IN THE SUPREME COURT OF THE STATE OF NEVADA

LUIS A, HIDALGO, JR. Appellant, vs. THE STATE OF NEVADA Respondent.	CASE NO.: 54209 On Appeal from a Final Judgment of Conviction entered by The Eighth Judicial District Court

APPELLANT'S APPENDIX

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DOMINIC P. GENTILE
Nevada Bar No. 1923
PAOLA M. ARMENI, ESQ.
Nevada Bar No. 8357
GORDON SILVER
3960 Howard Hughes Pkwy., 9th Floor
Las Vegas, Nevada 89169
Telephone: (702) 796-5555

ATTORNEYS FOR THE APPELLANT LUIS A. HIDALGO, JR.

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OPPS
GORDON & SILVER, LTD.
DOMINIC P. GENTILE
Nevada Bar No. 1923
PAOLA M. ARMENI
Nevada Bar No. 8357
3960 Howard Hughes Pkwy., 9th Floor
Las Vegas, Nevada 89169
(702) 796-5555
Attorneys for Defendant, Luis Alonso Hidalgo, III

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DISTRICT COURT

CLARK COUNTY, NEVADA

STATE OF NEVADA, Plaintiff, vs. LUIS ALONSO HIDALGO III. #1849634, Defendants.	CASE NO.: C212667 DEPT. NO.: XXI **OPPOSITION TO STATE'S MOTION TO CONDUCT VIDEOTAPED TESTIMONY OF A COOPERATING WITNESS** Date of Hearing: April 10, 2008 Time of Hearing: 9:30 a.m.

Defendant, Luis Alonso Hidalgo III., ("Defendant"), by and through his counsel of record, Dominic P. Gentile, Esq. of the law firm Gordon & Silver, Ltd., hereby opposes the State's Motion to Conduct Videotaped Testimony of a Cooperating Witness filed by Plaintiff, State of Nevada ("Plaintiff").

This Opposition is made and based upon the following Memorandum of Points and Authorities, any attachments thereto, and the papers and pleadings already on file herein

Dated this 16th day of April, 2008.

GORDON & SILVER, LTD.

By: _____
DOMINIC P. GENTILE
Nevada Bar No. 1923
PAOLA M. ARMENI
Nevada Bar No. 8357
3960 Howard Hughes Pkwy., 9th Floor
Las Vegas, Nevada 89169
(702) 796-5555
Attorneys for Defendant,
Luis Alonso Hidalgo, III

GORDON & SILVER, LTD.
ATTORNEYS AT LAW
NINTH FLOOR
3960 HOWARD HUGHES PKWY
LAS VEGAS, NEVADA 89169
(702) 796-5555

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The plaintiff has filed a motion with this Court seeking an order that the testimony of Anabel Espindola be memorialized prior to trial by way of a videotaped deposition. According to the charges, Espindola is now an admitted accomplice against whom plaintiff once sought the death penalty but with whom they have negotiated a plea of guilty to a "fictional" charge. As part of the plea bargain, plaintiff has promised Espindola release from custody and non-oppostion to a sentence of probation. It has made her release dependent upon her giving a deposition. See Exhibits 1 (Guilty Plea Agreement), 2 (Agreement to Testify) and 3 (Recorder's Transcript of Hearing Re: Espindola Plea, February 4, 2008).

The plaintiff offers no authority, statutory or otherwise, to support its application. Moreover, once again it fails to support its factual assertions - conclusory as they are - with any affidavits, declarations or materials for the Court to consider. Nothing appears in the record setting out the source(s) and basis for the prosecutor's statements that, prior to Espindola entering the plea of guilty, "another cooperating witness received pressure from at least one co-defendant to lie about the circumstances of May 19, 2005." The record is also bereft of any support for the proposition that "the witness[1] lives in danger now that it is known she will be testifying". The plaintiff asserts that memorializing the testimony of Espindola, an admitted accomplice witness, will somehow remove the motivation of some unknown person or persons to harm or kill Espindola. It does so without any factual support that anyone has made any attempts to harm Espindola or anything to establish that she wouldn't be harmed out a desire for revenge. Nor does it distinguish how Espindola's "danger" is any different from any other prosecution witness who may testify against a defendant in a criminal case, thereby making the instant matter an exception to the rule that depositions are not available in criminal cases.

More importantly, it fails to disclose to this Court that NRS 174.175, which governs the taking of a deposition to preserve testimony in a criminal case, expressly excludes accomplice

[1] From the text and grammar employed, it is unknown whether the plaintiff is speaking of Espindola or the "another cooperating witness" referred to in the prior sentence.

GORDON & SILVER, LTD.
ATTORNEYS AT LAW
NINTH FLOOR
3960 HOWARD HUGHES PKWY
LAS VEGAS, NEVADA 89169
(702) 796-5555

witnesses from its application. See NRS 174.175(3). Finally, its seeks to bind a non-party to this proceedings, Luis Alonso Hidalgo Jr., by the order that it requests, notwithstanding its failure to seek the order in the proper case.

II. THE TAKING OF A DEPOSITION TO PRESERVE TESTIMONY IN A CRIMINAL CASE IS GOVERNED BY STATUTE.

NRS 174.175 was enacted as part of the general omnibus revision of the Nevada Criminal Code in 1967. It provides:

> 1. If it appears that a prospective witness may be unable to attend or prevented from attending a trial or hearing, that his testimony is material and that it is necessary to take his deposition in order to prevent a failure of justice, the court at any time after the filing of an indictment, information or complaint may upon motion of a defendant or of the state and notice to the parties order that his testimony be taken by deposition and that any designated books, papers, documents or tangible objects, not privileged, be produced at the same time and place. If the deposition is taken upon motion of the state, the court shall order that it be taken under such conditions as will afford to each defendant the opportunity to confront the witnesses against him.
>
> 2. If a witness is committed for failure to give bail to appear to testify at a trial or hearing, the court on written motion of the witness and upon notice to the parties may direct that his deposition be taken. After the deposition has been subscribed the court may discharge the witness.
>
> 3. **This section does not apply to the prosecutor, or to an accomplice in the commission of the offense charged.**

Emphasis added to the original.

NRS 174.175(3) is unique to Nevada, representing a very deliberate legislative intent that accomplices testify only in person before a jury, consistent with Nevada's view of the inherent lack of trustworthiness of accomplice testimony without corroboration. The first two sections of the statute are similar to those found in many states and the federal rules of criminal procedure. The legislative history of AB 81, which was part of the Omnibus Revision of Nevada's Criminal Code enacted in 1967, makes it clear that Federal Rule of Criminal Procedure 15(a) was its model. However, section three was a verbatim carry over from the NRS 171.505 which was enacted as part of the 1911 Criminal Practice Act. It has been unchanged for almost one hundred years and deliberately preserved by the legislature as something *sui generis* to Nevada law. For

GORDON & SILVER, LTD.
ATTORNEYS AT LAW
NINTH FLOOR
3960 HOWARD HUGHES PKWY
LAS VEGAS, NEVADA 89169
(702) 796-5555

almost a century Nevada has prohibited the substitution at a jury trial of the deposition testimony of an accomplice in place of live testimony. In a case such as the one *sub judice* where the plaintiff had an opportunity to conduct a preliminary hearing in a related matter, as was demanded by the defendant in 08FB0018X, but chose instead to thwart the opportunity for cross-examination until its accomplice became more comfortable with testifying and got her story straight, this Court should not ignore one hundred years of legislative policy regarding accomplice testimony being excluded from the reaches of being presented to a jury by deposition.

Nevada has no jurisprudence on NRS 174.175. Other states and the federal courts have interpreted their rules which are similar to NRS 174.175(1) & (2), however. In State v. Brothers, 1979 WL 207495 (Ohio App Dist 7, 1979), the Ohio Court of Appeals examined Ohio's rule which states that a deposition may be taken only when a prospective witness will be unable to attend or will be prevented from attending a trial or hearing, and if it further appears that his testimony is material and that it is necessary to take his deposition in order to prevent a failure of justice, the court, at any time after the filing of an indictment may order the deposition taken. The Ohio Court of Appeals held in that case that there was no possibility of the witness' failure to appear because he had pleaded guilty to murder and was incarcerated. Anabel Espindola is in custody in this case. She has pleaded guilty to the killing of Timothy Hadland and admitted her role as an accomplice.[2] The Clark County Detention Center has an excellent record for protecting its inmates. In fact, it is difficult to imagine how Ms. Espindola could possibly be safer anywhere else. Moreover, since the crimes to which she has pleaded guilty make her eligible for a sentence greater than the amount of time that she has been in custody, there is little for her to lose by remaining in custody, as she will be credited for that time if she is not sentenced to probation. Yet the plaintiff seems to be concerned that she has been in custody almost three years and seems to have an appetite for her to be released, even if it is only

[2] Defendant does not concede that this admission by Espindola is true or false. He does, however, remain adamant that she was not *his* accomplice, as he had nothing to do with nor any knowledge of the homicide before it occurred.

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ATTORNEYS AT LAW
NINTH FLOOR
3960 HOWARD HUGHES PKWY
LAS VEGAS, NEVADA 89169
(702) 796-5555

prompted by being part of the purchase price for her testimony. Given that plaintiff wanted her to be subject to death prior to her "cooperation", this is not a stretch of the imagination. Simply stated, that is not sufficient reason to memorialize the testimony of an accomplice witness in the face of a legislative intent and mandate to the contrary, particularly when the plaintiff chose to avert a preliminary hearing in a related matter after the defendant in that case demanded one in fifteen days of arraignment, choosing to present the case to the grand jury and avoid cross-examination of Espindola.

In Brumley v. Wingard, 269 F. 3d 629, 640-642 (6th Cir. 2001) the United States Court of Appeals for the Sixth Circuit relied upon Barber v. Page, 390 U.S. 719, 722, 88 S.Ct. 1318, 20 L.Ed.2d 255 (1968) wherein the Supreme Court squarely held that a witness is not unavailable when in custody serving a sentence in a different jurisdiction than the trial proceedings. In Dixon v. State, 27 Md.App. 443, 340 A.2d 396, 402 (Md. App. 1975) the court held that it's criminal depositions rule, virtually identical to Nevada's, had as its purpose the perpetuation of evidence and noted that its Supreme Court held in Kardy v. Shook, 237 Md. 524, 207 A.2d 83 (1965) that trial courts lack an inherent power to direct the taking of depositions. Other states are consistent in recognizing that while depositions are allowable in criminal cases, the circumstances permitting their use must be exceptional. McGuinness v. State, 92 N.M. 441, 442, 589 P. 2d 1032, 1033 (N.M. 1979). State v. Barela, 86 N.M. 104, 519 P.2d 1185 (N.M Ct.App. 1974). The necessity must be clearly established, and the burden of showing that necessity is on the prosecution. Haynes v. People, 128 Colo. 565, 265 P.2d 995 (1954). While depositions are allowable in criminal cases when the legislature so provides, the circumstances permitting their use must be extraordinary. The necessity must be clearly established, and the duty of showing that necessity is the burden of the prosecution. See United States v. Mitchell, 385 F. Supp. 1190, 1192 (D. C. D. C. 1974). It follows that the conditions established by the legislature in enacting NRS 174.175 must be met honored with strict compliance for a trial court to order the taking of a deposition. Given that accomplice testimony is expressly excluded by NRS 174.175(3), this is impossible.

Here, one of the prosecutors assigned to the case has failed to offer anything other than

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NINTH FLOOR
3960 HOWARD HUGHES PKWY
LAS VEGAS, NEVADA 89169
(702) 796-5555

an unsworn, non-specific narrative of his own to support a showing of need of exceptional circumstances for the deposition that he seeks, does not call to the Court's attention that NRS 174.175(3) even exists and is disingenuous as to his true reasons for wanting the deposition taken - to enable the State to live up to its plea bargain agreement with the witness and keep her happy. In United States v. Ruiz-Castro, 92 F. 3d 1519, 1533 (10th Cir. 1996) *overruled on other grounds* by United States v. Flowers, 441 F.3d 900, 903(10th Cir. 2006) the United States Court of Appeals for the Tenth Circuit held that the applicant seeking the deposition failed to meet his burden of proving that exceptional circumstances existed justifying the taking of the deposition as required by Fed.R.Crim.P. 15(a). It relied upon an Eleventh Circuit opinion, United States. v. Drogoul, 1 F.3d 1546, 1552-53 (11th Cir.1993) which held that the burden is placed upon proponent of depositions to satisfy the rule or statutes requirements through the use of affidavits or some other evidentiary support. While the prosecutors in the instant case seem to have ignored them throughout its entire history, the Rules of the District Courts of the State of Nevada mandate that all motions in all actions, civil or criminal, have factual assertions supported by affidavit. DCR 5 reads:

> Rule 5. Scope, construction, and application of rules
> These rules shall be liberally construed to secure the proper and efficient administration of the business and affairs of the court and to promote and facilitate the administration of justice by the court.
>
> **These rules cover the practice and procedure in all actions in the district courts of all districts where no local rule covering the same subject has been approved by the supreme court.** Local rules which are approved for a particular judicial district shall be applied in each instance whether they are the same as or inconsistent with these rules.
> *Emphasis added to the original.*

The Eighth Judicial District Court has a specific rule dealing with motions in civil cases but not criminal cases. See EDCR 2.21. Therefore DCR 13, which reads in pertinent part as follows, applies to criminal cases in the Eighth Judicial District:

> Rule 13. Motions: Procedure for making motions; affidavits; renewal, rehearing of motions.
>
> 5. The affidavits to be used by either party shall identify the affiant, the party on whose behalf it is submitted, and the motion or application to which it pertains

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NINTH FLOOR
3960 HOWARD HUGHES PKWY
LAS VEGAS, NEVADA 89169
(702) 796-5555

and shall be served and filed with the motion, or opposition to which it relates. **Affidavits shall contain only factual, evidentiary matter, shall conform with the requirements of NRCP 56(e), and shall avoid mere general conclusions or argument. Affidavits substantially defective in these respects may be stricken, wholly or in part.**

6. **Factual contentions involved in any pre-trial or post-trial motion shall be initially presented and heard upon affidavits.** Oral testimony may be received at the hearing with the approval of the court, or the court may set the matter for a hearing at a time in the future and allow oral examination of the affiants to resolve factual issues shown by the affidavits to be in dispute.
Emphasis added to original.

The rule makes no mention of an exemption for statements of opinion couched as fact made by a prosecutor in the narrative portion of a motion by the State. This Court cannot find that Anabel Espindola "may be unable to attend or prevented from attending a trial or hearing" merely by relying on the prosecutor's unsupported opinion. Nor can it find that "it is necessary to take his deposition in order to prevent a failure of justice" just because the prosecutor says so. And most of all, it cannot and should not ignore that the prosecutor has either failed to learn the existence of NRS 174.175(3) or deliberately failed to cite NRS 174.175 at all out of a concern that subsection three would come to the Court's attention, thereby thwarting the State's effort to fulfill an ill-conceived promise made in a plea bargain. The State is free to agree to the release of Ms. Espindola without the deposition, if it wishes to keep her happy. It is neither empowered nor free to conscript the defendant into helping it do so.

III. A DEPOSITION IN THE ABSENCE OF A SHOWING OF COMPLIANCE WITH THE LEGISLATIVE AND JUDICIAL POLICY TOWARDS ACCOMPLICE TESTIMONY WILL HAVE AN ADVERSE AND PREJUDICIAL IMPACT ON THE JURY'S ABILITY TO ASSESS ESPINDOLA'S DEMEANOR AND DEPRECIATE THE VALUE OF CROSS-EXAMINATION.

The witness-stand is the place where witnesses give evidence. It is the place where the witness exposes himself to the jurors - a group of strangers to the witness - and submits her credibility to their judgment. The confrontation clause requires that a witness give a statement under oath and submit to what has been termed the "ordeal of a cross-examination". See Mattox v. United States, 156 U.S. 237, 244, 15 S. Ct. 337 (1895). It also requires that the jury be able "

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NINTH FLOOR
3960 HOWARD HUGHES PKWY
LAS VEGAS, NEVADA 89169
(702) 796-5555

to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility." Maryland v. Craig, 497 U.S. 836, 845-846, 111 L.Ed.2d 666, 679, 110 S.Ct. 3157 (1990). Demeanor evidence is importantly relevant on the issue of credibility. See California v. Green, 399 U.S. 149, 160, 26 L.Ed.2d 489, 90 S.Ct. 1930 (1979), and jurors are to be so instructed. As explained by Judge Learned Hand, a witness's " 'demeanor'-is a part of the evidence. The words used are by no means all that we rely on in making up our minds about the truth of a question that arises in our ordinary affairs, and it is abundantly settled that a jury is as little confined to them as we are. They may, and indeed they should, take into consideration the whole nexus of sense impressions which they get from a witness. This we have again and again declared, and have rested our affirmance of findings of fact of a judge, or of a jury, on the hypothesis that this part of the evidence may have turned the scale." Dyer v. MacDougall201 F.2d 265, 269 (2d Cir. 1952).

Demeanor evidence is of considerable legal consequence. It can have a dispositive effect in the outcome of a case "in which the existence or nonexistence of a determinative fact depends upon the credibility to be given to testimonial evidence." Harding v. Purtle, 275 Cal.App.2d 396, 400 79 Cal.Rptr. 772 (1969.) Although demeanor evidence does not appear on the record, and for that reason has led to the rule that the fact finder is the exclusive judge of credibility, many is the case which is affirmed on appeal because the reviewing court necessarily deferred to the finding of the trier of fact on issues of credibility. This is particularly true in Nevada where as a matter of Constitutional mandate the court may not weigh evidence in a criminal case.

"The primary object of the [Confrontation Clause] **was to prevent depositions** or ex parte affidavits ... **being used** against the prisoner **in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.**' " Kentucky v. Stincer, 482 U.S. 730, 736-737, 107 S.Ct. 2658, 2662-2663, 96 L.Ed.2d 631 (1987), quoting Mattox v. United States, 156 U.S. 237, 242-243, 15 S.Ct. 337, 339, 39 L.Ed. 409

GORDON & SILVER, LTD.
ATTORNEYS AT LAW
NINTH FLOOR
3960 HOWARD HUGHES PKWY
LAS VEGAS, NEVADA 89169
(702) 796-5555

(1895). "That experience - taking the oath or affirming to tell the truth, 'standing in the presence of the person the witness accuses' and speaking in front of a group of critical strangers-is expected to have a truth-inducing influence on the witness. "It is always more difficult to tell a lie about a person 'to his face' than 'behind his back.' ... Of course, the testimonial experience may also "unfortunately, upset the truthful rape victim or abused child; but by the same token may confound and undo the false accuser, or reveal the child coached by the malevolent adult." People v. Adams, 19 Cal. App. 4th 412, 438-439, 23 Cal. Rptr. 2d 512 (Cal. App. 6th Cist. 1993), relying on Coy v. Iowa, 487 U.S. 1012, 1019-1020, 108 S.Ct. 2798, 2802 (1988). Courts have recognized that an experienced witness can be "cagey" under cross-examination[3], can anticipate the reach of a line of cross-examination and give nonresponsive and unwanted answers[4], appear more comfortable in the presence of a jury than an inexperienced witness[5], and be rehearsed with the earlier videotaped deposition in preparation for live testimony at a subsequent trial. Thus it makes sense that a state that employs a policy of distrust of accomplice testimony, NRS 175.291, would find that the employment of depositions to memorialize accomplice testimony would tend to artificially bolster their credibility and take away from the jury an important decision making tool by impacting on the ability to judge truthfulness from the witness's demeanor. This is consistent with the pronouncement of the Nevada Supreme Court in Austin v. State, 87 Nev. 578, 491 P. 2d 724, 731 (Nev. 1971) wherein the Court held:

> By NRS 175.291, our legislature has declared that one who has participated criminally in a given criminal venture shall be deemed to have such character, and such motives, that his testimony alone shall not rise to the dignity of proof beyond a reasonable doubt. To this legislative policy we must give meaningful effect.

It is respectfully submitted that NRS 174.175(3) is an additional part of the legislative policy towards accomplice witnesses and must be honored with strict compliance here.

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[3] United States v. Cote, 2007 WL 1000849 (S.D.N.Y. 2007).

[4] People v. Auer, 393 Mich. 667, 674 (Mich. 1975).

[5] Ledesma v. State, 141 Tex. Crim. 37, 39, 181 S.W. 2d 705 (Tex. Crim. App. 1944)

GORDON & SILVER, LTD.
ATTORNEYS AT LAW
NINTH FLOOR
3960 HOWARD HUGHES PKWY
LAS VEGAS, NEVADA 89169
(702) 796-5555

CONCLUSION

Based on the foregoing, Luis Alonso Hidalgo III. respectfully requests the Court deny the State's motion.

Dated this 16th day of April, 2008.

GORDON & SILVER, LTD.

By: _____

DOMINIC P. GENTILE
Nevada Bar No. 1923
PAOLA M. ARMENI
Nevada Bar No. 8357
3960 Howard Hughes Pkwy., 9th Floor
Las Vegas, Nevada 89169
(702) 796-5555
Attorneys for Defendant,
Luis Alonso Hidalgo, III

CERTIFICATE OF SERVICE

The undersigned, an employee of Gordon & Silver, Ltd., hereby certifies that on the 16th day of April, 2008, she served a copy of the Opposition to Motion to Conduct Videotaped Testimony of a Cooperating Witness, by facsimile, and by placing said copy in an envelope, postage fully prepaid, in the U.S. Mail at Las Vegas, Nevada, said envelope addressed to:

David Roger
Clark County District Attorney
Marc Digiacomo
Chief Deputy District Attorney
200 Lewis Avenue
Las Vegas, Nevada 89155
Attorney for Plaintiff
Fax No. (702) 477-2922

ADELE L. JOHANSEN, an employee of
GORDON & SILVER, LTD.

GORDON & SILVER, LTD.
ATTORNEYS AT LAW
NINTH FLOOR
3960 HOWARD HUGHES PKWY
LAS VEGAS, NEVADA 89169
(702) 796-5555

EXHIBIT "1"

Document1

GMEM
DAVID ROGER
DISTRICT ATTORNEY
Nevada Bar #002781
MARC DIGIACOMO
Chief Deputy District Attorney
Nevada Bar #006955
200 Lewis Avenue
Las Vegas, NV 89155-2212
(702) 671-2500
Attorney for Plaintiff

FILED IN OPEN COURT
FEB 0 4 2008 20
CHARLES J. SHORT
CLERK OF THE COURT
BY DENISE HUSTED DEPUTY

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

ANABEL ESPINDOLA,
#1849750

Defendant.

CASE NO: C212667
DEPT NO: XXI

GUILTY PLEA AGREEMENT

I hereby agree to plead guilty to: VOLUNTARY MANSLAUGHTER WITH USE OF A DEADLY WEAPON (Category B Felony - NRS 200.040, 200.050, 200.080), as more fully alleged in the charging document attached hereto as Exhibit "1".

My decision to plead guilty is based upon the plea agreement in this case which is as follows:

The State agrees to make no recommendation at sentencing. Additionally, both sides agree, as a condition of the plea, to fulfill their obligations contained in Exhibit two (2) to this agreement.

CONSEQUENCES OF THE PLEA

I understand that by pleading guilty I admit the facts which support all the elements of the offense(s) to which I now plead as set forth in Exhibit "1".

I understand that as a consequence of my plea, the Court must sentence me to imprisonment in the Nevada Department of Corrections for a minimum term of not less than

ONE (1) year and a maximum term of not more than TEN (10) years, plus an equal and consecutive minimum term of not less than ONE (1) year and a maximum term of not more than TEN (10) years for the use of a deadly weapon enhancement. The minimum term of imprisonment may not exceed forty percent (40%) of the maximum term of imprisonment. I understand that I may also be fined up to $10,000.00. I understand that the law requires me to pay an Administrative Assessment Fee.

I understand that, if appropriate, I will be ordered to make restitution to the victim of the offense(s) to which I am pleading guilty and to the victim of any related offense which is being dismissed or not prosecuted pursuant to this agreement. I will also be ordered to reimburse the State of Nevada for any expenses related to my extradition, if any.

I understand that I am eligible for probation for the offense to which I am pleading guilty. I understand that, except as otherwise provided by statute, the question of whether I receive probation is in the discretion of the sentencing judge.

I understand that if more than one sentence of imprisonment is imposed and I am eligible to serve the sentences concurrently, the sentencing judge has the discretion to order the sentences served concurrently or consecutively.

I also understand that information regarding charges not filed, dismissed charges, or charges to be dismissed pursuant to this agreement may be considered by the judge at sentencing.

I have not been promised or guaranteed any particular sentence by anyone. I know that my sentence is to be determined by the Court within the limits prescribed by statute.

I understand that if my attorney or the State of Nevada or both recommend any specific punishment to the Court, the Court is not obligated to accept the recommendation.

I understand that if the State of Nevada has agreed to recommend or stipulate a particular sentence or has agreed not to present argument regarding the sentence, or agreed not to oppose a particular sentence, or has agreed to disposition as a gross misdemeanor when the offense could have been treated as a felony, such agreement is contingent upon my appearance in court on the initial sentencing date (and any subsequent dates if the sentencing

is continued). I understand that if I fail to appear for the scheduled sentencing date or I commit a new criminal offense prior to sentencing the State of Nevada would regain the full right to argue for any lawful sentence.

I understand if the offense(s) to which I am pleading guilty to was committed while I was incarcerated on another charge or while I was on probation or parole that I am not eligible for credit for time served toward the instant offense(s).

I understand that as a consequence of my plea of guilty, if I am not a citizen of the United States, I may, in addition to other consequences provided for by federal law, be removed, deported, excluded from entry into the United States or denied naturalization.

I understand that the Division of Parole and Probation will prepare a report for the sentencing judge prior to sentencing. This report will include matters relevant to the issue of sentencing, including my criminal history. This report may contain hearsay information regarding my background and criminal history. My attorney and I will each have the opportunity to comment on the information contained in the report at the time of sentencing. Unless the District Attorney has specifically agreed otherwise, then the District Attorney may also comment on this report.

WAIVER OF RIGHTS

By entering my plea of guilty, I understand that I am waiving and forever giving up the following rights and privileges:

1. The constitutional privilege against self-incrimination, including the right to refuse to testify at trial, in which event the prosecution would not be allowed to comment to the jury about my refusal to testify.

2. The constitutional right to a speedy and public trial by an impartial jury, free of excessive pretrial publicity prejudicial to the defense, at which trial I would be entitled to the assistance of an attorney, either appointed or retained. At trial the State would bear the burden of proving beyond a reasonable doubt each element of the offense charged.

3. The constitutional right to confront and cross-examine any witnesses who would testify against me.

4. The constitutional right to subpoena witnesses to testify on my behalf.

5. The constitutional right to testify in my own defense.

6. The right to appeal the conviction, with the assistance of an attorney, either appointed or retained, unless the appeal is based upon reasonable constitutional jurisdictional or other grounds that challenge the legality of the proceedings and except as otherwise provided in subsection 3 of NRS 174.035.

VOLUNTARINESS OF PLEA

I have discussed the elements of all of the original charge(s) against me with my attorney and I understand the nature of the charge(s) against me.

I understand that the State would have to prove each element of the charge(s) against me at trial.

I have discussed with my attorney any possible defenses, defense strategies and circumstances which might be in my favor.

All of the foregoing elements, consequences, rights, and waiver of rights have been thoroughly explained to me by my attorney.

I believe that pleading guilty and accepting this plea bargain is in my best interest, and that a trial would be contrary to my best interest.

I am signing this agreement voluntarily, after consultation with my attorney, and I am not acting under duress or coercion or by virtue of any promises of leniency, except for those set forth in this agreement.

I am not now under the influence of any intoxicating liquor, a controlled substance or other drug which would in any manner impair my ability to comprehend or understand this agreement or the proceedings surrounding my entry of this plea.

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My attorney has answered all my questions regarding this guilty plea agreement and its consequences to my satisfaction and I am satisfied with the services provided by my attorney.

DATED this 2ND day of January, 2008.

ANABEL ESPINDOLA
Defendant

AGREED TO BY:

MARC DIGIACOMO
Chief Deputy District Attorney
Nevada Bar #006955

CERTIFICATE OF COUNSEL:

I, the undersigned, as the attorney for the Defendant named herein and as an officer of the court hereby certify that:

1. I have fully explained to the Defendant the allegations contained in the charge(s) to which guilty pleas are being entered.

2. I have advised the Defendant of the penalties for each charge and the restitution that the Defendant may be ordered to pay.

3. All pleas of guilty offered by the Defendant pursuant to this agreement are consistent with the facts known to me and are made with my advice to the Defendant.

4. To the best of my knowledge and belief, the Defendant:

a. Is competent and understands the charges and the consequences of pleading guilty as provided in this agreement.

b. Executed this agreement and will enter all guilty pleas pursuant hereto voluntarily.

c. Was not under the influence of intoxicating liquor, a controlled substance or other drug at the time I consulted with the defendant as certified in paragraphs 1 and 2 above.

Dated: This 2 day of January, 2008.

FEB.

ATTORNEY FOR DEFENDANT

INFO
DAVID ROGER
Clark County District Attorney
Nevada Bar #002781
MARC DIGIACOMO
Chief Deputy District Attorney
Nevada Bar #006955
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

ANABEL ESPINDOLA,
#1849750

Defendant.

Case No: C212667
Dept No: XIV

THIRD AMENDED
INFORMATION

STATE OF NEVADA)
) ss.
COUNTY OF CLARK)

DAVID ROGER, District Attorney within and for the County of Clark, State of Nevada, in the name and by the authority of the State of Nevada, informs the Court:

That ANABEL ESPINDOLA, the Defendant above named, having committed the crime of VOLUNTARY MANSLAUGHTER WITH USE OF A DEADLY WEAPON (Category B Felony - NRS 200.040, 200.050, 200.080, 193.165), on or about May 19, 2005, within the County of Clark, State of Nevada, contrary to the form, force and effect of statutes in such cases made and provided, and against the peace and dignity of the State of Nevada, did then and there without authority of law, wilfully, unlawfully, and feloniously, without malice and without deliberation kill TIMOTHY JAY HADLAND, a human being, by shooting at and into the body and/or head of said TIMOTHY JAY HADLAND, with a deadly weapon, to-wit: a firearm, the Defendant and KENNETH JAY COUNTS, aka Kenneth Jay Counts, II, and LUIS ALONSO HIDALGO, aka, Luis Alonso Hidalgo III,

EXHIBIT 1

JAYSON TAOIPU, DEANGELO RESHAWN CARROLL, and/or Luis Alonso Hidalgo, Jr., being liable under one or more of the following theories of criminal liability, to-wit: (1) by aiding and abetting the commission of the crime by, directly or indirectly, counseling, encouraging, hiring, commanding, inducing or otherwise procuring each other to commit the crime, to-wit: by Defendant and/or LUIS HILDAGO, III and/or Luis Hildago, Jr. procuring DEANGELO CARROLL to beat and/or kill TIMOTHY JAY HADLAND; thereafter, DEANGELO CARROLL procuring KENNETH COUNTS and/or JAYSON TAOIPU to shoot TIMOTHY HADLAND; thereafter, DEANGELO CARROLL and KENNETH COUNTS and JAYSON TAOIPU did drive to the location in the same vehicle; thereafter, DEANGELO CARROLL calling victim TIMOTHY JAY HADLAND to the scene; thereafter, by KENNETH COUNTS shooting TIMOTHY JAY HADLAND; and/or (2) by conspiring to beat and/or kill TIMOTHY JAY HADLAND.

BY _____
DAVID ROGER
DISTRICT ATTORNEY
Nevada Bar #002781

DA#05FB0052C/
LVMPD EV#0505193516
CONSP MURDER;VMWDW - F
(TK7)

EXHIBIT "2"

ANAG
DAVID ROGER
Clark County District Attorney
Nevada Bar #002781
MARC DIGIACOMO
Chief Deputy District Attorney
Nevada Bar #006955
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

ANABEL ESPINDOLA,
#1849750

Defendant.

Case No. C212667

Dept No. XXI

AGREEMENT TO TESTIFY

IT IS HEREBY AGREED by and between the State of Nevada, by the Clark County District Attorney and through the undersigned Deputy, MARC DIGIACOMO, and ANABEL ESPINDOLA, by and through his undersigned defense attorney, CHRIS ORAM, ESQ.:

1. ANABEL ESPINDOLA will cooperate voluntarily with the Clark County District Attorney's Office, the Las Vegas Metropolitan Police Department, and any other law enforcement agency in the investigation and prosecution in Case No.C212667, *State of Nevada vs. Kenneth Counts, Deangelo Carroll, and Luis Hidalgo, III, and any other suspect* concerning the MURDER WITH USE OF A DEADLY WEAPON of TIMOTHY HADLAND which occurred on May 19, 2005, and/or any other investigation related to the Palomino Gentleman Caberet or the prosecution of the above referenced case.

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EXHIBIT 2

2. ANABEL ESPINDOLA will cooperate voluntarily by providing true information and by testifying fully and truthfully in all court proceedings in the above referenced case and investigation. After ANABEL ESPINDOLA has testified subject to cross-examination in a videotaped deposition, the State agrees to request her release from custody in jail to house arrest for her own protection.

3. The full terms of the plea agreement are set forth in the document styled Guilty Plea Memorandum, a copy of which is attached hereto and incorporated herein by reference. ANABEL ESPINDOLA shall receive the benefits described in this agreement subject to his compliance with all of the terms and conditions contained in this document. Moreover, should ANABEL ESPINDOLA violate the terms of this agreement, the State, may seek to withdraw her plea in this case and prosecute her for all of the original charges.

4. It is further understood that as a result of entering this agreement, ANABEL ESPINDOLA is waiving all appeal rights with respect to the entry of plea, speedy trial rights, and any other right to appeal any issue as a result of his prosecution in Case C212667.

OBLIGATION TO BE TRUTHFUL

OVERRIDING ALL ELSE, it is understood that this agreement requires from ANABEL ESPINDOLA an obligation to do nothing other than to tell the truth. It is understood between all the parties to this agreement that ANABEL ESPINDOLA, at all times, shall tell the truth, both during the investigation and while testifying on the witness stand. ANABEL ESPINDOLA shall tell the truth, no matter who asks the questions, including but not limited to investigators, prosecutors, judges and defense attorneys.

It is further understood that this entire agreement shall become null and void and ANABEL ESPINDOLA shall lose the benefits of this agreement for any deviation from the truth, for failure to answer any question that is the subject matter of this investigation, for purposely withholding information regarding this investigation, for providing evasive

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answers to questions asked by law enforcement officers investigating this case, for providing false information at any time on any matter concerning this investigation. Further, ANABEL ESPINDOLA shall be subject to prosecution for perjury for any intentional false statement which occurs while she is on the witness stand.

The parties agree that the trial court shall determine if ANABEL ESPINDOLA complied with her obligation of truthfulness for purposes of this agreement.

ADDITIONAL CONDITIONS

1. It is further agreed that if this agreement is declared null and void as a result of violation of the terms and conditions by ANABEL ESPINDOLA, the District Attorney will use any statements made by regarding this investigation against him, in any subsequent criminal trial/prosecution arising in Case No. C212667.

2. It is agreed that no interviews or communication with ANABEL ESPINDOLA shall be conducted by the District Attorney or its agents unless defense counsel CHRISTOPHER ORAM, ESQ. has been notified and CHRISTOPHER ORAM, ESQ. agrees to expressly waive his right to be present.

3. Any failure by the Office of the District Attorney and its agents to comply with the above requirements shall render this Agreement null and void and may result in ANABEL ESPINDOLA taking any action which would otherwise be available to him, including but not limited to refusing to testify based on his Fifth Amendment right or seeking to withdraw from the plea agreement in Case No.C212667.

4. All parties realize and understand their obligations and duties under this Agreement. Each party enters this Agreement with full knowledge of the meaning and effect of such Agreement.

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5. ANABEL ESPINDOLA has discussed this matter fully with her attorney. The parties realize and understand that there are no terms to this Agreement other than what is contained herein and in the Guilty Plea Agreement. ANABEL ESPINDOLA fully and voluntarily accepts all the terms and conditions of this agreement and understands the consequences of entering into this agreement.

2/2/08
DATE

ANABEL ESPINDOLA
Defendant

2/2/08
DATE

CHRISTOPHER ORAM, ESQ.
Attorney for Defendant

2/2/08
DATE

MARC DIGIACOMO
Chief Deputy District Attorney

EXHIBIT "3"

Document1

DISTRICT COURT

CLARK COUNTY, NEVADA

COPY

FILED IN OPEN COURT
FEB 0 7 2008 20
CHARLES J. SHORT
CLERK OF THE COURT
BY DENISE HUSTED DEPUTY

THE STATE OF NEVADA, Plaintiff, vs. KENNETH COUNTS, aka KENNETH JAY COUNTS II, LUIS ALONSO HIDALGO, aka LUIS ALONSO HIDALGO III, ANABEL ESPINDOLA DEANGELO RESHAWN CARROLL, JAYSON TAOIPU, Defendants.	)	CASE NO. C212667 DEPT. XXI

BEFORE THE HONORABLE VALERIE ADAIR, DISTRICT COURT JUDGE

Monday, February 4, 2008

RECORDER'S TRANSCRIPT OF HEARING RE:
Espindola Plea

APPEARANCES:

FOR THE STATE: MARK DIGIACOMO, ESQ.
Deputy District Attorney
GIANCARLO PESCI, ESQ.
Deputy District Attorney

FOR DEFENDANT ESPINDOLA: CHRISTOPHER ORAM, ESQ.

RECORDED BY: JANIE OLSEN, COURT RECORDER

KARReporting and Transcription Services
720-244-3978

TRANSCRIBED BY: KARReporting and Transcription Services

LAS VEGAS, NEVADA, MONDAY, FEBRUARY 4, 2008, 9:02 A.M.

P R O C E E D I N G S

THE COURT: All right. The record will reflect the presence of the Defendant Anabel Espindola, along with her attorney, Mr. Oram; the presence of Mr. Pesci and Mr. DiGiacomo on behalf of the State.

And my understanding is that this matter has been resolved; is that correct?

MR. ORAM: Yes, Your Honor.

THE COURT: And the Court is in possession of a written guilty plea and the third amended information. And was that filed this morning in open court?

MR. DIGIACOMO: It was, Judge.

THE COURT: All right. Very good.

All right. Ms. Espindola, the Court, as I have stated, is in possession of a written plea of guilty which was signed by you. Before I may accept your plea of guilty, I must be satisfied that your plea is freely and voluntarily given.

Are you making this plea freely and voluntarily?

THE DEFENDANT: Yes, Your Honor.

THE COURT: All right. Other than what's contained in the written plea of guilty and the exhibits affixed thereto, have any

promises or threats been made to induce you to enter your plea?

THE DEFENDANT: No, Your Honor.

THE COURT: All right. Before you sign the written plea of guilty, did you read it?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Did you understand everything contained in the written plea of guilty and the attachments thereto?

THE DEFENDANT: Yes.

THE COURT: All right. Did you have a full opportunity to discuss your plea of guilty with your attorney Mr. Oram?

THE DEFENDANT: Yes.

THE COURT: Before the Court accepts your plea of guilty, is there anything you would like to ask me about your plea or the charge of voluntary manslaughter with use of a deadly weapon to which you are pleading guilty?

THE DEFENDANT: No, Your Honor.

THE COURT: All right. We'll go through this then. Tell me in your own words what you did on or about May 19, 2005 within Clark County, Nevada that causes you to plead guilty to the reduced charge of voluntary manslaughter with use of a deadly weapon.

MR. ORAM: Your Honor, this --

THE COURT: And this is a fictional plea.

MR. ORAM: It is a fictional plea.

THE COURT: All right. I'm going to have her plea -- and the reason you're pleading fictionally is this is obviously a lesser

charge than the original charges which the State would be proceeding against you on; is that correct?

THE DEFENDANT: Yes, Your Honor.

THE COURT: And after discussing this with your attorney, Mr. Oram, you have concluded that it's in your best interest to enter this fictional plea; is that right?

THE DEFENDANT: Yes, Your Honor.

THE COURT: All right. The way we're going to do this is I'm going to have you tell me what you did and that will be the basis for the plea to be reduced charge of voluntary manslaughter with use of a deadly weapon.

THE DEFENDANT: I assisted all the co-conspirators.

THE COURT: Okay. So you conspired and aided and abetted the following individuals: Kenneth Counts, Luis Hidalgo, Jayson Taoipu, and Deangelo Carroll; is that correct?

THE DEFENDANT: Yes, ma'am.

MR. DIGIACOMO: Judge, both Luis Hildalgos.

THE COURT: Oh, all right.

MR. DIGIACOMO: You can ask her as to both Luis Hildalgos.

THE COURT: All right. All right.

MR. DIGIACOMO: The third and Junior.

THE COURT: The third and Luis Hidalgo, Sr.; is that correct?

THE DEFENDANT: Junior.

MR. DIGIACOMO: Junior.

THE COURT: I'm sorry. Junior and the third.

THE DEFENDANT: Yes, Your Honor.

THE COURT: All right. And together you counseled, encouraged, hired, commanded, or induced one or all of these individuals to be and/or kill Timothy J. Hadland; is that correct?

THE DEFENDANT: Yes, Your Honor.

THE COURT: And Deangelo Carroll actually procured Kenneth Counts and/or Jayson Taoipu to actually shoot Timothy Hadland; is that correct?

THE DEFENDANT: Yes, Your Honor.

THE COURT: All right. And as a result of this conspiracy and Mr. Deangelo Carroll procuring Mr. Counts and/or Jayson Taoipu, Timothy Hadland was actually fatally shot in the head; is that correct?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Is that acceptable with the State?

MR. DIGIACOMO: Yes, Judge.

THE COURT: All right. Ms. Espindola, the Court finds that your plea of guilty has been freely and voluntarily given and hereby accepts your plea of guilty.

Do we want a sentencing date in 60 days or what are we doing?

MR. DIGIACOMO: Why don't you give us a status check in 60 days, Judge.

THE COURT: All right. So we won't refer it to P&P right

now?

MR. DIGIACOMO: That's correct, Judge.

THE COURT: Okay.

MR. DIGIACOMO: We won't refer it over to P&P. And what I'd ask is that the guilty plea agreement be filed under seal with the exception that I'm allowed to provide it to the defense attorneys that are associated with the various people elicited in the amended information with the understanding that they're not supposed to pass it on. They certainly can discuss the contents, but they're not supposed to pass it on to their clients or any other witnesses in the case, Judge.

THE COURT: I'll see counsel at the bench.

MR. ORAM: Judge, also for the record, we waive any defect in any of the pleadings.

THE COURT: Oh, thank you. I thought I'd already said that, but I must have forgotten.

MR. ORAM: I'm sorry.

THE COURT: No, you're probably right.

(Off-record bench conference)

THE COURT: What we're going to do is we are going to file the guilty plea agreement and the third amended information. Those will be public records. The attachments will be temporarily sealed until further order of the Court in the interest of justice and the ongoing matters relating to the totality of the case.

MR. DIGIACOMO: Thank you, Judge.

THE COURT: All right. Thank you. We're going to set this out for a status check.

THE CLERK: April 8th at 9:30.

MR. ORAM: Thank you, Your Honor.

MR. DIGIACOMO: Thank you, Judge.

MR. ORAM: Your Honor, could we go any day before or after that?

THE COURT: Of course. We're flexible.

THE CLERK: April 15th --

MR. ORAM: Thank you very much.

THE CLERK: -- or the 31st. Which one?

THE COURT: Tax day or April Fool's day.

MR. ORAM: Tax day is fine. Tax day is fine.

THE COURT: Which is it, Mr. Oram?

MR. ORAM: Tax day, Your Honor.

THE CLERK: April 15th at 9:30.

MR. ORAM: Thank you, Your Honor.

THE COURT: All right. Is there anything else relating to Ms. Espindola's matter we need to do at this time?

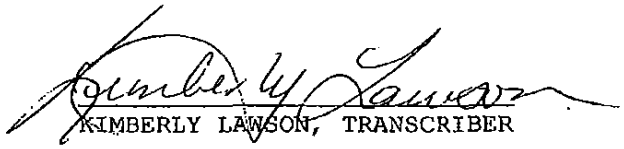
MR. ORAM: No, Your Honor.

THE COURT: All right. Thank you.

(Proceedings concluded at 9:09 a.m.)

*****

ATTEST: I HEREBY CERTIFY THAT I HAVE TRULY AND CORRECTLY TRANSCRIBED THE AUDIO/VIDEO PROCEEDINGS IN THE ABOVE-ENTITLED CASE TO THE BEST OF MY ABILITY.



KIMBERLY LAWSON, TRANSCRIBER

KARReporting and Transcription Services

REGISTER OF ACTIONS
CASE NO. 08C241394

The State of Nevada vs Luis Hidalgo Jr

Case Type:	**Felony/Gross Misdemeanor**
Date Filed:	**02/13/2008**
Location:	**Department 21**
Conversion Case Number:	**C241394**
Defendant's Scope ID #:	**1579522**
Lower Court Case Number:	**07GJ00101**

RELATED CASE INFORMATION

Related Cases

05C212667-1 (Consolidated)
05C212667-2 (Consolidated)
05C212667-3 (Consolidated)
05C212667-4 (Consolidated)
05C212667-5 (Consolidated)

PARTY INFORMATION

Defendant	**Hidalgo Jr, Luis** *Also Known As* Hidalgo , Luis A	**Lead Attorneys** **Dominic P. Gentile** *Retained* 7023860066(W)
Plaintiff	**State of Nevada**	**David J. Roger** 702-671-2700(W)

CHARGE INFORMATION

Charges: Hidalgo Jr, Luis	Statute	Level	Date
1. CONSPIRACY TO COMMIT A CRIME	199.480	Gross Misdemeanor	01/01/1900
1. MURDER.	200.010	Gross Misdemeanor	01/01/1900
1. DEGREES OF MURDER	200.030	Gross Misdemeanor	01/01/1900
2. MURDER.	200.010	Felony	01/01/1900
2. DEGREES OF MURDER	200.030	Felony	01/01/1900
2. USE OF A DEADLY WEAPON OR TEAR GAS IN COMMISSION OF A CRIME.	193.165	Felony	01/01/1900

EVENTS & ORDERS OF THE COURT

04/17/2008 **All Pending Motions** (9:30 AM) ()
ALL PENDING MOTIONS 4/17/08 Court Clerk: Denise Husted Reporter/Recorder: Debra Winn Heard By: Valerie Adair

Minutes
04/17/2008 9:30 AM

- DEFENDANT'S MOTION FOR COURT TO ALLOW PRESENTATION OF EVIDENCE TO THE JURY...DEFENDANT'S MOTION TO PROHIBIT ARGUMENT ON DETERRENCE OR TO PERMIT EVIDENCE OF LACK OF DETERRENCE...MOTION TO PROHIBIT THE STATE OF NEVADA FROM INTRODUCING EVIDENCE AND ARGUMENT REGARDING MITIGATING CIRCUMSTANCES THAT ARE NOT APPLICABLE TO LUIS HIDALGO JR...DEFENDANT'S MOTION TO DECLARE AS UNCONSTITUTIONAL THE UNBRIDLED DISCRETION OF PROSECUTION TO SEEK THE DEATH PENALTY...DEFENDANT'S MOTION FOR DISCLOSURE OF THE EXISTENCE OF ELECTRONIC SURVEILLANCE...STATE'S NOTICE OF MOTION AND MOTION TO CONDUCT VIDEOTAPED TESTIMONY OF A COOPERATING WITNESS...DEFENDANT'S MOTION FOR DISCLOSURE OF INTERCEPTED COMMUNICATIONS...DEFENDANT'S MOTION TO STRIKE THE DEATH PENALTY AS UNCONSTITUTIONAL BASED ON ITS ALLOWANCE OF INHERENTLY UNRELIABLE EVIDENCE...DEFENDANT'S MOTION TO STRIKE NOTICE OF INTENT TO SEEK DEATH PENALTY...DEFENDANT'S MOTION TO STRIKE DEATH PENALTY BASED UPON UNCONSTITUTIONALITY...DEFENDANT'S MOTION TO STRIKE NOTICE OF INTENT TO SEEK DEATH BASED UPON UNCONSTITUTIONAL WEIGHING EQUATION...DEFENDANT'S MOTION TO DISMISS COUNT ONE OF THE INDICTMENT FOR DUPLICITY OR, IN THE ALTERNATIVE, FOR AN ELECTION...DEFENDANT'S MOTION TO BIFURCATE PENALTY PHASE PROCEEDINGS COURT ORDERED, as

follows: Defendant's Motion for Court to Allow Presentation of Evidence to the Jury was not addressed; Defendant's Motion to Prohibit Argument on Deterrence or to Permit Evidence of Lack of Deterrence is DENIED so long as the State contends they are not going to argue deterrence; Motion to Prohibit the State of Nevada from Introducing Evidence and Argument Regarding Mitigating Circumstances that are not Applicable to Luis Hidalgo Jr. is GRANTED; Defendant's Motion to Declare as Unconstitutional the Unbridled Discretion of Prosecution to Seek the Death Penalty is DENIED; Defendant's Motion for disclosure of the Existence of Electronic Surveillance and Defendant's Motion for Disclosure of Intercepted Communications cannot be decided without an Affidavit from Christopher Lalli in the District Attorney's Office. Mr. Digiacomo stated he has no knowledge that the State ever uses electronic surveillance or intercepted communications. COURT ORDERED, motions CONTINUED and matter set for a Status Check regarding affidavit; State's Notice of Motion and Motion to Conduct Videotaped Testimony of a Cooperating Witness is CONTINUED; Defendant's Motion to Strike the Death Penalty as Unconstitutional Based on its Allowance of Inherently Unreliable Evidence, Defendant's Motion to Strike Notice of Intent To Seek Death Penalty, Defendant's Motion to Strike Death Penalty Based Upon Unconstitutionality, Defendant's Motion to Strike Notice of Intent to Seek Death Based Upon Unconstitutional Weighing Equation and Defendant's Motion to Bifurcate Penalty Phase Proceedings are DENIED. As to Defendant's Motion to Dismiss Count One of the Indictment for Duplicity or, in the Alternative, for an Election; Court directed the State to prepare and file and amended indictment taking duplicate language out. CUSTODY 5/1/01 9:30 AM DEFENDANT'S MOTION FOR DISCLOSURE OF THE EXISTENCE OF ELECTRONIC SURVEILLANCE...DEFENDANT'S MOTION FOR DISCLOSURE OF INTERCEPTED COMMUNICATIONS...STATE'S MOTION OF MOTION AND MOTION TO CONDUCT VIDEOTAPED TESTIMONY OF A COOPERATING WITNESS...STATUS CHECK: AFFIDAVIT OF CHRISTOPHER LALLI...STATUS CHECK: RESET TRIAL DATE

Parties Present
Return to Register of Actions

ORIGINAL

FILED IN OPEN COURT
MAY 01 2008 20
CHARLES J. SHORT
CLERK OF THE COURT
BY Denise Husted
DENISE HUSTED, DEPUTY

IND
DAVID ROGER
Clark County District Attorney
Nevada Bar #002781
MARC DIGIACOMO
Deputy District Attorney
Nevada Bar #006955
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

LUIS HIDALGO, JR., aka Luis Alonso Hidalgo,
#1579522

Defendant(s).

Case No. C241394
Dept. No. XXI

AMENDED

INDICTMENT

STATE OF NEVADA)
) ss.
COUNTY OF CLARK)

The Defendant(s) above named, LUIS HIDALGO, JR., aka Luis Alonso Hidalgo, accused by the Clark County Grand Jury of the crime(s) of CONSPIRACY TO COMMIT MURDER (Felony - NRS 200.010, 200.030, 199.480); and MURDER WITH USE OF A DEADLY WEAPON (Felony - NRS 200.010, 200.030, 193.165), committed at and within the County of Clark, State of Nevada, on or about the 19th day of May, 2005, as follows:

COUNT 1 – CONSPIRACY TO COMMIT MURDER

did, on or about May 19, 2005, then and there, meet with Deangelo Carroll and/or Luis Hidalgo, III and/or Anabel Espindola and/or Kenneth Counts and/or Jayson Taoipu and between themselves, and each of them with the other, wilfully, unlawfully, and feloniously conspire and agree to commit a crime, to-wit: murder, and in furtherance of said conspiracy,

Defendant and/or his co-conspirators, did commit the acts as set forth in Count 2, said acts being incorporated by this reference as though fully set forth herein.

COUNT 2 - MURDER WITH USE OF A DEADLY WEAPON

did, on or about May 19, 2005, then and there wilfully, feloniously, without authority of law, and with premeditation and deliberation, and with malice aforethought, kill TIMOTHY JAY HADLAND, a human being, by shooting at and into the body and/or head of said TIMOTHY JAY HADLAND, with a deadly weapon, to-wit: a firearm, the Defendant being liable under one or more of the following theories of criminal liability, to-wit: (1) by directly or indirectly committing the acts with premeditation and deliberation and/or lying in wait; and/or (2) by aiding and abetting the commission of the crime by, directly or indirectly, counseling, encouraging, hiring, commanding, inducing or otherwise procuring another to commit the crime, to-wit: by defendant along with LUIS HIDALGO, III procuring DEANGELO CARROLL to beat and/or kill TIMOTHY JAY HADLAND; thereafter, DEANGELO CARROLL procuring KENNETH COUNTS and/or JAYSON TAOIPU to shoot TIMOTHY HADLAND; thereafter, DEANGELO CARROLL and KENNETH COUNTS and JAYSON TAOIPU did drive to the location in the same vehicle; thereafter, DEANGELO CARROLL calling victim TIMOTHY JAY HADLAND to the scene; thereafter, by KENNETH COUNTS shooting TIMOTHY JAY HADLAND; defendant paying $5000.00 or $6000.00 to DEANGELO CARROLL for the killing of TIMOTHY JAY

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HADLAND; and/or (3) by conspiring to commit the crime of battery and/or battery resulting in substantial bodily harm and/or battery with use of a deadly weapon on the person of TIMOTHY JAY HADLAND whereby each and every co-conspirator is responsible for the reasonably foreseeable general intent crimes of each and every co-conspirator during the course and in furtherance of the conspiracy and/or (4) by conspiring to commit the crime of murder of TIMOTHY JAY HADLAND whereby each and every co-conspirator is responsible for the specific intent crime contemplated by the conspiracy.

DATED this 20th day of April, 2008.

DAVID ROGER
DISTRICT ATTORNEY
Nevada Bar #002781

BY
MARC DIGIACOMO
Deputy District Attorney
Nevada Bar #006955

07AGJ101X/08FB0018X/ts
LVMPD 0505193516
(TK 7)

REGISTER OF ACTIONS
CASE NO. 08C241394

The State of Nevada vs Luis Hidalgo Jr

Case Type:	**Felony/Gross Misdemeanor**
Date Filed:	**02/13/2008**
Location:	**Department 21**
Conversion Case Number:	**C241394**
Defendant's Scope ID #:	**1579522**
Lower Court Case Number:	**07GJ00101**

RELATED CASE INFORMATION

Related Cases

05C212667-1 (Consolidated)
05C212667-2 (Consolidated)
05C212667-3 (Consolidated)
05C212667-4 (Consolidated)
05C212667-5 (Consolidated)

PARTY INFORMATION

Defendant	**Hidalgo Jr, Luis** *Also Known As* Hidalgo , Luis A	**Lead Attorneys** **Dominic P. Gentile** *Retained* 7023860066(W)
Plaintiff	**State of Nevada**	**David J. Roger** 702-671-2700(W)

CHARGE INFORMATION

Charges: Hidalgo Jr, Luis	**Statute**	**Level**	**Date**
1. CONSPIRACY TO COMMIT A CRIME	199.480	Gross Misdemeanor	01/01/1900
1. MURDER.	200.010	Gross Misdemeanor	01/01/1900
1. DEGREES OF MURDER	200.030	Gross Misdemeanor	01/01/1900
2. MURDER.	200.010	Felony	01/01/1900
2. DEGREES OF MURDER	200.030	Felony	01/01/1900
2. USE OF A DEADLY WEAPON OR TEAR GAS IN COMMISSION OF A CRIME.	193.165	Felony	01/01/1900

EVENTS & ORDERS OF THE COURT

05/01/2008 **All Pending Motions** (9:30 AM) ()
ALL PENDING MOTIONS 5/1/08 Court Clerk: Denise Husted Reporter/Recorder: Janie Olsen Heard By: Valerie Adair

Minutes
05/01/2008 9:30 AM

- DEFENDANT'S MOTION FOR DISCLOSURE OF THE EXISTENCE OF ELECTRONIC SURVEILLANCE...DEFENDANT'S MOTION FOR DISCLOSURE OF INTERCEPTED COMMUNICATIONS...STATE'S MOTION TO CONDUCT VIDEOTAPED TESTIMONY OF A COOPERATING WITNESS...STATUS CHECK: AFFIDAVIT/C. LALLI...STATUS CHECK: TRIAL SETTING Opposition to State's Motion to Conduct Videotaped Testimony, Affidavit of Christopher Lalli and Amended Indictment FILED IN OPEN COURT. Argument by Mr. DiGiacomo. Court advised the State did make some good arguments; however, did not see the difference from any other informant or accomplice who was going to give testimony. Typically, the Court's procedure is to allow the video taped testimony as this is done with the Court and all parties present. The only drawback to this is that the jury does not get to evaluate the demeanor of the witness personally. Colloquy between Court and counsel regarding this being a deposition or preservation of testimony. Mr. Gentile argued this was in fact a deposition to preserve testimony; however, the statute should apply and there was no judicial empowerment to preserve this testimony. Further, Mr. Gentile argued that what the State was failing to recognize was that no inherent power existed, that there were strict guidelines as to when a deposition could take place, and more importantly, that an accomplice was an exemption to the statute. Mr. Gentile advanced the proposition that the only reason the State wanted to depose this witness was so that they could keep their promise to release her from custody. Regardless, the Court had a duty and the motivation to see that the statute was

complied with. State argued they had the right to preserve this testimony. Court advised the State made a tactical decision in not calling this witness at the preliminary hearing of Hidalgo III but the Court did not see any extraordinary risk or reason for a video deposition to be done; the same situation exists as at the time prior to the preliminary hearing and the State elected not to present the testimony. COURT ORDERED, motion to CONDUCT VIDEOTAPED TESTIMONY of cooperating witness DENIED as to both Hidalgo Jr. and Hidalgo III, although the reasoning did not apply to both, as one case was an indictment; the facts and circumstances of both cases were the same. Mr. DiGiacomo presented the Affidavit of Christopher Lalli to the Court and advised the statute required Mr. Roger and Mr. Roger only to order the wiretap, but Mr. Lalli was the Assistant District Attorney and prepared the affidavit which the State believed complied with the Court's Order. Mr. Gentile stated he didn't know if the affidavit complied or not as he was just now seeing it. Court inquired where Mr. Roger's affidavit was as in looking at this affidavit it may not be sufficient, it's lacking with regard to knowledge. Mr. Gentile requested a continuance with regard to this matter to determine whether or not there is compliance with the Court's order and the statute. COURT SO ORDERED. Colloquy between Court and Counsel regarding a trial date for the Hidalgo Jr. (C241394) case. Mr. DiGiacomo stated the Hidalgo III case (C212667) still showed a trial date, but that it had been stayed by the Nevada Supreme Court. COURT ORDERED, that trial date (C212667) would be VACATED; case C241394 SET FOR TRIAL. 6/3/08 9:30 AM STATUS CHECK: AFFIDAVIT...DEFENDANT'S MOTION FOR DISCLOSURE OF THE EXISTENCE OF ELECTRONIC SURVEILLANCE...DEFENDANT'S MOTION FOR DISCLOSURE OF INTERCEPTED COMMUNICATIONS 8/14/08 9:30 AM CALENDAR CALL 8/18/08 10:00 AM JURY TRIAL

Parties Present
Return to Register of Actions

IN THE SUPREME COURT OF THE STATE OF NEVADA

LUIS HIDALGO, III,
Petitioner,
vs.
THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, THE HONORABLE DONALD M. MOSLEY, DISTRICT JUDGE,
Respondents,
and
THE STATE OF NEVADA,
Real Party in Interest.

No. 48233

WRIT OF MANDAMUS

TO: The Honorable Donald M. Mosley, Judge of the Eighth Judicial District Court:

WHEREAS, this Court having made and filed its written decision that a writ of mandamus issue,

NOW, THEREFORE, you are directed to strike the two aggravating circumstances alleging solicitation to commit murder as prior violent felonies pursuant to NRS 200.033(2) and to allow the State to amend its notice of intent to seek the death penalty to declare the factual allegations supporting the pecuniary gain aggravator in a clear, comprehensible manner and to further explain its allegation that the victim's murder served to further the business interests of the Palomino Club, in the case entitled State vs. Hidalgo, case no. C212667.

WITNESS The Honorables Mark Gibbons, Chief Justice, James W. Hardesty, Ron Parraguirre, Michael L. Douglas, Michael A. Cherry, and

Nancy M. Saitta, Associate Justices of the Supreme Court of the State of Nevada, and attested by my hand and seal this 29th day of May, 2008.

Bruce A. Horstmueschoff
Chief Assistant Clerk

IN THE SUPREME COURT OF THE STATE OF NEVADA

LUIS HIDALGO, III and ANABEL ESPINDOLA,

Petitioners,

vs.

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

Respondents.

and

THE STATE OF NEVADA,

Real Party in Interest.

CASE NO. 58344

CERTIFICATE OF SERVICE

The undersigned, an employee of Gordon & Silver, Ltd., hereby certifies that on the 3rd day of June,. 2008, she served a copy of the Writ of Mandamus, by hand delivery addressed to:

The Honorable Donald M. Mosley
Department 14
200 Lewis Avenue
Las Vegas, NV 89155

Ghyles L. Stewart
An employee of GORDON & SILVER, LTD.

GORDON & SILVER, LTD.
ATTORNEYS AT LAW
NINTH FLOOR
3960 HOWARD HUGHES PKWY
LAS VEGAS, NEVADA 89169
(702) 796-5555

REGISTER OF ACTIONS
CASE NO. 08C241394

The State of Nevada vs Luis Hidalgo Jr

Case Type:	**Felony/Gross Misdemeanor**
Date Filed:	**02/13/2008**
Location:	**Department 21**
Conversion Case Number:	**C241394**
Defendant's Scope ID #:	**1579522**
Lower Court Case Number:	**07GJ00101**

RELATED CASE INFORMATION

Related Cases

05C212667-1 (Consolidated)
05C212667-2 (Consolidated)
05C212667-3 (Consolidated)
05C212667-4 (Consolidated)
05C212667-5 (Consolidated)

PARTY INFORMATION

Defendant	**Hidalgo Jr, Luis** *Also Known As* Hidalgo , Luis A	**Lead Attorneys** **Dominic P. Gentile** *Retained* 7023860066(W)
Plaintiff	**State of Nevada**	**David J. Roger** 702-671-2700(W)

CHARGE INFORMATION

Charges: Hidalgo Jr, Luis	Statute	Level	Date
1. CONSPIRACY TO COMMIT A CRIME	199.480	Gross Misdemeanor	01/01/1900
1. MURDER.	200.010	Gross Misdemeanor	01/01/1900
1. DEGREES OF MURDER	200.030	Gross Misdemeanor	01/01/1900
2. MURDER.	200.010	Felony	01/01/1900
2. DEGREES OF MURDER	200.030	Felony	01/01/1900
2. USE OF A DEADLY WEAPON OR TEAR GAS IN COMMISSION OF A CRIME.	193.165	Felony	01/01/1900

EVENTS & ORDERS OF THE COURT

06/17/2008 **All Pending Motions** (9:30 AM) ()
ALL PENDING MOTIONS 6/17/08 Court Clerk: Denise Husted Reporter/Recorder: Janie Olsen Heard By: Valerie Adair

Minutes
06/17/2008 9:30 AM

- DEFENDANT'S MOTION FOR DISCLOSURE OF THE EXISTENCE OF ELECTRONIC SURVEILLANCE...DEFENDANT'S MOTION FOR DISCLOSURE OF INTERCEPTED COMMUNICATIONS...STATUS CHECK: AFFIDAVIT Mr. DiGiacomo advised that the ruling from the Supreme Court was issued and the State will file amended an amended notice to conform with the ruling. He further stated the ruling is very narrow as to what the State can do, which may necessitate a briefing schedule. He informed parties that the State does not have electronic surveillance or intercepted communications. COURT ORDERED, Defendant's motions are OFF CALENDAR. Colloquy regarding filing of motion to consolidate this case with C212667. Mr. DiGiacomo stated that if the cases are consolidated, there will be trial strategy problems; Mr. Hidalgo III is speaking with other counsel, just in case. He further stated that if consolidated, this case will not be ready for trial on 8/18/08. Mr. DiGiacomo brought up the subject of Mr. Gentile's request for evidence and that he is free to view it at the vault. Also, the issue regarding the hard drives and whether they are available in pristine condition is in question. The Court directed the State to file a written motion regarding consolidation and Mr. Gentile may file an opposition. Mr. Gentile state that if the cases are consolidated, it raises issues regarding the trial date and whether or not he will be able to represent both Defendants; Mr. Hidalgo III is now speaking with other counsel in case there is a consolidation. Mr. Gentile stated the Supreme Court ruling was very narrow in terms of what the State will be permitted to do; he believes the State will seek an opportunity to include

information in their notice that wasn't there originally, specifically information from Annabella. He further advised he will challenge a new notice of intent that will require briefing, answer and a Court's ruling before deciding on a final motion to consolidate. The Court informed Mr. Gentile that should the State add information regarding Annabella, he can file an opposition to the amended notice. Upon further inquiry, Mr. DiGiacomo stated the notice will be filed within two days. Mr. DiGiacomo stated he received a letter regarding the evidence view. He further stated that he has invited the defense team to view the file and evidence at Metro; there is an issue regarding the hard drive and whether or not it is in pristine condition. Mr. DiGiacomo advised he will provide the hand writing exemplars as requested, as well as the Silverton records. He informed parties that the State does not have electronic surveillance or intercepted communications. Colloquy regarding trial date in case C212667. COURT ORDERED, trial date STANDS in this case and trial set in January, 2009 for case C212667. If the cases are not consolidated, Mr. Gentile will try one case in January and the other case in August. BOND

Parties Present
Return to Register of Actions

Electronically Filed
06/18/2008 03:16:15 PM

CLERK OF THE COURT

NISD
DAVID ROGER
Clark County District Attorney
Nevada Bar #002781
MARC DIGIACOMO
Chief Deputy District Attorney
Nevada Bar #006955
200 Lewis Avenue
Las Vegas, Nevada 89155-2211
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

LUIS HIDALGO, JR.,
#1579522

Defendant.

Case No. C241394

Dept No. XXI

AMENDED NOTICE OF INTENT TO SEEK DEATH PENALTY

COMES NOW, the State of Nevada, through DAVID ROGER, Clark County District Attorney, by and through MARC DIGIACOMO, Chief Deputy District Attorney, pursuant to NRS §175.552 and NRS §200.033, and Nevada Supreme Court Rule 250, declares its intention to seek the death penalty at a penalty hearing. Furthermore, the State of Nevada discloses that it will present evidence of the following aggravating circumstances:

1. The murder was committed by a person, for himself or another, to receive money or any other thing of monetary value, to-wit by:

On or about May 19, 2005, the owner of the Palomino Club, Luis Hidalgo, Jr., located at 1848 North Las Vegas Boulevard, made it known, that he would pay someone to kill Timothy Jay Hadland, who was a former employee of the club. Prior to May 19, 2005, Timothy Jay Hadland had been fired from the Palomino Club for stealing. On May 19,

2005, Luis Hidalgo Jr. (the owner of the club) and Luis Hidalgo, III (the owner's son and a manager at the club), learned that Timothy Jay Hadland had been "bad mouthing" the club to cab drivers. During a conversation that day, Defendant Luis Hidalgo, III told Luis Hidalgo, Jr. that he would not make as much money as other strip club owners if Luis Hidalgo, Jr. did not do something to Timothy Jay Hadland. The Palomino Club is not located on the Strip and its business relies heavily on customers being brought to the club by cabs. The club was losing money because of Timothy Jay Hadland's actions and as such Luis Hidalgo Jr., wanted him killed so that he, his business, and his employees would be better off financially by the increased flow of clients after Timothy Jay Hadland was silenced. Additionally, killing Timothy Jay Hadland would send a message to other people not to steal from the Palomino, thereby increasing his profits.

On the same date, Luis Hidalgo, III, a manager of the Palomino Club, called Deangelo Carroll and told him to come to the club and "bring baseball bats and garbage bags." When Defendant Carroll arrived at the Palomino Club, Luis Hidalgo, Jr., hired Deangelo Carroll to kill Timothy Jay Hadland. After conveying this information and procuring Deangelo Carroll, Deangelo Carroll went to 1676 "E" Street to the residence of Kenneth Counts and enlisted Defendant Kenneth Counts to kill Timothy Jay Hadland. Defendant Deangelo Carroll then drove Defendants Kenneth Counts and Jayson Taoipu, as well as witness Rontae Zone, out to the area of North Shore Road at Lake Mead, where Defendant Kenneth Counts shot and killed Timothy Jay Hadland.

After the killing, the group drove back to the Palomino Club and Defendant Deangelo Carroll entered the club with Defendant Kenneth Counts. Defendant Deangelo Carroll went into Luis Hidalgo Jr.'s office and met with him and Anabel Espindola. At that time Defendant Deangelo Carroll announced that, "it was done" and that Defendant Kenneth Counts wanted to be paid. Luis Hidalgo Jr., then told Anabel Espindola to get $5,000, which Defendant Anabel Espindola did and which she provided to Defendant Deangelo Carroll who then provided money to Defendant Kenneth Counts. Defendant Kenneth Counts then left the club in a cab.

These facts support the aggravator because the murder was committed for the purpose of improving the profits to the business and the employees of the Palomino Club. The owner of the club, Luis Hidalgo Jr. wanted Timothy Jay Hadland killed so that he could make more money in the strip club business. In addition, these facts support murder for hire under the aggravator as Defendants Kenneth Counts and Deangelo Carroll received money for killing Timothy Jay Hadland.

The basis for this aggravator is the aggravated nature of the crime itself. The evidence upon which the State will rely is the testimony and exhibits introduced during the guilt or penalty phase of the trial, as well as the verdicts from the guilt phase.

In filing this NOTICE, the State incorporates all pleadings, witness lists, notices and other discovery materials already provided to Defendant by the Office of the District Attorney as part of its open-file policy as well as any future discovery received and provided to Defendant.

DATED this 18th day of June, 2008.

Respectfully submitted,
DAVID ROGER
Clark County District Attorney
Nevada Bar #002781

BY /s/MARC DIGIACOMO
MARC DIGIACOMO
Chief Deputy District Attorney
Nevada Bar #006955

CERTIFICATE OF FACSIMILE TRANSMISSION

I hereby certify that service of the above and foregoing AMENDED NOTICE OF INTENT TO SEEK DEATH PENALTY, was made this 18th day of June, 2008, by facsimile transmission to:

Dominic Gentile, Esq.
369-2666

/s/D.Daniels
Secretary for the District Attorney's Office

REGISTER OF ACTIONS
CASE NO. 05C212667-2

The State of Nevada vs Luis A Hidalgo

Case Type:	**Felony/Gross Misdemeanor**
Date Filed:	**06/17/2005**
Location:	**Department 21**
Conversion Case Number:	**C212667**
Defendant's Scope ID #:	**1849634**
Lower Court Case Number:	**05FB00052**

RELATED CASE INFORMATION

Related Cases

05C212667-1 (Multi-Defendant Case)
05C212667-3 (Multi-Defendant Case)
05C212667-4 (Multi-Defendant Case)
05C212667-5 (Multi-Defendant Case)
08C241394 (Consolidated)

PARTY INFORMATION

Defendant	**Hidalgo, Luis A** *Also Known As* Hidalgo III , Luis A	**Lead Attorneys** **John L. Arrascada** *Retained* 7023283158(W)
Plaintiff	**State of Nevada**	**David J. Roger** 702-671-2700(W)

CHARGE INFORMATION

Charges: Hidalgo, Luis A	Statute	Level	Date
1. CONSPIRACY TO COMMIT A CRIME	199.480	Gross Misdemeanor	01/01/1900
1. MURDER.	200.010	Gross Misdemeanor	01/01/1900
1. DEGREES OF MURDER	200.030	Gross Misdemeanor	01/01/1900
2. MURDER.	200.010	Felony	01/01/1900
2. DEGREES OF MURDER	200.030	Felony	01/01/1900
2. USE OF A DEADLY WEAPON OR TEAR GAS IN COMMISSION OF A CRIME.	193.165	Felony	01/01/1900
3. SOLICITATION TO COMMIT A CRIME.	199.500	Felony	01/01/1900
4. SOLICITATION TO COMMIT A CRIME.	199.500	Felony	01/01/1900

EVENTS & ORDERS OF THE COURT

11/20/2008 **Request** (9:30 AM) ()
STATE'S REQUEST STATUS CHECK ON MTN TO CONSOLIDATE C241394 Court Clerk: Denise Husted Reporter/Recorder: Janie Olsen Heard By: Adair, Valerie

Minutes
11/20/2008 9:30 AM
- Mr. Gentile introduced Chris Adams, Esq. from Atlanta, who will be substituting in as counsel for Luis Hidalgo, III; also John Arascata, Esq. from Reno will be appearing later. He further stated that these attorneys will be representing Hidalgo, III because of the issues that can be raised between Hidalgo, III and Hidalgo, Jr. and because of the Nevada Supreme Court's narrow mandate in their ruling. Mr. Gentile advised he will continue to represent Hidalgo, Jr. and requested additional time to file oppositions for the Motions to Consolidate cases C212667 and C241394. Mr. Digiacomo requested time for the State to file replies to Mr. Gentile's opposition. COURT ORDERED, Mr. Gentile's opposition is due by 12/4/08 and the State's reply is due by 12/11/08. FURTHER, Motions to Consolidate CONTINUED in cases C212667 and C241394. CUSTODY

Parties Present
Return to Register of Actions

ORIGINAL

0020
GORDON SILVER
DOMINIC P. GENTILE
Nevada Bar No. 1923
PAOLA M. ARMENI
Nevada Bar No. 8357
3960 Howard Hughes Pkwy., 9th Floor
Las Vegas, Nevada 89169
(702) 796-5555
(702) 369-2666 (Facsimile)

Attorneys for Defendant LUIS A. HIDALGO JR.

FILED
2008 DEC -9 P 3:46
CLERK OF THE COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

STATE OF NEVADA, Plaintiff, vs. LUIS HIDALGO, JR., #1579522, Defendants.	CASE NO. C241394 DEPT. XXI

DEFENDANT LUIS A. HIDALGO JR.'S MOTION TO STRIKE THE AMENDED NOTICE TO SEEK DEATH PENALTY

Date of Hearing: December 19, 2008
Time of Hearing: 9:30a.m.

COMES NOW, LUIS A. HIDALGO JR., by and through his counsel, DOMINIC P. GENTILE, ESQ. and PAOLA M. ARMENI, ESQ., of the law firm of GORDON SILVER and hereby moves the Court to strike the Amended Notice to Seek Death Penalty.

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RECEIVED
DEC 09 2008
CLERK OF THE COURT

Gordon Silver
Attorneys At Law
Ninth Floor
3960 Howard Hughes Pkwy
Las Vegas, Nevada 89169
(702) 796-5555

This Motion is made and based on the following Memorandum of Points and Authorities, the exhibits attached hereto and any oral argument the Court may permit at the hearing of this matter.

Dated this 8th day of December, 2008.

GORDON SILVER

DOMINIC P. GENTILE
Nevada Bar No. 1923
PAOLA M. ARMENI
Nevada Bar No. 8357
3960 Howard Hughes Pkwy., 9th Floor
Las Vegas, Nevada 89169
(702) 796-5555
Attorneys for LUIS A. HIDALGO JR.

NOTICE OF MOTION

YOU, AND EACH OF YOU, will please take notice that the undersigned will bring the above and foregoing Motion on for hearing before this Court on the 19th day of December, 2008 at the hour of 9:30 o'clock a.m. of said day, or as soon thereafter as counsel can be heard in Department No. XXI.

Dated this 8th day of December, 2008.

GORDON SILVER

DOMINIC P. GENTILE
Nevada Bar No. 1923
PAOLA M. ARMENI
Nevada Bar No. 8357
3960 Howard Hughes Pkwy., 9th Floor
Las Vegas, Nevada 89169
(702) 796-5555
Attorneys for LUIS A. HIDALGO JR.

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MEMORANDUM OF POINTS AND AUTHORITIES

I.

STATEMENT OF RELEVANT FACTS

On or about the 6th of March, 2008 the State of Nevada (hereinafter, "State") filed a Notice of Intent to Seek Death Penalty (hereinafter, "Notice"). The following day, March 7, 2008, a Corrected Notice of Intent to Seek Death Penalty was filed, appearing to change only the case number and not the assertions of facts contained within[1] . Approximately, three months later, on or about June 18, 2008, the State filed an Amended Notice of Intent to Seek Death Penalty. This Amended Notice was untimely and therefore should be stricken. Moreover, it fails to state a basis upon which one of its theories, the indirect "monetary gain" aggravator, can be sustained, as it is purely and entirely speculative and theoretical as to (1) the reason why Timothy Hadland was terminated from employment at the Palomino Club and (2) any anticipated benefit flowing or "trickling down" to the operations of the Palomino Club because of Hadland's demise. The "indirect monetary gain" theory of aggravator should be stricken even if the remainder of the Notice survives. Finally, it added an entirely new theory - that Hadland was killed to send a message not to steal from the Palomino Club - which has no foundation in the "monetary gain" aggravator. This last theory, which alleges no facts to support it, is clearly untimely and insufficient to satisfy due process notice concerns.

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[1] The ID number however, was still incorrect and corresponds to Luis Hidalgo III. This marked another example of even the State confusing which Luis Hidalgo – "Jr. or III" – it was dealing with at the time.

Gordon Silver
Attorneys At Law
Ninth Floor
3960 Howard Hughes Pkwy
Las Vegas, Nevada 89169
(702) 796-5555

II.

LEGAL ARGUMENT

A. THE AMENDED NOTICE OF INTENT TO SEEK DEATH PENALTY IS INSUFFICIENT TO COMPLY WITH THE DUE PROCESS NOTICE REQUIREMENTS OF THE CONSTITUTIONS OF THE UNITED STATES OF AMERICA AND STATE OF NEVADA

> "The submissions before this court indicate that Hadland verbally discouraged cab drivers from bringing customers to the Palomino Club and that the Club had suffered a marked decline in business as a result. However, absent from the notice of intent is any fact explaining how Hadland's murder benefited the Palomino Club's business interest. We conclude that the phrase in the notice of intent "to further the business" is impermissibly vague. As the State may amend its notice of intent, **it must provide specific factual allegations as to how Hadland's murder furthered the business interests of the Palomino Club if the State intends to pursue this factual allegation at trial**.
>
> Although the notice of intent fails to clearly explain the factual allegations supporting the pecuniary gain aggravator, we conclude that the State should be allowed to amend the notice of intent to remedy the deficiency. **Allowing the State to amend the notice to remedy any confusion, vagueness, or ambiguity present in the pecuniary gain aggravator** will not prejudice Hidalgo or render subsequent proceedings unfair. By amending the notice, **the State will not be including events or circumstances not already alleged in the notice**. Rather, the State would be merely clarifying factual allegations in the notice."

Hidalgo v. Eighth Judicial District Court ex rel. Clark County, 184 P. 3d 369, 376 (Nev. 2008).

As this Court is aware, the above language is excerpted from a decision of the Nevada Supreme Court decided in a companion case to the one *sub judice* wherein the Court announced for the first time what the State must do to comply with constitutional procedural due process notice requirements when employing the "murder was committed by a person, for himself or another, to receive money or any other thing of monetary value" aggravator. NRS 200.330-5. This language is unique to Nevada. No other state employs precisely those terms. Its wording is extremely broad as to what it may embrace, necessarily requiring the State to save its constitutionality by articulating with precision the facts that lead to the conclusions upon which the presence of the aggravator exists. This conclusion was pointed out in the Nevada Supreme Court's original Opinion in Hidalgo, which articulated some of the questions that needed to be

Gordon Silver
Attorneys At Law
Ninth Floor
3960 Howard Hughes Pkwy
Las Vegas, Nevada 89169
(702) 796-5555

answered in the pleading in that case[2], as well as in the State's Petition for Rehearing[3]. The Supreme Court withdrew the original Opinion, modifying its holding that originally struck entirely the Notice of Intent to Seek Death. Instead it granted the State's request that it should be allowed to amend it if it could save it. In the Opinion that replaced the original the Court did not adopt the State's other arguments set out in the Petition for Rehearing nor did it allow the State to amend by merely omitting the "and/or" language in the original Notice of Intent to Seek Death. It mandated "facts" be set out that would allow for the defendant to know the basis of the conclusion that the aggravator applied[4].

On the only occasion in which the specific language of the "monetary gain" aggravator was considered by the Nevada Supreme Court the fact pattern was concrete and a due process challenge as to its application to the set of alleged facts was not presented to the Court. In Guy v. State, 108 Nev. 770, 781, 839 P.2d 578 (Nev. 1992) the allegations and evidence demonstrated that the victim was murdered while being robbed by the two perpetrators to obtain cocaine from him which has monetary value. It was clearly not a "murder for hire" situation such as the one before this Court. Provisions of death penalty statutes in other states specifying as an aggravating factor that the murder was committed for pecuniary gain, for the purpose of receiving or in expectation of receiving anything of monetary value, for remuneration, and the like, have generally been applied in four types of situations: where personal property was physically taken or attempted to be taken from the victim or another immediately before or after the killing; where the defendant was allegedly hired or hired another person to commit the murder in exchange for payment or other pecuniary reward or the promise thereof; where the victim's death was a necessary prerequisite to the defendant's receipt of a contractual or legal

[2] See Exhibit 1.

[3] See Exhibit 2.

[4] Exhibit 3.

Gordon Silver
Attorneys At Law
Ninth Floor
3960 Howard Hughes Pkwy
Las Vegas, Nevada 89169
(702) 796-5555

benefit, such as the proceeds of an insurance policy on the victim's life or an inheritance, devise, or legacy; and where the murder allegedly secured to the defendant some indirect pecuniary advantage, such as relief from a debt. The second of these is present in the Notice of Intent wherein it alleges that Deangelo Carroll and Kenneth Counts were paid to commit the murder of Hadland. Such an allegation is a clear "murder for hire" theory and requires no interpretation. Moreover, the Notice of Intent is clear as to who was paid, for what and by whom. However, nothing even close to the alternative "indirect monetary benefit to the Palomino Club" allegations in the Notice of Intent to Seek Death Penalty in the case sub judice has ever passed constitutional muster in any jurisdiction. And for good reason.

The United States Supreme Court in Gregg v Georgia 428 US 153, 49 L Ed 859, 96 S Ct 2909 (1976), *reh den* 429 US 875, 50 L Ed 158, 97 S Ct 197, 97 S Ct 198, held that the concerns earlier expressed in Furman v Georgia, 408 US 238, 33 L Ed 346, 92 S Ct 2726 (1972), *reh den* 409 US 902, 34 L Ed 163, 93 S Ct 89, over the often bizarre and inconsistent imposition of capital punishment by sentencing authorities having absolute discretion as to whether a particular defendant should live or die, could be met by a carefully drafted statute insuring that sentencing discretion is suitably directed and limited, so as to minimize the risk of wholly arbitrary and capricious action. The Court explained that the problem of jury inexperience in sentencing is alleviated if the jury is given guidance regarding the factors about the crime and the defendant that the state, representing organized society, deems particularly relevant to the sentencing decision, and determined that the state statute under which the petitioner was sentenced to death satisfied the constitutional requirement of guided discretion.

Obviously the statute permitting the State to seek the death penalty is the first place to look in determining whether the jury can ever reach the point of sentencing a person to death. A statute that is unconstitutionally vague - even if only as applied - does not so permit. In Hidalgo

Gordon Silver
Attorneys At Law
Ninth Floor
3960 Howard Hughes Pkwy
Las Vegas, Nevada 89169
(702) 796-5555

the Nevada Supreme Court recognized that when dealing with an aggravating circumstance so broad in its language that it can elevate into a capital case activity that which was not intended by the legislature, clear factual pleading is necessary to place the defendant on notice and to give the court and jury guidance as to precisely what the facts justifying death are should they be proven beyond a reasonable doubt. Moreover it is paramount to all else that the defendant whose life the State is seeking be given notice in advance of trial to allow preparation to meet the evidence at trial. The Nevada Supreme Court was direct and detailed in discussing the requirements upon the State in granting its request for an opportunity to amend the Notice in Hidalgo. The prosecutor was to be given an opportunity to "**remedy any confusion, vagueness, or ambiguity present in the pecuniary gain aggravator**." Moreover it mandated that the State "**must provide specific factual allegations as to how Hadland's murder furthered the business interests of the Palomino Club if the State intends to pursue this factual allegation at trial.**"

While it is true that the case involving Luis Hidalgo Jr. was not before the Nevada Supreme Court at that time, the pronouncement of the Court is binding in all respects that relate to the necessity for specific facts being alleged as to the basis of the monetary gain aggravator being used to seek death in all cases upon which the State relies on that aggravator. An examination of its original Opinion, albeit having been withdrawn to allow amendment, will enlighten this court as to what it should require of the State, which should be a factual demonstration as to how it will prove that theory of the presence of the aggravator. And because it comes so late and outside of the directives of SCR 250 with respect to timing of amendments, it should not be permitted to survive on any theory other than the one that it does state directly and clearly - that Deangelo Carroll and Kenneth Counts were paid to commit a murder. All the rest of the "theories" of how the monetary gain aggravator applies are without "specific factual allegations" mandated by Hidalgo. They represent mere generalities as to the Palomino Club

Gordon Silver
Attorneys At Law
Ninth Floor
3960 Howard Hughes Pkwy
Las Vegas, Nevada 89169
(702) 796-5555

losing business because of Hadland and somehow that providing the motive. There is nothing factual about business actually being lost, it tracing to Hadland's activities, etc. Moreover the "send a message" theory, in addition to being tardy under the SCR 250 timeline, is made of whole cloth. There is nothing in the Notice to indicate any facts that support that theory.

The Sixth Amendment to the United States Constitution mandates that a criminal defendant be informed of the nature and cause of any and all accusations against him. See Faretta v. California, 422 U.S. 806, 818 (1975). The Fifth Amendment also guarantees the right to reasonable notice of the specific charges. Taylor v. Hayes, 418 U.S. 488, 498-99 (1974). Nevada also guarantees these rights by statute. NRS 173.075(1) expressly requires that an indictment or information contain a "plain, concise and definite written statement of the essential facts constituting the offense charged." See also Sheriff v. Levinson, 95 Nev. 436, 596 P.2d 232 (1979). The charging document should also contain, when possible, a description of the means by which the defendant committed the offense. NRS 173.075(2); Simpson v. District Court, 88 Nev. 654, 660, 503 P.2d 1225, 1229 (1972) (the accusation must include a characterization of the crime and such description of the particular act alleged to have been committed by the accused as will enable him properly to defend against the accusation, and the description of the offense must be sufficiently full and complete to accord to the accused his constitutional right to due process of law); 4 R. Anderson, Wharton's Criminal Law and Procedure, Section 1760, at 553 (1957).

Citing the constitutional right of due process, our Supreme Court has held that where the State seeks to establish a defendant's guilt on a theory of aiding and abetting, the indictment should specifically allege that the defendant aided and abetted, and should provide additional information as to the specific acts constituting the means of the aiding and abetting so as to afford the defendant adequate notice to prepare his defense. Barren v. State, 99 Nev. 661, 668, 669 P.2d 725, 729 (1983); see also Wright v. State, 101 Nev. 269, 701 P.2d 743 (1985)

Gordon Silver
Attorneys At Law
Ninth Floor
3960 Howard Hughes Pkwy
Las Vegas, Nevada 89169
(702) 796-5555

(information invalid based upon its failure to include aiding and abetting allegations); Alford v. State, 111 Nev. 1409, 1413-1415, 906 P.2d 714, 716-717 (1995) (conviction reversed because the charging document did not allege felony murder and the State relied upon that theory at trial).

The aggravating factors are elements of capital-eligibility, Johnson v. State, 118 Nev. 787, 802-803, 59 P. 3d 450, 460 (Nev. 2002) and this Court must follow SCR 250(4)(c) specifically requiring the notice of intent to provide adequate notice of the aggravating factors. "[A] defendant cannot be forced to gather facts and deduce the State's theory for an aggravating circumstance from sources outside the notice of intent to seek death. Under SCR 250, the specific supporting facts are to be stated directly in the notice itself." Redeker v. Eighth Judicial Dist. Court, 122 Nev. 164, 127 P.3d 520, 523 (2006). But even the specification of facts is inadequate if it does not give notice of how the state intends to prove its theory of the aggravating factor. Just as in Alford, when a defendant is not given adequate notice of the factual and legal theory of the presence of the monetary gain aggravator- - the "acts constituting the offense" - - upon which the state intends to proceed, he cannot adequately prepare to defend himself. See Alford, 111 Nev. at 1414-1415; Simpson v. District Court, 88 Nev. 654, 659, 503 P.2d 1225, 1229 (1972).

The prosecution's allegations of the indirect or "trickle down" monetary gain to the Palomino Club in the Notice of Intent to Seek Death Penalty in Luis Hidalgo Jr.'s case is based purely on speculation, which can never support the seeking of capital punishment. Under the holding in Hidalgo there must be legally sufficient and detailed facts that support each theory, and the theory to which they relate must be reasonable, credible, and of solid value. See People v. Marshall, 15 Cal 4th 1, 61 Cal. Rptr 2nd 84, 102 (Cal 1997). See also United States v. Kwong, 977 F. Supp. 96, 101 (E.D. NY, 1995) and United States v. Jones, 863 F. Supp. 575, 578-579 (N.D. Ohio 1994) (theory of pecuniary gain as enhancement of punishment cannot be

Gordon Silver
Attorneys At Law
Ninth Floor
3960 Howard Hughes Pkwy
Las Vegas, Nevada 89169
(702) 796-5555

speculative). The Notice of Intention to Seek Death Penalty must clearly indicate that Luis Hidalgo Jr. committed the murder while at the time possessing the expectation that by doing so he would obtain the monetary gain articulated by supporting facts contained in the Notice itself. See People v. Crew, 31 Cal. 4th 822, 852, 3 Cal. Rptr. 3d 733 (Cal. 2003) (citing People v. Noguera, 4 Cal. 4th 599, 636, 842 P. 2d 1160 (Cal. 1992) and People v. Edelbacher, 47 Cal. 3d 983, 1025, 254 Cal. Rptr. 586 (Cal. 1989)). It does not. It gives absolutely no factual basis that anything took place that would cause Luis Hidalgo Jr. to believe that the business of the Palomino Club was being damaged by Hadland; that Hadland was actually bad mouthing the Club to cab drivers; that cab drivers didn't bring customers to the Club because of it; or anything in the nature of a specific fact. It states only an unsupported theory for which the factual underpinnings are not disclosed even in the discovery in the case, although had they been that would not have saved an insufficient Notice of Intent to Seek Death Penalty. See Redeker v. Eighth Judicial District Court of State of Nevada ex. rel Clark County, 122 Nev. 164, 127 P. 3d 520, 523 (Nev. 2006) (holding that SCR 250 (4)(c) requires allegations of specific facts that the state will rely upon to demonstrate the presence of the aggravator.)

B. THE INCLUSION OF THE "KILL HADLAND TO SEND A MESSAGE" THEORY IN THE AMENDED NOTICE DOES NOT COMPLY WITH SCR 250(4)(d).

The State ignored and violated the specific directives of the SCR 250(4)(d) when amending the Notice in the case *sub judice* in June 2008. The State added at that time a new theory, that Hadland was killed to "send a message" to others not to steal from the Palomino Club and presumably that would result in monetary gain to the Club by deterring those with access from stealing. That new theory in support of the indirect monetary gain aggravator should be stricken, eliminating it as the basis of the death penalty as a sentencing option for the jury. The State must have a factual basis upon which to make this allegation. On what does it base

Gordon Silver
Attorneys At Law
Ninth Floor
3960 Howard Hughes Pkwy
Las Vegas, Nevada 89169
(702) 796-5555

that Hadland was fired for stealing? When did it obtain that information? One could speculate that it's source is Anabel Espindola, but there is nothing in the discovery in this case to indicate that, even if it could save the deficient Notice. See Redeker, supra. As this Court knows from earlier hearings, the State has made a deliberate choice not to make a contemporaneous record of its interviews with Espindola other than that to which it claims attorney work product protection. The only record of what she has said up until now is her Grand Jury testimony which occurred on February 12, 2008. That preceded the original Notice of Intent to Seek Death Penalty in this case. If the factual basis of this new "send a message and it will lead to money or thing of monetary value" for the Club existed at the time of filing the original Notice, it's amendment is time barred. If the information was not available at the time that the original notice was filed, such factual allegations cannot be included in the Amended Notice without adhering to the procedure set out in Nevada Supreme Court Rule 250(4)(d)[5] . This the State did not do.

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

(d) Late notice of intent. Upon a showing of good cause, the district court may grant a motion to file a late notice of intent to seek the death penalty or of an amended notice alleging additional aggravating circumstances. The state must file the motion within 15 days after learning of the grounds for the notice or amended notice. If the court grants the motion, it shall also permit the defense to have a reasonable continuance to prepare to meet the allegations of the notice or amended notice. The court shall not permit the filing of an initial notice of intent to seek the death penalty later than 30 days before trial is set to commence.

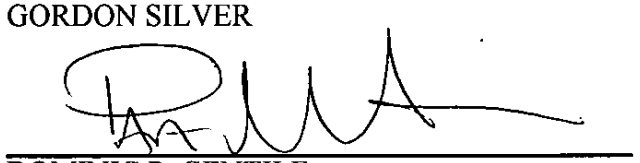
Gordon Silver
Attorneys At Law
Ninth Floor
3960 Howard Hughes Pkwy
Las Vegas, Nevada 89169
(702) 796-5555

CONCLUSION

For the foregoing reasons Luis Hidalgo Jr. asks this Honorable Court to Strike the Amended Notice of Intent to Seek Death Penalty.

Dated this 8th day of December, 2008.

GORDON SILVER



DOMINIC P. GENTILE
Nevada Bar No. 1923
PAOLA M. ARMENI
Nevada Bar No. 8357
3960 Howard Hughes Pkwy., 9th Floor
Las Vegas, Nevada 89169
(702) 796-5555
Attorneys for LUIS A. HIDALGO JR.

CERTIFICATE OF SERVICE

The undersigned, an employee of Gordon Silver, hereby certifies that on the 8th day of December, 2008, she served a copy of the DEFENDANT LUIS A. HIDALGO JR.'S MOTION TO STRIKE THE AMENDED NOTICE TO SEEK DEATH PENALTY, by facsimile, and by placing said copy in an envelope, postage fully prepaid, in the U.S. Mail at Las Vegas, Nevada, said envelope addressed to:

Marc DiGiacomo
Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
Las Vegas, NV 89155
Fax: (702) 477-2922

Giancarlo Pesci
Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
Las Vegas, NV 89155
Fax: (702) 477-2961

ADELE L. JOHANSEN, an employee of
GORDON SILVER

Gordon Silver
Attorneys At Law
Ninth Floor
3960 Howard Hughes Pkwy
Las Vegas, Nevada 89169
(702) 796-5555

EXHIBIT "1"

Document1

123 Nev., Advance Opinion 59

IN THE SUPREME COURT OF THE STATE OF NEVADA

LUIS HIDALGO III AND ANABEL ESPINDOLA,
Petitioners,
vs.
THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, THE HONORABLE DONALD M. MOSLEY, DISTRICT JUDGE,
Respondents,
and
THE STATE OF NEVADA,
Real Party in Interest.

No. 48233

FILED

DEC 27 2007

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

Original petition for a writ of mandamus or prohibition challenging the district court's order denying petitioners' motion to strike the State's notices of intent to seek the death penalty.

Petition granted.

Gentile DePalma, Ltd., and Dominic P. Gentile, Las Vegas,
for Petitioner Hidalgo.

JoNell Thomas, Las Vegas,
for Petitioner Espindola.

Catherine Cortez Masto, Attorney General, Carson City; David J. Roger, District Attorney, James Tufteland, Chief Deputy District Attorney, and Giancarlo Pesci and Marc P. DiGiacomo, Deputy District Attorneys, Clark County,
for Real Party in Interest.

BEFORE THE COURT EN BANC.

OPINION

PER CURIAM:

In this opinion, we consider whether solicitation to commit murder is a felony involving the use or threat of violence to the person of another within the meaning of the death penalty aggravator defined in NRS 200.033(2)(b). We conclude it is not. We also consider whether the State's notices of intent to seek the death penalty against petitioners satisfy the requirements of SCR 250(4)(c). We conclude they do not. Accordingly, we grant the petition and direct the district court to strike the notices of intent to seek the death penalty.[1]

FACTS

Petitioners Luis Hidalgo III and Anabel Espindola are awaiting trial on one count of conspiracy to murder Timothy Hadland, one count of first-degree murder for Hadland's death (under alternative theories of principal, aiding or abetting, and co-conspirator liability), and two counts of solicitation to commit the murders of two alleged witnesses to Hadland's death. The State filed substantively identical notices of intent to seek the death penalty alleging three aggravating circumstances against each petitioner. The first and second aggravators

[1]In response to the State's argument that counsel for petitioner Luis Hidalgo III has an impermissible conflict of interest due to his representation of Hidalgo's father in an unrelated matter, Hidalgo has moved this court to file certain exhibits under seal. Cause appearing, we grant the motion. Based on the affidavits submitted by Hidalgo, his counsel, and Hidalgo's father, we perceive no current or potential conflict sufficient to warrant counsel's disqualification at this time. See RPC 1.7. The State may renew its motion below in the future, however, if such a conflict arises.

are based on NRS 200.033(2)(b) and allege the two solicitation counts, assuming petitioners are found guilty of them, as prior felonies involving the use or threat of violence to another person.[2] The third aggravator alleges that Hadland's murder was committed by a person, for himself or another, to receive money or any other thing of monetary value pursuant to NRS 200.033(6).

On December 12, 2005, petitioners moved the district court to strike the State's notices of intent. The district court heard argument on the motion in March and September of 2006 and denied the motion from the bench on September 8, 2006. This original petition challenging the district court's ruling followed.

DISCUSSION

"This court may issue a writ of mandamus to compel the performance of an act which the law requires as a duty resulting from an office or where discretion has been manifestly abused or exercised arbitrarily or capriciously."[3] The writ will issue where the petitioner has no "plain, speedy and adequate remedy in the ordinary course of law."[4] The decision to entertain a mandamus petition lies within the discretion of this court, and this court considers whether "judicial economy and

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[2]NRS 200.033(2) permits the State to allege as an aggravating circumstance under NRS 200.033(2)(b) any felony involving the use or threat of violence that is charged in the same indictment or information as the first-degree murder count. Specifically, the statute provides, "For the purposes of this subsection, a person shall be deemed to have been convicted at the time the jury verdict of guilt is rendered . . . ."

[3]Redeker v. Dist. Ct., 122 Nev. 164, 167, 127 P.3d 520, 522 (2006); see also NRS 34.160.

[4]NRS 34.170; Redeker, 122 Nev. at 167, 127 P.3d at 522.

sound judicial administration militate for or against issuing the writ."[5] "Additionally, this court may exercise its discretion to grant mandamus relief where an important issue of law requires clarification."[6] The instant petition presents such issues. Further, considerations of judicial economy militate in favor of exercising our discretion to intervene by way of extraordinary writ at this time. Therefore, we have addressed the merits of the petition in this opinion.

Aggravators one and two: solicitation to commit murder as a prior felony involving the use or threat of violence under NRS 200.033(2)(b)

Petitioners argue that solicitation to commit murder cannot serve as a prior-violent-felony aggravating circumstance because it is not "[a] felony involving the use or threat of violence to the person of another" within the meaning of NRS 200.033(2)(b). We agree.

The crime of solicitation to commit murder is defined in NRS 199.500(2), which provides that "[a] person who counsels, hires, commands or otherwise solicits another to commit murder, if no criminal act is committed as a result of the solicitation, is guilty" of a felony. The elements of solicitation do not involve the use of violence to another, regardless of the crime solicited. The remaining question is whether solicitation of a violent crime can be considered an offense involving the threat of violence to the person of another. We conclude it cannot.

As this court observed in Sheriff v. Schwarz, "[u]nlike other criminal offenses, in the crime of solicitation, 'the harm is the asking—

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[5]Redeker, 122 Nev. at 167, 127 P.3d at 522.

[6]Id.

nothing more need be proven.'"[7] Solicitation is criminalized, of course, because it carries the risk or possibility that it could lead to a consummated crime. But as this court stated in Redeker v. District Court, a risk or potential of harm to others "does not constitute a 'threat' under NRS 200.033(2)(b)."[8]

Other jurisdictions have concluded that solicitation to commit murder cannot support an aggravator based on a prior felony involving the use or threat of violence to another person. For instance, in Elam v. State, the Supreme Court of Florida held that solicitation to commit murder could not support an aggravator based on a prior felony involving the use or threat of violence to the person, concluding that "[a]ccording to its statutory definition, violence is not an inherent element" of solicitation.[9] Citing Elam and other precedent, a Florida appellate court reached a similar conclusion in Lopez v. State that the crime of solicitation does not itself involve a threat of violence:

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

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[7]108 Nev. 200, 202, 826 P.2d 952, 954 (1992) (quoting People v. Miley, 204 Cal. Rptr. 347, 352 (Ct. App. 1984)).

[8]122 Nev. at 175, 127 P.3d at 527.

[9]636 So. 2d 1312, 1314 (Fla. 1994).

involve the threat of violence even if the crime solicited is a violent crime.[10]

The Supreme Court of Arizona addressed this issue in State v. Ysea.[11] The Ysea court considered whether solicitation to commit aggravated assault could support the aggravating factor of a prior felony involving "'the use or threat of violence on another person.'"[12] The court concluded that it could not because the statutory definition of solicitation did not require an act or a threat of violence as an element of the crime.[13]

The decisions in Elam, Lopez, and Ysea are not precisely on point because those courts relied on the statutory elements of the crime of solicitation, whereas we have held that the sentencer can look beyond the statutory elements to the charging documents and jury instructions to determine whether a prior felony conviction, after trial, involved the use or threat of violence.[14] However, the court in Elam dealt with a Florida statute that particularized solicitation to commit a capital felony.[15] And the courts in both Lopez and Ysea expressly concluded that

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[10]864 So. 2d 1151, 1152-53 (Fla. Dist. Ct. App. 2003) (citations omitted).

[11]956 P.2d 499, 502 (Ariz. 1998).

[12]Id. (quoting Ariz. Rev. Stat. § 13-703(F)(2)).

[13]Id.

[14]See Redeker, 122 Nev. at 172, 127 P.3d at 525.

[15]636 So. 2d at 1314; Fla. Stat. Ann. § 777.04(2), (4)(b) (West 1991). Nevada's solicitation statute similarly particularizes solicitation to commit murder: NRS 199.500(2) makes solicitation of murder a felony, while NRS 199.500(1) provides that solicitation of kidnapping or arson is a gross misdemeanor.

regardless of the violent nature of the crime solicited, solicitation itself is not a crime involving a threat of violence.

Obviously, the nature of the crime petitioners allegedly solicited is itself violent. But this does not transform soliciting murder into threatening murder within our view of the meaning of the statute. As the Ysea court put it, "the mere solicitation to commit an offense cannot be equated with the underlying offense. . . . [S]olicitation is a crime of communication, not violence, and the nature of the crime solicited does not transform the crime of solicitation into an aggravating circumstance."[16]

The State claims that California and Oklahoma both allow solicitation to commit murder to support a prior-violent-felony aggravator. However, the cases the State cites are not helpful to the State's position. The defendant in the Oklahoma case stipulated that his two prior convictions involved the use or threat of violence, and the case contains no useful analysis of this issue.[17] In the California case, while the defendant was in jail awaiting trial on a charge of killing his wife by lying in wait, he solicited a friend to murder a witness by lying in wait. Evidence of the solicitation was admitted not to establish any prior violent felony, but as proof of the defendant's consciousness of guilt and that he killed his wife while lying in wait.[18]

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[16]956 P.2d at 503.

[17]Woodruff v. State, 846 P.2d 1124, 1144 (Okla. Crim. App. 1993).

[18]People v. Edelbacher, 766 P.2d 1, 8, 15 (Cal. 1989).

We conclude that the threat provision of NRS 200.033(2)(b) was meant to apply in cases like Weber v. State,[19] which the State cites for the proposition that force need not be an element of the crime underlying the prior-violent-felony aggravator. In Weber, we upheld two prior-violent-felony aggravators based on sexual assaults of a minor girl.[20] We noted that the elements of sexual assault do not include the use or threat of violence, and we concluded there was "no evidence of overt violence or overt threats of violence by Weber" against the victim during the two assaults.[21] But we also concluded that the evidence showed "at least implicit" threats of violence that were perceived by the minor girl herself and enabled the sexual assaults to occur.[22] We therefore concluded that the sexual assaults could properly support the aggravator.[23] In this case, there are no allegations that petitioners made threats of violence, implicit or explicit, that were perceived as such by the intended victims.

We conclude that solicitation to commit murder, although it solicits a violent act, is not itself a felony involving the use or threat of violence within the meaning of NRS 200.033(2)(b). We therefore conclude that the first two aggravators must be stricken.

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[19]121 Nev. 554, 119 P.3d 107 (2005).

[20]Id. at 586, 119 P.3d at 129.

[21]Id.

[22]Id.

[23]Id.

Aggravator three: murder to receive money or any other thing of monetary value under NRS 200.033(6)

Petitioners also argue that the State's notices of intent to seek the death penalty violate SCR 250 in alleging the third aggravating circumstance pursuant to NRS 200.033(6), that "[t]he murder was committed by a person, for himself or another, to receive money or any other thing of monetary value." SCR 250(4)(c) provides that the notice of intent to seek death "must allege all aggravating circumstances which the state intends to prove and allege with specificity the facts on which the state will rely to prove each aggravating circumstance." Furthermore, "a defendant cannot be forced to gather facts and deduce the State's theory for an aggravating circumstance from sources outside the notice of intent to seek death. Under SCR 250, the specific supporting facts are to be stated directly in the notice itself."[24]

The State's notices allege in pertinent part:

> The murder was committed by a person, for himself or another, to receive money or any other thing of monetary value, to-wit by: by [Espindola] (a manager of the Palomino Club) and/or [Hidalgo] (a manager of the Palomino Club) and/or Luis Hidalgo, Jr. (the owner of the Palomino Club) procuring Deangelo Carroll (an employee of the Palomino Club) to beat and/or kill Timothy Jay Hadland; and/or Luis Hidalgo, Jr. indicating that he would pay to have a person either beaten or killed; and/or by Luis Hidalgo, Jr. procuring the injury or death of Timothy Jay Hadland to further the business of the Palomino Club; and/or [Hidalgo] telling Deangelo Carroll to come to work with bats and garbage bags;

[24]Redeker v. Dist. Ct., 122 Nev. 164, 168-69, 127 P.3d 520, 523 (2006).

> thereafter, Deangelo Carroll procuring Kenneth Counts and/or Jayson Taoipu to kill Timothy Hadland; thereafter, by Kenneth Counts shooting Timothy Jay Hadland; thereafter, [Hidalgo] and/or [Espindola] providing six thousand dollars ($6,000) to Deangelo Carroll to pay Kenneth Counts, thereafter, Kenneth Counts receiving said money; and/or by [Espindola] providing two hundred dollars ($200) to Deangelo Carroll and/or by [Espindola] and/or [Hidalgo] providing fourteen hundred dollars ($1400) and/or eight hundred dollars ($800) to Deangelo Carroll and/or by [Espindola] agreeing to continue paying Deangelo Carroll twenty-four (24) hours of work a week from the Palomino Club even though Deangelo Carroll had terminated his position with the club and/or by [Hidalgo] offering to provide United States Savings Bonds to Deangelo Carroll and/or his family.

This quoted portion of the notices includes a number of specific factual allegations. But the State's repeated use of "and/or" to connect the numerous allegations undercuts rather than bolsters the notices' specificity. The State is permitted to plead alternative fact scenarios for supporting an aggravator, but the notice of intent must still be coherent, with a clear statement of the facts and how the facts support the aggravator. The notices here are not a clear statement of how the facts support the aggravator.

When a notice connects a string of facts with "and/or," it permits the finding of the aggravator based on any of the facts taken separately as well as together. If the State pleads its notice in this manner, each separate fact must support the aggravator, not just any of the facts taken together. The notices here fail in this regard. For example, the allegation that Hidalgo's father "indicat[ed] he would pay to have a person either beaten or killed" does not support a finding that

Hadland's murder was committed for money or something of monetary value. That allegation, if its facts are separated by "or" rather than "and," does not allege that petitioners were even aware that Hidalgo's father was willing to pay for a beating or killing.[25]

Only after careful perusal does it appear to us that these accusations seem to fall into five basic theories. Due to the State's use of "and/or" to separate all the fact allegations, none of the theories is sufficiently specific to give petitioners the notice required by SCR 250(4)(c).

The first theory seems to be that petitioner Espindola and/or petitioner Hidalgo and/or petitioner Hidalgo's father procured Carroll to beat and/or kill Hadland. The charge does not set forth when, where, or how this procurement occurred and does not allege that money or anything of monetary value was implicated.

The second theory appears to be that petitioner Hidalgo's father indicated he would pay to have a person either beaten or killed. This charge vaguely alleges that an offer of money was made, but when, where, and how it was made, to whom, and in regard to what victim remain completely unspecified.

The third theory seems to be that petitioner Hidalgo's father procured the injury or death of Hadland to further the business of the Palomino Club, which Hidalgo's father allegedly owned. The victim is

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[25]The State is correct that the aggravator applies to a defendant who pays another to commit a murder, not just the person who commits the murder and receives the financial gain—provided the notice of intent sets forth sufficient facts to support the theory. See Wilson v. State, 99 Nev. 362, 376-77, 664 P.2d 328, 337 (1983).

identified, and the purpose of furthering business indicates a motive of monetary gain. But there is no allegation as to how the business would be furthered, nor is there any allegation regarding when, where, how, or to whom the procurement was made.

Fourth, the State appears to theorize that petitioner Hidalgo told Carroll to come to work with bats and garbage bags; Carroll procured Counts and/or Taoipu to kill Hadland; Counts shot Hadland; petitioner Hidalgo and/or petitioner Espindola provided $6,000 to Carroll to pay Counts; and Counts received the money. The crux of this charge seems to be that one or both of the petitioners paid Counts via Carroll for Hadland's murder, but the notice fails to specify when, where, or how the discussions and exchanges of money took place, what linked the exchanges to the murder, and whether Espindola knew Hidalgo paid someone, or vice versa. There is no allegation that before Hadland's death Carroll or Counts had been promised any remuneration or even expected any. Meanwhile, the allegations that Hidalgo told Carroll to bring bats and garbage bags to work and that Carroll procured Taoipu are not shown to support the theory.

The fifth apparent theory actually contains multiple subtheories of its own: petitioner Espindola provided $200 to Carroll; petitioner Espindola and/or petitioner Hidalgo provided $1,400 and/or $800 to Carroll; petitioner Espindola agreed to continue paying Carroll for working at the Palomino Club even though Carroll no longer worked there; and/or petitioner Hidalgo offered to provide savings bonds to Carroll and/or his family. Again, the notice fails to identify: when, where, or how any of the various sums of money were paid; when, where, or how petitioner Espindola and Carroll reached their agreement or whether any phony wages were ever paid; or when, where, or how the

offer of savings bonds was made. Nor does it specify how any of these alleged events could be connected to the murder, e.g., whether someone made express references to the murder before or during the exchanges.

Thus, none of the allegations in the notices, taken together or separately, are sufficiently complete to support the third aggravator charged against each petitioner, and the third aggravators must therefore be stricken. As no valid aggravators remain, we conclude the notices of intent to seek the death penalty must be stricken.

CONCLUSION

For the reasons stated above, we grant this petition. The clerk of this court shall issue a writ of mandamus directing the district court to strike the notices of intent to seek the death penalty.

_____, J.
Gibbons

_____, J.
Hardesty

_____, J.
Parraguirre

_____, J.
Douglas

_____, J.
Cherry

_____, J.
Saitta

MAUPIN, C.J., concurring in part and dissenting in part:

The majority correctly concludes that, under SCR 250, the imprecise language of the State's notices of intent to seek the death penalty is insufficient to allege the aggravating circumstance defined by NRS 200.033(6), i.e., that "[t]he murder was committed by a person, for himself or another, to receive money or any other thing of monetary value." However, I would hold that the crime of solicitation to commit murder necessarily involves the communication of a "threat of violence to the person of another."[1] I do not read NRS 200.033(2)(b) to require that such a "threat of violence" must be perceived by the intended victim. Rather, I understand the aggravating circumstance to encompass a threat of violence that is communicated to another regardless of whether the threatened victim is aware of it. Therefore, I dissent from the majority's conclusion that the aggravating circumstances alleged against petitioners under NRS 200.033(2)(b) must be stricken.

Maupin, C.J.
Maupin

[1]NRS 200.033 (2)(b).

ATTEST: A FULL, TRUE AND CORRECT COPY.

CLERK OF THE SUPREME COURT

By A. Alvarado
Deputy Clerk

EXHIBIT "2"

IN THE SUPREME COURT OF THE STATE OF NEVADA

LUIS HIDALGO, III and ANABEL ESPINDOLA

Petitioners,

vs.

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

Respondents,

And

THE STATE OF NEVADA,

Real Party in Interest.

Case No. 48233

STATE PETITION FOR REHEARING

CHRISTOPHER ORAM
Nevada Bar No. 4349
520 South 4th Street, 2nd Fl.
Las Vegas, NV 89101
(702) 384-5563

Counsel for Anabel Espindola

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

DOMINIC P. GENTILE
Nevada Bar No. 1923
3960 Howard Hughes Pkwy, #850
Las Vegas, Nevada 89109
(702) 796-5555

Counsel for Luis Hidalgo, III

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

Counsel for Petitioners

Counsel for Real Part in Interest

IN THE SUPREME COURT OF THE STATE OF NEVADA

LUIS HIDALGO, III and ANABEL ESPINDOLA

Petitioners,

vs.

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

Respondents,

And

THE STATE OF NEVADA,

Real Party in Interest.

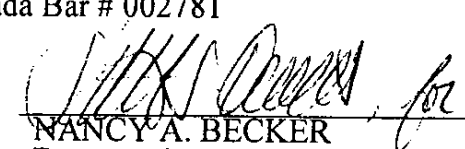
Case No. 48233

STATE PETITION FOR REHEARING

COMES NOW, the State of Nevada, Real Party in Interest, by DAVID ROGER, District Attorney, through his deputy, NANCY A. BECKER, on behalf of the above-named respondents and submits this Petition for Rehearing of the Opinion filed on December 27, 2007 in the above-captioned case as it pertains to the interpretation of SCR 250(4)(c) and its application to the monetary gain aggravator under NRS 200.033(6). This Petition is based on the following memorandum and all papers and pleadings on file herein.

Dated January 14, 2008.

DAVID ROGER
Clark County District Attorney
Nevada Bar # 002781

BY 

NANCY A. BECKER
Deputy District Attorney
Nevada Bar #000145
Attorney for Real Party in Interest

MEMORANDUM OF POINTS AND AUTHORITIES

The State respectfully submits the Court has misapprehended the law in its determination[1] that NRS 200.033(6) requires a direct nexus between a defendant and the money or monetary value required by the pecuniary gain aggravator. From language in the opinion, this Court appears to be interpreting NRS 200.033(6) to require that a charged defendant obtain direct financial benefit from the murder, paid for the murder or was personally motivated to participate in the murder to achieve a pecuniary benefit for some person or entity. The State concurs that all three of these conducts or "theories" are encompassed in NRS 200.033(6). However, on the face of the statute, the aggravator is applicable to any defendant who participates in a murder that is motivated, at least in part, by pecuniary gain, whether or not the individual defendant was directly involved in the pecuniary gain aspects of the murder.

In addition, the opinion language also suggests that in a "murder for hire" situation, there must be some specific agreement reached between the person who pays for the murder and the persons who are paid to commit the murder before the murder occurs; that payment must exchange hands before the murder and that some payment or gain is actually obtained as a result of the murder.[2] The plain language of NRS 200.033 does not contain such a requirement. The statute simply requires that the murder be motivated by pecuniary gain.

These misapprehensions of the aggravator affect this Courts analysis of the sufficiency of the Notice of Intent.

The State respectfully submits that the Court's opinion also misapprehends the language of SCR 250(4)(c). While the rule is a notice rule, it is does not require the State to set forth theories of criminal culpability for an aggravator, such as conspiracy or aiding and

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[1] While the Court does not directly interpret NRS 200.033(6) in its Opinion, statements in the Opinion referencing alleged defects in the Notice of Intent under SCR 250(4)(c) imply certain interpretations of NRS 200.033(6).

[2] Opinion, p. 11 (notice fails to say to whom the offer of money was made); p. 12 (notice fails to state that Carroll or Counts were promised remuneration before Hadland's death.)

abetting. No such culpability is required, but it appears from the Opinion that this Court may now be imposing such a requirement.

The rule is designed give notice of the facts the State will rely upon to prove the aggravator. In situations where the language of the aggravator contains multiple methods or "theories" for application of an aggravator to a defendant, the factual allegations are intended to permit the defendant to know what method or "theory" the State will argue. The construction of SCR 250(4)(c) necessarily affects the Court's analysis of the sufficiency of a notice of intent.

The State asserts this Honorable Court has also misapprehended a material fact, that being that the statements contained in the notices of intent contain theories of liability for the monetary gain aggravator rather than a series of factual statements which, when read as a whole, indicate what conduct the State is relying upon to support the aggravator.

Finally, the appropriate remedy for pre-trial insufficiency of notice challenges is to permit the State to amend the notice. Only if the State is unable to allege any facts to support the aggravator should it be stricken.

ARGUMENT

I

FACTUAL BACKGROUND

Mindful of NRAP 40, the State will not repeat of the Statement of Facts contained in its Answer. (Answer, pp. 13-12). However, for purposes of the Petition for Rehearing, essentially the State has evidence supporting the following facts.

Luis Hidalgo, Jr. ("Mr. H") owner of the Palomino Club, told Deangelo Carroll, an employee of the Palomino Club, in the presence of Anabel Espindola, a key employee of the Palomino Club, that he would pay money to have Timothy Hadland ("T.J.") beaten or killed. At the same meeting Mr. H also said his son, Luis Hidalgo, III (Hidalgo), manager of the Palomino Club, wanted T.J. taken care of. T.J. was talking to cab drivers to discourage them from bringing customers to the Palomino and the Palomino had suffered a marked decline in customers. On the same day, Hidalgo told Carroll to come to work with bats and garbage

bags which Carroll assumed, based on Mr. H's statements, meant T.J. was to be beaten to death.

Carroll enlists two other people, Jayson Taoipu and Kenneth Counts to help him kill T.J. While in route to find T.J., Espindola calls Carroll and tells him to kill T.J. if he is alone, but only beat T.J. if he is with other people. Carroll lures T.J. away from his girlfriend and Counts kills T.J. in the presence of Carroll and Taoipu. Mr. H directs Espindola to pay Counts for the killing. Espindola gives six thousand dollars to Carroll who gives the money to Counts. Espindola and Hidalgo also give several sums of money to Carroll and promise additional things of monetary value, savings bonds, to Carroll.

I
THE PECUNIARY GAIN AGGRAVATING CIRCUMSTANCE

The State respectfully contends that the Opinion impliedly misconstrues NRS 200.033(6) in two ways: (1) it suggests that for the aggravator to be applicable to a particular defendant that defendant must have personnel connection to the pecuniary gain achieved, and (2) it appears to require a specific agreement and a pre-murder exchange of money or monetary value in a murder for hire scenario and that monetary value actually be received. These issues were not the focus of the motions to strike in the district court or on the writs before this Court. If the Court is interpreting the aggravator in this fashion, the State argues this is in contradiction to the plain directive of the legislative language and this Court's previous case law and therefore grounds for rehearing.

1. Personal Nexus 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, from the murder, the person who paid for the murder, the actual killer or have pecuniary gain as the personal reason for the defendant's participation in the murder. NRS 200.033(6) states:

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

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

This Court recognized that the aggravator applies to the murder, not the defendant's role in the murder, when it rejected the concept that a murder for hire was not a murder for pecuniary gain. In Wilson v. State, 99 Nev. 362, 376-77, 664 P.2d 328, 337 (1983) this Court noted that the defendant need not be the one who gains from the murder, so long as the killer, or someone else, was intended to profit from the murder.

In addition, other courts have recognized that the aggravator applies to the motivation for the murder, not the defendant's personal motivation for pecuniary gain.[3] People v. Padilla, 11 Cal 4th 891, 906 P.2d 388 (Cal. 1995), overruled on other grounds by People v. Hill, 17 Cal. 4th 800, 952 P.2d 656 (Cal. 1998); see also Tenn. v. Austin, 87 S.W.3d 447 (Tenn. 2002); see also Harris v. Ala., 632 So.2d 503 (Ala. Cr. App. 1992) (where a defendant has been convicted of the capital offense of murder for hire, even though that person was the hirer and was convicted of the offense as an accomplice pursuant to the complicity statute, the aggravating circumstance that the capital offense was committed for pecuniary gain is established as a matter of law). In fact, the California Supreme Court has held that its financial gain statute does not require that anyone actually receive a direct financial gain as long as a financial gain is contemplated. See People v. Michaels, 28 Cal. 4th 486, 49 P.3d 1032 (Cal. 2002).

2. Potential Gain

NRS 200.033(6) does not require that some type of agreement to pay money be reached prior to the murder or that payment for the murder be made in advance. In fact, the statute does not require that someone actually receive a financial gain from the murder, only that the murder be motivated, in some part, by financial gain.

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

Pecuniary gain aggravators encompass the motivation for the murder, that is, a promise of compensation or expectation of monetary value. Whether murder results in an actual gain is evidence, but not a requirement, of the aggravator. Thus when someone lets it be known that they will pay to have a person killed and a killer commits the murder with the expectation the bounty will be paid, it is murder committed for pecuniary gain, regardless of whether the killer gets paid or not, the killer ever met the offering party or a specific agreement as to price was reached.

3. NRS 200.033(6) Applicability

In the instant case, the facts support two types of conduct evidencing the motive for the murder was pecuniary gain. Once that is established, the aggravator applies to a defendant who was a major participant in the murder.[4]

First - murder for hire. Carroll, Taoipu and Counts, individually or collectively, killed T.J. for a financial reward they expected to receive from the Palomino Club, Luis Hidalgo, Jr. ("Mr. H."), Luis Hildago, III ("Hidalgo") or Espindola, again individually or collectively. If the State proves that any one of these people intended to collect a bounty for killing T.J., the aggravator applies to the murder. If Hidalgo and Espindola are convicted of first degree murder, it applies to them, regardless of their reasons for participating in the murder.

Second – murder for gain. The Palomino Club, Mr. H, Hidalgo, or Espindola, individually or collectively, wanted T.J. killed because his activities were negatively impacting the business of the Palomino Club, causing it to lose customers. Eliminating T.J. would increase customers resulting in financial gain. So long as the State proves that any one of these entities intended to boost the Palomino Club's revenues by killing T.J., the aggravator applies to the murder and Hidalgo or Espindola's personal motives are irrelevant.

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[4] The State acknowledges that before the jury could consider the death penalty, they would still have to find that Hidalgo and Espindola were major participants in the murder itself, as distinguished from the aggravator, under the holdings of Edmund v. 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.

Because the Court appeared to be considering a more restrictive view of the aggravator in analyzing the sufficiency of the notice, the Court should grant rehearing, clarify its interpretation of NRS 200.033(6) and reanalyze the notice accordingly.

II

PURPOSE UNDERLYING SCR 250(4)(C)

The Court's Opinion suggests that SCR 250(4)(c) requires the State to plead theories of culpability for an aggravating circumstances. The State respectfully contends that this is a misapprehension of the rule and thus rehearing is warranted.

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

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

Prior to January 27, 1999, SCR 250 only required the State to list the aggravating circumstances the State intended to present. SCR 250(II)(A)(1) and (2) (ADKT 109, 6/17/93). In 1995, this Court instituted a review of the existing Rule 250 provisions. A committee was appointed for this purpose which later became known as the Fondi Commission as it was chaired by the Honorable Michael Fondi from the First Judicial District Court. Based on numerous meetings, the Fondi Commission issued a report on July 24, 1997 detailing its recommendations. After this Court considered those

recommendations, the existing version of SCR 250 was repealed and a new version adopted. (ADKT 219, 260 and 261, Order Adopting December 30, 1998, Effective date January 27, 1999.) The current language of the rule stems from these proceedings.

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

The first dealt with the inability of defense counsel to challenge the legal sufficiency of the aggravator in pre-trial proceedings – that is, without the factual basis for the aggravator, there was no way to assert that those facts, even if true, did not legally support the aggravating circumstances. This policy was involved in the portion of the Court's Opinion dealing with solicitation of murder as a crime of violence.

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

Thus SCR 250(4)(a) is a "notice" rule for these purposes. The State must allege sufficient facts to give notice of whether the State intends to prove that the aggravator applies because this is a murder for hire or a murder for gain or, if the facts warrant, both. Neither the NRS 200.033(6) nor SCR 250(4)(a) require that the State assert a criminal culpability theory of the defendant's involvement aggravator, i.e. as a conspirator, aider and abettor, direct actor or that the defendant intended or received pecuniary gain. Rather the State must show that that the murder was committed for monetary value or to achieve

something of monetary value for some person. Thus the facts required in the notice would be the facts, when taken as a whole, support one or both of these concepts.

If the Court is construing SCR 250(4)(c) to require theories of personal culpability for an aggravating circumstance, then the State asserts this is inconsistent with the policy behind the Rule's adoption. The Court should grant rehearing and reconsider the notice in light of the intent behind the Rule. In that light, the State asserts that the notices give ample forewarning that the State is alleging Counts and/or Carroll committed the murder with an expectation of being paid, i.e. the murder was committed for hire; and/or the murder was committed for gain, i.e. to stop Hadland's interference with the Palomino's customer base and thus increase the profits of the club.

III

THE COURT HAS MISAPPREHENDED A MATERIAL FACT BY CONSIDERING THE STATEMENTS IN THE NOTICE AS THEORIES RATHER THAN FACTUAL ALLEGATIONS

Because the Court appears to interpret SCR 250(4)(c) to require pleading of culpability theories, rather than the factual allegations as stated in the rule, it assumed the notices were stating separate theories of culpability, none of which were legally sufficient to support the aggravator. This is a misapprehension of the facts of this case and the notice itself.

The instant notice, while not the epitome of clarity, performs the function intended by SCR 250(4)(c) – it states the facts upon which the State is relying and thereby gives notice that the State is pursuing two methods or "theories" for applicability of the aggravator – murder by hire or murder for gain or both. The State uses "and/or" language, together with semi-colons and the word "thereafter" to indicate that the allegations are to be read as a whole. The allegations are not theories; they are facts that support the theories, i.e. murder for hire or murder for gain or both.

The first clause indicates that persons affiliated with the Palomino Club let it be known, individually or collectively, to Carroll that they wanted Carroll to beat or kill T.J.. The second clause indicates Mr. H offered money to have T.J. beaten or killed, that is, an

open ended contract on T.J., leaving it up to the individual or individuals who accepted the contract to decide whether to kill or beat T.J.. The third clause indicates Mr. H was also interested in having T.J. killed to further the business of the Palomino Club.[5] The fourth clause states that Hidalgo told Carroll to come to work with bats and garbage bags. (A fact, if believed by the jury, would be circumstantial evidence that the plan was to beat T.J. to death, hence the need for garbage bags.) Read together, these clauses indicate that the State intends to prove that these persons, individually or collectively, intended to pay money to someone to kill T.J. and/or to gain monetary value for the Palomino Club.

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

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

Read as whole, the Notice complies with SCR 250(4)(c). It gives the facts upon which the State intends to rely in proving that persons affiliated with the Palomino Club wanted T.J. beaten or killed and were willing to pay money for either result. Carroll was directed by one or more of those persons to see that this was accomplished. Carroll enlisted

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[5] The State recognizes that this Court in Hidalgo ruled that "further the business" is too vague and does not give notice 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.

the aid of two persons, Counts and Taoipu to help him carry out his orders. Counts fired the shots that killed T.J. and is paid Six Thousand Dollars. Additional sums of money and things of value (savings bonds) are paid or promised to Carroll for accomplishing the murder.

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

These are not legal theories, they are factual statements, plead in the alternative because several different individuals took different steps and it does not matter whether the jury believes Hidalgo, Mr. H or Espindola ordered and paid for the murder individually, acting together or acting as agents of the Palomino Club. The State's "theory" is that this was a murder for hire. The State alleged every fact in the alternative that would support this "theory" – i.e. people paid money for T.J.'s murder. The defense is free to argue that the monies were for something else, to keep witnesses silent, to take the rap, etc. It is for the jury to decide what inferences are to be drawn from these facts and whether they prove murder for hire or gain. A Notice is not deficient because the facts are complicated.[6] This Court misapprehended the nature of the notice and should grant rehearing.

IV

APPROPRIATE REMEDY

Finally, even if this Court still concludes the Notice of Intent is too confusing and does not give adequate notice under SCR 250(4)(c), then the appropriate remedy is to remand the case with instructions to permit the State to amend its notice in accordance with this Court's concerns, not to strike the aggravator. Since the Rule is based on the notice

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[6] The Court also seems to be requiring more than notice pleading because the Opinion states that the State failed to plead specific details of every conversation, where they occurred, who was present, what agreements were reached. This goes beyond facts to support how the conduct implicates the aggravator, the purpose of the rule. It is more akin to the kind of information required by SCR 250(4)(f), evidence in aggravation. If SCR 250(4)(c) is to be read to require every evidentiary fact, then this is much broader than notice pleading and another reason why leave to amend should be granted.

concepts derived from case law involving informations or indictments, the same remedy considerations should apply as well.

Generally an information or indictment may be amended at anytime if no additional or different offense is charged and substantial rights are not prejudiced. NRS 173.095. Pre-trial complaints about lack of notice can be remedied by the State and so dismissals should be without prejudice or the State should be given leave to amend. This is because there is no prejudice to the defendant in such a case. State v. Hancock, 114 Nev. 161, 955 P.2d 183 (1998). Indeed amendments on a pre-trial basis are generally recognized as the appropriate remedy for lack of notice allegations. State v. District Court, 116, Nev. 374, 997 P.2d 126 (2000). This is especially true when the defense has had notice of the charges or theory of the case and only the specifics of the notice have been challenged. Shannon v. State, 105 Nev. 782, 783 P.2d 942 (1989)(amendment permitted to allege different facts in support of same charge).

A different standard should not apply to the notice provisions of NRS 250(4)(c). The appropriate remedy is to permit the State to amend the Notice of Intent to clean up any confusing language, not to strike the aggravator. Amendment is more in line with the purpose and intent of SCR 250(4)(c) and the reasons for its promulgation. Thus even if the Court does not accept the State's other arguments and still believes the notices are too confusing, it should grant rehearing and remand the case with instructions to permit the State to amend the notices rather than striking the aggravators and then the notices. The Rule was never intended to permit form to govern over substance, especially in a clear case of murder for hire.

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CONCLUSION

For the reasons cited above, the State respectfully submits the Court should grant rehearing.

Dated January 14, 2008.

DAVID ROGER
Clark County District Attorney
Nevada Bar # 002781

BY _____
NANCY A. BECKER
Deputy District Attorney
Nevada Bar #000145

Office of the Clark County District Attorney
200 Lewis Avenue
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 Petition for Rehearing to the attorney of record listed below on January 14, 2008.

Christopher Oram
Attorney at Law
520 South Fourth Street, 2nd Floor
Las Vegas, Nevada 89101

Dominic P. Gentile
Attorney at Law
3960 Howard Hughes Pkwy, #850
Las Vegas, Nevada 89109

CERTIFICATE OF SERVICE

I hereby certify and affirm that a on January 14, 2008 copy of the foregoing Petition for Rehearing was delivered via facsimile and hard copy sent to:

Judge Donald Mosley
Department XIV
Regional Justice Center
200 Lewis Avenue
Las Vegas, Nevada 89101

FAX # 671-4418

And

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

Fax #671-4451

Employee, Clark County
District Attorney's Office

EXHIBIT "3"

Cite as: Hidalgo v. Dist. Ct.
124 Nev. Adv. Op. No. 33
May 29, 2008

IN THE SUPREME COURT OF THE STATE OF NEVADA

No. 48233

LUIS HIDALGO, III,

Petitioner,

vs.

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

Respondents,

and

THE STATE OF NEVADA,

Real Party in Interest.

Petition for rehearing of Hidalgo v. District Court, 123 Nev. ___, 173 P.3d 1191 (2007) (opinion withdrawn February 21, 2008). Original petition for a writ of mandamus or prohibition challenging the district court's order denying petitioner's motion to strike the State's notice of intent to seek the death penalty.

Petition for rehearing granted; petition for writ of mandamus granted in part.

MAUPIN, J., dissented in part.

Gordon & Silver, Ltd., and Dominic P. Gentile and Paola M. Armeni, Las Vegas, for Petitioner.

Catherine Cortez Masto, Attorney General, Carson City; David J. Roger, District Attorney, Steven S. Owens, Chief Deputy District Attorney, Giancarlo Pesci, Marc P. DiGiacomo, and Nancy A. Becker, Deputy District Attorneys, Clark County, for Real Party in Interest.

Michael Pescetta, Assistant Federal Public Defender, Las Vegas; Philip J. Kohn, Public Defender, and Howard Brooks, Deputy Public Defender, Clark County; David M. Schieck, Special Public Defender, Clark County, for Amici Curiae Federal Public Defender for District of Nevada, Nevada Attorneys for Criminal Justice, Clark County Public Defender, and Clark County Special Public Defender.

BEFORE THE COURT EN BANC.

OPINION ON REHEARING

PER CURIAM:

On December 27, 2007, this court issued an opinion in this case granting a petition for a writ of mandamus.[1] Subsequently, the real party in interest filed a rehearing petition. On February 21, 2008, this court withdrew the prior opinion pending resolution of the petition for rehearing. After reviewing the rehearing petition and answer, as well as the briefs and appendix, we conclude that rehearing is warranted under NRAP 40(c)(2), and we grant the petition for rehearing. We now issue this opinion in place of our prior opinion.

In this opinion, we consider whether solicitation to commit murder is a felony involving the use or threat of violence to the person of another within the meaning of the death penalty aggravator defined in NRS 200.033(2)(b). We conclude that it is not. We also consider whether the State's notice of intent to seek the death penalty against petitioner satisfies the requirements of SCR 250(4)(c). We conclude that it does not. However, we conclude that the State should be allowed to amend the notice of intent to cure the deficiency. Accordingly, we grant the writ petition in part and instruct the district court to strike the two aggravating circumstances alleging solicitation to commit murder as prior violent felonies pursuant to NRS 200.033(2) and to allow the State to amend its notice of intent to seek the death penalty with respect to the factual allegations supporting the pecuniary gain aggravator.[2]

FACTS

Petitioner Luis Hidalgo III is awaiting trial on one count of conspiracy to murder Timothy Hadland, one count of first-degree murder for Hadland's death (under alternative theories of principal, aiding and abetting, and coconspirator liability), and two counts of solicitation to commit the murders of two alleged witnesses to Hadland's death. The State subsequently filed a timely notice of intent to seek the death penalty alleging three aggravating circumstances. The first and second aggravators are based on NRS 200.033(2)(b) and allege the two solicitation counts, assuming Hidalgo is found guilty of them, as prior felonies involving the use or threat of violence to another person.[3] The third aggravator alleges that Hadland's murder was committed by a person, for himself or another, to receive money or any other thing of monetary value pursuant to NRS 200.033(6).

On December 12, 2005, Hidalgo moved the district court to strike the State's notice of intent. The district court heard argument on the motion in March and September of 2006 and denied the motion from the bench on September 8, 2006. This original petition challenges the district court's ruling.[4]

DISCUSSION

"This court may issue a writ of mandamus to compel the performance of an act which the law requires as a duty resulting from an office or where discretion has been manifestly abused or exercised arbitrarily or capriciously."[5] The writ will issue where the petitioner has no "plain, speedy and adequate remedy in the ordinary course of law."[6] The decision to entertain a mandamus petition lies within the discretion of this court, and this court considers whether "judicial economy and sound judicial administration militate for or against issuing the writ."[7] "Additionally, this court may exercise its discretion to grant mandamus relief where an important issue of law requires clarification."[8] The instant petition presents such issues. Further, considerations of judicial economy militate in favor of exercising our discretion to intervene by way of extraordinary writ at this time. Therefore, we have addressed the merits of the petition in this opinion.

Aggravators one and two: solicitation to commit murder as a prior felony involving the use or threat of violence under NRS 200.033(2)(b)

Hidalgo argues that solicitation to commit murder cannot serve as a prior-violent-felony aggravating circumstance because it is not "[a] felony involving the use or threat of violence to the person of another" within the meaning of NRS 200.033(2)(b). We agree.

The crime of solicitation to commit murder is defined in NRS 199.500(2), which provides that "[a] person who counsels, hires, commands or otherwise solicits another to commit murder, if no criminal act is committed as a result of the solicitation, is guilty" of a felony. The elements of solicitation do not involve the use of violence to another, regardless of the crime solicited. The remaining question is whether solicitation of a violent crime can be considered an offense involving the threat of violence to the person of another. We conclude that it cannot.

As this court observed in Sheriff v. Schwarz, "[u]nlike other criminal offenses, in the crime of solicitation, 'the harm is the asking— nothing more need be proven.'"[9] Solicitation is criminalized, of course, because it carries the risk or possibility that it could lead to a consummated crime. But as this court stated in Redeker v. District Court, a risk or potential of harm to others "does not constitute a 'threat' under NRS 200.033(2)(b)."[10]

Other jurisdictions have concluded that solicitation to commit murder cannot support an aggravator based on a prior felony involving the use or threat of violence to another person. For instance, in Elam v. State, the Supreme Court of Florida held that solicitation to commit murder could not support an aggravator based on a prior felony involving the use or threat of violence to the person, concluding that "[a]ccording to its statutory definition, violence is not an inherent element" of solicitation.[11] Citing Elam and other precedent, a Florida appellate court reached a similar conclusion in Lopez v. State that the crime of solicitation does not itself involve a threat of violence:

> "The gist of criminal solicitation is enticement" of another to commit a crime. No agreement is needed, and criminal solicitation is committed even though the person solicited would never have acquiesced to the scheme set forth by the defendant. Thus, the general nature of the crime of solicitation lends support to the conclusion that solicitation, by itself, does not involve the threat of violence even if the crime solicited is a violent crime.[12]

The Supreme Court of Arizona addressed this issue in State v. Ysea.[13] The Ysea court considered whether solicitation to commit aggravated assault could support the aggravating factor of a prior felony involving "'the use or threat of violence on another person.'"[14] The court concluded that it could not because the statutory definition of solicitation did not require an act or a threat of violence as an element of the crime.[15]

The decisions in Elam, Lopez, and Ysea are not precisely on point because those courts relied on the statutory elements of the crime of solicitation, whereas we have held that the sentencer can look beyond the statutory elements to the charging documents and jury instructions to determine whether a prior felony conviction, after trial, involved the use or threat of violence.[16] However, the court in Elam dealt with a Florida statute that particularized solicitation to commit a capital felony.[17] And the courts in both Lopez and Ysea expressly concluded that regardless of the violent nature of the crime solicited, solicitation itself is not a crime involving a threat of violence.

Obviously, the nature of the crime Hidalgo allegedly solicited is itself violent. But this does not transform soliciting murder into threatening murder within our view of the meaning of the statute. As the Ysea court put it, "the mere solicitation to commit an offense cannot be equated with the underlying offense. . . . [S]olicitation is a crime of communication, not violence, and the nature of the crime solicited does not transform the crime of solicitation into an aggravating circumstance."[18]

The State claims that California and Oklahoma both allow solicitation to commit murder to support a prior-violent-felony aggravator. However, the cases the State cites are not helpful to the State's position. The defendant in the Oklahoma case stipulated that his two prior convictions involved the use or threat of violence, and the case contains no useful analysis of this issue.[19] In the California case, while the defendant was in jail awaiting trial on a charge of killing his wife by lying in wait, he

solicited a friend to murder a witness by lying in wait. Evidence of the solicitation was admitted not to establish any prior violent felony, but as proof of the defendant's consciousness of guilt and that he killed his wife while lying in wait.[20]

We conclude that the threat provision of NRS 200.033(2)(b) was meant to apply in cases like Weber v. State,[21] which the State cites for the proposition that force need not be an element of the crime underlying the prior-violent-felony aggravator. In Weber, we upheld two prior-violent-felony aggravators based on sexual assaults of a minor girl.[22] We noted that the elements of sexual assault do not include the use or threat of violence, and we concluded there was "no evidence of overt violence or overt threats of violence by Weber" against the victim during the two assaults.[23] But we also concluded that the evidence showed "at least implicit" threats of violence that were perceived by the minor girl herself and enabled the sexual assaults to occur.[24] We therefore concluded that the sexual assaults could properly support the aggravator.[25] In this case, there are no allegations that Hidalgo made threats of violence, implicit or explicit, that were perceived as such by the intended victims.

We conclude that solicitation to commit murder, although it solicits a violent act, is not itself a felony involving the use or threat of violence within the meaning of NRS 200.033(2)(b). We therefore conclude that the first two aggravators must be stricken.

Aggravator three: murder to receive money or any other thing of monetary value under NRS 200.033(6)

Hidalgo argues that the State's notice of intent to seek the death penalty violates SCR 250 in alleging the third aggravating circumstance pursuant to NRS 200.033(6)—"[t]he murder was committed by a person, for himself or another, to receive money or any other thing of monetary value." SCR 250 (4)(c) provides that the notice of intent to seek death "must allege all aggravating circumstances which the state intends to prove and allege with specificity the facts on which the state will rely to prove each aggravating circumstance." Furthermore, "a defendant cannot be forced to gather facts and deduce the State's theory for an aggravating circumstance from sources outside the notice of intent to seek death. Under SCR 250, the specific supporting facts are to be stated directly in the notice itself."[26]

The State's notice alleges in pertinent part:

> The murder was committed by a person, for himself or another, to receive money or any other thing of monetary value, to-wit by: by [Espindola] (a manager of the PALOMINO CLUB) and/or [Hidalgo] (a manager of the PALOMINO CLUB) and/or Luis Hidalgo, Jr. (the owner of the PALOMINO CLUB) procuring DEANGELO CARROLL (an employee of the PALOMINO CLUB) to beat and/or kill TIMOTHY JAY HADLAND; and/or LUIS HIDALGO, JR. indicating that he would pay to have a person either beaten or killed; and/or by LUIS HIDALGO, JR. procuring the injury or death of TIMOTHY JAY HADLAND to further the business of the PALOMINO CLUB; and/or [Hidalgo] telling DEANGELO CARROLL to come to work with bats and garbage bags; thereafter, DEANGELO CARROLL procuring KENNETH COUNTS and/or JAYSON TAOIPU to kill TIMOTHY HADLAND; thereafter, by KENNETH COUNTS shooting TIMOTHY JAY HADLAND; thereafter, [Hidalgo, Jr.] and/or [Espindola] providing six thousand dollars ($6,000) to DEANGELO CARROLL to pay KENNETH COUNTS, thereafter, KENNETH COUNTS receiving said money; and/or by [Espindola] providing two hundred dollars ($200) to DEANGELO CARROLL and/or by [Espindola] and/or [Hidalgo] providing fourteen hundred dollars ($1400) and/or eight hundred dollars ($800) to DEANGELO CARROLL and/or by [Espindola] agreeing to continue paying DEANGELO CARROLL twenty-four (24) hours of work a week from the PALOMINO

> CLUB even though DEANGELO CARROLL had terminated his position with the club and/or by [Hidalgo] offering to provide United States Savings Bonds to DEANGELO CARROLL and/or his family.

This quoted portion of the notice includes a number of specific factual allegations. But the State's repeated use of "and/or" to connect the numerous allegations undercuts rather than bolsters the notice's specificity. The State is permitted to plead alternative fact scenarios in support of an aggravator, but the notice of intent must still be coherent, with a clear statement of the facts and how the facts support the aggravator. The notice here is not a clear statement of how the facts support the aggravator. When a notice connects a string of facts with "and/or," it permits the finding of the aggravator based on any of the facts taken separately as well as together. If the State pleads its notice in this manner, each separate fact must support the aggravator, not just any of the facts taken together. The notice here, however, fails in this regard.

SCR 250(4)(c) is "intended to ensure that defendants in capital cases receive notice sufficient to meet due process requirements."[27] In interpreting whether the manner in which a notice of intent is pleaded satisfies the due process concerns of SCR 250(4)(c), we look to other notice pleading requirements for guidance. A charging document in a criminal case, for example, serves a similar purpose to a notice of intent. NRS 173.075 provides that a charging document "must be a plain, concise and definite written statement of the essential facts constituting the offense charged." To satisfy this requirement, "the [charging document] standing alone must contain the elements of the offense intended to be charged and must be sufficient to apprise the accused of the nature of the offense so that he may adequately prepare a defense."[28] Although there are obvious differences in the purposes of a charging document and a notice of intent to seek the death penalty, their primary function is the same, i.e., to provide the defendant with notice of what he must defend against at trial and a death penalty hearing, respectively.

Although the State is not required to include exhaustively detailed factual allegations to satisfy SCR 250(4)(c), the notice of intent must provide a simple, clear recitation of the critical facts supporting the alleged aggravator, presented in a comprehensible manner. Here, the principal problem with the notice of intent in this case is not the lack of factual detail. Rather, the State has alleged the factual allegations supporting the pecuniary gain aggravator in an incomprehensible format such that it fails to meet the due process requirements of SCR 250(4)(c).

In addition to the confusing "and/or" format, one example of a lack of clarity in the notice of intent appears in the State's allegation that "[Hidalgo's father] procure[ed] the injury or death of [Hadland] to further the business of the PALOMINO CLUB." Although this allegation identified a victim and asserted that the murder was motivated by monetary gain, i.e., furthering the business, it lacked sufficient specificity because it failed to explain how the business would be furthered by Hadland's murder. The submissions before this court indicate that Hadland verbally discouraged cab drivers from bringing customers to the Palomino Club and that the Club had suffered a marked decline in business as a result. However, absent from the notice of intent is any fact explaining how Hadland's murder benefited the Palomino Club's business interest. We conclude that the phrase in the notice of intent "to further the business" is impermissibly vague. As the State may amend its notice of intent, it must provide specific factual allegations as to how Hadland's murder furthered the business interests of the Palomino Club if the State intends to pursue this factual allegation at trial.

Although the notice of intent fails to clearly explain the factual allegations supporting the pecuniary gain aggravator, we conclude that the State should be allowed to amend the notice of intent to remedy the deficiency. Allowing the State to amend the notice to remedy any confusion, vagueness, or ambiguity present in the pecuniary gain aggravator will not prejudice Hidalgo or render subsequent proceedings unfair. By amending the notice, the State will not be including events or circumstances not already alleged in the notice. Rather, the State would be merely clarifying factual allegations in the

notice.

Further, allowing the State to amend the notice of intent under the particular facts of this case would not contravene any statute or decision by this court. We have published only two decisions in which we struck notices of intent to seek the death penalty that were not compliant with SCR 250(4)(c)—Redeker v. District Court[29] and State v. District Court (Marshall).[30] However, both of these cases are distinguishable from the instant case.

In Redeker, this court concluded that the State's notice of intent to seek the death penalty failed to allege with specificity any facts showing that Redeker had been convicted previously of a felony involving the use or threat of violence to the person of another.[31] In particular, the State alleged that Redeker had been convicted of second-degree arson; however, although the notice of intent clearly identified the crime by title, date, location, case number, and victim, none of the allegations indicated that the second-degree arson was a crime of violence or threatened violence to the person of another.[32] We rejected the State's suggestion that it be allowed to amend its notice of intent to allege additional facts in the same manner as it would amend a charging document.[33] In doing so, we observed that the State had opposed Redeker's contention that aggravators must be alleged in a charging document based on a probable cause determination and indicated that the State's position was inconsistent with its argument that it be allowed to amend the notice of intent as it would a charging document: "[T]he State proposes that we allow it to evade the charging requirements of SCR 250 but enjoy the benefits, while avoiding the burdens, of the indictment/information process."[34]

Redeker is distinguishable from the instant case. In Redeker, this court concluded that the notice of intent compelled Redeker to speculate about facts not included in the notice of intent that would have established that his second-degree arson conviction was a violent felony.[35] Here, the issue is not that the notice of intent lacked factual specificity, compelling Hidalgo to speculate about evidence beyond what was included in the notice of intent. Rather, our overarching concern in this case is that the State's factual allegations as pleaded are unclear and confusing. Further, this court's rejection of the State's argument in favor of amending the notice of intent in Redeker is unique to the particular circumstances in that case. Moreover, in Redeker, we concluded that even if the State had included specific factual allegations it believed established Redeker's second-degree arson conviction as a crime involving the threat or use of violence to another person, the factual allegations failed to support the aggravator.[36]

We reject any interpretation of Redeker as suggesting that the State can never amend a notice of intent to cure any deficiencies in the factual allegations supporting an aggravator where, as here, they are not pleaded in a clear and comprehensible manner. Therefore, we expressly limit the holding in Redeker to the particular facts and circumstances in that case.

The other published decision in which this court struck a notice of intent based on SCR 250(4)(c) is State v. District Court (Marshall), where we upheld a district court's decision to deny the State's motion to file untimely notices of intent to seek the death penalty against two defendants.[37] Marshall thus focused on the timing requirement in SCR 250(4)(c) rather than the sufficiency of the notice. Here, Hidalgo was made aware by the filing of a timely notice of intent that the State intended to seek the death penalty and the factual allegations supporting the pecuniary gain aggravator.

To the extent Hidalgo contends that allowing the State to amend the notice of intent would render the notice untimely without a showing of good cause, we find that argument unpersuasive under the particular facts of this case. SCR 250(4)(d) provides that "[u]pon a showing of good cause, the district court may grant a motion to file a late notice of intent to seek the death penalty or of an amended notice alleging additional aggravating circumstances." (Emphasis added.) Here, the State is not seeking to amend its notice of intent to allege new aggravators but rather to clarify the factual allegations supporting the pecuniary gain aggravator, which was alleged in a timely notice of intent. This circumstance sets Hidalgo's case apart from the situation in Marshall, where the State simply neglected to follow SCR 250(4)(c)'s timing requirement and failed to demonstrate good cause for the delay.[38]

Although the notice of intent is deficient under SCR 250(4)(c) to the extent that it fails to provide a clear, comprehensible expression of the factual allegations to support the pecuniary gain aggravator, we conclude that the appropriate remedy is to allow the State to amend the notice of intent to cure this deficiency. We further conclude that allowing the State to amend the notice of intent to further explain its allegation that Hadland's murder served to further the business interests of the Palomino Club will not violate Hidalgo's due process rights.

CONCLUSION

For the reasons stated above, we grant this petition in part. The clerk of this court shall issue a writ of mandamus instructing the district court to strike the two aggravating circumstances alleging solicitation to commit murder as prior violent felonies pursuant to NRS 200.033(2) and to allow the State to amend its notice of intent to seek the death penalty to declare the factual allegations supporting the pecuniary gain aggravator in a clear, comprehensible manner and to further explain its allegation that the victim's murder served to further the business interests of the Palomino Club.

**********FOOTNOTES**********

[1] Hidalgo v. Dist. Ct., 123 Nev. ___, 173 P.3d 1191 (2007) (opinion withdrawn February 21, 2008).

[2] In response to the State's argument that counsel for petitioner Luis Hidalgo III has an impermissible conflict of interest due to his representation of Hidalgo's father in an unrelated matter, Hidalgo has moved this court to file certain exhibits under seal. Cause appearing, we grant the motion. Based on the affidavits submitted by Hidalgo, his counsel, and Hidalgo's father, we perceive no current or potential conflict sufficient to warrant counsel's disqualification at this time. See RPC 1.7. The State may renew its motion below in the future, however, if such a conflict arises.

[3] NRS 200.033(2) permits the State to allege as an aggravating circumstance any felony involving the use or threat of violence that is charged in the same indictment or information as the first-degree murder count. Specifically, the statute provides that "[f]or the purposes of this subsection, a person shall be deemed to have been convicted at the time the jury verdict of guilt is rendered."

[4] Anabel Espindola was charged with the same offenses and given notice of the same aggravators as Hidalgo. On April 9, 2008, we granted Espindola's motion to dismiss her from this original proceeding because she had reached a plea agreement with the State.

[5] Redeker v. Dist. Ct., 122 Nev. 164, 167, 127 P.3d 520, 522 (2006); see also NRS 34.160.

[6] NRS 34.170; Redeker, 122 Nev. at 167, 127 P.3d at 522.

[7] Redeker, 122 Nev. at 167, 127 P.3d at 522.

[8] Id.

[9] 108 Nev. 200, 202, 826 P.2d 952, 954 (1992) (quoting People v. Miley, 204 Cal. Rptr. 347, 352 (Ct. App. 1984)).

[10] 122 Nev. at 175, 127 P.3d at 527.

[11] 636 So. 2d 1312, 1314 (Fla. 1994).

[12] 864 So. 2d 1151, 1152-53 (Fla. Dist. Ct. App. 2003) (citations omitted).

[13] 956 P.2d 499, 502 (Ariz. 1998).

[14] Id. (quoting Ariz. Rev. Stat. § 13-703(F)(2)).

[15] Id.

[16] See Redeker v. Dist. Ct., 122 Nev. 164, 172, 127 P.3d 520, 525 (2006).

[17] 636 So. 2d at 1314; Fla. Stat. Ann. § 777.04(2), (4)(b) (West 1991). Nevada's solicitation statute similarly particularizes solicitation to commit murder: NRS 199.500(2) makes solicitation of murder a felony, while NRS 199.500(1) provides that solicitation of kidnapping or arson is a gross misdemeanor.

[18] 956 P.2d at 503.

[19] Woodruff v. State, 846 P.2d 1124, 1144 (Okla. Crim. App. 1993).

[20] People v. Edelbacker, 766 P.2d 1, 8, 15 (Cal. 1989).

[21] 121 Nev. 554, 119 P.3d 107 (2005).

[22] Id. at 586, 119 P.3d at 129.

[23] Id.

[24] Id.

[25] Id.

[26] Redeker v. Dist. Ct., 122 Nev. 164, 168-69, 127 P.3d 520, 523 (2006).

[27] State v. Dist. Ct. (Marshall), 116 Nev. 953, 959, 11 P.3d 1209, 1212 (2000).

[28] Laney v. State, 86 Nev. 173, 178, 466 P.2d 666, 669 (1970); see Sheriff v. Levinson, 95 Nev. 436, 437, 596 P.2d 232, 233 (1979) ("[T]he prosecution is required to make a definite statement of facts constituting the offense in order to adequately notify the accused of the charges and to prevent the prosecution from circumventing the notice requirement by changing theories of the case.").

[29] 122 Nev. 164, 127 P.3d 520 (2006).

[30] 116 Nev. 953, 11 P.3d 1209 (2000).

[31] 122 Nev. at 168, 127 P.3d at 523.

[32] Id.

[33] Id. at 169, 127 P.3d at 523.

[34] Id.

[35] Id. at 168-69, 127 P.3d at 523.

[36] Id. at 169, 127 P.3d at 523.

[37] 116 Nev. 953, 968, 11 P.3d 1209, 1218 (2000).

[38] Id. at 964, 11 P.3d at 1215.

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MAUPIN, J., concurring in part and dissenting in part:

The majority correctly concludes that, under SCR 250, the imprecise language of the State's notice of intent to seek the death penalty fails to clearly explain how the facts alleged support the aggravating circumstance defined by NRS 200.033(6), i.e., that "[t]he murder was committed by a person, for himself or another, to receive money or any other thing of monetary value." I further concur with the majority that the State should be allowed to amend the notice of intent to remedy this deficiency. However, I would hold that the crime of solicitation to commit murder necessarily involves the communication of a "threat of violence to the person of another."[1] I do not read NRS 200.033(2)

(b) to require that such a "threat of violence" must be perceived by the intended victim. Rather, I understand the aggravating circumstance to encompass a threat of violence that is communicated to another regardless of whether the threatened victim is aware of it. Therefore, I dissent from the majority's conclusion that the aggravating circumstances alleged against petitioner under NRS 200.033 (2)(b) must be stricken.

**********FOOTNOTES**********

[1] NRS 200.033(2)(b).

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CLERK OF THE COURT

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DAVID ROGER
Clark County District Attorney
Nevada Bar #002781
MARC DIGIACOMO
Chief Deputy District Attorney
Nevada Bar #006955
200 Lewis Avenue
Las Vegas, Nevada 89155-2211
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

LUIS HIDALGO, JR.,
#1579522

Defendant.

Case No. C241394

Dept No. XXI

NOTICE OF MOTION AND MOTION IN LIMINE TO EXCLUDE THE TESTIMONY OF VALERIE FRIDLAND

DATE OF HEARING: 1/20/09 Dept. 21

TIME OF HEARING: 9:30 A.M.

COMES NOW, the State of Nevada, by DAVID ROGER, District Attorney, through MARC DIGIACOMO, Chief Deputy District Attorney, and files this Notice of Motion and Motion in Limine to Exclude the Testimony of Valerie Fridland.

This Motion is made and based upon all the papers and pleadings on file herein, the attached points and authorities in support hereof, and oral argument at the time of hearing, if deemed necessary by this Honorable Court.

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NOTICE OF HEARING

YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that the undersigned will bring the foregoing motion on for setting before the above entitled Court, in Department XXI thereof, on the 20th day of January, 2009, at the hour of 9:30 o'clock A.M., or as soon thereafter as counsel may be heard.

DATED this 12th day of January, 2009.

DAVID ROGER
Clark County District Attorney
Nevada Bar #002781

BY _____
MARC DIGIACOMO
Chief Deputy District Attorney
Nevada Bar #006955

STATEMENT OF FACTS

On January 5, 2005, Defendant Luis Hidalgo, Jr. filed a supplemental notice of expert informing the State that Defendant intends to call Valerie Fridland, a Professor at the University of Nevada, Reno to "testify as to her analysis and comparison of the linguistics used by Anabel Espindola during her Grand Jury Testimony, as well as her speech captured on the body wires." Attached to the Notice was a Curriculum Vitae of Dr. Fridland as well as a report. A review of those documents demonstrate that Dr. Fridland is being called as a credibility expert. In her report, the ultimate conclusion is "In summary, based on my analysis of the recorded conversations with Ms. Espindola and her later testimony regarding the same facts, there are a large number of inconsistent presentations of both her role and the role of others in the events in question."

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POINTS AND AUTHORITIES

THE TESTIMONY OF THE EXPERT IS INADMISSIBLE VERACITY TESTIMONY

NRS 50.275 provides:

> If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by special knowledge, skill, experience, training or education may testify to matters within the scope of such knowledge.

Accordingly, there are three requirements to the admissibility of an experts' testimony:

> (1) he or she must be qualified in an area of "scientific, technical or other specialized knowledge" (the qualification requirement); (2) his or her specialized knowledge must "assist the trier of fact to understand the evidence or to determine a fact in issue" (the assistance requirement); and (3) his or her testimony must be limited "to matters within the scope of [his or her specialized] knowledge" (the limited scope requirement).

Hallmark v. Eldridge, 189 P.3d 646, 650 (Nev, 2008). Dr. Fridland fails all three of these requirements, however, the most clear failure is the assistance requirement. The assistance requirement requires that not only it assists the trier of fact, but that it is the product of reliable methodology. Id at 651. As is discussed below, commenting on the veracity of a witness never assists the trier of fact.

Defendant's notice of Dr. Fridland clearly indicates that she is in essence a "credibility expert." In essence, her testimony will be that from an analysis of the two separate statements of Ms. Espindola, she can determine that one of them must not be true. Additionally, Dr. Fridland indicates that she can determine what "common knowledge" Ms. Espindola and Deangelo Carroll have by inference from their statements. The law is overwhelmingly clear that such an expert is inadmissible.

While the scope of an expert testimony may be broad if it will assist the trier of fact, there are certain areas that an expert may never testify too. The most basic rule is that a witness may never comment on the veracity of another witness. *See* Daniel v. State, 119 Nev. 498, 78 P.3d 890 (2003); *see also* Rowland v. Lepire, 99 Nev. 308, 312, 662 P.2d 1332, 1334 (1983) (noting that it is exclusively within the province of the trier of fact to weigh evidence and pass on credibility of witnesses and their testimony)). The reasoning is that no one is supposed to invade the province of the jury. Daniel at 518. It is also clear that an expert witness "may not comment on the veracity of a witness." Lickey v. State, 108 Nev. 191, 827 P.2d 824 (1992) (*citing* Townsend v. State, 103 Nev. 113, 734 P.2d 705 (1987)). This rule applies to both the State and Defendant. Townsend at 119. The rule precluding an expert from making such conclusions is even more important because the weight that may be given to experts. *See* United States v. Sorodo, 845 F.2d 945, 949 (11th Cir.1988) ("[A] trial judge must be sensitive to the jury's temptation to allow the judgment of another to substitute for its own.") In Lickey, the Court noted that other jurisdictions also follow this well established rule. Lickey at 196 (*citing* State v. Bressman, 236 Kan. 296, 689 P.2d 901 (1984) (expert opinion becomes inadmissible as soon as it passes on credibility of the witness)).

This is not the only area where the Court has determined that an expert is inadmissible. In Pineda v. State, 120 Nev. 204, 88 P.3d 827 (2004), the Nevada Supreme Court stated that while an expert may testify to generalities, the expert may not opine on the state of mind of a specific person. Moreover, In Re Assad, while an administrative matter, indicated that the rules of evidence apply equally in both civil and criminal situations. In re Assad, 124 NevAdvOp 38 (June 12, 2008). In upholding the commissions decision to exclude an expert, the Court noted:

> Here, Professor Stempel's affidavit, which was attached to Judge Assad's prehearing motion and sets forth his proposed testimony, purported to evaluate the credibility of witnesses that had yet to testify (although they had given statements during the Commission's investigation); determined based on the March 31, 2003, court sessions audiotape that Chrzanowski could not have been handcuffed in court because no "click" could be heard on the tape; weighed "evidence" that had not yet been admitted; and discussed issues that were irrelevant to those properly before the

> Commission, such as whether Judge Assad would have had jurisdiction to hold Chrzanowski in contempt, whether she was engaged in the unauthorized practice of law by appearing on Madera's behalf, and the dismissal of Chrzanowski's civil lawsuit. Credibility determinations and weighing the evidence are tasks reserved to the Commission, and expert testimony on these issues would not have assisted the Commission to understand the evidence or resolve a disputed fact.

Id.

In the instant matter, Dr. Fridland purports to say that Ms. Espindola's testimony is inconsistent with her statements on the tape. Dr. Fridland also presumes to able to deduce (some she calls an assumption) from the surreptitious recording the "common knowledge" of both Ms. Espindola and Deangelo Carroll. In essence, Dr. Fridland will testify that Ms. Espindola's testimony at the grand jury (and presumably at trial) is untrue based upon the surreptitious recording. As such, it is inadmissible.

Dr. Fridland's entire opinion involves the application of a use of field of linguistics which she identifies as "discourse analysis." The area of discourse analysis has been discussed at length in several federal cases. In each case, the Court has upheld the exclusion of the testimony in front of a jury for a variety of reasons including unreliability, invading the province of the jury, not assisting the jury, not scientific knowledge, and more prejudicial than probative. Perhaps the most illustrative of the analysis is in a District Court order excluding the testimony of a linguist in "discourse analsys." United States v. Amawi, 552 F.Supp.2d 669 (2008). After noting that the testimony of the expert was essentially the conclusion that the jury was being asked to determine and was not necessary to assist the jury, the Court went on to quote extensively from an 11th Circuit case of United States v. Evans, 910 F2d 790 (11th Cir.1990). In Evans, the defendant sought to introduce a linguistics expert to utilize "discourse analysis" to establish that the defendant on a recording did not understand the illegal nature of the plan through specific taped conversations. Id at 802. The expert was utilizing the same techniques described in Dr. Fridland's report. Ultimately, the Evans Court held:

> We hold that the district court acted within its discretion in excluding Dr. Shuy's testimony. In considering whether the expert would aid the jury's ability to understand the taped conversations and whether the danger of jury confusion outweighed the testimony's probative value, the court engaged in the correct inquiry. *Cf.* United States v. Schmidt, 711 F.2d 595, 598 (5th

> Cir.1983), *cert. denied*, 464 U.S. 1041, 104 S.Ct. 705, 79 L.Ed.2d 169 (1984) (refusal to admit expert testimony of linguistics expert not an abuse of discretion where court concluded that testimony would not assist jury); United States v. Devine, 787 F.2d 1086, 1088 (7th Cir.), *cert. denied*, 479 U.S. 848, 107 S.Ct. 170, 93 L.Ed.2d 107 (1986) (not error to refuse to admit linguist's testimony where contents of tape recorded conversation not outside the average person's understanding); United States v. DeLuna, 763 F.2d 897, 912 (8th Cir.), *cert. denied*, 474 U.S. 980, 106 S.Ct. 382, 88 L.Ed.2d 336 (1985) (no error to refuse proffered expert testimony on discourse analysis). Further, our review of the evidentiary hearing on the admissibility of the expert testimony convinces us that the district court's findings on these matters were well supported. In this case, questions regarding the defendant's understanding of the illegality of the operation and the extent of government inducement were at the center of the trial. The jury's task was to determine, on the basis of its collective experience and judgment, what Evans's state of mind was when he accepted the money and whether he was entrapped into committing the crime for which he was charged. We agree with the district court that expert testimony would not have aided the jury in performing this task and that the testimony presented a risk that the jury would allow the judgment of the expert to substitute for its own.

Id at 803. After discussing Evans, the Awami court went on to discuss United States v. Kupau, 781 F.2d 740 (9th Cir.1986). In Kupau, the defendant tried to introduce a linguist expert to attempt to explain the intent of the speaker who was using ordinary terms within the average understanding of the jury. The Court found that excluding the testimony was not error. Id at 745.

After a lengthy discussion, the Awami court went on in a footnote to make a string citation to a sample of other cases excluding discourse analysis:

> Other criminal cases upholding exclusion or limitation of testimony by [linguistics expert] Prof. Shuy include U.S. v. Mitchell, 49 F.3d 769, 780-781 (D.C.Cir.1995) (proposed testimony "not only involves matters of general knowledge, but is squarely within the traditional province of the jury."); U.S. v. Edelman, 873 F.2d 791, 795 (5th Cir.1989) (testimony concerned "matters within the common knowledge of the jury"); U.S. v. Shields, 1992 WL 43239, at *33-34 (N.D.Ill.) (disallowing testimony regarding discourse analysis); State v. Hill, 601 So.2d 684, 693-94 (La.App.1992) (testimony would not have aided jury; properly excluded under state equivalent of Fed.R.Evid. 403); State v. Conway, 193 N.J.Super. 133, 169-71, 472 A.2d 588, 608-09 (1984) (upholding finding that "discourse analysis" testimony was no scientifically reliable means of determining speaker's intent during covertly recorded conversations and that such testimony would have been confusing to the jury); Rogers v. State, 1999 WL 93274, at *8-10 (Tex.App.) (exclusion based on state law equivalent to Fed.R.Evid. 403) (unreported disposition).

Id at 678 n. 4. Perhaps most noteworthy from this string citation is the discussion in State v. Conway which holds that use of linguistics to interpret covert audio records is not a scientifically valid area of study under the old United States v. Frye, 293 F. 1013, 1014 (D.C.Cir.1923). Conway at 171. As the Court is aware, if it does not satisfy Frye, there is no possibility it could pass muster under Daubert, which is the basis for Hallmark v. Eldridge, 189 P.3d 646, 650 (Nev, 2008). In fact, in all of the research conducted the undersigned could not find a single case that held it was error for the Court to exclude an linguist who utilized discourse analysis.

CONCLUSION

As the testimony of Dr. Fridland is not an area which will assist the trier of fact on the meaning of ordinary terms and it is not a scientifically reliable area or inquiry, the Court should exclude the testimony of Dr. Fridland in its entirety. Therefore, the Court should grant the MOTION IN LIMINE TO EXCLUDE THE TESTIMONY OF VALERIE FRIDLAND.

DATED this 12th day of January, 2009.

DAVID ROGER
Clark County District Attorney
Nevada Bar #002781

BY _____
MARC DIGIACOMO
Chief Deputy District Attorney
Nevada Bar #006955

CERTIFICATE OF FACSIMILE TRANSMISSION

I hereby certify that service of the above and foregoing, was made this 12th day of January, 2009, by facsimile transmission to:

DOMINIC GENTILE, ESQ. (Luis Hidalgo, Jr.)
369-2666

JOHN ARRASCADA, ESQ. (Luis Hidalgo, III)
FAX: 775-329-1253

CHRISTOPHER ADAMS, ESQ. (Luis Hidalgo, III)
FAX: 404-352-5636

/s/Deana Daniels
Secretary for the District Attorney's Office

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*** TX REPORT ***
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TRANSMISSION OK

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DAVID ROGER
Clark County District Attorney
Nevada Bar #002781
MARC DIGIACOMO
Chief Deputy District Attorney
Nevada Bar #006955
200 Lewis Avenue
Las Vegas, Nevada 89155-2211
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

LUIS HIDALGO, JR.,
#1579522

Defendant.

Case No. C241394

Dept No. XXI

NOTICE OF MOTION AND MOTION IN LIMINE TO EXCLUDE THE TESTIMONY OF VALERIE FRIDLAND

DATE OF HEARING: 1/20/09

TIME OF HEARING: 9:30 A.M.

COMES NOW, the State of Nevada, by DAVID ROGER, District Attorney, through MARC DIGIACOMO, Chief Deputy District Attorney, and files this Notice of Motion and

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*** TX REPORT ***
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RESULT	OK

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DAVID ROGER
Clark County District Attorney
Nevada Bar #002781
MARC DIGIACOMO
Chief Deputy District Attorney
Nevada Bar #006955
200 Lewis Avenue
Las Vegas, Nevada 89155-2211
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

LUIS HIDALGO, JR.,
#1579522

Defendant.

Case No. C241394

Dept No. XXI

NOTICE OF MOTION AND MOTION IN LIMINE TO EXCLUDE THE TESTIMONY OF VALERIE FRIDLAND

DATE OF HEARING: 1/20/09

TIME OF HEARING: 9:30 A.M.

COMES NOW, the State of Nevada, by DAVID ROGER, District Attorney, through MARC DIGIACOMO, Chief Deputy District Attorney, and files this Notice of Motion and

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*** TX REPORT ***
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TRANSMISSION OK

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RESULT	OK

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DAVID ROGER
Clark County District Attorney
Nevada Bar #002781
MARC DIGIACOMO
Chief Deputy District Attorney
Nevada Bar #006955
200 Lewis Avenue
Las Vegas, Nevada 89155-2211
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

LUIS HIDALGO, JR.,
#1579522

Defendant.

Case No. C241394

Dept No. XXI

NOTICE OF MOTION AND MOTION IN LIMINE TO EXCLUDE THE TESTIMONY OF VALERIE FRIDLAND

DATE OF HEARING: 1/20/09

TIME OF HEARING: 9:30 A.M.

COMES NOW, the State of Nevada, by DAVID ROGER, District Attorney, through MARC DIGIACOMO, Chief Deputy District Attorney, and files this Notice of Motion and

REGISTER OF ACTIONS
CASE NO. 05C212667-2

The State of Nevada vs Luis A Hidalgo

Case Type:	**Felony/Gross Misdemeanor**
Date Filed:	**06/17/2005**
Location:	**Department 21**
Conversion Case Number:	**C212667**
Defendant's Scope ID #:	**1849634**
Lower Court Case Number:	**05FB00052**

RELATED CASE INFORMATION

Related Cases

05C212667-1 (Multi-Defendant Case)
05C212667-3 (Multi-Defendant Case)
05C212667-4 (Multi-Defendant Case)
05C212667-5 (Multi-Defendant Case)
08C241394 (Consolidated)

PARTY INFORMATION

Defendant	**Hidalgo, Luis A** *Also Known As* Hidalgo III , Luis A	**Lead Attorneys** **John L. Arrascada** *Retained* 7023283158(W)
Plaintiff	**State of Nevada**	**David J. Roger** 702-671-2700(W)

CHARGE INFORMATION

Charges: Hidalgo, Luis A	**Statute**	**Level**	**Date**
1. CONSPIRACY TO COMMIT A CRIME	199.480	Gross Misdemeanor	01/01/1900
1. MURDER.	200.010	Gross Misdemeanor	01/01/1900
1. DEGREES OF MURDER	200.030	Gross Misdemeanor	01/01/1900
2. MURDER.	200.010	Felony	01/01/1900
2. DEGREES OF MURDER	200.030	Felony	01/01/1900
2. USE OF A DEADLY WEAPON OR TEAR GAS IN COMMISSION OF A CRIME.	193.165	Felony	01/01/1900
3. SOLICITATION TO COMMIT A CRIME.	199.500	Felony	01/01/1900
4. SOLICITATION TO COMMIT A CRIME.	199.500	Felony	01/01/1900

EVENTS & ORDERS OF THE COURT

01/16/2009 **All Pending Motions** (9:30 AM) ()
ALL PENDING MOTIONS 1-16-09 Relief Clerk: REBECCA FOSTER Reporter/Recorder: Janie Olsen Heard By: Valerie Adair

Minutes
01/16/2009 9:30 AM
- STATE'S MOTION TO REMOVE MR. GENTILE AS ATTORNEY OR REQUEST WAIVERS AFTER DEFENDANTS HAVE HAD TRUE INDEPENDENT COUNSEL...STATE'S REQUEST STATUS CHECK ON MOTION TO CONSOLIDATE C241394...DEFT'S MOTION FOR FAIR AND ADEQUATE VOIR DIRE Christopher W. Adams, Esq, pro hac vice also present. WAIVER OF RIGHTS TO A DETERMINATION OF PENALTY BY THE TRIAL JURY (HILDAGO, JR and HIDALGO III) FILED IN OPEN COURT. ORDER GRANTING THE STATE'S MOTION TO CONSOLIDATE C241394 INTO C212667 FILED IN OPEN COURT. Mr. DiGiacomo advised the Court an agreement has been reached between parties as it relates to conflict issue and Notice to Seek Death Penalty against both defts will be withdrawn. Further defense counsel acknowledged there is no conflict as to the guilt phase. Colloquy between Court and counsel regarding charging documents and voir dire process. COURT ORDERED, State's Motion to Remove Mr. Gentile is MOOT; Motion to Consolidate with C241394 is GRANTED; and Deft'S Motion for Fair and Adequate Voir Dire is MOOT. COURT FURTHER ORDERED, Deft's Motion to Suppress scheduled for 1-20 will be heard at 10:15 with other Motion in Limine to Exclude Testimony (C241394). CUSTODY

Parties Present
Return to Register of Actions

ORDR

DAVID ROGER
Clark County District Attorney
Nevada Bar #002781
MARC DIGIACOMO
Chief Deputy District Attorney
Nevada Bar #006955
200 Lewis Avenue
Las Vegas, NV 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

LUIS HIDALGO, III,
#1849634
and
LUIS HIDALGO, JR.
#1579522

Defendants.

Case No. C212667/C241394
Dept No. XXI

ORDER GRANTING THE STATE'S MOTION TO CONSOLIDATE C241394 INTO C212667

DATE OF HEARING: 1/16/2009
TIME OF HEARING: 9:30 A.M.

THIS MATTER having come on for hearing before the above entitled Court on the 16th day of January, 2009, the Defendants being present, represented by John Arrascada for LUIS HIDALGO, III and Dominic Gentile for LUIS HIDALGO, JR., the Plaintiff being represented by DAVID ROGER, District Attorney, through MARC DIGIACOMO, Chief Deputy District Attorney, and the Court having heard the arguments of counsel and good cause appearing therefor,

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///

IT IS HEREBY ORDERED that the STATE'S MOTION TO CONSOLIDATE C241394 INTO C212667, shall be, and it is Granted.

DATED this 16th day of January, 2009.

DISTRICT JUDGE

DAVID ROGER
DISTRICT ATTORNEY
Nevada Bar #002781

MARC DIGIACOMO
Chief Deputy District Attorney
Nevada Bar #006955

da