

IN THE SUPREME COURT OF THE STATE OF NEVADA

LUIS A, HIDALGO, JR.

Appellant,

vs.

THE STATE OF NEVADA

Respondent.

Electronically Filed
Feb 02 2011 01:35 p.m.
Tracie K. Lindeman
CASE NO.: 54209

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

APPELLANT'S APPENDIX

Volume 24 of 25

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

ATTORNEYS FOR THE APPELLANT LUIS A. HIDALGO, JR.

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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.

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ORIGINAL

FILED IN OPEN COURT
EDWARD A. FRIEDLAND
CLERK OF THE COURT

FEB 12 2009

DISTRICT COURT

BY: Denise Husted

DENISE HUSTED, DEPUTY

CLARK COUNTY, NEVADA

STATE OF NEVADA

Plaintiff(s),

-vs-

Luis Alonso Hidalgo III
Luis Hidalgo Jr.

Defendant(s).

CASE NO. C212667
C241394

DEPT. NO. XXI

PROPOSED VERDICT FORMS NOT USED

Attached hereto are the proposed verdict forms, which were offered in the above-entitled action, but not submitted to the Jury.

DATED: This 12th day of February, 2009.

Edward A Friedland, Clerk of the Court

By: Denise Husted

Denise Husted, Deputy Clerk

ORIGINAL

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.

ARRASCADA & ARRASCADA, LTD.
JOHN L. ARRASCADA
Nevada Bar No. 4517
151 Ryland St.
Reno, Nevada 89503
(775) 329-1118
(775) 329-1253 (facsimile)

CHRISTOPHER W. ADAMS, P.C.
CHRISTOPHER W. ADAMS
1800 Peachtree Street, NW, Suite 300
Atlanta, Georgia 30309
(404) 350-3234
Attorneys for Defendant LUIS A. HIDALGO III

DISTRICT COURT
CLARK COUNTY, NEVADA

STATE OF NEVADA,

Plaintiff,

vs.

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

Defendant.

CASE NO. C212667/C241394
DEPT. XXI

**DEFENDANTS LUIS A. HIDALGO III
AND LUIS A. HIDALGO JR.'S
PROPOSED JURY INSTRUCTIONS**

Comes now LUIS A. HIDALGO, JR., through his attorneys Dominic P. Gentile, Esq. and Paola M. Armeni, Esq. of the law firm of Gordon Silver, and LUIS A. HIDALGO III, through his attorneys, John L. Arrascada, Esq. of the law firm of Arrascada and Arrascada, Ltd. and Christopher W. Adams of the law firm of Christopher W. Adams, P.C. and hereby files with the

1 Court defendants proposed jury instructions.

2 Dated this 11th day of February, 2009.

3 GORDON SILVER

4 

5 DOMINIC P. GENTILE

6 Nevada Bar No. 1923

7 PAOLA M. ARMENI

8 Nevada Bar No. 8357

9 3960 Howard Hughes Pkwy., 9th Floor

10 Las Vegas, Nevada 89169

11 (702) 796-5555

12 Attorneys for Defendant LUIS HIDALGO, JR.

13 ARRASCADA & ARRASCADA, LTD.

14 CHRISTOPHER W. ADAMS, P.C.

15  for

16 JOHN L. ARRASCADA

17 Nevada Bar No. 4517

18 151 Ryland St.

19 Reno, Nevada 89503

20 (775) 329-1118

21 (775) 329-1253 (facsimile)

22 CHRISTOPHER W. ADAMS

23 1800 Peachtree Street, NW, Suite 300

24 Atlanta, Georgia 30309

25 (404) 350-3234

26 Attorneys for Defendant LUIS HIDALGO III

If one or more of the jurors are unclear or confused as to the meaning of any word or phrase used in these instructions, you should submit a question in writing to the bailiff. The bailiff will then consult with the judge and counsel for the parties and further guidance will be provided to you.

If in these instructions, any rule, direction or idea is repeated or stated in varying ways, no emphasis thereon is intended by me and none may be inferred by you. For that reason, you are not to single out any certain sentence or any individual point or instruction and ignore the others, but you are to consider all the instructions as a whole and regard each in the light of all the others.

INSTRUCTION NO. _____

If, during this trial, I have said or done anything which has suggested to you that I am inclined to favor the position of either party, you will not be influenced by any such suggestion.

I have not expressed, nor intended to express, nor have I intended to intimate, any opinion as to which witnesses are or are not worthy of belief, what facts are or are not established, or what inference should be drawn from the evidence. If any expression of mine has seemed to indicate an opinion relating to any of these matters, I instruct you to disregard it.

INSTRUCTION NO. _____

An Information and Indictment are a formal method of accusing a defendant of a crime. It is not evidence of any kind against the accused, and does not create any presumption or permit any inference of guilt.

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The penalty provided by law for the offense charged is not to be considered by the jury in arriving at a verdict.

There are two types of evidence which the jury may consider in this case. One is direct evidence, such as the testimony of an eyewitness. The other is circumstantial evidence, the proof of a chain of circumstances pointing to the existence or non-existence of another circumstance.

The law makes no distinction between direct and circumstantial evidence, but requires that before convicting a defendant, the jury be satisfied of the defendant's guilt beyond a reasonable doubt from all the evidence in the case.

INSTRUCTION NO. _____

Nothing that counsel says during the trial is evidence in the case.

The evidence in a case consists of the testimony of the witnesses and all physical
or documentary evidence which has been admitted.

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INSTRUCTION NO. _____

It is the duty of attorneys on each side of a case to object when the other side offers testimony or other evidence which counsel believes is not admissible.

When the court has sustained an objection to a question, the jury is to disregard the question and may draw no inference from the wording of it or speculate as to what the witness would have said if permitted to answer.

INSTRUCTION NO. _____

Good character, when considered in connection with the other evidence in the case, may generate a reasonable doubt sufficient to justify you in acquitting the defendant

Beddow v. State, 93 Nev. 619, 572 P.2d 526 (Nev. 1977).

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2 You are the sole judges of the credibility of the witnesses who have testified in
3 this case, which means that you must decide which witnesses are to be believed and how
4 much weight, if any, is to be given to the testimony of each witness.

5 In determining the credibility of a witness, you may consider anything which tends
6 in reason to prove or disprove the truthfulness of his testimony, such as: his or her
7 conduct, attitude and manner while testifying; whether the facts testified to by him or her
8 are inherently believe able or unbelievable; his or her ability and opportunity to hear or
9 see that about which he or she testified; his or her memory; his or her ability to relate
10 such matters, whether or not there was any bias, interest or other motive for him or her
11 not to tell the truth; any statement previously made by him or her that was consistent with
12 his or her testimony or, conversely, any statement previously made by him or her that
13 was inconsistent with his or her testimony; any admission by him or her that he or she
14 did not tell the truth; and the reasonableness of his or her testimony considered in light of
15 all the evidence in the case.

16 Also, in considering a discrepancy in a witness's testimony, you should consider
17 whether such discrepancy concerns an important fact or only a trivial detail. If the jury
18 believes that any witness has willfully sworn falsely, they may disregard the whole of the
19 evidence of any such witness.
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INSTRUCTION NO. _____

Although you are to consider only the evidence in the case in reaching a verdict, you must bring to the consideration of the evidence your everyday common sense and judgment as reasonable men and women. Thus, you are not limited solely to what you see and hear as the witnesses testify. You may draw reasonable inferences which you feel are justified by the evidence, keeping in mind that such inferences should not be based on speculation or guess.

A verdict may never be influenced by sympathy, passion, prejudice, or public opinion. Your decision should be the product of sincere judgment and sound discretion in accordance with these rules of law.

INSTRUCTION NO. _____

Every person charged with the commission of a crime shall be presumed innocent unless the contrary is proved by competent evidence beyond a reasonable doubt. The burden rests upon the prosecution to establish every element of the crime with which the defendant is charged beyond a reasonable doubt.

INSTRUCTION NO. _____

In every crime there must exist a union or joint operation of act and intent.

The burden is always upon the prosecution to prove both act and intent beyond a reasonable doubt.

INSTRUCTION NO. _____

A reasonable doubt is one based on reason. It is not mere possible doubt, but is such a doubt as would govern or control a person in the more weighty affairs of life. If the minds of the jurors, after the entire comparison and consideration of all the evidence, are in such a condition that they can say they feel an abiding conviction of the truth of the charge, there is not a reasonable doubt. Doubt to be reasonable, must be actual, not mere possibility or speculation.

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2 Intent may be proved by circumstantial evidence. It rarely can be established by
3 any other means. While witnesses may see and hear and thus be able to give direct
4 evidence of what a defendant does or fails to do, there can be no eyewitness account of a
5 state of mind with which the acts were done or omitted, but what a defendant does or fails
6 to do may indicate intent or lack of intent to commit the offense charged.

7 In determining the issue as to intent, the jury is entitled to consider any statements
8 made and acts done or omitted by the accused, and all facts and circumstances in
9 evidence which may aid determination of state of mind.
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INSTRUCTION NO. _____

It is your duty as jurors to consult with one another and to deliberate, with a view of reaching an agreement, if you can do so without violence to your individual judgment. You each must decide the case for yourself, but should do so only after a consideration of the case with your fellow jurors, and you should not hesitate to change an opinion when convinced that it is erroneous. However, you should not be influenced to vote in any way on any question submitted to you by the single fact that a majority of the jurors, or any of them, favor such a decision. In other words, you should not surrender your honest convictions concerning the effect or weight of evidence for the mere purpose of returning a verdict or solely because of the opinion of the other jurors.

INSTRUCTION NO. ____

A person who knowingly does any act to further the object of a conspiracy or otherwise participates therein is criminally liable as a conspirator.

Bolden v. State, 121 Nev. 908, 912-913 (2005).

01371-001/664706.doc

INSTRUCTION NO. _____

A coordinated series of acts furthering the underlying offense is sufficient to infer an existence of an agreement and participation in a conspiracy.

Bolden v. State, 121 Nev. 908, 912-913 (2005).

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In order to be a conspirator one must enter into a specific agreement to cooperate and achieve the purpose of the conspiracy.

Mere knowledge of , acquiesce in or approval of the conspiracy does not make one guilty of the crime of conspiracy.

Bolden v. State, 121 Nev. 908, 912-913 (2005).

INSTRUCTION NO. ____

The State of Nevada must prove beyond a reasonable doubt that the conspiracy existed, that the defendant knew about it and that he voluntarily agreed to join.

United States v. Chandler, 388 F.3d 796 (11th Cir. 2004).

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INSTRUCTION NO. ____

A conspiracy terminates when the object of the conspiracy is completed.

Goldsmith v. Sheriff, 85 Nev. 295, 306 (1969).

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INSTRUCTION NO. _____

Once the object of the conspiracy has been reached the conspiracy is terminated.

Krulewich v. United States, 336 U.S. 440, 443-44(1949).

INSTRUCTION NO. _____

A person can not join a conspiracy after the object of the conspiracy has occurred.
One who assists in the concealment of a conspiracy after the conspiracies objective has
been achieved is an accessory after the fact.

INSTRUCTION NO. _____

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A conspiracy begins when two or more persons enter into an unlawful agreement. A conspiracy continues beyond the accomplishment of its objective. However, a person cannot become a member of a conspiracy after the object of the conspiracy has been accomplished. If a person was not a member of the conspiracy before its objective was accomplished but assists the conspirators afterwards, he is an accessory after the fact.

INSTRUCTION NO. ____

A person who knowingly does any act to further the object of the 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 to a conspiracy. Mere knowledge of, acquiescence in, or approval of that purpose does not make on a party to a conspiracy.

INSTRUCTION NO. ____

A person is not liable in conspiracy except for the fair import of the concerted purpose or agreement as he understands it. The State must prove beyond a reasonable doubt that the conspiracy existed, that the defendant knew about the conspiracy and that he voluntarily agreed to join it.

INSTRUCTION NO. ____

A person aids or 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, 912-913 (2005).

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INSTRUCTION NO. ____

Under an aiding and abetting theory of principal liability, the aider or abettor must have knowingly aided the other person with the intent that the other person commits the charged crime.

Sharma v. State, 118 Nev. 648 (2002).

01371-001/664706.doc

INSTRUCTION NO. ____

As a matter of law one cannot aid and abet a murder after it has been accomplished.

U.S. v. Delpit, 94 F.3d 1134 (8th Cir. 1986).

Ex Parte Overfield, 39 Nev. 30 (1915).

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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.

Brooks v. State, 180 P.3d 657, 659 (Nev. 2008).

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

7 Luis A. Hidalgo Jr. asserts that he did not join the conspiracy, perform as a
8 principal or aid and abet in any way the murder charged this indictment. He contends
9 that he learned of it after it occurred and paid money to Deangelo Carroll to have the
10 killer leave the area and avoid arrest. Luis A. Hidalgo Jr. is not required to establish that
11 he was an accessory after the fact beyond a reasonable doubt, but if along with all of the
12 evidence in this case it raises in the minds of the jury a reasonable doubt as to whether the
13 defendant was only an accessory after the fact, then, in that event, it would be your sworn
14 duty to return a verdict of not guilty as to Luis A. Hidalgo Jr.

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27 Vallery v. State, 118 Nev. 357, 372, 46 P. 3d 66, 76-77 (Nev. 2002)
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In this case the Defendants are accused in an Information or Indictment alleging the charge of first degree murder. Murder in the First Degree is a specific intent crime. The Defendants can not be liable under conspiracy and/or aiding and abetting theory for First Degree Murder for acts committed by a co-conspirator, unless, Defendants had a premeditated and deliberate specific intent to kill.

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2 An accomplice is defined as one who is liable to prosecution, for the identical
3 offense charged against the defendant at the trial in the cause in which the testimony of
4 the accomplice is given. Nevada law prohibits a conviction to be had on the testimony of
5 an accomplice unless she or he is corroborated by other evidence which in itself, and
6 without aid of the testimony of the accomplice, tends to connect the defendant with the
7 commission of the offense.
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10 The corroboration is not sufficient if it merely shows the commission of the
11 offense or the circumstances thereof. In determining the question as to whether or not the
12 testimony of accomplices has been corroborated, you must first assume the testimony of
13 the accomplice has been removed from the case entirely and then examine all of the
14 remaining testimony, evidence, facts, and circumstances, and ascertain from such
15 examination whether there is any evidence tending to show the commission of the
16 offense charged and tending to connect the defendant with the offense. If there is not
17 such independent evidence which tends to connect the defendant with the commission of
18 the offense, the testimony of the accomplice is not corroborated.
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2 In deciding whether to believe testimony given by an accomplice, you should use
3 greater care and caution than you do when deciding whether to believe testimony given
4 by an ordinary witness. Because an accomplice is also subject to prosecution for the same
5 offense, an accomplice's testimony may be strongly influenced by the hope or expectation
6 that the prosecution will reward testimony that supports the prosecution's case by
7 granting the accomplice immunity or leniency. For this reason, you should view with
8 distrust accomplice testimony that supports the prosecution's case. Whether or not the
9 accomplice testimony supports the prosecution's case, you should bear in mind the
10 accomplice's interest in minimizing the seriousness of the crime and the significance of
11 the accomplice's own role in its commission, the fact that the accomplice's participation
12 in the crime may show the accomplice to be an untrustworthy person, and an
13 accomplice's particular ability, because of inside knowledge about the details of the
14 crime, to construct plausible falsehoods about it. In giving you this warning about
15 accomplice testimony, I do not mean to suggest that you must or should disbelieve the
16 accomplice testimony that you heard at this trial. Rather, you should give the accomplice
17 testimony whatever weight you decide it deserves after considering all the evidence in the
18 case.
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27 Riley v. State, 110 Nev. 638, 878 P.2d 272 (Nev.,1994.)
28

INSTRUCTION NO. _____

Solicitation to commit murder requires the asking of another to commit murder,
with the specific intent that a first degree murder be committed.

INSTRUCTION NO. _____

Solicitation to commit murder requires the asking of another to commit murder,
with the specific intent that the crime be committed.

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INSTRUCTION NO. _____

A person who conspires to commit Battery is guilty of Conspiracy to Commit Battery.

INSTRUCTION NO. _____

A person who conspires to commit Battery With a Deadly Weapon is guilty of
Conspiracy to Commit Battery with a Deadly Weapon.

INSTRUCTION NO. _____

A person who conspires to commit Battery Resulting In Substantial Bodily Harm
is guilty of Conspiracy to Commit Battery Resulting in Substantial Bodily Harm.

INSTRUCTION NO. _____

A Battery means any willful and unlawful use of force or violence upon the person of another.

INSTRUCTION NO. _____

A Battery With a Deadly Weapon means any willful and unlawful use of force or violence upon the person of another with the use of a deadly weapon.

INSTRUCTION NO. _____

A Battery which results in substantial bodily harm means any willful and unlawful use of force or violence upon the person of another where (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.

INSTRUCTION NO. _____

A battery without use of a deadly weapon or substantial bodily harm is not 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.

If you believe that the State had the ability to produce stronger and more satisfactory evidence than that which was offered on any material point, you should distrust any weaker and less satisfactory evidence offered by it.

If it is peculiarly within the power of either the prosecution or the defense to produce a witness who could give material testimony on an issue in the case, failure to call that witness may give rise to an inference that his testimony would be unfavorable to that party. The jury should always keep in mind that the law never imposes on a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

United States v. Anders, 602 F.2d 823 (8th Cir.1979)

Entrapment is an affirmative defense to the crime of Solicitation to commit murder. The elements of entrapment are:

1. An opportunity to commit a crime presented by a State actor and,
2. No predisposition by the Defendant to commit the act.

On May 23 and 24, 2005 as a matter of law Deangelo Carroll was a State actor.

Predisposition can be determined by

1. The defendant's character
2. Who first suggested the criminal activity
3. Whether the defendant engaged in the activity for profit
4. Whether the defendant demonstrated reluctance and
5. The nature of the State's inducement

It is the State's burden to prove beyond a reasonable doubt that defendant was predisposed to commit the act. If you find that the Defendant was entrapped you must find him Not Guilty of Solicitation to Commit murder.

COPY
DISTRICT COURT
CLARK COUNTY, NEVADA

FILED
NOV 24 2009

Ann D. Sullivan
CLERK OF COURT

STATE OF NEVADA,)	
)	
Plaintiff,)	CASE NO: C212667/C241394
)	DEPT NO: XXI
vs.)	
)	
LUIS ALONSO HIDALGO, aka)	
LUIS ALONSO HIDALGO, III, and)	Transcript of
LUIS ALONSO HIDALGO, JR.,)	Proceedings
)	
Defendants.)	
)	

BEFORE THE HONORABLE VALERIE P. ADAIR, DISTRICT COURT JUDGE

JURY TRIAL - DAY 14
VERDICT

MONDAY, FEBRUARY 17, 2009

APPEARANCES:

FOR THE STATE:	MARC DiGIACOMO, ESQ. Chief Deputy District Attorney GIANCARLO PESCI, ESQ. Deputy District Attorney
FOR LUIS ALONSO HIDALGO, JR.:	DOMINIC P. GENTILE, ESQ. PAOLA M. ARMENI, ESQ.
FOR LUIS ALONSO HIDALGO, III:	JOHN L. ARRASCADA, ESQ. CHRISTOPHER ADAMS, ESQ.

RECORDED BY: JANIE OLSEN, COURT RECORDER
TRANSCRIBED BY: KARReporting and Transcription Services

KARReporting & Transcription Services

04437

1 LAS VEGAS, NEVADA, MONDAY, FEBRUARY 17, 2009, 3:03 P.M.

2 P R O C E E D I N G S

3 (Outside the presence of the jury.)

4 THE COURT: All right. Is everyone here? Are we
5 all ready?

6 All right. You can go ahead and bring the jury in.

7 THE MARSHAL: The jury is entering.

8 THE COURT: All right. Everyone can be seated.
9 Court is now back in session. The record will reflect the
10 presence of the defendant, Mr. Hidalgo Jr., along with his
11 attorneys, Ms. Armeni and Mr. Gentile; the presence of the
12 defendant, Mr. Hidalgo, III, along with his attorneys
13 Mr. Adams and Mr. Arrascada; the presence of the State through
14 the Deputy District Attorneys, Mr. DiGiacomo and Mr. Pesci;
15 the officers of the Court and the members of the jury.

16 Who's the foreperson of the jury? All right. Juror
17 No. 10, Mr. Wallace, has the jury reach a verdict in this
18 case?

19 JUROR NO. 10: We have.

20 THE COURT: All right. Will you please hand the
21 forms of verdict to our bailiff.

22 All right. The clerk will now read the verdict out
23 loud and inquire if this is the verdict of the jury.

24 THE CLERK: Yes, Your Honor.

25 The State of Nevada, plaintiff, versus Luis Hidalgo,

KARReporting & Transcription Services

1 III, defendant. Case No. C212667, Department No. XXI.

2 Verdict.

3 We, the jury in the above-entitled case, find the
4 defendant Luis Hidalgo, III, as follows:

5 Count 1, conspiracy to commit murder. Guilty of
6 conspiracy to commit a battery with a deadly weapon or battery
7 resulting in substantial bodily harm.

8 Count 2, murder with use of a deadly weapon. Guilty
9 of second-degree murder with use of a deadly weapon.

10 Count 3, solicitation to commit murder. Guilty of
11 solicitation to commit murder.

12 Count 4, solicitation to commit murder. Guilty of
13 solicitation to commit murder.

14 Dated the 17th day of February 2009, juror,
15 foreperson.

16 The State of Nevada, plaintiff, versus Luis Hidalgo
17 Jr, defendant. Case No. C241394, Department XXI. Verdict.

18 We, the jury in the above-entitled case, find the
19 defendant Luis Hidalgo Jr. as follows:

20 Count 1, conspiracy to commit murder. Guilty of
21 conspiracy to commit a battery with a deadly weapon or battery
22 resulting in substantial bodily harm.

23 Count 2, murder with use of a deadly weapon. Guilty
24 of second-degree murder with use of a deadly weapon.

25 Dated this 17th day of February 2009, juror,

KARReporting & Transcription Services

1 foreperson.

2 Ladies and gentlemen of the jury, is this your
3 verdict as read, so say you one, so say you all?

4 (Jurors responded in the affirmative)

5 THE COURT: All right. Before the verdicts are
6 recorded in the minutes of the Court, does either side desire
7 to have the jury polled?

8 MR. GENTILE: Your Honor, we do.

9 MR. ARRASCADA: Yes, Your Honor.

10 THE COURT: All right. Ms. Husted.

11 THE CLERK: Juror No. 1, is this your verdict as
12 read?

13 JUROR NO. 1: Yes.

14 THE CLERK: No. 2, is this your verdict as read?

15 JUROR NO. 2: Yes.

16 THE CLERK: No. 3, is this your verdict as read?

17 JUROR NO. 3: Yes.

18 THE CLERK: No. 4, is this your verdict as read?

19 JUROR NO. 4: Yes.

20 THE CLERK: No. 5, is this your verdict as read?

21 JUROR NO. 5: Yes.

22 THE CLERK: No. 6, is this your verdict as read?

23 JUROR NO. 6: Yes.

24 THE CLERK: No. 7, is this your verdict as read?

25 THE COURT: Seven was an alternate. It's now No. 8.

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1 THE CLERK: That's right. I meant to say eight.
2 No. 8, is this your verdict as read?
3 JUROR NO. 8: Yes.
4 THE CLERK: No. 9, is this your verdict as read?
5 JUROR NO. 9: Yes.
6 THE CLERK: No. 10, is this your verdict as read?
7 JUROR NO. 10: Yes.
8 THE CLERK: No. 12, is this your verdict as read?
9 JUROR NO. 12: Yes?
10 THE CLERK: No. 13, is this your verdict as read?
11 JUROR NO. 13: Yes.
12 THE CLERK: And No. 14, is this your verdict as
13 read?
14 JUROR NO. 14: Yes.
15 THE CLERK: Thank you.
16 THE COURT: All right. The Court will now record
17 the verdicts in the minutes of the court.
18 Ladies and gentlemen, this concludes your service as
19 jurors. The prohibition on speaking about the case is now
20 lifted. You're free to speak about the case with each other
21 or anyone else you choose.
22 The attorneys often like to speak with members of
23 the jury to get your feedback and comments. If these
24 attorneys wish to speak with you and you're willing to speak
25 with them, that's fine. Obviously, if you don't wish to speak

1 with them, that -- they'll respect that as well.

2 I want to thank you for your service as jurors.
3 This was obviously a much longer trial than what had been
4 initially promised to you. I was very impressed,
5 notwithstanding that, with your attentiveness as evidenced by
6 the many questions throughout the course to have trial.

7 I want to thank you for your willingness to serve
8 and your attentiveness and participation. In a moment I'm
9 going to have our bailiff escort you back into the jury room,
10 and we will call down and make arrangements to make sure your
11 vouchers are available.

12 So take them through the back.

13 THE MARSHAL: Yes, ma'am.

14 THE COURT: All right.

15 (Jury recessed at 3:09 p.m.)

16 THE COURT: All right. The matter's referred to the
17 Department of Parole and Probation for presentence
18 investigation.

19 MR. DIGIACOMO: May we be heard as to Mr. Hidalgo,
20 Judge -- Jr.

21 THE COURT: Are you seeking remand?

22 MR. DIGIACOMO: I am, Judge. He's facing now 20 to
23 life, and he has substantial assets, Judge. At this point we
24 ask for him to be remanded, as well as Luis Hidalgo, III, to
25 be remanded. I know that he has bail set, but I'd ask that he

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1 be remanded without bail at this time.

2 MR. GENTILE: Your Honor, there's nothing about this
3 man to indicate that he's going to flee. He's been here a
4 long time.

5 THE COURT: I feel like based on the conviction I
6 have to remand him today. So he is remanded, held without
7 bond. Mr. Hidalgo, III, will also be held without bond,
8 pending sentencing. And your sentencing date is. . .

9 THE CLERK: May 5th and May 30th.

10 THE COURT: If anyone would like -- of the lawyers
11 would like to speak to the jury, typically our bailiff escorts
12 them to the third floor for them to pick up their vouchers, so
13 if you want to go down to the third floor, you'd be able to
14 speak with them down there.

15 MR. GENTILE: Thank you.

16 MR. DIGIACOMO: Thank you, Judge.

17 THE MARSHAL: Court is adjourned.

18 (Court adjourned at 3:10 p.m.)

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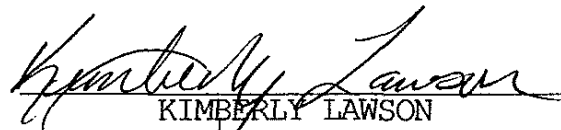
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ATTEST: I hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.


KIMBERLY LAWSON
TRANSCRIBER

1 INST

2 ORIGINAL

FILED IN OPEN COURT
EDWARD A. FRIEDLAND
CLERK OF THE COURT

3 FEB 17 2009

4 BY: Denise Husted
5 DENISE HUSTED, DEPUTY

6 DISTRICT COURT
CLARK COUNTY, NEVADA

7
8 THE STATE OF NEVADA,

9 Plaintiff,

CASE NO: C212667/C241394

10 -vs-

DEPT NO: XXI

11 LUIS HIDALGO, III, and
12 LUIS HIDALGO, JR,

Defendant.

13 INSTRUCTIONS TO THE JURY (INSTRUCTION NO. 1)

14 MEMBERS OF THE JURY:

15 It is now my duty as judge to instruct you in the law that applies to this case. It is
16 your duty as jurors to follow these instructions and to apply the rules of law to the facts as
17 you find them from the evidence.

18 You must not be concerned with the wisdom of any rule of law stated in these
19 instructions. Regardless of any opinion you may have as to what the law ought to be, it
20 would be a violation of your oath to base a verdict upon any other view of the law than that
21 given in the instructions of the Court.
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INSTRUCTION NO. 2

If, in these instructions, any rule, direction or idea is repeated or stated in different ways, no emphasis thereon is intended by me and none may be inferred by you. For that reason, you are not to single out any certain sentence or any individual point or instruction and ignore the others, but you are to consider all the instructions as a whole and regard each in the light of all the others.

The order in which the instructions are given has no significance as to their relative importance.

A Fourth Amended Information is but a formal method of accusing a person of a crime and is not of itself any evidence of his guilt and does not create any presumption or permit any inference of guilt.

In this case, it is charged in a Fourth Amended Information that on or between the 19th day and the 24th day of May, 2005, the Defendant, LUIS HIDALGO, III, having committed the crimes of CONSPIRACY TO COMMIT MURDER (Felony - NRS 200.010, 200.030, 193.165); MURDER WITH USE OF A DEADLY WEAPON (Felony - NRS 200.010, 200.030, 193.165), and SOLICITATION TO COMMIT MURDER (Felony - NRS 199.500), within the County of Clark, State of Nevada, contrary to the form, force and effect of statutes in such cases made and provided, and against the peace and dignity of the State of Nevada,

COUNT 1 - CONSPIRACY TO COMMIT MURDER

Defendant LUIS ALONSO HIDALGO, III, along with co-conspirators KENNETH JAY COUNTS, ANABEL ESPINDOLA, DEANGELO RESHAWN CARROLL and JAYSON TAOIPU did, on or about May 19, 2005, then and there meet with each other and/or Luis Hildago, Jr. and between themselves, and each of them with the other, wilfully, unlawfully, and feloniously conspire and agree to commit a crime, to-wit: the murder of TIMOTHY JAY HADLAND, and in furtherance of said conspiracy, the Defendants and/or their co-conspirators, did commit the act as set forth in Count 2, said acts being incorporated by this reference as though fully set forth herein.

COUNT 2 - MURDER WITH USE OF A DEADLY WEAPON

Defendant LUIS ALONSO HIDALGO, III, along with co-conspirators KENNETH JAY COUNTS, ANABEL ESPINDOLA, DEANGELO RESHAWN CARROLL and JAYSON TAOIPU did, on or about May 19, 2005, then and there wilfully, feloniously, without authority of law, and with premeditation and deliberation, and with malice aforethought, kill TIMOTHY JAY HADLAND, a human being, by shooting at and into the body and/or head of said TIMOTHY JAY HADLAND, with a deadly weapon, to-wit: a

1 firearm, the Defendant being liable under one or more of the following theories of criminal
2 liability, to-wit: (1) by aiding and abetting the commission of the crime by, directly or
3 indirectly, counseling, encouraging, hiring, commanding, inducing or otherwise procuring
4 each other to commit the crime, to-wit: by DEFENDANT Luis Hidalgo, III and/or Luis
5 Hidalgo, Jr., procuring Defendant DEANGELO CARROLL to beat and/or kill TIMOTHY
6 JAY HADLAND; thereafter, Defendant DEANGELO CARROLL procuring KENNETH
7 COUNTS and/or JAYSON TAOIPU to shoot TIMOTHY HADLAND; thereafter, Defendant
8 DEANGELO CARROLL and KENNETH COUNTS and JAYSON TAOIPU did drive to the
9 location in the same vehicle; thereafter, Defendant DEANGELO CARROLL calling victim
10 TIMOTHY JAY HADLAND to the scene; thereafter, by KENNETH COUNTS shooting
11 TIMOTHY JAY HADLAND; and/or (2) by conspiring to commit the crime of battery
12 and/or battery with use of a deadly weapon and/or battery resulting in substantial bodily
13 harm and/or to kill TIMOTHY JAY HADLAND whereby each and every co-conspirator is
14 responsible for not only the specific crime intended, but also for the natural and foreseeable
15 general intent crimes of each and every co-conspirator during the course and in furtherance
16 of the conspiracy.

17 COUNT 3 - SOLICITATION TO COMMIT MURDER

18 Defendant LUIS ALONSO HIDALGO, III did, on or between May 23, 2005, and
19 May 24, 2005, then and there willfully, unlawfully, and feloniously counsel, hire, command
20 or other solicit another, to-wit: DEANGELO CARROLL, to commit the murder of
21 JAYSON TAOIPU; the defendant being liable under one or more theories of criminal
22 liability, to-wit: (1) by directly or indirectly committing the acts constituting the offense;
23 and/or (2) by aiding and abetting the commission of the crime by, directly or indirectly,
24 counseling, encouraging, hiring, commanding, inducing or otherwise procuring ANABEL
25 ESPINDOLA to commit the crime.

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COUNT 4 – SOLICITATION TO COMMIT MURDER

Defendant LUIS ALONSO HIDALGO, III did, on or between May 23, 2005, and May 24, 2005, then and there willfully, unlawfully, and feloniously counsel, hire, command or other solicit another to-wit: DEANGELO CARROLL, to commit the murder of RONTAE ZONE; the defendant being liable under one or more theories of criminal liability, to-wit: (1) by directly or indirectly committing the acts constituting the offense; and/or (2) by aiding and abetting the commission of the crime by, directly or indirectly, counseling, encouraging, hiring, commanding, inducing or otherwise procuring ANABEL ESPINDOLA to commit the crime.

It is the duty of the jury to apply the rules of law contained in these instructions to the facts of the case and determine whether or not the Defendant is guilty of one or more of the offenses charged.

An Amended Indictment is but a formal method of accusing a person of a crime and is not of itself any evidence of his guilt and does not create any presumption or permit any inference of guilt.

In this case, it is charged in an Amended Indictment that on or about the 19th day of May, 2005, the Defendant, LUIS HIDALGO, JR., having committed the crimes of CONSPIRACY TO COMMIT MURDER (Felony - NRS 200.010, 200.030, 199.480); and MURDER WITH USE OF A DEADLY WEAPON (Felony - NRS 200.010, 200.030, 193.165), committed at and within the County of Clark, State of Nevada, as follows:

COUNT 1 - CONSPIRACY TO COMMIT MURDER

did, on or about May 19, 2005, then and there, meet with Deangelo Carroll and/or Luis Hidalgo, III and/or Anabel Espindola and/or Kenneth Counts and/or Jayson Taoipu and between themselves, and each of them with the other, wilfully, unlawfully, and feloniously conspire and agree to commit a crime, to-wit: murder, and in furtherance of said conspiracy, Defendant and/or his co-conspirators, did commit the acts as set forth in Count 2, said acts being incorporated by this reference as though fully set forth herein.

COUNT 2 - MURDER WITH USE OF A DEADLY WEAPON

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

1 shoot TIMOTHY HADLAND; thereafter, DEANGELO CARROLL and KENNETH
2 COUNTS and JAYSON TAOIPU did drive to the location in the same vehicle; thereafter,
3 DEANGELO CARROLL calling victim TIMOTHY JAY HADLAND to the scene;
4 thereafter, by KENNETH COUNTS shooting TIMOTHY JAY HADLAND; defendant
5 paying \$5000.00 or \$6000.00 to DEANGELO CARROLL for the killing of TIMOTHY JAY
6 HADLAND; and/or (3) by conspiring to commit the crime of battery and/or battery resulting
7 in substantial bodily harm and/or battery with use of a deadly weapon on the person of
8 TIMOTHY JAY HADLAND whereby each and every co-conspirator is responsible for the
9 reasonably foreseeable general intent crimes of each and every co-conspirator during the
10 course and in furtherance of the conspiracy and/or (4) by conspiring to commit the crime of
11 murder of TIMOTHY JAY HADLAND whereby each and every co-conspirator is
12 responsible for the specific intent crime contemplated by the conspiracy.

13 It is the duty of the jury to apply the rules of law contained in these instructions to the
14 facts of the case and determine whether or not the Defendant is guilty of one or more of the
15 offenses charged.
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INSTRUCTION NO. 5

In this case the Defendants are accused in an Information or Indictment alleging an open charge of murder. This charge includes and encompasses murder of the first degree, murder of the second degree and involuntary manslaughter.

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INSTRUCTION NO. 6

Murder is the unlawful killing of a human being, 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.

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INSTRUCTION NO. 7

Malice aforethought means the intentional doing of a wrongful act without legal cause or excuse or what the law considers adequate provocation. The condition of mind described as malice aforethought may arise, from anger, hatred, revenge, or from particular ill will, spite or grudge toward the person killed. It may also arise from any unjustifiable or unlawful motive or purpose to injure another, proceeding from a heart fatally bent on mischief or with reckless disregard of consequences and social duty. Malice aforethought does not imply deliberation or the lapse of any considerable time between the malicious intention to injure another and the actual execution of the intent but denotes an unlawful purpose and design as opposed to accident and mischance.

INSTRUCTION NO. 8

Express malice is that deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof.

Malice may be implied when no considerable provocation appears, or when all the circumstances of the killing show an abandoned and malignant heart.

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2 Murder of the first degree is murder which is perpetrated by means of any kind of
3 willful, deliberate, and premeditated killing. All three elements--willfulness, deliberation,
4 and premeditation--must be proven beyond a reasonable doubt before an accused can be
5 convicted of first-degree murder.

6 Willfulness is the intent to kill. There need be no appreciable space of time between
7 formation of the intent to kill and the act of killing.

8 Deliberation is the process of determining upon a course of action to kill as a result of
9 thought, including weighing the reasons for and against the action and considering the
10 consequences of the action.

11 A deliberate determination may be arrived at in a short period of time. But in all cases
12 the determination must not be formed in passion, or if formed in passion, it must be carried
13 out after there has been time for the passion to subside and deliberation to occur. A mere
14 unconsidered and rash impulse is not deliberate, even though it includes the intent to kill.

15 Premeditation is a design, a determination to kill, distinctly formed in the mind by the
16 time of the killing.

17 Premeditation need not be for a day, an hour, or even a minute. It may be as
18 instantaneous as successive thoughts of the mind. For if the jury believes from the evidence
19 that the act constituting the killing has been preceded by and has been the result of
20 premeditation, no matter how rapidly the act follows the premeditation, it is premeditated.

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INSTRUCTION NO. 10

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.

Murder which is immediately preceded by lying in wait is murder of the first degree.

The term "lying in wait" is defined as a waiting and watching for an opportune time to act, together with a concealment by ambush or some other secret design to take the other person by surprise. The lying in wait need not continue for any particular period of time provided that its duration is such as to show a state of mind equivalent to premeditation or deliberation.

To constitute murder by means of lying in wait there must be, in addition to the aforesaid conduct by the defendant, an intentional infliction upon the person killed of bodily harm involving a high degree of probability that it will result in death and which shows a wanton disregard for human life.

INSTRUCTION NO. 12

Although your verdict must be unanimous as to the charge, you do not have to agree on the principle of guilt or theory of liability. Therefore, even if you cannot agree on whether the facts establish premeditated and deliberate murder, or lying in wait, or liability as a principle, an aider and abettor or as a co-conspirator, so long as all of you agree that the evidence establishes Defendant's guilt of murder in the first degree, your verdict shall be Murder of the First Degree.

All murder which is not Murder of the First Degree is Murder of the Second Degree.

Murder of the Second Degree is:

1. Murder with malice aforethought, but without the admixture of premeditation and deliberation, or
2. An involuntary killing which occurs in the commission of an unlawful act, which, in its consequences, naturally tends to destroy the life of a human being; or
3. An involuntary killing which is committed in the prosecution of a felonious intent.

INSTRUCTION NO. 14

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.

Battery Resulting In Substantial Bodily Harm and Battery With Use of a Deadly Weapon are felonies. A Battery is a misdemeanor.

INSTRUCTION NO. 15

A conspiracy is an agreement between two or more persons for an unlawful purpose. To be guilty of conspiracy, a defendant must intend to commit, or to aid in the commission of, the specific crime agreed to. The crime is the agreement to do something unlawful; it does not matter whether it was successful or not.

A person who knowingly does any act to further the object of a conspiracy, or otherwise participates therein, is criminally liable as a conspirator. However, mere knowledge or approval of, or acquiescence in, the object and purpose of a conspiracy without an agreement to cooperate in achieving such object or purpose does not make one a party to conspiracy. Conspiracy is seldom susceptible of direct proof and is usually established by inference from the conduct of the parties. In particular, a conspiracy may be supported by a coordinated series of acts, in furtherance of the underlying offense, sufficient to infer the existence of an agreement.

A conspiracy begins when two or more persons enter into agreement for an unlawful purpose. A conspiracy to commit a crime does not end upon the completion of the crime. The conspiracy continues until the co-conspirators have successfully gotten away and concealed the crime. However, a person cannot become a member of a conspiracy after the object of the conspiracy has been accomplished. If a person was not a member of the conspiracy before its objective was accomplished but assists the conspirators afterwards, he is an accessory after the fact, not a co-conspirator.

INSTRUCTION NO. 110

Once a person joins a conspiracy, that person remains a member until he withdraws from it. A person can withdraw from a conspiracy by taking some positive action which disavowed or defeated the purpose of the conspiracy. It is not enough if the evidence shows that the defendant merely ceased his own activities in furtherance of the conspiracy.

The state has the burden of proving beyond a reasonable doubt the defendant did not withdraw from the conspiracy.

INSTRUCTION NO. 17

It is not necessary in proving a conspiracy to show a meeting of the alleged conspirators or the making of an express or formal agreement. The formation and existence of a conspiracy may be inferred from all circumstances tending to show the common intent and may be proved in the same way as any other fact may be proved, either by direct testimony of the fact or by circumstantial evidence, or by both direct and circumstantial evidence.

Each member of a criminal conspiracy is liable for each act and bound by each declaration of every other member of the conspiracy if the act or the declaration is in furtherance of the object of the conspiracy.

The act of one conspirator pursuant to or in furtherance of the common design of the conspiracy is the act of all conspirators. Every conspirator is legally responsible for a specific intent crime of a co-conspirator so long as the specific intent crime was intended by the Defendant. A conspirator is also legally responsible for a general intent crime that follows as one of the probable and natural consequence of the object of the conspiracy even if it was not intended as part of the original plan and even if he was not present at the time of the commission of such act.

Specific intent is the intent to accomplish the precise act which the law prohibits. A general intent crime is one that does not require specific intent.

Murder in the First Degree is a specific intent crime. A Defendant can not be liable under conspiracy and/or aiding and abetting theory for First Degree Murder for acts committed by a co-conspirator, unless, Defendant also had a premeditated and deliberate specific intent to kill.

Murder in the Second Degree may be a general intent crime. As such, Defendant may be may liable under conspiracy theory or aiding and abetting theory for Murder of the Second Degree for acts committed by a co-conspirator if the killing is one of the reasonably foreseeable probable and natural consequences of the object of the conspiracy or the aiding and abetting.

Where two or more persons are accused of committing a crime together, their guilt may be established without proof that each personally did every act constituting the offense charged.

All persons concerned in the commission of a crime who either directly and actively commit the act constituting the offense or who knowingly and with criminal intent aid and abet in its commission or, whether present or not, who advise and encourage its commission, with the intent that the crime be committed, are regarded by the law as principals in the crime thus committed and are equally guilty thereof.

A person aids and abets the commission of a crime if he knowingly and with criminal intent aids, promotes, encourages or instigates by act or advice, or by act and advice, the commission of such crime with the intention that the crime be committed.

The State is not required to prove precisely which defendant actually committed the crime and which defendant aided and abetted.

INSTRUCTION NO. 21

As a matter of law, one cannot aid and abet a murder after it has been accomplished.

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Where several parties join together in a common design to commit any lawful act, each is criminally responsible for the reasonably foreseeable general intent crimes committed in furtherance of the common design. In contemplation of law, as it relates to general intent crimes, the act of one is the act of all. Battery, Battery Resulting In Substantial Bodily Harm and Battery With A Deadly Weapon are general intent crimes. Second Degree Murder can be a general intent crime.

Additionally, a co-conspirator is guilty of the offenses he specifically intended to be committed. First Degree Murder is a specific intent crime.

You are instructed that if you find that the State has established that the defendant has committed conspiracy to commit murder you shall select conspiracy to commit murder as your verdict. You may find the defendant guilty of conspiracy to commit a Battery With a Deadly Weapon and/or Battery Resulting in Substantial Bodily Harm if:

1. You have not found, beyond a reasonable doubt, that the defendant is guilty of conspiracy to commit murder, and

2. All twelve of you are convinced beyond a reasonable doubt the defendant is guilty of the crime of conspiracy to commit a Battery With a Deadly Weapon and/or Battery Resulting in Substantial Bodily Harm.

If you are convinced beyond a reasonable doubt that the crime of conspiracy has been committed by the defendant, but you have a reasonable doubt whether such conspiracy was to commit murder or battery with a deadly weapon, or battery resulting in substantial bodily harm, you must give the defendant the benefit of that doubt and return a verdict of conspiracy to commit a Battery With a Deadly Weapon and/or Battery Resulting in Substantial Bodily Harm.

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2 You are instructed that if you find that the State has established that the defendant has
3 committed conspiracy to commit Battery With a Deadly Weapon and/or Battery Resulting in
4 Substantial Bodily Harm you shall select conspiracy to commit Battery With a Deadly
5 Weapon and/or Battery Resulting in Substantial Bodily Harm as your verdict. You may find
6 the defendant guilty of conspiracy to commit a Battery if:

7 1. You have not found, beyond a reasonable doubt, that the defendant is guilty of
8 conspiracy to commit Battery With a Deadly Weapon and/or Battery Resulting in Substantial
9 Bodily Harm, and

10 2. All twelve of you are convinced beyond a reasonable doubt the defendant is guilty
11 of the crime of conspiracy to commit a Battery.

12 If you are convinced beyond a reasonable doubt that the crime of conspiracy has been
13 committed by the defendant, but you have a reasonable doubt whether such conspiracy was
14 to commit battery with a deadly weapon, or battery resulting in substantial bodily harm, or
15 battery you must give the defendant the benefit of that doubt and return a verdict of
16 conspiracy to commit a Battery.

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

A battery which occurs with a deadly weapon is a felony.

A battery which results in substantial bodily harm is a felony.

"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.

A battery which occurs without a deadly weapon or does not result in substantial bodily harm is a misdemeanor.

INSTRUCTION NO. 26

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.

A defendant 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 duty to return a verdict of not guilty.

INSTRUCTION NO. 27

A person who counsels, hires, commands or otherwise solicits another to commit murder, if no criminal act is committed as a result of the solicitation, is guilty of solicitation to commit murder.

Solicitation to commit murder requires the specific intent to kill.

INSTRUCTION NO. 28

Mere presence at the scene of the crime and knowledge that a crime is being committed are not sufficient to establish that the defendant aided and abetted the crime, unless you find beyond a reasonable doubt that the defendant is a participant and not merely a knowing spectator. However, the presence of one at the commission of a crime of another is evidence which can be considered in determining whether or not he is guilty of aiding or abetting, as well as the defendant's presence, companionship, and conduct before, during and after the participation in the criminal act.

You are instructed that if you find that the State has established that the defendant has committed first degree murder you shall select first degree murder as your verdict. The crime of first degree murder includes the crime of second degree murder. You may find the defendant guilty of second degree murder if:

1. You have not found, beyond a reasonable doubt, that the defendant is guilty of murder of the first degree, and

2. All twelve of you are convinced beyond a reasonable doubt the defendant is guilty of the crime of second degree murder.

If you are convinced beyond a reasonable doubt that the crime of murder has been committed by the defendant, but you have a reasonable doubt whether such murder was of the first or of the second degree, you must give the defendant the benefit of that doubt and return a verdict of murder of the second degree.

INSTRUCTION NO. 30

You are instructed that if you find that the State has established that the defendant has committed murder you shall select the degree murder as your verdict. The crime of murder includes the crime of involuntary manslaughter. You may find the defendant guilty of involuntary manslaughter if:

1. You have not found, beyond a reasonable doubt, that the defendant is guilty of murder, and

2. All twelve of you are convinced beyond a reasonable doubt the defendant is guilty of the crime of involuntary manslaughter.

If you are convinced beyond a reasonable doubt that a crime has been committed by the defendant, but you have a reasonable doubt whether such crime was murder or involuntary manslaughter, you must give the defendant the benefit of that doubt and return a verdict of involuntary manslaughter.

INSTRUCTION NO. 31

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You are instructed that if you find a defendant guilty of Murder of the First Degree, or Murder of the Second Degree, you must also determine whether or not a deadly weapon was used in the commission of this crime.

INSTRUCTION NO. 32

"Deadly weapon" means 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; or, 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.

You are instructed that a firearm is a deadly weapon.

INSTRUCTION NO. 33

If more than one person commits a crime, and one of them uses a deadly weapon in the commission of that crime, each may be convicted of using the deadly weapon even though he did not personally himself use the weapon.

An unarmed offender "uses" a deadly weapon when the unarmed offender is liable for the offense, another person liable 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.

INSTRUCTION NO. 34

To constitute the crime charged, there must exist a union or joint operation of an act forbidden by law and an intent to do the act.

The intent with which an act is done is shown by the facts and circumstances surrounding the case.

Do not confuse intent with motive. Motive is what prompts a person to act. Intent refers only to the state of mind with which the act is done.

Motive is not an element of the crime charged and the State is not required to prove a motive on the part of the Defendant in order to convict. However, you may consider evidence of motive or lack of motive as a circumstance in the case.

INSTRUCTION NO. 35

The Defendant is presumed innocent unless the contrary is proved. This presumption places upon the State the burden of proving beyond a reasonable doubt every material element of the crime charged and that the Defendant is the person who committed the offense.

INSTRUCTION NO. 36

A reasonable doubt is one based on reason. It is not mere possible doubt but is such a doubt as would govern or control a person in the more weighty affairs of life. If the minds of the jurors, after the entire comparison and consideration of all the evidence, are in such a condition that they can say they feel an abiding conviction of the truth of the charge, there is not a reasonable doubt. Doubt to be reasonable must be actual, not mere possibility or speculation.

If you have a reasonable doubt as to the guilt of the Defendant, he is entitled to a verdict of not guilty.

INSTRUCTION NO. 38

You are here to determine the guilt or innocence of the Defendant from the evidence in the case. You are not called upon to return a verdict as to the guilt or innocence of any other person. So, if the evidence in the case convinces you beyond a reasonable doubt of the guilt of the Defendant, you should so find, even though you may believe one or more persons are also guilty.

INSTRUCTION NO. 38

In arriving at a verdict in this case as to whether the defendant is guilty or not guilty, the subject of penalty or punishment is not to be discussed or considered by you and should in no way influence your verdict. Sentencing is a subject left to the discretion of the Court.

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The evidence which you are to consider in this case consists of the testimony of the witnesses, the exhibits, and any facts admitted or agreed to by counsel.

There are two types of evidence; direct and circumstantial. Direct evidence is the testimony of a person who claims to have personal knowledge of the commission of the crime which has been charged, such as an eyewitness. Circumstantial evidence is the proof of a chain of facts and circumstances which tend to show whether the Defendant is guilty or not guilty. The law makes no distinction between the weight to be given either direct or circumstantial evidence. Therefore, all of the evidence in the case, including the circumstantial evidence, should be considered by you in arriving at your verdict.

Statements, arguments and opinions of counsel are not evidence in the case. However, if the attorneys stipulate to the existence of a fact, you must accept the stipulation as evidence and regard that fact as proved.

You must not speculate to be true any insinuations suggested by a question asked a witness. A question is not evidence and may be considered only as it supplies meaning to the answer.

You must disregard any evidence to which an objection was sustained by the court and any evidence ordered stricken by the court.

Anything you may have seen or heard outside the courtroom is not evidence and must also be disregarded.

Whenever there is slight evidence that a conspiracy existed, and that the defendant was one of the members of the conspiracy, then the statements and the acts by any person likewise a member may be considered by the jury as evidence in the case as to the defendant found to have been a member, even though the statements and acts may have occurred in the absence and without the knowledge of the defendant, provided such statements and acts were knowingly made and done during the continuance of such conspiracy, and in furtherance of some object or purpose of the conspiracy.

This holds true, even if the statement was made by the co-conspirator prior to the time the defendant entered the conspiracy, so long as the co-conspirator was a member of the conspiracy at the time.

The statements of a co-conspirator after he has withdrawn from the conspiracy were not offered, and may not be considered by you, for the truth of the matter asserted. They were only offered to give context to the statements made by the other individuals who are speaking, as or adoptive admissions or other circumstantial evidence in the case.

An adoptive admission is a statement of which a listener has manifested his adoption or belief in its truth.

A conviction shall not be had on the testimony of an accomplice unless he or she is corroborated by other evidence which in itself, and without the 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 hereby defined as one who is liable for prosecution, for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given.

To be an accomplice, the person must have aided, promoted, encouraged, or instigated by act or advice the commission of such offense with knowledge of the unlawful purpose of the person who committed the offense.

To corroborate the testimony of an accomplice there must be evidence of some act or fact related to the offense which, if believed, by itself and without any aid, interpretation or direction from the testimony of the accomplice, tends to connect the defendant with the commission of the offense charged.

However, it is not necessary that the evidence of the corroboration be sufficient in itself to establish every element of the offense charged, or that it corroborate every fact to which the accomplice testifies.

In determining whether an accomplice has been corroborated, you must first assume the testimony of the accomplice has been removed from the case. You must then determine whether there is any remaining evidence which tends to connect the defendant with the commission of the offense.

If there is not such independent evidence which tends to connect the defendant with the commission of the offense, the testimony of the accomplice is not corroborated.

INSTRUCTION NO. 43

The fact that a witness was given an inducement in exchange for her cooperation may be considered by you only for the purpose of determining the credibility of that witness. The existence of such an inducement does not necessarily destroy or impair the credibility of the witness. It is one of the circumstances that you may take into consideration in weighing the testimony of such a witness.

INSTRUCTION NO. 44

The determination of whether someone is an accomplice is left to the jury to decide, unless the witness' own statement leaves no doubt that he is subject to prosecution for the charged crime.

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INSTRUCTION NO. 45

In deciding whether to believe testimony given by an accomplice, you should use greater care and caution than you do when deciding whether to believe testimony given by an ordinary witness. Because an accomplice is also subject to prosecution for the same offense, an accomplice's testimony may be strongly influenced by the hope or expectation that the prosecution will reward testimony that supports the prosecution's case by granting the accomplice leniency. For this reason, you should view with distrust accomplice testimony that supports the prosecution's case. Whether or not the accomplice testimony supports the prosecution's case, you should bear in mind the accomplice's interest in minimizing the seriousness of the crime and the significance of the accomplice's own role in its commission, the fact that the accomplice's participation in the crime may show the accomplice to be an untrustworthy person, and an accomplice's particular ability, because of inside knowledge about the details of the crime, to construct plausible falsehoods about it. In giving you this warning about accomplice testimony, I do not mean to suggest that you must or should disbelieve the accomplice testimony that you heard at this trial. Rather, you should give the accomplice testimony whatever weight you decide it deserves after considering all the evidence in the case.

INSTRUCTION NO. 416

The accomplice corroboration rule is a separate and distinct legal requirement from the statements of a co-conspirator made in the course of and in furtherance of a conspiracy. When an accomplice testifies, their testimony must be corroborated. The other evidence in the case, including co-conspirator statements in the course and in furtherance of the conspiracy may be evidence utilized to establish the corroboration.

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2 You are the sole judges of the credibility of the witnesses who have testified in this
3 case, which means that you must decide which witnesses are to be believed and how much
4 weight, if any, is to be given to the testimony of each witness.

5 In determining the credibility of a witness, you may consider anything which tends in
6 reason to prove or disprove the truthfulness of his testimony, such as: his or her conduct,
7 attitude and manner while testifying; whether the facts testified to by him or her are
8 inherently believe able or unbelievable; his or her ability and opportunity to hear or see that
9 about which he or she testified; his or her memory; his or her ability to relate such matters,
10 whether or not there was any bias, interest or other motive for him or her not to tell the truth;
11 any statement previously made by him or her that was consistent with his or her testimony
12 or, conversely, any statement previously made by him or her that was inconsistent with his
13 or her testimony; any admission by him or her that he or she did not tell the truth; and the
14 reasonableness of his or her testimony considered in light of all the evidence in the case.

15 Also, in considering a discrepancy in a witness's testimony, you should consider
16 whether such discrepancy concerns an important fact or only a trivial detail. If you believe
17 that a witness has lied about any material fact in the case, you may disregard the entire
18 testimony of that witness or any portion of his testimony which is not proved by other
19 evidence.

20 Evidence of good character for truthfulness may be considered in judging the
21 credibility of a witness.
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INSTRUCTION NO. 48

The fact that a witness had been convicted of a felony, if such be a fact, may be considered by you only for the purpose of determining the credibility of that witness. The fact of such a conviction does not necessarily destroy or impair the witness' credibility. It is one of the circumstances that you may take into consideration in weighing the testimony of such a witness.

INSTRUCTION NO. 49

A witness who has special knowledge, skill, experience, training or education in a particular science, profession or occupation is an expert witness. An expert witness may give his opinion as to any matter in which he is skilled.

You should consider such expert opinion and weigh the reasons, if any, given for it. You are not bound, however, by such an opinion. Give it the weight to which you deem it entitled, whether that be great or slight, and you may reject it, if, in your judgment, the reasons given for it are unsound.

INSTRUCTION NO. 50

Although you are to consider only the evidence in the case in reaching a verdict, you must bring to the consideration of the evidence your everyday common sense and judgment as reasonable men and women. Thus, you are not limited solely to what you see and hear as the witnesses testify. You may draw reasonable inferences from the evidence which you feel are justified in the light of common experience, keeping in mind that such inferences should not be based on speculation or guess.

A verdict may never be influenced by sympathy, prejudice or public opinion. Your decision should be the product of sincere judgment and sound discretion in accordance with these rules of law.

INSTRUCTION NO. 51

When you retire to consider your verdict, you must select one of your number to act as foreperson who will preside over your deliberation and will be your spokesperson here in court.

During your deliberation, you will have all the exhibits which were admitted into evidence, these written instructions and forms of verdict which have been prepared for your convenience.

Your verdict must be unanimous. As soon as you have agreed upon a verdict, have it signed and dated by your foreperson and then return with it to this room.

INSTRUCTION NO. 52

Now you will listen to the arguments of counsel who will endeavor to aid you to reach a proper verdict by refreshing in your minds the evidence and by showing the application thereof to the law; but, whatever counsel may say, you will bear in mind that it is your duty to be governed in your deliberation by the evidence as you understand it and remember it to be and by the law as given to you in these instructions, with the sole, fixed and steadfast purpose of doing equal and exact justice between the Defendant and the State of Nevada.

GIVEN: Valerie Adan
DISTRICT JUDGE

1 VER

2 ORIGINAL

FILED IN OPEN COURT
EDWARD A. FRIEDLAND
CLERK OF THE COURT

FEB 17 2009

DISTRICT COURT
CLARK COUNTY, NEVADA
by Denise Husted 3:05 pm
DENISE HUSTED, DEPUTY

7 THE STATE OF NEVADA,

8 Plaintiff,

9 -VS-

10 LUIS HIDALGO, JR.,

11 Defendant.

CASE NO: C241394

DEPT NO: XXI

12
13 VERDICT

14 We, the jury in the above entitled case, find the Defendant LUIS HIDALGO, JR., as
15 follows:

16 COUNT 1 - CONSPIRACY TO COMMIT MURDER

17 (please check the appropriate box, select only one)

18 ☐ Guilty of Conspiracy To Commit Murder

19 ☒ Guilty of Conspiracy To Commit A Battery With A Deadly Weapon or
20 Battery Resulting In Substantial Bodily Harm

21 ☐ Guilty of Conspiracy To Commit A Battery

22 ☐ Not Guilty

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We, the jury in the above entitled case, find the Defendant LUIS HIDALGO, JR., as follows:

COUNT 2 - MURDER WITH USE OF A DEADLY WEAPON

(please check the appropriate box, select only one)

- ☐ Guilty of First Degree Murder With Use of a Deadly Weapon
- ☐ Guilty of First Degree Murder
- ☒ Guilty of Second Degree Murder With Use of a Deadly Weapon
- ☐ Guilty of Second Degree Murder
- ☐ Guilty of Involuntary Manslaughter
- ☐ Not Guilty

DATED this 17 day of February, 2009


FOREPERSON

ORIGINAL

FILED IN OPEN COURT
EDWARD A. FRIEDLAND
CLERK OF THE COURT

FEB 17 2009

DISTRICT COURT

CLARK COUNTY, NEVADA

BY: Denise Husted
DENISE HUSTED, DEPUTY

STATE OF NEVADA

Plaintiff(s),

-vs-

Luis Alonso Hidalgo III
Luis Hidalgo Jr.

Defendant(s).

CASE NO. C212667
C241394

DEPT. NO. XXI

PROPOSED VERDICT FORMS NOT USED

Attached hereto are the proposed verdict forms, which were offered in the above-entitled action, but not submitted to the Jury.

DATED: This 12th day of February, 2009.

Edward A Friedland, Clerk of the Court

By: Denise Husted

Denise Husted, Deputy Clerk

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VER

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

LUIS HIDALGO, Jr.,

Defendant.

CASE NO: C241394
DEPT NO: XXI

VERDICT

We, the jury in the above entitled case, find the Defendant LUIS HIDALGO, JR., as follows:

COUNT 1 - CONSPIRACY TO COMMIT MURDER

(please check the appropriate box, select only one)

☐ Not Guilty of Conspiracy

If you find the defendant not guilty of conspiracy, advise the bailiff and return to court.

☐ Guilty of Conspiracy

If you have found Defendant guilty of Conspiracy then continue:

We find the object of the Conspiracy to Be:

☐ Battery

☐ Battery Causing Substantial Bodily Harm

☐ Battery with a Deadly Weapon

☐ Murder

If you have found Defendant guilty of Conspiracy to Commit Battery then you may ONLY find him guilty of Involuntary Manslaughter and then only if you find that charge has been proven beyond a reasonable doubt.

If you have found Defendant guilty of Conspiracy to Commit Battery with a Deadly Weapon then you may ONLY find him guilty of Second Degree Murder and then only if you

1 find that charge has been proven beyond a reasonable doubt.

2 If you have found Defendant guilty of Conspiracy to Commit Battery with Substantial
3 Bodily Harm you may ONLY find him guilty of Second Degree Murder and then only if you
4 find that charge has been proven beyond a reasonable doubt.

5 If you have found Defendant guilty of Conspiracy to Commit Murder, you may ONLY
6 find Defendant guilty of First Degree Murder, Second Degree Murder and then only if you find
7 that charge has been proven beyond a reasonable doubt.

8
9 We, the jury in the above entitled case, find the Defendant LUIS HIDALGO, JR, as
10 follows:

11 **COUNT 2 -- MURDER**

(please check the appropriate box, select only one)

- 12 ☐ Not Guilty
13 ☐ Guilty of First Degree Murder
14 ☐ Guilty of Second Degree Murder
15 ☐ Guilty of Involuntary Manslaughter

16 Did the Defendant have actual knowledge that a Deadly Weapon was going to be used to
17 kill Timothy Jay Hadland?

- 18 ☐ Yes
19 ☐ No

20 DATED this ____ day of April, 2009

21 _____
22 FOREPERSON
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REGISTER OF ACTIONS

CASE No. 05C212667-2

The State of Nevada vs Luis A Hidalgo

Case Type: Felony/Gross
Date Filed: Misdemeanor
Location: 06/17/2005
Department: 21
Case Number: C212667
Scope ID #: 1849634
Case Number: 05FB00052

RELATED CASE INFORMATION

Related Cases

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

PARTY INFORMATION

Defendant **Hidalgo, Luls A**
Also Known As Hidalgo III , Luis A

Lead Attorneys
John L. Arrascada

Retained

7023283158(W)

Plaintiff State of Nevada

David J. Roger
702-671-2700(W)

CHARGE INFORMATION

Charges: Hidalgo, Luis A

1. CONSPIRACY TO COMMIT A CRIME
1. MURDER.
1. DEGREES OF MURDER
2. MURDER.
2. DEGREES OF MURDER
2. USE OF A DEADLY WEAPON OR TEAR GAS IN COMMISSION OF A CRIME.
3. SOLICITATION TO COMMIT A CRIME.
4. SOLICITATION TO COMMIT A CRIME.

Statute	Level	Date
199.480	Gross Misdemeanor	01/01/1900
200.010	Gross Misdemeanor	01/01/1900
200.030	Gross Misdemeanor	01/01/1900
200.010	Felony	01/01/1900
200.030	Felony	01/01/1900
193.165	Felony	01/01/1900
199.500	Felony	01/01/1900
199.500	Felony	01/01/1900

EVENTS & ORDERS OF THE COURT

02/24/2009 Motion for Own Recognizance Release/Setting Reasonable Bail (9:30 AM) ()
DEFT'S MTN FIR O.R. RELEASE FOR HOUSE ARREST/271 Relief Clerk: Sharon Chun Reporter/Recorder: Janie Olsen
Heard By: Valerie Adair

Minutes

02/24/2009 9:30 AM

- Following arguments by counsel, COURT ORDERED, Deft Espindola RELEASED ON O.R. WITH HOUSE ARREST THROUGH CLARK COUNTY DETENTION CENTER, noting that the State can coordinate her next appearance. O.R./H.A.

Parties Present

Return to Register of Actions


CLERK OF THE COURT

0031
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.

DISTRICT COURT
CLARK COUNTY, NEVADA

STATE OF NEVADA,

Plaintiff,

CASE NO. C212667/C241394
DEPT. XXI

vs.

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

Defendant.

**DEFENDANT LUIS A. HIDALGO, JR.'S MOTION FOR JUDGMENT OF
ACQUITTAL OR, IN THE ALTERNATIVE, A NEW TRIAL**

Date of Hearing: March 24, 2009
Time of Hearing: 9:30 .m.

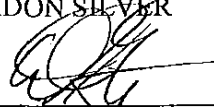
COMES NOW Defendant Luis A. Hidalgo, Jr., by and through his attorneys, Dominic P. Gentile and Paola M. Armeni of the Law Firm of Gordon Silver. and pray this Court to enter an Order of Judgment of Acquittal pursuant to NRS 175.381 based upon the insufficiency of the evidence adduced at trial to establish his guilt beyond a reasonable doubt of the offenses created by NRS 199.480(3)(g), NRS 200.010 and NRS 200.030. In the alternative, this Court is requested to enter an Order for a New Trial on those charges as entry of a judgment of conviction is contrary to the manifest weight of the evidence and to the jury instructions both given and refused, as well as the fact that the jury ignored the Court's instruction as to limited admissibility

1 of the statements of DeAngelo Carroll on the audio tapes, and therefore a new trial is required as
2 a matter of law.

3 This Motion is brought upon the entire record in this matter including, but not limited to,
4 the transcript of the evidence and arguments adduced at trial which are not as yet available, the
5 Points and Authorities following hereinafter and evidence to be adduced at a hearing on this
6 Motion.

7 Dated this 10th day of March, 2009.

8 GORDON SILVER

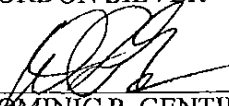
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10 DOMINIC P. GENTILE
11 Nevada Bar No. 1923
12 PAOLA M. ARMENI
13 3960 Howard Hughes Pkwy., 9th Floor
14 Las Vegas, Nevada 89169
15 (702) 796-5555
16 Attorneys for Defendant
17 LUIS A. HIDALGO, JR.

18 NOTICE OF MOTION

19 YOU, AND EACH OF YOU, will please take notice that the undersigned will bring the
20 above and foregoing Motion on for hearing before this Court on the 24th day of March, 2009, at
21 the hour of 9:30 o'clock A.M. of said day, or as soon thereafter as counsel can be heard in
22 Department No. XXI.

23 Dated this 10th day of March, 2009.

24 GORDON SILVER

25 
26 DOMINIC P. GENTILE
27 Nevada Bar No. 1923
28 PAOLA M. ARMENI
Nevada Bar No. 8357
3960 Howard Hughes Pkwy., 9th Floor
Las Vegas, Nevada 89169
(702) 796-5555
Attorneys for Defendant
LUIS A. HIDALGO, JR.

1 **POINTS AND AUTHORITIES**

2 **INTRODUCTION**

3 NRS 175.381 governs when the Court may enter a judgment of acquittal after verdict of
4 guilty. In pertinent part it reads:

5 ...
6 2. The court may, on a motion of a defendant or on its own motion, which
7 is made after the jury returns a verdict of guilty, set aside the verdict and enter a
8 judgment of acquittal if the evidence is insufficient to sustain a conviction. The
9 motion for a judgment of acquittal must be made within 7 days after the jury is
10 discharged or within such further time as the court may fix during that period.

11 3. If a motion for a judgment of acquittal after a verdict of guilty pursuant
12 to this section is granted, the court shall also determine whether any motion for a
13 new trial should be granted if the judgment of acquittal is thereafter vacated or
14 reversed. The court shall specify the grounds for that determination. If the motion
15 for a new trial is granted conditionally, the order thereon does not affect the
16 finality of the judgment. If the motion for a new trial is granted conditionally and
17 the judgment is reversed on appeal, the new trial must proceed unless the
18 appellate court has otherwise ordered. If the motion is denied conditionally, the
19 defendant on appeal may assert error in that denial, and if the judgment is
20 reversed on appeal, subsequent proceedings must be in accordance with the order
21 of the appellate court.

22 Thus, under the Nevada statutory scheme, in considering a Motion for Judgment of
23 Acquittal the Court must also consider simultaneously a Motion for New Trial. The latter is
24 governed by NRS 176.515, which reads in pertinent part:

25 New trial: Grounds; time for filing motion

26 1. The court may grant a new trial to a defendant if required as a matter of
27 law or on the ground of newly discovered evidence.

28 ...
...

4. A motion for a new trial based on any other grounds must be made
within 7 days after the verdict or finding of guilt or within such further time as the
court may fix during the 7-day period.

23 The jury returned its verdict on Tuesday, February 17, 2009. By implication it
24 acquitted Luis Alonso Hidalgo Jr. of Conspiracy to Commit Murder, a felony, instead
25 finding him guilty of a gross misdemeanor offense. Due to the form of verdict it is
26 impossible to determine whether the jury was unanimous with regard to the object of the
27 conspiracy. The verdict form grouped the objects, stating them as "Conspiracy to
28 Commit Battery with a Deadly Weapon or Battery Resulting in Substantial Bodily

1 Harm". It also acquitted him by implication of the charges of First Degree Murder with a
2 Deadly Weapon and First Degree Murder. The Amended Indictment contained four
3 theories of criminal liability for the Murder alleged in Count Two. Two were clearly
4 rejected by the jury, the first theory "by directly or indirectly committing the acts with
5 premeditation and deliberation or lying in wait" and the fourth theory "by conspiring to
6 commit the crime of murder of Timothy Jay Hadland whereby each and every co-
7 conspirator is responsible for the specific intent crime contemplated by the conspiracy."
8 Based upon the testimony and exhibits presented at the trial, as a matter of law and logic
9 the jury either found that Luis Alonso Hidalgo Jr. was vicariously liable for the death of
10 Mr. Hadland on the theory that he (1) aided and abetted a battery with use of a deadly
11 weapon or a battery resulting in substantial bodily harm, under the "procuring Deangelo
12 Carroll to beat.." theory, or, as it announced in its verdict as to Count One, (2) conspired
13 to commit a battery with a deadly weapon or battery resulting in substantial bodily harm
14 "whereby each and every co-conspirator is responsible for the reasonably foreseeable
15 general intent crimes of each and every co-conspirator during the course and in
16 furtherance of the conspiracy."

17 As will be demonstrated below, neither theory was proven beyond a reasonable
18 doubt in light of the limitations that were imposed by the law of evidence and the Court's
19 rulings as to certain of it having limited admissibility at trial. Moreover, the verdict form
20 and jury instructions which were given over the objection of the defense (1) created
21 substantial confusion as to the difference between the quantum of evidence necessary to
22 prove the conspiratorial theory of liability as opposed to that needed to allow
23 consideration by the jury of statements of co-conspirators, and (2) eliminated the need for
24 the jury to find, as a discrete aspect of the deadly weapon enhancement, that Luis Alonso
25 Hidalgo Jr. knew that a deadly weapon would be used and had control over its use.
26 Application of the rule of lenity requires, at a minimum, that the deadly weapon
27 enhancement not survive.

28 This Court is well aware of the entire proceedings, but a transcript is necessary to an
accurate summary of the evidence and is not currently unavailable. The references made to the
record in this Motion are therefore in the nature of a "bystander's record" as further supported by
the transcripts of the testimony of Ronte Zone and Anabel Espindola.

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1 phones and Carroll with Hadland. Not one single call or direct connect "chirp" came from the
2 phone of Luis A. Hidalgo Jr. connecting him to the series of communications between Espindola,
3 Carroll, Counts and Hadland. The record was completely devoid of such proof and the
4 prosecutor never suggested in argument that any such proof existed.

5 Gary McWhorter testified that he was driving a taxicab on the morning of May 20, 2005
6 and that over the years he brought people to strip clubs, including the Palomino Club, and was
7 paid by the clubs for the drop off. On that day, while waiting in the queue of cabs at the
8 Palomino, a black man alighted from a van in the parking lot and attempted to have McWhorter
9 take him to a location on the West Side. McWhorter originally refused to take him but the
10 person said he would pay him \$30 to do so. The person went into the Palomino and came out
11 and paid McWhorter the \$30 prior to the cab leaving the parking lot. McWhorter left the
12 Palomino at 12:26 a.m. and arrived at the destination of 513 Wyatt at 12:31 a.m. Ordinarily the
13 fare would have been \$5.70.

14 Michael McGrath was a detective assigned to homicide at the time of the occurrence. He
15 responded to the crime scene with others. When he looked at the phone left in the KIA Sportage
16 he noticed that the last call was from "Deangelo" and learned the next morning that Deangelo
17 Carroll worked at the Palomino. He obtained the phone number of the owner of the Palomino
18 Club from North Las Vegas Police Department and gave it to another detective. He returned to
19 the crime scene in daylight to make a more thorough search of it. At 7:30 p.m. on May 20th he
20 and Detective Wildman went to the Palomino Club and were interviewing a woman named Ariel
21 when Deangelo Carroll walked in to the club. They left the club with Carroll and went to
22 homicide offices to interview him. They videotaped the interview. After the interview Carroll
23 pointed out where the tires were that were removed from the van after the shooting. They then
24 brought Carroll home and saw him tell Ronte Zone to "tell the truth". Zone returned to homicide
25 offices with the detectives and was interviewed as to who was in the van, where each person sat,
26 who had which firearm and who did the shooting. McGrath and the other homicide detectives
27 made a plan to have Carroll secretly record the owners of the Palomino Club.

28 On May 21, 2005 McGrath and other LVMPD personnel executed a search warrant at the
home of Kenneth Counts and another home across the street and took Counts into custody. They
employed the SWAT team because Counts was "an extremely violent person" based upon the
police intelligence on him and his past criminal record as well as the crime for which he was
being charged. Ultimately Counts fought off dogs and incendiary devices before being literally

1 cut out of the space above the ceiling in the house. Photos admitted into evidence give a clear
2 depiction of how much force needed to be employed and how strongly Counts fought not to be
3 arrested. Palomino VIP cards were recovered from the location where Counts was found.
4 Fingerprints were developed and they were not those of Luis A. Hidalgo Jr. According to the
5 testimony of Fred Boyd, LVMPD crime scene analyst specializing in fingerprint identification
6 and comparison, they were those of both Deangelo Carroll and Kenneth Counts. Boyd testified
7 that Carroll's fingerprints were also recovered from a \$100 bill found in Counts home.

8 On May 23, 2005, McGrath along with FBI agent Shields employed a digital recording
9 device appearing to be a pager on the person of Deangelo Carroll and sent him into Simone's
10 Auto Plaza, a business owned and operated by Luis A. Hidalgo Jr. and Anabel Espindola,
11 because "we didn't think we had enough" evidence to charge anyone from the Palomino Club
12 with the murder of Hadland. Carroll was told a scenario to set up the conversation between
13 himself and Luis A. Hidalgo Jr. and others before he went in. Carroll was not searched before he
14 entered Simone's but was after he left. Carroll provided McGrath with \$1400 in cash and a
15 bottle of Tangeray Gin upon leaving Simone's. Carroll also provided the with the digital
16 recording device, which was downloaded to a computer by McGrath and Shields. The recording
17 was of a poor quality. At no time did Carroll request or even attempt to speak to Luis A. Hidalgo
18 Jr. while in Simone's. After listening to the recording they decided to send Carroll back in with
19 the device a second time and on May 24, 2005 they did so. This time Carroll handed them \$800
20 along with the recording device. Again Carroll made no attempt to speak with Luis A. Hidalgo
21 Jr.

22 [When the tape recordings were played for the jury the Court instructed them that
23 any discussions regarding money or plans to cause death to Counts, Zone or Taoipu were
24 not admitted as to Luis A. Hidalgo Jr. Moreover, the Court instructed the jury that the
25 statements of Deangelo Carroll were not admissible for the truth of what he was saying.
26 Luis A. Hidalgo Jr. objected to the admissibility of the tapes on the basis that they were not
27 made in furtherance of the conspiracy that was charged in Count One of his Amended
28 Indictment and were during the course of the conspiracy as they occurred after that
29 conspiracy had ended by the accomplishment of its objective. The Court ruled that
30 although Luis A. Hidalgo Jr. was not a member of the conspiracy to conceal - which it
31 correctly recognized to be a separate conspiracy - the statements made on the tape by

1 Espindola and Luis A. Hidalgo III were admissible as to Luis A. Hidalgo Jr. as to the
2 question of his membership in the conspiracy charged in Count One.]

3 After Carroll left Simone's on May 24, 2005 Anabel Espindola and Luis A. Hidalgo III
4 were arrested and charged with conspiracy to commit murder and murder of Timothy J. Hadland
5 and solicitation for the murders of Ronte Zone and Jayson Taoipu. Luis A. Hidalgo Jr. was
6 neither arrested nor charged until February 2008 after Anabel Espindola entered into a plea
7 bargain to avoid facing the death penalty on murder charges and gave a statement to the
8 prosecution implicating Luis A. Hidalgo Jr. in the death of Hadland.

9 McGrath testified that some of the information supplied to police by Carroll during his
10 debriefing proved to be incorrect, unsupported or false. For example, Carroll told them that the
11 gun used to kill TJ had been used in another shooting and named the shooter, location and
12 episode. It turned out that there was such a shooting but not where Carroll said it occurred and
13 the weapon used was a .22 caliber, not a .357 or .38. He also testified that Carroll was instructed
14 to engage Luis A. Hidalgo Jr. on the tape recorded conversation as well as Anabel Espindola and
15 Luis A. Hidalgo III. They also told Carroll what they wanted to hear discussed on the
16 recordings. For example, Carroll was told to assert that his orders were to kill Hadland so that a
17 response from those on the recording would confirm it. When Carroll's assertion was in fact
18 rebuffed by Espindola's denial of that intention, Carroll was sent back a second time to clear it
19 up. It didn't succeed then either. He did not tell Carroll to say, as he did on the recording, that
20 Counts "went goofy" and spontaneously shot Hadland. Nor did he tell Carroll to say, as he did
21 on the recording, that Counts was threatening Carroll's family. McGrath conceded that he had
22 and still has doubts about Carroll's credibility. McGrath conceded that Counts was a known
23 gang member and that Exhibit 71 depicted gang signs being flashed in the photo.

24 Jeff Smink testified that he has been a crime scene analyst supervisor for LVMPD for 9
25 years and conducted the search of Simone's Auto Plaza on May 24, 2005. He identified Exhibit
26 109 as a photo of a piece of paper found on top of a magazine laying on top of a stool near a pool
27 table in an area of Simone's that was accessible to employees and public. The note was in
28 handwriting conceded by the defense to be that of Luis A. Hidalgo Jr. It read "we may be under
surveills(sp). Keep your mouth shut."

Martin Wildemann testified that he was a homicide detective in May 2005 and was
assigned to this case. He conducted interviews of persons including Deangelo Carroll, Pajit
Karlson, Jayson Taoipu, Ronte Zone and others. He spoke by telephone with Luis A. Hidalgo Jr.

1 on May 20, 2005 and made an appointment to meet him at the Palomino Club. During the
2 conversation the defendant confirmed that Deangelo Carroll worked at the Palomino Club.
3 Wildemann was directed to speak with Ariel as to obtaining employment records, contact
4 information, etc. as to Carroll.

5 Later that evening Wildemann participated in the interview of Carroll, who gave "at
6 least" three versions of what occurred regarding the death of Hadland. He then led Wildemann
7 to the location of tires that were changed from the van after the death and also introduced them to
8 Ronte Zone. When Zone was interviewed his version was consistent with one of Carroll's. The
9 detectives also interviewed Jayson Taoipu who gave a similarly consistent version. On May 23,
10 2005, detectives decided to send Carroll into Simone's Auto Plaza while wearing a recording
11 device. Wildemann saw Luis A. Hidalgo Jr. enter the building before and leave hours after
12 Carroll's arrival and departure. He was the person who stopped the vehicle in which Anabel
13 Espindola was a passenger on May 24, 2005 and she accompanied him to the homicide offices.
14 He found Exhibit 240, a Palomino Club check payable to Deangelo Carroll, inside Espindola's
15 satchel which was in the vehicle at the time.

16 The only evidence in the case even mentioning Luis A. Hidalgo Jr. as having preexisting
17 knowledge of harm to Hadland came from Ronte Zone's reports of things he heard Carroll say
18 before and after the death of Hadland and the testimony of Anabel Espindola. We turn now to an
19 examination of that testimony.

20 Zone testified that in May 2005 he began "hanging out with" Carroll. Zone was living
21 with him at the time along with Zone's baby's mother and Carroll's wife. Zone was assisting
22 Carroll by handing out flyers for the Palomino Club at cab stations. Jayson Taoipu, who was
23 also known as "JJ", did it with them. At noon on May 19, 2005 he was with both of them when
24 Deangelo said "that Little Louie was...that Mr. H wanted someone killed."¹ Deangelo asked
25 Zone if he was "into doing it" and Zone replied "no". JJ said that he "was down" with it,
26 meaning "yes" according to Zone. Deangelo said something about Little Louie mentioning
27 baseball bats and bags. This discussion took place in the white Astro van. A few hours later
28 Carroll again mentioned that Carroll said he wanted someone "dealt with". He pulled out a .22
revolver with a green pearl handle and gave it to JJ. Carroll placed the bullets for the gun in
Zone's lap. Zone dumped them on the floor of the van and JJ picked them up. They then went

¹ "Mr. H." is a name by which Luis A. Hidalgo Jr. was known around the Palomino Club. "Little Louie" is a name
by which Luis A. Hidalgo III is known in the same context.

1 back to Deangelo's house and dressed for work. They then went out promoting at cab stops in
2 the Astro van. They returned to Deangelo's house and after a while Carroll said they were going
3 out promoting again. There was some further talk about a person having to be dealt with but
4 Zone barely heard it and then they left again. After the shooting Deangelo said Mr. H was going
5 to pay \$6000 to the person who did the shooting. No bats or trash bags were ever sought. They
6 then went to pickup KC in the area of D or F Streets. He had never seen nor heard of KC before.
7 Deangelo was inside for under ten minutes and came out with KC, who was wearing all black
8 including a black hoody and black gloves. KC got in the back seat next to Zone. They all drove
9 to Lake Mead. Zone realized they weren't going promoting when they got out to Lake Mead
10 because "There's nothing out there." There was no conversation on the way out other than
11 Deangelo talking on the phone. There was no conversation between Timothy and Deangelo.
12 Deangelo said they were going to meet up with Timothy, who thought they were going to
13 "smoke and chill". Zone had never met Timothy. After entering the Lake Mead area there was
14 conversation about Timothy being killed.

15 Zone had smoked marijuana on the way to Lake Mead and prior to that during the day.
16 He smoked about a "blunt", which he described as the size of a cigar, throughout the day. He
17 had been high on marijuana on other occasions in his life.

18 Deangelo had phone signal problems when they reached the Lake Mead area. Zone
19 heard a 'chirp' on Carroll's phone at that time and Carroll told Timothy where to meet him.
20 When they did meet up Carroll exited the van and "went to the bathroom" on the side of the road
21 and then reentered the van. Timothy came up to the side of the van to speak with Carroll. KC
22 got out of the van and shot Timothy in the head. He was shot again after he hit the ground. KC
23 got back in the van and Deangelo sped off. After reentering the van KC inquired as to whether
24 Zone had a gun and was told 'no'. JJ said that he had one but didn't want to hit Deangelo so he
25 didn't shoot. They drove back to the Palomino Club.

26 Deangelo went into the Palomino Club and came back out ten minutes later. Then both
27 KC and Deangelo went into the club. KC came out later and got into a cab. Deangelo came out
28 about 20 minutes later. They returned to Deangelo's house. The next morning they had the tires
changed. Deangelo also cleaned the van. They then went for breakfast at IHOP and then back to
Deangelo's house. Later they drove to Simone's Auto Plaza and waited inside the van while
Deangelo went in. They went in about one half hour later. Zone never saw Deangelo speak with
anyone in Simone's. They went into the bathroom with Deangelo and he told them that the

1 shooter was paid \$6000 and they would have received it had they done the shooting. He did see
2 Deangelo speak with Mr. H while in Simone's.

3 At some point Deangelo brought the police to Zone. Over a hearsay objection he was
4 permitted to testify that Carroll told him "if you don't tell the truth we are going to jail".

5 Zone remembers Carroll saying, prior to the death of Hadland, that Hadland was
6 "snitching" and that was the reason that he was to be "dealt with". Anything that he knows about
7 Mr. H he heard from Carroll, as he has never met nor spoken with him directly. Carroll held
8 himself out to be a "big representative of the Palomino Club" and Zone believed it. But Carroll
9 did make himself out to be bigger than he was. He is boastful. Zone is not afraid of Carroll and
10 has never seen him beat anyone up or kill anyone. Zone was only assisting as a flyer boy for
11 three days prior to the death of Hadland. Zone went to pick up weed in Northtown on May 19,
12 2005 during the day. On a normal day he smokes weed all day and did so on May 19, 2005.
13 Smoking weed makes him smarter. After the shooting Zone was afraid of KC. He admits that
14 smoking pot doesn't help your memory and he was smoking a lot of pot during the period of time
15 that the death of Hadland occurred. He also admits that during the day of May 20, 2005, prior to
16 Deangelo speaking to the police and prior to Zone speaking to the police, Deangelo was coming
17 up with scenarios that would help him and JJ out. When Deangelo told Zone to tell the truth to
18 the police Zone didn't know "whose truth he's talking about".

19 The prior inconsistent statements established at trial during the cross examination of Zone
20 are so numerous the Court need not be reminded of them..

21 Anabel Espindola was the State's key witness against Luis A. Hidalgo Jr. A complete
22 copy of the transcript of her testimony is attached as Exhibit 1a and 1b and will not be
23 summarized in full. However, it is critical and noteworthy that she did not testify as to having
24 heard any pre-homicide discussions between Deangelo Carroll and Luis A. Hidalgo Jr. Nor did
25 she contend that she was privy to any admissions by Luis A. Hidalgo Jr. as to any involvement in
26 or knowledge of any harm coming to Hadland prior to its occurring. Her testimony as to her
27 knowledge of pertinent events can be summarized by starting with a phone call that she allegedly
28 received from Deangelo Carroll in the afternoon of May 19, 2005. She claims that Carroll told
her that Timothy Hadland, a former employee, had been talking badly about the Palomino Club
at another strip club. Hadland had previously been terminated from his employment at the
Palomino Club. Prior to his termination Hadland was suspected by Luis A. Hidalgo III of
writing payout tickets for cab drivers for more passengers than were delivered and splitting it

1 with the cabbies. Luis A. Hidalgo Jr. and Luis A. Hidalgo III were present when she received
2 the phone call. She reported it to them and Luis A. Hidalgo III became vocal about how
3 something had to be done about it. She contends that he told his father that Rizzolo or Galardi -
4 other club owners in the area - would do something about it and that is why his father would
5 never be as successful as them. She testified that Luis A. Hidalgo Jr. made no response to this
6 outburst but instead told his son to mind his own business. She claimed that Luis A. Hidalgo III
7 then left the room and she didn't see or speak with him again about the matter. Luis A. Hidalgo
8 Jr. became silent and went off into another room at Simone's. They never discussed the matter
9 again. Later that evening, at the Palomino Club, she saw Luis A. Hidalgo Jr. leave his office
10 with Deangelo Carroll and later return without him. She does not know what they spoke about,
11 if anything. Later that evening she claims that Luis A. Hidalgo Jr. asked her to phone Carroll
12 and tell him to go to Plan B. She claims not to know or have asked about the meaning of the
13 message but that she had an intuition that Hadland was going to be harmed. She claims that
14 when she told Carroll to go to Plan B he responded that he was already out there and "he's
15 alone". Later that evening Carroll returned to the Club and entered the office. She was there with
16 Luis A. Hidalgo Jr. and Carroll. Carroll said "Its done. He wants to get paid." Luis A. Hidalgo Jr.
17 then told her to get "5" for Carroll. She asked "500"? Luis A. Hidalgo Jr. said "\$5000". She
18 then retrieved the money from the safe and counted it out for Carroll, who left after receiving it.

19 Espindola testified about events that occurred after the payment and Carroll leaving. She
20 contended that she never met with Jerome DePalma or Don Dibble on Saturday, May 21, 2005.
21 She didn't recall Dibble being there at all and said that DePalma told her to leave the office
22 because she couldn't be in the interview. She claims to have waited outside in the car and never
23 spoke with DePalma about the events. DePalma and Dibble testified in detail to the contrary.
24 DePalma's notes were introduced into evidence to confirm what was said at the meeting. Dibble
25 corroborated DePalma's opinion that 90% of what was said during the meeting was said by
26 Espindola. Moreover, the audio recordings that were obtained surreptitiously by Carroll on May
27 23 and 24, 2005, refute much of Espindola's trial testimony as to her knowledge and role in the
28 events. Espindola received a drastically reduced penalty exposure in exchange for her
cooperation and was facing the possibility of a death sentence at the time that she made her deal
with the prosecution. Moreover, the State agreed to her release from the Clark County Detention
Center on her own recognizance with a condition of home confinement once her testimony was

1 memorialized and subject to cross-examination. While its attempt to use a deposition was
2 thwarted she has now been released from the CCDC after her trial testimony.

3 **ARGUMENT**

4 **I. THE EVIDENCE WAS INSUFFICIENT AS A MATTER OF LAW TO SUPPORT A**
5 **JUDGMENT OF CONVICTION ON THE CHARGE OF CONSPIRACY TO COMMIT A**
6 **BATTERY WITH A DEADLY WEAPON OR RESULTING IN SUBSTANTIAL BODILY**
7 **HARM. THEREFORE IT CANNOT ACT AS SUPPORT FOR VICARIOUS LIABILITY**
8 **AS A CONSPIRATOR FOR SECOND DEGREE MURDER WITH USE OF A DEADLY**
9 **WEAPON.**

10 The Amended Indictment was directed at a single event – a homicide of Timothy Jay
11 Hadland involving multiple perpetrators at the scene and allegations of the existence of
12 conspirators or aiders and abettors not at the scene. Luis Alonso Hidalgo Jr.'s defense was
13 simple and all encompassing – absence of knowledge or intent prior to the acts that brought
14 death to Hadland. Luis Alonso Hidalgo Jr.'s trial testimony established that he learned of
15 Hadland badmouthing the Palomino Club from Deangelo Carroll while in the presence of Anabel
16 Espindola in his office at the Palomino Club and not, as she testified, from her reporting it to him
17 in the presence of his son after she had a phone conversation with Carroll earlier in the day while
18 at Simone's Auto Plaza. He was not concerned about it because of his belief and historic
19 knowledge that so long as cab drivers were paid for bringing passengers to the Palomino such
20 negative comments by anyone would not adversely impact the business. He also testified that he
21 responded that Carroll should tell Hadland to "stop spreading shit" about the club and nothing
22 more. Espindola's testimony was that she never heard any communications at all between Luis
23 Alonso Hidalgo Jr. and Carroll, although she contends that they left the office in the Palomino
24 together and had an opportunity to communicate. Thus, even if the jury rejected Luis Alonso
25 Hidalgo Jr.'s version of the conversation with Carroll, nothing replaces it and the record is void
26 of any evidence as to discussions or understandings between Carroll and the defendant on the
27 subject of Hadland's alleged remarks and if or how to respond to them.

28 Nowhere in the record is there anything to indicate that the use of a deadly weapon was
part of any agreement to which the defendant was a party nor of any knowledge on his part that
one would or even might be employed. 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. Brooks v. State,

1 180 P.3d 657, 659 (Nev. 2008) (instruction proffered by Brooks and not given by Court). The
2 proper focus is on the unarmed offender's knowledge of the use of the weapon brandished by
3 another principal. Brooks v. State, 180 P.3d 657, 660 (Nev. 2008). An unarmed offender "uses"
4 a deadly weapon...when the unarmed offender is liable as a principal for the offense that is
5 sought to be enhanced, another principal to the offense is armed with and uses a deadly weapon
6 in the commission of the offense, and the unarmed offender had knowledge of the use of the
7 deadly weapon. Brooks v State, 180 P.3d at 657, 661 (Nev. 2008). The deadly weapon element
8 is simply not proven as to Luis A. Hidalgo Jr. under Nevada law of vicarious liability. The
9 conviction, although ambiguous due to the Court's failure to separate the objectives of the
conspiracy in its verdict form, cannot stand in any case as to that component part.

10 Thus, the only theory upon which the conspiracy count can survive and provide a basis
11 for vicarious liability for a second degree murder is a conspiracy to commit a battery with
12 substantial bodily harm. However, vicarious coconspirator liability may be properly imposed for
13 general intent crimes only when the crime in question was a "reasonably foreseeable
14 consequence" of the object of the conspiracy. Bolden v. State, 121 Nev. 908, 124 P.3d 191, 201
15 (Nev. 2005). Battery is a general intent crime. Moreover, although battery that results in
16 substantial bodily harm is punished as a felony it does not require felonious intent. The charging
17 document in the instant case is silent as to whether the alternatively pled conspiracy to "beat"
18 Hadland included as its objective imposing substantial bodily harm. This is significant, as under
19 the narrow limits established by the Nevada Supreme Court the "second degree felony murder
20 rule" applies only where the felony is inherently dangerous, where death or injury is a directly
21 foreseeable consequence of the illegal act, and where there is an immediate and direct causal
22 relationship-without the intervention of some other source or agency-between the actions of the
23 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). The same
reasoning applies in the case *sub judice*.

24 More importantly, the evidence was insufficient to establish a conspiracy to commit
25 battery - even without substantial bodily harm -and support a vicarious responsibility for the
26 murder. The beyond a reasonable doubt standard is mandated by both the Nevada and United
27 States constitutions. See Jackson v. Virginia, 443 U.S. 18 (1979). Each and every element must
28 be proven to that standard. See also In re Winship, 397 US. 358, 364 Here there is insufficient
evidence of Luis A. Hidalgo Jr.s participation in the conspiracy regardless of its objective. His

1 knowledge of harm to come to Hadland is entirely dependent on the out of court statements of
2 Carroll, as Espindola adds nothing to the mix in that regard. Moreover, Carroll's statements on
3 the May 23 and 24, 2005 tapes are not admissible for the truth of their assertions. Even at that
4 they were rebuffed by Espindola on the tapes. Even with all that was given to her in exchange
5 for her testimony she never retracted from that position. Agreement among two or more persons
6 is an essential element of the crime of conspiracy, and mere association is insufficient to support
7 a charge of conspiracy. Sanders v. State, 110 Nev. 434, 436, 847 P. 2d 1239, 1240 (Nev. 1994).
8 The State had no more proof than mere association. The giving of the jury instruction #40
9 exacerbated the problems with the absence of evidence in this case and warrant a recognition that
10 the jury was invited to and did apply a lesser standard of proof to the conspiracy charge that the
11 law and constitution permits.

12 **II. A NEW TRIAL IS WARRANTED AS A MATTER OF LAW FOR (1) FAILURE OF**
13 **THE COURT'S INSTRUCTIONS TO INSURE DUE PROCESS OF LAW AND A FAIR**
14 **TRIAL and (2) THE ADMISSION OF THE SURREPTITIOUS TAPES AGAINST LUIS**
15 **A. HIDALGO JR. IN VIOLATION OF BOTH THE RULE AGAINST THE USE OF**
16 **HEARSAY EVIDENCE AND THE CONFRONTATION CLAUSES OF THE STATE**
17 **AND FEDERAL CONSTITUTIONS.**

18 Whether to grant or deny a motion for a new trial is within the trial court's discretion.
19 Rippo v. State, 113 Nev. 1239, 946 P.2d 1017, 1024 (Nev. 1997). A district court will not be
20 overturned for granting a motion for a new trial absent a palpable abuse of discretion." Johnson
21 v. State, 59 P.3d 450, 118 Nev. 787, 59 P. 3d 450, 456 (Nev. 2002). The district court may grant
22 a motion for a new trial based on an independent evaluation of the evidence because
23 "Historically, Nevada has empowered the trial court in a criminal case where the evidence of
24 guilt is conflicting, to independently evaluate the evidence and order another trial if it does not
25 agree with the jury's conclusion that the defendant has been proven guilty beyond a reasonable
26 doubt." State v. Purcell, 110 Nev. 1389, 887 P.2d 276, 278 (Nev. 1994) (citing Washington v.
27 State, 98 Nev. 601, 604, 655 P.2d 531, 532 (1982) (quoting State v. Busscher, 81 Nev. 587, 589,
28 407 P.2d 715, 716 (1965)). So long as the district court notes in its opinion that the evidence as
to guilt was conflicting, then states its general impression with regard to each count, as well as its
reasons for disagreeing with the jury verdict the conflict is clearly identified. Purcell, 110 Nev.
at 1394. Accordingly, the "totality of the evidence" evaluation is the standard for the district
court to use in deciding whether to grant a new trial based on an independent evaluation of
conflicting evidence. Purcell, 110 Nev. at 1394. In reaching this statement of the proper

1 standard the Supreme Court relied upon State v. Walker, 109 Nev. 683, 685-86, 857 P.2d 1, 2
2 (Nev. 1993), where it held:

3 [A] conflict of evidence occurs where there is sufficient evidence presented at
4 trial which, if believed, would sustain a conviction, but this evidence is contested
5 and the district judge, in resolving the conflicting evidence differently from the
6 jury, believes the totality of evidence fails to prove the defendant guilty beyond a
7 reasonable doubt.

8 In Walker, the Court drew a distinction between granting a new trial based on insufficient
9 evidence and granting a new trial based on conflicting evidence. In contrast to conflicting
10 evidence, insufficiency of the evidence occurs where the prosecution has not produced a
11 minimum threshold of evidence upon which a conviction may be based, even if such evidence
12 were believed by the jury. Walker, 109 Nev. at 685, 857 P.2d at 2. The protection against double
13 jeopardy is implicated where a judgment of acquittal is warranted but not where a new trial is
14 ordered. Purcell, 887 P.2d at 279.

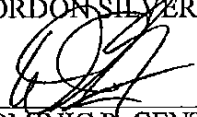
15 Here the evidence of guilty was skimpy at best. Moreover, over the objection of the defense,
16 the court gave instructions #40, which gave the jury a "slight evidence" standard to apply in
17 judging the existence of a conspiracy and the defendant's connection with it. This instruction has
18 been condemned by several federal circuits as being both unnecessary and confusing, as it does
19 nothing more than state the standard that the Court must apply in determining the admissibility
20 of what would otherwise be hearsay but for it qualifying as a co-conspirator statement made
21 during the course of and in furtherance of the conspiracy. See United States v. Martinez De
22 Ortiz, 907 F. 2d 629 (7th Cir 1989)(*en banc*). The trial judge alone is responsible for deciding
23 whether statements by co-conspirators are admissible, and that the question of admissibility
24 should not be submitted to the jury. United States v. Mitchell, 556 F.2d 371, 377 (6th Cir.), cert.
25 denied, 434 U.S. 925, 98 S.Ct. 406, 54 L.Ed.2d 284 (1977). Instructions that the jury may only
26 consider a co-conspirator's statement if the jury first finds that a conspiracy existed and that the
27 defendant was a member of it have repeatedly been held to be "altogether unnecessary." United
28 States v. Enright, 579 F.2d 980, 986-987 (6th Cir.1978). Accord, United States v. Swidan, 888
F.2d 1076, 1081 (6th Cir.1989). The judge should not advise the jury of the government's burden
of proof on the preliminary question of admissibility, or the judge's determination that the
government has met its burden. United States v. Vinson, 606 F.2d 149, 153 (6th Cir.1979), cert.
denied, 444 U.S. 1074, 100 S.Ct. 1020, 62 L.Ed.2d 756 (1980). Instead, the judge should admit

1 the statements, subject only to instructions on the government's ultimate burden of proof beyond
2 a reasonable doubt, and on the weight and credibility to be given statements by co-conspirators.

3 In the case *sub judice* this erroneous jury instruction, given over objection, invited disaster
4 and delivered it. When combined with the Court's error in admitting the post-conspiratorial
5 statements made under circumstances where Deangelo Carroll had reason to believe that they
6 would be used testimonially - which they were- both the Confrontation Clause of the Sixth
7 Amendment and the bar against the use of hearsay testimony were violated and require a new
8 trial be ordered.

9 Dated this 10th day of March, 2009.

10 GORDON SILVER

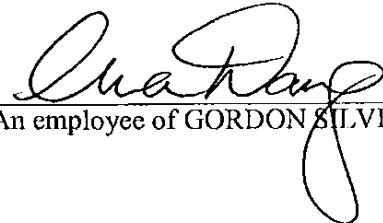
11 
12 DOMINIC P. GENTILE
13 Nevada Bar No. 1923
14 PAOLA M. ARMENI
15 Nevada Bar No. 8357
16 N3960 Howard Hughes Pkwy., 9th Floor
17 Las Vegas, Nevada 89169
18 (702) 796-5555
19 Attorneys for Defendant
20 LUIS A. HIDALGO, JR.
21
22
23
24
25
26
27
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CERTIFICATE OF SERVICE

The undersigned, an employee of Gordon Silver, hereby certifies that on the 10th day of March, 2009, she served a copy of the Motion for New Trial, 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
Marc.DiGiacomo@ccdanv.com

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


An employee of GORDON SILVER