EXHIBIT "6"

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DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

LUIS ALONSO HIDALGO, #1849634,
ANABEL ESPINDOLA, #1849750

Defendant.

CASE NO: C212667

DEPT NO: XIV

STATE'S OPPOSITION TO DEFENDANTS HIDALGO'S AND ESPINDOLA'S MOTION TO STRIKE NOTICE OF INTENT TO SEEK DEATH PENALTY

DATE OF HEARING: 12/22/05
TIME OF HEARING: 9:00 A.M.

COMES NOW, the State of Nevada, by DAVID ROGER, District Attorney, through MARC DIGIACOMO, Chief Deputy District Attorney, and hereby submits the attached Points and Authorities in Opposition to Defendant's Motion To Strike Notice Of Intent To Seek Death Penalty.

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

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STATEMENT OF FACTS

On May 19, 2005, shortly before midnight, the Las Vegas Metropolitan Police Department received a 9-1-1 emergency dispatch concerning a homicide on North Shore Road near Lake Mead. (Reporter's Transcript of the Preliminary Hearing ("RTP"), p. 146). When they arrived, they found the body of Timothy Hadland lying in the middle of the road with an apparent gunshot wound to the head. (RTP, p. 151). Just south of the body were several flyers from a strip club in North Las Vegas called the Palomino Club. Approximately thirty (30) feet in front of the body, the police found Mr. Hadland's silver Kia Sportage automobile. (RTP, p. 152). Inside the automobile, the police located a cell phone on the driver's side floorboard. (RTP, p. 153). A search of that cell phone determined that on May 19, 2005 at 11:27 p.m., the phone received a direct Nextel connect from a number identified as "Deangelo." (RTP, p. 154). Based upon an interview with Mr. Hadland's girlfriend who was located later, "Deangelo" was determined to be Defendant Deangelo Carroll, an employee of the Palomino Club.

The next day, detectives attended the autopsy of Mr. Hadland. During the autopsy, it was determined that there were in fact two entrance wounds to Mr. Hadland. (RTP, p. 157). One wound entered the left cheek of the victim while the other entered at the left ear.

Based upon the direct connect information in Mr. Hadland's cell phone, the police made a request for subscriber information from Nextel. Nextel responded that the number identified in the phone as "Deangelo" was in fact registered to Defendant Anabel Espindola at Simone's Auto Plaza at 6770 Bermuda, Las Vegas, Nevada. (RTP, p. 158). Through a

computer search, detectives also learned that Defendant Anabel Espindola was a key employee at the Palomino Club. (RTP, p. 159).

Due to the fact that much of the information was linked to the Palomino Club, detectives contacted Luis Hidalgo, Jr. ("Mr. H"), the owner of the club. (RTP, p. 160). "Mr. H" requested that detectives return when the floor manager, Ariel, could help them. (RTP, p. 162). Detectives returned to the Palomino Club and interviewed Ariel. During that interview, Ariel provided paperwork from the Palomino indicating that Defendant Deangelo Carroll was a current employee and that Timothy Hadland was a former employee. (RTP, p. 163). During the interview of Ariel, Defendant Deangelo Carroll arrived at the club. (RTP, p. 164). Detectives asked Defendant Carroll to accompany them to the police station. Defendant Carroll agreed and provided an approximately four (4) hour taped statement. (RTP, p. 164).

During the course of the statement, Defendant Deangelo Carroll explained that prior to arriving at work at the Palomino that night, Defendant Luis Hidalgo, III had called him at home and told him to "he's all like bring two garbage bags and a baseball bat, we have to go take care of_____but he never told me what it was about. Then when I got there to the club, I was called in the office." (Defendant's Exhibit 1, p. 58). Defendant Deangelo Carroll explained that initially, Mr. H called him into the office at the Palomino Club, in the presence of Defendant Anabelle Espindola, and explained that the victim, "T.J. was puttin' bad shit on his club and didn't like, so he tried to tell us, what, what, what he said is if you guys don't knock him out, at first he wanted us to beat him up, then he said that he wanted T.J. knocked off." (Defendant's Exhibit 1, p. 56). Mr. H also explained that Defendant

Hidalgo was very upset with T.J. and wanted Defendant Deangelo to "go take care of T.J." (Defendant's Exhbit 1, p. 88). Additionally, Mr. H was offering cash for the people who actually killed T.J. (Defendant's Exhibit 1, p. 61). During the car ride out to the Lake, Defendant Anabel Espindola called Defendant Deangelo Carroll and told him, "if [T.J.'s] by his self, then do him, if he isn't by his self, then just fuck him up ___, fuck him up and fuck up whoever's with him." (Defendant's Exhibit 1, p. 92). Thereafter, T.J. was lured to a remote location and executed by Defendant Kenneth Counts. After the killing, Defendant Kenneth Counts demanded six thousand dollars ($6000) for his services. Defendant Anabel Espindola provided the money to Defendant Deangelo Carroll to pay Defendant Kenneth Counts.

Moreover, Defendant Deangelo Carroll indicated that the motive behind the killing was the T.J. had been stealing from the club. (Defendant's Exhibit 1, p. 59). Additionally, Defendant Deangelo Carroll originally received one hundred dollars ($100) for his participation.

After the interview, detectives drove Defendant Carroll to his residence. When they arrived, Rontae Zone was present at the house. (RTP, p. 165). Rontae agreed to come to the homicide offices for an interview. (RTP, 166).

Rontae Zone testified at the preliminary hearing. Rontae is a nineteen (19) year old who knew Defendant Carroll. (RTP, p. 16). In May of 2005, Rontae began working with Defendant Carroll as a flyer boy for the Palomino Club. (RTP, p. 17). A flyer boy passes out flyers and pamphlets to cab stops. The flyers come in a variety of colors. (RTP, p. 18). Rontae worked with Defendant Carroll approximately four (4) to five (5) times. In order to

distribute the flyers, Defendant Carroll drove a white Chevy Astro van. On the first night, Rontae worked with Defendant Carroll and his cousin, Michael. (RTP, p. 19). Rontae got paid twenty dollars ($20) for his services. After work was over, Rontae stayed at Defendant Carroll's home. (RTP, p. 20).

On May 19th, Rontae and Defendant Carroll were joined by "JJ," later identified as Defendant Jayson Taoipu. (RTP, p. 25). While out promoting, Defendant Carroll told Rontae and Jayson that "Mr. H" wanted Defendant Carroll to kill someone. (RTP, p. 26). Rontae told Defendant Carroll that he was not willing to participate and specifically told him he would not participate. (RTP, p. 27). Defendant Taoipu, on the other hand, stated that he was willing to do it. (RTP, p. 28). Based upon that, Defendant Carroll gave Defendant Taoipu a .22 caliber revolver. Defendant Carroll tried to give Rontae the bullets to the gun, but Rontae wanted nothing to do with it and gave the bullets back to Defendant Taoipu. (RTP, p. 29).

Thereafter, the group went out to promote and pass out flyers. After passing out flyers, the group returned to Defendant Carroll's house. (RTP, p. 30). After a while, Defendant Carroll said it was time to go back to work. Concerned that he did not want to be involved in anything illegal, both Rontae and his girlfriend asked Defendant Carroll what they were leaving to do. (RTP, p. 31). Defendant Carroll told Rontae that they were only going to promote. The three, Rontae, Defendant Taoipu, and Defendant Carroll got into the white Chevy Astro Van. When they left, Defendant Carroll began driving to the west side, near E Street. (RTP, p. 31). On the way, Defendant Carroll told Defendant Taoipu and Rontae that "Mr. H's" son, Defendant Hidalgo, wanted the victim dead too, and that

Defendant Carroll should grab baseball bats and trash bags. (RTP, p. 34).

Once on E Street, Defendant Carroll stopped the van on E Street across the street from Defendant Carroll's mom's house. (RTP, p. 35). Defendant Carroll got out of the van and went into the house. Defendant Carroll spent approximately ten minutes inside the house. When he exited, he had "KC," later identified as Defendant Kenneth Counts, with him. Defendant Counts and Carroll got into the van. (RTP, p. 37). Defendant Carroll was driving, Defendant Taoipu was in the front passenger seat, Defendant Counts was in the rear passenger side seat and Rontae was behind the driver. (RTP, p. 40). From the west side, Defendant Carroll drove the van towards Lake Mead. As he was driving, Defendant Carroll was talking to the victim, Timothy Hadland, on the phone. (RTP, p. 38). During this time period, the group smoked Marijuana.[1]

While smoking the Marijuana, Defendant Counts asked Rontae if he had a "burner," referring to a gun. (RTP, 59). Rontae told Defendant Counts that he did not have one. Defendant Counts then asked Defendant Taoipu if he had a gun however, Rontae did not hear Defendant Taoipu's response. (RTP, p. 60).

As the Van drove down the hill to the lake, Timothy began to approach them in his Kia Sportage. When Defendant Carroll saw Timothy, he pulled the van over and parked. Timothy did a U-turn and pulled in front of the van by about thirty (30) feet. (RTP, p. 62). Timothy then got out of his vehicle and walked back to the van. (RTP, p. 64). As Timothy approached the van, Defendant Counts "sneaked" out the sliding passenger door of the van.

[1] It was at this point in the testimony where Defendant Counts', Hidalgo's and Espindola's attorneys demanded that the Court advise Rontae his rights and appoint counsel. After the appointment of Special Public Defender Randy Pike, Rontae continued his testimony as he wasn't the part of any conspiracy.

(RTP, p. 66). As he was sliding out of the van, Rontae saw Defendant Counts holding a black .357 firearm. After creeping out of the van, Defendant counts crept quietly around the front of the van, snuck up behind Timothy, raised up and shot Timothy as he was standing at the driver's side window. (RTP, p. 68). After Timothy fell, Defendant Counts fired another round into him when he hit the ground. (RTP, p. 69). After returning to the van, Defendant Counts instructed Defendant Carroll to drive. (RTP, p. 71). Defendant Carroll drove away.

As they were driving away, Defendant Counts confronted Defendant Taoipu about why he did not shoot. Defendant Taoipu said he was going to shoot however, Defendant Carroll was in the way. (RTP, p. 72). Thereafter, Defendant Counts asked Rontae where he lived. Defendant Carroll drove the van back to the Palomino Club.

Once back at the Palomino, Defendant Carroll and Counts entered the club. (RTP, p. 73). After about thirty (30) minutes, Defendant Counts exited the club and left in a cab. Thereafter, Defendant Carroll left the club and told Rontae and Defendant Taoipu that Defendant Counts got paid. (RTP, p. 75). Thereafter, Defendant Carroll, Taoipu and Rontae left and stayed at Defendant Carroll's house.

The next morning, Defendant Taoipu drove the van to a tire shop while Defendant Carroll followed in another vehicle. (RTP, p. 77). Defendant Carroll stabbed the tires on the van and had the tire shop replace the tires. (RTP, p. 78). Defendant Carroll paid and told Rontae that Defendant Espindola had given him a hundred dollars ($100) to replace the tires. (RTP, p. 79).

Later in the day, Defendant Carroll went to Simone's Auto Plaza. (RTP, p. 84). Defendant Taoipu and Rontae went with him. At Simone's Auto Plaza, Defendant Carrol

met with "Mr. H." (RTP, 95). The group then left in the Palomino Shuttle. (RTP, p. 96). Thereafter, Defendant Carroll went to work. (RTP, p. 99). The next time Rontae saw Defendant Carroll, he was with homicide detectives. Defendant Carroll, in the presence of homicide detectives, told Rontae to tell the truth.

Defendant Jayson Taoipu was located and interviewed. Taoipu confirmed most of the information provided by Defendant Deangelo Carroll; including calling the attack on T.J. a hit ordered by Mr. H; indicating that Defendant Luis Hidalgo, III called Defendant Deangelo Carroll and told him to bring garbage bags and baseball bats; confirming that Defendant Anabel Espindola called Defendant Deangelo Carroll as they were driving to the lake; and that Defendant Kenneth Counts and Deangelo Carroll were paid for their participation in the murder.

After interviewing Rontae and Defendant Taoipu, detectives set out to identify, locate and arrest "KC." Detectives knew from the description of where he was located that "KC," lived at 1676 E Street. (RTP, p. 167). Based upon this information, a search warrant was drafted for the residence. During the execution of the search warrant, "KC" was not located at 1676 E Street. (RTP, p. 171). During the execution of that warrant, detectives received information from Defendant Carroll that Defendant Counts was across the street at 1677 E Street. Contact was made with the occupants of 1677 E Street, however, efforts to contact Defendant Counts were unsuccessful. Therefore, a second search warrant was drafted and executed at that residence. (RTP, p. 172). After entry, Defendant Counts was found hiding in the attic. (RTP, p. 176). It took several hours and use of explosive devices to eventually get him out of the attic. Eventually, a hole in the ceiling had to be cut to extricate Defendant

Counts. (RTP, 178).

After Defendant Counts was removed, a search was conducted of 1677 E Street. During the search, a black satchel containing several one hundred dollar ($100) bills was found along with Defendant Counts' identification in front of a couch. (RTP, p. 181). Underneath the couch, in approximately the same general area as the satchel, was more money, some peach cigars as well as several VIP card from the Palomino Club.

After the search, detectives once again met with Defendant Carroll. (RTP, p. 183). Defendant Carroll consented to wear a body recorder and he was provided one on May 23rd. (RTP, p. 184). After placing the body recorder on Defendant Carroll, Defendant Carroll was surveilled as he entered Simone's Auto Plaza. After a while, Defendant Carroll exited Simone's Auto Plaza and was surveilled back to his meeting with detectives. (RTP, p. 186). At that time, the body recorder was collected and analyzed. In addition, Defendant Carroll was in possession of fourteen hundred dollars ($1400) in cash as well as a bottle of Tanqueray.

An enhanced version of the body recording was admitted at the preliminary hearing. (RTP, p. 250). On the recording, Defendant Espindola, Defendant Carrol and Defendant Hidalgo discuss the crime as well as request Defendant Carroll to kill Defendant Taoipu and Rontae Zone. In one part, Defendant Espindola indicates that Defendant Carroll was supposed to beat the victim. In another section, Defendant Hidalgo asks Defendant Carroll whether "KC" would be willing to kill Taoipu and Rontae:

DEANGELO: Who

LITTLE LOU: The people who are gonna rat.

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

LITTLE LOU: Could you have fucking KC kill them too, we'll fucking put something in their food so they die rat poison or something

DEANGELO: We can do that to

LITTLE LOU: And we'll get KC last.

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

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

Afterward, Defendant Hidalgo told Defendant Carroll to put rat poisoning in a bottle of Tanqueray gin and have Defendant Taoipu and Rontae drink it. Moreover, Defendant Espindola provided money to Defendant Carroll to keep Defendant Taoipu and Rontae quiet as well as money for Defendant Carroll himself. Defendant Hidalgo told Defendant Carroll if he goes to prison for the crime, Defendant Hidalgo will buy Defendant Carroll's family

United States' savings bonds to help pay for his family.

Later that day, based upon the conversations at Simone's Auto Plaza, Defendant Carroll went to the Palomino Club and resigned. (RTP, p. 189). During his resignation, he was wearing another body recorder.

The next day, May 24th, detectives decided to place another body recorder on Defendant Carroll and he was sent back into Simone's Auto Plaza. (RTP, p. 190). When he left Simone's Auto Plaza, he had approximately eight hundred dollars ($800) in cash which was recovered from him. After Defendant Carroll left Simone's Auto Plaza, detectives waited for the other suspects to leave before executing various search warrants. (RTP, p. 191). The first suspect to leave was Defendant Hidalgo. After leaving, Defendant Hidalgo was stopped by a patrol officer. (RTP, p. 192). After that he was contacted by detectives and a special agent of the Federal Bureau of Investigation and Defendant Hidalgo agreed to accompany them to the homicide offices for an interview. (RTP, p. 193). After receiving his Miranda warnings, Defendant Hidalgo was interviewed for several hours. (RTP, p. 210).

Sometime thereafter, Defendant Espindola left Simone's Auto Plaza with "Mr. H." (RTP, p. 211). Eventually, she was brought down to the homicide offices and read her Miranda warnings. (RTP, p. 212). Thereafter, Defendant Espindola admitted that she had spoken to Defendant Carroll on the two previous days at Simone's Auto Plaza. (RTP, p. 215).

The recording from the May 24th encounter at Simone's Auto Plaza where Defendant's Espindola, Carroll and Hidalgo can once again be heard discussing the crime, was admitted into evidence.

During this recording, Defendant Espindola tries to explain how she tried to call Defendant Carroll and change the plan from killing the victim to only beating the victim:

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

ANABEL: OK ____ listen listen

DEANGELO: I'm not...

ANABEL: ___ talk to him not fucking take care of him _____ god damn it I fucking called you

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

ANABEL: I _____

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

ANABEL: I said go to plan B fucking D'eangelo and D'eangelo you're just minutes away___ I told you no I fucking told you no, and I kept trying to fucking call you but you turned off your mother fucking phone

DEANGELO: I never turned off my phone

ANABEL: I couldn't reach you

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

ANABEL: Shh... I couldn't fucking reach you as soon as ___spoken ___knew where you fucking were I fucking tried calling you again and I couldn't fucking reach you.

After this discussion, Defendant Espindola got more money for Defendant Carroll. Moreover, Defendant Espindola told Defendant Carroll to deny everything and that if she is ever contacted, she is just going to deny any knowledge.

During the subsequent search of Simone's Auto Plaza, numerous items were located which were relevant to the investigation. In room six (6), numerous pieces of identification in the name of Defendant Hidalgo were located. In addition, thousands of dollars in United States' saving bonds were located, all in the name of Defendant Hidalgo, along with a variety of bottles of liquor. In Defendant Espindola's office, a check made out to Defendant Carroll for twenty-four (24) hours of work was located. (RTP, p. 318).

During the recording of May 23rd, Defendant Espindola told Defendant Carroll why he is getting a check for twenty-four hours:

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

because that was the day all the shit happened _____ Friday Thursday of the week before was the day that Timothy Hadland was killed. In addition, inside a common area of Simone's Auto Plaza, a handwritten note was located which stated, "Maybe we are being under surveill. Keep you mouth shut!!" (RTP, p.315). Outside Simone's Auto Plaza, the white Chevy Astro van was located. (RTP, p. 319).

On July 6, 2005, Notices of Intent to Seek the Death Penalty were filed against all four charged Defendants. As to Defendants Espindola and Hidalgo, there were three aggravating circumstances alleged. The first two aggravating circumstances alleged were:

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

See NRS 200.033(1). The basis for these two aggravating circumstances were that both Defendants solicited Defendant Deangelo Carroll to kill Witness Rontae Zone and Defendant Jayson Taoipu. The final aggravating circumstance alleged was:

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

See NRS 200.033(6). The basis for this aggravating circumstance is that this is clearly a case of murder for hire in which both the people doing the hiring as well as the people receiving the money are subject to the aggravating circumstance.

POINTS AND AUTHORITIES

Defendants argue in the instant motion to strike the notice of intent to seek the death penalty for a variety of reasons. To the extent that Defendants argue that there isn't evidence that Defendants are guilty of first degree murder, the State has not responded. Both Defendants filed a writ of habeas corpus to attack the evidence in support of probable cause to believe they committed the crime which was denied by this Court. To the extent that Defendants argue issues that weren't covered in the pre-trial writ, this response follows.[2]

I.

Whether Defendants Hidalgo And Espindola Intended That A Killing Take Place Or Intended That Lethal Force Be Employed Is A Question Of Fact For A Jury

Defendants Hidalgo and Espindola argue that the Eighth Amendment to the United States Constitution precludes the imposition of the death penalty as Defendants Hidalgo and Espindola did not intend that a killing take place or intend that lethal force be employed. To support this assertion, Defendants reference a variety of cases about whether a person who did not pull the trigger can be eligible for the Death Penalty. While Defendants discussion of the legal precedents is fairly accurate, their mistake of fact make this motion completely unsupported.

The case law is clear that if a person does not kill and never intended that a killing occur or deadly force be employed, then that Defendant is not eligible for the death penalty.

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[2] Defendants mention in a variety of places in their motion that this motion is also relevant to bail however, Defendants have not filed a motion to seek bail. As such, the State hasn't responded to the rhetoric concerning the effects on bail. Should Defendants file a bail motion, the State will respond in writing.

See Enmund v. Florida, 458 U.S. 782, 797 (1982); Tison v. Arizona, 481 U.S. 137 (1987); and Doleman v. State, 107 Nev. 409, 418, 812 P.2d 1287, 1292-3 (1991). Unfortunately for Defendants Hidalgo and Espindola, even viewing the evidence in a light most favorable to the Defendants, both of them at the very least joined a conspiracy where they intended that deadly force would be used.

Defendant Hidalgo specifically told Defendant Deangelo Carroll to come to work with baseball bats and garbage bags to beat T.J. Perhaps a good defense attorney could argue that the statement does not evidence that Defendant Hidalgo necessarily wanted T.J. dead, however, that is a question of fact for the jury. It certainly demonstrates that Defendant Hidalgo intended for a battery with a deadly weapon (deadly force) to be used. Moreover, Defendant Hidalgo's own father, Mr. H, indicated that Defendant Hidalgo was very upset and wanted Defendant Carroll to "go take care of T.J." In addition, on the recordings, Defendant Hidalgo expresses that he wants to hire Defendant Kenneth Counts to kill Zone and Taoipu **"TOO."** Thereafter, he provides Defendant Deangelo Carroll the method by which he is to have these two killed, e.i., rat poisoning in a gin bottle. Finally, even if perhaps there is some minute possibility that Defendant Hidalgo did not intend to kill, he certainly intended for deadly force to be used. To assert that beating an individual with baseball bats and stuffing them into garbage bags does not exhibit a complete indifference to human life is simply unsupportable.

The evidence that Defendant Espindola intended for T.J. to be killed is even stronger. Defendant Espindola was present when Mr. H instructed Defendant Deangelo Carroll to kill T.J. While Defendant Carroll was driving the executioner to the scene of the murder,

Defendant Espindola called Defendant Carroll. It was at this point that Defendant Espindola learned that T.J. was not at home as the original plan contemplated but out at the lake with potential witnesses. Upon learning this information, Defendant Espindola told Defendant Carroll, "if [T.J.'s] by his self, then do him, if he isn't by his self, then just fuck him up ___, fuck him up and fuck up whoever's with him." This information was confirmed by Defendant Espindola on the surreptitious recording when Defendant Carroll confronted her with this statement, Defendant Espindola stated, "I told you to go to plan B!" Later in the recordings, Defendant Espindola confirmed that her concern with killing T.J. in public was:

> Well the bastards fucking right what about it, what about everything might as well to lose it all, and if I lose the shop and I lose the club I can't help you or your family... God Damn it _____ your not that stupid you were playing with the _____ in the car you should have fucking turned back **YOU HAD TOO MANY FUCKING EYES ON YOUR ASS WHAT THE FUCK WERE YOU THINKING?**

(State's Writ Exhibit 2, p. 14).

There is absolutely no question that both Defendants Espindola and Hidalgo intended deadly force to be utilized. Whether they intended to kill is certainly a question for the jury. In either situation, even accepting all of the law cited by Defendants' attorneys, both are eligible for the death penalty.

II.

The Nevada Supreme Court Does Not Require, Nor Does The United States Constitution Require, A Finding of Probable Cause For An Aggravating Circumstance

The State maintains that its Notice of Intent to Seek the Death Penalty was proper and that the Nevada Supreme Court will continue to follow its recent holding which specifically provided that the State did not have to establish its aggravating circumstances at the probable cause determination. Moreover, this argument is particularly inappropriate as the only aggravating circumstances alleged are based upon the testimony which supported the probable cause for the charges contained in the Information. Defendant has already argued that insufficient evidence was presented to the justice of the peace to sustain those charges, and this Court has denied Defendants relief. As such, there is no additional evidence which would have had to be admitted at the justice of the peace to establish probable cause for the aggravating circumstances.

A. The State is Not Required to Establish Aggravating Circumstances at a Probable Cause Hearing.

The State followed the law in place at the time of the preliminary hearing and in place today when the case was presented to the justice of the peace. The State is not required to prove its aggravating circumstances at the probable cause hearing. Moreover, Defendant's reliance on Ring and Apprendi is misplaced.

The Nevada Supreme Court, less than three years ago, directly addressed the issue of whether the State is required to prove aggravating circumstances at the grand jury or preliminary hearing and held that "a probable cause finding is not necessary for the State to allege aggravating circumstances and seek a death sentence." Floyd v. State, 118 Nev. 156, 166, 42 P.3d 249, 256 (2002), cert. denied post-Ring, 537 U.S. 1196, 123 S.Ct. 1257, 154

L.Ed.2d 1033 (2003).

1. The Ring Decision Should Not Change the Floyd Holding.

In essence, defendant is asking this Court to overturn Floyd by extrapolating from two recent United States Supreme Court Cases: Ring v. Arizona, 536 U.S. 584, 122 S.Ct 2428, 153 L.Ed.2d 556 (2002), decided before the United States Supreme Court denied certiorari on Floyd; and Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), cited by Floyd at footnotes 13 and 14.

An argument based on Apprendi alone would be thwarted by *stare decisis*. Perhaps for this reason, defendants have supplemented the Apprendi argument that was unsuccessful in Floyd with a reference to Ring. As many state courts confronting this issue have pointed out, however, Ring expressly limited itself so as to not reach the issue being briefed in the instant case:

> Ring's claim is tightly delineated: He contends only that the Sixth Amendment required jury findings on the aggravating circumstances asserted against him. . . . *Ring does not contend that his indictment was constitutionally defective.* See Apprendi, 530 U.S., at 477, n. 3, 120 S.Ct. 2348 (Fourteenth Amendment "has not ... been construed to include the Fifth Amendment right to 'presentment or indictment of a Grand Jury'").

Ring, 536 U.S. at 597 n. 4, 122 S.Ct. at 2437 n.4 (emphasis added). For State decisions interpreting this self-limitation to mean that Ring did not affect analysis of the issue at bar, see for example, Gray v. State, WL 2065362, 12-13 (Miss. 2004); State v. Fortin, 178 N.J. 540, 633, 843 A.2d 974, 1027-1028 (2004); Primeaux v. State, 88 P.3d 893, 899-900 (Okla. Crim. App. 2004); Moeller v. Weber, 2004 WL 2254535, 16 (S.D. 2004); State v. Hunt, 357

N.C. 257, 271, 582 S.E.2d 593, 602 (2003), cert. denied 124 S.Ct. 44, 156 L.Ed.2d 702 (2003); State v. Oatney, 335 Or. 276, 296, 66 P.3d 475, 487 (2003); State v. Edwards, 810 A.2d 226, 233-234 (R.I. 2002).

2. The Federal Indictment Clause, Through Which Ring Might Govern State Indictments, Has Not Been Incorporated

The import of Ring's citation of Apprendi becomes apparent when one considers that Ring is premised upon the Sixth Amendment to the United States Constitution, which has been incorporated against the States via the 14th Amendment. To apply Ring, or its construction of aggravating factors to the States, one would have to rely on the Indictment Clause of the Fifth Amendment. However, as Ring explicitly recognizes, the Indictment Clause has not been incorporated against the States. See Ring, supra, citing Apprendi, 530 U.S. at 477 n. 3, 120 S.Ct. at 2356 n. 3, 147 L.Ed.2d at 447 n. 3. Accord Alexander v. Louisiana, 405 U.S. 625, 633, 92 S.Ct. 1221, 1226-27, 31 L.Ed.2d 536, 543 (1972) ("the Due Process Clause . . . does not require the States to observe the Fifth Amendment's provision for presentment or indictment by a grand jury"). For State decisions drawing attention to this fact while holding that Ring did not address the issue at bar, see for example State v. Fortin, 178 N.J. at 633, 843 A.2d at 1027-1028 (2004); State v. Berry, 141 S.W.3d 549, 558 (Tenn. 2004); People v. McClain, 343 Ill.App.3d 1122, 1138, 799 N.E.2d 322, 336-336 (Ill. App. 1 Dist. 2003); State v. Hunt, 357 N.C. at 271, 582 S.E.2d at 602 (2003), cert. denied 124 S.Ct. 44, 156 L.Ed.2d 702 (2003). Defendant's attempt to incorporate the Federal Indictment Clause via the Federal Due Process Clause, while clever, directly contradicts the

quotation from Alexander above and renders the proceeding quotations from Ring and Apprendi nonsensical; for these reasons it should be ignored.

Given Ring's questionable applicability, courts should ask: why would any State court find Ring instructive? To put the question more directly, why in other words, would a State transport Ring across a demarcation of State sovereignty that the United States Supreme Court took pains to observe? The State respectfully submits that this Court should not extend the reasoning in Ring to State indictments; rather, this Court should be, as one state Supreme Court put it, "unwilling to do what the U.S. Supreme Court would not." State v. Berry, 141 S.W.3d at 560-561 (Tenn. 2004) (holding, post-Ring, that Apprendi did not require the State to include aggravators in indictments).

3. State courts have not applied Ring, or its reasoning, in decisions relevant to the issue at bar

The State has surveyed the Constitutional law of the 37 States, other than Nevada, in which the death penalty is legal. The State found cases relevant to the issue at bar in 21 of those 37 states. Every single case in these jurisdictions either found Ring inapplicable or ignored it in the course of issuing opinions that would resolve the issue at bar. In all but one jurisdiction, the courts found that their own Constitution did not require that the State plead aggravators, or establish probable cause therefore, prior to seeking the death penalty. For a leading case from each jurisdiction, see: **ALABAMA:** Walker v. State, 2004 WL 2201197 (Ala. Crim. App. 2004) (indicating that Ring did not change prior case law holding that aggravators do not need to be pled in an indictment); **CONNECTICUT:** State v. Courchesne, 2003 WL 22133886, 1 (Conn. Super. 2003) (rejecting arguments based on Ring

on account of the Indictment Clause not being incorporated); **DELAWARE**: State v. Manley, 2003 WL 23511875, 41 (Del. Super. 2003) ("[t]his Court finds no requirement in either federal or State constitutional law that statutory aggravating circumstances must be alleged in the indictment."); **FLORIDA:** Bottoson v. Moore, 833 So.2d 693, 695 (Fla. 2002) (per curiam) (holding that Ring did not require that aggravators be pled in an indictment), cert. denied, 537 U.S. 1070, 123 S.Ct. 662, 154 L.Ed.2d 564 (2002); **GEORGIA:** Terrell v. State, 276 Ga. 34, 40, 572 S.E.2d 595, 602 (2002) (concluding in a post-Ring challenge to an indictment that the indictment need not allege aggravating circumstances, because Defendant had received other notice of aggravating factors), cert. denied 124 S.Ct. 88, 157 L.Ed.2d 64 (2003); **IDAHO**: State v. Lovelace, 90 P.3d 278, 295 (Idaho 2003) (denying defendant's claim of error where defendant claimed that Ring and Apprendi required that aggravating circumstances be pled in the indictment), cert. denied, __ S.Ct. __, 2004 WL 2075034 (2004); **ILLINOIS:** People v. McClain, 343 Ill.App.3d 1122, 1138, 799 N.E.2d322, 336-336, (Ill. App. 1 Dist. 2003) (holding that Ring does not require state prosecutors to plead aggravators in a state-court indictment and finding that defendants receive sufficient notice of aggravators, therefore there is no need for them to be pled in indictment), appeal denied by 206 Ill.2d 636, 806 N.E.2d 1070, 282 Ill. Dec. 482 (2003); **KENTUCKY:** Soto v. Commonwealth, 139 S.W.3d 827, 842 (Ky. 2004) (holding that notice of aggravating factors given after the indictment was filed was Constitutionally sufficient and rejecting arguments based on Ring and Apprendi); **MARYLAND:** Baker v. State, 367 Md. 648, 790 A.2d 629 (2002) (holding that death was not an enhanced sentence triggering the protections established in Apprendi and that defendant was put on notice of aggravators before trial),

cert. denied, 124 S.Ct. 1673, 158 L.Ed.2d 370, 72 USLW 3598 (2004), ruling reconsidered post-Ring, 2004 WL 2254539 (Md.); **MISSISSIPPI:** Berry v. State, 2004 WL 1470968, 12 (Miss. 2004) (noting that "like Apprendi, the Ring Court specifically noted that its opinion did not address the constitutionality of the indictment; and therefore, it never spoke to whether states are required provide such charges in their indictments" and remarking that the Indictment Clause does not apply to the state); **MISSOURI:** State v. Gilbert, 103 S.W.3d 743, 747 (Mo.2003) (en banc) (holding that Ring had no effect on the court's previous rejection of the argument that indictments need to allege aggravators); **NEW HAMPSHIRE:** State v. Melvin, 834 A.2d 247, 252 -253 (N.H. 2003) (State due process clause did not require the state to allege in the indictment prior convictions for aggravated felonious sexual assault that enhanced sentence to life imprisonment without parole; did not even consider Apprendi or Ring argument.); **NEW JERSEY:** State v. Fortin, 178 N.J. 540, 633, 843 A.2d 974, 1027-1028 (2004) ("Ring did not address the question whether aggravating factors in a capital case must be considered by a grand jury pursuant to the Fifth Amendment.");[3] **NEW MEXICO:** State v. Young, 90 P.3d 477, 481 (N.M. 2004) (the omission of statutory aggravators from an indictment charging defendant with first-degree murder does not deprive the sentencing court of jurisdiction to impose the death penalty;" no

[3] Note that the New Jersey Supreme Court recognized that its decision was not compelled at all by Ring. The Court found that "[the New Jersey Constitution] requires that aggravating factors be submitted to the grand jury and returned in an indictment," primarily because "[o]n more than one occasion, this Court has acknowledged that, in important ways, aggravating factors are functionally indistinguishable from the elements of a crime." See Fortin, 178 N.J. at 643, 843 A.2d at 1033-35. The basis for this holding, therefore, would not be compatible with Nevada jurisprudence, because this Court has held that "[a]ggravating circumstances are not separate penalties or offenses, but are standards to guide the making of the choice between the alternative verdicts of death and life imprisonment. Therefore, an aggravating circumstance alleged in a capital proceeding does not constitute a separate crime that requires a finding of probable cause under the U.S. or Nevada constitutions." Floyd, 42 P.3d at 256.

mention of Ring or other Constitutional challenges); **NORTH CAROLINA:** State v. Hunt, 357 N.C. 257, 271, 582 S.E.2d 593, 602 (2003) (holding that neither Ring nor Apprendi required that aggravating circumstances be pled in indictment), cert. denied 124 S.Ct. 44, 156 L.Ed.2d 702 (2003); **OKLAHOMA**: Lott v. State, __ P.3d __, 2004 WL 2002235, 26 (Okla. Crim. App. 2004) (finding that Ring does not contain any language requiring state prosecutors to charge alleged aggravating circumstances.); **OREGON**: State v. Oatney, 335 Or. 276, 296, 66 P.3d 475, 487 (2003) (finding that Ring did not address the issue of whether aggravators or even elements needed to be pled in the indictment; and, therefore, court's prior holding that an indictment need not contain aggravators remained unchanged), cert. denied __ U.S. ___, 124 S.Ct. 1148, 157 L.Ed.2d 1045 (2004); **RHODE ISLAND**: State v. Edwards, 810 A.2d 226, 233-234 (R.I. 2002) ("as recognized in both Apprendi and Ring, there is no federal requirement that a felony prosecution, capital or otherwise, be commenced by an indictment issued by a grand jury in a state prosecution"), cert. denied 538 U.S. 980, 123 S.Ct. 1808, 155 L.Ed.2d 670 (2003); **SOUTH DAKOTA:** Moeller v. Weber, 2004 WL 2254535, 16 (S.D. 2004) ("[t]he Court in Jones, Apprendi, and Ring dealt with the indispensable role of the jury in deciding criminal cases. These cases did not address whether notice of an aggravating factor had to be conveyed to the defendant only by means of an indictment or information, as opposed to some other means"); **TENNESSEE:** State v. Odom, 137 S.W.3d 572, 590 (Tenn. 2004) (holding, post-Ring, that Apprendi did not require the State to include aggravators in indictments, because the death penalty is within the statutory range of punishment prescribed for first degree murder and alternate notice to Defendant 30 days before trial satisfied Due Process requirements); **TEXAS:** Sigala v. State,

2004 WL 231326, 14 (Tex. Crim. App. 2004) (rejecting an Apprendi-based argument, because, despite the existence of mitigating factors, in Texas, the statutory maximum for a capital offense is death).

This list of cases demonstrates that in addition to acknowledging Ring's inapplicability, State courts have been unwilling to import the reasoning of Ring to the probable cause context. The fact that the United States Supreme Court has denied certiorari in 7 of the 21 cases listed above (and several other similar cases not listed in the interest of brevity) supports the observation that "the Supreme Court itself appears to be narrowing, not broadening, Apprendi's scope." See Fortin, 178 N.J. at 653, 843 A.2d at 1039-1040 (dissent), citing State v. Stanton, 176 N.J. 75, 94-96, 820 A.2d 637, 648-50 (2003) (discussing Apprendi in the aftermath of the subsequent decision in Harris v. United States, 536 U.S. 545, 122 S.Ct. 2406, 153 L.Ed.2d 524 (2002)).

4. Federal Courts applying Ring to the issue at bar are not informative, given the Department of Justice's preemptive policy of establishing probable cause for aggravators

At first glance, it may appear that, in a few federal courts of appeals, Apprendi's scope may be broadening. As defendants note, some federal courts have interpreted Ring to extend to the issue at bar. However, it appears that the federal courts' decisions have been prompted by the Department of Justice's preemptive policy of pleading aggravators. According to one account, "federal prosecutors [and] lower federal courts, out of an abundance of caution, have assumed that aggravating factors are to be included in federal indictments in the face of Ring." Fortin, 178 N.J. at 652, 843 A.2d at 1039 (dissent). See also

Id. at 644-645 ("Federal prosecutors apparently have assumed that Ring requires a grand jury to conclude that the government's decision to seek the death penalty is supported by sufficient evidence") (citing: United States v. Haynes, 269 F.Supp.2d 970, 973 (W.D. Tenn. 2003) (noting that, post-Ring, the government obtained a superseding indictment alleging aggravating factors); United States v. Sampson, 245 F.Supp.2d 327, 329 (D. Mass. 2003) (same); United States v. Church, 218 F.Supp.2d 813, 814 (W.D. Va. 2002) (same); United States v. Matthews, 246 F.Supp.2d 137, 140 (N.D. N.Y. 2002) (same); United States v. Lentz, 225 F.Supp.2d 672, 675 (E.D. Va. 2002) (same); United States v. Regan, 221 F.Supp.2d 672, 677 (E.D. Va. 2002) (same)).

To investigate this characterization of events, the State called the Department of Justice and spoke with an attorney involved in the setting the DOJ's capital policy. He explained that, out of an abundance of caution, the Department of Justice voluntarily adopted an internal policy after Ring advising U.S. Attorneys to prove up aggravators before the Grand Jury. The Department of Justice instituted this practice primarily because they did not want to risk losing their capital sentences in the event Ring were held to apply to indictments. They did not believe that they were compelled to do so by Ring or its reasoning.

Defendant suggests that because this issue is one of first impression in Nevada, this Court is relegated to looking at how other jurisdictions have interpreted . . . constitutional/statutory [indictment] requirements post-Ring. In this respect, it seems plain that the weight of jurisprudence outside Nevada weighs heavily in the State's favor. Defendant's previous arguments suggest that he will try to distinguish Nevada's pleading and sentencing scheme from those of the several states listed above. The State preemptively

issues three responses. First, the State believes that this is not an issue of first impression. This issue was decided in Floyd and Ring is inapplicable. Therefore, there is no reason to look to other jurisdictions. Secondly, to the extent this Court desires to look to other jurisdictions, the decisions of the federal courts seem easily distinguishable from the Nevada experience, because as is not the case in Nevada, the federal courts were responding to and accommodating the preemptive actions of the Department of Justice. Thirdly, in the following section, it will be argued that, even if the Federal Courts had not been merely responding to the overcautious policies of the Department of Justice, they would have misapplied the Supreme Court's reasoning in Ring.

C. Even if Ring Did Apply to the Instant Case, Ring's Mandates, Based Fundamentally in the Sixth Amendment, Have Been Satisfied.

1. Ring's reasoning is fundamentally based upon the Sixth Amendment

Ring held that "[b]ecause Arizona's enumerated aggravating factors operate as the functional equivalent of an element of a greater offense, the Sixth Amendment requires that they be found by a jury." Ring, 536 U.S. at 585 (quotation omitted). Defendants read this excerpt as though Justice Ginsburg had tacked "and the Fifth Amendment requires that they be pled in an indictment" to the end of the sentence, even though, as shown above, the Federal Indictment Clause has not been incorporated. In fact, it is not unfair to ask: if defendants have properly interpreted Ring, why did Ring and Apprendi explicitly refrain from incorporating the Federal Indictment Clause; further, why did the United States Supreme Court deny certiorari in Floyd and in one-third of the cases cited above? The State

believes that the most persuasive answer to this question stems from a pattern noted by the South Dakota and Georgia Supreme Courts: Ring, Apprendi and Jones were not concerned with the content of the indictment except insofar as it related to the role of the jury. See Terrell v. State, 276 Ga. 34, 40, 572 S.E.2d 595, 602 (2002) (Ring, Apprendi and Jones were "focused on the role of the jury"). See also Moeller, supra, ("[t]he Court in Jones, Apprendi, and Ring dealt with the indispensable role of the jury in deciding criminal cases").

The State believes that the reasoning of Ring, Apprendi and Jones is without exception focused primarily and fundamentally on the role of the jury. The reasoning of these three cases, along with the recent denials of certiorari cited above make clear that—in the jurisprudence of which Ring is a part—the United States Supreme Court has taken interest in State indictments only insofar as the content of the indictments relates to the role of the jury. Because Ring, Apprendi and Jones are focused on the role of the jury, it would be improper to take Ring's discussion of functional equivalence out of its context and apply it where the role of the jury is not implicated.

To flesh out this claim, the State first directs this Court's attention to Ring's holding. Note that Ring explicitly overruled Walton only to the extent that "[c]apital defendants . . . are entitled to a **jury determination** of any fact on which the legislature conditions an increase in the maximum punishment." Ring, 536 U.S. at 589, 122 S.Ct at 2432 (emphasis added).

In his dissent to Ring, Scalia explains that his opinions in Ring and Apprendi were influenced by his belief:

> that the fundamental meaning of the **jury-trial guarantee of the Sixth**

> **Amendment** is that all facts essential to imposition of the level of punishment that the defendant receives--whether the statute calls them elements of the offense, sentencing factors, or Mary Jane--**must be found by the jury** beyond a reasonable doubt.

Ring, 536 U.S. at 610, 122 S.Ct. at 2444 (2002) (dissent) (emphasis added).

Apprendi and Jones are similarly concerned with the role of the jury. The Question Presented that Justice Stevens issued in Apprendi focused on whether a jury would make the factual determination at issue. See Apprendi, 530 U.S. at 469, 120 S.Ct. at 2351. In Jones, the majority explained that:

> [t]he terms of the carjacking statute illustrate very well **what is at stake** . . . If a potential penalty might rise from 15 years to life on a nonjury determination, the **jury's role would** correspondingly **shrink from the significance** usually carried by determinations of guilt **to the relative importance of low-level gatekeeping.**

Jones v. U.S., 526 U.S. 227, 243-244, 119 S.Ct. 1215, 1224, 143 L. Ed. 2d 311 (1999) (emphasis added).

It appears from the language cited above that the attention of these three landmark cases is turned, at its essence, toward the role of the jury. The content of the indictment seems to be relevant in these cases only insofar as it is a vehicle for transporting factual determinations from the desk of the judge to the jury room.

In post-Ring Nevada, the jury must find aggravating factors regardless of whether those factors are included in the indictment. The content of the indictment therefore no

longer performs the function of bringing factual determinations before the jury. Thus the concerns of Jones, Apprendi and Ring have not been implicated by the State's behavior in the case at bar. To address the issue at bar in the language of Ring, Apprendi and Jones, consider the following. Defendant is entitled to a jury determination of any fact on which the legislature has conditioned an increase in the maximum punishment. Cf. Ring, supra at 589. All facts essential to imposition of the level of punishment that the defendant receives—whether they are called elements of the offense, sentencing factors, or Mary Jane—will be found by the jury beyond a reasonable doubt. Cf. Ring, supra at 610. Factual determinations relevant to the aggravators will be made by a jury. Cf. Apprendi, supra at 469. The role of the jury is not at stake and will not shrink from the significance usually carried by determinations of guilt. Cf. Jones, supra at 227.

Not only are Ring, Jones and Apprendi grounded in the Sixth Amendment, the primary and fundamental concern of these cases is addressed to the role of the jury. Because this concern is not implicated here, the reasoning of these cases should not be extended to the instant matter.

2. This Court should not extend Ring's reasoning beyond the Fifth Amendment context

Because the role of the jury is the fundamental concern of Ring, Apprendi and Jones, it would be imprudent to take the reasoning of these cases out of the Sixth Amendment context. This is especially so if it is true that "the Supreme Court itself appears to be narrowing, not broadening, Apprendi's scope." See Fortin, supra at 653. It is even more true for policy reasons, presumably the same policy reasons considered by this court when it

handed down Floyd. The State presumes that the policy implications of requiring the State to show probable cause for aggravators have not changed post-Ring. In case Defendant asserts that they have, the State offers post-Ring commentary from the Supreme Courts of North Carolina and Florida. The Supreme Court of North Carolina addressed the logistical problems that would arise from a holding that aggravators must be pled:

> many complications would invariably arise if we required aggravators to be pled in murder indictments. These problems include determining whether the grand jury would need to be "death-qualified" and what procedures, if any, would be employed so that the State could acquire a superseding indictment containing aggravating circumstances it may discover after defendant has been indicted.

Hunt, 357 N.C. at 276-277, 582 S.E.2d at 605-606.

The Supreme Court of Florida sketched an even more perilous picture:

> Extending Ring so as to render Florida's capital sentencing statute unconstitutional as applied to either King or Bottoson would have a catastrophic effect on the administration of justice in Florida and would seriously undermine our citizens' faith in Florida's judicial system. If Florida's capital sentencing statute is held unconstitutional based upon a change in the law applicable to these cases, all of the individuals on Florida's death row will have a new basis for challenging the validity of their sentences on issues which have previously been examined and ruled upon. These challenges could possibly result in entitlements to entire repeats of penalty phase trials, in turn leading to repeats of post conviction proceedings, and then new federal habeas proceedings. Evidence will clearly have grown stale or have been lost or destroyed, witnesses will be unavailable, and memories will surely have faded.

Importantly, all of those involved in these human tragedies will have to relive horrid experiences in order to reestablish the factual bases of these cases, many which are undeniably heinous.

Bottoson v. Moore, 833 So.2d at 698-699. For these policy reasons, as well as the ones undoubtedly considered by this Court at the time Floyd was handed down, Ring and its reasoning should not be applied to the case at bar.

D. Defendant's Equal Protection Rights Have Not Been Violated.

Defendant's equal protection claim is clearly premised on his mistaken belief that under Ring, aggravators are the equivalent of elements of a crime in the context of a State indictment. The Nevada Supreme Court has found previously that "[a]ggravating circumstances **are not separate** penalties or **offenses**, but are standards to guide the making of the choice between the alternative verdicts of death and life imprisonment. Therefore, an aggravating circumstance alleged in a capital proceeding does not constitute a separate crime that requires a finding of probable cause under the U.S. or Nevada constitutions." Floyd, 42 P.3d at 256 (2002) (citation omitted) (emphasis added). Again, for the reasons stated above, the State submits that Ring's discussion of functional equivalence only applies where the role of the jury is implicated. Because, under Floyd, aggravating factors are not considered separate offenses for purposes of indictment or establishing probable cause, both capital and non-capital defendants are treated equally in Nevada insofar as the State must show probable cause for all elements of an offense, regardless of whether the offense could possibly lead to the death penalty. The State respectfully submits that Floyd will not be overturned, for the

reasons stated above.

III.

The Notice of Intent To Seek the Death Penalty Enunciates With Specificity Factual Assertions Which May Be Utilized To Establish That The Crime Was A Murder Involving Pecuniary Gain

Defendants asserts that the State has failed to assert how it intends to prove that the murder involved pecuniary gain for themselves. While the Notices of Intent To Seek the Death Penalty do clearly spell out that information, it isn't relevant to determining whether information was contained in the Notices to support the aggravating circumstance. Defendant references many cases, laws and court rules, however, once again misses the facts in arguing to this Court that there isn't specific facts contained in the notice upon which the State will rely. See SCR 250(4)(c).

Initially, Defendants argue that the notice of intent is defined by a statute which requires certain language in Informations and Indictments. See NRS 173.075. How that statute is relevant to the discussion is never explained. Next, Defendants argue that cases related to Informations and Indictments somehow control the language necessary for a Notice of Intent To Seek An Indictment. In fact, statutorily, no notice need be provided if, as here, the aggravating circumstance is based upon the aggravating nature of the crime itself. See NRS 175.552(3) (...The State may introduce evidence of additional aggravating circumstances as set forth in NRS 200.033, **other than the aggravated nature of the offense itself**, only if it has been disclosed to the defendant before the commencement of the penalty hearing). However, Supreme Court Rule 250 appears to legislate that even where

the aggravator is based on the crime itself, some notice must be provided to Defendant. However, Defendant has confused the requirements of SCR 250(4)(c) with the notice requirement which is found in SCR 250(4)(f) which requires a detailed list of evidence be submitted at least fifteen (15) days prior to trial.

The aggravating circumstance upon which the State is relying is that this was a situation where there was a murder for hire as well as where some of the participants were seeking financial gain from the killing. NRS 200.033(6) states that an aggravating circumstance is appropriate where, "The murder was committed by a person, for himself or another, to receive money or any other thing of monetary value." Defendants appear to be arguing that since they hired the hitman, they are not subject to the aggravating circumstance, while on the other hand, the hitman is liable. Such a situation is ludicrous. The State need not prove, although there is support for it in the evidence, that the motive for the murder was for Defendants Espindola and/or Hidalgo to receive money. The State need only prove that there was pecuniary gain by someone in the murder. As such, by the Defendants agreeing to pay several individuals to kill T.J., they made themselves liable to the aggravator. Moreover, the evidence demonstrates that Mr. H wanted T.J. killed because he was hurting the business of the Palomino. Both Defendants Espindola and Hidalgo agreed and participated in the killing to help support the business, its owner and employees, of which Defendants are all three. Moreover, both Defendants evidence knowledge during the surreptitious recordings that they knew that people were getting paid, and if fact, made several payments themselves.

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IV.

If The Jury Determines That Either Defendants Hidalgo or Espindola Did Not Have The Specific Intent To Kill, Then They Won't Be Convicted Of First Degree Murder

Defendants argue that to the extent that their clients only intended to harm but not kill Timothy Hadland, they can not be subject to the death penalty. If Defendants did not intend to kill Timothy Hadland, they would only be guilty of Second Degree Murder, and as such, not eligible for the death penalty. See Bolden v. State, 121 Nev. Adv. Op. No. 86 (December 15, 2005). As such, if they are convicted of something other than First Degree Murder, then any argument is moot.

V.

Solicitation To Commit Murder Is A Felony Involving The Use Or Threat of Violence To The Person of Another

1. NRS 200.033(2) Is Not Vague or Ambiguous

Defendants argue that because Justice Maupin stated in a dissenting opinion that NRS 200.033(4) is vague and ambiguous, it must mean that a statute less specific must also be vague and ambiguous. Unfortunately, Defendants missed the import of Justice Maupin's conclusions. Justice Maupin, of which he eventually got a majority on the Court in McConnell v. State, 102 P.3d 606 (Nev.2004), was concerned that NRS 200.033(4) removed the intent requirement for a First Degree Murder conviction. As such, NRS 200.033(4) was unconstitutionally vague and ambiguous because it allowed the execution of someone who did not have the requisite intent to be eligible for the death penalty, (See Defendant's Instant

Motion, pp. 13-17), as well as did not narrow the category of individuals who did have such intent. Such a concern does not underlie NRS 200.033(2) because none of the factors which concerned Justice Maupin are part of NRS 200.033(2).

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

> In general, "[a] defendant's character and record are relevant to the jury's determination of the appropriate sentence for a capital crime." Pellegrini v. State, 104 Nev. 625, 630, 764 P.2d 484, 488 (1988). Accordingly, a murder is aggravated if it is committed by an individual previously convicted of a felony involving the use or threat of violence to the person of another. NRS 200.033(2). Such a conviction evinces a propensity for violence and is relevant to a determination of the appropriate sentence; more than one such conviction is likewise relevant.

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

2. Solicitation To Commit Murder Is Clearly A Crime Involving The Threat of Violence To A Person

Defendant argues that merely asking someone to kill another person is not a threat of violence against the person who may be killed based upon the request. Such an argument

cannot not factually be maintained nor would it give effect to the purpose behind NRS 200.033(2).

As discussed above, NRS 200.033(2) was enacted so that individuals who have a higher propensity to engage in dangerous violent activity are more eligible for the death penalty. See Riley v. State, 107 Nev. 205, 808 P.2d 551 (1991). In addition, NRS 200.033(2)(a) makes it an aggravating circumstance if you are guilty of another murder. To suggest that soliciting someone to kill another person does not evidence a propensity towards violent activity is meritless.

If a person solicits another to commit murder, and the solicitation is carried out, then NRS 200.033(2) would demand an aggravating circumstance. However, if you accept Defendants premise, if the Defendants get lucky, and the solicitation is not carried out, then the Defendants do not face an aggravating circumstance. Nonetheless, in both situations, Defendants have the same criminal intent and present the same danger to society from their propensity. As such, agreeing that Solicitation to Commit Murder is not a felony involving a threat to a person would lead to an unreasonable application of NRS 200.033(2) and defeat its purposes.

Notwithstanding, Defendants initially argue to this Court that non-binding Florida cases support the proposition that Solicitation To Commit Murder is not a violent felony, while analysis of those cases clearly distinguishes them from the instant matter. In Lopez v. State, 864 So.2d 1151 (Fla.App.2d Dist. 2003), an intermediate appellate Florida state court interpreted a Florida state statute that defined the violent habitual criminal allegation to mean that, Solicitation To Commit Murder did not qualify under the catch-all provision. To

support their conclusion, the Lopez court relied upon Elam v. State, 636 So.2d 1312 (Fla.1994). In Elam, the Florida Supreme Court ruled that Florida law required actual force inherent in the crime which is aggravated. The Elam court reasoned that actual force is not a necessary component of a solicitation, then even a solicitation to do a violent act didn't qualify under Florida law. The Nevada Supreme Court has rejected requiring force to be inherent in the aggravating crime. See Weber v. State, 119 P.3d 107 (Nev.2005). In Weber, Defendant had been convicted of a Sexual Assault. The Supreme Court noted that a Sexual Assault as defined in Nevada does not require actual force inherent in its commission. However, because of the implied force, the Sexual Assaults did qualify for use as prior violent felonies. The implication of the Nevada Supreme Court as well as the purpose behind the statute, NRS 200.033(2), would appear to require Solicitation to Commit Murder to be a prior violent conviction.

Moreover, in reviewing all of the authority relied upon by Florida, it doesn't appear that any other jurisdiction has referenced, let alone followed the referenced cases. Other States allow for a conviction for Solicitation To Commit Murder to be used as a prior felony conviction involving the threat of force on a person for purposes of an aggravating circumstance. See, e.g., Woodruff v. State, 846 P.2d 1124, 1143 (Okl.Cr.1993) and People v. Edelbacher, 47 Cal.3d 983, 1032, 254 Cal.Rptr. 586, 616 (Cal.,1989).[4]

Finally, the specific facts of this case demonstrate a clear threat to victims Taoipu and Zone. First, the Defendants solicited an individual who had only days before committed a

[4] Federal law also considers solicitation to commit murder a prior violent felony based on the federal habitual criminal statute 18 U.S.C. § 924(e). See U.S. v. Kaluna, 192 F.3d 1188 (C.A.9 HI.1999).

murder based upon their solicitation. They suggested that he use the same triggerman that he had used in the prior homicide. They provided their hitman with an instrumentality to cause the death of the victims. Thereafter, they paid their hitman for his services. In addition, they told their hitman that if the witnesses talked, Mr. H would kill everyone, providing substantial motivation over and above that associated with renumeration for their hitman to complete the job.

Defendants additionally argue that because they did not know that the person they were soliciting to kill two people was working for the police, they should receive a benefit from their ignorance. Such an argument would not give effect to the purposes behind NRS 200.033(2), and is unsupported by hundreds of years of jurisprudence in this country. Mistake of fact is not a defense to a crime unless it negates a state of mind. See Model Penal Code Sec. 2.04(1)-(2); Adler v. State, 95 Nev. 339, 594 P.2d 725 (Nev.1979). The mere fact that they believed they were actually hiring a hitman as opposed to an agent of the police does not in any manner negate their intent. Moreover, as discussed above, it is the Defendants propensity for violence which allows for the convictions to be used as aggravating circumstances, not whether the violence in fact occurred. Therefore, to agree with Defendants would allow for Defendants who got lucky to receive a different sentence than Defendants that got unlucky. Nothing in any of the jurisprudence of capital cases suggests that embracing such a construction would further the objects of the sentencing scheme. Therefore, Defendants arguments should be rejected.

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CONCLUSION

The Notices of Intent To Seek The Death Penalty were timely filed, listed the aggravating circumstances supported by the evidence and referenced with specificity the facts which support the allegations. Defendant's argument that they are not the worst or the worst is an argument that should be made to a jury. If the three aggravating circumstances were found by a jury, an argument that these Defendants are not the most callous of killers will not have much moment. As such, they are properly before this Court facing potentially the ultimate punishment. Therefore, this Court should deny the Defendants Motion To Strike Notice of Intent To Seek The Death Penalty.

DATED this 20th day of December, 2005.

Respectfully submitted,

DAVID ROGER
Clark County District Attorney
Nevada Bar #002781

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

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CERTIFICATE OF FACSIMILE TRANSMISSION

I hereby certify that service of STATE'S OPPOSITION TO DEFENDANTS HIDALGO'S AND ESPINDOLA'S MOTION TO STRIKE NOTICE OF INTENT TO SEEK DEATH PENALTY, was made this 21st day of December, 2005, by facsimile transmission to:

ROBERT DRASKOVICH, ESQ.
FAX #474-1320

AND

CHRISTOPHER ORAM, ESQ.
FAX #974-0623

D. McDonald
Secretary for the District Attorney's Office

MD/ddm

EXHIBIT "7"

FILED

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DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, vs. LUIS HIDALGO, III, ANABEL ESPINDOLA, Defendants.	CASE NO. C212667 DEPT. NO. XIV **REPLY TO STATE'S OPPOSITION TO MOTION TO STRIKE NOTICE OF INTENT TO SEEK DEATH PENALTY** Hearing Date: 1/19/06 Hearing Time: 9 a.m.

COMES NOW, the Defendants, LUIS ALONSO HIDALGO III, by and through his attorney Robert M. Draskovich and ANABEL ESPINDOLA, by and through her attorneys Christopher R. Oram, Esq. JoNell Thomas, Esq. and each of them respectfully replies to the State's opposition to their motion to strike notice of intent to seek death penalty.

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REPLY TO THE STATE'S POINTS AND AUTHORITIES

I. THE DEATH PENALTY IS NOT AN AVAILABLE PUNISHMENT FOR ANABEL ESPINDOLA OR LUIS HIDAGLO III, AS NEITHER OF THEM KILLED, ATTEMPTED TO KILL, OR INTENDED THAT A KILLING OF TIMOTHY HADLAND TAKE PLACE, NOR DID EITHER PERFORM A MAJOR ROLE IN HIS MURDER OR ACT WITH RECKLESS DISREGARD FOR HADLAND'S LIFE.

The State concedes that the death penalty is severely limited by case authority in cases where a defendant is not the actual killer. State's Opposition at page 15 ("While Defendants discussion of the legal precedents is fairly accurate . . ."). Accordingly, the State focuses its opposition upon its argument that both Mr. Hidaglo and Ms. Espindola "at the very least joined a conspiracy where they intended that deadly force would be used." State's Opposition at page 16. The State's argument is both factually and legally wrong.

The State argues that Mr. Hidalgo and Ms. Espindola intended that lethal force be used because they intended Deangelo Carroll to commit a battery with a deadly weapon against T.J. Hagland. State's Opposition at page 16. Throughout the State's argument it asserts that battery with a weapon involves "deadly force". State's Opposition at pages 16-17. The State fails, however, to cite to any authority for this broad proposition.

The United States Supreme Court has held that it is improper under the eighth amendment to impose the death penalty on one who "does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed." Enmund v. Florida, 458 U.S. 782, 797 (1981). In Enmund, the Court overturned a death sentence for felony murder because there was no proof that Enmund possessed the degree of culpability warranting the death penalty. Id. at 801. In Tison v. Arizona, 481 U.S. 137 (1987), the Court discussed Enmund, holding that "major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the Enmund culpability requirement." Id. at 158. See also Doleman v. State, 107 Nev. 409, 417, 812 P.2d 1287, 1292-93 (1991).

"Lethal force" has not been defined by the Nevada Legislature within the context of NRS 200.033, but it is clear from other statutes that use the term "lethal" is limited to situations where death is caused or contemplated. See NRS 176.355 ("The judgment of death must be inflicted by an injection of a lethal drug."); NRS 202.550 ("It is unlawful for any person to place any lethal bait on the public domain."); NRS 202.443 ("'Delivery system' means any apparatus, equipment, implement, device or means of delivery which is specifically designed to send, disperse, release, discharge or disseminate any weapon of mass destruction, any biological agent, chemical agent, radioactive agent or other lethal agent or any toxin."). There is no statutory basis, or other basis in law, for making the monumental leap that the State jumps to in concluding that intent to commit a battery with a bat is the same as the intent to kill or to use lethal force.[1]

The State's legal analysis also fails to address recent and controlling authority by the Nevada Supreme Court that is applicable to cases involving specific intent offenses and vicarious liability. In the Motion to Dismiss, Mr. Hildalgo and Ms. Espindola cited to Sharma v. State, 118 Nev. 648, 56 P. 3d 868 (2002), and noted that to be found guilty of a specific intent offense on an aiding and abetting theory, the aider and abettor must have the same intent as required of the principal. That is, to be convicted of first degree murder and sentenced to death based upon a finding that a defendant aided and abetted and intended that a killing take place or that lethal force will be employed, the State must prove that the defendant specifically intended that the victim be killed or that lethal force be employed against the victim. Sharma's holding was recently reaffirmed and expanded to include co-conspirator liability in Bolden v. State, 121 Nev. Adv. Opn. No. 86 (12/15/05). The Court explained its rationale:

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[1]Defendants in no way concede that they actually requested that Mr. Hadland be hit with bats, placed in garbage sacks or anything of the sort. They note that there is no claim by the State that a bat was ever located or used in this offense.

> [O]ur overarching concern in Sharma centered on the fact that the natural and probable consequences doctrine regarding accomplice liability permits a defendant to be convicted of a specific intent crime where he or she did not possess the statutory intent required for the offense. We are of the view that vicarious coconspirator liability for the specific intent crimes of another, based on the natural and probable consequences doctrine, presents the same problem addressed in Sharma, and we conclude that Sharma's rationale applies with equal force under the circumstances of the instant case. To convict Bolden of burglary and kidnapping, the State was required to prove under Nevada law that he had the specific intent to commit those offenses. Holding otherwise would allow the State to sidestep the statutory specific intent required to prove those offenses.

Id. at ___. The State fails to address either Sharma or Bolden despite their clear applicability to the facts of this case.

At best, assuming the State's evidence to be admissible and assuming the State's witnesses to be found credible (both of which are highly doubtful), the State's evidence establishes that Mr. Hildalgo and Ms. Espindola may have intended a battery to be committed upon Mr. Hadland. This evidence does not establish that they intended for him to be killed, that they intended that he be shot, or that lethal force be used against him. Without such specific intent, the death penalty may not be imposed against them and the State's notice of intent to seek death should therefore be dismissed.

II The Pecuniary Gain Aggravator Should Be Stricken Because As There Was No Probable Cause Finding Of Its Presence As An Aggravator.

a. The Failure To Submit The Aggravator Of Pecuniary Gain For A Probable Cause Determination Violates Article I, Section 8 Of The Nevada Constitution, NRS 172.155, And Both Movants' Due Process Rights Under The United States Constitution.

In their Motion to Dismiss, Mr. Hildalgo and Ms. Espindola contended that the aggravator of "pecuniary gain" should be dismissed because there was no probable cause determination to support the charging of this element of the capital offense. In response, the State cites to Floyd v. State, 118 Nev. 156, 166, 42 P.3d 249, 256 (2002) as support for its assertion that a probable cause determination is not required for aggravators.

State's Opposition at page 18. Floyd, however, was issued prior to the United States Supreme Court's decision in Ring v. Arizona, 122 S. Ct. 2428 (2002). In Ring, the Supreme Court overruled its prior case authority and rejected the legal theory upon which the Nevada Supreme Court rested its holding upon in Floyd. Floyd is therefore easily distinguished and should no longer be considered controlling authority on this issue.

In Floyd, 118 Nev. at 166, 42 P.3d at 256, the Court addressed this issue as follows:

> The United States Supreme Court has stated: "Aggravating circumstances are not separate penalties or offenses, but are 'standards to guide the making of [the] choice' between the alternative verdicts of death and life imprisonment." [quoting Poland v. Arizona, 476 U.S. 147, 156 (1986) (quoting Bullington v. Missouri, 451 U.S. 430, 438 (1981))]. Therefore, an aggravating circumstance alleged in a capital proceeding does not constitute a separate crime that requires a finding of probable cause under the U.S. or Nevada constitutions.
>
> Floyd also relies on the Supreme Court's holding in Jones v. United States that "under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." [526 U.S. 227, 243 n.6 (1999); see also Apprendi v. New Jersey, 530 U.S. 466, 478 (2000)] Jones does not support Floyd's proposition either. The Court emphasized that its holding in Jones did not apply to aggravating circumstances because "the finding of aggravating facts falling within the traditional scope of capital sentencing [is] a choice between a greater and lesser penalty, not . . . a process of raising the ceiling of the sentencing range available." [Jones, 526 U.S. at 251; see also Apprendi, 530 U.S. at 496 ("This Court has previously considered and rejected the argument that the principles guiding our decision today render invalid state capital sentencing schemes requiring judges, after a jury verdict holding a defendant guilty of a capital crime, to find specific aggravating factors before imposing a sentence of death.")].
>
> We conclude that a probable cause finding is not necessary for the State to allege aggravating circumstances and seek a death sentence.

As set forth in Floyd, this issue was initially addressed in Poland, 476 U.S. at 156, in 1986, as the United States Supreme Court considered whether double jeopardy was applicable to findings by a sentencing court that there was insufficient evidence to support an aggravating circumstance. The Supreme Court concluded that double jeopardy was not implicated and based its decision upon its finding that "[a]ggravating circumstances are not

separate penalties or offenses, but are 'standards to guide the making of [the] choice' between the alternative verdicts of death and life imprisonment." Poland, 476 U.S. at 156.

Four years later, in 1990, the United States Supreme Court revisited the issue in the context of a challenge to an Arizona statute that required capital sentencing hearings to be conducted by a judge rather than a jury. In Walton v. Arizona, 497 U.S. 639, 648 (1990), the Court rejected the defendant's claim that he was entitled to a jury verdict on the issue of whether the State established the existence of aggravating circumstances:

> Walton also suggests that in Florida aggravating factors are only sentencing "considerations" while in Arizona they are "elements of the offense." But as we observed in Poland v. Arizona, 476 U.S. 147 (1986), an Arizona capital punishment case: "Aggravating circumstances are not separate penalties or offenses, but are 'standards to guide the making of [the] choice' between the alternative verdicts of death and life imprisonment.

Walton, 497 U.S. at 648.

Related issues were considered by the Supreme Court in Jones v. United States, 526 U.S. 227 (1999) and Apprendi v. New Jersey, 530 U.S. 466 (2000). In Jones, the Supreme Court concluded that a sentencing enhancement for "causing serious bodily injury" was an element of the charge, and therefore had to be charged in the Indictment and presented to the jury rather than the sentencing judge. Jones, 526 U.S. at 251. The Court distinguished Walton and Poland by noting that those cases addressed aggravating circumstances in capital sentencing as "standards to guide the choice between the alternative verdicts of death and life imprisonment." Id. (quoting Walton, 497 U.S. at 648, in turn quoting Poland, 476 U.S. at 156). "The Court thus characterized the finding of aggravating facts falling within the traditional scope of capital sentencing as a choice

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between a greater and a lesser penalty, not as a process of raising the ceiling of the sentencing range available." Id.[2]

In Apprendi the Supreme Court recognized the constitutional right to a jury trial and requirement of proof beyond a reasonable doubt for sentencing enhancements in non-capital cases originating in state courts. Apprendi, 430 U.S. at 476. The defendant in Apprendi raised claims only as to the constitutional requirements for a jury trial and proof beyond a reasonable doubt, and did not present issues concerning probable cause findings and grand jury indictments. Accordingly, the Court addressed only the narrow issues before it. Id. at 477 n.3. Apprendi was not a capital case and the Court summarily distinguished its holding from capital cases such as Walton. Id. at 496.

Following the Nevada Supreme Court's decision in Floyd, which relied upon the logic of the Poland/Walton line of cases, the United States Supreme Court issued its decision in Ring v. Arizona, 536 U.S. 584 (2002). The Court recognized that its reasoning in Walton was erroneous and that Walton was inconsistent with Apprendi:

> In Walton v. Arizona, 497 U.S. 639 (1990), this Court held that Arizona's sentencing scheme was compatible with the Sixth Amendment because the additional facts found by the judge qualified as sentencing considerations, not as "elements of the offense of capital murder." Id., at 649. Ten years later, however, we decided Apprendi v. New Jersey, 530 U.S. 466 (2000), which held that the Sixth Amendment does not permit a defendant to be "exposed . . . to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone." Id., at 483. This prescription governs, Apprendi determined, even if the State characterizes the additional findings made by the judge as "sentencing factors." Id., at 492.

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[2]It is interesting to note that Justice Stevens issued a concurring opinion in Jones, in which he recognized that Jones cast doubt upon the validity of Walton and he urged reconsideration of the Walton holding. Jones, 526 U.S. at 253. The four dissenting justices in Jones also recognized that the Jones holding was inconsistent with Walton: "A further disconcerting result of today's decision is the needless doubt the Court's analysis casts upon our cases involving capital sentencing." Jones, 526 U.S. at 271 (dissenting opinion of Justices Kennedy, Rehnquist, O'Connor and Breyer) (citing Walton). Thus, a majority of the Court recognized that Walton was inconsistent with Jones.

> Apprendi's reasoning is irreconcilable with Walton's holding in this regard, and today we overrule Walton in relevant part. Capital defendants, no less than non-capital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment.

Ring, 536 U.S. at 588-589. As in Apprendi, the question presented was tightly delineated and specifically addressed the right to a jury trial and requirement of proof beyond a reasonable doubt. Id. at 597 n.4. The Court therefore did not address the requirement of a probable cause finding prior to the filing of an Information or return of an Indictment, even though it concluded that aggravating circumstances are the functional equivalent of an element of an offense.

The foundation of Floyd was the notion that aggravating circumstances are not elements of an offense, but merely "standards to guide the making of the choice' between the alternative verdicts of death and life imprisonment." That premise has been firmly rejected by the United States Supreme Court. Accordingly the State's reliance upon Floyd is misplaced as it is no longer controlling authority.

Article I, Section 8 of the Nevada Constitution provides that no person shall be held to answer to criminal charges without a finding of probable cause by a grand jury or a magistrate. This requirement is codified in NRS 171.206. As there is now no question that aggravating circumstances are elements of a capital offense, and not mere sentencing standards, there must be a probable cause finding before a defendant is charged with a capital offense.

The State presents authority from other states in which some courts have concluded that a probable cause finding is not required to alleged aggravating circumstances. The United States Supreme Court, however, has not made such a conclusion and has provided

no basis for suggesting that a probable cause requirement is necessary for some elements of an offense, but not all. Given the enormous expense of a capital case, the incredible emotional and psychological burden upon the defendants and others associated with death penalty cases, and the limited resources of the court and parties, there is simply no justification for not requiring a probable cause determination for these elements of the capital charge at issue.

b. The Failure To Present The Pecuniary Gain Aggravator To The Magistrate For A Probable Cause Determination Violates Luis And Anabel's Equal Protection Rights.

In their motion, Mr. Hildalgo and Ms. Espindola contended that their equal protection rights were violated because of the State's failure to present the aggravators to the Magistrate for a probable cause determination. In response, the State argues the following:

> Defendant's [sic] equal protection claim is clearly premised on his mistaken belief that under Ring, aggravators are the equivalent of elements of a crime in the context of a State indictment. The Nevada Supreme Court has found previously that "[a]ggravating circumstances are not separate penalties or offenses, but are standards to guide the making of the choice between the alternative verdicts of death and life imprisonment. Therefore, an aggravating circumstance alleged in a capital proceeding does not constitute a separate crime that requires a finding of probable cause under the U.S. or Nevada Constitutions." Floyd, 42 P.3d at 256 (2002) (citation omitted) [ ]. Again, for the reasons stated above, the State submits that Ring's discussion of functional equivalence only applies where the role of the jury is implicated."

State's Opposition at page 32.

In essence, the State argues that aggravators are the functional equivalent of elements of an offense for the purpose of the right to a jury trial, but not for any other purpose. This argument is both illogical and contrary to Supreme Court cannons of interpretation. See Leocal v. Ashcroft, 125 S.Ct. 377, 384 n.8 (2004) (finding that "crime of violence" had to be given the same interpretation in both civil and criminal contexts);

Clark v. Martinez, 125 S.Ct. 716, 723 (2005) (finding that the same words should be given the same meaning within a statute and should not apply differently to different classes of defendants). There is no valid reason for distinguishing between aggravators as elements of an offense and other elements required to convict a defendant of an offense. Accordingly, the defendants' rights to equal protection are violated. McGowan v. Maryland, 366 U.S. 420, 425-26 (1961).

III. The Pecuniary Gain Aggravator Must Be Stricken As It Does Not Contain A Plain/Concise Written Statement Of The Essential Facts Constituting The Aggravator Charged.

In their Motion to Dismiss, Defendants argued that the pecuniary gain aggravator must be dismissed because the State's notice of intent to seek death does not contain an adequate statement of the essential facts constituting the aggravator. In response, the State argues that Nevada Supreme Court Rule 250(4)(c) does not mandate the disclosure argued to be required by the Defendants. State's Opposition at page 34. The State is wrong. SCR 250(4)(c) reads as follows:

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

The State argues that it should be relieved of its obligations under SCR 250(4)(c) because SCR 250(4)(f) requires a detailed list of evidence be submitted at least 15 days prior to trial. State's Opposition at page 34. The State is wrong in its analysis of these Supreme Court Rules. SCR 250(4)(c) specifically addresses aggravating circumstances while SCR 250(4)(f) addresses all evidence to be presented at the penalty hearing, including character or "other" evidence that is not relevant to the alleged aggravators. See Mason v. State, 118

Nev. 554, 561-62, 51 P.3d 521, 525-26 (2002). The State's obligations under subsection (c) are not modified or lessened by its obligations under subsection (f).

The State next provides a description of its various theories as to how NRS 200.033(6) applies to the Defendants. Some of these allegations are included in the State's Notice of Intent to Seek Death, while others are not. None of the State's descriptions, however, meet the requirement of SCR 250(c)(4) that the State allege "all aggravating circumstances which the state intends to prove *and allege with specificity the facts on which the state will rely* to prove each aggravating circumstance." The State asserts, as it did in its Notice of Intent to Seek Death, that Mr. Hadland was killed to further the business of the Palimino Club, but the State fails to offer any theory as to how the Palomino Club's business would be furthered by his death. No facts are alleged, no witnesses are identified, no theory of financial gain is set forth. As a result, the defendants are unable to prepare any meaningful defense to the State's vague allegation. The State's allegations are also vague as to whether the alleged plan to make payments associated with the incident were made prior to or after Mr. Hadland's death, and are vague as to whether payment was intended for a battery or intended for a killing.

The aggravator must be stricken from the State's Notice of Intent to seek death based upon the State's failure to comply with SCR 250(4)(c) and failure to provide the defendants with their constitutional right to adequate notice of the charges against them.

IV. To The Extent That It Is Based Upon A Conspiracy To Commit A Battery ("Beat") Or Utilizes The Unqualified Term "Kill", The NISDPS Are Duplicitous And Cannot Supply The Basis For Imposition Of Capital Punishment.

In their Motion to Dismiss, Defendants contended that the aggravating circumstances cannot be supported upon a charge of conspiracy to beat Hadland because

a specific intent to kill is required. In response, the State cites to Bolden v. State, 121 Nev. Adv. Opn. No. 86 (12/15/05), thus acknowledging that co-conspirator liability for this specific intent offense requires that the defendants actually had the specific intent to kill, and not merely the intent to beat. The State argues, however, that if the defendants did not have the specific intent to kill that they would be guilty of only Second Degree Murder and as such would not be eligible for the death penalty and that this issue is therefore moot. State's Opposition at page 35.

The State's response provides no analysis, and provides no recognition, of the consequences to a defendant, aside from the ultimate imposition of a sentence of death, of an improper and unconstitutional aggravator. The State fails to address the fact that absent a charge of capital murder, the defendants would be able to request bail pending trial and would be able to assist their counsel in preparation for trial without the constraints of incarceration. Absent a charge of capital murder, the defendants would not be required to face the expense of hiring two attorneys and the expense of preparing for a penalty hearing which requires extensive investigation as to mitigators, aggravators and character evidence. Absent a charge of capital murder, it would not be necessary to "death qualify" a jury, expedite transcripts or otherwise impose upon the court's resources as required for a capital case.

The fact remains that the State's Notice of Intent to Seek Death is premised upon a faulty and unconstitutional theory and there is no reason to permit that theory to burden the defendants and the court to its detrimental consequences.

V. The Two Aggravators Stating Anabel Espindola And Luis Hidalgo III Committed A Felony With Use Or Threat Of Harm, To Wit: Solicitation To Commit Murder - Must Be Stricken Because (A) NRS 200.033 (b)(2) Is Unconstitutionally Vague and Ambiguous; and (B) Solicitation For Murder, Especially When Made To A Police Agent, Is Not A Felony Involving The Use Or Threat Of Violence.

a. NRS 200.033(b) (2) is unconstitutionally vague and ambiguous.

In their Motion to Dismiss, defendants contended that NRS 200.033(b)(2) is unconstitutionally vague because it fails to provide a definition of the term "a felony involving the use or threat of violence to the person of another." In response, the State asserts that "a rule promulgated to determine whether a person has a propensity for violence is not unconstitutionally vague or ambiguous", but fails to address the issue presented: what is the meaning of "use or threat of violence" and does the phrase provide a principled guide for the choice between death and a lesser penalty as required by Maynard v. Cartwright, 486 U.S. 356, 361-364 (1988) and Godfrey v. Georgia, 446 U.S. 420 (1980)?. A statute violates due process if it is so vague that it fails to give persons of ordinary intelligence fair notice of what conduct is prohibited and fails to provide law enforcement officials with adequate guidelines to prevent discriminatory enforcement." Hernandez v. State, 118 Nev. 513, 524, 50 P.3d 1100, 1108 (2002). In Bouie v. City of Columbia, 378 U.S. 347, 350-51 (1964), the United States Supreme Court explained that it is a basic principle that a criminal statute must give fair warning of the conduct that makes it a crime. (Citing United States v. Harriss, 347 U.S. 612, 617 (1954) (cited in Bush v. Gore, 531 U.S. 98 (2000)). "[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." Connally

v. General Const. Co., 269 U.S. 385, 391 (1926). "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids." Lanzetta v. New Jersey, 306 U.S. 451, 453 n.3 (1939). While these principles are generally applied to statutes that are vague in the language of the statute itself, they are equally applicable to cases where a statute that is precise on its face has been unforeseeably and retroactively expanded by judicial construction. Bouie, 378 U.S. at 352 (citing Pierce v. United States, 314 U.S. 306, 311 (1941)). Construction of a statute which unexpectedly broadens its application operates precisely like an *ex post facto* law and is therefore barred from retroactive application to pending cases under the due process clause. Id. at 353-54. Thus, even if this Court and the Nevada Supreme Court were to find solicitation to commit murder to be an eligible qualifying felony under NRS 200.033, the ruling could not be applied to this case.

The State summarily concludes that NRS 200.033(2)(b) "significantly limits the number of people eligible for the death penalty as this circumstance isn't usually tied to the facts underlying the murder charge." State's Opposition at page 36. The State provides no citation to case authority and no analysis of its conclusion. The State fails to address the fact that a great number of people charged with first degree murder have convictions for prior violent offenses committed before the time of the murder or are charged with violent acts contemporaneously with the murder. Thus, the narrowing criteria is not satisfied.

The State fails to provide any definition of "use or threat of violence," fails to provide any case authority narrowly interpreting this broad language, and fails to establish that this

aggravator meets the constitutional requirements of notice and narrowing. Accordingly, it should be stricken from the State's Notice of Intent to Seek the Death Penalty.

b. Solicitation To Commit Murder, Both In General And On The Facts Of This Case, Is Not A Felony Involving The Use Or Threat Of Violence.

In their Motion to Dismiss the defendants contended that solicitation to commit murder is not a crime involving the use of threat of violence, both in general and under the specific facts of this case. In response, the State argues that "the implication of the Nevada Supreme Court [based upon its decision in Weber v. State, 119 P.3d 107 (2005) in which it concluded that sexual assault was a qualifying felony] as well as the purpose behind the statute, NRS 200.033(2), would appear to require Solicitation to Commit Murder to be a prior violent conviction." State's Opposition at page 38. The State also argues that Florida decisions to the contrary are without merit. Id.

The State's analysis of this issue fails to address the arguments and authority set forth by the defendants in their motion. The State also fails to address cannons of statutory interpretation that must be applied to consideration of this statute which fails to define the meaning of its primary terms.

It must first be noted that the State summarily rejects authority from Florida but fails to address the fact that in crafting NRS 200.033, the Nevada Legislature looked to Florida as a source for our statutory scheme. Under these circumstances, Florida's interpretation of the same language is especially persuasive. Thus, Lopez v. State, 864 So. 2d 1151 (Fla. App. 2d Dist. 2003); Elam v. State, 636 So. 2d 1312 (Fla. 1994) and Duque v. State, 526 So. 2d 1079 (Fla. App. 2d 1988), and their holdings that solicitation to commit murder is a violent felony, should not be dismissed out of hand.

The State cites to Woodruff v. State, 846 P.2d 1124, 1143 (Okl. Cr. 1993) in support of its contention that Solicitation is a violent felony. State's Opposition at page 38. A review of the Woodruff opinion, however, reveals that the defendant in that case stipulated that the prior offense was a violent felony and the issue considered by the Oklahoma court in that case concerned double jeopardy implications that are wholly irrelevant here. The Oklahoma court neither considered nor ruled upon the issue presented here. Likewise, in People v. Edelbacher, 766 P.2d 1 (1989) stated that a conviction for solicitation for murder was an aggravating circumstance, but the California Supreme Court did not address in any way the issue presented here.

Contrary to the State's argument, Florida is not the only State to address this issue. In State v. Ysea, 956 P.2d 499 (1998), the Supreme Court of Arizona squarely addressed this issue:

> [T]he mere solicitation to commit an offense cannot be equated with the underlying offense. The solicitation statute criminalizes conduct that "encourages, requests or solicits another person to engage" in a felony or misdemeanor. See A.R.S. § 13-1002(A). The crime is completed by the solicitation and the "crime solicited need not be committed." W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW 414, 420 (1972) (cited with approval in State v. Johnson, 131 Ariz. 299, 302 n. 1. 640 P.2d 861, 864 n.1 (1982)). Thus, solicitation is a crime of communication, not violence, and the nature of the crime solicited does not transform the crime of solicitation into an aggravating circumstance.
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> . . . .
>
> . . . . [S]olicitation is a preparatory offense, complete upon the act of solicitation itself, and could not have been considered a crime of violence even if the act solicited would have qualified as such a crime.

Ysea, 956 P.2d at 503.

The State's citation to Weber v. State, 119 P.3d 107 (2005) is also misplaced. In Weber, the Nevada Supreme Court noted that there were implicit threats of violence for

offenses in which the defendant sexually assaulted a minor child based upon prior incidents where the victim experienced trauma and violence, the defendant was much superior to the victim in physical strength and was older than the victim, and the victim kicked in the door of the victim's home during the relevant time period. Id. at 129. None of these factors are present here.

The fact remains that there is nothing within the plain language of this statute that suggests the aggravator would be applied to the inchoate offense of solicitation. Likewise, although this aggravator has been addressed in 54 published opinions since the reinstatement of the death penalty following Furman and the enactment of NRS 200.033, not a single case has involved a solicitation offense.[3]

When the language of a statute is clear, the courts ascribe to the statute its plain meaning and do not look beyond its language. Lader v. Warden, 120 P.3d 1164, __ (Nev. 2005). However, when the language of a statute is ambiguous, the intent of the Legislature is controlling. In such instances, the courts will interpret the statute's language in accordance with reason and public policy. Id. at __. It is a maximum of statutory construction that when the scope of a criminal statute is at issue, ambiguity should be resolved in favor of the defendant. Id. at __ (citing Demosthenes v. Williams, 97 Nev. 611, 614, 637 P.2d 1203, 1204 (1981)). Here, the language of the statute is not plain and there

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[3]Likewise, in an extensive analysis of cases throughout the country that discuss this aggravating circumstance, there is no discussion of solicitation offenses. See *Sufficiency of Evidence, for Purposes of Death Penalty, to Establish Statutory Aggravating Circumstance That Defendant Was Previously Convicted of or Committed Other Violent Offense, Had History of Violent Conduct, Posed Continuing Threat To Society, And the Like - Post-Gregg Cases, 65 A.L.R.4th 838 (1988) (updated November 2005)*. The absence of such discussion, in the context of a thorough 130 page article, suggests that use of solicitation offenses to satisfy this aggravator is rare at best.

is no clear indication that it applies to solicitation offenses. There is also nothing in the Legislative history of this aggravator suggesting that it should be applied to solicitation offenses.

Reason and public policy mandate a finding that aggravator is not applicable to solicitation offenses. It is important to remember the purpose of aggravating circumstances. "The Eighth Amendment requires, among other things, that 'a capital sentencing scheme must "genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder."'" Loving v. United States, 517 U.S. 748, 755 (1996) (quoting Lowenfield v. Phelps, 484 U.S. 231, 244 (1988), in turn quoting Zant v. Stephens, 462 U.S. 862, 877 (1983)). "A capital sentencing scheme must, in short, provide a 'meaningful basis for distinguishing the few cases in which [the penalty] is imposed for the many cases in which it is not.'" Godfrey v. Georgia, 446 U.S. 420, 428 (1980) (quoting Gregg v. Georgia, 428 U.S. 153, 188 (1976)). The question here is not whether solicitation to commit murder is bad or whether it should be a crime or whether a person committing such an offense should be punished. The question here is does inclusion of this inchoate offense, which involved mere words and no agreement, no preparation and no actual violent act further the narrowing requirement of the Eighth Amendment. Reason and public policy demand a finding that such a broad application of this aggravator does not further the purpose of our death penalty scheme and the mandate that it meaningfully select "the worst of the worst." In any event, when the scope of a criminal statute is at issue, ambiguity must be resolved in favor of the defendant. Here, this ambiguity must be resolved by a finding that the aggravator does not apply to solicitation.

CONCLUSION

For the above reasons, each and all of the aggravators in the Notice of Intent to Seek the Death Penalty must be stricken.

DATED this 19th day of January, 2006.

DRASKOVICH & DURHAM

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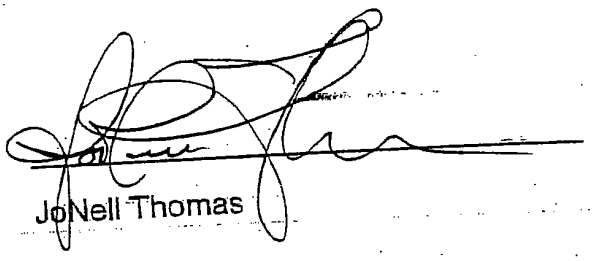
CERTIFICATE OF SERVICE

I hereby certify that I caused to be hand-delivered to the District Attorney's drop-box in the office of the Clark County Clerk a true and correct copy of this **REPLY TO STATE'S OPPOSITION TO MOTION TO STRIKE NOTICE OF INTENT TO SEEK DEATH PENALTY** addressed to

Marc DiGiacomo
Chief Deputy District Attorney
200 Lewis Avenue
Las Vegas, NV 89155

Dated this 19th day of January, 2006.



JoNell Thomas

EXHIBIT "8"

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ANABEL ESPINDOLA

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

vs.

LUIS HIDALGO, III,
ANABEL ESPINDOLA,

Defendants.

CASE NO. C212667
DEPT. NO. XIV

NOTICE OF SUPPLEMENTAL AUTHORITY IN SUPPORT OF DEFENDANTS' MOTION TO STRIKE NOTICE OF INTENT TO SEEK DEATH PENALTY

Hearing Date: 3/17/06
Hearing Time: 9 a.m.

COMES NOW, the Defendants, LUIS ALONSO HIDALGO III, by and through his attorney Robert M. Draskovich and ANABEL ESPINDOLA, by and through her attorneys

and inform this Court of supplemental authority relevant to their Motion to Strike Notice of Intent to Seek Death Penalty. The recent opinion of Redeker v. District Court, 122 Nev. Adv. Opn. No. 14 (2/9/06), attached, is relevant to the issues raised in the motion.

DATED this 15th day of March, 2006.

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ANABEL ESPINDOLA

CERTIFICATE OF SERVICE

I hereby certify that I caused to be hand-delivered to the District Attorney's drop-box in the office of the Clark County Clerk a true and correct copy of this **NOTICE OF SUPPLEMENTAL AUTHORITY** addressed to

Marc DiGiacomo
Chief Deputy District Attorney
200 Lewis Avenue
Las Vegas, NV 89155

Dated this 15th day of March, 2006.

JoNell Thomas

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

APPELLANT'S AMENDED APPENDIX

Volume 2 of 25

(Pages 193 - 442)

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ALPHABETICAL INDEX OF APPELLANT'S AMENDED APPENDIX

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

[2] Id.

[3] Id.

[4] Id.

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IN THE SUPREME COURT OF THE STATE OF NEVADA

LUIS HIDALGO III and ANABEL ESPINDOLA, Petitioners,	Supreme Court No. 48933
vs.	District Court No. C212667
THE HONORABLE DONALD M. MOSLEY, EIGHTH JUDICIAL DISTRICT COURT JUDGE, Respondent,	
and	
THE STATE OF NEVADA, Real Party in Interest.	

PETITION FOR WRIT OF MANDAMUS OR, IN THE ALTERNATIVE, WRIT OF PROHIBITION

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IN THE SUPREME COURT OF THE STATE OF NEVADA

LUIS HIDALGO III and **ANABEL ESPINDOLA,** Petitioners, vs. **THE HONORABLE DONALD M. MOSLEY, EIGHTH JUDICIAL DISTRICT COURT JUDGE,** Respondent, and **THE STATE OF NEVADA,** Real Party in Interest.	Supreme Court No. District Court No. C212667 **PETITION FOR WRIT OF MANDAMUS OR, IN THE ALTERNATIVE, WRIT OF PROHIBITION**

Petitioner Luis Hidalgo III, by and through his counsel Dominic P. Gentile, and Petitioner Anabel Espindola, by and through her counsel Christopher Oram and JoNell Thomas, hereby respectfully petition this Court for a Writ of Mandamus, or in the alternative, a Writ of Prohibition pursuant to NRAP 21, Article 6 §4 of the Nevada Constitution, NRS 34.160 and NRS 34.320. Petitioners satisfy the procedural requirements of verification and proof of service. See Exhibits 1 and 2.

Petitioners are defendants in the case of State of Nevada v. Hidalgo, Espindola, et. al., Eighth Judicial District Court, case number C212667. Respondent Judge Mosley was assigned to preside over the case. Petitioners are charged with one count

of first degree murder with use of a deadly weapon, conspiracy to commit murder, and two counts of solicitation for murder. See Exhibit 3 (Information).

The State asserts that on or about May 19, 2005, Kenneth Counts shot and killed Timothy Hadland, while in the company of DeAngelo Carroll, Jayson Taoipu, and Rontae Zone. Exhibit 3. The State's theory is that Counts did so after being recruited by DeAngelo Carroll and that Carroll acted pursuant to a conspiracy with Petitioners Luis Hidalgo III and Anabel Espindola. Id. Petitioner Hidalgo III is the son of Luis Hidalgo, Jr. who was the former owner of the Palomino Club and Petitioner Espindola was a manager of the Palomino Club. DeAngelo Carroll and Timothy Hadland had worked at the Palomino. The State further asserts that after Hadland was killed that Petitioners solicited DeAngelo Carroll, at a time when he was acting as a police agent, to kill Taoipu and Zone. Criminal charges were filed against Petitioners, Counts, Carroll and Taoipu. Charges were not filed against Zone.

Real Party in Interest State of Nevada filed a Notice of Intent to Seek Death Penalty against each of the Petitioners and has asserted the existence of aggravating circumstances of murder for hire and prior conviction of violent offenses. See Exhibit 4 (Notices of Intent).

Petitioners filed in the district court a Motion to Strike the Notices of Intent to Seek Death Penalty, Exhibit 5, in which they argued that the Notices of Intent were invalid as a matter of law because (1) the State failed to set forth a legally cognizable theory as to how the murder for hire aggravating circumstance applied; and (2) solicitation for murder, especially where the alleged solicitation is to a police agent, is not a crime of violence or threat of violence as a matter of law. The State opposed the motion. Exhibit 6. Petitioners replied to the State's opposition and filed a notice of supplemental authority in support of their motion. Exhibits 7 and 8.

Argument on the motion was first heard by the district court on March 17, 2006. Exhibit 9. Subsequent argument was held on August 31, 2006 and September 8, 2006. Exhibits 10 and 11. The district court rejected Petitioners' arguments and denied the motion. Exhibit 11. Petitioners now seek this Court's intervention by way of a petition for extraordinary relief because of the important legal issues presented in this matter.

The State sets forth a theory in its Notice of Intent, under NRS 200.033(6) (murder for hire) that an aggravating circumstance may be established based upon an allegation of intent to commit a battery, even though there is no statutory basis for permitting this theory to be presented to the jury. Despite the clear requirement that the State prove Petitioners acted with specific intent to establish the State's allegation of premeditated murder (there is no felony murder charge), the Notices of Intent set forth theories which do not require proof of the specific intent to kill and are therefore invalid. This aggravating circumstance is also invalid because the State fails to set forth precise details as to its assertions concerning monetary gain.

Likewise, the State's attempt to seek the death penalty based upon the assertion that it will prove at trial that Petitioners solicited another to kill two people, is invalid as a matter of law because solicitation is not a crime involving violence or the threat of violence under NRS 200.033(2).

Petitioners will suffer irreparable harm by having to stand trial for a capital case despite the invalid Notices of Intent to Seek Death Penalty. Because this is currently a capital case, Petitioners are being held without bail and may not be released from custody and are therefore unable to assist their counsel in preparation for their defense in an effective manner. Petitioners and their counsel must spend hundreds of hours preparing for a capital penalty hearing which cannot be lawfully held based upon the State's Notices of Intent to Seek Death Penalty. Further, court resources will be

unnecessarily expended by lengthy proceedings concerning the capital penalty hearing, a lengthy and complicated jury selection process, transcript expenses and other costs incurred by this case which would not be incurred if the Notices of Intent to Seek Death Penalty are dismissed. The Real Party in Interest will suffer no comparable harm as it will also expend far less resources on this case if a determination is made that it's alleged aggravating circumstances are invalid as a matter of law.

"This court may issue a writ of mandamus to compel the performance of an act which the law requires as a duty resulting from an office or where discretion has been manifestly abused or exercised arbitrarily or capriciously. The writ does not issue where the petitioner has a plain, speedy, and adequate remedy in the ordinary course of law. This Court considers whether judicial economy and sound judicial administration militate for or against issuing the writ. The decision to entertain a mandamus petition lies within the discretion of this court." Redeker v. Eighth Judicial Dist. Court (Mosley), 122 Nev. __, 127 P.3d 520, 522 (2006) (citing NRS 34.160, NRS 34.170, Round Hill Gen. Imp. Dist. v. Newman, 97 Nev. 601, 603-04, 637 P.2d 534, 536 (1981); Hickey v. District Court, 105 Nev. 729, 731, 782 P.2d 1336, 1338 (1989); State v. Babayan, 106 Nev. 155, 175-76, 787 P.2d 805, 819 (1990)). "Additionally, this court may exercise its discretion to grant mandamus relief where an important issue of law requires clarification." Redeker, 127 P.3d at 522 (citing State v. Dist. Ct. (Epperson), 120 Nev. 254, 258, 89 P.3d 663, 665-66 (2004)).

Petitioners here have no other plain, adequate or speedy remedy at law to protect their right not to face a capital penalty hearing where there is no legal basis for the State's aggravating circumstances. Moreover, judicial economy and sound judicial administration warrant issuance of the writ and this case presents an opportunity for this Court to clarify an important issue of law. This Court has

recognized that extraordinary relief is warranted under similar circumstances. See e.g. Redeker, 122 Nev. __, 127 P.3d 520 (granting petition for writ of mandamus pretrial based upon invalid aggravating circumstance); Bennett v. Eighth Judicial Dist. Court (McGroarty), 121 Nev. __, 121 P.3d 605 (2005) (granting petition for writ of mandamus based upon invalid amended notice which alleged new aggravating circumstances); State v. Second Judicial Dist. Court (Marshall), 116 Nev. 953, 11 P.3d 1209 (2000) (entertaining petition for writ of mandamus, addressing merits of legal issue and concluding that a district court acted properly in dismissing a notice of intent to seek death penalty which was not timely filed).

Wherefore, based on the foregoing and the accompanying Points and Authorities, Petitioners respectfully request that this Court issue a Writ of Mandamus compelling Respondent to order the dismissal of the State's Notices of Intent to Seek Death Penalty. In the alternative, Petitioners request that this Court issue a Writ of Prohibition precluding the State from proceeding on the invalid Notices of Intent to Seek Death Penalty.

Dated this 12th day of October, 2006

Dominic P. Gentile
JoNell Thomas
Attorneys for Petitioner

POINTS AND AUTHORITIES IN SUPPORT OF WRIT

The Charges

In an Information filed on June 20, 2005 the State charges Luis Hidalgo III, Anabel Espindola, and others as follows: Count 1 – Conspiracy to Commit Murder (of Timothy Jay Hadland) [punishable pursuant to NRS 199.480-1(b) by a term of two years to ten years of incarceration]; Count 2 – Murder with Use of a Deadly Weapon of Timothy Hadland pursuant to NRS 200.030 [on six different and alternative theories of criminal liability, although they are designated as three: (1) directly or indirectly committing the act and/or (2) lying in wait, and/or (3) aiding and abetting the commission of the crime, and/or (4) by conspiring to commit the crime of (a) battery, and/or (b) battery with the use of a deadly weapon, and/or (c) to kill (*sic*) Timothy Hadland]; Count 3 - Solicitation to Commit Murder of Jayson Taoipu; and Count 4 – Solicitation to Commit Murder of Rontae Zone.

The State's Intention to Seek the Death Penalty

On July 6, 2005 the State filed a Notice of Intent to Seek Death Penalty (hereinafter "the Notice of Intent") against each of the Petitioners. Although not a model of linguistic clarity, the Notices of Intent appear to rely upon the following as the statutory aggravating factors that will enable the State to seek the death penalty: (1) that Anabel Espindola and Luis Hidalgo III will be convicted of the Solicitation to Commit Murder of Jayson Taoipu, as alleged in Count 3, prior to the penalty hearing for the State's anticipated conviction of her on Count 2; (2) that Anabel Espindola and Luis Hidalgo III will be convicted of the Solicitation to Commit Murder of Rontae Zone, as alleged in Count 4, prior to the penalty hearing for the State's anticipated conviction of her on Count 2; and (3) the murder alleged in Count 2 was committed by Kenneth Counts for the purpose of someone receiving money or other thing of monetary value.

Just exactly how this last allegation will be supported is difficult to discern from the Notices of Intent themselves, as they contain several somewhat irreconcilable variations and mutations. Counsel for Petitioners' best efforts to understand them leads to a belief that the State contends that DeAngelo Carroll was "procured" to "**beat** and/or kill" Timothy Jay Hadland by Anabel Espindola, and/or Luis Hidalgo III, and/or Luis Hidalgo Jr. (who isn't charged in the Information), all of whom are associated in some manner with the Palomino Club. Whoever did the "procuring", according to defense counsels' divining of the Notices of Intent, somehow the **beating** and/or death of Timothy Jay Hadland was designed to "further" the business of the Palomino Club. Moreover, despite his being the one allegedly "procured" by one or more of the aforementioned persons, DeAngelo Carroll was himself apparently a "serial procurer" and bereft of the competency to "**beat** and/or kill" Hadland himself. He therefore resorted to making a secondary offering to Kenneth Counts and/or Jayson Taoipu. The Notices of Intent alleges that Kenneth Counts, having been "procured" by DeAngelo Carroll, terminated the life of Timothy Jay Hadland by shooting him with a firearm.

The Notices of Intent go on to narrate events that allegedly took place after the by then recent demise of Mr. Hadland. They assert that DeAngelo Carroll, subsequent to the event, was paid $6000 by either Anabel Espindola or Luis Hidalgo Jr. (who is not charged in the Information), or both of them, and that DeAngelo Carroll in turn later transferred all of the money to Kenneth Counts, apparently feeling unworthy of compensation himself or at least not having been motivated in his "procuring" efforts by the acquisition of worldly gain.

Or perhaps not.

The Notices of Intent continue in the disjunctive to assert that maybe what happened is that Anabel Espindola and/or Luis Hidalgo III (who <u>is</u> charged and who

brings this petition along with Anabel Espindola) may have done one or more of the following:

- Anabel Espindola provided $200 to DeAngelo Carroll (we know not when or why from the pleading itself) which he apparently either did not give to Kenneth Counts or the Notices of Intent are silent as to it;

- Anabel Espindola and Luis Hidalgo III provided $1400 and/or $800 to DeAngelo Carroll (we know not when or why from the pleading itself) that he apparently either did not give to Kenneth Counts or the Notices of Intent are silent as to it;

-Anabel Espindola agreed to pay DeAngelo Carroll for twenty-four hours per week of work at the Palomino Club even though he had already terminated his "position" there;

- Luis Hidalgo III offered to provide DeAngelo Carroll and/or his family with United States Savings Bonds.

It is not clear as to whether the foregoing allegations were premised upon a theory that money was paid as consideration for some pre-existing agreement to **beat** and/or kill Timothy Jay Hadland, or whether money was paid or promised out of fear of harm or threat following the killing, or whether the intent of the alleged payments was for something else altogether.

The Notices of Intent To Seek Death Penalty Are Invalid As A Matter of Law

This petition presents two very basic, very straightforward legal questions:

(1) May the State seek the death penalty upon a claim that a defendant paid another to **beat** the victim despite the clear language of NRS 200.033(6) which permits the aggravating circumstance only where "the **murder** was committed by a person, for himself or another, to receive money or any other thing of monetary value."

(2) Is a mere solicitation generally, or spoken to an agent of the police specifically, a felony "involving the use or threat of violence to the person of another" for purposes of NRS 200.033(2)(b).

The district court concluded that the State's Notices of Intent were valid and accepted the State's arguments that these were proper theories by which aggravating circumstances could be established. Petitioners disagree and contend that neither of the State's theories is legally cognizable.

General Principles

Capital punishment is reserved for the most heinous of murders. Not all murders qualify for death as the punishment. "Death is different." The United States Supreme Court has relied upon this principle and has interpreted the Eighth Amendment in that light for thirty years. See Gregg v. Georgia, 428 U.S. 153, 188 (1976); Woodson v. North Carolina, 428 U.S. 280, 303 (1976); Ford v. Wainwright, 477 U.S. 399, 411 (1986); Harmelin v. Michigan, 501 U.S. 957, 994 (1991); Morgan v. Illinois, 504 U.S. 719, 751 (1992) (Scalia, J., *dissenting*); Dobbs v. Zant, 506 U.S. 357, 363 (1993) (Scalia, J., concurring); Simmons v. South Carolina, 512 U.S. 154, 185 (1994) (Scalia, J., *dissenting*); Shafer v. South Carolina, 532 U.S. 36, 55 (2001) (Scalia, J., *dissenting*); Atkins v. Virginia, 536 U.S. 304, 337 (2002) (Scalia, J., *dissenting*); Ring v. Arizona, 536 U.S. 584, 606 (2002); Wiggins v. Smith, 539 U.S. 510, 557 (2003) (Scalia, J., *dissenting*).

This Court also recognizes its "obligation to ensure that aggravators are not applied so liberally that they fail to perform their constitutionally required narrowing function[.]" Redeker v. Eighth Judicial Dist. Court, 122 Nev. __, 127 P.3d 520, 526 & n. 30 (2006) (citing Zant v. Stephens, 462 U.S. 862, 878 (1983) and Arave v. Creech, 507 U.S. 463, 474 (1993)). In interpreting the statute at issue, this Court looks to the plain language of the statute. State v. Colosimo, 122 Nev. __, 142 P.3d

352, __ (2006) (citing State v. Washoe County, 6 Nev. 104, 107 (1870)). If a penal statute is ambiguous, "'rules of statutory interpretation . . . require that provisions which negatively impact a defendant must be strictly construed, while provisions which positively impact a defendant are to be given a more liberal construction.'" Colosimo, 122 Nev. at __, 142 P.3d at __ (quoting Mangarella v. State, 117 Nev. 130, 134, 17 P.3d 989, 992 (2001)).

The State's Murder For Hire Allegations Are Invalid

The State asserts that it may establish the aggravating circumstance of murder for hire, under NRS 200.033(6), based upon the following theories:

> The murder was committed by a person, for himself or another, to receive money or any other thing of monetary value, to-wit by: by [sic] Anabel Espindola (a manager of the Palomino Club) and/or Defendant Luis Hidalgo, III (a manager of the Palomino Club) and/or Luis Hidalgo, Jr. (the owner of the Palomino Club) procuring DeAngelo Carroll (an employee of the Palomino Club) to beat and/or kill Timothy Jay Hadland; and/or Luis Hidalgo, Jr., indicating that he would pay to have a person either beaten or killed; and/or by Luis Hidalgo, Jr. procuring the injury or death of Timothy Jay Hadland to further the business of the Palomino Club; and/or Defendant Luis Hidalgo, II telling DeAngelo Carroll to come to work with bats and garbage bags; thereafter, DeAngelo Carroll procuring Kenneth Counts and/or Jayson Taoipu to kill Timothy Hadland; thereafter, by Kenneth Counts shooting Timothy Jay Hadland; thereafter, Luis Hidalgo, Jr. and/or Anabel Espindola providing six thousand dollars ($6,000) to DeAngelo Carroll to pay Kenneth Counts, thereafter Kenneth Counts receiving said money; and/or by Anabel Espindola providing two hundred dollars ($200) to DeAngelo Carroll and/or by Anabel Espindola and/or defendant Luis Hidalgo, III providing fourteen hundred dollars ($1400) and/or eight hundred dollars ($800) to DeAngelo Carroll and/or by Anabel Espindola agreeing to continue paying DeAngelo Carroll twenty-four (24) hours of work a week from the Palomino Club even though DeAngelo Carroll had terminated his position with the club and/or by Defendant Luis Hidalgo, III offering to provide United States Savings Bonds to DeAngelo Carroll and/or his family.
>
> The basis for this aggravating is the aggravated nature of the crime itself. The evidence upon which the State will rely is the testimony and exhibits introduced during the guilt or penalty phase of the trial, as well as the verdicts from the guilt phase.

Exhibit 4.

This Court has held that based upon Enmund v. Florida, 458 U.S. 782, 797 (1982) and Tison v. Arizona, 481 U.S. 137 (1987), to receive the death sentence, a defendant must have himself killed, attempted to kill, intended that a killing take place, intended that lethal force be employed or participated in a felony while exhibiting a reckless indifference to human life. See Doleman v. State, 107 Nev. 409, 418, 812 P.2d 1287, 1292-93 (1991). In the aiding and abetting context, this is consistent with this Court's holding in Sharma v. State, 118 Nev. 648, 56 P. 3d 868 (2002) that to be guilty of a specific intent offense on an aiding and abetting theory the aider and abettor must have acted with specific intent that the offense be committed. Likewise, in the conspiracy context, the State must prove that the co-conspirator to a specific intent offense acted with specific intent that the offense be committed. Bolden v. State, 121 Nev. ___, 124 P.3d 191, 200 (2005). In this case the State has noticed its intent to seek the death penalty and has alleged the existence of the murder for hire aggravating circumstance upon various theories, several of which do not require a specific intent to murder. Under Sharma, Bolden, and the other authority noted herein, the State's pleading is invalid.

There is no dispute that Petitioners did not physically kill Hadland themselves. Rather, the State seeks to establish their guilt under aiding and abetting and conspiracy theories. The State asserts in its Notices of Intent that the object of the conspiracy was either to "beat" or to "kill" Hadland. That this makes a great difference to the validity of the Notices of Intent is obvious. NRS 200.033(6) provides for an aggravating circumstances only where "the **murder**" was committed to receive money or any other thing of monetary value. There is no provision for beatings or any other action short of murder. Moreover, to "kill" someone is not the equivalent of to "murder" someone. For example, state officials, jurists, police and even juries, enter into

agreements to "kill" people that are not criminal. Persons who are defending themselves from lethal force also fit into that category.

In the district court proceedings and at trial Petitioners will contest the allegation that they wanted Counts or anyone else to beat Hadland. But even accepting this allegation as true, for the purpose of this petition only, even a deliberate battery does not have as a foreseeable consequence, much less an intentional one, of a killing or great bodily harm. Absent it being the purpose of a burglary, battery does not form the basis of a felony-murder under Nevada law. See State v. Contreras, 118 Nev. 332, 46 P. 3d 661 (2002). Serious bodily injury is not inherently foreseeable of a mere battery. State v. Huber, 38 Nev. 253, 148 P. 562, 563 (1915) (where defendant intended only a battery and it resulted in killing of victim who fought back, result is manslaughter). An intentional act or intentional conduct done with no aim to cause death or serious bodily injury will constitute involuntary manslaughter if it creates an extreme risk of death or serious bodily injury and amounts to non-conscious recklessness. Alternatively, an intentional act which causes death is involuntary manslaughter if it is a misdemeanor dangerous in and of itself which is committed in a manner such that appreciable bodily injury to the victim was a reasonably foreseeable result. See Comber v. United States, 584 A. 2d 26, 54 (D.C. 1990). Thus, the "conspiracy to beat" alternative in the Notices of Intent to Seek Death cannot form the basis of the aggravating circumstance as the statutory aggravating circumstance clearly requires the specific intent that a murder, not a beating, be committed.

In the district court, the State attempted to justify its Notices of Intent by arguing that Petitioners intended that lethal force be used because they intended DeAngelo Carroll to commit a battery with a deadly weapon against T.J. Hagland. Exhibit 6, State's Opposition at page 16. Throughout the State's argument it asserted that battery with a weapon involves "deadly force." Id. at pages 16-17. The State

failed, however, to cite to any authority for this broad proposition. Nowhere in NRS 200.033(6) is there any support for the State's assertion that the aggravating circumstance can be established based upon a battery, battery with a weapon, battery with lethal force or any other offense short of murder.

"Lethal force" has not been defined by the Nevada Legislature within the context of NRS 200.033, but it is clear from other statutes that use the term "lethal" is limited to situations where death is caused or contemplated. See NRS 176.355 ("The judgment of death must be inflicted by an injection of a lethal drug."); NRS 202.550 ("It is unlawful for any person to place any lethal bait on the public domain."); NRS 202.443 ("'Delivery system' means any apparatus, equipment, implement, device or means of delivery which is specifically designed to send, disperse, release, discharge or disseminate any weapon of mass destruction, any biological agent, chemical agent, radioactive agent or other lethal agent or any toxin."). There is no statutory basis, or other basis in law, for making the monumental leap that the State jumped to in concluding that intent to commit a battery with a bat is the same as the intent to kill or to use lethal force.[1]

Most critically, the State's theory is not set forth in either the Indictment or the Notices of Intent, but instead was presented by the State in its opposition to the motion to strike the Notices of Intent. Exhibit 6 at page 16-17. There is no rule or statute which permits the State to supplement a Notice of Intent to Seek Death Penalty by presenting new theories and factual contentions in a pleading. Permitting such would

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[1]The State does not assert that Petitioner Espindola had knowledge of or was in any way associated with a bat. Petitioner Hidalgo does not in any way concede that he actually requested that Hadland be hit with bats or placed in garbage sacks. The State does not claim that a bat was ever located or used. These factual issues are not properly considered, however, because they are not alleged in the Notices of Intent.

violate SCR 250(4)(c), which mandates that facts in support of the aggravating circumstances alleged by the State be set forth in the Notice of Intent. "[A] defendant cannot be forced to gather facts and deduce the State's theory for an aggravating circumstance from sources outside the notice of intent to seek death. Under SCR 250, the specific supporting facts are to be stated directly in the notice itself." Redeker, 121 Nev. __, 127 P.3d at 523.

The State's legal analysis in the district court failed to address recent and controlling authority by this Court that is applicable to cases involving specific intent offenses and vicarious liability. In the Motion to Dismiss, Petitioners cited to Sharma v. State, 118 Nev. 648, 56 P. 3d 868 (2002), and noted that to be found guilty of a specific intent offense on an aiding and abetting theory, the aider and abettor must have the same intent as required of the principal. That is, to be convicted of first degree murder and sentenced to death based upon a finding that a defendant aided and abetted and intended that a killing take place or that lethal force will be employed, the State must prove that the defendant specifically intended that the victim be killed or that lethal force be employed against the victim. As noted above, Sharma's holding was reaffirmed and expanded to include co-conspirator liability in Bolden v. State, 121 Nev. __, 124 P.3d 191 (2005). This Court explained its rationale:

> [O]ur overarching concern in Sharma centered on the fact that the natural and probable consequences doctrine regarding accomplice liability permits a defendant to be convicted of a specific intent crime where he or she did not possess the statutory intent required for the offense. We are of the view that vicarious coconspirator liability for the specific intent crimes of another, based on the natural and probable consequences doctrine, presents the same problem addressed in Sharma, and we conclude that Sharma's rationale applies with equal force under the circumstances of the instant case. To convict Bolden of burglary and kidnapping, the State was required to prove under Nevada law that he had the specific intent to commit those offenses. Holding otherwise would allow the State to sidestep the statutory specific intent required to prove those offenses.

Id. at __, 124 P.3d at 200. The State failed to address either Sharma or Bolden despite

their clear applicability to the facts of this case.

The State sets forth the theory in its Notices of Intent that an aggravating circumstance may be established based upon an allegation of intent to commit a battery, even though there is no statutory basis for permitting this theory to be presented to the jury. Despite the clear requirement that the State prove Petitioners acted with specific intent to establish the State's allegation of premeditated murder (there is no felony murder charge), the Notices of Intent set forth theories which do not require proof of the specific intent to kill and are therefore invalid.

This aggravating circumstance is also invalid because it fails to set forth a plain, concise and definite written statement of the essential facts of the aggravating circumstance alleged by the State. The Sixth Amendment to the United States Constitution provides that a criminal defendant is entitled to be informed of the nature and cause of any and all accusations against him. In conformity therewith, NRS 173.075(1) expressly requires that an indictment or information contain a "plain, concise and definite written statement of the essential facts constituting the offense charged." See also Sheriff v. Levinson, 95 Nev. 436, 596 P.2d 232 (1979). The charging document should also contain, when possible, a description of the means by which the defendant committed the offense(s). NRS 173.075(2). This Court first contemplated the mandate of NRS 173.075 in Simpson v. District Court, 88 Nev. 654, 660, 503 P.2d 1225, 1229 (1972). Simpson was charged with murder by way of a Grand Jury Indictment. Simpson's Indictment alleged that she, "... on or about May 27, 1970, did wilfully, unlawfully, feloniously and with malice aforethought kill Amber Simpson, a human being." Id. at 655, 503 P.2d at 1226. At issue was whether Simpson's charges met the pleading requirements of NRS 173.075(2). This Court held that, because the indictment failed to specify the conduct which gave rise to the Simpson's charges, the indictment was insufficient under NRS 173.075. Accordingly,

the Simpson Court issued a permanent writ of prohibition, disallowing further proceedings based on the defective indictment. Id. at 661.

Elaborating on the pleading requirements necessary for an Indictment to meet constitutional muster, the Simpson Court held that:

> "Whether at common law or under statute, the accusation must include a characterization of the crime and such description of the particular act alleged to have been committed by the accused as will enable him properly to defend against the accusation, and the description of the offense must be sufficiently full and complete to accord to the accused his constitutional right to due process of law."

Id. at 660 (quoting 4 R. Anderson, Wharton's Criminal Law and Procedure, Section 1760, at 553 (1957)). This Court further noted that the fact that an accused has access to transcripts of the proceedings before the Grand Jury does not eliminate the necessity that an Indictment be definite. Id. This Court reasoned that such indefinite pleading would necessarily allow the prosecution absolute freedom to change theories at will, thus denying an accused the fundamental rights the Nevada legislature intended a definite Indictment to secure. Id.

The pleading requirement described above is reiterated in Nevada Supreme Court Rule 250, which governs capital offenses. "[A] defendant cannot be forced to gather facts and deduce the State's theory for an aggravating circumstance from sources outside the notice of intent to seek death. Under SCR 250, the specific supporting facts are to be stated directly in the notice itself." Redeker, 122 Nev. at __, 127 P.3d at 523. Here, the State sets forth theories and conclusions, but it fails to allege specific facts in support of those theories and conclusions, as required by SCR 250 and the Due Process clauses of the state and federal constitutions.

Under SCR 250, as well as NRS 173.075, Simpson and Redeker, the instant pecuniary gain aggravator must be dismissed. It contains absolutely no assertion of a factual basis as to how the alleged murder of Timothy Hadland furthered the

business of the Palomino Club. Petitioners are left to guess how the State is going to allege that the business was furthered. A simple allegation with no specificity is not sufficient to put Petitioners on notice. Further, the purpose of the Notice is to provide defendants just that. The pecuniary gain aggravator provides too many variables. With numerous "and/or" combinations, it is impossible for Petitioners and their counsel to know what allegation they are to defend against or exactly who was to "gain." Due to insufficient notice, Petitioners have not received the process due to them under the Nevada statutory scheme or the United States and/or Nevada Constitutions. Absent the requisite factual assertions, the Death Notice is constitutionally defective.

In the district court the State attempted to justify its Notice of Intent by arguing that SCR 250(4)(c) does not mandate the disclosure argued to be required by the Petitioners. Exhibit 6, State's Opposition at page 34. The State was wrong. SCR 250(4)(c) provides the following:

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

The State argued that it should be relieved of its obligations under SCR 250(4)(c) because SCR 250(4)(f) requires a detailed list of evidence be submitted at least 15 days prior to trial. Exhibit 6 State's Opposition at page 34. The State is wrong in its analysis of this Court's rules. SCR 250(4)(c) specifically addresses aggravating circumstances while SCR 250(4)(f) addresses all evidence to be presented at the penalty hearing, including character or "other" evidence that is not relevant to the alleged aggravators. See Mason v. State, 118 Nev. 554, 561-62, 51 P.3d 521, 525-26 (2002). The State's obligations under subsection (c) are not modified or lessened by its obligations under subsection (f).

In the district court, the State next provided a description of its various theories as to how NRS 200.033(6) applies to Petitioners. Some of these allegations are included in the State's Notice of Intent to Seek Death, while others are not. None of the State's descriptions, however, meet the requirement of SCR 250(c)(4) that the State allege "all aggravating circumstances which the state intends to prove *and allege with specificity the facts on which the state will rely* to prove each aggravating circumstance." The State asserted in the district court, as it did in its Notices of Intent to Seek Death, that Mr. Hadland was killed to further the business of the Palomino Club, but the State failed to offer any theory as to how the Palomino Club's business would or might be furthered by his death. No facts were alleged, no witnesses were identified, and no theory of financial gain was set forth. As a result, the defendants are unable to prepare any meaningful defense to the State's vague allegation. The State's allegations were also non-existent, or at least vague, as to whether the alleged plan to make payments associated with the incident were made prior to or after Mr. Hadland's death, and are non-existent, or at least vague, as to whether payment was intended for a battery or intended for a killing.

The aggravator must be stricken from the State's Notices of Intent to seek death based upon the State's failure to comply with SCR 250(4)(c) and failure to provide the defendants with their constitutional right to adequate notice of the charges against them.

The State's Prior Violent Felony Aggravators Are Invalid

The two aggravating circumstances which allege that Petitioners committed a felony with use or threat of harm are invalid and mut be stricken from the State's Notices of Intent because NRS 200.033 (b)(2) is unconstitutionally vague and ambiguous; and the offense of solicitation for murder, especially when made to a police agent, is not a felony involving the use or threat of violence.

The relevant Eighth Amendment law is well defined. First, a statutory aggravating factor is unconstitutionally vague if it fails to furnish principled guidance for the choice between death and a lesser penalty. See e.g., Maynard v. Cartwright, 486 U.S. 356, 361-364 (1988); Godfrey v. Georgia, 446 U.S. 420, 427-433 (1980). Second, in a "weighing" state, such as Nevada, where the aggravating and mitigating factors are balanced against each other, it is constitutional error for the sentencer to give weight to an unconstitutionally vague aggravating factor, even if other, valid aggravating factors obtain. See e.g. Stringer v. Black, 503 U.S. 222, 229-732 (1992); Clemons, 494 U.S. at 748-752. Third, a state appellate court may rely upon an adequate narrowing construction of the factor in curing this error. See Lewis v. Jeffers, 497 U.S. 764 (1990). Finally, in federal habeas corpus proceedings, the state court's application of the narrowing construction should be reviewed under the "rational fact finder" standard of Jackson v. Virginia, 443 U.S. 307 (1979). See Lewis, 497 U.S. at 781.

Circumstances aggravating first-degree murder are codified in NRS 200.033. Section 2 in pertinent part to this argument states:

> The murder was committed by a person who is or has been convicted of:
> (b) A felony ***involving the use or threat of violence to the person of another*** and the provisions of subsection 4 do not otherwise apply to that felony.

Subsection 4 enumerates the felonies that would constitute the felony murder rule. Specifically this subsection deals with if the murder was committed while engaged or attempting to engage in the following felonies: robbery, burglary, invasion of the home, kidnapping and arson in the first degree. Noticeably absent from this list is battery.

In a concurring opinion in Leslie v. Warden, 118 Nev. 773, 59 P.3d 440 (2002), Justice Maupin voiced his concern over NRS 200.033(4) when he wrote:

> To meet constitutional muster, a capital sentencing scheme "must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." The question is, does the felony aggravator set forth in NRS 200.033(4) genuinely narrow the death eligibility of felony murderers? First, compared to the felony basis for felony murder, NRS 200.033(4) limits somewhat the felonies that serve to aggravate a murder. **But the felonies it includes are those most likely to underlie felony murder in the first place.** Second, the aggravator applies only if the defendant "killed or attempted to kill" the victim or "knew or had reason to know that life would be taken or lethal force used." This is narrower than felony murder, which in Nevada requires only the intent to commit the underlying felony. This notwithstanding, it is quite arguable that Nevada's felony murder aggravator, standing alone as a basis for seeking the death penalty, fails to genuinely narrow the death eligibility...

Id. at 774-775, 59 P.3d at 448.

This Court has never addressed whether NRS. 200.033 (2)(b) is narrowly defined. However, if, as Justice Maupin has written, section (4) of the statute is not genuinely narrow then there is a strong argument that Section (2)(b) is not genuinely narrow. As stated above, Section (4) specifically states that if the murder was committed while the person was engaged in several enumerated felonies then that crime could be used as an aggravator under this section. Unlike Section (4), section (2) (b) does not enumerate any specific felonies. It simply states a felony involving the threat or use of violence. One is left to simply guess what types of felonies fall under this category. Significant to the instant case, this Court has never addressed whether the specific crime of Solicitation for Murder is considered a felony with the use or threat of violence. The statute is unconstitutionally vague both on its face and in its application to this case. Under these circumstances the aggravating circumstances of solicitation to murder are invalid.

The State argued in the district court that "a rule promulgated to determine whether a person has a propensity for violence is not unconstitutionally vague or ambiguous," but failed to address the issue presented: what is the meaning of "use or threat of violence" and does the phrase provide a principled guide for the choice

between death and a lesser penalty as required by Maynard v. Cartwright, 486 U.S. 356, 361-364 (1988) and Godfrey v. Georgia, 446 U.S. 420 (1980)? A statute violates due process if it is so vague that it fails to give persons of ordinary intelligence fair notice of what conduct is prohibited and fails to provide law enforcement officials with adequate guidelines to prevent discriminatory enforcement." Hernandez v. State, 118 Nev. 513, 524, 50 P.3d 1100, 1108 (2002). In Bouie v. City of Columbia, 378 U.S. 347, 350-51 (1964), the United States Supreme Court explained that it is a basic principle that a criminal statute must give fair warning of the conduct that makes it a crime. (Citing United States v. Harriss, 347 U.S. 612, 617 (1954) (cited in Bush v. Gore, 531 U.S. 98 (2000)). "[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." Connally v. General Const. Co., 269 U.S. 385, 391 (1926). "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids." Lanzetta v. New Jersey, 306 U.S. 451, 453 n.3 (1939). While these principles are generally applied to statutes that are vague in the language of the statute itself, they are equally applicable to cases where a statute that is precise on its face has been unforeseeably and retroactively expanded by judicial construction. Bouie, 378 U.S. at 352 (citing Pierce v. United States, 314 U.S. 306, 311 (1941)). Construction of a statute which unexpectedly broadens its application operates precisely like an *ex post facto* law and is therefore barred from retroactive application to pending cases under the due process clause. Id. at 353-54. Thus, even if this Court were to find solicitation to commit murder to be an eligible qualifying felony under NRS 200.033, the ruling could not be applied to this case.

The State summarily announced in the district court that NRS 200.033(2)(b) "significantly limits the number of people eligible for the death penalty as this circumstance isn't usually tied to the facts underlying the murder charge." Exhibit 6, State's Opposition at page 36. The State provided no citation to case authority and no analysis of its conclusion. The State failed to address the fact that a great number of people charged with first degree murder have convictions for prior violent offenses committed before the time of the murder or are charged with violent acts contemporaneously with the murder. Thus, the narrowing criteria is not satisfied.

The State failed to provide any definition of "use or threat of violence," failed to provide any case authority narrowly interpreting this broad language, and failed to establish that this aggravator meets the constitutional requirements of notice and narrowing. Accordingly, it should be stricken from the State's Notice of Intent to Seek the Death Penalty.

In ruling on this issue, the district court first acknowledged that it was not familiar with the briefing on this issue and had not read the Florida cases cited by Petitioners. Exhibit 11 at page 42. Nonetheless, the district court made its ruling after the following exchange:

The Court:	When someone solicits someone else to kill, orally, that's not sufficient?
Mr. Digiacomo:	They say that's not a crime of violence. That's their argument.
The Court:	It's not a crime of violence?
Mr.Digiacomo:	That's what their argument to the Court was.
The Court:	When someone is taped, as we see these living things on tv, where the husband or wife, disgruntled, is trying to contract with someone to kill the other party and they are in a car and it's being taped and they are saying "I want him dead. I want him dead; here's how you do it and here is what you get for it," that's not a crime?

Ms. Thomas That's correct.[2]

The Court: What court in this land came up with that?

Ms. Thomas: The Supreme Court of Arizona, the Supreme Court of Florida.

The Court: That ain't gonna fly here.

Exhibit 11 at pages 42-43.

The aggravating circumstances are also invalid because solicitation to commit murder, both in general and under the facts asserted here, is not a felony involving the use or threat of violence.

NRS 199.500(2) states:

> 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 category B felony.

The crime of solicitation is complete once the request is made. Moran v. Schwarz, 108 Nev. 200, 202, 826 P.2d 952, 954 (1992). Unlike other criminal offenses, in the crime of **solicitation,** "the harm *is* the asking -- nothing more need be proven." Id at 203, 826 P.2d at 954 (citing People v. Miley, 158 Cal. App. 3d 25, 34 (Ct. App. 1984)). There need be no real danger of the commission of the completed offense or of the person solicited being receptive to the invitation. It amounts to little more than speaking ones mind about wanting someone killed. Unlike a conspiracy to commit murder, where an agreement to complete the offense is involved, there is no threat of actual harm at the time of the solicitation, even to someone who is not a police operative. In a sense it is "half a conspiracy" or "half a contract", waiting for a willing person to accept or agree to fulfill the wishes of the desirous person.

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[2]Petitioners acknowledge that solicitation for murder is a criminal offense. Clearly from the context, Petitioners' counsel intended her answer of "that's correct" to mean that solicitation for murder is not crime involving violence or the threat of violence within the meaning of the aggravating circumstance.

In Wood v. State, 115 Nev. 344, 350-351, 990 P.2d 786, 790 (1999) this Court held that if a defendant is convicted of conspiracy to commit murder or attempted murder, he cannot be convicted of solicitation to commit murder for the same acts. Noting that when a person solicits another to commit murder and the second person agrees, a conspiracy is formed and NRS 199.480(1) governs, this Court held:

> A conspiracy is a criminal act, which triggers the exclusionary clause in the solicitation statute. In State v. Koseck, 113 Nev. 477, 479, 936 P.2d 836, 837 (1997), we held that, "[w]hen a defendant receives multiple convictions based on a single act, this court will reverse 'redundant convictions that do not comport with legislative intent.'" (Citation omitted.) Based on the exclusionary language contained in NRS 199.500(2), on remand, Wood could be convicted of solicitation to commit murder in these circumstances only if he is not convicted of conspiracy or attempted murder for the attack on Lisa.

See also People v. Vieira, 35 Cal. 4th 264, 106 P. 3d 990, 1009 (Cal. 2005) (holding that conspiracy to commit murder is not a death eligible crime).

In reviewing Nevada case law addressing this aggravating circumstance, there are no cases where solicitation has been considered a "felony with use or threat of use of force." In determining what is a felony with use or threat of violence Nevada has stated the following crimes fall in that category: attempt murder with use of a deadly weapon (Blake v. State, 121 Nev. __, 121 P.3d 567 (2005); Weber v. State, 121 Nev. __, 119 P.3d 107 (2005)), second-degree assault (Dennis v. State, 116 Nev. 1075, 13 P.3d 434 (2000)), attempted assault with a deadly weapon (Rhyne v. State, 118 Nev. 1, 38 P.3d 163 (2002)), aggravated sexual assault (Kaczmarek v. State, 120 Nev. __, 91 P.3d 16 (2004)), sexual assault of a child (Weber), armed robbery (Kaczmarek), robbery (State v. Powell, 122 Nev. __, 138 P.3d 453 (2006)), attempted robbery (Thomas v. State, 120 Nev. __, 83 P.3d 818 (2004), kidnapping (Petrocelli v. Angelone, 248 F.3d 877 (9th Cir. 2001); Weber), second degree arson (Dennis, but see Redeker, 127 P.3d 520 in which this Court found that this offense is not always a crime of violence), battery causing substantial bodily harm (Thomas), escape from

federal custody while threatening a jailer with a shank (State v. Haberstroh, 119 Nev. 173, 69 P.3d 676 (2003)), and battery by a prisoner (Rhyne). None of these are inchoate offenses and the harm or threat of harm is direct and certain to flow from the criminal act itself. They are not crimes that are committed with words but with physical deeds that are clearly and imminently dangerous to a victim who is present at its place of commission. Not so with solicitation. It is noteworthy that both conspiracy to commit murder and solicitation of murder are Class B felonies. In terms of the legislative intent regarding their punishment, they are identical and given substantially lesser punitive treatment than murder and other violent offenses. Likewise solicitation is not considered so inherently likely to lead to a murder that it is a statutory predicate for a felony-murder under NRS 200.033(4).

Other states that have directly addressed this issue have concluded that solicitation for murder does not constitute an aggravating circumstance under statutes similar to and identical to NRS 200.033(2). In Lopez v. State, 864 So. 2d 1151 (Fla. Dist. Ct. App. 2003) the trial court ruled that solicitation to commit murder was encompassed within the catch-all provision of a Florida Statute that permitted enhancement of a sentence for commission of a "felony that involved the use or threat of physical force or violence against an individual." On appeal the Court reversed and remanded for a new sentencing hearing. In holding that violence is not an inherent element of solicitation to commit murder, the Court relied upon Elam v. State, 636 So. 2d 1312 (Fla. 1994) wherein the Supreme Court of Florida **rejected solicitation to commit murder as a violent felony in the context of an analysis of aggravating circumstances to support the imposition of the death penalty**. The Lopez court also relied upon Duque v. State, 526 So. 2d 1079 (Fla. Dist. Ct. App. 1988) wherein the Court held that committing the offense of solicitation to commit murder did not itself involve the use of a firearm, deadly weapon, or intentional violence and thus

solicitation to commit murder is not a felony that involves the use or threat of violence. The Court in Lopez held:

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

864 So. 2d at 1153. Consideration of Florida law is especially persuasive as to this issue because Nevada's death penalty statute is almost identical to Florida's statute. See Calambro v. State, 114 Nev. 106, 113, 952 P.2d 946, 950 (1998).

In the district court, the State argued that Florida was the only state to adopt Petitioners' position, that Florida's position was not persuasive, and that other states had found solicitation to be a proper basis for the aggravating circumstance. There was no merit to the State's argument. The State cited to Woodruff v. State, 846 P.2d 1124, 1143 (Okl. Cr. App. 1993) in support of its claim that Solicitation is a violent felony. Exhibit 6, State's Opposition at page 38. A review of the Woodruff opinion, however, reveals that the defendant there stipulated that the prior offense was a violent felony and the issue considered by the Oklahoma court concerned double jeopardy implications that are wholly irrelevant here. The Oklahoma court neither considered nor ruled upon the issue presented here. Likewise, in People v. Edelbacher, 766 P.2d 1 (Cal. 1989), another case cited by the State in its opposition, the California Supreme Court stated that a conviction for solicitation for murder was an aggravating circumstance, but it mentioned this as a historical fact and did not address in any way the issue presented here as it was not presented as an issue by the parties to that case.

Contrary to the State's argument below, Florida is not the only State to address this issue. In State v. Ysea, 956 P.2d 499 (Ariz. 1998), the Supreme Court of Arizona squarely addressed this issue:

> [T]he mere solicitation to commit an offense cannot be equated with the underlying offense. The solicitation statute criminalizes conduct that "encourages, requests or solicits another person to engage" in a felony or misdemeanor. See A.R.S. § 13-1002(A). The crime is completed by the solicitation and the "crime solicited need not be committed." W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW 414, 420 (1972) (cited with approval in State v. Johnson, 640 P.2d 861, 864 n.1 (1982)). Thus, solicitation is a crime of communication, not violence, and the nature of the crime solicited does not transform the crime of solicitation into an aggravating circumstance.
>
> . . . .
>
> . . . . [S]olicitation is a preparatory offense, complete upon the act of solicitation itself, and could not have been considered a crime of violence even if the act solicited would have qualified as such a crime.

Ysea, 956 P.2d at 503.

Likewise, the State's citation to Weber v. State, 121 Nev. __, 119 P.3d 107 (2005) was also misplaced. In Weber, this Court noted that there were implicit threats of violence for offenses in which the defendant sexually assaulted a minor child based upon prior incidents where the victim experienced trauma and violence, the defendant was much superior to the victim in physical strength and was older than the victim, and the defendant kicked in the door of the victim's home during the relevant time period.[3] Id. at 129. None of these factors are present here.

The fact remains that there is nothing within the plain language of this statute that suggests the aggravator would be applied to the inchoate offense of solicitation. Although this aggravator has been addressed in 54 published opinions since the reinstatement of the death penalty following Furman and the enactment of NRS 200.033, not a single case has involved a solicitation offense. In an extensive analysis of cases throughout the country that discuss this aggravating circumstance, there is no

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[3]The State's reference to Weber is especially baffling as it involved an actual attack upon a child, which caused actual harm, whereas the mere words at issue here, which were said to a police agent, involved no actual violence or actual threat of violence and no injury or harm was caused to anyone as a result.

discussion of solicitation offenses. See *Sufficiency of Evidence, for Purposes of Death Penalty, to Establish Statutory Aggravating Circumstance That Defendant Was Previously Convicted of or Committed Other Violent Offense, Had History of Violent Conduct, Posed Continuing Threat To Society, And the Like - Post-Gregg Cases, 65 A.L.R.4th 838 (1988) (updated November 2005).* The absence of such discussion, in the context of a thorough 130 page article, suggests that use of solicitation offenses to satisfy this aggravator is rare at best.

It is clear that the act of asking another to perform something is not itself an act that constitutes violence or an imminent threat of harm or violence. A request by one person to another is simply just a request, an exploration of interest. The minute one person makes that request the crime of solicitation has occurred and is finished. The act of asking someone to complete a task does not require a threat of violence. The recipient has the choice to oblige or deny the request. Moreover, on the facts of this case, there was no real threat of violence to anyone. At the time the alleged solicitation occurred, DeAngelo Carroll was a police agent. As such the completed crime of murder or even conspiracy to commit murder could not have occurred as a matter of law. In Sears v. United States, 343 F.2d 139, 142 (5th Cir. 1965), the Court established the rule that, "as it takes two to conspire, there can be no indictable conspiracy with a government informer who secretly intends to frustrate the conspiracy". When two persons merely pretend to agree, the other party, whatever he may believe, is in fact not conspiring with anyone. Although he may possess the requisite criminal intent, there can be no criminal act.

There are certain dangers with the crime of conspiracy. "Such dangers however are non-existent when a person 'conspires' only with a government agent. There is no continuing criminal enterprise and ordinarily no inculcation of criminal knowledge and practices. Preventative intervention by law enforcement officers also is not a

significant problem in such circumstances. The agent, as part of the 'conspiracy,' is quite capable of monitoring the situation in order to prevent the completion of the contemplated criminal plan; in short, no cloak of secrecy surrounds any agreement to commit the criminal acts." United States v. Escobar de Bright, 742 F.2d 1196, 1200 (9th Cir. 1984).

This Court has also held that an informant is a feigned accomplice and therefore cannot be a coconspirator. Myatt v. Nevada, 101 Nev. 761, 763, 710 P.2d 720, 722 (1985). When one of two persons merely pretends to agree, the other party, whatever he may believe, is in fact not conspiring with anyone. Johnson v. Sheriff, Clark County, 91 Nev. 161, 532 P.2d 1037 (1975) (citing Delaney v. State, 51 S.W.2d 485 (Tenn.1932)). There is no conspiracy where the assent was feigned and not real, and that at no time was there any intention to assist in the unlawful enterprise. The danger to society of a conspiracy is not present. The same is true when a solicitation is made to a person unknown to the requester to be a police operative. The situation is feigned and not real. The informant's mere presence frustrates any potential harm that can be done. The fact that Carroll was a police operative and supplying the police with recordings of the discussions makes it clear that nothing would have come out of the alleged request. Therefore, it is clear that solicitation, especially in this context, cannot be considered a crime that involves use or threat of violence.

When the language of a statute is clear, the courts ascribe to the statute its plain meaning and do not look beyond its language. Lader v. Warden, 121 Nev. __, 120 P.3d 1164, 1167 (2005). However, when the language of a statute is ambiguous, the intent of the Legislature is controlling. In such instances, the courts will interpret the statute's language in accordance with reason and public policy. Id. It is a maximum of statutory construction that when the scope of a criminal statute is at issue, ambiguity should be resolved in favor of the defendant. Id. (citing Demosthenes v.

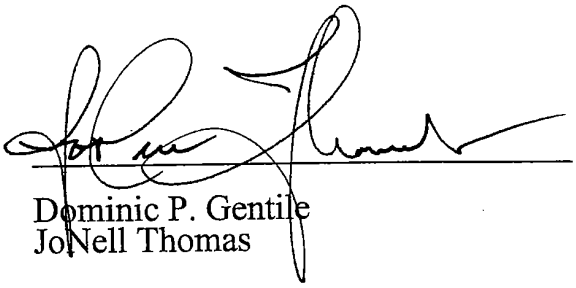
Williams, 97 Nev. 611, 614, 637 P.2d 1203, 1204 (1981)). Here, the language of the statute is not plain and there is no clear indication that it applies to solicitation offenses. There is also nothing in the Legislative history of this aggravator suggesting that it should be applied to solicitation offenses.

Reason and public policy mandate a finding that aggravator is not applicable to solicitation offenses. It is important to remember the purpose of aggravating circumstances. "The Eighth Amendment requires, among other things, that 'a capital sentencing scheme must "genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.'" Loving v. United States, 517 U.S. 748, 755 (1996) (quoting Lowenfield v. Phelps, 484 U.S. 231, 244 (1988), in turn quoting Zant v. Stephens, 462 U.S. 862, 877 (1983)). "A capital sentencing scheme must, in short, provide a 'meaningful basis for distinguishing the few cases in which [the penalty] is imposed for the many cases in which it is not.'" Godfrey, 446 U.S. at 428 (quoting Gregg, 428 U.S. at 188). The question here is not whether solicitation to commit murder is bad or whether it should be a crime or whether a person committing such an offense should be punished. The question here is does inclusion of this inchoate offense, which involved mere words and no agreement, no preparation and no actual violent act further the narrowing requirement of the Eighth Amendment. Reason and public policy demand a finding that such a broad application of this aggravator does not further the purpose of our death penalty scheme and the mandate that it meaningfully select "the worst of the worst." In any event, when the scope of a criminal statute is at issue, ambiguity must be resolved in favor of the defendant. Here, this ambiguity must be resolved by a finding that the aggravator does not apply to solicitation.

CONCLUSION

For the above reasons, each and all of the aggravators in the Notice of Intent to Seek the Death Penalty must be stricken.

Dated this 12th day of October, 2006.



Dominic P. Gentile
JoNell Thomas

State v. Hidalgo
State v. Espindola
District Court Case No. C212667

Index

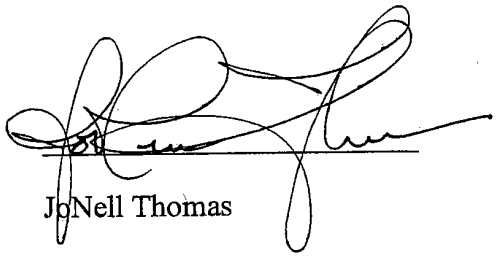
Exhibit	Date	Document
1	9/22/2006	Verification
2	9/22/2006	Proof of Service
3	6/20/2005	Information
4	7/6/2005	Notices of Intent to Seek Death Penalty for Defendants Hidalgo and Espindola
5	12/12/2005	Motion to Strike Notice of Intent to Seek Death Penalty
6	12/21/2005	State's Oppostition to Defendants Hidalgo's and Espindola's Motion to Strike Notice of Intent to Seek Death Penalty
7	1/5/2006	Reply to State's Opposition to Motion to Strike Notice of Intent to Seek Death Penalty
8	3/15/2006	Notice of Supplemental Authority in Support of Defendant's Motion to Strike Notice of Intent to Seek Death Penalty
9	3/17/2006	Reporter's Transcript of Proceedings
10	8/31/2006	Reporter's Transcript of Proceedings
11	9/8/2006	Reporter's Transcript of Proceedings

EXHIBIT "1"

VERIFICATION

Under penalties of perjury, the undersigned declares that she is counsel for Petitioner Anabel Espindola and she knows the contents thereof; that the pleading is true of her own knowledge, except as to those matters stated on information and belief, and that as to such matters he believes them to be true.

Executed this 22nd day of September, 2006.



JoNell Thomas

EXHIBIT "2"

CERTIFICATE OF SERVICE

I hereby certify that I caused to be hand-delivered to the District Attorney's drop-box in the office of the Clark County Clerk, and caused to be hand-delivered to the office of Honorable Donald M. Mosley, Eighth Judicial District Court, a true and correct copy of this **PETITION FOR WRIT OF MANDAMUS OR, IN THE ALTERNATIVE, WRIT OF PROHIBITION** addressed to

The Honorable Donald M. Mosley
Eighth Judicial District Court
200 Lewis Avenue
Las Vegas, NV 89155

Marc DiGiacomo
Chief Deputy District Attorney
200 Lewis Avenue
Las Vegas, NV 89155

Dated this 13th day of ~~September~~ October, 2006.

JoNell Thomas

EXHIBIT "3"

ELECTRONICALLY FILED
06/20/2005 07:23:11 AM

CLERK

INFO
DAVID ROGER
Clark County District Attorney
Nevada Bar #002781
MARC DIGIACOMO
Deputy District Attorney
Nevada Bar #006955
200 South Third Street
Las Vegas, Nevada 89155-2212
(702) 455-4711
Attorney for Plaintiff

I.A. 06/27/05
9:00 A.M.
Wildeveld/Oram
Draskovich/Figler

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

KENNETH COUNTS, aka Kenneth Jay Counts II, #1525643
LUIS ALONSO HIDALGO, aka, Luis Alonso Hidalgo, III, #1849634
ANABEL ESPINDOLA, #1849750,
DEANGELO RESHAWN CARROLL, #1678381

Defendant.

Case No: C212667
Dept No: XIV

INFORMATION

STATE OF NEVADA)
) ss.
COUNTY OF CLARK)

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

That KENNETH COUNTS, aka Kenneth Jay Counts II, LUIS ALONSO HIDALGO, aka, Luis Alonso Hidalgo, III, ANABEL ESPINDOLA, , the Defendant(s) above named, 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), on or between May 19, 2005, and May 24, 2005, within the County of Clark,

State of Nevada, contrary to the form, force and effect of statutes in such cases made and provided, and against the peace and dignity of the State of Nevada,

COUNT 1 - CONSPIRACY TO COMMIT MURDER

Defendants KENNETH JAY COUNTS, aka Kenneth Jay Counts, II, and LUIS ALONSO HIDALGO, aka, Luis Alonso Hidalgo III, ANABEL ESPINDOLA, DEANGELO RESHAWN CARROLL and JAYSON TAOIPU did, on or between May 19, 2005 and May 24, 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: murder, and in furtherance of said conspiracy, Defendants and/or their co-conspirators, did commit the acts as set forth in Counts 2 thru 4, said acts being incorporated by this reference as though fully set forth herein.

COUNT 2 - MURDER WITH USE OF A DEADLY WEAPON

Defendants KENNETH JAY COUNTS, aka Kenneth Jay Counts, II, and LUIS ALONSO HIDALGO, aka, Luis Alonso Hidalgo III, 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 firearm, the Defendants being liable under one or more of the following theories of criminal liability, to-wit: (1) by directly or indirectly committing the acts with premediation 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 each other to commit the crime, to-wit: by Defendant ANABEL ESPINDOLA and/or DEFENDANT LUIS HILDAGO, III and/or Luis Hildago, Jr. procuring Defendant DEANGELO CARROLL to beat and/or kill TIMOTHY JAY HADLAND; thereafter, Defendant DEANGELO CARROLL procuring KENNETH COUNTS and/or JAYSON TAOIPU to shoot TIMOTHY HADLAND; thereafter, Defendant DEANGELO CARROLL and KENNETH COUNTS and JAYSON

TAOIPU did drive to the location in the same vehicle; thereafter, Defendant DEANGELO CARROLL calling victim TIMOTHY JAY HADLAND to the scene; thereafter, by KENNETH COUNTS shooting TIMOTHY JAY HADLAND; and/or (3) by conspiring to commit the crime of battery and/or battery with use of a deadly weapon and/or to kill TIMOTHY JAY HADLAND whereby each and every co-conspirator is responsible for the foreseeable acts of each and every co-conspirator during the course and in furtherance of the conspiracy.

COUNT 3 - SOLICITATION TO COMMIT MURDER

Defendants LUIS ALONSO HIDALGO, aka, Luis Alonso Hidalgo III and ANABEL ESPINDOLA did, on or between May 23, 2005, and May 24, 2005, then and there wilfully, unlawfully, and feloniously counsel, hire, command or otherwise solicit another, to-wit: DEANGELO CARROLL, to commit the murder of JAYSON TAOIPU; the defendants 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 each other to commit the crime; and/or (3) by conspiring to commit the crime of murder where each and every co-conspirator is liable for the foreseeable acts of every other co-conspirator committed in the course and in furtherance of the conspiracy.

COUNT 4 - SOLICITATION TO COMMIT MURDER

Defendants LUIS ALONSO HIDALGO, aka, Luis Alonso Hidalgo III and ANABEL ESPINDOLA did, on or between May 23 and May 24, 2005, then and there wilfully, unlawfully, and feloniously counsel, hire, command or otherwise solicit another, to-wit: DEANGELO CARROLL, to commit the murder of RONTAE ZONE; the defendants being liable under one or more theories of criminal liability, (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 each other to commit the crime; and/or (3) by

conspiring to commit the crime of murder where each and every co-conspirator is liable for the foreseeable acts of every other co-conspirator committed in the course and in furtherance of the conspiracy.

BY _____
DAVID ROGER
DISTRICT ATTORNEY
Nevada Bar #002781

Names of witnesses known to the District Attorney's Office at the time of filing this Information are as follows:

NAME	ADDRESS
HADLAND, ALLAN	ADDRESS UNKNOWN
KARSON, PAJIT	ADDRESS UNKNOWN
KRYLO, JAMES	LVMPD P#5945
MADRID, ISMAEL	1729 STAR RIDGE WAY LV NV
MCGRATH, MICHAEL	LVMPD P#4575
MORTON, LARRY	LVMPD P#4935
RENHARD, LOUISE	LVMPD P#5223
SCHWANDERLIK, MICHELLE	4037 OVERBROOK DR LV NV
SMITH, STEPHANIE	LVMPD P#6650
TAOIPU, JAYSON	2008 JEANNE DR LV NV
TELGENHOFF, DR. GARY	C.C.M.E. #0003
VACCARO, JAMES	LVMPD P#1480
WILDEMANN, MARTIN	LVMPD P#3516
ZONE, RONTAE	c/o BILL FALKNER, Clark County D.A. Office

DA#05FB0052A-B/ddm
LVMPD EV#0505193516
CONSP MURDER;MWDW;SOLICIT MURDER - F
(TK7)

EXHIBIT "4"

ELECTRONICALLY FILED
07/06/2005 10:51:35 AM

CLERK

NISD
DAVID ROGER
Clark County District Attorney
Nevada Bar #002781
MARC DIGIACOMO
Deputy District Attorney
Nevada Bar #006955
200 South Third Street
Las Vegas, Nevada 89155-2211
(702) 455-4711
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

LUIS ALONSO HIDALGO,
#1849634

Defendant.

CASE NO: C212667

DEPT NO: XIV

NOTICE OF INTENT TO SEEK DEATH PENALTY

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

1. The murder was committed by a person who, at any time before a penalty hearing is conducted for the murder pursuant to NRS 175.552, is or has been convicted of a felony involving the use or threat of violence to the person of another and the provisions of subsection 4 do not otherwise apply to that felony, to-wit: Solicitation to Commit Murder, in that on or about May 23, 2005, DEFENDANT LUIS ALONSO HIDALGO, III and ANABEL ESPINDOLA, did then and there willfully, unlawfully, and feloniously counsel, hire, command or otherwise solicit DEANGELO CARROLL to commit the murder of JAYSON TAOIPU by DEFENDANT LUIS HIDALGO, III, in the presence of ANABEL

ESPINDOLA, inquiring of DEANGELO CARROLL whether KENNETH COUNTS would be willing to kill JAYSON TAOIPU and/or by DEFENDANT LUIS HIDALGO, III, in the presence of ANABEL ESPINDOLA, instructing DEANGELO CARROLL to put rat poisoning in a bottle of gin and have JAYSON TAOIPU drink it and/or by DEFENDANT LUIS HIDALGO, III, in the presence of ANABEL ESPINDOLA, instructing DEANGELO CARROLL to put rat poisoning in a marijuana cigarette and have JAYSON TAOIPU smoke it and/or soliciting any other manner to kill JAYSON TAOIPU and/or thereafter, ANABEL ESPINDOLA providing fourteen ($1400) dollars to DEANGELO CARROLL, and/or by DEFENDANT LUIS HIDALGO, III providing a bottle of gin at the meeting to facilitate the killing. [See NRS 200.033(2)(b)]

It is anticipated that DEFENDANT LUIS HIDALGO, III will be convicted of count three (3) of the instant information by a jury at the same time he is convicted of the murder alleged in count II. The evidence upon which the State will rely is the testimony and exhibits introduced during the guilt or penalty phase of the trial, as well as the verdicts from the guilt phase. As such, the State will prove through the witnesses and evidence that Defendant committed the crime of SOLICITATION TO COMMIT MURDER, the Defendant being liable under one or more of the theories of criminal liability contained in the information filed in the instant matter and incorporated by reference herein.

2. The murder was committed by a person who, at any time before a penalty hearing is conducted for the murder pursuant to NRS 175.552, is or has been convicted of a felony involving the use or threat of violence to the person of another and the provisions of subsection 4 do not otherwise apply to that felony, to-wit: Solicitation to Commit Murder, in that on or about May 23, 2005, DEFENDANT LUIS ALONSO HIDALGO, III and ANABEL ESPINDOLA, did then and there willfully, unlawfully, and feloniously counsel, hire, command or otherwise solicit DEANGELO CARROLL to commit the murder of RONTAE ZONE by DEFENDANT LUIS HIDALGO, III, in the presence of ANABEL ESPINDOLA, inquiring of DEANGELO CARROLL whether KENNETH COUNTS would be willing to kill RONTAE ZONE and/or by DEFENDANT LUIS HIDALGO, III, in the

presence of ANABEL ESPINDOLA, instructing DEANGELO CARROLL to put rat poisoning in a bottle of gin and have RONTAE ZONE drink it and/or by DEFENDANT LUIS HIDALGO, III, in the presence of ANABEL ESPINDOLA, instructing DEANGELO CARROLL to put rat poisoning in a marijuana cigarette and have RONTAE ZONE smoke it and/or soliciting any other manner to kill RONTAE ZONE and/or thereafter, ANABEL ESPINDOLA providing fourteen ($1400) dollars to DEANGELO CARROLL, and/or by DEFENDANT LUIS HIDALGO, III providing a bottle of gin at the meeting to facilitate the killing. [See NRS 200.033(2)(b)]

It is anticipated that DEFENDANT LUIS HIDALGO, III will be convicted of count four (4) of the instant information by a jury at the same time he is convicted of the murder alleged in count II. The evidence upon which the State will rely is the testimony and exhibits introduced during the guilt or penalty phase of the trial, as well as the verdicts from the guilt phase. As such, the State will prove through the witnesses and evidence that Defendant committed the crime of SOLICITATION TO COMMIT MURDER, the Defendant being liable under one or more of the theories of criminal liability contained in the information filed in the instant matter and incorporated by reference herein.

3. The murder was committed by a person, for himself or another, to receive money or any other thing of monetary value, to-wit by : by ANABEL ESPINDOLA (a manager of the PALOMINO CLUB) and/or DEFENDANT LUIS HILDAGO, III (a manager of the PALOMINO CLUB) and/or LUIS HILDAGO, JR. (the owner of the PALOMINO CLUB) procuring DEANGELO CARROLL (an employee of the PALOMINO CLUB) to beat and/or kill TIMOTHY JAY HADLAND; and/or LUIS HIDALGO, JR. indicating that he would pay to have a person either beaten or killed; and/or by LUIS HIDALGO, JR. procuring the injury or death of TIMOTHY JAY HADLAND to further the business of the PALOMINO CLUB; and/or DEFENDANT LUIS HIDALGO, III telling DEANGELO CARROLL to come to work with bats and garbage bags; thereafter, DEANGELO CARROLL procuring KENNETH COUNTS and/or JAYSON TAOIPU to kill TIMOTHY HADLAND; thereafter, by KENNETH COUNTS shooting TIMOTHY JAY HADLAND; thereafter, LUIS

HIDALGO, JR. and/or ANABEL ESPINDOLA providing six thousand dollars ($6,000) to DEANGELO CARROLL to pay KENNETH COUNTS, thereafter, KENNETH COUNTS receiving said money; and/or by ANABEL ESPINDOLA providing two hundred dollars ($200) to DEANGELO CARROLL and/or by ANABEL ESPINDOLA and/or DEFENDANT LUIS HIDALGO, III providing fourteen hundred dollars ($1400) and/or eight hundred dollars ($800) to DEANGELO CARROLL and/or by ANABEL ESPINDOLA agreeing to continue paying DEANGELO CARROLL twenty-four (24) hours of work a week from the PALOMINO CLUB even though DEANGELO CARROLL had terminated his position with the club and/or by DEFENDANT LUIS HIDALGO, III offering to provide United States Savings Bonds to DEANGELO CARROLL and/or his family. [See NRS 200.033(6)].

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

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

DATED this 6th day of July, 2005.

Respectfully submitted,

DAVID ROGER
Clark County District Attorney
Nevada Bar #002781

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

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CERTIFICATE OF FACSIMILE TRANSMISSION

I hereby certify that service of NOTICE OF INTENT TO SEEK DEATH PENALTY, was made this 6th day of July, 2005, by facsimile transmission to:

ROBERT DRASKOVICH, ESQ
FAX #474-1320

D. McDonald
Secretary for the District Attorney's Office

ELECTRONICALLY FILED
07/06/2005 10:49:59 AM

CLERK

NISD

DAVID ROGER
Clark County District Attorney
Nevada Bar #002781
MARC DIGIACOMO
Deputy District Attorney
Nevada Bar #006955
200 South Third Street
Las Vegas, Nevada 89155-2211
(702) 455-4711
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

ANABEL ESPINDOLA,
#1849750

Defendant.

CASE NO: C212667

DEPT NO: XIV

NOTICE OF INTENT TO SEEK DEATH PENALTY

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

1. The murder was committed by a person who, at any time before a penalty hearing is conducted for the murder pursuant to NRS 175.552, is or has been convicted of a felony involving the use or threat of violence to the person of another and the provisions of subsection 4 do not otherwise apply to that felony, to-wit: Solicitation to Commit Murder, in that on or about May 23, 2005, LUIS ALONSO HIDALGO, III and DEFENDANT ANABEL ESPINDOLA, did then and there willfully, unlawfully, and feloniously counsel, hire, command or otherwise solicit DEANGELO CARROLL to commit the murder of JAYSON TAOIPU by LUIS HIDALGO, III, in the presence of DEFENDANT ANABEL

ESPINDOLA, inquiring of DEANGELO CARROLL whether KENNETH COUNTS would be willing to kill JAYSON TAOIPU and/or by LUIS HIDALGO, III, in the presence of DEFENDANT ANABEL ESPINDOLA, instructing DEANGELO CARROLL to put rat poisoning in a bottle of gin and have JAYSON TAOIPU drink it and/or by LUIS HIDALGO, III, in the presence of DEFENDANT ANABEL ESPINDOLA, instructing DEANGELO CARROLL to put rat poisoning in a marijuana cigarette and have JAYSON TAOIPU smoke it and/or soliciting any other manner to kill JAYSON TAOIPU and/or thereafter, DEFENDANT ANABEL ESPINDOLA providing fourteen ($1400) dollars to DEANGELO CARROLL, and/or by LUIS HIDALGO, III providing a bottle of gin at the meeting to facilitate the killing. [See NRS 200.033(2) (b)]

It is anticipated that DEFENDANT ANABEL ESPINDOLA will be convicted of count three (3) of the instant information by a jury at the same time she is convicted of the murder alleged in count II. The evidence upon which the State will rely is the testimony and exhibits introduced during the guilt or penalty phase of the trial, as well as the verdicts from the guilt phase. As such, the State will prove through the witnesses and evidence that Defendant committed the crime of SOLICITATION TO COMMIT MURDER, the Defendant being liable under one or more of the theories of criminal liability contained in the information filed in the instant matter and incorporated by reference herein.

2. The murder was committed by a person who, at any time before a penalty hearing is conducted for the murder pursuant to NRS 175.552, is or has been convicted of a felony involving the use or threat of violence to the person of another and the provisions of subsection 4 do not otherwise apply to that felony, to-wit: Solicitation to Commit Murder, in that on or about May 23, 2005, LUIS ALONSO HIDALGO, III and DEFENDANT ANABEL ESPINDOLA, did then and there willfully, unlawfully, and feloniously counsel, hire, command or otherwise solicit DEANGELO CARROLL to commit the murder of RONTAE ZONE by LUIS HIDALGO, III, in the presence of DEFENDANT ANABEL ESPINDOLA, inquiring of DEANGELO CARROLL whether KENNETH COUNTS would be willing to kill RONTAE ZONE and/or by LUIS HIDALGO, III, in the presence of

DEFENDANT ANABEL ESPINDOLA, instructing DEANGELO CARROLL to put rat poisoning in a bottle of gin and have RONTAE ZONE drink it and/or by LUIS HIDALGO, III, in the presence of DEFENDANT ANABEL ESPINDOLA, instructing DEANGELO CARROLL to put rat poisoning in a marijuana cigarette and have RONTAE ZONE smoke it and/or soliciting any other manner to kill RONTAE ZONE and/or thereafter, DEFENDANT ANABEL ESPINDOLA providing fourteen ($1400) dollars to DEANGELO CARROLL, and/or by LUIS HIDALGO, III providing a bottle of gin at the meeting to facilitate the killing. [See NRS 200.033(2) (b)]

It is anticipated that DEFENDANT ANABEL ESPINDOLA will be convicted of count four (4) of the instant information by a jury at the same time she is convicted of the murder alleged in count II. The evidence upon which the State will rely is the testimony and exhibits introduced during the guilt or penalty phase of the trial, as well as the verdicts from the guilt phase. As such, the State will prove through the witnesses and evidence that Defendant committed the crime of SOLICITATION TO COMMIT MURDER, the Defendant being liable under one or more of the theories of criminal liability contained in the information filed in the instant matter and incorporated by reference herein.

3. The murder was committed by a person, for himself or another, to receive money or any other thing of monetary value, to-wit by : by DEFENDANT ANABEL ESPINDOLA (a manager of the PALOMINO CLUB) and/or LUIS HILDAGO, III (a manager of the PALOMINO CLUB) and/or LUIS HILDAGO, JR. (the owner of the PALOMINO CLUB) procuring DEANGELO CARROLL (an employee of the PALOMINO CLUB) to beat and/or kill TIMOTHY JAY HADLAND; and/or LUIS HIDALGO, JR. indicating that he would pay to have a person either beaten or killed; and/or by LUIS HIDALGO, JR. procuring the injury or death of TIMOTHY JAY HADLAND to further the business of the PALOMINO CLUB; and/or DEFENDANT LUIS HIDALGO, III telling DEANGELO CARROLL to come to work with bats and garbage bags; thereafter, DEANGELO CARROLL procuring KENNETH COUNTS and/or JAYSON TAOIPU to kill TIMOTHY HADLAND; thereafter, by KENNETH COUNTS shooting TIMOTHY JAY HADLAND; thereafter, LUIS

HIDALGO, JR. and/or DEFENDANT ANABEL ESPINDOLA providing six thousand dollars ($6,000) to DEANGELO CARROLL to pay KENNETH COUNTS, thereafter, KENNETH COUNTS receiving said money; and/or by DEFENDANT ANABEL ESPINDOLA providing two hundred dollars ($200) to DEANGELO CARROLL and/or by DEFENDANT ANABEL ESPINDOLA and/or LUIS HIDALGO, III providing fourteen hundred dollars ($1400) and/or eight hundred dollars ($800) to DEANGELO CARROLL and/or by DEFENDANT ANABEL ESPINDOLA agreeing to continue paying DEANGELO CARROLL twenty-four (24) hours of work a week from the PALOMINO CLUB even though DEANGELO CARROLL had terminated his position with the club and/or by LUIS HIDALGO, III offering to provide United States Savings Bonds to DEANGELO CARROLL and/or his family. [See NRS 200.033(6)].

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

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

DATED this 6th day of July, 2005.

Respectfully submitted,

DAVID ROGER
Clark County District Attorney
Nevada Bar #002781

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

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CERTIFICATE OF FACSIMILE TRANSMISSION

I hereby certify that service of NOTICE OF INTENT TO SEEK DEATH PENALTY, was made this 6th day of July, 2005, by facsimile transmission to:

CHRISTOPHER ORAM, ESQ.
FAX #974-0623

D. McDonald
Secretary for the District Attorney's Office

EXHIBIT "5"

0020
ROBERT DRASKOVICH, ESQ.
State Bar No. 6275
815 S. Casino Center Blvd.
Las Vegas, Nevada 89101
(702) 474-4222

Attorney for Defendant
LUIS HIDALGO III

CHRISTOPHER R. ORAM, ESQ.
State Bar No. 004349
520 South Fourth Street, Second Floor
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(702) 384-5563

Attorney for Defendant
ANABEL ESPINDOLA

FILED

2005 DEC 12 P 3:58

CLERK

DISTRICT COURT

CLARK COUNTY, NEVADA

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THE STATE OF NEVADA, Plaintiff, vs. LUIS HIDALGO, III, ANABEL ESPINDOLA, Defendants.	CASE NO. C212667 DEPT. NO. XIV **MOTION TO STRIKE NOTICE OF INTENT TO SEEK DEATH PENALTY** Hearing Date: Hearing Time:

COMES NOW, the Defendants, LUIS ALONSO HIDALGO III, by and through his attorney Robert M. Draskovich and ANABEL ESPINDOLA, by and through her attorney Christopher R. Oram, Esq. and each of them respectfully requests this Honorable Court to enter an Order Striking the Notice of Intent to Seek the Death Penalty heretofore filed by the Plaintiff in this matter.

This motion is based upon the attached Points and Authorities, any and all pleadings and transcripts on file herein, and any oral argument deemed necessary by this Court.

DATED this _____ day of December, 2005.

DRASKOVICH & DURHAM

By:_____

ROBERT M. DRASKOVICH, JR., ESQ.
State Bar No. 6275
815 South Casino Center Blvd.
Las Vegas, NV 89101
Attorney for Defendant
LUIS HIDALGO, III

LAW OFFICES OF CHRISTOPHER R. ORAM

By:_____

CHRISTOPHER R. ORAM, ESQ.
Bar No. 004349
520 South Fourth Street, Second Floor
Las Vegas, Nevada 89101
Attorney for Defendant
ANABEL ESPINDOLA

NOTICE OF MOTION

TO: THE STATE OF NEVADA; and

TO: MARC DIGIACOMO, Deputy District Attorney and GIANCARLO PESCI, Deputy District Attorney:

YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that the undersigned will bring the foregoing Motion to Strike Notice of Death Penalty for hearing before the above-entitled Court on the 22 day of December, 2005, at the hour of 9:00 a.m., in Department 14, or as soon thereafter as counsel can be heard.

DATED this _____ day of December, 2005.

DRASKOVICH & DURHAM

By: _____

ROBERT M. DRASKOVICH, JR., ESQ.
State Bar No. 6275
815 South Casino Center Blvd.
Las Vegas, NV 89101
Attorney for Defendant
LUIS HIDALGO, III

LAW OFFICES OF CHRISTOPHER R. ORAM

By: _____

CHRISTOPHER R. ORAM, ESQ.
Bar No. 004349
520 South Fourth Street, Second Floor
Las Vegas, Nevada 89101
Attorney for Defendant
ANABEL ESPINDOLA

STATEMENT OF THE CASE

The Information in the instant case was filed on June 20, 2005. It charges Luis Hidalgo III, Anabel Espindola, and others as follows: Count 1 – Conspiracy to Commit Murder (of Timothy Jay Hadland) [punishable pursuant to NRS 199.480-1(b) by a term of two years to ten years of incarceration]; Count 2 – Murder with Use of a Deadly Weapon of Timothy Hadland pursuant to NRS 200.030 [on six different and alternative theories of criminal liability, although they are designated as three: (1) directly or indirectly committing the act and/or (2)lying in wait, and/or (3) aiding and abetting the commission of the crime, and/or (4) by conspiring to commit the crime of (a) battery, and/or (b) battery with the use of a deadly weapon, and/or (c) to kill (*sic*) Timothy Hadland]; Count 3 - Solicitation to Commit Murder of Jayson Taoipu [punishable pursuant to NRS 199.500 by imprisonment in the state prison for a minimum term of not less than 2 years and a maximum term of not more than 15 years, and a fine of not more than $10,000]; and Count 4 – Solicitation to Commit Murder of Rontae Zone [punishable pursuant to NRS 199.500 by imprisonment in the state prison for a minimum term of not less than 2 years and a maximum term of not more than 15 years, and a fine of not more than $10,000]. Defendants Espindola and Hidalgo have a **right** to bail on Counts 1, 3 and 4. NRS 178.484-1. They **may** be granted bail on Count 2 unless the proof is evident or the presumption (of the guilt of each of them) is great. NRS 178.484-4. No hearing has been held as yet to make that determination or to set a bail.

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THE STATE'S INTENTION TO SEEK THE DEATH PENALTY

On July 6, 2005 the State filed a Notice of Intent to Seek Death Penalty (hereinafter "the NISDP") against each movant. Although not a model of linguistic clarity, the NISDPs appear to rely upon the following as the statutory aggravating factors that will enable the State to seek the death penalty: (1) that Anabel Espindola and Luis Hidalgo III ***will be convicted*** of the Solicitation to Commit Murder of Jayson Taoipu, as alleged in Count 3, prior to the penalty hearing for the State's anticipated conviction of her on Count 2; (2) that Anabel Espindola and Luis Hidalgo III ***will be convicted*** of the Solicitation to Commit Murder of Rontae Zone, as alleged in Count 4, prior to the penalty hearing for the State's anticipated conviction of her on Count 2; and (3) the murder alleged in Count 2 was committed by Kenneth Counts for the purpose of someone receiving money or other thing of monetary value.

Just exactly how this last allegation will be supported is difficult to discern from the NISDPs themselves, as they contain several somewhat irreconcilable variations and mutations. Defense counsels' best efforts to understand them leads to a belief that the State contends that DeAngelo Carroll was "procured" to "**beat** and/or kill" Timothy Jay Hadland by Anabel Espindola, and/or Luis Hidalgo III, and/or Luis Hidalgo Jr. (who isn't charged in the Information), all of whom are associated in some manner with the Palomino Club. Whoever did the "procuring", according to defense counsels' divining of the NISDPs, somehow the **beating** and/or death of Timothy Jay Hadland was designed to "further" the business of the Palomino Club. Moreover, despite his being the one allegedly "procured" by one or more of the aforementioned persons, DeAngelo Carroll was himself apparently a "serial procurer" and bereft of the competency to "**beat** and/or

kill" Hadland himself. He therefore, according to his incredible self, resorted to making a secondary offering to Kenneth Counts and/or Jayson Taoipu. The NISDPs allege that Kenneth Counts, having been "procured" by DeAngelo Carroll, terminated the life of Timothy Jay Hadland by shooting him with a firearm.

The NISDPs go on to narrate events that allegedly took place after the by then recent demise of Mr. Hadland. They assert that DeAngelo Carroll, subsequent to the event, was paid $6000 by either Anabel Espindola or Luis Hidalgo Jr. (who is not charged in the Information), or both of them, and that DeAngelo Carroll in turn later transferred all of the money to Kenneth Counts, apparently feeling unworthy of compensation himself or at least not having been motivated in his "procuring" efforts by the acquisition of worldly gain.

Or perhaps not.

The NISDPs continue in the disjunctive to assert that maybe what happened is that Anabel Espindola and/or Luis Hidalgo III (who is charged and who brings this motion along with Anabel Espindola) may have done one or more of the following:

- Anabel Espindola provided $200 to DeAngelo Carroll (we know not when or why from the pleading itself) which he apparently either did not give to Kenneth Counts or the NISDPs are silent as to it;

- Anabel Espindola and Luis Hidalgo III provided $1400 and/or $800 to DeAngelo Carroll (we know not when or why from the pleading itself) that he apparently either did not give to Kenneth Counts or the NISDPs are silent as to it;

-Anabel Espindola agreed to pay DeAngelo Carroll for twenty-four hours per week of work at the Palomino Club even though he had already terminated his "position" there;

- Luis Hidalgo III offered to provide DeAngelo Carroll and/or his family with United States Savings Bonds.

It is not clear as to whether the foregoing were consideration for some pre-existing agreement to **beat** and/or kill Timothy Jay Hadland or were paid or promised out of fear of what harm – physical, fabricated or otherwise – the motivated and by this time allegedly accomplished Carroll and/or his minions could cause to fall upon Ms. Espindola and Mr. Hidalgo III.

STATEMENT OF FACTS CURRENTLY IN THE RECORD

A preliminary hearing took place on June 13, 2005 presided over by Justice of the Peace Victor L. Miller in Boulder City[1]. During the preliminary hearing the State called Rontae Zone as a witness. Zone testified that he began working with co-defendant DeAngelo Carroll in May of 2005. Zone worked as a "flier boy" for the Palomino Club for three days before the events leading to the criminal charges. As part of his duties, Zone would pass out fliers to promote the Palomino Club. (Preliminary Hearing Transcript, pp. 16-19, hereinafter referred to as PHT).

According to Zone, DeAngelo Carroll told him that Luis Hidalgo Jr. (the owner of the club and not a defendant), wanted someone dead (PHT, pp. 26-27). Present during this conversation was Jayson Taoipu (PHT, pp. 27). Zone indicated that Taoipu agreed to be involved in the effort to kill that "someone" (PHT, pp. 28). Later that evening,

[1] The transcript of this preliminary hearing was submitted in this record with the Writ of Habeas Corpus previously filed herein.

Zone witnessed Taoipu with a .22 revolver (PHT, pp. 28) after work, at approximately 8:00 p.m. on May 19, 2005, when Zone, Taoipu and Carroll went to Carroll's home (PHT, pp. 30). Thereafter, the three picked up Kenneth Counts on E Street (PHT, pp. 31). According to Zone, Carroll, Taoipu, Counts and him proceeded out toward Lake Mead (PHT, pp. 37). During the drive, Zone admitted that they smoked marijuana (a hallucinogenic, psychoactive drug). (PHT, pp. 40).

At this point in the testimony, Zone requested and was permitted to speak with an attorney (PHT, pp. 44). Thereafter, a lengthy delay occurred while the Court contacted and appointed an attorney for the witness.

During this break, the State called Paijit Karlson (PHT, pp. 45). Ms. Karlson was in a dating relationship with the victim, Timothy Hadland and was camping at Lake Mead with him on the night of his death. (PHT, pp. 47). She knew that Hadland had previously worked at the Palomino Club but had stopped working there approximately two and a half weeks prior to the shooting (PHT, pp. 49). While with her at the lake, Hadland received a phone call from DeAngelo Carroll and agreed to meet him so that Hadland could receive some marijuana from Carroll (PHT, pp. 54). Hadland left and Ms. Karlson never saw him alive again (PHT, pp. 55).

Zone was recalled to the witness stand and agreed to continue with his examination after consultation with an attorney (PHT, pp. 58). While in the vehicle, Zone was asked by Kenneth Counts if he had a gun (PHT, pp. 59). Zone claimed he did not have a gun but a gun was provided by Mr. Taoipu (PHT, pp. 59). While in the area of the north shore of Lake Mead, Hadland approached in his vehicle. Both vehicles stopped on the side of the road and DeAngelo Carroll exited and then

reentered his vehicle (PHT, pp. 60-61). Hadland exited his vehicle and waved at Carroll (PHT, pp. 63). As Hadland walked toward the Carroll driven van, Counts got out of the Carroll van and shot Hadland. (PHT, pp. 66-68). Counts reentered the Carroll van and Carroll drove Counts, Zone and Taoipu away from the scene of the killing and to the Palomino Club. (PHT, pp. 71). According to Zone, Counts and Carroll went inside the Palomino Club for about 30 minutes (PHT, pp. 73). Counts then left the Palomino Club in a cab (PHT, pp. 73). Carroll exited about 45 minutes after Counts came out of the Palomino Club. (PHT, pp. 73). Carroll got back in the van with Taoipu and Zone and they left to go buy some new tires. (PHT, pp. 76-77). DeAngelo Carroll told him that he had been paid $100.00 to change the tires by Anabel Espindola (PHT, pp. 79). Zone, Taoipu and Carroll went to the IHOP to eat breakfast (PHT, pp. 82). After breakfast, they went back to the residence after Carroll stopped at a barber shop to get a haircut. Zone remained at Carroll's residence until the next morning, when Zone, Carroll and Taoipu went to Simone's Auto Plaza (PHT, pp. 84). Zone and Taoipu waited in the car as Carroll went into Simone's Auto Plaza (PHT, pp. 85).

Zone admitted that he only knew Anabel Espindola from the news reports about her arrest. (PHT, pp. 101). Prior to that he never saw her nor had he ever seen Carroll speak with her. (PHT, pp. 102). Neither did Zone know or speak with Luis Hidalgo III. (PHT, pp. 103). Zone admitted that his review of the newspaper reports and television accounts of the incident helped him "put things together" (PHT, pp. 110). Zone knew only what Carroll told him about that subject matter and informed the police that Hadland was shot because he was "snitching" (PHT, pp. 120).

Detective Michael McGrath testified that he responded to North Shore Road near Lake Mead on May 19, 2005. (PHT, pp. 145). Detective McGrath observed the body of Timothy Hadland lying face up. (PHT, pp. 151). Near the body, Detective McGrath observed some Palomino VIP cards (PHT, pp. 152). On the driver's side floor board of Hadland's vehicle, Detective McGrath located Hadland's cell phone (PHT, pp. 153). Detective McGrath reviewed the cell phone history on Hadland's phone and learned that on May 19, 2005, at 11:27 p.m. Mr. Hadland had received a phone call (PHT, pp. 154). Detective McGrath attended the autopsy of Hadland and learned that he had a single gun shot wound to the left side of his head (PHT, pp. 156) and a second wound to the ear (PHT, pp. 157).

Detective McGrath described Luis Hidalgo, Jr., as the owner of the Palomino Club, and Louis Hidalgo, III, as his son (PHT, pp. 160).

Detective McGrath eventually came into contact with DeAngelo Carroll and asked him to come to the homicide section wherein Carroll gave a recorded statement (PHT, pp. 164). Carroll informed Detective McGrath about Zone and Taoipu being present with him out at the lake (PHT, pp. 165). Detective McGrath also interviewed Zone (PHT, pp. 166) and eventually Taoipu (PHT, pp. 167). According to Detective McGrath, both Carroll and Zone described the residence where Kenneth Counts was picked up prior to driving out to the lake (PHT, pp. 167). Detective McGrath then prepared a search warrant and executed it at 1676 E Street (PHT, pp. 168). Detective McGrath obtained and executed an additional search warrant for 1677 E Street, wherein he located Kenneth Counts hiding in the attic (PHT, pp. 172-174).

According to Detective McGrath, DeAngelo Carroll agreed to wear a body recorder to converse with others whom he alleged were involved in Hadland's death. (PHT, pp. 184). On May 23, 2005, law enforcement conducted a visual surveillance of DeAngelo Carroll at Simone's Auto Plaza (PHT, pp. 185). After Carroll exited Simone's Auto Plaza, Carroll was interviewed regarding what took place inside (PHT, pp. 186). The next day Carroll again wore a body recorder into the Palomino Club[2]. (PHT, pp. 187-188). On this same date, police surveilled Simone's Auto Plaza until they observed Luis Hidalgo III leave (PHT, pp. 191). Patrol units were advised to stop Hidalgo III's vehicle and he was subsequently arrested (PHT, pp. 192-193, 199). He was then questioned by law enforcement after receiving his Miranda warnings (PHT, pp. 208-210).

Detective McGrath also conducted brief interrogation of Anabel Espindola who was in custody (PHT, pp. 211). During her interview she acknowledged seeing DeAngelo Carroll earlier in the day (PHT, pp. 214). Both of the interviews with the Movants were videotaped.

On May 24, 2005, police executed a search warrant at the Palomino Club (PHT, pp. 217). During the search, law enforcement located paperwork establishing that Carroll and Hadland had been employed with the Palomino Club. Additionally, law enforcement located proof of resignation by Carroll on May 23, 2005 (PHT, pp. 219).

Detective McGrath testified he was in possession of three surreptitious recordings made by DeAngelo Carroll, two on May 23 and one from May 24, 2005 (PHT, pp. 222). On the May 23, 2005, recording made at Simone's Auto Plaza, Anabel

[2]Transcripts of the recordings are attached hereto as Exhibits 1 & 2.

Espindola, in response to Carroll speaking about having been asked to kill Hadland, clearly replies to Carroll, "Why are you saying that shit, what we really wanted was for him to be beat up." Detective McGrath explained that after DeAngelo Carroll left Simone's Auto Plaza that he collected a Tangueray bottle filled with $1,400.00 United States currency from Mr. Carroll (PHT, pp. 251). On the recording made at the Palomino Club on May 24, 2005, Anabel Espindola clearly states, "I told you to talk to him, not fucking hurt him or kill him." (PHT, pp. 264). **Indicating his agreement with this statement of the historic facts, Carroll responds "there's not much I can do about that now."**

Detective McGrath characterized DeAngelo Carroll as a "habitual liar" (PHT, pp. 267) and that during the recorded statement of DeAngelo Carroll, he made up several different stories and motives for the killing (PHT, pp. 268). Additionally, DeAngelo Carroll (following in the footsteps of that famed fantasy writer "Lewis G." with whom he shares a surname) blamed several different people involved in the murder and then would change and blame others (PHT, pp. 268). Detective McGrath explained that it was very late in Carroll's 128 page recorded statement that he first decides to start blaming Anabel Espindola.[3] In fact, Detective McGrath characterized Carroll's statements to him as a situation where Carroll would make up things as he went along (PHT, pp. 281).

On July 6, 2005, the State filed a Notice of Intent to Seek Death Penalty against each movant which are both challenged by this Motion.

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[3] A transcript of the Carroll statement is attached hereto as Exhibit 3.

POINTS AND AUTHORITIES

I. THE DEATH PENALTY IS NOT AN AVAILABLE PUNISHMENT FOR ANABEL ESPINDOLA OR LUIS HIDAGLO III, AS NEITHER OF THEM KILLED, ATTEMPTED TO KILL, OR INTENDED THAT A KILLING OF TIMOTHY HADLAND TAKE PLACE, NOR DID EITHER PERFORM A MAJOR ROLE IN HIS MURDER OR ACT WITH RECKLESS DISREGARD FOR HADLAND'S LIFE.

Capital punishment is reserved for the most heinous of murders. Not all murders qualify for death as the punishment. "Death is different". The United States Supreme Court has been saying that and interpreting the Eighth Amendment in that light for thirty years. See Gregg v. Georgia, 428 U.S. 153, 188 (1976); Woodson v. North Carolina, 428 U.S. 280, 303 (1976); Ford v. Wainwright, 477 U.S. 399, 411 (1986); Harmelin v. Michigan, 501 U.S. 957, 994 (1991); Morgan v. Illinois, 504 U.S. 719, 751 (1992) (Scalia, J. *dissenting*); Dobbs v. Zant, 506 U.S. 357, 363 (1993) (Scalia, J., concurring); Simmons v. South Carolina, 512 U.S. 154, 185 (1994) (Scalia, J. *dissenting*); Shafer v. South Carolina, 532 U.S. 36, 55 (2001) (Scalia, J., *dissenting*); Atkins v. Virginia, 536 U.S. 304, 337 (2002) (Scalia, J. *dissenting*); Ring v. Arizona, 536 U.S. 584, 606 (2002); Wiggins v. Smith, 539 U.S. 510, 557 (2003) (Scalia, J. *dissenting*).

Not all defendants convicted of being associated with a murder may have the punishment of death imposed upon them. An example that is apropos and controlling in the case *sub judice* establishes that the Eighth Amendment does not permit the imposition of the death penalty on one who aids and abets a felony in the course of which a murder is committed by others but who does not kill, attempt to kill, or intend that a killing take place or that lethal force will be employed. In Enmund v. Florida, 458 U.S. 782, 797 (1982), the Court reversed and remanded the defendant's death sentence, holding that his only participation in the crimes was as a partner in the

robbery, being the driver of the getaway car. The Court held that even in a felony-murder situation, if a defendant neither kills nor intends to kill the victim, the imposition of capital punishment is not constitutionally justifiable under the cruel and unusual punishment clause of the Eighth Amendment. The United States Supreme Court has recognized that there must be individual consideration as a matter of constitutional right in imposing the death sentence. See Lockett v. Ohio, 438 U.S. 586, 605 (1978). The Court has made it clear that there must be a focus on "relevant facets of the character and record of the individual offender." Woodson v. North Carolina, 428 U.S. 280, 304 (1976).

Five years later the United States Supreme Court, in Tison v. Arizona, 481 U.S. 137 (1987), broadened the Enmund standard slightly, making it sufficient to satisfy the Enmund culpability test even if the defendant is not the killer where there is evidence of his "major participation in the felony committed, combined with reckless indifference to human life". In Tison, the Court remanded the case after it found that the Arizona Supreme Court applied the wrong standard. However, the Court distinguished the facts of Tison from those in Enmund, noting that Tison's degree of participation in the crimes was major rather than minor, and the record would support a finding of the culpable mental state of reckless indifference to human life, as Tison's participation up to the moment of the killing of the victims was substantially the same as the one who actually shot them. That is, the Tison actively participated in the events leading up to the deaths by providing the murder weapons, assisting in the killer's escape from prison and helping to abduct the victims and steal their auto to act as a replacement getaway car. Tison was present at the murder site, saw that the killer was holding the victims at

bay with firearms and did nothing to interfere with the murders, and after the murders even continued on the joint venture. Id at 145.

The Nevada Supreme Court has held that based upon Enmund and Tison, to receive the death sentence, appellant must have himself killed, attempted to kill, intended that a killing take place, intended that lethal force be employed or participated in a felony while exhibiting a reckless indifference to human life. See Doleman v. State, 107 Nev. 409, 418, 812 P.2d 1287, 1292-93 (1991). In the aiding and abetting context, this is consistent with the Nevada Supreme Court's holding in Sharma v. State, 118 Nev. 648, 56 P. 3d 868 (2002) that to be guilty of a specific intent offense on an aiding and abetting theory the aider and abettor must have the same intent as required of the principal. In the case *sub judice*, the State pleads in the Information and the record evidence is clear that, at worst, the Movants wanted the victim "beaten" or "talked to" and, in the words of Anabel Espindola on the surreptitious recording made by co-defendant Carroll at the request of the State, "not kill him".

In this case, it is clear that neither Anabel nor Luis had any intent that Timothy Hadland be killed. Anabel makes her intent clear through her comments to DeAngelo Carroll. Anabel states, "Why are you saying that shit, what we really wanted was for him to be beat up." (Return to Writ of Habeas Corpus – Exhibit 2 pp 4). Anabel had no idea that Carroll was wearing a recording device and she spoke clearly about what she thought was to happen -she wanted someone beaten up – and there is nothing to indicate that the "agreement", if one existed, contemplated anything beyond a simple battery. Not even the use of a weapon of any sort or substantial bodily harm. There is no dispute that movants did not physically kill Hadland themselves. Neither did either of

them attempt to kill Hadland as they weren't even near Hadland when he did get killed. Thus, under the Enmund theory, the death penalty is not an appropriate punishment.

Further, under Tison, Anabel did not play a major role in the activities that killed Hadland. Unlike the facts in Tison there is no evidence that Anabel helped plan, equip and/or carry out the murder of Hadland, nor is there any information supplied indicating that she was aware of it before it occurred. To the contrary, the record is clear that she intended for Hadland to be "beaten up" and nothing more. Based on these facts there could not be a finding of a culpable mental state of reckless indifference to human life or any major role in the homicide.

The same is true as to Luis Hidalgo III. Moreover, it is clear that he had no intent to have Hadland killed. Luis' comments on the surreptitious recordings are limited and he makes no statements about knowledge of or involvement in Hadland being **beaten** or killed prior to the homicide. Although Zone states that Carroll told him that Luis also wanted Hadland dead, and that Carroll should grab baseball bats and trash bags, this is rank hearsay. Zone cannot testify to what Carroll claims to have heard Luis say because Zone was not present for any conversation between Carroll and Luis. There is no dispute that Luis did not physically kill Hadland himself. He also did not attempt to kill Hadland because he was no where near Hadland when he did got killed. Further, there is no admissible evidence that suggests that Luis intended for a killing to take place or that lethal force be used. Thus, under the Enmund theory, the death penalty is not an appropriate punishment for Luis.

Under Tison, Luis did not play a major role in the activities that killed Hadland. Unlike the facts in Tison and Evans v. State, 112 Nev. 1172 (1996), there is no

evidence that Luis helped plan and carry out the murder of Hadland. Specifically, there is no evidence that Luis knew of or participated in the events leading up to Hadland's death, or that he provided any assistance in it. Further, there is no evidence that Luis assisted in luring Hadland to his death. Based on these facts there cannot be a finding of a culpable mental state of reckless indifference to human life or major participation in the homicide itself.

II. The Pecuniary Gain Aggravator Should Be Stricken Because As There Was No Probable Cause Finding Of Its Presence As An Aggravator.

a. The Failure To Submit The Aggravator Of Pecuniary Gain For A Probable Cause Determination Violates Article I, Section 8 Of The Nevada Constitution, NRS 172.155, And Both Movants' Due Process Rights Under The United States Constitution.

As a preliminary matter, the United States Supreme Court made clear in Ring v. Arizona, 122 S. Ct. 2428 (2002) that aggravating circumstances are "essential elements" of a capital offense and must be presented to a jury for testing against the beyond a reasonable doubt standard. Accordingly, the aggravating circumstances alleged herein are elements of the instant First Degree Murder charge, much like a "Use of a Deadly Weapon" enhancement is an "element" of the offense with which it is charged. The fact that the prosecution does not include the aggravators within the Information but files them in a separate document does not alter their character as elements of a Capital Murder charge.

Article I, Section 8 of the Nevada Constitution provides that no person shall be held to answer to criminal charges without a finding of probable cause by a grand jury or a magistrate. This requirement is codified in NRS 171.206. Article I, Section 8 of the Nevada Constitution, serves as a check on prosecutorial power and requires notice of the charges that must be defended against. United States v. Cotton, 535 U.S. 625, 122

S. Ct. 1781, 1786-87 (2002). In accord with this, the United States Supreme Court has reversed criminal convictions where a charging document alleges facts or theories beyond that which the probable cause hearing found supported by the preliminary evidence. Russell v. United States, 369 U.S. 749 (1962) (charging documents exceeded finding of grand jury). The policy endorsed in Russell is "effectuated by preventing the prosecution from modifying the theory and evidence upon which the indictment is based." United States v. Silverman, 430 F.2d 106, 110 (2nd Cir. 1970).

Article I, Section 8 of the Nevada Constitution mandates – that "no person shall be tried for a capital... crime... except on upon information duly filed by a district attorney. NRS 171.206 states that upon the information being filed, the magistrate finds whether there is "probable cause to believe that an offense has been committed and that the defendant has committed it" before the magistrate shall forthwith hold him to answer in the district court. Thus, the Nevada Constitution and Nevada law expressly require that all crimes be subject to a probable cause determination. Inasmuch as aggravating circumstances are elements of a capital offense, they, too, must be subject to this determination. In the instant case, the prosecution failed to present the instant aggravators to the magistrate and has as yet not done so to a Grand Jury, and has violated Luis and Anabel's Due Process rights, as secured by federal and state constitutional law, as well as Nevada statutory law. See Hicks v. Oklahoma, 447 U.S. 343 (1980) (holding that arbitrary denial of state created liberty interest amounts to Due Process violation).

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b. The Failure To Present The Pecuniary Gain Aggravator To The Magistrate For A Probable Cause Determination Violates Luis And Anabel's Equal Protection Rights.

The failure to present the aggravators to the Magistrate for a probable cause determination also violates the Equal Protection Clause of the United States Constitution. The Fourteenth Amendment to the United States Constitution (making applicable to the states the Fifth Amendment) guarantees all criminal defendants equal protection of the law. Accordingly, a State cannot subject some criminal offenses, but not others, to probable cause determinations at its whim. All crimes – and all elements thereof – must be subject to the same probable cause determination. To do otherwise would be to treat one class of defendants differently from another for no apparent reason, in direct contravention of the Equal Protection Clause.

While the Equal Protection Clause permits the states some discretion in enacting laws which affect some groups of citizens differently than other, a statute or practice is unconstitutional if the "classification rests on grounds wholly irrelevant to the achievement of the State's objective." McGowan v. Maryland, 366 U.S. 420, 425-26 (1961). The burden is on the State to show some rational reason why people facing a death penalty should be treated differently than other criminal defendants. There is none. If anything, death penalty cases should be subject to stricter scrutiny than other criminal offenses, not less. If this Court were to allow the prosecution to proceed on the NISDP which was not submitted to the magistrate for a probable cause determination, this Court would be sanctioning a process by which capital litigants are treated vastly different from their non-capital counterparts. Such a procedure amounts to a blatant violation of both Luis and Anabel's Equal Protection rights.

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III. The Pecuniary Gain Aggravator Must Be Stricken As It Does Not Contain A Plain/Concise Written Statement Of The Essential Facts Constituting The Aggravator Charged.

The Sixth Amendment to the United States Constitution provides that a criminal defendant is entitled to be informed of the nature and cause of any and all accusations against him. In conformity therewith, NRS 173.075(1) expressly requires that an indictment or information contain a "plain, concise and definite written statement of the essential facts constituting the offense charged." See also Sheriff v. Levinson, 95 Nev. 436 (1979). The charging document should also contain, when possible, a description of the means by which the defendant committed the offense(s). NRS 173.075(2). The Nevada Supreme Court first contemplated the mandate of NRS 173.075 in Simpson v. District Court, 88 Nev. 654, 660 (1972).[4] Simpson was charged with murder by way of a Grand Jury Indictment. Simpson's Indictment alleged that she, "... on or about May 27, 1970, did willfully, unlawfully, feloniously and with malice aforethought kill Amber Simpson, a human being." Id. At 655. At issue was whether Simpson's charges met the pleading requirements of NRS 173.075(2). The Supreme Court held that, because the indictment failed to specify the conduct which gave rise to the Simpson's charges, the indictment was insufficient under NRS 173.075. Accordingly, the Simpson Court issued a permanent writ of prohibition, disallowing further proceedings based on the defective indictment. Id. At 661.

Elaborating on the pleading requirements necessary for an Indictment to meet constitutional must, the Simpson Court held that:

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[4] In Simpson, the respondent District Court denied petitioner Simpson's motion to dismiss a murder Indictment. Simpson, at 655. Desiring guidelines for pleading cases similar to Simpson's, the Clark County District Attorney requested that the Supreme Court entertain Simpson's petition. Id.

> Whether at common law or under statute, the accusation must include a characterization of the crime and such description of the particular act alleged to have been committed by the accused as will enable him properly to defend against the accusation, and the description of the offense must be sufficiently full and complete to accord to the accused his constitutional right to due process of law.

Id. At 660 (quoting 4 R. Anderson, Wharton's Criminal Law and Procedure, Section 1760, at 553 (1957)). The Court further noted that the fact that an accused has access to transcripts of the proceedings before the Grand Jury does not eliminate the necessity that an Indictment be definite. Id. The Simpson Court reasoned that such indefinite pleading would necessarily allow the prosecution absolute freedom to change theories at will, thus denying an accused the fundamental rights the Nevada legislature intended a definite Indictment to secure. Id.

The pleading requirement described above is reiterated in Nevada Supreme Court Rule 250, which governs capital offenses. Specifically, SCR 250(4)(c) reads as follows:

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

(emphasis added).

Under SCR 250, as well as NRS 173.075 and Simpson, the instant pecuniary gain aggravator must be dismissed. It contains absolutely no assertion of a factual basis as to how the alleged murder of Timothy Hadland furthered the business of the Palomino Club. Anabel and Luis are left to guess how the State is going to allege that the business was furthered. A simple allegation with no specificity is not sufficient to put Luis and Anabel on notice. Further, the purpose of the Notice is to provide defendants just that. The Pecuniary gain aggravators provide too many variables. With numerous

and/or combinations, it is impossible for Anabel and Luis to know what allegation they are to defend against or exactly who was to "gain". Due to insufficient notice, Anabel and Luis have not received the process due to them under the Nevada statutory scheme or the United States and/or Nevada Constitutions. The prosecution cannot rely upon the magistrate's ruling in the case *sub judice* as a factual basis for the aggravating circumstances because the issue was not presented to him. Absent the requisite factual assertions, the Death Notice is constitutionally defective.

IV. To The Extent That It Is Based Upon A Conspiracy To Commit A Battery ("Beat") Or Utilizes The Unqualified Term "Kill", The NISDPS Are Duplicitous And Cannot Supply The Basis For Imposition Of Capital Punishment.

Count One of the Information charges the defendants with Conspiracy to Commit Murder. Where there is an agreement to commit a murder, the end result is foreseeable if the agreement is carried out. Moreover, each conspirator must have the specific intent to kill. Therefore each is responsible as a principal for the murder as it was clearly committed in furtherance of and to achieve the purpose or object of the conspiracy. See Walker v. State, 116 Nev. 670, 674 (Nev. 2000). However, probably because the surreptitious recording of conversations between DeAngelo Carroll and movants clearly show that there was never an intention on the part of either movant that Timothy Hadland be killed, but only "beaten", the State adds an uncharged and unchangeable theory to its NISDPs as grounds for imposition of the death penalty upon conviction. The NISDPs state that the object of the conspiracy was either to "beat" or to "kill" Hadland. That this makes a great difference to the validity of the NISDPs is obvious. Moreover, to "kill" someone is not the equivalent of "murder" someone. State officials, jurists, police and even juries, enter into agreements to "kill" people that are not

criminal. Persons who are defending themselves from lethal force also fit into that category.

First of all, even a deliberate battery does not have as a foreseeable consequence, much less an intentional one, a killing or great bodily harm. Absent it being the purpose of a burglary, battery does not form the basis of a felony-murder under Nevada law. See Contreras v. State, 118 Nev. 332, 46 p. 3d 661 (Nev. 2002). Serious bodily injury is not inherently foreseeable in a battery.

Moreover, serious bodily injury is not inherently foreseeable in a battery. State v. Huber, 38 Nev. 253, 148 P. 562, 563 (Nev. 1915) (where defendant intended only a battery and it results in killing of victim who fights back, result is manslaughter). An intentional act or intentional conduct done with no aim to cause death or serious bodily injury will constitute involuntary manslaughter if it creates an extreme risk of death or serious bodily injury and amounts to non-conscious recklessness. Alternatively, an intentional act which causes death is involuntary manslaughter if it is a misdemeanor dangerous in and of itself which is committed in a manner such that appreciable bodily injury to the victim was a reasonably foreseeable result. See Comber v. United States, 584 A. 2d 26, 54 (D.C. Ct. App. 1990)(*en banc*). Thus, the "conspiracy to beat" alternative in the NISDP cannot form the basis of a capital punishment hearing, as it is not charged in the Information and is not a statutory aggravating factor.

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V. The Two Aggravators Stating Anabel Espindola And Luis Hidalgo III Committed A Felony With Use Or Threat Of Harm, To Wit: Solicitation To Commit Murder - Must Be Stricken Because (A) NRS 200.033 (b)(2) Is Unconstitutionally Vague and Ambiguous; and (B) Solicitation For Murder, Especially When Made To A Police Agent, Is Not A Felony Involving The Use Or Threat Of Violence.

a. NRS 200.033(b) (2) is unconstitutionally vague and ambiguous.

The relevant Eighth Amendment law is well defined. First, a statutory aggravating factor is unconstitutionally vague if it fails to furnish principled guidance for the choice between death and a lesser penalty. See, *e.g.*, *Maynard* v. *Cartwright*, 486 U.S. 356, 361-364, 100 L. Ed. 2d 372, 108 S. Ct. 1853 (1988); *Godfrey* v. *Georgia*, 446 U.S. 420, 427-433, 64 L. Ed. 2d 398, 100 S. Ct. 1759 (1980). Second, in a "weighing" State, where the aggravating and mitigating factors are balanced against each other, it is constitutional error for the sentencer to give weight to an unconstitutionally vague aggravating factor, even if other, valid aggravating factors obtain. See, *e.g.*, *Stringer* v. *Black*, 503 U.S. 222, 229-232, 117 L. Ed. 2d 367, 112 S. Ct. 1130 (1992); *Clemons* v. *Mississippi, supra*, 494 U.S. at 748-752. Third, a state appellate court may rely upon an adequate narrowing construction of the factor in curing this error. See *Lewis* v. *Jeffers*, 497 U.S. 764, 111 L. Ed. 2d 606, 110 S. Ct. 3092 (1990); *Walton* v. *Arizona*, 497 U.S. 639, 111 L. Ed. 2d 511, 110 S. Ct. 3047 (1990). Finally, in federal habeas corpus proceedings, the state court's application of the narrowing construction should be reviewed under the "rational fact finder" standard of *Jackson* v. *Virginia*, 443 U.S. 307, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979). See *Lewis* v. *Jeffers, supra*, at 781.

Circumstances aggravating first-degree murder are codified in NRS 200.033. Section 2 in pertinent part to this argument states:

> The murder was committed by a person who is or has been convicted of:
> (b) A felony ***involving the use or threat of violence to the***

person of another and the provisions of subsection 4 do not otherwise apply to that felony.

Subsection 4 enumerates the felonies that would constitute the felony murder rule. Specifically this subsection deals with if the murder was committed while engaged or attempting to engage in the following felonies: robbery, burglary, invasion of the home, kidnapping and arson in the first degree.[5] In a concurring opinion in Leslie v. Warden, 118 Nev. 773 (2002), Justice Maupin voiced his concern over NRS 200.033(4) when he wrote:

> To meet constitutional muster, a capital sentencing scheme "must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." The question is, does the felony aggravator set forth in NRS 200.033(4) genuinely narrow the death eligibility of felony murderers? First, compared to the felony basis for felony murder, NRS 200.033(4) limits somewhat the felonies that serve to aggravate a murder. **But the felonies it includes are those most likely to underlie felony murder in the first place.** Second, the aggravator applies only if the defendant "killed or attempted to kill" the victim or "knew or had reason to know that life would be taken or lethal force used." This is narrower than felony murder, which in Nevada requires only the intent to commit the underlying felony. This notwithstanding, it is quite arguable that Nevada's felony murder aggravator, standing alone as a basis for seeking the death penalty, fails to genuinely narrow the death eligibility...

The Nevada Supreme Court has never addressed whether NRS. 200.033 (2)(b) is narrowly defined. However, if, as Justice Maupin has written, section (4) of the statute is not genuinely narrow then there is a strong argument that Section (2)(b) is not genuinely narrow. As stated above, Section (4) specifically states that if the murder was committed while the person was engaged in several enumerated felonies then that crime could be used as an aggravator under this section. Unlike Section (4), section (2)(b) does not enumerate any specific felonies. It simply states a felony involving the

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[5] It is noteworthy that **battery** is missing from this list.

threat or use of violence. One is left to simply guess what types of felonies fall under this category. Significant to the instant case, the Nevada Supreme Court has never addressed whether the specific crime of Solicitation for Murder is considered a felony with the use or threat of violence.

b. Solicitation To Commit Murder, Both In General And On The Facts Of This Case, Is Not A Felony Involving The Use Or Threat Of Violence.

NRS 199.500(2) states:

> 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 category B felony.

The crime of solicitation is complete once the request is made. Moran v. Schwarz, 108 Nev. 200, 202(1992). Unlike other criminal offenses, in the crime of solicitation, "the harm *is* the asking -- nothing more need be proven." Id at 203. citing People v. Miley, 158 Cal. App. 3d 25 (Ct. App. 1984). There need be no real danger of the commission of the completed offense or of the person solicited being receptive to the invitation. It amounts to little more than speaking ones mind about wanting someone killed. Unlike a conspiracy to commit murder, where an agreement to complete the offense is involved, there is no threat of actual harm at the time of the solicitation, even to someone who is not a police operative. In a sense it is "half a conspiracy" or "half a contract", waiting for a willing person to accept or agree to fulfill the wishes of the desirous person. In Wood v. State, 115 Nev. 344, 350-351, 990 P.2d 786, 790 (Nev. 1999) the Court held that if a defendant is convicted of conspiracy to commit murder or attempted murder, he cannot be convicted of solicitation to commit murder for the same acts. Noting that when a person solicits another to commit murder and the second person agrees, a conspiracy is formed and NRS 199.480(1) governs,

the Court held:

> A conspiracy is a criminal act, which triggers the exclusionary clause in the solicitation statute. In State v. Koseck, 113 Nev. 477, 479, 936 P.2d 836, 837 (1997), we held that, "[w]hen a defendant receives multiple convictions based on a single act, this court will reverse 'redundant convictions that do not comport with legislative intent.' " (Citation omitted.) Based on the exclusionary language contained in NRS 199.500(2), on remand, Wood could be convicted of solicitation to commit murder in these circumstances only if he is not convicted of conspiracy or attempted murder for the attack on Lisa.

See also People v. Vieira, 35 Cal. 4th 264, 106 P. 3d 990, 1009 (Cal. 2005)(holding that conspiracy to commit murder is not a death eligible crime).

In reviewing Nevada case law, there are no cases where solicitation has been considered a "felony with use of threat of use or force." In determining, what is a felony with use of threat or violence Nevada has stated the following crimes fall in that category: second-degree assault[6], aggravated criminal sexual assault, armed robbery, aggravated burglary [7], kidnapping [8], second degree arson[9], battery causing substantial bodily harm[10]. None of these are inchoate offenses and the harm or threat of harm is direct and certain to flow from the criminal act itself. They are not crimes that are committed with words but with physical deeds that are clearly and imminently dangerous to a victim who is present at its place of commission. Not so with solicitation. It is noteworthy that both conspiracy to commit murder and solicitation of murder are Class B felonies. In terms of the legislative intent regarding their punishment, they are

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[6] Dennis v. State, 116 Nev. 1075 (2000)

[7] Kaczmarek v. State, 91 P.3d 16 (2004)

[8] Petrocelli v. Angelone 248 F.3d 877 (2001)

[9] Dennis v. State, 116 Nev. 1075 (2000)

[10] Thomas v. State, 83 P.3d 818, 2004 Nev. LEXIS 7 (2004)

identical and given substantially lesser punitive treatment than murder.

Solicitation is not considered so inherently likely to lead to a murder that it is a statutory predicate for a felony-murder under NRS 200.033(4). Moreover, in Lopez v. State, 864 So. 2d 1151 (Fla. App. 2d Dist. 2003) the trial court ruled that solicitation to commit murder was encompassed within the catch-all provision of a Florida Statute that permitted enhancement of a sentence for commission of a "felony that involved the use or threat of physical force or violence against an individual." On appeal the Court reversed and remanded for a new sentencing hearing. In holding that violence is not an inherent element of solicitation to commit murder, the Court relied upon Elam v. State, 636 So. 2d 1312 (Fla. 1994) wherein the Supreme Court of Florida rejected solicitation to commit murder as a violent felony in the context of an analysis of aggravating circumstances to support the imposition of the death penalty. The Lopez court also relied upon Duque v. State, 526 So. 2d 1079 (Fla. App. 2d 1988) wherein the Court held that committing the offense of solicitation to commit murder did not itself involve the use of a firearm, deadly weapon, or intentional violence and thus solicitation to commit murder is not a felony that involves the use or threat of violence. The Court in Lopez held:

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

864 So. 2d 1153.

It is clear that the act of asking another to perform something is not itself an act that constitutes violence or an imminent threat of harm or violence. A request by one person to another is simply just a request, an exploration of interest. The minute one person makes that request; the crime of solicitation has occurred and is finished. The act of asking someone to complete a task does not require a threat of violence. The recipient has the choice to oblige or deny the request. Moreover, on the facts of the case *sub judice*, there was no real threat of violence to anyone. At the time the alleged solicitation occurred, DeAngelo Carroll was a police agent. As such the completed crime of murder or even conspiracy to commit murder could not have occurred as a matter of law. In Sears v. United States, 343 F.2d 139, 142 (5th Cir. 1965), the Court established the rule that, "as it takes two to conspire, there can be no indictable conspiracy with a government informer who secretly intends to frustrate the conspiracy". When two persons merely pretends to agree, the other party, whatever he may believe, is in fact not conspiring with anyone. Although he may possess the requisite criminal intent, there can be no criminal act. There are certain dangers with the crime of conspiracy. Such dangers however are non-existent when a person "conspires" only with a government agent. There is no continuing criminal enterprise and ordinarily no inculcation of criminal knowledge and practices. Preventative intervention by law enforcement officers also is not a significant problem in such circumstances. The agent, as part of the "conspiracy," is quite capable of monitoring the situation in order to prevent the completion of the contemplated criminal plan; in short, no cloak of secrecy surrounds any agreement to commit the criminal acts. See United States v. Escobar de Bright, 742 F.2d 1196, 1200 (9th Cir. 1984).

The Nevada Supreme Court has also held that an informant is a feigned accomplice and therefore cannot be a coconspirator. Myatt v. Nevada, 101 Nev. 761, 763 (1985). When one of two persons merely pretends to agree, the other party, whatever he may believe, is in fact not conspiring with anyone. Johnson v. Sheriff, Clark County, 91 Nev. 161 (1975) citing Delaney v. State, 51 S.W.2d 485 (Tenn.1932). There is no conspiracy where the assent was feigned and not real, and that at no time was there any intention to assist in the unlawful enterprise. The danger to society of a conspiracy is not present. The same is true when a solicitation is made to a person unknown to the requester to be a police operative. The situation is feigned and not real. The informant's mere presence frustrates any potential harm that can be done. The fact that Carroll was a police operative and supplying the police with recordings of the discussions makes it clear that nothing would have come out of the alleged request. Therefore, it is clear that solicitation, especially in this context, cannot be considered a crime that involves use or threat of violence.

CONCLUSION

For the above reasons, each and all of the aggravators in the Notice of Intent to Seek the Death Penalty must be stricken.

In conclusion, the reliance on these three weak aggravators, affects Anabel and Luis' constitutional right to bail. As the Court is aware these aggravators are what distinguish this case as a capital murder case. Accordingly, the absolute right to bail becomes a limited right to bail. In re Wheeler, 81 Nev. 495 (1965). Surely when such a valuable unconditional constitutional right is being affected by the State's allegations, there should be strict adherence to constitutional, legislative and judicially recognized

and refined requirements of due process as applied to findings of probable cause, pleading and proof than that which is present here.

DATED this _____ day of December, 2005.

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Shirley B. Parraguirre
CLERK

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

vs.

LUIS HIDALGO, III;
ANABEL ESPINDOLA,

Defendants.

CASE NO.: C212667
DEPT. NO.: XIV

RECEIPT OF COPY

RECEIPT OF COPY of the foregoing **MOTION TO STRIKE NOTICE OF INTENT TO SEEK DEATH PENALTY**, is hereby acknowledged this 13 day of Dec, 2005.

M. B

MARC DIGIACOMO,
Deputy District Attorney
GIANCARLO PESCI,
Deputy District Attorney
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Las Vegas, Nevada 89101