

IN THE SUPREME COURT OF THE STATE OF NEVADA

LUIS HIDALGO, III AND ANABEL
ESPINDOLA,
Petitioners,

vs.

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

No. 48233

FILED

OCT 20 2006

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richards*
CHIEF DEPUTY CLERK


ORDER DIRECTING ANSWER

This is an original petition for a writ of mandamus or prohibition in a case in which the State seeks a death sentence. The petition challenges the district court's denial of petitioners' motion to strike the notices of intent to seek death penalty. We have reviewed the petition, and it appears that petitioners have set forth issues of arguable merit and may have no plain, speedy, and adequate remedy in the ordinary course of the law. Accordingly, the State, on behalf of respondents, shall have 20 days from the date of this order within which to file an answer, including authorities, against issuance of the requested writ.

It is so ORDERED.

[Signature], C.J.

SUPREME COURT
OF
NEVADA

(O) 1947A 

06-21623

cc: Hon. Donald M. Mosley, District Judge
Gentile DePalma, Ltd.
JoNell Thomas
Attorney General George Chanos/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

123 Nev., Advance Opinion 59
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ESPINDOLA,
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DEC 27 2007

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *[Signature]*
CHIEF DEPUTY CLERK

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

Petition granted.

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

JoNell Thomas, Las Vegas,
for Petitioner Espindola.

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

BEFORE THE COURT EN BANC.

OPINION

PER CURIAM:

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

FACTS

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

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

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

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

DISCUSSION

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

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

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

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

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

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

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

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

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

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

⁶Id.

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

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

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

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

⁸122 Nev. at 175, 127 P.3d at 527.

⁹636 So. 2d 1312, 1314 (Fla. 1994).

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

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

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

¹⁰864 So. 2d 1151, 1152-53 (Fla. Dist. Ct. App. 2003) (citations omitted).

¹¹956 P.2d 499, 502 (Ariz. 1998).

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

¹³Id.

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

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

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

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

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

¹⁶956 P.2d at 503.

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

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

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

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

¹⁹121 Nev. 554, 119 P.3d 107 (2005).

²⁰Id. at 586, 119 P.3d at 129.

²¹Id.

²²Id.

²³Id.

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

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

The State's notices allege in pertinent part:

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

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

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

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

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

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

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

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

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

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

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

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

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

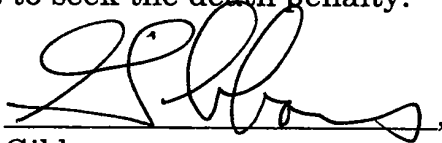
The fifth apparent theory actually contains multiple subtheories of its own: petitioner Espindola provided \$200 to Carroll; petitioner Espindola and/or petitioner Hidalgo provided \$1,400 and/or \$800 to Carroll; petitioner Espindola agreed to continue paying Carroll for working at the Palomino Club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

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

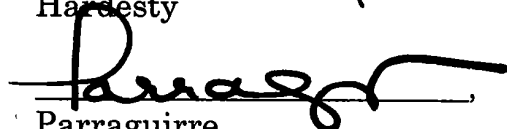
Thus, none of the allegations in the notices, taken together or separately, are sufficiently complete to support the third aggravator charged against each petitioner, and the third aggravators must therefore be stricken. As no valid aggravators remain, we conclude the notices of intent to seek the death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

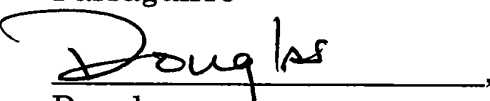
CONCLUSION

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

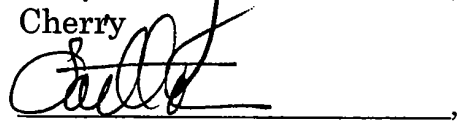
 J.
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 J.
Hardesty

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Parraguirre

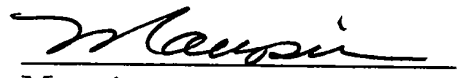
 J.
Douglas

 J.
Cherry

 J.
Saitta

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

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

 C.J.
Maupin

¹NRS 200.033 (2)(b).

ATTEST: A FULL, TRUE AND
CORRECT COPY.

CLERK OF THE SUPREME COURT

By 
Deputy Clerk


CLERK OF THE COURT

NISD
DAVID ROGER
Clark County District Attorney
Nevada Bar #002781
GIANCARLO PESCI
Chief Deputy District Attorney
Nevada Bar #007135
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,)	
Plaintiff,)	Case No. C212667
-vs-)	Dept No. XXI
ANABEL ESPINDOLA)	
#1849750)	
Defendant.)	

**AMENDED NOTICE OF EVIDENCE IN SUPPORT OF
AGGRAVATING CIRCUMSTANCES**

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

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

On or about May 19, 2005, the owner of the Palomino Club, Luis Hidalgo, Jr., located at 1848 North Las Vegas Boulevard, made it known to Deangelo Carroll, an employee of the Palomino Club, that he would pay someone to kill Timothy Jay Hadland, who was a former

1 employee of the club. Luis Hidalgo, Jr., was angry with the victim, Timothy Jay Hadland,
2 because after his firing from the club, Timothy Jay Hadland was hurting the club's business
3 by "bad mouthing" the club by spreading rumors about Luis Hidalgo Jr., and about the club.
4 Timothy Jay Hadland had a lot of contact with cab drivers and was telling cabbies not to
5 bring their fares to the club in retaliation for his firing. The Palomino Club is not located on
6 the Strip and its business relies heavily on customers being brought to the club by cabs. The
7 club was losing money because of Timothy Jay Hadland's actions and as such Luis Hidalgo
8 Jr., wanted him killed so that he, his business, and his employees would be better off
9 financially by the increased flow of clients after Timothy Jay Hadland was silenced. Based
10 upon this initial conversation, Deangelo Carroll procured the assistance of Jayson Taoipu to
11 commit the murder.

12 On the same date, after the initial conversation, Luis Hidalgo, III, a manager of the
13 Palomino Club, called Deangelo Carroll and told him to come to the club and "bring baseball
14 bats and garbage bags." When Defendant Carroll arrived at the Palomino Club, Defendant
15 Espindola and Luis Hidalgo, Jr., hired Deangelo Carroll to kill Timothy Jay Hadland. After
16 conveying this information and procuring Deangelo Carroll, Deangelo Carroll then went to
17 1676 "E" Street to the residence of Kenneth Counts and enlisted Defendant Kenneth Counts
18 to kill Timothy Jay Hadland. Defendant Deangelo Carroll then drove Defendants Kenneth
19 Counts and Jayson Taoipu, as well as witness Rontae Zone, out to the area of North Shore
20 Road at Lake Mead where Defendant Kenneth Counts shot and killed Timothy Jay Hadland.

21 After the killing, the group drove back to the Palomino Club and Defendant Deangelo
22 Carroll entered the club with Defendant Kenneth Counts. Defendant Deangelo Carroll went
23 into Luis Hidalgo Jr.'s office and met with him and Defendant Anabel Espindola. At that
24 time Defendant Deangelo Carroll announced that, "it was done" and that Defendant Kenneth
25 Counts wanted to be paid. Luis Hidalgo Jr., then told Defendant Anabel Espindola to get the
26 money, which Defendant Anabel Espindola did and which she provided to Defendant
27 Deangelo Carroll who then provided the six thousand dollars (\$6,000) to Defendant Kenneth
28 Counts. Defendant Kenneth Counts then left the club in a cab and Luis Hidalgo Jr., and

1 Defendant Anabel Espindola then discussed with Defendant Deangelo Carroll what he
2 should say if the police spoke to him. Additionally, Defendant Anabel Espindola and/or
3 Luis Hidalgo, III, provided hundreds of dollars to Defendant Deangelo Carroll for his part in
4 the crime.

5 These facts support the aggravator because the murder was committed for the purpose
6 of improving the profits to the business and the employees of the Palomino Club. The owner
7 of the club, Luis Hidalgo Jr., perceived that profits were being hurt by the victim, Timothy
8 Jay Hadland “bad mouthing” him and the club. As such, Luis Hidalgo Jr., used employees,
9 Defendants Anabel Espindola, Luis Hidalgo, III, and Deangelo Carroll to carry out his
10 wishes. Defendant Anabel Espindola, as an employee of the Palomino Club would receive,
11 “money or any other thing of monetary value” by the profits going back up by the silencing
12 of Timothy Jay Hadland. In addition, these facts support murder for hire under the
13 aggravator as Defendants Kenneth Counts and Deangelo Carroll received money for killing
14 Timothy Jay Hadland.

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

18 In filing this AMENDED NOTICE, the State incorporates all pleadings, witness lists,
19 notices and other discovery materials already provided to Defendant by the Office of the

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1 District Attorney as part of its open-file policy as well as any future discovery received and
2 provided to Defendant.

3 DATED this 9th day of January, 2008.

4 Respectfully submitted,

5 DAVID ROGER
6 Clark County District Attorney
7 Nevada Bar #002781

8 BY /s/GIANCARLO PESCI
9 GIANCARLO PESCI
10 Chief Deputy District Attorney
11 Nevada Bar #007135

12
13 **CERTIFICATE OF FACSIMILE TRANSMISSION**

14 I hereby certify that service of AMENDED NOTICE OF INTENT TO SEEK
15 DEATH PENALTY, was made this 9TH day of January, 2008, by facsimile transmission
16 to:

17 CHRISTOPHER ORAM
18 FAX #974-0623

19 /s/ D. Daniels
20 Secretary for the District Attorney's Office
21
22
23
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25
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28

SCANNED

ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEVADA

LUIS HIDALGO, III and
ANABEL ESPINDOLA

Petitioners,

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THE EIGHTH JUDICIAL DISTRICT COURT
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Respondents,

And

THE STATE OF NEVADA,

Real Party in Interest.

Case No. 48233

FILED

JAN 23 2008

REAGIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

STATE PETITION FOR REHEARING

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

DAVID ROGER
Clark County District Attorney
Nevada Bar #002781
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500

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

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

Counsel for Petitioners

Counsel for Real Part in Interest

1 IN THE SUPREME COURT OF THE STATE OF NEVADA

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4
5 LUIS HIDALGO, III and
6 ANABEL ESPINDOLA

7 Petitioners,

8 vs.

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

Case No. 48233

14 Respondents,

15 And

16 THE STATE OF NEVADA,

17 Real Party in Interest.


18 **STATE PETITION FOR REHEARING**

19 COMES NOW, the State of Nevada, Real Party in Interest, by DAVID ROGER,
20 District Attorney, through his deputy, NANCY A. BECKER, on behalf of the above-named
21 respondents and submits this Petition for Rehearing of the Opinion filed on December 27,
22 2007 in the above-captioned case as it pertains to the interpretation of SCR 250(4)(c) and its
23 application to the monetary gain aggravator under NRS 200.033(6). This Petition is based
24 on the following memorandum and all papers and pleadings on file herein.

25 Dated January 14, 2008.

26 DAVID ROGER
27 Clark County District Attorney
28 Nevada Bar # 002781

BY


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

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**MEMORANDUM OF
POINTS AND AUTHORITIES**

The State respectfully submits the Court has misapprehended the law in its determination¹ that NRS 200.033(6) requires a direct nexus between a defendant and the money or monetary value required by the pecuniary gain aggravator. From language in the opinion, this Court appears to be interpreting NRS 200.033(6) to require that a charged defendant obtain direct financial benefit from the murder, paid for the murder or was personally motivated to participate in the murder to achieve a pecuniary benefit for some person or entity. The State concurs that all three of these conducts or "theories" are encompassed in NRS 200.033(6). However, on the face of the statute, the aggravator is applicable to any defendant who participates in a murder that is motivated, at least in part, by pecuniary gain, whether or not the individual defendant was directly involved in the pecuniary gain aspects of the murder.

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

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

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

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

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

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

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

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

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

16 ARGUMENT

17 I

18 FACTUAL BACKGROUND

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

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

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

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

10 **I**
THE PECUNIARY GAIN AGGRAVATING CIRCUMSTANCE

11 The State respectfully contends that the Opinion impliedly misconstrues NRS
12 200.033(6) in two ways: (1) it suggests that for the aggravator to be applicable to a
13 particular defendant that defendant must have personnel connection to the pecuniary gain
14 achieved, and (2) it appears to require a specific agreement and a pre-murder exchange of
15 money or monetary value in a murder for hire scenario and that monetary value actually be
16 received. These issues were not the focus of the motions to strike in the district court or on
17 the writs before this Court. If the Court is interpreting the aggravator in this fashion, the
18 State argues this is in contradiction to the plain directive of the legislative language and this
19 Court's previous case law and therefore grounds for rehearing.

20 **1. Personal Nexus is not Required by the Pecuniary Gain Aggravator**

21 The pecuniary gain aggravator applies to the facts of the murder itself and not the
22 background of the individual charged with the murder. That is, the aggravator does not
23 require that a defendant be the person who gained, or was intended to gain, from the murder,
24 the person who paid for the murder, the actual killer or have pecuniary gain as the personal
25 reason for the defendant's participation in the murder. NRS 200.033(6) states:

26 **The murder** was committed by a person, for himself or another,
27 to receive money or any other thing of monetary value.
28

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

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

10 In addition, other courts have recognized that the aggravator applies to the
11 motivation for the murder, not the defendant's personal motivation for pecuniary gain.³
12 People v. Padilla, 11 Cal 4th 891, 906 P.2d 388 (Cal. 1995), overruled on other grounds by
13 People v. Hill, 17 Cal. 4th 800, 952 P.2d 656 (Cal. 1998); see also Tenn. v. Austin, 87
14 S.W.3d 447 (Tenn. 2002); see also Harris v. Ala., 632 So.2d 503 (Ala. Cr. App. 1992)
15 (where a defendant has been convicted of the capital offense of murder for hire, even though
16 that person was the hirer and was convicted of the offense as an accomplice pursuant to the
17 complicity statute, the aggravating circumstance that the capital offense was committed for
18 pecuniary gain is established as a matter of law). In fact, the California Supreme Court has
19 held that its financial gain statute does not require that anyone actually receive a direct
20 financial gain as long as a financial gain is contemplated. See People v. Michaels, 28 Cal.
21 4th 486, 49 P.3d 1032 (Cal. 2002).

22 2. Potential Gain

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

27
28 ³ California's financial gain aggravator reads "The murder was intentional and carried out for financial gain." Cal. Penal Code 190.2(1).

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

8 3. NRS 200.033(6) Applicability

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

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

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

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26
27 ⁴ The State acknowledges that before the jury could consider the death penalty, they would still have to find that Hidalgo
28 and Espindola were major participants in the murder itself, as distinguished from the aggravator, under the holdings of
Edmund v. Florida, 458 U.S. 782, 797 (1982) and Tison v. Arizona, 481 U.S. 137 (1987). However there is no
requirement that a defendant be a major participant in the aggravator, i.e. that a defendant be the killer or the person who
financially benefited from the murder.

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

4 II

5 PURPOSE UNDERLYING SCR 250(4)(C)

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

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

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

22 Prior to January 27, 1999, SCR 250 only required the State to list the aggravating
23 circumstances the State intended to present. SCR 250(II)(A)(1) and (2) (ADKT 109,
24 6/17/93). In 1995, this Court instituted a review of the existing Rule 250 provisions. A
25 committee was appointed for this purpose which later became known as the Fondi
26 Commission as it was chaired by the Honorable Michael Fondi from the First Judicial
27 District Court. Based on numerous meetings, the Fondi Commission issued a report on July
28 24, 1997 detailing its recommendations. After this Court considered those

1 recommendations, the existing version of SCR 250 was repealed and a new version adopted.
2 (ADKT 219, 260 and 261, Order Adopting December 30, 1998, Effective date January 27,
3 1999.) The current language of the rule stems from these proceedings.

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

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

11 The second issue arose with aggravators that involve multiple conduct or "theories"
12 such as the instant aggravator. As the Court notes the language "[t]he murder was
13 committed by a person, for himself or another, to receive money or any other thing of value"
14 incorporates two distinct concepts, murders for hire and murders for gain. Without a factual
15 predicate, it was possible for the defense to believe the State was pursuing one course of
16 conduct or "theory" based upon defense counsel's interpretation of the discovery, only to
17 find out in the middle of trial that the State had a different interpretation of the facts and their
18 application to the aggravating circumstance. To avoid this, the Rule now requires the State
19 to plead the facts so that defense counsel knows which course of conduct or conducts the
20 State intends to prove. Final Report of the Fondi Commission, ADKT 219, p. 14 (July 24,
21 1997)

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

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

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

11 III

12 **THE COURT HAS MISAPPREHENDED A MATERIAL FACT BY** 13 **CONSIDERING THE STATEMENTS IN THE NOTICE AS THEORIES** 14 **RATHER THAN FACTUAL ALLEGATIONS**

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

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

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

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

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

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

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

26
27 ⁵ The State recognizes that this Court in Hidalgo ruled that "further the business" is too vague and does not give notice
28 of how the murder would result in a pecuniary gain to the Palomino Club or any other person. However, as noted below,
the appropriate remedy for a pre-trial challenge relating to inadequate notice is giving the State leave to amend the
notice, rather than striking the aggravator.

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

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

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

19 IV

20 APPROPRIATE REMEDY

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

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

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

3 Generally an information or indictment may be amended at anytime if no additional
4 or different offense is charged and substantial rights are not prejudiced. NRS 173.095. Pre-
5 trial complaints about lack of notice can be remedied by the State and so dismissals should
6 be without prejudice or the State should be given leave to amend. This is because there is no
7 prejudice to the defendant in such a case. State v. Hancock, 114 Nev. 161, 955 P.2d 183
8 (1998). Indeed amendments on a pre-trial basis are generally recognized as the appropriate
9 remedy for lack of notice allegations. State v. District Court, 116, Nev. 374, 997 P.2d 126
10 (2000). This is especially true when the defense has had notice of the charges or theory of
11 the case and only the specifics of the notice have been challenged. Shannon v. State, 105
12 Nev. 782, 783 P.2d 942 (1989)(amendment permitted to allege different facts in support of
13 same charge).

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

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Dated January 14, 2008.

BY

Office of the Clark County District Attorney
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500

1 **CERTIFICATE OF MAILING**

2 I hereby certify and affirm that I mailed a copy of the foregoing Petition for
3 Rehearing to the attorney of record listed below on January 14, 2008.

4
5 Christopher Oram
6 Attorney at Law
7 520 South Fourth Street, 2nd Floor
8 Las Vegas, Nevada 89101

9 Dominic P. Gentile
10 Attorney at Law
11 3960 Howard Hughes Pkwy, #850
12 Las Vegas, Nevada 89109

13 **CERTIFICATE OF SERVICE**

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

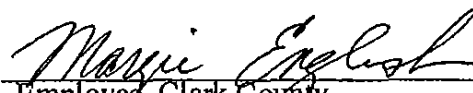
16 Judge Donald Mosley
17 Department XIV
18 Regional Justice Center
19 200 Lewis Avenue
20 Las Vegas, Nevada 89101

21 FAX # 671-4418

22 And

23 Judge Valerie Adair
24 Department XXI
25 Regional Justice Center
26 200 Lewis Avenue
27 Las Vegas, Nevada 89101

28 Fax #671-4451

29 
30 Employee, Clark County
31 District Attorney's Office

SCANNED

FILED IN OPEN COURT

FEB 04 2008 20

CHARLES J. SHORT
CLERK OF THE COURT

BY DENISE HUSTED
DEPUTY

1 **GMEM**
2 **DAVID ROGER**
3 **DISTRICT ATTORNEY**
4 Nevada Bar #002781
5 **MARC DIGIACOMO**
6 **Chief Deputy District Attorney**
7 Nevada Bar #006955
8 200 Lewis Avenue
9 Las Vegas, NV 89155-2212
10 (702) 671-2500
11 Attorney for Plaintiff

7 DISTRICT COURT
8 CLARK COUNTY, NEVADA

9 THE STATE OF NEVADA,

10 Plaintiff,

11 -vs-

12 ANABEL ESPINDOLA,
13 #1849750

14 Defendant.

CASE NO: C212667
DEPT NO: XXI

15 **GUILTY PLEA AGREEMENT**

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

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

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

24 CONSEQUENCES OF THE PLEA

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

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

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

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

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

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

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

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

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

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

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

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

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

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

17 WAIVER OF RIGHTS

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

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

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

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

1
2 My attorney has answered all my questions regarding this guilty plea agreement and
3 its consequences to my satisfaction and I am satisfied with the services provided by my
4 attorney.

5 DATED this 2nd day of January, 2008.

6
7 
ANABEL ESPINDOLA
Defendant

8
9 AGREED TO BY:

10 
11 MARC DIGIACOMO
12 Chief Deputy District Attorney
Nevada Bar #006955
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1 CERTIFICATE OF COUNSEL:

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

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

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

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

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

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

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

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

14 Dated: This 2 day of January, 2008.

15 
16 ATTORNEY FOR DEFENDANT
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28

1 **INFO**

2 DAVID ROGER
3 Clark County District Attorney
4 Nevada Bar #002781
5 MARC DIGIACOMO
6 Chief Deputy District Attorney
7 Nevada Bar #006955
8 200 Lewis Avenue
9 Las Vegas, Nevada 89155-2212
10 (702) 671-2500
11 Attorney for Plaintiff

7 DISTRICT COURT
8 CLARK COUNTY, NEVADA

9 THE STATE OF NEVADA,

10 Plaintiff,

11 -vs-

12 ANABEL ESPINDOLA,
13 #1849750

14 Defendant.

Case No: C212667
Dept No: XIV

THIRD AMENDED
INFORMATION

15 STATE OF NEVADA }
16 COUNTY OF CLARK } ss.

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


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

EXHIBIT 1

\\SUPERMAN\DIGIACM\$\MYDOCS\MVU\PALOMINO\AMEND INFO ESPINDOLA

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

13
14
15 BY



DAVID ROGER
DISTRICT ATTORNEY
Nevada Bar #002781

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23
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25 DA#05FB0052C/
26 LVMPD EV#0505193516
27 CONSP MURDER;VMWDW - F
28 (TK7)

Sealed Agreement to Testify (Espindola)

**Attached to Guilty Plea Agreement filed
February 4, 2008 as Exhibit 2.**

[Logout](#) [My Account](#) [Search Menu](#) [New District Civil/Criminal Search](#) [Refine Search](#) [Back](#)
Location : District Court Civil/Criminal [Help](#)**REGISTER OF ACTIONS**

CASE No. 05C212667-2

The State of Nevada vs Luis A Hidalgo

§
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§

Case Type: **Felony/Gross Misdemeanor**
 Date Filed: **06/17/2006**
 Location: **Department 21**
 Conversion Case Number: **C212667**
 Defendant's Scope ID #: **1849634**
 Lower Court Case Number: **05FB00052**

RELATED CASE INFORMATION**Related Cases**

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

PARTY INFORMATION

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

Lead Attorneys
John L. Arrascada

Retained

7023283158(W)

Plaintiff **State of Nevada**

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

CHARGE INFORMATION

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

EVENTS & ORDERS OF THE COURT

02/04/2008 Change of Plea (9:00 AM) ()

CHANGE OF PLEA Court Clerk: Denise Husted Reporter/Recorder: Janie Olsen Heard By: Valerie Adair

Minutes

02/04/2008 9:00 AM

- Third Amended Information FILED IN OPEN COURT. Negotiations are as contained in the Guilty Plea Agreement FILED IN OPEN COURT. DEFENDANT ESPINDOLA ARRAIGNED and PLED GUILTY to Voluntary Manslaughter with use of a Deadly Weapon. COURT ACCEPTED plea and ORDERED, matter CONTINUED for a status check regarding sentencing. FURTHER, pursuant to request by the State, Attachment to the Guilty Plea Agreement is to be FILED UNDER SEAL. CUSTODY 4/15/08 9:30 AM SENTENCING

Parties PresentReturn to Register of Actions

[Logout](#) [My Account](#) [Search Menu](#) [New District Civil/Criminal Search](#) [Refine Search](#) [Back](#)
Location : District Court Civil/Criminal [Help](#)**REGISTER OF ACTIONS**

CASE NO. 05C212667-2

The State of Nevada vs Luis A Hidalgo

§
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§
§
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 Date Filed: **06/17/2005**
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 Lower Court Case Number: **05FB00052**

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

PARTY INFORMATION

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

Lead Attorneys
John L. Arrascada

Retained

7023283158(W)

Plaintiff **State of Nevada**

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

CHARGE INFORMATION

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

EVENTS & ORDERS OF THE COURT

02/05/2008 All Pending Motions (9:30 AM) ()

ALL PENDING MOTIONS 2/5/08 Court Clerk: Denise Husted Reporter/Recorder: Janie Olsen Heard By: Valerie Adair

Minutes

02/05/2008 9:30 AM

- DEFENDANT'S MOTION FOR AUDIBILITY HEARING AND TRANSCRIPT APPROVAL (HIDALGO)...DEFENDANT'S MOTION TO SUPPRESS CUSTODIAL STATEMENT...DEFENDANT'S MOTION TO ALLOW STATEMENTS Hidalgo: CONFERENCE AT BENCH. Mr. Digiacomo advised that based on new evidence, the State is seeking an indictment against Hidalgo, Jr. Mr. Gentile stated that service would not be accepted as there is a Supreme Court ordered regarding conflict for him to represent Hidalgo III, and Hidalgo Jr.; those records are sealed. Following further arguments and request by the State, COURT ORDERED, the police are no to destroy any notes and they must be maintained; the Court will sign an order as to this. Mr. Gentile requested production of phone conversations from Espindolaa and Hidalgo Jr. COURT ORDERED, Defendant's Motion for Audibility Hearing and Transcrip Approval is CONTINUED. Counts: COURT ORDERED, Defendant's Motion to Suppress Custodial Statements pertain to Defendant Hidalgo and is CONTINUED; Defendant's Motion in Limine to Allow Statements is MOOT. CUSTODY (BOTH) CONTINUED TO: 2/7/08 9:30 AM DEFENDANT'S MOTION FOR AUDIBILITY HEARING AND TRANSCRIPT APPROVAL...DEFENDANT'S MOTION TO SUPPRESS CUSTODIAL STATEMENT (HIDALGO III)

Parties PresentReturn to Register of Actions

1 TRAN

FILED

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DISTRICT COURT

Janie L. Olsen
CLERK OF COURT

CLARK COUNTY, NEVADA

6 THE STATE OF NEVADA,)

7 Plaintiff,)

8 vs.)

CASE NO. C212667

CASE NO. C241394

DEPT. XXI

9 LUIS ALONSO HIDALGO, aka LUIS)
10 ALONSO HIDALGO, III, LUIS HIDALGO)
11 JR., aka LUIS A. HIDALGO,)
Defendants.)

12
13 BEFORE THE HONORABLE VALERIE ADAIR, DISTRICT COURT JUDGE

14 TUESDAY, FEBRUARY 5, 2008

15 RECORDER'S TRANSCRIPT OF HEARING RE:
16 DEFENDANT'S MOTION FOR AUDIBILITY HEARING
AND TRANSCRIPT APPROVAL

17 APPEARANCES:

18 FOR THE STATE:

19 MARC DIGIACOMO, ESQ.
Chief Deputy District Attorney
20 GIANCARLO PESCI, ESQ.
Chief Deputy District Attorney

21 FOR THE DEFENDANTS:

22 DOMINIC P. GENTILE, ESQ.
PAOLA M. ARMENI, ESQ.

23 ALSO PRESENT:

24 KRISTINA M. WILDEVELD, ESQ.

25 RECORDED BY: JANIE L. OLSEN, COURT RECORDER/TRANSCRIBER

1 LAS VEGAS, CLARK COUNTY, NV., TUES., FEB. 5, 2008

2
3 THE COURT: State versus Luis Hidalgo.

4 MR. GENTILE: The Third.

5 THE COURT: The Third, thank you. And he's present in custody with Mr.
6 Gentile and Ms. Armeni, and we've got Mr. DiGiacomo and Mr. Pesci for the State.

7 MR. DI GIACOMO: That's correct, Judge.

8 THE COURT: All right. We had some issues to put on the record first. Go
9 ahead.

10 MR. DI GIACOMO: I'll be happy to start, Judge.

11 THE COURT: All right.

12 MR. DI GIACOMO: One is, based on some new evidence the State has
13 drafted a notice of intent to seek indictment against Luis Hidalgo Junior, also known
14 as Mr. H.

15 I received a letter in 2005 from Mr. Gentile in which he indicated he
16 represented him on this particular case on this particular issue, and I had a
17 conversation with someone in his office at the time by the name of Mr. Gamage that
18 said, I'd be happy to sit down and talk with Mr. H, and we'll have the police there.

19 Mr. Gentile has informed me today that he's not willing to accept
20 service on him; however, we will serve Mr. H. That's one issue.

21 The other issue is that there is a Supreme Court order which addresses
22 the potential conflict between Mr. Gentile and Mr. Luis Hidalgo III. One of the things
23 that the order actually said is should Mr. H get charged, and it's my belief that in the
24 future he will likely be charged, that that may present a potential conflict.

25 I'm going to leave that up to Mr. Gentile. I don't know what the sealed

1 records filed with the Supreme Court were or were not. I don't know if those would
2 have any dispositive of whether or not Mr. H winds up getting charged.

3 MR. GENTILE: He will be.

4 MR. DI GIACOMO: However, during the course of this information that I
5 received, I received information that potentially a witness in the case received legal
6 advice from Mr. Gentile. I don't know whether or not that legal advice that she
7 received from Mr. Gentile on May 21st of 2005, presents a conflict with her. I'm just
8 raising that issue with the Court. I know part of what the conversations were
9 between her and Mr. Gentile. I don't know if that presents a conflict, and if it does,
10 certainly that needs to be addressed prior to the start of trial, and I just wanted to
11 make a record about that.

12 THE COURT: Would that be a witness who has previously -- or who is
13 charged in the case as well, or is that another witness?

14 MR. DI GIACOMO: Charged in the case as well.

15 THE COURT: All right.

16 MR. GENTILE: Well, let me address that.

17 THE COURT: Mr. Gentile, yes.

18 MR. GENTILE: From day one -- well, I shouldn't say from day one -- from the
19 beginning of the case in being, in other words, once the charges were filed, there
20 has been a joint defense agreement in existence between Mr. Hidalgo III who was
21 charged, Ms. Espindola who was charged and Mr. Hidalgo Junior who was not
22 charged.

23 To the extent that anything preceded that, while there's no question that
24 Ms. Espindola was present, she was never my client, and I'm quite certain that, you
25 know, certainly she's free to raise whatever she wants, but I'm not that lame.

1 Now, separate and apart from that, that does bring up the matter that I
2 want to address here.

3 THE COURT: All right.

4 MR. GENTILE: And I'm ready, willing and able to have a canvass take place.
5 I think the Court has to do a canvass. I think Mr. Hidalgo Junior and Mr. Hidalgo III
6 both have to be canvassed, and I'll be happy to submit to the Court also in the same
7 sealed fashion as I submitted it to the Supreme Court the exact same affidavits --

8 THE COURT: All right.

9 MR. GENTILE: -- and I think you can make up your mind from that.

10 THE COURT: Okay.

11 MR. GENTILE: And we could do that on Thursday because we have to come
12 back here on Thursday. We have a bail hearing on Thursday.

13 THE COURT: All right. And you would bring Mr. Hidalgo Junior with you --

14 MR. GENTILE: I will. Yeah, he'll be here with --

15 THE COURT: -- on Thursday, and that way the Court can canvass Mr.
16 Hidalgo Junior --

17 MR. GENTILE: Right. He'll be here with me on Thursday.

18 THE COURT: -- after I've reviewed the sealed affidavits that were previously
19 submitted to the Supreme Court.

20 MR. GENTILE: Right. And I've told the State this morning that if they get a
21 warrant for Mr. Hidalgo Junior I will surrender him. It's not an issue. He's not going
22 anywhere.

23 Separate and apart from that, it came to my attention yesterday
24 morning at about 9:15 that on Saturday Ms. Espindola at the Clark County Detention
25 Center met with Mr. DiGiacomo, Mr. Pesci, three police officers and her attorney for

1 a period of about three hours, perhaps a little bit longer than that.

2 I have made a formal demand. I'm making an oral demand now for any
3 recording of that interview, and the reason that I believe that there was a recording
4 is because every other interview that has taken place in this case has been
5 recorded, most of them video recorded as well as audio recording.

6 I asked Mr. DiGiacomo this morning if there was a recording. He said
7 to me what makes you think there wasn't, okay, and so if there was, I think I'm
8 entitled to it. If there was not, it is my understanding that notes were taken by the
9 police officers that were there, and there's a body of case law that says that we're
10 entitled to the preservation of those notes because candidly those notes may
11 provide Brady information, and those are percipient witnesses to statements that
12 were made by Ms. Espindola.

13 So I'm making a demand for the verbatim recording to the extent that it
14 exists. To the extent that it does not exist, then the second best evidence --

15 THE COURT: You want the Court to order that --

16 MR. GENTILE: The production of the notes.

17 THE COURT: -- the police officers at least retain their notes until the Court
18 either orders they have to turn it over to you or --

19 MR. GENTILE: I think you need to inspect them in camera --

20 THE COURT: Well, that's what I was going to do because there may be other
21 things on the notes --

22 MR. GENTILE: Right.

23 THE COURT: -- and so either the Court's going to order they be turned over
24 or they be allowed to be transcribed into another fashion or report prepared or
25 whatever, but at least they can't destroy the notes at this point in time. I'm willing to

1 order that that we --

2 MR. DI GIACOMO: Certainly they will not be destroyed; they'll be maintained.

3 THE COURT: They'll be maintained.

4 MR. DI GIACOMO: We may need to brief this issue because there was an
5 interview which was not recorded other than there may have been notes taken by
6 some people who --

7 THE COURT: Right. All I'm saying --

8 MR. DI GIACOMO: -- there was an interview by me --

9 THE COURT: Mr. DiGiacomo, all I'm saying right now is let's preserve the
10 status quo because what Mr. Gentile is anticipating as often happens is, oh, yeah,
11 there were notes but I've thrown them away or --

12 MR. GENTILE: I mean, I'm anticipating trial by ambush is what I'm
13 anticipating.

14 THE COURT: -- somebody else prepared the report and so I don't know
15 where my notes are. All I'm saying is the Court's willing to sign an order that any
16 notes by anyone present be preserved at this point in time for possible in-camera
17 review, and then the Court will determine whether or not that gets turned over to Mr.
18 Gentile, all of it, part of it, none of it.

19 MR. DI GIACOMO: I know. I'm --

20 THE COURT: And Metro, you know, if they want to have their attorney come
21 weigh in on the notes they can do that.

22 MR. DI GIACOMO: No, I just wanted to make sure that the Court is aware
23 that it will be the State's position that my interview of Ms. Espindola, people taking
24 notes for that were based upon my request, my order, and we can litigate the fact
25 that those notes may be privileged. We'll provide them to the Court in camera, but

1 certainly --

2 THE COURT: And that's fine. You're welcome to file whatever brief you want
3 to file, Mr. DiGiacomo, but I'm going to protect the notes until --

4 MR. DI GIACOMO: That's fine.

5 THE COURT: -- so that -- and we'll sign an order and we --

6 MR. GENTILE: I'd ask that they be submitted to the Court ASAP, as soon as
7 possible.

8 MR. DI GIACOMO: I don't have a problem with that. I mean, the detective
9 will be here testifying in another trial.

10 THE COURT: Okay. We'll just have the notes given to me, and that way we
11 know the --

12 MR. GENTILE: Yes. And in addition to that --

13 THE COURT: -- and I'll make a copy so that I don't lose them.

14 MR. GENTILE: In addition to that at this stage given that this happened so
15 close to trial, and I don't want a continuance. I would ask for production of the
16 telephone conversations between Ms. Espindola and Luis Hidalgo Junior, and the
17 reason I ask for -- from the jail.

18 THE COURT: From the jail, right.

19 MR. GENTILE: From the jail, yes. It is my understanding that there have
20 been some discussions in the last two or three weeks since this Court first
21 considered the bail issue in which statements that were made to Mr. Hidalgo Junior
22 by Ms. Espindola are definitely Brady, and they are in the -- yes.

23 THE COURT: Well, let's, I mean, I don't see the problem with turning over the
24 tapes, and then if there is an objection to them being admitted we can litigate that,
25 but certainly there's no problem in my view with turning them over.

1 MR. DI GIACOMO: I don't have a problem with them; it just more a logistical
2 problem. I have recordings between Ms. Espindola and Mr. H that have been
3 provided over to Mr. Oram because she was his lawyer (sic). I'd make another copy
4 now that she's a witness for Mr. Gentile. That's not a problem.

5 What I don't have is anything after November 28th of 2007, because that
6 was the date that Mr. Gentile requested, and we received the phone number from
7 Mr. H. If he wants to provide us a list of phone numbers that conversations were
8 occurring that he's aware of, I'll certainly have the jail run those phone numbers,
9 create a disc. We'll check to make sure that they're in fact the people that he
10 represents that they are, and we'll turn those over to him. I don't have a problem
11 with that.

12 MR. GENTILE: You can pick it up when you serve the Markham notice at
13 noon today.

14 THE COURT: All right. Well, Mr. Gentile's going to accommodate you with
15 that list at noon today.

16 What else?

17 MR. GENTILE: I believe that that covers it. We needed the -- the interview,
18 the jail phone calls, those two things.

19 THE COURT: Okay. And then everything else is being moved to Thursday.

20 MR. GENTILE: Well, yeah. Sure, if the Court has the time to accommodate
21 us on Thursday, that's great. We'll do it all on Thursday.

22 THE COURT: All right. Is that fine with everyone?

23 MR. DI GIACOMO: We are so long as we're not still in trial.

24 THE COURT: You're here. You're stuck here.

25 MR. DI GIACOMO: I mean, if we're still in trial with Mr. Counts, you may

1 decide to move that again, but that's fine. I mean, we're ready to go now.

2 THE COURT: Well, see, we had another evidentiary hearing scheduled for
3 this morning that's going to start, and that's what Mr. Gentile was referring to.

4 MR. GENTILE: And given that they're backed up and we, you know, ours is
5 not that emergent.

6 THE COURT: All right. So we'll see you all back here on Thursday.

7 MR. DI GIACOMO: There was one last issue.

8 THE COURT: Oh, I'm sorry. Yes.

9 MR. DI GIACOMO: And I don't believe because he hasn't made it yet that
10 he's going to make the bail, but I -- once again when I saw that there was an order
11 for the bail I made a request should he post that the State would request a source
12 hearing of that bail. I would once again make that request should he post bail that
13 there be a source hearing on the source of the funds for the bail.

14 MR. GENTILE: You have it motioned for reduction of bail that you're going to
15 hear on Thursday, so that would probably be a better time to address that issue.

16 THE COURT: Well, I guess the only issue is if he's going to make the bail
17 that I set in the next two days.

18 MR. GENTILE: Which he's not.

19 THE COURT: He's not. So you're assuring me, Mr. Gentile, he won't be
20 making bail before Thursday?

21 MR. GENTILE: Not before Thursday.

22 THE COURT: All right. Then we'll see him back here in custody on
23 Thursday.

24 MR. DI GIACOMO: Thank you, Judge.

25 MS. WILDEVELD: And, Your Honor, if I may briefly address the Court on

1 behalf of Kenneth Counts. I had requested -- we're in the middle of the death
2 penalty trial as Your Honor is well aware with Mr. Counts, and I had requested of the
3 District Attorney's office any evidence they have with Ms. Espindola, and I was told
4 that I wasn't entitled to anything. They didn't have anything that I was entitled to.

5 So I would ask that the same thing that Mr. Gentile is going to receive
6 that we also receive so we have time to listen to those in case Ms. Espindola
7 happens to become a witness in our case.

8 THE COURT: I don't believe the State intends on calling Ms. Espindola as a
9 witness.

10 MR. DI GIACOMO: We don't. I mean, not that we can't call her on rebuttal,
11 but should that come along, we'll be happy to provide them documents, but I don't
12 have anything for Ms. Wildeveld.

13 THE COURT: And right now you're not anticipating calling her in rebuttal?

14 MR. DI GIACOMO: I don't. I can't imagine what they would raise in rebuttal
15 that we would call her.

16 MS. WILDEVELD: They did use her statements in their opening statement in
17 our death penalty trial so I'd like to see what they have.

18 MR. DI GIACOMO: Co-conspirator statements on recordings, yes, but, I
19 mean, she's not a witness in the sense that she'll be testifying.

20 THE COURT: Right. She won't be testifying.

21 MR. GENTILE: I have one question to ask procedurally.

22 THE COURT: Yes.

23 MR. GENTILE: There does not seem to be a rule in the Eighth Judicial
24 District. There is one in the federal district court. In a criminal case because of
25 where the burden of proof is, in the federal district court, and some judges in this

1 building will permit the defense to file a trial brief that does not get served on the
2 State until at the close of the State's case. What is the Court's practice?

3 THE COURT: Like you would do in a civil case.

4 MR. GENTILE: Exactly. What is the Court's practice?

5 THE COURT: We've never had defense request to file a trial --

6 MR. GENTILE: Well, I have a 30-page brief that's now going to be about 22.

7 THE COURT: I mean, I'm assuming what the purpose of the brief is to
8 address any evidentiary issues --

9 MR. GENTILE: Exactly.

10 THE COURT: -- that you think may be coming up.

11 MR. GENTILE: Exactly.

12 THE COURT: What's the State's position on that?

13 I mean, typically a lot of times in civil cases both sides will file their own
14 trial briefs and their blind briefs obviously, and then at the conclusion the briefs are
15 served upon each other.

16 So the State I'm sure had no way of anticipating that that would be your
17 desire to file that brief. I mean, for the Court's point of view it's nice to have it
18 because then you know what to anticipate, and you're not having to rule off the cuff -
19 -

20 MR. GENTILE: And I'm not --

21 THE COURT: -- on evidentiary issues because you're -- again, you would
22 anticipate them. You've got their authority, and then to the extent the Court wants to
23 supplement its research it can do that ahead of time and not -- so they're helpful to
24 me, but again, you're kind of blindsiding the State a little bit, Mr. Gentile, because --

25 MR. DI GIACOMO: Yeah, with all due respect --

1 THE COURT: -- that's not the practice --

2 MR. DI GIACOMO: If he had asked six months or three months ago even, but
3 the fact of the matter that we're currently in a capital trial that we anticipate will finish
4 one day, will start the next, the State doesn't -- there's no way for us to do it at this
5 late date to file that.

6 I would object to them having the ability to file something where I won't
7 have the ability to put something together for the Court that's appropriate.

8 THE COURT: Here's what I would just say on that, Mr. Gentile. I think
9 because it's not common practice, you know, I don't know who does it of the current
10 judges, but it's my belief as it's not common practice -- again, no one's ever asked to
11 do it in a criminal case here.

12 What I would ask is that you not file it, but certainly you have the brief
13 available, and as the issues come up, then you'll have the authority that you can
14 give to me --

15 MR. GENTILE: Oh, I'll have it.

16 THE COURT: Well, no. All I'm saying is that way we can maybe address the
17 issues more quickly.

18 MR. GENTILE: Okay. You know, I did it -- I do it as a convenience to the
19 Court.

20 THE COURT: No, I know, and I'm recognizing it; it's helpful to me. But by the
21 same token, it does give the defense a little bit of an advantage because I'm just
22 looking at your arguments without the State really having had a chance to make
23 their own --

24 MR. GENTILE: Well, under -- the whole purpose for doing it in a blind fashion
25 and giving it to them at the end of their case in chief is that I have no duty to disclose

1 anything to them.

2 THE COURT: Right. No, I mean -- but what I'm saying, Mr. Gentile, and I
3 recognize that, but what I'm saying is typically if it's the practice like many civil
4 cases, they know that's the practice so they have an opportunity to prepare a blind
5 brief as well; whereas, you know, they're in the middle of a death penalty case I
6 can't really expect them to now throw together some kind of a blind brief.

7 MR. GENTILE: Okay.

8 THE COURT: And that's why I think it might be unfair although it would help
9 me, but I, you know, I have to put my interests aside.

10 MR. GENTILE: So we'll wait till trial to be on track. No, I don't mean to you, I
11 mean to the State. If I'm prepared and I have these issues and you have an
12 opportunity to study them, and you've already articulated you'd love to have that
13 opportunity, but here because I'm -- because they haven't got time to do what I have
14 done, you're not going to --

15 THE COURT: Well, except, Mr. Gentile, the point being it's not the standard
16 practice in the Eighth Judicial District, and I think the State is entitled to rely that it's
17 not the standard practice and not anticipate that you would be doing it. And I
18 suspect the State hasn't had a lot of experience because they're at NVU litigating
19 against you, have they?

20 Have you ever litigated against Mr. Gentile?

21 MR. DI GIACOMO: Other than this case, no.

22 THE COURT: No. They haven't had the experience that I've had litigating
23 against you, and so they didn't know to anticipate that, and I'm not going to hold it
24 against them because they're in NVU and they don't normally litigate against
25 Dominic Gentile.

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MR. GENTILE: Thank you.

MR. DI GIACOMO: Thank you, Judge.

-oOo-

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


JANIE L. OLSEN
Recorder/Transcriber

FILED
 JUSTICE COURT, BOULDER TOWNSHIP
 CLARK COUNTY, NEVADA
 FEB 7 10 59 AM '06

THE STATE OF NEVADA,

Plaintiff,

-vs-

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

Defendant.

JUSTICE COURT
 LAS VEGAS NEVADA

BY

DEPUTY CASE NO: 08FB0018X

CRIMINAL COMPLAINT

The Defendant above named having committed the crimes of CONSPIRACY TO COMMIT MURDER (Felony - NRS 200.010, 200.030, 199.480); and MURDER WITH USE OF A DEADLY WEAPON (Felony - NRS 200.010, 200.030, 193.165), in the manner following, to-wit: That the said Defendant, on or about the 19th day of May, 2005, at and within the County of Clark, State of Nevada,

COUNT 1 - CONSPIRACY TO COMMIT MURDER

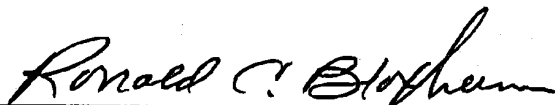
did, on or about May 19, 2005, then and there, meet with Deangelo Carroll and/or Luis Hidalgo, III and/or Anabel Espindola and/or Kenneth Counts and/or Jayson Taoipu and between themselves, and each of them with the other, wilfully, unlawfully, and feloniously conspire and agree to commit a crime, to-wit: murder, and in furtherance of said conspiracy, Defendant and/or his co-conspirators, did commit the acts as set forth in Count 2, said acts being incorporated by this reference as though fully set forth herein; and/or by Anabel Espindola and/or Luis Hidalgo, III soliciting Deangelo Carroll to commit murder on or between May 23 and May 24, 2005.

COUNT 2 - MURDER WITH USE OF A DEADLY WEAPON

did, on or about May 19, 2005, then and there wilfully, feloniously, without authority of law, and with premeditation and deliberation, and with malice aforethought, kill TIMOTHY JAY HADLAND, a human being, by shooting at and into the body and/or head of said TIMOTHY JAY HADLAND, with a deadly weapon, to-wit: a firearm, the Defendant being liable under one or more of the following theories of criminal liability, to-wit: (1) by

1 directly or indirectly committing the acts with premeditation and deliberation and/or lying in
2 wait; and/or (2) by aiding and abetting the commission of the crime by, directly or indirectly,
3 counseling, encouraging, hiring, commanding, inducing or otherwise procuring another to
4 commit the crime, to-wit: by defendant along with LUIS HIDALGO, III procuring
5 DEANGELO CARROLL to beat and/or kill TIMOTHY JAY HADLAND; thereafter,
6 DEANGELO CARROLL procuring KENNETH COUNTS and/or JAYSON TAOIPU to
7 shoot TIMOTHY HADLAND; thereafter, DEANGELO CARROLL and KENNETH
8 COUNTS and JAYSON TAOIPU did drive to the location in the same vehicle; thereafter,
9 DEANGELO CARROLL calling victim TIMOTHY JAY HADLAND to the scene;
10 thereafter, by KENNETH COUNTS shooting TIMOTHY JAY HADLAND; defendant
11 paying \$5000.00 or \$6000.00 to DEANGELO CARROLL for the killing of TIMOTHY JAY
12 HADLAND; and/or (3) by conspiring to commit the crime of battery and/or battery resulting
13 in substantial bodily harm and/or battery with use of a deadly weapon on the person of
14 TIMOTHY JAY HADLAND whereby each and every co-conspirator is responsible for the
15 reasonably foreseeable general intent crimes of each and every co-conspirator during the
16 course and in furtherance of the conspiracy and/or (4) by conspiring to commit the crime of
17 murder of TIMOTHY JAY HADLAND whereby each and every co-conspirator is
18 responsible for the specific intent crime contemplated by the conspiracy.

19 All of which is contrary to the form, force and effect of Statutes in such cases made
20 and provided and against the peace and dignity of the State of Nevada. Said Complainant
21 makes this declaration subject to the penalty of perjury.

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24 2/7/2008

25
26
27 08FB0018X/jgw
28 LVMPD EV# LVMPD
(TK7)

CASE No. 05C212667-2

www.pearsoned.com.au

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

RELATED CASE INFORMATION

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

PARTY INFORMATION

7023283158(W)

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

CHARGE INFORMATION

01/01/1900

EVENTS & ORDERS OF THE COURT

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CASE No. 05C212667-2

[illegible]

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

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

PARTY INFORMATION

7023283158(W)

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

CHARGE INFORMATION

01/01/1900

EVENTS & ORDERS OF THE COURT

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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

Volume 3 of 25

(Pages 443 - 577)

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

ATTORNEYS FOR THE APPELLANT LUIS A. HIDALGO, JR.

ALPHABETICAL INDEX OF APPELLANT'S AMENDED APPENDIX

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

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

² Id.

³ Id.

⁴ Id.

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

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

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

**Petition for Writ of Mandamus Or, In The
Alternative, Writ of Prohibition
(Hidalgo III and Espindola)**

Continued

1 anything else.

2 The aggravator is they were convicted of a crime
3 of violence, which means the jury verdict will be the
4 piece of evidence which would be necessary to establish
5 the aggravating circumstance.

6 There's no conspiracy or aiding and abetting
7 related to that whatsoever.

8 THE COURT: Well, I think it's moot, but I
9 guess I'm going to grant the motion to prohibit the
10 imputing of aggravating circumstances from one defendant
11 to the other.

12 And I realize it's a rather hybrid situation that
13 might occur, and I don't see it occurring here. If it
14 looks like it will occur then, certainly, we can discuss
15 it more fully during the progress of the trial.

16 I'm going to try to avoid that if I can, but if
17 it becomes relevant we can reevaluate.

18 MR. DIGIACOMO: The one granting it meaning
19 that one aggravator that's related to one defendant can't
20 be used against another. It's just their own aggravator
21 they pled?

22 THE COURT: Absolutely.

23 MR. DIGIACOMO: That's fine.

24 THE COURT: Next, motion to strike the
25 seeking of the death penalty based on unconstitutional

1 weighing equation.

2 That's weighing the aggravators and mitigators?

3 MS. THOMAS: Yes, Your Honor. Sometimes the
4 Nevada Supreme Court has required the aggravators to
5 outweigh the mitigators, other times the mitigators to
6 outweigh the aggravators.

7 We had originally raised this in both the federal
8 challenge and the State challenge. But most of that
9 relied upon Kansas versus Marsh. We acknowledge that the
10 supreme Court ruled to the contrary.

11 We do, however, still have issues of due process
12 meaning the protection of the State Constitutional
13 challenge, because the Nevada Supreme Court has flipped
14 off the standard from case to case, and sometimes within a
15 case instead of having one standard apply to all
16 defendants.

17 And, also, we think that there should be a ruling
18 that the State must prove the aggravators outweigh the
19 mitigators under the State Constitution.

20 THE COURT: But that's not the status.

21 What's your thinking?

22 MR. DIGIACOMO: My thinking is that the
23 Nevada Supreme Court surprisingly ruled directly on the
24 issue in Navarro v. State in the Supreme Court.

25 Navarro's primary condition on appeal is that

1 NRS 200.030, Subsection 4 is unconstitutional because it
2 places the burden on the accused through the mitigating
3 circumstances outweigh the aggravating circumstances in
4 order to avoid the imposition of the death penalty.

5 Navarro essentially argued that a 50/50 case when
6 the aggravating and mitigating circumstances are equal,
7 the death penalty should not be imposed. Neither the
8 United States Supreme Court nor this Court has pronounced
9 such a standard, and we see no reason to do so.

10 We accordingly hold that challenged statute is
11 constitutional. It's been directly addressed to be so.

12 THE COURT: Well, I am going to deny the
13 motion. It's been preserved for appeal.

14 Motion to determine admissibility of State's
15 hearsay evidence before trial. I wrote here, "Mini trial
16 before trial."

17 Is that what we're contemplating?

18 MS. THOMAS: Yes, Your Honor. And I've
19 actually been counsel on a case where this Court did
20 exactly that.

21 THE COURT: Who did?

22 MS. THOMAS: This Court in Moore and
23 Flanagan -- or State versus Moore and Flanagan.

24 THE COURT: I did that?

25 MS. THOMAS: In 1985 with Mr. Seaton and

1 Mr. Harmon. The Court held a hearing the day before trial
2 in which the State provided a list here of 25 items of
3 hearsay evidence we intend to introduce.

4 The Court held a hearing in circumstances not
5 unlike this case with multiple defendants, the State
6 claiming that certain hearsay statements were in
7 furtherance of the conspiracy and different hearsay
8 exceptions.

9 And this Court made a ruling, and during that
10 trial some of that hearsay stayed out, some of it came in.
11 But the jury wasn't prejudiced by hearing this first, and
12 the trial went smoother because that determination was
13 made in advance of trial.

14 THE COURT: Well, in 1985 I was very young
15 and inexperienced and I made a lot of mistakes in those
16 days, but I don't think I am going to make another one.

17 It is not that the concept is inappropriate, it's
18 just another layer of process here when we are so
19 desperately trying to acquire trial time for all these
20 cases that we have, and it's not to say this is not
21 important, certainly.

22 But when we put another layer in it's just we
23 don't have the facility to accomplish all of this, in my
24 judgment, with any kind of meaningful result. Because we
25 would have to contemplate what might be hearsay evidence

1 and I don't know where it would end, really.

2 But I guess back in 1985 there were some
3 specifics that they were discussing, because you would
4 have to have specifics.

5 MR. DIGIACOMO: And what's surprising to me
6 is that we had a preliminary hearing where there was the
7 vast majority of the evidence presented that related to
8 the hearsay type of statement.

9 There's been writs on those issues. If there's
10 any specific one they think this Court was either not
11 correct in ruling upon, or the Justice of the Peace was
12 not correct in ruling upon, they could raise that specific
13 one before this Court to litigate the entire trial prior
14 to trial.

15 I agree with the Court it is not something that's
16 appropriate. They are on notice of all of this so they
17 are seriously -- and I know that Ms. Thomas said to me
18 prior to Deangelo Carroll being severed: Hey, are you
19 going to use any of the statements that he offered to the
20 police.

21 And I said I'm not planning to, but who knows
22 what other counsel are planning to, let's just get rid of
23 them to resolve that problem. If there's any specific one
24 they want to address to the Court, then they should be
25 filing a specific motion.

1 MS. THOMAS: Your Honor, we're happy to go
2 through the preliminary hearing testimony, to go through
3 the discovery and write out what we think the problem
4 areas are going to be.

5 The fact is, in ruling on that writ this Court is
6 no way ruled on the admissibility of hearsay evidence.
7 And throughout the prelim you have a Justice of the Peace
8 who was essentially saying I'll rule on that later, I'll
9 rule on it later, I'll pick it up later.

10 There was no briefing on that in furtherance of
11 the conspiracy requirement. There was no thought, there
12 was no analysis to the extent they even had a ruling.

13 All this Court said was writ denied, or the
14 pretrial writ essentially denied. It didn't rule on the
15 admissibility of hearsay evidence. Those issues weren't
16 appropriate.

17 The issue of the writ was, is there probable
18 cause. This Court ruled on that. This Court has not said
19 everything that the DA has introduced at the preliminary
20 hearing is admissible at trial.

21 Those are two difference issues.

22 MR. DIGIACOMO: And, I'm sorry, I don't
23 think I said that. But their entire writ was, there
24 wasn't probable cause because everything the State
25 admitted was hearsay.

1 So the response was, it's not hearsay and here's
2 the reason why it's not hearsay. And the Court found that
3 it was appropriate evidence admitted before the Justice of
4 the Peace and denied the writ.

5 If there's something that they think was
6 incorrect about that analysis, or if I'm mistaken about
7 this, they weren't claiming that that was the problem with
8 the presentation --

9 MR. DRASKOVICH: Mr. Digiacomo is somewhat
10 right but also mistaken, because Your Honor had said these
11 are issues that are appropriate to address at trial. When
12 we approach trial we can address those issues.

13 At this time the writ is denied and that was Your
14 Honor's ruling.

15 THE COURT: Well, I don't think what's being
16 requested is inappropriate. But I cannot escape from my
17 conclusion that the benefit derived is outweighed by the
18 time and resources that it would take.

19 And I just don't want to set a precedent where
20 we're going to start doing these little mini trials before
21 we get to trial. I'm going to deny the request.

22 I need some help with this next one because I
23 think maybe we're using the wrong word here; to prohibit
24 evidence and argument on irrelevant mitigating
25 circumstances.

1 Did you mean to say aggravating circumstances?

2 MS. THOMAS: No, Your Honor.

3 THE COURT: Well, I am totally in the dark
4 then. What do you mean?

5 MS. THOMAS: What we don't want is the
6 Prosecutor standing up there with a blowup of the statute
7 that defines mitigators and to say, well, there was no
8 duress, they're not young and, in essence, turning the
9 statutory mitigators and the absence of those into
10 something to be held against the defendant.

11 Because that's not what mitigators are designed
12 for. Those are for the defendant's benefit. Even the
13 absence of those is nothing that should go to the State's
14 benefit.

15 While we agree the State could stand up there and
16 say, you know, there was no duress here, these are young
17 people, but during the selection phase, not during the
18 liability phase. But during part of the selection
19 criteria that might be a permissible argument.

20 But to mention the statute, to have an exhibit
21 showing the statute, or to in any way suggest that that
22 argument is enforced by statute, that's what we don't
23 want.

24 MR. DIGIACOMO: And I would disagree. I
25 would never put the statute up there and say: Hey, look,

1 the Legislature said duress -- I wouldn't to that.

2 Obviously, I may argue these people weren't under
3 duress, that they didn't grow up in a horrible background,
4 they didn't have a lengthy criminal history. These people
5 just decided to do a horrendous crime.

6 But I would agree with Ms. Thomas, that's
7 probably not appropriate.

8 THE COURT: Are you contemplating some sort
9 of a diagram? Or are you talking about should be able to
10 argue it, period?

11 MS. THOMAS: No diagram, and in their
12 argument should not be able to identify the statute as the
13 source of the authority for the argument.

14 MR. DIGIACOMO: I don't disagree with that
15 at all.

16 THE COURT: Just out of curiosity, does this
17 also go to the aggravators? You can get up and say:
18 Well, there is no danger from one person and all these
19 things.

20 MS. THOMAS: Yes. We can do that. There
21 are different burdens at a penalty phase. The State has
22 an incredible burden.

23 MR. DIGIACOMO: Well, Judge, I'm not
24 agreeing to that. If I can't put up a statute, they can't
25 put up a statute

1 MR. DRASKOVICH: I'm not saying we can put
2 up a statute, but we can argue that there was no
3 aggravator.

4 MR. DIGIACOMO: I can argue the existence of
5 the mitigators, and you can argue the absence of an
6 aggravator.

7 THE COURT: All right. That being said,
8 that will be the status of the matter. There will be no
9 bill billboards and whatnot.

10 Motion to declare NRS 704.206 unconstitutional.
11 That's the jury pool situation, and the argument was made,
12 I believe, that some jurisdictions do it a little
13 differently than smaller jurisdictions because they
14 require that power bills be --

15 Anyway, I don't quite understand why we care what
16 they do in Esmeralda County or some place.

17 MS. THOMAS: Your Honor, it's because it's a
18 State statute and it makes an artificial distinction
19 between rural counties and urban counties. And that
20 distinction, which is not a rational decision without a
21 compelling basis, I suggested warrant strict scrutiny
22 because of the Sixth Amendment rights involved.

23 There is no valid government interest in drawing
24 that distinction between the rural and the urban counties.
25 That's a distinction that shouldn't exist. Clark County

1 should not be limiting itself to DMV motor rolls. It
2 should have the utility lists.

3 And this Court has the authority to tell the
4 power company when Chuck Short asks: We need your rolls,
5 and the power company says: No, we're not giving them,
6 that should not have been the end of the matter.

7 The Judges of this jurisdiction of this county
8 have the authority to tell the power company: Hand that
9 over. You're not entitled to special treatment. We need
10 diverse juries, we need juries from different
11 socioeconomic levels and we're entitled to that
12 information.

13 That's what the Rose Commission on the study of
14 jurors suggests, that the list should be expanded. We
15 should be entitled to a broad jury pool.

16 THE COURT: Isn't this something that should
17 be broached to the Legislature?

18 MS. THOMAS: Your Honor, that's certainly
19 one route and I think the Supreme Court will go that
20 route, but we're not going to postpone this trial until
21 the next legislative session comes around.

22 THE COURT: Well, but there's two issues
23 that come to mind here. Let me suggest them to you and
24 you can respond. First of all, I don't see what the
25 prejudice is, number one.

1 Number two, you said there's no rational basis
2 for that thinking. Arguably, there is. If you're trying
3 to put a trial together in Fallon or something, you're
4 going to have some problems with the number of potential
5 jurors available.

6 Some of them living in rural areas, I mean,
7 you've got a difficulty. Where, obviously, in Clark
8 County there's no shortage of prospective jurors. I think
9 that's the reasoning behind it.

10 You may not agree with it, but I think you should
11 have to say that that is a rational basis.

12 MS. THOMAS: Your Honor, there may not be a
13 shortage of jurors in Clark County, but that doesn't
14 address the diversity of the pool issue. And we should be
15 able to draw from a pool that is just as diverse as those
16 rural counties.

17 There's no reason why the power company should
18 not turn over these rolls, not to me, not to
19 Mr. Digiacomo; to the Jury Commissioner, to Mr. Short, to
20 the Court Administration.

21 Just as the power companies in those rural areas
22 do, Nevada Power should be held to that same standard.

23 THE COURT: Well, what would be the next
24 thing, of course, is the matter would be brought before
25 the Court and the Court determine that it's not

1 constitutional, meaning against. Because of the law, the
2 power company is going to say: Hey, look at the law.

3 MS. THOMAS: Well, that's what I'm asking
4 the Court to do, is to find that statute unconstitutional.

5 THE COURT: So do we hear from everybody
6 else, or are we just going to do this offhand and make
7 this determination?

8 MR. DIGIACOMO: My question for the Court
9 was, and this was basically what my response was, if you
10 find that statute unconstitutional, the only thing that
11 will mean is, they don't have to give their rolls out in
12 the smaller counties.

13 The Legislature granted the Courts the authority
14 to order them to turn over in the smaller counties. If
15 you find that unconstitutional, that means they don't have
16 to do that.

17 There is no statute that authorizes you to order
18 them to turn it over. They're asking you to do something
19 the Legislature should do if it's, in fact, an appropriate
20 thing. I didn't address whether or not it's appropriate
21 because I figured that Nevada Power would probably want to
22 have a discussion about that argument.

23 MS. THOMAS: And I'm talking of sending a
24 copy of this to Nevada Power and we'll bring them in and
25 appeal it.

1 THE COURT: Well, that's fine. My second
2 concern is this matter of lack of prejudice.

3 Why do you think you would have a better, more
4 fair we'll say, for lack of a better term, jury panel if
5 the power bill isn't disclosed and we get people that
6 are -- everyone that subscribes to the power company?

7 MR. THOMAS: Your Honor, it's a more diverse
8 pool. And we cited the study on that because we're not
9 just going to draw people in from one segment of our
10 community. These defendants are entitled to a juror from
11 the community as a whole.

12 And there's a significant portion of the
13 community that is not being addressed in the jury rolls
14 because they don't have a driver's license, or they're not
15 registered to vote, and we want to reach out to the rest
16 of the community.

17 And it's not just me saying this. Justice Rose
18 had that big community. There were representatives from
19 all over. The committee recommended that this be the
20 action taken.

21 And based upon that and based upon -- we don't
22 need a statute to have diverse jury pools. It's a
23 constitutional right. This Court has the inherent
24 authority to recognize that right and to make it happen.

25 THE COURT: Well, my experience has been,

1 and we do this every week, as you know, impanel juries,
2 that we get to a very diverse group. I mean, obviously
3 anything, frankly, come in here.

4 And the other argument against it, and I'm just
5 kind of bantering back and forth, I'm not criticizing
6 anything, you have a good point, but I'm just trying to
7 explore this.

8 You know, one time we had a dog license holder
9 was on the list years ago. But where did you end?
10 There's concealed weapon permit holders. I mean, you can
11 take lists from many, many sources.

12 If your concept is valid, if a person accused
13 deserves a jury pool that is as diverse as possible in the
14 entire community, you're looking for names from the entire
15 community you could use a number of lists going beyond
16 just the power company.

17 But I don't know if that is a requirement that
18 you have every sole in the community on a list, or at
19 least potentially on a list, I don't know why we would
20 have that when we have such a diverse group the way it is.

21 Well, it's something to be preserved. I'm going
22 to deny it.

23 And, again, the questionnaire, I've already
24 indicated my thinking there.

25 So is there anything we have not entertained that

1 we should?

2 MS. THOMAS: Your Honor, there's still the
3 matter that's been under submission for a while now and
4 we're getting to the point where we need to start doing --

5 THE COURT: Good point.

6 MR. STEIN: Correct. We have the target in
7 April.

8 THE COURT: Absolutely. Any other
9 discussion on that point I'll entertain whatever you care
10 to.

11 MS. THOMAS: Your Honor, I think we've fully
12 talked about the motion, and unless the Court has
13 questions I think we're just all pretty anxious for a
14 ruling.

15 THE COURT: Right. And it has gone longer
16 than it should have. The argument has be made, as I
17 recall it, and I have notes here, that there's no
18 insufficient evidence of an intent..

19 Is that, basically, where we are? And,
20 therefore, that aggravator is not available to the State?

21 MR. DRASKOVICH: That was part of it. It
22 also dealt in large part with that laundry list. As you
23 recall, Your Honor, I had to pull the Notice of Intent to
24 Seek the Death Penalty. I have read it a number of times
25 and it's difficult to understand.

1 That was another one of the areas --

2 THE COURT: I'm sorry. What laundry list
3 are we talking about?

4 MR. DIGIACOMO: Their argument that I gave
5 them too much notice. They used to argue we didn't give
6 enough, so then I gave them every piece of fact I could
7 think of that related to that, and now they're saying I
8 gave them too much.

9 MR. DRASKOVICH: Did you happen to notice in
10 the Intent to Seek the Death Penalty, one of the three
11 primary arguments was that that was vague? It was
12 overbroad.

13 And we discussed Redeker a great deal, which was
14 the matter that this Court was waiting for to make its
15 determination.

16 MR. DIGIACOMO: Redeker said there wasn't
17 enough information in that notice so you have to put it
18 all in, which is what we did.

19 THE COURT: Well, are you saying, counsel,
20 that it was so broad that it was really of no significance
21 and you couldn't ferret through it and determine what was
22 actually going to be argued?

23 MR. DRASKOVICH: Yes. And, Your Honor, I
24 know this matter was not on calendar today and I know
25 there was actually a lot to review.

1 Would the Court mind hearing this perhaps and
2 putting this next week with the few motions that are still
3 outstanding?

4 THE COURT: Did Mr. Whipple want to be
5 involved in this particular issue?

6 MR. DRASKOVICH: No, he's not.

7 MS. WILDEVELD: No, he's not, Your Honor.
8 It would be our desire not to do that in part on that day,
9 Your Honor.

10 THE COURT: I'm sorry?

11 MR. DIGIACOMO: Ms. Wildeveld is saying they
12 don't want to be in court with all these lawyers, but they
13 all need to be here because you didn't grant the motion to
14 sever, and they need to be here next Friday too.

15 So there's no question that all the lawyers are
16 going to be here next Friday. But at some point, Judge,
17 we appreciate the ruling, but if the Court feels the need
18 to look at some more evidence.

19 THE COURT: Well, I didn't seize upon this
20 what you call a laundry list, but it's a simple matter and
21 we're going to be here next week so I don't think it makes
22 too much difference.

23 Mr. Digiacomo is correct, we are all going to be
24 here next Friday, I'm assuming, a week from tomorrow.

25 MR. DRASKOVICH: We'll be here, Judge.

1 THE COURT: I don't want to look up and say
2 now we've got to pass it.

3 Is your health going to permit it?

4 MS. WILDEVELD: Yes, Your Honor.

5 THE COURT: Anything further?

6 MR. DIGIACOMO: Just one last thing, Judge.
7 Apparently Mr. Figler left once again before we can
8 address the fact that he hasn't filed any motions.

9 I mean, I'm to the point now where I'm thinking I
10 need to file a motion to have new counsel appointed to
11 Mr. Carroll because he has done nothing, as far as I can
12 tell, and has violated the orders of the Court.

13 So I'm hoping that you can at least order
14 Mr. Figler be back here next Friday to address that issue.

15 MR. STEIN: And I think in addition to that
16 the fact that we have co-counsel on the District
17 Attorney's side who hasn't said anything should be
18 addressed.

19 THE COURT: Who is with Mr. Figler?

20 MR. DIGIACOMO: Mr. Bunin.

21 THE COURT: Well, I anticipate what you're
22 saying, basically, is that you're contemplating
23 ineffective assistance of counsel.

24 MR. DIGIACOMO: I don't know if they're
25 trying to set it up or what's going on. If he's trying to

1 buy a continuance since he's the one set first and he
2 doesn't want to go first, he could have told the Court
3 that.

4 So if he's trying to buy himself one, it puts us
5 in a precarious position where he'll get up there and say:
6 Well, I'll be ineffective, Judge. If you want to make me
7 go you make me go, and at some point we need to address
8 that sooner rather than later.

9 MS. THOMAS: Your Honor, Mr. Figler is not
10 here and he probably shouldn't have left. But at this
11 point I'm going to object on his behalf to anything more
12 being said about his case without him being present.

13 MR. DRASKOVICH: And he wasn't on calendar
14 today anyways.

15 MR. DIGIACOMO: He was supposed to be and he
16 certainly had orders of this Court to file motions. And
17 he was here and he chose to leave after joining in motions
18 that he was here on.

19 THE COURT: Friday, in addition to what I've
20 indicated, we're going to have a status check as to this
21 trial, all counsel, I mean all counsel; Mr. Bunin,
22 Mr. Figure and the entire panel are going to be here.

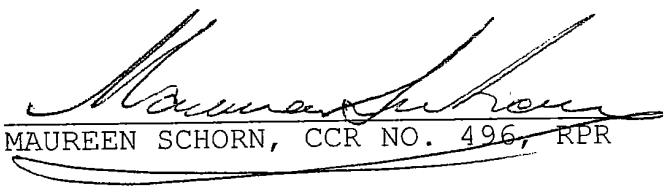
23 And I will indicate this to all present, and I am
24 not singling out anybody. If anyone is operating under
25 the misconception that I will indulge in this scheduling

1 things strategically as to who goes first and who gets a
2 continuance, I would invite them to look at the transcript
3 of the Hells Angels case wherein I took Mr. Kennedy and
4 other individuals from the Public Defender's office task.

5 And I think I left no confusion of how seriously
6 I took that. So if anyone is interested, then they can
7 look and see what the Court's posture is when that sort of
8 thing surfaces.

9 I'll see you all back the 8th. Center a nice
10 weekend.

11
12 ATTEST: Full, true and accurate transcript of
13 proceedings.

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MAUREEN SCHORN, CCR NO. 496, RPR

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MAUREEN SCHORN, CCR NO. 496, RPR

EXHIBIT "11"

Document1

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,)
)
 Plaintiff,)
)
 vs.) No. C212667
) Dept. No. XIV
 KENNETH COUNTS, LUIS HIDALGO,)
 ANABEL ESPINDOLA, DEANGELO)
 CARROLL,)
)
 Defendants.)
)

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

September 8, 2006
9:45 a.m.
Department XIV

APPEARANCES:

FOR THE STATE:
MARK DIGIACOMO
MR. GIANCARLO PESCI
Deputy District Attorneys

FOR THE DEFENDANT COUNTS:
MR. BRETT WHIPPLE
MS. KAREN WILDEVELD

OTHER DEFENDANTS' COUNSEL
INDICATED IN TEXT OF RECORD:

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

1 THE COURT: Calling C212667, State versus
2 Kenneth Counts, Luis A. Hidalgo, Anabel Espindola and
3 DeAngelo Carroll. The record reflects the presence of
4 counsel, Ms. Wildeveld and Mr. Whipple representing
5 Mr. Counts.

6 Do you wish proceed in the absence of
7 your client, counsel?

8 Excuse me. They are here seated in the
9 back of the courtroom.

10 They are all present I believe; is that
11 correct?

12 [All counsel indicated in the affirmative.]

13 THE COURT: Kenneth Counts is present.

14 Mr. Draskovich, do you wish to proceed
15 without Mr. Stein?

16 MR. DRASKOVICH: Yes, Your Honor.

17 THE COURT: You're representing Mr. Hidalgo?

18 MR. DRASKOVICH: Yes.

19 THE COURT: He is present in custody, as
20 well.

21 Mr. Oram is present with Ms. Thomas
22 representing Anabel Espindola and that Defendant is
23 present in custody.

24 Mr. Figler, is Mr. Bunin with you?

25 MR. FIGLER: No. He's out of the country.

1 THE COURT: Mr. Figler is here representing
2 DeAngelo Carroll who is present in custody.

3 This is a continuation of a hearing we
4 had begun last Friday.

5 We'll take it in the order that the
6 motions appear on calendar.

7 Mr. Bailiff, do we have any copies of
8 this?

9 MS. THOMAS: I believe we had one motion
10 this morning that's not on here.

11 THE COURT: This is Mr. Counts' renewed
12 motion to sever defendants. I guess this is really a
13 motion to reconsider, although not couched in that
14 language.

15 Is there any new evidence that I didn't
16 consider initially, Mr. Whipple and Ms. Wildeveld?

17 MR. WHIPPLE: Your Honor, regarding the
18 motion to sever there's a motion pending before the
19 Court with the remaining defendants whether the death
20 penalty could be considered or not.

21 Obviously the pendency of that motion
22 will be dispositive with regard to our motion to sever,
23 as well.

24 MR. DIGIACOMO: Why is that?

25 THE COURT: I don't understand.

1 MR. WHIPPLE: You have to pursue the death
2 penalty against one.

3 The position would be obviously if we're
4 going to pursue the death penalty against one person
5 they shouldn't be -- it has to be uniform.

6 If they aren't going to be able to be
7 considered against two of the defendants, they shouldn't
8 be able to be considered against our client, as well.

9 THE COURT: On what legal basis do you make
10 the argument?

11 MR. WHIPPLE: It's due process. I believe
12 it's a fairness issue.

13 THE COURT: Well, I'm not inclined to
14 reconsider at this juncture. As you suggested, it may
15 be premature.

16 I'm not saying we can't at some point,
17 if the circumstances dictate. At this juncture I don't
18 see any need to reconsider.

19 Mr. Counts' Motion to Suppress evidence
20 of prior felony convictions.

21 I'm not sure what legal basis there is
22 for that.

23 MR. WHIPPLE: It comes down to a prejudicial
24 versus probative matter.

25 In my reply I pointed out to the Court it

1 comes down to the discretion of the Court.

2 THE COURT: Are you talking about if your
3 client takes the stand?

4 MR. WHIPPLE: Correct, correct.

5 THE COURT: The law is pretty settled in that
6 regard.

7 MR. WHIPPLE: The law allows the court to
8 make that call.

9 If Mr. Counts takes the witness stand
10 and testifies that -- there is a very extraordinary
11 prejudicial effect to have his prior felonies come in.
12 I don't think -- you know, it has nothing to do with
13 what he's charged with, nothing to do with violence.

14 They are simple drug charges. It's
15 extraordinarily prejudicial.

16 I believe if the Court were to take what
17 probative value does it have versus prejudicial value it
18 remains within the discretion of the Court that the
19 Court could strike the fact that that information would
20 come out, if he testified.

21 THE COURT: Traditionally, of course, the
22 thinking behind the law in that regard is that it
23 challenges the veracity of his testimony.

24 What's the State's position?

25 MR. DIGIACOMO: I think Mr. Whipple has it

1 backwards. If it was a violent felony, it would be
2 prejudicial. Then the jury might consider it as
3 character evidence.

4 They are non-violent felonies. They are
5 not prejudicial.

6 The statute says that a felony is
7 relevant to his credibility and the case law says that
8 that felony, even if it's not related to a fraudulent
9 act, is relevant to his credibility.

10 He has two prior felonies. They are
11 both well within the 10 year time period.

12 THE COURT: What are they?

13 MR. DIGIACOMO: Both drug-related.

14 I didn't bring my opposition to the
15 motion. They are both either possession with intent to
16 sell or possession of controlled substance. There might
17 be a sale of a controlled substance.

18 They are both drug-related felony
19 offense.

20 THE COURT: You know, we hear this argument
21 about prejudice. I'm not discounting the propriety of
22 that under certain circumstances. Of course, it can be
23 made with anything.

24 If it hurts the defense or it hurts the
25 prosecution, it's prejudiced against them. I'm not

1 inclined to grant that motion.

2 For the record, I neglected to indicate
3 Mr. Pesci and Mr. DiGiacomo are present for the State.

4 Release of juvenile records.

5 That's Mr. Taoipu and Mr. Zone; is that
6 correct?

7 MR. WHIPPLE: Yes.

8 THE COURT: I believe I would review these
9 in chambers.

10 MR. DIGIACOMO: My understanding is I was
11 willing to submit Mr. Zone's. My position is as to
12 Mr. Taiopuh, he is not a witness.

13 THE COURT: He is not going to be a witness?

14 MR. DIGIACOMO: If at some point he becomes
15 a witness I will submit his juvenile records to your
16 chambers and you can make the determination if there's
17 anything in his juvenile records that need to be
18 released.

19 At this time he's a charged Defendant
20 who is set to go to trial, in fact, after all these
21 other defendants.

22 MR. WHIPPLE: For the record, Mr. Taoipu --
23 taking the State's statement of facts, he's the only
24 other individual that was located in the car with a
25 weapon.

1 That needs to be determined as well.

2 THE COURT: Is he going to be a witness
3 either called by the defense or prosecution?

4 MR. WHIPPLE: At this point that remains to
5 be seen.

6 THE COURT: If it turns out that he is, I
7 suppose we can discuss his record, but it would be moot
8 at this juncture, wouldn't it?

9 MR. WHIPPLE: There is a real issue with
10 regard to propensity. The character evidence on that is
11 we have a right to determine if this person is
12 associated with weapons in the past.

13 If he is, we can make appropriate
14 motions to hear --

15 THE COURT: A LITTLE SLOWER.

16 What you're suggesting is you want to be
17 able to indicate to the jury that Mr. Taoipu is
18 responsible, in some fashion.

19 MR. WHIPPLE: If he has an association with
20 weapons, then absolutely. I'm not saying we will.

21 I think that's something we need to have
22 the opportunity to evaluate and if we choose to bring
23 that motion before the Court then we'll do so. The
24 Court can rule on it at that time.

25 We can't get to first base until we find out

1 that information is in his background.

2 THE COURT: You indicated, I believe,
3 counsel, you didn't have his records; is that right?

4 MR. DIGIACOMO: No.

5 I'm sure that the juvenile division of
6 the District Attorney's Office is in possession of them.
7 We've never requested them to give them or requested an
8 order for their release.

9 If you want those delivered to your
10 chambers, I can have them delivered.

11 I certainly don't believe a propensity
12 of a witness or another person is admissible under the
13 evidence.

14 Propensity evidence is non-admissible
15 with the exception of the character of a victim or a
16 Defendant and then only under opinion and reputation
17 type testimony.

18 The propensity of another individual to
19 commit a crime is never admissible unless there's some
20 claim of self-defense and the guy is the victim.
21 That's the only time propensity evidence ever becomes
22 admissible.

23 I can't imagine what their argument
24 about relevancy of these records could be. It's
25 non-admissible.

1 If he had a gun five, six years ago, it
2 can't be used to establish he may have had a gun on the
3 date in question, because God knows, I would love to use
4 that type of evidence all the time.

5 I'm not allowed to use it.

6 There's no different rule of evidence
7 for the State than there is for the Defendant.

8 MR. WHIPPLE: Of course there is. We have
9 Constitutional protections and we'll follow the
10 statutes.

11 The guidelines allow, under 348.045, the
12 use of character evidence. The guidelines give
13 statutory paramaters which we will follow.

14 We can't make that determination until
15 we look at it.

16 We're not asking the State to deliver
17 the information to us. We're asking them to give it to
18 this Court.

19 The Court can make a determination.

20 All we're asking is to see if there's
21 weapons or, you know, weapons or guns involved and you
22 can take a look at the time line.

23 We're not asking for anything to be
24 disclosed to us.

25 THE COURT: All right. I tend to think it's

1 of no consequence, because I don't think it's
2 admissible.

3 In an abundance of caution, I'll ask for
4 both these individuals' records. I'll look at them and
5 whatever determination ultimately I'll make at the
6 proper time.

7 Motion for reduction of bail or release
8 to house arrest.

9 MR. WHIPPLE: I appreciate the Court
10 allowing me to continue this matter and bring it back.

11 Your Honor, Mr. Counts has no bail
12 setting at this point. What I have done and the reason
13 I asked for the opportunity to speak to you about it is
14 because I attached to the reply photographs of his
15 family.

16 I think that's something the Court can
17 take into consideration when it considers my client's
18 ties on the community.

19 He has spent a considerable time in
20 custody already. All we're asking for is a bail
21 setting.

22 He has every reason in the world to, if
23 he were somehow able to make bail, to stay in the good
24 graces of this Court. The most important thing to him
25 like any other father in this community are his

1 children.

2 I wanted this court to be aware he has a
3 family, he has a wife, he has a large supporting, loving
4 family.

5 I think that's something I asked this
6 court to take into consideration and it should be taken
7 into consideration.

8 With that basis I would feel comfortable
9 in asking for bail.

10 THE COURT: I don't disagree with the fact
11 that it is something to consider. There are other
12 considerations as well.

13 MR. DIGIACOMO: Judge, we have addressed
14 this issue on a number of occasions and we've addressed
15 this issue before the Court.

16 You've denied it before.

17 Since the last time you denied it we
18 found out that not only did the Defendant have previous
19 failures to appear, but we learned that the Defendant
20 was actually an absconder on probation from California
21 at the time he committed the homicide in this particular
22 matter.

23 Set aside the proof is evident and the
24 presumption is great and he is not entitled to any bail
25 whatsoever. After the court's denial the only new

1 evidence you have is more evidence of his likeliness not
2 to appear for trial.

3 I can't imagine imagine the Court
4 considering granting a bail in this matter after knowing
5 that not only is the evidence overwhelming against
6 Mr. Counts, but on top of that that the number of times,
7 one, that he attempted to flee from the police in this
8 case, but also the times that every other time he's had
9 a criminal case there's been failures to appear and/or
10 absconding on probation.

11 Submit it to the Court on that.

12 MR. WHIPPLE: If I can respond to
13 Mr. DiGiacomo's comments that the evidence is
14 overwhelming, show me the outstanding physical evidence,
15 what they are or the co-defendants and individuals who
16 have a reason to be biased that have made some
17 statement.

18 That's the primary evidence in this
19 case. Call it what you will.

20 Their star witnesses have every reason
21 in this world to be lying and to place the blame on
22 another person. They can call it overwhelming evidence.

23 I call it biased evidence, at best.

24 You know, here's the other thing. They
25 forget about all the positive things that my client was

1 doing here while he was out of custody.

2 He's been a little league coach. I can
3 bring in letter after letter of different people who owe
4 him gratitude for taking their children into his care
5 and assisting them in little league and football.

6 I understand he had some issue in
7 California. I'm not going to tell you one way or
8 another. I'm not sure what the status was.

9 While he's been a citizen here in this
10 state he did very, very positive things, among which
11 were raising a family, provide for them and support his
12 children by being involved with their activities.

13 MR. DIGIACOMO: And being arrested for
14 possession of controlled substance with the intent to
15 sell as well as being an ex-felon in possession of
16 firearm.

17 I love the family argument, but he picks
18 up two felony convictions while he's living in
19 California. I don't know how that's possible.

20 Was he doing drugs in California? I'm
21 not sure. Even while he's here he's getting picked up
22 for dealing drugs and for possession of firearm.

23 He's absconded and failed to appear on
24 numerous occasions. He's been extradited back to
25 California, once, previously.

1 MR. WHIPPLE: I filed the motion. I'll
2 take the last chance to reply.

3 We're not asking for an OR. We're not
4 asking for an OR. We're not saying anything to the
5 effect.

6 We're simply asking for bail.

7 THE COURT: Mr. Whipple, you mention his
8 work as a coach for his children and all that. That
9 poses another question that sort of tracks what I
10 discussed with my clerk this morning.

11 Granted, giving credence to the state's
12 argument -- and I tend to give credence to both sides
13 when I'm evaluating their position -- if you give the
14 state's argument credence, a glaring question arose in
15 my mind this morning. I asked my clerk about it.

16 According to the State, Mr. Carroll went
17 to Mr. Counts, his neighbor, and told him about this
18 deal.

19 "Hey, you can make some money if you go
20 shoot somebody."

21 I'm thinking and asked my clerk what in
22 the world would make Mr. Carroll think he could go over
23 to this man or knock on the door and say "Hey, you want
24 to kill somebody and make some money?"

25 That militates against the argument he's

1 a coach and all these wonderful things, at least in
2 Mr. Carroll's mind. Granted, that's one individual.

3 We don't know the dynamic, but to me it
4 was rather -- I was taken aback by the idea here is this
5 neighbor that happens to be entreated by his neighbor to
6 do something like this.

7 You have to wonder what the reason and
8 everything for it was.

9 In any case, the circumstances are such
10 I'm not going to disturb the current status.

11 We have Mr. Stein present now for
12 Mr. Hidalgo, as well.

13 Motion to preclude admission of phone
14 conversations.

15 This has to do with jail calls; is that
16 correct?

17 MR. WHIPPLE: That's correct, judge.

18 THE COURT: I think I understand. I'm not
19 going to preclude you from being heard.

20 I understand you're suggesting this
21 should be disallowed because the inference is present
22 that the caller was calling his wife and alluding to
23 some money under the pillow, et cetera.

24 MR. WHIPPLE: That's correct.

25 THE COURT: I understand that doesn't bode

1 well for your defense, but why is it legally
2 unacceptable?

3 MR. WHIPPLE: At the conclusion of this
4 trial you'll issue a jury instruction that tells the
5 Finder of Fact they are not to speculate.

6 Everything that the State is suggesting
7 in this particular motion that we've addressed in this
8 motion is absolute speculation.

9 They argue that references to a pillow
10 being fluffed in some secret message that my client is
11 asking if money is in a pillow or if money was left in a
12 pillow or if they found money in a pillow.

13 Absolute speculation on the part of any
14 person who listens to those telephone conversations.

15 Furthermore, they start talking about
16 information only my client would have in order to
17 somehow suggest he would only know about this if he were
18 the person involved with this alleged conspiracy.

19 The fact of the matter is police
20 officers told him ahead of time. Their own officers
21 told him what he was being charged with and he makes
22 reference to it in the phone call.

23 They are saying we have it for sure. We
24 know for fact he had to be out there, but how else would
25 he have this information?

1 In their own taped interviews with the
2 police officers they told him what they are alleging
3 against him at this time.

4 He learned it and they are doing an end
5 run and say we gave it to him and now we're going to
6 somehow help him with it, because there's no way he
7 could have learned about this unless he were at the
8 crime scene.

9 THE COURT: You're talking about things
10 other than the pillow reference?

11 MR. WHIPPLE: That's correct.

12 THE COURT: I have not listened to the
13 tapes. I'll tell you that right up front.

14 What do the tapes say, Mr. DiGiacomo?

15 MR. DIGIACOMO: I provided transcripts to
16 our opposition as to the ones that were used at the
17 preliminary hearing.

18 I would have to dispute with
19 Mr. Whipple, because the detective specifically
20 testified at the preliminary hearing that the
21 information concerning DeAngelo Carroll or mention of
22 DeAngelo Carroll or any mention of Mr. Carroll
23 whatsoever occurred, and what happens is as soon as he
24 finds out he's charged with murder he calls his wife and
25 tells her, by way of code we can prove, because he gives

1 the phone number, a description. He says "The guy that
2 drives the white car is on house arrest and here's his
3 mother's phone number."

4 It turns out to be Mr. Carroll's phone
5 number.

6 Mr. Counts was never informed prior to
7 the phone call he was being accused of anything
8 involving DeAngelo Carroll.

9 How does he know that person's name?

10 How does he know to find out what's
11 going on in the murder investigation that he should
12 contact DeAngelo Carroll?

13 There is absolutely no reason for him to
14 know that fact. Additionally, as to the pillow, if you
15 read the transcripts -- and if they want to argue this a
16 husband talking to his wife about the fluffiness of the
17 pillow, then there's nothing prejudicial about it.

18 Let them argue that to the jury. If you
19 read these transcripts, it's clear that he's discussing
20 with her an item that the police missed inside the
21 pillow.

22 Additionally, he starts discussing with
23 her a black hoody, the black hoody is described by
24 [inaudible] son, what he's wearing, and specifically
25 asked during the search did they get the black hoody?

1 "No, they don't have it."

2 He tells his wife "You know what to do
3 with it because the police can't get it."

4 These are clearly evidence of his
5 consciousness of guilt.

6 Is there "I shot Timothy Hadland in the
7 head?"

8 No.

9 If there was, there wouldn't be a lot
10 more to this case. Certainly the jury should be
11 entitled to listen to the evidence and make their
12 determination as to whether or not they think it's
13 relevant.

14 It's an argument Mr. Whipple should be
15 making to the jury, not to the Court.

16 MR. WHIPPLE: This Court has a duty -- that
17 type of information or that type of evidence passes some
18 sort of threshold. It can't be mere speculation.

19 That's exactly -- I mean, Mr. DiGiacomo
20 says it's clear. It may be clear in his mind, because
21 that's what he wants to find.

22 If you read that it talks about a fluffy
23 pillow and nothing more.

24 What is this code they are referring to?

25 Show me the way to break down the code.

1 Show me the person who is a professional or an expert
2 with regard to the code.

3 It's speculation on their part.

4 THE COURT: Let me ask you this, as long as
5 we're speculating, in a sense.

6 Why would someone call their wife from
7 jail and talk about a fluffy pillow?

8 MR. WHIPPLE: Maybe he wanted to make sure
9 his wife was sleeping well.

10 I don't know. It could be innumerable
11 reasons.

12 THE COURT: Here is the thing: You've
13 answered the question yourself, Mr. Whipple, when you
14 said mere speculation, the word "mere" being operative
15 here.

16 Granted, as you know, we instruct the
17 jury they shall not merely speculate. That suggests
18 speculation is based on an absence of evidence.

19 If you have evidence to base your
20 opinion, or you want to call it speculation, that's not
21 mere speculation.

22 What we're talking about is the theory
23 of the State's case and there is evidence that supports
24 that theory.

25 We can challenge how strong it is and

1 all that, but there is no basis to exclude this
2 telephone conversation or conversations.

3 MR. WHIPPLE: Your Honor, if I can ask as a
4 fallback or standby, I recognize that the -- at the end
5 the Court has dictated all motions are to be -- at this
6 point to cease or be completed.

7 Under 47.080 it allows for Offers of
8 Proof. At the time of trial I'd like to have the
9 opportunity to, if we feel it's appropriate to, to
10 address this Court, request that Offer of Proof of what
11 type of information they want to bring in through the
12 telephone.

13 THE COURT: LITTLE SLOWER, please.

14 We've already identified some of it.

15 MR. WHIPPLE: They have already identified
16 some of that information in their motion, but before we
17 just blindly, blindly allow tapes to be played from the
18 Clark County Detention Center recorded conversations I'd
19 ask this Court for an Offer of Proof from the State what
20 that information is, if there's any additional
21 information, and allow us the opportunity to begin to
22 address that issue closer to trial.

23 MR. DIGIACOMO: We've provided them a
24 transcript. We put it in at preliminary. There was
25 additional phone calls after that.

1 We provided those phone calls to them.
2 I'm sure any phone call I intend to play before this
3 jury should be transcribed and certainly those
4 transcripts will be turned over whenever that
5 transcription happens.

6 If they have some objection as to
7 something new that we provide them, that's fine. They
8 have these. I attached them to my -- and I referenced
9 exactly what it is that we're referencing and we talked
10 about it at the preliminary hearing.

11 Certainly I don't think Mr. Whipple
12 would be precluded from objecting to a piece of evidence
13 at trial and certainly he will have transcripts prior to
14 trial of anything additional we intend to offer.

15 If he has any argument as to those, he
16 certainly should be able to raise those.

17 THE COURT: How many phone calls are we
18 talking about?

19 MR. DIGIACOMO: There's hundreds of phone
20 calls. I think there was seven that we played at
21 preliminary.

22 In my listening of the other phone
23 calls, 99 percent of the stuff is conversations
24 unrelated to the homicide.

25 There may be one or two more phone calls

1 which will be transcribed prior to trial, but we haven't
2 gotten that far in trial preparation at this point.

3 THE COURT: Well, I think it's proper that
4 you do reduce whatever you intend to use to a
5 transcript, have it transcribed and given over.

6 My ruling on the motion is going to
7 stand in the sense that I'm not going to preclude the
8 admission of phone conversations as a general
9 proposition at this juncture and don't intend to, in the
10 future, based on what I know of it.

11 This doesn't mean we cannot review the
12 actual evidence. If there's some areas that are perhaps
13 not relevant or perhaps unduly prejudicial or something
14 of this nature you can deal with it then.

15 You should have the benefit of the
16 transcripts so you can review this in advance.

17 MR. WHIPPLE: Thank you.

18 THE COURT: Motion in Limine to preclude
19 admission of evidence of arrest or flight.

20 Your client was found in the attic; is
21 that right?

22 MR. WHIPPLE: He was.

23 THE COURT: If that's not evidence of
24 flight --

25 MR. WHIPPLE: No, it's not.

1 THE COURT: Okay.

2 MR. WHIPPLE: Evidence of flight is trying
3 to retreat, to flee from law enforcement.

4 In this situation there was no trying to
5 get away from law enforcement. The actions that you saw
6 were basically the actions of a person that was acting
7 irrational.

8 That's not evidence of flight.

9 THE COURT: Does he have a mental problem?

10 MR. WHIPPLE: On that particular basis,
11 absolutely. When the police officers surrounded his
12 building and he was absolutely scared. He acted in an
13 irrational manner.

14 It's not evidence of flight.

15 THE COURT: Let me ask you this: Is it not
16 fair to conclude that an attempt to secrete yourself is
17 tantamount to flight for purposes of consciousness of
18 guilt?

19 MR. WHIPPLE: He wasn't trying to secrete
20 himself. Everybody knew he was there.

21 He went paranoid.

22 THE COURT: Everybody knew he was there?

23 MR. WHIPPLE: Law enforcement was aware he
24 was in that house. That's why they were there.

25 That's why they seized it or -- and then

1 went out and got a search warrant.

2 THE COURT: Being in the building is a
3 little different than hiding in the attic, don't you
4 think?

5 MR. WHIPPLE: Actually, I do. It's not for
6 flight or escape.

7 It's for completely irrational behavior,
8 I think.

9 THE COURT: That can be argued.

10 I think the State has the right to argue
11 the opposite, that this is consciousness of guilt.
12 He's hiding from the police.

13 MR. WHIPPLE: Again, I understand. I don't
14 think his actions were a consciousness of guilt.

15 They are actions of an irrational
16 behavior. To allow that to go before a jury is
17 extraordinarily prejudicial, because it wasn't actions
18 of flight or thoughts of guilt.

19 It was irrational behavior.

20 THE COURT: I'm still inclined to think that
21 is subject to that argument. It doesn't preclude the
22 State from arguing the opposite, offhand.

23 Mr. DiGiacomo?

24 MR. DIGIACOMO: Yes.

25 Judge, in the characterization that

1 there was the irrational acts of a Defendant, I don't
2 know. The police go to search your house, you run
3 across the street into your neighbor's house.

4 The police go to your neighbor's house
5 saying they are looking specifically for you. You hide
6 in the attic and after all the cops are there and your
7 wife is calling you to come out the cops are telling you
8 that they are there for a homicide.

9 You continue to hide in an attic when
10 it's 115 degrees outside, refusing the demand of an
11 officer, attempting to avoid arrest.

12 That's admissible for his consciousness
13 of guilt.

14 That's what he did. That's what the
15 case law says. If you're attempting to avoid the arrest
16 the State can present evidence of that avoidance.

17 MR. WHIPPLE: Respond -- and I'll be brief.

18 He wasn't hiding because everybody knew
19 he was there. He wasn't -- he was acting irrational and
20 to allow that irrational behavior to go before a jury
21 without the ability to show it's culpability of guilt,
22 which it's not.

23 Everybody knew he was there. The fact
24 they had to get dogs and tasers and all this activity is
25 absolutely extraordinarily prejudicial.

1 It has nothing to do with culpability or
2 guilt. It has to do with the actions of an irrational
3 man.

4 That is extraordinarily prejudicial.

5 THE COURT: Let me ask you this,
6 Mr. Whipple, by way of analogy. Let's assume the more
7 traditional flight.

8 Say someone gets in their car, drives to
9 Canada some place and they leave notes to the girlfriend
10 and their family that say "I'm out of here. I'm going
11 to Saskatchewan."

12 Does that mean it's still not flight?

13 MR. WHIPPLE: In that situation it is
14 flight. He's trying to avoid lawful arrest.

15 In this situation lawful arrest was
16 unavoidable. It was going to occur.

17 To allow all this extraordinarily
18 prejudicial evidence of sending up dogs, of cutting
19 holes in the roof, of tasers, that's evidence of an
20 irrational individual.

21 It's extraordinarily prejudicial.

22 It's not evidence of flight or of
23 culpability. I recognize that it places upon this Court
24 that decision, but again, it's extraordinarily
25 prejudicial.

1 I mean, you understand that sometimes
2 people act irrational. They act without reason. That's
3 what happened here.

4 Lawful arrest was unavoidable. It was
5 going to occur. The house was surrounded.

6 His activities of going into the attic
7 and then all the activities of trying to bring him down
8 is simply extraordinarily prejudicial and has nothing to
9 do with consciousness of guilt and everything to do with
10 an irrational man. Because of that, it's
11 extraordinarily prejudicial to a jury.

12 It really shouldn't go to it. It has no
13 weight with regard to consciousness of guilt.

14 THE COURT: Are you indicating the police
15 actually went to his neighbor's house and cut a hole in
16 the roof?

17 MR. WHIPPLE: That's correct.

18 THE COURT: It might go to the argument that
19 the police were irrational.

20 MR. DIGIACOMO: They had to cut in the
21 ceiling, once they learned he was in the attic.

22 On the way to the attic he ditched the
23 physical evidence found inside the house of DeAngelo
24 Carroll's fingerprint on a VIP card from the Palomino
25 Club and \$600 in cash and his identification beneath a

1 couch.

2 After he did that -- not consciousness
3 of guilt, of course, Mr. Whipple.

4 He goes up into the ceiling. The police
5 surround the house, request him to come out. They
6 locate him hiding in the attic and ask him to come out.

7 He refuses.

8 They send a dog up there. He refuses.
9 He's in the back corner, no safe way for the police to
10 get to him. They cut a hole out beneath him and brought
11 him down from the attic that in manner.

12 MR. WHIPPLE: With regard to the playing
13 cards or the cards and the money, they don't know when
14 that was there.

15 THE COURT: Playing cards?

16 MR. WHIPPLE: The cards with the
17 co-defendant's fingerprint on it. They don't know when
18 those items were placed there.

19 To try to suggest somehow that all took
20 place at the same time -- what you see is the actions of
21 an irrational man.

22 I'm going to go back to the same thing.

23 How is that evidence of flight when you
24 surround a person and ask him to surrender and he
25 refuses to come down from the attic?

1 That's not flight.

2 THE COURT: All right.

3 Do you happen to know when these cards
4 and things were placed under the couch?

5 MR. DIGIACOMO: His aunt ran into the house
6 saying "The police are at my house. The aunt says my
7 nephew came over, ran into the house, saying the police
8 are at my house. He ran through the area where the
9 living room was and she was brought out of the house.
10 The only time he was in the house.

11 What's there is the purse; there is the
12 identification and then there is identification --
13 there's \$600 in cash, there is the VIP cards, which are
14 the exact same VIP cards which are found inside the
15 Palomino during the search warrant there in these boxes.
16 He's got a stack of those, got a bunch of cash that is
17 all right where it would be right beneath the couch as
18 you come through the front door.

19 In addition to that piece of
20 information, the phone calls, which they claim are not
21 relevant, he discusses those items. Certainly he has
22 knowledge of where those items were and he has
23 discussions about those items.

24 And one of the references to the pillow
25 is, was basically all the money in the purse or was --

1 or is the rest of the money in the pillow?

2 There is a discussion between what money
3 is in the purse versus what money is in the pillow.

4 There's evidence to suggest he ditched
5 that when he came through the door telling his aunt that
6 the police were over at his place and he needed to hide.

7 He indicates his efforts for an
8 avoidance of arrest.

9 MR. WHIPPLE: That's where the evidence
10 should stop.

11 That's -- if that's what they have
12 that's where it should stop. All the time that it took
13 to drag him out out of an attic should not come in.
14 That has no evidence of flight.

15 It has no evidence of consciousness of
16 guilt. It's evidence of an irrational person. That
17 type of information has no right in front of a jury.

18 Sending dogs into an attic, cutting
19 holes in ceilings, tasers, people in an attic is
20 extraordinarily prejudicial and has no value for their
21 purpose. It has no value.

22 Again, it's evidence of an irrational
23 behavior. It's almost character evidence. It's not
24 appropriate evidence that shows consciousness of guilt.

25 If they want to talk about what they

1 described, then it should stop at the point where he
2 came in the house and the search of the house.

3 It should have nothing to do with the
4 efforts to take him out of the attic.

5 Submit it, and thank you.

6 THE COURT: As to the rationality of the
7 Defendant, that's going to be a subject to be argued.

8 I'm not inclined to embrace either
9 side's theory in that regard.

10 Frankly, hiding from the police, you
11 take a chance. You pay the price.

12 You hide from the police, it's going to
13 be something that's going to be noteworthy and, in all
14 probability, admissible.

15 I don't see a problem in this case.
16 Motion in Limine is denied.

17 On this question of the death penalty
18 that is proffered by Mr. Draskovich and Mr. Oram, and
19 counsel, is that where we are?

20 MR. DIGIACOMO: Yes, judge.

21 THE COURT: Counsel, let me indicate where we
22 are in this matter. Simply stated -- we'll have
23 Ms. Thomas and Mr. Draskovich argue primarily.

24 Simply stated there are two arguments to
25 be made here, I believe. Correct me if I misidentify

1 this in some way.

2 One is there is a suggestion that the
3 committee -- I forget what they call the committee
4 within the District Attorney's Office--

5 MR. DIGIACOMO: I've heard it referred to as
6 both the death penalty committee as well as the death
7 review committee.

8 THE COURT: We'll say the death review
9 committee. The argument is that there should be an
10 opportunity for Defense counsel to be heard before the
11 decision to seek the death penalty is rendered.

12 Is that one of the arguments?

13 MR. DRASKOVICH: Yes, judge.

14 THE COURT: The other is that there is
15 insufficient evidence against Hidalgo and Espindola of
16 intent to kill or to hire someone to kill.

17 Is that the other argument?

18 MR. DRASKOVICH: That is part of the
19 argument.

20 THE COURT: Is there any other?

21 MS. THOMAS: Yes, Your Honor.

22 Essentially it is a matter of law. The
23 notice of intent is deficient without regard to the
24 intent issue.

25 On the pecuniary gain, as a matter of

1 the pleading, the actual words used by the state in its
2 notice of intent is that those are not sufficient to
3 meet the terms of the aggravator and that would be
4 because they refer to beating, as well as murder,
5 because it's not limited to pecuniary gain as the cause
6 of the murder, rather than as a result of the murder and
7 because it failed to provide sufficient detail about
8 their theory of pecuniary gain to the Palomino Club.

9 THE COURT: Let's stop -- and you're right.
10 I recall looking at this before.

11 Is that not as an example of alternative
12 pleading?

13 A special verdict form would address the
14 issue. If the jury finds that there was a hiring to
15 kill, then if that's the circumstance, if they find
16 hiring the batterer it's not -- the death penalty is not
17 in issue.

18 MS. THOMAS: That's the problem. It's not a
19 choice of valid options.

20 There are a number of theories proposed
21 by the State in their notice of intent that are not
22 legally cognizable, that are not valid, that should
23 never be submitted to a jury.

24 THE COURT: What, in particular, are you
25 talking about?

1 MS. THOMAS: The hiring to beat as a basis of
2 that aggravator.

3 THE COURT: No, it would not. If that was
4 the jury's finding during the guilt phase, then
5 obviously it's not an aggravator.

6 MR. DIGIACOMO: It's also not a First Degree
7 Murder. That was my point.

8 That pleading -- and so the court is
9 aware, that pleading was filed prior to Bolden coming
10 down, and Bolden is the one that changed all the
11 theories of liability.

12 I would agree with the court if the
13 State cannot prove the intent to kill of those two
14 individuals, then there is nothing to worry about a
15 death case about, because they are going to be found
16 guilty of something less than First Degree Murder, after
17 Bolden.

18 Pre-Bolden that requirement wasn't
19 necessary. Ultimately, the pleading was filed
20 pre-Bolden and so as such the jury is never going to
21 hear this if they find their intent was solely to beat
22 this person and not to kill.

23 Now, if we establish the intent to kill,
24 then they will get convicted of First Degree Murder.
25 Then we have to worry about this.

1 That's the problem with the entire
2 argument of the defense is the state can't prove the
3 intent to kill in order for us to be facing a death
4 case.

5 If the State can't prove the intent to
6 kill, it's not going to be a death case as to these two
7 defendants.

8 MS. THOMAS: We're not talking about the
9 evidence at trial. We're not talking about the verdict.

10 What we're talking about are the Four
11 Corners of this notice of intent to seek death.

12 The State has never sought to amend
13 that. Bolden was issued, many, many, many months ago.
14 It's not like it came out yesterday.

15 Even prior to Bolden this aggravator
16 could never be based upon murder to beat. It has to be
17 the pecuniary gain for the murder, not beating, not
18 drugs, not anything else.

19 The State had the option of pleading
20 this aggravator under the terms of the statute. They
21 didn't do so.

22 Bolden bolsters our position, but even
23 pre-Bolden that would have been an issue.

24 That's one of the reasons why that
25 aggravator is bad evidence.

1 THE COURT: Of course, you agree an
2 aggravator does not have to be proved at a preliminary
3 hearing or a Grand Jury.

4 MS. THOMAS: I understand the Nevada Supreme
5 Court has said that.

6 THE COURT: I'm inclined to go along with
7 them.

8 MS. THOMAS: I'm not waiving that issue.
9 Ultimately these issues need to be dealt with by the
10 U.S. Supreme Court -- and we're not there yet.

11 Even that aside, the Nevada Supreme
12 Court has said the State is obligated to file a valid
13 notice of intent to seek death.

14 THE COURT: Why is this not cured by the
15 fact we have an alternative pleading and what we've
16 indicated earlier?

17 If there's no finding of intent, it's
18 moot.

19 MS. THOMAS: Because we're going to death
20 qualify a jury. We'll have to deal with this case as
21 a death penalty case up until that point, because our
22 client should be entitled to bail so they can assist us
23 in preparing for this defense.

24 There a whole lot of negative
25 consequences that flow from a notice of intent to seek

1 death that would never be involved in this case.

2 If the Court were to evaluate this
3 notice of intent and say it's not good enough, it
4 doesn't meet the due process, the Sixth Amendment, 14th
5 Amendment and Supreme Court Rule 250 requirements as set
6 forth by the Nevada Supreme Court.

7 Here they had a chance. They had the
8 opportunity. There is -- we all know they are
9 experienced enough in doing death penalty cases that
10 they ought to have this down.

11 They needed to plead this in terms of
12 the statutory aggravator and they didn't do it. They
13 throw in a bunch of nonsense, cold, irrelevant matters
14 that should better be submitted to a jury and which
15 should not subject these defendants to facing the death
16 penalty.

17 THE COURT: You clarify these things, but
18 it's going to be the suggestion of this individual the
19 fact he was hired to go out and batter somebody.

20 MS. THOMAS: I'm not saying that's our
21 defense, by any sense.

22 What I'm talking about here is what the
23 alternative theories the State has pled in that notice
24 of intent.

25 One of their theories is it was a hiring

1 to beat, which is probably -- I'm certain hat's a
2 criminal offense.

3 That's something that should be
4 prosecuted and that's suggested, I think, by the
5 evidence that's been adduced as an alternative.

6 Whatever it is, it's not an aggravating
7 circumstance --

8 THE COURT: I don't know if can agree to
9 those two things at once.

10 MS. THOMAS: -- if they want to plead that
11 as a charge and submit to a jury on a guilty verdict.

12 THE COURT: You object to the and/or
13 language?

14 MS. THOMAS: Yes. I am absolutely opposed to
15 the and/or language.

16 THE COURT: But if Mr. Counts is alleging
17 the same thing it would be the same, wouldn't it?

18 MS. THOMAS: If the State would have filed a
19 notice of intent that said pecuniary gain, murder for
20 hire, left out all the allegations about beating, left
21 out the claim that there was going to be pecuniary gain
22 to the Palomino Club and left out the claim of money
23 paid after, as a result of the murder, rather than the
24 money being conditioned on the front end -- had the
25 State done so, which it did not, but it could have --

1 had the State done so we could be here arguing the
2 sufficiency of the evidence because there is not enough
3 evidence to support those claims.

4 The fact is what we're dealing with is
5 the notice of intent the State did draft, not the one
6 they could have drafted.

7 The one they did draft -- one they did
8 file as a matter of law is bad and should never be the
9 basis for holding these people on death charges.

10 THE COURT: So one alternative is to drop
11 the allegation of battery. Where do you benefit there?

12 MS. THOMAS: I think -- it would be to drop
13 that aggravator. The State didn't.

14 THE COURT: Well you're kind of blurring the
15 issue here. If they drop battery and they maintain
16 murder for hire, the aggravator is still there.

17 MS. THOMAS: Then we come back with another
18 motion to argue the sufficiency of the evidence.

19 What we're dealing with here is not what
20 could have the State done?

21 We're talking about the notice of intent
22 filed by the State is bad.

23 It has to be dismissed.

24 THE COURT: All right.

25 MS. THOMAS: The second part of that is the

1 solicitation issue, which is our argument, which was
2 supported by ample authority from Arizona, Florida as
3 well as plain wording.

4 THE COURT: Is this briefed?

5 MS. THOMAS: It was.

6 MR. DIGIACOMO: We discussed it last time.
7 I thought the Court rejected that and this was the issue
8 you were addressing.

9 THE COURT: I don't have any Florida cases
10 here.

11 MS. THOMAS: On the fact that solicitation
12 is an En Code (phonetic) defense, words coming out of
13 someone's mouths. It's insufficient to meet the
14 standard for the use of violence—or threat of violence
15 aggravator.

16 That's the last part of our argument.

17 THE COURT: When someone solicits someone
18 else to kill, orally, that's not sufficient?

19 MR. DIGIACOMO: They say that's not a crime
20 of violence. That's their argument.

21 THE COURT: It's not a crime of violence?

22 MR. DIGIACOMO: That's what their argument
23 to the Court was.

24 THE COURT: When someone is taped, as we see
25 these living things on tv, where the husband or wife,

1 disgruntled, is trying to contract with someone to kill
2 the other party and they are in a car and it's being
3 taped and they are saying "I want him dead. I want him
4 dead; here's how you do it and here is what you get for
5 it," that's not a crime?

6 MS. THOMAS: That's correct.

7 THE COURT: What court in this land came up
8 with that?

9 MS. THOMAS: The Supreme Court of Arizona,
10 the Supreme Court of Florida.

11 THE COURT: It ain't gonna fly here.

12 Back to the other argument issue.

13 MR. DRASKOVICH: As you know, I represent
14 Mr. Hidalgo in this case. One of our primary concerns
15 is that the State should be severely limited in seeking
16 the death penalty against people that aren't the actual
17 killers.

18 We're concerned about the waste of
19 taxpayer money. We're concerned about the waste of
20 time.

21 Our concern is that the District
22 Attorney's Office is seeking the death penalty in this
23 case against these two defendants where they really
24 don't deserve it.

25 Death is different. We've heard that

1 argument over and over again.

2 This is a First Degree Murder case. The
3 State is free to try and lock these people up for the
4 rest of their lives and under the facts of this case
5 where they themselves did no killing it's a waste of
6 everybody's time and for that reason they should not be
7 facing the death penalty.

8 THE COURT: You understand, Mr. Draskovich,
9 that there is an inherent problem with this.

10 As you say, they can be found guilty of
11 First Degree Murder, but not have the death penalty
12 apply. If you successfully argue lack of intent, there
13 is not a First Degree Murder.

14 The baby has been thrown out with the
15 bath water, from the point of the State.

16 MR. DRASKOVICH: True.

17 That's something we have to arrive at
18 after a very long trial, after very long process. Our
19 position is they can't be seeking death, to begin with,
20 under the circumstances of this case.

21 THE COURT: You're saying lack of evidence?

22 MR. DRASKOVICH: Yes, yes.

23 In the particular circumstances of the
24 case, there aren't the aggravators. At the very end, if
25 the jury decides this isn't a First Degree Murder case,

1 they have done that.

2 Nonetheless, we've had to go through the
3 entire process and make this a death penalty case when
4 it's not a death penalty case.

5 THE COURT: Mr. DiGiacomo and Mr. Pesci,
6 could you address this question of the battery and/or?

7 MR. DIGIACOMO: Yes, that was my point.

8 Pre-Bolden, the time where they changed
9 conspiracy liability, back then, a person, let's say
10 Ms. Espindola only asked Mr. Carroll to beat this man
11 severely.

12 Under conspiracy liability if there was
13 a foreseeable consequence he would die, she would have
14 been responsible for the murder and if Mr. Carroll had
15 the intent of First Degree Murder she would responsible
16 under a First Degree Murder theory.

17 After Bolden they changed the rules.

18 Now I have to show Anabel Espindola
19 intended a death to occur in order for me to convict her
20 of First Degree Murder.

21 The notice of intent, they are arguing
22 throw the whole notice out. If they want to strike the
23 word beating out of it, they can file a motion to strike
24 that language, but ultimately the evidence will show
25 that she says "I want you to beat him severely, if he's

1 with somebody. And if he's alone I want you to kill
2 him."

3 That's the evidence that we have against
4 Ms. Espindola.

5 Likewise, with Mr. Draskovich's client, Mr.
6 Hidalgo, he indicates "I want you to come to work,"
7 having previously discussed the fact that somebody needs
8 to get hurt. "I want you to bring baseball bats. I
9 want you to bring garbage bags", and once Mr. Carroll
10 gets to work he is solicited to kill Timothy Hadland.

11 Certainly there is an argument.

12 What does he need the garbage bags for
13 and the baseball bats for if Mr. Hidalgo, Junior or the
14 III'd didn't intend to kill?

15 Ultimately what they are asking us for
16 is a probable cause determination as to whether or not
17 there's sufficient evidence before you to establish the
18 intent that, as you indicated already, it's not
19 appropriate.

20
21 The question for the Court is this: If
22 they get convicted are they on notice of the aggravating
23 circumstances?

24 And what they want to bar is that
25 Mr. Counts got \$6,000 for this homicide, an aggravating

1 circumstance as to them, and I disagree.

2 The statute says the murder was committed
3 for the pecuniary gain of themselves or any other person.
4 They are liable. It's just a murder for hire.

5 The evidence also shows Mr. Hadland was
6 making references to the Palomino Club that was hurting
7 the business of the Palomino Club, and the matter of Mr.
8 Hidalgo, Senior, along with some evidence of there being
9 some argument between Mr. Hidalgo, the III'd and
10 Timothy Hadland, is he was telling the taxi drivers not
11 to show up at the club. The club was losing money and
12 that's the reason for the killing.

13 It was for the benefit of the Palomino
14 Club.

15 THE COURT: All right, counsel.

16 The court's rulings are as follows: The
17 argument that defense counsel has a right to attend the
18 death review committee, for lack of a better reference,
19 I find this is without merit.

20 There is no way I'm going to require
21 that counsel be allowed to attend these reviews.

22 Secondly, the question of this and/or
23 pleading situation, battery beating and/or death, I
24 don't have a problem with that. I'm going to allow
25 that.

1 As to the intent to kill, there is evidence
2 pro and con. Each side has their theory which is what
3 trials are about.

4 I don't think it's incumbent upon me; I
5 don't think it's my prerogative to prejudge this evidence
6 when there is sufficient evidence for the bindover and
7 that's the test at this juncture.

8 Beyond that the Court does not have it
9 within its discretion to mandate "Well, it looks weak.
10 It's sufficient to the bindover, but I don't think I
11 like the smell of it so we're going to strike it."

12 That is not going to be what's done by
13 the Court and I don't think it's proper for the Court to
14 get involved in. That will go before the jury.

15 Anything else, counsel?

16 MR. WHIPPLE: Nothing else, judge.

17 MR. DIGIACOMO: No, judge.

18
19
20
21 ATTEST that this is a true and complete
22 transcript of the proceedings.

23
24 
25 J. A. D'AMATO CCR #17

