

EXHIBIT "10"

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DISTRICT COURT

CLARK COUNTY, NEVADA

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LINDA SKINNER

STATE OF NEVADA,

Plaintiff,

vs.

KENNETH COUNTS,

aka KENNETH JAY COUNTS II,

LUIS ALONSO HIDALGO,

aka LUIS ALONSO HIDALGO III,

ANABEL ESPINDOLA,

Defendants.

Case No. C212667

Dept. XIV

REPORTER'S TRANSCRIPT
OF
DEFENDANTS' MOTIONS

BEFORE THE HONORABLE DONALD M. MOSLEY

DISTRICT JUDGE

Taken on Thursday, August 31, 2006

At 9:00 a.m.

Reported by: Maureen Schorn, CCR NO. 496, RPR

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APPEARANCES:

For the State: MARC DIGIACOMO, ESQ.
Deputy District Attorney

For the Defendant: KRISTINA M. WILDEVELD, ESQ.
(Counts) BRET O. WHIPPLE, ESQ

For the Defendant: ROBERT M. DRASKOVICH, JR., ESQ.
(Hidalgo) STEPHEN STEIN, ESQ.

For the Defendant: JoNELL THOMAS, ESQ.
(Espindola) CHRISTOPHER R. ORAM, ESQ.

For the Defendant: DAYVID J. FIGLER, ESQ.
(Carroll)

* * * *

1 LAS VEGAS, NEVADA. THURSDAY, AUGUST 31, 2006, 9:00 A.M.

2 * * * *

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4 THE COURT: C212667, State versus Kenneth
5 Counts, Alonso Hidalgo and Anabel Espindola. The record
6 will indicate the presence of counsel.

7 And are the named defendants all present?

8 MR. DRASKOVICH: Yes, we are, Your Honor.

9 MR. WHIPPLE: Your Honor, may I be heard
10 briefly?

11 THE COURT: Let me call the case. We have
12 Ms. Wildeveld and yourself. Are you with Counts?

13 MR. WHIPPLE: Yes, Your Honor.

14 THE COURT: The presence of Mr. Whipple is
15 acknowledged, along with Ms. Wildeveld.

16 We have Mr. Stein and Mr. Draskovich representing
17 Mr. Hidalgo; is that correct?

18 MR. DRASKOVICH: That's correct.

19 THE COURT: And Mr. Oram and Ms. Thomas
20 present for Ms. Espindola.

21 MS. THOMAS: Your Honor, Mr. Oram stepped
22 out for a quick moment. He was here and he should be
23 back.

24 THE COURT: Thank you.

25 MR. FIGLER: We're not on the calendar this

1 morning, Your Honor. I represent Mr. Carroll, the other
2 named codefendant. With the Court's permission I wanted
3 to file a motion to join in on the codefendants' motions,
4 and we would waive Mr. Carroll's presence for this
5 morning.

6 MR. DIGIACOMO: Judge, on that issue, when
7 we reset Mr. Carroll's case we set the same briefing
8 schedule that we had here for Mr. Carroll, and I have not
9 received a single motion related to Mr. Carroll's case
10 whatsoever.

11 I know apparently his name wasn't placed on the
12 calendar itself, but I'm a little concerned that as of yet
13 some year later I have received motions upon motions from
14 all the other counsel, and nothing from Mr. Carroll as of
15 this date, Judge.

16 MR. FIGLER: Well, certainly, Your Honor, we
17 don't want to have to file duplicative motions. If we
18 could just join in on the other defendants, I think that
19 it's in the interest of justice.

20 THE COURT: Well, I would think that this
21 might have been contemplated before the day of the
22 hearing.

23 MR. FIGLER: I appreciate that, Your Honor.
24 I just want to make sure that we get in on it. I wasn't
25 sure that the matter was actually going forward today.

1 THE COURT: Mr. Digiacomo is present for the
2 State. Does this somewhat prejudice the argument here in
3 your view, Mr. Digiacomo?

4 MR. DIGIACOMO: Well, I mean, I guess for
5 some of them. I know that Mr. Counts joined in some of
6 Hidalgo and Espindola's, and some of them would be wholly
7 unrelated to Mr. Carroll.

8 So if it's just on a blanket motion to join in, I
9 don't know if there's a separate issue related to any of
10 them, particularly since he's a severed codefendant.

11 MR. FIGLER: That's accurate, Your Honor.
12 The motion to join in are Hidalgo motions that were filed,
13 and they also relate to the death penalty. And the ones
14 that we listed, which are pretty much all of them, that
15 were filed by that defendant are relevant to Mr. Carroll
16 as well.

17 There's nothing new, nothing different. These
18 are the broad motions that were filed by counsel, and they
19 would apply from the jury questionnaire down to
20 bifurcating the penalty phase, et cetera. There's nothing
21 new and I'm just trying to make sure that Mr. Carroll's
22 rights are protected by joining in on these motions.

23 THE COURT: All right. I'm going to grant
24 the motion initially. If it turns out there's a problem
25 we can look into it.

1 Mr. Whipple, you wanted to be heard?

2 MR. WHIPPLE: Yes, Your Honor. I am
3 currently in the State of Nevada versus Ronald Lozano, a
4 capital murder case. It's the second week and I
5 physically have to leave this courtroom within the next 20
6 minutes.

7 I was going to ask this Court with regard to
8 Mr. Counts, because I am in the middle of the capital
9 murder trial, we start calling our witnesses today after
10 lunch. I haven't had an opportunity -- I'm not going to
11 be able to be here physically, and I haven't been able to
12 personally have the time to prepare for the argument for
13 these because I've been in the midst of this capital
14 murder trial for two weeks.

15 Ms. Wildeveld is here and we have discussed it.
16 I'm the person who filed the replies earlier and I would
17 like to be -- I'm going to ask this Court if it would be
18 willing to move the portion with regard to Mr. Counts to
19 late next week.

20 I anticipate finishing up probably on Tuesday or
21 Wednesday. I apologize for the late notice but, again,
22 I've been in a capital murder trial and I've been very
23 preoccupied.

24 THE COURT: Well, Mr. Whipple, with all due
25 respect, you've been in the capital murder trial for two

1 weeks and you've known it for two weeks.

2 Why didn't you give me a phone call and I would
3 have made some provisions? I came down here at 6:30 this
4 morning and went over all this. I had my clerk here who
5 has been working on it all week, and here we are. And we
6 just sort of, everybody can turn around and go home.

7 Is that the idea?

8 MR. WHIPPLE: Your Honor, you're right and I
9 apologize. I'm sorry. I just got so caught up in my
10 capital case. To begin with, I was hoping this would be
11 done quicker and that I would be able to be prepared, and
12 then as time went on I just lost track of time.

13 I apologize, Your Honor. There is no excuse and
14 I apologize. Ms. Wildeveld is here and it's just that I
15 would like to be involved and I have to leave here
16 shortly, and I haven't had really a chance to be prepared
17 to assist Ms. Wildeveld in argument.

18 MR. DIGIACOMO: And I would note that they
19 joined in most of the Espindola and Hidalgo motions,
20 Judge, and they should all be argued at one time.

21 If the Court is considering it, I'm currently in
22 a murder trial but I was prepared to go forward at this
23 point, we're dark today. But I'm going to submit to the
24 Court's discretion considering, for the record, this is a
25 250 case. That's my only concern, and submit it to

1 whatever the Court wants to do.

2 THE COURT: And I have a murder trial
3 starting Tuesday, Monday being a holiday. In theory, I
4 suppose, we could take this up next Friday.

5 MR. DIGIACOMO: And I apologize, I
6 anticipate to still be in trial next Friday. Could we go
7 two Fridays? Is that too far out?

8 THE COURT: We do what we have to do and I'm
9 going to try to work with everybody.

10 Ms. Thomas?

11 MS. THOMAS: I'm in a deposition that
12 Friday.

13 MR. STEIN: I'm in federal court Friday the
14 15th. Friday the 8th is fine with me.

15 Mr. Digiacomo, are you going to be here?

16 MR. DIGIACOMO: I'm prepared. I believe I'm
17 still in the murder trial. My only concern, I guess we
18 could talk to Judge Leavitt if we're going to set this at
19 9:00. The majority of the motions are going to get
20 submitted by both sides.

21 THE COURT: We could be the only one on
22 calendar.

23 MR. DIGIACOMO: We could ask Judge Leavitt
24 to start later than 9:00 a.m. next Friday and, hopefully,
25 that will resolve the issue. If for whatever reason she

1 doesn't agree, I'll contact all counsel and the Court.

2 MR. WHIPPLE: Your Honor, Ms. Wildeveld just
3 whispered in my ear as well. Specifically, there are
4 several that I responded to regarding Mr. Counts that she
5 feels comfortable going forward with those that will join
6 in many of them.

7 There's just a couple that are specific to
8 Mr. Counts regarding phone calls from the detention center
9 with regard to fleeing. There were a couple that were
10 specific to Mr. Counts, and those are the ones that I
11 spent time on, and those are the specific ones that if we
12 could move to where I would be here, I would appreciate
13 it.

14 And, Your Honor, again, I do apologize. I should
15 have called and I'm sorry.

16 THE COURT: Let me say this, Mr. Whipple.
17 This is not something that is typical of you, and I have
18 the utmost respect for you. I could name some people, but
19 you're not one of those names, so things happen.

20 Now, do you know on calendar which ones you
21 wanted to have --

22 MR. WHIPPLE: Yes.

23 MR. STEIN: Excuse me. Wouldn't it make
24 more sense for judicial economy to keep them all together
25 on one day?

1 THE COURT: Well, you're talking about
2 judicial economy and I'm going to be squeezing. I've got
3 a murder case too, you know. We're going to be fighting
4 for time whatever Friday.

5 And the next Friday the 8th is when I'm going to
6 have a murder trial too, so I have the option, just like
7 Judge Leavitt, to use that time. So, really --

8 MR. DIGIACOMO: Judge, my only concern with
9 your request -- and I apologize. Ultimately, I would like
10 to do them all right now, but because the Court has
11 already denied their motion to sever, the evidence that
12 they want to discuss relates to those other attorneys
13 also.

14 I'll submit it to the Court, Judge. I mean, they
15 all have a vested interest in the motions that
16 Ms. Wildeveld and Mr. Whipple want to argue on another
17 date. So we're all going to be back to the date. So if
18 it helps you --

19 MS. WILDEVELD: Your Honor, the motions that
20 we would like to set aside from the rest of the
21 codefendants are Mr. Counts, and there's the flight, the
22 phone conversations, which are all the specific to
23 Mr. Counts.

24 THE COURT: Are you working from the first
25 page?

1 MS. WILDEVELD: I don't have the list of the
2 motions. It would be the motion in limine to preclude
3 admission of phone conversations.

4 THE COURT: All right. On the calendar, and
5 I'm going --

6 MS. WILDEVELD: Page 3, Your Honor.

7 THE COURT: The second page, four from the
8 bottom is this evidence of flight. Then you mentioned
9 another. What is it?

10 MS. WILDEVELD: Page 3, Your Honor.

11 THE COURT: Phone calls?

12 MS. WILDEVELD: The phone calls.

13 THE COURT: That's six from the bottom.

14 MS. WILDEVELD: Then Defendant Counts'
15 renewed motion to sever defendants.

16 THE COURT: Have you located that?

17 MS. WILDEVELD: Five down, Your Honor, on
18 Page 3.

19 THE COURT: That's the motion to reconsider,
20 right?

21 MS. WILDEVELD: Right, Your Honor.

22 THE COURT: That won't take long.

23 MS. WILDEVELD: And then the motion for
24 release of juvenile records. And the one below that, the
25 reduction in bail or house arrest.

1 MR. DIGIACOMO: Which is another motion to
2 reconsider.

3 THE COURT: Where is the juvenile records?

4 MS. WILDEVELD: Juvenile records is in the
5 middle of the page, the very center one. And then the one
6 below it, the reduction in bail.

7 THE COURT: All right. Now, let me address
8 remaining counsel on the other matters. Is this going to
9 be a hardship of any kind if we delay the resolution of
10 those matters, five, I guess, until next Friday, a week
11 from tomorrow?

12 MR. DRASKOVICH: No, Judge.

13 THE COURT: Does anybody have a problem with
14 that?

15 MR. STEIN: Just those?

16 THE COURT: Just those.

17 THE CLERK: September 8th, 9:00 a.m.

18 THE COURT: All right. We'll start at the
19 head of the calendar here and go through them. The first
20 matter is Defendant Hidalgo and Espindola's joint counsel
21 motion to conduct voir dire on possible racial bias and
22 prejudice. As you know, counsel, we do address that
23 issue.

24 What is contemplated?

25 MS. THOMAS: Your Honor, what we're asking

1 is that the closed-end, yes-or-no question of, is anyone
2 here racially biased not be asked. And instead a more
3 open-ended, less direct question be asked.

4 Because I think it's very likely that no juror is
5 going to say: Yes, I'm a bigot. But by asking open-ended
6 questions, we may be able to elicit more information that
7 would be more beneficial in determining whether we should
8 exercise peremptory challenges, direct reservations, or a
9 cause for challenge.

10 THE COURT: Well, my experience has
11 been -- and, by the way, there have been those that
12 suggest that --

13 MS. THOMAS: And I know that that does
14 happen on occasion.

15 THE COURT: More likely the situation would
16 develop where a question is asked that somewhat catches
17 them unawares and they hesitate, and they kind of think
18 about the matter and, of course, to me that opens up the
19 door for further inquiry.

20 But what do you think of black people, or what do
21 you think of Hispanics, or something like that?

22 MS. THOMAS: Your Honor, we set forth some
23 questions in our motion talking more about, do you think
24 that black people, African-Americans or Hispanics are more
25 likely to commit crimes than white people.

1 And there are some other questions set forth in
2 the motion that specifically would open up more of a
3 conversation and allow more incite, rather than just
4 someone saying I'm not going to say, yes, I'm prejudiced
5 in a room full of strangers.

6 THE COURT: Well, you know, we've used the
7 same method for 25 years and it's served pretty well so
8 far. I don't know what the need is to reevaluate the
9 situation.

10 What's the State's position?

11 MR. DIGIACOMO: Judge, as in my response, if
12 they want questions, you've done this long enough, Judge,
13 whatever your discretion in choosing the jury is at your
14 discretion. You decide what questions we need ask and we
15 follow your orders.

16 THE COURT: Well, I'm going to be somewhat
17 relaxed in my -- obviously, because of the nature of
18 what's transpiring here, the voir dire process is going to
19 be somewhat relaxed and liberalized.

20 But I think I will ask that question, and I think
21 it will be pretty obvious if there's hesitation or some
22 equivocation to inquire.

23 But I don't like open-ended questions because it
24 invites the jurors to just rattle on about Lord knows
25 what. And it calls some prejudice to the other jurors

1 because you're inviting them to give a speech when they
2 start their harangue on whatever subject. It doesn't have
3 to be this subject, necessarily.

4 The other jurors are sitting there listening, and
5 pretty soon you've got a situation on your hands. But I'm
6 going to decline the request.

7 MR. STEIN: Your Honor, may we be allowed to
8 submit questions to you?

9 THE COURT: Well, under 7.70 of the State
10 Supreme Court rules there is that provision that suggests
11 by 4:00 o'clock the judicial date previous, which would be
12 Friday if this starts Monday, to propose voir dire
13 questions.

14 Now, I tell you that I prepare those lists with
15 the litany that I've typically asked, and oftentimes
16 there's a lot of repetition and a lot of rather close
17 matters. So I work with counsel on that and you are
18 certainly at liberty to submit something.

19 Next is the motion to prohibit introduction of
20 victim impact evidence during the guilt phase.

21 What does the State contemplate there?

22 MR. DIGIACOMO: I'm not sure what I
23 contemplate because I don't know what they contemplate.

24 THE COURT: Right. What do they think you
25 contemplate.

1 MR. DIGIACOMO: I'm not quite sure. Is
2 there going to be testimony of who the victim, the
3 individual who is dead is? He used to work for the
4 Palomino. He was on a vacation down at the lake with his
5 girlfriend, or was out that night at the lake with his
6 girlfriend when he was lured up to a location where he was
7 executed?

8 Yes. I'm not sure. Am I calling his mother or
9 sister to say he was a good person, putting in character
10 of him that is not relevant to whether or not he was
11 executed or not? No.

12 So I am not exactly sure what the motion is.

13 MS. THOMAS: Your Honor, that's exactly the
14 basis. Because I've had other murder cases where the
15 identification of the deceased is in no way the issue, but
16 you've got the mother and the sister on the stand
17 identifying the body and talking about their relationship.

18 And if the Prosecution doesn't intend to
19 introduce that testimony, well, then we don't have an
20 issue.

21 THE COURT: You've had experience during the
22 guilt phase of this kind of thing?

23 MS. THOMAS: Absolutely. And the Robert
24 Biford case is one that comes to mind.

25 THE COURT: Well, the Prosecution is not

1 contemplating that; is that correct?

2 MR. DIGIACOMO: That's correct, Your Honor.

3 THE COURT: It's a moot issue. If it turns
4 out there's some amendment to that concept, we'll have a
5 look at it anew.

6 Motion to exchange proposed jury instructions at
7 calendar call. Why in the world would we do that? In the
8 first place, you don't even know what the evidence is
9 entirely.

10 MS. THOMAS: Your Honor, and that's exactly
11 it. Because when you're getting ready to present your
12 case, if you don't know what the legal standards are going
13 to be, if we're going to have discussions over jury
14 instructions on solicitation for murder, for example, and
15 the intent required.

16 And I'm not saying everything has to be settled
17 in opening statements. But if we have some general
18 parameters as to the Court's thoughts on some of the
19 contested instructions, it will definitely aid counsel in
20 presenting their cases.

21 THE COURT: Well, certainly, when you have
22 as many motions as you have here, I think we pretty well
23 ferret out what the procedures are prior to worrying about
24 instructions.

25 But I'm not inclined to change the procedure I've

1 followed for 25 years. Your suggestion is going to be
2 denied.

3 Motion for jury questionnaire. That, of course,
4 has been the subject of some discussion.

5 Is there anything more to be said there?

6 MS. THOMAS: No, Your Honor.

7 THE COURT: By the way, I have looked at the
8 questionnaire and there are several things there that are
9 particularly inappropriate, in my judgment. I realize
10 it's subject to interpretation, but I might give you some
11 indication because this is going to be something that will
12 be disallowed during voir dire too, in all probability.

13 And I'm working with generalities here. I'm not
14 ruling per se, but I'll just give you some idea of where
15 we're headed with this kind of questionnaire.

16 Such things as what kind of books do you read,
17 what do you watch on television, things like that, what
18 that does, in my judgment, has nothing to do with a fair
19 and objective juror.

20 It merely is an opportunity to try to profile the
21 prospective juror to see if they're your kind of guy or
22 girl, and that is not what voir dire is about. Voir dire
23 is about finding 12 individuals who can be fair-minded in
24 their approach to the case.

25 So I am not going to allow questions that tend to

1 go on unendingly and they seem oftentimes about what kind
2 of person you are, and such questions as, are you a
3 leader, or have you been a boss and all that, which
4 clearly is to determine how they're going to maintain
5 their own view of the case, or are they going to be led
6 along by other jurors.

7 It's just a profiling process. And I can't seem
8 to find the offered questionnaire, but I'm just giving
9 some heads-up that there are some lengths, even in capital
10 cases, of what the voir dire constitutes, but we will
11 discuss it more fully as we proceed.

12 There will be no jury questionnaire.

13 MR. STEIN: No jury questionnaire?

14 THE COURT: Absolutely not.

15 MR. STEIN: That is your ruling?

16 THE COURT: That is my ruling and absolutely
17 has been for 25 years, as it is today, you bet.

18 Motion to strike the death penalty as
19 unconstitutional. I imagine you're just preserving that
20 for appeal. Is that what that is about?

21 MS. THOMAS: Yes, Your Honor.

22 THE COURT: That motion is denied.

23 MS. THOMAS: And that's not the lethal
24 injection, Your Honor.

25 THE COURT: No, it's not.

1 Motion for procedures regarding Bailiffs and
2 other personnel. I'll be quite candid with you. I took
3 exception to this, what you're supposing that somehow my
4 staff don't know what to do and I'm supposed to write down
5 instructions that you approve, I guess, as to what my
6 staff is supposed to do during this trial.

7 And I take exception to that. I don't know where
8 that came from, but it's absurd. My staff have been with
9 me for years, and they will continue to run a trial just
10 like they have for Lord knows how long, so there will be
11 no written instructions to my staff.

12 Motion to preclude introduction of hearsay during
13 sentencing. We're going to rewrite the law of Nevada
14 there, Ms. Thomas?

15 MS. THOMAS: Yes, Your Honor. In light of
16 new Supreme Court precedent such as Raines versus Arizona
17 explaining the aggravating circumstances and the way
18 inclusions are subject to constitutional restraints beyond
19 what they were in previous years.

20 I believe it's time that those issues be
21 reconsidered and that hearsay, particularly as it goes to
22 aggravators and mitigators, should not be permitted.

23 THE COURT: Your view, Mr. Digiacomo?

24 MR. DIGIACOMO: Yes, Judge. As to
25 mitigators I've never heard that before. I always thought

1 they would like hearsay evidence.

2 MS. THOMAS: Actually, Your Honor, I should
3 specify. The Defense should be able to present hearsay.
4 The Prosecutors, however, should not.

5 THE COURT: Just another way to bite down
6 the Prosecutor's burden.

7 MR. DIGIACOMO: Keep going, Judge. And
8 while I recognize that they have used the line of cases
9 for that, I filed a response. It's still a giant leap to
10 say that hearsay is now not admissible at a penalty
11 hearing.

12 We have a statute that the Supreme Court has
13 repeatedly ruled is constitutional. Nothing that the
14 U.S. Supreme Court has said has made that statute
15 unconstitutional, Judge.

16 So until such time as they change the law
17 somewhere else, somewhere higher, that the appropriate
18 ruling of this Court as it's always been should be the
19 same, Judge.

20 THE COURT: Well, the Court is going to
21 decline granting that motion.

22 And motion to prohibit argument on deterrence.
23 The death penalty deterrence? Is that what you mean?

24 MS. THOMAS: Yes, Your Honor.

25 THE COURT: I believe that the Supreme Court

1 has indicated that as well, has it not?

2 MS. THOMAS: Your Honor, our argument is
3 actually in two parts, and I don't believe that the Nevada
4 Supreme Court has squarely addressed the two parts within
5 a single case.

6 The Court has held that Defense attorneys are not
7 entitled to present evidence about lack of deterrence, and
8 the Court has held that the Prosecutors are free to argue
9 deterrence.

10 What they have not done is address how ridiculous
11 those two holdings are when you put them together. What
12 the Court has in essence said is, when you combine their
13 authority go ahead and make all the arguments you want
14 beyond need to have any evidence.

15 That's not how Courts work. We have evidence to
16 support argument. There is no deterrent effect to the
17 death penalty. It's like arguing a lie, and we should be
18 able to either prohibit them from making that argument, or
19 we should be able to present evidence showing how false
20 that argument is.

21 THE COURT: Go ahead.

22 MR. DIGIACOMO: Yes, Judge. There's two
23 things. The Supreme Court has allowed the State to
24 explain to the jury theories of penals. Why do we have
25 the death penalty, and explanation for why it exists.

1 And one of those reasons is, it's a great
2 specific deterrent. If you execute somebody he can never
3 commit a crime again. But, also, it's a general deterrent
4 and they said there's nothing wrong with that argument.

5 What they want to do is start putting experts on
6 the stand and discuss and, actually, it's not a resolved
7 issue as to whether or not it is or is not a deterrent.
8 But that's not what we're telling the jury.

9 We're telling the jury why it is we have the
10 death penalty, and the Supreme Court has said that that's
11 appropriate because the Legislature's findings that are at
12 least believe that it was a deterrent, and that's why it
13 is we have it.

14 And the Supreme Court has said there's nothing
15 wrong with that. If you want to have a mini trial and
16 have 12 experts from each side discuss whether or not it
17 is a deterrent, what factors relate to that, that's up to
18 the Court, Judge.

19 The Supreme Court has said it's within your
20 discretion, and if you deny it then it's not abuse of
21 discretion to waste this jury's time on those thoughts and
22 those discussions that take them away from the facts of
23 the case, and whether or not the death penalty is
24 appropriate in a particular circumstance.

25 THE COURT: Do you contemplate arguing

1 deterrence as a general proposition?

2 MR. DIGIACOMO: Correct. And to be truthful
3 to you, I mean, as I stand here today I don't know that
4 I've ever told a jury that. I might have or I might not
5 have. It depends on where it is in the case, what the
6 argument of the Defense attorneys is and whatever, we're
7 entitled to.

8 And that's only my response. I can't tell you
9 that I wouldn't, in fact, argue that to the jury. It may
10 not be very persuasive considering all the other factors
11 that we're going to be able to argue in this particular
12 case.

13 THE COURT: Well, I'll give you some
14 insight, counsel, as to my thinking here. Two motions
15 down where they're talking about the disproportionality,
16 arbitrariness and unfairness of the death penalty, I
17 wrote, "Death penalty not on trial." And that's true in
18 this instance too.

19 And I agree with you, Mr. Digiacomo, I can
20 perceive and I do not want to see a situation arise where
21 we start having experts come in and tell us what they
22 think of the death penalty.

23 So that's not going to happen unless I'm required
24 to do so. And, frankly, Ms. Thomas, it looks to me like
25 it's a situation that's open to argument. In your closing

1 you can say that there's no evidence to suggest that the
2 death penalty is a deterrent.

3 Whomever is involved in whatever circumstance,
4 it's not likely that they sat and considered the
5 ramifications of their act that would include the death
6 penalty so, therefore, they were dissuaded or not. So
7 it's something that's been argued from time to time in my
8 Court, but no experts, of course.

9 I think kind of paring out something, it's of
10 little consequence, really. I'm going to deny the motion.

11 Preclude the Court from participating in
12 rehabilitation of potential jurors. Well, I'm got going
13 to go for that, counsel. When we have a juror that says:
14 No, I am not likely to consider the death penalty, it's
15 not uncommon that I ask questions to clarify what they're
16 saying, and let counsel in turn inquire.

17 So I don't think I'm going to restrict my
18 participation in that regard. That motion is denied.

19 Then we have this disproportionality and
20 arbitrariness and unfairness of the death penalty.

21 Is that the one you alluded to earlier,
22 Ms. Thomas?

23 MS. THOMAS: I believe Your Honor did, yes.

24 THE COURT: Well, I know I did, but there
25 was another --

1 MR. DIGIACOMO: No, Judge. She wants to
2 discuss the lethal injection.

3 MS. THOMAS: No. The lethal injection one
4 is different.

5 THE COURT: In any case, you just prepared
6 this for argument on appeal, I take it?

7 MS. THOMAS: I would be happy to present the
8 evidence, but I understand. I would like to preserve it
9 for appeal as well.

10 THE COURT: Well, it has been embraced by
11 the State and many other states, and I'm not inclined to
12 disagree. The motion is denied.

13 Motion to bifurcate the penalty phase
14 proceedings. Again, this is contrary to the State's
15 procedural law, but what's the reasoning behind it?

16 MS. THOMAS: Your Honor, again, in light of
17 Raines versus Arizona and some more recent decisions
18 discussing the fact that the weighing equation is actually
19 a part, essentially, of the elements of the offense that
20 that's what makes it a capital case.

21 And because hearsay and evidence under oath that
22 would not normally be admissible under the evidence code
23 is permitted as to the selection phase of the penalty
24 hearing, the argument is that the eligibility phase and
25 selection phases should be bifurcated based upon those

1 different evidentiary considerations.

2 MR. DIGIACOMO: In other words, the jury
3 can't follow the instructions of the Court. And I think
4 that the Nevada Supreme Court has addressed this on
5 numerous occasions and we'll submit it, Judge, based upon
6 their rulings.

7 THE COURT: I am going to deny the motion.
8 It may well be something that the Supreme Court may want
9 to take up.

10 Motion to conduct full voir dire on potential
11 jurors' personal and professional experience. I have no
12 idea what that means.

13 MS. THOMAS: Your Honor, in the case of
14 Meyer versus State, it's a 2003 opinion by the Nevada
15 Supreme Court, in the case where a juror relayed her own
16 personal experience. I believe it was with a relative's
17 experience with cocaine to the other jurors.

18 And the Nevada Supreme Court found that that was
19 not misconduct, that jurors are free to discuss their own
20 areas of expertise, experiences and knowledge to the other
21 jurors.

22 In light of that holding it becomes critically
23 important that we know what those life experiences and
24 education and background and areas of expertise are, in
25 order both to exercise cause challenges and peremptory

1 challenges in any kind of important and meaningful way.

2 We need to have knowledge of what one juror is
3 going to be relaying to the other jurors during
4 deliberations of that type because, in essence, it makes
5 that juror almost a witness.

6 We don't get to be part of those conversations
7 during deliberations. So if there's a juror who is going
8 to be relaying some experiences, we should be able to know
9 what those are.

10 THE COURT: Well, as you know, we inquire as
11 to their employment, background, things of that nature.

12 What more would you want to ask?

13 MS. THOMAS: Your Honor, for example, in
14 that case, in the Meyer case, I doubt the attorneys in
15 that case knew that that juror's sister had been a cocaine
16 addict. And cocaine, use of cocaine was an issue in that
17 case.

18 And had the jurors been questioned about have any
19 of you had a relative that's been addicted to drugs and
20 been able to ask questions about that.

21 And here there are issues regarding the Palomino
22 Club and we want to know what jurors' experiences are.
23 There are drug issues here, there are a variety of issues,
24 and in light of that Meyer decision I believe we should be
25 able to explore those areas.

1 THE COURT: Well, in considering that
2 concept that would just -- there would be no end to it.
3 You would have to inquire as to everyone's experiences
4 in -- well, the number would be mind-boggling.

5 You take this case. Did anybody ever go to this
6 kind of a night club? Have you ever had a child use
7 narcotics? Have you ever had any kind of a problem with
8 people being bullies or someone threatening you?

9 I mean, it could go on forever. That's why we
10 have 12 people to bring their combined experiences
11 together and discuss whatever, and apply those to the
12 facts as they find the facts from the evidence in the
13 trial.

14 But the concept of what you're suggesting would
15 open up voir dire and we would spend two weeks with the
16 jury talking about their high school graduation, and their
17 first girlfriend or boyfriend, and it would never end.

18 MS. THOMAS: Your Honor, and that's why most
19 states have jury selection and a lot go for a month in a
20 capital case.

21 THE COURT: They do?

22 MS. THOMAS: Texas, North Carolina.

23 THE COURT: Well, that's why we're so much a
24 part of the Texas, North Carolina. See, we don't have
25 time to two-week jury selections.

1 Yes?

2 MR. DRASKOVICH: Your Honor, just for the
3 record, Robert Draskovich on behalf of Hidalgo.

4 What Ms. Thomas is asking for is just for a
5 handful of questions concerning their personal specifics.

6 THE COURT: Specific purposes or just
7 various as to our jurors?

8 MR. DRASKOVICH: Specific, perhaps five or
9 six questions that could be prepared beforehand to present
10 to the Court. Obviously, I understand the Court's
11 concerns. You don't want us to go on for two weeks on a
12 whole litany of issues to accomplish that.

13 But what we're requesting is just a handful of
14 questions unique to this case and the facts of this case.

15 THE COURT: And some of these are going to
16 be very personal, would they not?

17 MR. DRASKOVICH: They may be, yes.

18 THE COURT: Well, submit them in your voir
19 dire questions and we'll look and see what you have. I'm
20 trying to accommodate you, but I've got to have some kind
21 of regulation on where we go with this.

22 I don't know what they do in Texas, but I'm not
23 prepared to spend two weeks on jury selection.

24 MR. DRASKOVICH: Thank you.

25 THE COURT: I'm denying it per se, with the

1 understanding that I'm going to review it in the form of
2 what's proposed voir dire questions.

3 MR. STEIN: It's continued on the next page.

4 THE COURT: Right. What about it? I'm on
5 the next page. Are you ready?

6 MR. STEIN: Is that granted on this page?

7 THE COURT: Granted. Continued on the next
8 page. Motion to declare as unconstitutional the unbridled
9 discretion of the Prosecution to seek the death penalty.

10 Well, do you take exception to the process that
11 the District Attorney uses in their what they call their
12 death panel, I believe, or whatever it is; is that
13 correct?

14 MS. THOMAS: Both that process and the fact
15 that the Legislature has named so many aggravators that
16 the Prosecutors are free, essentially, to pick death in
17 any first degree murder case.

18 THE COURT: Am I supposed to overturn the
19 legislation in the matter?

20 MS. THOMAS: Yes, Your Honor.

21 THE COURT: I'm going to decline.

22 MR. DIGIACOMO: For the record, Judge, I
23 have only murder cases, and I have a number of first
24 degree murder cases where there's no aggravators. So
25 while I accept their argument, I have a couple in this

1 courtroom where there are no aggravating circumstances.

2 THE COURT: Motion to strike the death
3 penalty based on unconstitutionality. Again, in keeping
4 with some of the other arguments; is that right,
5 Ms. Thomas?

6 MS. THOMAS: Your Honor, is that the lethal
7 injection one?

8 THE COURT: No. This is No. 2 on Page 3.

9 MR. DIGIACOMO: No. 3 is the lethal
10 injection.

11 THE COURT: We'll take No. 3 along with it,
12 and that is to strike the intent to seek death based on
13 unconstitutionality of the lethal injection.

14 Do you have something you want to say in that
15 regard?

16 MS. THOMAS: Yes, Your Honor. In the
17 McConnell case, which is the only case the Nevada Supreme
18 Court has addressed the lethal injection to my knowledge,
19 the Court denied the challenge because there was not the
20 factual -- intensive factual basis necessary to decide the
21 issue.

22 And the defendant in that case asked the lethal
23 injection be declared constitutional as a matter of law.
24 What we have done is exactly what the Court in McConnell
25 said should be done, which is to present factual argument.

1 We'll present prison policy. We'll present the
2 extent of the affidavit of an expert regarding the Nevada
3 procedure.

4 And contrary to the State's argument here, which
5 is completely contrary to the normal rule, which is the
6 issues have to be raised at trial. And if they can't be
7 raised at trial --

8 THE COURT: I'm sorry, what should be raised
9 at trial?

10 MS. THOMAS: Issues regarding a case.
11 Because in postconviction you have to show why you
12 couldn't raise the issue. Usually it's ineffective
13 assistance of counsel.

14 We can raise the lethal injection issue. We've
15 got the affidavits, we know the procedures. We're doing
16 what the Nevada Supreme Court says to do, which is to come
17 to this Court and raise factual argument and have a
18 hearing on the constitutionality of the lethal injection.

19 THE COURT: What is the argument?

20 MS. THOMAS: Essentially, that the chemicals
21 that are used by the prison can create a situation where
22 the person is essentially paralyzed and, therefore, unable
23 to speak or motion and cannot give any verbal indication
24 of pain.

25 If the drugs are not applied appropriately, the

1 sodium-something that's one of the chemicals that can be
2 used can cause an extreme amount of pain.

3 And it's set forth in the affidavit from the
4 anesthesiologist that that chemical combination is
5 entirely unnecessary, that there are chemicals that can be
6 used for lethal injection that do not cause pain, and
7 coupled with the paralysis because of the types of drugs
8 that are used here.

9 And this is an issue that's very much being
10 litigated throughout the country right now. Several
11 states have stays in place because of the very severe
12 issues presented by lethal injections in talking about
13 botched executions, and the quality of the medical
14 personnel, if there are any medical personnel.

15 And all of those factors should be introduced and
16 that issue should be explored.

17 THE COURT: Well, did I understand you at
18 the beginning of your argument to preface your argument
19 with if the chemicals are not used properly, are you
20 presupposing that there might be an improper use of
21 the chemicals?

22 MS. THOMAS: Even if the chemicals are used
23 properly if they're injected, there are many, many times,
24 and the expert here has talked about that in his
25 affidavit, where if the needle is not applied

1 appropriately, if the timing is off, if you don't have a
2 doctor or an anesthesiologist supervise it, and even in
3 some cases where the chemicals are put in appropriately,
4 the fact is there is a risk.

5 And not a minute or a small risk, but there is a
6 risk of very intense pain that would not be permissible
7 under the Eighth Amendment, and that's why the lethal
8 injection procedures need to be examined.

9 THE COURT: Is there another method of
10 lethal injection that you suggest is perhaps used in
11 another jurisdiction that's recognized?

12 MS. THOMAS: There are anesthesia techniques
13 that actually are used by veterinarians. The protocol
14 here are not allowed by veterinarians because they can
15 cause animals pain.

16 Veterinarians have developed other protocols that
17 don't cause pain. To my knowledge, those are not being
18 used by other states. Most states usually use the same
19 chemicals, which is why state after state they imposed
20 throughout this country, and serious issues regarding
21 lethal injection are being litigated.

22 THE COURT: Response?

23 MR. DIGIACOMO: The cart is a little before
24 the horse, Judge. The penalty is the death penalty. The
25 procedure used to impose that penalty doesn't become

1 relevant until they actually are faced with the penalty.

2 Because the procedures, you're right, there is a
3 lot litigation going on as to what the procedures are.
4 Apparently, Ms. Thomas just got the procedures out of the
5 Nevada Department of Corrections as to what their
6 procedures are.

7 By the time we execute one these individuals we
8 may be back to a firing squad. It's a premature issue.
9 Let's see if they receive the death penalty. Then if
10 there needs to be a hearing, at some point there can a
11 hearing on that issue.

12 But if we're going to have a two-month hearing or
13 putting up experts to discuss the appropriateness of the
14 Nevada Department of Corrections procedures for somebody
15 who ultimately may not face that penalty, Judge, I think
16 it's premature, and that's what my response was.

17 THE COURT: Well, Ms. Thomas seems to think
18 that she has to preserve the issue.

19 Is that not your thinking?

20 MS. THOMAS: Oh, absolutely we need to
21 preserve the issue. But it's also, I mean, especially
22 that Mr. Digiacomo, he cites not a single case, not a
23 single statute.

24 And the way the system works is, we raise issues
25 at trial. We can't just pop up 20 years from now and say:

1 Yo-ho, we knew about this issue before, but we postponed
2 it because we didn't think it would ever actually happen.

3 That's not how it works. And the statute
4 provides that lethal injection is the method of execution.
5 Some states have alternatives. Illinois has provided an
6 example where they have the gas chamber, I believe, as a
7 backup.

8 We don't have a backup. And if this Court
9 declares lethal injection to be unconstitutional, then
10 there's no doubt to the penalty method, and then there's
11 no point in going forward with a penalty hearing.

12 MR. DIGIACOMO: That's their point. They're
13 going you have to say the lethal injection is
14 inappropriate so they don't have to face a death case.
15 No.

16 If Ms. Thomas' concern is that she hasn't
17 preserved the issue, then let me tell you that I will be
18 the person after the penalty hearing, that should they get
19 death when they raise this issue, I swear I won't raise,
20 hey, they failed to raise this at trial, since I'm the one
21 who objected to it being premature at trial.

22 THE COURT: Well, I'm going to indicate
23 right now that she has preserved the issue. So as far as
24 I'm concerned the Supreme Court can agree or disagree with
25 me, but I think she has.

1 There is, of course, the presumption of the
2 legality of the statutes, and I'm not inclined to overcome
3 that or set that aside based on some argument that a
4 veterinarian uses a different method.

5 And as to the general concept, Ms. Thomas, with
6 all due respect, I don't know any method that has been
7 recognized and used. Now, I grant you there could be
8 things as you say in the veterinarian world or something
9 there might be a better method, I don't know.

10 But you take gas which was used at one point in
11 Nevada, and hanging and firing squad and all these things,
12 I don't think you can say any of that is totally devoid of
13 pain. Now, granted, it's very brief.

14 So, I mean, a lot of this is conjecture. And I
15 don't mean to belittle it as conjecture when I say it, but
16 it is just that. We could argue back and forth and there
17 would be an expert say yes, and an expert say no. And we
18 could have a bunch of chemists in here, as we just go at
19 this full board.

20 But there's still a presumption that the method
21 prescribed by law in Nevada and embraced by the
22 Legislature at some juncture is proper, and I'm not going
23 to disturb that at this juncture.

24 If, obviously on appeal or further proceeding, we
25 want to get into this thing in depth, I suppose we can do

1 so. But at this juncture, however, I'm not inclined to
2 set that aside.

3 Next is Mr. Counts' request to join which has
4 been recognized.

5 The other matter has been that request to put off
6 to next Friday, the renewed motion to sever.

7 Motion to suppress evidence of prior felony
8 convictions. Now, is that on cross-examination of the
9 defendants if they take the stand?

10 MS. THOMAS: I don't think that's my motion,
11 Your Honor.

12 MR. DIGIACOMO: That's Ms. Wildeveld's
13 motion.

14 THE COURT: Ms. Wildeveld, is that your
15 motion to suppress evidence of prior felony convictions?

16 MS. WILDEVELD: Yes, Your Honor. And I
17 think we can handle that on Friday.

18 MR. DIGIACOMO: We can.

19 MS. WILDEVELD: If we could handle the three
20 in one next week?

21 THE COURT: All right. That will be the
22 order.

23 Motion to permit discovery of records pertaining
24 to family life of victim. I'm not sure I understand that.

25 There's no self-defense suggestion here, is

1 there?

2 MS. THOMAS: Your Honor, that's
3 Ms. Wildeveld's.

4 MS. WILDEVELD: And, Your Honor, I'll submit
5 on that.

6 THE COURT: Well, I didn't understand the
7 relevancy. Certainly, if you had a self-defense argument,
8 which I would think it's remotely possible here. So
9 seeing no relevance I'm going to deny it.

10 Motion to disclose exculpatory evidence
11 pertaining to the impact of the defendant's execution upon
12 the victim family members. I had to stretch with my clerk
13 to figure out what that means, and I'm not sure if I know
14 yet.

15 Can you enlighten me, Ms. Wildeveld?

16 MS. WILDEVELD: Your Honor, again, that's
17 another motion that Mr. Whipple has.

18 If I may address the Court sitting down?

19 THE COURT: Are you in pain and you want to
20 sit down?

21 MR. STEIN: She's pregnant.

22 THE COURT: Oh, I thought we had already
23 resolved that. Go ahead.

24 MS. WILDEVELD: I have other issues going
25 on, Your Honor. Mr. Whipple is currently in a death

1 penalty trial in the Lozano matter. And in that case the
2 victim's family members have addressed the fact that they
3 are against the death penalty and do not wish Mr. Lozano
4 to receive the death penalty.

5 So it would be the impact of the victim's family
6 if the defendant was to receive the death penalty. If
7 they are against the death penalty, we would like to know.
8 If they don't want him to receive the death penalty --

9 THE COURT: Who is overseeing that case?
10 What Judge?

11 MS. WILDEVELD: Adair.

12 MR. DIGIACOMO: But it was Judge McGroarty
13 when this information was found out.

14 THE COURT: Was there another trial you
15 mean?

16 MR. DIGIACOMO: He was granted a new trial
17 after the verdict. After the defendant was convicted,
18 after he received the death penalty he was granted a new
19 trial. The Supreme Court overturned it and Judge Adair is
20 handling the retrial.

21 THE COURT: What I'm asking is, what Judge
22 allowed the family members to get on the stand and say
23 they were against the death penalty?

24 MR. DIGIACOMO: I believe it was Judge
25 McGroarty.

1 THE COURT: Well, that's not going to happen
2 here, so I can tell you that.

3 Is that what you're concerned about?

4 MS. WILDEVELD: Well, we would like to know
5 if they are going to get the death penalty, we would like
6 to know that. The family members are all over the news.

7 THE COURT: If you want to talk to them and
8 they'll talk to you, they can discuss it when you're
9 talking. As far as the family members coming up here and
10 saying they're against the death penalty, I'm not inclined
11 to think that's proper.

12 What's the State's position?

13 MR. DIGIACOMO: In fact, the victim's family
14 cannot discuss what the appropriate penalty for the
15 defendant is. It's the steadfast purpose of the law.

16 THE COURT: We could get all the friends and
17 everybody just parade half the community up here and say
18 what do you think about the death penalty in this case,
19 right or wrong, good or bad, and that's not going to
20 happen.

21 But I'm not sure I'm understanding what you're
22 actually asking here. If you want to inquire of these
23 family members and they'll talk to you, then I'm not going
24 to try and prevent it.

25 MR. DIGIACOMO: They want me to inquire and

1 then me being forced to disclose my discussions with them
2 and, ultimately --

3 THE COURT: That's denied.

4 Motion to release juvenile records. I understand
5 that Mr. Taiopu, we don't have any juvenile records, or
6 they don't exist? Or what's the status there?

7 MR. DIGIACOMO: None of that. I'm assuming
8 he has juvenile records because his father at a hearing
9 testified that he had juvenile arrests.

10 Mr. Taiopu is not a witness at this time, so I
11 can't imagine what the possible basis for them to get
12 sealed juvenile records of a person who is not a witness.
13 He's a defendant. There's nothing about those records
14 that are relevant.

15 But I also thought these are one of those we
16 would pass to next Friday. I mean, I could get my hands
17 on them, I don't have my hands on them. And I can't
18 imagine what would be relevant inside of them.

19 If, obviously, he becomes a witness I'll
20 certainly submit them, just like Mr. Zone's, to chambers
21 and see if there's anything in there you want to disclose,
22 just like I'll submit Mr. Zone's.

23 Because I've reviewed Mr. Zone's and I can tell
24 you there's nothing in there that needs to be disclosed.
25 And I'll certainly give them to the Court for to you make

1 that determination.

2 THE COURT: I'm sorry. This is one of those
3 that's supposed to be passed.

4 MS. WILDEVELD: Your Honor, I'm working on
5 four hours of sleep here. I just had a baby three weeks
6 ago.

7 THE COURT: I apologize. That's true of the
8 next two as well.

9 Motion to dismiss death penalty due to federal
10 due process violations.

11 Is that Floyd versus State that addresses this
12 issue, does it not?

13 MR. DIGIACOMO: I don't know which one is
14 the original appeal on this calendar.

15 THE COURT: Well, it says --

16 MR. DIGIACOMO: It's Floyd, that's correct.

17 THE COURT: -- federal due process
18 violation. Have you seen that?

19 MS. WILDEVELD: Again, Your Honor, we will
20 submit it.

21 MR. DIGIACOMO: They're protecting the
22 record, Judge.

23 THE COURT: Well, I think that Floyd v.
24 State addresses that issue. It is denied.

25 And we'll skip the next and go down to motion to

1 preclude use of peremptory challenges. I don't quite
2 understand that, but peremptory challenges are governed by
3 statute.

4 Are you saying the State shouldn't get peremptory
5 challenges and the Defense should?

6 MS. THOMAS: No. I'm saying in that one
7 that we should correctly state that the statute is
8 unconstitutional. A number of U.S. Supreme Court Justices
9 now and other Courts have basically said that the
10 peremptory challenge system doesn't work, at least the
11 Batson violation and other improper denials of jurors,
12 sitting on jurors that, essentially, we should have
13 for-cause challenges only and no peremptories.

14 THE COURT: I don't know that I disagree.
15 But are you going to waive your peremptories if the State
16 waives theirs?

17 MS. THOMAS: Yes, Your Honor.

18 MR. DIGIACOMO: Judge, they only need to get
19 one person. I need all the 12; absolutely not.

20 THE COURT: Well, of course, the statutes
21 that govern this you're the one to challenge it on appeal.

22 MS. THOMAS: I hope to win, Your Honor.

23 THE COURT: I might take this under
24 advisement. It has a certain appeal to it. As at present
25 I think the law would preclude this, and I'm going to deny

1 it.

2 Motion to prohibit use of imputed aggravating
3 circumstances. I'm not quite sure I understand that.

4 MS. THOMAS: Your Honor, essentially that
5 motion is saying that they shouldn't be applying
6 aggravators to Ms. Espindola or to Mr. Hidalgo based upon
7 the conduct of the other one, or as any other defendants.

8 As I understand the State's position, they're
9 saying they don't intend to do that so it appears that
10 this may be moot.

11 MR. DIGIACOMO: We filed a Notice of Intent
12 to Seek the Death Penalty and listed out the aggravating
13 circumstances that apply to specifically Ms. Espindola,
14 and specifically to Mr. Hidalgo, and specifically to
15 Mr. Counts, and they're different, and specifically to
16 Mr. Carroll, and they're different.

17 So I don't intend to say because Mr. Carroll did
18 something at some point in his history and had a robbery
19 conviction, that somehow that aggravated the murder as to
20 Ms. Espindola.

21 So I don't understand exactly what it is they
22 were asking either, and I don't think that would be
23 appropriate.

24 MS. THOMAS: Your Honor, essentially we're
25 saying the aggravators should not be applied based upon a

1 conspiracy theory or aiding and abetting theory, that it
2 should be a direct participant.

3 THE COURT: I agree. I think you agree,
4 don't you?

5 MR. DIGIACOMO: Yes. I don't disagree with
6 that statement whatsoever. You know, if they didn't
7 solicit the murder of Taiopu or Zone, then they wouldn't
8 have an aggravator to apply to them.

9 So if Hidalgo gets convicted of that but
10 Espindola doesn't, let's say, I can't do that aggravator
11 against Ms. Espindola. If the other one is the money one
12 but, ultimately, that statute says that if the money was
13 to be provided to them or any other person, then it's
14 applicable against them.

15 As long as I can establish that money was
16 provided as part of the homicide, then the aggravator
17 applies to all of them.

18 MR. DRASKOVICH: If I could just briefly be
19 heard. Judge, as you recall in April we had a very
20 lengthy argument concerning the improper seeking of the
21 death penalty on the part of the State.

22 We had argued the motion and Your Honor had taken
23 it under advisement, I believe. A number of these issues
24 could be cleared up if the Court is prepared to give a
25 ruling on that motion we addressed a while back.

1 THE COURT: Well, granted, if the death
2 penalty is allowed then this is moot.

3 Is that what you're saying?

4 MR. DRASKOVICH: Yes.

5 THE COURT: Let's go ahead and talk about
6 this, and we're just about finished argument. I don't
7 understand why there should be any imputed aggravating
8 circumstances.

9 The example my clerk gave me was that
10 Mr. Counts, I believe, was on probation or parole.

11 MR. DIGIACOMO: Correct.

12 THE COURT: And that is an aggravator and
13 that would not apply to anyone that isn't on probation or
14 whatever.

15 Why is that complicated? Is there some reason to
16 think that's going to be confused by the jurors?

17 MS. THOMAS: Your Honor, essentially, if the
18 State were proceeding under an aiding or abetting or
19 conspiracy theory to find either defendant guilty of the
20 solicitation, for example, thereafter then based upon
21 direct conduct then that would apply.

22 MR. DIGIACOMO: So if they are -- the
23 aggravator is that they were convicted of a crime of
24 violence. Once they're convicted that's no
25 longer -- there's no conspiracy or aiding or abetting or

Cite as: Redeker v. Dist. Ct.

122 Nev. Adv. Op. No. 14

February 9, 2006

IN THE SUPREME COURT OF THE STATE OF NEVADA

No. 45083

ARIE R. REDEKER,

Petitioner,

vs.

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

Respondents,

and

THE STATE OF NEVADA,

Real Party in Interest.

Original petition for a writ of mandamus or prohibition.

Petition granted in part.

Philip J. Kohn, Public Defender, and Charles A. Cano and Scott L. Coffee, Deputy Public Defenders, Clark County, for Petitioner.

George Chanos, Attorney General, Carson City; David J. Roger, District Attorney, and Steven S. Owens, Chief Deputy District Attorney, Clark County, for Real Party in Interest.

BEFORE THE COURT EN BANC.

OPINION

PER CURIAM:

Petitioner Arie R. Redeker faces a capital murder trial. His petition for a writ of mandamus or prohibition challenges primarily the alleged aggravating circumstance that he was convicted of a felony involving the use or threat of violence to the person of another, based on his prior conviction of second-degree arson. Because this petition raises an important issue of law which requires clarification, we grant mandamus relief.

FACTS

In December 2002, the State charged Redeker by information with murder with the use of a deadly weapon, alleging that he strangled his girlfriend Skawduan Lannan to death with a ligature on October 22, 2002. Later that month, the State filed a notice of intent to seek the death penalty, alleging two aggravating circumstances: the murder was committed by a person (1) who was under sentence of imprisonment and (2) who had been convicted of a felony involving the use or threat of violence to the person of another. In regard to the second aggravator, the notice stated that Redeker had been convicted of second-degree arson for setting fire to his and Lannan's residence in Las Vegas in

<http://www.leg.state.nv.us/scd/122NevAdvOpNo14.html>

3/15/2006

June 2001. The notice gave no facts regarding the nature of the crime, simply stating: "The State will rely on the police reports, witness statements, charging documents, Judgment of Conviction, Guilty Plea Agreement and PreSentence Investigation Report associated with case C178281 to establish this aggravator."

In December 2003, Redeker moved to strike the aggravating circumstances, arguing in part that second-degree arson was not a "felony involving the use or threat of violence to the person of another," as required by NRS 200.033 (2)(b). The next month the district court heard argument on the motion. Defense counsel argued that the court should not look to the facts underlying the prior conviction. The prosecutor argued the contrary and informed the court that Redeker made threats upon Lannan's life before setting their house on fire. The prosecutor also argued that the arson involved a threat to neighboring houses. After hearing the argument, the district court denied the motion to strike.

On November 15, 2004, Redeker moved to dismiss the State's notice of intent to seek the death penalty for failure to present the aggravating circumstances for a probable cause determination. The motion also contended that the State's notice failed to conform to SCR 250(4)(c) and allege "with specificity the facts on which the state will rely to prove each aggravating circumstance." The district court did not expressly decide the motion, and Redeker filed his instant petition with this court on April 15, 2005. Pursuant to this court's order, the State filed an answer. We then directed the district court to enter a written order resolving Redeker's motion of November 15, 2004. The district court entered an order denying the motion on December 21, 2005.

DISCUSSION

This court may issue a writ of mandamus to compel the performance of an act which the law requires as a duty resulting from an office or where discretion has been manifestly abused or exercised arbitrarily or capriciously.[1] The writ does not issue where the petitioner has a plain, speedy, and adequate remedy in the ordinary course of law.[2] This court considers whether judicial economy and sound judicial administration militate for or against issuing the writ.[3] The decision to entertain a mandamus petition lies within the discretion of this court.[4]

Additionally, this court may exercise its discretion to grant mandamus relief where an important issue of law requires clarification.[5] The instant petition presents such an issue, and therefore we clarify in this opinion the parameters of the evidence that may be relied on to determine if a prior felony involved the use or threat of violence.

Alleging with specificity the facts supporting an aggravating circumstance

On its face the State's notice of intent to seek the death penalty did not satisfy the requirements of SCR 250. SCR 250(4)(c) provides that 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 notice in this case did not allege with specificity any facts to show that Redeker was previously convicted of a felony involving the use or threat of violence to the person of another, the second alleged aggravator.

The notice alleged in pertinent part:

On October 2, 2001, Defendant entered a guilty plea pursuant to the Alford decision to Second Degree Arson in Case C178281. The case arose out of an incident on June 9, 2001, in which Defendant set fire to the residence of Defendant and Skawduan Lannan at 9749 Manheim Lane, Las Vegas, Nevada. The State will rely on the police reports, witness statements, charging documents, Judgment of Conviction, Guilty Plea Agreement and PreSentence Investigation Report associated with case C178281 to establish this aggravator.

The State maintains that this notice "alleges specific facts of the date, guilty plea, title of the criminal offense, case number, victim's name, location of crime and certain supporting documentation." Some facts are specific: the crime is clearly identified by title, date, location, case number, and victim. This would be sufficient if the aggravating circumstance in question was that Redeker had been convicted of second-degree arson. However, the aggravator is that he had been convicted of a felony involving the use or threat of violence to the person of another. None of the alleged facts indicate how the second-degree arson was a crime of violence or threatened violence to the person of another.

A year after filing the notice, the State explained, in its opposition to Redeker's motion to strike the aggravating circumstances, that it considered the crime to be violent because Redeker had made threats against Lannan's life before burning the house. Later, the State also argued that the crime involved the threat of violence because the fire

endangered neighboring homes. These specific facts are not alleged in the notice. Instead, to explain and provide factual support for the alleged aggravator, the State has relied on the documents, such as police reports, named in its notice. But 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.

Nevertheless, the State contends that any failure on its part to comply with SCR 250 "is not of constitutional moment" because Redeker had full knowledge and understanding of the specific facts that the State will rely on to prove this aggravating circumstance. Therefore, the State argues that it should be allowed to amend the notice "in the same manner as it is permitted to amend an information or indictment." The State makes this argument at the same time that it flatly rejects Redeker's contention that aggravators should be charged in an indictment or information after a grand jury or justice court has determined probable cause.[6] Thus, the State proposes that we allow it to evade the charging requirements of SCR 250 but enjoy the benefits, while avoiding the burdens, of the indictment/information process. We reject this proposal.

Prior conviction of a felony involving the use or threat of violence to the person of another

In opposing Redeker's motions below and answering Redeker's petition here, the State has made specific factual allegations regarding the prior-violent-felony aggravator. Even if these allegations had been properly charged in the notice of intent to seek death, we conclude that they do not support the aggravator.

NRS 200.033(2) provides in relevant part that a first-degree murder may be aggravated if it 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." The State argues that Redeker's conviction of second-degree arson involved a threat of violence to his girlfriend Lannan, the eventual murder victim. Two questions arise in considering this argument. First, what evidence may be relied on to determine if a prior felony involved the use or threat of violence to the person of another? Second, does the evidence here show that Redeker's arson involved such violence or its threat?

The first question is one of law, which this court has not previously addressed. NRS 200.033(2)(b) itself does not precisely define or specifically enumerate offenses that involve the use or threat of violence, nor does it indicate what evidence is appropriate to consider in determining which offenses fit into this category. Redeker contends that only the statutory elements of an offense may be considered to determine whether it involved violence.

Redeker was convicted of violating NRS 205.015, which provides in pertinent part that "[a] person who willfully and maliciously sets fire to or burns . . . any abandoned building or structure, whether the property of himself or of another, is guilty of arson in the second degree." He points out that setting fire to an abandoned building is a crime against property that entails no element of use or threat of violence to the person of another.

However, the State has cited three judicial decisions that expressly permit the consideration of evidence underlying a prior felony conviction to determine whether the offense involved violence. The Supreme Court of North Carolina has held "that the involvement of the use or threat of violence to the person in the commission of the prior felony may be proven or rebutted by the testimony of witnesses and that the state may initiate the introduction of this evidence." [7] In upholding the consideration of facts alleged in an affidavit of complaint, the Supreme Court of Tennessee stated:

In determining whether the statutory elements of a prior felony conviction involve the use of violence against the person . . . , we hold that the trial judge must necessarily examine the facts underlying the prior felony if the statutory elements of that felony may be satisfied either with or without proof of violence.[8]

The Supreme Court of Florida ruled similarly regarding consideration of information from a presentence investigation. [9]

Redeker and the State have also cited other judicial decisions that consider evidence underlying prior offenses but do not address whether reliance on such evidence is appropriate or should be limited in any way.[10] Among these is our own decision in Dennis v. State, where we concluded that the evidence showed that Dennis's prior felonies involved the use or threat of violence to the person of another.[11] We noted that "the State presented police reports, certified copies of the judgments of conviction from the State of Washington, and testimony from victims" to prove that a second-degree arson committed by Dennis involved the use or threat of violence to the person of another.[12] (The

evidence showed that Dennis first set [REDACTED] to a home occupied by someone he [REDACTED] a dispute with and then menaced arresting officers with a knife.)[13]

On the other hand, the Supreme Court of Arizona concluded that a sentencer may not look beyond the statutory elements of an offense in determining whether it involved violence or the threat of violence.[14] That court concluded that to constitute an aggravating circumstance, "the prior conviction must be for a felony which by its statutory definition involves violence or the threat of violence on another person." [15] The court explained:

This reading of the statute guarantees due process to a criminal defendant. Evidence of a prior conviction is reliable, the defendant having had his trial and exercised his full panoply of rights which accompany his conviction. However, to drag in a victim of appellant's prior crime to establish the necessary element of violence outside the presence of a jury, long after a crime has been committed, violates the basic tenets of due process.[16]

The Arizona Supreme Court also concluded that a felony based on recklessness did not constitute one involving the use or threat of violence on another person.[17] This conclusion furthered the legislative intent that aggravating circumstances "narrow the class of death-eligible defendants." [18]

Redeker also cites Shepard v. United States, a recent decision by the United States Supreme Court that maintains a middle position as to what evidence a court can look to in determining whether a prior burglary was "generic," or "violent," under a federal sentencing provision.[19] Shepard relied on the Court's decision in Taylor v. United States, [20] which held that the federal Armed Career Criminal Act (ACCA) generally prohibits a sentencing court "from delving into particular facts disclosed by the record of conviction, thus leaving the court normally to 'look only to the fact of conviction and the statutory definition of the prior offense.'" [21] The Court reached this conclusion because it was generally supported by the language and legislative history of the statute and because of "the practical difficulties and potential unfairness of a factual approach." [22] But the Court recognized a narrow exception for burglary convictions.[23] "[A] court sentencing under the ACCA could look to statutory elements, charging documents, and jury instructions to determine whether an earlier conviction after trial was for generic burglary." [24]

In Shepard, the Court considered a prior burglary conviction based on a guilty plea. It held that under the ACCA a sentencing court "determining the character of an admitted burglary is generally limited to examining the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented" and cannot "look to police reports or complaint applications." [25]

We hereby adopt the approach taken by the Supreme Court in Taylor and Shepard in regard to determining whether a felony involved violence or its threat under NRS 200.033(2)(b). The language of NRS 200.033(2)(b)—"regarding a prior felony "involving" the use or threat of violence—does not restrict the determination of the character of a felony simply to consideration of its statutory elements.[26] On the other hand, the statute does not indicate that no limits should be placed on the sort of evidence that can be considered in making that determination. We believe that the approach in Taylor and Shepard answers the concerns about due process and narrowing of death eligibility identified by the Arizona Supreme Court, as well as the practical difficulties and potential unfairness of a factual approach recognized by the United States Supreme Court.

In this case, Redeker did not go to trial, so under Shepard we should look to the statutory definition, charging document, written plea agreement, transcript of the plea canvass, and any explicit factual finding by the district court to which Redeker assented to determine if the arson involved the use or threat of violence. The record before us does not contain the plea canvass, but Redeker pleaded guilty under North Carolina v. Alford [27] without admitting his guilt, so it is apparent that he did not assent to factual findings by the district court establishing violence or threats. Nor does the statutory definition of second-degree arson include any element of use or threat of violence to the person of another. The criminal information and written plea agreement are in the record. The information charges that Redeker committed second-degree arson on June 9, 2001, in that he did

wilfully, unlawfully, maliciously and feloniously set fire to, and thereby cause to be burned, a certain dwelling house, located at 9749 Manheim Lane, Las Vegas, Clark County, Nevada, said property being then and there the property of SKAWDUAN

LANNAN, by use of open flame and flammable and/or combustible materials, and/or by manner and means unknown.

The information thus includes no allegations that Redeker used or threatened violence against anyone. And the plea agreement simply refers to the information and makes no factual allegations of its own regarding the arson. Consequently, the appropriate evidence does not show that Redeker was convicted of a felony "involving the use or threat of violence to the person of another," as required by NRS 200.033(2)(b).

Given this court's decision in Dennis, [28] it was understandable that the district court looked beyond the evidence permitted by Shepard. However, as remarked above, although in Dennis we considered evidence underlying the prior felony to determine if it was violent, we were not presented with and did not address the issue which we now decide. But even if the district court's consideration of the other evidence alleged by the State had been proper here, we conclude that the district court abused its discretion because even those allegations do not support charging the arson as an aggravating circumstance under NRS 200.033(2)(b). [29] Given the plain language of the statute and our obligation to ensure that aggravators are not applied so liberally that they fail to perform their constitutionally required narrowing function, set forth by the United States Supreme Court, [30] a reasonable interpretation of the evidence here does not permit finding that the crime involved the use or threat of violence to the person of another.

In a statement Lannan wrote for police after the arson, she said that Redeker threatened her life on June 7, 2001, two days before the arson, and she and her children immediately moved out of their house to stay with her mother. Lannan also wrote that Redeker phoned her on June 9 and threatened her again. According to a fire investigator's report, Redeker's mother said that he made "a threat of violence to Ms. Lannan as well as a threat to burn the property," apparently in a phone call to his parents on June 9.

During the hearing on Redeker's motion to strike the aggravator, the prosecutor told the district court that "it's the State's theory that . . . the arson was committed . . . for the purpose of either intimidating this victim or perhaps killing her in the home itself. We don't know whether the defendant was aware of the victim being in the house at the time or not." The prosecutor also argued that Redeker "put this entire neighborhood in danger." In denying the motion, the district court stated:

[I]t would seem that a threat was made involving arson and then, sure enough, arson occurred, and there is a probability—certainly not absolute certainty, but there's certainly an arson—is fraught with the possibility of somebody being injured and so I'm going to conclude at this juncture that this aggravator would be allowed.

The arguments of the prosecutor and reasoning of the district court are faulty. First, the record does not support the prosecutor's suggestion that Redeker did not know whether Lannan was in the house when he set it on fire. The evidence shows that Lannan was living in her mother's house at the time and that Redeker called her there not long before he set the house on fire. Moreover, the fire investigation showed that Redeker had poured gasoline in the garage, the living room/kitchen, and master bedroom of the house when he set it on fire. It is evident that he knew the house was not occupied.

Second, the prosecutor argued and the district court noted that arson carries the possibility that other people may be injured, but a risk of harm to other people is not equivalent to a threat of violence to a person. The record shows that at most the arson created a potential of harm to others; this does not constitute a "threat" under NRS 200.033(2)(b). [31] In criminal law, a threat requires actual intent: "A threat can include almost any kind of an expression of intent by one person to do an act against another person, ordinarily indicating an intention to do harm." [32] There is no evidence that Redeker intended the arson to result in harm to anyone's person. And even if he intended the arson to intimidate Lannan, it still did not entail a threat of violence to the person. [33]

Finally, the evidence shows that Redeker made express threats against Lannan's life, but in this case these threats were distinct from the arson. Both the threats and the arson reflected his animus toward Lannan, but that does not mean that the arson "involved" the threats. We believe that other factual scenarios of second-degree arson could support such involvement, if shown by evidence permitted under Taylor and Shepard. By way of illustration, if Lannan had been at the house, Redeker confronted her and threatened to harm her, she fled, and he then set the house on fire, then the arson would have involved a threat of violence. Or if Lannan had been in the house and Redeker knew that and set the house on fire with the intent to harm her personally, then the arson would have involved a threat of

violence.[34]

Here, by contrast, the arson did not rely on or constitute a threat against the person of Lannan. Even if the allegations made in the police and fire reports could be considered, allowing the aggravator on the facts alleged in this case would so extend the aggravator that any felony property crime committed by someone who also made threats of violence against the owner (or user or occupant) of the property could be construed as a felony involving the threat of violence to the person of another. Based on this stance, if Redeker had made threats against Lannan on the phone and then stolen her car with no one else present, the theft would be considered a felony involving the threat of violence to the person of another. We conclude that the aggravator cannot be applied so broadly. The statutory language indicates that the felony itself must involve the use or threat of violence, not that the defendant made threats of violence and also committed a felony.

CONCLUSION

The State's notice of intent to seek death did not comply with SCR 250(4)(c), failing to allege with specificity any facts showing that Redeker's arson involved the use or threat of violence to the person of another. Moreover, the facts alleged in this case do not support that aggravator. We conclude that mandamus relief is warranted and grant the petition in part. We direct the clerk of this court to issue a writ of mandamus instructing the district court to strike the alleged aggravating circumstance that Redeker was convicted of a felony involving the use or threat of violence to the person of another. We also lift the stay of proceedings below imposed by this court on April 29, 2005.

*****FOOTNOTES*****

- [1] See NRS 34.160; Round Hill Gen. Imp. Dist. v. Newman, 97 Nev. 601, 603-04, 637 P.2d 534, 536 (1981).
- [2] NRS 34.170; Hickey v. District Court, 105 Nev. 729, 731, 782 P.2d 1336, 1338 (1989).
- [3] See State v. Babayan, 106 Nev. 155, 175-76, 787 P.2d 805, 819 (1990).
- [4] Hickey, 105 Nev. at 731, 782 P.2d at 1338.
- [5] State v. Dist. Ct. (Epperson), 120 Nev. 254, 258, 89 P.3d 663, 665-66 (2004).
- [6] We have declined to address this contention by Redeker.
- [7] State v. McDougall, 301 S.E.2d 308, 321 (N.C. 1983).
- [8] State v. Sims, 45 S.W.3d 1, 11-12 (Tenn. 2001).
- [9] See Brown v. State, 473 So. 2d 1260, 1266 (Fla. 1985).
- [10] See Com. v. Christy, 515 A.2d 832, 840-41 (Pa. 1986); State v. Moore, 614 S.W.2d 348, 351 (Tenn. 1981); Hopkinson v. State, 632 P.2d 79, 170-71 (Wyo. 1981); Hadley v. State, 575 So. 2d 145, 156-57 (Ala. Crim. App. 1990).
- [11] 116 Nev. 1075, 1082-83, 13 P.3d 434, 438-39 (2000).
- [12] Id. at 1082, 13 P.3d at 438.
- [13] Id. at 1082, 13 P.3d at 439.
- [14] State v. Gillies, 662 P.2d 1007, 1018 (Ariz. 1983); see also State v. McKinney, 917 P.2d 1214, 1228 (Ariz. 1996).
- [15] Gillies, 662 P.2d at 1018.
- [16] Id.
- [17] See McKinney, 917 P.2d at 1228.
- [18] Id. The Arizona Legislature has since amended the statute, eliminating this issue; the statute now mandates finding an aggravating circumstance when a defendant was previously convicted of a "serious offense," which is defined by a list of specific crimes. See id. at 1229 n.6; State v. Martinez, 999 P.2d 795, 806 (Ariz. 2000).
- [19] 544 U.S. ___, 125 S. Ct. 1254 (2005). Under the federal statute, a burglary is a violent felony only if it is "generic burglary," i.e., "committed in a building or enclosed space . . . , not in a boat or motor vehicle." Id. at ___, 125

S. Ct. at 1257.

[20] 495 U.S. 575 (1990).

[21] Shepard, 544 U.S. at ___, 125 S. Ct. at 1258 (quoting Taylor, 495 U.S. at 602).

[22] Taylor, 495 U.S. at 600-01.

[23] Shepard, 544 U.S. at ___, 125 S. Ct. at 1258.

[24] Id. at ___, 125 S. Ct. at 1257.

[25] Id. at ___, 125 S. Ct. at 1257.

[26] Cf. Taylor, 495 U.S. at 600.

[27] 400 U.S. 25 (1970).

[28] See 116 Nev. at 1082-83, 13 P.3d at 438-39.

[29] The parties have cited as persuasive authority judicial decisions in cases that resemble but are not squarely on point with this case. Compare People v. Stanley, 897 P.2d 481, 517 (Cal. 1995) (upholding admission of evidence of a car arson as an offense that "involved an implied threat of violence against a person"), and Brown, 473 So. 2d at 1266 (upholding attempted second-degree arson as a felony involving the use or threat of violence to the person because the presentence investigation showed the arson was "based on a violent incident"), with State v. Franklin, 969 S.W.2d 743,

5 (Mo. 1998) (concluding that a conviction of felonious injury to a building based on dynamiting a synagogue was not a "serious assaultive" conviction because it did not involve assault upon persons), Moore, 614 S.W.2d at 351 (concluding that evidence was insufficient to show that an arson of an empty dwelling involved the use or threat of violence to the person), and Hadley, 575 So. 2d at 156-57 (concluding that an attempted arson did not involve the use or threat of violence to the person where a suicidal defendant's actions did not constitute a threat of violence to arresting officers or to his mother in a nearby house). Also, as already noted, this court considered the arson in Dennis to involve a threat of violence to the person where Dennis set fire to a home occupied by someone he had a dispute with and then menaced arresting officers with a knife. 116 Nev. at 1082, 13 P.3d at 439.

[30] See, e.g., Zant v. Stephens, 462 U.S. 862, 878 (1983) ("[S]tatutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty."); Arave v. Creech, 507 U.S. 463, 474 (1993) (stating that a statutory aggravating circumstance must provide a principled basis for distinguishing those who deserve a death sentence from those who do not).

[31] Cf. Christy, 515 A.2d at 841 ("It is the 'threat of' and not the 'potential for' violence that brings a crime into this category [of a felony involving the use or threat of violence to the person].").

[32] Hadley, 575 So. 2d at 156 (emphases added).

[33] Cf. Hopkinson, 632 P.2d at 171 ("'Intimidate' and 'threat of violence to the person' are not necessarily synonymous.").

[34] This scenario resembles the one in Dennis. See 116 Nev. at 1082, 13 P.3d at 439.

EXHIBIT "9"

Document1

DISTRICT COURT
CLARK COUNTY, NEVADA

FILED IN OPEN COURT
MAR 21 2006
SHIRLEY B. PARRAGUIRRE, CLERK
Linda Skinned
LINDA SKINNED DEPUTY

THE STATE OF NEVADA,

Plaintiff,

vs.

KENNETH COUNTS aka COUNTS II,
KENNETH JAY HIDALGO, LUIS ALONSO
aka HIDALGO III, ANABEL ESPINDOLA,

Defendants.

No. C212667
Dept. XIV

ORIGINAL

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

March 17, 2006
9:30 a.m.
Department XIV

APPEARANCES:

For the State:
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MR. GIANCARLO PESCI
Deputy District Attorneys

For the Defendant:
SEE INDEX FOR COUNSEL

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

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MR. BRETT WHIPPLE

FOR DEFENDANT LUIS A. HILDAGO, III:

MR. ROBERT DRASKOVICH

MR. STEPHEN STEIN

FOR DEFENDANT ANABEL ESPINDOLA:

MS. JONELL THOMAS

MR. CHRISTPHER ORAM

FOR DEFENDANT DEANGELO CARROLL:

MR. DAYVID FIGLER

MR. DANIEL BUNIN

FOR DEFENDANT JASON TAOIPU:

MR.. TERRENCE JACKSON

J.A. D'Amato, CCR#17

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

vs.

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MS. JONELL THOMAS

MR. CHRISTOPHER ORAM

FOR DEFENDANT DEANGELO CARROLL:

MR. DAYVID FIGLER

MR. DANIEL BUNIN

FOR DEFENDANT JASON TAOIPU:

MR. TERRENCE JACKSON

THE COURT: C212667, State versus Kenneth
Counts, Luis A. Hidalgo, III and Anabel Espindola.

Certainly the defendants will remain
where they are. The matter is on for various motions
proffered by counsel.

I would indicate Kenneth Counts is
present, in custody, with Ms. Wildeveld representing
the Defendant.

Mr. Whipple is not here today?

MS. WILDEVELD: No, Your Honor.

THE COURT: Mr. Hidalgo is --

MR. DRASKOVICH: He's present.

THE COURT: -- again, in custody, and
Mr. Draskovich and Mr. Stein present as counsel.

MR. STEIN: Yes.

THE COURT: Anabel Espindola is present,
in custody, and present is Mr. Oram and Ms. Jonell
Thomas present as counsel.

We have Mr. Figler here present
representing Mr. Carroll who is --

MR. FIGLER: Not present.

I guess it's an issue we can address at
some point. For some odd reason, Mr. Carroll has been
left out of a number of loops.

I think it's a matter of miscommunication

as far as certain dates and notice from other counsel.
We typically get stuff from the State, but we haven't
been getting it from any of the co-defendants.
We're here today. Mr. Carroll is not
present. I think we can probably waive his
appearance.

If we need to join in certain things,
hopefully Your Honor would give us the opportunity to
do that. We're kind of unaware that we should be
going forward today, as well.

I apologize to the Court.

THE COURT: Mr. Bunin, are you
co-counsel?

MR. BUNIN: Yes.

THE COURT: You're so recognized.

I'll tell you the problem here.

Mr. Figler, am I correct in my assumption
that you have not officially joined, on behalf of your
client, in these motions?

MR. FIGLER: That's correct.

THE COURT: That's the problem. We'll go

into it further.

Mr. Jackson is here representing --

MR. JACKSON: I represent Mr. Taoipu. I
was asked by your secretary to be here, although his

1 case is separate. He was in a separate preliminary
2 hearing and he hasn't been joined with this group,
3 although it's set on the same date.

4 It's out of the same series of events.
5 In order to remove any confusion, I did file a
6 severance motion which isn't on calendar today. It's
7 on calendar for two weeks from today.

8 I've filed another motion which is on
9 calendar the same day. I think it's the 27th.

10 What I'm going to ask the court today is
11 that we set a different date from the 27th and have an
12 evidentiary hearing, because I start a federal jury
13 trial the 27th that will last for about a week.

14 Also I think the State would want time to
15 respond to my motions. Mr. Taoipu's case is separate
16 from these individuals here in Court today because it
17 was out of a separate information and although it set
18 the same date I think it's probably -- the State has
19 no objection to it being tried separately at this
20 time.

21 In any event, I'd like --
22 THE COURT: I guess mine is the only
23 objection. Hold on.

24 Is it true Mr. Jackson's client has a
25 separate case number?

MR. DIGIACOMO: He has the same case.

What happened is Mr. Jackson's client
fled to California. There was a warrant issued for
him and he wasn't picked up until after the
Informations were filed against the other four
defendants.

He had a preliminary hearing in Boulder
City and when he was bound over in Boulder City the
clerk of the court gave him the same case number,
C212667.

He was arraigned down in the lower level
and his trial date was set for the exact same date,
July 24th, as the other four co-defendants.

Mr. Jackson has filed the motion to sever
and I'm not sure if it should be his motion to sever
or our motion to accommodate.

I was going to talk to Mr. Jackson about
that because I made representations during Mr. Counts'
motion to sever that I wasn't looking to sever.

It would be the other co-defendants who
actually have the grounds to request a severance.

THE COURT: Did say you were or were not
looking for severance?

MR. DIGIACOMO: I was looking to
consolidate them. I was going to try Mr. Taoipu

1 separately from the other co-defendants, only because
2 he gives a detailed confession which would implicate
3 the other three co-defendants, committing a Bruton
4 problem.

5 Based on that, I wasn't going to move to
6 consolidate those cases.

7 THE COURT: You have the benefit of
8 knowing the facts.

9 Certainly, Mr. Jackson, we'll try to
10 accommodate your schedule. You're right about the
11 27th of March being the date.

12 What's your situation?

13 MR. JACKSON: I start a jury trial in
14 front of Judge George in Federal Court on March 27th.

15 THE COURT: How long?

16 MR. JACKSON: A week or two weeks after
17 that I should be available, if state wants time to
18 respond to the motions.

19 I filed a motion to suppress yesterday in
20 this case, the statement of -- any time in April for
21 an evidentiary hearing.

22 THE COURT: The Motion to Suppress, will
23 it be a lengthy matter, the Motion to Suppress?

24 MR. JACKSON: Probably an evidentiary
25 hearing, take a half hour or so. After that there may

1 be further Points & Authorities.

2 THE COURT: Two, three weeks after this
3 date?

4 MR. JACKSON: Some time in April we could
5 have an evidentiary hearing. Probably the first or
6 second week in April would be time for an evidentiary
7 hearing.

8 MR. DIGIACOMO: I would have to read the
9 motion. I just got handed it this morning. I haven't
10 read it through.

11 I have to check the preliminary hearing
12 transcript. We may have a factual predicate at the
13 preliminary hearing because we put in the statement.

14 I know we addressed his custody status
15 and the Miranda issues and everything.

16 We may be able to submit the transcript
17 and not have an evidentiary hearing with testimony.
18 We've already had testimony on this issue which the
19 Court could rely upon.

20 Maybe we should set it over for an
21 evidentiary hearing and we'll get a response in, and
22 if the Court determines you don't need to have it --
23 do we want to have argument, first, before we decide
24 we need to have an evidentiary hearing?

25 I don't want to waste the court's time.

1 THE COURT: Let's set it with an eye
2 towards an evidentiary hearing. If we don't have to
3 have evidence --
4 MR. DIGIACOMO: Fine.
5 MR. JACKSON: It may be a 10 minute
6 hearing.
7 THE COURT: May be a half hour. It won't
8 be an all day evidentiary hearing.
9 Is mid April agreeable?
10 MR. JACKSON: That's fine.
11 MR. DIGIACOMO: Fine, judge.
12 THE CLERK: April 10th, which is a Monday.
13 MR. DIGIACOMO: Can we do it on a Friday
14 morning?
15 THE COURT: What's that Friday look
16 like?
17 MS. CLERK: The 14th you have an
18 evidentiary hearing at 9:00 o'clock. State versus
19 Edward Jones.
20 MS. THOMAS: Part two of our evidentiary
21 hearing on the death case.
22 THE COURT: What's the week after that?
23 THE CLERK: Another evidentiary hearing,
24 State versus Justin Healey. Mr. Fumo is counsel.
25 THE COURT: Is that a writ?

1 done here effects each other.
2 MR. FIGLER: I've spoken with the
3 co-defendants. I think there will be better
4 communication with regard to future motions for
5 certain. I don't blame them.
6 I think it's a matter of what you're
7 saying. It's just not there.
8 THE COURT: You're welcome to be here
9 certainly to observe and we understand that you have.
10 MR. FIGLER: We're not precluded from
11 filing anything from our own consideration. Well do
12 that in short order, understanding the trial date is
13 coming up in July.
14 THE COURT: Understood. Thank you very
15 much.
16 Let's take these matters in the order
17 that I think they appear.
18 MS. WILDEVELD: Your Honor, we have an
19 issue. I've asked the Court about this before.
20 When Mr. Counts' motions are in Court we
21 wanted only Mr. Counts in Court. We didn't want it
22 convoluted with all the other attorneys present when
23 we're trying to address Mr. Counts' issues.
24 We asked the court to have Mr. Counts,
25 when he files motions, to be separate from Espindola,

1 MS. CLERK: It just says evidentiary
2 hearing.
3 THE COURT: Does that date seem
4 reasonable?
5 MR. JACKSON: Fine.
6 MR. DIGIACOMO: Good for me.
7 THE COURT: The 27th is stricken and
8 we'll set it on the 21st.
9 Are there any other procedural matters?
10 Well, Mr. Figler, and Mr. Jackson, let me
11 explain something.
12 The reason that you've kind of been left
13 out of here I suspect is the clerk's procedure that
14 she's kind of set in place, without any input from the
15 judges, frankly, where, if you aren't on calendar, you
16 don't get on calendar.
17 In other words, we used to have all the
18 defendants on the calendar, whether they had a matter
19 before the Court or not. We had an asterisk as to
20 whether they needed to be in Court, et cetera.
21 Now you could have five defendants as we
22 have here and you wouldn't even know it. That's why
23 you're not on calendar.
24 I'm going to order the five matters will
25 be on calendar, regardless, from now on. Everything

1 Hidalgo, Carroll.
2 THE COURT: What is the legal basis for
3 that request?
4 MS. WILDEVELD: Because Mr. Counts is not
5 involved in other counts that Espindola, Hidalgo and
6 Carroll are involved.
7 The solicitation -- it's our position he
8 was not part of the conspiracy, but yet he's being
9 charged with that.
10 We would ask that Mr. Counts be separate
11 whenever we file motions for him.
12 THE COURT: You have asked.
13 MS. WILDEVELD: Which we were separate
14 until they all got called until today.
15 THE COURT: Your request has been noted.
16 It's been denied. Defendant Hidalgo's motion to
17 strike notice of intent to seek death penalty.
18 I'm not sure I understand it.
19 What is the reasoning behind that?
20 Ms. Wildeveld, are these motions joined
21 in by Mr. Draskovich, Mr. Stein, Mr. Oram and
22 Ms. Thomas, essentially?
23 MR. DIGIACOMO: This one was filed only
24 by Espindola and Hidalgo.
25 MS. WILDEVELD: We would like to see if

13
1 their issues relate to us at all. I believe their
2 aggravators are substantially different than ours.
3 THE COURT: Who would argue this?
4 Ms. Thomas, go right ahead.
5 MS. THOMAS: Defendants Hidalgo and
6 Espindola filed a joint motion to strike the State's
7 notice of intent to seek the death penalty.
8 We've done so on three grounds.
9 First, neither of them killed anyone, nor
10 did they have any intent that anyone be killed. Under
11 the Edmond Tyson Doctrine they cannot be given the
12 death penalty under those circumstances.
13 Second, that there is no legal or factual
14 basis for an aggravating circumstance based upon
15 solicitation for murder.
16 Third, that the State's assertion of
17 pecuniary gain far exceeds the scope of the statutory
18 aggravator and that it's vague and has so many
19 different alternative theories that it fails to
20 provide the specific notice required by Supreme Court
21 Rule 250.
22 Before getting into the specifics of each
23 of those I think it's important to remember what the
24 death penalty is all about.
25 It's not about is behavior bad?

15
1 Again we see that in Redeker where the
2 Court says that the State is not free to come in and
3 amend its aggravating circumstances without some
4 pretty compelling circumstances, and in Bennett versus
5 District Court, where they said even a change in the
6 law, by the Nevada Supreme Court, isn't enough of a
7 cause to come in with more aggravators.
8 I think it's important this issue be
9 considered in light of the Nevada Supreme Court's very
10 clear message that it takes Supreme Court Rule 250
11 seriously, takes notice of intent seriously and it is
12 going to strictly construe aggravating circumstances
13 in a very narrow manner.
14 The first issue we discussed was the
15 Edmond Tyson finding and the specific intent to kill.
16 There is no question here that these two Defendants
17 did not kill anyone.
18 The State has alleged that they could be
19 found guilty because, under the State's theory, which
20 we greatly contest, there was perhaps an agreement
21 that the victim, Mr. Hadlund, be beat.
22 That falls --
23 THE COURT: Excuse me, the State's
24 theory that is he be beaten?
25 Is that the State's theory?

14
1 It's not about should it be punished?
2 It's about do the aggravating
3 circumstances particular to the class not of all
4 people, not of all criminals, but all people convicted
5 of First Degree Murder -- are these the ones who
6 should face death?
7 Does it narrow that class down to a
8 select few?
9 Looking at all of the murder committed in
10 the State in a given year can you say these are the
11 worst, based upon the aggravating circumstances?
12 That concept hasn't always been given a
13 lot of attention in the State of Nevada. Within the
14 last couple of years the Nevada Supreme Court has
15 really started putting teeth into that concept, into
16 that requirement by the U.S. Supreme Court.
17 We see that in cases like McDonnell with
18 the Felony Murder, less likely with the random,
19 without apparent motive aggravator, and most recently
20 in the decision of Redeker very District Court which
21 we filed a notice of supplemental authority about.
22 We also see from the recent cases by the
23 Nevada Supreme Court that the Court is very concerned
24 about the process and requires strict compliance with
25 Supreme Court Rule 250.

16
1 MR. DIGIACOMO: No, judge.
2 THE COURT: I don't think so.
3 MR. DEFENSE: It's set forth both in the
4 Indictment and notice of intent that he be beat and/or
5 killed.
6 THE COURT: All right. Let's say the
7 whole thing. Let's not shave it here and be
8 inaccurate.
9 Go ahead.
10 MS. THOMAS: When you look at the actual
11 evidence in the case that's admissible against these
12 defendants, and in particular in the wire tapped
13 transcripts which have been provided to the Court from
14 the State, and now from defense counsel after many,
15 many hours of trying to find out exactly what those
16 tapes say, the allegation that there was an intent to
17 kill by these two defendants is not supported.
18 They send a man in with a wire, clearly
19 with the intent to implicate them, to get them to say
20 "Yes, we intended to kill him" and as you go through
21 those tapes that is absolutely not supported by the
22 record.
23 You know, certainly I would encourage the
24 Court to listen to those tapes, to review the
25 transcripts. If the Court would desire, we can

17
1 arrange to play those in Court, but --
2 THE COURT: My clerk has indicated --
3 and perhaps you can fill me in, but maybe I don't have
4 a complete picture, but at least at one point in the
5 tape there was a suggestion that the victim be beaten
6 with baseball bats and garbage bags be taken to the
7 scene.

8 I questioned that and my clerk didn't
9 have the answer. Perhaps you do.
10 What were the garbage bags supposed to be
11 for?

12 MS. THOMAS: My understanding -- and
13 perhaps my co-counsel who were at the preliminary
14 hearing could help me out here -- is that the only
15 evidence of bats and garbage bags comes in through the
16 testimony of DeAngelo Carroll -- excuse me --
17 statement of DeAngelo Carroll in a statement to the
18 police, which is wholly inadmissible to these two
19 defendants.

20 MR. ORAM: It's not on the tape.

21 MS. THOMAS: It's not on the tape.

22 They have never agreed to that.

23 MR. DRASKOVICH: There is no record of
24 it. There was no testimony.

25 It was one of five lies that a

1 non-testifying subject of the investigation had said.
2 There is no evidence, whatsoever, that there was
3 baseball bats or bags. It was never found, because
4 they didn't exist.

5 THE COURT: So the taped conversation
6 between Mr. Carroll and Ms. Espindola did not include
7 this baseball bat and plastic bag thing?

8 MR. DIGIACOMO: That's correct. That's
9 true.

10 THE COURT: Appreciate your
11 clarification.

12 MS. THOMAS: But what we do have is
13 Ms. Espindola -- and I will recite this verbatim --
14 saying "Why are you saying that shit? What we really
15 wanted was him fucking beat up, if anything. We
16 didn't want him fucking dead."

17 DeAngelo Carroll, who at that point was
18 an agent of the police going in trying to get
19 information to incriminate these defendants, doesn't
20 say "You're wrong. You agreed to kill him."

21 He says "Ain't nothing we can do to
22 change it now."

23 That's not consistent with an intent to
24 kill. That doesn't show any evidence, whatsoever,
25 that these people had any intent that that man be

1 murdered.

2 DeAngelo Carroll was sent in with a
3 mission to get incriminating statements from these
4 people, doesn't confront them about that, doesn't say
5 "Bullshit. You told me, you know" -- or anything.

6 He says "Ain't nothing we can do about
7 that now."

8 That's wholly consistent with the fact
9 that these people had no intent that that man ever be
10 killed. That's required under Edmond Tyson, unless
11 they have a major participation showing reckless
12 indifference.

13 Even if you took everything the State
14 said here with the admissible evidence as true, at
15 most you might have a solicitation that the man be
16 beat, but that falls far short of the Edmond Tyson
17 requirement.

18 The next issue concerns the pecuniary
19 gain aggravator. And initially we presented the
20 argument that this was invalid because there was no
21 probable cause finding.

22 We acknowledged that, in Redeker, the
23 Nevada Supreme Court rejected that argument. We don't
24 expect this Court to rule contrary to the Nevada
25 Supreme Court, but we do wish to preserve that issue

1 for federal review, should that be necessary.

2 So with that said we still think there
3 are a lot of reasons this aggravator should be
4 dismissed.

5 The first is that it fails to meet the
6 fundamental, long-standing requirement of actually
7 giving notice to the Defense of what the State's
8 theory, facts and charges are.

9 Here we have a situation with a big, long
10 narrative paragraph with a bunch of theories, but no
11 facts and no specificity and no actual notice to the
12 Defendants of what they are defending against.

13 We have theories here again of beating,
14 which is not sufficient to meet the aggravator. It
15 requires solicitation to murder, not solicitation to
16 beat.

17 We have allegations concerning Luis
18 Hidalgo, Jr, who is not a charged Defendant in this
19 case.

20 We have a theory floating out there that
21 this was done for the financial benefit of the
22 Palomino Club, but no explanation as to why killing
23 Mr. Hadlund would benefit the Palomino Club, but
24 perhaps more importantly, why that would benefit, be a
25 pecuniary gain to Ms. Espindola and Mr. Hidalgo, the

1 • III?

2 None.

3 Basically the State is taking a shotgun
4 approach here where they are spraying out theories all
5 over the place, shooting out various ideas when what
6 the Nevada Supreme Court has said is "You don't get to
7 use a shotgun. You can use a rifle."

8 You need an instrument of precision that
9 gives the defense notice of what the charges are that
10 allows the jury to be instructed in a meaningful way
11 and which provides a valid basis, again, for a
12 narrowing of the death penalty.

13 This aggravator is traditionally applied
14 where the pecuniary gain is abundantly clear, things
15 like life insurance proceeds or someone who is going
16 to gain from a will.

17 It's not Pie in the Sky theories about
18 perhaps some business might get a gain and "Man, I'll
19 get a bonus in my paycheck."

20 We have no idea what the State is trying
21 to say with their financial theory here or how it
22 applies to these two specific defendants.

23 Again, Rule 250 4C and under the Redeker
24 Decision, they are obligated to provide that specific
25 notice and not the spraying allegations thrown out

21

1 here.

2 Finally as to the solicitation
3 aggravators, the State has noticed its intent to seek
4 death and provided for two aggravating circumstances.

5 Based upon the assertion Ms. Espindola
6 and Mr. Hidalgo solicited the murder of Jason Taoipu
7 and Rante Zone, the State's theory here is both
8 legally and factually wrong.

9 The use of the violence aggravator has
10 never been applied in this state to a solicitation
11 issue. It's important to keep in mind that
12 solicitation is an inchoate defense. It's uttering
13 words.

14 There is no actual threat that anything
15 is going to happen to anyone unless that solicitation
16 is accepted and acted upon.

17 At the point it becomes accepted it's a
18 conspiracy and that's a different issue for a
19 different day.

20 What we're talking about here are the
21 mere utterance of words.

22 I submit under the strict instruction
23 provided for in Redeker and the general theory that a
24 Defendant is entitled to notice that the ambiguity, if
25 there is any here, should be construed against the

22

23

1 State and the Court should find, as a matter of law,
2 that solicitation does not actually involve violence
3 and cannot be the subject of this aggravator.

4 And that is supported by the decisions of
5 the Florida courts -- and it's important to recognize
6 that when Nevada was creating its aggravating
7 circumstances we looked to Florida, because the U.S.
8 Supreme Court had already approved their scheme -- and
9 said "We'll model our scope after Florida."

10 Florida, with the same statutory
11 language, has addressed this issue and has said
12 solicitation isn't enough. And Arizona reached the
13 same conclusion.

14 I know the State says "Well, look to
15 Oklahoma, look to California."

16 When you look at those additions you
17 don't see thoughtful, engaging analysis by those
18 courts.

19 You see a recognition of some historic
20 fact because some bad attorney agreed that
21 solicitation was an aggravator and basically
22 stipulated to it.

23 That's below dicta even. It's certainly
24 not the basis for finding that solicitation does
25 involve a threat of violence.

1 I'll leave it to Mr. Draskovich to
2 address his client, but as to Ms. Espindola, I think
3 it's important to note when you look at the second
4 transcript -- excuse me -- the first transcript, and
5 where the allegations concerning the solicitation
6 arise, she doesn't agree to anything. She doesn't
7 make any solicitation.

8 She essentially says "You know, rat
9 poison isn't going to kill anyone."

10 That doesn't even rise to the level of a
11 solicitation.

12 For her, there is certainly not a factual
13 basis.

14 THE COURT: Are you -- let me make sure
15 I'm on the same page -- are you talking about where
16 there was some suggestion that the witnesses be done
17 away with?

18 MS. THOMAS: That's correct. And she --

19 THE COURT: And rat poisoning came kind
20 of late in the discussion.

21 Wasn't there something about "Let's do
22 away with him or let's take care of him" or something?

23 MS. THOMAS: I think when you look at the
24 transcript you'll see Ms. Espindola is not making
25 those statements.

24

25

1 THE COURT: Is anything like that said or
 2 am I imagining it all?
 3 MS. THOMAS: I would consider it banter.
 4 THE COURT: Banter or whatever it is,
 5 what was said; do you know?
 6 MR. ORAM: Nothing by Ms. Espindola was
 7 said about that. There was some conversaton about
 8 some co-defendant made about rat poison.
 9 Ms. Espindola's statement is that "That's not going to
 10 work."
 11 It's clear she's saying it's just stupid.
 12 There is no allegation she makes any statement saying
 13 these people should be killed.
 14 MS. THOMAS: Based upon all of that we
 15 would ask that each of the aggravators be stricken,
 16 that the notice of intent against these two defendants
 17 be dismissed.
 18 Thank you.
 19 THE COURT: Is there anything else to be
 20 said on that particular issue?
 21 MR. DRASKOVICH: She took the majority of
 22 the argument I was going to address.
 23 THE COURT: I appreciate your not
 24 wanting to repeat them.
 25 MR. DRASKOVICH: Absolutely.

27

1 MR. DRASKOVICH: They are the same. For
 2 the purpose of my argument they are one in the same,
 3 judge.
 4 THE COURT: I appreciate that. Thank
 5 you.
 6 MR. DRASKOVICH: If you can see them as
 7 notice, there's basically three bases that they are
 8 seeking to have these people killed. Two of them
 9 concern solicitation to commit murder.
 10 I'm not going to repeat arguments of my
 11 esteemed to counsel, but solicitation to commit murder
 12 doesn't count.
 13 That's not an appropriate aggravator.
 14 This is a legal argument. It's a
 15 question of law.
 16 It doesn't cut it. It doesn't cut it.
 17 And with the backdrop of Redeker and the
 18 other case law, basically you have to have a square
 19 peg for a square hole.
 20 You can't just fit it in there and let
 21 the defendants try and fight it out in front of a
 22 jury.
 23 Solicitation doesn't do it. It's not the
 24 crime of violence, the threat of violence.
 25 In Redeker, I think it was page five of

26

1 There are a few things I wanted to touch
 2 upon. Did you want me to address those issues at this
 3 point?
 4 THE COURT: I'd like to hear your entire
 5 argument, defendant's argument, and let Mr. DiGiacomo
 6 respond. We can have some discussion.
 7 MR. DRASKOVICH: I appreciate that.
 8 Does the Court have a copy of the state's
 9 notice of intent to seek the death penalty?
 10 THE COURT: I was looking for the
 11 charging document here, the various -- do you have the
 12 actual language?
 13 Do you have a copy of the actual
 14 language?
 15 MR. DIGIACOMO: Of each of the notice of
 16 intents?
 17 I have the originals sitting in my file
 18 in front of me. I was going to read it to the Court.
 19 MR. DRASKOVICH: I have a copy, but for
 20 my arguments to mean anything I think Your Honor
 21 should have one.
 22 MR. DIGIACOMO: The one as to Anabel
 23 Espindola -- sometimes their names are switched -- I
 24 have one copy of each.
 25 If if I can given you Anabel's --

28

1 the Advanced Opinion, while there obviously may be a
 2 potential for violence in a solicitation, the Court
 3 distinguishes the two, between a threat and the
 4 potential.
 5 Solicitation is talking, nothing more.
 6 Obviously if we address this in front of
 7 a jury for the solicitation charge we're going to say
 8 this is banter. That's all it is.
 9 Solicitation to commit murder, the
 10 talking about that is not a violent crime and it
 11 doesn't fit under the statutory construction that's
 12 required.
 13 Those are the first two aggravators.
 14 That's my only argument to make concerning those.
 15 They have been very adequately addressed.
 16 As to the third aggravator, it's that of
 17 pecuniary gain. I have read this over and over again.
 18 It's the third aggravator, on page three.
 19 You read through this and there are more
 20 and more -- there is theory after theory after theory
 21 laid out. There's people that haven't even been
 22 charged in this case who are named as actors in this
 23 aggravator.
 24 We can't defend against this.
 25 That's the very thing the court decided,

1 under Redeker. The Court requires they take a very
2 specific rifle approach.

3 You can't shotgun this thing and hit
4 everything and everything in this notice. Rule 250
5 does have teeth.

6 What we're trying to get at -- and
7 obviously the message the Nevada Supreme Court is
8 trying to send -- is you can't seek the death penalty
9 for all these people you want to put to death.

10 You're wasting court time, county dollars
11 and you're wasting a lot of other resources in trying
12 to kill people that shouldn't be killed.

13 For that reason, if you're going to do it
14 you'll have to state exactly why and give a very good
15 basis.

16 The third aggravator here just doesn't --
17 THE COURT: I'm missing -- state exactly
18 what --

19 MR. DRASKOVICH: What it is saying is the
20 requirement, under Redeker and the others, you have to
21 say expressly what the factual basis is and the legal
22 basis.

23 If you read on page three, the state,
24 they are painting with a broad, broad brush which is
25 exactly what everybody is trying to avoid.

1 context of the transcript track one --

2 THE COURT: Just a moment. Let me find
3 what we have here. How does it go again?

4 Page six --

5 MR. DRASKOVICH: Top of page six, right
6 above 13.38. There is a little time right there.
7 It's the fourth line down from the top.

8 THE COURT: What's the heading on the
9 document?

10 MR. DRASKOVICH: The head of the document
11 states disk marked as audio enhancement and it gives
12 the number, tracks one and two.

13 THE COURT: You say page four?

14 MR. DRASKOVICH: On mine I have it as
15 page six.

16 THE COURT: Mine says CD. "I just need
17 to smoke some weed."

18 MR. DIGIACOMO: That's the -- that's his
19 copy.

20 For the record, I dispute their
21 transcription. I think it's -- I have highlights
22 throughout this entire thing that -- when I listened
23 to the tape I hear something completely different.

24 That's part of the problem here. They
25 are asking to you make a factual determination on

1 For that reason this third aggravator
2 doesn't do it. It's wrong. It's absolutely wrong.

3 Now, the other thing I want to address,
4 as far as the notice, the notice not only is
5 procedurally wrong, it's substantively wrong. It
6 doesn't pass Constitutional muster.

7 The only other issue I wanted to address
8 concerns the principal. People have to be actively
9 involved in a killing in order to be held accountable
10 under the death penalty.

11 The State has made all sorts of wild
12 allegations, wholly unsupported, that Luis Hidalgo,
13 III intended to kill Mr. Hadlund. That's why they
14 charge him as a principal.

15 Now, as Ms. Thomas had addressed, a
16 person did go in, working as a State Agent, wearing a
17 wire, trying to elicit him and Ms. Espindola to say
18 something incriminating so the State could get a
19 stronger case.

20 The State ultimately got an enhanced tape
21 or an enhanced CD and provided it to all of us in this
22 case and we've provided you, Your Honor, and the State
23 with a very, very accurate transcription of what it
24 said.

25 If you look on page six, to put this in

1 stuff that's not true and not in there.

2 THE COURT: True and complete and
3 accurate. That's why Ms. Thomas said listen to the
4 tapes.

5 MR. DIGIACOMO: The general idea of what
6 he's saying there, we have a slightly different word.
7 But a general idea I'm not going to dispute Little Lou
8 says -- something -- you didn't have anything to do
9 with this.

10 I don't dispute that statement.

11 MR. DRASKOVICH: This is the state agent.
12 This is the guy saying they were put up to killing
13 somebody four lines down.

14 THE COURT: Go ahead, page six, DC.
15 That's DeAngelo Carroll.

16 MR. DRASKOVICH: "I just need to smoke
17 some weed."

18 It goes further -- unintelligible, next
19 line, the next line, that's DC, that's DeAngelo
20 Carroll.

21 It says "Hum?"

22 "You're not gonna fucking -- what the
23 fuck are you talking about?"

24 Don't worry about it, Lou. You had
25 nothing to do with it."

THE COURT: Lou is who?

MR. DRASKOVICH: This man sitting right here, Luis Hidalgo, III.

Judge, this is in the context of the death that has occurred. There is a conversation and the State's own agent who says "This man had nothing to do with it"

"What are you talking about? You got nothing to do with it."

"He didn't have anything to do with it."

The State, in spite of this very clear evidence, nonetheless, wants to charge him charge him as a principal.

Based upon their very own evidence taken from their enhanced CD, they can't.

This argument should be made in addition to all the procedural and substantive arguments we've made concerning the three aggravators, that Luis Hidalgo, III cannot be charged or should not be the object of the State's intent to seek the death penalty.

On that I'd submit it.

THE COURT: Response, please.

MR. DIGIACOMO: Yes, judge.

I'll start with Ms. Thomas, because it

does track in a little bit to what Mr. Draskovich says.

Everybody in this case seems to want to take one line, out of one piece of paper, out of one piece of discovery in a case that is boxes of discovery.

Let's talk about what the evidence actually is, but I would note Ms. Thomas submitted to you, one, we're not here for a probable cause determination, because the Supreme Court says that's not appropriate, but that's exactly what they are asking you to do.

One, we had a writ where they argued the exact same quote. They argued this quote to you at the writ.

You said, yeah, but there's other evidence that Luis Hidalgo, III intended to kill, particularly when he says "We could have KC kill them, too," in the tapes.

Here is what is really happening. In her original motion they actually gave you DeAngelo Carroll's transcript statement which you never had before.

A lot of the understanding of what happened inside these phone calls can be gleaned from

what happened in the transcript. He tells a story about what happened.

Here is generally what it is: "I'm an employee for the Palomino. Mr. H is the owner of the Palomino."

THE COURT: Who are you when you say you're an employee?

MR. DIGIACOMO: DeAngelo Carroll is an employee of the Palomino. Mr. H is the owner of the Palomino.

Anabel Espindola is Mr. H's assistant, as DeAngelo calls it or his girlfriend, as other evidence establishes, and that Little Lou over here is a manager of the Palomino Club and also Mr. H's son.

In the days leading up to the murder Mr. H tells DeAngelo that he may need some work done in harming somebody and that he would pay people if they would do a hit for them.

THE COURT: Who is this?

MR. DIGIACOMO: Mr. H, the owner, is telling.

THE COURT: We have three generations going on here, right?

MR. DIGIACOMO: There's kind of -- there is a Junior and a III'd. There's really kind of two

generations.

There's also a senior who is here in Court, the father -- the grandfather I guess you'd call him. There are a lot of Hildago's involved.

THE COURT: I'm doing this for the record. Basically we understand what we're talking about, but go ahead.

MR. DIGIACOMO: Correct.

What happens is is that DeAngelo knows at some point he's going to be asked to be involved in the killing of somebody, but he doesn't know who that is.

MR. DRASKOVICH: Judge, he interrupted me once and I try and observe candor in your court. He is now going to go on with speculation of things that aren't supported by the record.

He's going to try and address things that aren't admissible, which he generally does every time we have an argument before Your Honor.

He can't do that. It's not appropriate for him to do that.

He does it very well and does it very often.

MR. DIGIACOMO: That's funny, because on December 12, 2005, Mr. Draskovich, he signed the

1 motion, attached DeAngelo Carroll's statement which
2 I'm referencing to the Court.

3 MR. DRASKOVICH: He's summarizing and he
4 is not doing it accurately. The exhibits will speak
5 for themselves.

6 This was the statement that I informed
7 the court that was five different lies. We're
8 addressing the baseball bats and bags that never
9 occurred, that never existed.

10 What Mr. DiGiacomo understands and does
11 is he wants to argue with the State [sic] Things may
12 have happened.

13 It's inappropriate for the issues we're
14 addressing before Your Honor today.

15 MR. DIGIACOMO: I can read the whole
16 transcript. Let me start at page 56 where DeAngelo
17 Carroll says that Mr. H called him up to the office
18 and told him that Timothy Hadlund was putting "bad
19 shit out about the club" and that this was hurting the
20 business of the club and at first he said "He wanted
21 me to beat him, but then he changed his mind and
22 decided he wanted him killed."

23 Hence, why in my notes it says both
24 and/or kill because that was what Mr. H told him.

25 Later he gets a phone call from Junior,

1 Mr. Luis Hidalgo.

2 THE COURT: Is that in the transcript?

3 MR. DIGIACOMO: It's right here in the
4 transcript.

5 MR. STEIN: Not of the tape.

6 A transcript of statement to the police.

7 MR. DIGIACOMO: It was a tape.

8 MR. STEIN: You're reading --

9 MR. DIGIACOMO: DeAngelo Carroll was on
10 videotape which I've supplied to all of you when he
11 was making these statements.

12 MR. STEIN: You're reading from a
13 transcript from a tape.

14 MR. DIGIACOMO: I'm reading from the
15 transcript of the videotape of DeAngelo Carroll's
16 statements to the police.

17 MR. DRASKOVICH: He's talking about three
18 people.

19 MR. STEIN: More importantly, Your Honor,
20 what the prosecutor just stated was a statement made
21 not by the Defendant here.

22 MR. DIGIACOMO: Correct.

23 MR. STEIN: The individual making that
24 statement isn't even a charged Defendant.

25 MR. DIGIACOMO: Did I interrupt him?

1 THE COURT: I know that -- I think --

2 MR. STEIN: I just wanted that clear.

3 THE COURT: This is Carroll speaking?

4 MR. DIGIACOMO: Carroll telling the
5 police what Mr. H told him in the office. Anabel
6 Espindola was present.

7 That's a separate issue.

8 After he leaves and he's out out with
9 Rante and JJ, when he's back home at his house, Little
10 Lou, the Defendant, Mr. Draskovich's and Mr. Stein's
11 client, calls DeAngelo Carroll and says -- well, this
12 is what DeAngelo Carroll says -- "Before I got the
13 shift and, you know, I'm saying first Junior called me
14 and he's all like bring two garbage bags and a
15 baseball bat because we have to take care of" -- and
16 then he gets cut off and they ask him "But what are
17 you talking about?"

18 Ultimately he tells the police this:

19 "I'm at my house. I get a call from
20 Little Lou which is bring baseball bats and garbage
21 bags with you to work. I know that's in relationship
22 to with Mr. H told me."

23 I go back to work and I go back in the
24 office and Anabel Espindola is there and Mr. H, and I
25 say to him what Little Lou told me and he says "Yeah,

1 I want to keep Little Lou out of this. He's getting
2 really angry and I want you to kind of take care of
3 this on your own."

4 "I don't want Little Lou in the middle of
5 this mix. I want to you take care of it. I don't
6 want Little Lou to actually go out there and kill
7 him."

8 That's the statement.

9 So the statement of Little Lou's intent,
10 this one who wants him to bring baseball bats and
11 garbage bags to kill TJ.

12 THE COURT: This Carroll mentioned we're
13 talking about killing him or beating him?

14 MR. DIGIACOMO: Mr. H said first beat and
15 then he said kill. Mr. H also told him that Little
16 Lou was really upset and he was going out there and
17 going crazy.

18 I don't know what the exact words he used
19 were.

20 MR. DRASKOVICH: He didn't. That's why
21 I'm upset about him editorializing what he said.

22 He didn't say that.

23 THE COURT: Say what?

24 MR. DRASKOVICH: Anything about killing
25 anybody, nothing. Going crazy, this is Mr. DiGiacomo

1 - editorializing the evidence.

2 MR. DIGIACOMO: I'll read it again.

3 MR. DRASKOVICH: It doesn't say Mr.
4 Hadlund. It's blank.

5 MR. DIGIACOMO: I understand all the
6 sections because they have the statement which, right
7 before Mr. H got there, Mr. H --

8 THE COURT: What are you reading here?

9 MR. DIGIACOMO: DeAngelo Carroll, once
10 again, giving a statement to the police as to the
11 conversations that he had in Mr. H's office with
12 Anabel Espindola after he received a phone call from
13 Luis Hidalgo to the Defendant to bring baseball bats
14 and garbage bags to work.

15 This is what he said about the
3 conversation.

17 Right before Mr. H got there Mr. H and
18 Ms. Anabel got to the club before Little Lou did. By
19 the time Little Lou got to the club I was upstairs in
20 the office talking to Ms. Anabel -- Mr. H and
21 Ms. Anabel.

22 They said they didn't want Luis to get
23 involved because Luis was getting real upset about
24 everything. He wanted to go take care of TJ.

25 Luis came back in a pair of black -- and

1 then the cops cut in -- Luis talking about the younger
2 one, Luis, III, and he's getting upset.

3 "Why is he so bent about this?"

4 Because people are -- TH went and spread
5 a bunch of rumors about Mr. H's club and we haven't
6 had any customers. The club has been dead for the
7 last week.

8 And then they start talking about the
9 motive. They don't get back to what exactly Little
10 Lou was doing, but I had the same question you did.

11 If you're bringing baseball bats, what
12 are the garbage bags for, ultimately?

13 But then you take that and you go to the
14 transcript in which Little Lou says to DeAngelo, when
15 we're talking about the witnesses and all the problems
16 we're having, he says --

17 THE COURT: After the fact.

18 MR. DIGIACOMO: -- after the fact, after
19 the killing has occurred, and they are talking about
20 Rante and they are talking about Jason, this Defendant
21 says "Can we have or can you have KC, the shooter,
22 kill them, too?"

23 The implication is what?

24 That he's involved in the original
25 homicide in which the conspiracy occurred and it's

1 then tied in by the fact that he's told them to bring
2 garbage bags and baseball bats.

3 This isn't a statement that was solely
4 given by DeAngelo Carroll to the police.

5 Rante Zone, the witness at the
6 preliminary hearing said that, prior to the murder
7 ever occurring, DeAngelo Carroll told them that Little
8 Lou called and said "Bring garbage bags and a baseball
9 bat to work with you tonight."

10 It's not like DeAngelo Carroll is trying
11 to get himself out from beneath trouble when he's
12 talking to the police and making the story up. He
13 tells Rante Zone this before the murder even occurs.

14 I guess I'll get back to that issue,
15 because this issue goes to the first question as to
16 whether or not Little Lou and Anabel Espindola can
17 face the death penalty.

18 Ultimately the question is is did they
19 intend to kill?

20 That's the question for the jury, because
21 by the way, if the jury finds they didn't intend to
22 kill, then they are not guilty of First Degree Murder
23 so we never get to a penalty phase.

24 When they talk about putting the cart
25 before the horse, neither one of those two defendants

1 can be convicted of First Degree Murder, unless I can
2 establish in front of this jury that both of them
3 intended to kill, beyond a reasonable doubt.

4 That's my burden at the guilt phase.

5 If a jury ultimately decides they only
6 had an intent to beat, then they are not facing the
7 death penalty because they are not convicted of First
8 Degree Murder.

9 The second issue that they wanted to
10 raise was that the solicitation to commit murder is
11 not an aggravating circumstance.

12 I know this court knows a lot about Ari
13 Redeker because it was before this Court. What they
14 didn't tell you -- they told you you should go look at
15 Florida and they told you "We want you to look at
16 Oklahoma and Florida."

17 Look at Ari Redeker. Ari Redeker defined
18 solicitation to commit murder as a crime involving the
19 threat or use of violence upon another, because they
20 define threat.

21 Page five, they say in criminal law a
22 threat requires actual intent. "A threat can include
23 almost any kind of an expression of intent by one
24 person to do an act against other persons, ordinarily
25 indicating an intention to do harm."

That's the definition of a threat.

When Little Lou said "You can put rat poisoning in this bottle of gin" -- and by the way, there was an act because he provided a bottle of gin to DeAngelo Carroll which was immediately turned over to the police, and Anabel Espindola during that same meeting where they are talking about killing these people -- and she wasn't completely quoted as to what she had to say while they are talking about it -- I'm using mine, since I can rely upon what mine has to say -- at one point when they start talking about the killing -- that's the second part -- at one point in here when they start discussing about killing the other people she makes a statement, after Little Lou says "Could you have KC kill them, too? We'll put something in the their food so they die, rat poison or something," DeAngelo says "We can do that."

Little Lou says "We'll get KC?"

DeAngelo says "It's going to be impossible to find KC to kill these people. He ain't at his house. KC got his fucking shit and packed up upshot. I don't know where KC is."

Anabel says "Here is the thing. We can take care of KC, too."

To say she is not involved in the

THE COURT: What preceded the mention of KC?

MR. ORAM: That's where we want a page. What's being talked about is paying KC.

THE COURT: Later.

MR. DIGIACOMO: Later she talks about paying him off when they are talking about that.

THE COURT: Let's see where you're reading.

MR. DIGIACOMO: I lost my page as to where that was. I was reading it from the transcript. You heard me. Little Lou --

THE COURT: Where are you?

MR. DIGIACOMO: I'm at page four, five, six -- right after page six on his -- where you had him quoting --

THE COURT: Hold on. Let's let everybody get on the page.

Have you found it, Mr. Oram?

MR. ORAM: No.

THE COURT: Are the pages numbered?

MR. DIGIACOMO: The pages on this transcript -- on their transcript are numbered, judge they have got times. The times don't seemed to match up to my player.

discussion of killing the witnesses when they are talking about killing the shooter, too -- and I didn't even discharge the killing of the shooter, because when they left it that day it was "Take care of Rante and Jason and we'll talk about KC later."

MR. ORAM: That's pretty close to objectionable. I'll tell you why.

THE COURT: What do you mean?

MR. ORAM: Here is why.

In that transcript, if you listen to the tape they are talking about paying KC. KC wants money.

What Ms. Espindola is being questioned about is they want money for KC. When he's talking about context -- he hasn't charged that as an aggravator.

This is the first time ever I've heard KC, this gentleman, anybody was talking about killing him. That's not what they are talking about.

THE COURT: What was the subject of the discussion?

MR. DIGIACOMO: The subject of discussion was killing KC, too, and killing the witnesses.

MR. ORAM: I'd like to hear it quoted KC was -- could be killed.

THE COURT: You're using your transcript?

MR. DIGIACOMO: Mine, which was attached as an exhibit to the writ, judge, which I don't know if you have that before you anyway.

MR. ORAM: On page seven, if you look at page seven, Anabel Espindola --

THE COURT: Wait. Don't start reading. Get to the same page. Compare what you have, gentlemen.

MR. DIGIACOMO: He's on his page seven which is where it is; why I have all the highlights on this page for what it is -- I dispute is said on the tape. He's on his page seven which is also my page seven, too.

This ultimately this goes to the whole issue of why it is we don't have a probable cause hearing. They are asking you to make a probable cause determination.

This is what, when I listen to the tape, I hear.

THE COURT: Let's see if we can find the same dialogue. What are you going to begin with?

MR. DIGIACOMO: Start off with "Could you have fucking KC kill them, too? Which they start off with at 15.35 is "Tell fucking KC to kill them, too."

You see on page seven at 15:35?

THE COURT: Yes. It says LH, III.

MR. DIGIACOMO: "Tell fucking KC to kill them, too."

THE COURT: I'm with you. Go ahead.

MR. DIGIACOMO: My transcript says "Could you have fucking KC kill them, too?"

"Well, if you can put something in their food so they die, rat poison or something."

DEANGELO: We can do that, too.

LITTLE LOU: And we'll get KC last.

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

ANABEL: Here is the thing, we can take care of KC, too. There's blank.

KC is asking for money, right?

Here is the thing. He's the mother fucking shooter. People can pinpoint him.

DEANGELO: KC will kill the other guys. I know, but what I'm saying is KC -- call his fucking bluff.

ANABEL: We can go to fucking jail for shit like this.

Exactly.

Okay, so she should -- the only time she mentions money during that entire time period is that KC is asking for more money. She doesn't suggest she's gonna pay him more money. They are talking about the killing of the witnesses and utilizing KC to do so.

MR. ORAM: That's the clarification I was trying to make. It's perfectly apparent is where he's quoting from, it does say it. He's just quoted it.

That's right before 16:25, but wait a minute. Here is the thing, okay?

We think KC -- we think that KC is asking for more money, right?

Okay.

He's talking about money, not murdering him.

MR. DIGIACOMO: Notice what they left out of theirs. They left out "We can take care of KC, too."

That's not in their transcript.

MR. DRASKOVICH: Because it doesn't say --

MR. ORAM: I've listened to the transcript. We've had 300 dollar ear phones, each of us, Ms. Thomas and I, and we sat there and listened to

this over and over.

Even the prosecutor missed she's talking about money -- it says it right there -- not murder. That the man wanted more money, allegedly.

MR. DIGIACOMO: Hence the question of fact for the jury. If they think I'm wrong, then obviously their clients won't get convicted.

I didn't interrupt them during their entire argument. That's all they have been doing.

They don't want to rely upon all the facts. They want to take one word, one sentence.

What they didn't tell you is that after this first wire recording occurred and DeAngelo came out and the police listened to the recording they said to DeAngelo "Well, Anabel said they only wanted her beat."

DeAngelo says "Well that's correct. She did say that."

Why did she say that?

That's in both -- now it's in his transcript to the police and then it's verified by Ms. Anabel.

He says "Well, as I was driving out to this location out there to commit the homicide I got a cellphone call from Anabel Espindola."

By the way, there is a cellphone call on the cellphone records that confirms that Ms. Espindola called DeAngelo Carroll on the way out to the lake to commit the homicide.

According to DeAngelo, Anabel told him "Look, if he's alone, do him in. If he's with anybody else, just fuck him up real bad."

DeAngelo tells the police this after this first statement "Look, she told me if he's alone do him in, but if there's anybody else there beat, just beat him up."

"When we got back to the Palomino she was really upset we wound up killing the guy because she was worried about all the people that were in the car. There's three other people. He can pinpoint me. She's worried about we went through and did the killing."

She confirms that on the wire.

When they go back in the room the next day DeAngelo walks into the room and they start talking and DeAngelo says "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 says "Okay, listen."

DeAngelo says "I'm not --"

Anabel says "Talk to him, not fucking

1 take care of him. Goddam it, I fucking called you.
 2 DeAngelo says "Yeah, when I talked to you
 3 on the phone, Ms. Anabel, I said -- I specifically
 4 said -- I said if he is by himself do you still want
 5 me to do him in, and you said yeah."

6 Anabel says I _____ --

7 DeAngelo says "If he is with somebody --
 8 you said if he is with somebody just beat him up."

9 Here is what Anabel's testimony is that's
 10 a total lie? That's not her response?

11 Her response is "I said go to Plan B,
 12 fucking DeAngelo. DeAngelo, you're just minutes away
 13 and I told you no. I told you fucking no, and I kept
 14 trying to fucking call you, but you turned off your
 15 mother fucking phone."

16 She confirms that the conversation occurs
 17 and she claims that she's withdrawing from the
 18 conspiracy and tells him to go to Plan B.

19 What's Plan A?

20 It's what DeAngelo Carroll says Plan A
 21 is, is to kill him, if he's alone. Exactly what he
 22 said in the transcript.

23 They don't quote those to you, judge.

24 They also don't quote to you that Anabel Espindola is
 25 the person who turns the money over to DeAngelo to him

1 to Kenneth Counts.

2 Let's get to, one, the question is is did
 3 they have an intent to kill?

4 Absolutely. It's a -- is it a question
 5 for the jury?

6 Absolutely.

7 If the jury decides they only intended to
 8 beat him, they will get convicted of Second Degree
 9 Murder or something less.

10 If the jury finds they intended to kill
 11 him him they will get convicted of First Degree murder
 12 with use and get another aggravating situation. At
 13 any time before a penalty hearing is conducted for the
 14 murder, pursuant to NRS 175.522, is or has been
 15 convicted of a felony involving the use or threat of
 16 violence to the person of another.

17 I already read you the definition of a
 18 threat is an expression of an intent by one person to
 19 do an act against another person.

20 Hence, solicitation to commit murder is a
 21 crime which involves the threat of violence to another
 22 person.

23 Under Ari Redeker, the elements, alone,
 24 of the solicitation is sufficient for an aggravating
 25 circumstance.

1 That goes for both one and two.

2 Now, as to the last circumstance, number
 3 three, I'm missing it or they are reading a clause out
 4 of the aggravating circumstance.

5 "The murder was committed by a person" --
 6 and here is the part they always seem to leave out --
 7 "for himself or another to receive money or any other
 8 thing of monetary value."

9 That's the aggravating circumstance.

10 It is my position and it is always been
 11 our position that for every murder for hire there is
 12 an aggravating circumstance, because money is going to
 13 be exchanged for the killing.

14 That's what the definition of the
 15 aggravator is.

16 You have a robbery. If you're taking
 17 property from somebody, even though there's pecuniary
 18 gain, the definition of the aggravator is the murder
 19 was committed by a person for himself or another to
 20 receive money or any other thing of value.

21 Why did Counts kill him?

22 He got paid, so for himself or another.

23 Even if the rest of the stuff is totally
 24 irrelevant, the mere fact it's a murder for hire puts
 25 every co-defendant on an aggravating circumstance,

1 should they be convicted of First Degree Murder.

2 What else do we know?

3 Well, we know that Little -- Mr. H
 4 procured the killing, according to the witnesses,
 5 because Timothy Hadlund was saying bad things about
 6 the club and that it was preventing customers from
 7 coming to the club and he wanted him killed.

8 What do you have here?

9 You have the employees of the Palomino
 10 Club and the owner of the Palomino Club conspiring to
 11 kill a former employee because that employee is
 12 hurting the business.

13 In here I have -- it's not theories.
 14 These are facts. To beat and/or kill Timothy, because
 15 that was what the conspiracy was.

16 Luis Hidalgo, Junior indicating he would
 17 pay to have a person either beaten or killed -- that's
 18 a fact, not a theory -- by Luis Hidalgo, Junior
 19 procuring injury or death of Timothy Hadlund to
 20 further the business of the Palomino Club.

21 The procuring, because it was hurting the
 22 business of the Palomino Club, and/or Defendant Luis
 23 Hidalgo, III telling DeAngelo Carroll to come to work
 24 with bats and garbage bags.

25 Thereafter, the Defendant Carroll

1 procuring Kenneth Counts and/or Jason Taoipu to kill
2 them Timothy Hadlund, thereafter by Kenneth Counts
3 shooting Timothy Hadlund. Thereafter, by Luis
4 Hidalgo, Junior and Anabel Espindola providing \$6,000
5 to DeAngelo Carroll to pay Kenneth Counts.

6 Ultimately the aggravator is satisfied at
7 that point.

8 What the Supreme Court has done to this
9 court and to every other court is complain that we're
10 not providing them enough specificity in our notices.
11 It's like you're damned if you do and you're damned if
12 you don't.

13 If I stopped right there, they would be
14 arguing "You didn't put in all the facts that talk
15 about money changing hands in this case."

16 I listed every other time that money
17 changed hands based upon the murder so they would be
18 on notice of those facts, that I didn't have the
19 Supreme Court telling me "Mr. DiGiacomo, you should
20 have provided them more information than you already
21 did."

22 I'm damned if do and damned if I don't.
23 If hadn't put any more information in there they would
24 be complaining I didn't put enough information in
25 there.

1 THE COURT: Let me ask you this. I note
2 in there that there are sums of money that are
3 attributable to other individuals.

4 What's the basis, for the record?

5 How do you know this person paid this sum
6 of money?

7 MR. DIGIACOMO: DeAngelo Carroll told the
8 police that he received 200 dollars from Anabel
9 Espindola after he gave the six thousand dollars to
10 Kenneth Counts and that he used one of the 100 dollar
11 bills to take his family and his friends to the IHOP
12 for breakfast next morning.

13 He used the other hundred dollars to
14 change the tires on the Palomino Club van that was
15 used during the murder.

16 The next line on here is that Defendant
17 Luis Hidalgo, III providing \$1,400 and or \$800 to
18 Anabel Espindola and/or --

19 THE COURT: SLOW DOWN.

20 MR. DIGIACOMO: -- Anabel Espindola
21 and/or Defendant Luis Hidalgo providing \$1,400 and/or
22 \$800 to DeAngelo Carroll, right?

23 The \$1,400 is at the end of the first
24 wire on 5.23.05 at Simone's Auto Plaza. Anabel
25 Espindola leaves the room and comes back to the room

1 I've put all the information in here and
2 they are complaining you're not giving us the specific
3 facts you want to rely upon. I'm relying upon that
4 some eight thousand dollars in money that was
5 exchanged between the co-conspirators because of the
6 death of Timothy Hadlund.

7 I put all that information in the notice.

8 As such, if they get convicted of First
9 Degree Murder, then they should have to face the
10 aggravating circumstance of a pecuniary gain because
11 they paid people to kill.

12 Are they going to argue that only the
13 shooter is liable for an aggravating circumstance,
14 only the person hired that is reliable for the
15 aggravating circumstance, whereas the person doing the
16 hiring isn't?

17 Is that their argument?

18 That appears to be what their argument
19 is.

20 "Yeah, we hired Kenneth Counts to kill
21 him and he should face the death penalty, but we're
22 not as responsible because we didn't pull the
23 trigger."

24 That's ultimately the argument to the
25 court.

1 with \$1,400 and provides that to DeAngelo Carroll.

2 When he leaves the establishment he comes
3 back into contact with an FBI agent and a homicide
4 detective. They recover the gin that Little Lou
5 provided them to put the rat poisoning in and he gives
6 the \$1,400 over to the police which is impounded into
7 evidence.

8 The next day, on the 24th, he goes back
9 into Simone's Auto Plaza and there's another
10 discussion of money. Anabel Espindola goes and
11 retrieves \$800 more money and then comes back into the
12 room and provides the \$800 to DeAngelo Carroll in the
13 presence of Little Lou.

14 The next part, and/or by Anabel Espindola
15 agreeing to continue paying DeAngelo Carroll 24 hours
16 of work a week from the Palomino Club, even though
17 DeAngelo Carroll had terminated his position with the
18 club.

19 During this discussion she tells DeAngelo
20 Carroll that she's going to continue paying him 24
21 hours a week salary but "You can't be at the club so
22 we're going to claim you're no longer an employee of
23 the club. That will keep you quiet and keep your
24 family happy, but you don't have to show up and don't
25 have to do any work."

1 That information is confirmed because
2 during the search warrant we find a check for DeAngelo
3 Carroll for 24 hours' worth of work he didn't do.

4 The next part by Defendant Luis Hidalgo,
5 III offering to provide United States savings bonds to
6 DeAngelo Carroll and/or his family.

7 When Anabel leaves the room to get the
8 \$800 on the second incident or maybe it was the end of
9 the first incident; it was the end of the incident, on
10 the 23rd, Little Lou, the Defendant, and DeAngelo
11 start discussing his family and how his family needs
12 to be taken care of, and Defendant Little Lou says
13 "See all those savings bonds on the ground right
14 there? In one year I can get you \$25,000 in savings
15 bonds. I can move your family to -- you can move your
16 family to a nicer neighborhood. You can get a house
17 in a nicer neighborhood."

18 They have this discussion.

19 Lo an behold, we execute a search warrant
20 and in the room in which the search warrant was
21 found -- in his room in Simone's Auto Plaza there is
22 thousands of dollars of U.S. savings bonds as well as
23 hundreds of orders for additional savings bonds.

24 I put in there all the information that
25 leads to believe that the murder, that there was money

1 being exchanged for the killing of Timothy Hadlund.

2 The people who are spending the money
3 can't say "We don't suffer an aggravating circumstance
4 because we paid somebody to do the killing."

5 The statute says "For himself or another
6 to receive money or any other thing of value."

7 As such, they are suspect to that
8 aggravating circumstance in a murder for hire
9 situation.

10 Forget the fact they killed Timothy
11 Hadlund because he was saying bad things about the
12 Palomino Club. That is also an alternative theory as
13 to why they would be required under the statute to
14 face the aggravating circumstance, judge.

15 THE COURT: Is there anything further?

16 MR. ORAM: Can I make a very, very brief,
17 concise point?

18 There's been arguments over what
19 transcripts are correct. I want to read to you a very
20 small portion of the most direct part and important
21 part of the transcript, the first transcript.

22 THE COURT: Just a minute.

23 MR. ORAM: I don't believe Mr. DiGiacomo
24 or Mr. Pesci would argue there's anything wrong or
25 that it's flat inaccurate, what I'm going to read you.

1 MR. DIGIACOMO: Tell me the page.

2 THE COURT: What page?

3 MR. ORAM: Page four, comes after 8:34.

4 THE COURT: Where it says listen --

5 MR. ORAM: Where it says listen. Yes,
6 I'm reading from there.

7 Your Honor, if we can set this up. He
8 keeps quoting DeAngelo Carroll, the prosecutor, and
9 DeAngelo Carroll has made this big, long statement to
10 the police which he had done.

11 Now he's being wired, DeAngelo Carroll is
12 being wired. "Go in and talk to this lady. Get her
13 to admit what happened."

14 Before I start my point, we're not
15 arguing here that there's no probable cause to go to
16 trial. The Court has ruled on that.

17 We're going to trial on First Degree
18 Murder.

19 The point I want to make is should this
20 woman whose never been in trouble in her life, the
21 manager of the Palomino, really be facing a death
22 sentence in a capital jury?

23 When DeAngelo Carroll says to her -- he
24 basically sets it up -- "I did it. What's done is
25 done. You wanted him fucking taking care of".

1 THE COURT: I have listened.

2 Then where are we going from there?

3 MR. ORAM: I went up to the line before
4 on the next page.

5 It says "What's done is done. You wanted
6 him fucking taken care of. We took care of him."

7 Now, you would expect she would say "Yes,
8 that's very good. We wanted him taken care of. You
9 did a good job."

10 It's not what she says.

11 What does she say?

12 "Why are you saying that shit? What we
13 really wanted was him fucking beaten up, if anything.
14 We didn't want him fucking dead."

15 Now, just that -- when I just take a
16 little part of all these tapes and quote it to the
17 Court the reason I'm doing that, Your Honor, is
18 because it really goes to the crux of what we're
19 arguing.

20 She didn't want anybody dead. She says

21 it.

22 They never can point to anywhere in this
23 transcript where Anabel Espindola says "Good, I'm glad
24 he's dead."

25 My question is not should she be facing

1 First Degree Murder. We'll be arguing to a jury and
2 they get to argue for First Degree Murder, but not
3 death, judge.

4 THE COURT: Let me stop you there for a
5 minute so we can set the stage and get down to the
6 crux of it.

7 I don't like to assume the role of
8 Devil's Advocate and What If's and what have you. I
9 don't like to do that.

10 Let me say this so we can get right to
11 the crux of it.

12 There are two offhand explanations for
13 that that comes to my mind immediately.

14 Number one is what Mr. DiGiacomo recited
15 earlier, Plan A and Plan B. What you read here is
16 "What we really wanted was him beaten up."

17 In other words "What we really wanted was
18 Plan B, not Plan A."

19 That may have been her preference. We
20 can argue that, but that doesn't mean at some point
21 Plan A wasn't in the offing. That's arguendo.

22 That's one of these What If's, which I
23 don't like to get involved in.

24 The other thing that I recall is when we
25 had our last meeting on this issue in the other

1 building, way back when, there was a suggestion -- and
2 I forget how it came down, but it was suggested that
3 she got a little leery of this meeting with this fella
4 and thought perhaps someone was listening over the
5 shoulder, in some fashion.

6 She kind of orchestrated that "Gee whiz,
7 what are you here for? What are you talking to me
8 about all this?"

9 Kind of making a record, if you will.

10 As I recall, that was the argument.

11 This could well be kind of a staged

12 "Well, you know, why are you saying all that stuff?
13 What are you talking about, fella?"

14 MR. ORAM: That's right. You're
15 absolutely right. They were going prove that point.
16 Just the speculation that the State asked you to hear
17 it -- and we all heard it, too, was that maybe she
18 knew and the reason was -- because, remember, there
19 was this note found there saying "Maybe we're under
20 surveillance."

21 The State got an order to have a
22 handwriting exemplar done.

23 We're here, we're in the new building

24 now.

25 The State has lost their speculation.

1 They haven't done a handwriting exemplar. It's not
2 her handwriting.

3 That's speculation they asked to you do.

4 THE COURT: Help me here.

5 What difference does it make whose
6 handwriting some note --

7 MR. DIGIACOMO: I'm not sure it does.

8 MR. ORAM: The speculation they asked you
9 to do is they found this little note saying "We may be
10 under surveillance."

11 Hence the prosecution argued to you that
12 Ms. Espindola must have written this so she knew when
13 Mr. Carroll came in he was probably wired.

14 THE COURT: She gave it to Mr. Carroll,
15 supposedly.

16 THE COURT: How did the note figure in?

17 MR. ORAM: When they raided Simone's Auto
18 Plaza they found the note. It was incorrectly
19 spelled, but it appeared to say something like "We may
20 be under surveillance."

21 This is what they were asking to court to
22 consider, that maybe she knew that this was being
23 recorded.

24 Because of this note they asked for
25 handwriting exemplars to prove she wrote the note.

1 They haven't done it.

2 THE COURT: I'm trying -- I understand
3 what you're saying.

4 How is the note supposed to have figured
5 in?

6 I would think someone could have written
7 it out on the street. Joe Dokes, brought it in and
8 laid it on her desk and said "Hey, we may be."

9 I don't know.

10 MR. ORAM: It wasn't found on her desk at
11 all. It was something found.

12 It appears from this transcript she had
13 no idea that DeAngelo Carroll was wired. The only
14 speculation that they had that she did think that was
15 some note they wanted to attribute to her.

16 MR. DIGIACOMO: Or the fact they have got
17 him naked when he walked into the room.

18 Are you going to skip that part?

19 THE COURT: They got what?

20 MR. DIGIACOMO: They made DeAngelo
21 Carroll strip down to his underwear when he came into
22 the room, hence why the recording is bad.

23 MR. ORAM: Where is that?

24 MR. DIGIACOMO: DeAngelo does it and you
25 can hear it. He says "Come on, man, I'm not fucking

1 - wired. I'm far from fucking wired."

MR. ORAM: What does that have to do --

THE COURT: He stripped down?

MR. DIGIACOMO: They made him get naked to his underwear. They piled his clothes on the floor.

The recording device was hooked on his belt, and not on his clothing, at the front door.

He was made to sit on a bed in Little Lou's room across the way from where the door was. They speak in whispers.

This entire conversation is whispering while DeAngelo Carroll is sitting in his jockey shorts on a bed.

To imply they didn't think that perhaps there was some surveillance going on is ludicrous, particularly when there is a note found inside Simone's Auto Plaza that says "You know, shut your mouth. We are under surveilled [sic] -- it's misspelled.

It essentially says we may be under surveillance. To imply -- and by the way they then have a long conversation in whispers when they talk about "If the cops find out and we go down for this we're all going to wind up dead, because Mr. H is

leaving now."

Why does she incriminate herself, in part?

Why can the State say she's incriminating herself because she wanted him beaten up, but really she wanted him killed?

On the one hand what they are doing is they are saying "Look at how this transcript is incriminating."

When we point out, yes, could be incriminating, but it surely doesn't rise to a level of a death sentence, of the intent to kill.

They say that's because she's under surveillance. They are speaking out of two sides of their mouths.

THE COURT: We've seen this many times. Here is a fellow that's charged with killing his girlfriend and he admits he's a dope dealer.

"I was out with her selling dope."

It's like "Mea Culpa I'm going to come clean. I was selling this dope and I'll admit that, but I sure didn't kill Susie."

We see that all the time.

I'm not saying she's a sophisticated criminal, but there's any number of possibilities. We

going to have us all killed."

That's all in the transcript.

To imply that they don't know that the possibility is is that they are being surveilled -- and that later she tells them "By the way, don't come back here. I don't want to see your face again, because we don't want the cops to connect us."

She's clearly involved and she clearly understands the possibility she may be under surveillance, judge.

MR. ORAM: There is no way I can dispute right now those things. This is Mr. DiGiacomo saying Mr. Carroll told us he was in his jockey shorts. He's a truthful person.

This isn't in the transcript. Now he's going back to what Mr. Carroll said.

I don't want to get off of the point. They are using these transcripts because they want to execute this lady.

Yet in the very transcript when she's asked the question she says "No, beaten up."

If she thinks she's under surveillance and wants to minimize it why doesn't she say "I don't know what you're talking about. I don't want anything. I'm a completely innocent woman. I'm

get involved in all this What If Stuff.

We're really here to determine if there is a sufficient basis for the State to predicate a theory and to elevate this to a capital case.

In all candor -- and you know I respect you -- of all the attorneys in this town, I respect you a great deal -- we can go with this What If from now on.

Everybody can speculate as to what happened, what may have happened. We can do this forever.

The point is can the state substantiate what their theory is?

They have got a lot of things here that tend to point to the substantiation of their theory.

Notwithstanding, yes, but, now, what about all this other?

MR. ORAM: What I don't see they can substantiate is anything -- without going to DeAngelo Carroll, this man who makes all these different statements -- he's really the one that's putting her down. He's the one saying "She wanted this and she wanted that."

They don't have anything on these transcripts, nothing, to indicate that she

1 intentionally wanted Mr. Hadlund dead, nothing.
 2 The only thing they have is DeAngelo
 3 Carroll.
 4 All we're asking is that we don't have a
 5 capital jury -- that all we have is a First Degree
 6 Murder trial and remove the death penalty from this
 7 person who had never been in trouble. I know the
 8 Court understands.
 9 I know Mr. Draskovich and Ms. Thomas want
 10 to be heard.
 11 MR. DRASKOVICH: You've heard the
 12 expression death is different. We're not here saying
 13 stop the trial. There is going to be a trial and lots
 14 of What If's and issues addressed.
 15 This case, though, cannot be raised to
 16 the point of a death case. That's the only issue.
 17 Many of the State's arguments concern --
 18 it's almost like we're trying to defend a charge of
 19 murder. We're not.
 20 We're just saying this isn't a death
 21 case. Death cases should be few and far between.
 22 The State is abusing seeking the death
 23 penalty. They have done so in this case at the waste
 24 of the Court's time, taxpayer's money and these
 25 people's lives.

1 All these other matters do not involve
 2 the two people we've been talking about. She wanted
 3 to be here alone anyway.
 4 MR. ORAM: May we be excused?
 5 THE COURT: You joined, I know, but
 6 you've joined in this; have you not?
 7 MR. DRASKOVICH: No. We have not joined
 8 a single motion.
 9 THE COURT: If you haven't joined in
 10 here, you don't have to be here
 11 (RECESS TAKEN)
 12 THE COURT: Back on the record in case
 13 C212667, State versus Kenneth Counts, Luis Alonso
 14 Hidalgo and Anabel Espindola, DeAngelo Carroll and
 15 Jason Taoipu.
 16 The matter before the Court at the moment
 17 has only to do with Mr. Counts; is that correct?
 18 MS. WILDEVELD: Yes, Your Honor.
 19 THE COURT: We have Mr. Counts present
 20 and we have Ms. Wildeveld present as Defense counsel,
 21 representing Mr. Counts, Mr. DiGiacomo and Mr. Pesci
 22 representing the State.
 23 Allow me a moment to get my papers
 24 together here.
 25 We have the first matter which is

1 We'd ask the Court strike these
 2 aggravators. If they are convicted of First Degree
 3 Murder, they are convicted of First Degree Murder.
 4 They should not and cannot under the applicable law be
 5 facing death.
 6 Submit it on that.
 7 THE COURT: Anything else on this
 8 subject?
 9 MR. DIGIACOMO: No.
 10 THE COURT: Let me explain something
 11 here, briefly. We'll have a brief recess.
 12 We're working our man to death here.
 13 We'll take about 10 minutes. I've got to
 14 move this along. I have a funeral to attend.
 15 I'm going to take this matter under
 16 submission. I'll tell you why. I don't like to do
 17 these things in rushed manner.
 18 There is a lot to consider. I'll leave
 19 it there. And then we'll come back. A lot of these
 20 other matters are going to be very brief.
 21 MS. WILDEVELD: If you're so inclined, we
 22 can continue this for another day and hear the other
 23 11 counts for Mr. Counts on another day.
 24 THE COURT: I'm prepared. I've got some
 25 time, if do you.

1 defendant's motion to allow defense counsel to argue
 2 last at the penalty phase.
 3 Ms. Wildeveld, where did that come from?
 4 MS. WILDEVELD: These are all motions the
 5 Court has most likely seen before in death penalty
 6 cases.
 7 THE COURT: Not in the sense I haven't
 8 heard them before, but go ahead.
 9 MS. WILDEVELD: These are issues -- we
 10 know how the law reads currently. We're making sure
 11 that Mr. Counts' rights are preserved, in case there
 12 is any further litigation in this case, past the
 13 trial.
 14 The first motion we would submit as we do
 15 most of the motions as we go through them.
 16 MR. PESCI: Weber versus State, 119,
 17 P3rd, 107, Weber also claims that he had a right to
 18 argue last to the jury during his penalty hearing and
 19 the District Court improperly denied his motion to do
 20 so.
 21 This claim has no merit.
 22 As we have repeatedly explained, NRS
 23 175.141, subsection five, requires that counsel for
 24 the State open and conclude argument.
 25 If it is known by Defense counsel that

1 that is the state of the law that should be put in
2 front of you. That is known that that is the state of
3 the law.

4 There is no merit to this. It should be
5 dismissed.

6 THE COURT: I don't think the law of the
7 State of Nevada contemplates such. It will denied.
8 Motion to federalize all motions.

9 Your thinking there?

10 MS. WILDEVELD: Your Honor, certainly
11 reading the State's response to this motion, certainly
12 it's not asking counsel to be relieved of its
13 obligation to object each time there is an objection
14 that needs to be made.

15 Counsel knows better than that.

16 However, what we're asking is if the
17 whole recitation of the federalized objections aren't
18 made that they -- the Court discusses that if we don't
19 mention the 8th and 14th Amendment and all different
20 amendments that apply to each different objection that
21 they are intended to be included.

22 With that, we'd submit.

23 MR. PESCI: We're in State Court. We'll
24 submit it.

25 THE COURT: Is it your position,

1 Ms. Wildeveld, that if you don't mention at the time
2 of the objection contemporaneous with the item being
3 objected to, if you don't mention the constitutional
4 basis of the objection that you lose the right to
5 appeal to federal court on it?

6 MS. WILDEVELD: Yes, Your Honor. We want
7 to make sure.

8 THE COURT: Has there been a Federal
9 Court ruling in that regard?

10 MS. WILDEVELD: If you don't object to it
11 and raise the issues that belong to it, then yes, you
12 cannot raise it.

13 THE COURT: Is that your conclusion or a
14 federal judge's conclusion?

15 MS. WILDEVELD: I believe it's a federal
16 judge's conclusion, Your Honor.

17 THE COURT: I'm honestly asking that. I
18 don't know.

19 Has it -- has there been a federal judge
20 that said "Hey, you've made an objection in State
21 District Court on this Constitutional issue, arguably,
22 but you didn't say the magic word, Your Honor, in
23 District Court -- in the State Court 'We object
24 because this is contrary to the 14th Amendment or the
25 Second Amendment" or whatever it might be and,

1 therefore, ma'am, you can't be in Federal Court on
2 that issue?"

3 MS. WILDEVELD: No.

4 It's the case of Leonard that says if you
5 don't contemporaneously object -- and I understand
6 we're not asking to not contemporaneously -- we will
7 contemporaneously object when there is an
8 objectionable issue before the Court.

9 However, we don't want to have to make
10 the whole string of recitations on what Constitutional
11 arguments need to be made at that time with regard to
12 each objection.

13 THE COURT: I understand a
14 contemporaneous objection has to do with giving the
15 Court an opportunity to cure the situation.

16 I don't think that's the issue.

17 I'm trying to figure out why do you think
18 you have the need there to set out all the
19 constitutional reasons for your contemporaneous
20 objection?

21 MS. WILDEVELD: Because with each
22 objection you should, and I think -- I don't know if
23 it's actually required, but you should make your
24 objections for the record; not only just an objection
25 or a speaking objection, but state the reasons for

1 your objection.

2 THE COURT: Generally speaking, we don't
3 always go into a big legal argument when there's an
4 objection.

5 What is your thinking?

6 MR. DIGIACOMO: What the federal courts
7 have said is they shouldn't be in a position, later
8 on, of making the decision that wasn't put to the
9 trial court.

10 The defense counsel -- what they try and
11 do is say "We're giving all the possible reasons for a
12 contemporaneous objection.

13 We say Objection. Hearsay.

14 The Court says "Under the statutes it's
15 proper hearsay" and then they didn't say "Objection.
16 Crawford Violation", per se.

17 They argue to the court there was a
18 Crawford Violation and the Court said you should have
19 told the court that and allowed the Court to remedy
20 the ruling with the jury right there so we won't have
21 to send it back for a new hearing.

22 This doesn't solve the concerns of the
23 Federal Court.

24 What you'll essentially be saying is you
25 don't have to tell the Court the right remedy why they

1 should have sustained the objection.

2 You can give the Court any reason and
3 even if you're wrong and the court didn't think about
4 what the right reason would have been we'll let you
5 still address it later on.

6 That's a violation of the contemporaneous
7 objection rule. They should give this Court the
8 opportunity to rule upon the proper grounds.

9 That's all the the federal courts say.
10 We're not going to address this, if the court didn't
11 have an opportunity to rule upon it.

12 If there's some state law grounds they
13 want to object on, you know, objection, hearsay, and
14 evidentiary rule, if they want to jump in and say
15 "Despite the Hearsay Rule, we want to object on the
16 federal Constitution Crawford Violation confrontation
17 clause," they should stand up and say "Objection,
18 judge. Crawford Violation."

19 That's the only difference.

20 THE COURT: In fairness to
21 Ms. Wildeveld, does that mean she would be expected to
22 make an objection in this Court on both state and
23 federal grounds?

24 MR. DIGIACOMO: To be truthful, since I
25 don't try cases in Federal Court, I don't believe

1 that's true.

2 They jump up and say "Objection or file
3 an objection; objection to the question. Violation of
4 the Fourth Amendment."

5 That is the federal grounds that applies
6 to the State.

7 If they make an objection merely on state
8 law grounds and they don't make an objection, based
9 upon their federal grounds, then they can address it
10 in federal court.

11 THE COURT: What's your thinking there,
12 Ms. Wildeveld?

13 MS. WILDEVELD: That's our issue.

14 We want to make sure -- we're doing a
15 death penalty case here. Of course, the federal
16 courts will be looking at this case at some point in
17 time, should Mr. Counts get the death penalty.

18 We want to make sure when -- we'll make
19 every effort to bring up all grounds, but if we just
20 object and don't say stop the trial. Your Honor, this
21 is based on the 8th amendment, 14th Amendment, as it
22 applies to the Sixth Amendment, so on and so forth,
23 that's the reason.

24 THE COURT: Mr. DiGiacomo, it occurs to
25 me also it might serve to expedite matters to allow

1 such so we don't have to go through a laundry list of
2 all the possible federal bases for objections.

3 I understand.

4 MR. DIGIACOMO: I don't dispute that.

5 I don't think if she jumps up -- I'm not
6 sure of all the federal, unless it's a federal
7 Constitutional ground, but ultimately what she can't
8 do is just say, before trial "Look, judge, you may not
9 know about an issue. We may not know about an issue
10 and the State may not know about an issue and we're
11 not going to give you an opportunity to cure that
12 issue in front of a jury, but 15, 20 years later, as
13 I've got a penalty hearing now, which is 20 years old,
14 15, 20 years later we're going to tell some Federal
15 Court this objection should have been sustained for
16 this federal reason and they are going to say "Didn't
17 you ask the judge to cure the problem at the time?"

18 They are going to say "No, judge. We
19 filed a motion that says everything we say should be
20 federalized. As such, we were relieved from the
21 responsibility of giving the trial court the
22 opportunity to address the proper grounds for the
23 proper remedy in front of jury so we don't have to do
24 this again 20 years from now."

25 That was the whole purpose of the rule.

1 MS. WILDEVELD: We're not being asked to
2 be relieved of our obligations to make objections,
3 just not to disrupt the Court each and every time
4 there is an objection.

5 THE COURT: Would it have the effect of
6 what Mr. DiGiacomo is suggesting?

7 MS. WILDEVELD: To relieve us of our
8 obligation 15, 20 years from now, should this case be
9 looked at again, would it relieve us of our
10 obligation?

11 We'll make every effort to make sure our
12 objections are fully noted and argued. However, we
13 don't want to be faced with the prospect we don't
14 mention how it relates to the Constitution and that it
15 not be a federal issue.

16 THE COURT: The scenario Mr. DiGiacomo
17 sets out, you know, is a distinct possibility 15, 20
18 years from now, perhaps not, maybe two years, the same
19 principal; is that not a possibility?

20 MS. WILDEVELD: We're not asking to be
21 completely relieved of our obligation. We'll make
22 every effort to make full objections.

23 This is a routine motion filed for this
24 reason, because it has come up before in appeals.

25 MR. DIGIACOMO: Routinely filed,

1 routinely denied.
 2 Let's go to trial and see what happens.
 3 You can make determinations as to what happens.
 4 MS. WILDEVELD: It's not routinely
 5 denied.
 6 THE COURT: Well, your experience is the
 7 courts deny it?
 8 MR. DIGIACOMO: Been denied every time
 9 I've responded to it.
 10 MS. WILDEVELD: Judge McGroarty granted
 11 it in the Kenshaw Maxey death penalty case.
 12 MR. DIGIACOMO: Submit it, judge.
 13 THE COURT: I'm going to deny it without
 14 prejudice. I'm sure it will come up with co-counsel.
 15 I'll give it a little more consideration. I wrote a
 16 big question mark here.
 17 I wrote suspect. I'm not impugning
 18 counsel.
 19 I'm looking -- I'm thinking what are the
 20 ramifications of this motion for inability to voir
 21 dire?
 22 Submitted?
 23 MR. DIGIACOMO: Submitted by the State.
 24 MS. WILDEVELD: Submitted.
 25 THE COURT: Denied.

1 MR. DIGIACOMO: So we can disparage him,
 2 but the State doesn't get the opportunity to explain
 3 more about him and how it's impacted the State and his
 4 family, if I understand that correctly.
 5 MS. WILDEVELD: I know he has a daughter
 6 and son. They will be allowed to testify.
 7 I don't want to draw this thing out.
 8 THE COURT: He has a daughter and a son?
 9 MS. WILDEVELD: I believe.
 10 THE COURT: You contemplate calling them
 11 as witnesses?
 12 MR. DIGIACOMO: In the penalty phase,
 13 yes.
 14 THE COURT: Do you have a problem with
 15 that?
 16 MS. WILDEVELD: No.
 17 THE COURT: This is like the autopsy
 18 photographs. We'll have to look at it.
 19 I told my clerk, I mean, there's going to
 20 be lot -- we're not going to spend an inordinate
 21 amount of time parading this is his yearbook
 22 photograph and all that.
 23 We'll work through it as we progress.
 24 I'm reserving the ruling on that.
 25 MS. WILDEVELD: The fifth motion which is

1 I do -- I have yet to see the need. Over
 2 all the years I've handled these cases I have yet to
 3 see the need.
 4 Motion to exclude autopsy and gruesome
 5 photographs. We're a little premature.
 6 I would have no problem with looking over
 7 the photographs at the eve of trial and determine
 8 which we might have in and out.
 9 We're not going to overdo this thing.
 10 I'm going to reserve that matter.
 11 Preclude introduction of victim impact
 12 evidence. That's kind of a broad situation there.
 13 What do you mean there, Ms. Wildeveld?
 14 MS. WILDEVELD: We don't want to preclude
 15 victim impact evidence. We want to limit the victim
 16 impact evidence.
 17 THE COURT: Preclude, limit, all right.
 18 MS. WILDEVELD: We don't want to hear
 19 what a great guy Timothy Hadlund is and have his
 20 baseball coach from when he was seven years old
 21 testify, when he was a bouncer at a bar.
 22 At the lake, his presence at the lake was
 23 to meet these people, was allegedly to do a drug deal.
 24 We don't want to hear what a great guy he was when
 25 there is a lot more to his life.

1 the motion to prohibit any references to the first
 2 phase as being called the guilt phase, submit on that.
 3 MR. DIGIACOMO: Submitted.
 4 THE COURT: You're asking me to redesign
 5 the English language there. Denied.
 6 Bifurcate the penalty phase.
 7 I don't quite understand that. The
 8 thinking there?
 9 MS. WILDEVELD: Submit on that.
 10 This is a motion often brought in death
 11 penalty cases in which we want a break between the
 12 penalty phase -- I'm sorry -- the guilt or innocence
 13 phase and any penalty phase.
 14 THE COURT: See how difficult that is?
 15 MS. WILDEVELD: You just said because you
 16 just said we're going to use the words --
 17 THE COURT: You were following my lead?
 18 MS. WILDEVELD: I'm sorry, the trial
 19 phase.
 20 THE COURT: Okay.
 21 MS. WILDEVELD: We can separate the trial
 22 phase from the penalty phase.
 23 MR. DIGIACOMO: I thought the bifurcation
 24 was of the penalty phase and when a certain type of
 25 evidence would come in and when a jury could hear

1 other parts of evidence in the penalty phase, assuming
2 we got to that point.

3 THE COURT: I don't quite understand it.

4 What is it you want to do here?

5 MS. WILDEVELD: I'm hungry.

6 THE COURT: I am, too.

7 MS. WILDEVELD: I really want to submit
8 it.

9 MR. PESCI: I've responded to this exact
10 one in the past. Mr. DiGiacomo and I, in another
11 courtroom, were forced do this bifurcation even though
12 there's direct case law.

13 THE COURT: What courtroom is that?

14 MS. WILDEVELD: A different courtroom.
15 Judge Gates.

16 MR. PESCI: The concept of it is the jury
17 didn't get to hear the other evidence when we're in
18 the context of a penalty phase.

19 They only got to hear aggravators and
20 then mitigators, went out, made a determination if the
21 aggravators existed and if they outweighed the
22 mitigators, and only after that, came back in and got
23 to hear the other evidence, which is other evidence
24 that doesn't rise to the level of an aggravator.

25 The Nevada Supreme Court stated

1 is for. It was my motion and I could argue that first
2 there is no evidence of Mr. Counts being involved in
3 any gang.

4 THE COURT: No evidence.

5 You say that you have evidence?

6 MR. DIGIACOMO: We were told by the
7 witness. I didn't make a motion to put it in. I
8 don't know why we need a Motion In Limine to preclude
9 it.

10 If, at some point in time, the fact he's
11 a gang member from California becomes relevant to the
12 guilt phase I'll file a proper motion.

13 If we learn that evidence of his gang
14 affiliation is relevant to the penalty phase, I'll
15 file the proper motion.

16 At this time I'm not offering.

17 THE COURT: Absent a motion, it's not
18 in.

19 MR. DIGIACOMO: Correct.

20 MS. WILDEVELD: Thank you.

21 It has been moved before in Court.
22 That's the reason for bringing this motion to the
23 Court.

24 THE COURT: It won't be discussed unless
25 there is a motion.

1 specifically, again in Weber, argues that his penalty
2 hearing should have been bifurcated.

3 The Nevada Supreme Court has rejected
4 this argument before. Most recently in McConnell
5 versus state. We decline to reconsider the issue.

6 THE COURT: That's good enough for me.
7 Denied.

8 Motion to preclude admission of gang
9 affiliation, drug activity, handling of guns and
10 batteries.

11 MS. WILDEVELD: I believe we skipped the
12 Motion in Limine to bar improper prosecutorial
13 misconduct.

14 THE COURT: Since I already said that
15 big line of stuff why don't we look at that? What
16 gang affiliation, et cetera et cetera?

17 Is there something like that?

18 MR. DIGIACOMO: That was what my response
19 was, if we're talking about the defendant's gang
20 affiliation, because he's a gang member out of
21 California --

22 THE COURT: Who is?

23 MR. DIGIACOMO: The Defendant,
24 Mr. Counts.

25 MS. WILDEVELD: That's what this motion

1 What about drug activity?

2 MR. DIGIACOMO: I'm assuming this is the
3 first -- the guilt phase. He has prior convictions
4 for drug offenses.

5 MS. WILDEVELD: Child abuse.

6 MR. DIGIACOMO: But, you know, unless it
7 becomes relevant to something, I'll file a motion. It
8 would be another bad act.

9 For the guilt phase, I don't oppose this.

10 For the penalty phase it comes in.

11 THE COURT: As to the guilt phase,
12 unless there is a bad act motion, it's not in.

13 MR. DIGIACOMO: Correct.

14 MS. WILDEVELD: Right.

15 In the trial phase, although it will come
16 up that they were going to meet Mr. Hidalgo,
17 Mr. Carroll, Rante Zone and Jason Taoipu were going to
18 meet Mr. Hadlund to smoke marijuana.

19 MR. DIGIACOMO: I'm assuming she doesn't
20 mind we put in the fact they did smoke marijuana on
21 the way to kill him.

22 What they are talking about, I assume,
23 was the fact he's a neighborhood drug dealer. That
24 fact doesn't come in in any guilt phase, unless it
25 becomes relevant.

1 THE COURT: If it's part of the Case in
2 Chief, we're not talking about that, are we?

3 MS. WILDEVELD: No.

4 THE COURT: Handling of guns, what's
5 that?

6 MS. WILDEVELD: The State has brought up
7 before, in Court, Mr. Counts' record.

8 As a former Special Public Defender, I
9 used to have this on my computer and I can see his
10 record. I know we filed a motion to get the SCOPES of
11 all of the co-defendants and even the uncharged
12 co-defendant, Mr. Zone.

13 We haven't received those. I don't know
14 what's on Mr. Counts' SCOPE.

15 However, the State has mentioned before
16 gun charges and domestic violence charges and some
17 other charges that didn't belong to Mr. Counts, as far
18 as we know.

19 I submit I gave to Mr. DiGiacomo a
20 judicial clearance. I don't know if it was attached
21 to your motion, a judicial clearance.

22 May I approach?

23 THE COURT: Yes.

24 MS. WILDEVELD: A copy of which I'll give
25 to the Court.

1 dispute his felony convictions for a couple of felony
2 convictions for dope. They don't dispute he's been
3 arrested for ex-felon in possession of firearm.

4 If they are talking about the guilt
5 phase, his handling of guns, with the exception of the
6 gun he handled to execute Timothy Hadlund, you're
7 right. It would be another bad act and I'll file the
8 motion.

9 When it comes to a penalty phase, if we
10 can prove-up he was arrested for ex-felon in
11 possession of a firearm on a given date or convicted
12 of this or that crime, we will do so.

13 My understanding -- I received this this
14 morning -- this judicial clearance has to do with some
15 warrant he claims came from a juvenile incident that
16 we have records of. I'll look into it.

17 If we determine there's no evidence he's
18 the individual that they are talking about from
19 getting into a fight at school or something to that
20 effect when he was 16, then obviously we're not going
21 to raise the issue.

22 That's all penalty phase stuff.

23 I don't know what it has to do with the
24 guilt phase at all. It's a bad act.

25 I would have to file a motion with the

1 I'm simply saying there was another
2 Mr. Counts, Kenneth Counts, in California, who had
3 certain charges and the judicial clearance was showing
4 this was not the Kenneth Counts they were referring
5 to. That was the issue, so on and so forth.

6 Mr. Counts used to have to carry around
7 in his wallet a slip of paper, in case he was picked
8 up for anything, that he didn't have those bench
9 warrants out after him.

10 THE COURT: Do you know of any criminal
11 record?

12 MR. DIGIACOMO: Yes.

13 I've provided the information from that
14 criminal record. I put it in the notice of intent to
15 seek the Indictment.

16 She filed the motion for the SCOPES of
17 the various people and we discussed it and Mr. Whipple
18 was supposed to make an appointment to come over and
19 view them.

20 I wasn't physically giving them the
21 SCOPES of the individuals. That was the ruling of the
22 Court.

23 I've never been contacted to do anything
24 else.

25 The fact of the matter is that they don't

1 Court.

2 MS. WILDEVELD: These are motions are all
3 addressing Mr. Counts' case entirely. In this Court
4 before they brought up battery charges, so on and so
5 forth. I don't know of any of those that relate to
6 Mr. Counts.

7 I know drug charges, I would know of an
8 ex-felon in possession which stemmed from an old,
9 unuseable rifle found in his mother's house where he
10 was living. Those are only things I know of.

11 If the State has more evidence, I would
12 simply ask to have that myself so I don't have to file
13 these motions.

14 THE COURT: You need to go look at these
15 rap sheets that are involved with all these folks.

16 MS. WILDEVELD: It was my understanding
17 we are going to be provided with all of them except
18 for the juveniles which we're supposed to look at in
19 Camera in the Court.

20 MR. DIGIACOMO: It was my understanding
21 they were to come to my office and review them if
22 there's any felony convictions that were relevant.
23 Maybe I'm wrong.

24 I'll go back and check the transcript. I
25 was reading it last night for something else.

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1 I thought Mr. Whipple would make an
 2 appointment to come to my office. I know Mr. Whipple
 3 has copies of the police reports from the prior
 4 batteries.
 5 When I see the motion from Ms. Wildeveld
 6 I'm wondering if her and Mr. Whipple have spoken.
 7 I've given them those records they have.
 8 THE COURT: This is not --
 9 MR. DIGIACOMO: If they want to come
 10 over, great.
 11 THE COURT: We're making it too
 12 complicated. Get together, share the criminal records
 13 that you have and, Mr. DiGiacomo, if there is a need
 14 to have some prints made to check what we have here,
 15 we don't want to confuse this thing and have somebody
 16 else's record attributed to this man.
 17 We still have some time.
 18 MS. WILDEVELD: So you're aware, I went
 19 to the California courts and spent numerous hours in
 20 the L.A. court house searching all of Mr. Counts'
 21 records.
 22 I never found anything regarding anything
 23 other than drug cases.
 24 MR. DIGIACOMO: She can come over.
 25 THE COURT: And a firearm case?

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1 be reserved for the most gruesome murderers and which
 2 I myself have represented a few of those or numerous
 3 of those.
 4 We would ask -- this is a motion the
 5 whole defense bar would like to know what goes on in
 6 this death penalty committee to decide why a death
 7 penalty case is a death penalty case.
 8 It can't be as basic as the victim is
 9 white and the Defendant is black and it's a death
 10 penalty case.
 11 We want to know what they look at to make
 12 it a death penalty case.
 13 MR. PESCI: The State takes issue with
 14 the response the victim is white and the Defendant is
 15 black.
 16 She's making an argument here that
 17 somehow the State has been racist in its pursuit of
 18 the death penalty.
 19 There are statutory aggravators. The
 20 Legislature of the State of Nevada decided what those
 21 are.
 22 If the facts of the case support that, it
 23 is presented to a jury. A jury makes the
 24 determination of whether or not those aggravators
 25 exist and, if they do exist, according to the jury,

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1 MS. WILDEVELD: From here, yes.
 2 THE COURT: All right. Back up.
 3 Mr. DiGiacomo, Mr. Pesci, will you not
 4 indulge in improper behavior?
 5 MR. PESCI: Yes.
 6 MR. DIGIACOMO: Yes.
 7 MS. WILDEVELD: Thank you.
 8 THE COURT: There's a reciprocity issue
 9 here. You also promise and swear you won't get
 10 involved in any improper conduct?
 11 MS. WILDEVELD: Yes.
 12 THE COURT: Motion for discovery and
 13 evidentiary hearings regarding the manner and method
 14 of determining in which murder cases the death penalty
 15 will be sought -- well, noted, with the understanding
 16 of the RJ's opinion of 1999. I assume we're not going
 17 to put the District Attorney's Office on trial here.
 18 What is this involving?
 19 MS. WILDEVELD: You heard a lot of it
 20 this morning when Ms. Espindola's and Mr. Hidalgo's
 21 attorneys were talking.
 22 Nobody on the defense bar seems to
 23 understand why a death penalty is a death penalty
 24 case, why certain cases are death penalty cases.
 25 I agree that death penalty cases should

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1 whether those outweigh mitigators.
 2 MS. WILDEVELD: This case has five
 3 co-defendants in it. We sat here this morning for
 4 three hours and Mr. Counts was not a part of any of
 5 the stuff happening this morning in Court.
 6 This case is much much bigger than just
 7 Mr. Hadlund being murdered. That's the only part
 8 Mr. Counts is alleged to have been a part in, except
 9 he's also being charged with conspiracy.
 10 We have all five people -- I'm not sure,
 11 is Jason Taoipu facing the death penalty?
 12 MR. PESCI: He's a juvenile. He is not
 13 eligible.
 14 MS. WILDEVELD: Thank God.
 15 THE COURT: Let me interrupt you a
 16 moment.
 17 With all due respect, Mr. Pesci, I don't
 18 think what you've alluded to is what Mr. Wildeveld is
 19 talking about.
 20 We know there are aggravators or
 21 mitigators set out by statute. We know the jury will
 22 make the final determination.
 23 What she's alluding to is how is the
 24 decision made in your office to ask for the death
 25 penalty?

1 I think I'm correct in my assumption,
2 it's just that -- that your office doesn't look at a
3 case, determine if the aggravators are there and, if
4 they are there, in all such cases where they are there
5 you ask for a death penalty.

6 Isn't that true?

7 MR. PESCI: No. We do not seek the death
8 penalty in every single situation.

9 THE COURT: There is a committee involved
10 that evaluates the case and there are some factors.
11 These aren't off the cuff kind of "You know, I don't
12 like the looks of this guy or whatever and let's" --
13 there is a set out criteria; is there not?

14 MR. DIGIACOMO: There is the criteria of
15 the statute. Judge, there is a committee that looks
16 at it. The committee interprets the statutes as to
17 what the aggravators are.

18 There is no statutory requirement that a
19 committee even exist and that it go through that
20 process.

21 That is something set up by a former
22 defense attorney who was elected as a District
23 Attorney. That procedure has been followed since
24 then.

25 There is nothing to say -- no cite that

1 they can go to as to say how is it done?

2 It's not fair.

3 Ms. Wildeveld can have an opportunity to
4 be there. There is nothing to that effect. We have
5 potential aggravators. If those aggravators are
6 proven, the person is eligible.

7 If they are not, they are not eligible
8 for it.

9 THE COURT: What you're saying is what
10 I'm suggesting. They are eligible.

11 Just because they are doesn't mean, in
12 all cases if someone is eligible, your office will
13 seek the death penalty.

14 MR. DIGIACOMO: Correct.

15 THE COURT: There's got to be a decision
16 made there at some point; is there not?

17 MR. DIGIACOMO: There is.

18 THE COURT: She's suggesting she would
19 like to know what the criteria is.

20 How is that decision made?

21 I'm not saying she's entitled to know.

22 That's what she's asking.

23 MR. DIGIACOMO: That's what she's asking.

24 If somebody were to grant this motion, then fine.

25 We'll take it out of their hands.

1 We'll file on every case where there is a
2 statutory aggravating circumstance.

3 What they want to do is go into the
4 District Attorney's office, ultimately the District
5 Attorney's determination in his discretion as to
6 whether or not to seek the death penalty.

7 What they want to know is they want to go
8 into the District Attorney's internal workings and
9 find out what criteria we used.

10 There is no authority for that.

11 I would note that any defense attorney
12 who has ever asked to make a presentation to the
13 committee has been allowed to do so, has given a
14 presentation to the committee as to why it is this
15 case, while an aggravator maybe may exist, shouldn't
16 be.

17 They are asked to leave the room while
18 the discussion goes on as to whether or not it is or
19 it is not going to be a death penalty.

20 MS. WILDEVELD: We have no notice of when
21 these committees take place. There is no guidelines
22 as to how this is.

23 This is all prosecutorial discretion on
24 what cases are death penalty and what cases are even
25 charged.

1 Right now, I sit facing -- I have a 14
2 year old old kid facing a murder charge because he was
3 a passenger in a van from which a murder took place,
4 yet Ronte Zone is not a Defendant.

5 We want to effectively defend it.

6 THE COURT: When you say effectively
7 defend it, that's a fairly broad statement.

8 I wasn't aware the defense bar or
9 Defendant's attorney was invited to have comment on
10 these matters.

11 MR. DIGIACOMO: They aren't invited.

12 We've they had attorneys come to us and
13 say "Look, this case has aggravating circumstances.
14 We know you're going to a committee. At some point
15 and we'd like to make a presentation as to why it is
16 that there shouldn't be one."

17 And the committee has in the past said
18 "Fine. You can come and give a presentation as to why
19 you think your client shouldn't face the death
20 penalty."

21 THE COURT: Are you aware of that, Ms.
22 Wildeveld?

23 MS. WILDEVELD: In my eight years with
24 the special Public Defender's Office not once did I
25 ever -- did we have notice of one of these matters.

THE COURT: He doesn't seek you out.

If you have a client that's charged with murder and you, in your experience, figure this is a pretty strange situation, you go to them or somebody in their office and say "There may be a suggestion of death here. I'd like to be privy to when the thing is and I'd like to make an appearance."

MS. WILDEVELD: Surprisingly in this case, I was hired by -- the Court appointed me to Mr. Counts' case when he was in Justice Court.

I would have never thought it was a death case.

MR. DIGIACOMO: You got paid to execute somebody while on probation, and you didn't think that would be a death penalty case?

I would.

MS. WILDEVELD: I didn't know if he was on probation at the time. I still dispute that.

You haven't received those records.

THE COURT: You need to weigh it. It is what it is. Some attorneys look at it a little differently.

I'm not going to require the procedure be changed at this juncture. That's something the Legislature might be sought out on.

One other matter here, I don't know, Ms. Wildeveld. This is -- this rather states the obvious.

Shall we exclude jurors that would say automatically they would vote for the death penalty?

MS. WILDEVELD: In this case it's very important.

THE COURT: I'm not arguing with you. Certainly we're going to exclude them.

MS. WILDEVELD: If Mr. Counts is the alleged shooter in this case, then they will say "Give the shooter the worst and we'll step down everyone else."

THE COURT: I'm agreeing with you, I think. You can't win too much more than win, I guess.

If someone says "Of course, if I find them guilty of First Degree Murder, I'm going to give them the death penalty," that person will be out of here.

MR. DIGIACOMO: We still have a chance to talk them. We won't do it.

THE COURT: There will be rehabilitation and then they will be out of here.

MR. DIGIACOMO: And then they are gone.

MS. WILDEVELD: Thank you.

THE COURT: It's been wonderful. Thank you very much.

MS. WILDEVELD: As a business matter, Mr. Counts has a shoulder issue. He can't raise one of his shoulders.

He's put in many kites the at the jail to get his shoulder looked at. It's causing him substantial pain.

THE COURT: Do you know anything about that?

COURT SERVICES OFFICER: No.

THE COURT: Look into that. Court is adjourned.

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

J. A. D'AMATO CCR #017

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EXHIBIT "6"

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Δ Reply 1/5/06
Agmt 1/19/06 9:00 XIV

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9 THE STATE OF NEVADA,

10 Plaintiff,

11 -vs-

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

14 Defendant.

CASE NO: C212667

DEPT NO: XIV

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

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

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

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

26 ///

27 ///

28 ///

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

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

3 Due to the fact that much of the information was linked to the Palomino Club,
4 detectives contacted Luis Hidalgo, Jr. ("Mr. H"), the owner of the club. (RTP, p. 160). "Mr.
5 H" requested that detectives return when the floor manager, Ariel, could help them. (RTP, p.
6 162). Detectives returned to the Palomino Club and interviewed Ariel. During that
7 interview, Ariel provided paperwork from the Palomino indicating that Defendant Deangelo
8 Carroll was a current employee and that Timothy Hadland was a former employee. (RTP, p.
9 163). During the interview of Ariel, Defendant Deangelo Carroll arrived at the club. (RTP,
10 p. 164). Detectives asked Defendant Carroll to accompany them to the police station.
11 Defendant Carroll agreed and provided an approximately four (4) hour taped statement.
12 (RTP, p. 164).
13

14 During the course of the statement, Defendant Deangelo Carroll explained that prior
15 to arriving at work at the Palomino that night, Defendant Luis Hidalgo, III had called him at
16 home and told him to "he's all like bring two garbage bags and a baseball bat, we have to go
17 take care of _____ but he never told me what it was about. Then when I got there to the
18 club, I was called in the office." (Defendant's Exhibit 1, p. 58). Defendant Deangelo
19 Carroll explained that initially, Mr. H called him into the office at the Palomino Club, in the
20 presence of Defendant Anabelle Espindola, and explained that the victim, "T.J. was puttin'
21 bad shit on his club and didn't like, so he tried to tell us, what, what, what he said is if you
22 guys don't knock him out, at first he wanted us to beat him up, then he said that he wanted
23 T.J. knocked off." (Defendant's Exhibit 1, p. 56). Mr. H also explained that Defendant
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28

1 Hidalgo was very upset with T.J. and wanted Defendant Deangelo to "go take care of T.J."
2 (Defendant's Exhibit 1, p. 88). Additionally, Mr. H was offering cash for the people who
3 actually killed T.J. (Defendant's Exhibit 1, p. 61). During the car ride out to the Lake,
4 Defendant Anabel Espindola called Defendant Deangelo Carroll and told him, "if [T.J.'s] by
5 his self, then do him, if he isn't by his self, then just fuck him up ____, fuck him up and fuck
6 up whoever's with him." (Defendant's Exhibit 1, p. 92). Thereafter, T.J. was lured to a
7 remote location and executed by Defendant Kenneth Counts. After the killing, Defendant
8 Kenneth Counts demanded six thousand dollars (\$6000) for his services. Defendant Anabel
9 Espindola provided the money to Defendant Deangelo Carroll to pay Defendant Kenneth
10 Counts.
11

12
13 Moreover, Defendant Deangelo Carroll indicated that the motive behind the killing
14 was the T.J. had been stealing from the club. (Defendant's Exhibit 1, p. 59). Additionally,
15 Defendant Deangelo Carroll originally received one hundred dollars (\$100) for his
16 participation.
17

18 After the interview, detectives drove Defendant Carroll to his residence. When they
19 arrived, Rontae Zone was present at the house. (RTP, p. 165). Rontae agreed to come to the
20 homicide offices for an interview. (RTP, 166).
21

22 Rontae Zone testified at the preliminary hearing. Rontae is a nineteen (19) year old
23 who knew Defendant Carroll. (RTP, p. 16). In May of 2005, Rontae began working with
24 Defendant Carroll as a flyer boy for the Palomino Club. (RTP, p. 17). A flyer boy passes
25 out flyers and pamphlets to cab stops. The flyers come in a variety of colors. (RTP, p. 18).
26 Rontae worked with Defendant Carroll approximately four (4) to five (5) times. In order to
27
28

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

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

14 Thereafter, the group went out to promote and pass out flyers. After passing out
15 flyers, the group returned to Defendant Carroll's house. (RTP, p. 30). After a while,
16 Defendant Carroll said it was time to go back to work. Concerned that he did not want to be
17 involved in anything illegal, both Rontae and his girlfriend asked Defendant Carroll what
18 they were leaving to do. (RTP, p. 31). Defendant Carroll told Rontae that they were only
19 going to promote. The three, Rontae, Defendant Taoipu, and Defendant Carroll got into the
20 white Chevy Astro Van. When they left, Defendant Carroll began driving to the west side,
21 near E Street. (RTP, p. 31). On the way, Defendant Carroll told Defendant Taoipu and
22 Rontae that "Mr. H's" son, Defendant Hidalgo, wanted the victim dead too, and that
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1 Defendant Carroll should grab baseball bats and trash bags. (RTP, p. 34).

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

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

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

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27 ¹ It was at this point in the testimony where Defendant Counts', Hidalgo's and Espindola's attorneys
28 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.

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

7
8 As they were driving away, Defendant Counts confronted Defendant Taoipu about
9 why he did not shoot. Defendant Taoipu said he was going to shoot however, Defendant
10 Carroll was in the way. (RTP, p. 72). Thereafter, Defendant Counts asked Rontae where he
11 lived. Defendant Carroll drove the van back to the Palomino Club.

12
13 Once back at the Palomino, Defendant Carroll and Counts entered the club. (RTP, p.
14 73). After about thirty (30) minutes, Defendant Counts exited the club and left in a cab.
15 Thereafter, Defendant Carroll left the club and told Rontae and Defendant Taoipu that
16 Defendant Counts got paid. (RTP, p. 75). Thereafter, Defendant Carroll, Taoipu and Rontae
17 left and stayed at Defendant Carroll's house.

18
19 The next morning, Defendant Taoipu drove the van to a tire shop while Defendant
20 Carroll followed in another vehicle. (RTP, p. 77). Defendant Carroll stabbed the tires on the
21 van and had the tire shop replace the tires. (RTP, p. 78). Defendant Carroll paid and told
22 Rontae that Defendant Espindola had given him a hundred dollars (\$100) to replace the tires.
23 (RTP, p. 79).

24
25 Later in the day, Defendant Carroll went to Simone's Auto Plaza. (RTP, p. 84).
26 Defendant Taoipu and Rontae went with him. At Simone's Auto Plaza, Defendant Carrol
27
28

1 met with "Mr. H." (RTP, 95). The group then left in the Palomino Shuttle. (RTP, p. 96).

2 Thereafter, Defendant Carroll went to work. (RTP, p. 99). The next time Rontae saw
3 Defendant Carroll, he was with homicide detectives. Defendant Carroll, in the presence of
4 homicide detectives, told Rontae to tell the truth.

5 Defendant Jayson Taoipu was located and interviewed. Taoipu confirmed most of the
6 information provided by Defendant Deangelo Carroll; including calling the attack on T.J. a
7 hit ordered by Mr. H; indicating that Defendant Luis Hidalgo, III called Defendant Deangelo
8 Carroll and told him to bring garbage bags and baseball bats; confirming that Defendant
9 Anabel Espindola called Defendant Deangelo Carroll as they were driving to the lake; and
10 that Defendant Kenneth Counts and Deangelo Carroll were paid for their participation in the
11 murder.
12

13 After interviewing Rontae and Defendant Taoipu, detectives set out to identify, locate
14 and arrest "KC." Detectives knew from the description of where he was located that "KC,"
15 lived at 1676 E Street. (RTP, p. 167). Based upon this information, a search warrant was
16 drafted for the residence. During the execution of the search warrant, "KC" was not located
17 at 1676 E Street. (RTP, p. 171). During the execution of that warrant, detectives received
18 information from Defendant Carroll that Defendant Counts was across the street at 1677 E
19 Street. Contact was made with the occupants of 1677 E Street, however, efforts to contact
20 Defendant Counts were unsuccessful. Therefore, a second search warrant was drafted and
21 executed at that residence. (RTP, p. 172). After entry, Defendant Counts was found hiding
22 in the attic. (RTP, p. 176). It took several hours and use of explosive devices to eventually
23 get him out of the attic. Eventually, a hole in the ceiling had to be cut to extricate Defendant
24
25
26
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28

1 Counts. (RTP, 178).

2 After Defendant Counts was removed, a search was conducted of 1677 E Street.
3 During the search, a black satchel containing several one hundred dollar (\$100) bills was
4 found along with Defendant Counts' identification in front of a couch. (RTP, p. 181).
5 Underneath the couch, in approximately the same general area as the satchel, was more
6 money, some peach cigars as well as several VIP card from the Palomino Club.
7

8 After the search, detectives once again met with Defendant Carroll. (RTP, p. 183).
9 Defendant Carroll consented to wear a body recorder and he was provided one on May 23rd.
10 (RTP, p. 184). After placing the body recorder on Defendant Carroll, Defendant Carroll was
11 surveilled as he entered Simone's Auto Plaza. After a while, Defendant Carroll exited
12 Simone's Auto Plaza and was surveilled back to his meeting with detectives. (RTP, p. 186).
13 At that time, the body recorder was collected and analyzed. In addition, Defendant Carroll
14 was in possession of fourteen hundred dollars (\$1400) in cash as well as a bottle of
15 Tanqueray.
16

17 An enhanced version of the body recording was admitted at the preliminary hearing.
18 (RTP, p. 250). On the recording, Defendant Espindola, Defendant Carrol and Defendant
19 Hidalgo discuss the crime as well as request Defendant Carroll to kill Defendant Taoipu and
20 Rontae Zone. In one part, Defendant Espindola indicates that Defendant Carroll was
21 supposed to beat the victim. In another section, Defendant Hidalgo asks Defendant Carroll
22 whether "KC" would be willing to kill Taoipu and Rontae:
23
24
25

26 DEANGELO: Who
27
28

1 LITTLE LOU: The people who are gonna rat,

2
3 DEANGELO: They're gonna fucking work deals for themselves, they're
4 gonna get me for sure cause I was driving, they're gonna get KC because he
5 was the fucking trigger man. They're not gonna do anything else to the other
6 guys cause they're fucking snitching.

7
8 LITTLE LOU: Could you have fucking KC kill them too, we'll fucking put
9 something in their food so they die rat poison or something

10
11 DEANGELO: We can do that to

12
13 LITTLE LOU: And we'll get KC last.

14
15 DEANGELO: It's gonna be impossible to find KC to kill these, He ain't even
16 at his house, KC fucking got his shit and fucking packed up shop I don't know
17 where the fuck KC is.

18
19 ANABEL: Here's the thing, we can take care of KC too _____ KC is asking
20 for money, right ok, but here is the thing he's the mother fucking shooter,
21 people can pinpoint him _____

22
23 Afterward, Defendant Hidalgo told Defendant Carroll to put rat poisoning in a bottle of
24 Tanqueray gin and have Defendant Taoipu and Rontae drink it. Moreover, Defendant
25 Espindola provided money to Defendant Carroll to keep Defendant Taoipu and Rontae quiet
26 as well as money for Defendant Carroll himself. Defendant Hidalgo told Defendant Carroll
27 if he goes to prison for the crime, Defendant Hidalgo will buy Defendant Carroll's family
28

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

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

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

15 Sometime thereafter, Defendant Espindola left Simone's Auto Plaza with "Mr. H."
16 (RTP, p. 211). Eventually, she was brought down to the homicide offices and read her
17 Miranda warnings. (RTP, p. 212). Thereafter, Defendant Espindola admitted that she had
18 spoken to Defendant Carroll on the two previous days at Simone's Auto Plaza. (RTP, p.
19 215).

20 The recording from the May 24th encounter at Simone's Auto Plaza where
21 Defendant's Espindola, Carroll and Hidalgo can once again be heard discussing the crime,
22 was admitted into evidence.
23
24
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1 During this recording, Defendant Espindola tries to explain how she tried to call Defendant
2 Carroll and change the plan from killing the victim to only beating the victim:

3 **DEANGELO:** You know what I'm saying I did everything you guys asked me
4 to do you told me to take care of the guy and I took care of him
5

6 **ANABEL:** OK ____ listen listen
7

8 **DEANGELO:** I'm not...
9

10 **ANABEL:** ____ talk to him not fucking take care of him ____ god damn it I
11 fucking called you
12

13 **DEANGELO:** Yeah and when I talked to you on the phone Ms. Anabel I said
14 I specifically said I said if he is by himself do you still want me to do him in.
15 You said yeah
16

17 **ANABEL:** I ____
18

19 **DEANGELO:** if he is with somebody you said if he is with somebody then
20 just beat him up
21

22 **ANABEL:** I said go to plan B fucking D'eangelo and D'eangelo you're just
23 minutes away ____ I told you no I fucking told you no, and I kept trying to
24 fucking call you but you turned off your mother fucking phone
25

26 **DEANGELO:** I never turned off my phone
27
28

1 ANABEL: I couldn't reach you

2
3 DEANGELO: I never turned off my phone, my phone was on the whole
4 fucking night Ms. Anabel

5
6 ANABEL: Shh... I couldn't fucking reach you as soon as ___spoken ___knew
7 where you fucking were I fucking tried calling you again and I couldn't
8 fucking reach you.

9 After this discussion, Defendant Espindola got more money for Defendant Carroll.

10 Moreover, Defendant Espindola told Defendant Carroll to deny everything and that if she is
11 ever contacted, she is just going to deny any knowledge.

12
13 During the subsequent search of Simone's Auto Plaza, numerous items were located
14 which were relevant to the investigation. In room six (6), numerous pieces of identification
15 in the name of Defendant Hidalgo were located. In addition, thousands of dollars in United
16 States' saving bonds were located, all in the name of Defendant Hidalgo, along with a
17 variety of bottles of liquor. In Defendant Espindola's office, a check made out to Defendant
18 Carroll for twenty-four (24) hours of work was located. (RTP, p. 318).

19
20 During the recording of May 23rd, Defendant Espindola told Defendant Carroll why
21 he is getting a check for twenty-four hours:

22
23 ANABEL: Right, _____ fill out your time card from last week cause I didn't
24 get it, _____ your time card last week, 3 days Monday, Tuesday,
25 Wednesday, 8 hours a day that's 24 hours, I'm gonna give you a check for that
26 because obviously there gonna be asking to see our records so It'll be much
27 casier that way I can prove you were there because Thursday you weren't there
28

1 because that was the day all the shit happened _____ Friday

2 Thursday of the week before was the day that Timothy Hadland was killed. In addition,
3 inside a common area of Simone's Auto Plaza, a handwritten note was located which stated,
4 "Maybe we are being under surveill. Keep you mouth shut!!" (RTP, p.315). Outside
5 Simone's Auto Plaza, the white Chevy Astro van was located. (RTP, p. 319).
6

7 On July 6, 2005, Notices of Intent to Seek the Death Penalty were filed against all
8 four charged Defendants. As to Defendants Espindola and Hidalgo, there were three
9 aggravating circumstances alleged. The first two aggravating circumstances alleged were:
10

11 The murder was committed by a person who, at any time before a penalty
12 hearing is conducted for the murder pursuant to NRS 175.552, is or has been
13 convicted of a felony involving the use or threat of violence to the person of
14 another and the provisions of subsection 4 do not otherwise apply to that
15 felony, to-wit: Solicitation to Commit Murder. . .
16

17 See NRS 200.033(1). The basis for these two aggravating circumstances were that both
18 Defendants solicited Defendant Deangelo Carroll to kill Witness Rontae Zone and
19 Defendant Jayson Taoipu. The final aggravating circumstance alleged was:
20

21 The murder was committed by a person, for himself or another, to receive
22 money or any other thing of monetary value
23

24 See NRS 200.033(6). The basis for this aggravating circumstance is that this is clearly a
25 case of murder for hire in which both the people doing the hiring as well as the people
26 receiving the money are subject to the aggravating circumstance.
27
28

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.

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.

1 See Enmund v. Florida, 458 U.S. 782, 797 (1982); Tison v. Arizona, 481 U.S. 137 (1987);
2 and Doleman v. State, 107 Nev. 409, 418, 812 P.2d 1287, 1292-3 (1991). Unfortunately for
3 Defendants Hidalgo and Espindola, even viewing the evidence in a light most favorable to
4 the Defendants, both of them at the very least joined a conspiracy where they intended that
5 deadly force would be used.
6

7 Defendant Hidalgo specifically told Defendant Deangelo Carroll to come to work
8 with baseball bats and garbage bags to beat T.J. Perhaps a good defense attorney could
9 argue that the statement does not evidence that Defendant Hidalgo necessarily wanted T.J.
10 dead, however, that is a question of fact for the jury. It certainly demonstrates that
11 Defendant Hidalgo intended for a battery with a deadly weapon (deadly force) to be used.
12 Moreover, Defendant Hidalgo's own father, Mr. H, indicated that Defendant Hidalgo was
13 very upset and wanted Defendant Carroll to "go take care of T.J." In addition, on the
14 recordings, Defendant Hidalgo expresses that he wants to hire Defendant Kenneth Counts to
15 kill Zone and Taoipu "TOO." Thereafter, he provides Defendant Deangelo Carroll the
16 method by which he is to have these two killed, e.i., rat poisoning in a gin bottle. Finally,
17 even if perhaps there is some minute possibility that Defendant Hidalgo did not intend to
18 kill, he certainly intended for deadly force to be used. To assert that beating an individual
19 with baseball bats and stuffing them into garbage bags does not exhibit a complete
20 indifference to human life is simply unsupportable.
21
22

23 The evidence that Defendant Espindola intended for T.J. to be killed is even stronger.
24 Defendant Espindola was present when Mr. H instructed Defendant Deangelo Carroll to kill
25 T.J. While Defendant Carroll was driving the executioner to the scene of the murder,
26
27
28

1 Defendant Espindola called Defendant Carroll. It was at this point that Defendant Espindola
2 learned that T.J. was not at home as the original plan contemplated but out at the lake with
3 potential witnesses. Upon learning this information, Defendant Espindola told Defendant
4 Carroll, "if [T.J.'s] by his self, then do him, if he isn't by his self, then just fuck him up ____.
5 fuck him up and fuck up whoever's with him." This information was confirmed by
6 Defendant Espindola on the surreptitious recording when Defendant Carroll confronted her
7 with this statement, Defendant Espindola stated, "I told you to go to plan B!" Later in the
8 recordings, Defendant Espindola confirmed that her concern with killing T.J. in public was:
9

11 Well the bastards fucking right what about it, what about everything might as
12 well to lose it all, and if I lose the shop and I lose the club I can't help you or
13 your family... God Damn it _____ your not that stupid you were playing
14 with the _____ in the car you should have fucking turned back YOU HAD
15 TOO MANY FUCKING EYES ON YOUR ASS WHAT THE FUCK
16 WERE YOU THINKING?
17

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

19
20 There is absolutely no question that both Defendants Espindola and Hidalgo intended
21 deadly force to be utilized. Whether they intended to kill is certainly a question for the jury.
22 In either situation, even accepting all of the law cited by Defendants' attorneys, both are
23 eligible for the death penalty.
24

25 II.

26 The Nevada Supreme Court Does Not Require, Nor Does The United States
27 Constitution Require, A Finding of Probable Cause For An Aggravating Circumstance
28

1 The State maintains that its Notice of Intent to Seek the Death Penalty was proper and
2 that the Nevada Supreme Court will continue to follow its recent holding which specifically
3 provided that the State did not have to establish its aggravating circumstances at the probable
4 cause determination. Moreover, this argument is particularly inappropriate as the only
5 aggravating circumstances alleged are based upon the testimony which supported the
6 probable cause for the charges contained in the Information. Defendant has already argued
7 that insufficient evidence was presented to the justice of the peace to sustain those charges,
8 and this Court has denied Defendants relief. As such, there is no additional evidence which
9 would have had to be admitted at the justice of the peace to establish probable cause for the
10 aggravating circumstances.
11
12
13

14 A. The State is Not Required to Establish Aggravating Circumstances at a
15 Probable Cause Hearing.
16

17 The State followed the law in place at the time of the preliminary hearing and in place
18 today when the case was presented to the justice of the peace. The State is not required to
19 prove its aggravating circumstances at the probable cause hearing. Moreover, Defendant's
20 reliance on Ring and Apprendi is misplaced.
21

22 The Nevada Supreme Court, less than three years ago, directly addressed the issue of
23 whether the State is required to prove aggravating circumstances at the grand jury or
24 preliminary hearing and held that "a probable cause finding is not necessary for the State to
25 allege aggravating circumstances and seek a death sentence." Floyd v. State, 118 Nev. 156,
26 166, 42 P.3d 249, 256 (2002), cert. denied post-Ring, 537 U.S. 1196, 123 S.Ct. 1257, 154
27
28

1 L.Ed.2d 1033 (2003).

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

3 In essence, defendant is asking this Court to overturn Floyd by extrapolating from
4 two recent United States Supreme Court Cases: Ring v. Arizona, 536 U.S. 584, 122 S.Ct
5 2428, 153 L.Ed.2d 556 (2002), decided before the United States Supreme Court denied
6 certiorari on Floyd; and Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed.
7 2d 435 (2000), cited by Floyd at footnotes 13 and 14.

8
9 An argument based on Apprendi alone would be thwarted by *stare decisis*. Perhaps
10 for this reason, defendants have supplemented the Apprendi argument that was unsuccessful
11 in Floyd with a reference to Ring. As many state courts confronting this issue have pointed
12 out, however, Ring expressly limited itself so as to not reach the issue being briefed in the
13 instant case:
14
15

16 Ring's claim is tightly delineated: He contends only that the Sixth Amendment
17 required jury findings on the aggravating circumstances asserted against him. .
18 . . *Ring does not contend that his indictment was constitutionally defective. See*
19 Apprendi, 530 U.S., at 477, n. 3, 120 S.Ct. 2348 (Fourteenth Amendment "has
20 not ... been construed to include the Fifth Amendment right to 'presentment or
21 indictment of a Grand Jury'").
22

23 Ring, 536 U.S. at 597 n. 4, 122 S.Ct. at 2437 n.4 (emphasis added). For State decisions
24 interpreting this self-limitation to mean that Ring did not affect analysis of the issue at bar,
25 see for example, Gray v. State, WL 2065362, 12-13 (Miss. 2004); State v. Fortin, 178 N.J.
26 540, 633, 843 A.2d 974, 1027-1028 (2004); Primeaux v. State, 88 P.3d 893, 899-900 (Okla.
27 Crim. App. 2004); Moeller v. Weber, 2004 WL 2254535, 16 (S.D. 2004); State v. Hunt, 357
28

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

4
5 2. The Federal Indictment Clause, Through Which Ring Might Govern State
6 Indictments, Has Not Been Incorporated
7

8 The import of Ring's citation of Apprendi becomes apparent when one considers that
9 Ring is premised upon the Sixth Amendment to the United States Constitution, which has
10 been incorporated against the States via the 14th Amendment. To apply Ring, or its
11 construction of aggravating factors to the States, one would have to rely on the Indictment
12 Clause of the Fifth Amendment. However, as Ring explicitly recognizes, the Indictment
13 Clause has not been incorporated against the States. See Ring, *supra*, citing Apprendi, 530
14 U.S. at 477 n. 3, 120 S.Ct. at 2356 n. 3, 147 L.Ed.2d at 447 n. 3. Accord Alexander v.
15 Louisiana, 405 U.S. 625, 633, 92 S.Ct. 1221, 1226-27, 31 L.Ed.2d 536, 543 (1972) ("the
16 Due Process Clause . . . does not require the States to observe the Fifth Amendment's
17 provision for presentment or indictment by a grand jury"). For State decisions drawing
18 attention to this fact while holding that Ring did not address the issue at bar, see for example
19 State v. Fortin, 178 N.J. at 633, 843 A.2d at 1027-1028 (2004); State v. Berry, 141 S.W.3d
20 549, 558 (Tenn. 2004); People v. McClain, 343 Ill.App.3d 1122, 1138, 799 N.E.2d 322, 336-
21 336 (Ill. App. 1 Dist. 2003); State v. Hunt, 357 N.C. at 271, 582 S.E.2d at 602 (2003), cert.
22 denied 124 S.Ct. 44, 156 L.Ed.2d 702 (2003). Defendant's attempt to incorporate the Federal
23 Indictment Clause via the Federal Due Process Clause, while clever, directly contradicts the
24
25
26
27
28

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

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

11
12
13 3. State courts have not applied Ring, or its reasoning, in decisions relevant to the
14 issue at bar
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16 The State has surveyed the Constitutional law of the 37 States, other than Nevada, in
17 which the death penalty is legal. The State found cases relevant to the issue at bar in 21 of
18 those 37 states. Every single case in these jurisdictions either found Ring inapplicable or
19 ignored it in the course of issuing opinions that would resolve the issue at bar. In all but one
20 jurisdiction, the courts found that their own Constitution did not require that the State plead
21 aggravators, or establish probable cause therefore, prior to seeking the death penalty. For a
22 leading case from each jurisdiction, see: **ALABAMA:** Walker v. State, 2004 WL 2201197
23 (Ala. Crim. App. 2004) (indicating that Ring did not change prior case law holding that
24 aggravators do not need to be pled in an indictment); **CONNECTICUT:** State v.
25 Courchesne, 2003 WL 22133886, 1 (Conn. Super. 2003) (rejecting arguments based on Ring
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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.2d 322, 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),

1 cert. denied, 124 S.Ct. 1673, 158 L.Ed.2d 370, 72 USLW 3598 (2004), ruling reconsidered
2 post-Ring, 2004 WL 2254539 (Md.); **MISSISSIPPI**: Berry v. State, 2004 WL 1470968, 12
3 (Miss. 2004) (noting that "like Apprendi, the Ring Court specifically noted that its opinion
4 did not address the constitutionality of the indictment; and therefore, it never spoke to
5 whether states are required provide such charges in their indictments" and remarking that the
6 Indictment Clause does not apply to the state); **MISSOURI**: State v. Gilbert, 103 S.W.3d
7 743, 747 (Mo.2003) (en banc) (holding that Ring had no effect on the court's previous
8 rejection of the argument that indictments need to allege aggravators); **NEW**
9 **HAMPSHIRE**: State v. Melvin, 834 A.2d 247, 252 -253 (N.H. 2003) (State due process
10 clause did not require the state to allege in the indictment prior convictions for aggravated
11 felonious sexual assault that enhanced sentence to life imprisonment without parole; did not
12 even consider Apprendi or Ring argument.); **NEW JERSEY**: State v. Fortin, 178 N.J. 540,
13 633, 843 A.2d 974, 1027-1028 (2004) ("Ring did not address the question whether
14 aggravating factors in a capital case must be considered by a grand jury pursuant to the Fifth
15 Amendment.");³ **NEW MEXICO**: State v. Young, 90 P.3d 477, 481 (N.M. 2004) (the
16 omission of statutory aggravators from an indictment charging defendant with first-degree
17 murder does not deprive the sentencing court of jurisdiction to impose the death penalty;" no
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24 ³ Note that the New Jersey Supreme Court recognized that its decision was not compelled at all by Ring. The
25 Court found that "[the New Jersey Constitution] requires that aggravating factors be submitted to the grand
26 jury and returned in an indictment," primarily because "[o]n more than one occasion, this Court has
27 acknowledged that, in important ways, aggravating factors are functionally indistinguishable from the
28 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.

1 mention of Ring or other Constitutional challenges); **NORTH CAROLINA:** State v. Hunt
2 357 N.C. 257, 271, 582 S.E.2d 593, 602 (2003) (holding that neither Ring nor Apprendi
3 required that aggravating circumstances be pled in indictment), cert. denied 124 S.Ct. 44,
4 156 L.Ed.2d 702 (2003); **OKLAHOMA:** Lott v. State, __ P.3d __, 2004 WL 2002235, 26
5 (Okla. Crim. App. 2004) (finding that Ring does not contain any language requiring state
6 prosecutors to charge alleged aggravating circumstances.); **OREGON:** State v. Oatney, 335
7 Or. 276, 296, 66 P.3d 475, 487 (2003) (finding that Ring did not address the issue of whether
8 aggravators or even elements needed to be pled in the indictment; and, therefore, court's
9 prior holding that an indictment need not contain aggravators remained unchanged), cert.
10 denied __ U.S. __, 124 S.Ct. 1148, 157 L.Ed.2d 1045 (2004); **RHODE ISLAND:** State v.
11 Edwards, 810 A.2d 226, 233-234 (R.I. 2002) ("as recognized in both Apprendi and Ring,
12 there is no federal requirement that a felony prosecution, capital or otherwise, be
13 commenced by an indictment issued by a grand jury in a state prosecution"), cert. denied 538
14 U.S. 980, 123 S.Ct. 1808, 155 L.Ed.2d 670 (2003); **SOUTH DAKOTA:** Moeller v. Weber,
15 2004 WL 2254535, 16 (S.D. 2004) ("[t]he Court in Jones, Apprendi, and Ring dealt with the
16 indispensable role of the jury in deciding criminal cases. These cases did not address
17 whether notice of an aggravating factor had to be conveyed to the defendant only by means
18 of an indictment or information, as opposed to some other means"); **TENNESSEE:** State v.
19 Odom, 137 S.W.3d 572, 590 (Tenn. 2004) (holding, post-Ring, that Apprendi did not require
20 the State to include aggravators in indictments, because the death penalty is within the
21 statutory range of punishment prescribed for first degree murder and alternate notice to
22 Defendant 30 days before trial satisfied Due Process requirements); **TEXAS:** Sigala v. State,
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1 2004 WL 231326, 14 (Tex. Crim. App. 2004) (rejecting an Apprendi-based argument,
2 because, despite the existence of mitigating factors, in Texas, the statutory maximum for a
3 capital offense is death).

4 This list of cases demonstrates that in addition to acknowledging Ring's
5 inapplicability, State courts have been unwilling to import the reasoning of Ring to the
6 probable cause context. The fact that the United States Supreme Court has denied certiorari
7 in 7 of the 21 cases listed above (and several other similar cases not listed in the interest of
8 brevity) supports the observation that "the Supreme Court itself appears to be narrowing, not
9 broadening, Apprendi's scope." See Fortin, 178 N.J. at 653, 843 A.2d at 1039-1040 (dissent),
10 citing State v. Stanton, 176 N.J. 75, 94-96, 820 A.2d 637, 648-50 (2003) (discussing
11 Apprendi in the aftermath of the subsequent decision in Harris v. United States, 536 U.S.
12 545, 122 S.Ct. 2406, 153 L.Ed.2d 524 (2002)).
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16 4. Federal Courts applying Ring to the issue at bar are not informative, given the
17 Department of Justice's preemptive policy of establishing probable cause for
18 aggravators
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20 At first glance, it may appear that, in a few federal courts of appeals, Apprendi's
21 scope may be broadening. As defendants note, some federal courts have interpreted Ring to
22 extend to the issue at bar. However, it appears that the federal courts' decisions have been
23 prompted by the Department of Justice's preemptive policy of pleading aggravators.
24 According to one account, "federal prosecutors [and] lower federal courts, out of an
25 abundance of caution, have assumed that aggravating factors are to be included in federal
26 indictments in the face of Ring." Fortin, 178 N.J. at 652, 843 A.2d at 1039 (dissent). See also
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1 Id. at 644-645 ("Federal prosecutors apparently have assumed that Ring requires a grand jury
2 to conclude that the government's decision to seek the death penalty is supported by
3 sufficient evidence") (citing: United States v. Haynes, 269 F.Supp.2d 970, 973 (W.D. Tenn.
4 2003) (noting that, post-Ring, the government obtained a superseding indictment alleging
5 aggravating factors); United States v. Sampson, 245 F.Supp.2d 327, 329 (D. Mass. 2003)
6 (same); United States v. Church, 218 F.Supp.2d 813, 814 (W.D. Va. 2002) (same); United
7 States v. Matthews, 246 F.Supp.2d 137, 140 (N.D. N.Y. 2002) (same); United States v.
8 Lentz, 225 F.Supp.2d 672, 675 (E.D. Va. 2002) (same); United States v. Regan, 221
9 F.Supp.2d 672, 677 (E.D. Va. 2002) (same)).

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

21 Defendant suggests that because this issue is one of first impression in Nevada, this
22 Court is relegated to looking at how other jurisdictions have interpreted . . .
23 constitutional/statutory [indictment] requirements post-Ring. In this respect, it seems plain
24 that the weight of jurisprudence outside Nevada weighs heavily in the State's favor.
25 Defendant's previous arguments suggest that he will try to distinguish Nevada's pleading
26 and sentencing scheme from those of the several states listed above. The State preemptively
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1 issues three responses. First, the State believes that this is not an issue of first impression.
2 This issue was decided in Floyd and Ring is inapplicable. Therefore, there is no reason to
3 look to other jurisdictions. Secondly, to the extent this Court desires to look to other
4 jurisdictions, the decisions of the federal courts seem easily distinguishable from the Nevada
5 experience, because as is not the case in Nevada, the federal courts were responding to and
6 accommodating the preemptive actions of the Department of Justice. Thirdly, in the
7 following section, it will be argued that, even if the Federal Courts had not been merely
8 responding to the overcautious policies of the Department of Justice, they would have
9 misapplied the Supreme Court's reasoning in Ring.
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12 C. Even if Ring Did Apply to the Instant Case, Ring's Mandates,
13 Based Fundamentally in the Sixth Amendment, Have Been
14 Satisfied.

15 1. Ring's reasoning is fundamentally based upon the Sixth Amendment
16

17 Ring held that "[b]ecause Arizona's enumerated aggravating factors operate as the
18 functional equivalent of an element of a greater offense, the Sixth Amendment requires that
19 they be found by a jury." Ring, 536 U.S. at 585 (quotation omitted). Defendants read this
20 excerpt as though Justice Ginsburg had tacked "and the Fifth Amendment requires that they
21 be pled in an indictment" to the end of the sentence, even though, as shown above, the
22 Federal Indictment Clause has not been incorporated. In fact, it is not unfair to ask: if
23 defendants have properly interpreted Ring, why did Ring and Apprendi explicitly refrain
24 from incorporating the Federal Indictment Clause; further, why did the United States
25 Supreme Court deny certiorari in Floyd and in one-third of the cases cited above? The State
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1 believes that the most persuasive answer to this question stems from a pattern noted by the
2 South Dakota and Georgia Supreme Courts: Ring, Apprendi and Jones were not concerned
3 with the content of the indictment except insofar as it related to the role of the jury. See
4 Terrell v. State, 276 Ga. 34, 40, 572 S.E.2d 595, 602 (2002) (Ring, Apprendi and Jones were
5 "focused on the role of the jury"). See also Moeller, supra, ("[t]he Court in Jones, Apprendi,
6 and Ring dealt with the indispensable role of the jury in deciding criminal cases").

7
8 The State believes that the reasoning of Ring, Apprendi and Jones is without
9 exception focused primarily and fundamentally on the role of the jury. The reasoning of
10 these three cases, along with the recent denials of certiorari cited above make clear that—in
11 the jurisprudence of which Ring is a part—the United States Supreme Court has taken
12 interest in State indictments only insofar as the content of the indictments relates to the role
13 of the jury. Because Ring, Apprendi and Jones are focused on the role of the jury, it would
14 be improper to take Ring's discussion of functional equivalence out of its context and apply
15 it where the role of the jury is not implicated.

16
17 To flesh out this claim, the State first directs this Court's attention to Ring's holding.
18 Note that Ring explicitly overruled Walton only to the extent that "[c]apital defendants . . .
19 are entitled to a jury determination of any fact on which the legislature conditions an
20 increase in the maximum punishment." Ring, 536 U.S. at 589, 122 S.Ct at 2432 (emphasis
21 added).

22
23 In his dissent to Ring, Scalia explains that his opinions in Ring and Apprendi were
24 influenced by his belief:

25
26 that the fundamental meaning of the jury-trial guarantee of the Sixth
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1 Amendment is that all facts essential to imposition of the level of punishment
2 that the defendant receives--whether the statute calls them elements of the
3 offense, sentencing factors, or Mary Jane--**must be found by the jury** beyond
4 a reasonable doubt.

5
6 Ring, 536 U.S. at 610, 122 S.Ct. at 2444 (2002) (dissent) (emphasis added).

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

11
12 [t]he terms of the carjacking statute illustrate very well **what is at stake . . .** If
13 a potential penalty might rise from 15 years to life on a nonjury determination,
14 the **jury's role would correspondingly shrink from the significance** usually
15 carried by determinations of guilt to the **relative importance of low-level**
16 **gatekeeping.**

17
18 Jones v. U.S., 526 U.S. 227, 243-244, 119 S.Ct. 1215, 1224, 143 L. Ed. 2d 311 (1999)
19 (emphasis added).

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

24
25 In post-Ring Nevada, the jury must find aggravating factors regardless of whether
26 those factors are included in the indictment. The content of the indictment therefore no
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1 longer performs the function of bringing factual determinations before the jury. Thus the
2 concerns of Jones, Apprendi and Ring have not been implicated by the State's behavior in
3 the case at bar. To address the issue at bar in the language of Ring, Apprendi and Jones,
4 consider the following. Defendant is entitled to a jury determination of any fact on which the
5 legislature has conditioned an increase in the maximum punishment. Cf. Ring, supra at 589.
6 All facts essential to imposition of the level of punishment that the defendant receives—
7 whether they are called elements of the offense, sentencing factors, or Mary Jane—will be
8 found by the jury beyond a reasonable doubt. Cf. Ring, supra at 610. Factual determinations
9 relevant to the aggravators will be made by a jury. Cf. Apprendi, supra at 469. The role of
10 the jury is not at stake and will not shrink from the significance usually carried by
11 determinations of guilt. Cf. Jones, supra at 227.

12
13 Not only are Ring, Jones and Apprendi grounded in the Sixth Amendment, the
14 primary and fundamental concern of these cases is addressed to the role of the jury. Because
15 this concern is not implicated here, the reasoning of these cases should not be extended to
16 the instant matter.

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

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23 Because the role of the jury is the fundamental concern of Ring, Apprendi and Jones,
24 it would be imprudent to take the reasoning of these cases out of the Sixth Amendment
25 context. This is especially so if it is true that "the Supreme Court itself appears to be
26 narrowing, not broadening, Apprendi's scope." See Fortin, supra at 653. It is even more true
27 for policy reasons, presumably the same policy reasons considered by this court when it
28

1 handed down Floyd. The State presumes that the policy implications of requiring the State to
2 show probable cause for aggravators have not changed post-Ring. In case Defendant asserts
3 that they have, the State offers post-Ring commentary from the Supreme Courts of North
4 Carolina and Florida. The Supreme Court of North Carolina addressed the logistical
5 problems that would arise from a holding that aggravators must be pled:
6

7 many complications would invariably arise if we required aggravators to be
8 pled in murder indictments. These problems include determining whether the
9 grand jury would need to be "death-qualified" and what procedures, if any,
10 would be employed so that the State could acquire a superseding indictment
11 containing aggravating circumstances it may discover after defendant has been
12 indicted.
13

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

15 The Supreme Court of Florida sketched an even more perilous picture:
16

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

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

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

8
9 D. Defendant's Equal Protection Rights Have Not Been Violated.

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

2 **III.**

3 **The Notice of Intent To Seek the Death Penalty Enunciates With Specificity Factual**
4 **Assertions Which May Be Utilized To Establish That The Crime Was A Murder**
5 **Involving Pecuniary Gain**
6

7 Defendants asserts that the State has failed to assert how it intends to prove that the
8 murder involved pecuniary gain for themselves. While the Notices of Intent To Seek the
9 Death Penalty do clearly spell out that information, it isn't relevant to determining whether
10 information was contained in the Notices to support the aggravating circumstance.
11 Defendant references many cases, laws and court rules, however, once again misses the facts
12 in arguing to this Court that there isn't specific facts contained in the notice upon which the
13 State will rely. See SCR 250(4)(c).
14

15 Initially, Defendants argue that the notice of intent is defined by a statute which
16 requires certain language in Informations and Indictments. See NRS 173.075. How that
17 statute is relevant to the discussion is never explained. Next, Defendants argue that cases
18 related to Informations and Indictments somehow control the language necessary for a
19 Notice of Intent To Seek An Indictment. In fact, statutorily, no notice need be provided if,
20 as here, the aggravating circumstance is based upon the aggravating nature of the crime
21 itself. See NRS 175.552(3) (...The State may introduce evidence of additional aggravating
22 circumstances as set forth in NRS 200.033, other than the aggravated nature of the
23 offense itself, only if it has been disclosed to the defendant before the commencement of the
24 penalty hearing). However, Supreme Court Rule 250 appears to legislate that even where
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1 the aggravator is based on the crime itself, some notice must be provided to Defendant.
2 However, Defendant has confused the requirements of SCR 250(4)(c) with the notice
3 requirement which is found in SCR 250(4)(f) which requires a detailed list of evidence be
4 submitted at least fifteen (15) days prior to trial.

5
6 The aggravating circumstance upon which the State is relying is that this was a
7 situation where there was a murder for hire as well as where some of the participants were
8 seeking financial gain from the killing. NRS 200.033(6) states that an aggravating
9 circumstance is appropriate where, "The murder was committed by a person, for himself or
10 another, to receive money or any other thing of monetary value." Defendants appear to be
11 arguing that since they hired the hitman, they are not subject to the aggravating
12 circumstance, while on the other hand, the hitman is liable. Such a situation is ludicrous.
13 The State need not prove, although there is support for it in the evidence, that the motive for
14 the murder was for Defendants Espindola and/or Hidalgo to receive money. The State need
15 only prove that there was pecuniary gain by someone in the murder. As such, by the
16 Defendants agreeing to pay several individuals to kill T.J., they made themselves liable to
17 the aggravator. Moreover, the evidence demonstrates that Mr. H wanted T.J. killed because
18 he was hurting the business of the Palomino. Both Defendants Espindola and Hidalgo
19 agreed and participated in the killing to help support the business, its owner and employees,
20 of which Defendants are all three. Moreover, both Defendants evidence knowledge during
21 the surreptitious recordings that they knew that people were getting paid, and if fact, made
22 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

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

4 NRS 200.033(2) is premised on the fact that it is relevant to sentencing whether or not
5 an individual was violent in an isolated incident or whether there was violence in the past or
6 present:
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8 In general, "[a] defendant's character and record are relevant to the jury's
9 determination of the appropriate sentence for a capital crime." Pellegrini v.
10 State, 104 Nev. 625, 630, 764 P.2d 484, 488 (1988). Accordingly, a murder is
11 aggravated if it is committed by an individual previously convicted of a felony
12 involving the use or threat of violence to the person of another. NRS
13 200.033(2). Such a conviction evinces a propensity for violence and is relevant
14 to a determination of the appropriate sentence; more than one such conviction
15 is likewise relevant.
16

17 Riley v. State, 107 Nev. 205, 808 P.2d 551 (1991). Certainly, a rule promulgated to
18 determine whether a person has a propensity for violence is not unconstitutionally vague or
19 ambiguous. Moreover, it significantly limits the number of people eligible for the death
20 penalty as this circumstance isn't usually tied to the facts underlying the murder charge.
21

22
23 2. Solicitation To Commit Murder Is Clearly A Crime Involving The Threat of
24 Violence To A Person

25 Defendant argues that merely asking someone to kill another person is not a threat of
26 violence against the person who may be killed based upon the request. Such an argument
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1 cannot not factually be maintained nor would it give effect to the purpose behind NRS
2 200.033(2).

3 As discussed above, NRS 200.033(2) was enacted so that individuals who have a
4 higher propensity to engage in dangerous violent activity are more eligible for the death
5 penalty. See Riley v. State, 107 Nev. 205, 808 P.2d 551 (1991). In addition, NRS
6 200.033(2)(a) makes it an aggravating circumstance if you are guilty of another murder. To
7 suggest that soliciting someone to kill another person does not evidence a propensity towards
8 violent activity is meritless.
9

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11 If a person solicits another to commit murder, and the solicitation is carried out, then
12 NRS 200.033(2) would demand an aggravating circumstance. However, if you accept
13 Defendants premise, if the Defendants get lucky, and the solicitation is not carried out, then
14 the Defendants do not face an aggravating circumstance. Nonetheless, in both situations,
15 Defendants have the same criminal intent and present the same danger to society from their
16 propensity. As such, agreeing that Solicitation to Commit Murder is not a felony involving a
17 threat to a person would lead to an unreasonable application of NRS 200.033(2) and defeat
18 its purposes.
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21 Notwithstanding, Defendants initially argue to this Court that non-binding Florida
22 cases support the proposition that Solicitation To Commit Murder is not a violent felony,
23 while analysis of those cases clearly distinguishes them from the instant matter. In Lopez v.
24 State, 864 So.2d 1151 (Fla.App.2d Dist. 2003), an intermediate appellate Florida state court
25 interpreted a Florida state statute that defined the violent habitual criminal allegation to mean
26 that, Solicitation To Commit Murder did not qualify under the catch-all provision. To
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1 support their conclusion, the Lopez court relied upon Elam v. State, 636 So.2d 1312
2 (Fla.1994). In Elam, the Florida Supreme Court ruled that Florida law required actual force
3 inherent in the crime which is aggravated. The Elam court reasoned that actual force is not a
4 necessary component of a solicitation, then even a solicitation to do a violent act didn't
5 qualify under Florida law. The Nevada Supreme Court has rejected requiring force to be
6 inherent in the aggravating crime. See Weber v. State, 119 P.3d 107 (Nev.2005). In Weber,
7 Defendant had been convicted of a Sexual Assault. The Supreme Court noted that a Sexual
8 Assault as defined in Nevada does not require actual force inherent in its commission.
9 However, because of the implied force, the Sexual Assaults did qualify for use as prior
10 violent felonies. The implication of the Nevada Supreme Court as well as the purpose
11 behind the statute, NRS 200.033(2), would appear to require Solicitation to Commit Murder
12 to be a prior violent conviction.
13

14
15 Moreover, in reviewing all of the authority relied upon by Florida, it doesn't appear
16 that any other jurisdiction has referenced, let alone followed the referenced cases. Other
17 States allow for a conviction for Solicitation To Commit Murder to be used as a prior felony
18 conviction involving the threat of force on a person for purposes of an aggravating
19 circumstance. See, e.g., Woodruff v. State, 846 P.2d 1124, 1143 (Okla.1993) and People
20 v. Edelbacher, 47 Cal.3d 983, 1032, 254 Cal.Rptr. 586, 616 (Cal.,1989).⁴
21

22
23 Finally, the specific facts of this case demonstrate a clear threat to victims Taoipu and
24 Zone. First, the Defendants solicited an individual who had only days before committed a
25

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27
28 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).

1 murder based upon their solicitation. They suggested that he use the same triggerman that he
2 had used in the prior homicide. They provided their hitman with an instrumentality to cause
3 the death of the victims. Thereafter, they paid their hitman for his services. In addition, they
4 told their hitman that if the witnesses talked, Mr. H would kill everyone, providing
5 substantial motivation over and above that associated with remuneration for their hitman to
6 complete the job.
7

8 Defendants additionally argue that because they did not know that the person they
9 were soliciting to kill two people was working for the police, they should receive a benefit
10 from their ignorance. Such an argument would not give effect to the purposes behind NRS
11 200.033(2), and is unsupported by hundreds of years of jurisprudence in this country.
12 Mistake of fact is not a defense to a crime unless it negates a state of mind. See Model Penal
13 Code Sec. 2.04(1)-(2); Adler v. State, 95 Nev. 339, 594 P.2d 725 (Nev.1979). The mere fact
14 that they believed they were actually hiring a hitman as opposed to an agent of the police
15 does not in any manner negate their intent. Moreover, as discussed above, it is the
16 Defendants propensity for violence which allows for the convictions to be used as
17 aggravating circumstances, not whether the violence in fact occurred. Therefore, to agree
18 with Defendants would allow for Defendants who got lucky to receive a different sentence
19 than Defendants that got unlucky. Nothing in any of the jurisprudence of capital cases
20 suggests that embracing such a construction would further the objects of the sentencing
21 scheme. Therefore, Defendants arguments should be rejected.
22

23 ///

24 ///

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"

Document1

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DISTRICT COURT
CLARK COUNTY, NEVADA

24 THE STATE OF NEVADA,

25 Plaintiff,

26 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

1
2 I. THE DEATH PENALTY IS NOT AN AVAILABLE PUNISHMENT FOR ANABEL
3 ESPINDOLA OR LUIS HIDAGLO III, AS NEITHER OF THEM KILLED,
4 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.

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

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

16 The United States Supreme Court has held that it is improper under the eighth
17 amendment to impose the death penalty on one who "does not himself kill, attempt to kill,
18 or intend that a killing take place or that lethal force will be employed." Enmund v. Florida,
19 458 U.S. 782, 797 (1981). In Enmund, the Court overturned a death sentence for felony
20 murder because there was no proof that Enmund possessed the degree of culpability
21 warranting the death penalty. Id. at 801. In Tison v. Arizona, 481 U.S. 137 (1987), the
22 Court discussed Enmund, holding that "major participation in the felony committed,
23 combined with reckless indifference to human life, is sufficient to satisfy the Enmund
24 culpability requirement." Id. at 158. See also Doleman v. State, 107 Nev. 409, 417, 812
25 P.2d 1287, 1292-93 (1991).
26

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

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

24
25 ¹Defendants in no way concede that they actually requested that Mr. Hadland be hit
26 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.

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

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

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

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

24 **a. The Failure To Submit The Aggravator Of Pecuniary Gain For A
25 Probable Cause Determination Violates Article I, Section 8 Of The
26 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.

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

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

7 The United States Supreme Court has stated: "Aggravating
8 circumstances are not separate penalties or offenses, but are 'standards to
9 guide the making of [the] choice' between the alternative verdicts of death
10 and life imprisonment." [quoting Poland v. Arizona, 476 U.S. 147, 156 (1986)
11 (quoting Bullington v. Missouri, 451 U.S. 430, 438 (1981))]. Therefore, an
12 aggravating circumstance alleged in a capital proceeding does not constitute
13 a separate crime that requires a finding of probable cause under the U.S. or
14 Nevada constitutions.

15 Floyd also relies on the Supreme Court's holding in Jones v. United
16 States that "under the Due Process Clause of the Fifth Amendment and the
17 notice and jury trial guarantees of the Sixth Amendment, any fact (other than
18 prior conviction) that increases the maximum penalty for a crime must be
19 charged in an indictment, submitted to a jury, and proven beyond a
20 reasonable doubt." [526 U.S. 227, 243 n.6 (1999); see also Apprendi v. New
21 Jersey, 530 U.S. 466, 478 (2000)] Jones does not support Floyd's
22 proposition either. The Court emphasized that its holding in Jones did not
23 apply to aggravating circumstances because "the finding of aggravating facts
24 falling within the traditional scope of capital sentencing [is] a choice between
25 a greater and lesser penalty, not . . . a process of raising the ceiling of the
26 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

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

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

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

14 Walton, 497 U.S. at 648.

15 Related issues were considered by the Supreme Court in Jones v. United States,
16 526 U.S. 227 (1999) and Apprendi v. New Jersey, 530 U.S. 466 (2000). In Jones, the
17 Supreme Court concluded that a sentencing enhancement for "causing serious bodily
18 injury" was an element of the charge, and therefore had to be charged in the Indictment
19 and presented to the jury rather than the sentencing judge. Jones, 526 U.S. at 251. The
20 Court distinguished Walton and Poland by noting that those cases addressed aggravating
21 circumstances in capital sentencing as "standards to guide the choice between the
22 alternative verdicts of death and life imprisonment." Id. (quoting Walton, 497 U.S. at 648,
23 in turn quoting Poland, 476 U.S. at 156). "The Court thus characterized the finding of
24 aggravating facts falling within the traditional scope of capital sentencing as a choice
25
26

///

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

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

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

15 In Walton v. Arizona, 497 U.S. 639 (1990), this Court held that
16 Arizona's sentencing scheme was compatible with the Sixth Amendment
17 because the additional facts found by the judge qualified as sentencing
18 considerations, not as "elements of the offense of capital murder." Id., at 649.
19 Ten years later, however, we decided Apprendi v. New Jersey, 530 U.S. 466
20 (2000), which held that the Sixth Amendment does not permit a defendant to
21 be "exposed . . . to a penalty exceeding the maximum he would receive if
22 punished according to the facts reflected in the jury verdict alone." Id., at
23 483. This prescription governs, Apprendi determined, even if the State
24 characterizes the additional findings made by the judge as "sentencing
25 factors." Id., at 492.

26 ²It 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.

1 Apprendi's reasoning is irreconcilable with Walton's holding in this
2 regard, and today we overrule Walton in relevant part. Capital defendants,
3 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.

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

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

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

21 The State presents authority from other states in which some courts have concluded
22 that a probable cause finding is not required to alleged aggravating circumstances. The
23 United States Supreme Court, however, has not made such a conclusion and has provided
24
25
26

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

7
8 **b. The Failure To Present The Pecuniary Gain Aggravator To The**
9 **Magistrate For A Probable Cause Determination Violates Luis And**
10 **Anabel's Equal Protection Rights.**

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

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

25 State's Opposition at page 32.

26 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);

1 Clark v. Martinez, 125 S.Ct. 716, 723 (2005) (finding that the same words should be given
2 the same meaning within a statute and should not apply differently to different classes of
3 defendants). There is no valid reason for distinguishing between aggravators as elements
4 of an offense and other elements required to convict a defendant of an offense.
5 Accordingly, the defendants' rights to equal protection are violated. McGowan v. Maryland,
6 366 U.S. 420, 425-26 (1961).

7
8 **III. The Pecuniary Gain Aggravator Must Be Stricken As It Does Not Contain A**
9 **Plain/Concise Written Statement Of The Essential Facts Constituting The**
10 **Aggravator Charged.**

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

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

22 The State argues that it should be relieved of its obligations under SCR 250(4)(c) because
23 SCR 250(4)(f) requires a detailed list of evidence be submitted at least 15 days prior to trial.
24 State's Opposition at page 34. The State is wrong in its analysis of these Supreme Court
25 Rules. SCR 250(4)(c) specifically addresses aggravating circumstances while SCR
26 250(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

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

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

17
18 The aggravator must be stricken from the State's Notice of Intent to seek death
19 based upon the State's failure to comply with SCR 250(4)(c) and failure to provide the
20 defendants with their constitutional right to adequate notice of the charges against them.

21
22 **IV. To The Extent That It Is Based Upon A Conspiracy To Commit A Battery**
23 **("Beat") Or Utilizes The Unqualified Term "Kill", The NISDPS Are Duplicious**
24 **And Cannot Supply The Basis For Imposition Of Capital Punishment.**

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

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

8
9 The State's response provides no analysis, and provides no recognition, of the
10 consequences to a defendant, aside from the ultimate imposition of a sentence of death,
11 of an improper and unconstitutional aggravator. The State fails to address the fact that
12 absent a charge of capital murder, the defendants would be able to request bail pending
13 trial and would be able to assist their counsel in preparation for trial without the constraints
14 of incarceration. Absent a charge of capital murder, the defendants would not be required
15 to face the expense of hiring two attorneys and the expense of preparing for a penalty
16 hearing which requires extensive investigation as to mitigators, aggravators and character
17 evidence. Absent a charge of capital murder, it would not be necessary to "death qualify"
18 a jury, expedite transcripts or otherwise impose upon the court's resources as required for
19 a capital case.
20

21 The fact remains that the State's Notice of Intent to Seek Death is premised upon
22 a faulty and unconstitutional theory and there is no reason to permit that theory to burden
23 the defendants and the court to its detrimental consequences.
24
25
26

1 V. The Two Aggravators Stating Anabel Espindola And Luis Hidalgo III
2 Committed A Felony With Use Or Threat Of Harm, To Wit: Solicitation To
3 Commit Murder - Must Be Stricken Because (A) NRS 200.033 (b)(2) is
4 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.

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

6 In their Motion to Dismiss, defendants contended that NRS 200.033(b)(2) is
7 unconstitutionally vague because it fails to provide a definition of the term "a felony
8 involving the use or threat of violence to the person of another." In response, the State
9 asserts that "a rule promulgated to determine whether a person has a propensity for
10 violence is not unconstitutionally vague or ambiguous", but fails to address the issue
11 presented: what is the meaning of "use or threat of violence" and does the phrase provide
12 a principled guide for the choice between death and a lesser penalty as required by
13 Maynard v. Cartwright, 486 U.S. 356, 361-364 (1988) and Godfrey v. Georgia, 446 U.S.
14 420 (1980)? A statute violates due process if it is so vague that it fails to give persons of
15 ordinary intelligence fair notice of what conduct is prohibited and fails to provide law
16 enforcement officials with adequate guidelines to prevent discriminatory enforcement."
17 Hernandez v. State, 118 Nev. 513, 524, 50 P.3d 1100, 1108 (2002). In Bouie v. City of
18 Columbia, 378 U.S. 347, 350-51 (1964), the United States Supreme Court explained that
19 it is a basic principle that a criminal statute must give fair warning of the conduct that makes
20 it a crime. (Citing United States v. Hariss, 347 U.S. 612, 617 (1954) (cited in Bush v.
21 Gore, 531 U.S. 98 (2000)). "[A] statute which either forbids or requires the doing of an act
22 in terms so vague that men of common intelligence must necessarily guess at its meaning
23 and differ as to its application, violates the first essential of due process of law." Connally
24
25
26

1 v. General Const. Co., 269 U.S. 385, 391 (1926). "No one may be required at peril of life,
2 liberty or property to speculate as to the meaning of penal statutes. All are entitled to be
3 informed as to what the State commands or forbids." Lanzetta v. New Jersey, 306 U.S.
4 451, 453 n.3 (1939). While these principles are generally applied to statutes that are vague
5 in the language of the statute itself, they are equally applicable to cases where a statute
6 that is precise on its face has been unforeseeably and retroactively expanded by judicial
7 construction. Bouie, 378 U.S. at 352 (citing Pierce v. United States, 314 U.S. 306, 311
8 (1941)). Construction of a statute which unexpectedly broadens its application operates
9 precisely like an *ex post facto* law and is therefore barred from retroactive application to
10 pending cases under the due process clause. Id. at 353-54. Thus, even if this Court and
11 the Nevada Supreme Court were to find solicitation to commit murder to be an eligible
12 qualifying felony under NRS 200.033, the ruling could not be applied to this case.

13
14 The State summarily concludes that NRS 200.033(2)(b) "significantly limits the
15 number of people eligible for the death penalty as this circumstance isn't usually tied to the
16 facts underlying the murder charge." State's Opposition at page 36. The State provides
17 no citation to case authority and no analysis of its conclusion. The State fails to address
18 the fact that a great number of people charged with first degree murder have convictions
19 for prior violent offenses committed before the time of the murder or are charged with
20 violent acts contemporaneously with the murder. Thus, the narrowing criteria is not
21 satisfied.
22

23 The State fails to provide any definition of "use or threat of violence," fails to provide
24 any case authority narrowly interpreting this broad language, and fails to establish that this
25
26

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

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

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

13
14 The State's analysis of this issue fails to address the arguments and authority set
15 forth by the defendants in their motion. The State also fails to address cannons of statutory
16 interpretation that must be applied to consideration of this statute which fails to define the
17 meaning of its primary terms.

18 It must first be noted that the State summarily rejects authority from Florida but fails
19 to address the fact that in crafting NRS 200.033, the Nevada Legislature looked to Florida
20 as a source for our statutory scheme. Under these circumstances, Florida's interpretation
21 of the same language is especially persuasive. Thus, Lopez v. State, 864 So. 2d 1151
22 (Fla. App. 2d Dist. 2003); Elam v. State, 636 So. 2d 1312 (Fla. 1994) and Duque v. State,
23 526 So. 2d 1079 (Fla. App. 2d 1988), and their holdings that solicitation to commit murder
24 is a violent felony, should not be dismissed out of hand.
25
26

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

10
11 Contrary to the State's argument, Florida is not the only State to address this issue.
12 In State v. Ysea, 956 P.2d 499 (1998), the Supreme Court of Arizona squarely addressed
13 this issue:

14 [T]he mere solicitation to commit an offense cannot be equated with the
15 underlying offense. The solicitation statute criminalizes conduct that
16 "encourages, requests or solicits another person to engage" in a felony or
17 misdemeanor. See A.R.S. § 13-1002(A). The crime is completed by the
18 solicitation and the "crime solicited need not be committed." W. LAFAVE &
19 A. SCOTT, HANDBOOK ON CRIMINAL LAW 414, 420 (1972) (cited with
20 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.

21 [S]olicitation is a preparatory offense, complete upon the act of
22 solicitation itself, and could not have been considered a crime of violence
even if the act solicited would have qualified as such a crime.

23
24 Ysea, 956 P.2d at 503.

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

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

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

11 When the language of a statute is clear, the courts ascribe to the statute its plain
12 meaning and do not look beyond its language. Lader v. Warden, 120 P.3d 1164, __ (Nev.
13 2005). However, when the language of a statute is ambiguous, the intent of the Legislature
14 is controlling. In such instances, the courts will interpret the statute's language in
15 accordance with reason and public policy. Id. at __. It is a maximum of statutory
16 construction that when the scope of a criminal statute is at issue, ambiguity should be
17 resolved in favor of the defendant. Id. at __ (citing Demosthenes v. Williams, 97 Nev. 611,
18 614, 637 P.2d 1203, 1204 (1981)). Here, the language of the statute is not plain and there
19
20
21

22 ³Likewise, in an extensive analysis of cases throughout the country that discuss this
23 aggravating circumstance, there is no discussion of solicitation offenses. See Sufficiency
24 of Evidence, for Purposes of Death Penalty, to Establish Statutory Aggravating
25 Circumstance That Defendant Was Previously Convicted of or Committed Other Violent
26 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.

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

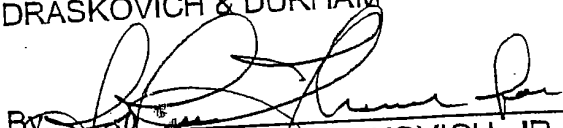
4 Reason and public policy mandate a finding that aggravator is not applicable to
5 solicitation offenses. It is important to remember the purpose of aggravating
6 circumstances. "The Eighth Amendment requires, among other things, that 'a capital
7 sentencing scheme must "genuinely narrow the class of persons eligible for the death
8 penalty and must reasonably justify the imposition of a more severe sentence on the
9 defendant compared to others found guilty of murder.'" Loving v. United States, 517 U.S.
10 748, 755 (1996) (quoting Lowenfield v. Phelps, 484 U.S. 231, 244 (1988), in turn quoting
11 Zant v. Stephens, 462 U.S. 862, 877 (1983)). "A capital sentencing scheme must, in short,
12 provide a 'meaningful basis for distinguishing the few cases in which [the penalty] is
13 imposed for the many cases in which it is not.'" Godfrey v. Georgia, 446 U.S. 420, 428
14 (1980) (quoting Gregg v. Georgia, 428 U.S. 153, 188 (1976)). The question here is not
15 whether solicitation to commit murder is bad or whether it should be a crime or whether a
16 person committing such an offense should be punished. The question here is does
17 inclusion of this inchoate offense, which involved mere words and no agreement, no
18 preparation and no actual violent act further the narrowing requirement of the Eighth
19 Amendment. Reason and public policy demand a finding that such a broad application of
20 this aggravator does not further the purpose of our death penalty scheme and the mandate
21 that it meaningfully select "the worst of the worst." In any event, when the scope of a
22 criminal statute is at issue, ambiguity must be resolved in favor of the defendant. Here, this
23 ambiguity must be resolved by a finding that the aggravator does not apply to solicitation.
24
25
26

CONCLUSION

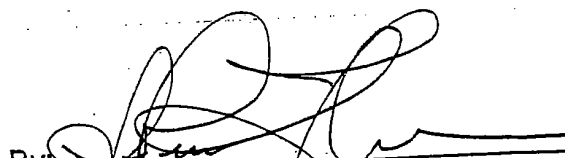
For the above reasons, each and all of the aggravators in the Notice of Intent to Seek the Death Penalty must be stricken.

DATED this 19th day of January, 2006.

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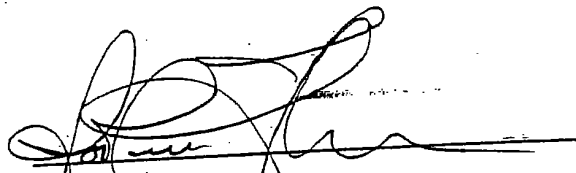
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CERTIFICATE OF SERVICE

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.



Jo Nell Thomas

EXHIBIT "8"

Document1

FILED

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Shirley P. Higgins
CLERK

1 **NOT**

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24 **DISTRICT COURT**

25 **CLARK COUNTY, NEVADA**

26 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

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

4 DATED this 15th day of March, 2006.

5 DRASKOVICH & DURHAM

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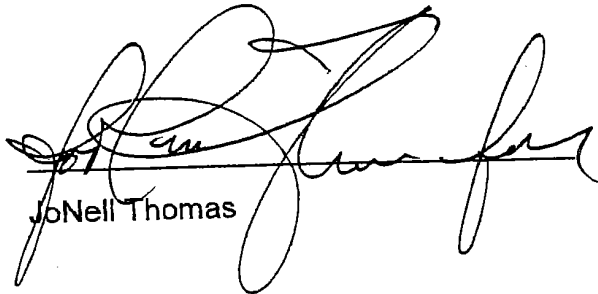
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CERTIFICATE OF SERVICE

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 **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

Electronically Filed
Feb 07 2011 10:40 a.m.
Tracie K. Lindeman

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

APPELLANT'S AMENDED APPENDIX

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CD: State's Exhibit 192A ²	02/04/09	15	02750
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¹ This CD is a copy of the original. The copy was prepared by a Clark County employee at the Regional Justice Center in Las Vegas Nevada. Eight hard copies of the CD are being mailed to the Nevada Supreme Court.

² Id.

³ Id.

⁴ Id.

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OCT 16 2006

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

IN THE SUPREME COURT OF THE STATE OF NEVADA

**LUIS HIDALGO III and
ANABEL ESPINDOLA,**

Petitioners,

Supreme Court No. 48033

District Court No. C212667

vs.

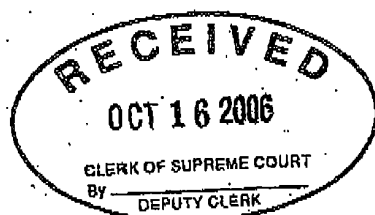
**THE HONORABLE DONALD M.
MOSLEY, EIGHTH JUDICIAL
DISTRICT COURT JUDGE,**

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

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

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

14 Real Party in Interest State of Nevada filed a Notice of Intent to Seek Death
15 Penalty against each of the Petitioners and has asserted the existence of aggravating
16 circumstances of murder for hire and prior conviction of violent offenses. See Exhibit
17 4 (Notices of Intent).

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

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

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

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

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

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

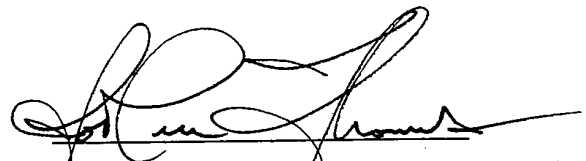
8 "This court may issue a writ of mandamus to compel the performance of an act
9 which the law requires as a duty resulting from an office or where discretion has been
10 manifestly abused or exercised arbitrarily or capriciously. The writ does not issue
11 where the petitioner has a plain, speedy, and adequate remedy in the ordinary course
12 of law. This Court considers whether judicial economy and sound judicial
13 administration militate for or against issuing the writ. The decision to entertain a
14 mandamus petition lies within the discretion of this court." Redeker v. Eighth Judicial
15 Dist. Court (Mosley), 122 Nev. ___, 127 P.3d 520, 522 (2006) (citing NRS 34.160,
16 NRS 34.170, Round Hill Gen. Imp. Dist. v. Newman, 97 Nev. 601, 603-04, 637 P.2d
17 534, 536 (1981); Hickey v. District Court, 105 Nev. 729, 731, 782 P.2d 1336, 1338
18 (1989); State v. Babayan, 106 Nev. 155, 175-76, 787 P.2d 805, 819 (1990)).
19 "Additionally, this court may exercise its discretion to grant mandamus relief where
20 an important issue of law requires clarification." Redeker, 127 P.3d at 522 (citing
21 State v. Dist. Ct. (Epperson), 120 Nev. 254, 258, 89 P.3d 663, 665-66 (2004)).

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

1 recognized that extraordinary relief is warranted under similar circumstances. See e.g.
2 Redeker, 122 Nev. ___, 127 P.3d 520 (granting petition for writ of mandamus pretrial
3 based upon invalid aggravating circumstance); Bennett v. Eighth Judicial Dist. Court
4 (McGroarty), 121 Nev. ___, 121 P.3d 605 (2005) (granting petition for writ of
5 mandamus based upon invalid amended notice which alleged new aggravating
6 circumstances); State v. Second Judicial Dist. Court (Marshall), 116 Nev. 953, 11 P.3d
7 1209 (2000) (entertaining petition for writ of mandamus, addressing merits of legal
8 issue and concluding that a district court acted properly in dismissing a notice of intent
9 to seek death penalty which was not timely filed).

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

16 Dated this 12th day of October, 2006

17
18 
19 Dominic P. Gentile
20 JoNell Thomas
21 Attorneys for Petitioner
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1 **POINTS AND AUTHORITIES IN SUPPORT OF WRIT**

2 **The Charges**

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

14 **The State's Intention to Seek the Death Penalty**

15 On July 6, 2005 the State filed a Notice of Intent to Seek Death Penalty
16 (hereinafter “the Notice of Intent”) against each of the Petitioners. Although not a
17 model of linguistic clarity, the Notices of Intent appear to rely upon the following as
18 the statutory aggravating factors that will enable the State to seek the death penalty:
19 (1) that Anabel Espindola and Luis Hidalgo III will be convicted of the Solicitation
20 to Commit Murder of Jayson Taoipu, as alleged in Count 3, prior to the penalty
21 hearing for the State's anticipated conviction of her on Count 2; (2) that Anabel
22 Espindola and Luis Hidalgo III will be convicted of the Solicitation to Commit
23 Murder of Rontae Zone, as alleged in Count 4, prior to the penalty hearing for the
24 State's anticipated conviction of her on Count 2; and (3) the murder alleged in Count
25 2 was committed by Kenneth Counts for the purpose of someone receiving money or
26 other thing of monetary value.

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

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

24 Or perhaps not.

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

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

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

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

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

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

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

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

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

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

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

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

8 General Principles

9 Capital punishment is reserved for the most heinous of murders. Not all
10 murders qualify for death as the punishment. “Death is different.” The United States
11 Supreme Court has relied upon this principle and has interpreted the Eighth
12 Amendment in that light for thirty years. See Gregg v. Georgia, 428 U.S. 153, 188
13 (1976); Woodson v. North Carolina, 428 U.S. 280, 303 (1976); Ford v. Wainwright,
14 477 U.S. 399, 411 (1986); Harmelin v. Michigan, 501 U.S. 957, 994 (1991); Morgan
15 v. Illinois, 504 U.S. 719, 751 (1992) (Scalia, J., *dissenting*); Dobbs v. Zant, 506 U.S.
16 357, 363 (1993) (Scalia, J., concurring); Simmons v. South Carolina, 512 U.S. 154,
17 185 (1994) (Scalia, J., *dissenting*); Shafer v. South Carolina, 532 U.S. 36, 55 (2001)
18 (Scalia, J., *dissenting*); Atkins v. Virginia, 536 U.S. 304, 337 (2002) (Scalia, J.,
19 *dissenting*); Ring v. Arizona, 536 U.S. 584, 606 (2002); Wiggins v. Smith, 539 U.S.
20 510, 557 (2003) (Scalia, J., *dissenting*).

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

1 352, __ (2006) (citing State v. Washoe County, 6 Nev. 104, 107 (1870)). If a penal
2 statute is ambiguous, “rules of statutory interpretation . . . require that provisions
3 which negatively impact a defendant must be strictly construed, while provisions
4 which positively impact a defendant are to be given a more liberal construction.”
5 Colosimo, 122 Nev. at __, 142 P.3d at __ (quoting Mangarella v. State, 117 Nev. 130,
6 134, 17 P.3d 989, 992 (2001)).

7 **The State’s Murder For Hire Allegations Are Invalid**

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

10 The murder was committed by a person, for himself or another, to
11 receive money or any other thing of monetary value, to-wit by: by [sic]
12 Anabel Espindola (a manager of the Palomino Club) and/or Defendant
13 Luis Hidalgo, III (a manager of the Palomino Club) and/or Luis Hidalgo,
14 Jr. (the owner of the Palomino Club) procuring DeAngelo Carroll (an
15 employee of the Palomino Club) to beat and/or kill Timothy Jay
16 Hadland; and/or Luis Hidalgo, Jr., indicating that he would pay to have
17 a person either beaten or killed; and/or by Luis Hidalgo, Jr. procuring the
18 injury or death of Timothy Jay Hadland to further the business of the
19 Palomino Club; and/or Defendant Luis Hidalgo, II telling DeAngelo
20 Carroll to come to work with bats and garbage bags; thereafter,
21 DeAngelo Carroll procuring Kenneth Counts and/or Jayson Taoipu to
22 kill Timothy Hadland; thereafter, by Kenneth Counts shooting Timothy
23 Jay Hadland; thereafter, Luis Hidalgo, Jr. and/or Anabel Espindola
24 providing six thousand dollars (\$6,000) to DeAngelo Carroll to pay
25 Kenneth Counts, thereafter Kenneth Counts receiving said money;
26 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.

1 This Court has held that based upon Enmund v. Florida, 458 U.S. 782, 797
2 (1982) and Tison v. Arizona, 481 U.S. 137 (1987), to receive the death sentence, a
3 defendant must have himself killed, attempted to kill, intended that a killing take
4 place, intended that lethal force be employed or participated in a felony while
5 exhibiting a reckless indifference to human life. See Doleman v. State, 107 Nev. 409,
6 418, 812 P.2d 1287, 1292-93 (1991). In the aiding and abetting context, this is
7 consistent with this Court's holding in Sharma v. State, 118 Nev. 648, 56 P. 3d 868
8 (2002) that to be guilty of a specific intent offense on an aiding and abetting theory
9 the aider and abettor must have acted with specific intent that the offense be
10 committed. Likewise, in the conspiracy context, the State must prove that the co-
11 conspirator to a specific intent offense acted with specific intent that the offense be
12 committed. Bolden v. State, 121 Nev. ___, 124 P.3d 191, 200 (2005). In this case the
13 State has noticed its intent to seek the death penalty and has alleged the existence of
14 the murder for hire aggravating circumstance upon various theories, several of which
15 do not require a specific intent to murder. Under Sharma, Bolden, and the other
16 authority noted herein, the State's pleading is invalid.

17 There is no dispute that Petitioners did not physically kill Hadland themselves.
18 Rather, the State seeks to establish their guilt under aiding and abetting and conspiracy
19 theories. The State asserts in its Notices of Intent that the object of the conspiracy was
20 either to "beat" or to "kill" Hadland. That this makes a great difference to the validity
21 of the Notices of Intent is obvious. NRS 200.033(6) provides for an aggravating
22 circumstances only where "the **murder**" was committed to receive money or any
23 other thing of monetary value. There is no provision for beatings or any other action
24 short of murder. Moreover, to "kill" someone is not the equivalent of to "murder"
25 someone. For example, state officials, jurists, police and even juries, enter into
26

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

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

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

1 failed, however, to cite to any authority for this broad proposition. Nowhere in NRS
2 200.033(6) is there any support for the State's assertion that the aggravating
3 circumstance can be established based upon a battery, battery with a weapon, battery
4 with lethal force or any other offense short of murder.

5 "Lethal force" has not been defined by the Nevada Legislature within the
6 context of NRS 200.033, but it is clear from other statutes that use the term "lethal"
7 is limited to situations where death is caused or contemplated. See NRS 176.355
8 ("The judgment of death must be inflicted by an injection of a lethal drug."); NRS
9 202.550 ("It is unlawful for any person to place any lethal bait on the public
10 domain."); NRS 202.443 ("'Delivery system' means any apparatus, equipment,
11 implement, device or means of delivery which is specifically designed to send,
12 disperse, release, discharge or disseminate any weapon of mass destruction, any
13 biological agent, chemical agent, radioactive agent or other lethal agent or any
14 toxin."). There is no statutory basis, or other basis in law, for making the monumental
15 leap that the State jumped to in concluding that intent to commit a battery with a bat
16 is the same as the intent to kill or to use lethal force.¹

17 Most critically, the State's theory is not set forth in either the Indictment or the
18 Notices of Intent, but instead was presented by the State in its opposition to the motion
19 to strike the Notices of Intent. Exhibit 6 at page 16-17. There is no rule or statute
20 which permits the State to supplement a Notice of Intent to Seek Death Penalty by
21 presenting new theories and factual contentions in a pleading. Permitting such would
22

23 ¹The State does not assert that Petitioner Espindola had knowledge of or was
24 in any way associated with a bat. Petitioner Hidalgo does not in any way concede that
25 he actually requested that Hadland be hit with bats or placed in garbage sacks. The
26 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.

1 violate SCR 250(4)(c), which mandates that facts in support of the aggravating
2 circumstances alleged by the State be set forth in the Notice of Intent. “[A] defendant
3 cannot be forced to gather facts and deduce the State’s theory for an aggravating
4 circumstance from sources outside the notice of intent to seek death. Under SCR 250,
5 the specific supporting facts are to be stated directly in the notice itself.” Redeker,
6 121 Nev. ___, 127 P.3d at 523.

7 The State’s legal analysis in the district court failed to address recent and
8 controlling authority by this Court that is applicable to cases involving specific intent
9 offenses and vicarious liability. In the Motion to Dismiss, Petitioners cited to Sharma
10 v. State, 118 Nev. 648, 56 P. 3d 868 (2002), and noted that to be found guilty of a
11 specific intent offense on an aiding and abetting theory, the aider and abettor must
12 have the same intent as required of the principal. That is, to be convicted of first
13 degree murder and sentenced to death based upon a finding that a defendant aided and
14 abetted and intended that a killing take place or that lethal force will be employed, the
15 State must prove that the defendant specifically intended that the victim be killed or
16 that lethal force be employed against the victim. As noted above, Sharma’s holding
17 was reaffirmed and expanded to include co-conspirator liability in Bolden v. State,
18 121 Nev. ___, 124 P.3d 191 (2005). This Court explained its rationale:

19 [O]ur overarching concern in Sharma centered on the fact that the natural
20 and probable consequences doctrine regarding accomplice liability
21 permits a defendant to be convicted of a specific intent crime where he
22 or she did not possess the statutory intent required for the offense. We
23 are of the view that vicarious coconspirator liability for the specific
24 intent crimes of another, based on the natural and probable consequences
25 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.

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

1 their clear applicability to the facts of this case.

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

9 This aggravating circumstance is also invalid because it fails to set forth a plain,
10 concise and definite written statement of the essential facts of the aggravating
11 circumstance alleged by the State. The Sixth Amendment to the United States
12 Constitution provides that a criminal defendant is entitled to be informed of the nature
13 and cause of any and all accusations against him. In conformity therewith, NRS
14 173.075(1) expressly requires that an indictment or information contain a "plain,
15 concise and definite written statement of the essential facts constituting the offense
16 charged." See also Sheriff v. Levinson, 95 Nev. 436, 596 P.2d 232 (1979). The
17 charging document should also contain, when possible, a description of the means by
18 which the defendant committed the offense(s). NRS 173.075(2). This Court first
19 contemplated the mandate of NRS 173.075 in Simpson v. District Court, 88 Nev. 654,
20 660, 503 P.2d 1225, 1229 (1972). Simpson was charged with murder by way of a
21 Grand Jury Indictment. Simpson's Indictment alleged that she, "... on or about May
22 27, 1970, did wilfully, unlawfully, feloniously and with malice aforethought kill
23 Amber Simpson, a human being." Id. at 655, 503 P.2d at 1226. At issue was whether
24 Simpson's charges met the pleading requirements of NRS 173.075(2). This Court
25 held that, because the indictment failed to specify the conduct which gave rise to the
26 Simpson's charges, the indictment was insufficient under NRS 173.075. Accordingly,

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

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

5 “Whether at common law or under statute, the accusation must
6 include a characterization of the crime and such description of the
7 particular act alleged to have been committed by the accused as will
8 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.”

9 Id. at 660 (quoting 4 R. Anderson, Wharton’s Criminal Law and Procedure, Section
10 1760, at 553 (1957)). This Court further noted that the fact that an accused has access
11 to transcripts of the proceedings before the Grand Jury does not eliminate the
12 necessity that an Indictment be definite. Id. This Court reasoned that such indefinite
13 pleading would necessarily allow the prosecution absolute freedom to change theories
14 at will, thus denying an accused the fundamental rights the Nevada legislature
15 intended a definite Indictment to secure. Id.

16 The pleading requirement described above is reiterated in Nevada Supreme
17 Court Rule 250, which governs capital offenses. “[A] defendant cannot be forced to
18 gather facts and deduce the State’s theory for an aggravating circumstance from
19 sources outside the notice of intent to seek death. Under SCR 250, the specific
20 supporting facts are to be stated directly in the notice itself.” Redeker, 122 Nev. at ___,
21 127 P.3d at 523. Here, the State sets forth theories and conclusions, but it fails to
22 allege specific facts in support of those theories and conclusions, as required by SCR
23 250 and the Due Process clauses of the state and federal constitutions.

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

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

11 In the district court the State attempted to justify its Notice of Intent by arguing
12 that SCR 250(4)(c) does not mandate the disclosure argued to be required by the
13 Petitioners. Exhibit 6, State’s Opposition at page 34. The State was wrong. SCR
14 250(4)(c) provides the following:

15 No later than 30 days after the filing of an information or indictment, the
16 state must file in the district court a notice of intent to seek the death
17 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.*

18 The State argued that it should be relieved of its obligations under SCR 250(4)(c)
19 because SCR 250(4)(f) requires a detailed list of evidence be submitted at least 15
20 days prior to trial. Exhibit 6 State’s Opposition at page 34. The State is wrong in its
21 analysis of this Court’s rules. SCR 250(4)(c) specifically addresses aggravating
22 circumstances while SCR 250(4)(f) addresses all evidence to be presented at the
23 penalty hearing, including character or “other” evidence that is not relevant to the
24 alleged aggravators. See Mason v. State, 118 Nev. 554, 561-62, 51 P.3d 521, 525-26
25 (2002). The State’s obligations under subsection (c) are not modified or lessened by
26 its obligations under subsection (f).

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

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

21 **The State's Prior Violent Felony Aggravators Are Invalid**

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

1 The relevant Eighth Amendment law is well defined. First, a statutory
2 aggravating factor is unconstitutionally vague if it fails to furnish principled guidance
3 for the choice between death and a lesser penalty. See e.g., Maynard v. Cartwright,
4 486 U.S. 356, 361-364 (1988); Godfrey v. Georgia, 446 U.S. 420, 427-433 (1980).
5 Second, in a "weighing" state, such as Nevada, where the aggravating and mitigating
6 factors are balanced against each other, it is constitutional error for the sentencer to
7 give weight to an unconstitutionally vague aggravating factor, even if other, valid
8 aggravating factors obtain. See e.g. Stringer v. Black, 503 U.S. 222, 229-732 (1992);
9 Clemons, 494 U.S. at 748-752. Third, a state appellate court may rely upon an
10 adequate narrowing construction of the factor in curing this error. See Lewis v.
11 Jeffers, 497 U.S. 764 (1990). Finally, in federal habeas corpus proceedings, the state
12 court's application of the narrowing construction should be reviewed under the
13 "rational fact finder" standard of Jackson v. Virginia, 443 U.S. 307 (1979). See
14 Lewis, 497 U.S. at 781.

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

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

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

26 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:

1 To meet constitutional muster, a capital sentencing scheme "must
2 genuinely narrow the class of persons eligible for the death penalty and
3 must reasonably justify the imposition of a more severe sentence on the
4 defendant compared to others found guilty of murder." The question is,
5 does the felony aggravator set forth in NRS 200.033(4) genuinely narrow
6 the death eligibility of felony murderers? First, compared to the felony
7 basis for felony murder, NRS 200.033(4) limits somewhat the felonies
8 that serve to aggravate a murder. **But the felonies it includes are those
9 most likely to underlie felony murder in the first place.** Second, the
10 aggravator applies only if the defendant "killed or attempted to kill" the
11 victim or "knew or had reason to know that life would be taken or lethal
12 force used." This is narrower than felony murder, which in Nevada
13 requires only the intent to commit the underlying felony. This
14 notwithstanding, it is quite arguable that Nevada's felony murder
15 aggravator, standing alone as a basis for seeking the death penalty, fails
16 to genuinely narrow the death eligibility...
17 Id. at 774-775, 59 P.3d at 448.

18 This Court has never addressed whether NRS. 200.033 (2)(b) is narrowly
19 defined. However, if, as Justice Maupin has written, section (4) of the statute is not
20 genuinely narrow then there is a strong argument that Section (2)(b) is not genuinely
21 narrow. As stated above, Section (4) specifically states that if the murder was
22 committed while the person was engaged in several enumerated felonies then that
23 crime could be used as an aggravator under this section. Unlike Section (4), section
24 (2) (b) does not enumerate any specific felonies. It simply states a felony involving
25 the threat or use of violence. One is left to simply guess what types of felonies fall
26 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.

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

1 between death and a lesser penalty as required by Maynard v. Cartwright, 486 U.S.
2 356, 361-364 (1988) and Godfrey v. Georgia, 446 U.S. 420 (1980)? A statute violates
3 due process if it is so vague that it fails to give persons of ordinary intelligence fair
4 notice of what conduct is prohibited and fails to provide law enforcement officials
5 with adequate guidelines to prevent discriminatory enforcement.” Hernandez v. State,
6 118 Nev. 513, 524, 50 P.3d 1100, 1108 (2002). In Bouie v. City of Columbia, 378
7 U.S. 347, 350-51 (1964), the United States Supreme Court explained that it is a basic
8 principle that a criminal statute must give fair warning of the conduct that makes it a
9 crime. (Citing United States v. Harriss, 347 U.S. 612, 617 (1954) (cited in Bush v.
10 Gore, 531 U.S. 98 (2000)). “[A] statute which either forbids or requires the doing of
11 an act in terms so vague that men of common intelligence must necessarily guess at
12 its meaning and differ as to its application, violates the first essential of due process
13 of law.” Connally v. General Const. Co., 269 U.S. 385, 391 (1926). “No one may be
14 required at peril of life, liberty or property to speculate as to the meaning of penal
15 statutes. All are entitled to be informed as to what the State commands or forbids.”
16 Lanzetta v. New Jersey, 306 U.S. 451, 453 n.3 (1939). While these principles are
17 generally applied to statutes that are vague in the language of the statute itself, they
18 are equally applicable to cases where a statute that is precise on its face has been
19 unforeseeably and retroactively expanded by judicial construction. Bouie, 378 U.S.
20 at 352 (citing Pierce v. United States, 314 U.S. 306, 311 (1941)). Construction of a
21 statute which unexpectedly broadens its application operates precisely like an *ex post*
22 *facto* law and is therefore barred from retroactive application to pending cases under
23 the due process clause. *Id.* at 353-54. Thus, even if this Court were to find
24 solicitation to commit murder to be an eligible qualifying felony under NRS 200.033,
25 the ruling could not be applied to this case.

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

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

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

18 The Court: When someone solicits someone else to kill, orally, that’s not
19 sufficient?

20 Mr. Digiacomo: They say that’s not a crime of violence. That’s their argument.

21 The Court: It’s not a crime of violence?

22 Mr.Digiacomo: That’s what their argument to the Court was.

23 The Court: When someone is taped, as we see these living things on tv, where
24 the husband or wife, disgruntled, is trying to contract with
25 someone to kill the other party and they are in a car and it’s being
26 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?

1 Ms. Thomas That's correct.²

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

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

4 The Court: That ain't gonna fly here.

5 Exhibit 11 at pages 42-43.

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

9 NRS 199.500(2) states:

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

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

23

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

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

6 A conspiracy is a criminal act, which triggers the exclusionary
7 clause in the solicitation statute. In State v. Koseck, 113 Nev. 477, 479,
8 936 P.2d 836, 837 (1997), we held that, "[w]hen a defendant receives
9 multiple convictions based on a single act, this court will reverse
10 '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.

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

13 In reviewing Nevada case law addressing this aggravating circumstance, there
14 are no cases where solicitation has been considered a "felony with use or threat of use
15 of force." In determining what is a felony with use or threat of violence Nevada has
16 stated the following crimes fall in that category: attempt murder with use of a deadly
17 weapon (Blake v. State, 121 Nev. ___, 121 P.3d 567 (2005); Weber v. State, 121 Nev.
18 ___, 119 P.3d 107 (2005)), second-degree assault (Dennis v. State, 116 Nev. 1075, 13
19 P.3d 434 (2000)), attempted assault with a deadly weapon (Rhyne v. State, 118 Nev.
20 1, 38 P.3d 163 (2002)), aggravated sexual assault (Kaczmarek v. State, 120 Nev. ___,
21 91 P.3d 16 (2004)), sexual assault of a child (Weber), armed robbery (Kaczmarek),
22 robbery (State v. Powell, 122 Nev. ___, 138 P.3d 453 (2006)), attempted robbery
23 (Thomas v. State, 120 Nev. ___, 83 P.3d 818 (2004), kidnapping (Petrocelli v.
24 Angelone, 248 F.3d 877 (9th Cir. 2001); Weber), second degree arson (Dennis, but
25 see Redeker, 127 P.3d 520 in which this Court found that this offense is not always
26 a crime of violence), battery causing substantial bodily harm (Thomas), escape from

1 federal custody while threatening a jailer with a shank (State v. Haberstroh, 119 Nev.
2 173, 69 P.3d 676 (2003)), and battery by a prisoner (Rhyne). None of these are
3 inchoate offenses and the harm or threat of harm is direct and certain to flow from the
4 criminal act itself. They are not crimes that are committed with words but with
5 physical deeds that are clearly and imminently dangerous to a victim who is present
6 at its place of commission. Not so with solicitation. It is noteworthy that both
7 conspiracy to commit murder and solicitation of murder are Class B felonies. In terms
8 of the legislative intent regarding their punishment, they are identical and given
9 substantially lesser punitive treatment than murder and other violent offenses.
10 Likewise solicitation is not considered so inherently likely to lead to a murder that it
11 is a statutory predicate for a felony-murder under NRS 200.033(4).

12 Other states that have directly addressed this issue have concluded that
13 solicitation for murder does not constitute an aggravating circumstance under statutes
14 similar to and identical to NRS 200.033(2). In Lopez v. State, 864 So. 2d 1151 (Fla.
15 Dist. Ct. App. 2003) the trial court ruled that solicitation to commit murder was
16 encompassed within the catch-all provision of a Florida Statute that permitted
17 enhancement of a sentence for commission of a “felony that involved the use or threat
18 of physical force or violence against an individual.” On appeal the Court reversed and
19 remanded for a new sentencing hearing. In holding that violence is not an inherent
20 element of solicitation to commit murder, the Court relied upon Elam v. State, 636 So.
21 2d 1312 (Fla. 1994) wherein the Supreme Court of Florida **rejected solicitation to**
22 **commit murder as a violent felony in the context of an analysis of aggravating**
23 **circumstances to support the imposition of the death penalty.** The Lopez court
24 also relied upon Duque v. State, 526 So. 2d 1079 (Fla. Dist. Ct. App. 1988) wherein
25 the Court held that committing the offense of solicitation to commit murder did not
26 itself involve the use of a firearm, deadly weapon, or intentional violence and thus

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

3 The gist of criminal solicitation is enticement of another to commit a
4 crime. No agreement is needed, and criminal solicitation is committed
5 even though the person solicited would never have acquiesced to the
6 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.

7 864 So. 2d at 1153. Consideration of Florida law is especially persuasive as to this
8 issue because Nevada's death penalty statute is almost identical to Florida's statute.
9 See Calambro v. State, 114 Nev. 106, 113, 952 P.2d 946, 950 (1998).

10 In the district court, the State argued that Florida was the only state to adopt
11 Petitioners' position, that Florida's position was not persuasive, and that other states
12 had found solicitation to be a proper basis for the aggravating circumstance. There
13 was no merit to the State's argument. The State cited to Woodruff v. State, 846 P.2d
14 1124, 1143 (Okla. Cr. App. 1993) in support of its claim that Solicitation is a violent
15 felony. Exhibit 6, State's Opposition at page 38. A review of the Woodruff opinion,
16 however, reveals that the defendant there stipulated that the prior offense was a violent
17 felony and the issue considered by the Oklahoma court concerned double jeopardy
18 implications that are wholly irrelevant here. The Oklahoma court neither considered
19 nor ruled upon the issue presented here. Likewise, in People v. Edelbacher, 766 P.2d
20 1 (Cal. 1989), another case cited by the State in its opposition, the California Supreme
21 Court stated that a conviction for solicitation for murder was an aggravating
22 circumstance, but it mentioned this as a historical fact and did not address in any way
23 the issue presented here as it was not presented as an issue by the parties to that case.

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

1 [T]he mere solicitation to commit an offense cannot be equated with the
2 underlying offense. The solicitation statute criminalizes conduct that
3 "encourages, requests or solicits another person to engage" in a felony
4 or misdemeanor. See A.R.S. § 13-1002(A). The crime is completed by
5 the solicitation and the "crime solicited need not be committed." W.
6 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.

7 [S]olicitation is a preparatory offense, complete upon the act of
8 solicitation itself, and could not have been considered a crime of
violence even if the act solicited would have qualified as such a crime.

9 Ysea, 956 P.2d at 503.

10 Likewise, the State's citation to Weber v. State, 121 Nev. ___, 119 P.3d 107
11 (2005) was also misplaced. In Weber, this Court noted that there were implicit threats
12 of violence for offenses in which the defendant sexually assaulted a minor child based
13 upon prior incidents where the victim experienced trauma and violence, the defendant
14 was much superior to the victim in physical strength and was older than the victim,
15 and the defendant kicked in the door of the victim's home during the relevant time
16 period.³ Id. at 129. None of these factors are present here.

17 The fact remains that there is nothing within the plain language of this statute
18 that suggests the aggravator would be applied to the inchoate offense of solicitation.
19 Although this aggravator has been addressed in 54 published opinions since the
20 reinstatement of the death penalty following Furman and the enactment of NRS
21 200.033, not a single case has involved a solicitation offense. In an extensive analysis
22 of cases throughout the country that discuss this aggravating circumstance, there is no
23

24 ³The State's reference to Weber is especially baffling as it involved an actual
25 attack upon a child, which caused actual harm, whereas the mere words at issue here,
26 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.

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

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

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

1 significant problem in such circumstances. The agent, as part of the ‘conspiracy,’ is
2 quite capable of monitoring the situation in order to prevent the completion of the
3 contemplated criminal plan; in short, no cloak of secrecy surrounds any agreement to
4 commit the criminal acts.” United States v. Escobar de Bright, 742 F.2d 1196, 1200
5 (9th Cir. 1984).

6 This Court has also held that an informant is a feigned accomplice and therefore
7 cannot be a coconspirator. Myatt v. Nevada, 101 Nev. 761, 763, 710 P.2d 720, 722
8 (1985). When one of two persons merely pretends to agree, the other party, whatever
9 he may believe, is in fact not conspiring with anyone. Johnson v. Sheriff, Clark
10 County, 91 Nev. 161, 532 P.2d 1037 (1975) (citing Delaney v. State, 51 S.W.2d 485
11 (Tenn.1932)). There is no conspiracy where the assent was feigned and not real, and
12 that at no time was there any intention to assist in the unlawful enterprise. The danger
13 to society of a conspiracy is not present. The same is true when a solicitation is made
14 to a person unknown to the requester to be a police operative. The situation is feigned
15 and not real. The informant’s mere presence frustrates any potential harm that can be
16 done. The fact that Carroll was a police operative and supplying the police with
17 recordings of the discussions makes it clear that nothing would have come out of the
18 alleged request. Therefore, it is clear that solicitation, especially in this context,
19 cannot be considered a crime that involves use or threat of violence.

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

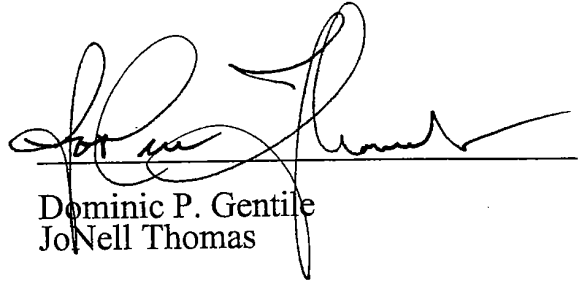
1 Williams, 97 Nev. 611, 614, 637 P.2d 1203, 1204 (1981)). Here, the language of the
2 statute is not plain and there is no clear indication that it applies to solicitation
3 offenses. There is also nothing in the Legislative history of this aggravator suggesting
4 that it should be applied to solicitation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

5 Reason and public policy mandate a finding that aggravator is not applicable
6 to solicitation offenses. It is important to remember the purpose of aggravating
7 circumstances. "The Eighth Amendment requires, among other things, that 'a capital
8 sentencing scheme must "genuinely narrow the class of persons eligible for the death
9 penalty and must reasonably justify the imposition of a more severe sentence on the
10 defendant compared to others found guilty of murder.'" Loving v. United States, 517
11 U.S. 748, 755 (1996) (quoting Lowenfield v. Phelps, 484 U.S. 231, 244 (1988), in turn
12 quoting Zant v. Stephens, 462 U.S. 862, 877 (1983)). "A capital sentencing scheme
13 must, in short, provide a 'meaningful basis for distinguishing the few cases in which
14 [the penalty] is imposed for the many cases in which it is not.'" Godfrey, 446 U.S. at
15 428 (quoting Gregg, 428 U.S. at 188). The question here is not whether solicitation
16 to commit murder is bad or whether it should be a crime or whether a person
17 committing such an offense should be punished. The question here is does inclusion
18 of this inchoate offense, which involved mere words and no agreement, no preparation
19 and no actual violent act further the narrowing requirement of the Eighth Amendment.
20 Reason and public policy demand a finding that such a broad application of this
21 aggravator does not further the purpose of our death penalty scheme and the mandate
22 that it meaningfully select "the worst of the worst." In any event, when the scope of
23 a criminal statute is at issue, ambiguity must be resolved in favor of the defendant.
24 Here, this ambiguity must be resolved by a finding that the aggravator does not apply
25 to solicitation.

1 **CONCLUSION**

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

4 Dated this 12th day of October, 2006.

5 
6
7 Dominic P. Gentile
Jo Nell Thomas

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

Index

<u>Exhibit</u>	<u>Date</u>	<u>Document</u>
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 Opposition 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

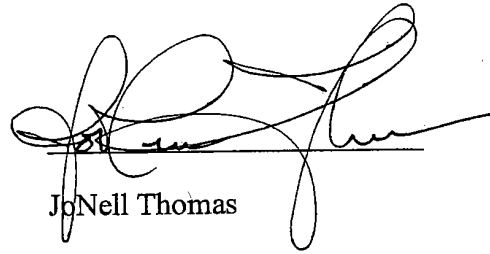
EXHIBIT "1"

Document1

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"

Document1

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 October, 2006.

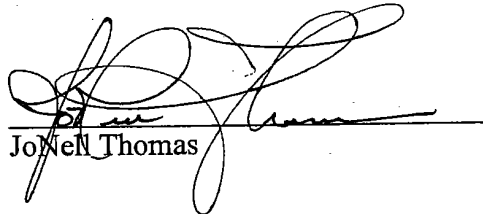

Jo Nell Thomas

EXHIBIT "3"

Document1


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 }
COUNTY OF CLARK } ss.

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,

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

3 COUNT 1 - CONSPIRACY TO COMMIT MURDER

4 Defendants KENNETH JAY COUNTS, aka Kenneth Jay Counts, II, and LUIS
5 ALONSO HIDALGO, aka, Luis Alonso Hidalgo III, ANABEL ESPINDOLA, DEANGELO
6 RESHAWN CARROLL and JAYSON TAOIPU did, on or between May 19, 2005 and May
7 24, 2005, then and there meet with each other and/or Luis Hildago, Jr. and between
8 themselves, and each of them with the other, wilfully, unlawfully, and feloniously conspire
9 and agree to commit a crime, to-wit: murder, and in furtherance of said conspiracy,
10 Defendants and/or their co-conspirators, did commit the acts as set forth in Counts 2 thru 4,
11 said acts being incorporated by this reference as though fully set forth herein.

12 COUNT 2 - MURDER WITH USE OF A DEADLY WEAPON

13 Defendants KENNETH JAY COUNTS, aka Kenneth Jay Counts, II, and LUIS
14 ALONSO HIDALGO, aka, Luis Alonso Hidalgo III, ANABEL ESPINDOLA, DEANGELO
15 RESHAWN CARROLL and JAYSON TAOIPU did, on or about May 19, 2005, then and
16 there wilfully, feloniously, without authority of law, and with premeditation and
17 deliberation, and with malice aforethought, kill TIMOTHY JAY HADLAND, a human
18 being, by shooting at and into the body and/or head of said TIMOTHY JAY HADLAND,
19 with a deadly weapon, to-wit: a firearm, the Defendants being liable under one or more of
20 the following theories of criminal liability, to-wit: (1) by directly or indirectly committing
21 the acts with premeditation and deliberation and/or lying in wait; and/or (2) by aiding and
22 abetting the commission of the crime by, directly or indirectly, counseling, encouraging,
23 hiring, commanding, inducing or otherwise procuring each other to commit the crime, to-
24 wit: by Defendant ANABEL ESPINDOLA and/or DEFENDANT LUIS HILDAGO, III
25 and/or Luis Hildago, Jr. procuring Defendant DEANGELO CARROLL to beat and/or kill
26 TIMOTHY JAY HADLAND; thereafter, Defendant DEANGELO CARROLL procuring
27 KENNETH COUNTS and/or JAYSON TAOIPU to shoot TIMOTHY HADLAND;
28 thereafter, Defendant DEANGELO CARROLL and KENNETH COUNTS and JAYSON

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

8 COUNT 3 - SOLICITATION TO COMMIT MURDER

9 Defendants LUIS ALONSO HIDALGO, aka, Luis Alonso Hidalgo III and ANABEL
10 ESPINDOLA did, on or between May 23, 2005, and May 24, 2005, then and there wilfully,
11 unlawfully, and feloniously counsel, hire, command or otherwise solicit another, to-wit:
12 DEANGELO CARROLL, to commit the murder of JAYSON TAOIPU; the defendants
13 being liable under one or more theories of criminal liability, to-wit: (1) by directly or
14 indirectly committing the acts constituting the offense; and/or (2)) by aiding and abetting the
15 commission of the crime by, directly or indirectly, counseling, encouraging, hiring,
16 commanding, inducing or otherwise procuring each other to commit the crime; and/or (3) by
17 conspiring to commit the crime of murder where each and every co-conspirator is liable for
18 the foreseeable acts of every other co-conspirator committed in the course and in furtherance
19 of the conspiracy.

20 COUNT 4 - SOLICITATION TO COMMIT MURDER

21 Defendants LUIS ALONSO HIDALGO, aka, Luis Alonso Hidalgo III and ANABEL
22 ESPINDOLA did, on or between May 23 and May 24, 2005, then and there wilfully,
23 unlawfully, and feloniously counsel, hire, command or otherwise solicit another, to-wit:
24 DEANGELO CARROLL, to commit the murder of RONTAE ZONE; the defendants being
25 liable under one or more theories of criminal liability, (1) by directly or indirectly
26 committing the acts constituting the offense; and/or (2)) by aiding and abetting the
27 commission of the crime by, directly or indirectly, counseling, encouraging, hiring,
28 commanding, inducing or otherwise procuring each other to commit the crime; and/or (3) by

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

4
5
6
7 BY



8 DAVID ROGER
9 DISTRICT ATTORNEY
Nevada Bar #002781

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

12	<u>NAME</u>	<u>ADDRESS</u>
13	HADLAND, ALLAN	ADDRESS UNKNOWN
14	KARSON, PAJIT	ADDRESS UNKNOWN
15	KRYLO, JAMES	LVMPD P#5945
16	MADRID, ISMAEL	1729 STAR RIDGE WAY LV NV
17	MCGRATH, MICHAEL	LVMPD P#4575
18	MORTON, LARRY	LVMPD P#4935
19	RENHARD, LOUISE	LVMPD P#5223
20	SCHWANDERLIK, MICHELLE	4037 OVERBROOK DR LV NV
21	SMITH, STEPHANIE	LVMPD P#6650
22	TAOIPU, JAYSON	2008 JEANNE DR LV NV
23	TELGENHOFF, DR. GARY	C.C.M.E. #0003
24	VACCARO, JAMES	LVMPD P#1480
25	WILDEMANN, MARTIN	LVMPD P#3516
26	ZONE, RONTAE	c/o BILL FALKNER, Clark County D.A. Office
27	DA#05FB0052A-B/ddm	
28	LVMPD EV#0505193516	
	CONSP MURDER;MWDW;SOLICIT MURDER - F	
	(TK7)	

EXHIBIT "4"

Document1


CLERK

1 **NISD**
2 DAVID ROGER
3 Clark County District Attorney
4 Nevada Bar #002781
5 MARC DIGIACOMO
6 Deputy District Attorney
7 Nevada Bar #006955
8 200 South Third Street
9 Las Vegas, Nevada 89155-2211
10 (702) 455-4711
11 Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

8 THE STATE OF NEVADA,
9 Plaintiff,

10 -vs-

11 LUIS ALONSO HIDALGO,
12 #1849634

13 Defendant.

CASE NO: C212667

DEPT NO: XIV

14 **NOTICE OF INTENT TO SEEK DEATH PENALTY**

15 COMES NOW, the State of Nevada, through DAVID ROGER, Clark County District
16 Attorney, by and through MARC DIGIACOMO, Deputy District Attorney, pursuant to NRS
17 175.552 and NRS 200.033 and declares its intention to seek the death penalty at a penalty
18 hearing. Furthermore, the State of Nevada discloses that it will present evidence of the
19 following aggravating circumstances:

20 1. The murder was committed by a person who, at any time before a penalty hearing
21 is conducted for the murder pursuant to NRS 175.552, is or has been convicted of a felony
22 involving the use or threat of violence to the person of another and the provisions of
23 subsection 4 do not otherwise apply to that felony, to-wit: Solicitation to Commit Murder, in
24 that on or about May 23, 2005, DEFENDANT LUIS ALONSO HIDALGO, III and
25 ANABEL ESPINDOLA, did then and there willfully, unlawfully, and feloniously counsel,
26 hire, command or otherwise solicit DEANGELO CARROLL to commit the murder of
27 JAYSON TAOIPU by DEFENDANT LUIS HIDALGO, III, in the presence of ANABEL
28

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

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

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

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

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

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

1 HIDALGO, JR. and/or ANABEL ESPINDOLA providing six thousand dollars (\$6,000) to
2 DEANGELO CARROLL to pay KENNETH COUNTS, thereafter, KENNETH COUNTS
3 receiving said money; and/or by ANABEL ESPINDOLA providing two hundred dollars
4 (\$200) to DEANGELO CARROLL and/or by ANABEL ESPINDOLA and/or
5 DEFENDANT LUIS HIDALGO, III providing fourteen hundred dollars (\$1400) and/or
6 eight hundred dollars (\$800) to DEANGELO CARROLL and/or by ANABEL ESPINDOLA
7 agreeing to continue paying DEANGELO CARROLL twenty-four (24) hours of work a
8 week from the PALOMINO CLUB even though DEANGELO CARROLL had terminated
9 his position with the club and/or by DEFENDANT LUIS HIDALGO, III offering to provide
10 United States Savings Bonds to DEANGELO CARROLL and/or his family. [See NRS
11 200.033(6)].

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

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

19 DATED this 6th day of July, 2005.

20 Respectfully submitted,

21 DAVID ROGER
22 Clark County District Attorney
Nevada Bar #002781

23 BY /s/MARC DIGIACOMO
24 MARC DIGIACOMO
25 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


CLERK

1 **NISD**
2 DAVID ROGER
3 Clark County District Attorney
4 Nevada Bar #002781
5 MARC DIGIACOMO
6 Deputy District Attorney
7 Nevada Bar #006955
8 200 South Third Street
9 Las Vegas, Nevada 89155-2211
10 (702) 455-4711
11 Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

8 THE STATE OF NEVADA,
9 Plaintiff,

10 -vs-

11 ANABEL ESPINDOLA,
12 #1849750

13 Defendant.

CASE NO: C212667

DEPT NO: XIV

14 **NOTICE OF INTENT TO SEEK DEATH PENALTY**

15 COMES NOW, the State of Nevada, through DAVID ROGER, Clark County District
16 Attorney, by and through MARC DIGIACOMO, Deputy District Attorney, pursuant to NRS
17 175.552 and NRS 200.033 and declares its intention to seek the death penalty at a penalty
18 hearing. Furthermore, the State of Nevada discloses that it will present evidence of the
19 following aggravating circumstances:

20 1. The murder was committed by a person who, at any time before a penalty
21 hearing is conducted for the murder pursuant to NRS 175.552, is or has been convicted of a
22 felony involving the use or threat of violence to the person of another and the provisions of
23 subsection 4 do not otherwise apply to that felony, to-wit: Solicitation to Commit Murder, in
24 that on or about May 23, 2005, LUIS ALONSO HIDALGO, III and DEFENDANT
25 ANABEL ESPINDOLA, did then and there willfully, unlawfully, and feloniously counsel,
26 hire, command or otherwise solicit DEANGELO CARROLL to commit the murder of
27 JAYSON TAOIPU by LUIS HIDALGO, III, in the presence of DEFENDANT ANABEL
28

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

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

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

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

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

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

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

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

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

19 DATED this 6th day of July, 2005.

20 Respectfully submitted,

21 DAVID ROGER
22 Clark County District Attorney
Nevada Bar #002781

23 BY /s/MARC DIGIACOMO
24 MARC DIGIACOMO
25 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"

Document1

1 0020
2 ROBERT DRASKOVICH, ESQ.
3 State Bar No. 6275
4 815 S. Casino Center Blvd.
5 Las Vegas, Nevada 89101
6 (702) 474-4222

7 Attorney for Defendant
8 LUIS HIDALGO III

9 CHRISTOPHER R. ORAM, ESQ.
10 State Bar No. 004349
11 520 South Fourth Street, Second Floor
12 Las Vegas, Nevada 89101
13 (702) 384-5563

14 Attorney for Defendant
15 ANABEL ESPINDOLA

16 DISTRICT COURT
17 CLARK COUNTY, NEVADA

18 *****

19 THE STATE OF NEVADA,
20
21 Plaintiff,

22 vs.

23 LUIS HIDALGO, III,
24 ANABEL ESPINDOLA,
25 Defendants.

26 CASE NO. C212667
27 DEPT. NO. XIV

28 MOTION TO STRIKE NOTICE OF
INTENT TO SEEK DEATH PENALTY

Hearing Date:
Hearing Time:

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

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

4 DATED this _____ day of December, 2005.

5 DRASKOVICH & DURHAM

6
7 By: 

8 ROBERT M. DRASKOVICH, JR., ESQ.
9 State Bar No. 6275
10 815 South Casino Center Blvd.
11 Las Vegas, NV 89101
12 Attorney for Defendant
13 LUIS HIDALGO, III

14 LAW OFFICES OF CHRISTOPHER R. ORAM

15 By: 

16 CHRISTOPHER R. ORAM, ESQ.
17 Bar No. 004349
18 520 South Fourth Street, Second Floor
19 Las Vegas, Nevada 89101
20 Attorney for Defendant
21 ANABEL ESPINDOLA
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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

1 kill" Hadland himself. He therefore, according to his incredible self, resorted to making a
2 secondary offering to Kenneth Counts and/or Jayson Taoipu. The NISDPs allege that
3 Kenneth Counts, having been "procured" by DeAngelo Carroll, terminated the life of
4 Timothy Jay Hadland by shooting him with a firearm.
5

6 The NISDPs go on to narrate events that allegedly took place after the by then
7 recent demise of Mr. Hadland. They assert that DeAngelo Carroll, subsequent to the
8 event, was paid \$6000 by either Anabel Espindola or Luis Hidalgo Jr. (who is not
9 charged in the Information), or both of them, and that DeAngelo Carroll in turn later
10 transferred all of the money to Kenneth Counts, apparently feeling unworthy of
11 compensation himself or at least not having been motivated in his "procuring" efforts by
12 the acquisition of worldly gain.
13

14 Or perhaps not.

15 The NISDPs continue in the disjunctive to assert that maybe what happened is
16 that Anabel Espindola and/or Luis Hidalgo III (who is charged and who brings this
17 motion along with Anabel Espindola) may have done one or more of the following:
18

- 19 - Anabel Espindola provided \$200 to DeAngelo Carroll (we know not when or
20 why from the pleading itself) which he apparently either did not give to Kenneth
21 Counts or the NISDPs are silent as to it;
22
23 - Anabel Espindola and Luis Hidalgo III provided \$1400 and/or \$800 to DeAngelo
24 Carroll (we know not when or why from the pleading itself) that he apparently
25 either did not give to Kenneth Counts or the NISDPs are silent as to it;
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1 -Anabel Espindola agreed to pay DeAngelo Carroll for twenty-four hours per
2 week of work at the Palomino Club even though he had already terminated his
3 "position" there;

4 - Luis Hidalgo III offered to provide DeAngelo Carroll and/or his family with United
5 States Savings Bonds.
6

7 It is not clear as to whether the foregoing were consideration for some pre-existing
8 agreement to beat and/or kill Timothy Jay Hadland or were paid or promised out of fear
9 of what harm – physical, fabricated or otherwise – the motivated and by this time
10 allegedly accomplished Carroll and/or his minions could cause to fall upon Ms.
11 Espindola and Mr. Hidalgo III.
12

13 **STATEMENT OF FACTS CURRENTLY IN THE RECORD**

14 A preliminary hearing took place on June 13, 2005 presided over by Justice of
15 the Peace Victor L. Miller in Boulder City¹. During the preliminary hearing the State
16 called Rontae Zone as a witness. Zone testified that he began working with co-
17 defendant DeAngelo Carroll in May of 2005. Zone worked as a "flier boy" for the
18 Palomino Club for three days before the events leading to the criminal charges. As part
19 of his duties, Zone would pass out fliers to promote the Palomino Club. (Preliminary
20 Hearing Transcript, pp. 16-19, hereinafter referred to as PHT).
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23 According to Zone, DeAngelo Carroll told him that Luis Hidalgo Jr. (the owner of
24 the club and not a defendant), wanted someone dead (PHT, pp. 26-27). Present during
25 this conversation was Jayson Taoipu (PHT, pp. 27). Zone indicated that Taoipu agreed
26 to be involved in the effort to kill that "someone" (PHT, pp. 28). Later that evening,
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28 ¹ The transcript of this preliminary hearing was submitted in this record with the Writ of Habeas
Corpus previously filed herein.

1 Zone witnessed Taoipu with a .22 revolver (PHT, pp. 28) after work, at approximately
2 8:00 p.m. on May 19, 2005, when Zone, Taoipu and Carroll went to Carroll's home
3 (PHT, pp. 30). Thereafter, the three picked up Kenneth Counts on E Street (PHT, pp.
4 31). According to Zone, Carroll, Taoipu, Counts and him proceeded out toward Lake
5 Mead (PHT, pp. 37). During the drive, Zone admitted that they smoked marijuana (a
6 hallucinogenic, psychoactive drug). (PHT, pp. 40).

8 At this point in the testimony, Zone requested and was permitted to speak with
9 an attorney (PHT, pp. 44). Thereafter, a lengthy delay occurred while the Court
10 contacted and appointed an attorney for the witness.
11

12 During this break, the State called Paijit Karlson (PHT, pp. 45). Ms. Karlson was
13 in a dating relationship with the victim, Timothy Hadland and was camping at Lake
14 Mead with him on the night of his death. (PHT, pp. 47). She knew that Hadland had
15 previously worked at the Palomino Club but had stopped working there approximately
16 two and a half weeks prior to the shooting (PHT, pp. 49). While with her at the lake,
17 Hadland received a phone call from DeAngelo Carroll and agreed to meet him so that
18 Hadland could receive some marijuana from Carroll (PHT, pp. 54). Hadland left and
19 Ms. Karlson never saw him alive again (PHT, pp. 55).
20

21 Zone was recalled to the witness stand and agreed to continue with his
22 examination after consultation with an attorney (PHT, pp. 58). While in the vehicle,
23 Zone was asked by Kenneth Counts if he had a gun (PHT, pp. 59). Zone claimed he
24 did not have a gun but a gun was provided by Mr. Taoipu (PHT, pp. 59). While in the
25 area of the north shore of Lake Mead, Hadland approached in his vehicle. Both
26 vehicles stopped on the side of the road and DeAngelo Carroll exited and then
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1 reentered his vehicle (PHT, pp. 60-61). Hadland exited his vehicle and waved at Carroll
2 (PHT, pp. 63). As Hadland walked toward the Carroll driven van, Counts got out of the
3 Carroll van and shot Hadland. (PHT, pp. 66-68). Counts reentered the Carroll van and
4 Carroll drove Counts, Zone and Taoipu away from the scene of the killing and to the
5 Palomino Club. (PHT, pp. 71). According to Zone, Counts and Carroll went inside the
6 Palomino Club for about 30 minutes (PHT, pp. 73). Counts then left the Palomino Club
7 in a cab (PHT, pp. 73). Carroll exited about 45 minutes after Counts came out of the
8 Palomino Club. (PHT, pp. 73). Carroll got back in the van with Taoipu and Zone and
9 they left to go buy some new tires. (PHT, pp. 76-77). DeAngelo Carroll told him that he
10 had been paid \$100.00 to change the tires by Anabel Espindola (PHT, pp. 79). Zone,
11 Taoipu and Carroll went to the IHOP to eat breakfast (PHT, pp. 82). After breakfast,
12 they went back to the residence after Carroll stopped at a barber shop to get a haircut.
13 Zone remained at Carroll's residence until the next morning, when Zone, Carroll and
14 Taoipu went to Simone's Auto Plaza (PHT, pp. 84). Zone and Taoipu waited in the car
15 as Carroll went into Simone's Auto Plaza (PHT, pp. 85).

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

1 Detective Michael McGrath testified that he responded to North Shore Road near
2 Lake Mead on May 19, 2005. (PHT, pp. 145). Detective McGrath observed the body of
3 Timothy Hadland lying face up. (PHT, pp. 151). Near the body, Detective McGrath
4 observed some Palomino VIP cards (PHT, pp. 152). On the driver's side floor board of
5 Hadland's vehicle, Detective McGrath located Hadland's cell phone (PHT, pp. 153).
6 Detective McGrath reviewed the cell phone history on Hadland's phone and learned that
7 on May 19, 2005, at 11:27 p.m. Mr. Hadland had received a phone call (PHT, pp. 154).
8 Detective McGrath attended the autopsy of Hadland and learned that he had a single
9 gun shot wound to the left side of his head (PHT, pp. 156) and a second wound to the
10 ear (PHT, pp. 157).
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13 Detective McGrath described Luis Hidalgo, Jr., as the owner of the Palomino
14 Club, and Louis Hidalgo, III, as his son (PHT, pp. 160).
15

16 Detective McGrath eventually came into contact with DeAngelo Carroll and
17 asked him to come to the homicide section wherein Carroll gave a recorded statement
18 (PHT, pp. 164). Carroll informed Detective McGrath about Zone and Taoipu being
19 present with him out at the lake (PHT, pp. 165). Detective McGrath also interviewed
20 Zone (PHT, pp. 166) and eventually Taoipu (PHT, pp. 167). According to Detective
21 McGrath, both Carroll and Zone described the residence where Kenneth Counts was
22 picked up prior to driving out to the lake (PHT, pp. 167). Detective McGrath then
23 prepared a search warrant and executed it at 1676 E Street (PHT, pp. 168). Detective
24 McGrath obtained and executed an additional search warrant for 1677 E Street, wherein
25 he located Kenneth Counts hiding in the attic (PHT, pp. 172-174).
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1 According to Detective McGrath, DeAngelo Carroll agreed to wear a body
2 recorder to converse with others whom he alleged were involved in Hadland's death.
3 (PHT, pp. 184). On May 23, 2005, law enforcement conducted a visual surveillance of
4 DeAngelo Carroll at Simone's Auto Plaza (PHT, pp. 185). After Carroll exited Simone's
5 Auto Plaza, Carroll was interviewed regarding what took place inside (PHT, pp. 186).
6 The next day Carroll again wore a body recorder into the Palomino Club². (PHT, pp.
7 187-188). On this same date, police surveilled Simone's Auto Plaza until they observed
8 Luis Hidalgo III leave (PHT, pp. 191). Patrol units were advised to stop Hidalgo III's
9 vehicle and he was subsequently arrested (PHT, pp. 192-193, 199). He was then
10 questioned by law enforcement after receiving his Miranda warnings (PHT, pp. 208-
11 210).

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

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

24 Detective McGrath testified he was in possession of three surreptitious
25 recordings made by DeAngelo Carroll, two on May 23 and one from May 24, 2005
26 (PHT, pp. 222). On the May 23, 2005, recording made at Simone's Auto Plaza, Anabel
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28 ²Transcripts of the recordings are attached hereto as Exhibits 1 & 2.

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

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

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

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28 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

1 robbery, being the driver of the getaway car. The Court held that even in a felony-
2 murder situation, if a defendant neither kills nor intends to kill the victim, the imposition
3 of capital punishment is not constitutionally justifiable under the cruel and unusual
4 punishment clause of the Eighth Amendment. The United States Supreme Court has
5 recognized that there must be individual consideration as a matter of constitutional right
6 in imposing the death sentence. See Lockett v. Ohio, 438 U.S. 586, 605 (1978). The
7 Court has made it clear that there must be a focus on "relevant facets of the character
8 and record of the individual offender." Woodson v. North Carolina, 428 U.S. 280, 304
9 (1976).
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12 Five years later the United States Supreme Court, in Tison v. Arizona, 481 U.S.
13 137 (1987), broadened the Enmund standard slightly, making it sufficient to satisfy the
14 Enmund culpability test even if the defendant is not the killer where there is evidence of
15 his "major participation in the felony committed, combined with reckless indifference to
16 human life". In Tison, the Court remanded the case after it found that the Arizona
17 Supreme Court applied the wrong standard. However, the Court distinguished the facts
18 of Tison from those in Enmund, noting that Tison's degree of participation in the crimes
19 was major rather than minor, and the record would support a finding of the culpable
20 mental state of reckless indifference to human life, as Tison's participation up to the
21 moment of the killing of the victims was substantially the same as the one who actually
22 shot them. That is, the Tison actively participated in the events leading up to the
23 deaths by providing the murder weapons, assisting in the killer's escape from prison
24 and helping to abduct the victims and steal their auto to act as a replacement getaway
25 car. Tison was present at the murder site, saw that the killer was holding the victims at
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1 bay with firearms and did nothing to interfere with the murders, and after the murders
2 even continued on the joint venture. Id at 145.

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

15 In this case, it is clear that neither Anabel nor Luis had any intent that Timothy
16 Hadland be killed. Anabel makes her intent clear through her comments to DeAngelo
17 Carroll. Anabel states, "Why are you saying that shit, what we really wanted was for
18 him to be beat up." (Return to Writ of Habeas Corpus – Exhibit 2 pp 4). Anabel had no
19 idea that Carroll was wearing a recording device and she spoke clearly about what she
20 thought was to happen -she wanted someone beaten up – and there is nothing to
21 indicate that the "agreement", if one existed, contemplated anything beyond a simple
22 battery. Not even the use of a weapon of any sort or substantial bodily harm. There is
23 no dispute that movants did not physically kill Hadland themselves. Neither did either of
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1 them attempt to kill Hadland as they weren't even near Hadland when he did get killed.
2 Thus, under the Enmund theory, the death penalty is not an appropriate punishment.

3 Further, under Tison, Anabel did not play a major role in the activities that killed
4 Hadland. Unlike the facts in Tison there is no evidence that Anabel helped plan, equip
5 and/or carry out the murder of Hadland, nor is there any information supplied indicating
6 that she was aware of it before it occurred. To the contrary, the record is clear that she
7 intended for Hadland to be "beaten up" and nothing more. Based on these facts there
8 could not be a finding of a culpable mental state of reckless indifference to human life or
9 any major role in the homicide.
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12 The same is true as to Luis Hidalgo III. Moreover, it is clear that he had no intent
13 to have Hadland killed. Luis' comments on the surreptitious recordings are limited and
14 he makes no statements about knowledge of or involvement in Hadland being **beaten**
15 or killed prior to the homicide. Although Zone states that Carroll told him that Luis also
16 wanted Hadland dead, and that Carroll should grab baseball bats and trash bags, this is
17 rank hearsay. Zone cannot testify to what Carroll claims to have heard Luis say
18 because Zone was not present for any conversation between Carroll and Luis. There is
19 no dispute that Luis did not physically kill Hadland himself. He also did not attempt to
20 kill Hadland because he was no where near Hadland when he did get killed. Further,
21 there is no admissible evidence that suggests that Luis intended for a killing to take
22 place or that lethal force be used. Thus, under the Enmund theory, the death penalty is
23 not an appropriate punishment for Luis.
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26 Under Tison, Luis did not play a major role in the activities that killed Hadland.
27 Unlike the facts in Tison and Evans v. State, 112 Nev. 1172 (1996), there is no
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1 evidence that Luis helped plan and carry out the murder of Hadland. Specifically, there
2 is no evidence that Luis knew of or participated in the events leading up to Hadland's
3 death, or that he provided any assistance in it. Further, there is no evidence that Luis
4 assisted in luring Hadland to his death. Based on these facts there cannot be a finding
5 of a culpable mental state of reckless indifference to human life or major participation in
6 the homicide itself.
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8 **II. The Pecuniary Gain Aggravator Should Be Stricken Because As There**
9 **Was No Probable Cause Finding Of Its Presence As An Aggravator.**

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

14 As a preliminary matter, the United States Supreme Court made clear in Ring v.
15 Arizona, 122 S. Ct. 2428 (2002) that aggravating circumstances are "essential
16 elements" of a capital offense and must be presented to a jury for testing against the
17 beyond a reasonable doubt standard. Accordingly, the aggravating circumstances
18 alleged herein are elements of the instant First Degree Murder charge, much like a "Use
19 of a Deadly Weapon" enhancement is an "element" of the offense with which it is
20 charged. The fact that the prosecution does not include the aggravators within the
21 Information but files them in a separate document does not alter their character as
22 elements of a Capital Murder charge.
23

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

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

9 Article I, Section 8 of the Nevada Constitution mandates – that "no person shall
10 be tried for a capital... crime... except on upon information duly filed by a district
11 attorney. NRS 171.206 states that upon the information being filed, the magistrate finds
12 whether there is "probable cause to believe that an offense has been committed and
13 that the defendant has committed it" before the magistrate shall forthwith hold him to
14 answer in the district court. Thus, the Nevada Constitution and Nevada law expressly
15 require that all crimes be subject to a probable cause determination. Inasmuch as
16 aggravating circumstances are elements of a capital offense, they, too, must be subject
17 to this determination. In the instant case, the prosecution failed to present the instant
18 aggravators to the magistrate and has as yet not done so to a Grand Jury, and has
19 violated Luis and Anabel's Due Process rights, as secured by federal and state
20 constitutional law, as well as Nevada statutory law. See Hicks v. Oklahoma, 447 U.S.
21 343 (1980) (holding that arbitrary denial of state created liberty interest amounts to Due
22 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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1 **III. The Pecuniary Gain Aggravator Must Be Stricken As It Does Not**
2 **Contain A Plain/Concise Written Statement Of The Essential Facts**
3 **Constituting The Aggravator Charged.**

4 The Sixth Amendment to the United States Constitution provides that a criminal
5 defendant is entitled to be informed of the nature and cause of any and all accusations
6 against him. In conformity therewith, NRS 173.075(1) expressly requires that an
7 indictment or information contain a "plain, concise and definite written statement of the
8 essential facts constituting the offense charged." See also Sheriff v. Levinson, 95 Nev.
9 436 (1979). The charging document should also contain, when possible, a description
10 of the means by which the defendant committed the offense(s). NRS 173.075(2). The
11 Nevada Supreme Court first contemplated the mandate of NRS 173.075 in Simpson v.
12 District Court, 88 Nev. 654, 660 (1972).⁴ Simpson was charged with murder by way of a
13 Grand Jury Indictment. Simpson's Indictment alleged that she, "... on or about May 27,
14 1970, did willfully, unlawfully, feloniously and with malice aforethought kill Amber
15 Simpson, a human being." Id. At 655. At issue was whether Simpson's charges met
16 the pleading requirements of NRS 173.075(2). The Supreme Court held that, because
17 the indictment failed to specify the conduct which gave rise to the Simpson's charges,
18 the indictment was insufficient under NRS 173.075. Accordingly, the Simpson Court
19 issued a permanent writ of prohibition, disallowing further proceedings based on the
20 defective indictment. Id. At 661.

21 Elaborating on the pleading requirements necessary for an Indictment to meet
22 constitutional must, the Simpson Court held that:
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27 ⁴ In Simpson, the respondent District Court denied petitioner Simpson's motion to dismiss a
28 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

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

9
10 **IV. To The Extent That It Is Based Upon A Conspiracy To Commit A Battery**
11 **("Beat") Or Utilizes The Unqualified Term "Kill", The NISDPS Are**
12 **Duplicitous And Cannot Supply The Basis For Imposition Of Capital**
13 **Punishment.**

14 Count One of the Information charges the defendants with Conspiracy to Commit
15 Murder. Where there is an agreement to commit a murder, the end result is foreseeable
16 if the agreement is carried out. Moreover, each conspirator must have the specific
17 intent to kill. Therefore each is responsible as a principal for the murder as it was
18 clearly committed in furtherance of and to achieve the purpose or object of the
19 conspiracy. See Walker v. State, 116 Nev. 670, 674 (Nev. 2000). However, probably
20 because the surreptitious recording of conversations between DeAngelo Carroll and
21 movants clearly show that there was never an intention on the part of either movant that
22 Timothy Hadland be killed, but only "beaten", the State adds an uncharged and
23 unchangeable theory to its NISDPs as grounds for imposition of the death penalty upon
24 conviction. The NISDPs state that the object of the conspiracy was either to "beat" or to
25 "kill" Hadland. That this makes a great difference to the validity of the NISDPs is
26 obvious. Moreover, to "kill" someone is not the equivalent of "murder" someone. State
27 officials, jurists, police and even juries, enter into agreements to "kill" people that are not
28

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

3 First of all, even a deliberate battery does not have as a foreseeable
4 consequence, much less an intentional one, a killing or great bodily harm. Absent it
5 being the purpose of a burglary, battery does not form the basis of a felony-murder
6 under Nevada law. See Contreras v. State, 118 Nev. 332, 46 p. 3d 661 (Nev. 2002).
7 Serious bodily injury is not inherently foreseeable in a battery.
8

9 Moreover, serious bodily injury is not inherently foreseeable in a battery. State v.
10 Huber, 38 Nev. 253, 148 P. 562, 563 (Nev. 1915) (where defendant intended only a
11 battery and it results in killing of victim who fights back, result is manslaughter). An
12 intentional act or intentional conduct done with no aim to cause death or serious bodily
13 injury will constitute involuntary manslaughter if it creates an extreme risk of death or
14 serious bodily injury and amounts to non-conscious recklessness. Alternatively, an
15 intentional act which causes death is involuntary manslaughter if it is a misdemeanor
16 dangerous in and of itself which is committed in a manner such that appreciable bodily
17 injury to the victim was a reasonably foreseeable result. See Comber v. United States,
18 584 A. 2d 26, 54 (D.C. Ct. App. 1990)(*en banc*). Thus, the "conspiracy to beat"
19 alternative in the NISDP cannot form the basis of a capital punishment hearing, as it is
20 not charged in the Information and is not a statutory aggravating factor.
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1 **V. The Two Aggravators Stating Anabel Espindola And Luis Hidalgo III**
2 **Committed A Felony With Use Or Threat Of Harm, To Wit: Solicitation To**
3 **Commit Murder - Must Be Stricken Because (A) NRS 200.033 (b)(2) Is**
4 **Unconstitutionally Vague and Ambiguous; and (B) Solicitation For**
5 **Murder, Especially When Made To A Police Agent, Is Not A Felony**
6 **Involving The Use Or Threat Of Violence.**

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

8 The relevant Eighth Amendment law is well defined. First, a statutory aggravating
9 factor is unconstitutionally vague if it fails to furnish principled guidance for the choice
10 between death and a lesser penalty. See, e.g., *Maynard v. Cartwright*, 486 U.S. 356,
11 361-364, 100 L. Ed. 2d 372, 108 S. Ct. 1853 (1988); *Godfrey v. Georgia*, 446 U.S. 420,
12 427-433, 64 L. Ed. 2d 398, 100 S. Ct. 1759 (1980). Second, in a "weighing" State,
13 where the aggravating and mitigating factors are balanced against each other, it is
14 constitutional error for the sentencer to give weight to an unconstitutionally vague
15 aggravating factor, even if other, valid aggravating factors obtain. See, e.g., *Stringer v.*
16 *Black*, 503 U.S. 222, 229-232, 117 L. Ed. 2d 367, 112 S. Ct. 1130 (1992); *Clemons v.*
17 *Mississippi, supra*, 494 U.S. at 748-752. Third, a state appellate court may rely upon an
18 adequate narrowing construction of the factor in curing this error. See *Lewis v. Jeffers*,
19 497 U.S. 764, 111 L. Ed. 2d 606, 110 S. Ct. 3092 (1990); *Walton v. Arizona*, 497 U.S.
20 639, 111 L. Ed. 2d 511, 110 S. Ct. 3047 (1990). Finally, in federal habeas corpus
21 proceedings, the state court's application of the narrowing construction should be
22 reviewed under the "rational fact finder" standard of *Jackson v. Virginia*, 443 U.S. 307,
23 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979). See *Lewis v. Jeffers, supra*, at 781.

24 Circumstances aggravating first-degree murder are codified in NRS 200.033.

25 Section 2 in pertinent part to this argument states:

26 The murder was committed by a person who is or has been
27 convicted of:

28 (b) A felony *involving the use or threat of violence to the*

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

3 Subsection 4 enumerates the felonies that would constitute the felony murder rule.
4 Specifically this subsection deals with if the murder was committed while engaged or
5 attempting to engage in the following felonies: robbery, burglary, invasion of the home,
6 kidnapping and arson in the first degree.⁵ In a concurring opinion in Leslie v. Warden,
7 118 Nev. 773 (2002), Justice Maupin voiced his concern over NRS 200.033(4) when he
8 wrote:
9

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

19 The Nevada Supreme Court has never addressed whether NRS. 200.033 (2)(b)
20 is narrowly defined. However, if, as Justice Maupin has written, section (4) of the
21 statute is not genuinely narrow then there is a strong argument that Section (2)(b) is not
22 genuinely narrow. As stated above, Section (4) specifically states that if the murder was
23 committed while the person was engaged in several enumerated felonies then that
24 crime could be used as an aggravator under this section. Unlike Section (4), section (2)
25 (b) does not enumerate any specific felonies. It simply states a felony involving the
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28 ⁵ It is noteworthy that **battery** is missing from this list.

1 threat or use of violence. One is left to simply guess what types of felonies fall under
2 this category. Significant to the instant case, the Nevada Supreme Court has never
3 addressed whether the specific crime of Solicitation for Murder is considered a felony
4 with the use or threat of violence.
5

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

9 NRS 199.500(2) states:

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

13 The crime of solicitation is complete once the request is made. Moran v.
14 Schwarz, 108 Nev. 200, 202(1992). Unlike other criminal offenses, in the crime of
15 solicitation, "the harm is the asking -- nothing more need be proven." Id at 203. citing
16 People v. Miley, 158 Cal. App. 3d 25 (Ct. App. 1984). There need be no real danger of
17 the commission of the completed offense or of the person solicited being receptive to
18 the invitation. It amounts to little more than speaking ones mind about wanting
19 someone killed. Unlike a conspiracy to commit murder, where an agreement to
20 complete the offense is involved, there is no threat of actual harm at the time of the
21 solicitation, even to someone who is not a police operative. In a sense it is "half a
22 conspiracy" or "half a contract", waiting for a willing person to accept or agree to fulfill
23 the wishes of the desirous person. In Wood v. State, 115 Nev. 344, 350-351, 990 P.2d
24 786, 790 (Nev. 1999) the Court held that if a defendant is convicted of conspiracy to
25 commit murder or attempted murder, he cannot be convicted of solicitation to commit
26 murder for the same acts. Noting that when a person solicits another to commit murder
27 and the second person agrees, a conspiracy is formed and NRS 199.480(1) governs,
28

1 the Court held:

2 A conspiracy is a criminal act, which triggers the exclusionary clause in
3 the solicitation statute. In State v. Koseck, 113 Nev. 477, 479, 936 P.2d 836, 837
4 (1997), we held that, "[w]hen a defendant receives multiple convictions based on
5 a single act, this court will reverse 'redundant convictions that do not comport
6 with legislative intent.'" (Citation omitted.) Based on the exclusionary language
7 contained in NRS 199.500(2), on remand, Wood could be convicted of
8 solicitation to commit murder in these circumstances only if he is not convicted of
9 conspiracy or attempted murder for the attack on Lisa.

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

12 In reviewing Nevada case law, there are no cases where solicitation has been
13 considered a "felony with use of threat of use or force." In determining, what is a felony
14 with use of threat or violence Nevada has stated the following crimes fall in that
15 category: second-degree assault⁶, aggravated criminal sexual assault, armed robbery,
16 aggravated burglary⁷, kidnapping⁸, second degree arson⁹, battery causing substantial
17 bodily harm¹⁰. None of these are inchoate offenses and the harm or threat of harm is
18 direct and certain to flow from the criminal act itself. They are not crimes that are
19 committed with words but with physical deeds that are clearly and imminently
20 dangerous to a victim who is present at its place of commission. Not so with solicitation.
21 It is noteworthy that both conspiracy to commit murder and solicitation of murder are
22 Class B felonies. In terms of the legislative intent regarding their punishment, they are
23

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

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

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

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

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

1 identical and given substantially lesser punitive treatment than murder.

2 Solicitation is not considered so inherently likely to lead to a murder that it is a
3 statutory predicate for a felony-murder under NRS 200.033(4). Moreover, in Lopez v.
4 State, 864 So. 2d 1151 (Fla. App. 2d Dist. 2003) the trial court ruled that solicitation to
5 commit murder was encompassed within the catch-all provision of a Florida Statute that
6 permitted enhancement of a sentence for commission of a "felony that involved the use
7 or threat of physical force or violence against an individual." On appeal the Court
8 reversed and remanded for a new sentencing hearing. In holding that violence is not an
9 inherent element of solicitation to commit murder, the Court relied upon Elam v. State,
10 636 So. 2d 1312 (Fla. 1994) wherein the Supreme Court of Florida rejected solicitation
11 to commit murder as a violent felony in the context of an analysis of aggravating
12 circumstances to support the imposition of the death penalty. The Lopez court also
13 relied upon Dugue v. State, 526 So. 2d 1079 (Fla. App. 2d 1988) wherein the Court held
14 that committing the offense of solicitation to commit murder did not itself involve the use
15 of a firearm, deadly weapon, or intentional violence and thus solicitation to commit
16 murder is not a felony that involves the use or threat of violence. The Court in Lopez
17 held:
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21 The gist of criminal solicitation is enticement" of another to commit a
22 crime. No agreement is needed, and criminal solicitation is committed
23 even though the person solicited would never have acquiesced to the
24 scheme set forth by the defendant. Thus, the general nature of the crime
25 of solicitation lends support to the conclusion that solicitation, by itself,
26 does not involve the threat of violence even if the crime solicited is a
27 violent crime.

28 864 So. 2d 1153.

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

1 The Nevada Supreme Court has also held that an informant is a feigned
2 accomplice and therefore cannot be a coconspirator. Myatt v. Nevada, 101 Nev. 761,
3 763 (1985). When one of two persons merely pretends to agree, the other party,
4 whatever he may believe, is in fact not conspiring with anyone. Johnson v. Sheriff,
5 Clark County, 91 Nev. 161 (1975) citing Delaney v. State, 51 S.W.2d 485 (Tenn.1932).
6 There is no conspiracy where the assent was feigned and not real, and that at no time
7 was there any intention to assist in the unlawful enterprise. The danger to society of a
8 conspiracy is not present. The same is true when a solicitation is made to a person
9 unknown to the requester to be a police operative. The situation is feigned and not real.
10 The informant's mere presence frustrates any potential harm that can be done. The fact
11 that Carroll was a police operative and supplying the police with recordings of the
12 discussions makes it clear that nothing would have come out of the alleged request.
13 Therefore, it is clear that solicitation, especially in this context, cannot be considered a
14 crime that involves use or threat of violence.

18 CONCLUSION

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

21 In conclusion, the reliance on these three weak aggravators, affects Anabel and
22 Luis' constitutional right to bail. As the Court is aware these aggravators are what
23 distinguish this case as a capital murder case. Accordingly, the absolute right to bail
24 becomes a limited right to bail. In re Wheeler, 81 Nev. 495 (1965). Surely when such a
25 valuable unconditional constitutional right is being affected by the State's allegations,
26 there should be strict adherence to constitutional, legislative and judicially recognized
27
28

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

3
4 DATED this _____ day of December, 2005.

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10 DISTRICT COURT
11 CLARK COUNTY, NEVADA

12 THE STATE OF NEVADA,

13 Plaintiff,

14 vs.

15 LUIS HIDALGO, III;
16 ANABEL ESPINDOLA,

17 Defendants.

CASE NO.: C212667
DEPT. NO.: XIV

18 **RECEIPT OF COPY**

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

21
22
23 *M. B.*
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25 Deputy District Attorney
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