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 IV

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)
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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 IV 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:

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

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/s/ Pharan Burchfield
Employee, McLetchie Shell LLC

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CLERK OF THE COURT

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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

LUIS HIDALGO, JR.,

Petitioner,

vs.

THE STATE OF NEVADA,

Respondent.

Case No.: 08C241394

Dept. No.: XXI

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

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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
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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
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III	01/30/2009	Transcript of Proceedings: Jury Trial - Day 4	HID PA00523 - HID PA00538
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IV	02/06/2009	Transcript of Proceedings: Jury Trial - Day 6	HID PA00764 - HID PA00948
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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
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XVIII	02/09/2011	Appellant Luis A. Hidalgo, Jr.'s Opening Brief	HID PA03067 - HID PA03134
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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
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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
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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

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b)(2)(B) I hereby certify that on the 29th day of February, 2016, I mailed a true and correct copy of the foregoing VOLUME III: 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:

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Attorneys for Respondent

Certified by: /s/ Mia Ji
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EXHIBIT "H"

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DISTRICT COURT

CLARK COUNTY, NEVADA

CLERK OF THE COURT

THE STATE OF NEVADA,

Plaintiff,

vs.

LUIS ALONZO HIDALGO, aka LUIS ALONSO HIDALGO III,

Defendant.

CASE NO. C212667
DEPT. XXI

BEFORE THE HONORABLE VALERIE ADAIR, DISTRICT COURT JUDGE

THURSDAY, FEBRUARY 7, 2008

RECORDER'S TRANSCRIPT OF HEARING RE:

DEFENDANT'S MOTION TO SET BAIL

APPEARANCES:

FOR THE PLAINTIFF: MARC DIGIACOMO, ESQ.
Deputy District Attorney

FOR THE DEFENDANT: DOMINIC P. GENTILE, ESQ.

RECORDED BY: JANIE L. OLSEN, COURT RECORDER

JRP TRANSCRIBING
702.635.0301

LAS VEGAS, CLARK COUNTY, NV, THURSDAY, FEBRUARY 7, 2008

THE COURT: All right. State versus Luis Hidalgo. He's present in custody with Mr. Gentile. We've got Mr. DiGiacomo for the State.

And Mr. Gentile, did you get a call from -- did your staff get a call from my chambers yesterday?

MR. GENTILE: Yes, we did.

THE COURT: And I apologize that it's taken so long to get these done. But, as you know, Ms. Wildeveld is -- could go into labor any moment, so we're way desperate to get that aspect of the case done. And I just apologize.

Now, in terms of scheduling, I'm thinking the guilt phase of the Kenneth Counts case may go to the jury sometime this afternoon. So I don't know if we want to maybe tentatively plan on doing the audibility hearing and the other matters this afternoon, or what's your preference? And, again, I apologize that we keep moving this.

MR. GENTILE: I would prefer to, perhaps, instead of -- I don't know that we're going to get to jury selection on Monday.

THE COURT: Okay.

MR. GENTILE: And I'm thinking maybe we ought to do these things on Monday, and start off on Tuesday with jury selection.

THE COURT: Okay. That's fine. I mean -- and, again, I apologize that this is just getting --

MR. GENTILE: It happens.

THE COURT: -- backed up like that.

Mr. DiGiacomo.

MR. DIGIACOMO: My only --

THE COURT: To do it --

MR. GENTILE: My only issue would be if Monday was -- I was actually thinking that, based on where we are at, that we may not be done with Mr. Counts on Monday. I was also going to ask the Court to be dark, at least in the afternoon on Monday, for the evidentiary hearing that I've moved now three times between the various trials that I've been in, once in this last trial, and start on Tuesday.

So maybe we could do the audibility hearing on Monday morning instead of Monday afternoon, if that would be okay with the Court, so that I can get to the hearing in the afternoon.

THE COURT: The only problem is if we don't finish, assuming we go to a penalty phase on Mr. Counts, if we don't finish that on Friday, then we will be doing that Monday morning.

MR. DIGIACOMO: That would be true. But I actually think that we'll be arguing. So maybe, you know, whatever time we argue, after we argue, as long as I can go to my hearing or we do it late in the afternoon, either way so I don't have to move the State witnesses for the Monday hearing again.

MR. GENTILE: I am -- I'm flexible, Judge.

THE COURT: Okay.

MR. GENTILE: I -- I have a trial in San Diego that follows this, but I'm never going to make the starting date of that trial given what's going on here. I intend to advise the judge down there.

THE COURT: All right. All right, let's just --

MR. GENTILE: Also, to some extent -- and I have a couple of motions that I'll submit to the Court and serve today. Those motions kind of need to be

decided prior to opening statement.

THE COURT: Right.

MR. GENTILE: Particularly the -- the debriefing of Espindola and what access we're going to have to her.

THE COURT: Okay. All right. Let's then move -- well, what time, Mr. DiGiacomo, do you think we should set all of these with Mr. Gentile for on Monday then?

MR. DIGIACOMO: Can we set them at 9:30? And then if Friday we don't finish, I'll call Mr. Gentile to tell him --

THE COURT: Or, we'll call him.

MR. DIGIACOMO: -- what time the Court --

THE COURT: Is that fine --

MR. DIGIACOMO: -- anticipates us to be done and --

THE COURT: -- with you, Mr. Gentile?

MR. GENTILE: Sure.

MR. DIGIACOMO: -- give him the time to --

THE COURT: All right. Otherwise, if Ms. Wildeveld, you know, wasn't in the condition she's in we could just start later on the Counts matter and do this. But --

MR. GENTILE: No, I understand.

THE COURT: -- I fear, as you know --

MR. GENTILE: I understand.

THE COURT: All right. Let's go ahead, then, and set the other motions over for a 9:30 Monday morning. And then the only matter that we're going to address today, then, is the bail motion.

As you know, I set bail at 800,000, and Mr. Gentile would like that lowered with house arrest.

MR. GENTILE: Okay. Let me take a couple of minutes. When the bail argument was made on the 15th of January -- I am going to read the transcript because I think it's important to show the changes that have occurred.

At page 28 Mr. DiGiacomo, responding to my contention that the State had approved that the presumption was great and the proof was evident in order to provide no bail, he said the following:

The record's pretty darn clear about the proof being evident and the presumption being great. Although, I will submit to the Court the proof is more evident and the presumption is greater as to Ms. Espindola than it is to Mr. Hidalgo. I certainly can't highlight the evidence that's already in the record to establish the burden to deny bail as to both defendants, Judge.

He went on to say:

Let's start first with -- I mean, they're kind of combined together. However, the specific language, and I know that's -- the defense addresses --

I'm just reading here.

THE COURT: No, I know.

MR. GENTILE: -- I then say from a procedural standpoint at law that it is that has to be real proof. It can't just be fast. You can't just look to whatever it's admissible or not. It has to be proof.

And then he says, I don't have a problem with that.

So he then goes to the narrative, What was at the preliminary hearing for the bind-over because justice of the peace found the proof was

evident and the presumption was great when he denied bail after the hearing, the preliminary hearing. The only thing he heard was live witnesses.

Prior to the murder in this case, in May of 2005, the evidence from witnesses that will testify will be that Deangelo Carroll came to certain witnesses and told them that Mr. H, meaning Mr. Hidalgo, Jr. --

And, of course, he's not charged.

THE COURT: Right.

MR. GENTILE: -- wanted someone killed and was willing to pay for someone to be killed. At that point in time one of the witnesses agreed to help Deangelo kill an individual that he knew was a white male, whereas the other witnesses say -- says I don't want any part of that.

Later in the day Mr. Luis Hidalgo, Jr. -- I'm sorry, the third, the defendant here, called Deangelo Carroll, and while Deangelo Carroll was at home with these two other witnesses, and specifically told him to come to the club and bring baseball bats and garbage bags indicating to Deangelo that they were going to do this hit, this killing.

I submit to you that the remaining four pages of an uninterrupted narrative by Mr. DiGiacomo never again mentions anything about Luis Hidalgo III prior to the murder taking place. The remainder of what he directs at Mr. Hidalgo III deals with surreptitious recordings --

THE COURT: The tapes, right.

MR. GENTILE: -- that took place at least five days later, and which I was candid enough to say to you -- and I think maybe you've heard them by now.

THE COURT: I've heard parts of them.

MR. GENTILE: Okay. There -- there's -- there's content in there that, if believed, could result in a conviction for solicitation for murder. And, in fact, for two and a half years now I have been trying to have a meeting with both Mr. Hidalgo, who's not a defendant, and Mr. Hidalgo III, who has -- and the State, and have written two letters that have received nothing back.

So it's not like we're not trying to come forth with this. So that's what they had then, and that's what they said that they had much more against Anabel Espindola and they had this thing about bring baseball bats and bags. That was Mr. DiGiacomo speaking. He didn't have a witness.

In the trial before you, Jason Taolpu was asked at page 39 of his testimony by Mr. Pesci, and the question is:

Question: All right. Go back, just kind of backtracking a little bit. Did you ever hear any conversations about baseball bats or garbage bags?

Answer: Yes, sir.

Question: Tell us what you heard, when you heard it, and who you heard it from.

Answer: We heard it before we went to go pick up PC. Deangelo told us that he called Anabel and Anabel was talking about baseball bats and trash bags.

There is no mention in the Counts case with respect to Luis Hidalgo having anything to do with what Mr. DiGiacomo said he had to do with.

Now, if you eliminate that and you assume that Mr. DiGiacomo was correct when he said that they had more evidence against Anabel Espindola, and we now know that Anabel Espindola is waiting day to day to be released because, for whatever reason, while a death penalty appeal trying to get the supreme court

to reinstate the death penalty against her was pending, the State felt that maybe death -- or letting her go home didn't matter. And so they let her go home on house confinement. I'm suggesting to you that you can't -- you can change your arguments, you just lose credibility when you do.

And so I'm here before you today to say that putting Mr. Hidalgo III on a home confinement release with the appropriate conditions, the bracelets, the monitoring, allowing him to visit his attorney's office as the only place that he can go, and even with some kind of a bail, whether it be a corporate surety bail or whether it be a property bail, is not unreasonable at this point in time. You cannot make and $800,000 bail. They -- they struggled to try to make the bail for Anabel Espindola and she signed the bail papers, and then did what she did.

So, you know, I don't think it's an unreasonable request. I think that there have been some developments. Mr. DiGiacomo's statement about there being a greater proof against Anabel Espindola, and the only mention that he makes that deals with pre-murder is Luis III talking about baseball bats and bags when in reality, under oath, the proof is that it was Anabel that did that. It really takes away from his position.

THE COURT: Although, don't -- I mean, to me, from what I've heard in the Counts case which, obviously, is focused more on the guilt of Mr. Counts, to me the tapes are pretty compelling evidence against both Anabel Espindola and Mr. Hidalgo III. And, to me, the tapes indicate not just knowledge after the fact, but indicate pre, knowledge before the crime, of what he's saying on the tape. So, you know --

MR. GENTILE: I would --

THE COURT: -- now I --

MR. GENTILE: I would agree with respect to Anabel Espindola. I would disagree as to Luis. And I think that at trial you're going to learn that that's not the case.

THE COURT: All right. And I'm just saying from what I've heard, I think the tapes are compelling -- compelling evidence against both of them. Why they did what they did with respect to Ms. Espindola I don't know, but that's not what I'm really here to consider today.

As you know, what I'm here to consider today is what's the likelihood of a conviction, and what's the risk given the likelihood and the potential penalty. You know, that 500,000 -- I mean, what price is freedom is really what it is. I mean, recognizing the death penalty isn't on the table, but that he could be looking at, you know, 40 years in prison. What is that worth?

And, you know, I know in your brief you talk about, well, house arrest and they do that, but the problem is I don't know exactly how the detention center -- obviously, he wouldn't be on probation with house arrest with a probation officer monitoring him and immediately knowing if he didn't answer the phone and then going out to pick him up and getting -- arresting him.

When you're -- go through house arrest at the jail, I don't know that you get that same kind of immediate response if someone absconds off house arrest.

MR. GENTILE: I have made --

THE COURT: And I think --

MR. GENTILE: I --

THE COURT: -- that that's kind of what you're trying to guarantee the Court, well, you know, it would be immediately apparent if he wasn't in the house

or didn't answer the phone or whatever. And I don't know how immediate that would come to law enforcement's attention to where they could go and find him right away. And I -- I -- unless I misread your -- your brief, I think that that was maybe one of the points.

MR. GENTILE: Well, it's my understanding, and I only have informal anecdotal knowledge. I have not --

THE COURT: Thank goodness none of us have personal knowledge.

MR. GENTILE: Right. And I hope that we are as adamant about as this thing on personal knowledge when we go to trial next week as we seem to not be here.

The -- essentially I'm reporting to the Court what I've learned in a -- in a survey from people at the jail, and people that monitor these systems. They have almost no problems with it. And it would seem to me that in conjunction with a bail and the home confinement, you know, you've got a little bit more than just the home confinement.

So, I mean, if you were to reduce the bail -- and I'm not -- I'm not trying to sell a Persian rug here. I'm not trying to bargain. Okay? I'm trying to get a number that can be made. If you were to reduce the bail to 200,000 and have home confinement, then he can be released.

THE COURT: Mr. -- well, except weren't they going to be able to cobble together the bail on Anabel Espindola, which I believe I set at $550,000? The reason for the discrepancy in the two was my sort of analysis of the case being that he was more the mastermind of it. And so that -- even though maybe there was more direct proof on Anabel which I wasn't as aware of.

Now having sat through the trial and actually heard what the

witnesses were going to say, that he, you know, being the mastermind, I felt was maybe, I don't know, more dangerous or more likely to flee or abscond or something like that.

MR. GENTILE: Your Honor, I think he --

THE COURT: And that was -- I'm just explaining my reasoning. You may disagree with it. You don't need to disagree with it --

MR. GENTILE: I - I think --

THE COURT: -- on the record --

MR. GENTILE: -- the State would --

THE COURT: -- but that -- that was --

MR. GENTILE: -- disagree with who was --

THE COURT: -- the reason I --

MR. GENTILE: -- the mastermind.

MR. DIGIACOMO: Actually, I wouldn't, if I can address that.

THE COURT: All right.

MR. DIGIACOMO: If you recall, I know Mr. Gentile didn't read it to you, but Rontae Zone, at the preliminary hearing, indicated the baseball bats and garbage bags was Mr. -- Little Lou's, or Mr. Hidalgo III's idea. And during the course of the trial as well he testified that when Deangelo first approaches him and tells him Mr. H wants a guy hit, they ask him who told you that. He says Little Lou. Little Lou has always been the individual that has been the -- the driving force behind it.

Now, I would agree with Mr. Gentile that prior to Saturday, or maybe Monday morning, the case for conviction on Ms. Espindola was better, and that's exactly what I said when we were arguing the proof is evident and the

presumption is great. But I recall Mr. Gentile handing you the transcript of Deangelo Carroll and asking you to consider the transcript of Deangelo.

And if you read that transcript of Deangelo Carroll, well, Anabel has knowledge and she acts -- and she does acts in furtherance. She certainly isn't the person who wants this person dead. She's not the individual that has a motive to kill this individual, and it is Mr. Hidalgo III, as well as Mr. H. And based upon that, the Court has to consider the fact that immediately upon learning that the other people in the van may go to the police, this guy wants them killed too.

And he makes other statements that are clearly indicative that he has knowledge of the conspiracy. There is a phone call from his -- from his cell phone to Deangelo Carroll's home immediately before Deangelo Carroll goes to the Palomino corroborating the statements of Rontae Zone and the other evidence that you are going to hear on the case, Judge. And so certainly Mr. Gentile can take a position about whether or not there should or should not be bail.

Let's address Anabel Espindola. Upon learning that the possibility that that situation was going to come about, Mr. H did everything in his power to try and bail her out of jail. And -- and certainly her concern about what it is the position she's in right now has to do with her fear for her safety, as well as what's going to happen to her in the future, Judge.

And so based upon all that I would urge the Court -- I argued that the proof is evident and the presumption is great. And let me tell you, now that we have an additional witness, the proof is really evident and the presumption is very great that he's going to get convicted. He shouldn't have bail. I'm a willing -- the Court made a ruling, but I don't think you should now suddenly reduce it.

And, as I recall the motion, the motion was that neither one of them could make bail. As soon as they learned that Ms. Espindola may be in a position where they want her out of custody, they did everything in their power to do so. And I'll submit it to the Court that this should not be reduced, Judge.

MR. GENTILE: I need to correct the record. The moment that bail was entered, the moment we learned of it -- because I think it kind of had a time lag, we learned of it on a Wednesday, but I -- I think you probably entered it, it just didn't make the minutes. I immediately contacted All Star Bail Bonds and we immediately began seeking bail for -- we knew at that point in time that there would not be enough premium to bail both out.

And it -- it was -- the efforts that were put forth, which took about a week and a half because of the property that needed to be put up as collateral, and raising the premium took about a week and a half. But it - it -- it didn't start -- it started when bail was set. And I say that to you as an officer of the court based on conversations that I had with bail bondsmen.

THE COURT: Again, I mean, as you know, what the Court looks at is what's the evidence, what's the likelihood, in my view, of conviction, and what's the penalty and how hard is it, how meaningful is the amount of money.

You have to set an amount of money that's meaningful enough that if they make it, there's a great deterrent, whether it's because of their family who has put property or whatever on the line or their own money. You can't set it so low that, you know, they're going to say, well, to insure -- you know what I mean?

Even if he gets life with the possibility of parole, assuming he's convicted of the first degree murder, I -- you know, it's 40 years or, you know, a substantial period of time. And so that's why I set the -- the price that I did.

Because, to me, you know, to lower it 250, given whatever wherewithal they might have, you need to set it at an amount that it really is so substantial and would be so arduous for him or his family that he's going to come back, notwithstanding the fact that, you know, if there's a conviction he's going to prison.

And that's why I thought the $800,000 was reasonable, and I still think it's reasonable. And if anything, truthfully, Mr. Gentile, sitting through the Counts case has made me more certain of that position rather than maybe less certain of it. So the motion is denied, but I'll see counsel at the bench on sort of an unrelated aspect.

MR. GENTILE: Would the Court consider a -- instead of a corporate surety bail a property bail?

MR. DIGIACOMO: Can we approach on it?

THE COURT: $800,000 property?

MR. DIGIACOMO: Judge, can we --

THE COURT: Yeah.

MR. GENTILE: -- approach on it?

(Conference at the bench.)

THE COURT: All right. Mr. Gentile, in terms of the property issue, if your client comes up with $800,000 in property and you would like the Court to consider whether that would satisfy the bond requirement, we'll hold a hearing on that giving the State an opportunity to be heard on that as well. But for right now, barring further order, the order stands.

So -- and, again, the Court will accommodate anything else in terms of the logistics with Mr. Hidalgo III being able to meet with you so that you can be adequately prepared to defend the case.

MR. GENTILE: Thank you.

MR. DIGIACOMO: Thank you, Judge.

THE COURT: All right. 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

EXHIBIT "I"

TRAN

COPY

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CLERK OF THE COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

vs.

LUIS ALONZO HIDALGO, aka LUIS ALONSO HIDALGO III,

Defendant.

CASE NO. C212667
DEPT. XXI

FUS

BEFORE THE HONORABLE VALERIE ADAIR, DISTRICT COURT JUDGE

THURSDAY, FEBRUARY 14, 2008

RECORDER'S TRANSCRIPT OF HEARING RE:

MOTIONS

APPEARANCES:

FOR THE PLAINTIFF: CHRIS J. OWENS, ESQ.
GIANCARLO PESCI, ESQ.
Deputy District Attorneys

FOR THE DEFENDANT: DOMINIC P. GENTILE, ESQ.
PAOLA M. ARMENI, ESQ.

RECORDED BY: JANIE L. OLSEN, COURT RECORDER

is going to be I got railroaded, I should've taken a deal against my dad or vice versa. Who knows? Because, you know, the evidence could be that this was all really Deangelo and the son working together to -- to push dad in the direction of this whole incident, so that -- that's one of the concerns.

The other concern, which we've discussed somewhat with Your Honor already, is Ms. Espindola, which we've brought up. And if I'm going over something that you feel you've already addressed, let me know. But Ms. Espindola has indicated that she has had interactions with Mr. Gentile and Ms. Armeni in preparation for trial.

Let's just take from the time of the murder until trial. We'll start there. She has indicated that there's been interactions in that regard. And the State's concern is that the -- the defense counsel may have gathered information in their joint defense preparation, which is something that they could use to impeach, impugn, attack the credibility of Ms. Espindola, which the State does not know because we're not privy to that same information.

There's also a long standing relationship to Mr. Gentile and father, Luis Hidalgo II, that predates the -- the homicide. So we're going back in time. 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.

And the reports even indicate that it was at the behest, or not behest, but at the advice of Mr. Gentile to go to make a report about an alleged extortion that was being brought upon the Palomino and/or specifically Mr. Hidalgo II. I don't know what evidence, if any, Mr. Gentile has, even if it is just dealing with Mr. Hidalgo II, that came from that representation.

Wait a minute. We omitted the date.

MR. GENTILE: Yeah. This needs to be dated.

THE COURT: Or he omitted the date.

(Mr. Hidalgo III exits the courtroom.)

(Mr. Hidalgo, Jr. enters the courtroom.)

THE COURT: Okay. You can sit over there at counsel table.

And for the record, Mr. Hidalgo III has been removed from the courtroom, and Mr. Hidalgo, Jr., or Mr. Hidalgo, II, is now present.

EXHIBIT "J"

NISD
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Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

LUIS HIDALGO, JR.,
#1849634

Defendant.

Case No. C241394
Dept No. XXI

CORRECTED
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 "F" 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

EXHIBIT "K"

NISD
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MARC DIGIACOMO
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200 Lewis Avenue
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(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

LUIS ALONSO HIDALGO, III
#1849634

Defendant.

Case No. C212667
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., perceived that profits were being hurt by the victim, Timothy Jay Hadland "bad mouthing" him and the club. As such, Luis Hidalgo Jr., used employees, Defendants Anabel Espindola, Luis Hidalgo, III., and Deangelo Carroll to carry out his wishes. Defendant Luis Hidalgo, III, as an employee of the Palomino Club would receive, "money or any other thing of monetary value" by the profits going back up by the silencing of Timothy Jay Hadland. 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

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CLERK OF THE COURT

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DISTRICT COURT C241394

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

RESPONSE TO DEFENDANT LUIS HIDALGO, JR. AND LUIS HIDALGO, III'S OPPOSITION TO CONSOLIDATE CASE NO. C241394 INTO C212667

DATE OF HEARING: 12/19/08
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 hereby submits the attached Points and Authorities in Response to Defendant's Opposition to the Motion to Consolidate Case No. C241394 into C212667.

This response 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.

POINTS AND AUTHORITIES

While voluminous, Defendant's opposition to consolidation can easily be understood by taking their arguments to a logical conclusion. To accept the arguments of counsel, no two capital cases should ever be tried together. For this case, unlike almost all other cases in which co-defendants would be tried together presents not a single cognizable ground in Nevada for separate trials.

In Nevada, the seminal case on severance, as cited in the motion for consolidation, is Marshall v. State, 118 Nev. 642, 56 P.3d 376 (2002), wherein the Nevada Supreme Court ruled that even where antagonistic defenses were asserted, joinder was still proper. That holding, is consistent with Zafiro v. United States, 506 U.S. 534, 113 S.Ct. 933 (1993), which held that in order to be entitled to separate trials, Defendants must establish that a specific trial right would have to be compromised for separate trials to be proper. Id at 539. Quite simply, the defense has posited no specific trial right that could be infringed in the current case. As such, separate trials are not appropriate.

Defendants also assert that capital cases should be given a heightened standard of review favoring severance. While providing no controlling authority for this position, they make citation to some lower federal court case law. *See* Untied States v. Catalan-Roman, 376 F.Supp.2d 96, 100 (2005). However, even if the Court agrees that the standard is heightened, the Defendants still need to point to the specific trial right to be infringed. Their failure to do so, even under the heightened standard, is a compelling reason to hold a joint trial.

I.

THE DEFENSES CANNOT BE ANTAGONISTIC NOR IS THERE A SPECIFIC TRIAL RIGHT WHICH WILL BE INFRINGED

Perhaps unique in its circumstances, the instance case is one where the defenses cannot be antagonistic as a matter of law. While the State has maintained that either Defendant may try to point the finger at the other, Mr. Gentile indicated to this Court that

such a situation would not occur. In fact, if either Defendant were to point the finger at the other Defendant, Mr. Gentile would have a conflict and have to withdraw. However, Mr. Gentile still represents Mr. Hidalgo, Jr. and previously represented Mr. Hidalgo, III, so certainly that cannot occur. In the last court appearance, Mr. Gentile reiterated there was no conflict, hence antagonistic defenses are only vaguely references to the Court and claimed to need to be presented to the court ex parte.

Defendant has presented no authority of the right to present his evidence of antagonistic defenses ex parte. To allow such an unprecedented ex parte colloquy with the Court would allow Defendants to argue their severance without the opposing side to rebut why such allegations can not survive the testing that is required under Marshall, *supra*.

The other trial right would be the admission against one Defendant a particular piece of evidence which is not admissible against another Defendant. *See* Chartier v. State, 191 P.3d 1182 (Nev.,2008). However, uniquely in this case, that will not occur.[1] In the instant case, every witness called by the State will be the same in a joint and severed trial. Every piece of evidence sought to be admitted will be the same in a joint and severed trial. As such, the defense cannot and does not point to a piece of evidence which will be admitted.

The most Defendants have been able to point to is that Defendant Hidalgo, III is charged with crimes arising from the surreptitious recordings where Defendant Hidalgo, Jr. is not.[2] Notwithstanding, the evidence, the surreptitious recordings themselves, has been heavily litigated in this matter and clearly admissible against both Defendants.[3] Defendants assert there are multiple conspiracies, however, only one conspiracy is alleged with multiple crimes stemming from that one conspiracy.

Hearsay is an out of court statement, offered in evidence to prove the truth of the

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[1] Theoretically, the State could seek to introduce the statement of Defendant Hidalgo, III in a joint trial. However, should the Court consolidate, the State will not seek to introduce the substance of the statement which references Defendant Hidalgo, Jr.

[2] As the Court has told every criminal jury, a charge is merely an allegation and not any evidence that a crime was committed. As such, a mere charge cannot be the basis for severance without some evidence being different.

[3] In co-defendant Counts' trial, he sought to preclude the admission of the tapes as well, however, after reviewing the relevant case law, the Court made the proper determination that they were admissible against all Defendants.

matter asserted unless the statement is offered against a party and is a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy. NRS 51.035(3)(e). In other words, co-conspirator statements are non-hearsay. The only requirement is that at the time the statements were made, the declarant was a member of the conspiracy, and the conspiracy was ongoing. *See* McDowell v. State,103 Nev. 527, 746 P.2d 149 (1987). The person against which the statement was offered does not need to be a member of the conspiracy at the time the statement was made. *See* id. Moreover, the person who hears the statement, need not be a co-conspirator. *See* Fish v. State, 92 Nev. 272, 549 P.2d 338 (1976). Finally, the conspiracy continues until such time as the co-conspirators have successfully concealed their crime. *See* Crew v. State, 100 Nev. 38, 675 P.2d 986 (1984) (*citing* Foss v. State, 92 Nev. 163, 547 P.2d 688 (1976)).

Certainly a discussion about how to prevent the witnesses to the crime from providing the information to the police is ongoing efforts of the conspiracy. Moreover, while the evidence demonstrates that Defendant Counts (who this Court admitted the recordings in his trial) had absolutely no knowledge of the conversations, the same cannot be said for Defendant Hidalgo, Jr. The evidence will show that Defendant Hidalgo, Jr. was consulted during the surreptitious recordings. This evidence will be corroborated by the fact that Defendant Hidalgo, Jr. was present in the Auto Shop at the time of the recordings. In a subsequent search warrant, a note indicating that Defendant Hidalgo, Jr. was concerned about surveillance was found in the Auto Shop and confirmed thru scientific testing to have been written by Defendant Hidalgo, Jr.

Based upon all of the foregoing, there is simply no trial right nor antagonistic defense upon which to base separate trials. Therefore, the Court would have to find another basis. All of the other reasons asserted in the opposition cannot possibly be the basis for separate trials, as those concerned would apply to any joint capital trial. Certainly, Defendants have presented no particular facts to justify in this case.

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II.

THE NEED FOR INDIVIDUALIZED SENTENCES CANNOT BE A BASIS FOR SEPARATE TRIALS

In a catchall claim, Defendants have asserted that multiple trials is necessary to ensure individualized sentences. Without examples specific to the instant case, the Court would have to find that no capital cases should be tried together, a proposition while not explicitly stated by Defendants, is essentially their argument to the Court.

III.

THE FACT THAT TWO DIFFERENT JURIES MAY CONFUSE THE MEANING OF ONE PIECE OF EVIDENCE IS AN ARGUMENT FOR, NOT AGAINST, A JOINT TRIAL

On of the vagaries of separate trials is the inconsistency in verdicts. Defendants appear to assert that one jury should be allowed to interpret a piece of evidence (the surreptitious recordings) in one manner, and another jury should interpret them in a different manner. Such a conclusion vitiates any sense of a jury trial being a search for the truth. The compelling reason to have one trial is to ensure that two different juries do not interpret the same evidence differently. In fact, it appears that Defendant are asserting a right to argue to the jury in one trial, that the names used on the recordings are referring to one individual while arguing to another jury that the names apply to the other. Such an argument cannot stand scrutiny.

The fallacy of this argument can be seen by Defendants arguing that the fact that Defendant Hidalgo, III solicited the murder of witnesses would prejudice a sentence for Defendant Hidalgo, Jr. However, even in separate trials, the jury will be aware that Defendant Hidalgo, III solicited the murder of witnesses as that is evidence of the conspiracy itself to which Defendant Hidalgo, Jr. is charged.

Defendants assert, without explaining what mitigation would be offered, the difference in mitigation evidence should be a basis for separate trials. However, to draw that

conclusion, would mean that capital defendants should never be tried jointly. Defendants have presented no case law to support that conclusion, because it clearing is inapposite to controlling Nevada Law.

Defendants also assert without authority that deciding penalty is never comparative. However, the Nevada Supreme Court disagrees. In Flanagan v. State, 107 Nev. 243, 810 P.2d 759 (1991) (*judgment vacated on other grounds*, Moore v. Nevada, 503 U.S. 930, 112 S.Ct. 1463, 117 L.Ed.2d 609, 60 USLW 3189, 60 USLW 3644, 60 USLW 3651 (U.S.Nev. Mar 23, 1992)), the Court held, interestingly in a two-codefendant capital trial, that proportionality of sentence between Defendants and co-defendants was an appropriate consideration for the jury:

> Flanagan and Moore further contend that the district court's allowance of testimony regarding the sentences of the other four co-defendants violated their Eighth Amendment rights to have the jury consider their individual characters and records and the circumstances of their particular crimes. *See* Woodson v. North Carolina, 428 U.S. 280, 304, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976). Appellants cite authority from several other jurisdictions in support of their argument that the prosecution should not have been allowed to introduce and argue this evidence. *See, e.g.*, People v. Belmontes, 45 Cal.3d 744, 248 Cal.Rptr. 126, 755 P.2d 310 (1988).
>
> At trial, the district court allowed testimony by one of the prosecutors from the original trial and penalty hearing. The prosecutor testified that co-defendant Johnny Ray Luckett had received four consecutive sentences of life without the possibility of parole, and that co-defendant Roy McDowell had received four consecutive sentences of life with the possibility of parole.
>
> We conclude that the district court did not err in allowing the testimony about the sentences of the other co-defendants. The evidence was admissible under NRS 175.552 as "any other matter which the court deems relevant...." Furthermore, the jury was instructed that it was not bound by the previous sentences. We believe that it was proper and helpful for the jury to consider the punishments imposed on the co-defendants. *See* State v. McKinney, 107 Idaho 180, 687 P.2d 570 (1984).

Id at 247-8. In their argument to the Court, Defendants assert the exact opposite holding of the Nevada Supreme Court based upon analysis of the same United States Supreme Court case rejected by the Nevada Supreme Court.

IV.

NONE OF THE OTHER ASSERTED REASONS BY DEFENDANTS SURVIVE SCRUTINY OF THEIR CLAIMS

Defendant asserts that the instant two (2) hispanic defendants should be tried separately based upon racial prejudice. How severance would somehow alleviate these concerns is never explained, as both juries would know the races of both Defendants. The only authority cited for such argument is a case where two charges of murder against the same defendant was the basis for severance. *See* Williams v. Superior Court, 36 Cal.3d 441, 452-3 (1984). Why that case is relevant to the instant discussion is never really asserted. To accept Defendants argument, the Court would have to find as a matter of law, that two defendants of the same race could never be tried in the same trial. That assertion has no basis in law.

Defendant also asserts "spillover effect" between the two Defendants. However, spillover is related to evidence admitted against one Defendant which is not admitted against another. Here, that simply is not the case. The evidence is the same against both defendants. To claim that the evidence is stronger against one and not the other is not really explained. The jury is going to hear about the solicitation in joint or separate trials. It is clear that evidence is not so prejudicial as to prevent a logical analysis of the evidence, considering Defendant Counts jury was clearly capable of doing so.

Defendants assert that lingering doubt may be a strategy at penalty. However, such a strategy is precluded from being presented at a penalty hearing. In Browning v. State, 188 P.3d 60 (Nev.,2008), the Nevada Supreme Court specifically rejected the argument the lingering doubt is relevant at sentencing:

> The focus of a capital penalty hearing is not the defendant's guilt, but rather his character, record, and the circumstances of the offense. Such considerations are relevant to the jury charged with imposing a penalty for a capital crime. This principle was affirmed in Oregon v. Guzek. In Guzek, the United States Supreme Court held that a capital murder defendant had no constitutional right to present additional alibi evidence at resentencing that was inconsistent with his prior conviction and shed no light on the manner in which he committed the crime for which he was convicted. Although we have not yet

> addressed Guzek, in Homick v. State, we held that "there is no constitutional mandate for a jury instruction in a capital case making residual doubt a mitigating circumstance." More recently, in McKenna v. State, we rejected an argument that the defendant was entitled to a residual doubt instruction at his second penalty hearing because the second jury had not determined his guilt. We reasoned that although "the penalty phase jury was composed of entirely different jurors than the guilt phase jury, a lingering doubt over [the defendant's] guilt is still not an aspect of his character, record, or a circumstance of the offense."

Id at 67. As such, such strategy cannot be a basis for granting separate trials.

Defendants claim that inconsistent mitigation evidence could be a basis for severance. Without even citation to any authority, Defendants assert that they should be able to present mutually exclusive penalty evidence in separate trials. For example, Defendants claim they could present that Defendant Hidalgo, Jr. was a good father, while also presenting that Defendant Hidalgo, III was neglected as a child. As one of those factors must be false, it would seem that it would end the search for truth in penalty hearings.[4]

Defendants claim that one's choice to allocate while another may not choose to allocate could somehow affect the decision as to whether or not conduct separate trials. However, in none of the citations, does Defendant present any case where this issue has been ruled to be a basis for severance. If somehow the Court were to determine that ones right to allocate in a sentencing hearing affected another's Fifth Amendment privilege, then no capital case could ever be tried in a single trial. Such is not the law, never has been the law, and there is no persuasive authority to even consider it the law.

CONCLUSION

Defendants have pointed to no particular piece of evidence which would be admitted or excluded in separate trials. Defendants have made no assertion of what possible antagonistic defense they wish to present. Even if the defense was antagonistic, there still needs to be analysis of the trial right which is being infringed. All of the other claims do not justify severance in this specific case. At most, if the Court believed their authority, it would

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[4] It would also appear that such a position would be antagonistic between Defendants, which Mr. Gentile has repeatedly claimed that their interests are not. If this is in fact true, then finger pointing in either the guilt or penalty phases should give rise to the conflict which the State has repeatedly and consistently been concerned exists.

require severance in all capital cases, clearly not the law. At best, Defendants objections are mere conclusory statements which is not sufficient to justify separate trials. *See* White v. State, 83 Nev. 292 (1967); Anderson v. State, 81 Nev. 477 (1965). See also NRS 174.165. Based on the foregoing, the State's Motion to Consolidate should be granted.

DATED this 15th day of December, 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, was made this 15th day of December, 2008, by facsimile transmission to:

DOMINIC GENTILE, ESQ. and
PAOLA ARMENI, ESQ. (DEF. HIDALGO, JR.)
369-2666

JOHN L. ARRASCADA, ESQ. (DEF. HIDALGO, III)
775-329-1253

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

MD/dd

ORIGINAL

FILED

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CLERK OF THE COURT

MTN
DAVID ROGER
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Nevada Bar #002781
MARC DIGIACOMO
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200 Lewis Avenue
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Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

LUIS ALONSO HIDALGO, JR.

Defendant.

Case No. C241394

Dept No. XXI

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 THEM

DATE OF HEARING: 1/20/09

TIME OF HEARING: 9:30 A.M.

COMES NOW, the State of Nevada, by DAVID ROGER, District Attorney, through MARC DIGIACOMO, Chief Deputy District Attorney, and files this 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 THEM.

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

RECEIVED
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CLERK OF THE COURT

deemed necessary by this Honorable 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, in Department XXI thereof, on the 20th day of January, 2009, at the hour of 9:30 o'clock A.M., or as soon thereafter as counsel may be heard.

DATED this 6th day of January, 2009.

DAVID ROGER
Clark County District Attorney
Nevada Bar #002781

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

PROCEDURAL HISTORY

On May 24, 2005, Defendant Luis Hidalgo, III and Anabel Espindola were arrested and charged with Conspiracy to Commit Murder, Murder With Use of a Deadly Weapon and two (2) counts of Solicitation to Commit Murder. During the inception of the case, Dominic Gentile represented the alleged owner of the Palomino Club, Mr. H, however, sought and paid for attoneys for the two Defendants. On October 9, 2006, Defendants Hidalgo and Espindola sought relief in the Nevada Supreme Court from the State's Notice of Intent to Seek the Death Penalty. The petition on behalf of Luis Hidalgo, III was filed by Dominic Gentile on behalf of Defendant Hidalgo, III. In response, the State raised the issue of a potential conflict of interest on the part of Mr. Gentile. (See attached State's Answer to Petition for Writ of Mandamus, or in the alternative, Writ of Prohibition).

On March 28, 2007, the Nevada Supreme Court issued an Order directing that oral arguments be set in the matter and specifically indicated that Mr. Gentile's conflict of interest was to be addressed at the hearing. Pending oral argument, Mr. Gentile filed

documents under seal with the Court. At oral argument, the Chief Justice indicated that the issue was resolved by those sealed documents.[1] However, Mr. Gentile indicated that had Luis Hidalgo Jr. ("Mr. H") been arrested, that this issue may have some merit. In Hidalgo v. District Court, 123 Adv. Op. 59 (2007), the Court disposed of the conflict issue in footnote one by stating:

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

(Emphasis added).

On February 7, 2008, based upon evidence which recently obtained from a previously unavailable witness, an arrest warrant for Conspiracy to Commit Murder and Murder With Use of a Deadly Weapon in the killing of Timothy Jay Hadland was issued for Luis Hidalgo, Jr. That same date, he was arrested. On February 11, 2008, Mr. H was arraigned in justice court and Dominic Gentile confirmed as his attorney of record.

On that same date, the State raised in front of the instant court the issue of Mr. Gentile's actual conflict of interest. This Court has set a hearing for Wednesday, February 13, 2008 at 1 p.m. to address that issue. On that date, the court began a hearing, a portion of which was sealed and ex parte. The next date, on Thursday, February 14, 2008, the Court held another hearing, a part of which the State was excluded from. Thereafter, while the Court did not make a ruling as to whether or not an actual conflict existed, the Court did find that valid waivers had been executed for any potential conflict. Thereafter, Mr. Gentile represented both Defendants.[2]

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[1] To date, those records remain sealed.

[2] While the State was not present, it was the impression of the State that any conflict was merely potential and not actual based upon the representation of counsel.

Recently, beginning in November of 2008, some disturbing information came to light concerning the conflict issue. At the State's Motion to Consolidate, Mr. Gentile announced that it would be "more effective" if there was a representation by separate lawyers. Based upon that representation, new lawyers were found for Defendant Hidalgo, III, and Mr. Gentile continued his representation of Defendant Hidalgo, Jr. This has led to a true anomaly that Mr. Gentile began his criminal representation of one defendant and mid-case switch to the other criminal Defendant. If this was not enough to cause concern, in their joint opposition to the State's Motion to Consolidate, Defendants have now asserted that their defenses are "antagonistic." Moreover, Defendants assert that they may want to present "inconsistent" mitigation evidence. At the time of the last inquiry, no discussion of the death penalty was considered as, at the time, the only Notice of Intent To Seek The Death Penalty was stricken against Defendant Hidalgo, III.

Due to the changing nature of the case, the clear assertion of a conflict, as well as a concern about the prior waiver, the State moves this Court to remove Mr. Gentile from the representation of Defendant Hidalgo, Jr. In the alternative, the State's seeks the Court to appoint truly independent counsel to Defendant Hidalgo, Jr. to completely review the file and provide advice to Defendant Hidalgo, Jr. Additionally, the State seeks the Court to acquire a new waiver from Defendant Hidalgo, III after consultation with his new counsel.

LEGAL AUTHORITY

While the State recognizes that the Court previously has canvassed the Defendants concerning the potential conflict and acquired waivers from them, it is clear now that there is simply no question that an actual conflict is present. Based upon that information, there is simply no option but request that Mr. Gentile be removed from representation of Defendant Hidalgo, Jr. Absent agreement from the Court, at the very least, a more complete record, as well as waivers that at least can be arguably sustained, needs to be made. With all due deference to the prior decision of the Court, the record of the case, most of which was made after the February 2008 hearing is not nearly complete enough for appropriate review to avoid an automatic reversal should Defendant Hidalgo, Jr. be convicted.

Courts have the power to disqualify an attorney from representing a particular client in order to preserve the integrity of their judgments, maintain public confidence in the integrity of the bar, eliminate conflicts of interest, and protect confidential communications between attorneys and their clients. Coles v. Arizona Charlie's, 973 F.Supp. 971 (Nev. 1997). Any doubts as to the existence of an asserted conflict of interest must be resolved in favor of disqualification. Coles, 973 F. Supp at 975.

The newly enacted Nevada Rule of Professional Conduct 1.7 states:

> (a) Except as provided in paragraph (b), a lawyer ***shall not*** represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
>
> (1) ***The representation of one client will be directly adverse to another client***; or
>
> (2) ***There is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client,*** a former client, or a third person or by a personal interest of the lawyer.
>
> (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
>
> (1) The lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation of each affected client;
>
> (2) The representation is not prohibited by law;
>
> (3) The representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
>
> (4) Each affected client gives informed consent, confirmed in writing.

Additionally, Rule 1.10 of the Nevada Rules of Professional Conduct deals with the "Imputation of Conflicts of Interest" by stating:

> (a) **While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so** by Rules 1.7, 1.9, or 2.2, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

It is well settled that a Defendant is entitled to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984). Counsel is ***presumed*** to be ***ineffective*** where he is burdened by an actual conflict of interest. Id. at 689 (*emphasis*

added). The Court went on to say:

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

Courts have imposed a duty on trial courts, when alerted by objection from one of the parties, to ensure that criminal defendants receive a trial that is fair and does not contravene the Sixth Amendment. Wheat v. United States, 486 U.S. 153, 108 S.Ct. 1692 (1988); Glasser v. United States, 315 U.S. 60 (1942). Because of the potential for later ineffective assistance of counsel claims which may arise from the granting of a defendants request for multiple representation,[3] the Supreme Court held that where a court justifiably finds an actual conflict of interest, it may decline a proffer of waiver, and insist that defendants be represented separately. Wheat v. United States, 486 U.S. at 162. "To preserve the protection of the Bill of Rights for hard-pressed defendant, we indulge every reasonable presumption against the waiver of fundamental rights." Id. *citing* Glasser, *supra*. As the Court aptly noted:

> When a trial court finds an actual conflict of interest which impairs the ability of the criminal defendant's chose counsel to conform with the ABA Code of Professional Responsibility, the court should not be required to tolerate an inadequate representation of the defendant. Such representation not only constitutes a breach of professional ethics and invites disrespect for the integrity of the court, but it is also detrimental to the independent interest of the trial judge to be free from future attacks over the adequacy of the waiver or the fairness of the proceedings in his own court and the subtle problems implicating the defendant's comprehension of the waiver.

In Wheat, the Supreme Court noted that the same lawyer could not represent both parties as either party may have an incentive to either testify against the other, or present a defense antagonistic to the point of being "mutually exclusive" between the parties.[4]

In Koza v. Eighth Judicial Dist. Court, 99 Nev. 535, 665 P.2d 244 (1983), The

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[3] Citing United States ex rel Tonaldi v. Elrod, 716 F.2d 431 (CA7 1983); United States v. Vowteras, 500 F.2d 1210 (CA2).

[4] For a definition of antagonistic defenses which are "mutually exclusive," *see* Marshall v. State, 118 Nev. 642, 56 P.3d 376 (2002)

Nevada Supreme Court put the onus on the counsel representing more than one Defendant by quoting the American Bar Association in saying:

> The potential for conflict of interest in representing multiple defendants is so grave that ***ordinarily a lawyer should decline to act for more than one of several co-defendants*** except in unusual situations when, after careful investigation, it is clear that no conflict is likely to develop and when the several defendants give an informed consent to such multiple representation.

Id. (*emphasis added*).

In Clark v. State, 108 Nev. 324, 831 P.2d 1374 (1992), the Court noted that in areas of conflict there are "certain limited instances" where "a defendant is relieved of the responsibility of establishing the prejudicial effect of his counsel's actions. An actual conflict of interest which adversely affects a lawyer's performance will result in a ***presumption of prejudice*** to the defendant." Id., *citing* Strickland; Cuyler v. Sullivan, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980); Mannon v. State, 98 Nev. 224, 226, 645 P.2d 433, 434 (1982). The Court went on to say that "this exception is based, in part, on the difficulty in measuring the effect of representation tainted by conflicting interests." Id., *citing* Strickland, 466 U.S. at 692, 104 S.Ct. at 2067.

In Harvey v. State, 96 Nev. 850, 619 P.2d 1214 (1980), the court reiterated the clear fact that "[e]very defendant has a constitutional right to the assistance of counsel unhindered by a conflict of interest." Id., *citing* Holloway v. Arkansas, 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978). The Court noted the obvious danger of an improper conflict in a single attorney representing co-defendants by stating "[r]epresentation of multiple defendants by a single attorney is fraught with the risks of conflict, and should be approached with caution by the parties, counsel and the trial court." Id., *citing* United States v. Lawriw, 568 F.2d 98 (8th Cir. 1977). The Court quoted the Supreme Court of Minnesota[5] by quoting:

> The inherent difficulty which faces any attorney who undertakes the joint representation of codefendants is that he or she must simultaneously balance the interests of each defendant against each other. Not only must the attorney of codefendants defend against the prosecution, but he or she must also defend against conflicts between the defendants themselves. Id.

The Harvey Court points out many of the more obvious risks of the joint

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[5] *Citing* State v. Olsen, 258 N.W.2d 898 (Minn.1977)

representation of co-defendants, including, "the possibility of inconsistent pleas; factually inconsistent alibis; conflicts in testimony; differences in degree of involvement in the crime; tactical admission of evidence; the calling, cross-examination, and impeachment of witnesses; strategy in final argument; and the possibility of guilt by association." Id.

In Cuyler v. Sullivan, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980), two defendants were represented by the same attorneys. The defendants were tried separately. The Supreme Court held that the Sixth Amendment does not require state courts to initiate inquiries into the propriety of multiple representation in every case. However, the Court indicated that an inquiry ***is required*** when the trial court "knows or reasonably should know that a particular conflict exists." Id. at --, 100 S.Ct. at 1717. The court also held that a defendant who raised no objection at trial may demonstrate a Sixth Amendment violation if an actual conflict of interest adversely effected his lawyer's performance.

ANALYSIS

I. THIS COURT MUST DECLINE ANY WAIVER AND DISQUALIFY ATTORNEY GENTILE BECAUSE THERE IS AN ACTUAL CONFLICT OF INTEREST

The mandate to decline such a waiver comes from the highest court of this nation. In Wheat v. United States, 486 U.S. 153, 108 S.Ct. 1692 (1988), the precise issue before the Supreme Court was essentially the issue before this Court: whether the trial court should decline a defendant's waiver of his right to conflict-free counsel and refuse to permit the proposed substitution of attorneys. Id. at 154, 108 S.Ct at 1694.

In Wheat, several co-defendants were charged in a drug distribution conspiracy. Id. Originally, attorney Eugene Iredale represented defendants Gomez-Barajas and Javier Bravo. Id. at 155, 108 S.Ct. at 1695. Defendant Gomez-Barajas was tried first and acquitted on some charges, but later pled guilty to tax evasion and illegal importation of merchandise to avoid a second trial on other charges. Id. Co-defendant Bravo pled guilty to a single count. Id. Accordingly, the cases against Gomez-Barajas and Bravo were concluded prior to the trial of a third defendant. Id.

Attorney Iredale then sought to represent a third defendant, co-defendant Mark

Wheat, during his trial on related charges. Id. The government "registered substantial concern about the possibility of conflict in the representation." Id. The primary concern was that co-defendant Bravo was a potential witness in the case against co-defendant Mark Wheat. Id. at 156, 108 S.Ct. at 1695. Attorney Iredale's position in representing both men - - even though co-defendant Bravo's case was concluded - - would become untenable, for ethical proscriptions would forbid him to cross-examine Bravo in any meaningful way. Id. By failing to do so, he would also fail to provide defendant Wheat with effective assistance of counsel. Id. Thus, because of attorney Iredale's prior representation of Gomez-Barajas and Bravo and the potential for serious conflict of interest, the Government urged the trial court to reject the substitution of attorneys. Id.

In response, Wheat emphasized his right to have counsel of his own choice and the willingness of Gomez-Barjas, Bravo and Wheat to waive the right to conflict-free counsel. Id. Wheat argued that the circumstances posited by the Government that would create a conflict were highly speculative. Id. Most importantly, all three defendants agreed to allow attorney Iredale to represent Wheat and to waive any future claims of conflict of interest. Id. In Wheat's view, the Government was manufacturing implausible conflicts in an attempt to disqualify attorney Iredale, who had already proved extremely effective in representing Gomez-Barajas and Bravo. Id at 157, 108 S.Ct. at 1696.

The trial court refused to accept the waiver of conflict and denied Wheat's request to substitute attorney Iredale as attorney of record. Id. Wheat proceeded to trial and was convicted of numerous drug distribution crimes. Id.

The Court of Appeals for the Ninth Circuit affirmed Wheat's convictions. Id. The Ninth Circuit found that the trial court had correctly balanced two Sixth Amendment rights: (1) the qualified right to be represented by counsel of one's choice; and (2) the right to a defense conducted by an attorney who is free of conflicts of interest. Id. Denial of either of these rights threatened the District Court with an appeal assigning the ruling as reversible error. Id.

Because the various Courts of Appeal had expressed substantial disagreement about

when a district court may override a defendant's waiver of his attorney's conflict of interest, the United States Supreme Court granted certiorari. Id. at 158, 108 S.Ct. at 1696. The U.S. Supreme Court recognized that

> ...while the right to select and be represented by one's preferred attorney is comprehended by the Sixth Amendment, *the essential aim of the Amendment is to guarantee an effective advocate* for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers.

Id. at 159, 108 S.Ct. at 1697 (citations omitted) (emphasis added). Moreover, the Supreme Court *rejected* Wheat's argument that the provision of waivers by all affected defendants cured any problem created by the multiple representation. Id. at 159, 108 S.Ct. at 1697.

> [N]o such flat rule can be deduced from the Sixth Amendment presumption in favor of counsel of choice. Federal courts have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them.

Id., 108 S.Ct. at 1698.[6] Significantly, the United States Supreme Court acknowledged that a waiver does not necessarily solve yet another problem created by successive representation: the "**apparent *willingness of Courts of Appeal to entertain ineffective assistance claims* from defendants who have specifically waived the right to conflict-free counsel.**" Id. at 162, 108 S.Ct. at 1699 (citations omitted) (emphasis added).

In light of the plethora of issues created by successive multiple representation, the Supreme Court held that "where a court justifiably finds an actual conflict of interest, **there can be no doubt that it may decline a proffer of waiver** and insist that defendants be separately represented." Id. at 162, 108 S.Ct. at 1699 (citations omitted).

> When a trial court finds an actual conflict of interest which impairs the ability of a criminal defendant's chosen counsel to conform with the ABA Code of Professional Responsibility, the court should not be required to tolerate an inadequate representation of a defendant. Such representation not only constitutes a breach of professional ethics and invites disrespect for the integrity of the court, but it is also detrimental to the independent interest of the trial judge to be free from future attacks over the adequacy of the waiver or the fairness of the proceedings in his own court and the subtle problems implicating

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[6] The Court also acknowledged that both the American Bar Association's Model Code of Professional Responsibility and its Model Rules of Professional Conduct impose limitations on multiple representation of clients.

the defendant's comprehension of waiver.

Id. at 162, 108 S.Ct. at 1699 (citations omitted).

The Court went on to explain the **unenviable position in which a trial court finds itself** when faced with this issue, particularly when attempting to forecast the potential problems associated with successive representation of clients.

> Unfortunately for all concerned, a district court must pass on the issue whether or not to allow a waiver of conflict of interest by a criminal defendant not with the wisdom of hindsight after the trial has taken place, but in the murkier pre-trial context when relationships between parties are seen through a glass, darkly. The likelihood and dimensions of nascent conflicts of interest are notoriously hard to predict, even for those thoroughly familiar with criminal trials.

Id. at 162-163, 108 S.Ct. at 1699.

Similarly, the Court described the problems posed to the criminal defense attorney who undertakes successive representation of defendants on the same case.

> It is a rare attorney who will be fortunate enough to learn the entire truth from his own client, much less be fully apprised before trial of what each of the Government's witnesses will say on the stand. A few bits of unforeseen testimony or a single previously unknown or unnoticed document may significantly shift the relationship between multiple defendants. These imponderables are difficult enough for a lawyer to assess, and even more difficult to convey by way of explanation to a criminal defendant untutored in the niceties of legal ethics. Nor is it amiss to observe that the willingness of an attorney to obtain such waivers from his clients may bear an inverse relation to the care with which he conveys all the necessary information to them.

Id. at 163, 108 S.Ct. at 1699. Consequently, the Supreme Court acknowledged that it **must defer to the trial courts in *refusing* waivers of conflicts of interest.**

> For these reasons, we think the district court must be allowed substantial latitude in *refusing* waivers of conflicts of interest not only in those rare cases where an *actual* conflict may be demonstrated before trial, but in the more common cases where a *potential* for conflict exists which may or *may not* burgeon into an actual conflict as the trial progresses.

Id. at 163, 108 S.Ct. at 1699 (emphasis added). Thus, the United States Supreme Court held that the lower court's refusal to permit substitution of counsel in Wheat's case was within its discretion and did *not* violate Wheat's Sixth Amendment rights. Id. at 164, 108 S.Ct. at 1700.

The Ninth Circuit Court of Appeals has also addressed the waiver-of-conflict issue and is in accord with the holding in Wheat. In U.S. v. Stites, 56 F.3d 1020 (9th Cir. 1995), *cert. denied* Stites v. U.S., 516 U.S. 1138, 116 S.Ct. 967 (1996), defendant Lynn Stites was convicted of numerous counts of RICO and mail fraud violations. On appeal, Stites argued that the trial court improperly disqualified two lawyers he wanted to represent him, including attorney Juanita Brooks. Stites, 56 F.3d at 1022.

Attorney Brooks had previously represented Stites's co-defendant, Cheryl Dark. Id. at 1022. By the time Stites went to trial, however, the case involving his co-defendant had concluded; the co-defendant had entered a plea and was sentenced. Id. at 1022-1023. The co-defendant also waived her attorney-client privilege regarding her communications with Attorney Brooks who now sought to represent Stites. Id. at 1023.

The trial judge expressed concern about the voluntariness of the co-defendant's waiver. Id. at 1023. Attorney Brooks said she would meet that problem by not cross-examining the co-defendant if the co-defendant testified at Stites's trial; instead, co-counsel would do the cross-examination, and a "Chinese wall" would prevent any communication from Attorney Brooks to co-counsel who would handle the cross-examination of the former client. Id. at 1023. Finally, attorney Brooks argued that she was familiar with the facts of the complex case, which somehow necessitated her involvement as trial counsel. Id. at 1023.

The Ninth Circuit recognized the presumption that a criminal defendant may have counsel of his choice if he can pay for it and counsel is willing. Id. at 1024, *citing* Wheat v. United States, 486 U.S. 153, 164, 108 S.Ct. 1692, 1699-1700 (1988). The presumption, however, may be overcome by even "a showing of a serious *potential* for conflict of interest." Id. (emphasis added). The Ninth Circuit found that there was not only serious *potential* for conflict but *actual* conflict of interest, and Stites failed to show good cause that the conflict was unlikely to continue. Id. at 1025.

An *actual* conflict existed because Attorney Brooks had represented the co-defendant in the same case in which she now sought to represent Stites. Id. at 1025. Attorney Brooks was bound by her duty to her former client not to enter into a relation where she would,

almost by necessity, have to draw on knowledge she had obtained in the earlier representation of the co-defendant. Id. The co-defendant tried to waive the duty; however, the Ninth Circuit relied on the U.S. Supreme Court's holding in Wheat: where a district court finds an *actual* conflict, there can be no doubt that it may decline a proffer of waiver. Id. at 1025, *citing* Wheat v. United States, 486 U.S. 153 at 162, 108 S.Ct. at 1698-1699.

The appellate court also expressed skepticism regarding Attorney Brooks's remedy: her pledge to keep the confidences and set up a "Chinese wall." The district court was under no necessity to accept the unusual arrangement which was virtually impossible to monitor, and the "Chinese wall" might have crumbled. Id. at 1025. Based on the actual conflict of interest, as well as the insufficient "Chinese wall" remedy, the Court rejected the defendant's claim that attorney Brooks was improperly disqualified from representing defendant. Id.

Likewise, in U.S. v. Shwayder, 312 F.3d 1109 (9th Cir. 2002), *opinion amended on denial of rehearing by* U.S. v. Shwayder, 320 F. 3d 889 (9th Cir. 2003), *cert. denied* Shwayder v. U.S., 124 S.Ct. 181 (2003), the Ninth Circuit refused to accept a waiver of a conflict of interest. In that case, attorney John Schlie initially represented defendant Swan concerning a grand jury investigation that resulted in a 110-count indictment. Id. at 1113. Later, attorney John Schlie was retained by Swan's co-defendant, Shwayder, to represent Shwayder at trial on the same matter. Id. at 1113-1114. Attorney Schlie obtained Swan's permission to represent Shwayder, and both Swan and Shwayder signed waivers. Id. at 1114. Despite the waiver, Shwayder, following his conviction, argued that his trial counsel's former representation of Swan created an actual conflict of interest. Id. at 1117.

The Ninth Circuit noted that Shwayder's waiver of his conflict of interest was *not* valid. Id. at 1117. Moreover, because Shwayder was never adequately informed of the significance of the various conflicts that might arise from attorney Schlie's former representation of Swan, Shwayder did not waive his right to conflict-free counsel. Id. at 1117. Finally, the Court addressed whether there was an actual conflict of interest.

> In successive representations, conflicts of interest may arise if the cases are substantially related or if the attorney reveals privileged communications of the former client or otherwise divides his loyalties. [citation omitted] One of the risks created

> by successive representation is that *the attorney who has obtained privileged information from the former client may fail to conduct a rigorous cross-examination* [of that client] for fear of misusing that confidential information. [citation omitted]

Id. at 1118 (emphasis added). Applying these standards, the appellate court concluded there was, in fact, an *actual* conflict of interest. Attorney Schlie represented Swan (former client) in matters directly connected to the trial. Id. at 1118. The conflict grew greater when Swan agreed to plead guilty and testify against Shwayder. Id. By inquiring into certain areas on cross-examination concerning matters on which he had previously represented Swan, attorney Schlie could have breached his duty of loyalty to Swan - - or at least feared that he would appear to do so and, therefore, avoided certain areas of inquiry. Id.

The Nevada Supreme Court has also expressed concern over successive multiple representation. In Koza v. Eighth Judicial District Court, 99 Nev. 535, 665 P.2d 244 (1983), defendant Maggie Koza was charged with murder. She was represented by the Clark County Public Defender's Office. Id. at 536-537. Defendant Koza sought to have the Public Defender's Office disqualified due to a conflict of interest; the Public Defender's Office previously represented Koza's co-defendant for six days. Id. at 537. The trial court denied the Public Defender's motion to be disqualified as Koza's counsel, and Koza sought relief via an extraordinary writ from the Nevada Supreme Court.

The Nevada Supreme Court determined that extraordinary intervention was warranted and that there was no plain, speedy or adequate remedy at law. Id. at 537. The Court was also mindful of the warning contained in American Bar Association's Standards Relating to the Administration of Criminal Justice, The Defense Function. The Court concluded that the public defender's office had a conflict between its duty to provide vigorous representation to Koza and its duty not to disclose any statements made by its former client. Id. at 539. The Court recognized that the public defender must also avoid acting adversely to its former client. Id. Consequently, the Nevada Supreme Court found that the trial court acted arbitrarily and capriciously in appointing the Public Defender to represent Koza, and that there was a considerable risk of irreparable harm in requiring counsel to proceed to trial on Koza's behalf. Id. at 540-541. Accordingly, the Court ordered the issuance of a writ of

mandamus compelling the district court to grant the public defender's motion to be disqualified as counsel. Id. at 541.

In Carter v. State, 102 Nev. 164, 717 P.2d 1111 (1986), the Nevada Supreme Court addressed the precise concerns expressed by the U.S. Supreme Court in Wheat: in cases involving multiple representation on the same case, the likelihood and dimensions of nascent conflicts of interest are notoriously hard to predict, even for those thoroughly familiar with criminal trials. In Carter, defendants Oliver Carter and Robert Holding were charged with embezzlement. Id. at 165, 717 P.2d at 1111. Both defendants elected to be represented by attorney Kevin Kelly. Id. Attorney Kelley discussed with the two defendants the possibility of a conflict of interest arising out of the dual representation, both defendants told the attorney they were content to be represented by him, and both defendants formally acknowledged their acceptance of dual representation. Id. Later, the trial judge expressed a concern about the potential conflict, the defendants were again canvassed, and the defendants waived their right to conflict-free counsel. Id. at 166, 717 P.2d at 1112.

Nevertheless, during the trial, an issue arose regarding the admission of a document which "raise[d] a complete conflict" between the defendants. Id. Consequently, the trial judge was forced to declare a mistrial, noting that "an appellate court would reverse this for the conflict that will occur in representing both of these defendants...". Id. at 168, 717 P.2d at 1113. The Nevada Supreme Court agreed:

> We recognize that a defendant may waive the right to conflict-free representation. [citation omitted] ***The right of waiver, however, cannot preclude a trial court from declaring a mistrial*** **when there is a manifest necessity for doing so.** Although defendants were repeatedly canvassed concerning ostensible conflict, their statements are rather clearly tied to the advice of their mutual counsel and to the trust they have placed in that counsel. Such statements must be received with caution and in the context of other factors inherent in the dual representation, factors which are more palpable by the trial judge than anyone else.

Id. at 170, 717 P.2d at 1114 (emphasis added); *see also* Hayes v. State, 106 Nev. 543, 797 P.2d 962 (during the course of trial, actual conflicts may arise which are of a much greater type, magnitude, or frequency than the potential conflicts of interest foreseen at the time of

the waiver of conflict-free counsel and the court may be justified in setting aside the waivers).

In the instant case, this Court must decline any waivers proffered by Defendant Hidalgo, III and Hidalgo, Jr. There is an *actual conflict* because attorney Gentile represented both clients. *See*, Stites, 56 F.3d at 1025 (actual conflict because attorney Brooks previously represented former co-defendant). Attorneys Gentile is bound by his duty to each respective client, even if that position would be adverse to the other respective co-defendant.[7] Even if Defendant Hidalgo, III and Defendant Hidalgo, Jr. attempt to waive the conflict, however, there can be no doubt that this court should decline a proffer of waiver. *See* Wheat, 486 U.S. at 162 (recognizing that courts should decline waivers based on actual conflicts of interest). Here, as in Wheat, Stites, and Shwayder, there is a substantial concern that attorney Gentile would have to take a position adverse to the co-defendant who was represented by Mr. Gentile. Attorney Gentile may, in the interest of zealously advocating for each respective client, take a position that would incriminate the other client. By failing to do so, attorney Gentile would fail to provide his client with effective assistance of counsel.

Here, as in Harvey, it is impossible to predict what issues might arise during the course of trial if this Court permits Defendant Hidalgo, III and Defendant Hidalgo, Jr. to be represented by the same lawyer. For instance:

> If Defendant Hidalgo, III elects to testify on his own behalf, then his lawyer would be precluded from asking questions which implicate Defendant Hidalgo, Jr. Moreover, Defendant Hidalgo may need to for go a defense which implicates his father when a witness will discuss conversations between Defendant Hidalgo, III and Defendant Hidalgo, Jr.

The above-cited examples are only the tip of the iceberg in terms of issues that might arise during trial.

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[7] The conflict between Defendant Hidalgo, III and Mr. H is inherent and readily identifiable. A witness has provided information where Defendant Hidalgo, III would have to for go the defense that it was his father that ordered the murder without his knowledge, and Mr. H would have to for go the defense that he merely paid the money to Defendant Carroll to protect his son. (See attached arrest report).

Even if Defendant Hidalgo,III and Mr. H's proffered waivers which arguably waive these issues, Attorney Gentile's representation of could nevertheless result in a mistrial. *See* Carter v. State, 102 Nev. 164 (the right of waiver cannot preclude a trial court from declaring a mistrial when there is a manifest necessity for doing so). Finally, if this Court accepts the respective waivers, it is providing either Defendant with **a built-in ineffective assistance of counsel argument before an appellate court.** *See* Shwayder, 320 F.3d at 1117 (the attorney who has obtained privileged information from the former client may fail to conduct a rigorous cross-examination of that client).

Recently, in Ryan v. Eighth Judicial Dist. Court, 168 P.3d 703 (Nev. 2007), the Court addressed this issue both procedurally and on the merits. While attorney Gentile has represented that Ryan is controlling, it does not automatically mean that representation must be allowed. Specifically, the Court stated:

> However, the right to choose one's own counsel may clash with the right to conflict-free representation, and the presumption in favor of the right to choose one's counsel "may be overcome not only by a demonstration of actual conflict but by a showing of a serious potential for conflict." **The district court is afforded broad discretion in making conflict determinations, and the district court must be allowed substantial latitude in refusing waivers of conflicts of interest not only in those rare cases where an actual conflict may be demonstrated before trial, but in the more common cases where a potential for conflict exists which may or may not burgeon into an actual conflict as the trial progresses.**
>
> .....

Id at 708 (emphasis added). Unlike Ryan, in the instant case, this is simply the rare case where an actual conflict of interest has arisen. Moreover, it is clearly one of those cases where the potential for conflict is so great, that the continued representation by attorney Gentile cannot be allowed. Finally, while Ryan overruled Hayes v. State, 106 Nev. 543, 797 P.2d 962 (1990), that a potential conflict may not give rise to a mistrial, it did nothing to change an actual conflict.

II. EVEN IF THE COURT CHOOSES NOT TO REMOVE MR. GENTILE, THE PRIOR WAIVERS ARE NOT SUFFICIENT TO PROTECT THE RECORD

Even if this Court were to consider a waiver of these rights, it may not do so until independent counsel has advised both clients so the Court can determine that any waiver was knowing, voluntary, and intelligent. Id at 710. This has yet to be accomplished properly. As an initial starting point, during the previous hearing, there were several different facts before the Court. First and foremost, Mr. Gentile actively asserted that there was no actual conflict of interest. Such an assertion not belied by the record. First, Mr. Gentile has at least acknowledged that it would be more "effective" for separate counsel to represent the various interests. However, interestingly, he did not remain counsel for his original criminal defendant, but switched representation to a new criminal defendant. In a joint motion to oppose severance, Mr. Gentile and Defendant Hidalgo, III new counsel have represented that their defenses are antagonistic. Moreover, at the time of the last waiver, neither case was capital. As such, there was never a discussion of antagonistic mitigation evidence. Attorney's for both Defendants have no asserted that their evidence in a penalty phase may be antagonistic. In essence, by definition, without ever saying it directly, Mr. Gentile must be now acknowledging an actual conflict of interest.

Moreover, in order for any waiver to be valid, the "independent counsel" is supposed to ensure that the Defendants waiver was knowing, voluntary and intelligent. There is simply no suggestion that either "independent counsel" had enough working knowledge of the case to effectively communicate to their clients. As for Defendant Hidalgo, Jr.'s lawyer, the situation was even more disturbing. The "independent counsel" wasn't anything close to being independent. It is undisputed that before advising Defendant Hidalgo, Jr. on his waiver, Attorney Cristalli met with Anabel Espindola, a co-defendant which everyone would agree has adverse interest to Defendant Hidalgo, Jr., in an effort to get her to retain him as her counsel. How could he now be relied upon to give proper advise to Defendant Hidalgo, Jr.? Additionally, there is simply no record that the "independent counsel" had access to all the discovery, had spent reasonable time in consultation with their clients, and were them selves of enough knowledge to properly advise their clients on the intricate level of potential pitfalls from the representation.

As to Defendant Hidalgo, III, the lawyer who was "independent counsel" at no point during any of the record that the State is able to access, ever indicated that they had a complete knowledge of the case and could properly advise their client about the conflict. Moreover, there is simply no evidence that these lawyers considered the implications of a waiver in a capital case where there may be "antagonistic mitigation" evidence. However, if the Court decides not to remove Mr. Gentile, then at the very least, Defendant Hidalgo, III now has independent lawyers who have intimate knowledge of the case. If Defendant Hidalgo, III is desirous of filing a new waiver, then at least they could be considered "independent counsel" for this purpose.

CONCLUSION

In the present case there is an *actual* conflict of interest and it is impossible to predict what other *serious potential* conflicts may arise during the trial. As such, attorney Gentile should be disqualified from representing either Defendant Hidalgo, Jr. However, should the Court seek to review waivers, it should first appoint independent attorneys to review the consequences of dual representation with both Defendant Hidalgo, Jr., and require Defendant Hidalgo, III to re-execute after advise from his new lawyers, before considering whether any waiver is knowing, voluntary, and intelligent

DATED this 6th day of January, 2009.

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 forgoing, was made this 6th day of January, 2009, by facsimile transmission to:

Dominic Gentile, Esq. & Paolo Armeni, Esq.
FAX: 369-2666

BY /s/ Deana Daniels
Employee of the District Attorney's Office

dd

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*** TX REPORT ***
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(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

LUIS ALONSO HIDALGO, JR.

Defendant.

Case No. C241394

Dept No. XXI

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 THEM

DATE OF HEARING: 1/20/09

TIME OF HEARING: 9:30 A.M.

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

ORIGINAL

FILED IN OPEN COURT
1-16 20 09
EDWARD A. FRIEDLAND
CLERK OF THE COURT
Rebecca Hooley
DEPUTY

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

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

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

Defendants.

Case No. C212667/C241394
Dept No. XXI

ORDER GRANTING THE STATE'S MOTION TO CONSOLIDATE C241394 INTO C212667

DATE OF HEARING: 1/16/2009
TIME OF HEARING: 9:30 A.M.

THIS MATTER having come on for hearing before the above entitled Court on the 16th day of January, 2009, the Defendants being present, represented by John Arrascada for LUIS HIDALGO, III and Dominic Gentile for LUIS HIDALGO, JR., the Plaintiff being represented by DAVID ROGER, District Attorney, through MARC DIGIACOMO, Chief Deputy District Attorney, and the Court having heard the arguments of counsel and good cause appearing therefor,

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///

IT IS HEREBY ORDERED that the STATE'S MOTION TO CONSOLIDATE C241394 INTO C212667, shall be, and it is Granted.

DATED this 16th day of January, 2009.

DISTRICT JUDGE

DAVID ROGER
DISTRICT ATTORNEY
Nevada Bar #002781

MARC DIGIACOMO
Chief Deputy District Attorney
Nevada Bar #006955

da

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EDWARD A. FRIEDLAND
CLERK OF THE COURT
BY Felicia Hickey
DEPUTY

WAIV
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Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

LUIS HIDALGO, JR.,
#1579522

Defendant.

CASE NO: C241394
DEPT NO: XXI

WAIVER OF RIGHTS TO A DETERMINATION OF PENALTY BY THE TRIAL JURY

I, LUIS HIDALGO, JR., knowingly and voluntarily, with the advice of counsel, do hereby waive my right to the trial jury imposing sentence should I be convicted of First Degree Murder.

Dated this 16th day of January, 2009.

LUIS HIDALGO, JR.
Defendant

DOMINIC GENTILE
Attorney for Defendant

MARC DIGIACOMO
Chief Deputy District Attorney
Nevada Bar #6955

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FILED
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CLERK OF COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

vs.

LUIS ALONSO HIDALGO III and LUIS HIDALGO, JR.,

Defendants.

CASE NO. C212667/C241394
DEPT. XXI

C241394

BEFORE THE HONORABLE VALERIE ADAIR, DISTRICT COURT JUDGE

THURSDAY, JANUARY 29, 2009

RECORDER'S TRANSCRIPT OF HEARING RE:

JURY TRIAL

APPEARANCES:

FOR THE STATE: MARC P. DIGIACOMO, ESQ.
GIANCARLO PESCI, ESQ.
Deputy District Attorneys

FOR LUIS HIDALGO III: JOHN L. ARRASCADA, ESQ.
CHRISTOPHER W. ADAMS, ESQ.

FOR LUIS HIDALGO, JR: DOMINIC P. GENTILE, ESQ.
PAOLA M. ARMENI, ESQ.

RECORDED BY: JANIE L. OLSEN, COURT RECORDER

RECEIVED
NOV 24 2009
CLERK OF THE COURT

chew my leg off when I do this, but I just think it's the right thing to do. We are going to file with the Court at this point our trial memorandum.

THE COURT: All right.

MR. GENTILE: It is redacted. What I did was, those things that I did not want to reveal in terms of our -- our defense theory and certain facts, I have redacted by highlighting them in black so that they can't be read.

THE COURT: Okay.

MR. GENTILE: There's never been an impression on here, so you won't be able to see it at all. And I will serve one on the State right now. How many do you need for your file?

THE COURT: Obviously -- Mr. Adams, do you have a copy of the brief?

MR. ADAMS: I'm fine. I'll -- I'll waive.

THE COURT: You've seen it and -- all right.

(Off-record colloquy)

MR. DIGIACOMO: Can we address something? It doesn't have to be --

THE COURT: Yeah.

MR. DIGIACOMO: -- on the record, but --

MS. ARMENI: Are we on the record?

THE RECORDER: We are.

THE COURT: We are right now.

MR. DIGIACOMO: I think there needs to be two rulings before my opening as I was putting it together last night. So one of which I think maybe the subject of one of the portions of his brief according to Mr. Gentile, the other one is something we've already erased. And I'd just tell the Court generally what they are, not that you need to discuss them now, but I do need between the time of

your ruling and the time you actually require me to open, approximately an hour depending on what your ruling is as to one of those motions.

And the first is whether or not the position of Louis Hidalgo III is, because I think I know what Mr. Louis Hidalgo, Jr.'s position is, to the statements of Deangelo Carroll on the wire. I am offering the wires under Tannenbaum, and when we did this in Counts we instructed the jury you cannot consider the statements of Deangelo Carroll for the truth of the matter asserted.

And Mr. Gentile's, I believe, position is is that he is using them for impeachment only. I don't know what Louis Hidalgo III's position is. There is a statement by Deangelo Carroll that says something to the effect of what are you worried about, Louie, you didn't have anything to do with it.

Now, if they're offering it for the truth of the matter asserted, that's fine, but that will change the nature of the way the evidence comes in if they're off -- if they're saying that that's used for impeachment of the other statements of Deangelo Carroll that's coming in. That's different.

It's kind of a complex legal issue, but it -- the State shouldn't be hampered from addressing the -- the issue of the jury during openings and not have the defense stand up and go, well, Deangelo Carroll didn't do it. If that's the case, then I -- I want to be able to address the substance of that statement in my opening.

MR. GENTILE: Okay. And to respond to that, it is Mr. Hidalgo, Jr.'s position, as I stated last week, that nothing in that tape should be admitted to him as to him at all, period, because it is not a furtherance of the conspiracy that -- and we've been through that.

THE COURT: No, I know.

MR. GENTILE: Okay. Separate and apart from that, if you do admit it, if you do make that decision, then as a matter of law, the statements of Deangelo Carroll ought not to even be in that tape. And the reason the courts allow it to remain in the tape is because they say that the responses that are made in that instance by Mr. Hidalgo III and Anabel Espindola adopt as admissions the statements of Mr. Carroll, which means that they are admitted for substantive use.

THE COURT: Right.

MR. DIGIACOMO: Well, I -- they're not all adopt admissions. They give context to these words of the defendants. Merely there is no response. When Deangelo Carroll says what are you worried about Little Lou, you had nothing to do with it, he doesn't say, you're right, I had nothing to do with it. There is no adoption of that.

MR. GENTILE: His silence is that adopted admission. He doesn't correct him.

MR. DIGIACOMO: He -- he goes on to talk about killing the witnesses. If they are asserting --

THE COURT: Well, I think, though, actually you got -- I may be mishearing Mr. DiGiacomo, but it sounds kind of like you're saying the same things. You think the tape should come in for the substance of the statement, and then he's saying, well, if they want this one statement, you want the substance of the other statements coming in.

MR. DIGIACOMO: Right.

MR. GENTILE: No.

MR. DIGIACOMO: Well, what I'm saying is if the substance of that

statement comes in, it's offered for the truth of the matter and --

THE COURT: Then all the statements should be offered for the truth of the matter.

MR. GENTILE: Which is why I object to it coming in at all as to Mr. Jr.

MR. DIGIACOMO: No, I don't necessarily think that.

MR. GENTILE: I agree with you. We're all in the same agreement, but I'm saying that it can't come in as to Junior at all for that very reason.

MR. DIGIACOMO: Under 51.069, we would be able to -- to impeach that particular statement. There is a reasonable explanation that Deangelo Carroll gave prior to ever making that statement.

MR. ADAMS: That's never been provided to us.

MR. DIGIACOMO: That's not true.

MR. ADAMS: Never --

MR. DIGIACOMO: It's in -- that's in his 128-page statement. There's a very reasonable explanation for what the meaning of that statement is --

MR. ADAMS: What is it?

MR. DIGIACOMO: -- and if the Court is going to -- I don't necessarily have to give you my opening. What I'm saying is --

MR. ADAMS: Well, no, but he would like -- can you help him out? Can you tell him where it is in the 120-page statement so Mr. Adams --

MR. GENTILE: I don't have any written statement --

MS. ARMENI: No.

MR. GENTILE: -- from Angelo -- from him. I have a transcript of a videotape.

MR. DIGIACOMO: Yeah, the transcript.

THE COURT: He's talking about page --

MR. DIGIACOMO: In the video -- in the video Deangelo Carroll gives an explanation as to a discussion that he had with Mr. H, and that discussion explains the statement that Deangelo Carroll made on -- on -- on the wire.

THE COURT: You know what, maybe there is an easier way to address this. And the easier way, at least for me, would be if you tell us what you would like to say in your opening statement and then rather than dealing in hypothetical and conjecture, if you just tell us what it is you would like to say, then both sides of the defense or -- can say what they find objectionable and I can rule in a more concrete way than trying to -- trying to guess at what maybe you're going to do.

MR. DIGIACOMO: But --

THE COURT: And I know you don't want to reveal your opening statement, but to the extent that we can avoid a lengthy conference at the bench and having you have to flip through your PowerPoint, let's just do it this way.

MR. DIGIACOMO: No, and I wasn't going to actually -- because I think there's going to be certain legal rulings that the Court's going to have to make. I'm not asking you to make those legal rulings.

What I'll say is if the position is it's coming in as substantive, I am going to tell the jury when you -- when you hear this or if -- they may even hear it during their opening, ladies and gentlemen, you will hear testimony that is going to explain that this does not mean that Little Lou wasn't involved in the conspiracy. But I can't make that statement if it's not offered for the truth of the matter asserted.

If it's -- if it's -- I can only make that statement if it -- if it's coming in as substantive evidence. I don't even need to discuss what the explanation is,

but I have a right to say to the jury before they're -- they're told in the opening, hey, Deangelo Carroll said he didn't do it, then I have a right in my opening to say to them, well, yes, but you're going to understand what the meaning of that is at the end of this case, and that meaning is not what is going to be ascribed to it or what you would naturally think he was saying in that statement. And that's all I want to be able to say.

But I felt like it would be inappropriate for me to say that if it's not being offered for the truth of the matter asserted. And so I just wanted to know what the position of the defense is. Are they going to offer that for the truth of the matter asserted, and if they are, then I'm -- then I'm -- I can't offer it for the truth of the matter asserted, but if they are I have a right to comment on it.

MR. GENTILE: Okay. Make it straight. As to Junior, we're not offering it at all. We're opposing it. If we get into our case in chief and we use the videotape that he's talking about, we're using it as a prior inconsistent statement.

THE COURT: So just for impeachment?

MR. GENTILE: That's certainly our attitude.

THE COURT: So now it's clear, Mr. DiGiacomo?

MR. DIGIACOMO: I -- my problem has never been with Mr. H.

THE COURT: It's with --

MR. DIGIACOMO: It's with Louis Hidalgo III. If they're going to attempt to argue to the jury that Mr. Carroll's statement means his client didn't do it, I want to be able to comment on that fact during my opening.

THE COURT: All right.

MR. GENTILE: I'm sure that's what they're going to do.

MR. DIGIACOMO: That's -- that's -- that's why I'm saying it. As long as

there's an indication that that's what's going to happen, then I feel comfortable making the statement I'm going to make to the jury.

THE COURT: And Mr. Gentile --

MR. GENTILE: But that doesn't mean --

THE COURT: -- doesn't really care because that doesn't go to his client anyway.

MR. GENTILE: No, but it doesn't mean that the -- the videotape when it does come in is used for substantive purposes. The State can never use that tape for substantive purposes.

MR. ADAMS: And I don't understand how he can explain away something from a videotape when the videotape is not admitted and we don't know if it's going to be admitted.

MR. DIGIACOMO: I'm not going to say what's on there or how it is the jury is going to know. I just want to have the right to comment that you heard that statement and that statement is not going to mean at the end of this case that Little Lou didn't do it or that Deangelo Carroll meant that Little Lou didn't do it.

MR. GENTILE: He can comment on it. He can comment on anything. The question is is he going to be able to get the evidence in later for that purpose?

THE COURT: Well, except it would be inappropriate for him to comment on evidence that he knows isn't going to be admitted, number one. And number two, Mr. DiGiacomo doesn't want to run the risk of commenting on evidence and then having the jury sit there and say, well, wait a minute, he talked about this, where was that, we didn't hear anything about it.

MR. ADAMS: What we would like to do, Judge, is to address the issue

after their opening statement.

THE COURT: No.

MR. DIGIACOMO: Well, my -- the issue is what I say.

MR. ADAMS: Because the sequencing of the order is they have to make their argument and then we make ours. Alternatively, if the Court is not inclined to do it that way --

THE COURT: I'm not.

MR. ADAMS: -- we'd like to think about it overnight and respond in an educated fashion tomorrow.

THE COURT: All right. And, Mr. DiGiacomo, this hour that you need --

MR. DIGIACOMO: Relates to the transcript --

THE COURT: -- is that any --

MR. DIGIACOMO: -- not to that.

THE COURT: Okay. Now, there are other people in the DA's office that are actually physically going to be able to do this work? So if I give you a ruling at 9:30 somebody else can -- can do the work, it's not an hour of your time?

MR. DIGIACOMO: More like a lunch -- I need a lunch break.

THE COURT: Okay. You'll get a lunch break.

MR. DIGIACOMO: If the ruling is -- if the ruling is before the lunch break, during the lunch break I can make whatever corrections.

THE COURT: Okay.

MR. DIGIACOMO: But essentially it relates to the transcript. I need to know if you're going to let us use the transcript, one. And if -- if you're not --

THE COURT: So that's the second issue is the transcript? You know, I was rethinking this issue, and I don't remember. I mean, it was so long ago.

There's been so many things in this case. But since there's a difference in the transcript, and we're fighting over the transcript, and I know it can help the jury listening to the tape, but maybe it would be better just to play the tape without anybody's transcript --

MR. GENTILE: I'm -- I'm all -- I'm down with that.

THE COURT: -- and letting the jury listen and see what they --

MR. DIGIACOMO: If that's the Court's ruling, we're going to play it 100 times and we'll be here for three weeks because you can't --

MR. GENTILE: That's cumulative. You can't do that.

MR. DIGIACOMO: -- you -- you have to listen to this tape lots and lots of times and you can't expect this jury to comprehensively understand the wording on there. We have a witness who is going to authenticate the transcripts that we provided to the defense. If the Court's ruling, and as I recall, this is a demonstrative piece of evidence. It's not like it's a physical piece of evidence.

THE COURT: No, it's not. And last time I said, okay, use both transcripts, but --

MR. DIGIACOMO: And if the Court's ruling is that you won't allow that section to be played in front of the jury, I need to know that. I don't see how it is -- I mean, what I guess I'll do is I'll bring in a blank board and ask Anabel to write in on a blank board, okay, what exactly did you hear at this portion of the transcript? I mean, ultimately, at the end of the day, I don't understand what the problem is. It's the -- the evidence has been turned over to them forever.

MR. ADAMS: Anabel can testify to what she heard in the room. She can't -- I don't think she's being offered as an authenticator of the transcript.

THE COURT: Well, except if she remembers the testimony and listened

to it and says, yeah, the -- or the conversation and says, yeah, that's what he said.

MR. ADAMS: We sure would like some notes of that debriefing session, Your Honor, because that is critical to us and we're entitled to know how she was prepped, how she was prompted to come up and listen to this stuff and fill in the gaps that are being filled in after the audibility hearing.

THE COURT: Okay. And that was with the district attorneys; right? Not with the police, not when she was in custody?

MR. DIGIACOMO: That's correct.

THE COURT: Okay.

MR. DIGIACOMO: And they're certainly not entitled to any notes should they exist.

THE COURT: So that's subsequent to the negotiation and all of that; is that right?

MR. DIGIACOMO: Correct.

THE COURT: Okay. And when just did -- did this meeting occur where she listened to the tape and the -- looked at the transcript and all that stuff?

MR. DIGIACOMO: What day is -- it was Monday because we were dark Monday.

THE COURT: Okay. And where did it occur?

MR. DIGIACOMO: What?

THE COURT: Where?

MR. DIGIACOMO: In this building.

THE COURT: In the DA's office?

MR. DIGIACOMO: Well, it was brought -- no, it's not technically in the

DA's office, but it's a room in the regional justice center for in-custody interviews.

THE COURT: Okay. And who was there?

MR. DIGIACOMO: Myself, Mr. Pesci, and the transporting investigators, and I believe Mr. Oram for part of the time was present.

THE COURT: Okay. And that would -- Would that be Mr. Faulkner? Was he there?

MR. DIGIACOMO: Mr. Faulkner and --

THE COURT: Okay.

MR. DIGIACOMO: -- one of the transporting, and Mr. Doherty, I believe, was the other transporting individual.

MR. ADAMS: We'd like to see some notes about how she was prompted on this part of the tape. If she's going to say this is the creation, this is how they came --

THE COURT: Well, first of all, those wouldn't be the investigator's notes because that would be the DA's preparing for her testimony, which if there are notes, that would be the lawyers' notes, number one. Because at this point in time, the DA investigators are just, I'm assuming, transport. They have to have her -- she's in custody, they bring her and what not. They're not really investigating at this point if the lawyers are the ones that are doing it, number one.

Number two, the reason I asked that was because it's not something from previous when she initially met with Metro and had the debriefing and all of that stuff. And you're certainly free to question her about it.

MR. ADAMS: But here's my concern, Judge. If they play the tape and she has the transcript and no changes are made and then they say, well, listen to

this part again and they prompt her to a special section and talk to her about that, that's Brady material. That if she did not identify this the first time that process is Brady material. It's all fertile ground for cross-examination. I think we're entitled to know all about what happened.

MR. DIGIACOMO: He's free to ask her.

MR. ADAMS: In advance of trial, in preparation of trial.

MR. GENTILE: You know, separate and apart from that whole issue it seems to me that Anabel can testify -- excuse me, Ms. Espindola can testify to anything that she thinks she hears on that tape. Nobody has a quarrel with that. But to let her authenticate a transcript which isn't even evidence in the first place, it's nothing more than her opinion at that point.

So if she can testify as a percipient witness that when we were there this is what was said and the jury then listens to the tape and the jury decides whether that's what they hear on it or not. I have no quarrel with that. As a matter of fact, nobody could have a quarrel with that. But it's this -- it's the use of the transcript itself that is the problem.

THE COURT: The second transcript.

MR. GENTILE: Right.

MR. ADAMS: The second transcript.

MR. DIGIACOMO: Well, there's a problem with the first transcript. Who's going to authenticate the first transcript? Who's going to authenticate their transcript? Because my understanding is that Anabel was part of the creation of that --

MR. GENTILE: You don't need --

MR. DIGIACOMO: -- particular transcript.

MR. GENTILE: -- to authenticate a transcript. Okay?

MR. DIGIACOMO: Well, then what's the problem?

MR. GENTILE: You don't need to authenticate --

MR. PESCI: The same --

MR. GENTILE: -- a transcript.

MR. PESCI: -- arguments can be made for the defense --

THE COURT: Right. I mean --

MR. PESCI: -- because Ms. -- Ms. --

THE COURT: -- if -- if we are just going to do it, if nobody is -- I mean, typically, you know, the detective will say, yeah, I listened to the transcript and this accurately is what the conversation was and I followed along with the tape and blah, blah, blah.

MR. PESCI: Right.

THE COURT: If we're not going to do that, if we're going to say, ladies and gentlemen, the tape is difficult to hear or you're going to be the judge of what's on the tape, but maybe to assist you two transcripts have -- there is dispute over what's on the tape, but to maybe assist you, two transcripts have been prepared. One has been prepared by the State, one has been prepared by the defense, we're going to pass out the first transcript, we'd like you to listen, and --

MR. GENTILE: Well, then I think we should be entitled at least to have it play the second time with the other one.

THE COURT: And then contemporaneous.

MR. GENTILE: Yeah.

THE COURT: Then -- and then -- and then say, okay, now here's the

defense's version. Ladies and gentlemen, you're not going to have these transcripts with you in the back so you have to -- they're not evidence, so you have to listen to this testimony as carefully as you would to any other testimony because it's -- you'll have the tape to play, but you won't have the transcript, so please listen carefully to the tape as it's played, this is just to assist you, no one is saying that this is the correct transcript or an incorrect transcript and we want you to follow along and it's your collective hearing that controls here. And then play the State's version, play the defense's version, and move on from there.

MR. ADAMS: The State's first original version that was ruled upon by the court.

MR. DIGIACOMO: You didn't rule upon it. You just -- we didn't even get that far. Look back at the transcript. You said the State can play theirs, the defense can play theirs. The suggestion that somehow that a transcript that is more accurate or is -- has more information filled into it, somehow that suddenly makes a difference. They still have the same tape.

We've been here for three days on jury selection. They haven't told you how they're prejudiced by the fact that there's additional words on the transcript at all. It's -- if this jury doesn't hear what's on that transcript, it's very bad for us. Right?

I don't understand what the prejudice to the defense is as to a demonstrative piece of evidence. There's other demonstrative pieces of evidence that I'm sure is being created or will be brought tomorrow. There's, you know, aerial maps.

THE COURT: Right. Whatever.

MR. DIGIACOMO: These are all demonstrative kind of things. I don't

understand what the argument from the defense is that they were --

MR. PESCI: Plus the creation of the defense's --

MR. DIGIACOMO: -- entitled to it.

MR. PESCI: -- version of it was done with the same witness. They will have the opportunity, because she's the State's witness now, to cross-examine that particular witness. And it's not to authenticate, it's because that was the person in the room. She was in there. She heard it all.

THE COURT: No, I know. She can say this is what was said or this is what I remember or --

MR. PESCI: She was in the process with --

THE COURT: No, I get it.

MR. PESCI: -- defense counsel making their version.

MR. ADAMS: Judge, there was a joint defense agreement that Ms. Espindola had entered into with Louis Hidalgo III that apparently has been violated and I think we're going to need some sort of hearing on the extent of -- of the violation and what it means. It's become clear now, based on their representation that she has violated the joint defense agreement that was effectuated between counsel for Mr. Hidalgo III and for Ms. Espindola.

MR. DIGIACOMO: And the courts have all said they're completely unenforceable, Judge. Ms. Espindola does not have some duty to an unenforceable document.

MR. GENTILE: Actually, the courts haven't said that, but --

MR. DIGIACOMO: What?

MR. GENTILE: I did a paper on that about six months ago. The courts haven't said that. There's a bunch of Federal cases.

THE COURT: What did the courts say?

MR. GENTILE: They've reversed a couple of convictions on it. I'll bring them to you tomorrow if I can find it.

THE COURT: All right. I mean, just -- if nobody is authenticating the transcript and it's this is one version, here is another version, you know, I think the fact that the other version may be better --

MR. GENTILE: Well --

THE COURT: -- or more complete --

Yes?

MR. GENTILE: I don't -- nobody needs to authenticate a transcript. I think we're all in agreement with that.

THE COURT: Right. We're just going to pass them out.

MR. GENTILE: The transcript is nothing more than the State's opinion as to what's on the tape.

THE COURT: As to what's on the tape and then --

MR. GENTILE: The best evidence of what's on the tape is the --

THE COURT: Is the tape.

MR. GENTILE: -- tape. The -- the additional evidence of what was said comes from the witness's mouth. This is what I said, okay, or this is what I heard.

THE COURT: Right.

MR. GENTILE: But to get into authenticating a transcript which has --

THE COURT: There's not going --

MR. GENTILE: -- no need to be authenticated --

THE COURT: There's not -- nobody is going to authenticate the

transcript. The only way the transcript will be used is just to say, you know, this may assist you, the Court is not saying this is an accurate transcript, this is the State's version of the transcript. The defense contests that there are parts that are not accurate and has prepared its own. It's for you folks to judge what you hear on the tape. You won't have the transcripts in the back. You need to listen carefully and play the tape, and collectively decide as a jury what's on the tape. I mean --

Yes?

MR. ADAMS: Well, which transcript are you now making reference to because the -- that makes a difference.

THE COURT: You know what, can I do this. I don't have the second transcript. Would you give me the -- Mr. DiGiacomo, this is your assignment.

MR. ARRASCADA: Judge --

THE COURT: The first transcript and the second transcript and highlight what's new on the second transcript that's different from the first transcript so I can see what we're talking about here.

MR. ARRASCADA: Judge, I think you'll find it's one gap has been filled.

MR. GENTILE: No, I -- I haven't checked them side by side either.

MR. DIGIACOMO: There's a word here, a word there, and --

THE COURT: Can you do that for me and just highlight on the second transcript what the new words are so I can have a more concrete idea of what we're dealing with and whether I think the late notice is prejudicial to the defense or not? Because it's sort of hard to decide it unless I really see.

You know, if we're talking about pages and pages of new, you know, inculpatory material, then that might be different than if we're talking about a

word here and there or a phrase here and there that previously was unintelligible. So I'd like to be able to look at that before I make a decision.

MR. GENTILE: Well, I have -- okay. That's fine.

THE COURT: What?

MR. GENTILE: Nothing.

THE COURT: All right.

MR. ARRASCADA: Judge, will we be able to argue this more tomorrow?

THE COURT: You won't be able to argue it more tomorrow at 9:00 a.m. because I want to start right at 9:00 a.m. But at some point you'll be able to argue it more fully.

MR. ARRASCADA: Thank you.

MR. ADAMS: Thank you. Because that -- I think that makes a difference for both of our entities.

MR. DIGIACOMO: And one -- one last question. If your ultimate decision -- so long as your ultimate decision is no transcripts, then I -- if you're going to say it could be either one of the two transcripts, is that -- if that's where you're leaning then I just need to know that tonight because I'll -- I'll have the second transcript ready for courtroom presentation that way it won't delay anything.

THE COURT: Okay.

MR. DIGIACOMO: But if you say no, then I'll probably need about an hour.

THE COURT: Okay.

MR. DIGIACOMO: Okay.

THE COURT: Well, we'll have a lunch break and whether you get to eat

lunch or you're working on your computer will remain to be seen.

(Proceedings adjourned at 5:55 p.m.)

-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

TRAN

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DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

vs.

LUIS ALONSO HIDALGO III and LUIS HIDALGO, JR.,

Defendants.

CASE NO. C212667/C241394
DEPT. XXI

C241394

BEFORE THE HONORABLE VALERIE ADAIR, DISTRICT COURT JUDGE

FRIDAY, JANUARY 30, 2009

RECORDER'S TRANSCRIPT OF HEARING RE:

JURY TRIAL

APPEARANCES:

FOR THE STATE: MARC P. DIGIACOMO, ESQ.
GIANCARLO PESCI, ESQ.
Deputy District Attorneys

FOR LUIS HIDALGO III: JOHN L. ARRASCADA, ESQ.
CHRISTOPHER W. ADAMS, ESQ.

FOR LUIS HIDALGO, JR: DOMINIC P. GENTILE, ESQ.
PAOLA M. ARMENI, ESQ.

RECORDED BY: JANIE L. OLSEN, COURT RECORDER

Anyone else includes members of your family and your friends. You may tell them that you've been selected to serve as a juror in a criminal case, but please don't tell them anything else like who the lawyers are or what courtroom it's in or anything else. Okay?

Additionally, do not read, watch, or listen to any reports or commentaries on any subject or person relating to this case. Don't do any independent research on any subject connected with the trial. Don't visit the locations at issue. And please don't form or express an opinion on the case.

I'm going to have you exit the courtroom with Officer Wooten. He'll tell you where to meet up Monday morning at 9:00 a.m. And then, as I said before, we'll begin the trial. So have a good weekend and we'll see you back here Monday.

PROSPECTIVE JUROR NO. 027: Thank you, Judge.

PROSPECTIVE JUROR NO. 021: Thank you.

(Jurors recessed at 4:56 p.m.)

THE COURT: All right. I guess we have to resolve the issue of the transcripts.

MR. DIGIACOMO: Yes, and then they were supposed to answer the question as to whether or not they want Deangelo Carroll's one line in there for the truth of the matter asserted or -- or not because --

THE COURT: I think they -- they said yesterday they did not.

MR. DIGIACOMO: No, they said they wanted to think about it overnight.

THE COURT: Oh, I'm sorry. Okay.

And the outcome is?

MR. ADAMS: Well, are you ruling on the transcript issue now, Your

Honor?

THE COURT: Well, let's do the other one first.

MR. ADAMS: Okay.

THE COURT: Who's going to address that?

MR. ARRASCADA: I will.

THE COURT: All right.

MR. ARRASCADA: Court's indulgence.

Your Honor, we believe it's admissible for the truth of the matter.

THE COURT: All right. And so, Mr. DiGiacomo, the State's position is?

MR. DIGIACOMO: Well, my position is that I can't offer it for that purpose and they can't argue it for that purpose. However, based upon the fact that they are going to assert in their opening that that is a statement which is offered for the -- which may be considered for the truth of the matter asserted, I am going to explain to the jury that I think that there will be an explanation during the course of the trial. And if ultimately the Court rules that that's not offered for the truth of the matter asserted, at least I had a good faith basis to make a statement.

THE COURT: All right. That's fine.

MR. GENTILE: That's fair.

THE COURT: That's fair.

Okay. So we're all kind of on the same page on that one.

Direct my attention, please, to the portion of the transcript that has the basically contested sentence.

MR. DIGIACOMO: I believe it's page 15. I can count it out right now because I forgot to number these last night. One, two, three, four, five, six,

seven, eight, nine, ten -- it's actually page 11. And I think when you say contested, you need to probably pull up theirs as well because I know I gave you my copy of theirs.

THE COURT: Well, I'm talking about the one that you just had and --

MR. DIGIACOMO: I -- I know, but part of what we changed is from theirs.

THE COURT: Okay. So -- and it is?

MR. DIGIACOMO: Little Lou line -- it reads now: Next time you do something stupid like that, I told you you should've taken care of TJ, but, space, all the fuckin' time, space, KC, space, priors, how do know this guy?

THE COURT: Okay.

MR. DIGIACOMO: If you see the part that is lined out, it used to read: Doing something stupid like that, I told you to take care of this, space, all the fuckin' time, KC priors, how do you know this guy?

And the defense's version read: space, you do something stupid like that, I told you you should have taken care of this, space, all the fuckin' time.

And then I don't remember what happens afterwards. But the -- that is the extent of the argument --

THE COURT: I don't --

MR. DIGIACOMO: -- that we're having.

THE COURT: I'm sorry. I don't see that the import or the impact of this is really markedly different between the State's new version and the old version. I mean, it's obvious they're talking about the same thing. I don't know what the big -- other than this or TJ, I don't really know what the big -- the big change is, I mean, to make it more prejudicial or more probative or anything else. I mean, I

think the content -- the content is essentially the same whichever version you look at.

MR. DIGIACOMO: That's -- that's kind of what I thought too, but --

THE COURT: That's how I read it. I mean, I'm -- I guess the defense disagrees with that, but whether it's you do something stupid like -- I mean, if you look through the whole content, it's the -- it's the -- it's not like they're -- looks like they're talking about anything different other than TJ and this. But I still think if you go through the content, it's not that -- I mean, it's obvious they're talking about the same thing. I just don't get what's so different, in my view.

MR. ARRASCADA: Your Honor, it's the reference. You can listen to that tape 100 times and come to 100 different conclusions regarding taking care of this TJ, but you cannot -- Judge, you've listened to the tapes. You can't hear.

And now they're going to be overly suggestive to this jury regarding TJ Hadland, that our client is referring to him by name in this statement. You don't see it as being any different, so what's the harm of just giving the one that everyone agreed on and not the contested one? And they -- obviously they're going to argue it, Judge.

MR. PESCI: Judge, that's just --

MR. ADAMS: But if you're going --

MR. PESCI: -- the misrepresentation. We didn't all agree to that.

MR. ARRASCADA: Judge, if I --

MR. PESCI: We agreed to have --

MR. ARRASCADA: You know --

MR. PESCI: -- two separate --

MR. ARRASCADA: -- please instruct --

MR. PESCI: -- ones.

MR. ARRASCADA: -- the prosecutor --

THE COURT: Let -- let --

MR. ARRASCADA: -- not to --

THE COURT: Mr. Pesci --

MR. ARRASCADA: -- interrupt.

THE COURT: -- first of all, don't double team. And second of all, Mr. Arrascada is speaking and wait until he's done speaking and then you can speak. Well, whoever wants to take this one.

MR. ARRASCADA: I believe Mr. DiGiacomo had the lead on this, and the Court just ruled no double teaming.

Your Honor, the point being now in the 11th hour they have come up with this new miraculous transcript that has the name TJ within it. And it's prejudicial to our client because it gets put in front of the jury that this is the context and it's overly suggestive. And the prior two transcripts were both blank in that area.

MR. DIGIACOMO: Judge, if I may be heard now in response to that, there was never an agreement as to the content of the transcript. They filed an audibility hearing in which they said, look, Judge, either you go through and you write a transcript, or we will accept that the State can offer one version and we'll offer another.

What they are essentially now claiming is there is some sort of discovery violation related to a demonstrative piece of evidence. That's what the argument is --

THE COURT: Yeah, that is what --

MR. DIGIACOMO: -- before the Court.

THE COURT: -- in my view, what it is.

MR. DIGIACOMO: And there -- there can't be a discovery issue related to the original tape. One, two, they know two weeks ago I specifically said that says TJ in that exact spot when they were in my office. I made that representation.

THE COURT: Well, that was not -- Mr. Gentile wasn't involved in that.

MR. DIGIACOMO: No, Mr. Gentile wasn't. But actually, I think that statement is somewhat exculpatory to Mr. H when I think all of the -- the things play out. In fact, there's another line that Mr. Gentile this morning said, oh, thanks for giving me that, I didn't hear that on there either. We didn't make stuff in there to help our case. We added other stuff that we could find, some of which was in their transcript itself.

Now they're saying one word, this versus TJ. That's it. That's what they're arguing to the Court. And to suggest that we have to stick with a word that we don't believe is correct in our transcript, they're free to put this in their transcript and they're free to argue let's do it again, it's this, and we're free to argue, listen again, he says TJ.

What's the difference? What possible prejudice could they have that -- that they would've done differently with their case had they known that that word was TJ versus this? What prejudice?

We've been here now five days for jury selection -- or four days for jury selection. What's changed in the entire -- what couldn't they have done in preparation of their case? I mean, what possible difference does it make?

MR. GENTILE: May I be heard?

THE COURT: Uh-huh.

MR. GENTILE: It's really not by beef because --

THE COURT: Right. You don't have a dog in the fight.

MR. GENTILE: I don't have a dog in it. But I was the person who argued it and -- and we were the ones who filed the --

THE COURT: Right.

MR. GENTILE: -- audibility hearing motion, at the time representing Mr. Hidalgo III. I will tell you that when I saw the transcript that the government proposed at that time my feeling was that there was nothing in it that would create a need for you to have to go through and listen to it all and make the decision.

My feeling was that whether a jury believed the one that existed at that time or the one that existed that -- that I had or believed neither of them, which is really what they're supposed to do. They're supposed to believe neither of them, that it didn't matter, and, candidly, I wanted the tape played twice because I thought it was really good for Mr. Hidalgo III, okay, especially on that issue.

This does change things, and I will tell you that had this been the transcript that had been offered at that time, I would've forced the Court to at least make an effort to --

THE COURT: You would've asked --

MR. GENTILE: I would've --

THE COURT: -- the Court.

MR. GENTILE: No, actually, Judge, I think there's a right to it.

THE COURT: All right.

MR. GENTILE: Okay?

THE COURT: Here --

MR. GENTILE: But -- but in the end -- in the final analysis --

THE COURT: If it wasn't the weekend -- I mean, I'm -- I'm happy to take the tape and listen to it and then make a finding one way or the other. If I think it says TJ or if it says this or I can't tell what the heck it says, my only concern is then in Mr. DiGiacomo's PowerPoint. I mean, in terms of these other words, I don't think anybody really cares if Mr. DiGiacomo uses this new transcript. The only issue is whether or not it says TJ this or nothing.

MR. GENTILE: And I will tell you on the record that but for --

THE COURT: Is that fair?

MR. GENTILE: That's absolutely true --

THE COURT: Mr. DiGiacomo --

MR. GENTILE: -- but for TJ thing.

THE COURT: -- if, let's say, Monday morning at 8:00 you were to be told, you know what, the Court said she didn't hear TJ, take the TJ out, just leave a blank there, how long would that take you to revise in your PowerPoint?

MR. DIGIACOMO: I'll tell you what, for purposes of my PowerPoint -- because I mean certainly I'm entitled to put up on -- on the --

THE COURT: You're --

MR. DIGIACOMO: -- thing with -- with the case not playing saying you will hear this. For purposes of my PowerPoint that'll make no difference. And if you rule right now that for purposes of my opening I don't play the audibility portion where -- and -- and the jury have a transcript that says TJ, then we're fine.

THE COURT: Right. I mean, you can say, obviously, in your PowerPoint -- I'm sorry, not in your PowerPoint, in your opening you can say you're going to listen to the tape and hear that he's talking about TJ, and then the defense can say that's not what the tape says, you're going --

MR. ARRASCADA: Not only --

THE COURT: -- to hear --

MR. ARRASCADA: Not only that's not what the tape says, but that's not what their transcript in the beginning said.

THE COURT: I know. I get it.

MR. ARRASCADA: And then their transcript --

THE COURT: I mean, I still think -- I still think that they can say what they think the evidence is going to show. It's up to the jury what the evidence shows. I mean, I can listen to this over the weekend and make a comparison and then make a finding one way or the other if it's not going to impact --

MR. DIGIACOMO: I'll take it --

THE COURT: -- the openings.

MR. DIGIACOMO: -- out of my closing, and then that way --

THE COURT: I mean your opening.

MR. DIGIACOMO: -- I mean, it's already late on Friday. We'll get you a clean copy with good headphones for you listen before it actually comes into evidence.

THE COURT: So I don't have to do it this weekend?

MR. DIGIACOMO: So you don't have to do it --

THE COURT: Okay.

MR. DIGIACOMO: -- this weekend, one.

Two, they keep saying that somehow that there's some evidentiary basis to make an argument as to a transcript. Unless they're going to -- they've already said they don't want a witness to authenticate it. Unless they're going to find a witness that originally authenticated or -- or created the transcript, how is it that they're going to impeach and say, well, this -- the government gave us a transcript that didn't have this in it and now they did.

Now, certainly they can -- they can ask -- I guess they can ask witnesses that question, but they're not allowed to just stand up there and go, well this is what the government gave us in discovery --

THE COURT: Right.

MR. DIGIACOMO: -- and it doesn't count.

THE COURT: I mean --

MR. ARRASCADA: Judge, we -- we wouldn't do that.

THE COURT: Right. You can comment on whatever, I mean, that, you know, they're going to see two transcripts and the govern -- and the State is putting in stuff that they're just not going to hear on the tape.

MR. ARRASCADA: Judge, if you're going to let in that transcript, then their original transcript -- transcript should be --

THE COURT: No, it's one transcript or the other. It's not going to be an issue about who prepared what transcript and whether they first -- I mean, the Court's going to make a determination of what transcript they're entitled to give, whether it's the first, whether it's the second, or it's the second with a slight redaction of the TJ, which seems to be the big issue.

Then you're going to make a Court exhibit of the first transcript, and the second transcript will be a Court exhibit as well. But there's not going to be a

bunch of arguing and fighting in front of the jury, oh, well, this transcript and that transcript. For appellate purposes, the transcripts, like I said, are Court's exhibits that don't, obviously, go back to the jury.

But, no, we're not going to get into that because there's no witness to that. How are you going to put it on? Then you're going to be the witness then arguing about a discovery violation and you're not a witness. So who's going to tell about what transcript and who did it? There's nobody to tell.

MR. ADAMS: Judge, I --

THE COURT: So it's not evidence.

MR. ADAMS: Judge, may I be heard momentarily --

THE COURT: Yes.

MR. ADAMS: -- please. I'm doing the opening statement for Mr. Hidalgo III. And Mr. DiGiacomo has referenced that he told us a couple of weeks ago in a part of a conversation that was off the record, and he asked us to be off the record on that. And there were other parts of that which I feel bound by the off the record part so I'm not going to go into those.

I think there is a process where he thought he heard something on the tape and he thinks now a witness has confirmed that. And I think he will ask this witness -- I think he'll ask Ms. Espindola about it.

THE COURT: That's okay.

MR. ADAMS: I think we are entitled to talk about the prior transcript before Ms. Espindola --

THE COURT: Okay.

MR. ADAMS: -- became a --

THE COURT: Here's the deal.

MR. ADAMS: -- State's witness.

THE COURT: If Ms. Espindola was not -- here's my ruling. Okay? Right or wrong. If Ms. Espindola was not involved in the making of the first transcript, which she was not, what difference -- how is she going to comment on the first transcript versus the second transcript?

Now, you can ask her, okay, as part of your agreement to cooperate in this -- in this case you met with the prosecutors and you listened to the tape, and you told them what was in the tape, or something like that, and you didn't do that until after. She can testify to that, but she can't comment on the first transcript why something --

MR. ADAMS: She would've reviewed the first transcript to come up with the additional stuff.

THE COURT: Yeah, but she doesn't know -- you know what, I'm not going to fight with you. That's my ruling. She doesn't know why something is in or not in the first transcript because she wasn't there and she didn't do it.

She can say I was given the first transcript and I filled in the blanks or I was given a transcript that was incomplete and I filled in the blanks and I put TJ in there. But beyond that she doesn't have any personal knowledge of anything relating to the first transcript, so what the heck is she going to comment on? I mean, all she can say is what she knows.

And, you know, anything else would be speculation. Well, why is this, or not this in the transcript? She doesn't know. She wasn't -- she wasn't cooperating at that time. She wasn't there. How does she know why somebody put or didn't put something in a transcript? I mean --

MR. GENTILE: May I address the Court?

THE COURT: Are you sure you want to?

MR. GENTILE: Yes, I do. It seems to me that, and with all due respect to everybody, we're getting kind of far afield. The transcript is nothing more than an aid --

THE COURT: An aid.

MR. GENTILE: -- for the jury. That's it.

THE COURT: Right.

MR. GENTILE: That's all it is. No witness should be talked to about the creation of a transcript. All right? Whether they assisted in it or whether they didn't assist in it. It doesn't matter. It's done for the aid to the jury. The jury should be instructed that it is not to be suggestive. We are not certifying that this is --

THE COURT: Didn't I say --

MR. GENTILE: -- what's on the tape.

THE COURT: -- that that was the instruction I intended to --

MR. GENTILE: Okay.

THE COURT: Didn't I say at the bench? Did I not say at the bench that that's what I was going to tell them, that we're --

MR. GENTILE: I don't know if you did --

THE COURT: -- not saying this --

MR. GENTILE: -- or you didn't.

THE COURT: -- is accurate or not accurate? There are two versions, they're going to listen and it's their determination, and this may help them, it may not help them.

MR. GENTILE: And when they go into -- when they go into deliberations

they're not going to have the transcript and --

THE COURT: Of course.

MR. GENTILE: -- you know, if they don't hear it, they don't hear it. But that's the reason you have to tell them that the transcript is only there to help them right now, and it does not -- it's not intended --

THE COURT: Okay.

MR. GENTILE: -- to be suggestive.

THE COURT: Mr. Gentile, you may not have heard me at the bench the other day, but I did say that that would be the admonition and that I tell them in every case that they don't get the transcript. You're not getting the transcript, it's not an exhibit, it's not going back in the jury room with you, it's just to aid you at this point in time. And then when we're done we collect the transcripts and -- and that's it.

MR. GENTILE: Right.

THE COURT: So that's part of my standard instruction and this instruction is going to be a little bit broader because there is a dispute as to what's in the transcript. I'm going to tell them there's a dispute as to what's in the transcript, it's up to you. The Court is not making a determination as to the accuracy of these transcripts. They may help you or not help you.

If anyone wants me to add anything to that general spiel, I will. But beyond that -- I mean, to me, we're really just fighting over a word.

MR. GENTILE: Well, and -- and the biggest problem with that is that because the transcript isn't in evidence, you -- you really can't comment, no lawyer can comment on the accuracy of the transcript. It's just not -- essentially it's a hearsay document. And it's a -- and it's a fugitive document because it's

not an exhibit.

MR. DIGIACOMO: Mr. Gentile and I are somewhat on the same page.

MS. ARMENI: Twice.

MR. DIGIACOMO: In one day.

THE COURT: All right then. I think we're dissecting this dead horse.

MR. DIGIACOMO: See you, guys.

MS. ARMENI: Have a good weekend.

(Proceedings adjourned at 5:13 p.m.)

-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