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

Volume 8 of 25

(Pages 1423 - 1494)

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.

ALPHABETICAL INDEX OF APPELLANT'S APPENDIX

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

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

[2] Id.

[3] Id.

[4] Id.

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

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

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

Transcript of Jury Trial Day 2

Continued

State, and you immediately said, well, you have friends or you know people who are gang members; is that right?

PROSPECTIVE JUROR NO. 047: Uh-huh.

THE COURT: What gangs are your friends affiliated with or --

PROSPECTIVE JUROR NO. 047: They're -- do I have to say?

MR. GENTILE: Your Honor, we could do it at sidebar.

THE COURT: All right. Or you could just -- well, let me ask you this. Are they kind of the typical street gangs or is it that some of the other people have mentioned or other maybe lesser known types of gangs?

PROSPECTIVE JUROR NO. 047: I -- it's some street and some organized crime.

THE COURT: Okay. And then why do you think that would prejudice you against the state? Because I don't think there's been discussion about what gang -- really about why the gang question has been -- been coming up?

PROSPECTIVE JUROR NO. 047: I don't know why the gang question has been coming up, but I know things that happen and the way things happen and I just -- probably am just going to keep my mouth shut on it.

THE COURT: Okay. When you say --

PROSPECTIVE JUROR NO. 047: It has to do with gangs, yeah.

THE COURT: Okay. Let me ask you this. You said you don't think the system is fair or experience with the system or you don't believe in the system or something to that effect. I didn't quite hear it. What -- what's -- what were you alluding to?

PROSPECTIVE JUROR NO. 047: Oh, I didn't -- did I say the system wasn't fair?

THE COURT: Well, maybe I misheard you. You said something about the system I thought.

PROSPECTIVE JUROR NO. 047: No.

THE COURT: Okay. Now, you understand the State has the burden of proof in this case?

PROSPECTIVE JUROR NO. 047: Yes, ma'am.

THE COURT: Okay. Now, if the State, if you listen to the evidence and you consider the witnesses and the testimony and the State proves the defendants of guilt beyond a reasonable doubt, would you be able to render a verdict of not guilty -- I'm sorry, of guilty?

PROSPECTIVE JUROR NO. 047: I can't honestly answer that.

THE COURT: All right. And why not?

PROSPECTIVE JUROR NO. 047: Just -- just because I know how the street works and I just -- I just didn't want to be a part of this.

THE COURT: Okay.

PROSPECTIVE JUROR NO. 047: Like I said, I'd do any court, any other case, but this one just isn't right for me.

THE COURT: Okay. And why not? I mean, what makes this case -- I mean, other than a civil case, a construction defect or med mal or something like that, which obviously is completely different, what is it about this case that you think makes it so different from any other criminal case that you could've been assigned to?

PROSPECTIVE JUROR NO. 047: Just word afterwards.

THE COURT: Just what?

PROSPECTIVE JUROR NO. 047: Word afterwards or before that I was

involved with it.

THE COURT: All right. Does the State want to follow up with Mr. Cannata?

MR. DIGIACOMO: Yes, Judge.

Your last answer you said worried afterwards? Or what did you -- I didn't quite get --

PROSPECTIVE JUROR NO. 047: Yeah, afterwards.

MR. DIGIACOMO: You're concerned about sitting on the jury?

PROSPECTIVE JUROR NO. 047: Yes.

MR. DIGIACOMO: Okay. And based upon the questions that are being asked here that's provided you some concern; correct?

PROSPECTIVE JUROR NO. 047: Yep.

MR. DIGIACOMO: Okay. I guess the -- nobody's told you really what the gang issue is.

PROSPECTIVE JUROR NO. 047: No they haven't.

MR. DIGIACOMO: Okay. There's going to be no assertion in this case that there is any sort of organized crime involvement by the individuals sitting on that side of the room.

PROSPECTIVE JUROR NO. 047: That's correct.

MR. DIGIACOMO: Okay? So knowing the fact that -- that there is no -- going to be no allegation of that type of thing here, does that change your -- your mind at all, or are you still concerned about the consequences?

PROSPECTIVE JUROR NO. 047: Yeah, I'm absolutely concerned. I've been around here long enough to know. And the things that, you know, I've seen and know from my friends, yeah. No, I don't partake in it, but I've grown up with

these people and they're still my friends.

MR. DIGIACOMO: And based upon that I'm guessing you'd feel more inclined to issue a not guilty verdict because you wouldn't have to have that concern after the trial?

PROSPECTIVE JUROR NO. 047: Yes, sir.

MR. DIGIACOMO: Approach, Your Honor?

THE COURT: Sure.

(Conference at the bench)

MR. GENTILE: Mr. Cannata, forgive me, but I need to understand so I'm going to ask you a couple of questions. First of all, I think -- I know that Mr. DiGiacomo said it, but he said it in his way. I'm going to say it in mine. There is not only no allegations that Mr. Hidalgo or his son are members of any kind of gang, but then again, I mean, there's absolutely zero proof of that. It's not only not charging them of that, but the State doesn't even contend that. Okay? There's no proof of that.

So what I'm trying to understand, and I think what you're trying to say, but I'm going to come out and say it, but you tell me if I'm -- if that's what you mean. You're concerned that if you enter a guilty verdict against somebody who may be a gang member then the gang might come after you. Is that what you're trying to say?

PROSPECTIVE JUROR NO. 047: In a way. Yeah. Yeah.

MR. GENTILE: Okay.

PROSPECTIVE JUROR NO. 047: And I'm going to -- and to go back to his question, I'm not going to say --

MR. GENTILE: Well, then tell me what you mean by in a way.

PROSPECTIVE JUROR NO. 047: Yeah. Okay. I guess I'm answering your question. Yeah, I do. I just think -- yeah, probably.

MR. GENTILE: Okay.

PROSPECTIVE JUROR NO. 047: Not for sure, but I wouldn't -- like I just said, I wouldn't render just guilty, not innocent or guilty, I probably just don't have an opinion on it.

MR. GENTILE: Well, you're not supposed to. That's a good thing at this moment. You understand where I'm coming from?

PROSPECTIVE JUROR NO. 047: Uh-huh.

MR. GENTILE: All right. So -- well, what you're saying is that before you said that you thought that because we've used this term gang that there might be some sort of a gang connection with the defendants in this case and that made you think there's no way I'm going to vote guilty because if I do then their brothers will come after me.

PROSPECTIVE JUROR NO. 047: Yeah.

MR. GENTILE: Is that it --

PROSPECTIVE JUROR NO. 047: Yes, sir.

MR. GENTILE: -- in essence? Okay. Now that you know that there is n gang connection --

And I think we're all in agreement; right?

MR. DIGIACOMO: As to these two individuals, that's correct.

MR. GENTILE: Right. As to these people. That's correct. Now that you know that, do you feel better about it?

THE COURT: I've got JAVS up here.

THE RECORDER: I just called them.

PROSPECTIVE JUROR NO. 047: I -- I just really don't even feel better about this whole trial. I don't. I just -- to me, inside, I just don't. And -- and I keep -- I keep saying I don't have a problem being a juror, just this isn't the one for me. I mean, I'll come back, I'll reschedule, I don't care. This is just not the one for me.

MR. GENTILE: Are you saying that you won't listen to the evidence?

PROSPECTIVE JUROR NO. 047: Oh, I'll listen to the evidence, yeah.

MR. GENTILE: Are you saying that you won't evaluate the evidence?

PROSPECTIVE JUROR NO. 047: No, I'm not saying that.

MR. GENTILE: Are you saying that you won't determine for yourself whether a person who gets up on this stand and takes the oath is telling the truth or has reasons to lie?

PROSPECTIVE JUROR NO. 047: Just in my history. You know, you asked the question to a couple of these jurors about the one that switched their story.

MR. GENTILE: Right.

PROSPECTIVE JUROR NO. 047: And just my experience in life is somewhere or another they got squeezed one way or another, either they got paid off somehow or they were given less time or whatever it is, but I would have a hard time listening to that person with that in my mind.

MR. GENTILE: Oh, so that's why you can't be fair to the State.

PROSPECTIVE JUROR NO. 047: One of the reasons.

MR. GENTILE: You have a hard time believing somebody who may have been --

PROSPECTIVE JUROR NO. 047: Well, that's one of the reasons, yes.

THE COURT: What are the other reasons?

MR. GENTILE: What are the other reasons?

PROSPECTIVE JUROR NO. 047: Well, the other reasons we brought up. You know, you already brought that up about --

THE COURT: Well, we --

PROSPECTIVE JUROR NO. 047: -- the gangs.

THE COURT: -- want to know from you what they reasons are. What are the reasons?

PROSPECTIVE JUROR NO. 047: That was -- that would be one of the reasons there.

THE COURT: What are the other reasons?

PROSPECTIVE JUROR NO. 047: The other reason is because --

THE COURT: I'm a really nice person until that noise. Just tell me what the other reasons are.

PROSPECTIVE JUROR NO. 047: Just -- just what the case is about. I mean, I just -- I had a friend killed in a -- in a fight. You know, the gang thing did definitely put a turn on it, and I had a friend --

THE COURT: Okay. But now you know that there is no allegation, no evidence, nobody is even suggesting that these two individuals, Mr. Hidalgo, Jr. and Mr. Hidalgo III, are involved in gangs or organized crime. There's nothing about that here. So now that you know that, what are you --

MR. DIGIACOMO: I apologize, Judge. Can we approach?

THE COURT: Yeah.

(Conference at the bench)

THE COURT: Ladies and gentlemen, we're going to take a ten minute

break. I know maybe some of you are getting as bad of a headache as I am from the noise and the JAVS gentleman is here. He is the wizard on this system. Hopefully it'll all be fixed.

Ladies and gentlemen, you're reminded of the admonishment. Don't talk about the case, don't do anything relating to the case in the hall. Everybody go through the double doors following our marshal there, and we'll see you all back here in ten minutes.

(Recess taken at 4:30 p.m.)

THE COURT: All right, guys. It's now a quarter of five. We can either just have Jeff excuse the whole jury, or we can bring them back in, I guess, and I'll excuse them for the -- I'll excuse them. Bring them back in.

MR. GENTILE: What does that mean? We're going to come back tomorrow --

THE COURT: Yeah.

MR. GENTILE: -- with this guy?

THE COURT: Right. Or you can have ten minutes with him.

MR. GENTILE: Well, that's -- let him have overnight to cool off. It's up to you.

(Prospective jury panel enters at 4:49 p.m.)

THE COURT: All right. Court is now back in session. The record will reflect the presence of the State, the defendants and their counsel, the officers of the court, and the members of the prospective jury panel.

Mr. Gentile, you may continue.

MR. GENTILE: Thank you.

Mr. Cannata, understand something, as long as you listen to the

testimony of that witness, or maybe there's more than one witness like that, I'm not sure, as long as you listen to that testimony and as long as you follow the Court's instructions with respect to that testimony, if after you listen to that testimony and after you listen to those instructions you choose to not believe that person, that is okay. That follows the law. Do you understand that?

PROSPECTIVE JUROR NO. 047: Yes, sir.

MR. GENTILE: Okay. The Court is going to give you a special instruction with respect to the evaluation of a -- of a witness who has been -- the Court's going to give you a special instruction. I'm not going to go any further than that. Okay? I know what the instruction is, but I'm not going to discuss that with you. But I'm sure that when you listen to it, you're going to be satisfied with it. And even if you weren't satisfied with it, you'd have to follow it.

But that -- that instruction is going to allow you to reject that testimony, but it doesn't mean that you must reject it. And as a matter of fact, you shouldn't reject it unless when you listen to that witness and you listen to the Court's instruction, you feel after that that you can reject it. What -- what we want to know, all you have to do is you have to be open-minded about it. You understand that?

PROSPECTIVE JUROR NO. 047: Uh-huh.

MR. GENTILE: And if, based on your life experiences and the wisdom that you bring here after being open-minded, you still feel that that witness is not to be believed, you're free to do that as is everybody else on this jury. You can do that; can't you?

PROSPECTIVE JUROR NO. 047: I can do that.

MR. GENTILE: That's all it takes. Thank you.

THE COURT: All right. Mr. Adams or Mr. Arrascada?

MR. ARRASCADA: Nothing, Your Honor.

MR. DIGIACOMO: I do, Judge.

THE COURT: All right.

MR. DIGIACOMO: Unless --

THE COURT: No, Mr. DiGiacomo, go ahead.

MR. DIGIACOMO: Obviously you can recognize Mr. Pesci and my concern; correct?

PROSPECTIVE JUROR NO. 047: Absolutely.

MR. DIGIACOMO: All right. You're telling me, hey, look, one, I may not believe the co-defendant, and, two, hey, look, I'd much rather vote not guilty because I know that no matter what nothing can come back on me; right?

PROSPECTIVE JUROR NO. 047: No. I mean, I -- I shouldn't have said that I'm just going to, you know, be -- I would be more [inaudible].

MR. DIGIACOMO: Okay.

PROSPECTIVE JUROR NO. 047: You know, I come -- I come here and I'm listening to everything that's going on in this case and I'm on both sides here because I had a friend that was murdered at a party in high school in '86 for a murder for hire at a party. And it was a friend of mine, so on one side that is another issue that's here too.

So I -- I have a lot of issues here that I'm weighing and I just -- like I said, I don't feel that this is the right case for me. Another case, yeah. I just -- there's just so many issues that I have. I don't know what -- you know, what I'm going to do here.

MR. DIGIACOMO: Okay.

PROSPECTIVE JUROR NO. 047: Or if I can even give you an answer.

MR. DIGIACOMO: And that's ultimately the question. I mean, we've heard this, there was a juror that was sitting in spot number seven earlier, I mean, unfortunately today is the day. If we don't have an answer at the end of -- our end of the time talking to you, then ultimately, at the end of the day, we can have problems when we wind up in that back room.

And one of the things that -- that you said was, you know, and I will assert to every member of this jury that we have simply no evidence whatsoever to suggest that Mr. Hidalgo or his son are a member of a criminal gang. None whatsoever.

The State has alleged, however, that they conspired with a gang member to commit the murder of Timothy Hadland, our victim in this particular case. Is that fact enough to give you the same kind of concerns that you were talking about before?

PROSPECTIVE JUROR NO. 047: Yes.

MR. DIGIACOMO: That some of the people associated in this case may be gang members; right?

PROSPECTIVE JUROR NO. 047: Maybe.

MR. DIGIACOMO: And based upon that you think that you won't be able to do the job that the Court's going to tell you you have to do?

PROSPECTIVE JUROR NO. 047: Yes.

MR. DIGIACOMO: Thank you very much.

THE COURT: And -- and can you expound upon -- I mean --

PROSPECTIVE JUROR NO. 047: I'm sorry?

THE COURT: When you say you're concerned, what are you -- I mean,

can you tell me in your own words what your concern is? I mean, what do you think the problem is going to be if you're selected to serve? Because you said, well, you'll listen to everything and you'll, you know, pay attention and you'll go back in the jury room with everyone and deliberate. So what -- but now in response to Mr. DiGiacomo's questioning you said you're concerned. Can you express for me or clarify for me what your concern is?

PROSPECTIVE JUROR NO. 047: My concern is being involved with the case in regards to any kind of gang activity just because I -- I've been around and, like I said, I've known the organized crime industry. I know, you know, just the things that happen and I just have concerns and I just don't feel --

THE COURT: Okay.

PROSPECTIVE JUROR NO. 047: -- I'm not comfortable.

THE COURT: Other than the fact that -- and many people -- I mean, again, it's a -- it's an onerous -- it can be -- it's a -- I don't want to use the word onerous. It's a big responsibility, and people have misgivings for a variety of reasons.

Now, you've heard there's no allegation that either of these people are involved with gangs or organized crime or anything of that nature. And so notwithstanding the misgivings that you may have had, the misapprehension that you had when you sat out there in the audience and just heard a bunch of questions and you didn't really know the context, now you do know the context. It doesn't involve any allegations against Mr. Hidalgo, Jr. or Mr. Hidalgo III, would you be able -- could you set aside those concerns and deliberate with your fellow jurors candidly and openly about the evidence?

PROSPECTIVE JUROR NO. 047: I don't think I can.

THE COURT: And why not?

PROSPECTIVE JUROR NO. 047: I just -- I don't. I don't feel I can play that part.

THE COURT: Mr. Gentile, would you like to ask Mr. Cannata any questions?

MR. GENTILE: No.

THE COURT: All right. I'll see counsel up here.

(Conference at the bench)

MR. ADAMS: Mr. Cannata, I'm going to speak with you briefly, I think. You've been asked similar questions and have given not the same answer. And what we would like to know -- what we need is we would like you to be qualified as a juror and we just need to know from you with no gang involvement on Mr. Hidalgo, Mr. H., or his son, Little Lou, can you be a juror? Can you participate in this process?

PROSPECTIVE JUROR NO. 047: I don't feel I can.

MR. ADAMS: You can't listen to the evidence?

PROSPECTIVE JUROR NO. 047: I can listen to the evidence.

MR. ADAMS: You can't weigh the evidence?

PROSPECTIVE JUROR NO. 047: Yes, I can.

MR. ADAMS: You can't listen to the Judge?

PROSPECTIVE JUROR NO. 047: Yes, I can.

MR. ADAMS: That's a trick question, I know, on that one. You can't participate with these other folks, these other jurors? You can't listen to them?

PROSPECTIVE JUROR NO. 047: I can listen to them.

MR. ADAMS: And communicate with them?

PROSPECTIVE JUROR NO. 047: Sure, I'm a good communicator.

MR. ADAMS: And I know. I know you are. I can sense that. And then at the end of the day be able to reach a just verdict? And Mr. DiGiacomo said there -- there might be -- would there be a problem in the back room. Well, so long as nobody hits one another, there doesn't have to be agreement. There just has to be good faith deliberation. Do you -- can you do that?

PROSPECTIVE JUROR NO. 047: With -- with -- with the talking, you know --

MR. ADAMS: Well, let me say this. I know you can do it. Will you do it?

PROSPECTIVE JUROR NO. 047: With everything that we talked about and with every question that was asked with gang involvement and there was a gang member involved with this, I don't think I can.

MR. ADAMS: Well, the gang member is not on trial.

PROSPECTIVE JUROR NO. 047: Okay.

MR. ADAMS: The gang member is not going to be a witness. Will you do it?

PROSPECTIVE JUROR NO. 047: I just have problems with it. I really do.

MR. ADAMS: I understand that.

PROSPECTIVE JUROR NO. 047: I don't -- I don't -- I don't want to make any decisions on this. I don't.

MR. ADAMS: I -- I -- I know you don't. Will you do it?

PROSPECTIVE JUROR NO. 047: What if I say -- what if I -- what if I say no?

THE COURT: Well, it's not up to him.

PROSPECTIVE JUROR NO. 047: Can I say no? I know, that's why -- that's why --

THE COURT: I mean, here's the deal.

PROSPECTIVE JUROR NO. 047: -- when he's asking me I don't know what --

THE COURT: I'm going to tell you the same thing I've told a lot of other jurors. There is not a right or wrong answer. It's what your opinion is, it's what your feelings are. The answer that's wrong is a dishonest answer. Okay? We want an honest answer. So give me an honest answer. Don't worry about the repercussions or the ramifications. All we ask of you -- that's why we place the jurors under oath. All we ask is your honesty. That's all we want from you --

PROSPECTIVE JUROR NO. 047: I can't do this.

THE COURT: -- is your honesty.

PROSPECTIVE JUROR NO. 047: I can't do this.

THE COURT: Not motivated by a desire to get out of jury duty, not motivated by anything else, just candor and honesty because your opinion is your opinion and when it comes to people's feelings and their opinions, there is no right or wrong answer. It's not a math test.

PROSPECTIVE JUROR NO. 047: Right.

THE COURT: It is what it is, and that's all we're asking you for.

PROSPECTIVE JUROR NO. 047: Correct.

THE COURT: All right.

PROSPECTIVE JUROR NO. 047: I don't think --

THE COURT: So what's --

PROSPECTIVE JUROR NO. 047: -- I can do this.

THE COURT: -- the answer?

PROSPECTIVE JUROR NO. 047: I don't think I can do this.

THE COURT: All right. I would like you to put the microphone in your chair. Officer Wooten, go ahead and wait for him in the vestibule. He'll give you instructions. You are eligible for reassignment to a civil case --

PROSPECTIVE JUROR NO. 047: Thank you.

THE COURT: -- that won't involve any allegations of any gang activity involving any witnesses or possible participants.

PROSPECTIVE JUROR NO. 047: Thank you.

THE COURT: Officer Wooten, would you direct Mr. Cannata from the courtroom, and he's eligible for civil reassignment.

All right. Ladies and gentlemen, some of you have childcare responsibility. I would love to work all night and get a jury picked. Unfortunately, there are some members of the prospective panel that do have childcare responsibilities. And if you can remember back to yesterday, I did promise that we would break at five so that those people who have childcare issues can make sure that they pick up their children.

Having said that, it is now five and we're going to go ahead and take our evening recess. We're going to reconvene. The Court has a very lengthy calendar tomorrow on a number of unrelated criminal matters, so we're going to reconvene at 12:30 tomorrow. We will not be taking a lunch break, so please plan accordingly and eat or do whatever you need to do prior to reporting at 10:30. I promise --

MR. DIGIACOMO: Hold on --

JURY PANEL: You said 12:30.

MR. DIGIACOMO: -- you said 12:30.

THE COURT: 12:30.

MR. DIGIACOMO: They're listening.

MR. GENTILE: They're paying attention.

THE COURT: I promise you that we will have our jury selected by tomorrow. So after tomorrow the only individuals who will have to return another day after tomorrow will be the 14 men and women who actually are seated on the jury. I thank everybody for their patience. I know this is a long process, but I'm sure everyone can appreciate how important it is for the participants --

PROSPECTIVE JUROR: So what time --

THE COURT: -- that are here.

PROSPECTIVE JUROR: -- it's going to be?

MR. GENTILE: 12:30.

THE COURT: 12:30.

All right. I've got to admonish you. Ladies and gentlemen, once again I'd remind everyone of the admonishment. Don't discuss anything about this case with each other or with anyone else. Don't read, watch, or listen to any reports of or commentaries on this case, and person or subject matter related to the case. Please don't do any independent research on any subject connected with the trial. Don't visit any of the locations at issue, and please don't form or express an opinion on the case.

I'm going to have everyone exit the courtroom through the double doors, and I believe Officer Wooten is out in the hallway if anyone has any questions or needs instructions on where to report tomorrow, please contact Officer Wooten and he'll give you further instructions.

We'll see you all back here at 12:30. Thank you.

(Proceedings adjourned at 5:04 p.m.)

-oOo-

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.

Julie Potter

JULIE POTTER
TRANSCRIBER

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.

ORIGINAL

FILED IN OPEN COURT
EDWARD A. FRIEDLAND
CLERK OF THE COURT
JAN 29 2009
BY: Denise Husted
DENISE HUSTED, DEPUTY

DISTRICT COURT

CLARK COUNTY, NEVADA

STATE OF NEVADA,

Plaintiff,

vs.

LUIS A. HIDALGO, JR., #1579522

Defendant.

CASE NO. C212667/C241394
DEPT. XXI

LUIS A. HIDALGO, JR.'S TRIAL MEMORANDUM (Redacted)

Comes now LUIS A. HIDALGO, JR., through his attorneys Dominic P. Gentile and Paola M. Armeni of the Gordon Silver law firm, and file with the Court in advance of trial this Trial Memorandum of factual and legal statements, issues and contentions that are likely to arise at the liability phase.

Dated this 27th day of January, 2009.

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.

I. PROCEDURAL HISTORY OF THE CASE

On May 19, 2005, Timothy J. Hadland was shot to death in a remote area of North Shore Road near Lake Mead. Because Palomino Club advertising materials were found at the scene both in Hadland's black leather bag and on the ground near his body, calls and radio communications had taken place between Hadland and a Palomino Club employee just prior to his being found dead, and Hadland had been an employee of the club until a short time prior to his death, law enforcement commenced an investigation which focused on persons associated with the Palomino Club. Late in the evening of May 20, 2005, Deangelo Carroll was interviewed by law enforcement officials investigating the matter. The interview was videotaped. Carroll related several different and inconsistent versions of his knowledge of the events leading to Hadland's death to the investigators. On May 23 and 24, 2005, at the behest of and as instructed by the investigators, Carroll held meetings and discussions with Anabel Espindola and Luis Alonso Hidalgo III while wearing a recording device. All three were arrested on May 24th.

On May 31, 2005, a Criminal Complaint in case number 05FB00521A-D was filed in open court in the Justice Court of Boulder Township, Clark County, Nevada. It named as defendants Kenneth Counts, Luis Alonso Hidalgo III, Anabel Espindola and Deangelo Renshaw Carroll. It named Luis A. Hidalgo, Jr. as an uncharged conspirator. It was later amended to also include Jayson Taoipu as a defendant. A preliminary hearing commenced on June 13, 2005. At its conclusion all defendants except Taoipu, who was not in custody as yet, were bound over to the District Court. [1]

An Information was filed in case #C212667 on June 20, 2005, charging Kenneth

[1] Taoipu's preliminary hearing took place on December 5, 2005. He was also bound over to District Court in C212667.

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

Counts, Luis Alonso Hidalgo III, Anabel Espindola and Deangelo Renshaw Carroll with conspiracy to commit murder and murder with a deadly weapon. It also charged Luis Hidalgo III and Anabel Espindola with two counts of solicitation for murder based upon the events recorded by Carroll on May 23 and 24, 2005. On July 6, 2005, the State of Nevada filed a Notice of Intent to Seek Death Penalty. On August 3, 2008, Luis Alonso Hidalgo III filed a petition for a writ of habeas corpus challenging the probable cause finding in Justice Court, which was denied on October 19, 2005. On December 12, 2005, Luis Alonso Hidalgo III filed a motion to strike the notice of intent to seek death penalty. It was denied on August 31, 2006.

The matter was brought to the attention of the Nevada Supreme Court through an extraordinary writ procedure. That Court originally issued the Writ of Mandamus on December 27, 2007 and struck the notice of intent to seek death penalty as to both Luis Alonso Hidalgo III and Anabel Espindola. It was filed and served upon the District Court on January 8, 2008 and certified to the Supreme Court on January 11, 2008. On January 10, 2008 the State of Nevada filed a Motion to File an Amended Notice of Intent to Seek Death Penalty as to Luis Alonso Hidalgo III and Anabel Espindola. On January 14, 2008 the State of Nevada filed a Petition for Rehearing in the Supreme Court. The next day the District Court conducted hearings on motions for bail filed by both Luis Alonso Hidalgo III and Anabel Espindola and set a bail.

While the Petition for Rehearing was pending before the Supreme Court, on February 4, 2008, Anabel Espindola changed her plea to guilty of voluntary manslaughter with use of a deadly weapon, which was described at her change of plea hearing as a "fictional charge". It carries a maximum sentence of 10 years in the Nevada State Prison system and a fine. A consecutive sentence of up to 10 years is

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

also available for the deadly weapon enhancement. Both sentences could be suspended and probation granted to Ms. Espindola. As part of her agreement with the State of Nevada she will testify at the trial of this case. Part of the obligation of the State of Nevada under the plea agreement is to make no recommendation as to sentencing. Thus, the State cannot oppose a sentence of probation, which is available to the Court as punishment in the case.[2]

On February 21, 2008 the Supreme Court issued an order withdrawing its December 27, 2007 opinion, recalled the writ and ordered a response to the petition. It also stayed, at the State's request, the trial of Luis Alonso Hidalgo III which was to start the next day.

Based upon the information supplied to the prosecution team by Espindola, Luis Alonso Hidalgo Jr. was arrested on charges of conspiracy to commit murder and murder with a deadly weapon on February 6, 2008. A Complaint was filed in Boulder Township Justice Court on February 7, 2008, case #08FB0018X. It charged Luis Alonso Hidalgo Jr. with conspiracy to commit murder and murder with a deadly weapon. A preliminary hearing was demanded pursuant to NRS 171.196 within 15 days of the initial appearance and was scheduled but did not take place. The State of Nevada presented the matter to the Grand Jury and on February 13, 2008 obtained Indictment #C241394 containing the same charges as the Complaint. Arraignment occurred on February 20, 2008. The State filed a Notice of Intent to Seek Death Penalty on March 7, 2008. On April 1, 2008 the Court granted Luis Alonso Hidalgo, Jr.'s motion for bail. Bond was

[2] Christopher Oram, counsel for Espindola, has advised defense counsel that the State has agreed to a sentence of probation and made the Court aware of that position, albeit not on the record. Disclosure of this communication should not be taken by the reader as belief in its truth but is merely offered to the Court and the prosecution out of defense counsel's sense of ethical responsibility and in the exercise of an abundance of caution. See NRPC 3.3(b) & 8.4.

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

posted and Luis Alonso Hidalgo Jr. was released from custody on April 3, 2008.

On January 16, 2009, the State voluntarily withdrew the Amended Notice of Intent to Seek Death Penalty. It also withdrew a motion to disqualify Dominic Gentile from acting as counsel for Luis A. Hidalgo Jr. after both he and his son, Luis A. Hidalgo III, through his counsel, acknowledged on the record that there would not be any conflict of interests in a joint trial on the liability phase. The defendants withdrew their opposition to consolidation at that time. Trial is currently scheduled to commence on January 27, 2009.

II. STATEMENT OF FACTS AND CONTENTIONS

On the 19th day of May, 2005 at approximately 11:45 p.m. Timothy J. Hadland was shot twice in the head from about two feet away and died. Both shots entered his skull, one through his left ear and the other through his left cheek. This homicide occurred in Clark County, Nevada in a remote area on the road leading to Lake Mead. Shortly thereafter, passersby saw Hadland's body lying in a pool of blood on the road. They called 911 and police responded to the scene. A search of the area discovered flyers from the Palomino Club near the body. Police found a Kia SUV at the scene and its motor was still running. The vehicle was registered to Pajit Karlson. It contained a cell phone the digital memory of which showed calls come from and to Deangelo Carroll on the night of the killing. The last call was at 11:27 p.m. The cell phone's ownership was traced to Simone's Auto Body Shop. Police also discovered that Hadland had gone camping with his girlfriend, the owner of the Kia, at Lake Mead. Police found her the next morning still waiting at the campsite. She advised them that when they arrived at the campsite, Hadland received several calls and he left her and drove in her vehicle to meet with Deangelo Carroll and never returned.

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

The Palomino Club is a world renowned adult entertainment establishment in North Las Vegas that has been in operation since 1966. It features nude dancing and serves alcoholic beverages. Deangelo Carroll was working there at that time. He is a convicted felon. Timothy Hadland worked at the Palomino Club in the past but his employment ended a short time prior to his death. Both Carroll and Hadland had worked together as doormen, greeting customers who were dropped off in cabs. Doormen were responsible for writing out tickets to give to the cab drivers who exchanged them at the rear of the building for cash payments from the club for each customer they dropped off. The payment of cab and limousine drivers for delivering passengers to adult entertainment establishments existed throughout the industry and continues to the present.

On the evening of May 20, 2005, the day after the homicide, police found Deangelo Carroll at the Palomino Club and brought him to the police station to question him about what he knew. Carroll gave a lengthy interview but will probably not testify at this trial[3]. The State will use Anabel Espindola, Rontae Zone and perhaps Jayson Taoipu as percipient witnesses and they will testify as to statements which they claim were made by Carroll in their presence. The State will seek to introduce these statements under NRS 51.025-3(e), contending that they were made during the course of and in furtherance of a conspiracy to which Luis A. Hidalgo, Jr. was a member. Both Luis A. Hidalgo Jr. and Luis A. Hidalgo III will contend that they knew nothing of any intention on anyone's part to harm Hadland and first learned of it after Hadland was already killed. Therefore, they could not be members of any conspiracy that had murder or any lesser degree of harm to Hadland as its objective. Any crimes they may

[3] The prosecution team has been steadfast in its maintaining to defense counsel and the Court that it will not use Carroll as a live witness at trial. It reiterated that position in open court on January 26, 2009.

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

have committed were after the fact. Luis A. Hidalgo Jr. will seek an instruction as his theory of defense that he is, at worst, an accessory after the fact.

If the State is successful in persuading the Court of its position and the out of court statements made by Carroll prior to Hadland's death are admitted into evidence, the defense will introduce some of the things Carroll said to the police that are inconsistent with what Zone, Espindola and Taoipu claim that they heard Carroll say[4]. Carroll told the police many different and inconsistent versions of what occurred. For example, even though at one time he claims that the killing of Hadland was a "hit" ordered by Luis A. Hidalgo Jr., later in the same statement to police Carroll is adamant that it was never intended that Hadland was to be killed.

The State will also play a tape recording that Carroll made of two conversations that he had with Espindola and Luis Hidalgo III. This tape recording is perhaps the most dependable evidence of what conversations took place between Espindola and Carroll prior to the death of Hadland, as it is surreptitious and reveals, through what is not said but understood by the participants, the "common ground" that they shared from their prior communications on the subjects being discussed. However, the statements were made after the murder for which Luis A. Hidalgo, Jr. is charged. The objective of the conspiracy had been reached, and therefore the statements on the tape by Espindola and Luis A. Hidalgo III are not admissible against Luis A. Hidalgo, Jr. for the truth of their assertions. They are admissible to discredit Espindola should she testify differently from them at trial.

The prosecution contends that many people were involved and the plan was to

[4] The legal bases for the impeachment of Carroll's declarations are NRS 51.069 and the rights of confrontation, cross-examination, effective assistance of counsel, the right to make a defense and the right to a fair trial, all of which are guaranteed to a criminal defendant by the Nevada and United States Constitutions.

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

kill Hadland, defendants in the case *sub judice* among them. The defense contends that neither defendant knew anything of what Carroll was doing or planning regarding Hadland until afterwards. [redacted] Zone, Taoipu and Carroll, were afraid of being harmed by Counts at the time, and this will come into evidence at the trial.

After the police interview of Carroll they drove him to his home where Rontae Zone was staying with his "baby's momma". Carroll spoke with Zone outside of police presence. Zone was then driven to the homicide offices of LVMPD and questioned. He told police that he and Jayson Taoipu worked for Carroll for a few days prior to these events. Carroll paid each of them $20-$30 per day in cash to help Carroll "promote" the Palomino Club, which includes passing out flyers to cab and limousine drivers and potential customers around Las Vegas. Zone is expected to testify, as he has in the past, that on the morning of the day of the shooting Carroll told him and Jayson Taoipu that "Mr. H" wanted Hadland "dealt with" because Hadland was "running his mouth" or "snitching". Zone told police that to him "dealt with" means "killed". He claims that Carroll said that "Mr. H" would pay them for doing it and that he refused but Jayson Taoipu agreed. At some time on that day, Zone claims that Carroll said that "Little Louie said to bring baseball bats and bags." None were actually brought by them, were not in their possession that day, and they didn't attempt to obtain any. Later that day both Zone and Taoipu were at Deangelo Carroll's house when Carroll said "let's go." Zone

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

will testify that he thought they were going "promoting" so he went along with Carroll and Taoipu.

"Little Louie" is Luis Hidalgo III, an unmarried man in his early 20s and the son of the owner of the Palomino Club, Luis Hidalgo Jr., or "Mr. H" as he is called by many people who know him. At the time, Mr. H also owned Simone's Auto Body shop near McCarran Airport. "Mr. H" was married for many years but going through a divorce. Anabel Espindola, who is often referred to by Carroll as "Miss Anabel", was the general manager of the Palomino Club and of Simone's, in which she also held an ownership interest. Ms. Espindola had an intimate relationship with Mr. H since 1991 and maintained it until these events and for the 33 months after she was arrested and in custody prior to her becoming a prosecution witness. Luis Hidalgo III - "Little Louie" - often stayed overnight in a room at Simone's Auto Body Shop. He worked at the Palomino as a manager and spoke by telephone to Carroll at his home at 7:42 p.m. on May 19th. The prosecution contends this is when the "bats and bags" call happened and that it is evidence indicating that Mr. Hidalgo III helped to plan the murder of Hadland. The defense contends that a "bats and bags" comment was never made by Luis A. Hidalgo III and that based upon testimony of Taoipu, Carroll said the "bats and bags" comment was made by Anabel Espindola.

Zone will further testify that when they left Carroll's house they drove to another house and Carroll told Zone and Taoipu to wait in the van while he went in. A half hour later Carroll emerged from the house with Kenneth Counts, an African American man who was dressed entirely in black. Counts got in the back seat next to Zone and behind Taoipu. The four men drove to Lake Mead. Carroll, Taoipu, Zone and Counts all smoked marijuana on the drive to the lake at some point during which Carroll used his

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

phone and set up a meeting with Hadland. When they arrived at the scene of the killing, a vehicle drove past, flashed its lights, and turned around to meet them. It was Hadland. Carroll left the van and went to the side of the road to urinate. He then returned to the van and Hadland, who had parked his vehicle with the motor running, got out of his SUV and approached the driver's side window where Carroll was sitting. As Hadland did so, Counts eased out of the passenger side minivan door, sneaked around to the front of the van in a crouched position, rose up and shot Hadland twice. Hadland fell to the ground and Counts jumped back into the van and ordered Carroll to drive away, which he did. Carroll drove back to the Palomino Club, located at 1848 Las Vegas Blvd., North, just southwest of Lake Mead Blvd. in North Las Vegas. On the ride back, Kenneth Counts asked Taoipu why he did not also shoot Hadland. Zone claims Taoipu's gun was unloaded but that Taoipu, who never left the van at the scene, told Counts he could not shoot because Deangelo Carroll's head was in the way. Counts threatened to kill anyone in the van who would snitch on him.

Upon arriving at the Palomino, Carroll and Counts went into the Club while Taoipu and Zone waited outside at Carroll's direction. Both of them were underage to enter a liquor serving establishment featuring nude dancing. Later, Counts came out of the Club, got into a taxicab, and left the area. Zone will say that he doesn't recall the color of the cab because "there were so many of them". The taxicab driver will testify that he had been on line at the Palomino Club and that there were at least two other cabs behind him. When he picked him up at the Palomino Club, Counts originally claimed that he had no cash of a denomination less that $100 and went back into the club to get smaller bills. He drove Counts to an area near Counts' home. Some time after Counts left, Carroll exited the Club and drove Zone and Taoipu home in the

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

minivan. The next day Zone and Taoipu went with Carroll in the minivan to a tire store. Carroll got out of the van and cut the tires with a knife as they approached it. Carroll told Zone that he was given money by Anabel Espindola to buy new tires. After changing the tires, Carroll took them and members of his family to IHOP for breakfast and picked up the tab.

After his statement to police Zone was driven back to Carroll's house. Carroll then spoke to Taoipu later in the day outside of the presence of police. Later Carroll drove Taoipu to homicide offices and he spoke with detectives about 6 p.m. on May 21, 2005. Taoipu has testified to a similar version of events except he said that Carroll told him Anabel Espindola was the one who spoke of bringing 'bats and bags". The police charge Taoipu with murder. Zone was not charged with any crime. Taoipu pled guilty to reduced charges and is currently on probation.

Because of statements made by Deangelo Carroll, Rontae Zone, and Jayson Taoipu to police on May 20th and 21st, police turned their attention to the Hidalgos and Espindola. Law enforcement personnel from the Federal Bureau of Investigation and the Las Vegas Metropolitan Police Department had been meeting with Carroll for three days after his statements to police. On May 23rd FBI agents and LVMPD detectives supplied him with a pager that acts as a recording device and instructed him to go to Simone's and obtain evidence against Mr. Hidalgo Jr., Mr. Hidalgo III, and Ms. Espindola. Upon his arrival at Simone's, Deangelo Carroll was directed by Anabel Espindola to go to room 6, in which Little Louie had spent the night. He met with Little Louie and they were joined shortly thereafter by Anabel. You can hear discussions on the tape about the death of Hadland. Anabel Espindola tells Carroll that "what we really wanted was him fuckin' beat up, if anything. We didn't want him fuckin' dead!" Carroll

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

replies "there's nothing we can do to change it now". You can hear Mr. Carroll talking about Zone and Taoipu wanting money or else they might go to the police. He also says that Counts (who is always referred to as "KC" by Carroll) isn't satisfied with the $6000 that he was paid and wants more money. You can hear statements from Luis Hidalgo III telling Deangelo Carroll about poisoning and killing these people through using rat poison in marijuana and in a bottle of Tanqueray gin, which Luis Hidalgo III supplied to Carroll. Little Lou tells Carroll that the people that he brought with him to the killing are Carroll's problem. Carroll tells Luis Hidalgo III, "What are you worried about Lou? You had nothing to do with it." At one point Anabel Espindola leaves the room and comes back with cash that she gives to Carroll to use to pay KC, Zone and Taoipu.

During this first recorded meeting, Anabel Espindola tells Carroll that he will be on leave from the Palomino Club until the heat dies down. Anabel Espindola offers to supply money to Carroll while he is on leave, going to the extreme of leaving money under a seat in a movie theater. Little Lou also tells Carroll that he will help out Carroll's wife and child financially if Carroll is arrested. Anabel Espindola tells Carroll that Mr. H. is "in a panic" and that she has to get him back "on track". She tells Carroll that if something happens to Mr. H she will lose "everything" and won't be able to help Carroll. After the meeting, Carroll leaves Simone's and meets with detectives. He gives the detectives the cash that he received from Anabel Espindola, the bottle of gin and the recording device.

The next day Carroll returns to Simone's again wearing the pager/recorder. In this recording you hear Anabel Espindola telling Carroll that he was told to "talk to the guy, not fucking take care of him like get him out of the fucking way." This time Carroll attempts to challenge that position, saying that he only did what he was asked to do.

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

The prosecution contends these statements regarding killing witnesses were made because Luis Hidalgo III and Espindola were trying to cover their tracks. The defense of Luis Hidalgo III may contend that he made these offers because he was worried about the welfare of his father, Espindola and Deangelo Carroll. Luis Hidalgo III maintains that he did not know about Hadland's death or any discussions, intentions or attempts to contact or harm Hadland until after the killing occurred. However, when he learned that his father and Anabel Espindola were very upset about and afraid of an unknown gangster-gunman on the loose who was trying to get money from them, he overreacted and spoke without thinking. He really was not planning or attempting to have anyone killed. Luis A. Hidalgo Jr. asserts that he knew nothing about the conversations taking place until he learned of them after the arrests of Anabel Espindola and his son. Neither did he direct or have any input into their content.

Luis Hidalgo Jr. - Mr. H. - concedes that he was emotionally upset and in a state of shock because of his learning that violence to Hadland occurred [redacted] Others who saw Carroll when he entered the club at that time and before he saw Luis Hidalgo Jr. will describe him as sweating profusely, hair disheveled and looking as though he had been on a long acid trip. They will also say that Counts, whom they had not seen before, waited for Carroll in the reception area of the club.

[redacted]

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

[redacted]

Luis Hidalgo Jr. had no prior knowledge of any attempt on the part of Carroll to approach Hadland about any contact that he had with cab or limousine drivers He definitely didn't suggest to Carroll that violence should occur to Hadland. He neither hired or fired Hadland and doesn't even know if he was fired or quit. That function was entirely within the authority of Anabel Espindola, the general manager. She had exclusive control over the daily receipts and reports of operations of the Palomino Club. [redacted] Luis Hidalgo Jr. had no concern about Hadland "badmouthing" the club to cab drivers because it didn't matter to cab drivers or the Club. So long as they were paid for bringing passengers to the Palomino they would do so. The Palomino, because of its location, was a larger fare on the meter for the cab drivers and it always paid the drivers $5 more per passenger than any of the clubs closer to the Strip. This will be corroborated by testimony from others in the industry and cab and limo drivers who will testify at trial. It will also be corroborated by the actual financial records of the Palomino Club for the relevant period, all of which

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

were created by Anabel Espindola and found on her computer that was seized by LVMPD. They have been in the State's possession since May 24, 2005. Despite her statements to Carroll on the tape recordings that "there is no more money" to pay KC or the others, approximately $151,000 in cash was found at the club when the search warrants were executed on the day of the arrests. She also had over $3,000 in cash in her possession when she was arrested on that day. Moreover, when asked by homicide detectives to do so, Rontae Zone could not identify the color of the taxicab in which Counts left the Palomino Club because, in his words, "there were so many of them". The cab driver that brought Counts home from the Club on May 20th has testified that there were other cabs in the staging line.

Luis Hidalgo Jr. knew nothing about the meetings on May 23 and 24, 2005 between Carroll, Espindola and Luis Hidalgo III at Simone's [redacted] On May 24th, the day of the second body wire, police arrested Luis Hidalgo III and Anabel Espindola and charged them with First Degree Murder under the theory that they conspired with Carroll and Counts to kill Hadland. They also were charged with 2 counts of Solicitation to Commit Murder for soliciting Deangelo Carroll to kill Rontae Zone and Jayson Taoipu with rat poison. Deangelo Carroll, despite his cooperation with police, was also charged with first degree murder, as was Kenneth Counts and Jayson Taoipu. Counts went to trial and was acquitted of the murder, being found guilty of conspiracy to commit murder. Taoipu pled guilty to a reduced charge and is currently on probation. Zone was never charged.

After her arrest, Anabel Espindola was given the opportunity to speak to officers

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

and chose to remain silent. Mr. H. was not charged. In February, 2008, after being in jail awaiting trial for 33 months, Anabel Espindola entered a plea agreement with the State of Nevada. She pleaded guilty to a "fictional charge" of one count of voluntary manslaughter with use of a deadly weapon for the death of Mr. Hadland. At the time she anticipated being released from custody if she gave a deposition at which she would be cross-examined by defense counsel for the Hidalgos. Although the State requested the Court to order that deposition, it did not. Therefore, the defense presumes that she is still in custody.[5] At the time of her change of plea she was facing a possibility of the death penalty but the prosecution cannot seek the death penalty for manslaughter. The maximum penalty that she faces under the plea agreement is therefore a term of 4 years to ten years plus a fine of $10,000. She can also receive a consecutive sentence in the same amount for the use of a deadly weapon. However, the Court could suspend both sentences and impose probation instead, in which case she will be immediately released from custody. On the record, the State has agreed to make no recommendation and cannot oppose Ms. Espindola being sentenced to probation if the Court sees fit. After her change of plea Ms. Espindola testified at the Grand Jury. An indictment was returned against Luis Hidalgo Jr. charging him with first-degree murder under the theories that he aided and abetted the murder and also conspired with others to commit it. Therefore, but for her testimony, it is safe to say that Luis A. Hidalgo, Jr. would not have been charged.

And so we turn to an analysis of her anticipated testimony at trial. Assuming that she is consistent with what she has said before the Grand Jury and that the summaries

[5] If she was released from custody without providing the deposition, the State should have disclosed it under Brady v. Maryland and Giglio v. United States.

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

of her debriefing by police are accurate and not misleading,[6] Anabel Espindola will testify that late in the afternoon of May 19, 2005, while she was at Simone's Auto Body, she received a call from Deangelo Carroll who told her that Hadland had been badmouthing the Palomino Club to cabdrivers. She will tell you that the club, which is located in North Las Vegas across from Jerry's Nugget and quite a distance from the Strip, is dependent on customers being dropped off by cab and limousine drivers. The club pays the drivers for each customer that they bring to it. She contends that she passed this information on to Mr. Hidalgo Jr. and Mr. Hidalgo III, both of whom were in her presence at the time. She will say that Little Louie - the son - became upset and ridiculed his father, telling Luis A. Hidalgo Jr. that he wouldn't do anything about Hadland and that this is why the Palomino would never make as much money as those clubs run by men named Rizzolo and Galardi.[7] He purportedly said that those other owners of strip clubs in Las Vegas know how to handle business and that one club owner even beat up a customer. She will say that Mr. H got upset at his son and told him to leave the office and that after Little Lou left Mr. H seems to become more upset. Anabel Espindola will tell you that after the argument with Little Lou, Mr. H met privately with Deangelo Carroll at the Palomino later that evening. Carroll then left the club. A couple of hours after Carroll left, while in the private office at the Palomino used by her and Mr. H, Mr. H told her to go into a kitchenette area of the office and call Carroll to

[6] Ms. Espindola is the only percipient witness to these events that was interviewed by the State and LVMPD personnel where a contemporaneous verbatim recording was not made. An application for the notes of the investigators and LVMPD personnel was made by the defense and denied by the Court.

[7] Rick Rizzolo was the owner/operator of the Crazy Horse II at the time. That club was seized by the United States Department of Justice and forfeited as a result of a tax fraud and RICO charge. Part of the basis of the RICO claim was that employees of the club beat a man to death and crippled another person by beating him. Michael Galardi was the owner/operator of Cheetahs, Leopards Lounge and Jaguars. He was indicted and pled guilty to a federal offense that, in simple terms, equates to bribery of public officials. There had never been any allegations of violence used in any Galardi operations.

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

instruct him to return to the club. She claims that Little Lou was not in the office when this is said. She called Carroll and told him to "go to plan B" which was a term commonly used by them to mean return to the Club. However, Carroll said that he was already at the Lake. Espindola claims that later Carroll showed up in Mr. H's office at the Palomino Club. In the office were Carroll, Mr. H, and her. Carroll said "it's done" and Mr. H told her to get $5,000 cash for Mr. Carroll. Carroll was given the money and he left. Espindola says that she then asked Mr. H "what did you do?" He did not respond.

The prosecution contends Espindola account of events is true. The defense contends that Anabel Espindola called Deangelo Carroll, and *vice versa*, many times that evening. This is confirmed by phone records. However, neither Mr. H nor Little Lou were aware of what Carroll was doing and neither had any prior knowledge of any plan to confront or harm Hadland. [redacted] The defense contends that Anabel Espindola made up her version of what happened to minimize her own role, place the blame on the others and to get a lenient sentence that would avoid

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

taking a chance of being convicted and put to death. There will also be evidence that while in custody and before she became a cooperating witness, Anabel Espindola learned that Luis Hidalgo Jr., her lover for fourteen years, had taken up with another woman while she was in jail. Thus, she became vindictive.

Anabel Espindola will say that after Carroll left with the money, Mr. H seemed very upset. After their shift, Anabel Espindola and Luis A. Hidalgo Jr. went to the MGM casino then to her home. She claims that she went to sleep while Luis A. Hidalgo Jr. surfed television news channels. When she awoke the next morning she says that Mr. H was still awake, not having been to sleep. She claims that he was talking to himself saying "he really did it" and "what did I say to him". It was from television news on the morning of May 20, 2005 that Espindola claims that she learned for the first time that Hadland had been killed. She claims that Luis A. Hidalgo then phoned his lawyer, Dominic Gentile, and learned that he was out of town.

On Saturday, May 21, 2005, Mr. Hidalgo Jr. and Anabel Espindola moved to the Silverton Hotel Casino for a few days. That same day they went to meet with a lawyer, Jerome DePalma, who was recommended by Mr. H's lawyer, Dominic Gentile. Also present was an investigator, Donald R. Dibble, who worked for Mr. Gentile. They told Mr. Hidalgo Jr. to not talk with anyone because they may be under surveillance. A note in Mr. H's handwriting was found on a stool in a public area of the auto body store that said "We may be under surveills (sic). Keep your mouth shut." The prosecution contends that this is proof that Mr. H had knowledge of the attack on Hadland prior to its occurrence and something to hide. [redacted]

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

You will hear that the lawyer told both Mr. H and Espindola that Deangelo Carroll may be recording conversations with them, that they should terminate him at once, that they shouldn't meet with him again and shouldn't discuss the matter with anyone except the lawyer. [redacted]

The next day, May 22, 2005, Mr. H met with Dominic Gentile, who flew in to Las Vegas from San Diego for the meeting. Mr. H had a prior relationship with his lawyer from an episode in which the Palomino Club was involved as the victim of an extortion attempt. He was also once sued by a client represented by Mr. Gentile. The same advice was given to him by Mr. Gentile as was done by Mr. DePalma. Espindola did not sit in on the meeting with Mr. Gentile.[8]

The prosecution contends that the move to the Silverton was to avoid detection. [redacted]

What is undisputed between all parties is that neither Luis Hidalgo Jr. nor Luis Hidalgo III was the shooter and neither was present when the murder of Timothy Hadland took place. The State of Nevada's primary evidence against Luis Hidalgo Jr. is

[8] Dominic P. Gentile is trial counsel for Luis A. Hidalgo, Jr. It is not anticipated that he will need to be a witness at trial, for Anabel Espindola has already conceded that she was not involved in the meeting between him and Luis A. Hidalgo, Jr., but instead sat in Mr. Gentile's private office while the meeting took place in the conference room.

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

based on statements of two alleged co-conspirators/accomplices: (1) Deangelo Carroll, who will be heard only through statements of other witnesses reporting what Carroll said to them, and (2) Anabel Espindola, who is an admitted accomplice of Carroll's and claims to have that same relationship with Luis Hidalgo Jr. The same is true as to Luis Hidalgo III, with the addition of his own statements on the surreptitious audio recordings made by Carroll. Carroll has been relentless in his statements to police that it was never intended that Hadland be killed. In one of his accounts of the events he told the police that Counts did it on his own without prior arrangement. Moreover, in the surreptitious tape recording he claims that after smoking marijuana on the way to meet Hadland, Counts "got stupid" and killed him. He has never persisted in the claim that he was hired to kill Hadland, although in one of his versions in his police interrogation - after a twenty minute "quiet period" between questioning - he claimed that it was a "hit" at the request of Mr. H. He later retreated from this position and again contended that Hadland was not to be killed.

III. STATE'S ALTERNATIVE THEORIES OF MOTIVE

A. Greed: Concern Over Impact on Cab Driver Response

The State asserts that the Hidalgos perceived that they were losing thousands of dollars in revenue at the Palomino Club because Timothy Hadland was "badmouthing" it to cab drivers. It will not and cannot prove that Hadland was in fact "badmouthing" the Club at all or that the Club was losing any money because of it. The Defendants will present evidence on both cross-examination of any witness that the State produces on the subject and in the Defense case in chief that the Palomino Club was more profitable in the time frame relevant to the events in this case than it had been in prior years that Luis Hidalgo Jr. owned and Anabel Espindola acted as general manager with daily

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

financial oversight of it. Moreover, the testimony of Kevin Kelly, who was a member and officer of the Nevada Association of Nightclubs, a Gentlemen's Club trade association made up of all such businesses in Clark County, Nevada at the time, will establish that the only factor that keeps cab and limousine drivers in general from bringing customers to such clubs is when the clubs do not pay for the drop offs. Kelly will testify that during the relevant time frame the Palomino Club was always understood by its competitors in the Association to pay $5 more per passenger to cab and limousine drivers and the competitors acquiesced in the practice. His testimony will be corroborated by other club owners who were members of the organization.

B. Greed: Deter Theft by Employees or Revenge on Hadland

Testimony will establish that if any theft was taking place during the period of time that Timothy Hadland was a doorman it would have first been discovered by Anabel Espindola. Espindola was the person responsible for analyzing on a daily basis the operational revenue of the Club. Espindola made the daily accounting reports, had "first count" of the daily proceeds, determined the payroll and handled all financial controls of the club directly. She reported to Luis A. Hidalgo, Jr., who was primarily involved with promotions and talent management. Moreover, during the period of time that Hadland operated as a doorman, so did Deangelo Carroll. Therefore, if theft had been taking place, Carroll would have been as suspected of it as Hadland, which was in fact the case. Testimony will be introduced through percipient witnesses who actually saw both Hadland and Carroll selling free admission passes to the Palomino Club to persons who were dropped off by cabs and limos. Such passes were still in Hadland's possession in the KIA in his black bag when he was found dead,.

It is the theory of defense that Carroll created the "badmouthing" cab drivers

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

scenario out of whole cloth and reported it to Anabel Espindola as a stratagem to make himself appear heroic and deeply concerned about the welfare of the Club and the Hidalgos so as to cast off any suspicions that he was the one who was the thief. Carroll, an ex-felon, had a well paying job with the Hidalgos and did not want to be perceived as being a cohort of Hadland's in the theft. Moreover, because of Hadland's close familiarity with Carroll and lack of fear of him as a result, Carroll needed to employ a genuine tough-guy gang member to frighten Hadland into concern for repercussions if he were to "snitch" on Carroll. Rontae Zone, in his first and subsequent statements about the events of the day of Hadland's killing, said the Carroll told him that Hadland was "snitching".

Additionally, under this theory of deterring theft by "sending a message", it would have been necessary for the Hidalgos to somehow publish that they were responsible for the harm to Hadland. Nothing in evidence will demonstrate any effort on their part to publish the fact of them being responsible. In fact, such conduct is inconsistent with the prosecution's contention that Luis Hidalgo Jr. was being secretive about it and trying to avoid accessibility in the aftermath of the killing. While it is true that Palomino Club flyers were found at the scene, everything indicates it was accidental and unknown to Carroll until the homicide detectives told him about it during their initial interview of him on May 20th.

IV. THE SPECIFIC CHARGES AND THEIR ELEMENTS

A. Count One: Conspiracy to Commit Murder: NRS 200.010, 200.030, 199.480[9]

[9] **199.480. Penalties (Conspiracy)**

1. Except as otherwise provided in subsection 2, whenever two or more persons conspire to commit murder, ... each person is guilty of a category B felony and shall be punished:...

(b) If the conspiracy was to commit murder, by imprisonment in the state prison for a minimum term of not less than 2 years and a maximum term of not more than 10 years, and may be further punished by a fine

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

Since the prosecution controls the charging document, whatever predicaments flow from its decisions are of its own creation. See United States v. Ballentine, 4 F. 3d 504, 508 (7th Cir. 1993). In the instant Indictment, as amended, Count One charges a conspiracy to commit murder and incorporates the acts alleged in Count Two "as though fully set forth herein". Among the allegations in Count Two is the third alternative theory which reads:

> "by conspiring to commit the crime of battery and/or battery resulting in substantial bodily harm and/or battery with a deadly weapon on the person of Timothy Jay Hadland"

Nevada conspiracy law considers the crime of conspiracy a completed act upon the making of an unlawful agreement regardless of whether the object of the conspiracy is effectuated. Nunnery v. Eighth Judicial Dist. Court ex rel. County of Clark, 186 P.3d 886, 888-889 (Nev. 2008). Nevada law defines a conspiracy as "an agreement between two or more persons for an unlawful purpose." A person who knowingly does any act to further the object of a conspiracy, or otherwise participates therein, is criminally liable as a conspirator. Evidence of a coordinated series of acts furthering the underlying offense is sufficient to infer the existence of an agreement and support a conspiracy conviction. However, absent an agreement to cooperate in achieving the purpose of a conspiracy, mere knowledge of, acquiescence in, or approval of that purpose does not make one a party to conspiracy. Bolden v. State, 121 Nev. 908, 912-913,124 P.3d 191,194 (Nev. 2005).

It is fundamental conspiracy law that a criminal agreement is defined by the scope of

---

(continued)

of not more than $5,000....

(g) To accomplish any criminal or unlawful purpose, or accomplish a purpose, not in itself criminal or unlawful, by criminal or unlawful means, each person is guilty of a gross misdemeanor.

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

the commitment of its co-conspirators. Thus, where a defendant is unaware of the overall objective of an alleged conspiracy or lacks any interest in, and therefore any commitment to, that objective, he is not a member of that conspiracy. United States v. Smith, 82 F. 3d 1261, 1269 (3rd Cir 1996). For over a century it has been recognized that while in theory and in law there can be no objection to proving a crime by proof of a conspiracy to commit it, yet in practice that method of establishing the issue is liable to give the prosecution an undue advantage. Where the scope, limits, or purpose of the alleged conspiracy are accurately defined by the pleading in the case, the accused has to meet at the trial a multitude of inculpatory facts claimed to be relevant to the main fact in issue. There is always danger in such cases that the specific charge will be lost sight of and disappear in the mass of collateral facts growing out of other subjects, and that the defendant may be convicted because of other wrongdoing with which he was not charged. See People v. McCain, 9 N.Y. Crim. R 377, 38 N.E. 950 (N.Y. 1894). To guard against this the law recognizes that proof of a conspiracy with an objective different from that charged in the Indictment results in a fatal variance, as it is not the same conspiracy. As the United States Court of Appeals for the Eleventh Circuit held in reversing a conviction due to a fatal variance caused by multiple conspiracies being proven when one was charged in the case of United States v. Chandler, 388 F. 3d 796 (11th Cir. 2004):

> Since no one can be said to have agreed to a conspiracy that they do not know exists, proof of knowledge of the overall scheme is critical to a finding of conspiratorial intent. "Nobody is liable in conspiracy except for the fair import of the concerted purpose or agreement as he understands it." The government, therefore, must prove beyond a reasonable doubt that the conspiracy existed, that the defendant knew about it and that he voluntarily agreed to join it.

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

388 F. 3d at 806. (internal citations omitted; emphasis supplied). See United States v. Varelli, 407 F. 2d 735 (7th Cir. 1969).

Because of the language of incorporation contained in Count One, if the State proves a conspiracy to commit a battery the defendant cannot complain that it is a different conspiracy than the one charged. Although it is pled by incorporation and in the alternative, it is nonetheless alleged and the defense has notice of it. Since battery can be an included offense of murder, Count One must be viewed as charging an included offense of Conspiracy to Commit Battery, sort of an alternative and lesser included object of the conspiratorial agreement. The pleading of multiple and alternative objects of a conspiracy requires the use of a special verdict form, especially when the statutory punishment for the conspiracy and/or the completed objective proven through vicarious liability based upon membership in the conspiracy is objective dependent. See United States v. Neuhausser, 241 F.3d 460 (6th Cir. 2001); United States v. Ballard, 400 F. 3d 404 (6th Cir. 2005) (government must seek the special verdict if it seeks more than least grave sentencing consequence); United States v. Allen, 302 F.3d 1260, 1267-1276 (11th Cir. 2002); United States v. Dennis, 786 F. 2d 1029, 1041 (11th Cir 1986); United States v. Paluch, 2003 WL 22717990 at pg. 8 (9th Cir. 2003); Negrete-Saenz v. United States, 2008 WL 2902067 at pg. 6 (E.D.Cal July 24, 2008). See also United States v. Lucas, 2006 WL 3062490 (S.D. Miss 2006).

The problem that is presented is that it is clear that under Nevada law one who joins a conspiracy to commit battery cannot be held vicariously liable for a murder. This conclusion follows from two Nevada Supreme Court decisions. In Labastida v. State, 115 Nev. 298, 986 P. 2d 443 (NV 1999) our Supreme Court held that "the second degree felony murder rule applies only where the felony is inherently dangerous, where

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

death or injury is a directly foreseeable consequence of the illegal act, and where there is an immediate and direct causal relationship-without the intervention of some other source or agency-between the actions of the defendant and the victim's death. 986 P. 2d at 449. The "second degree felony murder" rule to which the Court alludes flows from a combined reading of the language of NRS 200.070 and NRS 200.030(2). Battery, however, is neither a felony - thereby eliminating a felonious intent - nor "an unlawful act, which, in its consequences, naturally tends to destroy the life of a human being." It follows that if the jury is properly instructed and believes that a conspiratorial agreement was entered into by a defendant in the case *sub judice* the objective of which was to commit a battery on Timothy Jay Hadland, and further that the battery was carried out without an agreement on the part of a defendant in this case that substantial bodily harm result or that a dangerous weapon be used, then it presents the classic case of involuntary manslaughter.

The second Nevada Supreme Court opinion that mandates this result is Bolden v. State, 121 Nev. 908, 124 P. 3d 191, 200-201 (Nev. 2005). There the Court held:

> "[I]n future prosecutions, vicarious coconspirator liability may be properly imposed for general intent crimes only when the crime in question was a "reasonably foreseeable consequence" of the object of the conspiracy. We caution the State that this court will not hesitate to revisit the doctrine's applicability to general intent crimes if it appears that the theory of liability is alleged for crimes too far removed and attenuated from the object of the conspiracy.

Bolden v. State, 121 Nev. at 923, 124 P. 3d at 201.

Since murder in the first degree requires specific intent, the State must show that the defendant who is a co-conspirator and did not actually perform the killing did agree to it and possessed the requisite statutory intent. Bolden v. State, 121 Nev. 908, 124 P.

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

3d 191, 200-201 (Nev. 2005). Moreover, since death is not a reasonably foreseeable consequence of a battery, and battery does not contain a felonious intent component, applying liability for murder to an unintended death flowing from an agreement to commit a battery is exactly what the Supreme Court warned against in Bolden. It is respectfully submitted that a reading of the post-Bolden decisions of Nunnery v. Eighth Judicial Dist. Court ex rel. County of Clark, 186 P.3d 886 (Nev. 2008) and Brooks v. State, 180 P.3d 657 (Nev. 2008) support this conclusion.

And whether it be a battery or a murder that was the object of the conspiracy, it terminates or ends once its aim has been achieved. Goldsmith v. Sheriff of Lyon County, 85 Nev. 295, 306, 454 P. 2d 86 (Nev. 1969) (where murder had collection of insurance proceeds as its objective it continued until they were collected). See Grunewald v. United States, 353 U.S. 391, 77 S. Ct. 963 (1957); See also People v. Zamora, 18 Cal.3d 538, 560, 557 P.2d 75, 90 fn. 20 (Cal. 1976) (cannot join murder conspiracy once murder occurs); People v. Marks, 45 Cal. 3d 1335, 1345, 756 P. 2d 260, 267-268 (Cal. 1988)(cannot be criminally liable under conspiracy theory for a crime committed prior to joining the conspiracy). In the case *sub judice* as in most conspiracy cases, the determination as to when the objective of the conspiracy was accomplished is controlling as to the question of admissibility of co-conspirator statements as admissions of a party as well as vicarious liability for crimes committed in furtherance of the conspiracy. Simply stated, once the objective has been reached the conspiracy is terminated for these purposes. Krulewich v. United States, 336 U.S. 440, 443-444, 69 S.Ct. 716, 718-719 (1949) and Lutwak v. United States, 344 U.S. 604, 617-618, 73 S.Ct. 481, 489-490 (1953).

Here, the death of Hadland put an end to the conspiracy to commit murder. The

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

conversations of May 23rd and 24th were contrived by the State and not in furtherance of any existing conspiracy to commit murder. Carroll was not a conspirator and the request for additional money was also contrived as a stratagem by the State. It was a legal impossibility to engage in a conspiracy with him at that time. "There is neither a true agreement nor a meeting of the minds when an individual 'conspires' to violate the law with only one other person and that person is a government agent." United States v. Escobar de Bright, 742 F.2d 1196, 1199 (9th Cir.1984). An individual must conspire with at least one bona fide co-conspirator to meet the formal requirements of a conspiracy. United States v. Schmidt, 947 F. 2d 362, 367 (9th Cir. 1991). Nor can one conspire with an informant working at the direction of government. Sears v. United States, 343 F. 2d 139 (9th Cir. 1965). Therefore the statements of Luis A. Hidalgo III and Anabel Espindola made on the surreptitious tapes are inadmissible hearsay as to Luis A. Hidalgo Jr. See United States v. Floyd, 555 F 2d 45, 48-49 (2nd Cir. 1977).

B. Count Two: Murder with Use of a Deadly Weapon: NRS 200.010[10], 200.030,[11]

---

[10] **200.010. "Murder" defined**

Murder is the unlawful killing of a human being:

1. With malice aforethought, either express or implied;...

The unlawful killing may be effected by any of the various means by which death may be occasioned.

[11] **200.030. Degrees of murder; penalties**

1. Murder of the first degree is murder which is:

(a) Perpetrated by means of poison, lying in wait or torture, or by any other kind of willful, deliberate and premeditated killing;...

2. Murder of the second degree is all other kinds of murder.

3. The jury before whom any person indicted for murder is tried shall, if they find him guilty thereof, designate by their verdict whether he is guilty of murder of the first or second degree.

4. A person convicted of murder of the first degree is guilty of a category A felony and shall be punished:

(a) By death, only if one or more aggravating circumstances are found and any mitigating circumstance or circumstances which are found do not outweigh the aggravating circumstance or circumstances, unless a court has made a finding pursuant to NRS 174.098 that the defendant is a person with mental retardation

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

193.165[12]

(continued)

and has stricken the notice of intent to seek the death penalty; or

(b) By imprisonment in the state prison:

(1) For life without the possibility of parole;

(2) For life with the possibility of parole, with eligibility for parole beginning when a minimum of 20 years has been served; or

(3) For a definite term of 50 years, with eligibility for parole beginning when a minimum of 20 years has been served.

A determination of whether aggravating circumstances exist is not necessary to fix the penalty at imprisonment for life with or without the possibility of parole.

5. A person convicted of murder of the second degree is guilty of a category A felony and shall be punished by imprisonment in the state prison:

(a) For life with the possibility of parole, with eligibility for parole beginning when a minimum of 10 years has been served; or

(b) For a definite term of 25 years, with eligibility for parole beginning when a minimum of 10 years has been served.

NRS 200.040. "Manslaughter" defined

1. Manslaughter is the unlawful killing of a human being, without malice express or implied, and without any mixture of deliberation.

2. Manslaughter must be voluntary, upon a sudden heat of passion, caused by a provocation apparently sufficient to make the passion irresistible, or involuntary, in the commission of an unlawful act, or a lawful act without due caution or circumspection.

NRS 200.070. "Involuntary manslaughter" defined

1. ... involuntary manslaughter is the killing of a human being, without any intent to do so, in the commission of an unlawful act, or a lawful act which probably might produce such a consequence in an unlawful manner, but where the involuntary killing occurs in the commission of an unlawful act, which, in its consequences, naturally tends to destroy the life of a human being, or is committed in the prosecution of a felonious intent, the offense is murder.

NRS 200.090. Punishment for involuntary manslaughter

A person convicted of involuntary manslaughter is guilty of a category D felony and shall be punished as provided in NRS 193.130.

NRS 193.130. Categories and punishment of felonies

2. Except as otherwise provided by specific statute, for each felony committed on or after July 1, 1995:...

(d) A category D felony is a felony for which a court shall sentence a convicted person to imprisonment in the state prison for a minimum term of not less than 1 year and a maximum term of not more than 4 years. In addition to any other penalty, the court may impose a fine of not more than $5,000, unless a greater fine is authorized or required by statute.

[12] **NRS 193.165. Additional penalty: Use of deadly weapon or tear gas in commission of crime; restriction on probation**

1. Except as otherwise provided in NRS 193.169, any person who uses a firearm or other deadly weapon ... in the commission of a crime shall, in addition to the term of imprisonment prescribed by statute for the crime, be punished by imprisonment in the state prison for a minimum term of not less than 1 year and a

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

Elements of Murder in the First Degree as a Principal

The allegations in Count Two are that the defendants, through different theories of criminal liability, killed Timothy J. Hadland by shooting him in the head twice. To prove it as Murder in the First Degree, the State must prove beyond a reasonable doubt that each defendant acted with the following elements present:

Theory One - Directly or indirectly committing the acts with premeditation and deliberation

The defendant must have acted:

_____ (continued)

maximum term of not more than 20 years. In determining the length of the additional penalty imposed, the court shall consider the following information:

(a) The facts and circumstances of the crime;

(b) The criminal history of the person;

(c) The impact of the crime on any victim;

(d) Any mitigating factors presented by the person; and

(e) Any other relevant information.

The court shall state on the record that it has considered the information described in paragraphs (a) to (e), inclusive, in determining the length of the additional penalty imposed.

2. The sentence prescribed by this section:

(a) Must not exceed the sentence imposed for the crime; and

(b) Runs consecutively with the sentence prescribed by statute for the crime.

3. This section does not create any separate offense but provides an additional penalty for the primary offense, whose imposition is contingent upon the finding of the prescribed fact.

4. The provisions of subsections 1, 2 and 3 do not apply where the use of a firearm, other deadly weapon or tear gas is a necessary element of such crime.

5. The court shall not grant probation to or suspend the sentence of any person who is convicted of using a firearm, other deadly weapon or tear gas in the commission of any of the following crimes:

(a) Murder;...

6. As used in this section, "deadly weapon" means:

(a) Any instrument which, if used in the ordinary manner contemplated by its design and construction, will or is likely to cause substantial bodily harm or death;

(b) Any weapon, device, instrument, material or substance which, under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing substantial bodily harm or death; or

(c) A dangerous or deadly weapon specifically described in NRS 202.255, 202.265, 202.290, 202.320 or 202.350.

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

Willfully and feloniously - Willfulness is the intent to kill. There need be no appreciable space of time between formation of the intent to kill and the act of killing. Byford v. State, 116 Nev. 215, 994 P.2d 700, 714 (Nev. 2000).

Without authority of law - means the absence of justification such as self-defense, necessity, duress, etc.

With premeditation- Premeditation is a design, a determination to kill, distinctly formed in the mind by the time of the killing. Premeditation need not be for a day, an hour, or even a minute. It may be as instantaneous as successive thoughts of the mind. For if the jury believes from the evidence that the act constituting the killing has been preceded by and has been the result of premeditation, no matter how rapidly the act follows the premeditation, it is premeditated. The law does not undertake to measure in units of time the length of the period during which the thought must be pondered before it can ripen into an intent to kill which is truly deliberate and premeditated. The time will vary with different individuals and under varying circumstances. The true test is not the duration of time, but rather the extent of the reflection. A cold, calculated judgment and decision may be arrived at in a short period of time, but a mere unconsidered and rash impulse, even though it includes an intent to kill, is not deliberation and premeditation as will fix an unlawful killing as murder of the first degree. Byford v. State, 116 Nev. 215, 994 P.2d 700, 715 (Nev. 2000).

With deliberation - Deliberation is the process of determining upon a course of action to kill as a result of thought, including weighing the reasons for and against the action and considering the consequences of the action. A deliberate determination may be arrived at in a short period of time. But in all cases the determination must not be formed in passion, or if formed in passion, it must be carried out after there has been time

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

for the passion to subside and deliberation to occur. A mere unconsidered and rash impulse is not deliberate, even though it includes the intent to kill. Byford v. State, 116 Nev. 215, 994 P.2d 700, 715 (Nev. 2000).,

With malice aforethought - The condition of the mind described as malice aforethought may arise, not alone from anger, hatred, revenge or from particular ill will, spite or grudge toward the person killed, but may result from any unjustifiable or unlawful motive or purpose to injure another, which proceeds from a heart fatally bent on mischief or with reckless disregard of consequences and social duty. Guy v. State, 108 Nev. 770, 839 P.2d 578, 582 (Nev. 1992).

The Hidalgo defendants deny that any of these elements are present in the proof as to their conduct. Moreover, Luis A. Hidalgo Jr. asserts as his defense [redacted] made him an accessory after the fact.

Theory Two - Aiding and abetting the commission of the crime of murder with use of a deadly weapon[13]

The defendant must have directly or indirectly been counseling, encouraging, hiring, commanding, inducing or otherwise procuring the actual killer. The language of the charge in the Indictment is controlling as to the scope of what the State must prove,

[13] **NRS 195.020. Principals**

Every person concerned in the commission of a felony, gross misdemeanor or misdemeanor, whether he directly commits the act constituting the offense, or aids or abets in its commission, and whether present or absent; and every person who, directly or indirectly, counsels, encourages, hires, commands, induces or otherwise procures another to commit a felony, gross misdemeanor or misdemeanor is a principal, and shall be proceeded against and punished as such. The fact that the person aided, abetted, counseled, encouraged, hired, commanded, induced or procured, could not or did not entertain a criminal intent shall not be a defense to any person aiding, abetting, counseling, encouraging, hiring, commanding, inducing or procuring him.

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

as it is the only notice that has been provided to the Defendants as to what has been charged. It alleges that Luis A. Hidalgo, Jr. is guilty of:

1) "along with Luis Hidalgo III, procuring Deangelo Carroll to **beat** Hadland",

AND/OR

"along with Luis Hidalgo III procuring Deangelo Carroll to **kill** Hadland"

THEREAFTER

2) "Deangelo Carroll procuring Kenneth Counts to shoot Hadland,"

AND/OR

"Deangelo Carroll procuring Jayson Taoipu to shoot Hadland,"

THEREAFTER

3) "Deangelo Carroll, Kenneth Counts and Jayson Taoipu did drive to the location in the same vehicle"

THEREAFTER

4) "Deangelo Carroll calling Timothy Hadland to the scene"

THEREAFTER

5) "Kenneth Counts shooting Timothy Hadland"

(THEREAFTER)????

6) Luis Hidalgo Jr. paying Deangelo Carroll $5000 or $6000 for the killing of Timothy Jay Hadland.

A person aids and abets the commission of a crime if he aids, promotes, encourages or instigates, by act or advice, the commission of such crime with the intention that the crime be committed. Bolden v. State, 121 Nev. 908, 124 P.3d 191, 195 (Nev. 2005). In order for a person to be held accountable for the specific intent crime of another - such as murder - under an aiding or abetting theory of principal

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

liability, the aider or abettor must have knowingly aided the other person with the intent that the other person commit the charged crime. Sharma v. State, 118 Nev. 648, 56 P.3d 868, 872 (Nev. 2002).

As to this theory of criminal liability both Hidalgo defendants share the same theory of defense. Neither of them had any idea that Carroll was going to contact or confront Hadland, much less harm him, until after the killing was already accomplished. Thus they did not procure Carroll to do so. In addition, Luis A. Hidalgo Jr. was, at worst, an accessory after the fact [redacted] As a matter of law one cannot aid and abet a murder after it has been accomplished. One can only be an accessory after the fact. See United States v. Delpit, 94 F. 3d 1134, 1150-1151 (8th Cir. 1996) and Ex parte Overfield, 39 Nev. 30, 152 P. 568 (Nev. 1915). Moreover, the two are mutually exclusive as a matter of law. See Givens v. State, 273 Ga. 818, 546 S.E. 2d 509, 512 (Ga. 2001) (a person cannot be both party to a crime and an accessory after the fact as under common law and modern practice an accessory after the fact is not an accomplice.) People v. Verlinde, 100 Cal App. 4th 1146, 1158, 123 Cal. Rptr. 2d 322, 331 (Cal App 4th Dist. 2002) citing People v. Sully, 53 Cal 3d 1195, 812 P. 2d 163, 182 (Cal 1991).

Theory Three A - Conspiring to Commit the Crime of Battery[14]

[14] **NRS 200.481. Battery: Definitions; penalties**

1. As used in this section:

(a) "Battery" means any willful and unlawful use of force or violence upon the person of another....

2. Except as otherwise provided in NRS 200.485, a person convicted of a battery, other than a battery committed by an adult upon a child which constitutes child abuse, shall be punished: (a) If the battery is not committed with a deadly weapon, and no substantial bodily harm to the victim results, except under circumstances where a greater penalty is provided in paragraph (d) or in NRS 197.090, for a misdemeanor.

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

Much of this has been covered, *supra.* Nevada law defines a conspiracy as "an agreement between two or more persons for an unlawful purpose." A person who knowingly does any act to further the object of a conspiracy, or otherwise participates therein, is criminally liable as a conspirator. Evidence of a coordinated series of acts furthering the underlying offense is sufficient to infer the existence of an agreement and support a conspiracy conviction. However, absent an agreement to cooperate in achieving the purpose of a conspiracy, mere knowledge of, acquiescence in, or approval of that purpose does not make one a party to conspiracy. Bolden v. State, 121 Nev. 908, 912-913, 124 P.3d 191,194 (Nev. 2005).

On this theory of criminal liability in the case *sub judice* the State cannot obtain a conviction for murder, as battery is a misdemeanor and therefore doesn't have as a component part a felonious intent requirement. If the jury believes beyond a reasonable doubt that either of the defendants agreed with Carroll that Hadland should be "beat" as the charging document avers, then the only legal basis for making them responsible for the death of Hadland would be involuntary manslaughter as that crime is defined by NRS 200.070. Because vicarious coconspirator liability may be properly imposed for general intent crimes only when the crime in question was a "reasonably foreseeable consequence" of the object of the conspiracy. Bolden v. State, 121 Nev. 908, 124 P.3d 191, 201 (Nev. 2005), and because death from a misdemeanor battery does not fit that description, murder cannot occur. See People v. Cox, 23 Cal. 4th 665, 97 Cal. Rptr. 2d 697, 2 P. 3d 1189, 1195-1197 (Cal. 2000).

——————————— (continued)

NRS 199.480. Penalties (Conspiracy)...

3. Whenever two or more persons conspire:...

(g) To accomplish any criminal or unlawful purpose, or to accomplish a purpose, not in itself criminal or unlawful, by criminal or unlawful means, each person is guilty of a gross misdemeanor.

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

The defense will request jury instructions that will guide the jury in determining whether a conspiracy to commit a simple battery was proven beyond a reasonable doubt and also seek a special verdict form so as to insure unanimity on the part of the jury under this multifaceted and outcome determinative aspect of the Indictment.

Theory Three B - Conspiring to Commit the Crime of Battery Resulting in Substantial Bodily Harm[15]

Vicarious coconspirator liability may be properly imposed for general intent crimes only when the crime in question was a "reasonably foreseeable consequence" of the object of the conspiracy. Bolden v. State, 121 Nev. 908, 124 P.3d 191, 201 (Nev. 2005). Battery is a general intent crime. Moreover, although battery that results in substantial bodily harm is punished as a felony it does not require felonious intent. The charging document in the instant case is silent as to whether the alternatively pled conspiracy to "beat" Hadland included as its objective imposing substantial bodily harm.

---

[15] **200.481. Battery: Definitions; penalties**

1. As used in this section:

(a) "Battery" means any willful and unlawful use of force or violence upon the person of another....

2. Except as otherwise provided in NRS 200.485, a person convicted of a battery, other than a battery committed by an adult upon a child which constitutes child abuse, shall be punished:...

(b) If the battery is not committed with a deadly weapon, and substantial bodily harm to the victim results, for a category C felony as provided in NRS 193.130.

NRS 0.060. "Substantial bodily harm" defined

Unless the context otherwise requires, "substantial bodily harm" means:

1. Bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement or protracted loss or impairment of the function of any bodily member or organ; or

2. Prolonged physical pain.

199.480. Penalties ...

3. Whenever two or more persons conspire:...

(g) To accomplish any criminal or unlawful purpose, or to accomplish a purpose, not in itself criminal or unlawful, by criminal or unlawful means, each person is guilty of a gross misdemeanor.

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

This is significant, as under the narrow limits established by the Nevada Supreme Court the "second degree felony murder rule" applies only where the felony is inherently dangerous, where death or injury is a directly foreseeable consequence of the illegal act, and where there is an immediate and direct causal relationship-without the intervention of some other source or agency-between the actions of the defendant and the victim's death. Labastida v. State, 115 Nev. 298, 306-307, 986 P. 2d 443, 448 (Nev. 1999); Sheriff v. Morris, 99 Nev. 109, 118, 659 P. 2d 852, 859 (Nev. 1983).

Theory Three C - Conspiring to Commit the Crime of Battery with Use of a Deadly Weapon[16]

An unarmed defendant, charged as an aider and abettor or co-conspirator, cannot be held criminally responsible for use of a deadly weapon unless he has actual or constructive control over the deadly weapon. An unarmed defendant does not have constructive control over a weapon unless the State proves he had knowledge the armed offender was armed and he had the ability to exercise control over the firearm.

---

[16] **NRS 200.481. Battery: Definitions; penalties**

1. As used in this section:

(a) "Battery" means any willful and unlawful use of force or violence upon the person of another.

2. Except as otherwise provided in NRS 200.485, a person convicted of a battery, other than a battery committed by an adult upon a child which constitutes child abuse, shall be punished: ...

(e) If the battery is committed with the use of a deadly weapon, and:...

(2) Substantial bodily harm to the victim results, for a category B felony by imprisonment in the state prison for a minimum term of not less than 2 years and a maximum term of not more than 15 years, and may be further punished by a fine of not more than $10,000.

NRS 199.480 Penalties (Conspiracy)...

3. Whenever two or more persons conspire:...

(g) To accomplish any criminal or unlawful purpose, or to accomplish a purpose, not in itself criminal or unlawful, by criminal or unlawful means, each person is guilty of a gross misdemeanor.

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

Brooks v. State, 180 P.3d 657, 659 (Nev. 2008) (instruction proffered by Brooks and not given by Court). The proper focus is on the unarmed offender's knowledge of the use of the weapon brandished by another principal. Brooks v. State, 180 P.3d 657, 660 (Nev. 2008). An unarmed offender "uses" a deadly weapon...when the unarmed offender is liable as a principal for the offense that is sought to be enhanced, another principal to the offense is armed with and uses a deadly weapon in the commission of the offense, and the unarmed offender had knowledge of the use of the deadly weapon. Brooks v State, 180 P.3d at 657, 661 (Nev. 2008).

Even assuming that the State adduces evidence that Luis A. Hidalgo Jr. had advanced knowledge and agreed with Carroll that Hadland be "beat" as is articulated in the charging document, there will not be any evidence introduced in this trial to indicate that Luis A. Hidalgo Jr. had any knowledge that a deadly weapon was going to be used in any proposed battery of Hadland. Vicarious coconspirator liability may be properly imposed for general intent crimes only when the crime in question was a "reasonably foreseeable consequence" of the object of the conspiracy. Bolden v. State, 121 Nev. 908, 124 P.3d 191, 201 (Nev. 2005). Since conspiracy is a specific intent offense that requires definition to the agreement, the State must prove beyond a reasonable doubt that the agreement "to beat", at the time that it was made, included knowledge on the part of Luis A. Hidalgo Jr. that a deadly weapon would be used. See Nunnery v. Eighth Judicial Dist. Court ex rel. County of Clark, 186 P.3d 886 (Nev. 2008).

Theory Three D - Conspiring to Commit the Crime of Murder[17]

[17] **199.480. Penalties (Conspiracy)**

1. ... whenever two or more persons conspire to commit murder...

(b) If the conspiracy was to commit murder, by imprisonment in the state prison for a minimum term of not less than 2 years and a maximum term of not more than 10 years, and may be further punished by a fine of not more than $5,000.

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

If the jury finds that Count One as charged has been proven beyond a reasonable doubt then this theory of liability for the murder of Hadland flows from an application of Bolden v. State, 121 Nev. 908, 124 P. 3d 191 (Nev. 2005). The murder, being the objective of the conspiracy in Count One, was certainly a "reasonably foreseeable consequence" of the agreement were it to be carried out. However, absent an agreement to cooperate in achieving the purpose of a conspiracy, mere knowledge of, acquiescence in, or approval of that purpose does not make one a party to conspiracy." Bolden v. State, 121 Nev. 908, 912-913, 124 P.3d 191,194 (Nev. 2005).

Because of the incorporation language employed by Count One, this case will require a special verdict form, as mentioned *ante*.

V. LUIS A. HIDALGO JR.'s THEORIES OF DEFENSE

The defendant Luis Hidalgo Jr. denies having any advanced knowledge that harm was to come to Timothy Jay Hadland. He will acknowledge that a payment of money was made to Carroll by Espindola [redacted] The defense will establish that when Carroll came into the Palomino Club after the killing of Hadland his physical appearance was shocking. It will be described as looking as though he was under the influence of a psychedelic drug. He was disheveled, sweating profusely and horrifying in appearance. [redacted]

(continued)

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

[redacted] an accessory after the fact to whatever crime had been committed by Carroll and Counts. The defense will request that the jury be fully instructed on the difference between an accessory after the fact, an aider and abettor and a co-conspirator.

Accessory After The Fact Defense

Luis A. Hidalgo Jr.'s primary theory of defense to the charges in the Amended Indictment is that the murder of Timothy Jay Hadland was a completed event before he learned that anyone was going to do any harm to Hadland. That being the case, he is not responsible as a principal, aider and abettor or conspirator. [redacted]

In essence it is Luis Hidalgo Jr.'s position that he was not involved in the murder of Hadland, didn't seek it or order it, wasn't desirous of it and made no agreement to pay

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

anyone to accomplish it or any other wrongful or criminal act. His knowledge of anyone seeking to accomplish Hadland's murder and/or any attempt to physically harm Hadland came after it had occurred and [redacted]. [redacted] which makes Luis A. Hidalgo Jr., at worst, an accessory after the fact. See NRS 195.030[18] and 195.040.[19] This defense requires an analysis of timing as to when a person must join a conspiracy or aid and abet another in relationship to when the crime that is the object of the conspiracy or that aided and abetted is complete. See Grunewald v. United States, 353 U.S. 391, 77 S. Ct. 963 (1957)(conspiracy); People v. Zamora, 18 Cal.3d 538, 560, 557 P.2d 75, 90 fn. 20 (Cal. 1976)(conspiracy); People v. Marks, 45 Cal. 3d 1335, 1345, 756 P. 2d 260, 267-268 (Cal. 1988)(conspiracy); United States v. Delpit, 94 F. 3d 1134, 1150-1151 (8th Cir. 1996); Givens v. State, 273 Ga. 818, 546 S.E. 2d 509, 512 (Ga. 2001); People v. Verlinde, 100 Cal App. 4th 1146, 1158, 123 Cal. Rptr. 2d 322, 331 (Cal App 4th Dist. 2002);

Timing of Vicarious Liability for a Completed Offense.

A conspiracy is created and completed under Nevada law at the time the agreement to achieve an illegal objective is entered into. Nevada law defines a conspiracy as 'an agreement between two or more persons for an unlawful purpose.

[18] NRS 195.030: Every person not standing in the relation of husband or wife, brother or sister, parent or grandparent, child or grandchild, to the offender, who:
1. After the commission of a felony harbors, conceals or aids such offender with intent that he may avoid or escape from arrest, trial, conviction or punishment, having knowledge that such offender has committed a felony or is liable to arrest, is an accessory to the felony.

[19] NRS 195.040: 1. An accessory to a felony may be indicted, tried and convicted either in the county where he became an accessory, or where the principal felony was committed, whether the principal offender has or has not been convicted, or is or is not amenable to justice, or has been pardoned or otherwise discharged after conviction. Except where a different punishment is specially provided by law, the accessory is guilty of a category C felony and shall be punished as provided in NRS 193.130.

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

The "unlawful agreement is the essence of the crime of conspiracy" and "conspiracy is committed upon reaching the unlawful agreement." NRS 199.490 provides that an overt act in furtherance of the conspiracy is not required to support a conviction for conspiracy. Thus the elements of conspiracy to commit a violent crime such as murder does not involve the use of violence to another although its objective does. Nunnery v. Eighth Judicial Dist. Court ex rel. County of Clark, 186 P.3d 886, 888 (Nev. 2008). Nevada conspiracy law considers the crime of conspiracy a completed act upon the making of an unlawful agreement regardless of whether the object of the conspiracy is effectuated. Nunnery v. Eighth Judicial Dist. Court ex rel. County of Clark, 186 P.3d 886, 888-889 (Nev. 2008).

However, a person who knowingly does any act to further the object of a conspiracy, or otherwise participates therein, may be held criminally liable as a conspirator because "evidence of a coordinated series of acts furthering the underlying offense is sufficient to infer the existence of an agreement and support a conspiracy conviction." The State must prove beyond a reasonable doubt that someone entered the agreement and joined the conspiracy prior to its objective being attained because "absent an agreement to cooperate in achieving the purpose of a conspiracy, mere knowledge of, acquiescence in, or approval of that purpose does not make one a party to conspiracy." Bolden v. State, 121 Nev. 908, 912-913,124 P.3d 191,194 (Nev. 2005). The statute of limitations for conspiracy commences to run from the time one joins the conspiracy. Thus, once the criminal objective contemplated by the conspiratorial agreement has been achieved or abandoned, it is completed and one cannot join that conspiracy or commit an overt act in furtherance of it. See Grunewald v. United States, 353 U.S. 391, 77 S. Ct. 963 (1957); See also People v. Zamora, 18 Cal.3d 538, 560,

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

557 P.2d 75, 90 fn. 20 (Cal. 1976) (cannot join murder conspiracy once murder occurs); People v. Marks, 45 Cal. 3d 1335, 1345, 756 P. 2d 260, 267-268 (Cal. 1988)(cannot be criminally liable under conspiracy theory for a crime committed prior to joining the conspiracy). In other words, once the crime that was the objective of the conspiracy occurs - here, murder - one can approve of it, even celebrate it, but it is simply too late to agree that it occur. See People v. Brown, 226 Cal. App. 3d 1361, 1368, 277 Cal. Rptr. 309, 313 (Cal. App., 5th Dist. 1991)(The object of a punishable conspiracy is commission of a crime which cannot be brought about, produced, caused, or accomplished if it has already been committed).

A conspirator is one who agrees to the commission of a crime before it occurs whereas one who learns of a crime that has occurred and assists a person to get away with it is an accessory after the fact. See State v. Skipintheday, 717 N.W. 2d 423, 426-427 (Minn. 2006). The accessory after the fact has had no part in causing the crime or assisting in its perpetration but instead interferes with the process of justice after the crime occurs. The same principal holds true as to aiding and abetting a murder. As a matter of law one cannot aid and abet a murder after it has been accomplished. One can be an accessory after the fact. See Ex parte Overfield, 39 Nev. 30, 152 P. 568 (Nev. 1915). Moreover, the two are mutually exclusive as a matter of law. See United States v. Ortega, 44 F.3d 505, 507 (7th Cir. 1995); Givens v. State, 273 Ga. 818, 546 S.E. 2d 509, 512 (Ga. 2001) (a person cannot be both party to a crime and an accessory after the fact as under common law and modern practice an accessory after the fact is not an accomplice.) People v. Verlinde, 100 Cal App. 4th 1146, 1158, 123 Cal. Rptr. 2d 322, 331 (Cal App 4th Dist. 2002) citing People v. Sully, 53 Cal 3d 1195, 812 P. 2d 163, 182 (Cal 1991).

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

Theory of Defense Instruction as to Accessory After the Fact

Whether rooted in the rights to trial by jury and compulsory process, or in the due process clauses, the Constitutions of the United States of America and the State of Nevada guarantee criminal defendants a right to present a defense, and therefore a right to a requested instruction on the defense theory of the case. Mathews v. United States, 485 U.S. 58, 63, 108 S. Ct. 883 (1988). A defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor. A failure to instruct the jury regarding the defendant's theory of the case precludes the jury from considering the defendant's defense to the charges against him. Permitting a defendant to offer a defense is of little value if the jury is not informed that the defense, if it is believed or if it helps create a reasonable doubt that will entitle the defendant to a judgment of acquittal. United States v. Escobar de Bright, 742 F.2d 1196, 1201- 1202 (9th Cir 1984); Vallery v. State, 118 Nev. 357, 372, 46 P. 3d 66, 76-77 (Nev. 2002) (defense has the right to have the jury instructed on its theory of the case as disclosed by the evidence, no matter how weak or incredible that evidence may be); United States v. Durham, 825 F. 2d 716, 719-720 (2nd Cir. 1987) (defendant entitled to jury instruction that the conspiratorial agreement had as its object one different from that in the indictment).

Pertinent to the case *sub judice,* United States v. Brown, 33 F.3d 1002, 1004 (8th Cir. 1994), held that the defendant's right to an instruction on the defense theory was infringed by the trial court's failure to give an accessory after the fact instruction. Since a reasonable jury could find from the defendant's testimony that he was not a principal but was an accessory after the fact, "the accessory after the fact theory function[ed] as a defense." Argument by the defense is no substitute for a correct instruction from the

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

bench. Taylor v. Kentucky, 436 U.S. 478, 488-489, 98 S.Ct.1930 (1978). Indeed, reliance on a particular principle by defense counsel in final argument magnifies, rather than reduces, the prejudice from failure to instruct on that principle. Defense counsel is seen as a biased and motivated advocate. The jury is informed at the threshold that it is the judge of facts and the presiding judge is responsible for the law. The *imprimatur* of the court on any principle of law is the only method by which the jury can find it reliable. United States v. Durham, 825 F. 2d 716, 719-720 (2nd Cir. 1987); See Wright v. United States, (9th Cir. 1964) 339 F.2d 578, 580 (9th Cir. 1964) and United States v. Phillips 217 F.2d 435, 440 (7th Cir. 1954). Luis A. Hidalgo Jr. submits the following instructions to be given by the Court in its charge to the jury:

Proposed Theory of Defense Instruction #1 -- Accessory After the Fact

An accessory after the fact is one who, after the commission of a felony harbors, conceals or aids such offender with intent that he may avoid or escape from arrest, trial, conviction or punishment, having knowledge that such offender has committed a felony or is liable to arrest. One cannot be both an accessory after the fact and an aider and abettor or conspirator for the completed offense.

Luis A. Hidalgo Jr. asserts that he did not join the conspiracy, perform as a principal or aid and abet in any way the murder charged this Indictment. He contends that he learned of it after it occurred [redacted]. Luis A. Hidalgo Jr. is not required to establish that he was an accessory after the fact beyond a reasonable doubt, but if along with all of the evidence in this case it raises in the minds of the jury a reasonable doubt as to whether the defendant was only an accessory after the fact, then, in that event, it would be your sworn duty to return a verdict of not guilty as to Luis A. Hidalgo Jr.

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

See United States v Brown, 33 F.3d 1002, 1004 (8th Cir 1994); Carman v. State, 658 P.2d 131, 135 (Alaska Ct. App. 1983); United States v. Ortega, 44 F.3d 505, 507 (7th Cir. 1995).

Need for Accomplice Corroboration

NRS 175.291 mandates that "a conviction shall not be had on the testimony of an accomplice unless he is corroborated by other evidence which in itself, and without aid of the testimony of the accomplice, tends to connect the defendant with the commission of the offense; and the corroboration shall not be sufficient if it merely shows the commission of the offense or the circumstances thereof." An accomplice is defined as one who is liable to prosecution, for the identical offense charged against the defendant at the trial in the cause in which the testimony of the accomplice is given. In the case *sub judice*, notwithstanding the fact that the State has chosen not to bring charges against Rontae Zone, the evidence will show that he is at least arguably an accomplice of Carroll, Taoipu and Counts. It is well settled that this is a question of fact for the jury. Rowland v. State, 118 Nev. 31, 41, 39 P. 3d 114 (Nev. 2002); Basurto v. State, 86 Nev. 567, 569, 472 P. 2d 339 (Nev. 1970). The State not bringing charges against him was a stratagem designed to avoid the pitfalls of the need for independent corroboration of his testimony linking Luis Hidalgo Jr. to the offense of murder and conspiracy to commit murder through reports by him of statements made by Carroll in his presence.

Without a doubt the other persons who fit the definition of accomplice in this case whose statements will be heard by the jury are Deangelo Carroll and Anabel Espindola. Thus, their testimony must be corroborated independently of each other as the corroborative evidence must tend in some degree to connect the defendant to the commission of the offense charged without the aid of the accomplice's testimony.

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

Corroborative evidence is not sufficient if it requires any of the accomplice's testimony to form the link between the defendant and the crime, or if it tends to connect the defendant with the perpetrators and not the crime. See Glossip v. State, 157 P. 3d 143, 152 (Ok. Cr. App. 2007). The Oklahoma statute mandating corroboration of accomplice testimony (22 O.S. 2001 §742) is identical to Nevada's. It has been interpreted in accordance with its plain meaning that the jury must be instructed that it must set aside the testimony of all accomplices and still be able to find some separate evidence that tends to connect the defendant with the charged offense. Given Nevada's lack of a pattern jury instruction on this subject, this Court should give the Oklahoma Pattern Instruction. OUJI-CR (2d) 9-32 (as modified for this case).

Proposed Defense Instruction -- Accomplice Testimony

> An accomplice is defined as one who is liable to prosecution, for the identical offense charged against the defendant at the trial in the cause in which the testimony of the accomplice is given. Nevada law prohibits a conviction to be had on the testimony of an accomplice unless he is corroborated by other evidence which in itself, and without aid of the testimony of the accomplice, tends to connect the defendant with the commission of the offense. The corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof. In determining the question as to whether or not the testimony of accomplices has been corroborated, you must be able to eliminate all accomplice testimony entirely and then examine all of the remaining testimony, evidence, facts, and circumstances, and ascertain from such examination whether there is any evidence tending to show the

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

commission of the offense charged and tending to connect the defendant with the offense. If there is, then the testimony of the accomplice is corroborated."

VI. ANTICIPATED EVIDENTIARY ISSUES

A. Admissibility of Out of Court Declarations of Deangelo Carroll

Deangelo Carroll's out of court statements fall into three categories: (1) those that will be reported by Rontae Zone and Jayson Taoipu as having been made in their presence on May 19, 2005 prior to the murder; (2) those that will be reported by Anabel Espindola as having been made to her on the telephone on May 19, 2005 prior to the murder; (3) those that will be reported by Zone and Taoipu as having been made in their presence after the murder; (4) those that will be reported by Anabel Espindola as having been made in the presence of her and Luis A. Hidalgo, Jr. after the murder; (5) and those contained on the tape recordings made on May 23 and 24, 2005, at the behest of law enforcement. The latter, along with the police interrogation of Carroll on May 20, 2005, are clearly a violation of Luis A. Hidalgo Jr.'s right to confront witnesses as guaranteed by the Constitutions of the State of Nevada and United States of America as they were clearly testimonial when made and not in furtherance of any conspiracy, charged or otherwise, in which Luis A. Hidalgo Jr. was involved. According to NRS 51.035(3)(e), an out-of-court statement of a co-conspirator made during the course and in furtherance of the conspiracy is admissible as non-hearsay against another co-conspirator. The Nevada Supreme Court has recognized that Federal Rules of Evidence 801(d)(2)(E) is analogous to NRS 51.035(3)(e) and has used federal decisions to interpret our statute. Pursuant to this statute, it is necessary that the co-conspirator who uttered the statement be a member of the conspiracy at the time the

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

statement was made and that there be slight evidence to link the defendant to the conspiracy, even if he joined it afterwards. McDowell v. State, 103 Nev. 527, 529-530, 746 P.2d 149, 150 (Nev. 1987). Carroll was clearly not a co-conspirator with Luis A. Hidalgo, Jr. on either of the last two occasions.

Moreover, Crawford v. Washington, 541 U.S. 36, 68, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) holds that the Confrontation Clause bars the use of a testimonial statement made by a witness who is unavailable for trial unless the defendant had an opportunity to previously cross-examine the witness regarding the witness's statement. In Crawford, the United States Supreme Court did not define "testimonial" for purposes of the Confrontation Clause analysis, but it did give examples of what would qualify as testimonial. The Court listed "affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially" as the "core class" of testimonial statements. Medina v. State, 122 Nev. 346, 143 P.3d 471, 476 (Nev. 2006). See City of Las Vegas v. Walsh, 121 Nev. 899, 124 P. 3d 203 (Nev. 2005); Flores v. State, 121 Nev. 706, 120 P.3d 1170 (Nev. 2005). It isn't even arguable that these statements were not "testimonial" under that definition. They should not come into evidence in the State's case in chief against Luis A. Hidalgo Jr.

B. Admissibility of Deangelo Carroll's Videotaped Interview for Impeachment

Turning the focus to the anticipated testimony Zone and Taoipu, they have historically reported to police and under oath at preliminary hearings and trials statements that they contend were made by Carroll regarding involvement of Luis A. Hidalgo, Jr. in the plan to beat and/or kill Hadland. Espindola will likewise report statements made to her on the telephone by Carroll when Luis A. Hidalgo Jr. was not a

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

participant. Should the court allow this testimony into the record, Luis A. Hidalgo Jr. has a right to impeach Carroll's veracity notwithstanding the apparent exclusion from the definition of hearsay of co-conspirators statements by NRS 51.035(3)(e). It is respectfully submitted that the language of NRS 51.069, if read to exclude the opportunity to impeach a statement admitted under NRS 51.035(3)(e) would render the statutory scheme unconstitutional under a confrontation clause analysis. See Douglas v. Alabama, 380 U.S. 415, 418 (1968). See United States v. Barrett, 8 F.3d 1296, 1299 (8th Cir. 1993) (finding that the trial court violated the Confrontation Clause by preventing the defendant from using a child-declarant's statements from a competency hearing to impeach hearsay testimony); United States v. Moody, 903 F.2d 321, 329 (5th Cir. 1990) (finding that the trial court violated the defendant's Confrontation Clause rights by preventing the defendant from calling a character witness to impeach an absent declarant); Smith v. Fairman, 862 F.2d 630, 637-38 (7th Cir. 1988) (finding that the trial court violated the defendant's Confrontation Clause rights by refusing to admit the prior inconsistent statement of the hearsay declarant.

In addition to proof of his prior felony conviction, opinion and reputation for truthfulness, his drug use on the day of the declarations, his bias and interest in assistance from law enforcement in staying out of jail, Luis A. Hidalgo Jr. may offer into evidence the entire videotape recording of the May 20, 2005 interview by police of Deangelo Carroll. This tape is replete with statements inconsistent with what Zone and Taoipu report Carroll said to them on May 19, 2005 that the State will introduce through them at trial. While this tape can be excerpted to introduce only inconsistent statements, defense counsel concedes that it would then be permissible for the State to offer those aspects that are consistent with what Zone and Taoipu remember at trial.

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

Therefore, if the defense introduces the tape recording into evidence it will play it in its entirety. See United States v. Wali, 860 F. 2d 588 (3rd Cir. 1989); United States v. Moody, 903 F. 3d 321 (5th Cir. 1990); United States v. Grant, 256 F. 3d 1146, 1152-1156 (11th Cir. 2001); State v. King, 183 W. Va. 440, 396 S.E. 2d 402, 404-410 (W.Va. 1990); People v. Martin, 2004 WL 605440 at pp. 7-8 (Cal App, 1st Dist. 2004); People v. White, 2003 WL 22093893 (Cal. App. 3d Dist 2003).

C. Admissibility of Jayson Taoipu's Prior Sworn Testimony As Contradiction

On January 26, 2009, the State disclosed on the record that it has not been able to serve Taoipu with a subpoena. Therefore, it is anticipated that the State will not call Jayson Taoipu as a witness in its case in chief. The defense has likewise failed to succeed in doing so despite its best efforts. It is further anticipated that Rontae Zone will testify, as he has in the past, that on May 19, 2005, Deangelo Carroll told him that Luis A. Hidalgo III said that Carroll should "bring a baseball bat and bags" to the Club that night. Taoipu testified at the Kenneth Counts trial that Carroll said that it was Anabel Espindola who said this to Carroll. The problem is self evident. How to get before the jury the observation made by Taoipu while under oath at the Counts trial that contradicts Zone's live testimony at the trial of this case. The answer is supplied by NRS 51.325 which reads:

> Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of another proceeding, is not inadmissible under the hearsay rule if:
>
> 1. The declarant is unavailable as a witness; and
>
> 2. If the proceeding was different, the party against whom the former testimony is offered was a party or is in privity with one of the former

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

parties and the issues are substantially the same.

Given that this fact goes right to the heart of who is responsible for the harm that was to come to Hadland and who had knowledge of it before it occurred, it is a central and crucial issue in the case, not in any manner collateral. See Abbott v. State, 122 Nev. 715, 138 P. 3d 462, 476 (Nev. 2006). Moreover, the concept of impeachment by contradiction is not covered in either the Federal Rules of Evidence nor in the Nevada Revised Statutes and is governed by principles of common law. See United States v. Cruz-Rodriguez, 541 F. 3d 19, 29 fn.4 (1st Cir. 2008). Where, as in the case *sub judice*, the witness, were he available, could be called to testify about the fact independently of its being contradictory because it is relevant in its own right, there is no issue as to it being collateral and it is admissible. See United States v. Scott, 243 F. 3d 1103, 1108 (8th Cir 2001). See also 3 Christopher B. Mueller & Laird C. Kirkpatrick, Federal Evidence § 6:85 (3d ed.2007) (explaining impeachment by contradiction). Thus the operation of NRS 51.325 and NRS 48.015 make Taoipu's sworn testimony from the Counts trial admissible on this point.

Dated this 27th day of January, 2009.

Respectfully submitted,

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.

CERTIFICATE OF SERVICE

The undersigned, an employee of Gordon Silver, hereby certifies that on the 27 day of January, 2009, she served a copy of the DEFENDANT LUIS A. HIDALGO, JR.'S TRIAL MEMORANDUM, 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
Deputy District Attorney
Regional Justice Center
200 Lewis Avenue
Las Vegas, NV 89155
Fax: (702) 477-2922

Giancarlo Pesci
Deputy 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