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17 **DISTRICT COURT**

18 **CLARK COUNTY, NEVADA**

19 **STATE OF NEVADA,**

20 **Plaintiff,**

21 **vs.**

22 **LUIS A. HIDALGO, III, #1849634**

23 **LUIS A. HIDALGO, JR., #1579522**

24 **Defendants.**

CASE NO. C212667

DEPT. XXI

OPPOSITION TO STATE OF NEVADA'S
MOTION IN LIMINE TO EXCLUDE
TESTIMONY OF VALERIE FRIDLAND

Date of Hearing: 1/22/09

Time of Hearing: 9:30A.M

26 COMES NOW Defendants, LUIS A. HIDALGO JR., by and through his counsel,
27 DOMINIC P. GENTILE, ESQ., and PAOLA M. ARMENI, ESQ. of the law firm Gordon Silver,
28 and LUIS A. HIDALGO III, by and through his counsel, JOHN L. ARRASCADA, ESQ. of the

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E. J. [Signature]
CLERK OF DISTRICT COURT

1 law firm of Arrascada and Arrascada, Ltd. and CHRISTOPHER W. ADAMS, ESQ. of the law
2 firm Christopher W. Adams, P.C. and hereby opposes the Motion in Limine to Exclude the
3 Testimony of Valerie Fridland filed by the State of Nevada.

4 This Opposition is made and based upon the following Memorandum of Points and
5 Authorities, any attachments thereto, and the papers and pleadings already on file herein

6 Dated this 20th day of January, 2009.

7 GORDON SILVER

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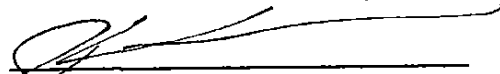
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MEMORANDUM OF POINTS AND AUTHORITIES

LEGAL ARGUMENT

25 Professor Valerie Fridland's testimony should not be excluded because she has
26 specialized knowledge in the field of linguistics, with specific interest in the area of
27 sociolinguistics. This specialized knowledge will assist the jury in understanding the language
28

1 use of Anabel Espindola (hereinafter, "Espindola") and will also assist the jury in determining a
2 fact in issue, the role of Espindola and others in the crimes charged. For these reasons, the State
3 of Nevada's Motion in Limine to Exclude the Testimony of Valerie Fridland should be denied.

4 **A. EXPERT TESTIMONY LEGAL STANDARD.**

5 Nevada has not adopted the federal expert witness standard set forth in FRE 702 and
6 interpreted by the United States Supreme Court in Daubert v. Merrell Dow Pharmaceuticals, Inc.
7 While Daubert and federal court decisions discussing it may provide persuasive authority in
8 determining whether expert testimony should be admitted in Nevada courts, these decisions are
9 not binding on the Court. See Hallmark v. Eldridge, ___ Nev. ___, 189 P.3d 646, 650 (2008).

10 Expert witnesses are governed by Nevada Revised Statute ("NRS") 50.275, which states:

11 "To testify as an expert witness under NRS 50.275, the witness must satisfy the
12 following three requirements: (1) he or she must be qualified in an area of
13 'scientific, technical or other specialized knowledge' (the qualification
14 requirement); (2) his or her specialized knowledge must 'assist the trier of fact to
understand the evidence or to determine a fact in issue.' (the assistance
requirement); and (3) his or her testimony must be limited 'to matters within the
scope of [his or her specialized] knowledge' (the limited scope requirement)."

15 Nev. Rev. Stat. 50.275; see also Pineda v. Nev., 120 Nev. 204, 213, 88 P.3d 827, 833 (2004)
16 (holding it was error to not allow expert testimony regarding the perceptions of a person within
17 gang culture). Pineda goes on further to note, in the context of expert testimony, that the due
18 process clauses in our constitutions assure an accused the right to introduce into evidence any
19 testimony or documentation which would tend to prove the defendant's theory of the case.
20 Pineda, 120 Nev. at 214. As Dr. Fridland's testimony would directly tend to prove Hidalgo's
21 theory of the case and assist the jury in determining a fact in issue, it should be admitted as
22 expert testimony under NRS. 50.275.

23 **1. *Qualification Requirement***

24 The State of Nevada does not argue that Professor Valerie Fridland does not have
25 specialized knowledge in the area of linguistics as this would be disingenuous based on Professor
26 Fridland's impressive curriculum vitae. See Exhibit 1. Nevertheless, a short synopsis of the
27 Professor's qualifications is necessary. In Hallmark v. Eldridge, ___ Nev. ___, 189 P.3d 646, 651
28 (2008), the Nevada Supreme Court provides factors which will assist a lower court in

1 determining whether a person is qualified in an area of specialized knowledge, these factors
2 include but are not limited to: (1) formal schooling and academic degrees; (2) licensure; (3)
3 employment experience; and (4) practical experience and specialized training.

4 Professor Fridland has obtained a B.S., M.A. and Ph.D all in the field of language and
5 linguistics. She is currently an associate professor at the University of Nevada, Reno. She has
6 received numerous grants and awards. Professor Fridland has numerous publications and has
7 done an abundant amount of presentations in these areas.

8 Professor Fridland meets all the requirements laid out in Hallmark. v. Elridge, ___ Nev.
9 ___, 189 P.3d 646, 651 (2008); thus, Professor Valerie Fridland is qualified in the area of
10 linguistics.

11 **2. Assistance Requirement**

12 The State argues that Dr. Fridland's testimony is not reliable. In determining whether an
13 expert's opinion is based upon reliable methodology, a district court should consider whether the
14 opinion is: (1) within a recognized field of expertise; (2) testable and has been tested; (3)
15 published and subjected to peer review; (4) generally accepted in the scientific community (not
16 always determinative); and (5) based on more particularized facts rather than assumptions,
17 conjecture or generalization. Hallmark, 189 P.3d at 651. These factors may be accorded varying
18 weights and may not equally apply in every case. Id. Determining whether an expert witness is
19 competent to offer an opinion as an expert is largely within the trial court's discretion. Walton v.
20 Eighth Judicial Dist. Court ex. rel County of Clark, 94 Nev. 690, 693, 586 P.2d 309, 310 (1978).

21 Courts have been willing to consider the use of linguistics and discourse analysis. In
22 United States v. Evans, a case extensively relied upon by the prosecution, the Eleventh Circuit
23 Court of Appeals noted the district court's conclusion that "while a jury in an appropriate case
24 might be aided by testimony from a linguistic expert, the case at bar was not appropriate for such
25 testimony." U.S. v. Evans, 910 F.2d 790, 803 (11th Cir. 1990) (ultimately holding that expert
26 testimony on linguistics was not needed in this case). The court in Evans did not discount
27 discourse analysis or linguistics in their entirety, merely as applied to the fact of the case at hand.

28 Further, in Evans, the Court excluded the testimony of Dr. Roger Shuy, a well respected

1 linguist. Although, Dr. Shuy was not permitted to testify in Evans, he has testified in 20 federal
2 cases as an expert in linguistics, including 2 in the United States District Court, District of
3 Nevada in Reno and most notably in the well-known case United States v. John DeLorean. See
4 Exhibit 2. He has also testified in 19 state court cases and at 4 US House of Representatives &
5 Senate cases. See Exhibit 3 & 4. Dr. Shuy has also worked on behalf of government agencies as
6 an expert in the field of linguistics. See Exhibit 5. So although the State has provided cases in
7 which the federal courts have excluded testimony of linguists, clearly there are other cases that
8 show the opposite outcome. Further, several state courts have taken a different approach to the
9 admission of linguistics.

10 State courts have allowed expert testimony on linguistics because it would aid the jury in
11 understanding a fact in issue. This is because Linguists, as opposed to the average person are
12 trained to look systematically for patterns and inconsistencies in language. See State v. Trevino,
13 516 P.2d 779, 784 (Wash. Ct. App. 1973) (holding a trial court committed error in not allowing
14 expert testimony on the meaning and force of a threat as it applied to one with an impoverished
15 Mexican-Spanish background); Weller v. Am. Broadcasting Co., Inc., 283 Cal. Rptr. 644, 655
16 (Cal. Ct. App. 1991) (upholding the admission of expert testimony regarding the disparity
17 between words expressly stated and the implicit meaning conveyed). "An expert witness may so
18 thoroughly educate a jury regarding applicable general principles that 'the factual issues in the
19 case become ones that the jurors can answer as easily as the expert.'" People v. Page, 2 Cal. Rptr.
20 2d 898, 914-15 (Cal. Ct. App. 1991) (internal citation omitted) (holding that an expert could
21 testify about general psychological factors that lead to false confessions, even if not specifically
22 applied to the case).

23 In the case *sub judice*, the testimony of Professor Fridland will assist the jury through
24 linguistics in determining the role of Espindola and others. This can be determined through the
25 language use of Espindola in both her grand jury testimony, as well as her statements on the
26 recordings. Conversation is a rational activity and discourse analysis, pragmatics and semantics
27 attempt to examine the rules or principles that guide, constrain or govern linguistic
28 communications. The average person or more specifically jury members are not trained to look

1 systematically for patterns and inconsistencies in language. Since a lay person uses language
2 everyday, they are usually not accustomed to thinking about rules they use when communicating.
3 "A Linguist using discourse analysis of written or spoken communications are trained to look for
4 certain features that help to reveal the overall structure, how the text holds together, including
5 analysis of topics. This is important in examining law enforcement recordings." See Exhibit 6.
6 Article: Ask the Expert: Margaret van Naerssen on the Admissibility of Discourse Analysis. For
7 these reasons, Dr. Fridland's testimony will assist the trier of fact in understanding the
8 recordings, which the State will seek to introduce into evidence as well as to determine a fact in
9 issue, namely the role Espindola and others had in the Conspiracy to Commit Murder on
10 Timothy Hadland and the Murder of Timothy Hadland.

11 **3. *Limited Scope Requirement***

12 Professor Fridland will only opine based on her specialized knowledge in the area of
13 linguistics. This is clear based on her preliminary report. See Exhibit 7.

14 **B. Expert Testimony Regarding the Testimony of Others Tends to Prove the**
15 **Defendant's Theory of the Case.**

16 When determining the appropriateness of expert testimony regarding the testimony of
17 another, the Nevada Supreme Court has stated:

18 [I]t is essential to recognize that expert testimony, by its very nature, often tends
19 to confirm or refute the truthfulness of another witness. It is, therefore,
20 appropriate for qualified experts to characterize their findings, observations and
21 conclusions with the framework of their field of expertise, irrespective of the
22 corroborative or refutative effect it may have on the testimony of a complaining
23 witness.

24 Townsend v. State, 103 Nev. 113, 118-19, 734 P.2d 705, 709 (1987) (internal citations omitted)
25 (discussing expert testimony regarding the testimony of child sex abuse victims). The court
26 further notes that it is generally inappropriate to directly characterize another's testimony as
27 being truthful or false. Id.

28 While the issue of expert testimony regarding discourse analysis is one of first impression
in Nevada, Nevada case law implies that expert testimony may be used to characterize the
testimony of another, so long as it does not go to the veracity of the witness's testimony. Dr.

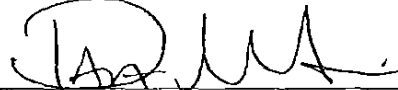
1 Fridland's testimony regarding the recorded conversations and testimony of Espindola may be
2 used to help the jury determine a fact in issue, how the language, as explained through the theory
3 of common ground, identifies the roles of Ms. Espindola and others in the events in question. In
4 Professor Fridland's report she does not make an evaluative judgment on the truth or veracity of
5 Espindola's statements, she only points out how Espindola's contributions were inconsistent with
6 the ways she constructed her discourse and the conversational implicatures they carried in the
7 recordings and the later testimony. There were inconsistencies in terms of how the discourse was
8 structured and Dr. Fridland's report shows Espindola's use of pronominals and presuppositions
9 shifts. In an abundance of caution, the court could certainly admonish Dr. Fridland at the
10 beginning of her testimony thereby preventing her from opining about Espindola's credibility.

11
12 CONCLUSION

13 Based on the foregoing, Defendants Luis A. Hidalgo III and Luis A. Hidalgo Jr.
14 respectfully requests the Court deny the State of Nevada's Motion in Limine to Exclude the
15 Testimony of Valerie Fridland.

16
17 Dated this 20th day of January, 2009.

18 GORDON SILVER

19 

20 DOMINIC P. GENTILE

21 Nevada Bar No. 1923

22 PAOLA M. ARMENI

23 Nevada Bar No. 8357

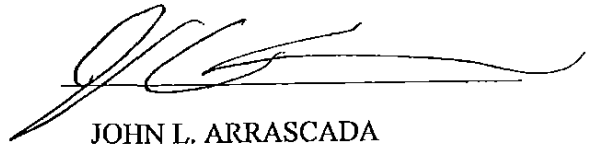
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CERTIFICATE OF SERVICE

The undersigned, an employee of Gordon Silver, hereby certifies that on the 20th day of January, 2009, she served a copy of the Opposition to the State's Motion to Exclude the Testimony of Valerie Fridland, by facsimile, and by placing said copy in an envelope, postage fully prepaid, in the U.S. Mail at Las Vegas, Nevada, said envelope addressed to:

Marc DiGiacomo
Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
Las Vegas, NV 89155
Fax: (702) 477-2922
Attorney for: State of Nevada

Giancarlo Pesci
Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
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Attorney for: State of Nevada

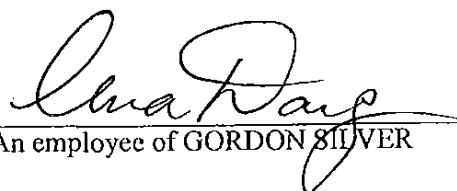

An employee of GORDON SILVER

EXHIBIT 1

Valerie Fridland
Associate Professor
Department of English/MS098
University of Nevada, Reno.
Reno, NV 89557

Professional Preparation:

Ph.D. (1998) Department of Linguistics, Michigan State University.
Area of Specialization: Sociolinguistics

M.A. (1993) English Department, University of Memphis.
Area of Concentration: Linguistics

B.S. (1990) School of Languages and Linguistics, Georgetown University.
Area of concentration: Chinese Language

Appointments:

Associate Professor. University of Nevada, Reno. Fall 1999-present.

Visiting Professorship in Linguistics. Macalester College, St. Paul, MN. Spring 1999.

Visiting Lectureship in Linguistics. Bogazici University, Istanbul, Turkey. Fall 1998.

Teaching Assistant. Michigan State University, East Lansing, MI. 1994-1997.

Grants and Awards:

National Science Foundation Grant (Linguistics Program-BCS 0518264). Fall 2005-present

Scholarly and Creative Activities Grant. University of Nevada, Reno. Fall 2006.

National Science Foundation Grant (Linguistics Program-BCS 0132145). Fall 2002-2005

National Science Foundation Grant (Linguistics Program-BCS 0001725). Fall 2000-2002

Graduate School Dissertation Completion Fellowship Recipient. Spring 1998.

Service:

University Service:

Committee member. College Course and Curriculum Committee. 2004-2005 and 2007-present.

Committee member. University Disabilities Resource Committee. 2001-present.

Committee member. English Graduate Committee. 2002-present.

Chair. Language Committee. 1999-2001 and 2006-2007. Committee member. 2002-present.

Committee member. Search committee. 2001-2002.

Committee member. Election Committee. 2002.

Professional/National service:

Review Panelist. National Science Foundation Science of Learning Centers Competition. 2003.

Abstract Reviewer. New Ways of Analyzing Variation conferences. 2003-present.

Advisory committee member, Terascale Linguistics Initiative (TSL). 2003-present.

Ad-hoc grant reviewer. National Science Foundation Linguistics Program. 2000-present.

Panel Moderator. New Ways of Analyzing Variation (NWAV) conference session. 2001.

Public Service Activities:

Invited Speaker. Middle Tennessee State University Lecture Series. 2006.
 Interview. National Public Radio Day to Day Program. April 2003.
 Invited Speaker. UNR History Club dinner. 2003.
 Invited Speaker. Middle Tennessee State University Lecture Series. 2002.
 Informal Advisor for faculty grant writing and student graduate program applications. Middle Tennessee State University. 2002.
 Invited Speaker. Northwest Reno Library's book club. 2000.

Publications:

- Fridland, Valerie and Toby Macrae. In Press. Patterns of uw, U, and ow fronting in Reno, Nevada. To appear in *American Speech*.
- Fridland, Valerie. In Press. Interpreting Intra-Regional Southern Vowel Distinctions. To appear in *Proceedings from the 33rd meeting of the Berkeley Linguistics Society*.
- Fridland, Valerie. In Press. The cycle of perception, ideology, and perception in the speech of Memphis, TN. *A Reader in Sociophonetics*. Dennis Preston and Nancy Nieldelski (eds.). Mouton de Gruyter.
- Fridland, Valerie. In Press. Regional differences in perceiving vowel tokens on Southernness, education and pleasantness ratings. To appear in *Language Variation and Change*.
- Fridland, Valerie. In Press. Coreectness, Pleasantness and Degree of Difference Ratings across regions. To appear in *American Speech*.
- Fridland, Valerie. Sounds of Ole Man River. 2006. *American Voices: How dialects differ from coast to coast*. Walt Wolfram and Ben Ward (eds.) Blackwell:MA.49-53.
- Fridland, Valerie and Kathy Bartlett. In Press. Southern or rural? The social perception of intra-regional vowel distinctions. To appear in the *Southern Journal of Linguistics*.
- Fridland, Valerie and Kathryn Bartlett. 2006. The social and linguistic conditioning of back vowel fronting across ethnic groups in Memphis, TN. *English Language and Linguistics* 10: 1-22.
- Fridland, Valerie, Bartlett, Kathryn and Roger Kreuz. 2005. Making sense of variation:Pleasantness and education ratings of regional vowel variants. *American Speech*. 80:366-387.
- Fridland, Valerie, Bartlett, Kathryn and Roger Kreuz. 2004. Do you hear what I hear? Experimental measurement of the perceptual salience of acoustically manipulated vowel variants by Southern speakers in Memphis, TN.. *Language Variation and Change* 16. 1-16.
- Fridland, Valerie. 2003. Tide, tied and tight :The expansion of /ai/ monophthongization in African-American and European-American speech in Memphis, TN. *Journal of Sociolinguistics* 7. 279-298.

- Fridland, Valerie. 2003. Quiet in the Court: Attorney's silencing strategies during courtroom cross-examination. In *Discourse and Silencing*. Lynn Theismeyer (ed.). Benjamins Press. 119-138.
- Fridland, Valerie. 2003. Network strength and the realization of the Southern Vowel Shift among African-Americans in Memphis, TN. *American Speech* 78. 3-30.
- Fridland, Valerie. 2003. Sounds of Ole Man River. *Language Magazine: The Journal of Communication and Education*. 27-29.
- Fridland, Valerie. 2001. Social factors in the Southern Shift: gender, age and class. *Journal of Sociolinguistics* 5. 233-53.
- Fridland, Valerie. 2000. The Southern Vowel Shift in Memphis, TN. *Language Variation and Change* 11. 267-285.
- Fridland, Valerie. 1994. Language in male-on-male rape trials. In *Cultural Performances: Proceedings of the Third Berkeley Women and Language Conference*. M. Bucholtz et al. (eds.). Berkeley: Berkeley Women and Language Group. 205-219.

In preparation:

- Fridland, Valerie and Kathy Bartlett. What we hear and what it expresses: The perception and meaning of vowel differences among dialects. Paper presented at LAVIS III (Language and Variation in the South II) Conference. Tuscaloosa, AL. Submitted to LAVIS III proceedings.
- Fridland, Valerie. The spread of the cot/caught merger in the speech of Memphians: An ethnolinguistic marker? Submitted to LAVIS III proceedings.

Presentations:

- Fridland, Valerie. February 2007. Interpreting intra-regional Southern vowel distinctions. Presented at the 33 Annual Berkeley Linguistics Society Conference.
- Fridland, Valerie. October 2006. Talking, listening and evaluating: A unified approach to understanding the Memphis speech community. Paper presented at NWAVE35. Ohio State University, Columbus, Ohio.
- Fridland., Valerie. July 2006. Production, perception and attitudes in Memphis, TN: An emerging synthesis. Sociolinguistics Symposium 16. Dublin, Ireland.
- Fridland, Valerie, Kathy Bartlett and Wayne Mackey. October 2005. Regional differences in perceiving vowel tokens on Southernness, education and pleasantness ratings. Paper presented at the NWAVE 34 Conference. New York University, New York, N.Y.

- Fridland, Valerie and Kathy Bartlett. October 2005. Southern or rural? The social perception of intra-regional vowel distinctions. Paper presented at the NWAVE 34 Conference. New York University, New York, N.Y.
- Fridland, Valerie. July 2005. Symposium panelist (Sociophonetics — A New Tool in Applied Linguistics). The cycle of perception, ideology, and perception in the speech of Memphis, TN. Paper presented at the AILA conference. Madison, WI.
- Fridland, Valerie and Kathy Bartlett. March 2005. Correctness, Pleasantness and Degree of Difference Ratings across Regions. SECOL Conference. Raleigh, N.C.
- Fridland, Valerie and Kathy Bartlett. 2004. What we hear and what it expresses: The perception and meaning of vowel differences among dialects. Paper presented at LAVIS III (Language and Variation in the South II) Conference. Tuscaloosa, AL.
- Fridland, Valerie. 2004. The spread of the cot/caught merger in the speech of Memphians: An ethnolinguistic marker? Paper presented at LAVIS III (Language and Variation in the South II) Conference. Tuscaloosa, AL.
- Fridland, Valerie, Bartlett, Kathy and Wayne Mackey. 2003. Making sense of variation: Pleasantness and education ratings of regional vowel variants. New Ways of Analyzing Variation Conference 32, Philadelphia, PA.
- Fridland, Valerie. 2003. The social and linguistic conditioning of back vowel fronting across ethnic groups in Memphis, TN. New Ways of Analyzing Variation Conference 32, Philadelphia, PA.
- Fridland, Valerie. 2003. A Look Across Region and Race: patterns of fronting in the BOOT, BOOK and BOAT classes. 2003 Southeastern Conference on Linguistics (SECOL), Washington, D.C.
- Fridland, Valerie and Kathy Bartlett. 2002. Do you hear what I hear? Experimental measurement of the perceptual salience of acoustically manipulated vowel variants by Southern speakers in Memphis, TN. New Ways of Analyzing Variation Conference 31, Stanford, CA.
- Anderson, Bridget and Valerie Fridland. 2002. A Comparative Study of /ai/ among African-Americans in Memphis and Detroit. New Ways of Analyzing Variation Conference 31, Stanford, California.
- Fridland, Valerie. 2002. Convergent and divergent tendencies in the African-American and European-American vowel systems in Memphis, TN. 2002 Southeastern Conference on Linguistics (SECOL), Memphis, TN.
- Fridland, Valerie. 2001. Network strength and the realization of the Southern Vowel Shift among African-Americans in Memphis, TN. New Ways of Analyzing Variation (NWAVE 30). North Carolina State University in Raleigh, N.C.

- Fridland, Valerie. 2000. Searching for identity: Competing national and local norms in the Southern Shift. New Ways of Analyzing Variation: 29th Annual Meeting (NWAVE 29). Michigan State University, East Lansing, MI.
- Fridland, Valerie. 2000. Language and Gender Revisited: the language of young adults. 7th International Pragmatics Conference (IPRA). Budapest, Hungary.
- Fridland, Valerie. 2000. The Sociolinguist in Court. Discourse analysis in criminal justice panelist. Georgetown University Roundtable on Linguistics (GURT). Washington, D.C.
- Fridland, Valerie. 1999. The social dissemination of the Southern Shift. New Ways of Analyzing Variation: 28th Annual Meeting (NWAVE 28). University of York, Toronto, CA
- Fridland, Valerie. 1999. Motivating Sound Change In American Dialects: A Critical Look at Chain-shifting. Linguistic Society of America 1999 Annual Conference (LSA). Los Angeles, CA.
- Fridland, Valerie. 1998. Evaluating the Chain-Shift Status of the Southern Vowel Shift: A Critical Re-Examination. New Ways of Analyzing Variation: 27th Annual Meeting (NWAVE 27). University of Georgia, Athens, GA.
- Fridland, Valerie. 1998. Southern Vowels. Southeastern Conference on Linguistics (SECOL). University of Southeastern Louisiana, Lafayette, LA.
- Fridland, Valerie. 1997. The Effect of Neutralization and the Southern Vowel Shift on Vowel Behavior before Laterals in Memphis, TN. New Ways of Analyzing Variation: 26th Annual Meeting (NWAVE 26). Laval University, Quebec, Canada.
- Fridland, Valerie. 1997. The Pin/Pen Merger (or lack thereof) in Memphis, TN. New Ways of Analyzing Variation: 26th Annual Meeting (NWAVE 26). Laval University, Quebec, Canada.
- Fridland, Valerie. 1996. Linguistic and Social Environments Affecting the Southern Vowel Shift. New Ways of Analyzing Variation: 25th Annual Meeting (NWAVE 25). University of Nevada, Las Vegas, NV.
- Fridland, Valerie. 1996. Prosecuting strategies in rape trials. Sociolinguistics Symposium 11. University of Wales, Cardiff, UK.
- Fridland, Valerie. 1996. Prosecution and Defense: An Analysis of Examination Strategies. Law and Society Conference. Glasgow University, Glasgow, Scotland.
- Fridland, Valerie. 1995. Tri-Syllabic Vowel Laxing and the Mental Lexicon of Native English Speakers. New Ways of Analyzing Variation: 24th Annual Meeting (NWAVE 24). University of Pennsylvania, Philadelphia, PA.

- Fridland, Valerie. 1995. Silence in the Court: attorneys silencing strategies in cross-examination. Keio University Symposium on Silence and Silencing Strategies. Tokyo, Japan.
- Fridland, Valerie. 1995. Tri-Syllabic Vowel Laxing and the Mental Lexicon of Native English Speakers. Michigan Linguistics Society. University of Michigan, Ann Arbor, MI.
- Fridland, Valerie. 1995. The Interaction of Question Form and Narrative Structure in Courtroom Cross- Examination. Presession. Georgetown University Roundtable on Linguistics. Washington, D.C.
- Fridland, Valerie. 1995. Synchronic Organization of Diachronic Sound Changes: The Status of Tri-Syllabic Vowel Laxing in Native English Speakers. Michigan State University Linguistics Colloquium Series. East Lansing, MI.
- Fridland, Valerie. 1994. Language and Power in Male-on-Male Rape Trials. Berkeley Women and Language Conference. Berkeley University, Berkeley, CA.
- Fridland, Valerie. 1994. Language and Power in Male-on-Male Rape Trials. Southeastern Conference on Linguistics (SECOL). University of Memphis (formerly Memphis State University), Memphis, TN.
- Fridland, Valerie. 1993. Problems with Men and Women. Southeastern Conference on Linguistics (SECOL). Auburn University, Auburn, AL.

EXHIBIT 2



Distinguished Research Professor
of Linguistics, Emeritus
Georgetown University

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Federal Criminal Cases In Which Expert Witness Testimony Was Given:

U.S. v. Brian Lett
District Court of Minnesota
Attorney: Scott F. Tilsen, USPDO (conspiracy to commit fraud) 2001

U.S. v. James Leonard
Eastern District of New York Federal court(Hearing)
Attorney: Ralph Martin, Washington D.C. (narcotics)1994

U.S. v. Paul Campbell
District of Columbia Federal District Court
Attorney: Reita Pendry, Washington, D.C. (narcotics) 1993

U.S. v. Kevin Williams-Davis et al
D.C. Federal District Court, Washington,D.C.
Attorney: Leonard Birdsong, Washington, D.C. (murder) 1992

U.S. v. David Shields and Pasquale DeLeo
Illinois Federal District Court, Chicago
Attorneys: Dan Webb, Steve Molo, Chicago (bribery)1991

US v. Richard Silberman
California Federal District Court, San Diego
Attorneys: James Brosnahan, San Francisco (money laundering) 1990

US v Amancio Alonso
Florida Federal District Court, Miami
Attorney: Jose M. Quinon, Coral Gables (bribery) 1989

US v Gordon Reeves, Doylin Kile, Charles Kerlegon
Louisiana Federal District Court, Lafayette
Attorney: Michael Small, Alexandria, LA (bribery) 1988

US v Alan Blake, Jack Capra et al
Minnesota Federal District Court, Minneapolis
Attorney: Joseph Friedberg, Minneapolis (narcotics) 1987

US v John DeLorean
California Federal District Court, Los Angeles (Hearing)
Attorney: Howard Weltzman, Los Angeles (narcotics) 1984

US v Natale, Malina and Wash
Texas Federal District Court, Dallas
Attorney: Steve Sumner, Dallas (threatening) 1984

US v Henry Ingram and C. Brantley
South Carolina Federal District Court, Columbia
Attorney: James Moss, Beaufort, SC (bribery) 1984

US v. G. Meacham and C. Lozan
Maryland Federal District Court,Baltimore
Attorney: Larry Debus, Phoenix (narcotics) 1983

US v William Page
Oklahoma Federal District Court (Western)
Attorneys: Warren Gotcher, McAlester, Carl Hughes, Oklahoma City
(bribery) 1983

US v T. Coleman and S. Busch
Oklahoma Federal District Court (Northern)
Attorneys: J. Lang, Tulsa, R. Mook, Tulsa (bribery)1983

US v Don Tynor
Oklahoma Federal District Court (Western)

Attorneys: D.C. Thomas, Oklahoma City, S.A. Guiberson, Houston
(threatening)1982

US v William Musto et al
New Jersey Federal District Court, Newark
Attorneys: Alan Silber, Newark, Joseph Haydon, Newark
(bribery)1982

US v Gene Slipe and Red Ivy
Oklahoma Federal District Court (Western)
Attorneys: Carl Hughes, Oklahoma City, S.A. Guiberson, Houston
(bribery) 1981

US v John McNown
Nevada Federal District Court, Reno
Attorney: Frederick Pinkerton, Reno (bribery) 1981)

US v John Poli and John McNown
Nevada Federal District Court, Reno
Attorney: Frederick Pinkerton, Reno (bribery) 1981

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State Criminal Cases In Which Expert Witness Testimony Was Given:

Montana v. Cheryl I. Clifford and Larry J. Clifford
Helena, MT: Attorneys: Palmer Hoovestel and Greg Jackson (Helena)
(threatening) 2003

Colorado v. Delfino Ortega
Colorado Springs, CO: Attorney: Dennis W. Hartley (narcotics) 2001

Texas v. Jim Ovecka
Dallas: Attorney: Charles Jamleson (sexual misconduct) 1998

California v. Wright, Hill and Mason
San Diego, CA (hearing) Attorney: Geraldine Russell (murder) 1996

Delaware v. Gene Read
Georgetown, DE: Attorney: Joseph Hurley, Wilmington (bribery) 1992

Virginia v. Beverly Monroe
Powhatan, VA: Attorney: Murray Janus, Richmond (murder) 1992

Arizona v. Ron Tapp and Carolyn Walker
Phoenix, AZ: Attorney: Larry Debus, Phoenix (bribery) 1992

North Carolina v. Robert Lee Biggs
Edenton, NC: Attorney: Zee B. Lamb Elizabeth City, N.C. (murder) 1992

Oklahoma v. Steven Allen
Bartlesville, OK: Attorney: Alan Carlson, Tulsa (murder) 1991

Florida v. Donald Fitzpatrick
Ft. Lauderdale, FL: Attorney: Bruce Lyons, Ft. Lauderdale (narcotics) 1990

District of Columbia, In re: MBR (juvenile): Attorney: Julia Leighton, DC (harassment) 1991

California v. Keith Cosby
San Diego, CA (hearing) Attorney: Allen Bloom, San Diego (murder) 1988

California v. Laura Trojani
Vista, CA: Attorney: Geraldine Russell, San Diego (murder) 1987

Alaska v. Larry Gentry
Anchorage, AL: Attorney: Mitchell J. Schapira, Anchorage (murder) 1986

Ohio v. Charles Lorraine
Warren, O: Attorney: Michael Gleespen, Columbus (murder) 1986

Florida v. David Glendenning
Sarasota, FL: Attorney: James Dirmann, Sarasota (child sexual abuse) 1985

Texas v. Robert Gahl
Dallas: Attorney: Michael Gibson, Dallas (bribery) 1985

Ohio v. Samuel Huggins
Creston, O: Attorney: Daniel O'Brien, Dayton (narcotics) 1984

Texas v. T. Cullen Davis
Ft. Worth: Attorney: Richard Haynes, Houston (soliciting murder) 1979

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US House of Representatives & Senate Cases In Which Expert Witness Testimony Was Given:

July 14, 17, 1989

Testimony before the U.S. Senate Special Impeachment Committee in the matter of the impeachment of Federal Judge Alcee Hastings; Chairman, Senator Jeff Bingaman. On behalf of the government, presented analysis of the tape recorded conversations used in Judge Hastings' criminal trial, concluding that the conversations were conducted in a hastily constructed code.

March 4, 1989

Testimony before the U.S. House of Representatives Committee on the Judiciary, Subcommittee on Criminal Justice; Chairman Rep. John Conyers, in the matter of the impeachment hearings of Federal Judge Alcee Hastings. On behalf of the government, presented analysis of the tape recorded conversations used in Judge Hastings' criminal trial, concluding that Hastings and another man conversed in hastily constructed code language.

March 4, 1982

Testimony before the U.S. Senate in the matter of the Senate Ethics Committee hearings concerning U.S. Senator Harrison A. Williams, Jr. On behalf of the Senator, presented analysis of tape recorded conversations in Senator Williams' Abscam trial and conviction, showing that his criminal trial overlooked or misinterpreted tape recorded information.

March 2, 1982

Testimony before the U.S. House of Representatives Committee on the Judiciary, Subcommittee on Civil and Constitutional Rights, Chairman Rep. Don Edwards (FBI Oversight). Represented the field of forensic linguistics and what it has to say about how the government used language evidence in past and current sting operations.

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EXHIBIT 5



Roger W. Shuy

Distinguished Research Professor
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Consultant/Trainer, State of Montana Department of Revenue, 2005.

Assisted the department in revising its tax forms, instructions and letters, then carried out a series of training programs for department employees about how to accomplish clear writing.

Consultant, F.B.I., Gary, Indiana extortion, bomb threat, 1997.

The FBI sent me 4 bomb threat messages, which I used to compare with the writings of ten employees at a women's clinic that received the threats. Doing a stylistic analysis of the ten writers, I concluded that the writer was the head of the clinic herself. When confronted with my analysis, the clinic's owner confessed.

Consultant, F.B.I., Atlanta Olympics bombings, 1997.

The FBI gave me the 911 telephone recording in this case and asked me to prepare a linguistic profile of the writer, which I did in the form of a report.

Consultant, Royal Canadian Mounted Police, LOKI bomber case in PEI, 1997.

I was asked by RCMP to analyze the writings of a suspect in this case. I carried out a stylistic comparison and the investigators confronted the suspect with my findings, assisting in his confession.

Consultant, F.B.I., Arizona train sabotage case, 1996.

The FBI asked me to analyze a message found at the scene of the sabotage and to produce a linguistic profile of the perpetrator. I provided a report of my findings.

Consultant, F.B.I., the case of the Unabomber, 1996.

The FBI asked me to analyze the messages sent to victims of bombings, and later the Manifesto, in order to provide a linguistic profile of the perpetrator. I provided a report of my findings.

Consultant, U.S. Department of Justice, U.S. v Lee Anderson (illegal campaign fund use), 1994.

I was asked by the DOJ attorney to analyze tape recordings in this case and be prepared to testify at trial. The case was settled before trial.

Consultant, U.S. Department of Justice, "Dirty Dozen Case" (police misconduct, narcotics), 1994.

I was asked by the D.C. Assistant DA to analyze tape recordings in this case and be prepared to testify at trial if the defense should use a linguist. The defense did not.

Expert Witness, D.C. Police Department, Internal Affairs, hearings on alleged cheating on police promotion examinations, 1993-94.

I was called by the DC Police Dept. to analyze the exams of candidates for promotion and to help them determine whether or not one particular examinee had used out-side information to obtain a high score on her exam. I testified about my findings at a trial before the police commissioners.

Speaker, Organized Crime and Drug Enforcement Task Force, on the language of undercover operations, Osage Beach, Missouri, 1992.

I was invited to present to the Task Force what a linguist would do, for the prosecution or defense, with undercover tape recordings.

Director, U.S. Drug Enforcement Agency training program on the language of undercover operations, Miami, June 1991.

The director of the Miami DEA invited me to train undercover agents on the linguistic aspects of their undercover conversations. It was a 7 hour, one day training program.

Consultant, U.S. Department of Justice, U.S. v. Federal Judge Robert Aguilar (RICO, obstruction of justice), 1990.

The Asst. DA had me analyze the tape recordings and be prepared to testify if the defense should use a linguist. The defense did not.

Expert Witness, U.S. Senate, special committee on impeachment of Federal Judge Alcee Hastings, 1989.

After this matter was finished by the House, the Senate had me testify before this committee, which I did.

Expert Witness, U.S. House of Representatives, Committee on the Judiciary, hearings on the Impeachment of Federal Judge Alcee Hastings, 1988.

The government called me to analyze tape recordings and to testify before the committee, which I did.

Consultant, U.S. Department of Justice, U.S. v. Noucher, New Hampshire (extortion), 1988-89.
The Asst. DA in this case had me analyze the tape recordings and be prepared to testify if the defense should use a linguist. The defense did not.

Consultant, U.S. Department of Justice, U.S. v. Hicks, New Hampshire, (extortion), 1987.
The Asst. DA in this case had me analyze the tape recording and be prepared to testify if the defense should use a linguist. The defense did not.

Director, 6 three month training programs on clear writing of legal notices, U.S. Social Security Administration, 1985-86.

Some 50 or 60 SSA writers (12 to 15 per group) were trained by a psychologist and me in weekly sessions over a three month period in how to make their notices effective and clear. For our work we were given a Public Service Award by the SSA.

Expert Witness, U.S. House of Representatives, Committee on the Judiciary, hearing on FBI oversight, March 2, 1982.

This report was done over several months, producing several documents, including "FBI Undercover Operations," published by the US Govt. Printing office in April 1984.

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SUNDAY, JUNE 29, 2008

ASK THE EXPERT: Margaret van Naerssen on
Forensic Linguistics

"ASK THE EXPERTS" IMPORTANT TOPICS FOR FOREIGN NATIONALS

Marcia Shein on Cultural Issues and
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Kathy Kellerman on Cultural
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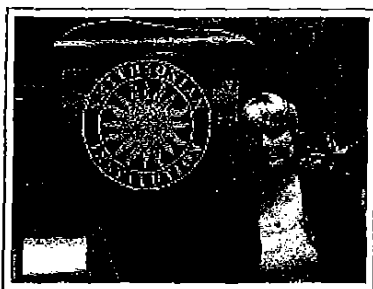
John Ovink on Immigration Law
Issues

Sophie Feal on Cuban Nationals and
Repatriation

Isabel Framer on Qualified
Interpreters

Mark Warren on Consular

<http://representingforeignnationals.blogspot.com/2008/06/ask-expert-margaret-van-naersse...> 1/20/2009



Ask The Expert: Margaret van Naerssen on the Admissibility of Discourse Analysis

In *USA v Amawi*, a federal court judge granted the government's motion to exclude testimony from a renown forensic linguist, Roger

Shuy. 2008 U.S. Dist. LEXIS 38287.

An excerpt of the opinion can be found here.

Editor: We asked expert, Dr. Margaret van Naerssen, to comment on the Court's pre-trial decision to exclude Dr. Shuy's testimony.

Dr. van Naerssen has a Ph.D. in applied linguistics/language acquisition from the University of Southern California (1981), and is now on the faculty at Immaculata University (Pennsylvania), coordinating graduate-level teacher training programs in cultural and linguistic diversity. She is also occasionally an English language specialist overseas with the U.S. Department of State. Since 1997 she's done expert consultant/witness work in forensic linguistics at the federal and state level, in criminal and civil cases involving murder, rape, drugs, money laundering, robbery, perjury, fraud, contract and plain language guidelines, slander, medical malpractice, and interpreting issues. A majority of her cases have involved non-native speakers of English. She's has published and given presentations on forensic linguistics, including at the Smithsonian Institute in Washington D.C. and at the FBI Academy.

Q: On reading the court's opinion, what was your general reaction to the Court having excluded Dr. Shuy's expert testimony from trial?

A: I'm particularly concerned about the negative effect that some of the wording of the court's opinion might have on future contributions by qualified forensic linguists doing careful and systematic linguistic analysis in other cases.

Notification/Vienna Convention
Margaret van Naerssen on Forensic Linguistics
David Pakula on Immigration Consequences of Simple Possession

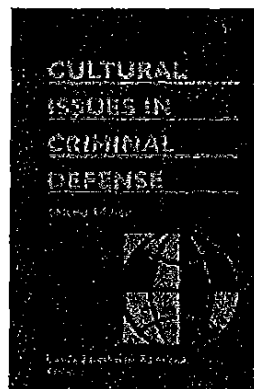
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TREATISES FOR PRACTITIONERS



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Q: The opinion suggests that Dr. Shuy did not testify prior to the court's ruling on the admissibility of the proffered testimony. Do you think this made some difference in the court's ultimate decision on admissability?

A: I think it might have though I don't know all the circumstances of the trial. The judge did not give Dr. Shuy an opportunity to respond to the Court's belief that the substance of Shuy's testimony is common knowledge. I've **boldfaced** the critical phrases.

"The first two of these analyses -- topics and responses -- as presented in Prof. Shuy's report, constitute little, if any, more than a recitation of what is readily discernible in the recorded conversations."

* * *

"Prof. Shuy's response analysis likewise consists, in essence, of a recapitulation of readily ascertainable aspects of how El-Hindi and Griffin interacted, or failed to interact, during their various encounters and conversations. Thus, the first two segments of the proposed testimony provide nothing beyond that which the jury can hear for themselves, or from which counsel can urge them to draw the inferences they seek to have the jurors draw."

And in the court's reference to a precedent in USA v Evans:

"The court also found that the expert's testimony would not assist the jury because the subject matter of the testimony, conversation, was one which could be expected to be within the general knowledge of jurors."

* * *

"Such testimony was aimed not at explaining technical terms used in the conversation. Instead, this expert sought to interpret language in ordinary usage, which the district court found would have confused, not assisted, the jury."

I do think the court's arguments reflect a common concern linguists have when testifying in court. Non-linguists naturally think they know all there is to know about their language since they speak it, probably have spoken it all their lives, have been educated through it, and use it in their daily lives. However, they are NOT trained to look systematically for patterns and inconsistencies in language.

Q: Well, can't we all have opinions about our language?

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Please go to our blog on
*Extradition, and Foreign Evidence
Issues*

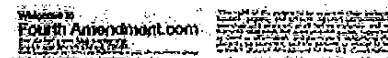
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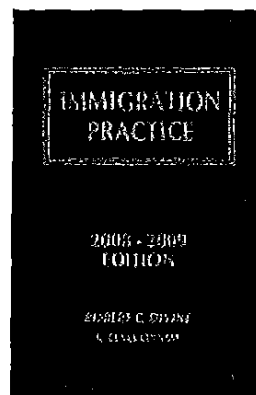
IMMIGRATION PRACTICE

A: Yes, but these opinions generally are more intuitive than based on rational theory and systematic linguistic evidence. Non-linguists use language everyday, so they are usually not accustomed to thinking about the rules they use when communicating. Just like when we walk, we don't think much about it unless we are having some sort of difficulty. We do it naturally. Native speakers have a hard time recalling specific formal grammar or spelling rules learned in elementary school. We usually don't need to refer to a rule since we use the language naturally, without thinking about it. Also the court appears to assume that a linguistic expert could only testify on technical terms used in a conversation, if there had been any. Yes, linguists do sometimes testify about the meaning of a word(s), for example, in cases on contracts or trademarks. But linguistic experts also testify about other areas as well.

Linguistics is the scientific study of the language and its systems. It's been accepted by the National Science Foundation as a legitimate area of scientific research. When analyzing conversations linguists can do analyses at both macro- and micro-levels. Discourse analysts focus on units of speech larger than the sentence and their relationship to the contexts in which they occur. Linguists doing **discourse analyses** of written or spoken communications are trained to look for certain features that help to reveal the overall structure, how the text holds together, including analysis of topics. (In examining covert law enforcement recordings, topic analysis is very important.)

Conversation analysts focus more on the micro-level. In doing **conversation analysis** they examine turn-taking, including the various features of interactions that mark who is controlling the interaction, communication breakdowns, misunderstandings, etc. Discourse and conversation analyses **do not** involve making intuitive judgments. They are grounded in principled research. In both linguists know which features are relevant and important to note and quantify. Linguists with experience in forensic settings bring the additional expertise of knowing how to relate an analysis to legal questions and consider which linguistic tools, strategies, and features are most relevant. Shuy is such an expert. [2]

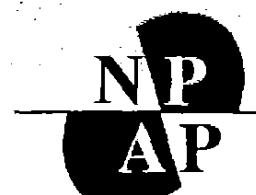
Q: So once the analysis is completed, the expert then needs to report the findings to assist the fact finders in understanding the evidence in question?



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National Police Accountability Project provides support and networking opportunities to plaintiff's attorneys in Section 1983 law enforcement misconduct cases.

TREATISE ON MITIGATING
FACTORS: 171 EASY

A: Right. But here is the dilemma. Once an analysis is done, an effective expert then tries to make the findings accessible to non-linguists (attorneys, judges, jury members) – as you said, to assist them in better understanding the evidence before them. However, by making the findings accessible, then there may be the reaction, "Oh, I hadn't thought about that, but yes...of course, I see, that's common sense."

At the same time the findings must also be reported in a way that is accepted in the professional field of the expert. Perhaps it was this attempt to make evidence accessible to non-linguists --yet keep it grounded in theory-- that caused the judge

--To refer to the evidence in a disparaging way, "semi-academic dressage," as in "'conversational strategies' as contained in Prof. Shuy's proposed report, despite its semi-academic dressage."

--To use the argument: "within the general knowledge of jurors" by using that phrase--as well as "provide nothing beyond that which the jury can hear for themselves, or from which counsel can urge them to draw the inferences they seek to have the jurors draw.." and " what is readily discernible in the recorded conversations."

Thus, it is understandable that a non-linguist, such as a judge, may feel that what the expert has provided is within common knowledge so it is something the jury can intuit anyway. But it takes the linguist to know what to look for, to know how to do the analysis in a principled way so the analysis is well-grounded and patterns quantified so the findings are sound linguistic evidence, and not just intuition. The linguist also helps the fact-finders by keeping track of the patterns of interaction which the fact-finder is not likely to track systematically. But Dr. Shuy was not allowed to explain the basis of his analysis nor his findings to the fact finders.

Q: I see the dilemma, but isn't it a hard idea to get across to a non-linguist?

A: True, but let me paraphrase a comparison Shuy has made about the role of an expert. For example, based on my own basic education, media exposure, other life experiences, I can look at an x-ray of your chest. I can find your lungs, your basic skeletal bones, your intestines, your stomach, and your heart. I can do this without

MITIGATING FACTORS

"171 Easy Mitigating Factors" is a widely used and nationally acclaimed publication which includes a compilation of federal cases from around the country suggesting grounds and approaches for mitigating a criminal sentence. Authored by Michael Levine, the publication is updated regularly during the year.

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▼ January (14)

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Immigration Law: Alien has no Right to Effective R...

International Human Rights Law: No Sovereign Immun...

Immigration Advocacy: Spotlight on the National Im...

Vienna Convention: NJ Court Rejects Claim

Jury Selection: Florida S. Ct.

medical training. But if you were having a health problem, would you want me to try to diagnose the problem. No! You'd want a trained physician to do the diagnosis, right? To recognize the details and to know what they indicate.

In the same way, we all can intuit things about language. But suppose your life or freedom depended on others listening to a recording of you talking with another person. If you felt you were innocent, and if you felt you hadn't said anything incriminating, wouldn't you want an expert in linguistics to do the analysis?

Or would you prefer to leave it up to the jury to simply give their intuitive and mixed interpretations, influenced by the persuasive techniques of the attorneys, of what your meaning was, of was going on in the conversation? Of course, no one, not even the linguist, could know with absolute certainty what was happening in a person's mind. But in such a case an expert in linguistics can provide principled and useful insights to assist the fact finders. (Note: I am not addressing the specific claims in the case USA v Amawi)

Q: One last observation—the judge did say that "Other courts have found testimony of the sort proffered here, including testimony by Prof. Shuy, not to be admissible for similar reasons." Does that mean that no testimony involving analysis of conversations has been admitted in courts?

A: Wrong. It has been admitted in numerous cases. But these were not mentioned in the opinion. Such cases cannot be found in a search of cases unless a linguistic issue is the basis of an appeal. If Shuy had testified, he could have provided information on the numerous cases where his testimony has been admitted. For example, in a well-known case (US v John DeLorean), also involving covert recordings, Shuy's report was admitted and his findings became critical. The confidential informant, wired for recordings, used ambiguous references such "we," "this," "that," "interim deal," "interim financing," "interim thing." The government claimed these referred to the early stages of building a drug business. Shuy was brought into analyze the tapes. He was able to show that throughout the conversations DeLorean's understanding of "interim deal" etc., referred to a more benign investment.

Finally when DeLorean realized the government informant was

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(1977)

► 2008 (209)

referring specifically to a drug deal, Shuy also was able to show how DeLorean, through language, tried to distance himself. DeLorean even concocted the IRA as a protector-- saying that they wouldn't want to him to be involved in anything that was illegal. It was Shuy's analysis and testimony on this SPECIFIC conversation that convinced the judge and jury, by then angry and outraged, that this was clearly a case of entrapment. DeLorean was set free. [3]

Thanks for giving me a chance to discuss my thoughts on this court opinion. I hope these comments give you-- and other officers of the court--a few insights on what an expert witness in linguistics can offer "beyond common knowledge" about language evidence

[1] I am not directly familiar with the details of the case except as presented in the several excerpts of the judicial opinions that Linda Ramirez has posted.

[2] Dr. Shuy is recognized internationally as a leader in the forensic linguistics community. He is well respected for his ethics and overall professionalism and his scholarship in the applied linguistics field, having been given the Award for Distinguished Scholarship and Service, by the American Association, March 1999. In the area of Discourse Analysis, and especially in examining undercover communications as in this case, he is the best expert there is.

[3] The case is discussed in Shuy's 1993 book, Language Crimes; in an unpublished paper by Shuy, "Using a Linguist in Tape Cases," pp. 11-12; and in personal communication, 9/8/05.

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November 26, 2008

ANALYSIS AND COMPARISON OF LINGUISTICS USED BY
ANABEL ESPINDOLA

As background, my name is Valerie Fridland and I am a tenured professor at the University of Nevada, Reno. My PhD is in the field of linguistics, with a specialization in the area of sociolinguistics. I was recently an expert in the matter of Steve Sisolak v. Harvard Lomax, a Nevada Supreme Court case, Case No. 51798, where I opined about the term limit initiatives. The following analysis of Anabel Espindola's language use is based on my professional expertise and training and the materials I have been provided for review. I have also attached specific excerpts of Espindola's linguistics which I discuss below.

Sociolinguistics takes an empirical approach to the investigation of language variation and language use. My analysis of the provided materials was informed by the fields of discourse analysis (Schiffren 1994, 2003) and pragmatics (Levinson 1983). Discourse analysis involves examining utterances in connected discourse to determine how interlocutors construct conversation in such a way that intended meaning is produced and, crucially, understood. Speech events are rapid and efficient in that speakers and hearers typically do not provide contextualizing framing with every utterance, instead relying on shared background and knowledge of prior events to 'fill in' any unstated information to maintain discourse cohesion. The extent to which such

shared or background knowledge is assumed by participants will determine the degree to which such information will be included in the actual discourse or will, instead, utilize discourse cues indicating common ground status. This prior knowledge can be assumed based on previous discourse or events (at some point prior to current discourse) to which conversationalists had access or to more general common beliefs or background shared by participants. So, for example, by using the definite article 'the' in an utterance such as "The bird sings beautifully," a speaker is indicating that the listener is aware of which bird it is to which he/she is referring. On the other hand, the utterance "A bird sings beautifully," which uses an indefinite article, makes no such assumptions and, instead, would be taken as a general statement. Similarly, the use of pronominals (such as he, they, it) is highly context dependent as listeners must be able to establish, based on either immediate or prior events, the antecedent for the pronoun in order to maintain discourse coherence.

This discussion is relevant to the interpretation of the grand jury testimony and statements to police made by Anabel Espindola (Heretofore referred to as AE) and the recordings of her conversation with Mr. Deangelo Carroll (Heretofore DC). In the surreptitious recording made by DC, AE's utterances made extensive use of the first person singular (I) and first person plural (we) pronouns. In addition, these pronouns were typically employed in subject position of declarative statements using the nominative case. In other words, her sentences were syntactically constructed with the 'I' or 'we' pronouns occupying the subject position. (See excerpts marked 1-8). In contrast, when testifying before the grand jury, she rarely used the first person pronoun in the nominative case (in subject position), instead shifting to pronouns positioned syntactically as verbal object. In her grand jury testimony, AE instead typically assigned syntactic subject position to pronouns or proper names that referenced Luis Hidalgo, Jr., the man she was testifying against for the government (See excerpts marked 9-17).

More important than the simple structural position of pronominals is the way in which those pronominals are understood in terms of the role they play in the action described by the verb. Through the syntactic assignment of thematic roles (or the understanding of the roles played by various syntactic phrases within a sentence in terms of the verbal action), interlocutors are able to essentially interpret who did what to whom and where. Now, while this may seem very straightforward, it is actually quite a complex process whereby we all must have the SAME understanding of the relationship between syntactic position in a sentence and the role played by that position in order for conversation to be intelligible. In other words, in the sentence "He shot T.H.," it is a crucially important distinction that the antecedent for the pronoun 'He' was the actor in the verbal action and T.H. the recipient of the verbal action. The theory of such role assignment and how we interpret them is referred to in semantics as the study of theta or thematic roles (Jackendoff 1972). As English sentences lack the extensive case markings found in some other languages, we must make use of word order in the marking of thematic roles. In other words, since there is typically no case ending that appears on individual words in English that tell us how to interpret them in relation to the other words in the sentence, we must tightly control which syntactic position a phrase occupies in order to properly depict how that phrase should be interpreted. Thus, English listeners assign a default 'agent' role to all subject positions unless the sentence is 'marked' to be interpreted differently, such as in the case of passive voice sentences where there are syntactic signals that typical role assignment is suspended. In fact, there is quite a bit of evidence that we are essentially 'pre-programmed' cognitively to assume the subject as agent. Children do not seem to understand the syntactic signals of passive voice until the age of six or so, instead interpreting all sentences as having agentive subjects.

Unlike modern English, old English had a more flexible word order as nouns were case marked. A vestige of this case marking is contained on modern day pronouns which still maintain this nominative/objective case distinction (I/me, we/us, he/him, etc.). When used in nominative case, listeners assign an agentive role to the pronoun such that using

"I" or "we" will suggest to an English listener that the person or persons speaking was directly involved as the actor of the verbal action. Similarly, using objective case pronouns will lead to the interpretation of the referent (the person referred to by the pronoun) as the recipient of the action described by the verb.

In her almost exclusive use of objective case self-referential pronouns in object position and her positioning of nominative case third person pronouns and proper names in subject position in her grand jury testimony, AE suggests that she was only the recipient, not the agent or actor, of the action which she describes. She positions herself as a passive recipient of both information in terms of her knowledge of events and in terms of her participation in the activities that lead to the death of Mr. Hadland. Examine AE's discussion of DC's taking a leave of absence in her grand during testimony.

(Excerpts 14 and 15)

In contrast, in the surreptitious recording made directly following the events in question two years earlier, AE almost exclusively uses first person pronouns (either I or we) and there is not a single reference to Luis Hidalgo, JR, either directly or as referent of a pronominal form, as the agent of action to which she was recipient, as she suggests in her later testimony (Excerpts 19a and b, 22). In other words, she never positions herself as the recipient of information that she is just passing along to DC with no direct knowledge of or involvement in the events in question. For example, in her statement to police she claimed that it was Luis Hidalgo, Jr.'s idea that DC not come to the club anymore and to use his sick son as justification, (See excerpt 18) The recordings, though, suggest that that DC's leave of absence using his sick son as an excuse was her idea (Excerpts 19a and b). She never indicates to Mr. Carroll that Mr. Hidalgo will be the one to compensate him for his silence as claimed in her police statement. Instead, when speaking to Mr. Carroll and unknowingly being recorded, she coaches him on what he should say to the police and assures him that she will take care of him (Excerpts 21 and 22). Again, while she attributes both of these directives to Mr. Hidalgo and herself as

merely a messenger in her statement two years later to police (Excerpt 18), there is no mention of or reference to Mr. Hidalgo's role when she speaks with Mr. Carroll. Similarly, she claims to police (excerpt 18, 20) that Mr. Hidalgo told her to tell DC to get a pre-paid phone, but in her actual conversation with DC, she never attributes the need for a pre-paid phone to a request from Mr. H. (Excerpt 6, 20), though she is quite forceful in her representation of its urgency.

In addition to her shift in use of pronominal forms, she presents conflicting accounts of what has been established as the common ground in the initial recording and the record of her grand jury testimony. Common ground is essentially presupposed information between speakers, where a presupposition of an utterance is taken as part of the "assumed background" of an asserted proposition (Stalnaker 1974). The Common Ground (CG) is essentially the beliefs about the world in which the conversation is grounded which the participants agree to be uncontroversial (and uncontested) for the purposes of the conversation. The CG aids in the efficiency of conversation, as one does not state things already taken for granted or previously discussed. In addition, we do not generally assert things that are incompatible with the CG, as they will not be accepted by interlocutors.

The representation of the Common Ground during A.E.'s grand jury testimony is starkly different than what is established by conversation as the common ground during the surreptitious recordings made two years prior. In her grand jury testimony, Ms. Espindola asserts that she had no first hand knowledge of the planning of or follow-through on the attack/murder of Mr. Hadland. However, her conversation with Deangelo Carroll from two years earlier indicates otherwise. Excerpt 23 reprints her testimony in front of the grand jury where she discusses her attempts to get in touch with Mr. Carroll on the night of the event in question.

In this reported exchange, Anabel says Mr. Hidalgo directed her to call Deangelo and tell him to go to plan B and that this is unusual on Mr. H's part. Previously in her

grand jury testimony she claims she was not privy to any of the planning regarding the intent to do bodily harm to Mr. Hadland and that her only involvement had been as an employee of Mr. H., instructed to make a 5,000 dollar payment to Mr. Carroll, the reason for which she, like the above, was not made aware. In both cases, she states that these were unusual actions, but ones which she did not question further. In her grand jury testimony, she is claiming that the common ground (or prior knowledge) that had been established in her conversations with Mr. H. did not include the solicitation of the assault on Mr. Hadland or of the related activities of Mr. Carroll on that evening. She instead suggests that the common ground merely involved unusual requests by Mr. H.

Compare this to the discussion of this same call between Ms. Espindola and Mr. Carroll that came just days after the events in question in Excerpt 24. In this relaying of the same phone call referenced in her grand jury testimony, there is no discussion of any involvement of other persons. For example, She does not say "No! Louie only told you to beat him up, not take care of him." Nor does Ms. Espindola deny the propositional content of the conversation in terms of the fact that they had a discussion about whether to beat up Mr. Hadland or to 'do him in'. Instead, the debate centers on whether she in fact wanted him dead or, instead, wanted Mr. Carroll to go to plan B. Lines 7-11 from the above transcript are particularly important in establishing the Common Ground. In lines 7 and 8, DC recalls that he specifically asked Ms. Espindola if she still wanted him to 'do him in'.

If the full propositional content of these utterances are to be added to the common ground (that which is mutually understood and uncontested as having occurred by both participants) then Ms. Espindola must not reject (1) that she had a conversation with Mr. Carroll and (2) that they discussed whether to 'do him in' if he was alone. In her response to Mr. Carroll's assertion, she does not debate either (1) or (2) as true. Her disagreement, instead, is only with his statement that "You said Yeah". To which she replied "I did not say 'yes'", further suggesting that they did in fact have the conversation

repeated in lines 7 and 8 and that she disagreed with his claim that she did in fact encourage him to 'do him in'. By her response that she did not say yes to his question, she acknowledges the veracity of the conversation as repeated by Mr. Carroll (thereby establishing it as common ground in their conversation). She didn't in any way reject the presupposition that there was a conversation and that this conversation included a discussion of whether to harm Mr. Hadland. Instead, she rejects Mr. Carroll's assertion that she answered in the affirmative to his question, implying the question was indeed asked. She goes on to attempt to correct him in terms of his recollection of her response to his question of what to do to Mr. Hadland by indicating that she told him NOT to 'do' Mr. Hadland thereby further contributing to the common ground that she was directly involved and had knowledge of the solicitation of his assault/murder. In contrast with her later testimony to the grand jury, this conversation strongly suggests that she was both aware of and involved in the plot to harm Mr. Hadland. In addition, unlike her testimony in front of the grand jury which suggests she was merely relaying a message from MR. H. to Mr. Carroll without knowledge of its intent, this conversation does not suggest that a prior conversation with Mr. H. for either of the participants was part of the common ground.

These comparative excerpts are also good examples of how her first person pronoun use shifts from "me" and recipient-based positioning in the grand jury testimony to the use of subjective case pronouns positioned as agent, not recipient of the verbal action in the direct recording, as discussed earlier. Here, Mr. Hidalgo's alleged direction of Ms. Espindola in the events is unmentioned, while, in contrast, it was featured prominently in her later testimony. This lack of mention, of course, does not necessitate that Mr. H. was uninvolved, but it is odd that Ms. Espindola never attributes her actions as orders from Mr. H. during her recorded conversations with Mr. Carroll as she does numerous times during her grand jury testimony. Typically, conversationalists attempt to include all information relevant in the building of the CG as conversation proceeds.

That Mr. Hidalgo was the solicitor of Mr. Hadland's demise rather than Ms. Espindola (according to her later testimony) would, one would generally assume, come up in such a conversation as relevant information. According to Speech Act Theory¹ and the Cooperative Principle (J.L. Austin 1962, H.P. Grice 1989, Searle 1969) it is infelicitous to make statements that one knows to be false (violating the maxim of quality) or misleading (violating the maxim of manner), as AE would have to be doing if it is true that Mr. Hidalgo, not Ms. Espindola, directed Mr. Carroll to do harm to Mr. Hadland. For example, if Mary tells speaker Jane "That man on my front lawn is horribly unfriendly", Jane would rightly feel misled when he discovered that the man was in fact Mary's husband, as the maxim of manner (don't be obscure or vague) was violated. In other words, we approach conversation expecting that participants do not withhold

¹ Similar to discourse analysis, the field of pragmatics deals with what is added to utterance interpretation based on the background knowledge, beliefs and context that speaker-hearers bring to the discourse. This background knowledge can include specific knowledge about how linguistic words and phrases are typically used and interpreted and more general knowledge about the world. Such contextually-derived meaning is not random but based on well-established norms agreed-upon and prescribed within communities. Such norms are always assumed to be in operation, or treated as the 'unmarked' case, unless they are 'marked' in some fashion (linguistically or otherwise) that suspends the expectation that they are in effect. Pragmatics accounts for the ways in which speakers are able to perform and understand speech acts that fall outside the strict semantic interpretation of the statements uttered. For example, conversationalists are remarkably good at understanding what are referred to as 'conversational implicatures' or the interpretation of the intended meaning of utterances which do not actually make any direct statement of their meaning. For example, if speaker A asks "Did you speak to Mr. X yesterday" and speaker B responds "I think he was in Dallas," speaker B's utterance contains the implicature that he/she did not speak to Mr. X despite the fact that it does not actually semantically encode such information directly. The reason Speaker A would not feel as if speaker B's response was inconsistent with his/her question is because both speakers assume that they are each adhering to what is called the cooperative principle (CP) as proposed by Grice (1989). Following the CP, speaker A assumes that speaker B is in fact providing an interpretable response to his/her question about Mr. X because, in order for conversations to proceed in an organized and interpretable fashion, we must assume that all conversational participants follow the same rules for interpretation. These conversational rules are referred to as 'maxims' of conversation and they can be broken down into a number of subtypes, namely the maxims of quality, quantity, relevance and manner. The maxim of quality states that we must make contributions truthful, the maxim of quantity states that they must be neither too brief nor too long, relevance requires that we make contributions cohere to previous discourse and manner requires that we not be obscure or vague in our contributions. If a speaker appears, at first glance, to be breaking one of these maxims such as speaker B above (who is violating the maxim of relevance), such a violation is taken to be a meaningful clue to how the utterance should be interpreted. In other words, that speaker B's comment is, in fact, relevant and that speaker A should attempt to interpret it as such, thus leading to the understanding of B's statement as an answer essentially saying "No, I have not seen him BECAUSE he was in Dallas".

important or clarifying information during conversation in order for conversation to proceed in an orderly and organized fashion.

There are a number of other examples where Ms. Espindola makes statements that conflict in terms of what can be assumed as Common Ground in her conversation with Mr. Carroll in comparison to her later statements. For instance, AE also testifies that Mr. Hidalgo instructs her to make a large monetary payment to Mr. Carroll (Excerpt 25). Following this statement, AE further testifies that she had no direct knowledge of the planned attack on Mr. Hadland, claiming that, after he tells her to pay Mr. Carroll, she asks Mr. H. what he had done (Excerpt 26). Again, the common ground she posits in this testimony (that there were unusual requests from Mr. H. but no discussion of what had been planned involving the assault on Mr. Hadland) differs markedly from her conversation with Mr. Carroll where the impending assault is clearly part of the common ground (see excerpts 24 and 27) in a conversation she reports as occurring before her reported conversation with Mr. Hidalgo suggesting she had no prior knowledge of the events in question (e.g. Excerpt 26) during the grand jury testimony.

Ms. Espindola also testifies that her later contact with Mr. Carroll (providing the recordings) came at Mr. H's request and that it was Mr. H. who directed her to tell Mr. Carroll stay away from the club (Excerpt 28). And, as mentioned previously, she tells the police in her declaration that Mr. H. told her to tell Mr. Carroll that he "would be compensated and he could use his sick son as an excuse" to resign from work at the club. However, in her recorded conversation with Mr. Carroll, Mr. Hidalgo's involvement to which she later testifies is curiously never established as part of the common ground. Instead, it was actually Mr. Carroll who introduces the topic of whether or not he should come back to work. In response, Ms. Espindola then comes up with the idea to use his sick son as a reason to take time off (Excerpt 29). Based on this discussion, there is no evidence that Mr. Hidalgo had anything to do with the determination of if and/or how Mr. Carroll should resign. Again, AE never establishes Mr. Hidalgo's involvement as part of

the common ground in the earlier recorded conversation in contrast to later testimony where she attributes both of these ideas to Mr. Hidalgo (e.g. excerpts 18 and 28). In addition, she never tries to introduce Mr. H. into the common ground by indicating that he is the one pledging to take care of Mr. Carroll or that it was his wish that Mr. Carroll take time off from work. In fact, when conversing with Mr. Carroll, she exhibits first person (self-referential) exclusively throughout this discourse. This is in sharp contrast to her later testimony where she presents herself as merely doing Mr. H's bidding (excerpts 18, 28).

In addition, while she testifies that she paid out funds to Mr. Carroll under the direction of Mr. Hidalgo, suggesting that she did not have any initiative or authority outside of him to do so; she repeatedly discusses payment with and provides monies to Mr. Carroll during the surreptitiously recorded conversation with no mention of Mr. Hidalgo's involvement. There is no mention of his role or of needing to consult with him during her conversation with Mr. Carroll, again suggesting that he was never established as an element of the common ground and also suggesting that the common ground shared by Mr. Carroll and Ms. Espindola included the understanding that Ms. Espindola had the funds and authority to make monetary payments. Mr. Carroll at no point asked her to request funds from Mr. Hidalgo nor did she, at any point, comment on the need to consult him in contrast to the presentation of facts during her grand jury testimony (See excerpts 1,2,3,5,21, 22, 30).

In summary, based on my analysis of the recorded conversations with Ms. Espindola and her later testimony regarding the same facts, there are a large number of inconsistent presentations of both her role and the role of others in the events in question.

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EXCERPTS OF STATEMENTS MADE BY
ANABEL ESPINDOLA

Surreptitious Recording (SR) – Track One

Excerpt 1: (from p. 8-9, starting line 3))

AE: Why are you saying that shit? What we really wanted was him fuckin beat up, if anything, we didn't want him fuckin' dead!

DC: There ain't nothing we can do to change it now. We got no fucking choice but to stick together if not we're all gonna go down, I'm not trying to go to prison.

AE: So we...I'm telling you right now, if, if, it comes to the point where they come and pick you up, just say "you know what, I told you guys everything I already know" and nothing more, nothing fucking more, "you know what, I want to speak to my attorney and see if you're lying." Have you got an attorney before?

DC: no

AE You don't have one?

AE: Alright, I'm gonna have to find an in between person to talk to you. Somebody I can trust. It might be...if the person calls, looks for you, she's gonna say it's through –Boo – I'm boo.

DC: OK

AE: OK. Then you know you can fucking trust this person. If this shit starts we're gonna have to fucking pay him....

Excerpt 2: (p. 4 top)

AE: Listen to what I'm going to tell you. I'm gonna give you some money so you can maintain yourself. I need you to go in tonight to see Ariel and tell her....

Excerpt 3: (p. 12)

AE: Well, let me tell you. Based on what she fucking wrote....based on the investigation that's going on, it's best that you right now you need to get your head together. This is what you're going to say: "Ariel, I'm turning in, you know, my resignation right now I need to take care of my son. I need to spend some time at home." OK, you're going to be fine – With me you are. In two to three months, maybe a month, I don't know, 'till this shit kinda fucking fades out. In the mean time (obscured by noise)...in the meantime, every week we're going to find (obscured by noise) some where, in the movie theater taped underneath the seat or what ever the fuck it is, so every week you're gonna get fuckin' paid. I'm not gonna leave you fuckin' hanging.

Excerpt 4: (p. 19, bottom)

AE: All I am telling you is, -- all that I'm telling you is to stick to your mother fucking story. Make fucking sure you fucking stick to your fucking story. I'm telling you right now, it's a lot easier for me to try to find you, to get an attorney to get you fucking out

than it will be for....everybody will go to fucking jail and I'm telling you once that happens we can kiss everything fucking goodbye. All of it! Your kid's salvation and everything else. It's all gonna depend on you.

Excerpt 5: (p. 21)

AE: That's for the rest of your fucking life. What about it? What about everything? You want to lose it all? If I lose the shop and I lose the club, I can't help you or your family.

Excerpt 6: (p. 24)

AE: So, we keep our mouth shut, we maybe get lucky. Your wife can call an attorney (unintelligible) your wife can (unintelligible). Like I said you need a mother fucking prepaid phone.

Surreptitious Recording (SR) – Track Two

Excerpt 7: (p. 2)

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

A.E. O.K. wait, listen, listen to me (Unintelligible)

D.C: I'm not worried

A.E. Talk to the guy, not fucking take care of him like get him out of the fucking way (unintelligible). God damn it, I fucking called you

D.C.: yeah, and when I talked to you on the phone, Ms. Anabel, I specifically said, I said "if he's by himself, do you still want me to do him in."

A.E.: I I...

D.C.: You said Yeah

A.E. I did not say "yes".

D.C.: You said if he's with somebody, then beat him up.

A.E. I said go to plan B, --fucking Deangelo, Deangelo you just told admitted to me that you weren't fucking alone. I told you 'no', I fucking told you 'no' and I kept trying to fucking call you and you turned off your mother fucking phone."

Excerpt 8: (p. 3-4)

A.E.: All I'm telling you is denial – cause I ain't fucking singing and I already said, I don't know shit, I don't know shit, fucking, I don't know a mother fucking thing and that's how I gotta fucking play it. And that's how I told everyone else to play it. I don't know a mother fucking thing.

D.C.: I understand that.

A.E. Ok, and that's how it's got to be fuckin played.

Grand Jury Testimony (GJT)

Excerpt 9 (p. 100 lines 12-19)

Q: And when you're back there, do you talk to Mr. H?

A: Yes

Q: What does he tell you

A: He tells me to call Deangelo, to go into the back room, there is a room behind the kitchenette that has the safe...., he asked me to go back there and call Deangelo, tell Deangelo to go to plan B.

Excerpt 10: (p. 103, lines 1-4)

Q: And if you were going to contact him what were you going to tell him?

A: To go to plan B. Exactly what Louie told me to do. To come back.

Excerpt 11: (p. 104, lines 1-9)

A. Deangelo walks in, he sits, Louie is on my right, I'm still sitting behind the desk, Deangelo is on the left. He looks at Louis and says, it's done, I need five. Louie looks at Deangelo and then he looks at me and tells me to go get five out of the safe.

Q: What is your reaction?

A: I looked over at Louie and I said, five what, I'm like five hundred dollars, and he's like go get five thousand dollars out of the safe.

Excerpt 12: (p. 105, line 25 and p. 106, lines 1-2)

A: His response was none. He just, he looked very worried. He looked scared. He told me to turn on the TV and look for the news.

Excerpt 13: (p. 116, lines 7-8)

A: I asked him if he wanted me to go talk to Deangelo.

Excerpt 14: (p. 117, lines 13-20)

Q: And when you see Mr. Carroll, prior to talking to Mr. Carroll do you have any conversations with Mr. H. as to exactly what it is you're supposed to be talking to Mr. Carroll about?

A: Yes. We go ahead and Louie tells me to let Mr. Carroll know that it would be a good idea for him to resign or at least take some time off and that he would go ahead and still be paid.

Excerpt 15: (p. 119, lines 15-16)

A: I tell him that I spoke to Deangelo and I told him exactly what he told me about him taking time off.

Excerpt 16: (p. 121, lines 18-22)

Q: Why didn't he go back in the room?

A: Because he was told by Mr. Gentile not to speak to Deangelo and he --

Q: Why did you go back to the room?

A: Because he asked me to.

Excerpt 17: (p. 122, lines 6-10)

A: I went into the kitchen and told Louie that Mr. Carroll wanted more money.

Q: And what was Louie's response?

A: Give give him more money.

Declaration Of Warrants Statement

Excerpt 18: (p. 10, second paragraph)

"Mr. H told Espindola to advise Carroll not to come to the Palomino Club for awhile and to take a leave of absence. Mr. H. stated Carroll would be compensated and he could use his sick son as an excuse. Mr. H. told Espindola to tell Carroll not to talk to the police and to "hang tough".....Espindola also advised Carroll to get a pre-paid cell phone, per Mr. H's instruction."

Surreptitious Recording (SR) – Track One

Excerpt 19a: (p. 10)

A.E.: O.K., listen to me. I've been, I've been thinking. Your son has been sick, is that correct? He's still sick, correct?....

Excerpt 19b: (p. 11)

AE: Well, let me tell you. Based on what she fucking wrote....based on the investigation that's going on, it's best that you right now you need to get your head together. This is what you're going to say: "Ariel, I'm turning in, you know, my resignation right now I need to take care of my son. I need to spend some time at home."....

Excerpt 20: (p. 23)

AE: Get to -- get somebody to buy a prepaid phone. It cannot be you; it cannot be any of your goddamn fucking homeys. Can't tell anyone (unintelligible)

AE: Get a fucking prepaid mother fucking phone. (unintelligible) so that you can buy it. Tonight when you go to the fucking club...

Excerpt 21: (p. 11)

AE: Listen to what I'm going to tell you. I'm gonna give you some money so you can maintain yourself. I need you to go in tonight to see Ariel and tell her....

Excerpt 22: (p. 11)

A.E.:OK, you're going to be fine – With me you are. In two to three months, maybe a month, I don't know, 'till this shit kinda fucking fades out. In the mean time (obscured by noise)...in the meantime, every week we're going to find (obscured by noise) some where, in the movie theater taped underneath the seat or what ever the fuck it is, so every week you're gonna get fuckin' paid. I'm not gonna leave you fuckin' hanging.

Grand Jury Testimony (GJT)

Excerpt 23: (p. 100 lines 12)

Q: And when you're back there, do you talk to Mr. H?

A: Yes

Q: What does he tell you

A: He tells me to call Deangelo, to go into the back room, there is a room behind the kitchenette that has the safe...., he asked me to go back there and call Deangelo, tell Deangelo to go to plan B.

Q: Now let me ask you some questions. Mr. H is standing there with Pillarr and he asks you to walk to an area. Is that out of earshot of P.K.?

A: yes

Q: And then he's now asking you to go call Deangelo at an area which would be out of earshot of everybody?

A: Correct

Q: Was that unusual for him to want you to make a call from that location as opposed to from the desk?

A: Yes

Q: And he indicates to you to call Deangelo and tell him what?

A: Tell him to go to plan B.

Q: Plan B?

A: Yes

Q: So what do you do?

A: I go to the back room and I try to contact Deangelo.

Q: How do you do it; do you recall?

A I don't recall if I first tried to page him. We have Nextel phones that are two-way radios so you can go ahead and use it as a walkie-talkie. I believe I tried to page him that way first.

Q: At some point do you wind up talking to him?

A: Yes, I do

Q: Is it by walkie-talkie or regular phone?

A: By regular phone.

Q: and describe the conversation that you had with Mr. Carroll at this point.

A: I told Deangelo to go to plan B. He tells me that, he says I'm already here, I said no, go to plan B, and then there is no conversation.

Q: Does he say anything about being alone?

A: Yes, he mentioned he was alone.

Surreptitious Recording (SR) – Track Two

Excerpt 24: (p. 2)

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

A.E. O.K. wait, listen, listen to me (Unintelligible)

D.C.: I'm not worried

A.E. Talk to the guy, not fucking take care of him like get him out of the fucking way (unintelligible). God damn it, I fucking called you

D.C.: yeah, and when I talked to you on the phone, Ms. Anabel, I specifically said, I said "if he's by himself, do you still want me to do him in."

A.E. I I...

D.C.: You said Yeah

A.E. I did not say "yes".

D.C.: You said if he's with somebody, then beat him up.

A.E. I said go to plan B, --fucking Deangelo, Deangelo you just told admitted to me that you weren't fucking alone. I told you 'no', I fucking told you 'no' and I kept trying to fucking call you and you turned off your mother fucking phone."

Grand Jury Testimony (GJT)

Excerpt 25 (p. 104 lines 1-5)

A. Deangelo walks in, he sits, Louie is on my right, I'm still sitting behind the desk, Deangelo is on the left. He looks at Louis and says, it's done, I need five. Louie looks at Deangelo and then he looks at me and tells me to go get five out of the safe.

Excerpt 26 (p.105 lines 18-25 and 1 and 2 on page 106)

A: Deangelo picks up the money.

Q: And where does he go?

A: He walks out of the office.

Q: What do you do when he leaves?

A: I look over at Louie and I said What have you done

Q: And what was his response?

A: His response was none. He just, he looked very worried. He looked scared. He told me to turn on the TV and look for the news.

Excerpt 27 (SR, Track one 8:34)

DC: Hey. What's done is done. You wanted him fuckin' taken care of and we took care of him.

AE: Listen (sigh)

DC: Don't worry

AE: Why are you saying that shit? What we really wanted was him fuckin beat up, if anything, we didn't want him fuckin dead!

Excerpt 28 (p. 117, lines 13-20)

Q: And when you see Mr. Carroll, prior to talking to Mr. Carroll do you have any conversations with Mr. H as to exactly what it is you're supposed to be talking to Mr. Carroll about?

A: Yes, we go ahead and Louie tells me to let Mr. Carroll know that it would be a good idea for him to resign or at least take some time off and that he would go ahead and still be paid.

(pg 119, lines15-16)

A: I tell him that I spoke to Deangelo and I told him **exactly what he told me** about him taking time off.

Surreptitious Recording (SR) – Track One

Excerpt 29 (p. 10 11:05)

DC: So what about work? Am I supposed to come back to work?

AE: This is what I need you to do....

D.C. I have to come

A.E.: O.K., listen to me. I've been, I've been thinking. Your son has been sick, is that correct? He's still sick, correct?....

AE:.....This is what you're going to say:"Arieal, I'm turning in, you know, my resignation right now I need to take care of my son...You're going to be fine. With me you are....I'm not gonna leave you fuckin' hanging.

Excerpt 30 (p. 9)

AE: Ok, Then you know you can fucking trust this person. If this shift starts we're gonna have to fucking pay him...

CASE No. 05C212667-2

~~~~~

Case Type: Felony/Gross  
Date Filed: Misdemeanor  
Location: 06/17/2005  
Department 21  
Case Number: C212667  
s 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

Christopher Adams, Esq. appearing in case C212667; Dominic Gentile, Esq. and Paola Armeni, Esq. appearing in consolidated case C241394, with Defendant Luis Hidalgo Jr. Colloquy regarding trial date. Counsel announced ready for trial which should last two weeks with 26 witnesses. Mr. Arrascada stated opposition to parts of the State's Fourth Amended Information. Mr. Digiacoimo stated that the Jury must be advised there are two different conspiracies and that he believes it was addressed as to Luis Hidalgo Jr. He further advised that it will require a special verdict form, which is not before the Court at this time. Consolidated case C241394: STATE'S MOTION IN LIMINE TO EXCLUDE THE TESTIMONY OF VALERIE FRIDLAND...DEFENDANT'S MOTION TO SUPPRESS EVIDENCE...CALENDAR CALL Arguments by Mr. Gentile regarding the linguistics expert, Valerie Fridland. He stated that the use of pronouns employed by Ms. Espindola in the tapes in which she didn't know she was being recorded and the Grand Jury tapes were different and that the expert will be able to evaluate what was said in order to assist the jury. Opposition by Mr. Digiacoimo. The Court stated that this matter will be reviewed further and a ruling will be made on 1/23/09. As to Defendant's Motion to Suppress Evidence, Mr. Gentile submitted on the pleadings. He added that this was a general warrant; the issue regarding Family Court signing the warrant needed to be raised now, or it can't be raised later in front of the Supreme

Court. COURT FINDS, Family Court has jurisdiction to sign warrants. Mr. Gentile stated the warrant left too much to the discretion of the searching officers, which violates the Fourth Amendment. Mr. Digiacomo argued that each and every one of the witnesses is tied to a specific crime and there was probable cause for each item listed. COURT FINDS, it was not so general as to be considered a general warrant and ORDERED, Defendant's Motion to Suppress is DENIED. Colloquy regarding pleadings and whether or not new Information would be filed. Additionally, discussion ensued as to possibly striking parts of the Information/Indictment. COURT ORDERED, a ruling will be given on 1/23/09 following further review of the Court's minutes and transcripts. COURT ORDERED, ORDERED, trial date VACATED and RESET for a firm setting. 1/27/09 12:30 PM JURY TRIAL (C212667 AND C241394)

Parties Present

Return to Register of Actions



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4 DISTRICT COURT  
5 CLARK COUNTY, NEVADA  
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8 THE STATE OF NEVADA,

9 Plaintiff,

10 vs.

11 LUIS ALONSO HIDALGO aka LUIS  
12 ALONSO HIDALGO III; LUIS HIDALGO  
13 JR., aka LUIS A. HIDALGO

14 Defendants.

CASE#: C212667  
C241394

DEPT. XXI

15 BEFORE THE HONORABLE VALERIE P. ADAIR, DISTRICT COURT JUDGE

16 THURSDAY, JANUARY 22, 2009

17 **TRANSCRIPT OF PROCEEDINGS**

18 **CALENDAR CALL; STATE'S MOTION IN LIMINE TO EXCLUDE TESTIMONY  
OF VALERIE FRIDLAND; DEFENDANT, LUIS HIDALGO, JR.'S  
MOTION TO SUPPRESS EVIDENCE**

19 **APPEARANCES:**

20 For the State:

MARC P. DIGIACOMO, ESQ.  
Chief Deputy District Attorney

21 For the Defendants:

22 DOMINIC P. GENTILE, ESQ.  
23 PAOLA M. ARMENI, ESQ.  
24 JOHN L. ARRASCADA, ESQ.  
CHRISTOPHER ADAMS, ESQ.

25 RECORDED BY: JANIE OLSEN, COURT RECORDER

1 THURSDAY, JANUARY 22, 2009 AT 11:04 A.M.

2  
3 THE COURT: All right. We'll move into the Hidalgo matter. State versus  
4 Luis Hidalgo III and Luis Hidalgo, Jr. All right. Shall we begin with the State's  
5 motion in limine to exclude the testimony of the linguist?

6 MR. DIGIACOMO: Yes, Judge.

7 THE COURT: All right. I --

8 MR. DIGIACOMO: Go ahead.

9 THE COURT: I had a question for the defense that I was not able to flee,  
10 sort of appreciate. I mean, I get the theory about what she's going to testify to but I  
11 was a little bit curious, I guess, or confused as to what the specifics of her  
12 testimony would be and just tell me if I'm wrong, I understood this is -- she's going  
13 to listen to the recording and say: Well what we look for as a linguist is space  
14 between sounds or stuff -- yeah, that's what I didn't get exactly --

15 MR. GENTILE: No, no.

16 THE COURT: I mean, obviously, she can't say this is credible and this is not  
17 credible.

18 MR. GENTILE: Right -- no; obviously.

19 THE COURT: I'm assuming what she's going to do or what you'd like her to  
20 do is to say: Well as a linguist, these are voice patterns that we look for and then if  
21 you listen to this, those voice patterns -- is that essentially --

22 MR. GENTILE: No, no.

23 THE COURT: Okay. Tell me then. I'll be quiet.

24 MR. GENTILE: First of all, let me give you a little background as to why,  
25 okay; just to start off with. You've got a lot of materials in front of you about Dr.

1 Roger Shuy. By the way, that's how you say his name, S-H-U-Y is pronounced  
2 Shy. The U is silent.

3 Dr. Shuy and I started working together, oh about 1985. So, I worked  
4 with him for a long time. But he is now retired. He lives in Missoula, Montana.  
5 And last year when we had the term limits case before the Supreme Court of  
6 Nevada, because of the wording of the Constitutional Amendment that the voters,  
7 in their wisdom enacted, it was a critical pivotal issue before the Supreme Court,  
8 the meaning of those words. I asked Dr. Shuy to come down. He wouldn't do it.  
9 He says: I'm retired. I'm liking it up here, and he referred me to Dr. Fridland. We  
10 got Dr. Fridland by -- through a referral that Dr. Shuy made to a lawyer -- to a  
11 linguist in Massachusetts who then said this to Dr. Fridland. Dr. Fridland submitted  
12 an affidavit to the Nevada Supreme Court in the Sisolak [phonetic] writ. And the  
13 Supreme Court -- naturally, that was not an -- it was an adversary proceeding but it  
14 was not live testimony.

15 THE COURT: Right; and so you can submit whatever affidavits you want to  
16 submit along with your brief.

17 MR. GENTILE: Right; but there were also -- but so could the opposition and  
18 the opposition didn't. Okay. Let's put it that way.

19 In the meantime, we learned of the credentials of Dr. Fridland and  
20 because of my experience with Dr. Shuy, who testified in a number of different  
21 cases; actually in this Court, I just can't remember because it's so long ago. One  
22 of them was when -- a prosecution that goes so back that Ray Jeffers prosecuted  
23 it. We had a --

24 THE COURT: That's before my time.

25 MR. GENTILE: Yeah, we have a couple of fireman from Tulsa, Oklahoma

1 who were accused of trying to get some money back for Oral Roberts and Race  
2 Horse Haines [phonetic] from Houston, Texas and I defended the two firemen.  
3 And Dr. Shuy came in a testified in that case.

4           So, in any case, we have come to realize that the use of pronouns  
5 that was employed by Ms. Espindola in the surreptitious tapes, where she did not  
6 know that she was being listened to, were certainly different than what she did in  
7 terms of characterization, the use of pronouns, in her grand jury testimony and in  
8 what appears to be the summaries at least, because, of course, we don't have  
9 verbatim of her debriefing with the District Attorney's office. The Court's already  
10 ruled and we're not going to be able to get the notes.

11           And, so, the question became: Well what's the significance of this?  
12 Are we reading it correctly? Does it mean anything? Why are there things that  
13 seem to be assumed? And, so we then went to Dr. Fridland, which is what this  
14 Court's analysis is all about. Dr. Fridland compared the two and she points out in  
15 language certainly that I can't and that the jury would not that there is, in fact, a  
16 difference and what the differences are. But she does not opine as to voracity. It  
17 would clearly not be permissible for us to use her to say: When Anabel Espindola  
18 is being truthful and when Anabel Espindola is not being truthful or whether she's  
19 being truthful either time or whether she's being truthful both times. Okay. But she  
20 will assist the jury in being able to look with a critical eye. And I don't mean critical  
21 in a negative, you know, criticism, but critical in its true meaning --

22           THE COURT: In the evaluative.

23           MS. GENTILE: In the evaluative -- in the evaluation of the meanings and  
24 more importantly, what is not said and why it is not said. See, when you're  
25 studying speech patterns -- I mean, Your Honor, you and I have a history and we

1 can speak to each other and we know that history is. And, so, we don't have  
2 revisit it each and every time that we speak to each other. We don't have to start  
3 from scratch. And that is a critical issue with respect to -- particularly with respect  
4 to the tape recording that Carroll makes of Anabel Espindola when she doesn't  
5 know she's being recorded. There is implied in there because of things that are  
6 not said or because of things that are assumed that there was -- that there were  
7 earlier meanings and that there is a common ground.

8 Now a linguist can explain to a jury the existence of that phenomenon  
9 in every day speech. So, she's not going to be coming in and talking about tones  
10 of voice; she's not going to be coming in and talking about pauses. She's going to  
11 be coming and talking about what--

12 THE COURT: Word choice.

13 MR. GENTILE: Not only word choice but the significance of what is not said,  
14 as meaning that there was a common ground from a pre-existing communication  
15 or relationship. She's certainly not going to supply what was not said. That's  
16 something that's going to be subject to argument. All right. But she is going to be  
17 able to, with charts, enlighten the jury as to where those events take place and  
18 where that common ground is. And then it will be for both sides to argue it.

19 THE COURT: Correct me if I'm wrong. But looking at this, it does not  
20 appear to me that she has ever testified as an expert witness anywhere; is that  
21 right? I don't see --

22 MR. GENTILE: It appears as though --

23 THE COURT: -- it in here. I see that Mr. Shuy has testified --

24 MR. GENTILE: Right.

25 THE COURT: -- in a number of cases, according to this printout, but I can't

1 tell what he --

2 MR. GENTILE: But there once was a time when he didn't.

3 THE COURT: What the -- I mean -- what he testified about.

4 MR. GENTILE: There once was a time when Roger Shuy did not testify.

5 THE COURT: But Ms. Fridland, who's the expert in question here, she has  
6 never testified as an expert before; is that correct?

7 MR. GENTILE: She has not. To the best of my knowledge, she has not  
8 been even submitted to a Court for purposes of testimony. She is, however, the  
9 only person in our Nevada system, in our Nevada University system who teaches  
10 this in this area. And that's the reason that, you know, we went to her in the  
11 Supreme Court case. So --

12 THE COURT: All right. And let me ask you two more questions.

13 MR. GENTILE: Sure.

14 THE COURT: There is a rather extensive list dating back over 20 years on  
15 cases that Mr. Shuy has testified about. Now you personally were not involved in  
16 any of these cases; is that right?

17 MR. GENTILE: I was, some of 'em, yeah.

18 THE COURT: Okay.

19 MR. GENTILE: I don't know if there are on the list 'cause frankly I didn't  
20 scrutinize it. The list is so long.

21 THE COURT: Okay. I guess I was -- because as you know, Mr. Gentile, a  
22 lot of these experts can provide expert testimony in a number of different sort of  
23 subsets of their overall expertise --

24 MR. GENTILE: Sure.

25 THE COURT: -- which would be linguistics. So, from this, do you know if

1 Mr. Shuy has ever provided testimony that's similar --

2 MR. GENTILE: I can --

3 THE COURT: -- to the type of testimony that you want Ms. Fridland or Dr.  
4 Fridland to testify to?

5 MR. GENTILE: I can tell you of a matter that was with the Federal Trade  
6 Commission. I don't know if it's listed on there or not.

7 A number of years ago when there were a great number of  
8 telemarketers in our community, the Federal Trade Commission got quite active  
9 here. And one of the issues was involved -- that was a fraud case of course.  
10 Okay. And one of the issues in that case was the -- because telemarketers have  
11 subsequent -- you know, they -- the term that's used in that industry is reload.  
12 Okay. They have -- well you used to prosecute those cases. So, I know you know  
13 'em. They have subsequent communications and one of the issues in a case like  
14 that is when these subsequent communications tend to be rather -- certainly briefer  
15 than the original communication than the original fix that got somebody involved in  
16 the first place.

17 THE COURT: Right; 'cause they're not going to pitch the same thing over  
18 and over again.

19 MR. GENTILE: Right.

20 THE COURT: They've already got the person --

21 MR. GENTILE: Right.

22 THE COURT: -- and so now it's to sell 'em on whatever vitamins or  
23 whatever it is they're telemarketing.

24 MR. GENTILE: That's the point, that's the point. One of the issues that was  
25 involved in that case was this question of common ground and what was not said

1 in subsequent communications between the telemarketer and the customer.

2 THE COURT: Isn't that just common sense? I mean, whenever you have a  
3 subsequent conversation it's based on perception and an understanding of all  
4 previous conversations whereas as when you're testifying to the grand jury, you  
5 recognize that these are people who are hearing it cold. And, so, there wouldn't  
6 be that understanding or that shared common knowledge.

7 MR. GENTILE: Your Honor, I don't believe that the -- well I'll tell you what.  
8 If you think about the way people butcher the English language every day and if  
9 you think about the -- particularly with the use of pronouns. I mean, how many  
10 times how you heard somebody talk about he and she and you didn't know who  
11 they were talking about because there were so many other people that had been  
12 mentioned earlier in the same sentence? It's one of my pet peeves. All right.

13 THE COURT: Mine is the misuse of the word myself.

14 MR. GENTILE: Instead of me?

15 THE COURT: Right.

16 MR. GENTILE: Okay. Well you understand what I'm saying. And it can  
17 give a different meaning. Okay. And, so, I would say to you that it would be nice  
18 to believe that is a matter of common sense. It is probably a matter of common  
19 sense that someone with your education and mine. Okay? But we're not going to  
20 get that on a jury. And, so, I am not willing to say to you that it's truly a --

21 THE COURT: Oh, Mr. Gentile, I'm a firm believer in the wisdom of juries.

22 MR. GENTILE: Wisdom, yes, education, no.

23 THE COURT: That's true.

24 MR. GENTILE: Okay. A jury's 12 times smarter than anybody in the room  
25 with 'em. I believe that. I've said that many times. But it doesn't mean that they're



1 going -- that as a matter of common sense of the jury, they're going to understand  
2 these pronominal changes. I didn't even know what pronominal meant until we got  
3 this case; pronominal, excuse me.

4 And, so, no I don't agree with you that it's a matter of common sense.  
5 I think that you need to be able to give the jury something that they can attach it to  
6 so that an argument is meaningful.

7 THE COURT: All right. Mr. DiGiacomo, anything you'd like to add?

8 MR. DIGIACOMO: Well there's a whole lot I'd like to add related to it. And I  
9 see it as like three separate analyses -- whatever.

10 THE COURT: Analyses.

11 Mr. DIGIACOMO: Apparently I don't use the words probably a linguist would  
12 use. But the very first issue for me would be whether or not she's qualified in this  
13 area and you look at her publications. You can go through -- and it's a long list of  
14 publications on her CV, and there are things like: Interpreting inter-regional  
15 southern vowel distinctions; the meaning of O-U versus U-W versus -- there is  
16 nothing in any one of her writings related to the area which she claims to be an  
17 expert in. And I think probably the most important reason for that would be it's  
18 never been a real recognized area of expertise. If you run linguistics experts on a  
19 Westlaw search, you're going to get 120 hits where a linguistic expert is addressed  
20 in -- by a Court of Appeal in some jurisdiction in the United States. Most of 'em are  
21 Federal Court. And if you go through each and every one of those 120 times, you  
22 will find there are times when experts in linguistics are allowed to testify.

23 I defy the Court to find one time where two English speaking  
24 individuals speaking the same language speaking the same English, they have  
25 allowed an expert to opine what those two individuals mean by what they're saying

1 in common everyday usage. And that's exactly what she wants to do. She wants  
2 to say: People use the term we meaning themselves and somebody else. They  
3 use I meaning I did it. And then when she's at the grand jury, she uses he did it,  
4 and that's inconsistent.

5 I don't know if the Court's read the report but her report essentially  
6 says: This is what she says on the wire, this is what she says in the grand jury,  
7 and those two aren't consistent. Now I don't know why we need an expert to say  
8 that. I don't know why Mr. Gentile won't be cross-examining Anabel. But when you said  
9 we, we means you; right? We means somebody else. Who's the other person?  
10 Now when you're at the grand jury, why did you say he? Now the expert may be  
11 useful to him in formulating a cross-examination, but to the extent that you're going  
12 to put an expert on to say this is what a person speaking English actually means  
13 and then the person who was doing the speaking says: This is what I mean, and  
14 it's inconsistent with what the expert says, suddenly now there's a credibility  
15 dispute between an expert and a lay witness and that's exactly what they want to  
16 do.

17 And if you look at all the cases and it is always Dr. Shuy. I couldn't  
18 find any other expert whoever testified in this discourse analysis. Every Court says  
19 in discourse analysis, it's unreliable. It can't be tested. How could you ever  
20 possibly test it? And three: No Court has ever said it was error for a Court to  
21 exclude Dr. Shuy when he wants to talk about the content of a communication in  
22 English. In fact, Dr. Shuy himself, in one case, says: It's unethical for a linguist to  
23 delve in the area of covert recordings because they're different than what we  
24 normally do.

25 There are simply no basis whatsoever to allow this witness to testify,

1 forget even if she is an expert in a field that isn't recognized that is not allowed to  
2 be put into -- in front of Court, and I'll submit it, Judge.

3 THE COURT: Anything else, Mr. Gentile?

4 MR. GENTILE: Yeah.

5 First of all, with respect to the reported decisions, obviously where a  
6 Court exercises its discretion to allow the witness to testify, you're not going to find  
7 a reported decision. It's only going to be where you exclude it and then an  
8 appellate court has that as a sign of error in the case. And, so, I don't think that  
9 the numbers game works.

10 Secondly, I can tell you one case right off the top of my head you  
11 asked me was I involved in and there's another one that I just remembered.  
12 Many years ago in Houston, Texas, a man named P. Cullen Davis was  
13 prosecuted, believe it or not, for an attempt murder of a judge. He was an oilman.  
14 He had been acquitted for the murder of his wife and then later on, he was -- he  
15 apparently was charged with hiring a hit man to assassinate a judge who was  
16 giving him a bad deal in the divorce that was taking place between his wife before  
17 she died. In that case, Dr. Shuy testified. He actually testified in that case, yeah,  
18 in that case. I was involved representing a witness in that case and -- although I  
19 wasn't involved with Dr. Shuy. And his testimony in that case went directly to the  
20 question of discourse analysis in a surreptitious recording.

21 So, I'm not aware of his statement that it's unethical but many of the  
22 recordings that Dr. Shuy has opined or evaluated -- because he doesn't really  
23 opine on them, he evaluates them and sets it up in terms of the structure have  
24 involved surreptitious recording.

25 And, finally, Your Honor, I always hear this argument every single

1 time. If the expert witness who clearly has the training here, I mean, we would  
2 hope so. She's training Nevadans in this area; okay? If an expert witness doesn't  
3 have a publication on the evaluation of Anabel Espindola's surreptitious  
4 statements on tape, then a prosecutor will say that, you know, she doesn't have  
5 expertise in this area. She clearly has expertise in this area. She has enough to  
6 be teaching at UNR in the department. She's -- I can say to you safely, at least in  
7 terms of our current university system, she is the ranking person in that area.

8           John Bersfeld [phonetic] who has testified as an expert for me in other  
9 cases, one in front of Judge Vega a few years ago, the Marshall Silver [phonetic]  
10 case, actually also referred us to her. John is Professor Emeritus and former chair  
11 of the English Department at UNLV. He's a pope and he was qualified as an  
12 expert witness in semantics by Judge Vega. So, you know -- I understand that it's  
13 a discretionary call on your part but I would move for admission of State's ask you  
14 to recognize that it will helpful to the jury in this case.

15           THE COURT: All right.

16           First of all, if she's allowed to testify, her testimony would be so limited  
17 as to just being pretty generic, like, you know, the use of this pronoun connotes  
18 this and the use of that connotes that. And that would be pretty much it. And then  
19 you would be responsible in argument to go through -- because the other evidence  
20 would speak for itself: Okay. You heard from the expert that I means, you know,  
21 this and we means that and she means this and he means that and on this tape  
22 you hear this, and on that grand jury testimony, she acknowledged that she  
23 testified in this way or that way, or something like that. So, I don't know how  
24 helpful it would be. If you were allowed to do, it would be limited just to sort of  
25 general concepts of the use of pronouns in the English language and everything

1 beyond that would be the subject of you having to link it together in your argument.

2 MR. GENTILE: What about the common ground aspect? I mean, the fact  
3 of --

4 MS. DIGIACOMO: She's going to --

5 MR. GENTILE: The part that deals with what is not being said, being  
6 indicative of having earlier communications --

7 THE COURT: Right; I mean, in terms of that --

8 MR. GENTILE: -- but we simply don't know what they were.

9 THE COURT: -- I would consider that general concept in linguistics  
10 although I'm not saying you're going to do it. I mean, first of all, looking at the  
11 publications -- and I recognize people may publish and have an interest in one  
12 area, one subset of a general topic, but that does not mean they don't have  
13 expertise in another area. I would note her publications all indicate she seems to  
14 be an expert in vowels and vowel sounds, particularly with an emphasis in the  
15 South. I mean, I think that that's pretty clear. Beyond that, you know -- but she  
16 may have some expertise in this regard as well. Like I said, I recognize that  
17 people may have an area of interest but still have expertise in other areas.

18 You know, I'm just not sure that this is really an accepted science. I  
19 mean, linguistics is the study of changes in language and things like that I think we  
20 can all say is an accepted science. But whether or not this sort of subset of  
21 linguistics that people will say we when they mean this and they'll say I when we  
22 mean that and they'll say he or she when they mean this other thing, I don't know  
23 how accepted that is in the field. And unfortunately her publications, I think the  
24 relevancy of her publications is, yes, she has been peer reviewed or published in  
25 peer review journals but it's not anything dealing with this topic. It's dealing with

1 more conventional, you know, sounds in linguistics as the study of sound as  
2 opposed to the study of words themselves or the use of words or the use of  
3 pronouns. And I think just sort of that just appears to be what her -- I'll think about  
4 it further. Those are my sort of preliminary thoughts on this. Certainly, you know,  
5 she wouldn't be able to say this is credible or she's trying to minimize her  
6 responsibility in this version and maximize responsibility in that version, nothing  
7 like that, if she's allowed to testify.

8           But I do have some serious reservations on the accepted nature of  
9 this and unfortunately that's why I asked some of the preliminary questions I  
10 asked. Unfortunately, from looking at Dr. Shuy's testimony in other cases, from  
11 looking at her publications, I'm unable to decipher two things: Number one, I'm  
12 unable to decipher whether or not this is an accepted subset of linguistics  
13 accepted within the linguistics community. I can't discern that. And, number two:  
14 I can't discern whether or not this type of linguistic testimony, meaning testimony  
15 relating to the choice and use of certain pronouns has ever been allowed in either  
16 in a civil or a criminal proceeding.

17           So, those are my two, I think, substantial reservations with allowing  
18 the use of this testimony. I mean, obviously, again, linguistics is a big field. There  
19 could be testimony relating to language differences, other things that may be  
20 linguistic testimony. But, again, I cannot decipher from this exactly what area was  
21 involved in these other cases.

22           MR. GENTILE: Your Honor, I would call --

23           THE COURT: Those are my reservations.

24           MR. GENTILE: -- I would call the Court's attention to an exhibit that is  
25 attached to our opposition to the State's motion.

1 THE COURT: All right. And I'm looking at the opposition right now which --

2 MR. GENTILE: Right; it's Exhibit 6 --

3 THE COURT: Okay.

4 MR. GENTILE: -- page four and it is --

5 THE COURT: And this is her interview?

6 MR. GENTILE: No, no, Exhibit 6 --

7 THE COURT: Oh.

8 MR. GENTILE: -- is not her interview.

9 THE COURT: Oh, this is her --

10 MR. GENTILE: Exhibit 6, page four, it's an excerpt representing foreign  
11 nationals and it also shows cultural issues in criminal defense on the third page.  
12 And then the fourth page deals with immigration practice and the National Police  
13 Accountability Project. And in the very middle of that page --

14 THE COURT: Where it's talking about discourse analysis.

15 MR. GENTILE: It says: Linguistics is the scientific study of language and its  
16 systems has been accepted by the National Science Foundation as a legitimate  
17 area of scientific research. And it goes on to address, I think, the issue that you're  
18 just bringing up. So, I mean, it has been recognized and it is subject to peer  
19 review. There are people that are involved in it. I mean, I'm not singling out this  
20 one paragraph. We have other materials as well.

21 THE COURT: No, I know -- like I said, I recognize he's testified in other  
22 cases. Obviously, I'm going to assume that it was in the area of linguistics.

23 MR. GENTILE: It was.

24 THE COURT: Right; I mean, obviously --

25 MR. GENTILE: In fact, it was this Court's analysis because it was -- at least

1 in my experience because it always listening to tape recordings and talking about  
2 the dynamics of the conversation. I mean, he might have some other things in  
3 cases that I'm -- in the many, many, many cases that I wasn't involved with but at  
4 least in mine, it was always every one of 'em dealt with listening to tape recordings  
5 and talking about the dynamics of the conversation from the stand point of a  
6 linguist.

7 MR. DIGIACOMO: Judge, if you read --

8 THE COURT: Yeah, I --

9 MR. DIGIACOMO: -- the whole page 'cause it talks about the majority of  
10 her cases have to do with non-native, English speaking, and when you read the  
11 cases, that's exactly right. When two people are speaking English that we're all  
12 speaking in the courtroom, it's just not a reliable witness.

13 THE COURT: All right. Well I'll consider it further, but those are my initial  
14 impressions. So -- all right. Moving right along. The motion to suppress.

15 MR. GENTILE: To supplement the motion to suppress with oral argument  
16 seems to be kind of waste of time. I think we really set it out. This is a general  
17 warrant. And I don't we need to say -- I don't think I need to submit anything in  
18 addition to that in terms of oral argument. I'm not suggesting to you that the other  
19 issues aren't important. The Family Court issue is a interesting one; okay?

20 THE COURT: Yeah -- and, I mean --

21 MR. GENTILE: And I don't expect you to grant this motion on that issue. I  
22 think it would be presumptuous of you, candidly; okay? But if I don't raise it front of  
23 you --

24 THE COURT: Right; you can't raise it again.

25 MR. GENTILE: Then I can't raise it in the Supreme Court.



1 THE COURT: Right; and, I mean, I think, you know, we're all District Court  
2 judges and a Family Court judge can come and sit over here and hear -- I mean,  
3 like Art Ritchie being a perfect example. He was elected to the Family Court  
4 bench. Now he's the Chief Judge. So, he's hearing other matters that typically are  
5 heard, you know, extradition matters --

6 MR. GENTILE: Well --

7 THE COURT: -- other things. So, I think I recognize this as a separate  
8 issue --

9 MR. GENTILE: Right.

10 THE COURT: -- but I think that they do have jurisdiction --

11 MR. GENTILE: And you know that --

12 THE COURT: -- and the authority to sign warrants. So --

13 MR. GENTILE: And just because things are always -- how do we put it?

14 THE COURT: Well it's that argument --

15 MR. GENTILE: Just because we do things that way --

16 THE COURT: Doesn't mean it's right.

17 MR. GENTILE: -- doesn't mean it's right. And, so, we raised the issue. I  
18 think it's a novel issue, I think it's an interesting issue. Could turn out to be an  
19 important issue someday in some case. But it's certainly not our main issue. Our  
20 main issue is that this is a general warrant. It left entirely too much to the  
21 discretion of the searching officers. And I think that -- let me put it to you this way,  
22 something that we cannot escape.

23 There are judges who are frequently called upon to review probable  
24 cause affidavits and there are some who are not. Some judges, when they look  
25 through an affidavit, will say for the person submitting the affidavit: You know we

1 have enough. Go back and get this. Or maybe they won't even tell 'em what to go  
2 back and get; okay? Although I don't see anything wrong with that. You know,  
3 they make an argument that you don't even have to be a lawyer to issue a search  
4 warrant in Nevada. Well that may be true but that does not mean that you're going  
5 to do it the right way. In this instance, this warrant is a general warrant. It is  
6 entirely overbroad in terms of the empowerment of the -- that it leads the officer to  
7 believe that they have. And, so not only does it violate the Fourth Amendment but  
8 it cannot be saved by the good faith exception.

9 THE COURT: Mr. DiGiacomo.

10 Mr. DIGIACOMO: Yes, Judge, I would almost submit it except I want to  
11 address a couple things he said.

12 Each and every one of the items on here are specifically tied to a  
13 specific crime which is the requirement. The suggestion by Mr. Gentile that there  
14 could have been a more specific definition, I didn't see a suggestion, first of all,  
15 what that specific suggestion would be. Contained in the itemized list in the  
16 warrant or in the affidavit for probable cause was probable cause for each one of  
17 those items that are listed.

18 And, finally, as to the good faith analysis, when you do a good faith  
19 analysis -- and I think the U.S. Supreme Court came out with a case on Monday  
20 where they said: Look, if the exclusionary rule is used to prevent misconduct by  
21 the police if they're reasonably relying upon the actions of the judge. How many  
22 warrants, Judge, have you personally signed that has the same general language  
23 that is contained here in this affidavit to say that the --

24 THE COURT: Well I'm sure Mr. Gentile tells you I'm one of those judges  
25 that just signs everything.

1 MR. DiGIACOMO: Right. The suggestion that somehow the police should  
2 be held liable because a judge did not tell them: Hey, this needs to be more  
3 specific when the items were clearly specific. And then on top of that, they  
4 basically said: We want everything out. They don't specifically list: Hey, where  
5 did the officers go too broad? What did they search that they shouldn't have? I  
6 would note --

7 THE COURT: So, they're saying it's a bad warrant. They're not saying that  
8 the search exceeded the scope of the warrant.

9 MR. DiGIACOMO: Correct.

10 THE COURT: They're saying that the warrant itself is flawed because it's  
11 not with enough specificity. The -- and what you're saying is: Well what else do  
12 they want? I mean, I'll just note one thing. I mean, they don't know what the  
13 evidence is going to be. So, obviously if you're looking for a gun, you know, that's  
14 the murder weapon. You can put in: I'm looking for this type of a firearm; I'm  
15 looking for a handgun. If you know what clothes the assailant was wearing  
16 because it's on the videotape, you can specifically say: I'm looking for, you know,  
17 jeans and sneakers or whatever it is they were wearing. But when you're looking  
18 for sort of -- well maybe there's a letter here or maybe there's a photo here or  
19 maybe there's something in this computer that indicates what this relationship was  
20 with Timothy Hadland or Kenneth Counts or DeAngelo Carroll. I mean, they could  
21 have said: Information in the computer linking the owner of the Palomino Club  
22 with as opposed to generally --

23 MR. DiGIACOMO: Well just so the Court's aware --

24 THE COURT: But they don't know what's in there. They don't know. And,  
25 so, I'm kind of agreeing with you and disagreeing with you at the same time.

1 MS. DIGIACOMO: The only thing I can say is the computers -- the  
2 computers weren't searched under this warrant, they were seized under this  
3 warrant. There is a separate warrant --

4 THE COURT: And then they did the subsequent warrant saying what  
5 they're looking for.

6 MR. DIGIACOMO: -- to search the computer which there has never been a  
7 motion as it relates to that warrant. This warrant is -- they didn't have the right to  
8 seize it. And, obviously, there's probable cause to believe that because these  
9 people are at two different places and communicating in two different places, that  
10 there may be information contained on those computers. The item like videotape,  
11 there's a camera that is -- it's a business and they're looking for establishment of  
12 videotapes related to the crime and the people that were associated at the crime. I  
13 don't know specifically as it relates to the paperwork if there's a listing of probably  
14 cause in there that Mr. -- Little Lou was writing things down and later would burn  
15 some of those pieces of paper, and that they were looking for that paperwork, and  
16 then items of possession.

17 Each and every item that's listed in the warrant is specifically tied to  
18 the probable cause in the case and I'll submit it.

19 THE COURT: Anything else, Mr. Gentile?

20 MR. GENTILE: No, Your Honor.

21 THE COURT: All right.

22 I don't think it's so general as to be a general warrant. Some of these  
23 things maybe they could have been a little more specific to say what they were  
24 looking for. But, again, you know, I gave the example of things where you know  
25 specifically; when you think maybe's there's a photo and maybe there's a letter;

1 maybe there's some writing. You don't know if these things are in existence. That  
2 doesn't mean you can't look for them.

3 And, so, to me that is more what they're doing here than looking for,  
4 you know, like going through clothing when they know what the assailant was  
5 wearing because again, these are things that they don't know. Is there a letter? Is  
6 a there a note? Is there something? They don't know. And, so, you know, I'm at  
7 a little bit of a loss to figure out how much more specific you could be without  
8 saying, you know: Any letters between this person and that person, any letters  
9 between that person and this person, when again, they don't know. They don't  
10 know what's been written. They don't know what's been on the computer. They  
11 don't know what photos were taken. So, it's denied for the reasons I've just stated.

12 And that should be everything. Look for, definitely, by tomorrow. You  
13 will definitely know whether or not Ms. Fridland can be called as a witness and if  
14 there's anything beyond the parameters I've already set or any clarification, I will  
15 indicate as well. Okay.

16 MR. GENTILE: All right. A couple of other things.

17 First of all, when we were here last, the State did not state on the  
18 record and I think I need it stated on the record, at the time the State was  
19 contemplating filing a new pleading in this case. That new pleading has not been  
20 filed. And, so, I'm assuming: A, that we're going to trial on the pleading as it  
21 currently exists --

22 THE COURT: Right. And sorry to interrupt, but just -- and that would be  
23 one pleading as to Hidalgo III and one pleading as to Hidalgo, Jr. which would be  
24 read separately, obviously, to the jury.

25 MR. GENTILE: Right; and I'm also assuming that the State is not going to

1 modify that pleading between now and the time that we commence trial.

2 THE COURT: Is that correct, Mr. DiGiacomo, you're not going to modify the  
3 pleading?

4 MR. DIGIACOMO: That's correct. It was Mr. Gentile's request to use two  
5 separate documents. I've told him I've reviewed the initial Information -- Indictment  
6 against his client and that seems appropriate to me. I've provide a Fourth  
7 Amended Information as it relates to Little Lou to Mr. Arrascada and Mr. Adams.  
8 They're in the process of reviewing that if they haven't already completely  
9 reviewed it and that's the -- there's no substantive change to the Information that  
10 I'm aware of. I believe they've reviewed that as it relates to the original Information  
11 as it relates to --

12 THE COURT: Right.

13 MR. DIGIACOMO: -- Mr. Hidalgo.

14 THE COURT: And, Mr. Arrascada, any objection to the amended pleading  
15 as it pertains to your client?

16 MR. ARRASCADA: Yes, Your Honor. We actually brought this up to Mr.  
17 DiGiacomo. If I could have the Court's indulgence perhaps they'll be striking this.  
18 If not, we'll have to argue it.

19 MR. DIGIACOMO: We won't be striking it. I know exactly what he's going to  
20 say.

21 MR. ARRASCADA: Okay.

22 MR. GENTILE: I'll address it.

23 THE COURT: Okay.

24 MR. ARRASCADA: In count one of the Fourth Amended --

25 THE COURT CLERK: This is case 212667?

1 MR. ARRASCADA: Yes, ma'am.

2 THE COURT: Yes.

3 MR. ARRASCADA: Does the Court have a copy of the proposed Fourth  
4 Amended Information?

5 THE COURT: I do not. Thank you.

6 MR. DIGIACOMO: That's actually the original right there, Judge.

7 MR. ADAMS: That's the original.

8 THE COURT: Okay. It's on it. All right. Go ahead.

9 MR. ARRASCADA: Your Honor, on page two regarding count one, line  
10 eight, after the comment starts: Did commit the acts as set forth in counts two  
11 through four, said acts being incorporated by this reference as though fully set  
12 forth herein.

13 Your Honor, this is charged as the conspiracy to commit murder. And  
14 the murder with use of the deadly weapon would be what is conspired to do.

15 THE COURT: Right.

16 MR. ARRASCADA: Arguably, if there is a conspiracy -- of course, we don't  
17 agree with that, but, Your Honor, by case law, if there is a conspiracy, under  
18 *Grunewald v. State* and *Krulewich*, the conspiracy ends once the objective is  
19 achieved and therefore the solicitations to commit murder counts two and three,  
20 would not be something that would be incorporated into a conspiracy to commit  
21 murder. So, we're proposing striking the S on counts and then the through four so  
22 it just reads: As set forth in count two, said acts being incorporated.

23 MR. DIGIACOMO: If you recall, Judge, this was a subject of a prior motion  
24 by Mr. Gentile. The original Information said: Conspiracy to commit, to wit:  
25 murder, and then it had the original -- as set forth in counts two through four as we

1 believe the solicitation charges are acts in furtherance of the conspiracy under  
2 *Crew v. State*.

3           During the course of a hearing in that case as well as being in  
4 chambers with Mr. Gentile, the Court came to an accommodation which the State  
5 agreed to do that would add the murder of Timothy Hadland to make sure there  
6 was no confusion as to what conspiracy Mr. Hidalgo III was engaged in, and that  
7 you would properly instruct the jury as to the laws it relates to conspiracy and that  
8 to be liable under count one, he had to form the agreement to kill Mr. Hadland prior  
9 to Mr. Hadland's death and that cured any concerns that the defense would have  
10 that the jury might believe merely because he is --may be involved in a conspiracy  
11 to kill those other witnesses, they would convict him of count one. And that was a  
12 resolution worked out prior to Mr. Arrascada being on the case.

13           The original Information in this case says counts two through four.  
14 There is no change. And, so, the fact that he's readdressing a different motion, not  
15 the amended being filed, this amended merely strikes the name of the other  
16 people in the heading and puts them in the body. And, so, there's no substantive  
17 change to the Information as originally put.

18           MR. GENTILE: I know this isn't my motion but may I address it based on my  
19 memory?

20           THE COURT: Sure.

21           MR. GENTILE: First of all, if you permit these two pleadings to go forth to  
22 the jury, then you have to -- you must advise the jury that there are two different  
23 conspiracies because the conspiracy with respect to the Indictment of Luis Jr. does  
24 not include any post --

25           THE COURT: Right.



1 MR. GENTILE: -- killing events. It ended with the killing. Okay. So, you're  
2 really dealing with a separate different conspiracy and it names, if I'm not  
3 mistaken, in the pleading as to Louis III. Louis, Jr. as a co-conspirator which is  
4 going to be very confusing to the jury because he's not charged in that conspiracy.

5 Second, separate, and apart from that, my memory, and I could be  
6 wrong; all right. I want to say that right on the front end. But my memory is that I  
7 addressed this issue with respect to Luis Jr.'s Indictment because if you recall, the  
8 original Indictment of Luis Jr. had two component parts of the conspiracy count,  
9 count one. It had one that ended with the killing of Hadland and then it went into  
10 these other dates, the 23<sup>rd</sup> and 24<sup>th</sup> of May. So, it -- there was one conspiracy that  
11 was May 19<sup>th</sup> and one was the 23<sup>rd</sup> and 24<sup>th</sup>. I said it was duplicitous, that it had  
12 two conspiracies jammed into one, and that the murder conspiracy clearly ends  
13 with the murder. I don't recall -- I think the Court granted that motion. But I know  
14 that we now have -- that has been stricken.

15 THE COURT: Okay.

16 MR. GENTILE: So, it might have been stricken because the DA agreed to it.

17 THE COURT: Voluntarily or I may have granted it. And I don't remember.

18 MR. GENTILE: Or you may have granted it. You know, there's been so  
19 much that's happened in this case.

20 THE COURT: Right; I don't remember.

21 MR. GENTILE: I don't have independent recollection --

22 THE COURT: I don't either.

23 MR. GENTILE: -- of all of it. But in any case, now we're faced with a  
24 situation. I can tell you that beyond any doubt whatsoever, at least with respect to  
25 Luis, Jr.'s case, this is going to require a special verdict form because there are so

1 many different objectives stated by the incorporation language of count one  
2 incorporating count two. But we -- that's not before you now and that's something  
3 we will deal with [indiscernible].

4 THE COURT: And that's fine.

5 MR. GENTILE: The -- but I don't remember ever addressing it on behalf of  
6 Luis III and that's all I'm saying. I'm not saying I didn't do it. I remember vividly --

7 THE COURT: And I don't remember either.

8 MR. GENTILE: -- addressing it for Luis, Jr. and I know that the  
9 accommodation was made. But I do not recall addressing it for Luis III.

10 MR. DiGIACOMO: Well the way to answer that question is to look to see if  
11 there's ever been an amended filed as to Mr. H. There hasn't. I believe the  
12 original Indictment --

13 MR. GENTILE: Yes; there is.

14 MR. DiGIACOMO: Is there an Amended Indictment?

15 MR. GENTILE: Oh, yes, there was.

16 MR. DiGIACOMO: I don't recall that happening. But that may or may not  
17 have happened. But the motion was filed 'cause I have the motion. It was under --  
18 if the Court recall, we were about to start trial on Little Lou and the motion was  
19 related to -- and I actually typed up the Fourth Amended Information to file to start  
20 the trial and we got stayed at the last moment. I don't specifically recall as to what  
21 happened as it relates as to Mr. H or not, but the fact of the matter is it's not two  
22 different conspiracies. It's the same darn conspiracy. He may not have  
23 participated in certain acts in furtherance of that conspiracy so he's not charged.  
24 But it's one conspiracy and that's the conspiracy to murder to Timothy Hadland,  
25 the acts of covering up under Crew, it's still the same conspiracy. It's his acts in

1 furtherance of the conspiracy which is alleged in the Information/Indictment.

2 MR. GENTILE: I submit to the Court that there are two United States  
3 Supreme -- actually there's three. I can't remember. I think *Lachey* is the third  
4 one, but *Grunewold versus The United States* and *Krulewich versus the United*  
5 *States* and I think *Lachey versus the United States* all address the issue.

6 What counsel is really saying is that there was a separate conspiracy  
7 to cover up the first conspiracy.

8 THE COURT: No; he's saying it's part and parcel of the same conspiracy,  
9 that first you have the murder and then you have the attempted cover-up and that  
10 this is what Mr. DiGiacomo was saying as I understand it. And even though Mr.  
11 Hidalgo, Jr. may not have participated in the acts in the cover-up, it's still part and  
12 parcel of the same conspiracy because the point of the cover-up was to cover-up  
13 the murder so that none of the conspirators would be apprehended or whatever. Is  
14 that what you're saying, Mr. DiGiacomo?

15 MR. DIGIACOMO: That's correct. And that's how it's charged. Count one  
16 is the conspiracy to commit murder of Mr. Hadland; count two is the murder of Mr.  
17 Hadland; counts three and four as it relate to Little Lou is his specific intent acts in  
18 furtherance of the conspiracy --

19 THE COURT: Okay.

20 MR. DIGIACOMO: -- after the murder.

21 THE COURT: Okay. Well I will just note whether that's the case or not, the  
22 case that it should be part and parcel of the same conspiracy. I think Mr. Gentile's  
23 certainly entitled to rely on the last Amended Information that was filed --

24 MR. DIGIACOMO: I do.

25 THE COURT: -- in terms of what the evidence is going to be linking his

1 client to the conspiracy because that's what we have. So --

2 MR. DiGIACOMO: No, no, I completely agree with that. No, I was only  
3 addressing Mr. Arrascada's point that counts three and four should be struck [sic].

4 THE COURT: No, no, no. But I think Mr. Gentile is asking for an  
5 instruction, if it is allowed to go forward, that that only pertains to Mr. Hidalgo III. It  
6 doesn't pertain to Mr. Hidalgo, Jr. And what I'm saying to you is whether or not it  
7 still is part of the conspiracy or not part of the conspiracy, I think Mr. Gentile is  
8 entitled to rely on the charging document that was last filed and the history as it  
9 pertains to Mr. Hidalgo, Jr. Do you see what I'm saying?

10 MR. DiGIACOMO: Well --

11 THE COURT: I don't think you can change in midstream your theory.

12 MR. DiGIACOMO: -- that's true although I would note that the original  
13 indictment had the additional language of that additional stuff and the Court said:  
14 To avoid confusion, I'm still going to allow in the evidence and still allow that to  
15 come in. Go back to the notes.

16 MR. GENTILE: The Court never said that.

17 THE COURT: Well okay. I don't have -- I have pretty good memory but I  
18 don't have a detailed recollection of this whole thing. So, I'm trying to look at the  
19 minutes as I'm sitting up here to refresh my recollection. But as you know, there  
20 are many Defendants in this case and so the minutes are very long and it's very  
21 difficult to find what minutes pertain to what hearing with respect to your client.

22 I'm happy to study this further in chambers and see if I can figure out  
23 what I said. But, obviously, if that was the ruling of the Court, Mr. Gentile's entitled  
24 to rely on the document and the deletions in the document as to this client. We  
25 can't now on the eve of trial say: Oh, well, wait a minute. We're going to do this.

1 And, so, if it goes forward the way it's pled as to Mr. Hidalgo III, I think that Mr.  
2 Gentile, like I just said, is entitled to rely on the fact that that wouldn't be offered  
3 unless I said what you say I say.

4 MR. DiGIACOMO: Right; I mean --

5 THE COURT: But, you know, that --

6 MR. DiGIACOMO: The evidence has always been that Mr. H wrote a note  
7 during the course of the surreptitious recordings and that there was testimony  
8 related to him --

9 MR. GENTILE: No; it isn't.

10 MR. DiGIACOMO: -- being present during those surreptitious recordings  
11 outside a room and being consulted with by Anabel. And that was all part of the  
12 original Indictment. This was a language issue that he didn't want the jury to  
13 believe that Mr. H formed and joined the conspiracy after the murder. That was  
14 the argument, not that: I'm not suddenly on notice that the State thinks that I  
15 participated in actions that occurred days later.

16 THE COURT: Okay. I do not have independent recollection of this. I'm  
17 going to review the minutes. I'm going to figure out the date of the hearing. This  
18 having been a death case, will already have a transcript. I'll read the transcript and  
19 I'll see what I said. That's the best I can do.

20 MR. DiGIACOMO: Right.

21 THE COURT: Because, honestly, for you to say what I said, I don't  
22 remember what I said. I'm going to see what I said and then go forward  
23 accordingly. That's just one issue as to Mr. Gentile's client. We still have the  
24 remaining issue as to Mr. Adams and Mr. Arrascada's client which may be  
25 dispositive and then maybe Mr. Gentile's issue won't matter.

1 MR. GENTILE: Let me just say one more thing, please.

2 THE COURT: Right.

3 MR. GENTILE: Because as long as you're going to go through this review,  
4 I'd ask you to read those three Supreme Court cases or certain review them. But  
5 more important than anything else, in order for a statement to be admissible as a  
6 co-conspirator's statement, it has to be made during the course of --

7 THE COURT: Right; of course.

8 MR. GENTILE: -- any furtherance. If my conspiracy ends with the murder,  
9 which it does, then the events of the 23<sup>rd</sup> and the 24<sup>th</sup> are not admissible as to  
10 Junior. And you can cure that instructing the jury; okay? But they're not  
11 admissible.

12 MR. DiGIACOMO: There's so many different ways I want to say no to that  
13 but first of all, *Crew v. State* says that those acts are -- that the conspiracy  
14 continues until the co-conspirators have completed their affirmative acts of  
15 concealment. So, obviously, those statements.

16 Not only that, Mr. Gentile last week, and I don't want to get that much,  
17 but he said a statement that I don't want the Court be -- rely too much upon  
18 because there's briefings related to that. His client doesn't necessarily have to be  
19 a member of the conspiracy at the beginning of the conspiracy when other co-  
20 conspirators for those statements to come in. As long as the person speaking at  
21 the time was a member of the conspiracy and the statement was made in  
22 furtherance of the conspiracy, if he joins that conspiracy later, I'll allow Mr. Counts  
23 join the conspiracy. But the statements made by DeAngelo Carroll before Mr.  
24 Counts joined that conspiracy were still admissible [Indiscernible]. We've briefed  
25 that issue in a number of writs and motions with the Court. And, so, I just want to

1 make sure that the Court is -- has reviewed that law. I'm sure you know that law.

2 THE COURT: Right.

3 MR. DiGIACOMO: But those statements will be coming in.

4 THE COURT: Right; I mean, all I'm saying is I think Mr. Gentile -- whatever I  
5 said, whether it be right whether it wrong, he's entitled to rely on that. And, so, I  
6 need to refresh my memory as to exactly what the history of the case is. It may  
7 be, you know -- anyway -- anything else for me?

8 MR. DiGIACOMO: I just don't know what you're going to rule as to Mr.  
9 Arrascada. If you strike -- and through count four --

10 THE COURT: Right; it's not an issue as to Mr. Gentile obviously.

11 MR. DiGIACOMO: -- if you strike it, then obviously there's no issue.

12 THE COURT: Isn't that what I just said? I try to say these things to speed  
13 things up but it never works because everybody just says it again.

14 Yes, Mr. Arrascada, anything else?

15 MR. ARRASCADA: Your Honor, creating no issue is better than having one  
16 at times. So, we'd ask that -- it appears Mr. DiGiacomo is saying that the Court's  
17 already ruled on this and we're going to rely on your review of the minutes. And if  
18 the Court finds that you have ruled on this, we're asking you to reconsider it  
19 because it's highly prejudicial.

20 THE COURT: Okay.

21 MR. ARRASCADA: And it doesn't make sense to have a conspiracy to  
22 commit murder and then they're saying: And then others conspired to kill people  
23 who are part of the conspiracy. It doesn't -- its two different conspiracies. So, two  
24 and four -- three and four should not be a part. And we just ask that you rely on  
25 your minutes and if you rule differently, we ask that you end any issues on this and

1 strike the S and through four.

2 THE COURT: All right.

3 MR. DIGIACOMO: As long as there is no evidentiary consequence of the  
4 ruling, I could literally case less. I mean, my only concern is somehow they're  
5 going to think that there's an evidentiary consequence to what the charging  
6 document which is a merely noticed pleading is. It's not going to change the  
7 nature of the evidence or the arguments of the State.

8 THE COURT: Well either way wouldn't matter because you charge him  
9 separately with solicitation to commit murder. So --

10 MR. DIGIACOMO: No; but I certainly intend to argue to this jury that the  
11 statements made by Mr. -- by Little Lou may be admissible by Mr. H because they  
12 are statements in furtherance of the original conspiracy.

13 THE COURT: Okay.

14 Number one: With respect to Mr. Arrascada. If you're willing to strike  
15 the language but still introduce and argue the evidence which you are able to do  
16 because you've charged it separately, and so you would have to give that  
17 evidence anyway. So, striking the language, not striking the language in the  
18 Fourth Amended Indictment really has no bearing then according to the State on  
19 your presentation of evidence and your argument with respect to Mr. Hidalgo III.

20 With respect to Mr. Hidalgo, Jr, we're back to square one which was:  
21 What did the Court say in the previous motions, because Mr. Gentile, I think, what  
22 he's also saying is that can't be argued to show that his client was part of a  
23 conspiracy. Is that fair what you're saying? Okay. I think I got it.

24 Now I have homework and I'll do that in chambers and try to figure out  
25 where we are on this and you'll definitely have something by tomorrow because I



1 know everybody's preparing for trial. Okay. One final thing and then --

2 MR. GENTILE: Can we start Tuesday? We have these boxes --

3 THE COURT: And that was my final thing.

4 MR. GENTILE: Okay.

5 THE COURT: I anticipated that I was going to ask you want to start Monday  
6 or Tuesday.

7 MR. GENTILE: Tuesday.

8 THE COURT: Court's willing to start Tuesday. We will start Tuesday at  
9 10:30.

10 MR. DiGIACOMO: Smile for it.

11 THE COURT: No; that's optimistic because it's a criminal day and they have  
12 to take the prisoners out and then these guys are downstairs or at least Mr.  
13 Hidalgo III will be downstairs dressed. So, that's like a 20 minute shift. So, I'm  
14 wondering maybe what we should do instead of trying to start in the morning is just  
15 start at 12:30 and not take a lunch break. That may make more sense and then  
16 just go 'til like 5:30 or 6 or whatever.

17 MR. GENTILE: You know, if you want to modify your schedule for the trial  
18 that day that would be great. There's no reason not to. If you have -- if your staff  
19 has an opportunity to have lunch -- finish your calendar, have lunch, and then we  
20 start and go straight through.

21 THE COURT: Right; let's do that.

22 MR. GENTILE: That would be fine with us; wouldn't it?

23 THE COURT: Okay. That's easier.

24 MR. ADAMS: That would be easier.

25 THE COURT: Right; I think that's easier. So, let's just say we're going to

1 start at 12:30 then.

2 MR. DIGIACOMO: Everyday or just on your criminal day?

3 THE COURT: No, no, just on Tuesday, because once we have only 14  
4 people. I'm not as concerned with people waiting around as when you have a  
5 hundred people.

6 MR. DIGIACOMO: Right. Okay.

7 THE COURT: So, let's do that. Tuesday at 12:30.

8 MR. DIGIACOMO: Thank you, Judge.

9 MR. GENTILE: Thank you, Judge.

10 MR. ADAMS: Judge, one very quick matter. We were on the pleadings as  
11 part of the linguist motion. So, I think our joining that is clear.

12 On the motion to suppress, I don't know that we signed on that. So,  
13 we would like to orally join that.

14 THE COURT: Okay.

15 MR. ADAMS: Thank you.

16 THE COURT: All right. Thanks. That's it. And call us tomorrow.

17 Look it up in Blackstone. Thank you.

18 MR. DIGIACOMO: Thank you, Judge.

19

20 [Proceedings concluded at 11:57 a.m.]

21

22 ATTEST: I do hereby certify that I have truly and correctly transcribed the  
23 audio/video recording in the above-entitled case.

24

25

  
PATRICIA SLATTERY  
Court Transcriber

**CASE No. 05C212667-2**

\_\_\_\_\_

Case Type: Felony/Gross  
Date Filed: Misdemeanor  
Location: 06/17/2005  
Department 21  
Case Number: C212667  
Case 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

[Return to Register of Actions](#)



ORIGINAL

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

JAN 26 2009

BY: Denise Husted  
DENISE HUSTED, DEPUTY

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

DISTRICT COURT  
CLARK COUNTY, NEVADA

9 THE STATE OF NEVADA,

10 Plaintiff,

11 -vs-

12 LUIS ALONSO HIDALGO, III,  
13 #1849634  
14 Defendant.

Case No: C212667  
Dept No: XXI

FOURTH AMENDED  
INFORMATION

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

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

20 That LUIS ALONSO HIDALGO, III, the Defendant above named, having committed  
21 the crimes of CONSPIRACY TO COMMIT MURDER (Felony - NRS 200.010, 200.030,  
22 193.165); MURDER WITH USE OF A DEADLY WEAPON (Felony - NRS 200.010,  
23 200.030, 193.165), and SOLICITATION TO COMMIT MURDER (Felony - NRS  
24 199.500), on or between May 19, 2005, and May 24, 2005, within the County of Clark,  
25 State of Nevada, contrary to the form, force and effect of statutes in such cases made and  
26 provided, and against the peace and dignity of the State of Nevada,

27 //

28 //

6.  
1 COUNT 1 - CONSPIRACY TO COMMIT MURDER

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

10 COUNT 2 - MURDER WITH USE OF A DEADLY WEAPON

11 Defendant LUIS ALONSO HIDALGO, III, along with co-conspirators KENNETH  
12 JAY COUNTS, ANABEL ESPINDOLA, DEANGELO RESHAWN CARROLL and  
13 JAYSON TAOIPU did, on or about May 19, 2005, then and there wilfully, feloniously,  
14 without authority of law, and with premeditation and deliberation, and with malice  
15 aforethought, kill TIMOTHY JAY HADLAND, a human being, by shooting at and into the  
16 body and/or head of said TIMOTHY JAY HADLAND, with a deadly weapon, to-wit: a  
17 firearm, the Defendant being liable under one or more of the following theories of criminal  
18 liability, to-wit: (1) by aiding and abetting the commission of the crime by, directly or  
19 indirectly, counseling, encouraging, hiring, commanding, inducing or otherwise procuring  
20 each other to commit the crime, to-wit: by DEFENDANT Luis Hidalgo, III and/or Luis  
21 Hidalgo, Jr., procuring Defendant DEANGELO CARROLL to beat and/or kill TIMOTHY  
22 JAY HADLAND; thereafter, Defendant DEANGELO CARROLL procuring KENNETH  
23 COUNTS and/or JAYSON TAOIPU to shoot TIMOTHY HADLAND; thereafter, Defendant  
24 DEANGELO CARROLL and KENNETH COUNTS and JAYSON TAOIPU did drive to the  
25 location in the same vehicle; thereafter, Defendant DEANGELO CARROLL calling victim  
26 TIMOTHY JAY HADLAND to the scene; thereafter, by KENNETH COUNTS shooting  
27 TIMOTHY JAY HADLAND; and/or (2) by conspiring to commit the crime of battery  
28 and/or battery with use of a deadly weapon and/or battery resulting in substantial bodily

harm and/or to kill TIMOTHY JAY HADLAND whereby each and every co-conspirator is responsible for not only the specific crime intended, but also for the natural and foreseeable general intent crimes of each and every co-conspirator during the course and in furtherance of the conspiracy.

COUNT 3 – SOLICITATION TO COMMIT MURDER

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

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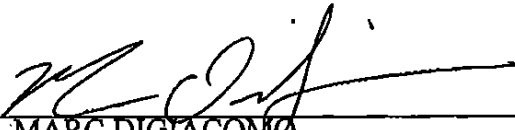
//

//

1 COUNT 4 – SOLICITATION TO COMMIT MURDER

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

10  
11  
12 BY

  
13 MARC DIGIACOMO  
14 CHIEF DEPUTY DISTRICT ATTORNEY  
15 Nevada Bar #006955  
16  
17  
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19  
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22  
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26 DA#05FB0052A/dd  
27 LVMPD EV#0505193516  
28 CONSP MURDER;MWDW - F  
(TK7)



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 11:56 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 5 of 25

(Pages 800 - 1014)

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ATTORNEYS FOR THE APPELLANT LUIS A. HIDALGO, JR.

## ALPHABETICAL INDEX OF APPELLANT'S AMENDED APPENDIX

| Document                                                                                              | Date Filed | Vol. | Page No.    |
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| 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 <sup>1</sup>                                                                  | 02/04/09   | 15   | 02749       |
| CD: State's Exhibit 192A <sup>2</sup>                                                                 | 02/04/09   | 15   | 02750       |
| CD: State's Exhibit 192B <sup>3</sup>                                                                 | 02/04/09   | 15   | 02751       |
| CD: Defense Exhibit 1 <sup>4</sup>                                                                    | 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 |
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| Fourth Amended Information (Hidalgo III)                                                              | 01/26/09   | 5    | 01011-01014 |
| Guilty Plea Agreement (Espindola)                                                                     | 02/04/08   | 3    | 00549-00557 |
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<sup>1</sup> 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.

<sup>2</sup> Id.

<sup>3</sup> Id.

<sup>4</sup> Id.

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| 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     |
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1 **OPPS**  
2 GORDON & SILVER, LTD.  
3 DOMINIC P. GENTILE  
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8 Las Vegas, Nevada 89169  
9 (702) 796-5555  
10 Attorneys for Defendant, Luis Alonso Hidalgo, III

FILED  
APR 10 4 34 11 '08  
CLERK OF DISTRICT COURT

11 **DISTRICT COURT**  
12 **CLARK COUNTY, NEVADA**

13 STATE OF NEVADA,

14 Plaintiff,

15 vs.

16 LUIS ALONSO HIDALGO III. #1849634,

17 Defendants.

CASE NO.: C212667

DEPT. NO.: XXI

**OPPOSITION TO STATE'S MOTION TO  
CONDUCT VIDEOTAPED TESTIMONY  
OF A COOPERATING WITNESS**

Date of Hearing: April 10, 2008

Time of Hearing: 9:30 a.m.

18 Defendant, Luis Alonso Hidalgo III., ("Defendant"), by and through his counsel of  
19 record, Dominic P. Gentile, Esq. of the law firm Gordon & Silver, Ltd., hereby opposes the  
20 State's Motion to Conduct Videotaped Testimony of a Cooperating Witness filed by Plaintiff,  
21 State of Nevada ("Plaintiff").

22 This Opposition is made and based upon the following Memorandum of Points and  
23 Authorities, any attachments thereto, and the papers and pleadings already on file herein

24 Dated this 16<sup>th</sup> day of April, 2008.

25 GORDON & SILVER, LTD.

26 By: 

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Attorneys for Defendant,

Luis Alonso Hidalgo, III

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 **I. INTRODUCTION**

3 The plaintiff has filed a motion with this Court seeking an order that the testimony of  
4 Anabel Espindola be memorialized prior to trial by way of a videotaped deposition. According to  
5 the charges, Espindola is now an admitted accomplice against whom plaintiff once sought the  
6 death penalty but with whom they have negotiated a plea of guilty to a "fictional" charge. As part  
7 of the plea bargain, plaintiff has promised Espindola release from custody and non-opposition to  
8 a sentence of probation. It has made her release dependent upon her giving a deposition. See  
9 Exhibits 1 (Guilty Plea Agreement), 2 (Agreement to Testify) and 3 (Recorder's Transcript of  
10 Hearing Re: Espindola Plea, February 4, 2008).

11 The plaintiff offers no authority, statutory or otherwise, to support its application.  
12 Moreover, once again it fails to support its factual assertions - conclusory as they are - with any  
13 affidavits, declarations or materials for the Court to consider. Nothing appears in the record  
14 setting out the source(s) and basis for the prosecutor's statements that, prior to Espindola entering  
15 the plea of guilty, "another cooperating witness received pressure from at least one co-defendant  
16 to lie about the circumstances of May 19, 2005." The record is also bereft of any support for the  
17 proposition that "the witness<sup>1</sup> lives in danger now that it is known she will be testifying". The  
18 plaintiff asserts that memorializing the testimony of Espindola, an admitted accomplice witness,  
19 will somehow remove the motivation of some unknown person or persons to harm or kill  
20 Espindola. It does so without any factual support that anyone has made any attempts to harm  
21 Espindola or anything to establish that she wouldn't be harmed out a desire for revenge. Nor  
22 does it distinguish how Espindola's "danger" is any different from any other prosecution witness  
23 who may testify against a defendant in a criminal case, thereby making the instant matter an  
24 exception to the rule that depositions are not available in criminal cases.

25 More importantly, it fails to disclose to this Court that NRS 174.175, which governs the  
26 taking of a deposition to preserve testimony in a criminal case, expressly excludes accomplice

27 <sup>1</sup> From the text and grammar employed, it is unknown whether the plaintiff is speaking of  
28 Espindola or the "another cooperating witness" referred to in the prior sentence.

1 witnesses from its application. See NRS 174.175(3). Finally, its seeks to bind a non-party to this  
2 proceedings, Luis Alonso Hidalgo Jr., by the order that it requests, notwithstanding its failure to  
3 seek the order in the proper case.

4 **II. THE TAKING OF A DEPOSITION TO PRESERVE TESTIMONY IN A CRIMINAL**  
5 **CASE IS GOVERNED BY STATUTE.**

6 NRS 174.175 was enacted as part of the general omnibus revision of the Nevada  
7 Criminal Code in 1967. It provides:

8 1. If it appears that a prospective witness may be unable to attend or prevented  
9 from attending a trial or hearing, that his testimony is material and that it is  
10 necessary to take his deposition in order to prevent a failure of justice, the court at  
11 any time after the filing of an indictment, information or complaint may upon  
12 motion of a defendant or of the state and notice to the parties order that his  
13 testimony be taken by deposition and that any designated books, papers,  
documents or tangible objects, not privileged, be produced at the same time and  
place. If the deposition is taken upon motion of the state, the court shall order that  
it be taken under such conditions as will afford to each defendant the opportunity  
to confront the witnesses against him.

14 2. If a witness is committed for failure to give bail to appear to testify at a trial or  
15 hearing, the court on written motion of the witness and upon notice to the parties  
16 may direct that his deposition be taken. After the deposition has been subscribed  
the court may discharge the witness.

17 3. This section does not apply to the prosecutor, or to an accomplice in the  
18 commission of the offense charged.

19 *Emphasis added to the original.*

20 NRS 174.175(3) is unique to Nevada, representing a very deliberate legislative intent that  
21 accomplices testify only in person before a jury, consistent with Nevada's view of the inherent  
22 lack of trustworthiness of accomplice testimony without corroboration. The first two sections of  
23 the statute are similar to those found in many states and the federal rules of criminal procedure.  
24 The legislative history of AB 81, which was part of the Omnibus Revision of Nevada's Criminal  
25 Code enacted in 1967, makes it clear that Federal Rule of Criminal Procedure 15(a) was its  
26 model. However, section three was a verbatim carry over from the NRS 171.505 which was  
27 enacted as part of the 1911 Criminal Practice Act. It has been unchanged for almost one hundred  
28 years and deliberately preserved by the legislature as something *sui generis* to Nevada law. For



1 almost a century Nevada has prohibited the substitution at a jury trial of the deposition testimony  
2 of an accomplice in place of live testimony. In a case such as the one *sub judice* where the  
3 plaintiff had an opportunity to conduct a preliminary hearing in a related matter, as was  
4 demanded by the defendant in 08FB0018X, but chose instead to thwart the opportunity for cross-  
5 examination until its accomplice became more comfortable with testifying and got her story  
6 straight, this Court should not ignore one hundred years of legislative policy regarding  
7 accomplice testimony being excluded from the reaches of being presented to a jury by  
8 deposition.

9 Nevada has no jurisprudence on NRS 174.175. Other states and the federal courts have  
10 interpreted their rules which are similar to NRS 174.175(1) & (2), however. In State v. Brothers,  
11 1979 WL 207495 (Ohio App Dist 7, 1979), the Ohio Court of Appeals examined Ohio's rule  
12 which states that a deposition may be taken only when a prospective witness will be unable to  
13 attend or will be prevented from attending a trial or hearing, and if it further appears that his  
14 testimony is material and that it is necessary to take his deposition in order to prevent a failure of  
15 justice, the court, at any time after the filing of an indictment may order the deposition taken.  
16 The Ohio Court of Appeals held in that case that there was no possibility of the witness' failure  
17 to appear because he had pleaded guilty to murder and was incarcerated. Anabel Espindola is in  
18 custody in this case. She has pleaded guilty to the killing of Timothy Hadland and admitted her  
19 role as an accomplice.<sup>2</sup> The Clark County Detention Center has an excellent record for  
20 protecting its inmates. In fact, it is difficult to imagine how Ms. Espindola could possibly be  
21 safer anywhere else. Moreover, since the crimes to which she has pleaded guilty make her  
22 eligible for a sentence greater than the amount of time that she has been in custody, there is little  
23 for her to lose by remaining in custody, as she will be credited for that time if she is not  
24 sentenced to probation. Yet the plaintiff seems to be concerned that she has been in custody  
25 almost three years and seems to have an appetite for her to be released, even if it is only

26  
27 <sup>2</sup> Defendant does not concede that this admission by Espindola is true or false. He does,  
28 however, remain adamant that she was not *his* accomplice, as he had nothing to do with nor any  
knowledge of the homicide before it occurred.

1 prompted by being part of the purchase price for her testimony. Given that plaintiff wanted her to  
2 be subject to death prior to her "cooperation", this is not a stretch of the imagination. Simply  
3 stated, that is not sufficient reason to memorialize the testimony of an accomplice witness in the  
4 face of a legislative intent and mandate to the contrary, particularly when the plaintiff chose to  
5 avert a preliminary hearing in a related matter after the defendant in that case demanded one in  
6 fifteen days of arraignment, choosing to present the case to the grand jury and avoid cross-  
7 examination of Espindola.

8 In Brumley v. Wingard, 269 F. 3d 629, 640-642 (6<sup>th</sup> Cir. 2001) the United States Court of  
9 Appeals for the Sixth Circuit relied upon Barber v. Page, 390 U.S. 719, 722, 88 S.Ct. 1318, 20  
10 L.Ed.2d 255 (1968) wherein the Supreme Court squarely held that a witness is not unavailable  
11 when in custody serving a sentence in a different jurisdiction than the trial proceedings. In  
12 Dixon v. State, 27 Md.App. 443, 340 A.2d 396, 402 (Md. App. 1975) the court held that it's  
13 criminal depositions rule, virtually identical to Nevada's, had as its purpose the perpetuation of  
14 evidence and noted that its Supreme Court held in Kardy v. Shook, 237 Md. 524, 207 A.2d 83  
15 (1965) that trial courts lack an inherent power to direct the taking of depositions. Other states are  
16 consistent in recognizing that while depositions are allowable in criminal cases, the  
17 circumstances permitting their use must be exceptional. McGuinness v. State, 92 N.M. 441, 442,  
18 589 P. 2d 1032, 1033 (N.M. 1979). State v. Barela, 86 N.M. 104, 519 P.2d 1185 (N.M Ct.App.  
19 1974). The necessity must be clearly established, and the burden of showing that necessity is on  
20 the prosecution. Haynes v. People, 128 Colo. 565, 265 P.2d 995 (1954). While depositions are  
21 allowable in criminal cases when the legislature so provides, the circumstances permitting their  
22 use must be extraordinary. The necessity must be clearly established, and the duty of showing  
23 that necessity is the burden of the prosecution. See United States v. Mitchell, 385 F. Supp. 1190,  
24 1192 (D. C. D. C. 1974). It follows that the conditions established by the legislature in enacting  
25 NRS 174.175 must be met honored with strict compliance for a trial court to order the taking of a  
26 deposition. Given that accomplice testimony is expressly excluded by NRS 174.175(3), this is  
27 impossible.

28 Here, one of the prosecutors assigned to the case has failed to offer anything other than

1 an unsworn, non-specific narrative of his own to support a showing of need of exceptional  
2 circumstances for the deposition that he seeks, does not call to the Court's attention that NRS  
3 174.175(3) even exists and is disingenuous as to his true reasons for wanting the deposition taken  
4 - to enable the State to live up to its plea bargain agreement with the witness and keep her happy.  
5 In United States v. Ruiz-Castro, 92 F. 3d 1519, 1533 (10<sup>th</sup> Cir. 1996) *overruled on other grounds*  
6 by United States v. Flowers, 441 F.3d 900, 903(10<sup>th</sup> Cir. 2006) the United States Court of  
7 Appeals for the Tenth Circuit held that the applicant seeking the deposition failed to meet his  
8 burden of proving that exceptional circumstances existed justifying the taking of the deposition  
9 as required by Fed.R.Crim.P. 15(a). It relied upon an Eleventh Circuit opinion, United States. v.  
10 Drogoul, 1 F.3d 1546, 1552-53 (11th Cir.1993) which held that the burden is placed upon  
11 proponent of depositions to satisfy the rule or statutes requirements through the use of affidavits  
12 or some other evidentiary support. While the prosecutors in the instant case seem to have ignored  
13 them throughout its entire history, the Rules of the District Courts of the State of Nevada  
14 mandate that all motions in all actions, civil or criminal, have factual assertions supported by  
15 affidavit. DCR 5 reads:

16 Rule 5. Scope, construction, and application of rules

17 These rules shall be liberally construed to secure the proper and efficient  
18 administration of the business and affairs of the court and to promote and  
19 facilitate the administration of justice by the court.

20 **These rules cover the practice and procedure in all actions in the district  
21 courts of all districts where no local rule covering the same subject has been  
22 approved by the supreme court. Local rules which are approved for a particular  
23 judicial district shall be applied in each instance whether they are the same as or  
24 inconsistent with these rules.**

25 *Emphasis added to the original.*

26 The Eighth Judicial District Court has a specific rule dealing with motions in civil cases but not  
27 criminal cases. See EDCR 2.21. Therefore DCR 13, which reads in pertinent part as follows,  
28 applies to criminal cases in the Eighth Judicial District:

29 Rule 13. Motions: Procedure for making motions; affidavits; renewal, rehearing  
30 of motions.

31 5. The affidavits to be used by either party shall identify the affiant, the party on  
32 whose behalf it is submitted, and the motion or application to which it pertains

1 and shall be served and filed with the motion, or opposition to which it relates.  
2 Affidavits shall contain only factual, evidentiary matter, shall conform with  
3 the requirements of NRCP 56(e), and shall avoid mere general conclusions or  
4 argument. Affidavits substantially defective in these respects may be  
5 stricken, wholly or in part.

6 6. Factual contentions involved in any pre-trial or post-trial motion shall be  
7 initially presented and heard upon affidavits. Oral testimony may be received  
8 at the hearing with the approval of the court, or the court may set the matter for a  
9 hearing at a time in the future and allow oral examination of the affiants to resolve  
10 factual issues shown by the affidavits to be in dispute.

11 *Emphasis added to original.*

12 The rule makes no mention of an exemption for statements of opinion couched as fact made by a  
13 prosecutor in the narrative portion of a motion by the State. This Court cannot find that Anabel  
14 Espindola "may be unable to attend or prevented from attending a trial or hearing" merely by  
15 relying on the prosecutor's unsupported opinion. Nor can it find that "it is necessary to take his  
16 deposition in order to prevent a failure of justice" just because the prosecutor says so. And most  
17 of all, it cannot and should not ignore that the prosecutor has either failed to learn the existence  
18 of NRS 174.175(3) or deliberately failed to cite NRS 174.175 at all out of a concern that  
19 subsection three would come to the Court's attention, thereby thwarting the State's effort to fulfill  
20 an ill-conceived promise made in a plea bargain. The State is free to agree to the release of Ms.  
21 Espindola without the deposition, if it wishes to keep her happy. It is neither empowered nor  
22 free to conscript the defendant into helping it do so.

23 **III. A DEPOSITION IN THE ABSENCE OF A SHOWING OF COMPLIANCE WITH**  
24 **THE LEGISLATIVE AND JUDICIAL POLICY TOWARDS ACCOMPLICE**  
25 **TESTIMONY WILL HAVE AN ADVERSE AND PREJUDICIAL IMPACT ON THE**  
26 **JURY'S ABILITY TO ASSESS ESPINDOLA'S DEemeanOR AND DEPRECIATE THE**  
27 **VALUE OF CROSS-EXAMINATION.**

28 The witness-stand is the place where witnesses give evidence. It is the place where the  
witness exposes himself to the jurors - a group of strangers to the witness - and submits her  
credibility to their judgment. The confrontation clause requires that a witness give a statement  
under oath and submit to what has been termed the "ordeal of a cross-examination". See Mattox  
v. United States, 156 U.S. 237, 244, 15 S. Ct. 337 (1895). It also requires that the jury be able "

1 to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing  
2 his credibility.” Maryland v. Craig, 497 U.S. 836, 845-846, 111 L.Ed.2d 666, 679, 110 S.Ct.  
3 3157 (1990). Demeanor evidence is importantly relevant on the issue of credibility. See  
4 California v. Green, 399 U.S. 149, 160, 26 L.Ed.2d 489, 90 S.Ct. 1930 (1979), and jurors are to  
5 be so instructed. As explained by Judge Learned Hand, a witness's “ ‘demeanor’-is a part of the  
6 evidence. The words used are by no means all that we rely on in making up our minds about the  
7 truth of a question that arises in our ordinary affairs, and it is abundantly settled that a jury is as  
8 little confined to them as we are. They may, and indeed they should, take into consideration the  
9 whole nexus of sense impressions which they get from a witness. This we have again and again  
10 declared, and have rested our affirmance of findings of fact of a judge, or of a jury, on the  
11 hypothesis that this part of the evidence may have turned the scale.” Dyer v. MacDougall 201  
12 F.2d 265, 269 (2d Cir. 1952).

13 Demeanor evidence is of considerable legal consequence. It can have a dispositive effect  
14 in the outcome of a case “in which the existence or nonexistence of a determinative fact depends  
15 upon the credibility to be given to testimonial evidence.” Harding v. Purtle, 275 Cal.App.2d  
16 396, 400 79 Cal.Rptr. 772 (1969.) Although demeanor evidence does not appear on the record,  
17 and for that reason has led to the rule that the fact finder is the exclusive judge of credibility,  
18 many is the case which is affirmed on appeal because the reviewing court necessarily deferred to  
19 the finding of the trier of fact on issues of credibility. This is particularly true in Nevada where  
20 as a matter of Constitutional mandate the court may not weigh evidence in a criminal case.

21 “The primary object of the [Confrontation Clause] was to prevent depositions or ex  
22 parte affidavits ... being used against the prisoner in lieu of a personal examination and cross-  
23 examination of the witness in which the accused has an opportunity, not only of testing the  
24 recollection and sifting the conscience of the witness, but of compelling him to stand face to  
25 face with the jury in order that they may look at him, and judge by his demeanor upon the  
26 stand and the manner in which he gives his testimony whether he is worthy of belief.”  
27 Kentucky v. Stincer, 482 U.S. 730, 736-737, 107 S.Ct. 2658, 2662-2663, 96 L.Ed.2d 631 (1987),  
28 quoting Mattox v. United States, 156 U.S. 237, 242-243, 15 S.Ct. 337, 339, 39 L.Ed. 409

1 (1895). "That experience - taking the oath or affirming to tell the truth, 'standing in the presence  
2 of the person the witness accuses' and speaking in front of a group of critical strangers-is  
3 expected to have a truth-inducing influence on the witness. "It is always more difficult to tell a  
4 lie about a person 'to his face' than 'behind his back.' ... Of course, the testimonial experience  
5 may also "unfortunately, upset the truthful rape victim or abused child; but by the same token  
6 may confound and undo the false accuser, or reveal the child coached by the malevolent adult."  
7 People v. Adams, 19 Cal. App. 4<sup>th</sup> 412, 438-439, 23 Cal. Rptr. 2d 512 (Cal. App. 6<sup>th</sup> Dist. 1993),  
8 relying on Coy v. Iowa, 487 U.S. 1012, 1019-1020, 108 S.Ct. 2798, 2802 (1988). Courts have  
9 recognized that an experienced witness can be "cagey" under cross-examination<sup>3</sup>, can anticipate  
10 the reach of a line of cross-examination and give nonresponsive and unwanted answers<sup>4</sup>, appear  
11 more comfortable in the presence of a jury than an inexperienced witness<sup>5</sup>, and be rehearsed with  
12 the earlier videotaped deposition in preparation for live testimony at a subsequent trial. Thus it  
13 makes sense that a state that employs a policy of distrust of accomplice testimony, NRS 175.291,  
14 would find that the employment of depositions to memorialize accomplice testimony would tend  
15 to artificially bolster their credibility and take away from the jury an important decision making  
16 tool by impacting on the ability to judge truthfulness from the witness's demeanor. This is  
17 consistent with the pronouncement of the Nevada Supreme Court in Austin v. State, 87 Nev.  
18 578, 491 P. 2d 724, 731 (Nev. 1971) wherein the Court held:

19 By NRS 175.291, our legislature has declared that one who has participated  
20 criminally in a given criminal venture shall be deemed to have such character, and  
21 such motives, that his testimony alone shall not rise to the dignity of proof beyond  
22 a reasonable doubt. To this legislative policy we must give meaningful effect.

23 It is respectfully submitted that NRS 174.175(3) is an additional part of the legislative  
24 policy towards accomplice witnesses and must be honored with strict compliance here.

25 ///

26 ///

27 ///

28 <sup>3</sup> United States v. Cote, 2007 WL 1000849 (S.D.N.Y. 2007).

<sup>4</sup> People v. Auer, 393 Mich. 667, 674 (Mich. 1975).

<sup>5</sup> Ledesma v. State, 141 Tex. Crim. 37, 39, 181 S.W. 2d 705 (Tex. Crim. App. 1944)

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**CONCLUSION**

Based on the foregoing, Luis Alonso Hidalgo III. respectfully requests the Court deny the State's motion.

Dated this 16<sup>th</sup> day of April, 2008.

GORDON & SILVER, LTD.

By: 

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Luis Alonso Hidalgo, III





# EXHIBIT "1"

Document1

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

FILED IN OPEN COURT

FEB 04 2008 20

CHARLES J. SHORT  
CLERK OF THE COURT

BY *Denise Husted*  
DENISE HUSTED DEPUTY

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 "I".

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 "I".

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

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

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

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

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

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

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

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

24 I understand that if the State of Nevada has agreed to recommend or stipulate a  
25 particular sentence or has agreed not to present argument regarding the sentence, or agreed  
26 not to oppose a particular sentence, or has agreed to disposition as a gross misdemeanor  
27 when the offense could have been treated as a felony, such agreement is contingent upon my  
28 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           4. The constitutional right to subpoena witnesses to testify on my behalf.  
2           5. The constitutional right to testify in my own defense.  
3           6. The right to appeal the conviction, with the assistance of an attorney, either  
4 appointed or retained, unless the appeal is based upon reasonable constitutional jurisdictional  
5 or other grounds that challenge the legality of the proceedings and except as otherwise  
6 provided in subsection 3 of NRS 174.035.

7                               VOLUNTARINESS OF PLEA

8           I have discussed the elements of all of the original charge(s) against me with my  
9 attorney and I understand the nature of the charge(s) against me.

10          I understand that the State would have to prove each element of the charge(s) against  
11 me at trial.

12          I have discussed with my attorney any possible defenses, defense strategies and  
13 circumstances which might be in my favor.

14          All of the foregoing elements, consequences, rights, and waiver of rights have been  
15 thoroughly explained to me by my attorney.

16          I believe that pleading guilty and accepting this plea bargain is in my best interest,  
17 and that a trial would be contrary to my best interest.

18          I am signing this agreement voluntarily, after consultation with my attorney, and I am  
19 not acting under duress or coercion or by virtue of any promises of leniency, except for those  
20 set forth in this agreement.

21          I am not now under the influence of any intoxicating liquor, a controlled substance or  
22 other drug which would in any manner impair my ability to comprehend or understand this  
23 agreement or the proceedings surrounding my entry of this plea.

24        //

25        //

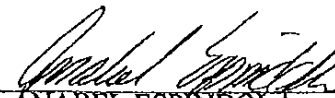
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1  
2 My attorney has answered all my questions regarding this guilty plea agreement and  
3 its consequences to my satisfaction and I am satisfied with the services provided by my  
4 attorney.

5 DATED this 2<sup>nd</sup> 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)  
5 to which guilty pleas are being entered.

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

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

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

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

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

15 c. Was not under the influence of intoxicating liquor, a controlled substance or  
16 other drug at the time I consulted with the defendant as certified in paragraphs  
17 1 and 2 above.

18 Dated: This 2 day of January, 2008.

19 *Feb.*  
20   
21 ATTORNEY FOR DEFENDANT  
22  
23  
24  
25  
26  
27  
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

12 DISTRICT COURT  
13 CLARK COUNTY, NEVADA

14 THE STATE OF NEVADA,

15 Plaintiff,

16 -vs-

17 ANABEL ESPINDOLA,  
18 #1849750

19 Defendant.

Case No: C212667  
Dept No: XIV

20 THIRD AMENDED  
21 INFORMATION

22 STATE OF NEVADA }  
23 COUNTY OF CLARK } ss.

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

26 That ANABEL ESPINDOLA, the Defendant above named, having committed the  
27 crime of VOLUNTARY MANSLAUGHTER WITH USE OF A DEADLY WEAPON  
28 (Category B Felony - NRS 200.040, 200.050, 200.080, 193.165), on or about May 19, 2005,  
within the County of Clark, State of Nevada, contrary to the form, force and effect of statutes  
in such cases made and provided, and against the peace and dignity of the State of Nevada,  
did then and there without authority of law, wilfully, unlawfully, and feloniously, without  
malice and without deliberation 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 and KENNETH JAY COUNTS, aka  
Kenneth Jay Counts, II, and LUIS ALONSO HIDALGO, aka, Luis Alonso Hidalgo III,

EXHIBIT 1

\\SUPERMAN\\DIGIACMS\\MYDOCS\\MVUSP\\ALOMINO\\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

16  
17  
18  
19  
20  
21  
22  
23  
24  
25 DA#05FB0052C/  
26 LVMPD EV#0505193516  
27 CONSP MURDER;VMWDW - F  
(TK7)  
28

# EXHIBIT "2"

Document1

1 ANAG  
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, ~~Plaintiff~~

10 Plaintiff,

11 -vs-

12 ANABEL ESPINDOLA,  
13 #1849750

14 Defendant.

Case No. C212667

Dept No. XXI

15  
16 AGREEMENT TO TESTIFY

17 IT IS HEREBY AGREED by and between the State of Nevada, by the Clark County  
18 District Attorney and through the undersigned Deputy, MARC DIGIACOMO, and  
19 ANABEL ESPINDOLA, by and through his undersigned defense attorney, CHRIS ORAM,  
20 ESQ.:

21 1. ANABEL ESPINDOLA will cooperate voluntarily with the Clark County District  
22 Attorney's Office, the Las Vegas Metropolitan Police Department, and any other law  
23 enforcement agency in the investigation and prosecution in Case No.C212667, *State of*  
24 *Nevada vs. Kenneth Counts, Deangelo Carroll, and Luis Hidalgo, III, and any other suspect*  
25 *concerning the MURDER WITH USE OF A DEADLY WEAPON of TIMOTHY*  
26 *HADLAND* which occurred on May 19, 2005, and/or any other investigation related to the  
27 Palomino Gentleman Caberet or the prosecution of the above referenced case.

28 //

EXHIBIT 2

1           2. ANABEL ESPINDOLA will cooperate voluntarily by providing true information  
2 and by testifying fully and truthfully in all court proceedings in the above referenced case  
3 and investigation. After ANABEL ESPINDOLA has testified subject to cross-examination  
4 in a videotaped deposition, the State agrees to request her release from custody in jail to  
5 house arrest for her own protection.

6           3. The full terms of the plea agreement are set forth in the document styled Guilty  
7 Plea Memorandum, a copy of which is attached hereto and incorporated herein by reference.  
8 ANABEL ESPINDOLA shall receive the benefits described in this agreement subject to his  
9 compliance with all of the terms and conditions contained in this document. Moreover,  
10 should ANABEL ESPINDOLA violate the terms of this agreement, the State, may seek to  
11 withdraw her plea in this case and prosecute her for all of the original charges.

12           4. It is further understood that as a result of entering this agreement, ANABEL  
13 ESPINDOLA is waiving all appeal rights with respect to the entry of plea, speedy trial  
14 rights, and any other right to appeal any issue as a result of his prosecution in Case C212667.

15                           **OBLIGATION TO BE TRUTHFUL**

16           OVERRIDING ALL ELSE, it is understood that this agreement requires from  
17 ANABEL ESPINDOLA an obligation to do nothing other than to tell the truth. It is  
18 understood between all the parties to this agreement that ANABEL ESPINDOLA, at all  
19 times, shall tell the truth, both during the investigation and while testifying on the witness  
20 stand. ANABEL ESPINDOLA shall tell the truth, no matter who asks the questions,  
21 including but not limited to investigators, prosecutors, judges and defense attorneys.

22           It is further understood that this entire agreement shall become null and void and  
23 ANABEL ESPINDOLA shall lose the benefits of this agreement for any deviation from the  
24 truth, for failure to answer any question that is the subject matter of this investigation, for  
25 purposely withholding information regarding this investigation, for providing evasive

26 //

27 //

28 //

1 answers to questions asked by law enforcement officers investigating this case, for providing  
2 false information at any time on any matter concerning this investigation. Further,  
3 ANABEL ESPINDOLA shall be subject to prosecution for perjury for any intentional false  
4 statement which occurs while she is on the witness stand.

5 The parties agree that the trial court shall determine if ANABEL ESPINDOLA  
6 complied with her obligation of truthfulness for purposes of this agreement.

7  
8 **ADDITIONAL CONDITIONS**

9 1. It is further agreed that if this agreement is declared null and void as a result of  
10 violation of the terms and conditions by ANABEL ESPINDOLA, the District Attorney will  
11 use any statements made by regarding this investigation against him, in any subsequent  
12 criminal trial/prosecution arising in Case No. C212667.

13 2. It is agreed that no interviews or communication with ANABEL ESPINDOLA  
14 shall be conducted by the District Attorney or its agents unless defense counsel  
15 CHRISTOPHER ORAM, ESQ. has been notified and CHRISTOPHER ORAM, ESQ. agrees  
16 to expressly waive his right to be present.

17 3. Any failure by the Office of the District Attorney and its agents to comply with the  
18 above requirements shall render this Agreement null and void and may result in ANABEL  
19 ESPINDOLA taking any action which would otherwise be available to him, including but  
20 not limited to refusing to testify based on his Fifth Amendment right or seeking to withdraw  
21 from the plea agreement in Case No.C212667.

22 4. All parties realize and understand their obligations and duties under this  
23 Agreement. Each party enters this Agreement with full knowledge of the meaning and effect  
24 of such Agreement.

25 //

26 //

27 //

28 //

1  
2 5. ANABEL ESPINDOLA has discussed this matter fully with her attorney. The  
3 parties realize and understand that there are no terms to this Agreement other than what is  
4 contained herein and in the Guilty Plea Agreement. ANABEL ESPINDOLA fully and  
5 voluntarily accepts all the terms and conditions of this agreement and understands the  
6 consequences of entering into this agreement.  
7

8  
9 2/2/08

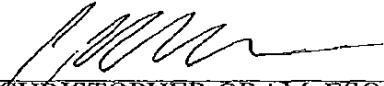
10 DATE



11 ANABEL ESPINDOLA  
12 Defendant

13 2/2/08

14 DATE



15 CHRISTOPHER ORAM, ESQ.  
16 Attorney for Defendant

17 2/2/08

18 DATE



19 MARC DIGIACOMO  
20 Chief Deputy District Attorney  
21  
22  
23  
24  
25  
26  
27  
28

# EXHIBIT "3"

Document1

DISTRICT COURT

CLARK COUNTY, NEVADA

 **COPY**

FILED IN OPEN COURT

FEB 07 2008 20

CHARLES J. SHORT  
CLERK OF THE COURT

BY DENISE HUSTED DEPUTY

THE STATE OF NEVADA,

Plaintiff,

vs.

KENNETH COUNTS, aka KENNETH  
JAY COUNTS II, LUIS ALONSO  
HIDALGO, aka LUIS ALONSO  
HIDALGO III, ANABEL ESPINDOLA  
DEANGELO RESHAWN CARROLL,  
JAYSON TAOIPU,

Defendants.

BEFORE THE HONORABLE VALERIE ADAIR, DISTRICT COURT JUDGE

Monday, February 4, 2008

RECORDER'S TRANSCRIPT OF HEARING RE:  
Espindola Plea

APPEARANCES:

FOR THE STATE:

MARK DIGIACOMO, ESQ.  
Deputy District Attorney  
GIANCARLO PESCI, ESQ.  
Deputy District Attorney

FOR DEFENDANT ESPINDOLA: CHRISTOPHER ORAM, ESQ.

RECORDED BY: JANIE OLSEN, COURT RECORDER

KARReporting and Transcription Services  
720-244-3978

00826



TRANSCRIBED BY: KARReporting and Transcription Services

LAS VEGAS, NEVADA, MONDAY, FEBRUARY 4, 2008, 9:02 A.M.

P R O C E E D I N G S

THE COURT: All right. The record will reflect the presence of the Defendant Anabel Espindola, along with her attorney, Mr. Oram; the presence of Mr. Pesci and Mr. DiGiacomo on behalf of the State.

And my understanding is that this matter has been resolved; is that correct?

MR. ORAM: Yes, Your Honor.

THE COURT: And the Court is in possession of a written guilty plea and the third amended information. And was that filed this morning in open court?

MR. DIGIACOMO: It was, Judge.

THE COURT: All right. Very good.

All right. Ms. Espindola, the Court, as I have stated, is in possession of a written plea of guilty which was signed by you. Before I may accept your plea of guilty, I must be satisfied that your plea is freely and voluntarily given.

Are you making this plea freely and voluntarily?

THE DEFENDANT: Yes, Your Honor.

THE COURT: All right. Other than what's contained in the written plea of guilty and the exhibits affixed thereto, have any

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1 promises or threats been made to induce you to enter your plea?  
2 THE DEFENDANT: No, Your Honor.  
3 THE COURT: All right. Before you sign the written plea of  
4 guilty, did you read it?  
5 THE DEFENDANT: Yes, Your Honor.  
6 THE COURT: Did you understand everything contained in the  
7 written plea of guilty and the attachments thereto?  
8 THE DEFENDANT: Yes.  
9 THE COURT: All right. Did you have a full opportunity to  
10 discuss your plea of guilty with your attorney Mr. Oram?  
11 THE DEFENDANT: Yes.  
12 THE COURT: Before the Court accepts your plea of guilty,  
13 is there anything you would like to ask me about your plea or the  
14 charge of voluntary manslaughter with use of a deadly weapon to which  
15 you are pleading guilty?  
16 THE DEFENDANT: No, Your Honor.  
17 THE COURT: All right. We'll go through this then. Tell  
18 me in your own words what you did on or about May 19, 2005 within  
19 Clark County, Nevada that causes you to plead guilty to the reduced  
20 charge of voluntary manslaughter with use of a deadly weapon.  
21 MR. ORAM: Your Honor, this --  
22 THE COURT: And this is a fictional plea.  
23 MR. ORAM: It is a fictional plea.  
24 THE COURT: All right. I'm going to have her plea -- and  
25 the reason you're pleading fictionally is this is obviously a lesser

1 charge than the original charges which the State would be proceeding  
2 against you on; is that correct?

3 THE DEFENDANT: Yes, Your Honor.

4 THE COURT: And after discussing this with your attorney,  
5 Mr. Oram, you have concluded that it's in your best interest to enter  
6 this fictional plea; is that right?

7 THE DEFENDANT: Yes, Your Honor.

8 THE COURT: All right. The way we're going to do this is  
9 I'm going to have you tell me what you did and that will be the basis  
10 for the plea to be reduced charge of voluntary manslaughter with use  
11 of a deadly weapon.

12 THE DEFENDANT: I assisted all the co-conspirators.

13 THE COURT: Okay. So you conspired and aided and abetted  
14 the following individuals: Kenneth Counts, Luis Hidalgo, Jayson  
15 Taoipu, and Deangelo Carroll; is that correct?

16 THE DEFENDANT: Yes, ma'am.

17 MR. DIGIACOMO: Judge, both Luis Hildalgos.

18 THE COURT: Oh, all right.

19 MR. DIGIACOMO: You can ask her as to both Luis Hildalgos.

20 THE COURT: All right. All right.

21 MR. DIGIACOMO: The third and Junior.

22 THE COURT: The third and Luis Hidalgo, Sr.; is that  
23 correct?

24 THE DEFENDANT: Junior.

25 MR. DIGIACOMO: Junior.

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720-244-3978

1 THE COURT: I'm sorry. Junior and the third.

2 THE DEFENDANT: Yes, Your Honor.

3 THE COURT: All right. And together you counseled,  
4 encouraged, hired, commanded, or induced one or all of these  
5 individuals to be and/or kill Timothy J. Hadland; is that correct?

6 THE DEFENDANT: Yes, Your Honor.

7 THE COURT: And Deangelo Carroll actually procured Kenneth  
8 Counts and/or Jayson Taoipu to actually shoot Timothy Hadland; is  
9 that correct?

10 THE DEFENDANT: Yes, Your Honor.

11 THE COURT: All right. And as a result of this conspiracy  
12 and Mr. Deangelo Carroll procuring Mr. Counts and/or Jayson Taoipu,  
13 Timothy Hadland was actually fatally shot in the head; is that  
14 correct?

15 THE DEFENDANT: Yes, Your Honor.

16 THE COURT: Is that acceptable with the State?

17 MR. DIGIACOMO: Yes, Judge.

18 THE COURT: All right. Ms. Espindola, the Court finds that  
19 your plea of guilty has been freely and voluntarily given and hereby  
20 accepts your plea of guilty.

21 Do we want a sentencing date in 60 days or what are we  
22 doing?

23 MR. DIGIACOMO: Why don't you give us a status check in 60  
24 days, Judge.

25 THE COURT: All right. So we won't refer it to P&P right

1 now?

2 MR. DIGIACOMO: That's correct, Judge.

3 THE COURT: Okay.

4 MR. DIGIACOMO: We won't refer it over to P&P. And what  
5 I'd ask is that the guilty plea agreement be filed under seal with  
6 the exception that I'm allowed to provide it to the defense attorneys  
7 that are associated with the various people elicited in the amended  
8 information with the understanding that they're not supposed to pass  
9 it on. They certainly can discuss the contents, but they're not  
10 supposed to pass it on to their clients or any other witnesses in the  
11 case, Judge.

12 THE COURT: I'll see counsel at the bench.

13 MR. ORAM: Judge, also for the record, we waive any defect  
14 in any of the pleadings.

15 THE COURT: Oh, thank you. I thought I'd already said  
16 that, but I must have forgotten.

17 MR. ORAM: I'm sorry.

18 THE COURT: No, you're probably right.

19 (Off-record bench conference)

20 THE COURT: What we're going to do is we are going to file  
21 the guilty plea agreement and the third amended information. Those  
22 will be public records. The attachments will be temporarily sealed  
23 until further order of the Court in the interest of justice and the  
24 ongoing matters relating to the totality of the case.

25 MR. DIGIACOMO: Thank you, Judge.

1 THE COURT: All right. Thank you. We're going to set this  
2 out for a status check.

3 THE CLERK: April 8th at 9:30.

4 MR. ORAM: Thank you, Your Honor.

5 MR. DIGIACOMO: Thank you, Judge.

6 MR. ORAM: Your Honor, could we go any day before or after  
7 that?

8 THE COURT: Of course. We're flexible.

9 THE CLERK: April 15th --

10 MR. ORAM: Thank you very much.

11 THE CLERK: -- or the 31st. Which one?

12 THE COURT: Tax day or April Fool's day.

13 MR. ORAM: Tax day is fine. Tax day is fine.

14 THE COURT: Which is it, Mr. Oram?

15 MR. ORAM: Tax day, Your Honor.

16 THE CLERK: April 15th at 9:30.

17 MR. ORAM: Thank you, Your Honor.

18 THE COURT: All right. Is there anything else relating to  
19 Ms. Espindola's matter we need to do at this time?

20 MR. ORAM: No, Your Honor.

21 THE COURT: All right. Thank you.

22 (Proceedings concluded at 9:09 a.m.)

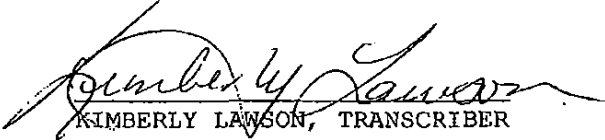
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\*\*\*\*\*

ATTEST: I HEREBY CERTIFY THAT I HAVE TRULY AND CORRECTLY  
TRANSCRIBED THE AUDIO/VIDEO PROCEEDINGS IN THE  
ABOVE-ENTITLED CASE TO THE BEST OF MY ABILITY.

  
KIMBERLY LAWSON, TRANSCRIBER

KARReporting and Transcription Services

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720-244-3978

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

CASE NO. 08C241394

The State of Nevada vs Luis Hidalgo Jr

§  
§  
§  
§  
§  
§  
§  
§  
§

Case Type: **Felony/Gross Misdemeanor**  
 Date Filed: **02/13/2008**  
 Location: **Department 21**  
 Conversion Case Number: **C241394**  
 Defendant's Scope ID #: **1579522**  
 Lower Court Case Number: **07GJ00101**

**RELATED CASE INFORMATION****Related Cases**

05C212667-1 (Consolidated)  
 05C212667-2 (Consolidated)  
 05C212667-3 (Consolidated)  
 05C212667-4 (Consolidated)  
 05C212667-5 (Consolidated)

**PARTY INFORMATION**

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

**Lead Attorneys**  
**Dominic P. Gentile**

*Retained*

7023860066(W)

**Plaintiff** **State of Nevada**

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

**CHARGE INFORMATION**

| Charges: Hidalgo Jr, Luis                                       | 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 |

**EVENTS & ORDERS OF THE COURT**

04/17/2008 All Pending Motions (9:30 AM) ()

ALL PENDING MOTIONS 4/17/08 Court Clerk: Denise Husted Reporter/Recorder: Debra Winn Heard By: Valerie Adair

**Minutes**

04/17/2008 9:30 AM

DEFENDANT'S MOTION FOR COURT TO ALLOW PRESENTATION OF EVIDENCE TO THE JURY...DEFENDANT'S MOTION TO PROHIBIT ARGUMENT ON DETERRENCE OR TO PERMIT EVIDENCE OF LACK OF DETERRENCE...MOTION TO PROHIBIT THE STATE OF NEVADA FROM INTRODUCING EVIDENCE AND ARGUMENT REGARDING MITIGATING CIRCUMSTANCES THAT ARE NOT APPLICABLE TO LUIS HIDALGO JR...DEFENDANT'S MOTION TO DECLARE AS UNCONSTITUTIONAL THE UNBRIDLED DISCRETION OF PROSECUTION TO SEEK THE DEATH PENALTY...DEFENDANT'S MOTION FOR DISCLOSURE OF THE EXISTENCE OF ELECTRONIC SURVEILLANCE...STATE'S NOTICE OF MOTION AND MOTION TO CONDUCT VIDEOTAPED TESTIMONY OF A COOPERATING WITNESS...DEFENDANT'S MOTION FOR DISCLOSURE OF INTERCEPTED COMMUNICATIONS...DEFENDANT'S MOTION TO STRIKE THE DEATH PENALTY AS UNCONSTITUTIONAL BASED ON ITS ALLOWANCE OF INHERENTLY UNRELIABLE EVIDENCE...DEFENDANT'S MOTION TO STRIKE NOTICE OF INTENT TO SEEK DEATH PENALTY...DEFENDANT'S MOTION TO STRIKE DEATH PENALTY BASED UPON UNCONSTITUTIONALITY...DEFENDANT'S MOTION TO STRIKE NOTICE OF INTENT TO SEEK DEATH BASED UPON UNCONSTITUTIONAL WEIGHING EQUATION...DEFENDANT'S MOTION TO DISMISS COUNT ONE OF THE INDICTMENT FOR DUPLICITY OR, IN THE ALTERNATIVE, FOR AN ELECTION...DEFENDANT'S MOTION TO BIFURCATE PENALTY PHASE PROCEEDINGS COURT ORDERED, as



follows: Defendant's Motion for Court to Allow Presentation of Evidence to the Jury was not addressed; Defendant's Motion to Prohibit Argument on Deterrence or to Permit Evidence of Lack of Deterrence is DENIED so long as the State contends they are not going to argue deterrence; Motion to Prohibit the State of Nevada from Introducing Evidence and Argument Regarding Mitigating Circumstances that are not Applicable to Luis Hidalgo Jr. is GRANTED; Defendant's Motion to Declare as Unconstitutional the Unbridled Discretion of Prosecution to Seek the Death Penalty is DENIED; Defendant's Motion for disclosure of the Existence of Electronic Surveillance and Defendant's Motion for Disclosure of Intercepted Communications cannot be decided without an Affidavit from Christopher Lalli in the District Attorney's Office. Mr. Digiacomo stated he has no knowledge that the State ever uses electronic surveillance or intercepted communications. COURT ORDERED, motions CONTINUED and matter set for a Status Check regarding affidavit; State's Notice of Motion and Motion to Conduct Videotaped Testimony of a Cooperating Witness is CONTINUED; Defendant's Motion to Strike the Death Penalty as Unconstitutional Based on its Allowance of Inherently Unreliable Evidence, Defendant's Motion to Strike Notice of Intent To Seek Death Penalty, Defendant's Motion to Strike Death Penalty Based Upon Unconstitutionality, Defendant's Motion to Strike Notice of Intent to Seek Death Based Upon Unconstitutional Weighing Equation and Defendant's Motion to Bifurcate Penalty Phase Proceedings are DENIED. As to Defendant's Motion to Dismiss Count One of the Indictment for Duplicity or, in the Alternative, for an Election; Court directed the State to prepare and file and amended indictment taking duplicate language out. CUSTODY 5/1/01 9:30 AM DEFENDANT'S MOTION FOR DISCLOSURE OF THE EXISTENCE OF ELECTRONIC SURVEILLANCE...DEFENDANT'S MOTION FOR DISCLOSURE OF INTERCEPTED COMMUNICATIONS...STATE'S MOTION OF MOTION AND MOTION TO CONDUCT VIDEOTAPED TESTIMONY OF A COOPERATING WITNESS...STATUS CHECK: AFFIDAVIT OF CHRISTOPHER LALLI...STATUS CHECK: RESET TRIAL DATE

Parties Present

Return to Register of Actions

ORIGINAL

FILED IN OPEN COURT

MAY 01 2008 20

CHARLES J. SHORT  
CLERK OF THE COURT

BY Denise Husted  
DENISE HUSTED DEPUTY

1 IND

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

DISTRICT COURT

CLARK COUNTY, NEVADA

10 THE STATE OF NEVADA, )

11 Plaintiff, )

12 -vs- )

13 LUIS HIDALGO, JR., aka Luis Alonso  
14 Hidalgo,  
15 #1579522 )

16 Defendant(s). )

Case No. C241394  
Dept. No. XXI

AMENDED  
INDICTMENT

18 STATE OF NEVADA }  
19 COUNTY OF CLARK } ss.

20 The Defendant(s) above named, LUIS HIDALGO, JR., aka Luis Alonso Hidalgo,  
21 accused by the Clark County Grand Jury of the crime(s) of CONSPIRACY TO COMMIT  
22 MURDER (Felony - NRS 200.010, 200.030, 199.480); and MURDER WITH USE OF A  
23 DEADLY WEAPON (Felony - NRS 200.010, 200.030, 193.165), committed at and within  
24 the County of Clark, State of Nevada, on or about the 19th day of May, 2005, as follows:

25 COUNT 1 - CONSPIRACY TO COMMIT MURDER

26 did, on or about May 19, 2005, then and there, meet with Deangelo Carroll and/or  
27 Luis Hidalgo, III and/or Anabel Espindola and/or Kenneth Counts and/or Jayson Taoipu and  
28 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,

1 Defendant and/or his co-conspirators, did commit the acts as set forth in Count 2, said acts  
2 being incorporated by this reference as though fully set forth herein.

3 COUNT 2 - MURDER WITH USE OF A DEADLY WEAPON

4 did, on or about May 19, 2005, then and there wilfully, feloniously, without authority  
5 of law, and with premeditation and deliberation, and with malice aforethought, kill  
6 TIMOTHY JAY HADLAND, a human being, by shooting at and into the body and/or head  
7 of said TIMOTHY JAY HADLAND, with a deadly weapon, to-wit: a firearm, the Defendant  
8 being liable under one or more of the following theories of criminal liability, to-wit: (1) by  
9 directly or indirectly committing the acts with premeditation and deliberation and/or lying in  
10 wait; and/or (2) by aiding and abetting the commission of the crime by, directly or indirectly,  
11 counseling, encouraging, hiring, commanding, inducing or otherwise procuring another to  
12 commit the crime, to-wit: by defendant along with LUIS HIDALGO, III procuring  
13 DEANGELO CARROLL to beat and/or kill TIMOTHY JAY HADLAND; thereafter,  
14 DEANGELO CARROLL procuring KENNETH COUNTS and/or JAYSON TAOIPU to  
15 shoot TIMOTHY HADLAND; thereafter, DEANGELO CARROLL and KENNETH  
16 COUNTS and JAYSON TAOIPU did drive to the location in the same vehicle; thereafter,  
17 DEANGELO CARROLL calling victim TIMOTHY JAY HADLAND to the scene;  
18 thereafter, by KENNETH COUNTS shooting TIMOTHY JAY HADLAND; defendant  
19 paying \$5000.00 or \$6000.00 to DEANGELO CARROLL for the killing of TIMOTHY JAY

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1 HADLAND; and/or (3) by conspiring to commit the crime of battery and/or battery resulting  
2 in substantial bodily harm and/or battery with use of a deadly weapon on the person of  
3 TIMOTHY JAY HADLAND whereby each and every co-conspirator is responsible for the  
4 reasonably foreseeable general intent crimes of each and every co-conspirator during the  
5 course and in furtherance of the conspiracy and/or (4) by conspiring to commit the crime of  
6 murder of TIMOTHY JAY HADLAND whereby each and every co-conspirator is  
7 responsible for the specific intent crime contemplated by the conspiracy.

8  
9 DATED this 20<sup>th</sup> day of April, 2008.

10  
11 DAVID ROGER  
12 DISTRICT ATTORNEY  
13 Nevada Bar #002781

14 BY

  
15 MARC DIGIACOMO  
16 Deputy District Attorney  
17 Nevada Bar #006955  
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27 07AGJ101X/08FB0018X/ts  
28 LVMPD 0505193516  
(TK 7)

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

CASE No. 08C241394

The State of Nevada vs Luis Hidalgo Jr

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§

Case Type: **Felony/Gross Misdemeanor**  
 Date Filed: **02/13/2008**  
 Location: **Department 21**  
 Conversion Case Number: **C241394**  
 Defendant's Scope ID #: **1579522**  
 Lower Court Case Number: **07GJ00101**

**RELATED CASE INFORMATION****Related Cases**

05C212667-1 (Consolidated)  
 05C212667-2 (Consolidated)  
 05C212667-3 (Consolidated)  
 05C212667-4 (Consolidated)  
 05C212667-5 (Consolidated)

**PARTY INFORMATION**

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

**Lead Attorneys**  
**Dominic P. Gentile**

*Retained*

7023860066(W)

**Plaintiff** **State of Nevada**

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

**CHARGE INFORMATION**

| Charges: Hidalgo Jr, Luis                                       | 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 |

**EVENTS & ORDERS OF THE COURT**

05/01/2008 All Pending Motions (9:30 AM) ()

ALL PENDING MOTIONS 5/1/08 Court Clerk: Denise Husted Reporter/Recorder: Janie Olsen Heard By: Valerie Adair

**Minutes**

05/01/2008 9:30 AM

DEFENDANT'S MOTION FOR DISCLOSURE OF THE EXISTENCE OF ELECTRONIC SURVEILLANCE...DEFENDANT'S MOTION FOR DISCLOSURE OF INTERCEPTED COMMUNICATIONS...STATE'S MOTION TO CONDUCT VIDEOTAPED TESTIMONY OF A COOPERATING WITNESS...STATUS CHECK: AFFIDAVIT/C. LALLI...STATUS CHECK: TRIAL SETTING Opposition to State's Motion to Conduct Videotaped Testimony, Affidavit of Christopher Lalli and Amended Indictment FILED IN OPEN COURT. Argument by Mr. DiGiacomo. Court advised the State did make some good arguments; however, did not see the difference from any other informant or accomplice who was going to give testimony. Typically, the Court's procedure is to allow the video taped testimony as this is done with the Court and all parties present. The only drawback to this is that the jury does not get to evaluate the demeanor of the witness personally. Colloquy between Court and counsel regarding this being a deposition or preservation of testimony. Mr. Gentile argued this was in fact a deposition to preserve testimony; however, the statute should apply and there was no judicial empowerment to preserve this testimony. Further, Mr. Gentile argued that what the State was failing to recognize was that no inherent power existed, that there were strict guidelines as to when a deposition could take place, and more importantly, that an accomplice was an exemption to the statute. Mr. Gentile advanced the proposition that the only reason the State wanted to depose this witness was so that they could keep their promise to release her from custody. Regardless, the Court had a duty and the motivation to see that the statute was

complied with. State argued they had the right to preserve this testimony. Court advised the State made a tactical decision in not calling this witness at the preliminary hearing of Hidalgo III but the Court did not see any extraordinary risk or reason for a video deposition to be done; the same situation exists as at the time prior to the preliminary hearing and the State elected not to present the testimony. COURT ORDERED, motion to CONDUCT VIDEOTAPED TESTIMONY of cooperating witness DENIED as to both Hidalgo Jr. and Hidalgo III, although the reasoning did not apply to both, as one case was an indictment; the facts and circumstances of both cases were the same. Mr. DiGiacomo presented the Affidavit of Christopher Lalli to the Court and advised the statute required Mr. Roger and Mr. Roger only to order the wiretap, but Mr. Lalli was the Assistant District Attorney and prepared the affidavit which the State believed complied with the Court's Order. Mr. Gentile stated he didn't know if the affidavit complied or not as he was just now seeing it. Court inquired where Mr. Roger's affidavit was as in looking at this affidavit it may not be sufficient, it's lacking with regard to knowledge. Mr. Gentile requested a continuance with regard to this matter to determine whether or not there is compliance with the Court's order and the statute. COURT SO ORDERED. Colloquy between Court and Counsel regarding a trial date for the Hidalgo Jr. (C241394) case. Mr. DiGiacomo stated the Hidalgo III case (C212667) still showed a trial date, but that it had been stayed by the Nevada Supreme Court. COURT ORDERED, that trial date (C212667) would be VACATED; case C241394 SET FOR TRIAL. 6/3/08 9:30 AM STATUS CHECK: AFFIDAVIT...DEFENDANT'S MOTION FOR DISCLOSURE OF THE EXISTENCE OF ELECTRONIC SURVEILLANCE...DEFENDANT'S MOTION FOR DISCLOSURE OF INTERCEPTED COMMUNICATIONS 8/14/08 9:30 AM CALENDAR CALL 8/18/08 10:00 AM JURY TRIAL

Parties Present

Return to Register of Actions

IN THE SUPREME COURT OF THE STATE OF NEVADA

LUIS HIDALGO, III,  
Petitioner,

No. 48233

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.

WRIT OF MANDAMUS

TO: The Honorable Donald M. Mosley, Judge of the Eighth Judicial  
District Court:

WHEREAS, this Court having made and filed its written decision  
that a writ of mandamus issue,

NOW, THEREFORE, you are directed to strike the two aggravating  
circumstances alleging solicitation to commit murder as prior violent  
felonies pursuant to NRS 200.033(2) and to allow the State to amend its  
notice of intent to seek the death penalty to declare the factual allegations  
supporting the pecuniary gain aggravator in a clear, comprehensible  
manner and to further explain its allegation that the victim's murder  
served to further the business interests of the Palomino Club, in the case  
entitled State vs. Hidalgo, case no. C212667.

WITNESS The Honorables Mark Gibbons, Chief Justice, James W.  
Hardesty, Ron Parraguirre, Michael L. Douglas, Michael A. Cherry, and

Nancy M. Saitta, Associate Justices of the Supreme Court of the State of Nevada, and attested by my hand and seal this 29th day of May, 2008.



Bruce A. Horstmannhoff  
Chief Assistant Clerk



IN THE SUPREME COURT OF THE STATE OF NEVADA

LUIS HIDALGO, III and ANABEL  
ESPINDOLA,

Petitioners,

CASE NO. 58344

vs.

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

Respondents.

and

THE STATE OF NEVADA,

Real Party in Interest.

**CERTIFICATE OF SERVICE**

The undersigned, an employee of Gordon & Silver, Ltd., hereby certifies that on the 3rd  
day of June, 2008, she served a copy of the Writ of Mandamus, by hand delivery addressed to:

The Honorable Donald M. Mosley  
Department 14  
200 Lewis Avenue  
Las Vegas, NV 89155

  
An employee of GORDON & SILVER, LTD.

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

CASE NO. 08C241394

The State of Nevada vs Luis Hidalgo Jr

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Case Type: **Felony/Gross Misdemeanor**  
 Date Filed: **02/13/2008**  
 Location: **Department 21**  
 Conversion Case Number: **C241394**  
 Defendant's Scope ID #: **1679522**  
 Lower Court Case Number: **07GJ00101**

**RELATED CASE INFORMATION****Related Cases**

05C212667-1 (Consolidated)  
 05C212667-2 (Consolidated)  
 05C212667-3 (Consolidated)  
 05C212667-4 (Consolidated)  
 05C212667-5 (Consolidated)

**PARTY INFORMATION**

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

**Lead Attorneys**  
**Dominic P. Gentile**

*Retained*

7023860066(W)

**Plaintiff** **State of Nevada**

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

**CHARGE INFORMATION**

| Charges: Hidalgo Jr, Luis                                       | 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 |

**EVENTS & ORDERS OF THE COURT**

06/17/2008 All Pending Motions (9:30 AM) ()

ALL PENDING MOTIONS 6/17/08 Court Clerk: Denise Husted Reporter/Recorder: Janie Olsen Heard By: Valerie Adair

**Minutes**

06/17/2008 9:30 AM

DEFENDANT'S MOTION FOR DISCLOSURE OF THE EXISTENCE OF ELECTRONIC SURVEILLANCE...DEFENDANT'S MOTION FOR DISCLOSURE OF INTERCEPTED COMMUNICATIONS...STATUS CHECK: AFFIDAVIT Mr. DiGiacomo advised that the ruling from the Supreme Court was issued and the State will file amended an amended notice to conform with the ruling. He further stated the ruling is very narrow as to what the State can do, which may necessitate a briefing schedule. He informed parties that the State does not have electronic surveillance or intercepted communications. COURT ORDERED, Defendant's motions are OFF CALENDAR. Colloquy regarding filing of motion to consolidate this case with C212667. Mr. DiGiacomo stated that if the cases are consolidated, there will be trial strategy problems; Mr. Hidalgo III is speaking with other counsel, just in case. He further stated that if consolidated, this case will not be ready for trial on 8/18/08. Mr. DiGiacomo brought up the subject of Mr. Gentile's request for evidence and that he is free to view it at the vault. Also, the issue regarding the hard drives and whether they are available in pristine condition is in question. The Court directed the State to file a written motion regarding consolidation and Mr. Gentile may file an opposition. Mr. Gentile state that if the cases are consolidated, it raises issues regarding the trial date and whether or not he will be able to represent both Defendants; Mr. Hidalgo III is now speaking with other counsel in case there is a consolidation. Mr. Gentile stated the Supreme Court ruling was very narrow in terms of what the State will be permitted to do; he believes the State will seek an opportunity to include

information in their notice that wasn't there originally, specifically information from Annabella. He further advised he will challenge a new notice of intent that will require briefing, answer and a Court's ruling before deciding on a final motion to consolidate. The Court informed Mr. Gentile that should the State add information regarding Annabella, he can file an opposition to the amended notice. Upon further inquiry, Mr. DiGiacomo stated the notice will be filed within two days. Mr. DiGiacomo stated he received a letter regarding the evidence view. He further stated that he has invited the defense team to view the file and evidence at Metro; there is an issue regarding the hard drive and whether or not it is in pristine condition. Mr. DiGiacomo advised he will provide the hand writing exemplars as requested, as well as the Silverton records. He informed parties that the State does not have electronic surveillance or intercepted communications. Colloquy regarding trial date in case C212667. COURT ORDERED, trial date STANDS in this case and trial set in January, 2009 for case C212667. If the cases are not consolidated, Mr. Gentile will try one case in January and the other case in August. BOND

Parties Present

Return to Register of Actions

  
CLERK OF THE COURT

**NISD**  
**DAVID ROGER**  
Clark County District Attorney  
Nevada Bar #002781  
**MARC DIGIACOMO**  
Chief Deputy District Attorney  
Nevada Bar #006955  
200 Lewis Avenue  
Las Vegas, Nevada 89155-2211  
(702) 671-2500  
Attorney for Plaintiff

**DISTRICT COURT**  
**CLARK COUNTY, NEVADA**

THE STATE OF NEVADA,

Plaintiff,

-vs-

LUIS HIDALGO, JR.,  
#1579522

Defendant.

Case No. C241394

Dept No. XXI

**AMENDED NOTICE OF INTENT TO SEEK DEATH PENALTY**

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

1. The murder was committed by a person, 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, that he would pay someone to kill Timothy Jay Hadland, who was a former employee of the club. Prior to May 19, 2005, Timothy Jay Hadland had been fired from the Palomino Club for stealing. On May 19,

1 2005, Luis Hidalgo Jr. (the owner of the club) and Luis Hidalgo, III (the owner's son and a  
2 manager at the club), learned that Timothy Jay Hadland had been "bad mouthing" the club to  
3 cab drivers. During a conversation that day, Defendant Luis Hidalgo, III told Luis Hidalgo,  
4 Jr. that he would not make as much money as other strip club owners if Luis Hidalgo, Jr. did  
5 not do something to Timothy Jay Hadland. The Palomino Club is not located on the Strip  
6 and its business relies heavily on customers being brought to the club by cabs. The club was  
7 losing money because of Timothy Jay Hadland's actions and as such Luis Hidalgo Jr.,  
8 wanted him killed so that he, his business, and his employees would be better off financially  
9 by the increased flow of clients after Timothy Jay Hadland was silenced. Additionally,  
10 killing Timothy Jay Hadland would send a message to other people not to steal from the  
11 Palomino, thereby increasing his profits.

12 On the same date, Luis Hidalgo, III, a manager of the Palomino Club, called  
13 Deangelo Carroll and told him to come to the club and "bring baseball bats and garbage  
14 bags." When Defendant Carroll arrived at the Palomino Club, Luis Hidalgo, Jr., hired  
15 Deangelo Carroll to kill Timothy Jay Hadland. After conveying this information and  
16 procuring Deangelo Carroll, Deangelo Carroll went to 1676 "E" Street to the residence of  
17 Kenneth Counts and enlisted Defendant Kenneth Counts to kill Timothy Jay Hadland.  
18 Defendant Deangelo Carroll then drove Defendants Kenneth Counts and Jayson Taoipu, as  
19 well as witness Rontae Zone, out to the area of North Shore Road at Lake Mead, where  
20 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 Anabel Espindola. At that time  
24 Defendant Deangelo Carroll announced that, "it was done" and that Defendant Kenneth  
25 Counts wanted to be paid. Luis Hidalgo Jr., then told Anabel Espindola to get \$5,000, which  
26 Defendant Anabel Espindola did and which she provided to Defendant Deangelo Carroll  
27 who then provided money to Defendant Kenneth Counts. Defendant Kenneth Counts then  
28 left the club in a cab.

These facts support the aggravator because the murder was committed for the purpose of improving the profits to the business and the employees of the Palomino Club. The owner of the club, Luis Hidalgo Jr. wanted Timothy Jay Hadland killed so that he could make more money in the strip club business. In addition, these facts support murder for hire under the aggravator as Defendants Kenneth Counts and Deangelo Carroll received money for killing Timothy Jay Hadland.

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

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

DATED this 18th day of June, 2008.

Respectfully submitted,  
DAVID ROGER  
Clark County District Attorney  
Nevada Bar #002781

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

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CERTIFICATE OF FACSIMILE TRANSMISSION

I hereby certify that service of the above and foregoing AMENDED NOTICE OF INTENT TO SEEK DEATH PENALTY, was made this 18th day of June, 2008, by facsimile transmission to:

Dominic Gentile, Esq.  
369-2666

/s/D.Daniels  
Secretary for the District Attorney's  
Office

**CASE No. 05C212667-2**

~~~~~

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

STATE'S REQUEST STATUS CHECK ON MTN TO CONSOLIDATE C241394 Court Clerk: Denise Husted
Reporter/Recorder: Janie Olsen Heard By: Adair, Valerie

- Mr. Gentile introduced Chris Adams, Esq. from Atlanta, who will be substituting in as counsel for Luis Hidalgo, III; also John Arascata, Esq. from Reno will be appearing later. He further stated that these attorneys will be representing Hidalgo, III because of the issues that can be raised between Hidalgo, III and Hidalgo, Jr. and because of the Nevada Supreme Court's narrow mandate in their ruling. Mr. Gentile advised he will continue to represent Hidalgo, Jr. and requested additional time to file oppositions for the Motions to Consolidate cases C212667 and C241394. Mr. Digiacomo requested time for the State to file replies to Mr. Gentile's opposition. COURT ORDERED, Mr. Gentile's opposition is due by 12/4/08 and the State's reply is due by 12/11/08. FURTHER, Motions to Consolidate CONTINUED in cases C212667 and C241394. CUSTODY

[Return to Register of Actions](#)

ORIGINAL

0020

GORDON SILVER
DOMINIC P. GENTILE
Nevada Bar No. 1923
PAOLA M. ARMENI
Nevada Bar No. 8357
3960 Howard Hughes Pkwy., 9th Floor
Las Vegas, Nevada 89169
(702) 796-5555
(702) 369-2666 (Facsimile)

Attorneys for Defendant LUIS A. HIDALGO JR.

7
FILED

2008 DEC -9 P 3:46

[Signature]
CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

STATE OF NEVADA,

Plaintiff,

CASE NO. C241394
DEPT. XXI

vs.

LUIS HIDALGO, JR., #1579522,

Defendants.

**DEFENDANT LUIS A. HIDALGO JR.'S MOTION TO STRIKE
THE AMENDED NOTICE TO SEEK DEATH PENALTY**

Date of Hearing: December 19, 2008
Time of Hearing: 9:30a.m.

[Signature]

COMES NOW, LUIS A. HIDALGO JR., by and through his counsel, DOMINIC P. GENTILE, ESQ. and PAOLA M. ARMENI, ESQ., of the law firm of GORDON SILVER and hereby moves the Court to strike the Amended Notice to Seek Death Penalty.

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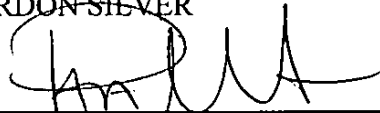
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DEC 09 2008
CLERK OF THE COURT
Gordon Silver
Attorneys At Law
Ninth Floor
3960 Howard Hughes Pkwy
Las Vegas, Nevada 89169
(702) 796-5555

1 This Motion is made and based on the following Memorandum of Points and Authorities,
2 the exhibits attached hereto and any oral argument the Court may permit at the hearing of this
3 matter.

4 Dated this 8th day of December, 2008.

5 GORDON SILVER

6 

7 DOMINIC P. GENTILE

8 Nevada Bar No. 1923

9 PAOLA M. ARMENI

10 Nevada Bar No. 8357

11 3960 Howard Hughes Pkwy., 9th Floor

12 Las Vegas, Nevada 89169

13 (702) 796-5555

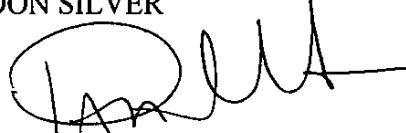
14 Attorneys for LUIS A. HIDALGO JR.

15 **NOTICE OF MOTION**

16 **YOU, AND EACH OF YOU**, will please take notice that the undersigned will bring the
17 above and foregoing Motion on for hearing before this Court on the 19th day of December, 2008
18 at the hour of 9:30 o'clock a.m. of said day, or as soon thereafter as counsel can be heard in
19 Department No. XXI.

20 Dated this 8th day of December, 2008.

21 GORDON SILVER

22 

23 DOMINIC P. GENTILE

24 Nevada Bar No. 1923

25 PAOLA M. ARMENI

26 Nevada Bar No. 8357

27 3960 Howard Hughes Pkwy., 9th Floor

28 Las Vegas, Nevada 89169

(702) 796-5555

Attorneys for LUIS A. HIDALGO JR.

///

///

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I.

3 STATEMENT OF RELEVANT FACTS

4 On or about the 6th of March, 2008 the State of Nevada (hereinafter, "State") filed a
5 Notice of Intent to Seek Death Penalty (hereinafter, "Notice"). The following day, March 7,
6 2008, a Corrected Notice of Intent to Seek Death Penalty was filed, appearing to change only the
7 case number and not the assertions of facts contained within¹. Approximately, three months
8 later, on or about June 18, 2008, the State filed an Amended Notice of Intent to Seek Death
9 Penalty. This Amended Notice was untimely and therefore should be stricken. Moreover, it fails
10 to state a basis upon which one of its theories, the indirect "monetary gain" aggravator, can be
11 sustained, as it is purely and entirely speculative and theoretical as to (1) the reason why
12 Timothy Hadland was terminated from employment at the Palomino Club and (2) any
13 anticipated benefit flowing or "trickling down" to the operations of the Palomino Club because
14 of Hadland's demise. The "indirect monetary gain" theory of aggravator should be stricken even
15 if the remainder of the Notice survives. Finally, it added an entirely new theory - that Hadland
16 was killed to send a message not to steal from the Palomino Club - which has no foundation in
17 the "monetary gain" aggravator. This last theory, which alleges no facts to support it, is clearly
18 untimely and insufficient to satisfy due process notice concerns.
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27 ¹ The ID number however, was still incorrect and corresponds to Luis Hidalgo III. This marked another example of
28 even the State confusing which Luis Hidalgo - "Jr. or III" - it was dealing with at the time.

II.

LEGAL ARGUMENT

A. THE AMENDED NOTICE OF INTENT TO SEEK DEATH PENALTY IS INSUFFICIENT TO COMPLY WITH THE DUE PROCESS NOTICE REQUIREMENTS OF THE CONSTITUTIONS OF THE UNITED STATES OF AMERICA AND STATE OF NEVADA

"The submissions before this court indicate that Hadland verbally discouraged cab drivers from bringing customers to the Palomino Club and that the Club had suffered a marked decline in business as a result. However, absent from the notice of intent is any fact explaining how Hadland's murder benefited the Palomino Club's business interest. We conclude that the phrase in the notice of intent "to further the business" is impermissibly vague. As the State may amend its notice of intent, it must provide specific factual allegations as to how Hadland's murder furthered the business interests of the Palomino Club if the State intends to pursue this factual allegation at trial.

Although the notice of intent fails to clearly explain the factual allegations supporting the pecuniary gain aggravator, we conclude that the State should be allowed to amend the notice of intent to remedy the deficiency. Allowing the State to amend the notice to remedy any confusion, vagueness, or ambiguity present in the pecuniary gain aggravator will not prejudice Hidalgo or render subsequent proceedings unfair. By amending the notice, the State will not be including events or circumstances not already alleged in the notice. Rather, the State would be merely clarifying factual allegations in the notice."

Hidalgo v. Eighth Judicial District Court ex rel. Clark County, 184 P. 3d 369, 376 (Nev. 2008).

As this Court is aware, the above language is excerpted from a decision of the Nevada Supreme Court decided in a companion case to the one *sub judice* wherein the Court announced for the first time what the State must do to comply with constitutional procedural due process notice requirements when employing the "murder was committed by a person, for himself or another, to receive money or any other thing of monetary value" aggravator. NRS 200.330-5. This language is unique to Nevada. No other state employs precisely those terms. Its wording is extremely broad as to what it may embrace, necessarily requiring the State to save its constitutionality by articulating with precision the facts that lead to the conclusions upon which the presence of the aggravator exists. This conclusion was pointed out in the Nevada Supreme Court's original Opinion in Hidalgo, which articulated some of the questions that needed to be

1 answered in the pleading in that case², as well as in the State's Petition for Rehearing³. The
2 Supreme Court withdrew the original Opinion, modifying its holding that originally struck
3 entirely the Notice of Intent to Seek Death. Instead it granted the State's request that it should be
4 allowed to amend it if it could save it. In the Opinion that replaced the original the Court did not
5 adopt the State's other arguments set out in the Petition for Rehearing nor did it allow the State to
6 amend by merely omitting the "and/or" language in the original Notice of Intent to Seek Death.
7 It mandated "facts" be set out that would allow for the defendant to know the basis of the
8 conclusion that the aggravator applied⁴.

10 On the only occasion in which the specific language of the "monetary gain" aggravator
11 was considered by the Nevada Supreme Court the fact pattern was concrete and a due process
12 challenge as to its application to the set of alleged facts was not presented to the Court. In Guy
13 v. State, 108 Nev. 770, 781, 839 P.2d 578 (Nev. 1992) the allegations and evidence
14 demonstrated that the victim was murdered while being robbed by the two perpetrators to obtain
15 cocaine from him which has monetary value. It was clearly not a "murder for hire" situation
16 such as the one before this Court. Provisions of death penalty statutes in other states specifying
17 as an aggravating factor that the murder was committed for pecuniary gain, for the purpose of
18 receiving or in expectation of receiving anything of monetary value, for remuneration, and the
19 like, have generally been applied in four types of situations: where personal property was
20 physically taken or attempted to be taken from the victim or another immediately before or after
21 the killing; where the defendant was allegedly hired or hired another person to commit the
22 murder in exchange for payment or other pecuniary reward or the promise thereof; where the
23 victim's death was a necessary prerequisite to the defendant's receipt of a contractual or legal

26 ² See Exhibit 1.

27 ³ See Exhibit 2.

28 ⁴ Exhibit 3.

1 benefit, such as the proceeds of an insurance policy on the victim's life or an inheritance, devise,
2 or legacy; and where the murder allegedly secured to the defendant some indirect pecuniary
3 advantage, such as relief from a debt. The second of these is present in the Notice of Intent
4 wherein it alleges that Deangelo Carroll and Kenneth Counts were paid to commit the murder of
5 Hadland. Such an allegation is a clear "murder for hire" theory and requires no interpretation.
6 Moreover, the Notice of Intent is clear as to who was paid, for what and by whom. However,
7 nothing even close to the alternative "indirect monetary benefit to the Palomino Club"
8 allegations in the Notice of Intent to Seek Death Penalty in the case sub judice has ever passed
9 constitutional muster in any jurisdiction. And for good reason.
10

11 The United States Supreme Court in Gregg v Georgia 428 US 153, 49 L Ed 859, 96 S Ct
12 2909 (1976), *reh den* 429 US 875, 50 L Ed 158, 97 S Ct 197, 97 S Ct 198, held that the concerns
13 earlier expressed in Furman v Georgia, 408 US 238, 33 L Ed 346, 92 S Ct 2726 (1972), *reh den*
14 409 US 902, 34 L Ed 163, 93 S Ct 89, over the often bizarre and inconsistent imposition of
15 capital punishment by sentencing authorities having absolute discretion as to whether a particular
16 defendant should live or die, could be met by a carefully drafted statute insuring that sentencing
17 discretion is suitably directed and limited, so as to minimize the risk of wholly arbitrary and
18 capricious action. The Court explained that the problem of jury inexperience in sentencing is
19 alleviated if the jury is given guidance regarding the factors about the crime and the defendant
20 that the state, representing organized society, deems particularly relevant to the sentencing
21 decision, and determined that the state statute under which the petitioner was sentenced to death
22 satisfied the constitutional requirement of guided discretion.
23

24
25 Obviously the statute permitting the State to seek the death penalty is the first place to
26 look in determining whether the jury can ever reach the point of sentencing a person to death. A
27 statute that is unconstitutionally vague - even if only as applied - does not so permit. In Hidalgo
28

1 the Nevada Supreme Court recognized that when dealing with an aggravating circumstance so
2 broad in its language that it can elevate into a capital case activity that which was not intended by
3 the legislature, clear factual pleading is necessary to place the defendant on notice and to give the
4 court and jury guidance as to precisely what the facts justifying death are should they be proven
5 beyond a reasonable doubt. Moreover it is paramount to all else that the defendant whose life the
6 State is seeking be given notice in advance of trial to allow preparation to meet the evidence at
7 trial. The Nevada Supreme Court was direct and detailed in discussing the requirements upon
8 the State in granting its request for an opportunity to amend the Notice in Hidalgo. The
9 prosecutor was to be given an opportunity to "**remedy any confusion, vagueness, or ambiguity**
10 **present in the pecuniary gain aggravator.**" Moreover it mandated that the State "**must**
11 **provide specific factual allegations as to how Hadland's murder furthered the business**
12 **interests of the Palomino Club if the State intends to pursue this factual allegation at trial."**
13

14
15 While it is true that the case involving Luis Hidalgo Jr. was not before the Nevada
16 Supreme Court at that time, the pronouncement of the Court is binding in all respects that relate
17 to the necessity for specific facts being alleged as to the basis of the monetary gain aggravator
18 being used to seek death in all cases upon which the State relies on that aggravator. An
19 examination of its original Opinion, albeit having been withdrawn to allow amendment, will
20 enlighten this court as to what it should require of the State, which should be a factual
21 demonstration as to how it will prove that theory of the presence of the aggravator. And because
22 it comes so late and outside of the directives of SCR 250 with respect to timing of amendments,
23 it should not be permitted to survive on any theory other than the one that it does state directly
24 and clearly - that Deangelo Carroll and Kenneth Counts were paid to commit a murder. All the
25 rest of the "theories" of how the monetary gain aggravator applies are without "specific factual
26 allegations" mandated by Hidalgo. They represent mere generalities as to the Palomino Club
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1 losing business because of Hadland and somehow that providing the motive. There is nothing
2 factual about business actually being lost, it tracing to Hadland's activities, etc. Moreover the
3 "send a message" theory, in addition to being tardy under the SCR 250 timeline, is made of
4 whole cloth. There is nothing in the Notice to indicate any facts that support that theory.

5
6 The Sixth Amendment to the United States Constitution mandates that a criminal
7 defendant be informed of the nature and cause of any and all accusations against him. See
8 Faretta v. California, 422 U.S. 806, 818 (1975). The Fifth Amendment also guarantees the right
9 to reasonable notice of the specific charges. Taylor v. Hayes, 418 U.S. 488, 498-99 (1974).
10 Nevada also guarantees these rights by statute. NRS 173.075(1) expressly requires that an
11 indictment or information contain a "plain, concise and definite written statement of the essential
12 facts constituting the offense charged." See also Sheriff v. Levinson, 95 Nev. 436, 596 P.2d 232
13 (1979). The charging document should also contain, when possible, a description of the means
14 by which the defendant committed the offense. NRS 173.075(2); Simpson v. District Court, 88
15 Nev. 654, 660, 503 P.2d 1225, 1229 (1972) (the accusation must include a characterization of the
16 crime and such description of the particular act alleged to have been committed by the accused as
17 will enable him properly to defend against the accusation, and the description of the offense must
18 be sufficiently full and complete to accord to the accused his constitutional right to due process
19 of law); 4 R. Anderson, Wharton's Criminal Law and Procedure, Section 1760, at 553 (1957).

20
21 Citing the constitutional right of due process, our Supreme Court has held that where the
22 State seeks to establish a defendant's guilt on a theory of aiding and abetting, the indictment
23 should specifically allege that the defendant aided and abetted, and should provide additional
24 information as to the specific acts constituting the means of the aiding and abetting so as to
25 afford the defendant adequate notice to prepare his defense. Barren v. State, 99 Nev. 661, 668,
26 669 P.2d 725, 729 (1983); see also Wright v. State, 101 Nev. 269, 701 P.2d 743 (1985)
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1 (information invalid based upon its failure to include aiding and abetting allegations); Alford v.
2 State, 111 Nev. 1409, 1413-1415, 906 P.2d 714, 716-717 (1995) (conviction reversed because
3 the charging document did not allege felony murder and the State relied upon that theory at trial).
4

5 The aggravating factors are elements of capital-eligibility, Johnson v. State, 118 Nev.
6 787, 802-803, 59 P. 3d 450, 460 (Nev. 2002) and this Court must follow SCR 250(4)(c)
7 specifically requiring the notice of intent to provide adequate notice of the aggravating factors.
8 “[A] defendant cannot be forced to gather facts and deduce the State’s theory for an aggravating
9 circumstance from sources outside the notice of intent to seek death. Under SCR 250, the
10 specific supporting facts are to be stated directly in the notice itself.” Redeker v. Eighth Judicial
11 Dist. Court, 122 Nev. 164, 127 P.3d 520, 523 (2006). But even the specification of facts is
12 inadequate if it does not give notice of how the state intends to prove its theory of the
13 aggravating factor. Just as in Alford, when a defendant is not given adequate notice of the
14 factual and legal theory of the presence of the monetary gain aggravator- - the “acts constituting
15 the offense” - - upon which the state intends to proceed, he cannot adequately prepare to defend
16 himself. See Alford, 111 Nev. at 1414-1415; Simpson v. District Court, 88 Nev. 654, 659, 503
17 P.2d 1225, 1229 (1972).
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20 The prosecution's allegations of the indirect or "trickle down" monetary gain to the
21 Palomino Club in the Notice of Intent to Seek Death Penalty in Luis Hidalgo Jr.'s case is based
22 purely on speculation, which can never support the seeking of capital punishment. Under the
23 holding in Hidalgo there must be legally sufficient and detailed facts that support each theory,
24 and the theory to which they relate must be reasonable, credible, and of solid value. See People
25 v. Marshall, 15 Cal 4th 1, 61 Cal. Rptr 2nd 84, 102 (Cal 1997). See also United States v. Kwong,
26 977 F. Supp. 96, 101 (E.D. NY, 1995) and United States v. Jones, 863 F. Supp. 575, 578-579
27 (N.D. Ohio 1994) (theory of pecuniary gain as enhancement of punishment cannot be
28

1 speculative). The Notice of Intention to Seek Death Penalty must clearly indicate that Luis
2 Hidalgo Jr. committed the murder while at the time possessing the expectation that by doing so
3 he would obtain the monetary gain articulated by supporting facts contained in the Notice itself.
4 See People v. Crew, 31 Cal. 4th 822, 852, 3 Cal. Rptr. 3d 733 (Cal. 2003) (citing People v.
5 Noguera, 4 Cal. 4th 599, 636, 842 P. 2d 1160 (Cal. 1992) and People v. Edelbacher, 47 Cal. 3d
6 983, 1025, 254 Cal. Rptr. 586 (Cal. 1989)). It does not. It gives absolutely no factual basis that
7 anything took place that would cause Luis Hidalgo Jr. to believe that the business of the
8 Palomino Club was being damaged by Hadland; that Hadland was actually bad mouthing the
9 Club to cab drivers; that cab drivers didn't bring customers to the Club because of it; or anything
10 in the nature of a specific fact. It states only an unsupported theory for which the factual
11 underpinnings are not disclosed even in the discovery in the case, although had they been that
12 would not have saved an insufficient Notice of Intent to Seek Death Penalty. See Redeker v.
13 Eighth Judicial District Court of State of Nevada ex. rel Clark County, 122 Nev. 164, 127 P. 3d
14 520, 523 (Nev. 2006) (holding that SCR 250 (4)(c) requires allegations of specific facts that the
15 state will rely upon to demonstrate the presence of the aggravator.)
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19 B. **THE INCLUSION OF THE "KILL HADLAND TO SEND A MESSAGE"**
20 **THEORY IN THE AMENDED NOTICE DOES NOT COMPLY WITH**
21 **SCR 250(4)(d).**

22 The State ignored and violated the specific directives of the SCR 250(4)(d) when
23 amending the Notice in the case *sub judice* in June 2008. The State added at that time a new
24 theory, that Hadland was killed to "send a message" to others not to steal from the Palomino
25 Club and presumably that would result in monetary gain to the Club by deterring those with
26 access from stealing. That new theory in support of the indirect monetary gain aggravator should
27 be stricken, eliminating it as the basis of the death penalty as a sentencing option for the jury.
28 The State must have a factual basis upon which to make this allegation. On what does it base

1 that Hadland was fired for stealing? When did it obtain that information? One could speculate
2 that it's source is Anabel Espindola, but there is nothing in the discovery in this case to indicate
3 that, even if it could save the deficient Notice. See Redeker, supra. As this Court knows from
4 earlier hearings, the State has made a deliberate choice not to make a contemporaneous record of
5 its interviews with Espindola other than that to which it claims attorney work product protection.
6 The only record of what she has said up until now is her Grand Jury testimony which occurred
7 on February 12, 2008. That preceded the original Notice of Intent to Seek Death Penalty in this
8 case. If the factual basis of this new "send a message and it will lead to money or thing of
9 monetary value" for the Club existed at the time of filing the original Notice, it's amendment is
10 time barred. If the information was not available at the time that the original notice was filed,
11 such factual allegations cannot be included in the Amended Notice without adhering to the
12 procedure set out in Nevada Supreme Court Rule 250(4)(d)⁵. This the State did not do.
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23 ⁵ (c) **Notice of intent after filing of indictment or information.** No later than 30 days after the filing of an
24 information or indictment, the state must file in the district court a notice of intent to seek the death penalty. The
notice must allege all aggravating circumstances which the state intends to prove and allege with specificity the facts
on which the state will rely to prove each aggravating circumstance.

25 (d) **Late notice of intent.** Upon a showing of good cause, the district court may grant a motion to file a late
26 notice of intent to seek the death penalty or of an amended notice alleging additional aggravating circumstances. The
27 state must file the motion within 15 days after learning of the grounds for the notice or amended notice. If the court
28 grants the motion, it shall also permit the defense to have a reasonable continuance to prepare to meet the allegations
of the notice or amended notice. The court shall not permit the filing of an initial notice of intent to seek the death
penalty later than 30 days before trial is set to commence.

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CONCLUSION

For the foregoing reasons Luis Hidalgo Jr. asks this Honorable Court to Strike the Amended Notice of Intent to Seek Death Penalty.

Dated this 8th day of December, 2008.

GORDON SILVER



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Attorneys for LUIS A. HIDALGO JR.

CERTIFICATE OF SERVICE

The undersigned, an employee of Gordon Silver, hereby certifies that on the 8th day of December, 2008, she served a copy of the DEFENDANT LUIS A. HIDALGO JR.'S MOTION TO STRIKE THE AMENDED NOTICE TO SEEK DEATH PENALTY, by facsimile, and by placing said copy in an envelope, postage fully prepaid, in the U.S. Mail at Las Vegas, Nevada, said envelope addressed to:

Marc DiGiacomo
Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
Las Vegas, NV 89155
Fax: (702) 477-2922

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


ADELE L. JOHANSEN, an employee of
GORDON SILVER

EXHIBIT "1"

Document1

123 Nev., Advance Opinion 59
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

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.

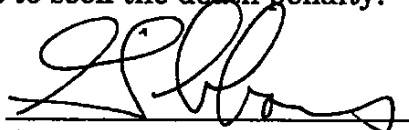
The fifth apparent theory actually contains multiple subtheories of its own: petitioner Espindola provided \$200 to Carroll; petitioner Espindola and/or petitioner Hidalgo provided \$1,400 and/or \$800 to Carroll; petitioner Espindola agreed to continue paying Carroll for working at the Palomino Club 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.

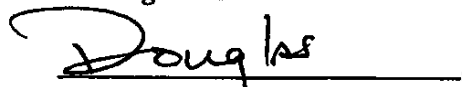
CONCLUSION

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.

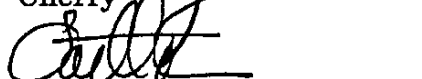
 J.
Gibbons

 J.
Hardesty

 J.
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.

Maupin C.J.
Maupin

¹NRS 200.033 (2)(b).

ATTEST: A FULL, TRUE AND
CORRECT COPY.

CLERK OF THE SUPREME COURT

By A. Murado
Deputy Clerk

EXHIBIT "2"

Document1

1 IN THE SUPREME COURT OF THE STATE OF NEVADA

2
3
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**

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1 IN THE SUPREME COURT OF THE STATE OF NEVADA

2
3
4
5 LUIS HIDALGO, III and
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9 THE EIGHTH JUDICIAL DISTRICT COURT
10 OF THE STATE OF NEVADA, IN AND FOR
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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.

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.

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:

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

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.

25
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
25

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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28 //


1 CONCLUSION

2 For the reasons cited above, the State respectfully submits the Court should grant
3 rehearing.

4 Dated January 14, 2008.

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

8
9 BY


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Margi English
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EXHIBIT "3"

Document1

Cite as: Hidalgo v. Dist. Ct.
124 Nev. Adv. Op. No. 33
May 29, 2008

IN THE SUPREME COURT OF THE STATE OF NEVADA

No. 48233

LUIS HIDALGO, III,

Petitioner,

vs.

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

Respondents,

and

THE STATE OF NEVADA,

Real Party in Interest.

Petition for rehearing of Hidalgo v. District Court, 123 Nev. ___, 173 P.3d 1191 (2007) (opinion withdrawn February 21, 2008). Original petition for a writ of mandamus or prohibition challenging the district court's order denying petitioner's motion to strike the State's notice of intent to seek the death penalty.

Petition for rehearing granted; petition for writ of mandamus granted in part.

MAUPIN, J., dissented in part.

Gordon & Silver, Ltd., and Dominic P. Gentile and Paola M. Armeni, Las Vegas, for Petitioner.

Catherine Cortez Masto, Attorney General, Carson City; David J. Roger, District Attorney, Steven S. Owens, Chief Deputy District Attorney, Giancarlo Pesci, Marc P. DiGiacomo, and Nancy A. Becker, Deputy District Attorneys, Clark County, for Real Party in Interest.

Michael Pescetta, Assistant Federal Public Defender, Las Vegas; Philip J. Kohn, Public Defender, and Howard Brooks, Deputy Public Defender, Clark County; David M. Schieck, Special Public Defender, Clark County, for Amici Curiae Federal Public Defender for District of Nevada, Nevada Attorneys for Criminal Justice, Clark County Public Defender, and Clark County Special Public Defender.

BEFORE THE COURT EN BANC.

OPINION ON REHEARING

PER CURIAM:

On December 27, 2007, this court issued an opinion in this case granting a petition for a writ of mandamus.[1] Subsequently, the real party in interest filed a rehearing petition. On February 21, 2008, this court withdrew the prior opinion pending resolution of the petition for rehearing. After reviewing the rehearing petition and answer, as well as the briefs and appendix, we conclude that rehearing is warranted under NRS 40(c)(2), and we grant the petition for rehearing. We now issue this opinion in place of our prior opinion.

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 that it is not. We also consider whether the State's notice of intent to seek the death penalty against petitioner satisfies the requirements of SCR 250(4)(c). We conclude that it does not. However, we conclude that the State should be allowed to amend the notice of intent to cure the deficiency. Accordingly, we grant the writ petition in part and instruct the district court to strike the two aggravating circumstances alleging solicitation to commit murder as prior violent felonies pursuant to NRS 200.033(2) and to allow the State to amend its notice of intent to seek the death penalty with respect to the factual allegations supporting the pecuniary gain aggravator.[2]

FACTS

Petitioner Luis Hidalgo III is 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 and abetting, and coconspirator liability), and two counts of solicitation to commit the murders of two alleged witnesses to Hadland's death. The State subsequently filed a timely notice of intent to seek the death penalty alleging three aggravating circumstances. The first and second aggravators are based on NRS 200.033(2)(b) and allege the two solicitation counts, assuming Hidalgo is found guilty of them, as prior felonies involving the use or threat of violence to another person.[3] 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, Hidalgo moved the district court to strike the State's notice 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 challenges the district court's ruling.[4]

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." [5] The writ will issue where the petitioner has no "plain, speedy and adequate remedy in the ordinary course of law." [6] The decision to entertain a mandamus petition lies within the discretion of this court, and this court considers whether "judicial economy and sound judicial administration militate for or against issuing the writ." [7] "Additionally, this court may exercise its discretion to grant mandamus relief where an important issue of law requires clarification." [8] 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)

Hidalgo argues 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 that 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— nothing more need be proven.’”[9] 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).”[10]

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.[11] 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 involve the threat of violence even if the crime solicited is a violent crime.[12]

The Supreme Court of Arizona addressed this issue in State v. Ysea. [13] 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.”[14] 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.[15]

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.[16] However, the court in Elam dealt with a Florida statute that particularized solicitation to commit a capital felony.[17] And the courts in both Lopez and Ysea expressly concluded that 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 Hidalgo 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.”[18]

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.[19] 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.[20]

We conclude that the threat provision of NRS 200.033(2)(b) was meant to apply in cases like Weber v. State,[21] 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.[22] 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.[23] 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.[24] We therefore concluded that the sexual assaults could properly support the aggravator.[25] In this case, there are no allegations that Hidalgo 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.

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

Hidalgo argues that the State's notice of intent to seek the death penalty violates SCR 250 in alleging the third aggravating circumstance pursuant to NRS 200.033(6)—"[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." [26]

The State's notice alleges 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; thereafter, DEANGELO CARROLL procuring KENNETH COUNTS and/or JAYSON TAOIPU to kill TIMOTHY HADLAND; thereafter, by KENNETH COUNTS shooting TIMOTHY JAY HADLAND; thereafter, [Hidalgo, Jr.] 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 notice 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 notice's specificity. The State is permitted to plead alternative fact scenarios in support of 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 notice here is 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 notice here, however, fails in this regard.

SCR 250(4)(c) is "intended to ensure that defendants in capital cases receive notice sufficient to meet due process requirements." [27] In interpreting whether the manner in which a notice of intent is pleaded satisfies the due process concerns of SCR 250(4)(c), we look to other notice pleading requirements for guidance. A charging document in a criminal case, for example, serves a similar purpose to a notice of intent. NRS 173.075 provides that a charging document "must be a plain, concise and definite written statement of the essential facts constituting the offense charged." To satisfy this requirement, "the [charging document] standing alone must contain the elements of the offense intended to be charged and must be sufficient to apprise the accused of the nature of the offense so that he may adequately prepare a defense." [28] Although there are obvious differences in the purposes of a charging document and a notice of intent to seek the death penalty, their primary function is the same, *i.e.*, to provide the defendant with notice of what he must defend against at trial and a death penalty hearing, respectively.

Although the State is not required to include exhaustively detailed factual allegations to satisfy SCR 250(4)(c), the notice of intent must provide a simple, clear recitation of the critical facts supporting the alleged aggravator, presented in a comprehensible manner. Here, the principal problem with the notice of intent in this case is not the lack of factual detail. Rather, the State has alleged the factual allegations supporting the pecuniary gain aggravator in an incomprehensible format such that it fails to meet the due process requirements of SCR 250(4)(c).

In addition to the confusing "and/or" format, one example of a lack of clarity in the notice of intent appears in the State's allegation that "[Hidalgo's father] procure[d] the injury or death of [Hadland] to further the business of the PALOMINO CLUB." Although this allegation identified a victim and asserted that the murder was motivated by monetary gain, *i.e.*, furthering the business, it lacked sufficient specificity because it failed to explain how the business would be furthered by Hadland's murder. The submissions before this court indicate that Hadland verbally discouraged cab drivers from bringing customers to the Palomino Club and that the Club had suffered a marked decline in business as a result. However, absent from the notice of intent is any fact explaining how Hadland's murder benefited the Palomino Club's business interest. We conclude that the phrase in the notice of intent "to further the business" is impermissibly vague. As the State may amend its notice of intent, it must provide specific factual allegations as to how Hadland's murder furthered the business interests of the Palomino Club if the State intends to pursue this factual allegation at trial.

Although the notice of intent fails to clearly explain the factual allegations supporting the pecuniary gain aggravator, we conclude that the State should be allowed to amend the notice of intent to remedy the deficiency. Allowing the State to amend the notice to remedy any confusion, vagueness, or ambiguity present in the pecuniary gain aggravator will not prejudice Hidalgo or render subsequent proceedings unfair. By amending the notice, the State will not be including events or circumstances not already alleged in the notice. Rather, the State would be merely clarifying factual allegations in the

notice.

Further, allowing the State to amend the notice of intent under the particular facts of this case would not contravene any statute or decision by this court. We have published only two decisions in which we struck notices of intent to seek the death penalty that were not compliant with SCR 250(4)(c)—Redeker v. District Court[29] and State v. District Court (Marshall). [30] However, both of these cases are distinguishable from the instant case.

In Redeker, this court concluded that the State's notice of intent to seek the death penalty failed to allege with specificity any facts showing that Redeker had been convicted previously of a felony involving the use or threat of violence to the person of another.[31] In particular, the State alleged that Redeker had been convicted of second-degree arson; however, although the notice of intent clearly identified the crime by title, date, location, case number, and victim, none of the allegations indicated that the second-degree arson was a crime of violence or threatened violence to the person of another. [32] We rejected the State's suggestion that it be allowed to amend its notice of intent to allege additional facts in the same manner as it would amend a charging document.[33] In doing so, we observed that the State had opposed Redeker's contention that aggravators must be alleged in a charging document based on a probable cause determination and indicated that the State's position was inconsistent with its argument that it be allowed to amend the notice of intent as it would a charging document: "[T]he State proposes that we allow it to evade the charging requirements of SCR 250 but enjoy the benefits, while avoiding the burdens, of the indictment/information process." [34]

Redeker is distinguishable from the instant case. In Redeker, this court concluded that the notice of intent compelled Redeker to speculate about facts not included in the notice of intent that would have established that his second-degree arson conviction was a violent felony.[35] Here, the issue is not that the notice of intent lacked factual specificity, compelling Hidalgo to speculate about evidence beyond what was included in the notice of intent. Rather, our overarching concern in this case is that the State's factual allegations as pleaded are unclear and confusing. Further, this court's rejection of the State's argument in favor of amending the notice of intent in Redeker is unique to the particular circumstances in that case. Moreover, in Redeker, we concluded that even if the State had included specific factual allegations it believed established Redeker's second-degree arson conviction as a crime involving the threat or use of violence to another person, the factual allegations failed to support the aggravator.[36]

We reject any interpretation of Redeker as suggesting that the State can never amend a notice of intent to cure any deficiencies in the factual allegations supporting an aggravator where, as here, they are not pleaded in a clear and comprehensible manner. Therefore, we expressly limit the holding in Redeker to the particular facts and circumstances in that case.

The other published decision in which this court struck a notice of intent based on SCR 250(4)(c) is State v. District Court (Marshall), where we upheld a district court's decision to deny the State's motion to file untimely notices of intent to seek the death penalty against two defendants.[37] Marshall thus focused on the timing requirement in SCR 250(4)(c) rather than the sufficiency of the notice. Here, Hidalgo was made aware by the filing of a timely notice of intent that the State intended to seek the death penalty and the factual allegations supporting the pecuniary gain aggravator.

To the extent Hidalgo contends that allowing the State to amend the notice of intent would render the notice untimely without a showing of good cause, we find that argument unpersuasive under the particular facts of this case. SCR 250(4)(d) provides that "[u]pon a showing of good cause, the district court may grant a motion to file a late notice of intent to seek the death penalty or of an amended notice alleging additional aggravating circumstances." (Emphasis added.) Here, the State is not seeking to amend its notice of intent to allege new aggravators but rather to clarify the factual allegations supporting the pecuniary gain aggravator, which was alleged in a timely notice of intent. This circumstance sets Hidalgo's case apart from the situation in Marshall, where the State simply neglected to follow SCR 250(4)(c)'s timing requirement and failed to demonstrate good cause for the delay.[38]

Although the notice of intent is deficient under SCR 250(4)(c) to the extent that it fails to provide a clear, comprehensible expression of the factual allegations to support the pecuniary gain aggravator, we conclude that the appropriate remedy is to allow the State to amend the notice of intent to cure this deficiency. We further conclude that allowing the State to amend the notice of intent to further explain its allegation that Hadland's murder served to further the business interests of the Palomino Club will not violate Hidalgo's due process rights.

CONCLUSION

For the reasons stated above, we grant this petition in part. The clerk of this court shall issue a writ of mandamus instructing the district court to strike the two aggravating circumstances alleging solicitation to commit murder as prior violent felonies pursuant to NRS 200.033(2) and to allow the State to amend its notice of intent to seek the death penalty to declare the factual allegations supporting the pecuniary gain aggravator in a clear, comprehensible manner and to further explain its allegation that the victim's murder served to further the business interests of the Palomino Club.

*****FOOTNOTES*****

[1] Hidalgo v. Dist. Ct., 123 Nev. ___, 173 P.3d 1191 (2007) (opinion withdrawn February 21, 2008).

[2] In 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.

[3] NRS 200.033(2) permits the State to allege as an aggravating circumstance 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 that "[f]or the purposes of this subsection, a person shall be deemed to have been convicted at the time the jury verdict of guilt is rendered."

[4] Anabel Espindola was charged with the same offenses and given notice of the same aggravators as Hidalgo. On April 9, 2008, we granted Espindola's motion to dismiss her from this original proceeding because she had reached a plea agreement with the State.

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

[6] NRS 34.170; Redeker, 122 Nev. at 167, 127 P.3d at 522.

[7] Redeker, 122 Nev. at 167, 127 P.3d at 522.

[8] Id.

[9] 108 Nev. 200, 202, 826 P.2d 952, 954 (1992) (quoting People v. Miley, 204 Cal. Rptr. 347, 352 (Ct. App. 1984)).

[10] 122 Nev. at 175, 127 P.3d at 527.

[11] 636 So. 2d 1312, 1314 (Fla. 1994).

[12] 864 So. 2d 1151, 1152-53 (Fla. Dist. Ct. App. 2003) (citations omitted).

[13] 956 P.2d 499, 502 (Ariz. 1998).

[14] Id. (quoting Ariz. Rev. Stat. § 13-703(F)(2)).

- [15] Id.
- [16] See Redeker v. Dist. Ct., 122 Nev. 164, 172, 127 P.3d 520, 525 (2006).
- [17] 636 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.
- [18] 956 P.2d at 503.
- [19] Woodruff v. State, 846 P.2d 1124, 1144 (Okla. Crim. App. 1993).
- [20] People v. Edelbacker, 766 P.2d 1, 8, 15 (Cal. 1989).
- [21] 121 Nev. 554, 119 P.3d 107 (2005).
- [22] Id. at 586, 119 P.3d at 129.
- [23] Id.
- [24] Id.
- [25] Id.
- [26] Redeker v. Dist. Ct., 122 Nev. 164, 168-69, 127 P.3d 520, 523 (2006).
- [27] State v. Dist. Ct. (Marshall), 116 Nev. 953, 959, 11 P.3d 1209, 1212 (2000).
- [28] Laney v. State, 86 Nev. 173, 178, 466 P.2d 666, 669 (1970); see Sheriff v. Levinson, 95 Nev. 436, 437, 596 P.2d 232, 233 (1979) ("[T]he prosecution is required to make a definite statement of facts constituting the offense in order to adequately notify the accused of the charges and to prevent the prosecution from circumventing the notice requirement by changing theories of the case.").
- [29] 122 Nev. 164, 127 P.3d 520 (2006).
- [30] 116 Nev. 953, 11 P.3d 1209 (2000).
- [31] 122 Nev. at 168, 127 P.3d at 523.
- [32] Id.
- [33] Id. at 169, 127 P.3d at 523.
- [34] Id.
- [35] Id. at 168-69, 127 P.3d at 523.
- [36] Id. at 169, 127 P.3d at 523.
- [37] 116 Nev. 953, 968, 11 P.3d 1209, 1218 (2000).
- [38] Id. at 964, 11 P.3d at 1215.

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

The majority correctly concludes that, under SCR 250, the imprecise language of the State's notice of intent to seek the death penalty fails to clearly explain how the facts alleged support 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." I further concur with the majority that the State should be allowed to amend the notice of intent to remedy this deficiency. 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 petitioner under NRS 200.033(2)(b) must be stricken.

*****FOOTNOTES*****

[1] NRS 200.033(2)(b).

ORIGINAL

FILED 7

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E. L. [Signature]
CLERK OF THE COURT

0001
DAVID ROGER
Clark County District Attorney
Nevada Bar #002781
MARC DIGIACOMO
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Nevada Bar #006955
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Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

LUIS HIDALGO, JR.,
#1579522

Defendant.

Case No. C241394

Dept No. XXI

NOTICE OF MOTION AND MOTION IN LIMINE TO EXCLUDE THE
TESTIMONY OF VALERIE FRIDLAND

DATE OF HEARING: 1/20/09

TIME OF HEARING: 9:30 A.M.

COMES NOW, the State of Nevada, by DAVID ROGER, District Attorney, through
MARC DIGIACOMO, Chief Deputy District Attorney, and files this Notice of Motion and
Motion in Limine to Exclude the Testimony of Valerie Fridland.

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

///

///

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101

CLERK OF THE COURT

RECEIVED
JAN 13 2009

7
1 **NOTICE OF HEARING**

2 YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that the undersigned
3 will bring the foregoing motion on for setting before the above entitled Court, in Department
4 XXI thereof, on the 20th day of January, 2009, at the hour of 9:30 o'clock A.M., or as soon
5 thereafter as counsel may be heard.

6 DATED this 12th day of January, 2009.

7
8 DAVID ROGER
9 Clark County District Attorney
Nevada Bar #002781

10
11
12 BY 

13 MARC DIGIACOMO
14 Chief Deputy District Attorney
15 Nevada Bar #006955

16 **STATEMENT OF FACTS**

17 On January 5, 2005, Defendant Luis Hidalgo, Jr. filed a supplemental notice of expert
18 informing the State that Defendant intends to call Valerie Fridland, a Professor at the
19 University of Nevada, Reno to "testify as to her analysis and comparison of the linguistics
20 used by Anabel Espindola during her Grand Jury Testimony, as well as her speech captured
21 on the body wires." Attached to the Notice was a Curriculum Vitae of Dr. Fridland as well
22 as a report. A review of those documents demonstrate that Dr. Fridland is being called as a
23 credibility expert. In her report, the ultimate conclusion is "In summary, based on my
24 analysis of the recorded conversations with Ms. Espindola and her later testimony regarding
25 the same facts, there are a large number of inconsistent presentations of both her role and the
26 role of others in the events in question."

27 ///

28 ///

1 POINTS AND AUTHORITIES

2 **THE TESTIMONY OF THE EXPERT IS INADMISSIBLE VERACITY**
3 **TESTIMONY**

4 NRS 50.275 provides:

5 If scientific, technical or other specialized knowledge will assist the
6 trier of fact to understand the evidence or to determine a fact in
7 issue, a witness qualified as an expert by special knowledge, skill,
8 experience, training or education may testify to matters within the
9 scope of such knowledge.

10 Accordingly, there are three requirements to the admissibility of an experts' testimony:

11 (1) he or she must be qualified in an area of "scientific, technical or
12 other specialized knowledge" (the qualification requirement); (2)
13 his or her specialized knowledge must "assist the trier of fact to
14 understand the evidence or to determine a fact in issue" (the
15 assistance requirement); and (3) his or her testimony must be
16 limited "to matters within the scope of [his or her specialized]
17 knowledge" (the limited scope requirement).

18 Hallmark v. Eldridge, 189 P.3d 646, 650 (Nev, 2008). Dr. Fridland fails all three of these
19 requirements, however, the most clear failure is the assistance requirement. The assistance
20 requirement requires that not only it assists the trier of fact, but that it is the product of
21 reliable methodology. Id at 651. As is discussed below, commenting on the veracity of a
22 witness never assists the trier of fact.

23 Defendant's notice of Dr. Fridland clearly indicates that she is in essence a
24 "credibility expert." In essence, her testimony will be that from an analysis of the two
25 separate statements of Ms. Espindola, she can determine that one of them must not be true.
26 Additionally, Dr. Fridland indicates that she can determine what "common knowledge" Ms.
27 Espindola and Deangelo Carroll have by inference from their statements. The law is
28 overwhelmingly clear that such an expert is inadmissible.

1 While the scope of an expert testimony may be broad if it will assist the trier of fact,
2 there are certain areas that an expert may never testify too. The most basic rule is that a
3 witness may never comment on the veracity of another witness. See Daniel v. State, 119
4 Nev. 498, 78 P.3d 890 (2003); see also Rowland v. Lepire, 99 Nev. 308, 312, 662 P.2d 1332,
5 1334 (1983) (noting that it is exclusively within the province of the trier of fact to weigh
6 evidence and pass on credibility of witnesses and their testimony)). The reasoning is that no
7 one is supposed to invade the province of the jury. Daniel at 518. It is also clear that an
8 expert witness "may not comment on the veracity of a witness." Lickey v. State, 108 Nev.
9 191, 827 P.2d 824 (1992) (citing Townsend v. State, 103 Nev. 113, 734 P.2d 705 (1987)).
10 This rule applies to both the State and Defendant. Townsend at 119. The rule precluding an
11 expert from making such conclusions is even more important because the weight that may be
12 given to experts. See United States v. Sorodo, 845 F.2d 945, 949 (11th Cir.1988) ("[A] trial
13 judge must be sensitive to the jury's temptation to allow the judgment of another to
14 substitute for its own.") In Lickey, the Court noted that other jurisdictions also follow this
15 well established rule. Lickey at 196 (citing State v. Bressman, 236 Kan. 296, 689 P.2d 901
16 (1984) (expert opinion becomes inadmissible as soon as it passes on credibility of the
17 witness)).

18 This is not the only area where the Court has determined that an expert is
19 inadmissible. In Pineda v. State, 120 Nev. 204, 88 P.3d 827 (2004), the Nevada Supreme
20 Court stated that while an expert may testify to generalities, the expert may not opine on the
21 state of mind of a specific person. Moreover, In Re Assad, while an administrative matter,
22 indicated that the rules of evidence apply equally in both civil and criminal situations. In re
23 Assad, 124 NevAdvOp 38 (June 12, 2008). In upholding the commissions decision to
24 exclude an expert, the Court noted:

25 Here, Professor Stempel's affidavit, which was attached to Judge
26 Assad's prehearing motion and sets forth his proposed testimony,
27 purported to evaluate the credibility of witnesses that had yet to
28 testify (although they had given statements during the
Commission's investigation); determined based on the March 31,
2003, court sessions audiotape that Chrzanowski could not have
been handcuffed in court because no "click" could be heard on the
tape; weighed "evidence" that had not yet been admitted; and
discussed issues that were irrelevant to those properly before the

Commission, such as whether Judge Assad would have had jurisdiction to hold Chrzanowski in contempt, whether she was engaged in the unauthorized practice of law by appearing on Madera's behalf, and the dismissal of Chrzanowski's civil lawsuit. Credibility determinations and weighing the evidence are tasks reserved to the Commission, and expert testimony on these issues would not have assisted the Commission to understand the evidence or resolve a disputed fact.

Id.

In the instant matter, Dr. Fridland purports to say that Ms. Espindola's testimony is inconsistent with her statements on the tape. Dr. Fridland also presumes to be able to deduce (some she calls an assumption) from the surreptitious recording the "common knowledge" of both Ms. Espindola and Deangelo Carroll. In essence, Dr. Fridland will testify that Ms. Espindola's testimony at the grand jury (and presumably at trial) is untrue based upon the surreptitious recording. As such, it is inadmissible.

Dr. Fridland's entire opinion involves the application of a use of field of linguistics which she identifies as "discourse analysis." The area of discourse analysis has been discussed at length in several federal cases. In each case, the Court has upheld the exclusion of the testimony in front of a jury for a variety of reasons including unreliability, invading the province of the jury, not assisting the jury, not scientific knowledge, and more prejudicial than probative. Perhaps the most illustrative of the analysis is in a District Court order excluding the testimony of a linguist in "discourse analysis." United States v. Amawi, 552 F.Supp.2d 669 (2008). After noting that the testimony of the expert was essentially the conclusion that the jury was being asked to determine and was not necessary to assist the jury, the Court went on to quote extensively from an 11th Circuit case of United States v. Evans, 910 F.2d 790 (11th Cir.1990). In Evans, the defendant sought to introduce a linguistics expert to utilize "discourse analysis" to establish that the defendant on a recording did not understand the illegal nature of the plan through specific taped conversations. Id. at 802. The expert was utilizing the same techniques described in Dr. Fridland's report. Ultimately, the Evans Court held:

We hold that the district court acted within its discretion in excluding Dr. Shuy's testimony. In considering whether the expert would aid the jury's ability to understand the taped conversations and whether the danger of jury confusion outweighed the testimony's probative value, the court engaged in the correct inquiry. Cf. United States v. Schmidt, 711 F.2d 595, 598 (5th

1 Cir.1983), *cert. denied*, 464 U.S. 1041, 104 S.Ct. 705, 79 L.Ed.2d
2 169 (1984) (refusal to admit expert testimony of linguistics expert
3 not an abuse of discretion where court concluded that testimony
4 would not assist jury); United States v. Devine, 787 F.2d 1086,
5 1088 (7th Cir.), *cert. denied*, 479 U.S. 848, 107 S.Ct. 170, 93
6 L.Ed.2d 107 (1986) (not error to refuse to admit linguist's testimony
7 where contents of tape recorded conversation not outside the
8 average person's understanding); United States v. DeLuna, 763 F.2d
9 897, 912 (8th Cir.), *cert. denied*, 474 U.S. 980, 106 S.Ct. 382, 88
10 L.Ed.2d 336 (1985) (no error to refuse proffered expert testimony
11 on discourse analysis). Further, our review of the evidentiary
12 hearing on the admissibility of the expert testimony convinces us
13 that the district court's findings on these matters were well
14 supported. In this case, questions regarding the defendant's
15 understanding of the illegality of the operation and the extent of
16 government inducement were at the center of the trial. The jury's
17 task was to determine, on the basis of its collective experience and
18 judgment, what Evans's state of mind was when he accepted the
19 money and whether he was entrapped into committing the crime for
20 which he was charged. We agree with the district court that expert
21 testimony would not have aided the jury in performing this task and
22 that the testimony presented a risk that the jury would allow the
23 judgment of the expert to substitute for its own.

24 Id at 803. After discussing Evans, the Awami court went on to discuss United States v.
25 Kupau, 781 F.2d 740 (9th Cir.1986). In Kupau, the defendant tried to introduce a linguist
26 expert to attempt to explain the intent of the speaker who was using ordinary terms within
27 the average understanding of the jury. The Court found that excluding the testimony was not
28 error. Id at 745.

After a lengthy discussion, the Awami court went on in a footnote to make a string
citation to a sample of other cases excluding discourse analysis:

Other criminal cases upholding exclusion or limitation of testimony
by [linguistics expert] Prof. Shuy include U.S. v. Mitchell, 49 F.3d
769, 780-781 (D.C.Cir.1995) (proposed testimony "not only
involves matters of general knowledge, but is squarely within the
traditional province of the jury."); U.S. v. Edelman, 873 F.2d 791,
795 (5th Cir.1989) (testimony concerned "matters within the
common knowledge of the jury"); U.S. v. Shields, 1992 WL 43239,
at *33-34 (N.D.Ill.) (disallowing testimony regarding discourse
analysis); State v. Hill, 601 So.2d 684, 693-94 (La.App.1992)
(testimony would not have aided jury; properly excluded under
state equivalent of Fed.R.Evid. 403); State v. Conway, 193
N.J.Super. 133, 169-71, 472 A.2d 588, 608-09 (1984) (upholding
finding that "discourse analysis" testimony was no scientifically
reliable means of determining speaker's intent during covertly
recorded conversations and that such testimony would have been
confusing to the jury); Rogers v. State, 1999 WL 93274, at *8-10
(Tex.App.) (exclusion based on state law equivalent to Fed.R.Evid.
403) (unreported disposition).

1 Id at 678 n. 4. Perhaps most noteworthy from this string citation is the discussion in State v.
2 Conway which holds that use of linguistics to interpret covert audio records is not a
3 scientifically valid area of study under the old United States v. Frye, 293 F. 1013, 1014
4 (D.C.Cir.1923). Conway at 171. As the Court is aware, if it does not satisfy Frye, there is
5 no possibility it could pass muster under Daubert, which is the basis for Hallmark v.
6 Eldridge, 189 P.3d 646, 650 (Nev, 2008). In fact, in all of the research conducted the
7 undersigned could not find a single case that held it was error for the Court to exclude an
8 linguist who utilized discourse analysis.

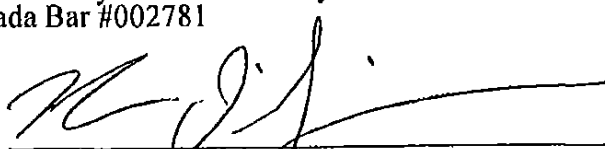
9 **CONCLUSION**

10 As the testimony of Dr. Fridland is not an area which will assist the trier of fact on the
11 meaning of ordinary terms and it is not a scientifically reliable area or inquiry, the Court
12 should exclude the testimony of Dr. Fridland in its entirety. Therefore, the Court should
13 grant the MOTION IN LIMINE TO EXCLUDE THE TESTIMONY OF VALERIE
14 FRIDLAND.

15 DATED this 12th day of January, 2009.

16 DAVID ROGER
17 Clark County District Attorney
18 Nevada Bar #002781

19 BY

20 
21 MARC DIGIACOMO
22 Chief Deputy District Attorney
23 Nevada Bar #006955
24
25
26
27
28

CERTIFICATE OF FACSIMILE TRANSMISSION

I hereby certify that service of the above and foregoing, was made this 12th day of January, 2009, by facsimile transmission to:

DOMINIC GENTILE, ESQ. (Luis Hidalgo, Jr.)
369-2666

JOHN ARRASCADA, ESQ. (Luis Hidalgo, III)
FAX: 775-329-1253

CHRISTOPHER ADAMS, ESQ. (Luis Hidalgo, III)
FAX: 404-352-5636

/s/Deana Daniels

Secretary for the District Attorney's
Office

*** TX REPORT ***

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DAVID ROGER
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Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,
Plaintiff,

-vs-

LUIS HIDALGO, JR.,
#1579522

Defendant.

Case No. C241394

Dept No. XXI

NOTICE OF MOTION AND MOTION IN LIMINE TO EXCLUDE THE
TESTIMONY OF VALERIE FRIDLAND

DATE OF HEARING: 1/20/09

TIME OF HEARING: 9:30 A.M.

COMES NOW, the State of Nevada, by DAVID ROGER, District Attorney, through
MARC DIGIACOMO, Chief Deputy District Attorney, and files this Notice of Motion and

to Exclude the Testimony of Valerie Fridland

*** TX REPORT ***

TRANSMISSION OK

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1 0001

2 DAVID ROGER
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4 Nevada Bar #002781
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8 200 Lewis Avenue
9 Las Vegas, Nevada 89155-2211
10 (702) 671-2500
11 Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

12 THE STATE OF NEVADA,
13 Plaintiff,

Case No. C241394

14 -vs-

Dept No. XXI

15 LUIS HIDALGO, JR.,
16 #1579522
17 Defendant.

18 NOTICE OF MOTION AND MOTION IN LIMINE TO EXCLUDE THE
19 TESTIMONY OF VALERIE FRIDLAND

20 DATE OF HEARING: 1/20/09

21 TIME OF HEARING: 9:30 A.M.

22 COMES NOW, the State of Nevada, by DAVID ROGER, District Attorney, through
23 MARC DIGIACOMO, Chief Deputy District Attorney, and files this Notice of Motion and

24

*** TX REPORT ***

TRANSMISSION OK

TX/RX NO 3702
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RESULT OK

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MARC DIGIACOMO
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(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

LUIS HIDALGO, JR.,
#1579522

Defendant.

Case No. C241394

Dept No. XXI

NOTICE OF MOTION AND MOTION IN LIMINE TO EXCLUDE THE
TESTIMONY OF VALERIE FRIDLAND

DATE OF HEARING: 1/20/09

TIME OF HEARING: 9:30 A.M.

COMES NOW, the State of Nevada, by DAVID ROGER, District Attorney, through
MARC DIGIACOMO, Chief Deputy District Attorney, and files this Notice of Motion and

1 **ORDR**

2 **DAVID ROGER**
3 Clark County District Attorney
4 Nevada Bar #002781
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FILED IN OPEN COURT
1-16 2009
EDWARD A. FRIEDLAND
CLERK OF THE COURT
BY **REBECCA FOSTER** DEPUTY

8 DISTRICT COURT
9 CLARK COUNTY, NEVADA

10 THE STATE OF NEVADA,
11 Plaintiff,

12 -vs-

13 **LUIS HIDALGO, III,**
14 #1849634
15 and
16 **LUIS HIDALGO, JR.**
17 #1579522
18 Defendants.

Case No. C212667/C241394
Dept No. XXI

17 ORDER GRANTING THE STATE'S MOTION TO CONSOLIDATE C241394 INTO
18 C212667

19 DATE OF HEARING: 1/16/2009
20 TIME OF HEARING: 9:30 A.M.

21 THIS MATTER having come on for hearing before the above entitled Court on the
22 16th day of January, 2009, the Defendants being present, represented by John Arrascada for
23 LUIS HIDALGO, III and Dominic Gentile for LUIS HIDALGO, JR., the Plaintiff being
24 represented by DAVID ROGER, District Attorney, through MARC DIGIACOMO, Chief
25 Deputy District Attorney, and the Court having heard the arguments of counsel and good
26 cause appearing therefor,

27 ///


28 ///

1 IT IS HEREBY ORDERED that the STATE'S MOTION TO CONSOLIDATE
2 C241394 INTO C212667, shall be, and it is Granted.

3 DATED this 16th day of January, 2009.
4

5
6 DISTRICT JUDGE

7
8 DAVID ROGER
9 DISTRICT ATTORNEY
Nevada Bar #002781

10
11 
12 MARC DIGIACOMO
13 Chief Deputy District Attorney
14 Nevada Bar #006955
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