

1 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

2 LUIS HIDALGO, JR.,

3 Appellant,

4 vs.

5 THE STATE OF NEVADA,
6 Respondent.

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Case No. 71458

7 **APPELLANT'S APPENDIX VOLUME I**

8 Appeal from Eighth Judicial District Court, Clark County

9 The Honorable Valerie Adair, District Judge

10 District Court Case No. 08C241394

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INDEX TO APPELLANT'S APPENDIX

<u>VOL.</u>	<u>DOCUMENT</u>	<u>DATE</u>	<u>BATES NUMBERS</u>
II	Appendix of Exhibits Volume 1 to Supplemental Petition for Writ of Habeas Corpus	02/29/2016	PA0048-PA0254
III	Appendix of Exhibits Volume 2 to Supplemental Petition for Writ of Habeas Corpus	02/29/2016	PA0255-PA0501
IV	Appendix of Exhibits Volume 3 to Supplemental Petition for Writ of Habeas Corpus (through HID PA 00538)	02/29/2016	PA0502-PA0606
V	Appendix of Exhibits Volumes 3-4 to Supplemental Petition for Writ of Habeas Corpus (Transcript: Jury Trial Day 5)	02/29/2016	PA0607-PA0839
VI	Appendix of Exhibits Volume 4 to Supplemental Petition for Writ of Habeas Corpus (from HID PA 00765)	02/29/2016	PA0840-PA1024
VII	Appendix of Exhibits Volume 5 to Supplemental Petition for Writ of Habeas Corpus (Transcript: Jury Trial Day 7 pgs. 1-189)	02/29/2016	PA1025-PA1220
VIII	Appendix of Exhibits Volume 5 to Supplemental Petition for Writ of Habeas Corpus (Transcript: Jury Trial Day 7 pgs. 190-259)	02/29/2016	PA1221-PA1290
IX	Appendix of Exhibits Volume 6 to Supplemental Petition for Writ of Habeas Corpus	02/29/2016	PA1291-PA1457
X	Appendix of Exhibits Volume 7 to Supplemental Petition for Writ of Habeas Corpus	02/29/2016	PA1458-PA1649

<u>VOL.</u>	<u>DOCUMENT</u>	<u>DATE</u>	<u>BATES NUMBERS</u>
XI	Appendix of Exhibits Volumes 8-9 to Supplemental Petition for Writ of Habeas Corpus (Transcript: Jury Trial Day 10 pgs. 1-218)	02/29/2016	PA1650-PA1874
XII	Appendix of Exhibits Volumes 8-9 to Supplemental Petition for Writ of Habeas Corpus (Transcript: Jury Trial Day 10 pgs. 319-341)	02/29/2016	PA1875-PA2004
XIII	Appendix of Exhibits Volumes 10-11 to Supplemental Petition for Writ of Habeas Corpus (Transcript: Jury Trial Day 11 pgs. 1-177)	02/29/2016	PA2005-PA2188
XIV	Appendix of Exhibits Volumes 10-11 to Supplemental Petition for Writ of Habeas Corpus (Transcript: Jury Trial Day 11 pgs. 178-318)	02/29/2016	PA2189-PA2336
XV	Appendix of Exhibits Volumes 12-13 to Supplemental Petition for Writ of Habeas Corpus (Transcript: Jury Trial Day 12 pgs. 1-229)	02/29/2016	PA2337-PA2574
XVI	Appendix of Exhibits Volumes 12-13 to Supplemental Petition for Writ of Habeas Corpus (Transcript: Jury Trial Day 12 pgs. 230-330)	02/29/2016	PA2575-PA2683
XVII	Appendix of Exhibits Volume 14 to Supplemental Petition for Writ of Habeas Corpus	02/29/2016	PA2684-PA2933
XVIII	Appendix of Exhibits Volumes 15-16 to Supplemental Petition for Writ of Habeas Corpus	02/29/2016	PA2934-PA3089

1
2
3
4
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<u>VOL.</u>	<u>DOCUMENT</u>	<u>DATE</u>	<u>BATES NUMBERS</u>
XIX	Appendix of Exhibits Volume 17 to Supplemental Petition for Writ of Habeas Corpus	02/29/2016	PA3090-PA3232
XX	Appendix of Exhibits Volume 18 to Supplemental Petition for Writ of Habeas Corpus	02/29/2016	PA3233-PA3462
XXI	Appendix of Exhibits Volumes 19-20 to Supplemental Petition for Writ of Habeas Corpus	02/29/2016	PA3463-PA3703
XXII	Minute Order	08/15/2016	PA3811
XXII	Notice of Appeal	10/03/2016	PA3862-PA3864
XXII	Notice of Entry of Findings of Fact and Conclusions of Law and Order	09/19/2016	PA3812-PA3861
XXII	Register of Actions for District Court Case Number 08C241394	07/11/2017	PA3865-PA3883
XXII	Reply to State's Response to Supplemental Petition for Writ of Habeas Corpus	07/21/2016	PA3786-PA3798
XXII	State's Response to Supplemental Petition for Writ of Habeas Corpus	05/18/2016	PA3709-PA3785
XXII	Supplement to Supplemental Petition for Writ of Habeas Corpus	03/08/2016	PA3704-PA3708
I	Supplemental Petition for Writ of Habeas Corpus	02/29/2016	PA0001-PA0047
XXII	Transcript of Petition for Writ of Habeas Corpus Hearing	08/11/2016	PA3799-PA3810

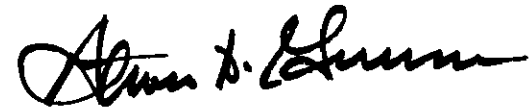
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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

LUIS HIDALGO, JR.,

Petitioner,

vs.

THE STATE OF NEVADA,

Respondent.

Case No.: 08C241394

Dept. No.: XXI

Hearing Time: June 28, 2016

Hearing Date: 9:30am

SUPPLEMENTAL MEMORANDUM OF POINTS AND AUTHORITIES IN
SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS
(POST-CONVICTION)

COMES NOW, Petitioner, LUIS HIDALGO JR., by and through his attorney, MARGARET A. MCLETCHIE, ESQ., and files his SUPPLEMENTAL MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION). This Memorandum is made and based on the following points and authorities, the papers and pleadings on file herein, together with oral argument at the time of hearing.

DATED this 29th day of February, 2016

/s/ Margaret A. McLetchie

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TABLE OF CONTENTS

I. INTRODUCTION 6

II. STATEMENT OF FACTS 7

 A. The Death of Timothy Hadland 7

 B. The Investigation 9

 C. The Testimony of Anabel Espindola 13

 D. The Testimony of Other Witnesses Which Contradicted Anabel Espindola’s
 Testimony. 17

 E. The Testimony of Luis Hidalgo Jr. 19

 F. Facts Regarding Petitioner’s Retention of Attorney Gentile 20

 1. Prior to the Instant Case, Hidalgo Jr. Had Significant Business Assets. 20

 2. Hidalgo Jr. and Espindola Meet With Mr. Gentile; Hidalgo Jr. Sells His Assets
 to Mr. Gentile to Retain his Legal Services. 20

 3. Hidalgo Jr.’s Legal Retainer and Consulting Agreement with Mr. Gentile..... 22

 4. Joint Defense: Agreement and Dissatisfaction..... 23

III. PROCEDURAL BACKGROUND..... 23

 A. Related Events Prior to Hidalgo Jr.’s Indictment..... 23

 B. Hidalgo Jr.’s Indictment and Trial. 25

 C. Hidalgo Jr.’s Appellate and Post-Conviction Record. 28

IV. ARGUMENT 29

 A. Hidalgo Jr. Was Denied Effective Assistance of Counsel Based Upon Substantial
 Conflicts of Interest on the Part of Attorney Gentile. 30

 1. Attorney Gentile’s Purchase of Bermuda Sands LLC from Hidalgo Jr. Created
 an Impermissible Conflict of Interest. 30

2.	Attorney Gentile’s Apparent Failure to Fully Fund Hidalgo III’s and Espindola’s Defense Prejudiced Hidalgo Jr.....	32
3.	Espindola’s Participation in the Joint Defense Agreement and Her Subsequent Decision to Testify as a Witness for the State Created An Irreconcilable Conflict of Interest.....	32
B.	Hidalgo Jr. Was Denied Effective Assistance of Counsel in Pretrial Stages of Litigation.....	35
1.	The Petitioner Was Denied Effective Assistance of Counsel for conceding the Motion to Consolidate.....	35
C.	Hidalgo Jr. Was Denied Effective Assistance of Counsel During the Appellate Proceedings.	39
1.	If Trial Counsel Contends it Properly Objected to the State’s Motion to Consolidate, Then Counsel Was Deficient for Failing to Brief Joinder on Appeal. ..	39
2.	Appellate Counsel Was Ineffective for Failure to Raise the Admission of Prejudicial Hearsay Statements Made by Carroll That Were Not in Furtherance of the Alleged Conspiracy.....	39
D.	Hidalgo Jr. is Entitled to An Evidentiary Hearing on His Petition.	42
E.	Discovery to Be Completed.....	43
V.	CONCLUSION.....	43

TABLE OF AUTHORITIES

Cases

Baker v. United States, 10 F.3d 1374 (9th Cir. 1993).....	36
Bruton v. United States, 391 U.S. 123 (1968).	27
Byford v. State, 123 Nev. 67, 156 P.3d 691 (2007)	42
Chartier v. State, 191 P.3d 1182 (2008).....	37, 38
Ford v. State, 105 Nev. 850, 784 P.2d 951 (1989)	39
GTE North, Inc. v. Apache Prods. Co., 914 F. Supp. 1575 (N.D.Ill.1996)	33
In re Gabapentin Patent Litig., 407 F.Supp.2d 607 (D. N.J. 2005).....	33
Jones v. Barnes, 463 U.S. 745, 103 S. Ct. 3308, 77 L. Ed. 2d 987 (1983).....	39
Kirksey v. State, 112 Nev. 980, 923 P.2d 1102 (1997)	39
Krulewitch v. United States, 336 U.S. 440 (1949).....	38
Lara v. State, 120 Nev. 177 (2004).....	30
Lisle v. State, 113 Nev. 679 (1997).....	36
McConnell v. State, 212 P.3d 307, 125 Nev. Adv. Rep. 24 (2009)	30, 42
Moore v. United States, 429 U.S. 20, (1976).....	40
Nika v. State, 198 P.3d 839, 124 Nev. Adv. Rep. 103 (2008)	42
State v. Love, 109 Nev. 1136, 865 P.2d 322 (1993)	30
State v. Rendon, 148 Ariz. 524, 71 P.2d 777 (Ariz. App. 1986).....	36
Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....	30
Summers v. State, 102 Nev. 195 (1986).....	40
Tabish v. State, 119 Nev. 293 (2003).....	40
United States v. Douglas, 780 F.2d 1472 (9th Cir. 1986).....	37
United States v. Henke, 222 F.3d 633 (9th Cir. 2000)	30, 32, 33
United States v. Long, 905 F.2d 1572 (D.C. Cir. 1990).....	37
United States v. McPartlin, 595 F.2d 1321 (7th Cir. 1979).....	32
United States v. Patterson, 819 F.2d 1495 (9th Cir. 1987).....	37
United States v. Stepney, 246 F.Supp.2d 1069 (N.D. Cal. 2003)	33

1
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12
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20
21
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28

Wilson P. Abraham Constr. Corp. v. Armco Steel Corp., 559 F.2d 250 (5th Cir. 1977)
..... 32, 34
Zafiro v. United States 506 U.S. 534, 113 S. Ct. 933 (1993) 36, 37
Statutes
Nev. Rev. Stat. § 34.770 42
Nev. Rev. Stat. § 34.780 43
Nev. Rev. Stat. § 34.790 42
Nev. Rev. Stat. § 51.035 39, 41

I. INTRODUCTION

Following a fourteen-day jury trial, Petitioner Luis Hidalgo Jr. (hereinafter “Hidalgo Jr.”) was convicted of one count of Conspiracy to Commit Battery with a Deadly Weapon or Battery Resulting in Substantial Bodily Harm and one count of Second Degree Murder with Use of a Deadly Weapon. These convictions stem from Hidalgo Jr.’s alleged participation in the murder of Timothy Hadland on May 19, 2005. At the time of Hadland’s death, Hidalgo Jr. was the owner and operator of the Palomino Club, a gentleman’s club located on Las Vegas Boulevard North that was and is the only gentleman’s club in the State of Nevada which served alcohol under a full liquor license in an all-nude facility.

As will be described in detail below, there was no direct evidence tying Hidalgo Jr. to Hadland’s murder. Instead, the State relied on a patchwork of circumstantial evidence and testimony from former co-defendant Anabel Espindola to prove that Hidalgo Jr.—who was not present at the time of Hadland’s death—had orchestrated Hadland’s murder from afar to punish Hadland for allegedly badmouthing the Palomino Club.

This Supplemental Petition for Writ of Habeas Corpus outlines several facts which demonstrate that trial counsel representation of Hidalgo Jr. in this case was ineffective. First, as will be described the record in this case indicates that Hidalgo Jr.’s trial counsel had several conflicts of interest that rendered his representation of Hidalgo Jr. fundamentally and irredeemably ineffective. Second, trial counsel failed to provide effective assistance of counsel during the pretrial stages of litigation. Third, trial counsel failed to provide effective assistance of counsel during the appellate proceedings. As described below, these failings by trial counsel—individually and collectively—deprived Hidalgo Jr. of his Sixth Amendment right to adequate representation.

Additionally, the record in this case raises more questions than it answers regarding the adequacy of trial counsel’s representation of Hidalgo Jr. Accordingly, Hidalgo Jr. is entitled to an evidentiary hearing, and is also entitled to additional discovery in this case to gather additional evidence.

///

II. STATEMENT OF FACTS

This case arises out of the shooting death of Timothy Hadland near Lake Mead on May 19, 2005. A total of seven individuals were charged in connection with the killing: Deangelo Carroll, Rontae Zone, Kenneth Counts, Jason Taoipu, Anabel Espindola, Luis Hidalgo III, and the Petitioner, Luis Hidalgo Jr. Petitioner, Luis Hidalgo Jr. was the owner of a North Las Vegas gentleman's club called the Palomino Club, which employed Hadland until approximately one week before his death. Hidalgo Jr.'s girlfriend, Anabel Espindola, and his son, Luis Hidalgo III, also worked at the club. In addition, the Palomino Club employed Deangelo Carroll during the time in question.

A. The Death of Timothy Hadland

At approximately 9:00 to 10:00pm on May 19, 2005, Timothy Hadland, was camping at Lake Mead with his girlfriend, Paijit Karlson, when he received a walkie-talkie call on his cell phone. (Petitioner's Appendix ("PA") 674, 679-680, 682.) After the phone call, Hadland informed Karlson that he was going to meet "Angelo," a co-worker at Hadland's former place of employment, the Palomino Club. (PA 680-681.) Hadland told Karlson that he was meeting "Angelo" to obtain marijuana. (PA 681.)

Ms. Karlson became concerned after Hadland failed to return, and attempted to call him several times. (PA 682-683.) However, she received no response. (PA 683.) At approximately 11:30 that evening, several picnickers discovered the body of Timothy Hadland on North Shore Road near Lake Mead. (PA 643-644, 649-650.) Hadland had sustained two gunshot wounds to his body, one of which was on the left side of his cheek. (PA 833-834.) Thirty-three advertisement cards from the Palomino Club were found next to Hadland's body. (PA 718.)

At the time of trial in this matter, co-defendant Rontae Zone testified that he was present for the shooting death of Mr. Hadland. (PA 883.) Zone stated that that he was a relatively recent friend of co-defendant Deangelo Carroll in May of 2005. (PA 852.) On May 19, 2005, Zone was residing with Carroll, along with Carroll's wife and Zone's "baby's mother." (PA 853.) Zone was also working with Carroll passing out Palomino Club flyers to

1 cab companies. (PA 853.) During his employment passing out flyers, Zone was paid under
2 the table by Carroll and not by the club. (PA 857.)

3 At approximately noon on May 19, 2015, Zone was with Carroll and “JJ” [co-
4 defendant, Jason Taoipu] in a white Astro van registered in the name of Anabel Espindola
5 when Carroll informed them both that “Mr. H” [Petitioner, Luis Hidalgo Jr.] wanted someone
6 killed.” (PA 857, 860-861.) However, Zone admitted that the language used by Carroll was
7 that he wanted to have the person “dealt with.” (PA 863.) Zone further admitted that Carroll
8 had never used the word murder and that “dealt with” was the only terminology used. (PA
9 909.) Zone admits that he learned all this information from Carroll and did not speak directly
10 to Hidalgo Jr. (PA 963.) At this point, Carroll inquired of them whether they wanted to be
11 involved in the killing. (PA 860-861.) Zone responded in the negative, while Taoipu stated
12 that he was “down.” (PA 860-861.) Zone testified that was somewhat skeptical of the
13 proposition, as he knew Carroll to be a “big talker” and someone who wasn’t trustworthy.
14 (PA 967, 1012.)

15 At some point, Carroll showed Zone a .22 revolver with a green pearl handle. (PA
16 863.) Zone stated that Carroll offered both Taoipu and himself the gun and some bullets, but
17 only Taoipu accepted them. (PA 864.)

18 Following this conversation, Zone, Carroll, and Taoipu went to Carroll’s house to
19 put on the black pants and shirt that they wore when promoting the club. (PA 865.) The three
20 men then traveled to a home on F Street to pick up “KC” [co-defendant Kenneth Counts].
21 (PA 869.) Zone had not met KC prior to this night. (PA 869.) After KC was brought into the
22 car, the four men drove to Lake Mead. (PA 872.) Not long after entering the Lake Mead area,
23 the conversation resumed regarding killing Hadland. (PA 874.) It was Zone’s understanding
24 that Carroll had told Hadland on the phone that they were going to smoke marijuana and
25 “chill.” (PA 875.) He also heard Carroll on the phone with co-defendant Anabel Espindola,
26 wherein Espindola stated “go to plan B” and Carroll responded “we’re too far along Ms.
27 Anabel.” (PA 1035.) Eventually Zone spotted Hadland driving toward them in a Kia
28 Sportage, which he drove in a U-turn and parked on the side of the road. (PA 880-881.)

Carroll then parked the Astro Van and relieved himself on the side of the road while Hadland got out of his car. (PA 881.) Carroll came back into the car and talked with Hadland at the window. (PA 882.) While this was going on, KC exited the sliding door of the Astro van, approached Hadland, and shot him in the head. (PA 883.) After the shooting, KC quickly hopped in the van and Carroll drove off. (PA 884.) KC then asked Zone and Taoipu why they did not assist him. (PA 885.)

The four men then drove to the Palomino club, where Carroll parked and went inside, leaving Zone, KC, and Taoipu in the van. (PA 886.) About ten minutes later, Carroll retrieved KC and brought him into the club. (PA 886.) Eventually KC came out of the club, got in a cab, and left. (PA 887.) Carroll came out of the club thirty minutes later. (PA 887.) Zone, Carroll, and Taoipu then went to Carroll's house. (PA 888.) The next morning, the three men drove to Simone's Auto Plaza. (PA 892.)

Zone and Taoipu waited outside of Simone's while Carroll went inside. Eventually Carroll came out and told them both to come into the office. (PA 893.) Carroll then went into the back room for a period of time and allegedly briefly spoke to Hidalgo Jr. (PA 894, 896.) Following that, all three men left the premises. (PA 896.)

Carroll informed Zone after the incident that "Mr. H was going to pay \$6,000 to the man that killed Hadland. (PA 867.) Later Carroll told Zone that they would not be receiving any money and chastised Taoipu and Zone for their failure to participate. (PA 894-896.) Carroll further informed them that KC was going to be paid the six grand. (PA 894-896.)

B. The Investigation

Sergeant Michael McGrath responded to the crime scene on North Shore Road on May 19, 2005. (PA 1112.) At the scene he was able to identify a Kia Sportage as belonging to Hadland's girlfriend. (PA 1119.) Sergeant McGrath located Hadland's cell phone on the floorboard of the Sportage's driver seat. (PA 1120.) He opened the phone and noted that a recent call was displayed with the name "Deangelo" and a Nextel number. (PA 1121.) After some investigation, Sergeant McGrath was able to identify the recent call as Deangelo

Carroll, an employee of the Palomino Club. (PA 1123.)

At approximately 7:00 to 7:30 a.m. on May 20, 2005, McGrath accompanied Detective Marty Wildemann to the Palomino Club to meet with “Arial,” the office manager, to obtain Carroll’s address and phone number. (PA 1125.) However, while Sergeant McGrath was at the Palomino Club, he became aware that Carroll had also arrived at the club. (PA 1126.) Wildemann and McGrath asked Carroll to accompany them to the homicide office and he voluntarily complied. (PA 1127.) Detective Wildemann interviewed Carroll, wherein he gave three different statements about the course of events on the night in question. (PA 1632.) In addition, Wildemann and McGrath interviewed Zone, whose story was allegedly consistent with the third version of Carroll’s account. (PA 1130, 1638.)

After the interview with Zone, McGrath developed a plan to “have Mr. Carroll meet with the people that owned the Palomino Club and record a conversation with those people to determine the accuracy as to what had happened that night.” (PA 1132.)

On the morning of May 23, 2005, Sergeant McGrath contacted Special Agent Bret Shield of the FBI to obtain a recording device for Carroll to wear while meeting with Hidalgo Jr. (PA 1163-1164.) Special Agent Shield and Sergeant McGrath met with Carroll at approximately 2:35 p.m. that same day to place the recording device and to prep him for obtaining information from Hidalgo Jr. (PA 1164-1165.) McGrath specifically told Carroll that he wanted to hear Hidalgo Jr. on the tape. (PA 1166.) After the surveillance team witnessed Carroll enter and later leave Simone’s Auto, McGrath and Shields made contact with Carroll and recovered the recording device, \$1,400, and a bottle of Tanqueray Gin. (PA 1167.) McGrath admitted that the quality of the recording that they obtained from Carroll was poor. (PA 1171.)

At the time of trial on this matter the surreptitious recording obtained by Deangelo Carroll on May 23, 2005 was played to the jury. (PA 1192.) Due to differences between the State’s and Hidalgo III’s defense counsel’s interpretation of the content on the recordings, two transcripts were provided to the jury to aid their understanding of the communications. (PA 1178-1179, 1192.) On both the defense and State’s transcript of the May 23, 2005

1 recording, Deangelo Carroll can be heard speaking with Espindola and Hidalgo III (PA 2797-
2 2813, 2824-2853.) Though the quality of the tape was so poor that there were a number of
3 blank lines on the transcript, Carroll could be heard asking for money to give the people that
4 were with him because they were threatening to go to the police. (PA 2799-2800.) Espindola
5 responded that she did not know where she was going to get the money, but that she had
6 “maybe six bills.” (PA 2800.) Espindola stated:

7
8 . . . if the cops can’t go no where with you, the shits gonna have to, fucking
9 end, they gonna have to go someplace else, they’re still gonna dig. They are
10 gonna keep digging they’re gonna keep looking they’re gonna keep on, they’re
11 gonna keep on looking. Louie [Hidalgo Jr.]¹ went to see an attorney not just
for him but for you as well, just in case. Just in case...we don’t want it to get
to that point, I’m telling you because if we have to get to that point, you and
Louie are gonna have to stick together.

12 (PA 2801.)

13 Espindola also said “Why are you saying that shit, what we really wanted was for
14 him to be beat up, then anything else, _____ motherfucking dead.” (PA 2801.) Espindola
15 continued to try and calm Carroll down and emphasized the importance of Carroll taking
16 care of this problem by stating:

17 If you go to jail for this shit I’m telling you, when the heat goes down
18 everybody’s fucked. The club is gone, the shop is gone, anybody who can take
care of your family is fucking gone, he is the only one that can fucking say to
take care of everybody... He’s it.

19 (PA 2802.)

20 Espindola went on to state that she was going to give Carroll some money to “maintain”
21 himself. (PA 2803.) Espindola then returned to berating Carroll, stating:

22 You should of fucking turned your ass around, before this guy....knowing that
23 you had people in the fucking car that could pinpoint you, that this
24 motherfucker had his wife, you should of motherfucking turned around on the
road, don’t give a fuck what KC said, you know what bad deal turn the fuck
around.

25 (PA 2804.)

26 Silent until this point, Hidalgo III asked Carroll “could you have fucking KC kill
27

28 ¹ Though it is unclear from the name “Louie” if Espindola is referring to Hidalgo Jr. or
Hidalgo III, Espindola testified that she was referring to Hidalgo Jr. (PA 1374.)

1 them too, we'll fucking put something in their food so they die rat poison or something." (PA
2 2805.) Later Hidalgo III speaks about giving Carroll a bottle of Tanqueray and saying
3 something to the effect of "you stir in the poison." (PA 2811.) Shortly after that comment,
4 the recording ends. At no point in the recording can the voice of Hidalgo Jr. be heard.

5 After listening to the May 23 recording, McGrath decided to send Carroll back into
6 Simone's on May 24. (PA 1172.) After sending him in for the second time, McGrath
7 recovered \$800 in cash and another recording from Carroll. (PA 1173.) The second recording
8 was of better quality but contained approximately twenty-eight (28) minutes of blank tape
9 where nothing was recorded. (PA 1175.)

10 This recording was also played for the jury. It memorialized a conversation between
11 Carroll and Espindola. (PA 2815, 2819.) In this conversation Carroll informed Espindola that
12 he needs money to get his wife and child out of town. (PA 2815-2816.) At one point, Carroll
13 supported his plea for money by stating that he did everything that was asked of him and that
14 he "took care of him," presumably referring to Hadland. Espindola responded stating
15 "___ talk to the guy not fucking take care of him ___god damn it I fucking called you." (PA
16 2816.) Espindola went on to state:

17 I said to go to plan B fucking Deangelo and Deangelo you're just minutes
18 away___I told you no I fucking told you no, and I kept trying to fucking call
19 you but you turned off your mother fucking phone.

19 (PA 2816.)

20 At this point, Hidalgo III appeared to enter the room to inquire about what was
21 happening. (PA 2817.) Carroll informed Hidalgo III that KC is threatening to kill his wife
22 and child and that he wants more money. (PA 2817.) Espindola then states:

23 All I telling you is denial cause I'm fucking saying and I already said I don't
24 know shit I don't know shit fucking I don't know a mother fucking thing and
25 that's how I got to fucking play it. And that's how I told everybody else to play
26 it_____

25 (PA 2817.)

26 Shortly after this statement the recording device was removed but left activated for
27 28 minutes, after which Carroll retrieves the device and returns to his vehicle. (PA 2818.)
28 Once again, at no point in the recording was the voice of Hidalgo Jr. present.

1 **C. The Testimony of Anabel Espindola**

2 Anabel Espindola pleaded guilty to voluntary manslaughter with use of a deadly
3 weapon prior to her trial in this matter. (PA 1516.) In the guilty plea agreement, the State
4 agreed to give no recommendation as to sentencing but stipulated to house arrest conditioned
5 on her giving testimony and a videotaped deposition. (PA 1517-1520.) Her testimony at the
6 trial of Hidalgo Jr. was as follows:

7 Espindola testified that she met Hidalgo Jr. when she was working for him in the
8 San Francisco Bay Area at the age of eighteen. (PA 1373.) Almost immediately after the
9 working relationship began, she and Hidalgo Jr. became romantically involved. (PA 1376.)
10 Espindola knew Hidalgo Jr. as “Louie,” but knew that others referred to him as “Mr. H.” (PA
11 1374.) In 1999, when she was approximately 27 years old, she moved to Las Vegas with
12 Hidalgo Jr. (PA 1375.)

13 When Hidalgo Jr. established Simone’s Auto Body in Las Vegas, Espindola was
14 the business administrator. (PA 1383.) In or about 2000 or 2001, Hidalgo Jr. got involved
15 with the Palomino Club, which was owned by Dr. Simon Stertz. (PA 1388.) Hidalgo Jr.
16 became the general manager, and Espindola performed the bookkeeping for the club. (PA
17 1389.) Espindola was aware that Dr. Stertz paid \$13 million for the club at the time of
18 purchase. (PA 1389.)

19 The title to the club was passed to Hidalgo Jr. in approximately 2004. (PA 1390.)
20 According to Espindola, Dr. Stertz did not want the “publicity” of owning the club and he
21 executed a note for \$13 million which was to be paid back to him in weekly \$10,000
22 increments. (PA 1392.) Money that was not paid to Dr. Stertz was kept in an LLC named
23 Bermuda Sands, which was a holding account for the Palomino Club as well as Satin Saddle
24 and Lacy’s, two other clubs included in the purchase. (PA 1393.)

25 By April of 2005, Espindola was the general manager of the Palomino Club,
26 Hidalgo Jr. was the owner, and Hidalgo III was the manager. (PA 1401.) The Palomino Club
27 also employed Deangelo Carroll for promotions and Timothy Hadland as the front door man.
28 (PA 1402.) Espindola was aware that Hidalgo III and Carroll had a social relationship outside

1 of the club, but was not aware of a social relationship between Hidalgo Jr. and Carroll. (PA
2 1403.)

3 Approximately one week before the death of Hadland on May 19, 2005, Espindola
4 allegedly overheard a conversation between Hidalgo Jr. and Hidalgo III regarding Hadland.
5 (PA 1404.) Hidalgo III was informing Hidalgo Jr. that Hadland was falsifying tickets for cab
6 driver promotions and getting a kickback. (PA 1404, 1407.) Hidalgo Jr.'s response to this
7 information was that Hadland needed to be watched. (PA 1408.) Later, Hidalgo Jr. told
8 Espindola that Hadland needed to be fired and directed her to issue his final check. (PA
9 1409.)

10 On the afternoon of May 19, 2005, Deangelo Carroll called Espindola regarding
11 Hadland allegedly badmouthing the Palomino Club at another gentleman's club. (PA 1411-
12 1412.) After she got off the phone with Carroll, Espindola discussed the conversation with
13 Hidalgo Jr. and Hidalgo III at the offices of Simone's Auto Body. (PA 1413.) Espindola
14 testified that when she explained what Carroll had told her Hidalgo Jr. had no response, while
15 his son, Hidalgo III, became angry. (PA 1415.) Hidalgo III allegedly yelled at his father about
16 why he wasn't doing anything, and stated that Hidalgo Jr. would never be like "Gilardi [sic]
17 and Rizzolo" [other strip club owners] because "they take care of business." (PA 1415.)
18 During the course of Hidalgo III's rant he allegedly referenced that Rizzolo had sent one of
19 his employees to beat up a customer. (PA 1417.) Hidalgo Jr. reacted to his son by yelling at
20 him to "mind his own business." (PA 1417.) At that point, Hidalgo III left Simone's Auto
21 Body. (PA 1418.)

22 After Espindola finished her paperwork for the day, she left Simone's Auto Body
23 with Hidalgo Jr., who she claimed was still angry, and they traveled to the Palomino Club.
24 (PA 1428-1429.) Later that day, Espindola was working in the Palomino Club office with
25 Hidalgo Jr. when Carroll knocked on the door. (PA 1435.) Hidalgo Jr. let Carroll in and they
26 walked out of the office together. (PA 1436.) After a half an hour Hidalgo Jr. returned to the
27 office and gave Espindola instructions unrelated to Hadland, while another employee, "PK,"
28 was present. (PA 1436.) Hidalgo Jr. then asked Espindola to follow him to the kitchenette

1 and told her to call Carroll and tell him to go to plan B. (PA 1437-1438.) Espindola claimed
2 that she told him she would do it, despite her later claim that she did not know what the term
3 “plan B” referenced. (PA 1438.) Espindola then chirped Carroll on his Nextel phone and he
4 returned the call on her regular phone. (PA 1439.) She told Carroll to go to plan B; he
5 allegedly responded “I’m already here.” (PA 1441.) Espindola once again informed Carroll
6 to go to plan B, at which point the phone call disconnected. (PA 1441.) Espindola then
7 informed Hidalgo Jr. that she had fulfilled his request to inform Carroll to go to plan B, which
8 Hidalgo Jr. responded to by calmly walking out of the office with PK. (PA 1445.)

9 Later, Hidalgo Jr. and Espindola were watching TV when Carroll came into the
10 office. (PA 1445-1446.) Carroll sat down in front of Hidalgo Jr. and stated “it’s done.” (PA
11 1446.) Hidalgo Jr. responded by telling Espindola to “go get 5 out of the safe.” (PA 1447.)
12 Espindola then removed \$5,000 from the safe and placed it in front of Carroll on the desk.
13 (PA 1447-1448.) Espindola alleged that Hidalgo Jr. told her to put on the news and asked
14 something to the effect of “did he do it?” (PA 1449-1450.) Approximately an hour after
15 Carroll left, Hidalgo Jr. and Espindola went gambling at the MGM. (PA 1450-1451.)
16 The following morning at Espindola’s home, she and Hidalgo Jr. turned on the news and
17 heard that there was a death at Lake Mead. (PA 1454.) Espindola claimed that Hidalgo Jr.
18 stated “he did it.” (PA 1454.) Espindola asked Hidalgo Jr. what he had done, and he
19 responded by saying that he needed to call his attorney. (PA 1454.)

20 On May 21, 2005, Espindola and Hidalgo Jr. stayed the evening at the Silverton
21 Casino’s hotel because Hidalgo Jr. stated that he did not want to stay at the house. (PA 1472.)
22 At some point, Hidalgo III visited them in the room. (PA 1473.) At this time, he allegedly
23 told his father not to worry and that he had spoken to Carroll and “he won’t say anything.”
24 (PA 1473.)

25 On May 22, 2005, Espindola met briefly with Attorney Dominic Gentile after he
26 and Hidalgo Jr. had a closed-door meeting. At that time he told Espindola not to speak to
27 Carroll because he may be wearing a wire. (PA 1478, 1480-1481.) The next morning,
28 Hidalgo Jr. allegedly said to Espindola that “I don’t know what I told him to do.” (PA 1482-

1 1483.) At that point, Hidalgo Jr. became distraught and said that he felt like killing himself.
2 (PA 1483.) Espindola asked Hidalgo Jr. if he wanted her to talk to Carroll and he responded
3 in the affirmative. (PA 1484.) Hidalgo Jr. and Espindola then had a conversation wherein
4 Hidalgo Jr. told Espindola to tell Carroll that he needs to resign and not talk to the police,
5 otherwise there will be no one to take care of him. (PA 1487.)

6 On May 23, 2005, Espindola arranged a meeting with Carroll at Simone's Auto
7 Body where Espindola, Carroll and Hidalgo III spoke. (PA 1484, 1488-1489.) Hidalgo Jr. is
8 not present for the meeting. (PA 1489.) Espindola claimed that even though the recording
9 memorialized her saying "we wanted him beat up, not motherfucking dead," she stated she
10 did not know what order Carroll had been given at that point. (PA 1490.) Espindola recalled
11 giving Carroll \$600 at that time, and does not know where he got the other \$800 that amounts
12 to the \$1400 that was seized by the police. (PA 1494.)

13 On May 24, 2005, Espindola once again met with Carroll at Simone's Auto Body
14 and had the conversation which became the subject of the second surreptitious recording.
15 (PA 1496.) Espindola left the room to speak with Hidalgo Jr. and his father Hidalgo Sr. in
16 the kitchen. She informed them that Carroll told her the shooter was making threats. (PA
17 1497, 1500.) Espindola then claimed that Hidalgo Jr. responded by telling Espindola to give
18 him more money. (PA 1500.) She did not testify to any subsequent conversations with
19 Hidalgo Jr. on the matter.

20 After the defense counsel in this case cast doubt on the consistency of Ms.
21 Espindola's testimony on cross-examination, the State proffered Espindola's counsel,
22 Christopher Oram as an alleged witness to prior consistent statements. Mr. Oram testified
23 that he was the attorney retained to represent Espindola in the instant matter. (PA 2498-
24 2499.) He testified that during the course of his representation of Espindola, he met with her
25 approximately 85 times. (PA 2500.)

26 Mr. Oram recalled that Espindola told him that she had received a phone call from
27 Carroll earlier in the day that Hadland was killed. (PA 2501.) During the course of this
28 conversation she received information that she relayed to Hidalgo Jr. and Hidalgo III that

caused them to have an argument. (PA 2502.) Espindola allegedly further informed Mr. Oram on numerous occasions that Hidalgo Jr. told her to make a phone call and “go to plan B.” (PA 2504-2505.) Espindola also had informed Oram of Carroll being paid \$5,000 and saying “it’s done.” (PA 2505.)

D. The Testimony of Other Witnesses Which Contradicted Anabel Espindola’s Testimony.

Despite Ms. Espindola’s testimony, several witnesses were called by the defense that cast doubt on her credibility. Michelle Schwanderlik, also known as “Ariel,” testified that she used to work at the Palomino Club, first as a dancer and eventually the office manager under the ownership of Dr. Stertz. (PA 2062-2064.) Ms. Schwanderlik recalled that between approximately 7:00 and 8:00 pm on May 19, 2005, the day that Espindola claimed Hidalgo Jr. had a closed door meeting with Carroll, she observed Deangelo Carroll in her office making copies. (PA 2072.) At that time Hidalgo Jr. called Ms. Schwanderlik and told her to bring the “banks” and to bring Carroll upstairs. (PA 2073.) When they entered the office, Hidalgo Jr. began to chastise Carroll for the state of the company van, complaining of cigarette smoke, marijuana smoke, and trash. (PA 2075.) After Hidalgo Jr.’s discussion with Carroll, both Ariel and Carroll left the office with no discussion of Hadland having been made. (PA 2076.) She further stated that Carroll was never truthful and had frequently caught him in lies. (PA 2073.)

Margaret Ann Johnson, also known as “Susie” was a dancer at the Palomino and was still employed there at the time of her testimony in this case. (PA 2088.) She testified that she worked with Carroll when he was performing as a DJ. It was her opinion that Carroll was not a trustworthy person. (PA 2089.) Ms. Johnson was also familiar with Hidalgo Jr. as the owner of the Palomino Club, and she stated that she trusted him. (PA 2090-2091.)

Pee-Lar Handley was an independent contractor working for the Palomino Club during the time period in question. (PA 2177.) In May of 2005, he was supervising some operations for the Palomino Club and noted that Hadland was frequently disappearing from his post outside the club. (PA 2184.) As a result, Mr. Handley confronted Hadland about his

1 behavior and generated a report that he turned over to Espindola. (PA 2185-2186.) Mr.
2 Handley understood that Hadland was subsequently fired. (PA 2186.)

3 Mr. Handley also stated that he was present at the Palomino Club late May 19 to
4 early May 20, 2005 when he encountered Carroll. (PA 2239.) Carroll approached Handley
5 and stated “I messed up, I f-ed up, I need to talk to [Mr.] H, I need to talk to Ms. Anabel.”
6 (PA 2239.)

7 When asked if Hidalgo Jr. used the term “plan B,” Mr. Handley responded that he
8 was aware of Hidalgo Jr. using the term plan B in relation to the club promoters. (PA 2247.)
9 Plan A was to write up an offending promoter and fire them, plan B was to fire all the
10 promoters at once. (PA 2247.)

11 Jerry De Palma was a solo practicing attorney on May 21, 2005, when he met with
12 Hidalgo Jr. and Espindola. (PA 2110.) At that time he was unclear whether Espindola or
13 Hidalgo Jr. was the client. (PA 2120.) He stated that Espindola informed him that a detective
14 was asking questions about an employee at the Palomino Club named Deangelo Carroll. (PA
15 2114.) Mr. De Palma further testified that Espindola did the majority of the talking during
16 the meeting. (PA 2114.) During this meeting, Mr. De Palma recalls Hidalgo Jr. being calm
17 and passive while Espindola was quite animated and vocal. (PA 2115.)

18 At that meeting Espindola stated that on Thursday night she had overheard Hidalgo
19 Jr. telling Carroll “to tell TJ [Hadland] to stop spreading... shit.” (PA 2116.) Espindola
20 further stated to De Palma that she heard that Carroll had returned that night and said “it’s
21 done” and that “one of my homeboys shot him.” (PA 2116.) In response, Espindola stated
22 that Hidalgo Jr. said, “what the fuck you talking about.” (PA 2117.) She further claimed to
23 De Palma that she paid Carroll \$5,000 because she took what Carroll’s statements as a threat
24 against them. (PA 2118.)

25 Donald Dibble testified that he was Attorney Dominic Gentile’s private investigator
26 on May 21, 2005 when he was called by Gentile to go to Mr. De Palma’s office. (PA 2138.)
27 Mr. Dibble understood that he was going to gather information on a new client because Mr.
28 Gentile was in San Diego on another case. (PA 2138.) At that meeting with Hidalgo Jr. and

1 Espindola, Mr. Dibble recalled Espindola doing most of the talking. (PA 2140.) She informed
2 Mr. De Palma and Mr. Dibble that an employee had come into their office and informed him
3 that another person had “gone crazy” and shot an ex-employee of the club in the head. (PA
4 2140.) He further testified that Espindola had said that the person who had committed the
5 shooting was demanding money, and that she and Hidalgo Jr. had acquiesced out of fear.
6 (PA 2140.)

7 Ms. Obi Perez testified that she was incarcerated at the Clark County Detention
8 Center in 2007 and became acquainted with Espindola during that time. (PA 2315.) She
9 stated that one day in spring of 2007, Espindola returned to her cell after court and was
10 crying. (PA 2317.) Ms. Perez approached her and Espindola explained that she was scared
11 that she was going to get the death penalty. (PA 2318.) Espindola stated that she had
12 contacted Carroll to beat up the man who was killed. (PA2319.) Espindola did not mention
13 any involvement on the part of Hidalgo Jr. or Hidalgo III. (PA 2318.)

14 **E. The Testimony of Luis Hidalgo Jr.**

15 Petitioner Hidalgo Jr. testified in his own defense at the time of trial in this matter.
16 During the course of his testimony, Hidalgo Jr. stated that he was aware of Hadland as an
17 employee, but had very little communication with him. (PA 2394-2395.) Hidalgo Jr. stated
18 that he was not involved in the firing of Hadland and did not know about it until a week and
19 a half after it occurred. (PA 2396.)

20 When asked about Espindola’s testimony that she, Hidalgo Jr., and Hidalgo III had
21 a conversation about Hadland badmouthing the club, Hidalgo Jr. stated that this conversation
22 did not happen. (PA 2398.) Further, Hidalgo Jr. stated he never got into a fight with his son
23 regarding Hadland. (PA 2398.) The first time Hidalgo Jr. learned that Hadland was bad-
24 mouthing the club was from Deangelo Carroll. (PA 2399.) Carroll had come into the office
25 and informed Espindola that Hadland was badmouthing the club. Hidalgo Jr. responded
26 stating “what is the big deal?” (PA 2400.) Hidalgo Jr. further stated that he was already angry
27 at Carroll for the earlier conversation that they had regarding the cleanliness of the club’s
28 vehicle. (PA 2400.) At most, Hidalgo Jr. told Carroll if he wanted to talk to Hadland, he

1 should just tell him to stop. (PA 2403.) Hidalgo Jr. denied ever asking anyone to harm
2 Hadland. (PA 2405.)

3 Hidalgo Jr. learned that Hadland had been harmed when Carroll came into the
4 office and told Hidalgo Jr. and Espindola that he “fucked up” and that a person got out of the
5 car and “put a bullet in the guy’s head.” (PA 2406-2507.) Hidalgo Jr. responded by stating
6 “what the fuck did you do,” (PA 2407-2408.) Espindola reacted by standing up from the
7 chair, covering her face, and calling Carroll stupid. (PA 2408.) Carroll then demanded \$5000
8 and informed them that his friend was a Crip gang member that they didn’t want to “fuck
9 with.” (PA 2409.) Hidalgo Jr. admitted that he paid the money out of fear. (PA 2410-2411.)
10 Hidalgo Jr. denied that he ever instructed Espindola to call Carroll or referred to any “plan
11 B.” (PA 2411-2412.) Further he denied ever speaking to Carroll following the May 19th
12 conversation in his office. (PA 2427.)

13 **F. Facts Regarding Petitioner’s Retention of Attorney Gentile**

14 **1. Prior to the Instant Case, Hidalgo Jr. Had Significant Business Assets.**

15 In 2005, Hidalgo Jr. owned several business entities which were all registered in
16 the state of Nevada under the auspices of Hidalgo Enterprises, Inc. (Sealed Petitioner’s
17 Appendix (“SPA”) SPA 8.) Hidalgo Enterprises fully owned four LLC’s: (1) Bermuda
18 Sands, LLC; (2) Palomino Club, LLC; (3) Club Satin Saddle, LLC; and (4) Lacy’s, LLC.
19 (SPA 8.) At the time, Bermuda Sands owned approximately 4.5 acres of real property along
20 Las Vegas Boulevard. (Id.) Among other things, the Palomino Club, Club Satin Saddle, and
21 Lacy’s were located on the real property owned by Bermuda Sands. (Id.) As noted above,
22 Bermuda Sands had acquired these assets from Simon Stertzner in 2004 (PA 1393), who had
23 executed a \$13 million note on the properties through Windrock LLC. (PA 1392; SPA 8.)

24 **2. Hidalgo Jr. and Espindola Meet With Mr. Gentile; Hidalgo Jr. Sells**
25 **His Assets to Mr. Gentile to Retain his Legal Services.**

26 Days after Hadland’s murder, Hidalgo Jr. met with Mr. DePalma—who shortly
27 later became Mr. Gentile’s partner in Gentile DePalma, Ltd.—and Mr. Gentile’s investigator,
28 Don Dibble to discuss potential criminal charges. (SPA 00099; SPA 00133.) Espindola went

1 to Mr. DePalma's office with Hidalgo Jr. (SPA 100; SPA 133.) Mr. Gentile did not
2 participate in the meeting because he was in San Diego, California for trial in an unrelated
3 matter. (SPA 133.) After the initial meeting with Mr. DePalma, Hidalgo Jr. and Espindola
4 met with Mr. Gentile. (Id.) Espindola did not participate in all of the meeting, but during the
5 portion of the meeting she did attend, however, Mr. Gentile gave her legal advice regarding
6 talking to Carroll. (SPA 134.)

7 After police arrested Hidalgo III and Espindola, Hidalgo Jr. decided to retain Mr.
8 Gentile to represent him in the event that the State decided to charge him in connection with
9 Hadland's murder. (SPA 151.) He also wanted to secure representation—with the assistance
10 and direction of Mr. Gentile—for Hidalgo III and Espindola. (SPA 152; SPA 155.) Shortly
11 thereafter, Hidalgo Jr. began selling off all his assets to Mr. Gentile—or members of Mr.
12 Gentile's family.

13 In or about October 2005, 1848 Note, LLC, an LLC in which Mr. Gentile was a
14 principal, entered into a contract with Windrock LLC to acquire the \$13 million note for cash
15 and a new promissory note. (SPA 8.) Later, in January 2006, Gentile DePalma Ltd. acquired
16 full ownership of Bermuda Sands. (SPA 9; SPA 24-30.) Under the terms of the purchase
17 agreement, the purchase price of full interest in Bermuda Sands was only \$500,000. (SPA
18 24.) The purchase agreement also granted Mr. Gentile the right to operate the Palomino Club,
19 the Satin Saddle, and Lacy's, provided that Bermuda Sands entered into ground leases with
20 Palomino Club LLC, Satin Saddle LLC, and Lacy's LLC to allow the LLC to run their
21 respective clubs. (SPA 25.)

22 At the same time that Mr. Gentile acquired Bermuda Sands from Hidalgo Jr., his
23 son Adam Gentile acquired the LLC's associated with the Palomino Club, the Satin Saddle,
24 and Lacy's. Through Hidalgo Enterprises, Inc., Hidalgo Jr. sold all of his interests in
25 Palomino Club LLC, Lacy's LLC, and Satin Saddle, LLC to Hachiman LLC, an LLC owned
26 by Adam Gentile. (SPA 19.) Under the terms of the purchase agreement, Hachiman LLC
27 paid Hidalgo Enterprises \$10,000 for each LLC. (Id.)

28 In both the transaction with Mr. Gentile and the transaction with Adam Gentile,

Hidalgo Jr. was represented by Mark Nicoletti. (SPA 156; see also Shell Dec. at ¶ 12.) During the course of preparing the instant petition, Ms. Shell corresponded with Mr. Nicoletti regarding his representation of Hidalgo Jr. in both transactions. (Shell Dec. at ¶¶ 10-13.) Mr. Nicoletti informed Ms. Shell that prior to 2005, he had been an attorney with Gordon Silver, a Las Vegas law firm. (Shell Dec. at ¶ 10.) Mr. Nicoletti recalled that in late 2005, Mr. Gentile contacted him and informed him that Hidalgo Jr. needed to sell all of his businesses to pay for legal representation. (Shell Dec. at ¶ 11.) Based on Ms. Shell's research and Mr. Nicoletti memory of the transactions, it does not appear that any valuations of Mr. Hidalgo's significant assets were conducted prior to the sales to Mr. Gentile and his son. (Shell Dec. at ¶ 13.)

3. Hidalgo Jr.'s Legal Retainer and Consulting Agreement with Mr. Gentile

Under the terms of the representation agreement he entered into with Mr. Gentile, Hidalgo Jr. signed over all of his interest in Bermuda Sands to Mr. Gentile to provide legal representation in this case. (SPA 11; see also Declaration of Luis Hidalgo Jr. ("Hidalgo Jr. Dec.") at ¶ 4.)² The written agreement also provided that Mr. Gentile would be responsible for all fees, costs, and expenses of the legal representation of Hidalgo III and Espindola. (SPA 12; Hidalgo Dec. at ¶ 5.) Additionally, the written agreement provided that Mr. Gentile would secure bail for Hidalgo III and Espindola if they became eligible. (SPA 12.)

Oddly, though it was never discussed at the sealed conflict hearing conducted by this Court on February 13, 2008, at the same time that Hidalgo Jr. sold his business assets to Mr. Gentile, he also entered into a consulting agreement with Mr. Gentile. (SPA 16-18.) Under the terms of the consulting agreement, Mr. Gentile agreed to retain Hidalgo for a thirty-month term as a consultant in the fields of law enforcement, service of process, public records investigation, and other areas. (SPA 16.) Under the terms of the consulting

² As of the date of the filing of this petition, Hidalgo Jr. had affirmed and signed the aforementioned declaration, but the declaration had not yet been received by counsel. Counsel will supplement the record with Hidalgo Jr.'s signed declaration immediately upon receipt.

1 agreement, Mr. Gentile paid Hidalgo Jr. an initial \$30,000 fee, followed by \$10,000 per
2 month for each month thereafter for the duration of the term. (SPA 16-17.)

3 **4. Joint Defense: Agreement and Dissatisfaction**

4 Although he was not yet a defendant in this matter, in July 2006 Hidalgo Jr. entered
5 into a joint defense agreement with Hidalgo III and Espindola. (SPA 31-39.) As described
6 above, Mr. Gentile was expected to pay for all fees, costs, and expenses associated with the
7 joint defense of Hidalgo Jr. and his eventual co-defendants. (SPA 11; Hidalgo Dec. at ¶ 5.)
8 However, from the perspective of Espindola and her counsel, Mr. Gentile did not fulfill this
9 obligation. During the sealed February 13, 2008 conflict hearing, Espindola's attorney,
10 Christopher Oram, told the Court that approximately seven to eight months prior to the
11 hearing, Espindola felt that Mr. Gentile had failed to fully fund her defense, and moreover
12 felt that Mr. Gentile was exerting too much control over the joint defense. (SPA 000103-
13 SPA 000108.) According to Mr. Oram, this made Espindola angry. (SPA 000104; SPA
14 000106; SPA 000107.) This dissatisfaction with Mr. Gentile's failure to fund her defense led
15 Espindola to testify as a State witness. Similarly, Hidalgo Jr. believed that Mr. Gentile was
16 not properly funding either Espindola or Hidalgo III's defense (Hidalgo Jr. Dec. at ¶ 6), and
17 that this failure prejudiced his defense. (Hidalgo Dec. at ¶ 7.)

19 **III. PROCEDURAL BACKGROUND**

20 **A. Related Events Prior to Hidalgo Jr.'s Indictment.**

21 On June 20, 2005, Kenneth Counts, Luis Hidalgo III, Anabel Espindola, and
22 Deangelo Carroll were charged via Information in Eighth Judicial District Court Case No.
23 C212667 with murder, and various other charges, related to the shooting death of Timothy
24 Hadland. (PA 1-4.) Subsequently, on July 6, 2005, the State filed Notices of Intent to Seek
25 the Death Penalty against all of the parties, including Espindola and Hidalgo III. (PA 4-14.)
26 At the time that the notices were filed, Christopher Oram was Espindola's attorney of record
27 and Robert Draskovich was representing Hidalgo III. (PA 9, 14.)

28 After attempting to strike the Notices of Intent to Seek the Death Penalty against

both Espindola and Hidalgo III at the District Court level, those parties brought a Petition for Writ of Mandamus, or in the Alternative, Writ of Prohibition against the District Court. (PA 15.) The documents filed in that proceeding indicate that attorney Jonell Thomas was filing on behalf of Espindola and that attorney Dominic Gentile was filing for Hidalgo III. (PA 15.) While the arguments raised in that petition are only tangentially related to the instant petition, the State raised the issue of a potential conflict in Gentile's representation of Hidalgo III while apparently simultaneously representing the Petitioner, Luis Hidalgo Jr., Hidalgo III's father. (PA 45- 60.)

In its Answer, the State first noted that:

At all times in District Court, Defendant Hidalgo [III] has been represented by Robert Draskovich and Steven Stein.... At no time, prior to the instant petition has Mr. Gentile represented Defendant Hidalgo. A review of the District Court record does not reflect that Defendant Hidalgo has substituted for counsel of record.

(PA 45.) The State further noted that Mr. Gentile had represented to the Las Vegas Metropolitan Police Department as early as May of 2005 that his office represented Hidalgo Jr. (PA 47.)

Though the State noted that Hidalgo Jr. had not yet been charged in connection with this case, the State correctly predicted that Hidalgo Jr. would eventually be charged with conspiracy to murder Hadland. (PA 48.) Citing to these circumstances, the State argued that Mr. Gentile's contemporaneous representation of both Hidalgo III and Hidalgo Jr. was (1) an impermissible conflict of interest due to antagonistic defenses; (2) that Mr. Gentile could not effectively represent Hidalgo III while being paid by Hidalgo Jr.; (3) that Mr. Gentile was a potential witness in this case; and (4) that there was substantial risk of prejudice to Hidalgo III due to this conflict. (PA 45-60.) In making this argument, the State explicitly stated *"it is beyond obvious that a lawyer representing the interests of Defendant Hidalgo cannot possibly represent the best interests of Mr. H [Hidalgo Jr.] in the same crime."* (PA 49.) (emphasis added.)

In response to the State, Hidalgo III, through attorney Gentile, filed a Reply. (PA 63-79.) In that Reply, Mr. Gentile claimed that Hidalgo Jr. had executed a waiver of conflict,

which was filed under seal with the Supreme Court. (PA 67)(SPA 40-52.) On December 27, 2007, the Supreme Court granted the petition for mandamus. (PA 92.) Subsequently, the opinion was withdrawn on February 21, 2008 and the Court granted a Petition for rehearing. (PA 92.) In its May 29, 2008 opinion the Court addressed the State's conflict argument in a footnote, stating:

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 motions. 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.

(PA 94.)

On February 4, 2008, shortly before the Court granted rehearing on the matter, Espindola pled guilty to Voluntary Manslaughter with Use of a Deadly Weapon. (PA 80-87.) As part of her guilty plea agreement, Espindola executed an agreement to cooperate with the prosecution in the "State of Nevada v. Kenneth Counts, Deangelo Carroll, and Luis Hidalgo III, and any other suspect concerning the MURDER WITH USE OF A DEADLY WEAPON of TIMOTHY HADLAND..." (PA 88-91.) Shortly after Espindola's Agreement to Testify was executed, Hidalgo Jr. was indicted on charges related to Hadland's murder. (PA 201-204.)

B. Hidalgo Jr.'s Indictment and Trial.

The States charged Hidalgo Jr. by way of an Indictment dated February 13, 2008, with Conspiracy to Commit Murder and Murder with Use of a Deadly Weapon. (201-204.) Following Hidalgo Jr.'s Indictment, on February 13, 2008, the Court conducted a closed hearing in Hidalgo III's case regarding a potential conflict of interest in Mr. Gentile's contemporaneous representation of both Hidalgos. (SPA 60-88.) This closed hearing was conducted in response to the State's motion to have conflict-free counsel appointed to Hidalgo III. (SPA 61.) As a majority of these proceedings were under seal, it is unclear what decision was reached by the Court. However, Hidalgo III continued to be represented by Mr.

Gentile. (PA 147-148.)

Hidalgo Jr. was arraigned before Hearing Master Kevin V. Williams on February 20, 2008. (PA 205-209.) At that time Mr. Gentile appeared as counsel for the Petitioner. (PA 206.) Mr. Gentile agreed to transfer the case to Department 21, the department in which both Espindola and Hidalgo III were being tried. (PA 206.) Subsequently, the State filed its Notice of Intent to Seek the Death Penalty noting one aggravator, namely that “the murder was committed by a person, for himself or another, to receive money or any other thing of monetary value...” (PA 210-212.)

During an April 1, 2008 bail hearing, Mr. Gentile represented that he received Bermuda Sands LLC as his fee, subject to a mortgage. (PA 231.) He further stated that as part of the deal with Hidalgo Jr. that he would use the Bermuda Sands LLC as security for a bond. (PA 231-232.) During that hearing Mr. Gentile made the following representation: “You know, if I trust this man [Hidalgo Jr.], and I do and I’ve known him since 1988 or 9, somewhere around there - - what’s everybody else worried about?” (PA 232.) The Court ultimately granted Hidalgo Jr. bail in the amount of \$650,000 with a condition of house arrest. (PA 233.)

On June 25, 2008, the State moved to consolidate the Petitioner’s case with that of his son, Luis Hidalgo III. (PA 246-258.) At a July 22, 2008, status check on the motion to consolidate, Gentile represented that he would continue to represent both Hidalgo Jr. and Hidalgo III unless the cases were consolidated. (PA 147-148.) At a November 20, 2008 hearing, prior to the defendants filing an Opposition to the Motion to Consolidate, Gentile brought attorneys Chris Adams and John Arrascada to the Court and represented that they would be substituting in as counsel for Hidalgo III. (PA 149-150.) Gentile further represented that the substitution was due to 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.” (PA 149-150.)

Ironically, and despite new counsel confirming for Hidalgo III, the defense for Hidalgo Jr. and Hidalgo III submitted a Joint Opposition to the Motion to Consolidate on

1 December 8, 2008. (PA 259-469.) In their Opposition the Hidalgos argued that the severance
2 should be denied based upon the following: (1) that special consideration should be made for
3 capital defendants; (2) that the Eighth Amendment right to individual sentencing requires
4 severance; (3) that spill over prejudice will prejudice Hidalgo Jr. from Hidalgo III's
5 additional charges of solicitation to commit murder against witnesses; (4) that a joint penalty
6 trial will prejudice Hidalgo Jr.'s "lingering doubt" mitigation strategy; (5) that joining a
7 weaker case (Hidalgo Jr.'s) with a stronger case (Hidalgo III's) will prejudice Hidalgo Jr.;
8 (6) the potential conflict between the defendants Sixth Amendment rights pursuant to Bruton³
9 and the Eighth Amendment right to mitigation; and (7) antagonistic defenses. (PA 229-290.)
10 On January 16, 2009, the Court granted the State's Motion to Consolidate. (PA 500-501.)

11 On January 7, 2009, the State filed a Motion to Remove Mr. Gentile as Attorney
12 for Defendant Hidalgo Jr., or in the Alternative, to Require Waivers after Defendants have
13 had True Independent Counsel to Advise Them. (PA 479-499.) In that motion the State
14 argued that Gentile's representation of both Hidalgo III and Hidalgo Jr. created a real conflict
15 that could not be remedied with a waiver. (PA 488-504.) Further, the State argued that prior
16 waivers in this case were insufficient to protect the record. (PA 495-497.) At a January 16,
17 2009 hearing on the matter, the State represented that the parties had reached an agreement
18 regarding the conflict issue and that Notices of Intent to Seek the Death Penalty against both
19 Hidalgos would be withdrawn. (PA 155-156.) It was at this hearing that the Court also
20 granted the State's Motion to Consolidate. (PA 155-156.)

21 On January 20, 2016, Attorney Shell contacted John L. Arrascada, Hidalgo III's
22 trial counsel. (Shell Dec. at ¶ 17.) Mr. Arrascada informed Ms. Shell that there was an
23 informal agreement between the State and both defense counsel that the defense would
24 withdraw its objection to consolidate if the State would withdraw its request for the death
25 penalty. (Shell Dec. ¶ 18.)

26 On January 16, 2009, Hidalgo Jr. filed a written waiver to determination of penalty
27 by jury trial. (PA 502.) Trial in this matter commenced on January 27, 2009 and lasted until
28

³ Bruton v. United States, 391 U.S. 123 (1968).

February 17, 2009. (PA 503-2796.) On February 17, 2009, the jury returned a verdict of Count One: GUILTY of Conspiracy to Commit Battery with a Deadly Weapon or Battery Resulting in Substantial Bodily Harm and Count Two: GUILTY of Second Degree Murder with Use of a Deadly Weapon. (PA 2789-2796.)

On March 10, 2009, Hidalgo Jr. filed a Motion for Judgment of Acquittal or, in the Alternative, a New Trial. (PA 2931-2948.) This Motion was predicated on insufficiency of evidence on the conspiracy to commit battery charge and an objection to jury instruction No. 40 which applied a slight evidence standard to judging the existence of a conspiracy. (PA 3781- 3797.) The State filed an Opposition stating that the motion was untimely and that there was sufficient evidence to support conviction. (PA 2949-2961.) On June 23, 2009, the Court denied the Motion stating that there was sufficient evidence to sustain the conspiracy charges. (PA 190.)

Hidalgo Jr. filed a sentencing memorandum on June 19, 2009 (PA 2992-3030.) On June 23, 2009, Hidalgo Jr. was sentenced before the Court. (PA 3031-3058.) At that time, the court sentenced Hidalgo Jr. to Count 1: a minimum term of 120 months in the Nevada Department of Corrections and a maximum term of life and an equal and consecutive 120 months to life and Count 2: to 12 months in the Clark County Detention Center, concurrent to Count 1. (PA 3055-3056.) On July 6, 2011, Hidalgo Jr.'s defense counsel filed a sealed ex-parte application requesting an order that Hidalgo Jr. be declared indigent and for the appointment of counsel. (PA 3059-3060.) The Judgment of Conviction was filed on July 10, 2009. (PA 4124.)

C. Hidalgo Jr.'s Appellate and Post-Conviction Record.

On July 18, 2009, Hidalgo Jr. filed his Notice of Appeal in District Court. (PA 3063.) The Defense filed its opening brief on February 9, 2011 challenging 1) whether the Court's proffered instruction No. 40 that conspiracy could be established by "slight evidence," 2) whether there was insufficient evidence to convict, 3) whether the State's failure to record Espindola's plea negotiation violated due process, 4) whether Hidalgo Jr.'s right to confrontation was violated by offering statement of a co-conspirator that both sides

1 agreed had withdrawn from the conspiracy, and 5) whether the District Court's denial of
2 Hidalgo Jr.'s motion for a new trial based on juror misconduct an abuse of discretion. (PA
3 3067-3134.)

4 The State filed its Answering Brief on June 10, 2010. (PA 3135-3196.) Hidalgo
5 Jr.'s Reply Brief was filed on September 30, 2011. (PA 3197-3237.) On June 21, 2012, the
6 Court filed its Order of Affirmance. (PA 3334-3344.) In denying Hidalgo Jr.'s claim that the
7 statements of Carroll were improperly admitted as adoptive admissions the Court stated:

8 Hidalgo also argues that the district court improperly instructed the jury that
9 Carroll's statement could be considered as "adoptive admission[s]." A review
10 of the record demonstrate that it was Hidalgo who first equated "context" with
11 adoptive admission" and acquiesces throughout trial in treating these two
12 concepts as synonymous. Thus Hidalgo cannot properly raise this argument on
13 appeal." Carter, 121 Nev. At 769, 121 P.3d at 599 ("A party who participates
14 in an alleged error is estopped from raising any objection on appeal.")

15 (PA 3336.)

16 On July 9, 2012, Hidalgo Jr. filed a Petition for Rehearing, which was denied on
17 July 27, 2012. (PA 3345-3352.) Subsequently, defense counsel filed a Petitioner for En Banc
18 Reconsideration on August 10, 2012. (PA 3353-3365.) On September 19, 2012, the Court
19 ordered the State to Answer the Petition for Rehearing, and the State submitted its Answer
20 on October 2, 2012. (PA 3366-3379.) On November 13, 2012, the Court denied the petition
21 for En Banc Reconsideration without addressing the merits. (PA 3400-3401.) Hidalgo Jr.
22 subsequently filed a Petition for Writ of Certiorari to the United States Supreme Court, which
23 was denied on May 15, 2013. (PA 3402.)

24 On December 31, 2013, the Petitioner filed his pro se Petition for Writ of Habeas
25 Corpus and Memorandum of Points and Authorities in Support thereof. (PA 3403-3483.) On
26 the same day, the Petitioner filed a Motion for Appointment of Counsel, which was granted
27 by this Court. (PA 3484-3489.) This Supplemental Memorandum follows.

28 IV. ARGUMENT

The question of whether a criminal defendant has received ineffective assistance of
counsel in violation of the Sixth Amendment is a mixed question of law and fact. *Lara v.*

State, 120 Nev. 177, 179 (2004); citing State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993.) Nevada applies the two-prong test in Strickland v. Washington to determine if counsel has provided effective assistance. McConnell v. State, 212 P.3d 307, 313, 125 Nev. Adv. Rep. 24 (2009); citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984.)

To prevail on a claim of ineffective assistance of trial counsel, a defendant must demonstrate (1) that counsel's performance was deficient and (2) that counsel's deficient performance prejudiced the defense. Id. A court need not consider both prongs of the Strickland test if a defendant makes an insufficient showing on either prong. Id.

A. Hidalgo Jr. Was Denied Effective Assistance of Counsel Based Upon Substantial Conflicts of Interest on the Part of Attorney Gentile.

“Few aspects of our criminal justice system are more vital to the assurance of fairness than the right to be defended by counsel, and this means counsel not burdened by a conflict of interest.” United States v. Henke, 222 F.3d 633, 638 (9th Cir. 2000) (per curiam). It is well-settled that the Sixth Amendment requires that a criminal defendant enjoy the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 14. 668. Counsel is presumed to be ineffective where he is burdened by an actual conflict of interest. Id. at 689.

As the Supreme Court explained in Strickland:

In those circumstances, counsel breaches the duty of loyalty, perhaps the most basic of counsel's duties. Moreover, it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests. Given the obligation of counsel to avoid conflicts of interest and the ability of trial courts to make early inquiry in certain situations likely to give rise to conflicts, see, e.g., Fed. Rule Crim. Proc. 44(c), it is reasonable for the criminal justice system to maintain a fairly rigid rule of presumed prejudice for conflicts of interest.

Id.

In this case, several conflicts on the part of Mr. Gentile deprived Hidalgo Jr. of his constitutional right to effective assistance of counsel.

1. Attorney Gentile's Purchase of Bermuda Sands LLC from Hidalgo Jr. Created an Impermissible Conflict of Interest.

Nevada Rule of Professional Conduct (“NRPC”) 1.8(a) provides that:

A lawyer shall not entered into a business contract with a client or knowingly acquire an ownership, possessory, security or other interest adverse to a client unless:

(1) The transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client.

NRPC 1.8. In this case, as described above, Mr. Gentile entered into a purchase agreement with Hidalgo Jr. in which Hidalgo Jr. sold his interest in Bermuda Sands LLC to Mr. Gentile in exchange for legal representation in the instant matter. According to the terms of the purchase agreement, the value of Bermuda Sands was a mere \$500,000. (SPA 00024.) Upon research of counsel, it does not appear that either party sought a valuation of Bermuda Sands and its holdings prior to the transaction. (Shell Dec. at ¶ 13.)

The lack of a property valuation of Bermuda Sands violated NRPC 1.8 and created a fundamental conflict of interest for Attorney Gentile. As described above, Bermuda Sands owned approximately 4.53 acres of land in Las Vegas, and also owned the LLC's for several businesses, including the Palomino Club LLC. (SPA 8.) At that time, and to this day, the Palomino Club is the only holder of a Special Use Permit in the State of Nevada which allows the facility to serve alcohol under a full liquor license in an all-nude facility. (Id.) This fact alone made the Palomino Club LLC, and by extension Bermuda Sands, a uniquely valuable property. Absent a valuation of Bermuda Sands prior to the sale to Attorney Gentile, Hidalgo Jr. had no way of knowing if the \$500,000 value noted in the purchase agreement was a fair and accurate accounting of Bermuda Sands' true value. As discussed below, the fact that there appears to have been no valuation of the property indicates that additional discovery—including a forensic valuation of Bermuda Sands LLC—is required.

Moreover, the concurrent sale of the three LLC's held by Bermuda Sands to an LLC owned by Mr. Gentile's son for a mere \$30,000, as well as Mr. Gentile's retention of Hidalgo Jr. as a consultant, raises serious questions about whether Mr. Gentile had an irreconcilable conflict of interest in this case. The fact that these transactions occurred so close together in time, and the fact that Mr. Gentile did not disclose his hiring of Hidalgo Jr. at the February 13, 2008 sealed hearing, creates at the very least the appearance of impropriety

which requires further exploration through discovery.

2. Attorney Gentile's Apparent Failure to Fully Fund Hidalgo III's and Espindola's Defense Prejudiced Hidalgo Jr.

As discussed above, approximately one year after Hidalgo Jr. and his co-defendants entered into the joint defense agreement, Espindola began to doubt that Mr. Gentile was fully funding her defense. As explained by her attorney, Mr. Oram, at the February 13, 2008 sealed hearing, her growing belief that Mr. Gentile was not fully funding her defense led her to become increasingly angry, and increasingly convinced that Mr. Gentile had a conflict of interest in continuing to represent both Hidalgo Jr. and Hidalgo III. In fact, Hidalgo Jr. believes Mr. Gentile's failure to pay Espindola and Hidalgo III's attorneys directly prejudiced his defense. (Hidalgo Jr. Dec. at ¶ 7.) Based on the testimony at the sealed hearing, it appears that Espindola's belief that Mr. Gentile was not paying for her defense led to her decision to testify against Hidalgo Jr. and his son.

At the sealed hearing in this matter, Mr. Gentile specifically disclaimed Espindola's accusations. (SPA 134-136; SPA 137.) However, Mr. Oram did not have an opportunity to respond to Mr. Gentile's assertions, and there is nothing in this record which indicates Espindola had a chance to explain her beliefs regarding the lack of funding for her defense. Given this, as discussed below, further discovery is required to determine whether there is any validity to Ms. Espindola's claims.

3. Espindola's Participation in the Joint Defense Agreement and Her Subsequent Decision to Testify as a Witness for the State Created An Irreconcilable Conflict of Interest.

"A joint defense agreement establishes an implied attorney-client relationship with the co-defendant." United States v. Henke, 222 F.3d 633, 637 (9th Cir. 2000) (per curiam). (citing United States v. McPartlin, 595 F.2d 1321, 1337 (7th Cir. 1979); Wilson P. Abraham Constr. Corp. v. Armco Steel Corp., 559 F.2d 250, 253 (5th Cir. 1977) (per curiam)). In general, courts agree that a traditional attorney-client relationship is not established between an attorney and his client's former co-defendant via a joint defense agreement. However, the

1 attorney may nonetheless owe a duty of confidentiality to the former co-defendant. See
2 United States v. Stepney, 246 F.Supp.2d 1069, 1080 (N.D. Cal. 2003) (“Courts have
3 consistently viewed the obligations created by joint defense agreements as distinct from those
4 created by actual attorney-client relationships.”); see also In re Gabapentin Patent Litig., 407
5 F.Supp.2d 607, 612 (D. N.J. 2005) (concluding that working together pursuant to a joint
6 defense agreement “could create implied attorney-client or fiduciary obligations under
7 certain circumstances”); GTE North, Inc. v. Apache Prods. Co., 914 F. Supp. 1575, 1579–80
8 (N.D.Ill.1996) (describing the duty).

9 The Ninth Circuit’s opinion in Henke is instructive here, and indicates that the
10 conflict of interest created by Espindola’s decision to testify against Hidalgo Jr. impaired Mr.
11 Gentile’s ability to cross-examine Espindola so much that it rendered his assistance at trial
12 ineffective. In Henke, three defendants—Desaigoudar, Henke, and Gupta—were indicted on
13 charges of conspiracy, making false statements, securities fraud, and insider trading. Henke,
14 222 F.3d at 636. Central to the prosecution’s theory of the case was whether the defendants
15 had advance knowledge of a false revenue reporting scheme and whether they traded stock
16 because of it. Id.

17 Desaigoudar, Henke, and Gupta had participated in joint defense meetings during
18 which confidential information was exchanged and discussed among their counsel. Id.
19 “Communications made during these pre-trial meetings were protected by the lawyers’ duty
20 of confidentiality imposed by a joint defense privilege agreement.” Id. Shortly before trial,
21 Gupta accepted a plea agreement and agreed to testify for the government against
22 Desaigoudar and Henke. Id.

23 Counsel for Desaigoudar and Henke moved for a mistrial and filed motions to
24 withdraw, arguing that their duties of confidentiality owed to Gupta precluded them from
25 effectively cross-examining him. Id. The district court disagreed. At trial, counsel for
26 Desaigoudar and Henke “conducted no cross examination [of Gupta] for fear that the
27 examination would lead to inquiries into material covered by the joint defense privilege.” Id.

28 On appeal, the Ninth Circuit reversed. The Ninth Circuit found that “a joint defense

1 agreement establishes an implied attorney-client relationship with [co-defendants]” and that
2 “[t]his privilege can also create a disqualifying conflict where information gained in
3 confidence by an attorney becomes an issue.” Id. at 637. The court continued:

4 Just as an attorney would not be allowed to proceed against his former client
5 in a cause of action substantially related to the matters in which he previously
6 represented that client, an attorney should also not be allowed to proceed
7 against a co-defendant of a former client wherein the subject matter of the
8 present controversy is substantially related to the matters in which the attorney
9 was previously involved, and wherein confidential exchanges of information
10 took place between the various co-defendants in preparation of a joint defense.

11 Id. (quoting Wilson P. Abraham, 559 F.2d at 253).

12 Similarly here, Espindola and her counsel entered into a joint defense agreement
13 with Hidalgo Jr. and Hidalgo III. During the course of their joint defense, Espindola’s
14 counsel undoubtedly participated in joint defense meetings, during which Mr. Gentile could
15 have gleaned information which prevented him from effectively cross-examining Espindola
16 when she testified as a State witness. It is possible that Mr. Gentile had learned information
17 during the joint defense meetings which would have provided fertile ground for
18 impeachment.

19 In fact, it is likely that the potential for this precise conflict of interest began months
20 before the entry of the parties into the joint defense agreement. As the State pointed out in
21 its Answer to Hidalgo III’s Petition for a Writ of Mandamus, as early as June 2005, Mr.
22 Gentile and Hidalgo Jr. met with Espindola and Mr. Oram while Espindola was incarcerated
23 in the Clark County Detention Center. (PA 56.) Later, on August 12, 2005, Espindola met
24 with Mr. Oram and Mr. Gentile, apparently to discuss her criminal case. (Id.) Mr. Gentile
25 met with Espindola and her attorney several additional times. (PA 57-58.)

26 As explained above, Espindola’s testimony was contradicted by several defense
27 witnesses. Nevertheless, given that the jury convicted Hidalgo Jr., it is clear that despite the
28 inconsistencies in Espindola’s testimony, the jury found her to be generally credible. Had
Mr. Gentile been able free of the conflict created by his earlier visits with Espindola and
Espindola’s prior participation in the joint defense agreement, he could have more effectively

impeached the State's most critical witness.

B. Hidalgo Jr. Was Denied Effective Assistance of Counsel in Pretrial Stages of Litigation.

1. The Petitioner Was Denied Effective Assistance of Counsel for conceding the Motion to Consolidate.

In this case, Hidalgo Jr. was indicted almost two years after his co-defendants had been arraigned. A review of the record demonstrates that there was simply no evidence to establish Hidalgo Jr. was involved in the murder of Hadland, while there was significant evidence adduced against Hidalgo III and Espindola. It was not until Espindola, facing the death penalty and denied funding, decided to turn state's evidence and implicate Hidalgo Jr. that the Petitioner was indicted.

Fortunately, due to the length of time between the co-defendants' case being filed and Hidalgo Jr.'s arraignment, the Petitioner was assigned a different case number and was arraigned in a different department. (PA 205-209.) As a result, Hidalgo Jr. was beneficially distanced from his co-defendant Hidalgo III.

However, at the time of his arraignment, Hidalgo Jr.'s counsel stipulated with the State to have Hidalgo Jr.'s case moved into the same department as Hidalgo III and the remainder of the co-defendants. (PA 206.) This occurred at a point in time when both the Petitioner and his son were being represented by the same counsel. This concession paved the way for the cases to be consolidated by putting both Hidalgos in front of the same Court. When the inevitable Motion to Consolidate was brought by the State, counsel initially opposed the Motion correctly noting in the joint defense Opposition that Hidalgo Jr. would suffer from spill over prejudice and the presence of antagonistic defenses. (PA 259-469.) However, it appears that despite the filing of this Opposition, that the parties conceded the consolidation motion in exchange for withdrawing the State's Notice of Intent to Seek the Death Penalty. See (Shell Dec ¶¶ 17, 18).

While it may be beneficial to have the death penalty removed as a sentencing possibility in the case of a defendant who had a substantial likelihood of conviction, that is

not the case in the instant matter. The case against Hidalgo Jr. was weak and relied primarily on the biased testimony of Espindola. However, the prejudicial impact of being tried with Hidalgo III, who is recorded making admissions of participation in not only the murder for hire of Hadland, but also the solicitation of the murder of witnesses, cannot be overborne. The limited impact of the removal of the death penalty is evident in the jury's conviction of both Hidalgos for Second Degree Murder, rather than First Degree Murder, and thus removing the death penalty as a sentencing option. (PA 2791, 2883).

As such, trial counsel's concession of the Motion to Consolidate was deficient given the presence of both spill over prejudice and antagonistic defenses that prejudiced the Petitioner was deficient and likely resulted in Hidalgo's conviction.

a. Spill-Over Prejudice Required Severance of Hidalgo Jr. and Hidalgo III's trials.

While it is true that "guilt by association" alone is not sufficient to support severance, severance is warranted when other additional compelling evidence is demonstrated. See *Lisle v. State*, 113 Nev. 679 (1997). In *Lisle*, the court acknowledged that "the 'spillover' or 'rub off theory' involves the question of whether a jury's unfavorable impression of [one] defendant against whom the evidence is properly admitted will influence the way the jurors view the other defendant." *Id.* at 680, citing *State v. Rendon*, 148 Ariz. 524, 71 P.2d 777, 782 (Ariz. App. 1986).

In *Zafiro v. United States* 506 U.S. 534, 113 S. Ct. 933, 938 (1993), the United States Supreme Court stated that severance should be granted "when there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants or **prevent the jury from making a reliable judgment about guilt or innocence.**" (emphasis added.) The *Zafiro* Court went further and stated that "evidence of a co-defendant's wrongdoing in some circumstances erroneously could lead a jury to conclude that a defendant was guilty." *Id.*; See also, *Baker v. United States*, 10 F.3d 1374 (9th Cir. 1993) ("The consequent risk of spillover prejudice cannot be ignored. This risk is particularly acute for comparatively peripheral defendants . . . whose separate trial could [be] concluded in a matter of days or

1 weeks, but who [may be] required to sit in the courtroom during months of proof involving
2 entirely unrelated conspiracies and substantive offenses.”)

3 Persuasively, the Ninth Circuit has recognized that “a great disparity in the amount
4 of evidence introduced against joined defendants may, in some cases, be grounds for
5 severance.” *United States v. Douglas*, 780 F.2d 1472, 1479 (9th Cir. 1986) (emphasis added);
6 see also *United States v. Patterson*, 819 F.2d 1495, 1503 (9th Cir. 1987). While the courts
7 have a legitimate interest in joint trials for co-defendants, “this interest must never be allowed
8 to eclipse a defendant’s right to a fair trial.” *United States v. Long*, 905 F.2d 1572, 1581 (D.C.
9 Cir. 1990). In Nevada, the cumulative effect of accumulation of evidence of guilt which
10 comes from being tried with other defendants may indeed become so unfairly prejudicial that
11 severance is warranted. *Chartier v. State*, 191 P.3d 1182, 1187 (Nev. 2008).

12 In this case, there was clearly more evidence adduced against Hidalgo III than
13 Hidalgo Jr. The surreptitious recordings made by Deangelo Carroll were ostensibly the focal
14 point of the trial. Hidalgo III can be heard not only acknowledging the acts that were
15 committed against Hadland, but advocating that the witnesses be killed. (PA 2797- 2813,
16 2824-2853.) Moreover, Hidalgo III was charged and convicted for the solicitation of
17 tampering with these witnesses. (PA 2789-2796.) These charges were not brought against
18 Hidalgo Jr.

19 The only evidence presented against Hidalgo Jr. to support the conspiracy is the testimony
20 of Anabel Espindola, which was circumstantial at best. Compounding this prejudice is the
21 fact that the Hidalgos are father and son, making it easy for the jury to assume that they acted
22 in concert. The failure of counsel to ensure that Hidalgo Jr. was not tried with his son was
23 beyond deficient and likely had a direct impact on the jury’s decision to convict Hidalgo Jr.

24 **b. Antagonistic Defenses Required Severance of Hidalgo Jr. and**
25 **Hidalgo III’s Trials.**

26 In addition, the United States Supreme Court recognizes inherent prejudice when
27 co-defendants present antagonistic defenses at trial. *Zafiro v. United States*, supra at 938.
28 While the court rejected a “bright-line test” for granting severance where antagonistic

1 defenses are present, the court articulated that when jury instructions and other safeguards
2 cannot minimize the prejudice, or if there is evidence which is admissible against only one
3 defendant, but spills over to the other defendants, justice may require severance. Id. In
4 addition, the Court in *Zafiro* stated that “the risk of prejudice will vary slightly with the facts
5 in each case, the district courts may find prejudice in situations not discussed here.” Id.

6 District courts must determine the risk of prejudice from a joint trial based on the
7 facts of each case. *Chartier v. State*, 191 P.3d 1182, 1185 (2008). The Supreme Court also
8 recognized the dangers associated with a multi defendant trial are magnified where
9 conspiracies are charged, as in this case. Multi-defendant conspiracy prosecutions “call for
10 use of every safeguard to individualize each defendant in his relation to the mass.”
11 *Krulewitch v. United States*, 336 U.S. 440 (1949) (concurring opinion).

12 It is apparent from the record that Hidalgo III and the Petitioner have antagonistic
13 defenses to the instant charges. Hidalgo Jr.’s voice was not present on the surreptitious
14 recording, but the voices of his son and girlfriend were present discussing a conspiracy. The
15 obvious defense in this matter would be that Hidalgo III and Espindola entered into a
16 conspiracy to murder Hadland, without the knowledge of Hidalgo Jr. This argument explains
17 why Hidalgo Jr. is not featured on the recordings and why there was no person other than
18 Espindola to testify that Hidalgo Jr. spoke to Carroll on the issue. Further, the participation
19 of Hidalgo III would explain why it was his voice on the recording and why Hidalgo III and
20 Espindola provided money to Carroll at that time. This argument would obviously be
21 contrary to Hidalgo III’s argument that he did not have anything to do with the conspiracy.

22 However, as Hidalgo III and Hidalgo Jr. were tried together, Hidalgo Jr. would
23 likely be prejudiced by association if his son was implicated in the crime. The instant matter
24 is truly unique in that the joined co-defendants in this case are father and son. Because of
25 their close relationship any criminal activity associated with Hidalgo III would likely be
26 imputed to Hidalgo Jr. by the jury. Further, by trying the Hidalgos together, Hidalgo Jr.’s
27 defense team would essentially be tasked with defending Hidalgo Jr. at the expense of their
28 client’s child. The joinder of these cases created an impossible situation for Hidalgo Jr. that

1 resulted in an inability to present his theory of defense. Consequently, trial counsel's
2 concession to the joinder was deficient and likely contributed to the Petitioner's conviction.

3 **C. Hidalgo Jr. Was Denied Effective Assistance of Counsel During the Appellate**
4 **Proceedings.**

5 To state a claim of ineffective assistance of appellate counsel, a petitioner must
6 demonstrate that counsel's performance was deficient in that it fell below an objective
7 standard of reasonableness, and resulting prejudice such that the omitted issue would have
8 had a reasonable probability of success on appeal. Kirksey, 112 Nev. 980, 998, 923 P.2d
9 1102, 1113-14. Appellate counsel is not required to raise every nonfrivolous issue on appeal.
10 Jones v. Barnes, 463 U.S. 745, 751, 103 S. Ct. 3308, 77 L. Ed. 2d 987 (1983). Rather, this
11 court has held that appellate counsel will be most effective when every conceivable issue is
12 not raised on appeal. Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

13 Appellate counsel compounded the significant errors that occurred at trial by failing
14 to adequately brief the issues on appeal.

15 **1. If Trial Counsel Contends it Properly Objected to the State's Motion**
16 **to Consolidate, Then Counsel Was Deficient for Failing to Brief**
17 **Joinder on Appeal.**

18 While there is evidence that the defense conceded the State's Motion to Consolidate
19 in exchange for striking the Notice to Seek the Death Penalty, if trial counsel contends that
20 they in fact opposed the Motion the issue should have been raised on appeal, for the reasons
21 stated in Section B above.

22 **2. Appellate Counsel Was Ineffective for Failure to Raise the Admission**
23 **of Prejudicial Hearsay Statements Made by Carroll That Were Not in**
24 **Furtherance of the Alleged Conspiracy.**

25 Pursuant to Nev. Rev. Stat. § 51.035, an out of court statement offered to prove the
26 truth of the matter asserted is inadmissible at the time of trial. Traditionally, hearsay evidence
27 is inadmissible because it is not subject to the usual tests to show the credibility of the
28 declarant and is lacking in cross-examination to ascertain a declarant's perception, memory

1 and truthfulness. Moore v. United States, 429 U.S. 20, 21-22 (1976). In this case, the State
2 was allowed not only to present hearsay testimony of a witness as to text messages he
3 received from another person, but was also allowed to admit into evidence additional text
4 messages which were clearly hearsay.

5 This court reviews hearsay errors under a harmless error standard. Tabish v. State,
6 119 Nev. 293, 311 (2003). A violation of the hearsay rule will not automatically require
7 reversal of a criminal conviction. Where the remaining evidence of guilt is overwhelming,
8 the out-of-court declarant's statement cumulative, and the prejudicial effect of the statement
9 insignificant by comparison so that it is clear beyond a reasonable doubt that the improper
10 admission of the statement was harmless error, the court shall not reverse the conviction.
11 Summers v. State, 102 Nev. 195, 202 (1986). However, reversal is mandated where the
12 evidence of guilt is woven from circumstantial evidence and it is not established beyond a
13 reasonable doubt that the admission of the statement was harmless error. Id.

14 In this case, the following conversation was solicited by the State at the time of trial
15 during the direct examination of Rontae Zone:

16 Q. All right. Did you have time to talk with Deangelo from when the
17 police got to you and when you went and talked to the police?

18 A. No.

19 Q. Did Deangelo tell you what you needed to say to the - -

20 A. He said one - - he said just - - he said - - his last words to me - -

21 MR. GENTILE: Objection. Hearsay. This is not in furtherance.

22 THE WITNESS: Well, quote unquote, his last words to me that he said-

23 MS. ARMENI: Objection

24 MR. GENTILE: Objection. Hearsay, Your Honor.

25 THE COURT: Overruled.

26 MR. PESCI: I'm sorry your Honor.

27 THE COURT: I said overruled. Go ahead.

28 BY MR. PESCI:

1 Q. Okay. She's saying you can answer the question.

2 A. Okay. What came out of his mouth, not what I heard, but what came
3 out of his mouth was, if you don't tell the truth, we're going to jail.

4 (PA 898-99.)

5 In addition, the same hearsay statement was solicited from Detective McGrath
6 during direct examination:

7 Q. During the time that he's [Rontae Zone] leaving with you, do you hear
8 Deanglo Carroll make any statement to Rontae?

9 A. Yes.

10 Q. What statement does he make?

11 A. He says, tell them the truth, tell them the truth. I told them the truth.

12 (PA 1129-30.)

13 In this case, Carroll's hearsay statement telling Zone to tell the "truth" to the police
14 was solicited by the State on two occasions. This statement was clearly to establish the
15 credibility of Zone's own testimony. However, this statement was hearsay that had been
16 submitted for the truth of the matter, as the purpose of its admission was to establish that
17 Zone was telling the truth when he testified. Nev. Rev. Stat. § 51.035. Further, the statement
18 does not fall into any hearsay exception, including "a statement by a coconspirator of a party
19 during the course and in furtherance of the conspiracy." Nev. Rev. Stat. § 51.035(e). Carroll's
20 statement clearly was not in furtherance of the alleged conspiracy, as informing Zone to
21 confess would only serve to hamper a conspiracy.

22 This statement was extremely prejudicial as it essentially bolsters the testimony of
23 Zone, who was the only person to testify that was allegedly present at the scene of the murder.
24 Further, it was Zone that testified that Carroll had told him that Mr. H wanted "wanted
25 someone killed." (PA 857, 860-861.) Moreover, the issue of the Petitioner's guilt was close
26 and Zone was the only witness aside from Espindola that tended to implicate Hidalgo Jr. in
27 the conspiracy. Carroll's hearsay statement bolstering Zone's credibility likely had a
28 significant impact on the jury's view of Zone's testimony.

Although trial counsel properly objected to the introduction of the statement when it was introduced through Zone’s testimony, counsel failed to brief the issue on appeal. Given the prejudicial impact of this statement, and the dearth of evidence implicating Hidalgo Jr., counsel’s failure to brief this issue on appeal was deficient.

D. Hidalgo Jr. is Entitled to An Evidentiary Hearing on His Petition.

In Nevada, a post-conviction habeas petitioner is entitled to a post-conviction evidentiary hearing when he asserts claims supported by specific factual allegations not belied by the record that, if true, would entitle him to relief. *McConnell v. State*, 212 P.3d 307, 313, 125 Nev. Adv. Rep. 24 (2009); See also *Byford v. State*, 123 Nev. 67, 68-69, 156 P.3d 691, 692 (2007); *Nika v. State*, 198 P.3d 839, 124 Nev. Adv. Rep. 103 (2008); Nev. Rev. Stat. Ann. § 34.770.

In this case, it is clear that there is a cognizable claim for ineffective assistance of counsel based upon multiple conflicts of interest in Attorney Gentile’s representation of Hidalgo Jr. However, the full scope of this conflict is not apparent solely from the record in this case. The Petitioner requires the testimony of witnesses who have knowledge of the scope of Gentile’s representation, the financial agreement between the Petitioner and Gentile, the effect of Gentile’s concurrent representation of Hidalgo III and the Petitioner, and the failure of Gentile to fund Espindola’s defense as per the agreement. In addition, an evidentiary hearing is necessary to determine the agreement between the State and defense counsel to consolidate Hidalgo Jr. and Hidalgo III’s cases as it is not readily apparent from the record.

Additionally, once this Court grants an evidentiary hearing, Hidalgo Jr. is also entitled to expand the records. When an evidentiary hearing is granted, the record may be expanded by inclusion of additional materials relevant to the determination of the merits of the petition including “. . . without limitation, letters which predate the filing of the petition in the district court, documents, exhibits and answers under oath to written interrogatories propounded by the judge.” Nev. Rev. Stat. § 34.790(2). Affidavits may be submitted and considered as part of the record. *Id.*

1 **E. Discovery to Be Completed.**

2 In order to properly prepare for an evidentiary hearing in this matter, the Petitioner
3 respectfully requests this Court to grant discovery pursuant to Nev. Rev. Stat. § 34.780. The
4 discovery that needs to be completed in the instant matter is as follows:

- 5 • A forensic valuation of the business interests transferred to Attorney Gentile by the
6 Petitioner in exchange for his representation.
- 7 • Depositions of the potential witnesses, including, but not limited to: Mark Nicoletti,
8 Dominic Gentile, Paola Armeni, Joseph Sciscento, Christopher Oram, Don Dibble,
9 John L. Arrascada, and Amy Chellini.

10
11 **V. CONCLUSION**

12 Accordingly, Petitioner Luis Hidalgo Jr. prays this Court grant him all such relief
13 to which he may be entitled, including discovery and an evidentiary hearing.

14 DATED this 29th day of February, 2016

15
16 /s/ Margaret A. McLetchie

17 MARGARET A. MCLETCHIE, Nevada Bar No. 10931

18 **MCLETCHIE SHELL LLC**

19 701 East Bridger Ave., Suite 520

20 Las Vegas, Nevada 89101

21 Telephone: (702) 728-5300

22 Attorney for Petitioner Luis Hidalgo, Jr.

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b)(2)(B) I hereby certify that on the 29th day of February, 2016, I mailed a true and correct copy of the foregoing SUPPLEMENTAL MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION) by depositing the same in the United States mail, first-class postage fully pre-paid, to the following address:

STEVEN B. WOLFSON, District Attorney
RYAN MACDONALD, Deputy District Attorney
200 Lewis Avenue
P.O. Box 552212
Las Vegas, Nevada 89155

MARC DIGIACOMO, Deputy District Attorney
Office of the District Attorney
301 E. Clark Avenue # 100
Las Vegas, NV 89155

Attorneys for Respondent

Luis Hidalgo, Jr., ID # 1038134
Northern Nevada Correctional Center
1721 E. Snyder Avenue
Carson City, NV 89701
Petitioner

Certified by: /s/ Pharan Burchfield
An Employee of McLetchie Shell LLC

MARGARET A. MCLETCHIE, Nevada Bar No. 10931
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Email: maggie@nvlitigation.com
Attorney for Petitioner Luis Hidalgo, Jr.

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

LUIS HIDALGO, JR.,
Petitioner,

Case No.: 08C241394

Dept. No.: XXI

vs.

THE STATE OF NEVADA,
Respondent.

DECLARATION OF ALINA M. SHELL IN SUPPORT OF PETITIONER LUIS HIDALGO JR.'S SUPPLEMENTAL PETITION FOR WRIT OF HABEAS CORPUS

DECLARATION OF ALINA M. SHELL

Alina M. Shell, the law partner of Petitioner Luis Hidalgo, Jr.'s attorney, Margaret A. McLetchie, hereby declares the following is true and correct under the penalties of perjury.

1. My partner, Margaret A. McLetchie, is appointed counsel for Petitioner Luis Hidalgo, Jr. in his post-conviction proceedings.

2. I have been assisting Ms. McLetchie in her representation of Mr. Hidalgo.

3. This case relates to a murder which occurred in May 2005, and involves multiple co-defendants and witnesses.

4. Mr. Hidalgo was convicted of Second Degree Murder With Use of A Deadly Weapon and Conspiracy to Commit A Battery With A Deadly Weapon Or Battery Resulting In Substantial Bodily Harm.

5. The court imposed two consecutive sentences of one hundred and twenty (120) months to Life for the Second Degree Murder charge plus a concurrent sentence of twelve

1 (12) months for the Conspiracy charge.

2 6. As the Court is aware, Mr. Hidalgo's trial counsel, Dominic Gentile, also
3 represented his son and co-defendant, Luis Hidalgo III during the proceedings. In addition,
4 Mr. Hidalgo's trial counsel had a joint defense agreement with Luis Hidalgo III, and Anabel
5 Espindola, with whom Mr. Hidalgo had antagonistic defenses.

6 7. During the course of my firm's investigation of Mr. Hidalgo's case, we determined
7 that Mr. Hidalgo owned Hidalgo Enterprises, an LLC which, prior to October, 2005, held
8 100% membership interest in four different LLC's: Bermuda Sands, Palomino Club, Club
9 Satin Saddle, and Lacy's.

10 8. Based on my research, Bermuda Sands LLC owned 4.53 acres of real property.
11 There were five buildings on those 4.53 acres, including the Palomino Club and Lacy's
12 Lounge, and Club Satin Saddle.

13 9. Based on my research, in or about January, 2006, Mr. Gentile's law firm at that
14 time, Dominic P. Gentile, Ltd., acquired 100% ownership of Bermuda Sands LLC as part of
15 an agreement to provide legal services to Mr. Hidalgo, Louis Hidalgo, III, and Anabel
16 Espindola.

17 10. On January 12, 2016, and later on January 15 and 16, 2016, I contacted Mark
18 Nicoletti, an attorney based in Los Angeles, California who had previously worked for
19 Gordon Silver and was acquainted with both Mr. Hidalgo and Mr. Gentile.

20 11. According to Mr. Nicoletti, Mr. Gentile contacted him in the latter part of 2005 and
21 told him Mr. Hidalgo needed to sell all of his businesses to pay for representation for himself,
22 Luis Hidalgo, III, and Anabel Espindola in the instant matter.

23 12. Mr. Nicoletti represented Mr. Hidalgo in the sale of Bermuda Sands LLC to Mr.
24 Gentile. Mr. Nicoletti also represented Mr. Hidalgo in the sale of Palomino Club LLC, Satin
25 Saddle LLC, and Lacy's LLC to Hachiman LLC, an LLC owned by Mr. Gentile's son, Adam
26 Gentile.

27 13. Based on my conversations with Mr. Nicoletti and my own research, it does not
28 appear that any valuations were conducted prior to the sale of Bermuda Sands, LLC,

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Palomino Club LLC, Satin Saddle LLC, or Lacy's LLC.

14. During my research and investigation in this case, I also contacted John Arrascada, an attorney who represented Luis Hidalgo, III during trial.

15. As is reflected in the register of actions in this case, on June 25, 2008, the State filed a motion to consolidate the trial of Mr. Hidalgo with that of his son.

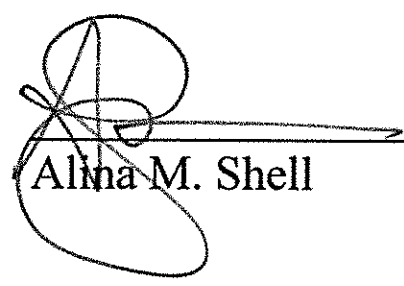
16. Although Mr. Hidalgo and his son initially opposed the motion to consolidate and asked the Court to sever their trials, the register of actions indicates the Court ultimately granted the State's motion to consolidate.

17. During a January 20, 2016 telephone call with Mr. Arrascada, he stated that although Mr. Hidalgo and his son had originally opposed the motion to consolidate, they both Mr. Hidalgo and his son entered into an agreement with the State to withdraw their opposition and proceed to a consolidated trial.

18. Mr. Arrascada told me that in exchange for proceeding to consolidated trial, the State agreed not to pursue the death penalty against either Mr. Hidalgo or his son.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: February 29, 2016


Alma M. Shell