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3 IN THE SUPREME COURT OF THE STATE OF NEVADA

4 Electronically Filed
5 Mar 30 2012 03:18 p.m.
6 Tracie K. Lindeman
7 Clerk of Supreme Court

8 LUIS A, HIDALGO, JR.

9 Appellant,

CASE NO. 54209

10 vs.

11 THE STATE OF NEVADA

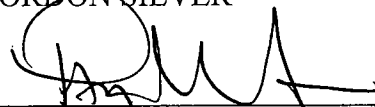
12 Respondent.

**APPELLANT'S MOTION TO
RECONSIDER SUBMISSION FOR
DECISION WITHOUT ORAL
ARGUMENT**

13 **COMES NOW** Appellant, Luis A. Hidalgo, Jr., by and through counsel, Dominic P.
14 Gentile, Esq., of the law firm of Gordon Silver, and pursuant to Rule 27 of the Nevada Rules of
15 Appellate Procedure hereby moves the Court to reconsider its Order of March 9, 2012 submitting
16 the above-entitled matter for decision without oral argument. (Appended hereto as Exhibit "A").
17 This Motion is made and based on all pleadings and papers on file herein, the exhibits appended
18 hereto, and the following Memorandum of Points and Authorities.

19 Dated this 30th day of March, 2012.

20 GORDON SILVER

21 

22 DOMINIC P. GENTILE, ESQ.

23 Nevada Bar No. 1923

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Attorneys for Appellant

LUIS HIDALGO, JR.

...

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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 INTRODUCTION

3 Rule 34(f)(1) of the Nevada Rules of Appellate Procedure (“NRAP”) provides that “[t]he
4 court may order a case submitted for decision on the briefs, without oral argument.” The Nevada
5 rule does not prescribe any standards or criteria for consideration by this Court in making a
6 determination to order an appeal submitted for decision without oral argument.¹ However, its
7 federal counterpart does. Thus, Rule 34(a)(2) of the Federal Rules of Appellate Procedure
8 (“FRAP”) provides as follows:

9 “(2) **Standards.** Oral argument must be allowed in every case
10 unless a panel of three judges who have examined the briefs and
11 record unanimously agrees that oral argument is unnecessary for
any of the following reasons:

12 (A) the appeal is frivolous;

13 (B) the dispositive issue or issues have been authoritatively
14 decided; or

15 (C) the facts and legal arguments are adequately presented in the
16 briefs and record, and the decisional process would not be
significantly aided by oral argument.”

17 Although NRAP 34(f)(1) does not prescribe standardized criteria for the submission of an
18 appeal for decision without oral argument, the jurisprudence of this Court does reflect
19 consideration of factors similar to those set forth in the above-quoted federal rule. See *e.g.*, *In re*
20 *Discipline of Winter*, 2012 WL 642837 (Nev. February 24, 2012) (ordering appeal submitted on
21 the record without oral argument where parties did not submit briefs challenging findings and
22 recommendation of state bar panel or inform the Court of intent to contest the same); *Simpson v.*
23 *State*, No. 58435, 2011 WL 5827791 (Nev. Nov. 17, 2011) (ordering appeal submitted on the
24 record without oral argument where “there were no non-frivolous issues . . . on appeal”); *Luckett*
25 *v. Warden*, 91 Nev. 681, 541 P.2d 910 (1975) (denial of oral argument with respect to successive

26 ¹ NRAP 34(f)(3) does provide that “[a]ppeals brought in proper person and appeals in post-
27 conviction proceedings instituted under NRS 34.360 et seq. will be submitted for decision
28 without oral argument, but the court may direct that a case be argued.” Neither of these
circumstances is present in the case at bar.

1 application for post-conviction relief absent explanation as to why issues were not previously
2 raised).

3 Appellant Luis Hidalgo, Jr. respectfully submits that circumstances justifying the
4 submission of an appeal for decision without oral argument do not obtain in the instant case, and
5 that for the reasons hereinafter stated, the Court should therefore reconsider its order of March 9,
6 2012 submitting his appeal on the record and the briefs on file without oral argument – at least
7 with respect to the three issues identified hereinafter.²

8 **I.**

9 **THE INSTANT APPEAL PRESENTS IMPORTANT CONSTITUTIONAL**
10 **AND LEGAL ISSUES OF FIRST IMPRESSION IN THIS JURISDICTION;**
11 **AND THEREFORE, THE COURT SHOULD NOT TAKE THIS APPEAL**
12 **UNDER SUBMISSION WITHOUT PROVIDING THE APPELLANT AN**
13 **OPPORTUNITY TO PRESENT ORAL ARGUMENT.**

14 Appellant respectfully submits that his appeal in this case is hardly frivolous. Nor have
15 the dispositive issues in question been authoritatively decided. Indeed, the instant appeal
16 implicates important constitutional and legal issues of first impression in this jurisdiction. And
17 therefore, it cannot be said that the decisional process of this Court would not be significantly
18 aided by oral argument in this case.

19 Thus, appellant's challenge to jury instruction number 40, given by the court over his
20 contemporaneous objection at trial, presents this Court with its first opportunity to construe the
21 constitutional implications of NRS 47.060 (Preliminary questions of admissibility:
22 Determination) and 47.070 (Preliminary questions of admissibility: Relevancy conditioned on
23 fact) identified in the briefs with respect to the impermissible confusion inherent in a jury's
24 consideration of the "slight evidence" standard applicable with respect to the admissibility of co-
25 conspirator statements in view of its ultimate and overriding simultaneous constitutional duty to
26 apply the "beyond a reasonable doubt" standard in its determination of guilt or innocence under
27 the substantive law of conspiracy. Appellant's Opening Brief pages 32-42; Appellant's Reply
28 Brief pages 1-14. Indeed, as the state expressly concedes in its brief in this case: "In Nevada, it is

² Appellant's Opening Brief identifies a total of five issues on appeal. Pages ii, 1.

1 an unresolved issue of statutory interpretation whether a jury may be charged with also making
2 an admissibility determination regarding co-conspirator statements.” Respondent’s Answering
3 Brief Page 16, lines 19-21.³ See also Respondent’s Answering Brief Page 20, lines 4-6 (“it is
4 unsettled law in Nevada whether a jury must be instructed to make an admissibility
5 determination prior to considering the statements of a defendant’s co-conspirators”);
6 Respondent’s Answering Brief Page 24, lines 25-28 (“the Court is free to now permit or prohibit
7 Nevada’s district courts from instructing their juries to make the admissibility determination
8 regarding co-conspirator statements. The law would probably benefit from the Court’s guidance
9 and Mr. H’s case does present the question”).⁴

10 Likewise, Appellant’s challenge to the state’s deliberate and purposeful decision in this
11 case not to memorialize the evidentiary proffer of a cooperating alleged accomplice who testified
12 against him at trial pursuant to an executory agreement with the state providing for substantial
13 benefits and inducements in exchange for such testimony in order to frustrate meaningful cross-
14 examination and confrontation of that witness implicates important state and federal
15 constitutional questions of due process and confrontation that have never been authoritatively
16 decided by this Court. However, this Court’s decisions in *Sheriff v. Acuna*, 107 Nev. 664, 819
17 P.2d 197 (1991) and *Leslie v. State*, 114 Nev. 8, 952 P.2d 966 (1998) strongly suggest that such
18 sharp practice is constitutionally repugnant and precludes the admissibility of the testimony of a
19 putative accomplice. Appellant’s Opening Brief pages 48-52; Appellant’s Reply Brief pages 25-
20 27.

21 In addition, this case involves critical and important issues involving the insufficiency of
22 corroboration of the accomplice testimony which was absolutely essential to the state’s case
23 against this moving Appellant; corroboration of which by independent evidence was likewise

24 _____
25 ³ *I.e.*, after the trial court has already made a threshold determination to admit such a statement
into evidence pursuant to NRS 47.070(1).

26 ⁴ Furthermore, this issue is particularly – and uniquely – important in the case of this moving
27 Appellant because – in contradistinction to the case of co-defendant and appellant Luis Hidalgo,
28 III (as to whom this Court *has* granted oral argument), the co-conspirator statements in question
are entirely *vicarious* with respect *only* to Appellant Luis Hidalgo, Jr. (Notice of Oral Argument
Setting in the case of Luis Hidalgo, III appended hereto as Exhibit “B”).

1 essential to support the Appellant's conviction. Appellant's Opening Brief pages 42-48;
2 Appellant's Reply Brief pages 17-25.

3 The deliberate, calculated, and selective official decision not to memorialize the initial
4 evidentiary proffer *only* of alleged accomplice Anabel Espindola and the lack of adequate
5 independent corroboration of her testimony against this moving Appellant at trial are particularly
6 troubling in this case. For her testimony was the *sine qua non* of any arguable hypothesis of
7 culpability on the part of this moving Appellant and the testimony of other, highly-credible
8 witnesses affirmatively undermined the credibility of her testimony.

9 Indeed, Espindola had been jailed for 32 months awaiting trial on a murder charge and
10 facing the death penalty in this matter prior to making a deal with the state to testify against this
11 moving Appellant – who, unlike herself, had not theretofore been charged in this case – in
12 exchange for avoidance of the death penalty, probation-eligibility and release from confinement.
13 The state has affirmatively acknowledged that without Espindola it did not have sufficient
14 evidence to charge Appellant in this matter. 14 ROA 2724; 15 ROA 2837-2838; 16 ROA 3119;
15 17 ROA 3281, 3286. And prior to cutting her deal, Espindola knew that the state wanted her to
16 tie this moving Appellant to the crimes with which she was charged. 17 ROA 3280.

17 The evidence showed that prior to making her deal with the state, Espindola had come to
18 believe that Appellant – with whom she had been involved in a long-standing intimate
19 relationship – had been unfaithful to her while she was locked up, and had told him that he had
20 one week to procure her release on bail. 17 ROA 3291, 3299-3300.

21 Espindola was debriefed for hours in the presence of 2 deputy district attorneys, 2
22 detectives and her attorney without recordation. 17 ROA 3271-3271. She was the only state's
23 cooperating witness in this case whose evidentiary proffer was not memorialized.

24 And Espindola had given a detailed account of the events in question -- completely
25 inconsistent with her trial testimony and exculpatory as to this moving Appellant – in a face-to-
26 face meeting attended by both Attorney Jerome De Palma and private investigator Don Dibble, a
27 24 year veteran of the Las Vegas Metropolitan Police Department and its predecessor Clark
28 County Sheriff's Department, as both De Palma and Dibble testified at trial. 19 ROA 3702-3704,

1 3710-3721, 3723-3725, 3731-3732, 3736-3738. Mr. De Palma's notes of the meeting were
2 produced to the district attorney in advance of his trial testimony, (19 ROA 3708), and were
3 admitted in evidence as Exhibit 241. 19 ROA 3730.

4 Despite the detailed testimony of both De Palma and Dibble to the contrary, Espindola
5 denied ever speaking with them about the events at issue in this case, (16 ROA 3058, 3065,
6 3069-3072, 17 ROA 3290), and testified that if Attorney De Palma were to testify that she had
7 done so (as he later did) he would be lying. 17 ROA 3239-3240, 3306-3309.

8 Appellant respectfully submits that, in view of the foregoing, the deliberate, selective
9 decision of state officials not to memorialize Espindola's debriefing by them for the calculated
10 purpose of thereby insulating her from meaningful cross-examination as required by *Sheriff v.*
11 *Acuna*, 107 Nev. 664, 819 P.2d 197 (1991) and *Leslie v. State*, 114 Nev. 8, 952 P.2d 966 (1998)
12 raises profound due process and confrontation issues sufficient to preclude the admissibility of
13 her testimony against this moving Appellant at trial, and requires scrupulous insistence that her
14 testimony against him have been corroborated by sufficient independent evidence. And
15 Appellant further respectfully submits that the Court should entertain oral argument on all of the
16 issues identified herein before taking the instant appeal under advisement.

17 II.

18 **THE COURT HAS SET ORAL ARGUMENT IN THE COMPANION**
19 **APPEAL OF APPELLANT'S CO-DEFENDANT, LUIS HIDALGO, III,**
20 **WHICH RAISES SEVERAL APPELLATE ISSUES CO-EXTENSIVE**
21 **WITH THOSE RAISED BY APPELLANT LUIS HIDALGO, JR.,**
22 **WITHOUT LIMITING THE SCOPE OF ORAL ARGUMENT TO**
23 **APPELLATE ISSUES WHICH ARE UNIQUE TO CO-DEFENDANT LUIS**
24 **HIDALGO III'S APPEAL; AND THEREFORE, THE COURT SHOULD**
25 **PROVIDE APPELLANT LUIS HIDALGO, JR. AN EQUAL**
26 **OPPORTUNITY TO PRESENT ORAL ARGUMENT WITH RESPECT TO**
27 **THOSE ISSUES WHICH ARE COMMON TO THE APPEALS OF BOTH**
28 **CO-DEFENDANTS.**

25 As pointed out *supra*, at footnote 4, this Court has granted oral argument in the appeal of
26 this moving Appellant's co-defendant, Luis Hidalgo, III. See Exhibit "B." But in so doing, the
27 Court has not limited the scope of oral argument in the latter's case to those issues raised in his
28 briefs which are unique to his case on appeal. Rather, Appellant's co-defendant has been

1 permitted oral argument with respect to all issues raised on appeal, including those which are co-
2 extensive with the issues raised in the briefs filed by this moving Appellant – including the three
3 issues identified in this Motion as particularly deserving of oral argument. And Appellant
4 respectfully submits that, in fairness, his counsel should likewise be permitted to present oral
5 argument to this Court with respect to these issues. This is particularly true in that, as pointed out
6 *supra*, at footnote 4, in contradistinction to the case of co-defendant Luis Hidalgo, III, the co-
7 conspirator statements implicated by the jury instruction issue are merely vicarious in the case of
8 this moving Appellant, Luis Hidalgo, Jr., and particularly in view of the fact that the testimony of
9 alleged accomplice Anabel Espindola was absolutely essential to any arguable hypothesis of
10 culpability in the case of this moving Appellant.

11 Respectfully submitted this 30th day of March, 2012.

12 GORDON SILVER

13 

14 DOMINIC P. GENTILE, ESQ.

15 Nevada Bar No. 1923

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17 Nevada Bar No. 8357

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19 Las Vegas, Nevada 89169

20 (702) 796-5555

21 Attorneys for Appellant

22 LUIS HIDALGO, JR.

CERTIFICATE OF SERVICE

The undersigned, an employee of Gordon Silver, hereby certifies that on the 30th day of March, 2012, she served a copy of the Motion to Reconsider Submission for Decision Without Oral Argument, by Electronic Service, in accordance with the Master Service List as follows:

Nancy A. Becker
Chief Deputy District Attorney
Regional Justice Center
200 Lewis Avenue
Las Vegas, NV 89155


ADELE L. JOHANSEN, an employee of
GORDON SILVER

EXHIBIT “A”

IN THE SUPREME COURT OF THE STATE OF NEVADA

LUIS HIDALGO, JR. A/K/A LUIS A.
HIDALGO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 54209

FILED

MAR 09 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY A. Nogosa
DEPUTY CLERK

ORDER SUBMITTING APPEAL FOR DECISION
WITHOUT ORAL ARGUMENT

Oral argument will not be scheduled in this appeal, and it shall stand submitted on the record and the briefs filed herein, as of the date of this order. NRAP 34(f).

It is so ORDERED.

Ortola, C.J.

cc: Gordon & Silver, Ltd.
Attorney General/Carson City
Clark County District Attorney

EXHIBIT “B”

CLERK OF THE SUPREME COURT
201 SOUTH CARSON STREET
CARSON CITY, NEVADA 89701-4702
(775) 684-1600

LUIS A. HIDALGO, III,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

Supreme Court No. 54272
District Court Case No. C212667

NOTICE OF ORAL ARGUMENT SETTING

DATE: March 01, 2012

TO: Christopher W. Adams
Arrascada & Arrascada, Ltd./John L. Arrascada
Clark County District Attorney/Nancy A. Becker, Deputy District Attorney
Attorney General/Carson City/Catherine Cortez Masto, Attorney General
Clark County District Attorney/Steven S. Owens, Chief Deputy District Attorney

Pursuant to **NRAP 34**, the above-referenced matter is set for oral argument as follows:

Date: April 11, 2012
Time: 10:00 AM
Length: 30 minutes
Location: Regional Justice Center
200 Lewis Avenue
Courtroom - 17th Floor
Las Vegas, NV 89101

BEFORE: Southern Panel 12
Justices Douglas, Gibbons, Parraguirre

Notification List

Electronic

Arrascada & Arrascada, Ltd./John L. Arrascada
Attorney General/Carson City/Catherine Cortez Masto, Attorney General
Clark County District Attorney/Steven S. Owens, Chief Deputy District Attorney
Clark County District Attorney/Nancy A. Becker, Deputy District Attorney
Gordon & Silver, Ltd./Dominic P Gentile
Gordon & Silver, Ltd./Paola M. Armeni

Paper

Christopher W. Adams