 is simply extraordinarily prejudicial and has nothing to
9 do with consciousness of guilt and everything to do with
10 an irrational man. Because of that, it's
11 extraordinarily prejudicial to a jury.

12 It really shouldn't go to it. It has no
13 weight with regard to consciousness of guilt.

14 THE COURT: Are you indicating the police
15 actually went to his neighbor's house and cut a hole in
16 the roof?

17 MR. WHIPPLE: That's correct.

18 THE COURT: It might go to the argument that
19 the police were irrational.

20 MR. DIGIACOMO: They had to cut in the
21 ceiling, once they learned he was in the attic.

22 On the way to the attic he ditched the
23 physical evidence found inside the house of DeAngelo
24 Carroll's fingerprint on a VIP card from the Palomino
25 Club and \$600 in cash and his identification beneath a

1 couch.

2 After he did that -- not consciousness
3 of guilt, of course, Mr. Whipple.

4 He goes up into the ceiling. The police
5 surround the house, request him to come out. They
6 locate him hiding in the attic and ask him to come out.

7 He refuses.

8 They send a dog up there. He refuses.
9 He's in the back corner, no safe way for the police to
10 get to him. They cut a hole out beneath him and brought
11 him down from the attic that in manner.

12 MR. WHIPPLE: With regard to the playing
13 cards or the cards and the money, they don't know when
14 that was there.

15 THE COURT: Playing cards?

16 MR. WHIPPLE: The cards with the
17 co-defendant's fingerprint on it. They don't know when
18 those items were placed there.

19 To try to suggest somehow that all took
20 place at the same time -- what you see is the actions of
21 an irrational man.

22 I'm going to go back to the same thing.

23 How is that evidence of flight when you
24 surround a person and ask him to surrender and he
25 refuses to come down from the attic?

1 That's not flight.

2 THE COURT: All right.

3 Do you happen to know when these cards
4 and things were placed under the couch?

5 MR. DIGIACOMO: His aunt ran into the house
6 saying "The police are at my house. The aunt says my
7 nephew came over, ran into the house, saying the police
8 are at my house. He ran through the area where the
9 living room was and she was brought out of the house.
10 The only time he was in the house.

11 What's there is the purse; there is the
12 identification and then there is identification --
13 there's \$600 in cash, there is the VIP cards, which are
14 the exact same VIP cards which are found inside the
15 Palomino during the search warrant there in these boxes.
16 He's got a stack of those, got a bunch of cash that is
17 all right where it would be right beneath the couch as
18 you come through the front door.

19 In addition to that piece of
20 information, the phone calls, which they claim are not
21 relevant, he discusses those items. Certainly he has
22 knowledge of where those items were and he has
23 discussions about those items.

24 And one of the references to the pillow
25 is, was basically all the money in the purse or was --

1 or is the rest of the money in the pillow?

2 There is a discussion between what money
3 is in the purse versus what money is in the pillow.

4 There's evidence to suggest he ditched
5 that when he came through the door telling his aunt that
6 the police were over at his place and he needed to hide.

7 He indicates his efforts for an
8 avoidance of arrest.

9 MR. WHIPPLE: That's where the evidence
10 should stop.

11 That's -- if that's what they have
12 that's where it should stop. All the time that it took
13 to drag him out out of an attic should not come in.
14 That has no evidence of flight.

15 It has no evidence of consciousness of
16 guilt. It's evidence of an irrational person. That
17 type of information has no right in front of a jury.

18 Sending dogs into an attic, cutting
19 holes in ceilings, tasers, people in an attic is
20 extraordinarily prejudicial and has no value for their
21 purpose. It has no value.

22 Again, it's evidence of an irrational
23 behavior. It's almost character evidence. It's not
24 appropriate evidence that shows consciousness of guilt.

25 If they want to talk about what they

1 described, then it should stop at the point where he
2 came in the house and the search of the house.

3 It should have nothing to do with the
4 efforts to take him out of the attic.

5 Submit it, and thank you.

6 THE COURT: As to the rationality of the
7 Defendant, that's going to be a subject to be argued.

8 I'm not inclined to embrace either
9 side's theory in that regard.

10 Frankly, hiding from the police, you
11 take a chance. You pay the price.

12 You hide from the police, it's going to
13 be something that's going to be noteworthy and, in all
14 probability, admissible.

15 I don't see a problem in this case.
16 Motion in Limine is denied.

17 On this question of the death penalty
18 that is proffered by Mr. Draskovich and Mr. Oram, and
19 counsel, is that where we are?

20 MR. DIGIACOMO: Yes, judge.

21 THE COURT: Counsel, let me indicate where we
22 are in this matter. Simply stated -- we'll have
23 Ms. Thomas and Mr. Draskovich argue primarily.

24 Simply stated there are two arguments to
25 be made here, I believe. Correct me if I misidentify

1 this in some way.

2 One is there is a suggestion that the
3 committee -- I forget what they call the committee
4 within the District Attorney's Office--

5 MR. DIGIACOMO: I've heard it referred to as
6 both the death penalty committee as well as the death
7 review committee.

8 THE COURT: We'll say the death review
9 committee. The argument is that there should be an
10 opportunity for Defense counsel to be heard before the
11 decision to seek the death penalty is rendered.

12 Is that one of the arguments?

13 MR. DRASKOVICH: Yes, judge.

14 THE COURT: The other is that there is
15 insufficient evidence against Hidalgo and Espindola of
16 intent to kill or to hire someone to kill.

17 Is that the other argument?

18 MR. DRASKOVICH: That is part of the
19 argument.

20 THE COURT: Is there any other?

21 MS. THOMAS: Yes, Your Honor.

22 Essentially it is a matter of law. The
23 notice of intent is deficient without regard to the
24 intent issue.

25 On the pecuniary gain, as a matter of

1 the pleading, the actual words used by the state in its
2 notice of intent is that those are not sufficient to
3 meet the terms of the aggravator and that would be
4 because they refer to beating, as well as murder,
5 because it's not limited to pecuniary gain as the cause
6 of the murder, rather than as a result of the murder and
7 because it failed to provide sufficient detail about
8 their theory of pecuniary gain to the Palomino Club.

9 THE COURT: Let's stop -- and you're right.
10 I recall looking at this before.

11 Is that not as an example of alternative
12 pleading?

13 A special verdict form would address the
14 issue. If the jury finds that there was a hiring to
15 kill, then if that's the circumstance, if they find
16 hiring the batterer it's not -- the death penalty is not
17 in issue.

18 MS. THOMAS: That's the problem. It's not a
19 choice of valid options.

20 There are a number of theories proposed
21 by the State in their notice of intent that are not
22 legally cognizable, that are not valid, that should
23 never be submitted to a jury.

24 THE COURT: What, in particular, are you
25 talking about?

1 MS. THOMAS: The hiring to beat as a basis of
2 that aggravator.

3 THE COURT: No, it would not. If that was
4 the jury's finding during the guilt phase, then
5 obviously it's not an aggravator.

6 MR. DIGIACOMO: It's also not a First Degree
7 Murder. That was my point.

8 That pleading -- and so the court is
9 aware, that pleading was filed prior to Bolden coming
10 down, and Bolden is the one that changed all the
11 theories of liability.

12 I would agree with the court if the
13 State cannot prove the intent to kill of those two
14 individuals, then there is nothing to worry about a
15 death case about, because they are going to be found
16 guilty of something less than First Degree Murder, after
17 Bolden.

18 Pre-Bolden that requirement wasn't
19 necessary. Ultimately, the pleading was filed
20 pre-Bolden and so as such the jury is never going to
21 hear this if they find their intent was solely to beat
22 this person and not to kill.

23 Now, if we establish the intent to kill,
24 then they will get convicted of First Degree Murder.
25 Then we have to worry about this.

1 That's the problem with the entire
2 argument of the defense is the state can't prove the
3 intent to kill in order for us to be facing a death
4 case.

5 If the State can't prove the intent to
6 kill, it's not going to be a death case as to these two
7 defendants.

8 MS. THOMAS: We're not talking about the
9 evidence at trial. We're not talking about the verdict.

10 What we're talking about are the Four
11 Corners of this notice of intent to seek death.

12 The State has never sought to amend
13 that. Bolden was issued, many, many, many months ago.
14 It's not like it came out yesterday.

15 Even prior to Bolden this aggravator
16 could never be based upon murder to beat. It has to be
17 the pecuniary gain for the murder, not beating, not
18 drugs, not anything else.

19 The State had the option of pleading
20 this aggravator under the terms of the statute. They
21 didn't do so.

22 Bolden bolsters our position, but even
23 pre-Bolden that would have been an issue.

24 That's one of the reasons why that
25 aggravator is bad evidence.

1 THE COURT: Of course, you agree an
2 aggravator does not have to be proved at a preliminary
3 hearing or a Grand Jury.

4 MS. THOMAS: I understand the Nevada Supreme
5 Court has said that.

6 THE COURT: I'm inclined to go along with
7 them.

8 MS. THOMAS: I'm not waiving that issue.
9 Ultimately these issues need to be dealt with by the
10 U.S. Supreme Court -- and we're not there yet.

11 Even that aside, the Nevada Supreme
12 Court has said the State is obligated to file a valid
13 notice of intent to seek death.

14 THE COURT: Why is this not cured by the
15 fact we have an alternative pleading and what we've
16 indicated earlier?

17 If there's no finding of intent, it's
18 moot.

19 MS. THOMAS: Because we're going to death
20 qualify a jury. We'll have to deal with this case as
21 a death penalty case up until that point, because our
22 client should be entitled to bail so they can assist us
23 in preparing for this defense.

24 There a whole lot of negative
25 consequences that flow from a notice of intent to seek

1 death that would never be involved in this case.

2 If the Court were to evaluate this
3 notice of intent and say it's not good enough, it
4 doesn't meet the due process, the Sixth Amendment, 14th
5 Amendment and Supreme Court Rule 250 requirements as set
6 forth by the Nevada Supreme Court.

7 Here they had a chance. They had the
8 opportunity. There is -- we all know they are
9 experienced enough in doing death penalty cases that
10 they ought to have this down.

11 They needed to plead this in terms of
12 the statutory aggravator and they didn't do it. They
13 throw in a bunch of nonsense, cold, irrelevant matters
14 that should better be submitted to a jury and which
15 should not subject these defendants to facing the death
16 penalty.

17 THE COURT: You clarify these things, but
18 it's going to be the suggestion of this individual the
19 fact he was hired to go out and batter somebody.

20 MS. THOMAS: I'm not saying that's our
21 defense, by any sense.

22 What I'm talking about here is what the
23 alternative theories the State has pled in that notice
24 of intent.

25 One of their theories is it was a hiring

1 to beat, which is probably -- I'm certain hat's a
2 criminal offense.

3 That's something that should be
4 prosecuted and that's suggested, I think, by the
5 evidence that's been adduced as an alternative.

6 Whatever it is, it's not an aggravating
7 circumstance --

8 THE COURT: I don't know if can agree to
9 those two things at once.

10 MS. THOMAS: -- if they want to plead that
11 as a charge and submit to a jury on a guilty verdict.

12 THE COURT: You object to the and/or
13 language?

14 MS. THOMAS: Yes. I am absolutely opposed to
15 the and/or language.

16 THE COURT: But if Mr. Counts is alleging
17 the same thing it would be the same, wouldn't it?

18 MS. THOMAS: If the State would have filed a
19 notice of intent that said pecuniary gain, murder for
20 hire, left out all the allegations about beating, left
21 out the claim that there was going to be pecuniary gain
22 to the Palomino Club and left out the claim of money
23 paid after, as a result of the murder, rather than the
24 money being conditioned on the front end -- had the
25 State done so, which it did not, but it could have --

1 had the State done so we could be here arguing the
2 sufficiency of the evidence because there is not enough
3 evidence to support those claims.

4 The fact is what we're dealing with is
5 the notice of intent the State did draft, not the one
6 they could have drafted.

7 The one they did draft -- one they did
8 file as a matter of law is bad and should never be the
9 basis for holding these people on death charges.

10 THE COURT: So one alternative is to drop
11 the allegation of battery. Where do you benefit there?

12 MS. THOMAS: I think -- it would be to drop
13 that aggravator. The State didn't.

14 THE COURT: Well you're kind of blurring the
15 issue here. If they drop battery and they maintain
16 murder for hire, the aggravator is still there.

17 MS. THOMAS: Then we come back with another
18 motion to argue the sufficiency of the evidence.

19 What we're dealing with here is not what
20 could have the State done?

21 We're talking about the notice of intent
22 filed by the State is bad.

23 It has to be dismissed.

24 THE COURT: All right.

25 MS. THOMAS: The second part of that is the

1 solicitation issue, which is our argument, which was
2 supported by ample authority from Arizona, Florida as
3 well as plain wording.

4 THE COURT: Is this briefed?

5 MS. THOMAS: It was.

6 MR. DIGIACOMO: We discussed it last time.
7 I thought the Court rejected that and this was the issue
8 you were addressing.

9 THE COURT: I don't have any Florida cases
10 here.

11 MS. THOMAS: On the fact that solicitation
12 is an En Code (phonetic) defense, words coming out of
13 someone's mouths. It's insufficient to meet the
14 standard for the use of violence—or threat of violence
15 aggravator.

16 That's the last part of our argument.

17 THE COURT: When someone solicits someone
18 else to kill, orally, that's not sufficient?

19 MR. DIGIACOMO: They say that's not a crime
20 of violence. That's their argument.

21 THE COURT: It's not a crime of violence?

22 MR. DIGIACOMO: That's what their argument
23 to the Court was.

24 THE COURT: When someone is taped, as we see
25 these living things on tv, where the husband or wife,

1 disgruntled, is trying to contract with someone to kill
2 the other party and they are in a car and it's being
3 taped and they are saying "I want him dead. I want him
4 dead; here's how you do it and here is what you get for
5 it," that's not a crime?

6 MS. THOMAS: That's correct.

7 THE COURT: What court in this land came up
8 with that?

9 MS. THOMAS: The Supreme Court of Arizona,
10 the Supreme Court of Florida.

11 THE COURT: It ain't gonna fly here.

12 Back to the other argument issue.

13 MR. DRASKOVICH: As you know, I represent
14 Mr. Hidalgo in this case. One of our primary concerns
15 is that the State should be severely limited in seeking
16 the death penalty against people that aren't the actual
17 killers.

18 We're concerned about the waste of
19 taxpayer money. We're concerned about the waste of
20 time.

21 Our concern is that the District
22 Attorney's Office is seeking the death penalty in this
23 case against these two defendants where they really
24 don't deserve it.

25 Death is different. We've heard that

1 argument over and over again.

2 This is a First Degree Murder case. The
3 State is free to try and lock these people up for the
4 rest of their lives and under the facts of this case
5 where they themselves did no killing it's a waste of
6 everybody's time and for that reason they should not be
7 facing the death penalty.

8 THE COURT: You understand, Mr. Draskovich,
9 that there is an inherent problem with this.

10 As you say, they can be found guilty of
11 First Degree Murder, but not have the death penalty
12 apply. If you successfully argue lack of intent, there
13 is not a First Degree Murder.

14 The baby has been thrown out with the
15 bath water, from the point of the State.

16 MR. DRASKOVICH: True.

17 That's something we have to arrive at
18 after a very long trial, after very long process. Our
19 position is they can't be seeking death, to begin with,
20 under the circumstances of this case.

21 THE COURT: You're saying lack of evidence?

22 MR. DRASKOVICH: Yes, yes.

23 In the particular circumstances of the
24 case, there aren't the aggravators. At the very end, if
25 the jury decides this isn't a First Degree Murder case,

1 they have done that.

2 Nonetheless, we've had to go through the
3 entire process and make this a death penalty case when
4 it's not a death penalty case.

5 THE COURT: Mr. DiGiacomo and Mr. Pesci,
6 could you address this question of the battery and/or?

7 MR. DIGIACOMO: Yes, that was my point.

8 Pre-Bolden, the time where they changed
9 conspiracy liability, back then, a person, let's say
10 Ms. Espindola only asked Mr. Carroll to beat this man
11 severely.

12 Under conspiracy liability if there was
13 a foreseeable consequence he would die, she would have
14 been responsible for the murder and if Mr. Carroll had
15 the intent of First Degree Murder she would responsible
16 under a First Degree Murder theory.

17 After Bolden they changed the rules.

18 Now I have to show Anabel Espindola
19 intended a death to occur in order for me to convict her
20 of First Degree Murder.

21 The notice of intent, they are arguing
22 throw the whole notice out. If they want to strike the
23 word beating out of it, they can file a motion to strike
24 that language, but ultimately the evidence will show
25 that she says "I want you to beat him severely, if he's

1 with somebody. And if he's alone I want you to kill
2 him."

3 That's the evidence that we have against
4 Ms. Espindola.

5 Likewise, with Mr. Draskovich's client, Mr.
6 Hidalgo, he indicates "I want you to come to work,"
7 having previously discussed the fact that somebody needs
8 to get hurt. "I want you to bring baseball bats. I
9 want you to bring garbage bags", and once Mr. Carroll
10 gets to work he is solicited to kill Timothy Hadland.

11 Certainly there is an argument.

12 What does he need the garbage bags for
13 and the baseball bats for if Mr. Hidalgo, Junior or the
14 III'd didn't intend to kill?

15 Ultimately what they are asking us for
16 is a probable cause determination as to whether or not
17 there's sufficient evidence before you to establish the
18 intent that, as you indicated already, it's not
19 appropriate.

20
21 The question for the Court is this: If
22 they get convicted are they on notice of the aggravating
23 circumstances?

24 And what they want to bar is that
25 Mr. Counts got \$6,000 for this homicide, an aggravating

1 circumstance as to them, and I disagree.

2 The statute says the murder was committed
3 for the pecuniary gain of themselves or any other person.
4 They are liable. It's just a murder for hire.

5 The evidence also shows Mr. Hadland was
6 making references to the Palomino Club that was hurting
7 the business of the Palomino Club, and the matter of Mr.
8 Hidalgo, Senior, along with some evidence of there being
9 some argument between Mr. Hidalgo, the III'd and
10 Timothy Hadland, is he was telling the taxi drivers not
11 to show up at the club. The club was losing money and
12 that's the reason for the killing.

13 It was for the benefit of the Palomino
14 Club.

15 THE COURT: All right, counsel.

16 The court's rulings are as follows: The
17 argument that defense counsel has a right to attend the
18 death review committee, for lack of a better reference,
19 I find this is without merit.

20 There is no way I'm going to require
21 that counsel be allowed to attend these reviews.

22 Secondly, the question of this and/or
23 pleading situation, battery beating and/or death, I
24 don't have a problem with that. I'm going to allow
25 that.

1 As to the intent to kill, there is evidence
2 pro and con. Each side has their theory which is what
3 trials are about.

4 I don't think it's incumbent upon me; I
5 don't think it's my prerogative to prejudge this evidence
6 when there is sufficient evidence for the bindover and
7 that's the test at this juncture.

8 Beyond that the Court does not have it
9 within its discretion to mandate "Well, it looks weak.
10 It's sufficient to the bindover, but I don't think I
11 like the smell of it so we're going to strike it."

12 That is not going to be what's done by
13 the Court and I don't think it's proper for the Court to
14 get involved in. That will go before the jury.

15 Anything else, counsel?

16 MR. WHIPPLE: Nothing else, judge.

17 MR. DIGIACOMO: No, judge.

18

19

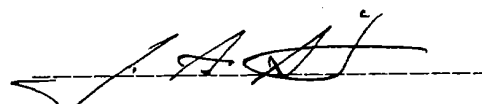
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21 ATTEST that this is a true and complete
22 transcript of the proceedings.

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J. A. D'AMATO CCR #17

