IN THE SUPREME COURT OF THE STATE OF NEVADA

LUIS HIDALGO, JR.,
Appellant,

vs.

THE STATE OF NEVADA,
Respondent.

Case No. 71458

APPELLANT'S APPENDIX VOLUME III

Appeal from Eighth Judicial District Court, Clark County

The Honorable Valerie Adair, District Judge

District Court Case No. 08C241394

MCLETCHIE SHELL LLC
Margaret A. McLetchie (Bar No. 10931)
701 East Bridger Ave., Suite 520
Las Vegas, Nevada 89101
Counsel for Appellant, Luis Hidalgo, Jr.

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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
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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

CERTIFICATE OF SERVICE

I certify that I am an employee of McLetchie Shell LLC and that on this 24th day of July, 2017 the APPELLANT'S APPENDIX VOLUME III was filed electronically with the Clerk of the Nevada Supreme Court, and therefore electronic service was made in accordance with the Master Service List as follows:

STEVEN OWENS
Office of the District Attorney
200 Lewis Avenue, Third Floor
Las Vegas, NV 89155

ADAM P. LAXALT
Office of the Attorney General
100 North Carson Street
Carson City, NV 89701

I hereby further certify that the foregoing APPELLANT'S APPENDIX VOLUME III was served by first class U.S. mail on July 24, 2017 to the following:

LUIS HIDALGO, JR., ID # 1038134
NORTHERN NEVADA CORRECTIONAL CENTER
1721 E. SNYDER AVE
CARSON CITY, NV 89701
Appellant

/s/ Pharan Burchfield
Employee, McLetchie Shell LLC

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02/29/2016 12:51:10 PM

CLERK OF THE COURT

MARGARET A. MCLETCHIE, Nevada Bar No. 10931
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Attorney for Petitioner, Luis Hidalgo Jr.

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

LUIS HIDALGO, JR.,

Petitioner,

vs.

THE STATE OF NEVADA,

Respondent.

Case No.: 08C241394

Dept. No.: XXI

PETITIONER'S APPENDIX FOR SUPPLEMENTAL PETITION FOR WRIT OF HABEAS CORPUS

VOLUME II:
PETITIONER'S APPENDIX FOR SUPPLEMENTAL PETITION FOR WRIT OF HABEAS CORPUS

VOLUME	DATE	DOCUMENT	BATES
I	06/20/2005	Information	HID PA00001 - HID PA00004
I	07/06/2005	Notice Of Intent To Seek Death Penalty	HID PA00005 - HID PA00009
I	07/06/2005	Notice Of Intent To Seek Death Penalty	HID PA00010 - HID PA00014
I	11/14/2006	Answer To Petition For Writ of Mandamus Or, In the Alternative, Writ of Prohibition	HID PA00015 - HID PA00062
I	12/20/2006	Reply to State's Answer To Petition For Writ of Mandamus Or, In The Alternative, Writ of Prohibition	HID PA00063 - HID PA00079
I	02/04/2008	Guilty Plea Agreement	HID PA00080 - HID PA00091
I	05/29/2008	Advance Opinion 33, (No. 48233)	HID PA00092 - HID PA00113

VOLUME	DATE	DOCUMENT	BATES
I	02/11/2008-01/13/2016	Docket	HID PA00114 - HID PA00131
I	02/11/2008-11/10/2015	Minutes	HID PA00132 - HID PA00200
II	02/13/2008	Indictment	HID PA00201 - HID PA00204
II	02/20/2008	Transcript of Proceedings: Hearing re Arraignment	HID PA00205 - HID PA00209
II	03/07/2008	Notice of Intent to Seek Death Penalty	HID PA00210 - HID PA00212
II	04/01/2008	Transcript of Proceedings: Hearing re Motions	HID PA00213 - HID PA00238
II	05/01/2008	Amended Indictment	HID PA00239 - HID PA00241
II	06/18/2008	Amended Notice of Intent To Seek Death Penalty	HID PA00242 - HID PA00245
II	06/25/2008	Notice of Motion And Motion To Consolidate Case No. C241394 Into C212667	HID PA00246 - HID PA00258
II	12/08/2008	Defendant Luis Hidalgo Jr. And Luis Hidalgo III's Opposition To The Motion To Consolidate Case No. C241394 Into C212667 + Exhibits A-G	HID PA00259 - HID PA00440
III	12/08/2008	Defendant Luis Hidalgo Jr. And Luis Hidalgo III's Opposition To The Motion To Consolidate Case No. C241394 Into C212667, Exhibits H-K	HID PA00441 - HID PA00469
III	12/15/2008	Response To Defendant Luis Hidalgo, Jr. and Luis Hidalgo, III's Opposition To Consolidate Case No. C241394 Into C212667	HID PA00470 - HID PA00478
III	01/07/2009	State's Motion To Remove Mr. Gentile As Attorney For Defendant Hidalgo, Jr., Or In The Alternative, To Require Waivers After Defendants Have Had True Independent Counsel To Advise Him	HID PA00479 - HID PA00499
III	01/16/2009	Order Granting The State's Motion To Consolidate C241394 Into C212667	HID PA00500 - HID PA00501
III	01/16/2009	Waiver of Rights To A Determination Of Penalty By The Trial Jury	HID PA00502
III	01/29/2009	Transcript of Proceedings: Jury Trial - Day 3	HID PA00503 - HID PA00522

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VOLUME	DATE	DOCUMENT	BATES
III	01/30/2009	Transcript of Proceedings: Jury Trial - Day 4	HID PA00523 - HID PA00538
III	02/02/2009	Transcript of Proceedings: Jury Trial - Day 5 (Pg. 1-152)	HID PA00539 - HID PA00690
IV	02/02/2009	Transcript of Proceedings: Jury Trial - Day 5 (Pg. 153-225)	HID PA00691 - HID PA00763
IV	02/06/2009	Transcript of Proceedings: Jury Trial - Day 6	HID PA00764 - HID PA00948
V	02/04/2009	Transcript of Proceedings: Jury Trial - Day 7	HID PA00949 - HID PA01208
VI	02/05/2009	Transcript of Proceedings: Jury Trial - Day 8	HID PA01209 - HID PA01368
VII	02/06/2009	Transcript of Proceedings: Jury Trial - Day 9	HID PA01369 - HID PA01553
VIII	02/09/2009	Transcript of Proceedings: Jury Trial - Day 10 (Pg. 1-250)	HID PA01554 - HID PA01803
IX	02/09/2009	Transcript of Proceedings: Jury Trial - Day 10 (Pg. 250-340)	HID PA01804 - HID PA01894
X	02/10/2009	Transcript of Proceedings: Jury Trial - Day 11 (Pg. 1-250)	HID PA01895 - HID PA02144
XI	02/10/2009	Transcript of Proceedings: Jury Trial - Day 11 (Pg. 1-251)	HID PA02145 - HID PA02212
XII	02/11/2009	Transcript of Proceedings: Jury Trial - Day 12 (Pg. 1-250)	HID PA02213 - HID PA02464
XIII	02/11/2009	Transcript of Proceedings: Jury Trial - Day 12 (Pg. 251-330)	HID PA02465 - HID PA02545
XIV	02/12/2009	Transcript of Proceedings: Jury Trial - Day 13	HID PA02546 - HID PA02788
XV	02/17/2009	Transcript of Proceedings: Jury Trial - Day 14	HID PA02789 - HID PA02796
XVI	02/05/2009	Court Exhibit: 2 (C212667), Transcript of Audio Recording (5/23/05)	HID PA02797 - HID PA02814
XVI	02/05/2009	Court Exhibit: 3 (C212667), Transcript of Audio Recording (5/24/05)	HID PA02815 - HID PA02818
XVI	No Date On Document	Court Exhibit: 4 (C212667), Transcript of Audio Recording (Disc Marked As Audio Enhancement)	HID PA02819 - HID PA02823
XVI	02/05/2009	Court Exhibit: 5 (C212667), Transcript of Audio Recording (Disc Marked As Audio Enhancement)	HID PA02824 - HID PA02853
XVI	05/20/2010	Court Exhibit: 229 (C212667) Note	HID PA02854

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VOLUME	DATE	DOCUMENT	BATES
XVI	02/10/2009	Court Exhibit: 238 (C212667) Phone Record	HID PA02855 - HID PA02875
XVI	02/17/2009	Jury Instructions	HID PA02876 - HID PA02930
XVII	03/10/2009	Defendant Luis Hidalgo, Jr.'s Motion For Judgment Of Acquittal Or, In The Alternative, A New Trial	HID PA02931 - HID PA02948
XVII	03/17/2009	State's Opposition To Defendant Luis Hidalgo Jr.'s Motion For Judgment of Acquittal Or, In the Alternative, A New Trial	HID PA02949 - HID PA02961
XVII	04/17/2009	Reply To State's Opposition To Defendant Luis Hidalgo Jr.'s Motion For Judgment of Acquittal Or, In the Alternative, A New Trial	HID PA02962 - HID PA02982
XVII	04/27/2009	Supplemental Points And Authorities To Defendant Luis A. Hidalgo, Jr.'s Motion For Judgment Of Acquittal Or, In The Alternative, A New Trial	HID PA02983 - HID PA02991
XVII	06/19/2009	Luis A. Hidalgo Jr.'s Sentencing Memorandum	HID PA02992 - HID PA03030
XVII	06/23/2009	Transcript of Proceedings: Sentencing	HID PA03031 - HID PA03058
XVII	07/06/2009	Ex-Parte Application Requesting That Defendant Luis A. Hidalgo Jr.'s Ex-Parte Application Requesting An Order Declaring Him Indigent For Purposes Of Appointing Appellate Counsel Be Sealed	HID PA03059 - HID PA03060
XVII	07/10/2009	Judgment Of Conviction	HID PA03061 - HID PA03062
XVII	07/16/2009	Luis Hidalgo, Jr.'s Notice Of Appeal	HID PA03063- HID PA03064
XVII	08/18/2009	Amended Judgment Of Conviction	HID PA03065 - HID PA03066
XVIII	02/09/2011	Appellant Luis A. Hidalgo, Jr.'s Opening Brief	HID PA03067 - HID PA03134
XVIII	06/10/2011	Respondent's Answering Brief	HID PA03135 - HID PA03196
XVIII	09/30/2011	Appellant Luis A. Hidalgo, Jr.'s Reply Brief	HID PA03197 - HID PA03238
XVIII	03/09/2012	Order Submitting Appeal For Decision Without Oral Argument	HID PA03239

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VOLUME	DATE	DOCUMENT	BATES
XVIII	03/30/2012	Appellant's Motion To Reconsider Submission For Decision Without Oral Argument	HID PA03240 - HID PA03251
XVIII	04/17/2012	Appellant's Emergency Supplemental Motion To Reconsider Submission For Decision Without Oral Argument + Exhibits A-C	HID PA03252 - HID PA03289
XIX	04/17/2012	Appellant's Emergency Supplemental Motion To Reconsider Submission For Decision Without Oral Argument, Exhibit D	HID PA03290 - HID PA03329
XIX	04/26/2012	Notice Of Oral Argument Setting	HID PA03330
XIX	06/05/2012	Appellant's Notice of Supplemental Authorities [NRAP31(e)]	HID PA03331 - HID PA03333
XIX	06/21/2012	Order Of Affirmance	HID PA03334 - HID PA03344
XIX	07/09/2012	Petition For Rehearing Pursuant To Nevada Rule Of Appellate Procedure 40	HID PA03345 - HID PA03351
XIX	07/27/2012	Order Denying Rehearing	HID PA03352
XIX	08/10/2012	Petition For En Banc Reconsideration Pursuant To NRAP 40A	HID PA03353 - HID PA03365
XIX	09/18/2012	Order Directing Answer To Petition For En Banc Reconsideration	HID PA03366
XIX	10/02/2012	Answer To Petition For En Banc Reconsideration	HID PA03367 - HID PA03379
XIX	10/09/2012	Luis A. Hidalgo, Jr.'s Motion For Permission To File A Reply To Answer To Petition For En Banc Reconsideration	HID PA03380 - HID PA03383
XIX	10/12/2012	Instruction #40 Was Structural Error And Therefore Reversible Per Se Under Post-Bolden Nevada Conspiracy Jurisprudence	HID PA03384 - HID PA03399
XIX	11/13/2012	Order Denying En Banc Reconsideration	HID PA03400 - HID PA03401
XIX	05/15/2013	Letter to Clerk of Court: Petition For USSC Writ Of Certiorari Denied	HID PA03402
XX	12/31/2013	Petition For Writ Of Habeas Corpus (Post Conviction)	HID PA03403 - HID PA03483
XX	12/31/2013	Motion For Appointment Of Counsel	HID PA03484 - HID PA03488

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VOLUME	DATE	DOCUMENT	BATES
XX	01/08/2014	Order For Petition For Writ Of Habeas Corpus	HID PA03489
XX	01/13/2014	State's Response To Defendant's Pro Per Motion For Appointment of Counsel	HID PA03490 - HID PA03494
XX	01/13/2016	Documents received from the Nevada Secretary of State	HID PA03495 – HID PA03516

DATED this 29th day of February, 2016.

/s/ Margaret A. McLetchie

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

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 VOLUME II: PETITIONER'S APPENDIX FOR SUPPLEMENTAL PETITION FOR WRIT OF HABEAS CORPUS by depositing the same in the United States mail, first-class postage 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

Certified by: /s/ Mia Ji
An Employee of McLetchie Shell LLC

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CLERK OF THE COURT

IND

DAVID ROGER
Clark County District Attorney
Nevada Bar #002781
MARC DIGIACOMO
Deputy District Attorney
Nevada Bar #006955
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

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

Defendant(s).

Case No. C241394
Dept. No. XIV

INDICTMENT

STATE OF NEVADA)
) ss.
COUNTY OF CLARK)

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

COUNT 1 – CONSPIRACY TO COMMIT MURDER

did, on or about May 19, 2005, then and there, meet with Deangelo Carroll and/or Luis Hidalgo, III and/or Anabel Espindola and/or Kenneth Counts and/or Jayson Taoipu and between themselves, and each of them with the other, wilfully, unlawfully, and feloniously conspire and agree to commit a crime, to-wit: murder, and in furtherance of said conspiracy,

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Defendant and/or his co-conspirators, did commit the acts as set forth in Count 2, said acts being incorporated by this reference as though fully set forth herein; and/or by Anabel Espindola and/or Luis Hidalgo, III soliciting Deangelo Carroll to commit murder on or between May 23 and May 24, 2005.

COUNT 2 - MURDER WITH USE OF A DEADLY WEAPON

did, on or about May 19, 2005, then and there wilfully, feloniously, without authority of law, and with premeditation and deliberation, and with malice aforethought, kill TIMOTHY JAY HADLAND, a human being, by shooting at and into the body and/or head of said TIMOTHY JAY HADLAND, with a deadly weapon, to-wit: a firearm, the Defendant being liable under one or more of the following theories of criminal liability, to-wit: (1) by directly or indirectly committing the acts with premeditation and deliberation and/or lying in wait; and/or (2) by aiding and abetting the commission of the crime by, directly or indirectly, counseling, encouraging, hiring, commanding, inducing or otherwise procuring another to commit the crime, to-wit: by defendant along with LUIS HIDALGO, III procuring DEANGELO CARROLL to beat and/or kill TIMOTHY JAY HADLAND; thereafter, DEANGELO CARROLL procuring KENNETH COUNTS and/or JAYSON TAOIPU to shoot TIMOTHY HADLAND; thereafter, DEANGELO CARROLL and KENNETH COUNTS and JAYSON TAOIPU did drive to the location in the same vehicle; thereafter, DEANGELO CARROLL calling victim TIMOTHY JAY HADLAND to the scene; thereafter, by KENNETH COUNTS shooting TIMOTHY JAY HADLAND; defendant paying $5000.00 or $6000.00 to DEANGELO CARROLL for the killing of TIMOTHY JAY HADLAND; and/or (3) by conspiring to commit the crime of battery and/or battery resulting in substantial bodily harm and/or battery with use of a deadly weapon on the person of TIMOTHY JAY HADLAND whereby each and every co-conspirator is responsible for the

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reasonably foreseeable general intent crimes of each and every co-conspirator during the course and in furtherance of the conspiracy and/or (4) by conspiring to commit the crime of murder of TIMOTHY JAY HADLAND whereby each and every co-conspirator is responsible for the specific intent crime contemplated by the conspiracy.

DATED this 13th day of February, 2008.

DAVID ROGER
DISTRICT ATTORNEY
Nevada Bar #002781

BY
MARC DIGIACOMO
Deputy District Attorney
Nevada Bar #006955

ENDORSEMENT: A True Bill

Foreperson, Clark County Grand Jury

Names of witnesses testifying before the Grand Jury:

ZONE, RONTAE, C/O CCDA, 200 LEWIS AVENUE, LVN 89101

ESPINDOLA, ANABEL, C/O CCDA, 200 LEWIS AVENUE, LVN 89101

TELEGENHOFF, DR. GARY, CCME, 1704 PINTO LANE, LVN

MCGRATH, MICHAEL, LVMPD P#4575

WILDEMANN, MARTIN, LVMPD P#3516

Additional witnesses known to the District Attorney at the time of filing this Indictment:

KYGER, TERESA, LVMPD P#4191

07AGJ101X/08FB0018X/ts
LVMPD 0505193516
(TK 7)

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CLERK OF THE COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, vs. LUIS HIDALGO, JR., aka, Luis Alonso Hidalgo, Defendant.	CASE NO. C241394 DEPT. XXI (ARRAIGNMENT HELD IN DEPT. LLA)

BEFORE THE HONORABLE KEVIN V. WILLIAMS, HEARING MASTER

WEDNESDAY, FEBRUARY 20, 2008

RECORDER'S TRANSCRIPT OF HEARING RE: ARRAIGNMENT

APPEARANCES:

For the State: MARC DIGIACOMO, ESQ.,
GIANCARLO PESCI, ESQ.,
Deputies District Attorney

For the Defendant: DOMINIC P. GENTILE, ESQ.
PAOLA M. ARMENI, ESQ.

RECORDED BY: KIARA SCHMIDT, COURT RECORDER

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AUG 28 2008
CLERK OF THE COURT

WEDNESDAY, FEBRUARY 20, 2008

* * * * *

PROCEEDINGS

THE COURT: Case Number C241394, Hidalgo.

MR. DIGIACOMO: Good morning, Judge, Marc Digiacomo and Giancarlo Pesci for the State.

MR. GENTILE: Your Honor, Dominic Gentile and Paola Armeni for the Defendant, Mr. Hidalgo.

As you can see this came as a surprise to me.

THE COURT: That's okay. It happens I know.

MR. GENTILE: Yeah.

MR. DIGIACOMO: Judge --

THE COURT: What are we doing here today?

MR. DIGIACOMO: It's going to be a not-guilty plea, however, based on Mr. Gentile's representations, Judge Mosley has already recused himself and the five other co-defendants have already gone to Judge Adair.

We've spoken to Judge Adair. So once we arraign him, it needs to go to Department XXI, not 14.

THE COURT: Okay. That's fine. As long as you -- everybody's on the same page, we're fine with that.

MR. GENTILE: That's correct, Your Honor. And I would ask the Court to set, if you can, for a status on Monday or Tuesday, earliest available date because we want to file a bail motion in this case.

THE COURT: Okay, that's fine and dandy. Do you have a copy of the

Information there, Mr. Gentile?

MR. GENTILE: It's an Indictment, yes.

THE COURT: I mean, an Indictment. I'm sorry. Do you have it?

MR. GENTILE: Yes.

THE COURT: Waive its reading?

MR. GENTILE: Yes.

THE COURT: What's your true name, sir?

THE DEFENDANT: My first name is Luis, last name, Hidalgo, Your Honor.

THE COURT: How old are you?

THE DEFENDANT: I am 57.

THE COURT: How far did you go in school?

THE DEFENDANT: Two years of college.

THE COURT: Read, write, and understand the English language?

THE DEFENDANT: Yes, I do, sir.

THE COURT: Understand what you're charged with?

THE DEFENDANT: Yes, sir.

THE COURT: What's your plea?

THE DEFENDANT: Not guilty.

THE COURT: You have a right to a speedy trial within 60 days. Do you want a speedy trial?

MR. GENTILE: Yes.

THE DEFENDANT: yes.

THE COURT: Okay, speedy trial.

THE CLERK: Department XXI --

THE COURT: Give them the same -- do you know the calendar call and

trial date from the other --

MR. DIGIACOMO: We pick a jury tomorrow on the other one so --

THE COURT: Oh, so never mind. I understand. Okay, give them a speedy trial.

THE CLERK: Okay, first available calendar call is March 27. That's at 9:30 a.m. Trial date is March 31st, and that's at ten a.m., Department XXI.

THE COURT: And --

MR. GENTILE: We'd ask -- yeah, ask that it be set for Monday or Tuesday.

THE COURT: Yeah, we're going to do that in just a second.

I'll give you 21 days from the filing of any transcripts to file any writs you deem appropriate, sir.

Additionally, we're going to give him -- give them a status check date first of this week coming up so that they can do what they need to do.

THE CLERK: On a Tuesday?

MR. DIGIACOMO: Yes.

MR. GENTILE: That'll be fine.

THE CLERK: Do February 26th, and that's at 9:30 a.m.

THE COURT: Okay.

MR. GENTILE: Thank you, Judge.

MR. DIGIACOMO: Thank you.

THE COURT: And a warrant is executed, you said, without bail pending Judge Adair's decision.

///

///

ALL PARTIES: Thank you, Judge.

THE COURT: Okay.

(Proceedings concluded)

* * * * *

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

Kiara Schmidt, Court Recorder/Transcriber

Electronically Filed
03/07/2008 08:56:12 AM

CLERK OF THE COURT

NISD
DAVID ROGER
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Nevada Bar #002781
MARC DIGIACOMO
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DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

LUIS HIDALGO, JR.,
#1579522

Defendant.

Case No. C241394

Dept No. XXI

NOTICE OF INTENT TO SEEK DEATH PENALTY

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

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

On or about May 19, 2005, the owner of the Palomino Club, Luis Hidalgo, Jr., located at 1848 North Las Vegas Boulevard, made it known, that he would pay someone to kill Timothy Jay Hadland, who was a former employee of the club. Luis Hidalgo, Jr., was angry with the victim, Timothy Jay Hadland, because after his firing from the club, Timothy Jay

Hadland was hurting the club's business by "bad mouthing" the club by spreading rumors about Luis Hidalgo Jr., and about the club. During a conversation that day, Defendant Luis Hidalgo, III told Luis Hidalgo, Jr. that he would not make as much money as other strip club owners if Luis Hidalgo, Jr. did not do something to Timothy Jay Hadland. The Palomino Club is not located on the Strip and its business relies heavily on customers being brought to the club by cabs. The club was losing money because of Timothy Jay Hadland's actions and as such Luis Hidalgo Jr., wanted him killed so that he, his business, and his employees would be better off financially by the increased flow of clients after Timothy Jay Hadland was silenced.

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

After the killing, the group drove back to the Palomino Club and Defendant Deangelo Carroll entered the club with Defendant Kenneth Counts. Defendant Deangelo Carroll went into Luis Hidalgo Jr.'s office and met with him and Anabel Espindola. At that time Defendant Deangelo Carroll announced that, "it was done" and that Defendant Kenneth Counts wanted to be paid. Luis Hidalgo Jr., then told Anabel Espindola to get $5,000, which Defendant Anabel Espindola did and which she provided to Defendant Deangelo Carroll who then provided money to Defendant Kenneth Counts. Defendant Kenneth Counts then left the club in a cab.

These facts support the aggravator because the murder was committed for the purpose of improving the profits to the business and the employees of the Palomino Club. The owner

of the club, Luis Hidalgo Jr. wanted Timothy Jay Hadland killed so that he could make more money in the strip club business. In addition, these facts support murder for hire under the aggravator as Defendants Kenneth Counts and Deangelo Carroll received money for killing Timothy Jay Hadland.

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

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

DATED this 6th day of March, 2008.

Respectfully submitted,

DAVID ROGER
Clark County District Attorney
Nevada Bar #002781

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

CERTIFICATE OF FACSIMILE TRANSMISSION

I hereby certify that service of the above and foregoing NOTICE OF INTENT TO SEEK DEATH PENALTY, was made this 6th day of MARCH, 2008, by facsimile transmission to:

Dominic Gentile, Esq.
369-2666

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

TRAN

ORIGINAL

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, vs. LUIS HIDALGO, JR., Defendant.	CASE NO. C241394 DEPT. XXI

BEFORE THE HONORABLE VALERIE ADAIR, DISTRICT COURT JUDGE

TUESDAY, APRIL 1, 2008

RECORDER'S TRANSCRIPT OF HEARING RE:

MOTIONS

APPEARANCES:

FOR THE PLAINTIFF: MARC DIGIACOMO, ESQ.
GIANCARLO PESCI, ESQ.

FOR THE DEFENDANT : DOMINIC P. GENTILE, ESQ.

RECORDED BY: JANIE L. OLSEN, COURT RECORDER

LAS VEGAS, CLARK COUNTY, NV, TUESDAY, APRIL 1, 2008

THE COURT: State versus Luis Hidalgo, Jr. Mr. Hidalgo is present in custody. This is Mr. Gentile. And we've got for the State, Mr. DiGiacomo -- Mr. DiGiacomo and Pesci.

All right. This was passed to give Mr. Gentile an opportunity to address the use of the father's identification at the jail.

MR. GENTILE: Well, and I think that we have come to conclude that the father's identification was not used at the jail because the father's identification has been in El Salvador since sometime in the middle of 2006. But I think we also have an explanation. I -- I have witnesses, by the way, so it's not -- I'm going to make a proffer, and if you want to hear witnesses, I'll present them.

But, unlike the State, when I give you a proffer I'm going to tell you the basis of the proffer. Okay? Not just that it's my opinion.

The first thing that we did is we spoke with Mr. Hidalgo to ask Mr. Hidalgo if, in fact, he had ever used anybody's identification other than his own and he said, no, he did not. Okay? I will tell you -- and I have the court orders here and we have the jail records here that I visited Anabel Espindola with Mr. Hidalgo. And on one occasion I think Christopher Orem was there with us and on another occasion it might have been Jonelle Thomas, but I definitely visited Ms. Espindola with Mr. Hidalgo on two occasions.

On one of those occasions, Judge -- I don't know that the Court has ever visited anybody at the jail as an outsider.

THE COURT: No.

MR. GENTILE: Okay.

THE COURT: I have not.

MR. GENTILE: All right. Well, here's what happens. And -- and I think probably the key ingredient here, the key component, is that sometime after Anabel Espindola and Luis Hidalgo, III were put into custody at the Clark Count Detention Center, somewhere about a year and a half later, from my best estimate, the computer system changed.

So a whole new system was put into place. I believe that that has everything to do with what happened here.

On one of the two occasions -- when you go into the jail to visit somebody for a contact visit, you have to present -- if you're an attorney, you have to present your bar card and your driver's license. You're given your drivers license back because everybody who visits anybody at the jail, whether it be me or whether it be anybody sitting here in the back -- and you guys should pay attention to this -- is immediately -- as soon as they --

THE COURT: Does this count as like community service or something --

MR. GENTILE: Yes, it is.

THE COURT: -- Mr. Gentile?

MR. GENTILE: Yes, it is.

As soon as --

THE COURT: CLE credit or something?

MR. GENTILE: I'll apply for it.

As soon as somebody visits -- as soon as somebody goes up to

the window at the jail and talks to a corrections officer, the corrections officer asks for their identification, and then they will ask for who are you going to visit.

The first thing that's pulled upon the screen is the person who you are going to visit. If it is the first time that you are visiting this person, or when the computer changed if it was not the first time you're visiting, but the first time you're visiting with the new computer system, you're information is typed into the system. All right?

And from that point forward, you are assigned an identification number. The next time that you go, same thing happens. You say who you're going to visit, the screen is pulled up, you've given them your ID.

Now, if your name is Joey Johnson, and there isn't a Joey Johnson, Jr. or a Joey Johnson, Sr. or a Joey Johnson, III, and -- and you're going to visit Anabel Espindola and they see Luis Hidalgo's name on there, they're going to enter a new entry, that being Joey Johnson. All right?

But if your name is Luis Hidalgo, although they are supposed to enter a new entry, they don't at all times. Okay? Now, let me tell you what happened the time that I went with Mr. Hidalgo to visit Anabel Espindola. On that day I was the person who, when we left, collected all of the ID's. Now, there were two different occasions, but I only remember collecting the ID's once.

And, naturally, when I collected the ID's as we were leaving I had to pass them out to people. And I assure you, death and taxes certainty, that the ID that I got back from the person behind the glass, was the driver's license of that man. It was not the driver's license of anybody else. Okay?

Now, Don Dibble is ready to -- to advise you. He went over to the jail twice, actually. He's spoke to -- I spoke to the Sheriff yesterday. I also spoke to the Deputy Chief. I have not spoken to the Captain, but Mr. Dibble has. And it is my understanding that there is a lieutenant here.

Is he here?

MR. DIGIACOMO: There is.

MR. GENTILE: You're here. Okay.

Here is what we believe happened. When this -- if you go to visit Anabel Espindola today and you say you want to visit Anabel Espindola, and you're not Luis Hidalgo because if it comes up that it's Luis Hidalgo they're going to immediately notify a lieutenant in the homicide department because that's what the computer says that they're supposed to do.

But if you go there to visit her today a screen is going to pop up with her on it. There is also going to be a list of people who have visited her. All right? When you say who you are, you -- the person operating the computer goes to a second screen.

Now, if that person is astute, if that person is on their toes, and if they really truly examine the driver's license that's presented as compared to the information that is in the computer, well, then they should catch the fact that it's a different Luis Hidalgo. Okay? It appears as though this has gone to default over and over again

Now, my basis for the information that Luis Hidalgo, Sr., the -- the deceased Mr. Hidalgo, who's dead almost two years now, that his driver's license, his Nevada driver's license is in El Salvador, and still in El Salvador, and we really did try to get these people up here. All right? But

you can appreciate that -- that -- that they didn't care enough to come up here.

But I have Rudy Velaqua (phonetic) here today and he has spoken to that family --

How many times, Rudy?

MR. VELAQUA: Four times.

MR. GENTILE: Four times since last Friday. They have assured him that the driver's license was in the wallet of Mr. Hidalgo, Sr. when Mr. Hidalgo, Sr. passed away. And it's been in the hands of Mr. Hidalgo, Sr.'s son down there. A son through a second wife, a different mother than -- than the defendant.

But that man was traveling in Mexico and was unreachable. And the mother just did not want to come here. I mean, I -- I offered to -- to send her a ticket and pay for the ticket and get her up here, but she just didn't want to come here. She is not the mother of this man.

THE COURT: So she doesn't care.

MR. GENTILE: In so many words she doesn't care. And I'm not sure that we were able to convey to her what this really all meant and the sense of the importance of it. Okay?

Now, if you examine the jail records, and I don't know if you have them before you. On one occasion when I went to visit Ms. Espindola -- no, Mr. Hidalgo, III, I was listed as his spouse. Okay? Now, I've had many things said about me in my life. Okay? Some of which I am not particularly proud of, but I have never been married to a man. Okay? I have been married twice.

THE COURT: At least not in this state, Mr. Gentile.

MR. GENTILE: I'm sorry?

THE COURT: At least not in this state.

MR. GENTILE: Well, I haven't been married to a man anywhere, Judge. And to be candid with you, it's just not my cup of tea. Okay? And so -- and I can prove that I'm listed as the spouse --

THE COURT: Okay.

MR. GENTILE: -- because I've got the records. Okay?

THE COURT: So the long and short of it is the jail is inaccurate.

MR. GENTILE: Well, I've --

THE COURT: You're saying --

MR. GENTILE: -- more.

THE COURT: Oh, well --

MR. GENTILE: Okay? Christopher Orem, I think the Court can take judicial notice that he was not born in 1930. Okay?

Now, Mr. DiGiacomo said that he could bring a hundred counts against Luis Hidalgo, Jr. for having presented false identification. Well, then he should bring a hundred counts against Christopher Orem because Christopher Orem's birthday is listed every time as January 1, 1930. Okay? So he, obviously, must have also presented an ID that says January 1, 1930, and I want equal treatment. If Mr. Hidalgo, Jr. is going to be prosecuted, Mr. Orem should be prosecuted.

The bottom line to it is there are problems with the computer system. It appears as though they happened after the transition. It looks like the ones that happened before that were more accurate. But I would actually

invite the lieutenant, and I haven't talked to him, and I'm sure the State has talked to him plenty, you know, to see if -- if this is all bologna.

But I have, ready to testify, Don Dibble, who went through the entire process twice, once with this lieutenant, I think, once with the Captain. I have Sheena Hoffstead ready to come before you and say there has never been a romantic relationship between her and Luis Hidalgo, Jr. She's here.

You heard the State say last week that this is his girlfriend. I think they learned that from Anabel. I think that they might have even said that to Anabel just to get her to become more cooperative, candidly. It's been done before. Okay?

And I'm ready.

THE COURT: All right.

MR. GENTILE: That's my proffer.

THE COURT: Well, I'll -- I'll trust your representations. We don't need to swear the witnesses in.

MR. DIGIACOMO: Okay. I mean, I don't distrust anything Mr. Gentile said. I -- I would address the court, though, that the times that the jail found Mr. Luis Hidalgo going into the jail was when Mr. Gentile got exparte orders allowing Mr. Hidalgo to meet with Anabel Espindola as well as Luis Hidalgo, III.

He went with his lawyers. He, obviously, had to show the right ID because the order itself specifically referenced who it was he was going to see. This was before you were on the case, Judge.

THE COURT: Yeah, I was trying -- I was thinking, I don't remember

signing those. Because --

MR. DIGIACOMO: This was before --

THE COURT: -- normally I only do that for lawyers and investigators and --

MR. DIGIACOMO: Sure. This was before --

MR. GENTILE: Well, I was a lawyer and an investigator.

THE COURT: I know, but I would --

MR. GENTILE: Okay.

THE COURT: -- have signed one for -- which I don't --

MR. GENTILE: I never asked you to, Judge.

THE COURT: Right. I know. That's why I was making a face because I didn't recollect signing any of those.

MR. GENTILE: Right.

MR. DIGIACOMO: When those occasions, and during that time period, it appears that Mr. Hidalgo's identification was the appropriate identification that, through DMV, he has.

Mr. Gentile said that sometime mid-2006, Mr. -- the grandfather went down to El Salvador. If I -- my understanding is -- my understanding is this system was instituted in -- in the early -- or the mid part of 2006. You'd have to assume that the first person to visit Ms. Espindola after the entry of the system was Mr. -- or was the grandfather.

THE COURT: The grandfather.

MR. DIGIACOMO: And then 147 times thereafter he got entered into the computer as the grandfather. That doesn't seem reasonable to me, but I'll submit it to the Court. I will acknowledge that Mr. -- that Lieutenant

Driscal has the list of people who visited, that only the grandfather's name and identification information is on that list.

THE COURT: Right. So that would mean that the time that Mr. Gentile represents from personal knowledge that Mr. Hidalgo gave his correct ID, that it was input incorrectly --

MR. DIGIACOMO: No.

THE COURT: -- and attributed it to --

MR. DIGIACOMO: Because it wasn't when that system was in place. The time when Mr. Gentile when was in 2005 before the system was included.

Now, I don't believe there's ever been a time when Mr. Gentile went to visit Ms. Espindola --

THE COURT: Has there been a time --

MR. DIGIACOMO: -- with Mr. H. --

THE COURT: -- Mr. Gentile --

MR. DIGIACOMO: -- when the new system was in.

THE COURT: -- following 2006 that you went to visit Ms. Espindola or Luis Hidalgo, III with Mr. Hidalgo here when he gave his correct ID, or was --

MR. GENTILE: I can't tell you that.

THE COURT: Yeah. Because that --

MR. GENTILE: I -- I don't know.

THE COURT: -- would just --

MR. GENTILE: I don't know.

THE COURT: -- clear it up right then and there.

MR. GENTILE: I visited Anabel Espindola --

MR. DIGIACOMO: It was 2005. It was August, September, and October of 2005. The records are here. You can see the dates when --

MR. GENTILE: Well --

MR. DIGIACOMO: -- they go in at the same time.

MS. JIMENEZ: -- I have also visited her after that.

MR. DIGIACOMO: Well, you have --

MR. GENTILE: But not with him.

THE COURT: You have.

MR. DIGIACOMO: -- but not with him.

MR. PESCI: Not with him.

MR. GENTILE: Right.

THE COURT: Right. Not with him. Because if you visited with him and he gave the correct ID and it shows up on --

MR. GENTILE: Yeah, no. I -- I --

THE COURT: -- the computer as the wrong ID then the inquiry is over.

MR. GENTILE: It's my understanding that the computer changed in March of '06. So the likelihood is that when he showed his ID it was in '05.

But, you know, there's another interesting study here, and that's the fact on the Luis Hidalgo, III visits, it does not -- it lists him as him.

THE COURT: Oh, it does?

MR. GENTILE: Yes. On the Luis Hidalgo, III visits it lists him as him. So --

MR. DIGIACOMO: Which seems to suggest the jail would get it right.

Because when he goes, he's shown, and when the grandfather goes, he's shown.

THE COURT: No, because if they -- if they keep the lists separate according --

MR. GENTILE: Right. Exactly.

THE COURT: -- to each defendant, and the jail isn't going to know -- isn't going to have a record interfacing inmates with one another relating to their charges. They would just have a separate file for each inmate.

So if the grandfather never visited Little Lu, and he's --

MR. DIGIACOMO: He did.

THE COURT: -- the only one --

MR. DIGIACOMO: They both did. Both the grandfather and Mr. H. visited Little Lu. Their --

MR. GENTILE: They did.

MR. DIGIACOMO: -- proper identification --

MR. GENTILE: And they're --

MR. DIGIACOMO: -- was used.

MR. GENTILE: -- both in the computer, if I understand, the lieutenant correctly.

MR. DIGIACOMO: I don't know that the lieutenant looked at -- at --

THE LIEUTENANT: I only looked at --

MR. DIGIACOMO: -- Little Lu. He only looked at Anabel.

THE LIEUTENANT: Right.

MR. DIGIACOMO: But if you look at the records you can see --

MR. GENTILE: Well, they have to --

MR. DIGIACOMO: -- he used his license for Little Lu and he --

THE COURT: So what would be the motivation, Mr. DiGiacomo? That's what didn't --

MR. DIGIACOMO: Well, I --

THE COURT: -- make sense to me. If he's showing his ID some times, what's the motivation in using the false IDs?

MR. GENTILE: I -- Your Honor --

MR. DIGIACOMO: I can just find one where he went in later in the year of 2007 in the timeframe when this was happening. So I -- I don't have a suggestion to the Court of what the motivation is.

THE COURT: Because it doesn't make sense to me. It just --

MR. GENTILE: Well, there's more to it than that. He --

MR. DIGIACOMO: My suggestion -- I'm -- I'm sorry.

THE COURT: I'm going to let Mr. Di --

MR. GENTILE: Let me address it because I can clear it up.

THE COURT: Okay. Go ahead.

MR. GENTILE: I don't mean to interrupt you, but I want to clear it up. Okay?

THE COURT: But you did.

MR. GENTILE: I did, and I apologize.

Mr. Hidalgo and everybody else that one of these folks in this box calls -- because they have to call you, you can't call them -- every time you get a phone call from the jail it tells you it's coming from the jail and it may be recorded. There are dozens, maybe hundreds, of telephone conversations between Mr. Hidalgo and Anabel Espindola in which he refers

to, I'm coming to see you, in which he talks about how nice she looked the last time he went to see her.

So, as you say, what's the motivation? He knows he's being recorded, he knows they're going to know that he's there visiting her.

MR. DIGIACOMO: Judge, we didn't have any idea about it until he gave us the phone number for Mr. H. not too long ago, and then we got all the phone calls.

THE COURT: Yeah. I -- I mean if -- I can see if he was afraid a warrant was issued or something like that, but he -- you know, they cooperating that using somebody else's ID. But if he's going in sometimes with the correct ID and sometimes with the wrong ID, you know, the only explanation would be that he didn't want people to know he was visiting Anabel Espindola. But that, truthfully, doesn't make a lot of -- of sense to me.

So I'm just saying, I -- I just don't know where the nefarious intent here is on this whole thing because I'm just -- I'm not getting it. But I -- you know more about the case and what it could be than I do.

MR. GENTILE: When Mr. Hidalgo was arrested he had a wallet. In his wallet he had a driver's license. He didn't have two and he didn't have his father's.

MR. HIDALGO: Your Honor?

MR. GENTILE: Your Honor, and Mr. Hidalgo -- I'm going to let him address the Court if he could.

MR. HIDALGO: I'm sorry, I don't mean to interrupt. I would know better. Okay? I noticed that a lot of times when I went to the jail for visiting

either my son or Ms. Espindola, I give them my driver's license because you get it checked twice. The State knows that. You have to show your ID at the very beginning at the entrance, and you also have to show it at the booth. So they check out the driver's license.

When they took my driver's license many times the lady would put it in the computer and then she would ask me, are you the father or are you the grandfather? I would tell them, no, I'm the dad.

So maybe perhaps that's also could be a cause, you know, for the confusion. Because a lot of times they didn't ask and they just went ahead and did it on their own, so I just presumed that they got it right. But there were many times where they asked me, are you the father or are you the grandfather?

MR. GENTILE: And --

MR. HIDALGO: And I keep telling them my father is dead. He died already. So --

MR. GENTILE: Your Honor knows that Mr. Hidalgo worked for the jail in San Bruno. I mean, he knows how they operate.

THE COURT: All right. Anything else? I mean, like I said. I trust Mr. Gentile's representations. He's not going to stand in here and say that people are going to testify to things when he knows they can be called as witnesses if they're not really going to testify to that. So I --

MR. DIGIACOMO: Well --

THE COURT: -- represent those representations.

MR. DIGIACOMO: -- believe everything he says.

THE COURT: Right.

MR. DIGIACOMO: I just don't know that --

THE COURT: That that --

MR. DIGIACOMO: -- the evidence clearly establishes that it was his grand -- particularly since he left sometime in 2006, but --

THE COURT: I don't think it clearly

MR. DIGIACOMO: -- I didn't know that this --

THE COURT: -- establishes it either, but I think --

MR. DIGIACOMO: -- was the main point of the motions that --

THE COURT: No, it's not. There's, obviously, other issues, but that was something you brought up and surprised, frankly, Mr. Gentile with last time. So I thought it was only fair that Mr. Gentile be given an opportunity to inquire into that when he was surprised by it. And that was one of the things you brought up at our last hearing. So --

MR. PESCI: The defense has been in possession of those -- some of those logs, Judge. So it's not that the State surprised him. We were requested to get further ones because I was telling Mr. Dibble that they don't quite show the full page. So it's not as if they didn't have these things.

THE COURT: I don't know. Mr. Gentile looked surprised to me. I -- you don't know -- I don't know if you saw Mr. Gentile, but I did. And I -- I believe that he was surprised by the allegation that his client was going in using somebody else's ID at the jail. I think that that -- whether he had the logs or not, I don't believe that Mr. Gentile looked at them with that in mind --

MR. GENTILE: I didn't.

THE COURT: -- and I think he was completely surprised by the

allegation.

MR. PESCI: Sure, but it was nothing that we were holding off.

THE COURT: And you have Mr. Hidalgo's passport --

MR. GENTILE: I have his passport here in court.

THE COURT: -- and as you know a condition of release was going to be surrender of the passport.

And as one more question from the Court, is Ms. -- I don't -- would you refresh my memory please? Is Ms. Anabel Espindola in detention or is she -- has she been released?

MR. DIGIACOMO: She's still in custody, Judge.

THE COURT: All right.

MR. DIGIACOMO: And I -- we call that the defense's motion was also an order of house arrest should you release Mr. -- and then I think --

THE COURT: No.

MR. DIGIACOMO: -- at that point, Judge --

MR. GENTILE: I can tell you --

MR. DIGIACOMO: -- you can make a determination.

MR. GENTILE: -- that the bondsman won't -- won't make bail if you don't put house arrest on him.

MR. DIGIACOMO: And the -- the only other question I had from the other day was this question. If Mr. H. only reserved a right to post the money to Mr. Gentile, is it really his money that -- that's what --

MR. GENTILE: There's no money.

MR. DIGIACOMO: Or whatever it is, the property, is there really anything at risk preventing Mr. H. from fleeing and hosing -- or and -- and --

MR. GENTILE: That's a good word.

MR. DIGIACOMO: Yeah. Basically, is it Mr. Gentile --

THE COURT: Is it Mr. Gentile --

MR. DIGIACOMO: -- accepting the risk --

THE COURT: -- who's accepting the risk --

MR. DIGIACOMO: -- for his client?

THE COURT: -- for Mr. Hidalgo.

MR. DIGIACOMO: That's the question I have for the Court. Because if that's -- that's a legitimate --

THE COURT: No, that's a valid --

MR. DIGIACOMO: -- concern of the --

THE COURT: That's a valid question.

MR. GENTILE: Wait --

THE COURT: And, honestly, on the El Salvador issue, I mean, Mr. Hidalgo has lived in this country for over half a century. But he still has family there. So it's kind of -- like I said, I mean, clearly he has strong ties here. He's lived here over 50 years. So --

MR. GENTILE: And he doesn't have strong enough ties there to get them here with that driver's license today, so --

THE COURT: Right. But still, you know, I mean, it's not like, you know, me or Mr. DiGiacomo traveling to El Salvador with our backpack at the bus stop looking for a place to stay. I mean, you know, he has family there, so it is a little bit different. But, like I said, I recognize he's lived here for over half a century and, obviously, has established strong ties to this country. So anything else?

MR. DIGIACOMO: I just didn't know if it is Mr. Gentile. I just want it on the record that he's accepting the risk of Mr. H. running. If that's the relationship the Court needs to be apprised of that relationship before you set a bail amount.

MR. GENTILE: The Bermuda Sands, LLC, which owns a piece of real estate subject to a mortgage, but has equity in it that is satisfactory to a bail bondsman. I am the only member.

When I obtained it, I obtained it as my fee. And when I took it as my fee, Mr. Hidalgo reserved the right -- it was part of our deal -- and -- and he reserved the right, and he was represented by counsel, Mark Nicholetti (phonetic) -- I misspoke last week, he was with Gibson, Bunin, Hutcher at the time, he was not with Snell and Wilmer -- represented him.

He was represented by an independent lawyer at that time. And that -- and -- and so to the extent that if Mr. Hidalgo were to flee and to the extent that Bermuda Sands, LLC is security for the bail --

THE COURT: You'd be taking it in the shorts, pardon the expression.

MR. GENTILE: I'd be taking a risk. But you know what? I check all that out with the bar. And Mr. Rob Bare tells me that --

THE COURT: No, I think it's ethical.

MR. GENTILE: -- there's nothing wrong with that as long as he was represented by another lawyer.

MR. DIGIACOMO: No, no.

THE COURT: No, no, no. It's not that they're saying --

MR. DIGIACOMO: I'm not saying --

THE COURT: -- it's unethical. They're just saying, well, what's

holding him here? You're not the one that's going to prison if he's convicted. He's the one that's going to prison. And if he flees it's your money that is being -- although --

MR. GENTILE: It's a piece of real estate. It's the equity in a piece of real estate.

THE COURT: Yeah, but I mean it's -- it's your asset that is at risk, not Mr. Hidalgo's asset that is at risk.

MR. GENTILE: Oh, but Mr. Hidalgo is paying a premium. It's not -- I'm not paying a premium.

MR. DIGIACOMO: He's gone one way or the other.

THE COURT: Well --

MR. DIGIACOMO: Once he posts the money is gone. So then what holds him here is really Mr. Gentile's --

THE COURT: Is really Mr. Gentile's --

MR. DIGIACOMO: Is -- is my question. It's not so much that I'm worried about Mr. Gentile. He can afford the hit. I -- you know, the -- the --

THE COURT: Although, I don't know. I wouldn't want t rip Mr. Gentile off for half a million.

MR. DIGIACOMO: I mean --

MR. GENTILE: You know, if I trust this man, and I do -- and I've know him since 1998 or 9, somewhere around there -- what's everybody else worried about?

THE COURT: All right. Considering everything, I don't think this case is as strong as it is against some of the other defendants. The length of his residence here, the fact that he does still have family ties to another country,

considering all those things, I'm going to set bail at the amount of $650,000 with house arrest as a condition, surrender his passport. Is that doable, Mr. Gentile?

MR. GENTILE: The passport here and we'll post the bail.

THE COURT: All right. Now, additionally I'm going to add that as a condition of your release, you know, Ms. Espindola is currently in the detention center. That could change. You are not to have any contact with Ms. Espindola outside of the detention center or inside of the detention center. That means you're not to contact her telephonically. You're not to send her letters. You're not, certainly, to go and see her in person unless, you know, you're lawyer is there or something like that.

MR. GENTILE: No, we, there's a -- the computer -- and the lieutenants is here. He's probably checked it out.

THE COURT: Well, I'm saying if Ms. Espindola gets released. I can's say whether or not she's going to remain in custody, number one. The saying, although there's less of a risk of this, obviously applies to Jayson Taoipu and Rontae Zone, although, frankly, the Court is more concerned about Ms. Espindola.

If it comes to the Court's attention that you have violated this order, then, obviously, the Court would entertain remand.

MR. DIGIACOMO: Judge, two other issues.

THE COURT: Yes.

MR. DIGIACOMO: If Mr. Hidalgo is willing to post it's my belief that we're not likely to go to trial in -- in four weeks.

MR. GENTILE: There's another reason why we can't. Paula Armeni

had her baby.

MR. DIGIACOMO: Okay.

MR. GENTILE: And she's had complications, and there's no way for me to get a second lawyer ready. And this --

THE COURT: That's fine.

MR. GENTILE: Okay.

MR. DIGIACOMO: That's fine. I mean, we're going to move -- we're going to move to consolidate anyways with the son, and that's a stayed case anyway.

MR. GENTILE: Sure.

MR. DIGIACOMO: The only issue will be is that we need to do a videotaped deposition of Ms. Espindola considering the circumstances of the case I'd ask that we set that up and -- and do the videotaped depositions considering the situation of the case.

MR. GENTILE: Well, you know, I didn't -- I didn't come here prepared today to --

THE COURT: Yeah.

MR. GENTILE: -- be able to tell you that.

THE COURT: I mean, I think you need to file a motion.

I'll just tell you generally what my policy is, Mr. Gentile. We do it as with -- in court, not like a, you know, civil deposition.

MR. GENTILE: Right.

THE COURT: And then basically it's preserved, but they still have to make efforts to get the witness here and have the witness test -- testify live. And then they have to make a showing in order to use the videotape

deposition that they've made all of those efforts and that she's not here and the Court would make a finding.

So it's basically more of an abundance of caution thing. It doesn't guarantee that they even get to use it. And then it's just like any other deposition in a civil case or otherwise. Any inconsistencies, obviously, are thought of for impeachment.

MR. GENTILE: Well, it's not just like any other deposition and I'll tell you why it's not. And we -- we need to address this.

THE COURT: I didn't say it was like any other deposition.

MR. GENTILE: Oh, okay.

THE COURT: I'm just saying you can use her testimony to impeach her if she comes in live.

MR. GENTILE: All right.

THE COURT: That's what I'm saying.

MR. GENTILE: It has to be done in open court.

THE COURT: In open court. Yeah, absolutely.

MR. GENTILE: And it has to be -- if they want to be here, there has to be a gallery because the minor evidence is something that a jury has a right to consider.

MR. DIGIACOMO: I didn't know he was going to try and intimidate the witnesses from the gallery, but, I mean, it's an open courtroom. People are going to show up. It's an open courtroom.

THE COURT: It's an open court, and --

MR. DIGIACOMO: If they do something improper

MR. GENTILE: All right.

THE COURT: --basically it's recorded --

MR. DIGIACOMO: -- they get arrested.

THE COURT: -- on the JAVS equipment.

MR. GENTILE: That's fine.

THE COURT: And then it would be played and I'd give an explanation that she's unavailable and blah blah blah. But, like I said, it's --

MR. GENTILE: And I resent that intimidation remark, sir.

THE COURT: -- it's an abundance of caution. The defendants are here, the DA's are here, I'm here, court staff is here, so it -- it is different than a deposition. It's not at some lawyer's office, it's in open court. It's just testimony persevered. That's why I do it.

MR. GENTILE: Your Honor, I want the record to reflect clearly. I've got a pretty thick skin, you know that. But I've just had Mr. DiGiacomo say that he -- I heard him say that he didn't know that I was going to intimidate Ms. Espindola with people in the gallery. And I resent that remark. And he should be sanctioned for it.

THE COURT: Well, Mr. DiGiacomo, you know that you're not to engage in personal attacks towards opposing counsel. Don't do it again.

I'm not going to sanction him this time. I'm just going to ask that he not engage in personal attacks. And, obviously --

MR. GENTILE: Thank you, Judge.

THE COURT: -- it goes -- it goes for all the lawyers.

MR. DIGIACOMO: All right. As long as it applies to all sides.

THE COURT: So, Mr. Pesci, knock it off.

MR. PESCI: I'll try, Judge.

THE COURT: All right. Do I need to do anything else?

MR. GENTILE: Where do I surrender the passport?

THE COURT: Can you take it Denise? I don't know.

THE CLERK: I don't know. I -- I guess. I have absolutely no idea.

MR. GENTILE: It's been in our safe at our office for, I don't know, a long time, months, anyhow.

THE CLERK: I've never had this happen before.

THE COURT: Do you know, Mr. DiGiacomo?

MR. DIGIACOMO: I don't, but there's a procedure, I thought, before they released him that --

THE COURT: It goes to the jail.

MR. DIGIACOMO: -- the jail does something with the order of the Court, but I don't know. I mean, I've never --

MR. GENTILE: Well, I'll maintain it, and we'll inquire --

THE COURT: All right.

MR. GENTILE: -- and whatever the jail tells us to do, we'll do.

THE COURT: All right.

MR. GENTILE: Okay.

Who would be the person that we would learn from, Lieutenant?

THE LIEUTENANT: I don't know. I'll check into it.

MR. GENTILE: Thank you.

THE LIEUTENANT: I think it's outside the jail though.

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MR. GENTILE: Okay. Thank you.

THE COURT: All right. That's it. Thank you.

-oOo-

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

Julie Potter

JULIE POTTER
TRANSCRIBER

ORIGINAL

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MAY 01 2008 20
CHARLES J. SHORT
CLERK OF THE COURT
BY Denise Husted
DENISE HUSTED, DEPUTY

IND
DAVID ROGER
Clark County District Attorney
Nevada Bar #002781
MARC DIGIACOMO
Deputy District Attorney
Nevada Bar #006955
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

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

Defendant(s).

Case No. C241394
Dept. No. XXI

AMENDED

INDICTMENT

STATE OF NEVADA)
) ss.
COUNTY OF CLARK)

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

COUNT 1 – CONSPIRACY TO COMMIT MURDER

did, on or about May 19, 2005, then and there, meet with Deangelo Carroll and/or Luis Hidalgo, III and/or Anabel Espindola and/or Kenneth Counts and/or Jayson Taoipu and between themselves, and each of them with the other, wilfully, unlawfully, and feloniously conspire and agree to commit a crime, to-wit: murder, and in furtherance of said conspiracy,

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

COUNT 2 - MURDER WITH USE OF A DEADLY WEAPON

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

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

DATED this 20th day of April, 2008.

DAVID ROGER
DISTRICT ATTORNEY
Nevada Bar #002781

BY
MARC DIGIACOMO
Deputy District Attorney
Nevada Bar #006955

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CLERK OF THE COURT

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

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

LUIS HIDALGO, JR.,
#1579522

Defendant.

Case No. C241394

Dept No. XXI

AMENDED NOTICE OF INTENT TO SEEK DEATH PENALTY

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

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

On or about May 19, 2005, the owner of the Palomino Club, Luis Hidalgo, Jr., located at 1848 North Las Vegas Boulevard, made it known, that he would pay someone to kill Timothy Jay Hadland, who was a former employee of the club. Prior to May 19, 2005, Timothy Jay Hadland had been fired from the Palomino Club for stealing. On May 19,

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

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

After the killing, the group drove back to the Palomino Club and Defendant Deangelo Carroll entered the club with Defendant Kenneth Counts. Defendant Deangelo Carroll went into Luis Hidalgo Jr.'s office and met with him and Anabel Espindola. At that time Defendant Deangelo Carroll announced that, "it was done" and that Defendant Kenneth Counts wanted to be paid. Luis Hidalgo Jr., then told Anabel Espindola to get $5,000, which Defendant Anabel Espindola did and which she provided to Defendant Deangelo Carroll who then provided money to Defendant Kenneth Counts. Defendant Kenneth Counts then left the club in a cab.

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

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

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

DATED this 18th day of June, 2008.

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

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

CERTIFICATE OF FACSIMILE TRANSMISSION

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

Dominic Gentile, Esq.
369-2666

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

0001

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

FILED

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CLERK OF COURT

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DISTRICT COURT
CLARK COUNTY, NEVADA

C241394

THE STATE OF NEVADA,

Plaintiff,

-vs-

LUIS ALONSO HIDALGO, III, #1849634
LUIS HIDALGO, JR., #1579522

Defendant.

Case No. C~~212667~~ C241394

Dept No. ~~XXI~~

NOTICE OF MOTION AND MOTION TO CONSOLIDATE CASE NO. C241394 INTO C212667

DATE OF HEARING: 7/10/08

TIME OF HEARING: 9:30 A.M.

COMES NOW, the State of Nevada, by DAVID ROGER, District Attorney, through MARC DIGIACOMO, Chief Deputy District Attorney, and files this Notice of Motion and MOTION TO CONSOLIDATE CASE NO. C241394 INTO C212667.

This Motion is made and based upon all the papers and pleadings on file herein, the attached points and authorities in support hereof, and oral argument at the time of hearing, if deemed necessary by this Honorable Court.

///

RECEIVED
JUN 25 2008
CLERK OF THE COURT

NOTICE OF HEARING

YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that the undersigned will bring the foregoing motion on for setting before the above entitled Court, Department XXI, thereof, on Thursday, the 10th day of July, 2008, at the hour of 9:30 o'clock A.M., or as soon thereafter as counsel may be heard.

DATED this 24th day of June, 2008.

DAVID ROGER
Clark County District Attorney
Nevada Bar #002781

BY
MARC DIGIACOMO
Chief Deputy District Attorney
Nevada Bar #006955

STATEMENT OF THE CASE

In May of 2005, Defendant Luis Hidalgo, III was arrested and charged with Conspiracy to Commit Murder, Murder With Use of a Deadly Weapon, and Solicitation to Commit Murder (Two Counts). After a preliminary hearing, he was held to answer and charged with the same crimes in C212667. In February of 2008, the State uncovered some additional evidence, and charged Luis Hidalgo, Jr. in the same Conspiracy to Commit Murder and Murder With Use of a Deadly Weapon. Luis Hidalgo, Jr. was indicted on those charges in C241394. Notices of Intent to Seek the Death Penalty have been filed in both cases. The State now seeks to consolidate the cases for trial.

STATEMENT OF THE FACTS

Timothy Hadland's body was found at about 11:45 p.m. lying in the roadway at North Shore Road east of Lake Mead Boulevard. The victim's car was located near the body and it was still running. Homicide Detective McGrath found a cell phone inside the victim's car and also found flyers to the Palomino Strip Club near the victim's body. Detectives discovered that the last call that the victim received by the victim was placed at 11:27 p.m.

by Defendant Deangelo Carroll who worked at the Palomino. The cell phone was traced back to Simone's Auto Plaza which is owned by Luis Hidalgo, Jr. and run by Defendant Anabel Espindola. The bill to the phone was addressed to Anabel Espindola at 6770 Bermuda Road. A records check of Defendant Espindola revealed that she had a work card as the general manager at the Palomino.

Detectives made contact with Defendant Carroll at the Palomino and after Miranda warning obtained a statement from Defendant Carroll. Defendant Carroll worked at the Palomino for Mr. Hidalgo, Jr. hereinafter "Mr. H", where he did various jobs including handing out pamphlets and flyers to cab drivers and potential customers. Defendant Carroll explained that Rontae Zone and Jayson Taoipu helped him pass out flyers. On the night of the murder, Defendant Luis Hidalgo, III, also known as "Little Lou," called Defendant Carroll, telling him to come to the club and to bring baseball bats and garbage bags with him. When Defendant Carroll got to the Palomino he spoke to Mr. "H" who told him he wanted to hire someone to "take care of" Timothy Hadland who used to work at the club. Hadland was said to have been "bad mouthing" the Palomino, particularly with the contacts he knew among the cab drivers. As a result the Palomino was losing thousands of dollars in business so Mr. "H" said he would pay anyone who killed Hadland.

Defendant Carroll explained that on May 19, 2005 at about 11:00 p.m. he, Rontae Zone, and Jayson Taoipu picked Defendant Kenneth Counts (KC) in a white Chevy Astro van that was owned by the Palomino Club. Defendant Carroll told Defendant Counts that Mr. "H" wanted to pay someone to kill someone. Defendant Counts agreed to do it. Defendant Carroll called the victim and set up a meeting at Lake Mead. On the way to the meeting a discussion ensued regarding killing the victim. During the drive to the Lake, Defendant Espindola called Defendant Carroll and told him that Mr. "H" said, "If Hadland was alone, then go through with the plan." Defendant Espindola also told Defendant Carroll that if Hadland was not alone then Defendant Carroll was only to beat Hadland badly, or "go to plan B." When they arrived at the Lake, the victim got out of his car and approached Defendant Carroll, who was driving the van. When the victim approached, Defendant

Counts got out of the van and came around the front of the van and shot Timothy Hadland two times in the head. Defendant Counts then jumped back in the car and told Defendant Carroll to drive.

The group then drove back to the Palomino and Defendant Carroll and Defendant Counts went inside. Defendant Carroll went into Mr. "H's" office and spoke with Mr. "H" and Defendant Espindola. Defendant Carroll indicated that the job was done and that Defendant Counts wanted six thousand dollars. Mr. "H" told Defendant Espindola to get the money, which she did. Defendant Carroll then gave the money to Defendant Counts who left in a cab. Defendant Carroll told police that Mr. "H" and Defendant Espindola told him what he should tell police if he was questioned. Sometime later Mr. "H" contacted Defendant Carroll and told him that the police were looking for him.

Sometime on May 20th, Defendant Carroll was told to take the van used and get the tires changed. The co-conspirators were afraid that Defendant Carroll drove over either the body or some blood at the scene. Defendant Carroll took the van to Simone's Auto Plaza and changed the tires. The cut tires were thrown in a dumpster. Those tires have since been recovered.

On May 21, 2005, Detectives spoke with Rontae Zone. Rontae confirmed that he had accompanied Defendant Carroll, Taoipu, and Defendant Counts to Lake Mead. Rontae told police that he saw Defendant Counts shot the victim twice in the head with a .357 revolver. Since a revolver was used there were no casings found at the scene.

On May 21, 2005, Detectives also spoke with Jayson Taoipu. Jayson confirmed what the others did. Specifically, Jason indicated that he accompanied Defendant Carroll, Rontae, and Defendant Counts. Jayson told the police that killing the victim was discussed and that he saw Defendant Counts shoot the victim with a revolver two times. Defendant Counts was taken into custody on May 21, 2005 by members SWAT. At the time, Defendant Counts fled from police and hid in an attic in an effort to avoid the police.

On May 23, 2005, Defendant Carroll told police that he was contacted by Mr. Hidalgo III, "Little H", who told Defendant Carroll to pick up the Palomino shuttle bus and

drive it to Simone's Auto Plaza. Defendant Carroll then met with police and prepared to set up a recorded conversation with Mr. "H", Defendant Hidalgo, and Defendant Espindola. When Defendant Carroll arrived Defendant Espindola met him and told him to go to "Little Lou's" office, which he did. In "Little Lou's" office, Defendant Hidalgo told Defendant Carroll that the phones and room was bugged so he whispered to Defendant Carroll. Defendant Espindola then came in the room and told Defendant Carroll to remove his clothing to make sure that he was not wearing a wire. Defendant Carroll took his clothes off and then Defendant Hidalgo and Defendant Espindola spoke to him in whispers.

Defendant Hidalgo had a large sword which was part of a wood cane that he was swinging during the conversation. Defendant Hidalgo told Defendant Carroll that if he told him what happened he would cut him up. Defendant Hidalgo further explained to Defendant Carroll that if he had to go to jail he, Defendant Hidalgo, would take care of Deangelo's wife. Defendant Espindola also told Defendant Carroll that Mr. "H" indicated that he would pay for an attorney for him. Defendant Carroll explained that Defendant Counts, Taoipu, and Zone wanted more money. Defendant Espindola then gave Defendant Carroll one thousand dollars to keep the other two quiet and gave Defendant Carroll four hundred more dollars. Defendant Hidalgo then gave Defendant Carroll a bottle of gin and Defendant Espindola and Defendant Hidalgo talked to Defendant Carroll about killing Zone and Taoipu. Specifically, they told Defendant Carroll to put rat poisoning in the gin and give it to Zone and Taoipu. Defendant Hidalgo then told Defendant Carroll to put more rat poisoning in a marijuana cigarette and have them smoke it in order to kill them. Defendant Espindola then told Defendant Carroll that he needed to resign from the Palomino but they would still pay him and after a few months he could come back to work when the investigation died down.

When the conversation ended, Defendant Carroll exited the Palomino and told the police what happened. The recording was analyzed and confirmed what Defendant Carroll said the other parties had said.

On May 24, 2005, Defendant Carroll once again entered Simone's Auto Plaza

wearing a recording device. Like the day before, a meeting between Defendant Hidalgo, Defendant Espindola and Defendant Carroll occurred in room 6 of Simone's Auto Plaza which is a bedroom where Defendant Hidalgo resided. During this conversation, Defendant Espindola can be heard on the tape acknowledging that Mr. "H", Defendant Espindola and Defendant Hidalgo hired Defendant Carroll to harm Hadland. In addition, more money was given to Defendant Carroll to keep quite.

After this recording, contact was made with Defendant Hidalgo and Defendant Espindola. In a mirandized conversation, Defendant Hidalgo told the police to talk to his father, Mr. "H," and he would explain everything. Defendant Espindola acknowledged talking to Defendant Carroll on May 23rd and 24th at Simone's but terminated the interview before substantive information about the conversations were obtained.

While the interviews were taking place, search warrants were executed at both the Palomino Club and Simone's Auto Plaza. A number of incriminating items were recovered. One of those items was a note found in a recreation room with a pool table in near Defendant Hidalgo's bedroom. On the table was a bullet proof vest. Next to the table were bar stools. On one of the bar stools, a note which said, "MAYBE WE ARE BEING UNDERSERVAILLE, KEEP YOUR MOUTH SHUT!" The State previously sought handwriting samples and an order was filed as to Anabel Espindola, Deangelo Carroll and Luis Hidalgo, III. The note was not identified. As Luis Hidalgo Jr. was not charged, we did not take an exemplar from him. At the grand jury, Anabel Espindola indicated that she believed the handwriting was Mr. H's. Subsequent testing determined the note was written by Luis Hidalgo, Jr.

In addition, the State learned that the victim, Timothy Jay Hadland, had been fired from the club for allegedly stealing money that was related to promotions given to cab drivers who brought clients to the club. Earlier on the 19th of May, Defendant Carroll called Anabel at Simone's Auto Body to tell her that Mr. Hadland had been bad mouthing the club to cab drivers. When Ms. Espindola relayed what she heard in the presence of Luis Hidalgo, Jr. and Luis Hidalgo, III, a discussion occurred between the two men. During the discussion,

Luis Hidalgo, III, told his father that he would never make as much money as other strip club owners if he, Luis Hidalgo, Jr., did not do something to Mr. Hadland. Thereafter, Luis Hidalgo, III left Simone's. Phone records reflect that Luis Hidalgo, III called Deangelo Carroll's home after he left Simone's.

POINTS AND AUTHORITIES

NRS 173.115 provides in part;

> Two or more offenses may be charged in the same indictment or information in a single count for each offense if the offenses charged, whether felonies or misdemeanors, are ... based on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

NRS 174.155 provides:

> The Court may order two or more indictments or informations or both to be tried together if the offenses, and the defendant, if there is more than one, could have been joined in a single indictment or information. The procedure shall be the same as if the prosecution were under such single indictment or information.

Conversely, if the Court was considering the separation of various charges in one pleading document, the defendant would have to show that prejudice would result from a single trial or more than one count. Ex parte Groesbeck, 77 Nev. 412 (1961). Mere anticipatory conclusions are insufficient. White v. State, 83 Nev. 292 (1967); Anderson v. State, 81 Nev. 477 (1965). See also NRS 174.165.

It is important to not that NRS 174.165 uses the words may order. By use of the word "may" it is obvious that the legislature has intended to give the court broad discretion in applying the statute. Citing NRS 174.155, the Court in Lovell v. State, 92 Nev. 128 (1976), held that "joinder is within the discretion of the trial court and its action will not be reversed absent an abuse of discretion." Moeller v. United States, 378 F.2d 14 (5th Cir. 1967). Where no prejudice will result from the joinder of two informations, no abuse of discretion is committed by a court who orders such a joinder. See Lovell v. State, supra.

The Nevada Statutes cited above are taken from the Federal Rules of Criminal Procedure. NRS 174.155 is the same as Federal Rule 13 and NRS 173.135 is the same as

Federal Rule 8(b). In considering whether to allow consolidation, the courts have looked at the conflicting policies of economy and efficiency in judicial administration by looking to control overcrowded court calendars and avoidance of multiple trials, and any resulting prejudice to a defendant which might arise from being prosecuted at trial by presentation of evidence of other crimes flowing from two or more interconnected transactions. Cantano v. United States, 167 F.2d 820 (Ca. 4th, 1948); United States v. Fencher, 195 F. Supp. 634 (D. Conn. 1960).

The interests of both justice and economy support the consolidation of these two cases. Moreover, consolidation of both cases would avoid the possibility of inconsistent verdicts. As an initial starting point, all of the evidence admissible against one co-defendant will also be admissible against the other. Through review of the case, there doesn't appear to be any cross-admissibility issues. It also does not appear that Defendants have antagonistic defenses. Both defendants have the same lawyer, something which would not be possible if there interests were adverse. Additionally, where two co-conspirators commit crimes together, the law favors consolidation.

The general rule favoring joinder has evolved for a specific reason – there is a substantial public interest in joint trials of persons charged together because of the judicial economy involved. Jones v. State, 111 Nev. at 853. Joint trials of persons charged with committing the same offense expedites the administration of justice, reduces the congestion of trial dockets, conserves judicial time, lessens the burden upon citizens to sacrifice time and money to serve on juries, and avoids the necessity of recalling witnesses who would otherwise be called upon to testify only once. Jones, 111 Nev. at 853-854 (citations omitted). Consequently, the doctrine of severance is a very limited one.

In Marshall v. State, 118 Nev. 642, 56 P.3d 376 (2002), for example, codefendants Marshall and Currington were tried and convicted together of first degree murder, robbery, and conspiracy to commit robbery. At trial, Marshall's defense strategy was to blame Currington; Currington's defense strategy was to blame Marshall. Id. at 644-645. Both were convicted.

On appeal, Marshall contended the district court erred in refusing to sever his trial from Currington's. Id. at 644. Marshall contended he and Currington had antagonistic

defenses in that each argued the other was responsible for the murder. Id. at 645. Marshall relied on the standard articulated in Rowland v. State, 118 Nev. 31, 39 P.3d 114 (2002), which stated that, "defenses must be antagonistic to the point that they are 'mutually exclusive' before they are to be considered prejudicial," requiring severance. Marshall, 118 Nev. at 646 (citation omitted). Rowland further stated that defenses are mutually exclusive when the core of the codefendant's defense is so irreconcilable with the core of the defendant's own defense that the acceptance of the codefendant's theory by the jury precludes acquittal of the defendant. Marshall, 118 Nev. at 646 (citations omitted).

The Court in Marshall was concerned that the language in Rowland was too broadly stated. Consequently, the Court clarified - - and limited - - the standard articulated in Rowland which requires severance.

> "To the extent that this language suggests that prejudice requiring severance is presumed whenever acceptance of one defendant's defense theory logically compels rejection of another defendant's theory, **it is too broadly stated**. As we have explained elsewhere, while there are situations in which inconsistent defenses may support a motion for severance, **the doctrine is a very limited one**. A defendant seeking severance must show that the codefendants have conflicting and irreconcilable defenses and there is danger that the jury will unjustifiably infer that this conflict alone demonstrates that both are guilty. We take this opportunity to further clarify this issue.

Marshall, 118 Nev. at 646 (emphasis added). The Court then went on to explain the standard articulated in Rowland.

> The decisive factor in any severance analysis remains prejudice to the defendant. NRS 174.165(1) provides in relevant part: 'If it appears that a defendant ... is prejudiced by a joinder ... of defendants ... for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires.' Nevertheless, prejudice to the defendant is not the only relevant factor: **a court must consider not only the possible prejudice to the defendant but also the possible prejudice to the State resulting from expensive, duplicative trials**. Joinder promotes judicial economy and efficiency as well as consistent verdicts and is preferred as long as it does not compromise a defendant's right to a fair trial. Despite the concern for efficiency and consistency, the district court has a continuing duty at all stages of the trial to grant a severance if prejudice does appear. Joinder of defendants is within the discretion of the district court, and its decision will not be reversed absent an abuse of discretion. To establish that joinder was prejudicial requires more than simply showing that severance made acquittal more likely; misjoinder requires reversal only if it has a substantial and injurious effect on the verdict.

Marshall v. State, 118 Nev. at 646-647 (emphasis added) (citations omitted).

Most importantly, the Court stated that "**antagonistic defenses are a relevant consideration but not, in themselves, sufficient grounds for concluding that joinder of defendants is prejudicial.**" 118 Nev. at 648 (emphasis added). In fact, the Court in Marshall ruled that the defenses were antagonistic; nevertheless, joinder was proper. The fact that codefendants at a joint trial offer mutually exclusive defenses, the Court recognized, is not, in itself, sufficient to establish that joinder was prejudicial. Id. at 648. Marshall failed to demonstrate that the joint trial compromised a specific trial right or prevented the jury from making a reliable judgment regarding guilt or innocence. Marshall, 118 Nev. at 648. Moreover, the State's case was not dependent on either defendant's testimony, and the prosecution presented evidence linking both to the murder. Id. Accordingly, the Court affirmed Marshall's conviction.

A similar analysis was offered by the highest court of the land in Zafiro v. United States, 506 U.S. 534, 113 S.Ct. 933 (1993). In that case, petitioners contended it is prejudicial whenever two defendants both claim they are innocent and each accuses the other of the crime. 506 U.S. at 538. The United States Supreme Court rejected their contention, holding that "mutually antagonistic defenses are not prejudicial *per se*." 506 U.S. at 538. A court should grant a severance *only* if 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. 506 U.S. at 539. It is *not* prejudicial for a codefendant to introduce relevant, competent evidence that would be admissible against the defendant at a severed trial. Id. The Government offered sufficient evidence against all four petitioners, and the district court cured any possibility of prejudice by properly instructing the jury that it had to consider the case against each defendant separately. 506 U.S. at 540-541. Thus, the U.S. Supreme Court held it was not an abuse of discretion to deny petitioners' motions to sever. Id. at 541.

CONCLUSION

The defendants are both charged with conspiring to kill Timothy Jay Hadland, as well as the killing itself. While Defendant Luis Hidalgo, III is also charged with solicitation to

kill the witnesses, the evidence demonstrates not only was Defendant Luis Hidalgo, Jr. being kept abreast of the subsequent meetings with Defendant Deangelo Carroll, but that he was in the same building while they were going on. Additionally, these conversations were part of the ongoing conspiracy to conceal the crime. As such, all of the evidence against both Defendants would be admissible in separate trials. Based on the foregoing, the State's Motion to Consolidate should be granted.

DATED this 24th day of June, 2008.

DAVID ROGER
Clark County District Attorney
Nevada Bar #002781

BY _____
MARC DIGIACOMO
Chief Deputy District Attorney
Nevada Bar #006955

CERTIFICATE OF FACSIMILE TRANSMISSION

I hereby certify that service of the above and foregoing, was made this 24th day of June, 2008, by facsimile transmission to:

Dominic Gentile, Esq.
369-2666

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

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*** TX REPORT ***
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DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

LUIS ALONSO HIDALGO, III,
#1849634
LUIS HIDALGO, JR.,
#1579522

Defendant.

Case No. C212667
C241394

Dept No. XXI

NOTICE OF MOTION AND MOTION TO CONSOLIDATE CASE NO. C241394 INTO C212667

DATE OF HEARING: 7/10/08

TIME OF HEARING: 9:30 A.M.

COMES NOW, the State of Nevada, by DAVID ROGER, District Attorney, through

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*** TX REPORT ***
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DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

LUIS ALONSO HIDALGO, III, #1849634
LUIS HIDALGO, JR., #1579522

Defendant.

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COMES NOW, the State of Nevada, by DAVID ROGER, District Attorney, through

S15

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C241394

DISTRICT COURT

CLARK COUNTY, NEVADA

STATE OF NEVADA,

Plaintiff,

vs.

LUIS ALONSO HIDALGO III, #1849634,
LUIS HIDALGO, JR. #1579522

Defendants.

CASE NO. C212667
~~C241394~~

DEPT. XXI

DEFENDANTS LUIS HIDALGO JR. AND LUIS HIDALGO III'S OPPOSITION TO THE MOTION TO CONSOLIDATE CASE NO. C241394 INTO C212667

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

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

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ARRASCADA & ARRASCADA, LTD.[1] and hereby opposes the Motion to Consolidate Case No. C241394 into C212667 filed by the State of Nevada on June 24, 2008.

This Opposition is made and based upon the following Memorandum of Points and Authorities, any exhibits attached hereto, and the papers and pleadings already on file herein

Dated this 8th day of December, 2008.

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MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

As a preliminary matter, the court should note that because no reasonably sized motion can begin to address the several complicated issues that joint trials in capital cases raise, counsel has attached a 22-page social science article of Edward J. Bronson (hereinafter "Bronson Article") to this motion in opposition. Exhibit A. Dr. Bronson is a social scientist specializing in jury behavior and has been qualified as an expert witness in many federal death penalty cases

[1] Christopher W. Adams has submitted his pro hac vice application and is awaiting approval to represent Luis Hidalgo III with John Arrascada from the State Bar of Nevada.

on the likely effects of joinder in capital prosecutions.[1] While this motion incorporates portions of the Bronson Article to support points of law, Defendants rely on Dr. Bronson's entire article to make the showing of prejudicial joinder.

II.

RELEVANT STATEMENT OF FACTS

On or about the 19th of May, 2005, Timothy Hadland died as a result of being shot in the head twice. Within a matter of five days, Luis Hidalgo III (hereinafter, Mr. Hidalgo III) was arrested. At the time of his arrest a videotape recorded statement was taken of Mr. Hidalgo III. During that statement, Mr. Hidalgo III is heard asking to speak to his father before continuing to answer questions. Exhibit B. The State brought charges by way of a Criminal Complaint #05FB0052ABCD against Mr. Hidalgo III, Anabel Espindola (hereinafter, "Espindola"), Deangelo Carroll (hereinafter, "Carroll") and Kenneth Counts for the murder and conspiracy to commit it of Hadland. Mr. Hidalgo III was also charged with two counts of solicitation of murder based on surreptitious recordings between himself, Espindola and Carroll, who at that time was working as an agent for law enforcement. On or about the 6th of July, 2005 the State of Nevada (hereinafter, "State"), pursuant to Nevada Supreme Court Rule 250(c), filed a Notice of Intent to Seek Death Penalty (hereinafter, "Notice").[2] The State included three aggravating circumstances in the Notice. The first and second related to the Solicitation to Commit Murder

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[1] Dr. Bronson is an esteemed social scientist that has conducted significant research into juror attitudes with regard to criminal justice and the effects of those attitudes on verdicts, as well as the effect of various trial processes on those attitudes. He has studied the process of qualifying juries in capital cases and has published several studies on this subject, some of which have been cited many times by appellate courts, including the California Supreme Court and the United States Supreme Court, e.g., *Hovey v. Alameda County Superior Court*, 168 Cal.Rptr. 128 (1980), and *Grigsby v. Mabry*, 569 F.Supp. 1273 (E.D. Ark. 1983), aff'd, 758 F.2d 226, (8th Cir. 1985), rev'd, sub nom. *Lockhart v. McCree*, 476 U.S. 162 (1986). Likewise, he has testified on the issue in well over 50 cases, including the trial court hearings in both *Lockhart v. McCree* and *Hovey v. Alameda County Superior Court*. In addition, he has qualified as an expert witness on the issue of severance of defendants, and has testified on the issue in eight cases, and has offered affidavits on the severance issue in many other cases. About half of the cases were in federal court, including *United States v. McVeigh & Nichols*, No. 95-CR-00110 RPM and *United States v. Cesar Gonzales, et al.*, No. 95-CR-00538 MV.

[2] See Exhibit C.

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charges[3], and the third aggravator related to the fact that the murder was allegedly committed by a person, for himself or another, to receive money or any other thing of monetary value.[4]

Mr. Hidalgo III filed a Motion to Strike the Notice of Death Penalty in the District Court, which was denied. Subsequently, Mr. Hidalgo III filed a Petition for Writ of Mandamus or Prohibition with the Nevada Supreme Court (hereinafter, "Supreme Court"). The Supreme Court took jurisdiction and issued an opinion granting the petition for a writ of mandamus, stating that the charge of Solicitation to Commit Murder was not a crime that involved the use or threat of violence and ordered the two aggravators associated with this crime stricken. Likewise, the Supreme Court struck the third aggravator, holding that it failed to give proper notice because the manner in which it alleged the facts that it contained was incomprehensible. Accordingly, since all the aggravators were stricken, the Notice was also stricken.

The State filed a petition for reconsideration. Shortly thereafter, defendant Espindola became a state witness and as a result of the information she provided to the State, Mr. Hidalgo III's father, Luis Hidalgo Jr. (hereinafter, "Mr. Hidalgo Jr.")[5] was indicted on or about February

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[3] Counts 3 & 4 of the Information.

[4] NRS 200.033(6).

[5] Unique to the case sub judice is the similarity in names of the two defendants. There have been several occasions throughout this process wherein parties to this matter, have confused the two persons calling one by the others name. Some examples include:

April 17, 2008 Transcript – p 3. Exhibit D.
THE COURT: · Is the Anabel Espindola deposition is the one as to Mr. Luis Hidalgo Junior.
MR. GENTILE: No.
THE COURT: No.
MR. GENTILE: It's the – that's the one as to Luis Hidalgo III.
THE COURT: It's the other way around.
MR. DIGIACOMO: The III, correct

May 1, 2008 Transcript – p 8, 11. Exhibit E.

THE COURT: No, no, no. That's as to – as to, obviously, Mr. Hidalgo II, it is because they had the opportunity. Now, this is a totally new situation since the time Mr. Hidalgo, III, was indicted because there was a complete change. So the reasoning there doesn't really apply to Mr. Hidalgo, II. But, you know, again, I think for the other reasons that have already been discussed – what I have said previously, what Mr. Gentile has argued, it's denied as to Mr. Hidalgo, III.
THE COURT: Right, but we can set it as to Mr. Hidalgo, II. And if the stay is lifted it's –
MR. GENTILE: Junior
THE COURT: There's sort of – I'm sorry……

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11, 2008[6] and charged with the crimes of conspiracy to commit murder and murder of Timothy Hadland. Mr. Hidalgo Jr. was not charged with Solicitation of Murder as he was not a participant in the three way conversation between Carroll, his son Mr. Luis Hidalgo III and Espindola. By the time Mr. Luis Hidalgo Jr. was indicted, Mr. Luis Hidalgo III was on or about his sixth (6th) trial setting[7] and his pending trial date was February 19, 2008; however it was ultimately moved to February 22, 2008. Mr. Hidalgo Jr. was not set for trial at that time and in fact was initially set for trial on the 31st of March, 2008[8]. A day before Mr. Hidalgo III's February trial setting, on February 21, 2008, the Supreme Court withdrew its prior opinion pending the resolution of its decision on the rehearing petition. In the period of time taken by the Nevada Supreme Court to reevaluate their prior decision, the State filed a Notice of Intent to Seek Death on Mr. Hidalgo Jr.[9] On May 29, 2008, the Supreme Court granted the writ of mandamus in part, modifying its earlier decision as it relates to Mr. Hidalgo III. Specifically,

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(continued)

June 17, 2008 Transcript – p 8. Exhibit F.
THE COURT: Because what Mr. Gentile is saying is I'm assuming he would remain Hidalgo, II—
MR. GENTILE: Junior
THE COURT: Right, Junior. .....

February 4, 3008 Transcript – p 4. Exhibit G.
THE COURT: The third and Luis Hidalgo, Sr., is that correct?
THE DEFENDANT (Espindola): Junior

February 7, 2008 Transcript – p 6. Exhibit H.
MR. GENTILE: Later in the day Mr. Luis Hidalgo Jr.—I'm sorry, the third, the defendant here.....

February 14, 2008, Transcript – p 6, 15. Exhibit I.
MR. PESCI – Specifically, we're in possession and the defense is in possession of police reports that were generated by the visit to the police by Luis Hidalgo II, father, and Anabel Espindola.
There is a long standing relationship to Mr. Gentile and father, Luis Hidalgo II

p 15
COURT: And for the record, Mr. Hidalgo III has been removed from the courtroom and Mr. Hidalgo, Jr. or Mr. Hidalgo II, is not present.

[6] An amended indictment was filed on May 1, 2008; however, the charges did not change.

[7] Mr. Hidalgo III was set to go to trial on (1) 8/29/05; (2) 7/24/06; (3) 4/16/07; (4) 6/14/07; (5) 1/23/08 but was changed to 1/18/08; (6) 2/19/08 but changed to 2/21/08 and then 2/22/08; (6) 5/27/08; (7) 1/26/09 (current trial setting)

[8] Mr. Hidalgo Jr.'s trial has been reset several times: (1) 3/31/08; (2) 4/24/08; (3) 8/18/08; and (4) 1/26/09 (Current trial setting).

[9] March 7, 2008 – Exhibit J.

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the Supreme Court once again struck the two aggravators associated with the crime of Solicitation of Murder. As to the third aggravator the Supreme Court found that the Notice of Intent was deficient as to this aggravator; however, it permitted the State to amend the Notice of Intent if it could cure this deficiency based upon the same facts and aggravator that it alleged in the original Notice. On or about June 18, 2008, the State filed an Amended Notice of Intent to Seek Death Penalty (hereinafter, "Amended Notice")[10] on Mr. Hidalgo III alleging one aggravator: that the crime was committed by a person, for himself or another, to receive money or any other thing of monetary value. Currently, the State is seeking a sentence of death for father, Mr. Hidalgo Jr. and son, Mr. Hidalgo III, who are both facing the sole aggravating circumstance of pecuniary gain.

Although father and son are charged essentially with the same crimes, the facts as they apply to them are quite different. There are only two events that take place in where the State alleges that father and son were ever in each other's company. The first event allegedly takes place on the 19th of May, wherein Espindola reports to Mr. Hidalgo Jr. that Hadland is bad mouthing the club. Espindola's statement is allegedly made in the presence of Mr. Hidalgo III. The State alleges that at this time Mr. Hidalgo III spouts off his mouth at his father, although the State does not suggest that Mr. Hidalgo Jr. entertains this conversation and in fact their star witness, Espindola testified at the grand jury that Mr. Hidalgo Jr. told his son to "mind his own business." The State's own time line does not put Mr. Hidalgo III and his father speaking until Mr. Hidalgo III, Mr. Hidalgo Jr. and Espindola are all present at the Silverton Hotel & Casino, several days after Hadland was killed.

Further, the State has alleged that Mr. Hidalgo Jr. met with Carroll and directed Espindola to hand over $5000 to Carroll. There has never been an accusation that Mr. Hidalgo III ever paid or knew that Carroll or Counts received any money until the surreptitious tape recording made by Carroll on May 24, 2005, five days after Hadland's death. In that recording Carroll tells Mr. Hidalgo III "what do you care, you had nothing to do with it" referencing the

[10] See Exhibit K.

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death of Hadland. There is no evidence that Mr. Hidalgo III was even present when the money was paid. There are also statements by Espindola of statements made by Mr. Hidalgo Jr. after watching a newscast of the murder. Such statements could lead the jury to believe Mr. Hidalgo Jr.'s culpability.

On the reverse end, the surreptious recordings, do not involve Mr. Hidalgo Jr. It is not alleged that he was present during the conversations or that he participated in any way. This is clear by the fact that he was not charged for almost three years after Espindola and Mr. Hidalgo III. There are several factors in this case that make it unique and warrant separate trials.

III.

LEGAL ARGUMENT

"Special constitutional considerations present in capital cases... may require severance in situations that would not ordinarily do so in non-capital criminal cases." *United States v. Catalan-Roman*, 376 F.Supp.2d 96, 100 (2005) "Multi-defendant capital cases indeed give rise to a range of unfamiliar legal issues some of which *favor severance even during the guilt phase*. These considerations that favor severance may become more acute in the sentencing phase in light of the constitutionally mandated fact-finding procedures necessary to impose the death penalty with a higher degree of reliability." *Id.* (emphasis added). Separate trials are warranted and necessary in this case for several reasons stated herein and documented in the Article of Dr. Bronson.

Separate trials are critical in this case because the jury's task of individualizing penalty is peculiarly difficult in multi-defendant cases. In this case it will be particularly troublesome. There will be the problem of shared minority racial status, the unique issue of having father and son both facing the death penalty, the number and complicated nature of the charges, the fact that there are separate and distinct conspiracy charges with overlapping but different overt acts, time frames and objectives, the audio-taped evidence supporting on additional charges agianst Mr.

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Hidalgo III, Bruton and other issues related to Mr. Hidalgo III's statement, and the likely length of the trial. This will make the jury's task even more taxing, and asks jurors to demonstrate qualities and skills it is unreasonable to expect them to possess.

For these reasons, and others discussed below, separate trials for Mr. Hidalgo III and Mr. Hidalgo Jr are necessary to ensure a fair and efficient trial for each.

A. THE RULES OF SEVERANCE AND THE SPECIAL CONSIDERATIONS IN CAPITAL CASES MILITATE IN FAVOR OF SEVERANCE IN THIS CASE.

The rules governing consolidation of cases are well established. Nevada law on consolidation follows the federal court model. Although federal courts prefer joint trials of defendants who are indicted together, severance is necessary when a serious risk exists that joinder will compromise a specific trial right, or will affect the jury's ability to make a reliable judgment about guilt or innocence. *Zafiro v. United States*, 506 U.S. 534, 539 (1993). While joinder promotes "economy, efficiency and... avoid[s] multiplicity of trials," (*Id.*), courts act impermissibly when they "secure greater speed, economy and convenience...at the price of fundamental principles of constitutional liberty." *Bruton v. United States*, 391 U.S. 123, 134-135 (1968).

"Special constitutional considerations present in capital cases, however, may require severance in situations that would not ordinarily do so in non-capital criminal cases." *United States v. Catalan-Roman*, 376 F.Supp.2d 96, 100 (2005) "Multi-defendant capital cases indeed give rise to a range of unfamiliar legal issues some of which *favor severance even during the guilt phase*. These considerations that favor severance may become more acute in the sentencing phase in light of the constitutionally mandated fact-finding procedures necessary to impose the death penalty with a higher degree of reliability." *Id.* (emphasis added). See also *United States v. Green* 324 F.Supp.2d 311 (D.Mass. 2004)("the standards for severance are necessarily leavened

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by the fact this is a death penalty case. The threshold for determining what constitutes prejudice and when the jury's ability to render a reliable verdict is compromised is necessarily lower than in the ordinary case); *United States v. Perez*, 299 F.Supp.2d 38, (D.Conn. January 14, 2004) (granting severance based on evidentiary concerns "given the heightened need for reliability in a death penalty trial").

Generally, where "defendants are tried together in a complex case and they have markedly different degrees of culpability," grounds for severance exists because of the potential for prejudice to co-defendants. *Zafiro*, 506 U.S. at 539. Likewise, the risk of prejudice is substantial where the prosecution introduces evidence that is probative of defendant's guilt but is admissible only against a co-defendant. *Id.* citing *Bruton*, 391 U.S. 123. Moreover, "[t]he risk of prejudice will vary with the facts of each case, and the district courts may find prejudice in situations not discussed here." *Zafiro*, 506 U.S. at 539.

The granting of separate trials is within the sound discretion of trial court. *United States v. Odom*, 888 F. 2d 1014, 1018 (4th Cir. 1989) (severance proper because "[t]he taking of an adversarial stance [against a defendant] on the part of a co-defendant's counsel may generate trial conditions so prejudicial to the defendant under multiple attack as to deny him a fair trial")(internal citation omitted). While the decision to deny severance is likewise within the court's discretion, *failure* to sever when prejudice results is reversible error. *See, e.g., United States v. Tootick*, 952 F.2d 1078, 1081 (9th Cir. 1991)(failure to sever co-defendants with mutually exclusive defenses was abuse of discretion); *United States v. Breinig*, 70 F.3d 850 (6th Cir. 1995) (in trial of two married defendants for tax evasion, failure to sever was error because wife's properly admitted evidence that she was controlled and manipulated by her cheating, domineering husband, improperly put evidence of husband's bad character before the jury); *United States v. Peveto*, 881 F.2d 844, 856-858 (10th Cir. 1989) (Failure to sever was error

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where the jury's acceptance of a co-defendant's defense "would tend to preclude the acquittal of [defendant]."](internal citation omitted); *United States v. Johnson*, 478 F.2d 1129 (5th Cir. 1973)(Failure to sever was abuse of discretion in light of trial court's "continuing duty at all stages of the trial to grant a severance if prejudice does appear.")(*citing, Schaffer v. United States*, 362 U.S. 511, 516); *United States v. Donaway*, 447 F.2d 940 (abuse of discretion for failure to sever peripheral defendant).

Where, as here, not one, but multiple conspiracies are alleged, the danger of prejudicial joinder is even greater. The application of NRS 51.035-3(e) in a single trial involving multiple conspiracies with different time scopes and objectives will require separation of statements of co-conspirators that will not be susceptible to limiting instructions being understood by the jury no matter how hard the Court tries to do so. If a case must be reversed where a single conspiracy charged proves to be multiple conspiracies in the proof, it is axiomatic that separate but overlapping conspiracies are of their very nature confusing to juries and likely to result in a misapplication of evidence of one conspiracy to the proof of the other. The danger of prejudicial spillover of evidence is exacerbated here due to the charges in Counts 3 and 4 in the Hidalgo III Information and their further inclusion in the conspiracy charged as to him. Simply stated, given that the conspiracy as to the murder of Hadland terminated with his death, no matter who the members were, evidence as to efforts by Espindola and Hidalgo III to kill the witnesses to the Hadland murder are not admissible as to Hidalgo Jr. In a joint trial with two defedants that possess the same given and surnames, the dange of prejudicial spillover is so great that they should not be tried together for that reason alone.

> while "the joinder of numerous defendants in a single joint trial may result in judicial economy...we, as judges, should not shirk our duty to protect our courts from becoming mere prosecutorial mills through which criminal convictions are processed all in the name of judicial efficiency. This danger of sacrificing individual justice arises most often in a case such as this, wherein questions are

> raised as to whether there was one single conspiracy or several minor conspiracies...Our district judges have the first and most critical responsibility, for they are positioned to sever trials when they can readily see, quicker than we, injustices that may occur if such is not done."

United States v. Eubanks, 591 F.2d 513, 522 (9th Cir. 1979) (Ely, J., concurring).

In fact, despite the preference for joint trials, district courts have granted some type of severance in the *majority* of federal death penalty cases. For example, [o]f 56 multiple-defendant capital cases, a severance of some sort was granted in 37 (66%), and in one other, the decision was mooted prior to penalty phase. The motion was denied in just ten cases, and there were various explanations for the others (no motion filed, issue mooted by one defendant pleading, motion opposed by one co-defendant, no aggravator found). Thus, in federal capital cases, severance motions are routinely granted.

The court in *United States v. Ayala Lopez*, 319 F.Supp.2d 236 (D.Puerto Rico 2004), cited similar data when it granted severance.

> "...we find compelling what other federal district courts have done when faced with the "ever-present risk of prejudice" of joint trials. In the majority of federal death penalty cases some type of severance has been granted. See Declaration of Kevin McNally, Dockets 269, 270-Exhibit A. Specifically, in the twelve cases which have reached the trial stage where there was a single capital defendant and one or more non-capital defendants, severance has been granted eight times (67%).

Id. at 240.

Mr. Hidalgo III and Mr. Hidalgo Jr urge this Honorable Court to exercise similar caution in this case and order separtate trials for these capital co-defendants.

B. <u>THE EIGHTH AMENDMENT RIGHT TO INDIVIDUALIZED SENTENCING REQUIRES SEVERANCE OF MR. HIDALGO III AND MR. HIDALGO JR.</u>

When the government seeks to have a convicted offender condemned to death, the Eighth Amendment requires "precise and individualized sentencing," *Stringer v. Black*, 503 U.S. 222,

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232 (1992), to ensure that "each defendant in a capital case [is treated] with that degree of respect due the uniqueness of the individual." *Lockett v. Ohio*, 438 U.S. 586, 605 (1978). The constitutional necessity of individualized treatment has led the Supreme Court to strike down death sentences imposed without full consideration of "any relevant circumstance that could cause [the sentencer] to decline to impose the [death] penalty," *McCleskey v. Kemp*, 481 U.S. 279, 306 (1987), *see e.g., Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Skipper v. South Carolina*, 476 U.S. 1 (1986); *Hitchcock v. Dugger*, 481 U.S. 393 (1987); *Mills v. Maryland*, 486 U.S. 367 (1988); *Penry v. Lynaugh*, 492 U.S. 302 (1989), as well as whenever the procedures employed created an unnecessary risk of factual error in the decision to inflict death as punishment. *See Lankford v. Idaho*, 500 U.S. 110 (1991); *Ford v. Wainwright*, 477 U.S. 399 (1986); *Beck v. Alabama*, 447 U.S. 625 (1980) and *Gardner v. Florida*, 430 U.S. 349 (1977).

The requirement of individualized treatment in capital sentencing means, among other things, that the legally relevant facts to be litigated and decided in a capital sentencing hearing are potentially limitless. As summarized by Justice Powell in *McCleskey v. Kemp*, 481 U.S. 279 (1987), "the Constitution requires that [the jury's capital sentencing] decision rest on innumerable factors that vary according to the characteristics of the individual defendant and the facts of the particular capital offense." *Id.* at 294 (emphasis added). *Accord, California v. Ramos*, 463 U.S. 992, 1008 (1983) (referring to the "myriad of factors"that determine sentencer's choice between life and death); *Zant v. Stephens*, 462 U.S. 862, 900 (1983) (Rehnquist, J., concurring) (citing "the countless considerations" weighed by capital sentencing authorities). For this reason, the issues before the sentencer are exponentially more complex than those usually confronted at the guilt phase of the trial. When a sentencing jury confronts this array of complexities for more than one capital defendant, a number of difficult and potentially insoluble conflicts between constitutional rights can develop.

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In *United States v. McVeigh*, 169 F.R.D. 362 (D. CO 1996), Chief Judge Matsch engaged in analysis of the delicate balancing between judicial economy and the risk of prejudice, candidly discussing the acceptable level of risk of a mistrial or reversible error. Of special significance, since we are facing a complex trial involving the ultimate sanction, is the *McVeigh* Court's belief that the sheer magnitude of a case can "compel caution and restraint ..." in ruling on a severance motion. *Id.* at 364.

As discussed below and in the Bronson Article, all of the circumstances of this case require severance of the capital defendants to preserve their rights to precise and individualized sentencing .

1. **The size and complexity of this case and the unrelatedness of the acts attributed to each defendant will cause juror confusion resulting in prejudice at the guilt and penalty phase.**

"Each defendant is entitled to a jury's separate and independent evaluation of the evidence received against him in any trial, regardless of the number of other persons alleged to have participated in the crimes charged." *McVeigh*, 169 F.R.D. at 364. "When the court believes that such separate consideration is not reasonably to be expected, separate trials must be ordered." *Id.*

In this case, Mr. Hidalgo III and Mr. Hidalgo Jr each have several charges against them, but only one alleged conversation involves both defendants prior to the killing of Hadland. Thus, among other things, the jury will hear evidence of a solicitation to commit two other murders in which Mr. Hidalgo Jr had no involvement. On the other hand, the jury will hear evidence of alleged conversations between Mr. Hidalgo Jr and Deangelo Carroll, and the passing of money to Deangelo Carroll and the statements made by Mr. Hidalgo Jr. after watching the newscast in which Mr. Hadland's body was reported as being found. Thus the only conversation involving alleged joint participation of Mr. Hidalgo III and Mr. Hidalgo Jr involved

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Mr. Hidalgo III telling Mr. Hidalgo Jr that he would not do anything about Timothy Jay Hadland, and Mr. Hidalgo Jr instucting Mr. Hidalgo III to "mind your own business."

Thus the volume, complexity, and unrelatedness of the evidence in a joined trial will result in (1) jury confusion (jurors may be confused and fail to segregate the evidence as to the specific charges) (2) accumulation (the jury may accumulate evidence across charges and defendants; (3) "criminal inference"(the jury may infer a defendant's criminal disposition from the joined cases.) Exhibit A, p. 7.[11]

Thus, in the loosely sewn-together conspiracy to committ murder case presently before the court, juror confusion and "spillover prejudice" is inevitable because this is a complex case, both legally and factually. There are mulitple counts and separate solititation to commit murder charges. Also the defendants are related, El Salvadoran-American, and have the same name, Luis Hidalgo, with the only distinction being the suffix Jr. or III. Jr. and III are both conventionally associated with sons rather than fathers. In other words, when the jurors hear someone referred to as Jr. or as the III in everyday contexts, these naming conventions are usually those given to sons. Thus, this adds to the difficulty in ensuring the appropriate referent is clear in a trial where both the father and the son are so named. This could namely be a problem when the jury is provided the verdict form with both the name of Luis Hidalgo Jr. and Luis Hidalgo III.

Further, there are several nicknames that have been used by the Court, defense attorneys, prosecutors, as well as potential witnesses in describing either Mr. Hidalgo III or Mr. Hidalgo Jr. none of which are consistent. This multitude of names, used by all the parties involved creates an issue of clarity and this problem will be compounded with contributions from several different attorneys, the Court and witnesses during the trial. If representatives of the court and the

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[11] While Dr. Bronson defined these terms in relation to studies done on joinder of charges, they clearly can apply with joinder of defendants, if not more so since each joined defendant brings with him several joined charges, thereby increasing the risk of confusion, accumulation and criminal inference.

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attorneys who have had a great deal of time and preparation in this case can not keep the names straight then the expectation that jurors would do better is dubious.

The multitude of names itself would be less confusing if tried separately in that the request being made of jurors to keep them straight would be less burdensome. If tried together, jurors need to try to keep all the different names and their associated referents separated and also try to keep track of who is being referred to in terms of their role in the events in question so that they can be sure to accurately gauge the involvement of each man. In addition, they will need to be sure to keep the charges against each individual clear in terms of which referent they go with. If, instead of using each individual's name, representatives of the court instead use the term "the defendant", this still offers no greater clarity with two defendants. With only one individual on trial, this burden is reduced, as any reference to a potentially confusing name can be clarified simply by stating that it refers to the defendant. The jurors' main focus must then be on being sure to keep track of the actions and references to one individual only, in addition to being clear about the charges made against him. If tried separately, there would be fewer references to either the son or the father in concert. In other words, most of the testimony would instead focus on the activities of Luis Hidalgo Jr. who could be simply referred to as the client, decreasing the memory burden on Jurors.

Furthermore, some guilt or aggravation evidence that comes into evidence as admissible only against one defendant could raise serious problems for a co-defendant and prevent individualized decision making. Thus failure to order separate trials for Mr. Hidalgo III and Mr. Hidalgo Jr under these circumstances will "prevent the jury from making a reliable judgment of guilt or innocence," *Zafiro*, 506 U.S. at 539.

Moreover, guilt phase evidence during this trial will inevitably affect Mr. Hidalgo III and Mr. Hidalgo Jr's Eighth Amendment rights to have their sentences based on "the character and

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record of the individual offender . . .." *Woodson v. North Carolina,* 428 U.S. 280, 304 (1976). While the acts of other co-conspirators to prove the conspiracy may be admissible against a defendant during the guilt phase, a jury must rely only on the defendant's actions and culpability when sentencing a capital defendant. *See Enmund v. Florida*, 458 U.S. 782 (1982)(reversal of death sentence because criminal culpability must be limited to defendant's actual participation in the crime, and his punishment must be tailored to his personal responsibility and moral guilt.)

For example, the allegations that Mr. Hidalgo III solicited the murder of two witnesses in this case is highly inflammatory to Mr. Hidalgo Jr. at the guilt phase and at the sentencing phase. Thus, Mr. Hidalgo III and Mr. Hidalgo Jr will suffer prejudice during the guilt phase of the trial due to the sheer magnitude of the case because the jury will face the nearly *impossible* tasks of (1) separating relevant from irrelevant evidence as to each and defendant, and (2) remembering what evidence applies to each defendant at sentencing.

While the prosecution will doubtlessly argue that evidence of any one co-conspirator is admissible against all to prove the conspiracy, this is not true during sentencing. The confusion that will result at sentencing from trying both defendants together will violate the Eighth Amendment requirement that "[f]or purposes of imposing the death penalty... criminal culpability must be limited to [the defendant's] participation in the robbery, and his punishment must be tailored to his personal responsibility and moral guilt." *Enmund*, 458 U.S. at 801.

In this case, juror confusion and "spillover prejudice" during the penalty trial is inevitable given the complex and inflammatory nature of the unrelated facts and charges. Accordingly, severance is necessary to ensure a fair trial and precise and individualized sentencing.

2. A Joint Trial Will Dilute Mr. Hidalgo III And Mr. Hidalgo Jr's Mitigation Evidence.

According to social science research, death verdicts are more likely in joined penalty trials. For example, in a Fresno County, California study conducted by Dr. Bronson, he

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concluded that all three defendants [desribed in the study] are likely to receive death verdicts about three times as often (66% compared to 23%) in joint trials as in severed ones. The additional studies referenced in Exhibit A produced similar results, leading Dr. Bronson to conclude that joinder in a death "penalty trial leads to a higher percentage of death verdicts and to less individualized decision making. There is also some evidence that jurors will be less likely to consider important social history mitigating evidence in a joined penalty trial. Exhibit A, p 21-22.

One aspect of the difficulty of individualizing penalty is the assessment of life experience. Life experience, or social history, is the heart of mitigation and penalty phase presentations. The Eighth Amendment requires that "[a] sentencer [must] be allowed to give *full* consideration and *full* effect to mitigating circumstances." *Penry v. Johnson*, 532 U.S. 782, 797 (2001)(*Penry II*). The *Penry II* Court clarified that,

> "Penry I did not hold that the mere mention of 'mitigating circumstances' to a capital sentencing jury satisfies the Eighth Amendment. Nor does it stand for the proposition that it is constitutionally sufficient to inform the jury that it may 'consider' mitigating circumstances in deciding the appropriate sentence. Rather, the key under *Penry I* is that the jury be able to consider and *give effect* to [a defendant's mitigating] evidence in imposing sentence. [A] sentencer [must] be allowed to give *full* consideration and *full* effect to mitigating circumstances"

Penry II, 532 U.S. at 797(internal quotes and citations omitted)(emphasis in original).

Thus any procedure or process that interferes with a jury's ability to give full consideration and effect to defendant's mitigation evidence violates the Eighth Amendment. Separate trials are necessary to preserve Mr. Hidalgo III and Mr. Hidalgo Jr 's rights to individualized sentencing because joint penalty trials will dilute the mitigation evidence, thus robbing the jury of its ability to give full effect and consideration to his individual circumstances. This is especially true where, as here, you have a father and son both facing the death penalty.

It is likely in this case that both capital defendants will present similar arguments at the

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penalty defense. For example, both are Latino Americans in a country where they are a minority. Thus, their course in life was influenced by external factors, and they became the product of societal forces they neither understood nor could control or overcome. That might be a compelling argument for one defendant, but it will lose its impact if retold for each defendant. The impact of the plea for mercy will tend to be discredited, depriving one or both of the defendants of individualized penalty consideration. When the jury hears multiple pleas for mercy, based on the same mitigating factors, the jury's capacity for mercy may be strained. In effect they are saying, is no one to pay for this terrible crime? That does not happen in a severed penalty phase, since a jury hearing a severed penalty phase is able to assume that the other defendant will receive death. See Exhibit A, at 2.

Both Mr. Hidalgo III and Mr. Hidalgo Jr run a substantial risk that the jury will disregard their mitigation evidence if they proceed jointly to the penalty trial. Counsel for each defendant have have consulted sufficiently with one another on the penalty phase of this case to make plain that there will be substantial themes supporting mitigation of punishment that are common to them. Thus, while Mr. Hidalgo III and Mr. Hidalgo Jr may each may have a compelling story to tell that favors life, repetition of these stories will de-sensitize the jury, and may well engender cynicism. Thus each defendant loses the benefit of his individualized circumstances when his codefendant relies on similar themes.

Because of the significant risk that co-defendants' similar themes will dilute each defendant's mitigation and/or transform such mitigation into aggravation, severance is necessary to protect the Eighth Amendment right to precise and individualized sentencing. While the policy advantage of joinder at guilt phase is that it allows the jury to assess the case comparatively, in that the jury can weigh the relative roles, strength of evidence, credibility, etc. for and against each of the defendants, deciding penalty is *not* comparative. That is the major

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reason why determining the joinder-severance issue is very different in the penalty phase of a capital trial from most severance motions heard by the courts.

3. Severance is required because of prejudicial association and likely confusion of evidence resulting from negative racial stereotyping.

In *Williams v. Superior Court* 36 Cal.3d 441, 452-453 (1984) the California Supreme Court focused on a particular form of prejudice in ruling that the trial court had abused its discretion in denying an African American capital defendant's motion to sever two "gang-related" homicides: negative racial stereotyping of African Americans as gang members. In the present case, as will be shown below, this form of prejudice will be present to an impermissible degree if Mr. Hidalgo III and Mr. Hidalgo Jr stand trial together.

In *Williams*, the California Supreme Court emphasized that prejudice flowing from improper joinder can take many forms:

> "It is true that the present case does not involve the 'highly inflammatory' issue of sex crimes against children. Yet it would be folly to suggest that we should limit the consideration of the prejudicial impact of a joint trial to cases which involve sexual assaults against minors. Examining the facts of the two separate incidents here, we find that all four of the factors established in the above model are also present in the current matter, albeit in somewhat different form.
>
> First, as we have noted above, the two shootings do not share sufficient common and distinctive marks to be admissible in the respective separate trials. Second, the evidence of gang membership - the sole distinctive factor allegedly common to each incident - might indeed have a very prejudicial, if not inflammatory effect on the jury in a joint trial. *The implication that gangs were involved and the allegation that petitioner is a gang member might very well lead a jury to cumulate the evidence and conclude that petitioner must have participated in some way in the murders* or, alternatively that involvement in one shooting necessarily implies involvement in the other... *In addition, as petitioner suggests, it might be the highly publicized phenomenon of gang warfare in Southern California which would be on trial as much as the defendant, thereby raising the spectre of prejudice far beyond the facts of the actual case.*"

Id. (emphasis added).

Here, too, the government's theory that the owner and employees of an Las Vegas strip

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club are responsible for all of the violence alleged in the information and indictment is unfairly bolstered when the government is allowed to bring together in one courtroom two Hispanic-American males who run and work for a Las Vegas strip club, whose mere joint presence in a confined setting gives a constant visual reinforcement to the common and incorrect racial stereotype that two Hispanic American males are probably violent, and that their alleged crimes, no matter how divergent, must necessarily be gang related.[12] Further, as in *Williams*, it might be the highly publicized phenomenon of gang and strip club violence in Las Vegas that would be on trial as much as the defendants, thereby raising the spectre of prejudice far beyond the facts of the actual case.

The United States Supreme Court described local prejudice against minorities in America in words that have equal force in this case:

> On the facts of this case, a juror who believes that blacks are violence prone or morally inferior might well be influenced by that belief in deciding whether petitioner's crime involved the aggravating factors specified under ... law. Such a juror might also be less favorably inclined toward petitioner's evidence of mental disturbance as a mitigating circumstance. More subtle, less consciously held racial attitudes could also influence a juror's decision in this case. Fear of blacks, which could easily be stirred up by the violent facts of petitioner's crime, might incline a juror to favor the death penalty.

Turner v. Murray, 476 U.S. 28, 36.

To most jurors Mr. Hidalgo III and Mr. Hidalgo Jr are members of a minority or an "out-group." Exhibit A, at 2, 4-5. Of course ethnicity is a cognizable trait. Individuals in such a group become almost fungible, and in this case they share other qualities, including their co-

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12. Mr. Hidalgo III and Mr. Hidalgo Jr are not speculating on the high probability of such racial stereotyping in this case. In the most recent of a long line of empirical research on this issue, Stanford researchers found that in a carefully constructed study based on 600 death eligible cases, "the more stereotypically Black a defendant is perceived to be, the more likely that person is to be sentenced to death." J. Eberhardt, et. al, *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes, Psychological Science*, Vol. 17, No. 5 (2006). The authors note that prior studies have confirmed that "people associate Black physical traits with criminality in particular", and that "[t]he more stereotypically Black a person's physical traits appear to be, the more criminal that person is perceived to be." The same is true for Latino Americans.

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defendant status and their family name. People, and thus jurors, tend to stereotype in such a situation, what has been called "out-group homogeneity," so that people who are not a part of the group attribute more similarities to the group members than they would to their own group. This tends to lessen the ability of a jury to individualize its decision, a critical requirement of both the guilt and penalty phases of a capital trial. *Id.*

For these reasons, the risk that racial prejudice may infect a joint trial of Mr. Hidalgo III and Mr. Hidalgo Jr, is "unacceptable in light of the ease with which that risk could (be) minimized." *Turner v. Murray*, 476 U.S. 28, 36 (1986). As in *Williams*, Mr. Hidalgo III and Mr. Hidalgo Jr are entitled to separate trials in order to ensure that local prejudice against a racial minority does not swamp each defendant's right to a fair trial.

4. A Joint trial for one Mr. Hidalgo will prejudice the other Mr. Hidalgo Because He Will Suffer From Negative Spillover, the Reverse Halo Effect, and Guilt by Association.

Prejudice "may be demonstrated by showing... that the jury cannot be expected to compartmentalize the evidence with respect to different defendants due to a 'prejudicial spillover effect' between the cases against them... ." *United States v. Boone* 437 F.3d 829 (8th Cir. 2006)(citing *United States v. Lueth*, 807 F.2d 719, 731 (8th Cir.1986)). Spillover effects may occur "where the crimes of some defendants are more horrific or better documented than the crimes of others." *United States v. Innamorati*, 996 F.2d 456, 469 (1st Cir.1993).

Here, joinder of Mr. Hidalgo III and Mr. Hidalgo Jr would be severely prejudicial because, among other things, Mr. Hidalgo III is accused of solicitng the murder of two witnesses in this case. This is highly inflammatory. The very fact that it is a separate charge in this case is evidence that it is considered severe and reprehensible conduct. Because Mr. Hidalgo III and Mr. Hidalgo Jr are already at risk of being lumped together due to the factors discussed above (prejudicial association and racial/outgroup stereotyping), and because the jury will be instructed

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at the guilt phase that all of Mr. Hidalgo III's acts can be attributed to Mr. Hidalgo Jr, and vice versa, for purposes of the conspiracy to commit murder charge, the likelihood that the jury will impermissibly consider the inflammatory evidence of Mr. Hidalgo III's separate crimes in the penalty phase is significant. In addition, evidence of allegations of *other* violent acts by Mr. Hidalgo Jr will increase the spillover effect upon Mr. Hidalgo III.[13]

Moreover, regardless of who the jury perceives is more blameworthy, both defendants will suffer prejudice from joinder due to the "negative halo effect" whereby the less 'sinister' defendant is attributed guilt by association. Thus, where evidence of the acts of each defendant do not overlap, each are still held blameworthy. One defendant, Mr. Hidalgo Jr, is alleged to have ordered the killing of Mr. Hadland and to have offered and paid money to the triggerman. He is alleged to have manufactured stories for Deangelo Carroll to repeat to police and to have written a note to keep people from talking. The other defendant, Mr. Hidalgo III, is additionally charged with two counts of solicitation for murder. Oddly enough, both defendants are prejudiced by joinder. The "worst" defendant is prejudiced because he will be perceived as the one most deserving of death, if one defendant must be chosen. Yet the other defendant is prejudiced because of the additional allegations involving the possible killing of two additional people, the "negative halo effect." Of course these factors are amplified by the father-son relationship shared by the defendants in this matter.

Thus no matter which defendant the jury singles out as "the worst," each will suffer prejudice from joinder. Moreover because each defendant is charged in the overarching conspiracy to murder, but the facts vary for each defendant, while only Mr. Hidalgo III is charged with two counts of solicitation of murder, the risk of spillover is heightened because of the likelihood of jury confusion. Because a capital defendant's "punishment must be tailored to

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[13] Deangelo Carroll indicated that Mr. Hidalgo Jr. previously had harmed people.

his personal responsibility and moral guilt," *Enmund*, 458 U.S. at 801, the risk of spillover prejudice is unacceptable in this case and requires severance.

5. A Joint Penalty Trial Will Prejudice Mr. Hidalgo III and Mr. Hidalgo Jr if Lingering Doubt Becomes His Penalty Phase Strategy.

Lingering doubt may be a factor for both defendants in this case, based on the the lack of strngth of the government's case as well as the impeachment and bias of one or more problematic government informants.[14] Lingering doubt is a legitimate and common consideration in a penalty phase. *See e.g., Siripongs v. Calderon* 133 F.3d 732 (9th Cir. 1998) (failure to present evidence of accomplice defense in penalty phase of capital murder prosecution was not ineffective assistance of counsel, because counsel made reasonable tactical decision to capitalize on any lingering doubts about defendant's actual involvement in crimes); *Bryan v. Mullin* 335 F.3d 1207, 1242 (10th Cir. 2003)(decision to pursue a lingering doubt strategy should be granted wide deference, especially if mitigating evidence is presented that complements that strategy. However, in a joint penalty phase, this potential mitigating circumstance is more likely to be lost. For example, if either defendant in this case testifies that he participated in the conspiracy alleged between them, the other defendant loses the benefit of any lingering doubt created as to his own participation. Thus the non-testifying defendant suffers prejudice where, if tried alone, lingering doubt would have remained with the jury as to his participation.

Likewise, multiple defendants who assert the lingering doubt issue at penalty phase, often point powerfully at another defendant as the major player. While it may be rational to tolerate mutual blame in determining guilt, in a penalty phase the jury decision must be individualized,

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[14] This is not the appropriate time or place to impugn the quality and quantity of evidence relied on by the prosecution. However, for the purpose of illustrating the potential for lingering doubt, the prosecution, relying on many of the same witnesses as will testify in the cases against Mr. Hidalgo III and Mr. Hidalgo Jr, failed to convict the alleged triggerman, Kenneth Counts, of pulling the trigger. The defense teams have a good faith basis for believing that lingering doubt will be a pertinent issue if the prosecution secures convictions against the defendants.

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not comparative. Forcing the jury to choose culpability among defendants at the guilt phase may sometimes be proper, but such balancing in a joined penalty phase is inappropriate. It is exponentially more prejudicial when the relationship between the defendants is that of father and son.

6. Joining a Weaker Case to a Stronger One Is Likely to Negatively Impact the Defendants Whose Case is Weaker.

A factor causing prejudice in joinder of charges is when a relatively weak case is joined to a relatively strong one, so that there is a spillover effect likely to alter the outcome of the weaker case. It is reasonable to believe that a similar process would operate in the joinder of defendants. Exhibit A, at 6. When granting a writ to sever two co-defendants, the court in *Calderon v. People*, 87 Cal. App. 4th 933 (2001), looked to the fact that the prosecution had joined a weak case to a strong one. There, the co-defendant in the trial was also facing charges for an unrelated but joined case in which *Calderon* was not involved. Because of the joined charges for the co-defendant, the court applied the factors used in joinder of charges cases to decide the issue of joinder of co-defendants . One such factor is the combining of a strong case with a weak one. Such joinder can lead to a spillover effect, strengthening the weak charge in the minds of jurors.

This legal issue is applicable to both defendnats as the strongest piece of government evidence is the current case is the tape of Mr. Hidalgo III speaking with Deangelo Carroll after the death of Mr. Hadland. On the other hand, Anabel Espindola and Deangelo Carroll place much more culpability for and attribute many more acts leading to the incident on Mr. Hidalgo Jr.

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7. Due ot the Father-Son Relationship, A Joined Trial will put the Defendant's in the Real Position of Injuring Their Co-defendant, and Thereby Producing Non-Statutory Aggravating Evidence, by Presenting Their Full Mitigation Case.

If Mr. Hidalgo III and Mr. Hidalgo Jr are not provided separate trials, father and son will each be confronted with the issue of presenting their full mitigation case and run the risk of harming their father/son, or to refuse to present parts of the mitigation case as part of the greater good. For instance, Mr. Hidalgo Jr may have evidence of being a "good father" while Mr. Hidalgo III may have evidence of being raised in a "neglectful household." While both may be true and both are recognized as legitimate mitigating evidence, it is unlikely both with be accreditied by the jury. One defendant's mitigation can serve as aggravation for the other defendant. However, this is not a trial tactics issue. A defendant who presents his full mitigation case may also alienate a juror who believes a defendant is more worthy of death because he did not protect his father/son.

Furthermore, in a joint trial of father and son, potential mitigation witnesses are put in an unbearable position of deciding which defendant she/he most want to live. Using the above example, a sibling or close family friend may have critical evidence in mitigation that would support Mr. Hidalgo III's contention of being raised in a neglectful household. This witness may refuse to fully cooperate so as not to harm Mr. Hidalgo Jr. Or a witness that would buttress the "good father" evidence may not do so out of fear of harming the sentencing case of Mr. Hidalgo III. These problems would be avoided by having separate trials.

C. <u>THE CONFLICT BETWEEN FIFTH AMENDMENT (SELF-INCRIMINATION) AND EIGHTH AMENDMENT (MITIGATION) RIGHTS OF CO-DEFENDANTS REQUIRES SEVERANCE IN THIS CASE.</u>

As discussed above, it is well settled that a capital defendant must be permitted to offer, and the sentencer must consider, evidence in mitigation of punishment. Such factors include his

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post-crime cooperation with law enforcement, and his expressed remorse during the trial or sentencing proceedings. See *Gregg v. Georgia*, 428 U.S. 153, 197 (1976) (listing the extent of the defendant's cooperation with law enforcement as an example of a mitigating factor). See also, *Minnick v. Mississippi*, 498 U.S. 146, 167 (1990) (Scalia, J., dissenting) ("A confession is rightly regarded by the [Federal] Sentencing Guidelines as warranting a reduction of sentence, because it "demonstrates a recognition and affirmative acceptance of personal responsibility for . . . criminal conduct' . . . which is the beginning of reform.") (citation omitted). This creates a substantial likelihood that, in according mitigating weight to one defendant's voluntary self-incrimination and expressions of remorse, the jury will at the same time treat as aggravating the failure of his co-defendant to produce similar evidence in mitigation.

The difficulty with this, of course, is that the Fifth Amendment right against compelled self-incrimination applies with undiminished force to the penalty phase of a capital case. *Estelle v. Smith*, 451 U.S. 454 (1981). Thus any adverse consideration by a sentencing jury of a capital defendant's failure to incriminate himself--whether by cooperating with the police investigation, confessing to his role in the offenses charged, or expressing remorse either before or after conviction--would violate that defendant's Fifth Amendment rights, *Carter v. Kentucky*, 450 U.S. 288 (1981), *Griffin v. California*, 380 U.S. 609 (1965), and by extension his eighth amendment rights as well. *Zant v. Stephens*, 462 U.S. 862, 885 (1983) (Eighth Amendment violated by state's attachment of "aggravating" label to defendant's assertion of constitutional right) (dictum).

This conflict between the Fifth and Eighth Amendment rights of capital co-defendants is especially vexing because in many cases a trial judge will find that he can neither foresee it prior to trial nor resolve it by instructions. The conflict is unforeseeable prior to trial because a defendant will not normally offer evidence of his cooperation or remorse until the sentencing phase. Indeed, the evidence may not exist until that stage of the proceedings: one of the reasons

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for a bifurcated sentencing proceeding is to permit a defendant to assert his constitutional right to remain silent with respect to his guilt or innocence, and yet to express remorse or contrition for his crime at the sentencing hearing after conviction. A capital defendant enjoys an inviolable constitutional right to have the weight of the evidence considered by the sentencing jury, and the court may not circumscribe that right in any material way. *Penry v. Lynaugh*, 492 U.S. 302 (1989), *Hitchcock v. Dugger*, 481 U.S. 393 (1987), *Skipper v. South Carolina*, 476 U.S. 1 (1986), *Eddings v. Oklahoma*, 455 U.S. 104 (1982).

Just as the Court may not predict before trial how both the presence and the absence of co-defendants' remorse, cooperation and voluntary self-incrimination may enter into a joint jury sentencing trial, neither will the familiar remedy of jury instructions be available to safeguard the Fifth Amendment rights of the silent co-defendants. For the Court cannot tell the jury to disregard the fact that one defendant exercised his Fifth Amendment right to remain silent throughout the pretrial, trial and sentencing stages of the proceedings, as required by *Carter v. Kentucky*, 450 U.S. 288, *Bruno v. United States*, 308 U.S. 287 (1939), without treading upon the co-defendant's *Lockett* right to have his waiver of his Fifth Amendment rights considered in mitigation of his punishment. Simply put, if a defendant's willingness to waive his rights against self-incrimination is logically relevant to the sentence he should receive, so too must a co-defendant's unwillingness to make a similar waiver. The Court cannot by instructions deny the probative significance of the latter without nullifying the significance of the former as well. Severance of the defendants' capital sentencing hearings is the only remedy available to resolve this conflict between constitutional rights.

D. THE POSSIBLE CONFLICT BETWEEN SIXTH AMENDMENT (BRUTON) AND EIGHTH AMENDMENT (MITIGATION) RIGHTS OF THE CO-DEFENDANTS REQUIRE SEPARATE TRIALS.

The Sixth Amendment guarantees the accused a right to confront and cross examine the

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witnesses against him. *Bruton*, 391 U.S. at 134; *Crawford v. Washington*, 541 U.S. 36, 42 (2004). When the prosecution introduces a confession by a co-defendant that inculpates a defendant and that co-defendant does not take the stand, the inculpated defendant loses his right of confrontation. *Bruton*, 391 U.S. at 134. A limiting instruction will not cure this constitutional infringement because,

> "...powerfully incriminating statements of a codefendant who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial. Not only are the incriminations devastating to the defendant but their credibility is inevitably suspect, a fact recognized when accomplices do take the stand and the jury is instructed to weigh their testimony carefully given the recognized motivation to shift blame onto others. The unreliability of such evidence is intolerably compounded when the alleged accomplice, as here, does not testify and cannot be tested by cross-examination. It was against such threats to a fair trial that the Confrontation Clause was directed."

Id. at 135-136.

The court explained that a jury "cannot determine that a confession is true insofar as it admits that A has committed criminal acts with B and at the same time effectively ignore the inevitable conclusion that B has committed those same criminal acts with A." *Id.* at 131. Moreover, redaction of the confession is an improper remedy unless all direct and inferred reference to the inculpated defendant disappears from the co-defendant's confession. *United States v. Peterson*, 140 F.3d 819 (9th Cir. 1998)(deleting defendant's name from co-defendant's confession and inserting pronouns in its place is inadequate Sixth Amendment protection when the jury can infer that defendant was the deleted party.)

Recently, in *Crawford*, 541 U.S. 36, the Supreme Court reaffirmed its long-standing protection of the right of confrontation by holding that out-of-court statements that incriminate a defendant are inadmissible, despite their reliability, unless the witness is unavailable and the defendant had an opportunity to cross-examine the witness. *Id.* at 59.

According to the discovery, Mr. Hidalgo III made a statement to police officers upon

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arrest where he repeatedly asks to speak to his father before continuing to answer questions. These requests, if introduced in full, would violate Mr. Hidalgo Jr's right to confront under *Bruton*, 391 U.S. 123. However, prohibiting Mr. Hidalgo III the opportunity to admit this entire statement into evidence denies him evidence of 1) post-arrest cooperation with police, 2) operating under the control of his father, and 3) not being the ringleader and therefore less worthy of death, 4) and funcitioning at a level of dependence that shows immaturity for his age. Denying Mr. Hidalgo III evidence of this mitigation would deprive him of his Eigth Amendment right to a fair sentencing.

E. JURY INSTRUCTIONS WILL NOT CURE THE PREJUDICE RESULTING FROM JOINDER.

Courts often rely on the availability of jury instructions and limiting instructions when denying severance motions. The magnitude of instructions necessary in this case however will not cure the prejudice to defendants from joinder:

> "...the human limitations of the jury system and the consequent risk of spillover prejudice cannot be ignored... . At oral argument in this case, the Assistant United States Attorney averred that his multiple violations of the district court's limiting instructions during closing argument were the inadvertent result of confusion. *When a seasoned prosecutor is unable to keep track of nearly 200 limiting instructions given over the course of a 16-month trial, our faith in a lay jury's ability to do so is stretched to the limit.* Our presumption that a jury is able to follow the trial court's instructions is 'rooted less in the absolute certitude that the presumption is true than in the belief that it represents a reasonable practical accommodation of the interests of the state and the defendant in the criminal justice process.' The presumption is not irrebuttable."

United States v. Baker, 10 F.3d 1374, 1391 (9th Cir. 1993)(overruled on other grounds).

Although courts presume that jurors will perform their duty to follow the law, jurors may be somewhat unable, if not unwilling, to do so. Exhibit A, at 8-10. As the *Bruton* court readily and honestly acknowledged, "[t]he naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction. . . ." *Bruton*, 391 U.S. at 129 (*quoting Krulewitch v. United States*, 336 U.S. 440, 453 (1949). *See also*

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Exhibit A, at 9 (noting among other things that 40.5% of the respondents in a venue survey said that they would *ignore* the court's instruction to consider only the evidence they heard in court and *would* consider a defendant's confession that they learned of in the news.) .

A separate trial is the only remedy available to the Court to fully resolve the myriad of problems raised by joinder in this case.

F. **ANTAGONISTIC DEFENSES**

Counsel for Mr. Hidalgo III and Mr. Hidalgo Jr have trial strategies that result in antagonistic defenses. As this goes to the heart of trial preparation, counsel for each defendnat requests to review this evidence with the court in an ex parte hearing.

G. **SEPARATE TRIALS IN THIS CASE SERVES THE PUBLIC INTEREST IN JUDICIAL ECONOMY**

While joint trials may save time and resources in some cases, the same does not hold true when as here, almost all of the evidence against one defendant will not apply directly to the other defendant. The single trial of Mr. Hidalgo III and Mr. Hidalgo Jr will in effect be the equivalent of two trials conducted under the umbrella of a conspiracy theory. In this case, the sheer number of evidentiary objections mounted by counsel for either defendant regarding inadmissible evidence against one but not the other defendant, and the attendant limiting instructions, will significantly lengthen the duration of trial. Similarly, the extensive instructions necessary at the penalty phase attempting to cure any spillover prejudice to the defendants will cause significant delay. Such delays would fall away if separate trials occur. Indeed, because most guilt phase and *all* penalty phase evidence will apply primarliy to only one defendant, two trials will conserve rather than waste judicial resources.

Notwithstanding these examples of the ways in which joinder will actually impede judicial economy, the need for severance far outweighs any perceived efficiency resulting from a joint trial. As the court in *United States v. Ayala Lopez*, 319 F.Supp.2d 236, (D.Puerto Rico)

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aptly stated, "we are unable to conclude that the time required for two separate trials will be substantially greater than the time required for a joint trial. Needless to say, when balancing life and judicial economy, we refuse to tilt the balance in favor of the latter." *Id.* at 240.

CONCLUSION

For the reasons stated herein, Mr. Hidalgo III and Mr. Hidalgo Jr respectfully requests the Court deny the State of Nevada's Motion to Consolidate Case No. C241394 Into C212667.

Dated this 8th day of December, 2008.

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CERTIFICATE OF SERVICE

The undersigned, an employee of Gordon Silver, hereby certifies that on the 8th day of December, 2008, she served a copy of the DEFENDANTS LUIS HIDALGO JR. AND LUIS HIDALGO III'S OPPOSITION TO THE MOTION TO CONSOLIDATE CASE NO. C241394 INTO C212667, by facsimile, and by placing said copy in an envelope, postage fully prepaid, in the U.S. Mail at Las Vegas, Nevada, said envelope addressed to:

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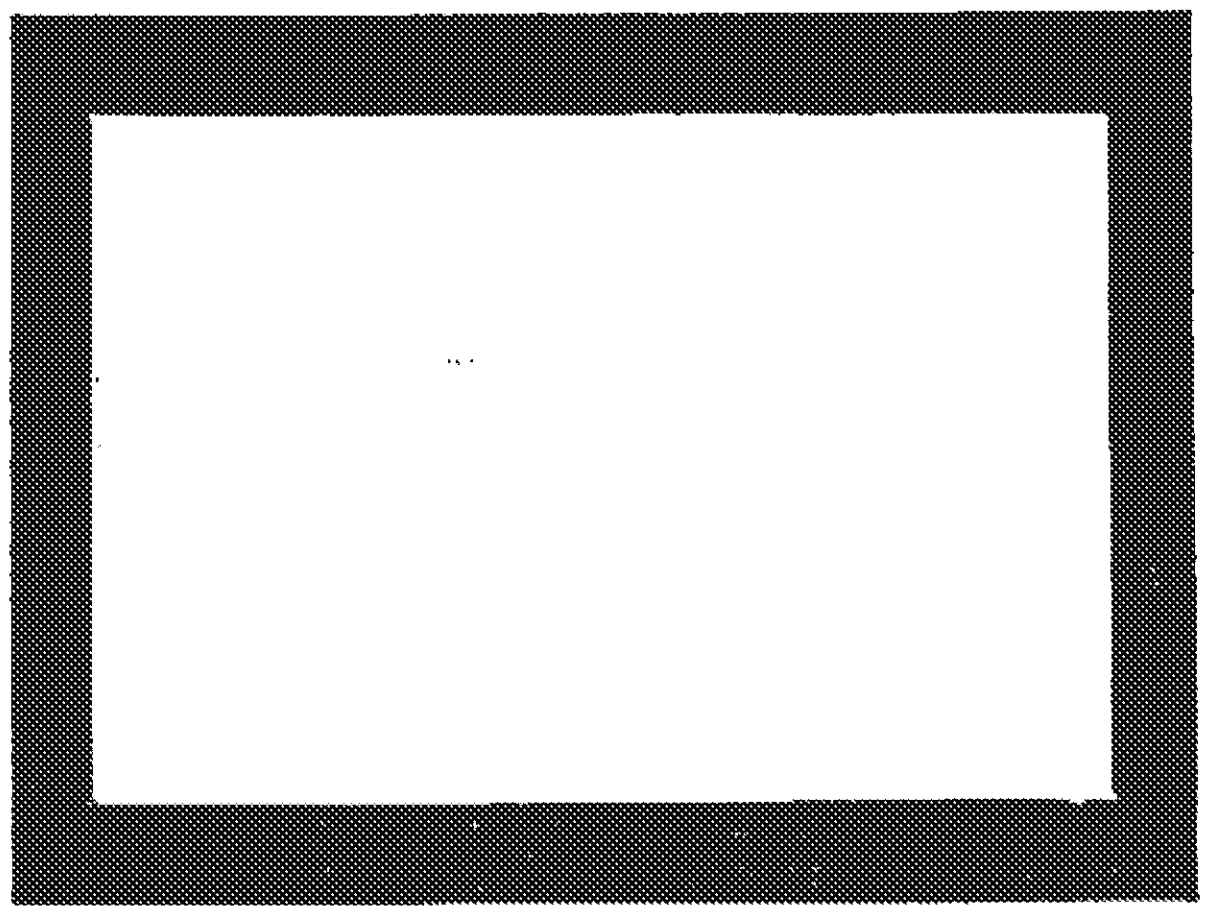

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SEVERANCE OF CO-DEFENDANTS IN CAPITAL CASES: SOME EMPIRICAL EVIDENCE

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Discussion Paper Series No. 94-1

SEVERANCE OF CO-DEFENDANTS IN CAPITAL CASES: SOME EMPIRICAL EVIDENCE

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There has been very little research conducted on the effects of joinder on co-defendants. This article summarizes the available findings on severance of co-defendants, reviews the related research on severance of charges, and then presents new data, focusing on the effects of joinder of capital co-defendants at penalty phase. These data suggest that jurors are more likely to opt for death and have greater difficulty individualizing their penalty decisions in joined trials.

I. INTRODUCTION

The problem of whether to sever co-defendants in criminal trials is a continuing dilemma. Courts prefer joinder because of its efficiency. There can be significant savings of time and money, and witnesses are not re-traumatized with a second recitation of their testimony. Prosecutors prefer joinder for the same reasons; in addition a joined trial can provide a substantial tactical advantage to the prosecutor if defendants blame each other or if otherwise inadmissible evidence is introduced.

Defense attorneys generally prefer severed trials, but it is often difficult to prove that a defendant will be prejudiced. Appellate courts are reluctant to reverse a trial judge's decision to reject severance, and the appellate decisions refusing to overturn convictions in those cases have generated case law that gives the appearance of a virtual per se rule favoring joinder. It would seem, however, that there is a distinction between, on the one hand, the legal standard that an appellate court adopts in ruling that a trial court judge's decision on joinder was not so egregious as to violate due process, and, on the other hand, the standard that a subsequent trial court judge adopts in deciding on a severance motion. It would be a matter of concern if that trial judge, believing that joinder would be unfair and prejudicial, nevertheless did not sever because case law or the fear of reversal would not require it.

II. PROBLEMS IN MULTI-DEFENDANT CAPITAL CASES

A. Capital Cases. The problem of joinder are of particular concern with capital defendants. The fairness issues at the guilt phase are in many ways similar to those faced in other criminal cases, but raise critical difficulties at the penalty phase. The

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* My special thanks to Geoffrey A. Braun, who obtained support for the study and who participated in the design and analysis of the empirical work. My thanks also to the judges of the Butte County Superior Court, who permitted the use of prior jury lists, and to Jury Commissioner Sandra Jones who was helpful in many ways.

cases instruct us that this factor is one supporting severance. (E.g., People v. Keenan (1988) 46 Cal.3d 478, a case on joined charges: "Severance motions in capital cases should receive heightened scrutiny for potential prejudice.")

Apparently, one reason for such concern is the seriousness of the possible penalty. A more relevant concern to the social scientist is that capital trials, by their very nature, impose a special burden on fact finders in the penalty phase. That burden is, as the United States Supreme Court said, the

> consideration of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.[1]

Thus, a penalty phase jury must individualize its decision. This requirement is more difficult with multiple defendants. It will be hard for a jury to consider individually each defendant's penalty phase mitigation in many situations with two defendants. Where there are more than two defendants, it will be harder still.

By no means do I suggest some sort of per se rule of severance in capital cases. However, as Keenan teaches, courts should be more open to severance in a capital case when there are other factors present that may lead to prejudice.

B. Dilution of Mitigation. Life experience is the heart of penalty phase presentations. Suppose, in one scenario, that multiple defendants present an "abused childhood" penalty defense. That might be a compelling argument for one defendant, but it will lose its impact if retold for each defendant. The impact of the plea for mercy will tend to be discredited, depriving some or all the defendants of individualized penalty consideration.

Another possibility: If the parents of one defendant urge the jury to spare the life of their son, what is the impact for those defendants whose parents do not make that plea?

Court decisions instruct us that lingering doubt is a legitimate and common consideration in a penalty phase. But in a joint penalty phase with multiple defendants, this potential mitigating circumstance of individualized guilt may be lost.

C. Race. Of potential concern in many cases is that the defendants may be members of minority groups. Research tends to show that people tend to stereotype in such a situation, what has been called "out group homogeneity," so that people who

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[1]California v. Ramos (1983) 463 U.S. 992, 1001, n. 13 (citation omitted). As the California Supreme Court said:

> A capital penalty jury . . . is charged with a responsibility different in kind from . . . guilt phase decisions: its role is not merely to find facts, but also -- and most important -- to render an individualized, normative determination about the penalty appropriate for the particular defendant -- i.e., whether he should live or die.
> People v. Brown (1988) 46 Cal.3d 432, 448 (emphasis in original).

are not a part of the group attribute more similarities to the group members than they would to their own group.

D. Juror Memory. There is the problem of juror memory: Which facts applied to which defendants? Some aggravation evidence that comes into evidence as admissible only against one defendant could raise serious problems for co-defendants and prevent individualized decision making.

E. Special Problems. The limited research and the prior legal decisions themselves often deal with relatively simple problems. But the possible problems are many, and may be cumulative. There may be more than two co-defendants. The problems are difficult if there are only two, but the difficulties increase geometrically as additional capital defendants are added. Thus, meaningful juror consideration of the penalty issues in the case may be prevented. In one case, all three defendants wield the murder weapon. In another case the defendants are quite young and all present similar penalty-phase mitigation. Sometimes each defendant attempts to blame the co-defendants.

While difficulties arise if the penalty-phase mitigation is similar for each defendant, equally intractable problems may arise if defense counsel choose different approaches to the penalty phase. Even the exercise of shared peremptory challenges will be much more difficult. Similar problems can arise in the guilt phase as well, and they constitute one of the standard reasons supporting severance. The problems which occur in the capital penalty phase, however, can be more serious and sometimes more subtle. They can determine who lives and who dies. To encounter the classic finger pointing at the penalty phase is quite different from when done it is done in the guilt phase.

F. Jury Selection. Noncapital co-defendants in a capital trial have an additional issue. In a joint trial the jury would necessarily be death-qualified. The United States Supreme Court has held that the rights of a noncapital co-defendant who did not seek a severance were not violated when he was tried by a death-qualified jury. Buchanan v. Kentucky (1987) 483 U.S. 402. While death qualification, standing alone, might not require a severance, it is a factor that militates in favor of severing the noncapital defendants. Even the Lockhart Court acknowledged that "'death-qualification' produces juries somewhat more 'conviction-prone' than 'non-death-qualified' juries."[2]

There are other voir dire problems in a capital case. Joinder of multiple capital (and noncapital) defendants leads to several problems, both in the voir dire questioning, written or oral, and in the exercise of peremptory and cause challenges. Will defense counsel be required to agree about some or all the challenges? When some attorneys are only concerned with guilt-phase jurors, and others are primarily concerned with penalty-phase jurors, concurrence on whom to challenge is unlikely. The competing tactical concerns clash.

What happens if an attorney has a client facing the death penalty and wishes to voir dire jurors about an issue that can only arise if the case reaches the penalty phase?

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[2]Lockhart v. McCree (1986) 476 U.S. 162, 173.

The issue may be inadmissible and prejudicial during the guilt phase, but if an attorney expects his or her client to be convicted, he or she can tactically decide to raise the issue in voir dire. The court must decide whether the co-defendants should be penalized by revealing the information to the jury during the voir dire, thus prejudicing their guilt trials, or whether the first attorney should be prevented from seeking the necessary information.

What if multiple capital defendants take opposing sides on cause challenges? Is the court not then placed in the untenable position of committing possible error irrespective of the ruling?

G. Confessions. Bruton[3] makes the introduction of a confession a special and sometimes insuperable problem with joined defendants. The related problem of admissions also creates barriers to a fair trial. While there are alternatives such as redaction, they raise problems all their own. What is the court to do when it must redact potentially mitigating statements as to a co-defendant from another defendant's confession? Confessions are a prime example of the difficulty jurors have in considering evidence limited to fewer than all the defendants.

H. Prejudicial Associations with Co-Defendants. Some defendants bring qualities that could negatively affect their co-defendants. One defendant might have a significant prior criminal record. Another defendant may face additional serious charges. Even though prior records, uncharged criminal activities, and other matters may not be cross-admissible, jury members are likely to attribute some of these qualities to defendants who do not possess them. This can happen through confusion or stereotyping. Research tends to show that people do stereotype in such a situation, the process of assuming "out group homogeneity," so that people who are not a part of the group attribute more similarities to the group members than they would to their own group.

A particularly serious matter arises where one defendant has escaped or attempted to do so. Escape charges are prejudicial at the guilt trial, where such evidence is used to establish consciousness of guilt. A greater negative effect for a defendant who was not involved in the escape would arise at the penalty phase. The possibility of escape tends to undercut one of the most important arguments in support of life imprisonment without possibility of parole, that society can be protected from dangerous defendants without the necessity of executing them.[4]

This process of lumping co-defendants together is a common pattern. An example arose in a recent change-of-venue motion in a capital murder case in California involving nine co-defendants. A survey of a representative cross-section of 395 jury-eligible respondents was conducted. Those who recognized the case (N = 345, 87.3%) were asked the following prejudgment question:

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[3]Bruton v. United States (1967) 391 U.S. 123.

[4]In the study discussed below, §V, one jury panel member wrote, in explaining why he or she had voted in favor of the death penalty: "He (the penalty phase defendant) could perhaps be persuaded into escaping prison to again be influenced to killing again."

> The authorities have accused nine people of the murder and of other charges, including torture, kidnapping, and robbery. Based on what you have read, heard or seen about the case, do you believe that those accused are definitely guilty; probably guilty; definitely not guilty; or probably not guilty of murder?

Of the 345, 178 (51.6%) were willing to say that all nine defendants were either definitely or probably guilty. Only 13 respondents voiced concern with answering the guilt question as to all nine defendants. Of those, two still said the defendants were definitely guilty, and six said they were probably guilty. These defendants became an "out-group" that respondents lumped together in judging guilt primarily because they were charged together.[5]

There is also a tendency for people to attribute group characteristics in the direction of the most extreme example in the group.[6] Thus the least culpable defendant may be prejudiced by his or her association with the co-defendants; yet those co-defendants will also be prejudiced because the jury will compare them with the less iniquitous.

I. Defendant Testimony. The possibility that only some of the defendants may testify at the penalty phase is also a potential problem in a joint trial. For example, if one of the defendants takes the stand and others do not, jurors might be very likely to draw very damaging inferences from the "refusal" of the co-defendants to testify. Second, exonerating testimony is sometimes made unavailable by the pressures of a joint trial.

J. Confusion Arising from the Evidence, and Mutually Exclusive or Antagonistic Defenses. When multiple defendants clash, confusion is increased. Reliability can be undermined. Furthermore, each defendant faces not only the regular prosecutor, but one or more de facto qui tam prosecutors as well.

K. Practical Problems. There are also practical problems to be considered. For example, there is the problem of space. Courtrooms often are not designed to accommodate groups of defendants with their separate lawyers and investigators. The ability of counsel to discuss issues with their clients, with reasonable privacy, becomes a problem, as does security, transportation, and other mundane matters. Scheduling, hearing of motions, and simply running an orderly trial become difficult. Separate juries, if used, present serious obstacles. Keeping them apart, finding space for them, seating them appropriately in the courtroom (while preserving the privacy of lawyer-client confidentiality), and preventing prejudicial speculation about what is being going on while the other jury is in the courtroom are illustrative of the complexities. While these logistical problems may be tolerable in the ordinary case, these concerns can give rise to constitutional error or serious unfairness in a capital case.

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[5] People v Dodds, et al. (Trinity County, 1993).

[6] Note, "Rethinking Criminal Joinder: An Analysis of the Empirical Research and Its Implications for Justice," 52 Law & Contemporary Problems 325, 338-39 (citation omitted) (1989).

III. THE ROLE OF SOCIAL SCIENCE

Social science may be able to play a role in helping to understand whether joinder creates unacceptable levels of prejudice in particular cases. The social evidence may be divided into three general types. The first category is the research on joined charges, much of which provides insights into the effects of joining defendants.

The second area is that of related social science studies. By a related study I mean the kind of study that deals with illuminating the way in which jurors make decisions, handle their biases, respond accurately on voir dire, etc. Included would be such matters as prospective jurors' willingness to put aside prejudicial and irrelevant information when instructed to do so by the trial judge.[7] There are many other such studies conducted by other social scientists. Some go beyond jurors' willingness to follow instructions, and deal with their ability to follow the instructions. The results suggest that jurors have great difficulty in following the law in such situations, even when they are properly instructed. Furthermore, when they are not under the social-desirability pressure of responding to a judge in a courtroom, many jurors are unwilling even to profess their willingness to follow the court's instructions in certain situations. These studies are in addition to those that deal directly with severance issues, either of charges or of defendants.

The third area is the most directly relevant, studies of the effect of joinder of defendants. There is only one such reported study, but this article presents some additional data on the subject.

IV. RESEARCH ON JOINED CHARGES

A. General. Most of the social science research on severance deals with joined charges, not joined defendants. No doubt that is because it is much easier to design a study to measure the effects of such joinder.[8] However, much of the social science evidence from the joint-charge studies (and the language from the joint-charge severance cases) is relevant on the issue of severance of defendants.

The joinder of defendants and the joinder of multiple charges share the policy justification of judicial economy, but there is an important difference. The defendant is said to have an equalizing advantage when charges are joined: First, the defendant may benefit from concurrent sentencing; second, the defendant may avoid the draining impact of serialized charging. There is no concomitant advantage to a defendant from joinder with other defendants.[9]

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[7]Some of these studies are cited below, §IV.

[8]See Note, "Rethinking Criminal Joinder: An Analysis of the Empirical Research and Its Implications for Justice," 52 Law & Contemporary Problems 325 (1989). The author notes, "No empirical research has been published to date dealing with the potential for prejudice in trials of joined criminal defendants." Id., 338.

[9]It has been suggested that some joined defendants could benefit because of a consistency of result and/or from giving the jury an overall view of the case.

There are seven published empirical studies on joinder of charges.[10] They are designed to explore the major theories of prejudice that arise in joinder of charges. The three theories are as follows: (1) jurors may be confused and fail to segregate the evidence as to the specific charges ("jury confusion"); (2) the jury may accumulate evidence across charges ("accumulation"); (3) the jury may infer a defendant's criminal disposition from the joined charges ("criminal inference").[11]

While the studies are methodologically distinct, the general pattern is that a control group of subjects is used to pre-test the offenses to measure the percentage of guilty verdicts when the charges are presented separately. Mock jurors then hear the evidence of the joined offenses, voting on guilt. They are asked about the process that led to the verdicts. They are also asked about their recall of specific evidence, relating to "jury confusion;" they rate the evidence to test for "accumulation;" and then rate the defendant on qualities such as dangerousness, likability, credibility, and honesty, relating to "criminal inference."

The studies found some evidence of jury confusion although most of the studies did not find this linked to biased verdicts. That may be due to the fact that other research demonstrates that memory of specific facts is not strongly correlated with general impressions.[12] There was not much support demonstrated for the accumulation theory. The criminal inference theory was strongly supported, however. Jurors were persuaded by the multiple charges that the defendant had a criminal personality, a negative "halo effect"[13] that led to biased verdicts.

While the studies differed somewhat on the causes of bias, all found a greater likelihood of conviction with joinder. The biasing effect increased significantly as the number of joined offenses increased.

As noted, this research is not directly addressed to the problems of bias in trials of joined defendants. Nevertheless, some of the findings are applicable. The robust

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[10]Kerr, N., & Sawyers, G., "Independence of Multiple Verdicts Within a Trial by Mock Jurors," 10 Representative Research in Social Psychology 16 (1979); Horowitz, A., Bordens, K., & Feldman, M., "A Comparison of Verdicts Obtained in Severed and Joined Criminal Trials," 10 Journal of Applied Social Psychology 444-456 (1980); Bordens, K., & Horowitz, I., "Information Processing in Joined and Severed Trials," 13 Journal of Applied Social Psychology 351 (1983); Tanford, S., & Penrod, S., "Biases in Trials Involving Defendants Charged with Multiple Offenses," 12 Journal of Applied Social Psychology 453 (1982); Tanford, S., & Penrod, S. "Social Inference Processes in Juror Judgments of Multiple-Offense Trials," 47 Journal of Personality & Social Psychology 749 (1984); Tanford, S., Penrod, S., & Collins, R., "Decision Making in Joined Criminal Trials: The Influence of Charge Similarity, Evidence Similarity, and Limiting Instructions," 9 Law & Human Behavior 319 (1985); Greene, E., & Loftus, E., "When Crimes Are Joined at Trial: Institutionalized Prejudice?" 9 Law & Human Behavior 193 (1985).

[11]Note, "Rethinking Criminal Joinder: An Analysis of the Empirical Research and Its Implications for Justice," 52 Law & Contemporary Problems 325, 327 (1989). A fourth theory of prejudice identified by the courts, that a defendant may become embarrassed or confounded in presenting separate defenses, has not been tested empirically.

[12]See id., n. 39.

[13]Id., n. 46.

relationship between joinder and jurors drawing a criminal inference (from the other joined criminal activity) is troubling. A criminal defendant linked to other co-defendants, particularly when his individuality is lost to that of the worst co-defendant, may suffer from the acquired negative halo. Juror confusion can also be a major problem. Finally, the studies demonstrated the lack of effect of cautionary instructions.

B. Instructions As a Curative. Judicial instructions are often seen as a curative when courts are concerned about possible prejudice that could arise from refusal to sever. Some courts believe that joint trial problems can be obviated with an appropriate instruction, telling jurors to "unring the bell." There has been research on, first, the professed willingness of prospective jurors to follow judicial instructions; and, second, on their ability to do so. I will discuss some of that research below. First, the research suggests that jurors have much difficulty understanding judicial instructions.[14]

Second, jurors may often be unwilling to follow the court's instructions. In connection with severance and change-of-venue motions in other cases, social scientists have tested prospective jurors' willingness to put aside prejudicial and irrelevant information when instructed to do so by the trial judge. Some studies go beyond jurors' willingness to follow instructions, and deal with their ability to follow the instructions. The results suggest that jurors have great difficulty in following the law in such situations, even when they are properly instructed. Furthermore, when they are not under the social-desirability pressure of responding to a judge in a courtroom, many jurors are unwilling even to profess their willingness to follow the court's instructions in certain situations.[15]

In a venue survey about a defendant named Melton, respondents were asked the following question:

> Now suppose that you're a juror in a criminal trial—like the Shawn Melton case. The case has been widely reported in the newspapers and on TV and radio. Assume that during the trial you remember a news story that told about a confession that the defendant made to

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[14]It has been found repeatedly that even after service as a trial juror, a substantial proportion of persons is unable to understand correctly the principles of presumption of innocence, burden of proof, and reasonable doubt. See, e.g., Strawn, D. and Buchanan, R., "Jury Confusion: A Threat to Justice," 59 Judicature 478 (1976) (50% of instructed jurors did not understand after trial that the defendant did not have to present evidence of innocence); Sales, B., et al., Making Jury Instructions Understandable, (1981) (average comprehension level among 1,000 jurors of attempted murder trial instructions was 51%). The subjects of both studies cited were actual jurors.

The most recent study (including a literature review) is Reifman, A., Gusick, S., & Ellsworth, P., "Real Jurors' Understanding of the Law in Real Cases," 16 Law & Human Behavior (1992).

[15]There is an excellent general review of some of the literature of the effectiveness of judicial instructions, plus a review of the findings of the curative powers of such instructions in joinder of charges cases, in Note, "Rethinking Criminal Joinder: An Analysis of the Empirical Research and Its Implications for Justice," 52 Law & Contemporary Problems 325, 333-36 (1989). The author concluded that based on empirical studies, "curative instructions, as used by the courts today, are insufficient to counter the prejudicial effects of joinder." Id., at 336.

the police. But suppose the confession isn't presented during the trial. The judge instructs you that you must make your decision about guilt or innocence only on the evidence you heard in court. Without the confession, the prosecution's case is weak; it would not convince you beyond a reasonable doubt of the defendant's guilt. In reaching your verdict, which would you do?

I would not consider the confession even though it might mean the defendant will go free.

I would take the confession into consideration in reaching my verdict since it shows the defendant's guilt.

Of 386 respondents of this representative cross-section of jury-eligible people in the county, 194 (50.3%) said they would follow the court's instructions, but 156 (40.5%) would ignore the court and the law, 28 (7.3%) said they didn't know, and 8 (2.1%) refused to answer. Thus, only half even said they would ignore the prerrial publicity, and surely many of those would have great difficulty doing so, even if they tried.[16]

In a case involving severance of charges in San Diego, the survey results were even more disturbing. Respondents were asked about their ability to follow the judge's instructions to ignore a certain statement. Only 25.6% said they would do so; 67.5% said they would consider the statement, and 6.7% gave a don't know or refusal response.[17]

Even when jurors conscientiously try to follow instructions, they often have great difficulty in doing so. There are several studies investigating this problem. For example, those interested in decision making by jurors have written about a process called "hindsight bias,"[18] a distortion in judgment caused by attitudes or knowledge that a juror has. For example, a juror instructed to consider a defendant's criminal record only for purposes of credibility, but not as evidence of guilt, may try to do so. But knowledge of the defendant's incriminating past may lead the juror to view other evidence through a prism of guilt.[19] In an important study that provided some insight into why death-qualified juries were more conviction prone, the authors wrote that,

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[16]The data are reported in Declaration in Support of a Change of Venue Motion: A Highly Publicized Criminal Case (E. Bronson), in E. Krauss & B. Bonora, Eds., Jurywork: Systematic Techniques (2nd ed.) (Appendix E-2). New York: Clark Boardman, 1987, 1989 rev. Reprinted as part of Ch. 7, pp. 7-78 to 7-122, 1990 rev.

[17]The survey was conducted in connection with People v. Maier (San Diego Superior Court, 1988).

[18]E.g., Kagehiro, D., et al., "Hindsight Bias and Third-Party Consentors To Warrantless Police Searches," 15 Law & Human Behavior 305 (1991); Casper, J., "Juror Decision Making, Attitudes, and the Hindsight Bias," 13 Law & Human Behavior 291 (1989).

[19]One study found that subjects tended to ignore the limiting instruction. Juries with the criminal record information were likely to discuss it as evidence the defendant committed the crime. Hans, V. & Doob, A., "Section 12 of the Canada Evidence Act and the Deliberation of Simulated Juries," 18 Criminal Law Quarterly 235 (1976).

"ambiguous information tends to be interpreted in a way that maintains people's initial beliefs and confirms their expectations . . . ."[20] The authors found that jurors predisposed to convict resolved ambiguous testimony consistent with a prosecution theory, or "script," of the case, finding the prosecution's witnesses more credible than the defense's, the prosecution's version of the facts more plausible, the inference from the facts more consistent with guilt, and the witnesses' attributions more favorable to the prosecution. Such jurors even had a lower threshold of conviction.

One of the many studies on the ineffectiveness of judicial instructions noted that jurors were unaware of the extent to which they had been biased in their decision making by the improperly considered evidence.[21]

The classic statement of the lack of effectiveness of judicial instructions to cure the incurable came 25 years ago in the leading case dealing with a possible issue in any joined case: "'The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction. . . .'" Bruton v. United States.[22]

One last comment on the efficacy of judicial instruction in the context of a death penalty trial is in order. When jurors are instructed to perform unrealistic tasks, such as ignoring what they know or putting aside prejudices, it is a tenuous proposition to rely on when jurors are deciding guilt, where the rules are reasonably straightforward. But to expect them to do so in the penalty phase, when their very role is to bring to the jury all the community's biases -- vengeance, mercy, and a dozen more -- is even more unrealistic.

V. NEW EMPIRICAL DATA ON JOINDER IN CAPITAL CASES

A. Introduction. As noted above, there is a fair amount of research on the effects of joinder of charges, but only one study on the effect of joinder of co-defendants.[23] In that study, the thrust of the evidence was that jurors would have great difficulty considering separately the guilt evidence and each individual defendant's mitigating penalty-phase evidence. That study demonstrates a prejudicial impact on the facts of that case, but more empirical research is needed.[24]

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[20]Thompson, W., et al., "Death Penalty Attitudes and Conviction Proneness: The Translation of Attitudes into Verdicts," 8 Law & Human Behavior 95, 98 (citations omitted) (1984).

[21]Thompson, W., "Inadmissible Evidence and Juror Verdicts," 40 Journal of Personality & Social Psychology 453 (1981).

[22](1967) 391 U.S. 123, 129 (citations omitted). The Court added, "'A jury cannot "segregate evidence into separate intellectual boxes."'" Id., at 131.

[23]The results of that research were reported in Heaney, L., "Severance Motions: Successful Application of Social Science Evidence," July/August 1988 Forum 20.

[24]In addition, a good deal of very practical evidence was presented to the court on the kinds of difficult problems that can arise under certain circumstances in joint trials, particularly in the penalty phase of capital cases.

In the current study, the question was whether the joinder of three capital defendants in a case in which all participated in the killing and in which the penalty phase evidence was similar for all defendants will result in an unfair penalty determination by a jury. The hypothesis was that if jurors decide the penalties for the three defendants in a joint trial, then, first, they will be more likely to favor death, and, second, they will be less likely to make the individualized decisions that the law requires.

B. Method. The data for this study were obtained by administering a set of questionnaires to two groups of subjects. The first group was 236 college students from Chico State University. The group was reduced to 167 by eliminating those who would not be eligible to serve as a juror in a capital trial. Of the 69 excluded, 23 were non-citizens, 2 were under 18 years of age, and 44 were not death qualified, indicating either that they would never vote for the death penalty (Witherspoon excludables -- WEs) (29) or that they would always vote for the death penalty (ADPs) (15).

Of the 167 qualified subjects, there were 95 females and 72 males. The mean age was 22.53, and 95 of the subjects were in the age group of 18-21. All were enrolled either in Psychology or Political Science classes, both lower and upper division.

The second group of subjects was 98 residents of Butte County who had been placed in the jury pool by the Jury Commissioner for 1992. The names and addresses of 300 jury pool members, chosen in the standard manner by computer, were supplied to the experimenter, who mailed each a questionnaire with a cover letter and a return envelope. Of the 98 who responded, 22 were not death qualified, indicating either that they would never vote for the death penalty (9) or that they would always vote for the death penalty (13). Two additional questionnaires were rejected because the questions were not answered, leaving a net of 74 qualified respondents. Of these, 42 were women and 32 were men. The mean age was 46.01.[25]

Thus there were 241 qualified respondents, 167 students and 74 jury pool members.

C. Design. To test the hypothesis that a juror would be more likely to vote for the death penalty for a defendant tried jointly with co-defendants than if the defendant were tried separately, subjects were given one of four questionnaire versions (Composite, Able, Baker, or Charlie). In all four versions the crime was described in some detail, a murder-robbery-burglary involving three defendants (Able, Baker, and Charlie). In the composite version the respondent was then asked to assume that his or her jury had unanimously found the three defendants guilty of murder, robbery, and burglary. The respondent was also told that the jury had found that all the "special circumstances" charged against the defendants in the case are true -- that the murder was committed in the course of a robbery, by lying in wait, and by torture. The respondent was also told, in accordance with California law, that since the defendants have been convicted of murder with special circumstances, the only punishment is either the death penalty or life imprisonment without the possibility of parole (LWOP).

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[25]Nine were in their twenties, including one aged 20 and one aged 21.

The nature of a penalty trial was described, and the respondents were then instructed on the meaning of aggravating and mitigating circumstances and the process of deciding between death and LWOP, in accordance with applicable CALJIC instructions.

The respondent was presented with an extensive description of both aggravating and mitigating evidence for each defendant, including such factors as the brutality of the crime, the role of each defendant, his prior criminal background, and his social history.[26] In the composite version, respondents were told, "The judge instructs the jury that it must decide the punishment for each defendant separately and that the defendants need not necessarily receive the same punishment."

Respondents then voted either for the death penalty or for LWOP for each defendant. They were also asked for any reasons considered in reaching a decision.

The three other versions described severed trials, one for each defendant.[27] The same full scenario of the crime was presented, but the penalty phase evidence concerned only the penalty phase evidence for that individual defendant, and the respondent was asked to make a penalty decision only on that defendant. E.g., "The judge now instructs you to consider your penalty verdict only as to defendant Charlie."

The scenarios produced a good division of penalty decisions. Overall (including both the joined and composite versions), 56.6% of the verdicts were for death, and 43.4% were for LWOP.[28] Interestingly, jury pool members and students voted for the death penalty at almost exactly the same rate, 56.1% for jury pool members, and 56.8% for students. There was some variation between defendants: overall, Able got death on 37.4% of the questionnaires, Baker got death on 76.3%, and Charlie got death on 58.2%. Thus, it would seem that the respondents saw the penalty decisions as fairly even overall, and that, at least in a general overall way, they were also able to see meaningful differences between the defendants.

D. Results. The results will be discussed in three ways. First, the combined results of the two groups, students and jury pool members, will be noted. Then each of the two groups will be examined separately.

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[26]The guilt and penalty scenarios of the composite questionnaire were 3,078 words in length, plus the introduction and questionnaire portions, including a brief death qualification. For experiments of this type, this questionnaire is quite long. While not approaching the length of a trial, it is much longer than, for example, the questionnaire scenarios used to obtain verdict or penalty decisions in the standard change-of-venue questionnaire.

[27]The guilt and penalty scenarios of the severed questionnaires averaged 1,672 words in length, plus the introduction and questionnaire portions, including a brief death qualification. The reduction in length from the composite scenario was obtained by omitting the penalty scenarios of the co-defendants.

[28]These results are comparable to those obtained in actual capital trials that go to penalty phase in California, in which death verdicts are returned approximately 50% of the time. California Appellate Project, Recap, August 13, 1990, p. 30.

1. Combined Results. Table I shows the penalty verdicts combined across the two studies and for all three defendants. The table shows that respondents voted for death 65.1% of the time when defendants were tried jointly, but just 47.2% of the time when the defendant was tried alone. This provides evidence that joinder, at least in some cases, makes it more likely that a defendant will receive the death penalty. This result was highly statistically significant.[29]

Table 1. Combined Results for Subjects Who Would Be Eligible to Serve As Capital Juror (N = 241[30])
(All Defendants, Both Studies)

Death Penalty When Joined	Death Penalty When Severed	LWOP When Joined	LWOP When Severed
65.1% (127)	47.2% (83)	34.9% (68)	52.8% (93)

P < .001

Table II (next page) breaks out the penalty verdicts by defendant. As can be seen, each of the defendants is more likely to receive the death penalty when tried jointly than when his case is severed.

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[29]The chi-square (X^2) test is used to determine the probability (P) that the two variables (joined trial death verdicts and severed trial death verdicts) are associated by chance. X^2 is a standard and basic statistical technique. Social scientists generally agree that a P of .05 or less means that a result is statistically significant; such a relationship will occur by chance only five times in a hundred. A result of .01 or less (fewer than one chance in a hundred) is said to be highly statistically significant. In Table I there is less than one chance in a thousand (P < .001) that these results could have occurred by chance, that is, that there is no relationship between the death penalty decisions and whether that decision is made in the joined or in the severed condition.

When P is between .05 and .10, the results are said to be marginally statistically significant. The X^2 test is very sensitive to sample size, so it is difficult to demonstrate statistical significance with small samples. The sample sizes in most of the variations in this experiment were relatively small, so it required large disparities to produce statistical significance. However, even when the results do not yield results that are statistically significant, the results may still be significant from a policy point of view, since a larger sample size that produced the same results would show statistical significance, assuming, of course, that the observed pattern remained unchanged.

[30]There were 241 respondents, of whom 65 had the composite scenario and 176 had single individual scenarios. Thus there were 195 penalty decisions in the joint scenario and 176 penalty decisions in individual scenarios, a total of 371 decisions.

One death qualified respondent from the jury pool with the composite scenario was unable to decide on any penalty. That questionnaire was excluded.

Table II. Combined Results for Subjects Who Would Be Eligible to Serve As Capital Jurors (N = 241)
(All Defendants, Both Studies, By Defendant)

Scenario	Death Penalty	LWOP
Able (Joined) (65)	43.1% (28)	56.9% (37)
Able (Severed) (66)	31.8% (21)	68.2% (45)
Baker (joined) (65)	80.0% (52)	20.0% (13)
Baker (severed) (53)	71.7% (38)	28.3% (15)
Charlie (joined) (65)	72.3% (47)	27.7% (18)
Charlie (severed) (57)	42.1% (24)	57.9% (33)

P for Able < .10; for Baker n.s.; for Charlie < .001

Non-Individualized Decision Making. An important legal requirement is that the penalty verdict be individualized. Thus a process that tends to treat co-defendants as semi-fungible is troubling. In this study there was a strong tendency for respondents to lump the three defendants together in penalty phase decision making. There were 65 composite questionnaires.[31] In 36 of them the respondents gave the same penalty verdict for all three defendants (24 death verdicts for all three, 12 LWOPs for all three).

Intuitively this result -- giving the same penalty verdict for all three defendants -- seems very high, but there is a way to test this finding. If a coin comes up heads three times in a row, that is much higher than pure chance. We would expect that the chances of that happening are just one in eight -- the odds of it happening once (1/2) times the odds of it happening the next time (1/2) times the chances of it happening a third time (1/2). The combined chances of three consecutive heads or three consecutive tails are thus one in four, 1/8 + 1/8.

The chances that a respondent would vote for the death penalty for any of the defendants in this experiment are best measured by what the respondents

[31] An additional respondent "hung" on all three penalty decisions. This questionnaire was excluded from the analysis. Some believe that a juror inclined toward hanging is usually a plus for the defense.

actually did, shown in Table III . These data allow us to compute the a priori odds that a respondent would vote the same punishment for all three defendants if the decisions were independent of each other, like coin flips.[32]

Table III. Measuring the Level of Support for Each Penalty for Each Defendant (Both Studies, Both Formats)

	Able	Baker	Charlie
Death Penalty %	37.4%	76.3%	58.2%
LWOP %	62.6%	23.7%	41.8%

Statistically, we would expect that respondents would vote for the death penalty for all three defendants just 16.61% of the time,[33] yet death verdicts for all three defendants were cast on 36,92% of the composite version questionnaires. Similarly, we would expect all three votes for LWOP just 6.20% of the time,[34] yet it actually happened 18.46% of the time. Put another way, we would have expected that just 22.81% of the respondents would have chosen the same verdict for all three defendants, but in practice it happened 55.38% of the time.[35] This would suggest that the penalty decisions were not individualized, but rather that the respondents were tending to make a collective penalty judgment.

In fact the above analysis may seriously understate the problem of how non-individualized penalty phase decision making favors death in joint trials. That is because the probability was calculated based on the percentage of death votes both in joined and severed trials. But joinder increases the likelihood of death verdicts, thus bootstrapping the expected percentage of death verdicts. If we calculate the likelihood of three death verdicts just in severed trials, using the percentages in Table IV (next page), the chance of death verdicts for all three defendants drops from 16.61% in joint trials to just 9.60% in severed trials.[36] The data from this experiment suggest that, relatively speaking, all three defendants are likely to receive death

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[32]It could be argued that penalty decisions in joined capital trials are not like coin tosses, since they are not discrete events. That argument may prove too much if it means that jurors' penalty decisions in joint trials are not individualized.

[33].374 (Able) x .763 (Baker) x .582 (Charlie).

[34].626 (Able) x .237 (Baker) x .418 (Charlie).

[35]These calculations included only those who voted for a penalty for each defendant. There were 65 such respondents with composite version questionnaires. An additional respondent "hung" with respect to all defendants. That respondent was omitted from these calculations.

[36].318 (Able) x .717 (Baker) x .421 (Charlie).

verdicts roughly four times as often (36.92% compared to 9.60%) in joint trials as in severed ones.

Table IV. Measuring the Level of Support for Each Penalty for Each Defendant (Both Studies, Severed Formats Only)

	Able	Baker	Charlie
Death Penalty %	31.8%	71.7%	42.1%
LWOP %	68.2%	28.3%	57.9%

2. The Significance of the Comments by Respondents.

a. A partial explanation of why joined penalty trials are prejudicial. The final question asked on the questionnaire, after the respondent votes either for the death penalty or LWOP, is as follows: "What are some of the reasons you considered in making your decision?" A content analysis of the responses shows that the respondents tended to focus either on the defendant's role in the crime or on his social history. Only a few of the respondents seemed to weigh the aggravating factors against the mitigating ones. In the composite format, 23 of the 65 respondents lumped the defendants together or gave exactly the same comment for the penalty for each defendant. E.g., one said, "the crime," for each defendant; another wrote "premeditation" for each, then added, "all have equal guilt." Another wrote, "I do not take tragic upbringings or bad home-lives into question when it comes to murder. . . . It is too bad these three men were not more properly punished for their crimes when they were juveniles . . . ." Another respondent wrote, "Brutally committing murder" for Able, then "same as above" for Baker and "same as above" for Charlie.

The most revealing insight from examining the comments is that respondents were much more likely to consider the childhood and social history of the defendant when they heard the case in the severed version. The data are shown in Table V (next page). Respondents were far more likely to comment on a defendant's social history/mitigation evidence in the severed state than in the joined penalty scenario.

The Able penalty phase comments are instructive. In the composite scenario, just 22 of the 65 respondents, 34%, made some comment about Able's brutal childhood in explaining their verdicts. Of these, 8 viewed his social history as mitigating, leading to an LWOP verdict, and 10 saw the evidence as possibly mitigating but no excuse.[37] There were three respondents who indicated that Able might be capable of rehabilitation, probably based on some positive aspects of his background; they voted

[37]One of these respondents still voted for LWOP; the rest voted for death.

for LWOP. One other respondent wrote that Able's history indicated his violence and that he was a habitual offender.

Table V. Percentage of Respondents Mentioning Defendant's Social History

	Respondent Mentioned Defendant's Social History	
Defendant	Composite Scenario	Severed Scenario
Able	33.8% (22/65)	56.1% (37/66)
Baker	33.8% (22/65)	64.2% (34/53)
Charlie	38.5% (25/65)	66.7% (38/57)
All Defendants	35.4% (69/195)	61.9% (109/176)

When the Able case was presented to respondents in a severed format, 37 of 66 respondents, 56%, explained their verdict with a comment about Able's childhood or social history. Thus, relatively speaking, respondents were over one and one-half times more likely (1.66) to take note of the crux of Able's penalty defense. Of these, 25 saw his social history as mitigating.[38] There were 9 who stated that his bad life did not constitute an excuse,[39] and 3 thought he might be rehabilitated, presumably based on his abused background and attempts at reform.

Furthermore, as shown in Table VI (next page), in the separate penalty trial, over three-fourths of those who gave social history as a reason for their penalty decision on Able considered that evidence as supporting LWOP, while in the joined penalty scenario, just half saw that evidence as sufficiently mitigating to justify LWOP for Able.

Similar patterns were observed with respect to both Baker and Charlie, as shown in Tables V and VI.[40] Thus it would seem that one mechanism by which defendants

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[38]One voted for death (it was "kinder"), and the rest chose LWOP.

[39]One still voted for LWOP.

[40]It might be argued that this finding is tautological, that is, since more respondents voted for LWOP in the severed scenario, we would expect to find more references to the mitigating social history evidence. But respondents given the severed scenario were also more likely to cite but discount the social history evidence when they voted for the death penalty. The point is that the

Table VI. Impact of Defendant's Social History

Defendant	Social History Used to Support LWOP: Composite Scenario	Severed Scenario
Able	47.8% (11/23)	75.7% (28/37)
Baker	26.1% (6/23)	23.5% (8/34)
Charlie	47.8% (11/22)	63.2% (24/38)
All Defendants	40.6% (28/69)	55.0% (60/109)

fare better in severed penalty trials is that jurors are more likely to consider who they are, and how they came to do what they did. Perhaps jurors who hear such a sad story once will be more attentive and sympathetic to it than those who hear it, or some variation thereof, several times.[41]

Social history evidence is used in mitigation in an attempt to personalize the convicted murderer, as the defense attorney attempts to individualize and humanize the defendant. If jurors are less likely to consider such evidence in joint penalty hearings, the function of the jury to individualize its penalty decision-making may be adversely affected. The defendant becomes a stereotype again, just another murderer engaged in the apparently routine practice of justifying his act by blaming others.

b. Validity. In an experiment of this sort, one must be concerned with the question of external validity, that is, the extent to which the experiment measures

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respondents appeared to weigh the social history arguments more seriously in the severed scenarios.

In the Baker scenario, there is a small reversal in Table VI. However, in the severed scenario, many gave mitigating weight to Baker's background, but still struck the balance in favor of death.

[41]This is a variation on the approach taken by lawyers considering a bench trial before an experienced trial judge, and that judge's probable view of the classic defense, "I bought it from some dude on the corner." A jury might be willing to buy the defendant's story (or at least have a reasonable doubt) that he acquired the stolen television set from the "dude on the corner" who offered him the set for $10 in order to buy milk for his young child. Judges have been desensitized by hearing such stories too often.

Death-qualified jurors, who are by definition sympathetic to the death penalty, might be willing to vote for less than death for one defendant with a tragic childhood, but to accept the defense for multiple defendants cuts against the grain.

what it is supposed to measure in the real world. Questionnaires are not trials. The relative length and detail of the questionnaire are of some help in seeking verisimilitude, as are the instructions that accompanied it. The written responses indicate that the respondents took their task seriously; many responses were detailed and showed emotional intensity.

It should be noted that this was a study of prospective jurors, not juries. However, juror votes are the building blocks of jury verdicts. Deliberation rarely changes the initial majority decision. Kalven and Zeisel wrote many years ago in their classic The American Jury, "The deliberation process might well be likened to what the developer does for an exposed film: it brings out the picture, but the outcome is pre-determined."[42]

3. The Student Study. The overall data from the college student study are shown in Table VII. Fewer than half (46.7%) voted for the death penalty when the trials were severed, but almost two-thirds (65.9%) chose death in joined trials. Table VIII (next page) breaks down the penalty decisions for each decision. For each defendant, respondents were more likely to vote for death when the penalty trial was joined.

Table VII. Overall Verdict Choices for College Student Subjects Who Would Be Eligible to Serve As Capital Juror (N = 167)[43]
(All Defendants)

Death Penalty When Joined	Death Penalty When Severed	LWOP When Joined	LWOP When Severed
65.9% (89)	46.7% (57)	34.1% (46)	53.3% (65)

P < .005

4. The Juror Pool Study. The overall data from juror pool study are shown in Table IX (next page). Fewer than half (48.1%) voted for the death penalty when the trials were severed, but almost two-thirds (63.3%) chose death in joined trials. Table X (2 pages over) breaks down the penalty decisions for each decision. For defendants Able and Charlie, respondents were more likely to vote for death when the penalty trial was joined. However, respondents were more likely to vote for death for Baker in the severed condition.

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[42]H. Kalven & H. Zeisel, The American Jury 489 (1966).

[43]There were 236 respondents. Of these, 23 were non-citizens, two were under 18, and 44 were not death qualified (15 ADPs and 29 WEs), leaving a net of 167 qualified respondents; 45 had the composite scenario, 44 had the severed Able scenario, 40 had the severed Baker scenario, 38 had the severed Charlie scenario. There are more responses than respondents because those with the composite scenario (45) voted on all three cases.

Table VIII. College Student Verdicts by Defendant

Scenario	Death Penalty	LWOP
Able (Joined)	40.9% (18)	59.1% (26)
Able (Severed)	34.1% (15)	65.9% (29)
Baker (joined)	81.8% (36)	18.2% (8)
Baker (severed)	67.5% (27)	32.5% (13)
Charlie (joined)	70.5% (31)	29.5% (13)
Charlie (severed)	39.5% (15)	60.5% (23)

For Able, P n.s.; for Baker, P < .10; for Charlie, P < .005.

Table IX. Overall Verdict Choices for Juror Pool Subjects Who Would Be Eligible to Serve As Capital Jurors (N = 74) (All Defendants)[44]

Death Penalty When Joined	Death Penalty When Severed	LWOP When Joined	LWOP When Severed
63.3% (38)	48.1% (26)	36.7% (22)	51.9% (28)

P < .10

With respect to the jury pool respondents' reversal on Baker, there are two points to be made. First, there were six LWOP votes for Baker in the composite format. On five of those votes, the respondent voted for LWOP for all three defendants, the lumping-together tendency discussed above. If it is true that in joined penalty trials there are two forces operating, one a pro-death bias, and the

[44]300 questionnaires were mailed out, with 98 responding. Of these, 13 were ADPs, 9 were WEs, and two respondents did not answer, leaving a net of 74 qualified respondents. Table shows their responses. 20 had the composite scenario, 22 had the severed Able scenario, 13 had the severed Baker scenario, 19 had the severed Charlie scenario.

The response rate is reasonable for a single (no follow-up) mailed questionnaire.

Table X. Juror Pool Verdicts for Each Defendant

Scenario	Death Penalty	LWOP
Able (Joined)	50.0% (10)	50.0% (10)
Able (Severed)	27.3% (6)	72.7% (16)
Baker (joined)	70.0% (14)	30.0% (6)
Baker (severed)	84.6% (11)	15.4% (2)
Charlie (joined)	70.0% (14)	30.0% (6)
Charlie (severed)	47.4% (9)	52.6% (10)

P for Able ‹ .10; for Baker n.s.; for Charlie ‹ .10

other a tendency to lump defendants together, it may be that the lumping effect overcame the pro-death bias as to Baker. Second, this process may come into play especially for defendants who are most likely to receive the death penalty, as was true for Baker in the crime scenario in this experiment.[45] Another way to view the impact of a joined capital trial is that, most importantly, it makes death penalty verdicts more likely, but, secondarily, that it generates a leveling effect, wherein the most likely death candidates do a little better and the most likely LWOP candidates do significantly worse than the difference in their cases might suggest.[46]

VI. CONCLUSIONS ON SEVERANCE/JOINDER EXPERIMENT. Data from the experiment support the hypothesis that joinder in a three-defendant penalty trial leads to a higher percentage of death verdicts and to less individualized decision making.

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[45]An additional point is that because of the lower return rate of Baker questionnaires from jury pool members plus a fewer number that were submitted by death-qualified respondents, the number of usable Baker questionnaires was significantly smaller than for Able or Charlie (13 for Baker, compared with 22 for Able and 19 for Charlie). The smaller sample size can lead to a situation where a shift in just one or two votes can alter the relationships.

The combined verdicts, adding together both the students and the jury pool members, still show a greater likelihood of death verdicts for Baker in the joined penalty hearing.

[46]This view is contrary to the view of some lawyers, that the most culpable defendant is at great risk in a joint trial because the comparatively aggravated nature of his case makes a death verdict even more likely, and that the least culpable defendant might have some advantage in a joint trial because he will be compared to the most egregious defendants.

There is also some evidence that jurors will be less likely to consider important social history mitigating evidence in a joined penalty trial.

This study of joinder and severance of co-defendants is case specific, and therefore has limitations in terms of its generalizability. There is a need for researchers to explore whether the problems of prejudice in this case scenario also occur in other factual contexts. It is an area in which little research has been done, and it is to be hoped that with other approaches, we will be able to help identify and understand the implications for fair trial and judicial economy raised by joinder and severance.

EXHIBIT "B"

LAS VEGAS METROPOLITAN POLICE DEPARTMENT

VOLUNTARY STATEMENT

PAGE 1

EVENT #:050519-3516

SPECIFIC CRIME: HOMICIDE

DATE OCCURRED: 05-19-05 TIME OCCURRED: 2343 HRS.

LOCATION OF OCCURRENCE: NORTH SHORE ROAD AND LAKE MEAD DRIVE

CITY OF LAS VEGAS CLARK COUNTY

NAME OF PERSON GIVING STATEMENT: LUIS HILDAGO

DOB: [redacted] SOCIAL SECURITY #: [redacted]

RACE: SEX:

HEIGHT: WEIGHT:

HAIR: EYES:

WORK SCHEDULE: DAYS OFF:

HOME ADDRESS: 316 GLEN RIDING
LAS VEGAS, NV 89123 HOME PHONE:

WORK ADDRESS: WORK PHONE:

BEST PLACE TO CONTACT:

BEST TIME TO CONTACT:

The following is the transcription of a video recorded interview conducted by FBI SPECIAL AGENT B. SHIELDS and LVMPD HOMICIDE DETECTIVE M. MCGRATH, P#4575, on 05-24-05 at hours.

A. This one's probably to Z out the register.

Q. Right.

A. And I don't what the fuck these keys are. These are Mim's keys. These are her keys.

Q. And Mim's the manager there or something?

A. Yeah, she took a leave of absence 'cause she got real sick.

Q. Okay.

A. Some type of down there problem or some shit. I don't know. I _____(unintelligible).

Q. Okay. Hang on just _____(inaudible).

BS (B. SHIELDS). Mike, we're gonna need a chair too.

MM (M. MCGRATH). Okay.

BS. I'll grab a chair.

??. There you go. _____(inaudible).

MM. Did you get the other chair?

BS. Yes.

MM. Okay.

BS. Yeah, we're good.

MM. Okay. Good. You wanna a pen?

BS. Okay. Luis, like I said, my name's Agent Brett Shields. I'm with the FBI. This is Detective Mike McGrath from the Metro Homicide here. We're investigating the homicide that you're familiar with, correct? As far as, ah, ah, Detective McGrath was down at your place, right?

A. I don't, like I said, I, didn't pay too much attention.

Q. I know, I know, I know. I only talked to you briefly.

BS. Well that's.

A. 30 seconds, _____(inaudible).

BS. Well that 30 seconds that's what we're investigating. Okay? Whenever we have somebody down here we go ahead and we advise them of their rights. Okay? You're not under arrest at this point. I'm gonna go ahead and read you your rights just so you know what's going on because you have some possible involvement in this. Okay? You have the right to remain silent. Anything you say can be used against you in court. You have the right to the presence of an attorney. If you cannot afford an attorney one will be appointed before any questions, if you wish. Do you understand those rights?

A. Yeah.

BS. Okay.

MM. He just asked if you understand, that's all.

A. Yeah.

MM. How, you said you came here in what year? I just wanna.

A. Late part of '99.

BS. Can I get you to sign right there. Just.

Q. Where you livin' now, for an address that we can use? You got an address we can use to say that this is where you're staying?

A. 361 Glenn Riding.

Q. Is it Riding one word?

A. Yes.

Q. Is that Las Vegas?

A. Yes.

Q. What's the zip?

A. 89123.

Q. And, ah, give me, give me phone numbers. Give me a cell phone number.

A. 604-6348.

Q. And how about, um, you got a home phone or another phone you we can use if we need to talk to you?

A. That's it.

Q. What about the club or where you were? Do those have phone numbers in case we can't get you on your cell? Is there another phone number?

A. (No response.)

Q. No?

A. _____(both talking) I've always answer my own and make sure that my phone's on.

Q. Okay. Okay. Go ahead, Brett, I just wanted to get these so we have an address.

BS. Okay. Um, as I told you out on the street, okay, that, ah, we've been investigating this homicide since it happened on the 19th of this month. Okay? You gotta look at me so I know that you're understanding what I'm saying.

A. I know what you're saying. Yeah.

BS. Okay. Um, were you working that night on the 19th?

A. _____(inaudible). Let me see here, Wednesday, Wednesday I went to Star Wars, so I have a movie ticket for that. I went with Mark and Sandra, which led into Thursday.

BS. Mark and Sandra, do they work with you or?

A. No. Well Sandra does. Mark partially. We went to Star Wars. We saw the 12:30 showing. She bought 'em on Fandago. I have all the tickets and all that other stuff, so.

BS. That was on Wednesday?

A. That was Wednesday going into Thursday. I'm just telling you 'cause I can't quite remember. Okay? Thursday I got into the club around 8:00. Ah, I closed the club that night. Never left. And I had an altercation with a dancer, um, and, ah, then the floor manger, floor supervisor, um, and I stayed in the parking lot til 5:30 in the morning.

BS. Okay.

A. And then obviously I went to, from there I had to go to Chevron gas station, talked to the same guy I did for the last year. I don't gamble so I just read a couple of the magazines and that was it. _____(both talking).

BS. So you just hang out there at the Chevron?

A. _____(inaudible).

BS. Okay. What, what's the clerk's name that you hang out with there?

A. I don't know.

BS. You don't know?

A. Just the _____(unintelligible). You know you go in and you go oh it's the same shit everyday, you know. Hey, let me read the magazine. _____(inaudible). That was about it.

BS. When you're working the club, what do you do for the club?

A. Um, pretty much just assist Ariel. Like, ah, give the, you know making sure that the cashier has the proper change. If they're like oh, I need a bottle of _____(unintelligible) I gotta run to the liquor room, grab the bottle, run upstairs.

BS. Kind of a jack of all trades type thing?

A. _____(both talking).

BS. _____(both talking).

A. I went to bartending school. I got my _____ card and all that other stuff. If a bartender calls in sick or calls in late then I'm the fill in person.

BS. Okay.

A. If, ah.

BS. Now Ari, Ariel is the manager there, right?

A. Yeah.

BS. And even though you're the owner's son you're not, you don't have any like supervisory title or anything like that, or do you?