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 XIX

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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Counsel for Appellant, Luis Hidalgo, Jr.

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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 XIX 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 XIX was served by first class U.S. mail on July 24, 2017 to the following:

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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	07/06/2005	Notice Of Intent To Seek Death Penalty	HID PA00010 - HID PA00014
I	11/14/2006	Answer To Petition For Writ of Mandamus Or, In the Alternative, Writ of Prohibition	HID PA00015 - HID PA00062
I	12/20/2006	Reply to State's Answer To Petition For Writ of Mandamus Or, In The Alternative, Writ of Prohibition	HID PA00063 - HID PA00079
I	02/04/2008	Guilty Plea Agreement	HID PA00080 - HID PA00091
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II	02/20/2008	Transcript of Proceedings: Hearing re Arraignment	HID PA00205 - HID PA00209
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II	05/01/2008	Amended Indictment	HID PA00239 - HID PA00241
II	06/18/2008	Amended Notice of Intent To Seek Death Penalty	HID PA00242 - HID PA00245
II	06/25/2008	Notice of Motion And Motion To Consolidate Case No. C241394 Into C212667	HID PA00246 - HID PA00258
II	12/08/2008	Defendant Luis Hidalgo Jr. And Luis Hidalgo III's Opposition To The Motion To Consolidate Case No. C241394 Into C212667 + Exhibits A-G	HID PA00259 - HID PA00440
III	12/08/2008	Defendant Luis Hidalgo Jr. And Luis Hidalgo III's Opposition To The Motion To Consolidate Case No. C241394 Into C212667, Exhibits H-K	HID PA00441 - HID PA00469
III	12/15/2008	Response To Defendant Luis Hidalgo, Jr. and Luis Hidalgo, III's Opposition To Consolidate Case No. C241394 Into C212667	HID PA00470 - HID PA00478
III	01/07/2009	State's Motion To Remove Mr. Gentile As Attorney For Defendant Hidalgo, Jr., Or In The Alternative, To Require Waivers After Defendants Have Had True Independent Counsel To Advise Him	HID PA00479 - HID PA00499
III	01/16/2009	Order Granting The State's Motion To Consolidate C241394 Into C212667	HID PA00500 - HID PA00501
III	01/16/2009	Waiver of Rights To A Determination Of Penalty By The Trial Jury	HID PA00502
III	01/29/2009	Transcript of Proceedings: Jury Trial - Day 3	HID PA00503 - HID PA00522

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

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VOLUME	DATE	DOCUMENT	BATES
XVI	02/10/2009	Court Exhibit: 238 (C212667) Phone Record	HID PA02855 - HID PA02875
XVI	02/17/2009	Jury Instructions	HID PA02876 - HID PA02930
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XVII	03/17/2009	State's Opposition To Defendant Luis Hidalgo Jr.'s Motion For Judgment of Acquittal Or, In the Alternative, A New Trial	HID PA02949 - HID PA02961
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XVII	06/19/2009	Luis A. Hidalgo Jr.'s Sentencing Memorandum	HID PA02992 - HID PA03030
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XVII	07/10/2009	Judgment Of Conviction	HID PA03061 - HID PA03062
XVII	07/16/2009	Luis Hidalgo, Jr.'s Notice Of Appeal	HID PA03063- HID PA03064
XVII	08/18/2009	Amended Judgment Of Conviction	HID PA03065 - HID PA03066
XVIII	02/09/2011	Appellant Luis A. Hidalgo, Jr.'s Opening Brief	HID PA03067 - HID PA03134
XVIII	06/10/2011	Respondent's Answering Brief	HID PA03135 - HID PA03196
XVIII	09/30/2011	Appellant Luis A. Hidalgo, Jr.'s Reply Brief	HID PA03197 - HID PA03238
XVIII	03/09/2012	Order Submitting Appeal For Decision Without Oral Argument	HID PA03239

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

DISTRICT COURT

CLARK COUNTY, NEVADA

C241394
~~C212667~~

STATE OF NEVADA,

Plaintiff,

vs.

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

Defendant.

CASE NO. C212667/C241394
DEPT. XXI

DEFENDANT LUIS A. HIDALGO, JR.'S MOTION FOR JUDGMENT OF ACQUITTAL OR, IN THE ALTERNATIVE, A NEW TRIAL

Date of Hearing: March 24, 2009
Time of Hearing: 9:30 .m.

COMES NOW Defendant Luis A. Hidalgo, Jr., by and through his attorneys, Dominic P. Gentile and Paola M. Armeni of the Law Firm of Gordon Silver. and pray this Court to enter an Order of Judgment of Acquittal pursuant to NRS 175.381 based upon the insufficiency of the evidence adduced at trial to establish his guilt beyond a reasonable doubt of the offenses created by NRS 199.480(3)(g), NRS 200.010 and NRS 200.030. In the alternative, this Court is requested to enter an Order for a New Trial on those charges as entry of a judgment of conviction is contrary to the manifest weight of the evidence and to the jury instructions both given and refused, as well as the fact that the jury ignored the Court's instruction as to limited admissibility

of the statements of DeAngelo Carroll on the audio tapes, and therefore a new trial is required as a matter of law.

This Motion is brought upon the entire record in this matter including, but not limited to, the transcript of the evidence and arguments adduced at trial which are not as yet available, the Points and Authorities following hereinafter and evidence to be adduced at a hearing on this Motion.

Dated this 10th day of March, 2009.

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NOTICE OF MOTION

YOU, AND EACH OF YOU, will please take notice that the undersigned will bring the above and foregoing Motion on for hearing before this Court on the 24th day of March, 2009, at the hour of 9:30 o'clock A.M. of said day, or as soon thereafter as counsel can be heard in Department No. XXI.

Dated this 10th day of March, 2009.

GORDON SILVER

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POINTS AND AUTHORITIES

INTRODUCTION

NRS 175.381 governs when the Court may enter a judgment of acquittal after verdict of guilty. In pertinent part it reads:

> ...
>
> 2. The court may, on a motion of a defendant or on its own motion, which is made after the jury returns a verdict of guilty, set aside the verdict and enter a judgment of acquittal if the evidence is insufficient to sustain a conviction. The motion for a judgment of acquittal must be made within 7 days after the jury is discharged or within such further time as the court may fix during that period.
>
> 3. If a motion for a judgment of acquittal after a verdict of guilty pursuant to this section is granted, the court shall also determine whether any motion for a new trial should be granted if the judgment of acquittal is thereafter vacated or reversed. The court shall specify the grounds for that determination. If the motion for a new trial is granted conditionally, the order thereon does not affect the finality of the judgment. If the motion for a new trial is granted conditionally and the judgment is reversed on appeal, the new trial must proceed unless the appellate court has otherwise ordered. If the motion is denied conditionally, the defendant on appeal may assert error in that denial, and if the judgment is reversed on appeal, subsequent proceedings must be in accordance with the order of the appellate court.

Thus, under the Nevada statutory scheme, in considering a Motion for Judgment of Acquittal the Court must also consider simultaneously a Motion for New Trial. The latter is governed by NRS 176.515, which reads in pertinent part:

> New trial: Grounds; time for filing motion
>
> 1. The court may grant a new trial to a defendant if required as a matter of law or on the ground of newly discovered evidence.
> ...
> ...
>
> 4. A motion for a new trial based on any other grounds must be made within 7 days after the verdict or finding of guilt or within such further time as the court may fix during the 7-day period.

The jury returned its verdict on Tuesday, February 17, 2009. By implication it acquitted Luis Alonso Hidalgo Jr. of Conspiracy to Commit Murder, a felony, instead finding him guilty of a gross misdemeanor offense. Due to the form of verdict it is impossible to determine whether the jury was unanimous with regard to the object of the conspiracy. The verdict form grouped the objects, stating them as "Conspiracy to Commit Battery with a Deadly Weapon or Battery Resulting in Substantial Bodily

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Harm". It also acquitted him by implication of the charges of First Degree Murder with a Deadly Weapon and First Degree Murder. The Amended Indictment contained four theories of criminal liability for the Murder alleged in Count Two. Two were clearly rejected by the jury, the first theory "by directly or indirectly committing the acts with premeditation and deliberation or lying in wait" and the fourth theory "by conspiring to commit the crime of murder of Timothy Jay Hadland whereby each and every co-conspirator is responsible for the specific intent crime contemplated by the conspiracy." Based upon the testimony and exhibits presented at the trial, as a matter of law and logic the jury either found that Luis Alonso Hidalgo Jr. was vicariously liable for the death of Mr. Hadland on the theory that he (1) aided and abetted a battery with use of a deadly weapon or a battery resulting in substantial bodily harm, under the "procuring Deangelo Carroll to beat.." theory, or, as it announced in its verdict as to Count One, (2) conspired to commit a battery with a deadly weapon or battery resulting in substantial bodily harm "whereby each and every co-conspirator is responsible for the reasonably foreseeable general intent crimes of each and every co-conspirator during the course and in furtherance of the conspiracy."

As will be demonstrated below, neither theory was proven beyond a reasonable doubt in light of the limitations that were imposed by the law of evidence and the Court's rulings as to certain of it having limited admissibility at trial. Moreover, the verdict form and jury instructions which were given over the objection of the defense (1) created substantial confusion as to the difference between the quantum of evidence necessary to prove the conspiratorial theory of liability as opposed to that needed to allow consideration by the jury of statements of co-conspirators, and (2) eliminated the need for the jury to find, as a discrete aspect of the deadly weapon enhancement, that Luis Alonso Hidalgo Jr. knew that a deadly weapon would be used and had control over its use. Application of the rule of lenity requires, at a minimum, that the deadly weapon enhancement not survive.

This Court is well aware of the entire proceedings, but a transcript is necessary to an accurate summary of the evidence and is not currently unavailable. The references made to the record in this Motion are therefore in the nature of a "bystander's record" as further supported by the transcripts of the testimony of Ronte Zone and Anabel Espindola.

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STATEMENT OF FACTS

The body of Timothy Hadland was found in the middle of road in a desolate area of Lake Shore Drive in the Lake Mead Recreational Area on May 19, 2005. The body was lying on its back when found. Hadland's hat was found on his chest with his blood stained eyeglasses approximately 10 feet from his body. He had been shot twice - once just behind and below the left ear and once through his left cheek. The weapon was not recovered but it was either a .357 or .38 caliber based upon the bullets that were recovered from the body. Dr. Gary Telgenhoff, a forensic pathologist, testified that no sign of significant trauma such as would come from being beaten or run over was found on Hadland's body.

According to Pajit Karlson, Hadland's girlfriend who had been living with him since her return to the United States from Thailand, they had been camping at Lake Mead that evening. Hadland had been working at the Palomino Club but had ceased doing so about 2 weeks prior and was a tile installer. While at the camp grounds Hadland received a phone call from Deangelo Carroll, a former co-worker at the Palomino who had been to the house that Hadland and Karlson shared. He was the only Palomino employee ever to go to their home. Hadland left the campsite in Karlson's KIA Sportage to meet Deangelo to obtain some marijuana and never returned. He had $40 or $50 with him when he left. She learned of his death the next morning when told by the police.

Kristen Grammas testified that she is a crime scene analyst for the LVMPD. She was at the scene of the homicide. Among the items that were recovered from the vicinity of the body was a pneumatic tube such as used by banks and drug stores at drive up windows as well as advertising and VIP cards from the Palomino Club. In addition, Palomino Club business cards were recovered from the glove compartment of the KIA Sportage. Only $6 was recovered from the Sportage. No money was recovered from Hadland's clothing. Some latent fingerprints were developed. Several connected Zone and Carroll to the events. None were the prints of Luis A. Hidalgo Jr.

Jennifer Schead testified that she was an employee of Sprint. She produced business records relating to several telephone/direct-connect devices that were serviced by Sprint. Among these were records of devices that testimony of other witnesses and exhibits associated with Luis A. Hidalgo Jr., Luis A. Hidalgo III, Anabel Espindola, Deangelo Carroll, Timothy Hadland and Kenneth Counts. A chronological telephone and direct connect link analysis was created by the prosecution showing many calls at relevant times between the Espindola and Carroll or Counts

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phones and Carroll with Hadland. Not one single call or direct connect "chirp" came from the phone of Luis A. Hidalgo Jr. connecting him to the series of communications between Espindola, Carroll, Counts and Hadland. The record was completely devoid of such proof and the prosecutor never suggested in argument that any such proof existed.

Gary McWhorter testified that he was driving a taxicab on the morning of May 20, 2005 and that over the years he brought people to strip clubs, including the Palomino Club, and was paid by the clubs for the drop off. On that day, while waiting in the queue of cabs at the Palomino, a black man alighted from a van in the parking lot and attempted to have McWhorter take him to a location on the West Side. McWhorter originally refused to take him but the person said he would pay him $30 to do so. The person went into the Palomino and came out and paid McWhorter the $30 prior to the cab leaving the parking lot. McWhorter left the Palomino at 12:26 a.m. and arrived at the destination of 513 Wyatt at 12:31 a.m. Ordinarily the fare would have been $5.70.

Michael McGrath was a detective assigned to homicide at the time of the occurrence. He responded to the crime scene with others. When he looked at the phone left in the KIA Sportage he noticed that the last call was from "Deangelo" and learned the next morning that Deangelo Carroll worked at the Palomino. He obtained the phone number of the owner of the Palomino Club from North Las Vegas Police Department and gave it to another detective. He returned to the crime scene in daylight to make a more thorough search of it. At 7:30 p.m. on May 20th he and Detective Wildman went to the Palomino Club and were interviewing a woman named Ariel when Deangelo Carroll walked in to the club. They left the club with Carroll and went to homicide offices to interview him. They videotaped the interview. After the interview Carroll pointed out where the tires were that were removed from the van after the shooting. They then brought Carroll home and saw him tell Ronte Zone to "tell the truth". Zone returned to homicide offices with the detectives and was interviewed as to who was in the van, where each person sat, who had which firearm and who did the shooting. McGrath and the other homicide detectives made a plan to have Carroll secretly record the owners of the Palomino Club.

On May 21, 2005 McGrath and other LVMPD personnel executed a search warrant at the home of Kenneth Counts and another home across the street and took Counts into custody. They employed the SWAT team because Counts was "an extremely violent person" based upon the police intelligence on him and his past criminal record as well as the crime for which he was being charged. Ultimately Counts fought off dogs and incendiary devices before being literally

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cut out of the space above the ceiling in the house. Photos admitted into evidence give a clear depiction of how much force needed to be employed and how strongly Counts fought not to be arrested. Palomino VIP cards were recovered from the location where Counts was found. Fingerprints were developed and they were not those of Luis A. Hidalgo Jr. According to the testimony of Fred Boyd, LVMPD crime scene analyst specializing in fingerprint identification and comparison, they were those of both Deangelo Carroll and Kenneth Counts. Boyd testified that Carroll's fingerprints were also recovered from a $100 bill found in Counts home.

On May 23, 2005, McGrath along with FBI agent Shields employed a digital recording device appearing to be a pager on the person of Deangelo Carroll and sent him into Simone's Auto Plaza, a business owned and operated by Luis A. Hidalgo Jr. and Anabel Espindola, because "we didn't think we had enough" evidence to charge anyone from the Palomino Club with the murder of Hadland. Carroll was told a scenario to set up the conversation between himself and Luis A. Hidalgo Jr. and others before he went in. Carroll was not searched before he entered Simone's but was after he left. Carroll provided McGrath with $1400 in cash and a bottle of Tangeray Gin upon leaving Simone's. Carroll also provided the with the digital recording device, which was downloaded to a computer by McGrath and Shields. The recording was of a poor quality. At no time did Carroll request or even attempt to speak to Luis A.Hidalgo Jr. while in Simone's. After listening to the recording they decided to send Carroll back in with the device a second time and on May 24, 2005 they did so. This time Carroll handed them $800 along with the recording device. Again Carroll made no attempt to speak with Luis A. Hidalgo Jr.

[**When the tape recordings were played for the jury the Court instructed them that any discussions regarding money or plans to cause death to Counts, Zone or Taoipu were not admitted as to Luis A. Hidalgo Jr. Moreover, the Court instructed the jury that the statements of Deangelo Carroll were not admissible for the truth of what he was saying. Luis A. Hidalgo Jr. objected to the admissibility of the tapes on the basis that they were not made in furtherance of the conspiracy that was charged in Count One of his Amended Indictment and were during the course of the conspiracy as they occurred after that conspiracy had ended by the accomplishment of its objective. The Court ruled that although Luis A. Hidalgo Jr. was not a member of the conspiracy to conceal - which it correctly recognized to be a separate conspiracy - the statements made on the tape by**

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Espindola and Luis A. Hidalgo III were admissible as to Luis A. Hidalgo Jr. as to the question of his membership in the conspiracy charged in Count One.]

After Carroll left Simone's on May 24, 2005 Anabel Espindola and Luis A. Hidalgo III were arrested and charged with conspiracy to commit murder and murder of Timothy J. Hadland and solicitation for the murders of Ronte Zone and Jayson Taoipu. Luis A. Hidalgo Jr. was neither arrested nor charged until February 2008 after Anabel Espindola entered into a plea bargain to avoid facing the death penalty on murder charges and gave a statement to the prosecution implicating Luis A. Hidalgo Jr. in the death of Hadland.

McGrath testified that some of the information supplied to police by Carroll during his debriefing proved to be incorrect, unsupported or false. For example, Carroll told them that the gun used to kill TJ had been used in another shooting and named the shooter, location and episode. It turned out that there was such a shooting but not where Carroll said it occurred and the weapon used was a .22 caliber, not a .357 or .38. He also testified that Carroll was instructed to engage Luis A. Hidalgo Jr. on the tape recorded conversation as well as Anabel Espindola and Luis A. Hidalgo III. They also told Carroll what they wanted to hear discussed on the recordings. For example, Carroll was told to assert that his orders were to kill Hadland so that a response from those on the recording would confirm it. When Carroll's assertion was in fact rebuffed by Espindola's denial of that intention, Carroll was sent back a second time to clear it up. It didn't succeed then either. He did not tell Carroll to say, as he did on the recording, that Counts "went goofy" and spontaneously shot Hadland. Nor did he tell Carroll to say, as he did on the recording, that Counts was threatening Carroll's family. McGrath conceded that he had and still has doubts about Carroll's credibility. McGrath conceded that Counts was a known gang member and that Exhibit 71 depicted gang signs being flashed in the photo.

Jeff Smink testified that he has been a crime scene analyst supervisor for LVMPD for 9 years and conducted the search of Simone's Auto Plaza on May 24, 2005. He identified Exhibit 109 as a photo of a piece of paper found on top of a magazine laying on top of a stool near a pool table in an area of Simone's that was accessible to employees and public. The note was in handwriting conceded by the defense to be that of Luis A. Hidalgo Jr. It read "we may be under surveills(sp). Keep your mouth shut."

Martin Wildemann testified that he was a homicide detective in May 2005 and was assigned to this case. He conducted interviews of persons including Deangelo Carroll, Pajit Karlson, Jayson Taoipu, Ronte Zone and others. He spoke by telephone with Luis A. Hidalgo Jr.

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on May 20, 2005 and made an appointment to meet him at the Palomino Club. During the conversation the defendant confirmed that Deangelo Carroll worked at the Palomino Club. Wildemann was directed to speak with Ariel as to obtaining employment records, contact information, etc. as to Carroll.

Later that evening Wildemann participated in the interview of Carroll, who gave "at least" three versions of what occurred regarding the death of Hadland. He then led Wildemann to the location of tires that were changed from the van after the death and also introduced them to Ronte Zone. When Zone was interviewed his version was consistent with one of Carroll's. The detectives also interviewed Jayson Taoipu who gave a similarly consistent version. On May 23, 2005, detectives decided to send Carroll into Simone's Auto Plaza while wearing a recording device. Wildemann saw Luis A. Hidalgo Jr. enter the building before and leave hours after Carroll's arrival and departure He was the person who stopped the vehicle in which Anabel Espindola was a passenger on May 24, 2005 and she accompanied him to the homicide offices. He found Exhibit 240, a Palomino Club check payable to Deangelo Carroll, inside Espindola's satchel which was in the vehicle at the time.

The only evidence in the case even mentioning Luis A. Hidalgo Jr. as having preexisting knowledge of harm to Hadland came from Ronte Zone's reports of things he heard Carroll say before and after the death of Hadland and the testimony of Anabel Espindola. We turn now to an examination of that testimony.

Zone testified that in May 2005 he began "hanging out with" Carroll. Zone was living with him at the time along with Zone's baby's mother and Carroll's wife. Zone was assisting Carroll by handing out flyers for the Palomino Club at cab stations. Jayson Taoipu, who was also known as "JJ", did it with them. At noon on May 19, 2005 he was with both of them when Deangelo said "that Little Louie was...that Mr. H wanted someone killed."[1] Deangelo asked Zone if he was "into doing it" and Zone replied "no". JJ said that he "was down" with it, meaning "yes" according to Zone. Deangelo said something about Little Louie mentioning baseball bats and bags. This discussion took place in the white Astro van. A few hours later Carroll again mentioned that Carroll said he wanted someone "dealt with". He pulled out a .22 revolver with a green pearl handle and gave it to JJ.Carroll placed the bullets for the gun in Zone's lap. Zone dumped them on the floor of the van and JJ picked them up. They then went

[1] "Mr. H." is a name by which Luis A. Hidalgo Jr. was known around the Palomino Club. "Little Louie" is a name by which Luis A. Hidalgo III is known in the same context.

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back to Deangelo's house and dressed for work. They then went out promoting at cab stops in the Astro van. They returned to Deangelo's house and after a while Carroll said they were going out promoting again. There was some further talk about a person having to be dealt with but Zone barely heard it and then they left again. After the shooting Deangelo said Mr. H was going to pay $6000 to the person who did the shooting. No bats or trash bags were ever sought. They then went to pickup KC in the area of D or F Streets. He had never seen nor heard of KC before. Deangelo was inside for under ten minutes and came out with KC, who was wearing all black including a black hoody and black gloves. KC got in the back seat next to Zone. They all drove to Lake Mead. Zone realized they weren't going promoting when they got out to Lake Mead because "There's nothing out there." There was no conversation on the way out other than Deangelo talking on the phone. There was no conversation between Timothy and Deangelo. Deangelo said they were going to meet up with Timothy, who thought they were going to "smoke and chill". Zone had never met Timothy. After entering the Lake Mead area there was conversation about Timothy being killed.

Zone had smoked marijuana on the way to Lake Mead and prior to that during the day. He smoked about a "blunt", which he described as the size of a cigar, throughout the day. He had been high on marijuana on other occasions in his life.

Deangelo had phone signal problems when they reached the Lake Mead area. Zone heard a 'chirp' on Carroll's phone at that time and Carroll told Timothy where to meet him. When they did meet up Carroll exited the van and "went to the bathroom" on the side of the road and then reentered the van. Timothy came up to the side of the van to speak with Carroll. KC got out of the van and shot Timothy in the head. He was shot again after he hit the ground. KC got back in the van and Deangelo sped off. After reentering the van KC inquired as to whether Zone had a gun and was told 'no'. JJ said that he had one but didn't want to hit Deangelo so he didn't shoot. They drove back to the Palomino Club.

Deangelo went into the Palomino Club and came back out ten minutes later. Then both KC and Deangelo went into the club. KC came out later and got into a cab. Deangelo came out about 20 minutes later. They returned to Deangelo's house. The next morning they had the tires changed. Deangelo also cleaned the van. They then went for breakfast at IHOP and then back to Deangelo's house. Later they drove to Simone's Auto Plaza and waited inside the van while Deangelo went in. They went in about one half hour later. Zone never saw Deangelo speak with anyone in Simone's. They went into the bathroom with Deangelo and he told them that the

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shooter was paid $6000 and they would have received it had they done the shooting. He did see Deangelo speak with Mr. H while in Simone's.

At some point Deangelo brought the police to Zone. Over a hearsay objection he was permitted to testify that Carroll told him "if you don't tell the truth we are going to jail".

Zone remembers Carroll saying, prior to the death of Hadland, that Hadland was "snitching" and that was the reason that he was to be "dealt with". Anything that he knows about Mr. H he heard from Carroll, as he has never met nor spoken with him directly. Carroll held himself out to be a "big representative of the Palomino Club" and Zone believed it. But Carroll did make himself out to be bigger than he was. He is boastful. Zone is not afraid of Carroll and has never seen him beat anyone up or kill anyone. Zone was only assisting as a flyer boy for three days prior to the death of Hadland. Zone went to pick up weed in Northtown on May 19, 2005 during the day. On a normal day he smokes weed all day and did so on May 19, 2005. Smoking weed makes him smarter. After the shooting Zone was afraid of KC. He admits that smoking pot doesn't help your memory and he was smoking a lot of pot during the period of time that the death of Hadland occurred. He also admits that during the day of May 20, 2005, prior to Deangelo speaking to the police and prior to Zone speaking to the police, Deangelo was coming up with scenarios that would help him and JJ out. When Deangelo told Zone to tell the truth to the police Zone didn't know "whose truth he's talking about".

The prior inconsistent statements established at trial during the cross examination of Zone are so numerous the Court need not be reminded of them..

Anabel Espindola was the State's key witness against Luis A. Hidalgo Jr. A complete copy of the transcript of her testimony is attached as Exhibit 1a and 1b and will not be summarized in full. However, it is critical and noteworthy that she did not testify as to having heard any pre-homicide discussions between Deangelo Carroll and Luis A. Hidalgo Jr. Nor did she contend that she was privy to any admissions by Luis A. Hidalgo Jr. as to any involvement in or knowledge of any harm coming to Hadland prior to its occurring. Her testimony as to her knowledge of pertinent events can be summarized by starting with a phone call that she allegedly received from Deangelo Carroll in the afternoon of May 19, 2005. She claims that Carroll told her that Timothy Hadland, a former employee, had been talking badly about the Palomino Club at another strip club. Hadland had previously been terminated from his employment at the Palomino Club. Prior to his termination Hadland was suspected by Luis A. Hidalgo III of writing payout tickets for cab drivers for more passengers than were delivered and splitting it

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with the cabbies. Luis A. Hidalgo Jr. and Luis A. Hidalgo III were present when she received the phone call. She reported it to them and Luis A. Hidalgo III became vocal about how something had to be done about it. She contends that he told his father that Rizzolo or Galardi - other club owners in the area - would do something about it and that is why his father would never be as successful as them. She testified that Luis A. Hidalgo Jr. made no response to this outburst but instead told his son to mind his own business. She claimed that Luis A. Hidalgo III then left the room and she didn't see or speak with him again about the matter. Luis A. Hidalgo Jr. became silent and went off into another room at Simone's. They never discussed the matter again. Later that evening, at the Palomino Club, she saw Luis A. Hidalgo Jr. leave his office with Deangelo Carroll and later return without him. She does not know what they spoke about, if anything. Later that evening she claims that Luis A. Hidalog Jr. asked her to phone Carroll and tell him to go to Plan B. She claims not to know or have asked about the meaning of the message but that she had an intuition that Hadland was going to be harmed. She claims that when she told Carroll to go to Plan B he responded that he was already out there and "he's alone". Later that evening Carroll returned to the Club and entered the office. She was there with Luis A. Hidalgo Jr. and Carroll. Carroll said "Its done. He wants to get paid." Luis A Hidalgo Jr. then told her to get "5" for Carroll. She asked "500"? Luis A. Hidalgo Jr. said "$5000". She then retrieved the money from the safe and counted it out for Carroll, who left after receiving it.

Espindola testified about events that occurred after the payment and Carroll leaving. She contended that she never met with Jerome DePalma or Don Dibble on Saturday, May 21, 2005. She didn't recall Dibble being there at all and said that DePalma told her to leave the office because she couldn't be in the interview. She claims to have waited outside in the car and never spoke with DePalma about the events. DePalma and Dibble testified in detail to the contrary. DePalma's notes were introduced into evidence to confirm what was said at the meeting. Dibble corroborated DePalma's opinion that 90% of what was said during the meeting was said by Espindola. Moreover, the audio recordings that were obtained surreptitiously by Carroll on May 23 and 24, 2005, refute much of Espindola's trial testimony as to her knowledge and role in the events. Espindola received a drastically reduced penalty exposure in exchange for her cooperation and was facing the possibility of a death sentence at the time that she made her deal with the prosecution. Moreover, the State agreed to her release from the Clark County Detention Center on her own recognizance with a condition of home confinement once her testimony was

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memorialized and subject to cross-examination. While its attempt to use a deposition was thwarted she has now been released from the CCDC after her trial testimony.

ARGUMENT

I. THE EVIDENCE WAS INSUFFICIENT AS A MATTER OF LAW TO SUPPORT A JUDGMENT OF CONVICTION ON THE CHARGE OF CONSPIRACY TO COMMIT A BATTERY WITH A DEADLY WEAPON OR RESULTING IN SUBSTANTIAL BODILY HARM. THEREFORE IT CANNOT ACT AS SUPPORT FOR VICARIOUS LIABILITY AS A CONSPIRATOR FOR SECOND DEGREE MURDER WITH USE OF A DEADLY WEAPON.

The Amended Indictment was directed at a single event – a homicide of Timothy Jay Hadland involving multiple perpetrators at the scene and allegations of the existence of conspirators or aiders and abettors not at the scene. Luis Alonso Hidalgo Jr.'s defense was simple and all encompassing – absence of knowledge or intent prior to the acts that brought death to Hadland. Luis Alonso Hidalgo Jr.'s trial testimony established that he learned of Hadland badmouthing the Palomino Club from Deangelo Carroll while in the presence of Anabel Espindola in his office at the Palomino Club and not, as she testified, from her reporting it to him in the presence of his son after she had a phone conversation with Carroll earlier in the day while at Simone's Auto Plaza. He was not concerned about it because of his belief and historic knowledge that so long as cab drivers were paid for bringing passengers to the Palomino such negative comments by anyone would not adversely impact the business. He also testified that he responded that Carroll should tell Hadland to "stop spreading shit" about the club and nothing more. Espindola's testimony was that she never heard any communications at all between Luis Alonso Hidalgo Jr. and Carroll, although she contends that they left the office in the Palomino together and had an opportunity to communicate. Thus, even if the jury rejected Luis Alonso Hidalgo Jr.'s version of the conversation with Carroll, nothing replaces it and the record is void of any evidence as to discussions or understandings between Carroll and the defendant on the subject of Hadland's alleged remarks and if or how to respond to them.

Nowhere in the record is there anything to indicate that the use of a deadly weapon was part of any agreement to which the defendant was a party nor of any knowledge on his part that one would or even might be employed. An unarmed defendant, charged as an aider and abettor or co-conspirator, cannot be held criminally responsible for use of a deadly weapon unless he has actual or constructive control over the deadly weapon. An unarmed defendant does not have constructive control over a weapon unless the State proves he had knowledge the armed offender was armed and he had the ability to exercise control over the firearm. Brooks v. State,

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180 P.3d 657, 659 (Nev. 2008) (instruction proffered by Brooks and not given by Court). The proper focus is on the unarmed offender's knowledge of the use of the weapon brandished by another principal. Brooks v. State, 180 P.3d 657, 660 (Nev. 2008). An unarmed offender "uses" a deadly weapon...when the unarmed offender is liable as a principal for the offense that is sought to be enhanced, another principal to the offense is armed with and uses a deadly weapon in the commission of the offense, and the unarmed offender had knowledge of the use of the deadly weapon. Brooks v State, 180 P.3d at 657, 661 (Nev. 2008). The deadly weapon element is simply not proven as to Luis A. Hidalgo Jr. under Nevada law of vicarious liability. The conviction, although ambiguous due to the Court's failure to separate the objectives of the conspiracy in it verdict form, cannot stand in any case as to that component part.

Thus, the only theory upon which the conspiracy count can survive and provide a basis for vicarious liability for a second degree murder is a conspiracy to commit a battery with substantial bodily harm. However, vicarious coconspirator liability may be properly imposed for general intent crimes only when the crime in question was a "reasonably foreseeable consequence" of the object of the conspiracy. Bolden v. State, 121 Nev. 908, 124 P.3d 191, 201 (Nev. 2005). Battery is a general intent crime. Moreover, although battery that results in substantial bodily harm is punished as a felony it does not require felonious intent. The charging document in the instant case is silent as to whether the alternatively pled conspiracy to "beat" Hadland included as its objective imposing substantial bodily harm. This is significant, as under the narrow limits established by the Nevada Supreme Court the "second degree felony murder rule" applies only where the felony is inherently dangerous, where death or injury is a directly foreseeable consequence of the illegal act, and where there is an immediate and direct causal relationship-without the intervention of some other source or agency-between the actions of the defendant and the victim's death. Labastida v. State, 115 Nev. 298, 306-307, 986 P. 2d 443, 448 (Nev. 1999); Sheriff v. Morris, 99 Nev. 109, 118, 659 P. 2d 852, 859 (Nev. 1983). The same reasoning applies in the case *sub judice.*

More importantly, the evidence was insufficient to establish a conspiracy to commit battery - even without substantial bodily harm -and support a vicarious responsibility for the murder. The beyond a reasonable doubt standard is mandated by both the Nevada and United States constitutions. See Jackson v. Virginia, 443 U.S. 18 (1979). Each and every element must be proven to that standard. See also In re Winship, 397 US. 358, 364 Here there is insufficient evidence of Luis A. Hidalgo Jr.s participation in the conspiracy regardless of its objective. His

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knowledge of harm to come to Hadland is entirely dependent on the out of court statements of Carroll, as Espindola adds nothing to the mix in that regard. Moreover, Carroll's statements on the May 23 and 24, 2005 tapes are not admissible for the truth of their assertions. Even at that they were rebuffed by Espindola on the tapes. Even with all that was given to her in exchange for her testimony she never retracted from that position. Agreement among two or more persons is an essential element of the crime of conspiracy, and mere association is insufficient to support a charge of conspiracy. Sanders v. State, 110 Nev. 434, 436, 847 P. 2d 1239, 1240 (Nev. 1994). The State had no more proof than mere association. The giving of the jury instruction #40 exacerbated the problems with the absence of evidence in this case and warrant a recognition that the jury was invited to and did apply a lesser standard of proof to the conspiracy charge that the law and constitution permits.

II. A NEW TRIAL IS WARRANTED AS A MATTER OF LAW FOR (1) FAILURE OF THE COURT'S INSTRUCTIONS TO INSURE DUE PROCESS OF LAW AND A FAIR TRIAL and (2) THE ADMISSION OF THE SURREPTITIOUS TAPES AGAINST LUIS A. HIDALGO JR. IN VIOLATION OF BOTH THE RULE AGAINST THE USE OF HEARSAY EVIDENCE AND THE CONFRONTATION CLAUSES OF THE STATE AND FEDERAL CONSTITUTIONS.

Whether to grant or deny a motion for a new trial is within the trial court's discretion. Rippo v. State, 113 Nev. 1239, 946 P.2d 1017, 1024 (Nev. 1997). A district court will not be overturned for granting a motion for a new trial absent a palpable abuse of discretion." Johnson v. State, 59 P.3d 450, 118 Nev. 787, 59 P. 3d 450, 456 (Nev. 2002). The district court may grant a motion for a new trial based on an independent evaluation of the evidence because "Historically, Nevada has empowered the trial court in a criminal case where the evidence of guilt is conflicting, to independently evaluate the evidence and order another trial if it does not agree with the jury's conclusion that the defendant has been proven guilty beyond a reasonable doubt." State v. Purcell, 110 Nev. 1389, 887 P.2d 276, 278 (Nev. 1994) (citing Washington v. State, 98 Nev. 601, 604, 655 P.2d 531, 532 (1982) (quoting State v. Busscher, 81 Nev. 587, 589, 407 P.2d 715, 716 (1965)). So long as the district court notes in its opinion that the evidence as to guilt was conflicting, then states its general impression with regard to each count, as well as its reasons for disagreeing with the jury verdict the conflict is clearly identified. Purcell, 110 Nev. at 1394. Accordingly, the "totality of the evidence" evaluation is the standard for the district court to use in deciding whether to grant a new trial based on an independent evaluation of conflicting evidence. Purcell, 110 Nev. at 1394. In reaching this statement of the proper

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standard the Supreme Court relied upon State v. Walker, 109 Nev. 683, 685-86, 857 P.2d 1, 2 (Nev. 1993), where it held:

> [A] conflict of evidence occurs where there is sufficient evidence presented at trial which, if believed, would sustain a conviction, but this evidence is contested and the district judge, in resolving the conflicting evidence differently from the jury, believes the totality of evidence fails to prove the defendant guilty beyond a reasonable doubt.

In Walker, the Court drew a distinction between granting a new trial based on insufficient evidence and granting a new trial based on conflicting evidence. In contrast to conflicting evidence, insufficiency of the evidence occurs where the prosecution has not produced a minimum threshold of evidence upon which a conviction may be based, even if such evidence were believed by the jury. Walker, 109 Nev. at 685, 857 P.2d at 2. The protection against double jeopardy is implicated where a judgment of acquittal is warranted but not where a new trial is ordered. Purcell, 887 P.2d at 279.

Here the evidence of guilty was skimpy at best. Moreover, over the objection of the defense, the court gave instructions #40, which gave the jury a "slight evidence" standard to apply in judging the existence of a conspiracy and the defendant's connection with it. This instruction has been condemned by several federal circuits as being both unnecessary and confusing, as it does nothing more than state the standard that the Court must apply in determining the admissibility of what would otherwise be hearsay but for it qualifying as a co-conspirator statement made during the course of and in furtherance of the conspiracy. See United States v. Martinez De Ortiz, 907 F. 2d 629 (7th Cir 1989)(*en banc*). The trial judge alone is responsible for deciding whether statements by co-conspirators are admissible, and that the question of admissibility should not be submitted to the jury. United States v.Mitchell, 556 F.2d 371, 377 (6th Cir.), cert. denied, 434 U.S. 925, 98 S.Ct. 406, 54 L.Ed.2d 284 (1977). Instructions that the jury may only consider a co-conspirator's statement if the jury first finds that a conspiracy existed and that the defendant was a member of it have repeatedly been held to be "altogether unnecessary." United States v. Enright, 579 F.2d 980, 986-987 (6th Cir.1978). Accord, United States v. Swidan, 888 F.2d 1076, 1081 (6th Cir.1989). The judge should not advise the jury of the government's burden of proof on the preliminary question of admissibility, or the judge's determination that the government has met its burden. United States v. Vinson, 606 F.2d 149, 153 (6th Cir.1979), cert. denied, 444 U.S. 1074, 100 S.Ct. 1020, 62 L.Ed.2d 756 (1980). Instead, the judge should admit

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the statements, subject only to instructions on the government's ultimate burden of proof beyond a reasonable doubt, and on the weight and credibility to be given statements by co-conspirators.

In the case *sub judice* this erroneous jury instruction, given over objection, invited disaster and delivered it. When combined with the Court's error in admitting the post-conspiratorial statements made under circumstances where Deangelo Carroll had reason to believe that they would be used testimonially - which they were- both the Confrontation Clause of the Sixth Amendment and the bar against the use of hearsay testimony were violated and require a new trial be ordered.

Dated this 10th day of March, 2009.

GORDON SILVER

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LUIS A. HIDALGO, JR.

CERTIFICATE OF SERVICE

The undersigned, an employee of Gordon Silver, hereby certifies that on the 10th day of March, 2009, she served a copy of the Motion for New Trial, by facsimile, and by placing said copy in an envelope, postage fully prepaid, in the U.S. Mail at Las Vegas, Nevada, said envelope addressed to:

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An employee of GORDON SILVER

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CLERK OF THE COURT

OPPS
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DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, -vs- LUIS HIDALGO, JR., #1579522 Defendant.	CASE NO: C241394 DEPT NO: XXI

STATE'S OPPOSITION TO DEFENDANT LUIS HIDALGO JR.'S MOTION FOR JUDGMENT OF ACQUITTAL OR, IN THE ALTERNATIVE, A NEW TRIAL

DATE OF HEARING: 3/24/09
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 hereby submits the attached Points and Authorities in Opposition to Defendant's Motion For Judgment Of Acquittal, Or In The Alternative, A New Trial.

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

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STATEMENT OF FACTS

On February 17, 2009, the Jury in the instant matter convicted Defendant Luis Hidalgo, Jr. of Conspiracy to Commit Battery With A Deadly Weapon and/or Battery Resulting In Substantial Bodily Harm and Second Degree Murder With Use of a Deadly Weapon.[1] On February 24, 2009, this Court entered an Ex Parte Order To Extend Time To File A Motion For New Trial until March 10, 2009.[2] As far as the State can determine, there has never been a motion for extension of time to file a Motion to Extend Time to File a Motion For A Judgment of Acquittal.

POINTS AND AUTHORITIES

I.

THE COURT LACKS JURISDICTION TO ENTERTAIN A MOTION FOR JUDGMENT OF ACQUITTAL

The statute which gives jurisdiction to a Court to entertain a Motion for Judgment of Acquittal is contained in NRS 175.381. NRS 175.381 states in relevant part:

> 1. If, at any time after the evidence on either side is closed, the court deems the evidence insufficient to warrant a conviction, it may advise the jury to acquit the defendant, but the jury is not bound by such advice.
>
> 2. The court may, on a motion of a defendant or on its own motion, which is made after the jury returns a verdict of guilty or guilty but mentally ill, set aside the verdict and enter a judgment of acquittal if the evidence is insufficient to sustain a conviction. **The motion for a judgment of acquittal must be made within 7 days after the jury is discharged or within such further time as the court may fix during that period.**

This statutory language is the same as required by NRS 176.515 which states in relevant part:

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[1] As this Court sat thru the trial, the facts related to the basis of the jury verdict will not be recounted here.
[2] As of the date of this response, the State has not been served with either the motion or the order extending time. However, the motion and order filed with the Court asserts the basis for an extension of time to be the inability to get from the Clerk of the Court the jury instructions given and offered but not given.

> 3. A motion for new trial based on the ground of newly discovered evidence may be made only within 2 years after the verdict or finding of guilt.
>
> **4. A motion for a new trial based on any other grounds must be made within 7 days after verdict or finding of guilt or within such further time as the court may fix during the 7-day period.**

The statutory time periods are jurisdictional in nature. It is clear that Defendant failed to fulfill the seven (7) day requirement and therefore, this Court lacks jurisdiction to entertain the motion.

In Snow v. State, 105 Nev. 521, 779 P.2d 96 (1989), a defendant filed a motion for new trial based on newly discovered evidence after the two year time period had run. The trial court held that it lacked jurisdiction to hear the matter and the Nevada Supreme Court affirmed that decision. The Nevada Supreme Court reaffirmed their holding that the time requirements were jurisdictional and specifically cited Snow in D'Agostino v. State, 112 Nev. 417, 915 P.2d 264 (1996). It is clear that the jurisdictional requirement also applies to the seven (7) day period. In DePasquale v. State, 106 Nev. 843, 803 P.2d 218 (1991), a Defendant was convicted of first degree murder on September 14, 1989 at 11:53 pm. On September 22, 1989, Defendant filed a motion for new trial alleging numerous grounds. The Nevada Supreme Court upheld the denial of the motion based on lacking jurisdiction by only one day and described the seven (7) day period as a "deadline."

In the instant matter, the time to request additional time to file a Motion for Judgment of Acquittal ran on February 24, 2009. While Defendant filed an Ex Parte Request to Extend Time To File A Motion For New Trial, he never requested an extension of time to File A Motion For Judgment of Acquittal. The jurisdiction to entertain those two separate motions are contained in two different statutes. The failure of the Court to grant an extension during that time, precludes the Court to consider a motion for Judgment of Acquittal.

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II.

THE COURT SHOULD DENY A MOTION FOR NEW TRIAL AS THE EVIDENCE WAS MORE THAN SUBSTANTIAL TO SUPPORT CONVICTION OF DEFENDANT ON ALL CHARGES

Defendant is essentially arguing that since the Defendant was convicted of a lesser included count, the Court cannot consider the evidence presented of the higher count. Or in essence, Defendant is arguing an implied acquittal on the higher charges. Unfortunately for Defendant, his assumption of the law is incorrect.

As a starting point, when a jury convicts of a lesser included count, it does not mean that the jury acquitted Defendant of the higher count. In Green v. State, 119 Nev. 542, 80 P.3d 93 (Nev. 2003), the Nevada Supreme Court specifically rejected that Defendant must be acquitted first before a jury is entitled to reduce the charge to a lesser included offense. Specifically, the Court found that such an instruction would increase the likelihood of hung juries, and as a matter of policy rejected allowing for that situation. As such, nothing can be inferred from the fact that the jury convicted him of a lesser included offense. In fact, even before Green, as it relates to analyzing motions for new trial, and insufficiency of the evidence, the Nevada Supreme Court has held that a Defendant cannot be heard to complain when the sufficiency of the higher charge is stronger than that for the lesser included offense. The Nevada Supreme Court has stated:

> Although appellant was charged with the crime of robbery with the use of a deadly weapon in the commission of a crime, the jury returned a verdict of robbery without the use of a deadly weapon. The jury found there existed sufficient evidence to sustain a conviction of the charged offense. The uncontroverted testimony of the victim was that appellant entered her motel room and when she screamed, appellant drew a knife. Brinkman then took the victim's handbag from the table near where she was sitting and effected his escape.
>
> For whatever reason, the jury saw fit to convict appellant of the lesser included offense. In State v. McCorgary, 218 Kan. 358, 543 P.2d 952 (1975), *cert. denied*, 429 U.S. 867, 97 S.Ct. 177, 50 L.Ed.2d 147, the Kansas court held that:

> where a jury relieves a defendant of punishment for a greater offense . . . and convicts him of a lesser included offense . . . the jury may have adopted its conclusion as an act of clemency. In such a case, the defendant cannot complain because the error does him no harm. (Citations omitted.)
>
> Id. 543 P.2d at 960. Here, there was adequate evidence to convict appellant of the charged offense. He should not now be heard to complain that the jury saw fit to relieve him of the enhanced penalty provided by NRS 193.165.

Brinkman v. State, 95 Nev. 220, 224-5, 592 P.2d 163 (Nev. 1979). Here, had the jury convicted Defendant of Conspiracy to Commit Murder, there would simply be no argument that there wasn't substantial evidence to support such a charge. Because the jury showed Defendant leniency, he cannot now be heard to complain that the jury did so, as it acted to his benefit. *See also* Graham v. State, 116 Nev. 23, 31 n.8, 992 P.2d 255, 260 n.8 (2000) (citation omitted) ("[o]ur ruling today renounces "lenity" as a separate basis for giving instructions on murder of the second degree. Of course, in any case where there is evidence supporting either first- or second-degree murder, a jury is entitled to extend lenity and convict of the lesser offense. While juries may not be instructed on this issue, convictions rendered on this basis, in accord with our prior decisions, may be upheld").

In other words, in assessing the evidence, the Court should consider the "totality of the circumstances" as it relates to the higher counts and any inferences from that evidence. "'The standard of review for sufficiency of the evidence upon appeal is whether the jury, acting reasonably, could have been convinced of the defendant's guilt beyond a reasonable doubt.' Kazalyn v. State, 108 Nev. 67, 71, 825 P.2d 578, 581 (1992). There is sufficient evidence if the evidence, viewed in the light most favorable to the prosecution, would allow any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. Davis v. State, 110 Nev. 1107, 1116, 881 P.2d 657, 663 (1994) (*citing* Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979))." Leonard v. State, 114 Nev. 1196, ___, 969 P.2d 288, 296-297 (1998). In addition, "it is the jury's function, not that of the court, to assess the weight of the evidence and determine the credibility of witnesses." Origel- Candido, 114 Nev. 378, ___, 956 P.2d 1378,1380 (1998) (quoting

McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992)); see also Culverson v. State, 95 Nev. 433, 435, 596 P.2d 220, 221 (1979) (Court held it is the function of the jury to weigh the credibility of identifying witnesses); Azbill v. State, 88 Nev. 240, 252, 495 P.2d 1064, 1072 (1972)(In all criminal proceedings the weight and sufficiency of the evidence are questions for the jury, and its verdict will not be disturbed upon appeal if there is evidence to support it; the evidence cannot be weighed by an Appellate Court). The testimony of one witness, if believed, is sufficient to uphold a verdict. Washington v. State, 96 Nev. 305, 308, 608 P.2d 1101, 1103 (1980).

The evidence before the court established that prior to the murder, Defendant Carroll had indicated that Defendant had wanted Mr. Hadland "dealt with." During that initial time, Defendant Carroll provided Mr. Taoipu with a firearm and tried to provide Mr. Zone with bullets to complete the object of the conspiracy. After those conversations, a witness described an argument where Defendant Hidalgo, III was trying to convince his father to harm Mr. Hadland. After that argument, Defendant Hidalgo, III called Defendant Carroll to the Palomino Club to complete the object of the conspiracy and told him to bring baseball bats and garbage bags. After going to the club, Defendant Carroll and Defendant Hidalgo, Jr. had a meeting. After the meeting, as Defendant Carroll was procuring Defendant Counts (who was armed with a gun), Defendant Hidalgo, Jr. told Ms. Espindola to call Defendant Carroll and go to "Plan B." During the call, the evidence supports the inference that "Plan A" was to kill Mr. Hadland, and "Plan B" was to harm him severely. At the murder site, Defendant Counts exited the vehicle, and because Mr. Hadland was alone, executed him by shooting him twice in the head. After the execution, Defendant Carroll returned to the club and told Defendant Hidalgo, Jr. that the murder was completed. To which, Defendant Hidalgo Jr. did not object, but immediately ordered the payment of the money for the execution. For the next several days, the co-conspirators continued to meet to discuss their efforts to get away with the crime.

The only evidence in dispute of his guilt was the wholly incredible testimony of Defendant himself. Defendant claimed that he did talk to Defendant Carroll on that day

prior to the murder. Defendant admitted he told Defendant Carroll to tell Mr. Hadland to keep his "mouth shut." Defendant then claimed that Defendant Carroll returned to the club, told him he killed Mr. Hadland, Defendant Counts was downstairs, and Defendant Hidalgo Jr. merely paid the money because he was scared. Thereafter, he claimed that he wrote a note to remind himself to keep his own mouth shut because they may be under surveillance, but could not at all explain why he should be worried of the surveillance.

Most incredible about his testimony was why he paid the money. Defendant spent great amounts of time during the trial attacking the credibility of Defendant Carroll. His own lawyer told the jury that they should never believe anything Defendant Carroll said. However, in order to believe Defendant Hidalgo Jr., the jury had to believe that an employee he has known as a liar for a long time, came to his office, made incredible allegations, which he automatically believed. The jury would have had to believe that Defendant accepted these "outrageous claims" when he had the ability of getting up and walking just a couple of steps to look at the surveillance system to see if Defendant Counts was even in the building, yet he failed to do so. Moreover, how did he believe this habitual liar was even telling the truth about Mr. Hadland being dead?

Defendant asserts that this Court can grant a new trial based upon conflicting evidence. State v. Purcell, 110 Nev. 1389, 887 P.2d 276, 278 (Nev. 1994). However, the only conflicting evidence is that Defendant presented was his own self-serving statements (or adopted ones by a thoroughly impeached investigator and former lawyer). In essence, he is asking this court to disrespect the jury's determination in favor of an outlandish claim of defense. "If there is substantial evidence to support a jury verdict neither the trial court nor this court will disturb it." Azbill v. State, 88 Nev. 240, 495 P.2d 1064 (Nev. 1972) (*citing* McGuire v. State, 86 Nev. 262, 468 P.2d 12 (1970); Lamb v. Holsten, 85 Nev. 566, 459 P.2d 771 (1969); Tellis v. State, 85 Nev. 679, 462 P.2d 526 (1969); Criswell v. State, 84 Nev. 459, 443 P.2d 552 (1968); Crowe v. State, 84 Nev. 358, 441 P.2d 90 (1968)). There was more than substantial evidence to support not only the finding of the jury, but conviction on the higher offenses. As such, the Court should deny the motion for new trial.

Finally, Defendant asserts that the Court's instruction to the jury that "slight evidence" of a conspiracy must be shown before the jury can consider statements of a co-conspirator in course and in furtherance of the conspiracy may be considered against Defendant was erroneous.[3] In support of his argument, Defendant initially claims that the jury would be confused by this instruction. As an initial starting point, jurors are presumed to have followed their instructions. *See* Richardson v. Marsh, 481 U.S. 200, 107 S.Ct. 1702 (1987). Notwithstanding, the Jury was instructed on a number of occasions, in order to find Defendant guilty, they must find the existence of the conspiracy and Defendant's participation in it beyond a reasonable doubt. Additionally, during deliberations, despite the wishes of the State, the Court instructed the jury that Defendant had to be a member of the conspiracy before the killing occurred.

Throughout the trial, Defendant repeatedly requested this Court to not make a finding that there was sufficient evidence of a conspiracy on the record because defendant did not want the jury to think by the Court so finding, they the jury had to as well. Now, after verdict, Defendant complains that the jury was required to make a finding of a conspiracy before using evidence against Defendant. Imagine the argument if the Court had not given such an instruction. In support of his argument, Defendant makes citation to a number of federal cases, however, he fails to mention that the Nevada Supreme Court has previously determined that Nevada and Federal law are different in respect to co-conspirators statements:

> McDowell was tried with his co-conspirators and found guilty by overwhelming evidence of the crimes charged. The most damaging of the overwhelming evidence admitted were the various co-conspirator out-of-court declarations. In determining the admissibility of the extra-judicial statements, the district court properly found the existence of a conspiracy by "slight evidence" as required in Nevada. See Fish v. State, 92 Nev. 272, 549 P.2d 338 (1976); NRS 51.035(3)(e).FN2 Application of a higher standard of proof for preliminary questions of fact, such as the "preponderance" standard urged upon this court by McDowell, is not

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[3] Defendant asserts that he objected to the "slight evidence" language in the instruction as opposed to objecting that the instruction should not apply as the recordings were not admissible against Defendant. The State does not recall Defendant specifically requesting that the jury not make a preliminary finding of admissibility prior to considering the recordings, but the record will bear out that assertion, or not.

> constitutionally mandated by the sixth amendment's Confrontation Clause. Although the United States Supreme Court has applied the preponderance standard to the preliminary fact finding process when determining the admissibility of co-conspirator hearsay statements pursuant to the federal rules of evidence, such an application is merely the result of statutory interpretation. That is, preliminary facts, like the existence of a conspiracy required to be found pursuant to Federal Rules of Evidence 801(d)(2)(E), must be found by a preponderance according to Federal Rules of Evidence 104(a). See Bourjaily v. U.S., 483 U.S. 171, 107 S.Ct. 2775, 97 L.Ed.2d 144 (1987). Hence, there being no constitutional reason for this court to ignore stare decisis, we decline to do so. The preliminary question of the existence of a conspiracy for purposes of NRS 51.035(3)(e) need only be established, as properly found by the district court in the instant case, by "slight evidence."

McDowell v. State, 103 Nev. 527, 746 P.2d 149 (Nev.,1987) (internal footnotes omitted). Defendant has provided no authority that a "stock" instruction, which actually inures to Defendant's benefit, created some prejudice to him.

Finally, Defendant asserts that the admission of Defendant Carroll's words on the tapes were in violation of the Confrontation Clause. As has been repeatedly litigated in this case, those statements are not offered for the truth of the matter asserted and, as such, are admissible. In order to qualify as hearsay, the statements must have been admitted to prove the truth of the matter asserted. NRS 51.035. None of the statements by Defendant Carroll on the surreptitious recordings were offered to prove the truth of the matter asserted, and as such, were not hearsay.

The Nevada Supreme Court has previously addressed the exact same issue in Wade v. State,114 Nev. 914, 966 P.2d 160 (1998). In Wade, the State introduced a surreptitious recording between Wade and an informant. Prior to trial, the informant became unavailable. As such, the informant was not present to testify to the details surrounding the recording. In analyzing this exact issue, the Nevada Supreme Court agreed with the Federal Courts when they stated:

> In Tangeman, an informant's statements on a tape recorded conversation with a defendant were determined to be nonhearsay. Tangeman, 30 F.3d at 952. The court analyzed the case based upon a defendant's right to confront witnesses pursuant to the Sixth Amendment because the informant there had also become unavailable. Id. In holding that the tapes were nonhearsay, the court stated:

> We agree with the district court ... that [the informant's] statements were offered to provide context for Tangeman's admissions and not to prove the truth of the matters asserted therein. The court also cautioned the jury that voices in the recordings other than Tangeman's were to be considered only to place Tangeman's statements in context.

Id. at 952.

We agree with the rationale in Tangeman and, therefore, adopt that federal court's approach when such circumstances present themselves. Accordingly, we conclude that the State did not introduce Hodges' statements on the tapes to prove the truth of the matter asserted, but only for the limited purpose of providing a context for Wade's statements. See NRS 51.035. The record reflects that the State argued this precise rationale before the district court at the time Wade objected to admission of the tapes below. Because we adopt the approach taken in Tangeman, we further conclude that the tapes are nonhearsay and, therefore, their admission into evidence did not violate Wade's rights of confrontation.

Id at 917-8 (quoting United States v. Tangeman, 30 F.3d 950 (8th Cir.1994)).

In Crawford, Kenneth Lee was stabbed at his apartment by Crawford with Crawford's wife present. Id at 1357. After giving Crawford's wife Miranda warnings, detectives interrogated her twice. At trial, Crawford claimed self-defense however his wife did not testify invoking Washington's marital privilege. The state then offered the formal interviews that the wife gave. Id at 1358. The trial court found that while the statements did not fall under a specific exception to the hearsay rule, they did bear adequate indicia of reliability, and therefore admitted the statements. The United States Supreme Court held that to the extent a **hearsay** statement is "testimonial," it only satisfies the Confrontation Clause if the declarant is unavailable and the declarant was the subject of a prior cross-examination.[4]

The Court then decided not to define a specific test for "testimonial," however, it provided a framework for courts to utilize. "Testimony," the Court concluded is "typically 'a solemn declaration or affirmation made **for the purpose of establishing or proving some fact.**'" Id at 1364 (quoting 1 N. Webster, An American Dictionary of the English Language (1828)) (emphasis added). The Court thereafter stated that "statements taken by police

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[4] The court did leave open the likelihood that a testimonial dying declaration would be admissible under Crawford. Id at 1367 n. 6.

officers in the course of interrogations are also testimonial under even a narrow standard." Id. It is this statement that defendants have repeatedly and erroneously tried to utilize to exclude any **hearsay** statements. Clearly, the word "interrogation" was a term of art to describe a particular type of police interview.[5] The Court proceeded to liken the admissibility of an "interrogation" to ex-parte examinations conducted by justices of the peace in England during the Renaissance era. Id at 1365. At least one other court appears to suggest that the Supreme Court was really only referring to suspects in custody with structured questioning sufficient to be called a police interrogation. See State v. Nix, 2004 WL 2315035, p. 19 (Ohio App. 1 Dist.). Whatever the specific definition that the Court meant to imply, the holding actually only applied to a structured interview of a suspect after Miranda warnings had been given. Moreover, the entire interview was admitted. It was this blatant violation of the Confrontation Clause which led the Court to state:

> [W]e view this as one of those rare cases in which the result below is so improbable that it reveals a fundamental failure on our part to interpret the Constitution in a way that secures its intended constraint on judicial discretion.

Crawford at 1373.

As such, to the extent Defendant Carroll was heard on the surreptitious recording, his statements were not admitted for the truth of the matter asserted and therefore were not hearsay implicating Crawford. Non-hearsay statements have never implicated the confrontation clause. See Wade v. State,114 Nev. 914, 966 P.2d 160 (1998).

Additionally, Crawford is not implicated by co-conspirator statements. In the first matter, statements admitted under 51.035(3)(e) are non-hearsay under the Nevada Rules of Evidence. As such, by their very definition, they do not implicate Crawford. However, even assuming that a statement of a co-conspirator made during the course and in furtherance of the conspiracy did implicate the Confrontation Clause, their admissibility would not be affected by Crawford.

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[5] Specifically, the Court stated it meant the term in its colloquial sense rather than any technical legal sense.

The rule that the declarant must testify and be subject to cross-examination only applies to those "hearsay" statements which are testimonial. While the Court did not specifically define testimonial, they did require that the declarant believe that the statement being made would be uttered someday in a prosecution. Crawford at 1364. By their very definition, a person involved in a conspiracy does not want the statements made to be used in a future prosecution. As such, by definition, the statements made by a co-conspirator in the course and in furtherance of a conspiracy cannot implicate Crawford. Other Courts have reached the same conclusion. See, e.g., Shelton v. State, 611 S.E.2d 11 (GA 2005). As no "inadmissible hearsay" was admitted, the jury was properly instructed, and Defendant cannot establish prejudice, his motion should be denied.

III.

AN EXTENSION OF MORE TIME TO FILE A MOTION FOR NEW TRIAL SHOULD NOT HAVE BEEN GRANTED[6]

At the time Defendant filed the Ex Parte request, the only grounds for extension of time is that the Clerk of the Court had not produced the jury instructions given and offered but rejected. No other grounds were given in the written motion. As this Court is aware, a copy of the instructions given were provided to the attorneys for all the parties prior to argument, and the instructions not given were proffered by Defendant himself. The Defendant was in the best position to obtain the very instructions that he proposed to this Court in order to file this motion. There was no need for the Clerk of the Court to provide what he already had. As such, the delay in the clerk's office could not have been the only basis for an extension of time. This fact is highlighted by the fact that the only instruction that Defendant cited was a standard instruction that he was well aware was given. As such, there were no grounds for extension of time to file the motion for new trial.

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[6] The State is fully aware that this Court already made the decision. However, as the order was Ex Parte, and the State was not heard at the time of entry of the order, the State feels compelled to include this argument to preserve any objection, if necessary, for appellate purposes.

CONCLUSION

The Court is jurisdictionally barred from granting the Motion for Judgment of Acquittal. Moreover, as substantial evidence was presented of both the higher charges, as well as the lesser included charges for which the jury showed leniency in giving, the Court must deny the Motion for New Trial.

DATED this 17th day of March, 2009.

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 17th day of March, 2009, by facsimile transmission to:

Dominic Gentile, Esq. and Paola Armeni, Esq.
FAX: 369-2666

/s/Deana Daniels
Secretary for the District Attorney's Office

MD/dd

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DISTRICT COURT

CLARK COUNTY, NEVADA

C241394

STATE OF NEVADA,

Plaintiff,

vs.

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

Defendant.

CASE NO. C212667/C241394
DEPT. XXI

REPLY TO STATE'S OPPOSITION TO DEFENDANT LUIS A. HIDALGO, JR.'S MOTION FOR JUDGMENT OF ACQUITTAL OR, IN THE ALTERNATIVE, A NEW TRIAL

Date of Hearing: April 21, 2009
Time of Hearing: 9:30 a.m.

COME NOW, Luis A. Hidalgo, Jr., by and through his counsel of record, Dominic P. Gentile, Esq., and Paola M. Armeni, Esq., of the law firm of Gordon Silver, and hereby submits his Reply to the State's Opposition to Defendant Luis A. Hidalgo Jr.'s Motion for Judgment of Acquittal or, in the Alternative, a New Trial.

This Reply is made and based upon the papers and pleadings already on file herein, including the Motion to Motion for Judgment of Acquittal or, in the Alternative, a New Trial, the

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following Memorandum of Point & Authorities, and any oral argument the Court may permit at the hearing of this matter.

Dated this 17th day of April, 2009.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. THE FAILURE TO OBTAIN AN EXTENSION OF TIME FOR FILING THE MOTION FOR JUDGMENT OF ACQUITTAL REPRESENTS A VIOLATION OF LUIS A. HIDALGO JR.'S RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL

Given that there can be few instances where the failure of defense counsel to have his client acquitted can be a reasonable trial or post-trial tactical decision, where the evidence is insufficient to support the verdict a failure to properly preserve the issue must of necessity demonstrate ineffectiveness in accordance with an element of the standard set out in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984). See Means v. State, 120 Nev. 1001, 1015, 103 P. 2d 25, 33 (Nev. 2004)(failure to file notice of appeal presumed ineffective); Mann v. State, 118 Nev. 351, 46 P. 3d 1228 (Nev. 2002); Kimmelman v. Morrison, 477 U.S. 365, 106 S. Ct. 2574 ((1986)(failure to file timely motion to suppress evidence can be ineffective assistance of counsel); State v. Sanborn, 564 N.W.2d 813 (Ia. 1997)(failure to move for judgment of acquittal is ineffective assistance of counsel); United States v. Skelton, 2003 WL 21456252 (6th Cir. 2003)(failure to file timely notice of appeal is ineffective assistance unless court grants an extension); State *ex rel.* Hahan v. Stubblefield, 996 S.W. 2d 103 (Mo. App. E.D. 1999)(same);

People v. Fuqua, 764 P. 2d 56, 59, fn.1 (Colo. 1988) (failure to file timely motion to reduce sentence is ineffective assistance of counsel unless extension granted by the court); see also Rodriguez-Lariz v. INS, 282 F.3d 1218, 1227 (9th Cir.2002) (attorney's failure to file a timely application for relief presents a "clear and obvious case of ineffective assistance"). The absence of a rule applicable to criminal proceedings such as NRCP 6(b)(2) and EDCR 2.25 or Federal Rule of Criminal Procedure 45 makes it clear that no "neglect" is "excusable" under the circumstances in the case *sub judice*. See United States v. Kim, 2009 WL 29688 (S.D. Tex. 1/5/2009).

As is demonstrated by the affidavit of Dominic P. Gentile, attached hereto, efforts were made to obtain the agreement of the prosecutors in this case to a stipulation to extend the time for filing the motion for judgment of acquittal and motion for new trial. He left voice messages with both Messrs. DiGiacomo and Pesci and spoke to Assistant District Attorney Christopher Lalli, their supervisor. Mr. Lalli was informed of the purpose and necessity for communicating with one of them and the fact that stipulations had been drafted to extend the time for both motions. Mr. Lalli said that he would locate one of them and have them return Mr. Gentile's call. As can be seen from the declaration and will be supported at the hearing on this matter by Paola Armeni, she had possession of the stipulations and was waiting in Mr. Lalli's reception area for quite some time but he did not respond. It was then that the decision was made to call chambers and ask if an *ex parte* order extending time would be entertained. In the haste created by this situation Mr. Gentile was clearly negligent and ineffective, as he signed the *ex parte* motion without noticing that it referenced only the extension of time for the motion for new trial and made no mention of the motion for judgment of acquittal. This negligence clearly worked to the detriment of his client.

///

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II. THE COURT CAN GRANT THE JUDGMENT OF ACQUITTAL *SUA SPONTE.*

The State calls to the Court's attention that there is a seven day time limitation on the filing of a motion for judgment of acquittal under NRS 175.381. It also directs the Court to the language of NRS 176.515 which governs a motion for a new trial. It is clear from the text of the two statutes that only the judgment of acquittal statute empowers the trial court to act *sua sponte.* Given the strange use of language in the statute speaking of "filing" a motion, and the absence of any other context from which to clarify its meaning, it begs the question of when, if ever, a court that has the inherent obligation to insure justice has any time limitation on its legislatively declared procedural power to act *sua sponte*- once determined - as to when it must act while it still has jurisdiction over the case.

An examination and comparison between Federal Rule of Criminal Procedure 29 and NRS 175.381 is enlightening on this point. FRCrP 29 states that the "court may on its own consider whether the evidence is insufficient to sustain a conviction" but only prior to the jury being given the case. It has the power and the obligation to take the case from the jury and dismiss it with prejudice and double jeopardy protection fully preserved. Once the jury has returned a verdict of guilty or has been discharged, the federal trial court can only enter a judgment of acquittal upon the making or renewal of a motion by the defendant. It is no longer able to enter judgment of acquittal *sua sponte.* See FRCrP 29 (c). Because the federal district court lacks jurisdiction to act on its own in entering a judgment of acquittal after a guilty verdict or discharge, the United States Supreme Court has held that it cannot consider a motion filed by a defendant unless the seven day time limit established by FRCrP 29(c)(1) is strictly satisfied. Carlisle v. United States, 517 U.S. 416, 116 S. Ct. 1460 (1996). FRCrP 33, which governs a motion for new trial and also has the seven day time limit after verdict of guilty that Nevada has, has been interpreted to allow a timely filed motion for judgment of acquittal to be transformed by

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the trial court *sua sponte* into a motion for new trial where the latter was never filed at all. See United States v. Clemente, 2004 WL 97689 (S.D.N.Y. 2004).

In Nevada, while the trial court may advise the jury of its opinion of what the verdict should be it may never take a case from the jury. It can only act after the jury verdict of guilty is returned. It has the power to enter a judgment of acquittal on its own but can only grant a motion for new trial if it is filed by a defendant. The Nevada Supreme Court spoke to this in State v. Combs, 116 Nev. 1178, 14 P. 3d 521 (Nev. 2000) without reference to any time limits upon the court acting on its own. As a practical matter, Court's throughout Nevada simply wait for such a motion to be brought by a defendant after conviction. There would be no reason to require a court to act in the same time frame that a defendant must. The sole purpose for having a court empowered to grant a post guilty verdict judgment of acquittal is to avoid an injustice. It makes little sense to put a time limitation on the court's power to do so *sua sponte* while it still has jurisdiction over the case and force it to impose to enter judgment and impose a sentence on a defendant when the court itself believes that the State has failed in its burden of proof. It begs the questions "can't the time be better used" in anticipation of what will certainly be claims of ineffective assistance of counsel. See Monroe v. State, 652 A. 2d 560 (Del. 1995).

The United States Supreme Court has previously stated that it is "a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free." In re Winship, 397 U.S. 358, 372, 90 S. Ct. 1068, 1076 (1970). As a result, courts historically have been entrusted with the responsibility to ensure that no criminal defendant is convicted unless the government has produced sufficient evidence to prove every element of the offense charged. This Court must independently evaluate the evidence pursuant to the motion for new trial and make its own determination as to whether the evidence, although minimally sufficient to give support to each element of the offense nevertheless was conflicting. State v.

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Purcell, 110 Nev. 1389, 887 P 2d 276 (Nev. 1994). In doing so it should not be limited to resolving the conflict in favor of a new trial if it believes that the evidence also does not support an element of the offense. It is respectfully submitted that the seven day limitation only makes sense with respect to a motion by the defendant and not a unilateral decision by the Court. The Court should construe its seven day limitation to bind only the defendant, and not the Court when it acts *sua sponte*.

III. JUDGMENT OF ACQUITTAL AND/OR A NEW TRIAL ARE WARRANTED BASED UPON THE EVIDENCE AND INSTRUCTIONS IN THE CASE *SUB JUDICE*, PARTICULARLY AS TO THE DEADLY WEAPON ENHANCEMENT.

The State's Opposition does not address the arguments made in Defendant's motion as to the application of Brooks v. State, 180 P. 3d 657, 660 (Nev. 2008), Bolden v. State, 121 Nev. 908, 124 P. 3d 191 (Nev. 2005), Labastida v. State, 115 Nev. 298, 986 P. 2d 443 (Nev. 1999) and Sheriff v. Morris, 99 Nev. 109, 659 P. 2d 852 (Nev. 1999) to the facts and instructions in this case. Instead, the State tries to re-characterize the defense arguments and seek an application of a "totality of the circumstances" standard to the analysis that this Court must perform in response to the Motion for New Trial. The State's tactics are born of the inability to directly address the problems that it created in the manner in which it crafted the charges in the first place and submitted jury instructions or objected to others at the trial. The fact is that a combination of joining the conspiratorial objectives instead of separating them, particularly in the instructions and verdict forms, resulted in the inability to determine whether the criminal liability for the murder was based upon the jury unanimously finding beyond a reasonable doubt that the defendant agreed to the use of a deadly weapon in the battery. No evidence was adduced through any admissible source to support such a conclusion. "Dealt with", even if accurately repeated by Carroll to Zone at a time when it was an admissible statement as to the defendant, doesn't equal "cause serious bodily harm" or "kill" in anyone's language. Nothing else in the

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record supports the conclusion that it meant those things, other than the result of the episode itself. Although the facts clearly bear out that a deadly weapon was used in the killing of Hadland, nothing in the record indicates that Luis A. Hidalgo Jr. knew about or authorized it. This would not have been the case had the jury found a conspiracy to commit murder, but it didn't. Allowing for two alternatively stated conspiratorial objectives to remain in the verdict form vitiates any ability to be certain that the jury found the use of the weapon to be part of the conspiratorial agreement entered into by Luis A Hidalgo, Jr. Therefore, under the holding in Brooks, this Court must either enter a judgment of acquittal or a new trial on that aspect of the conviction without regard to any other arguments raised by Luis A. Hidalgo Jr.

Although nothing more will be argued with respect to the other evidentiary points raised in the motion, as they are not addressed in the Opposition, they are still relied upon by defendant.

IV. JURY INSTRUCTION #40 ALLOWED CONVICTION OF CONSPIRACY AND THEREFORE MURDER IN THE SECOND DEGREE ON AN UNCONSTITUTIONAL STANDARD.

As Mr. Justice Brennan wrote for the Court in Speiser v. Randall, 357 U.S. 513, 525-526, 78 S.Ct. 1332, 1341-1342, 2 L.Ed.2d 1460 (1958):

> 'There is always in litigation a margin of error, representing error in fact-finding, which both parties must take into account. Where one party has at stake an interest of transcending value-as a criminal defendant his liberty-this margin of error is reduced as to him by the process of placing on the other party the burden of persuading the fact-finder at the conclusion of the trial of his guilt beyond a reasonable doubt.'

The United States Supreme Court has been relentless in articulating, preserving and protecting the beyond a reasonable doubt standard, finding it to be fundamental to the Sixth Amendment right to a fair trial and the Fifth Amendment right to due process of law. In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970); see also Jackson v. Virginia, 443 U.S. 307, 315-316, 99 S.Ct. 2781, 2787, 61 L.Ed.2d 560 (1979). Any language

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that could confuse a jury into applying a lesser standard is deemed structural error, making it not susceptible to a harmless error analysis. Sullivan v. Louisiana, 508 U.S. 275, 113 S. Ct. 2078 (1993); Cage v. Louisiana, 498 U.S. 39, 111 S. Ct. 328 (1990).

The Nevada Supreme Court has been equally protective of insuring that a jury has a clear understanding of the meaning of and necessity of applying the reasonable doubt standard. In McCullough v. State, 99 Nev. 72, 75, 657 P.2d 1157, 1158 (1983), it forbid any attempt to supplement, change, or clarify the statutory reasonable doubt definition. The Court held that "[t]he concept of reasonable doubt is inherently qualitative. Any attempt to quantify it may impermissibly lower the prosecution's burden of proof, and is likely to confuse rather than clarify." 657 P.2d at 1159. In Holmes v. State, 114 Nev. 1357, 972 P. 2d 337, 342-342 (Nev. 1998) the Supreme Court mandated that "[t]he lower courts of this state must defer to the legislature's institutional competence and adhere to the statutorily prescribed reasonable doubt instruction codified at NRS 175.211. Additionally, we caution the prosecutors of this state that they venture into calamitous waters when they attempt to quantify, supplement, or clarify the statutorily prescribed reasonable doubt standard."

In its Opposition the State brushes aside the effect that Instruction #40 had on this case. Moreover, it mistakenly believes that the standard by which the Court determines the admissibility of evidence under an application of NRS 47.060 somehow leaves for the jury an opportunity to later apply the same standard under NRS 47.070 in determining if and how to use the evidence after the court has admitted it. In doing so it displays a lack of understanding of the separate functions and standards to be applied by the Court and the jury in the context of evidence governed by NRS 51.035 (3)(e). Simply stated, even if the "slight evidence" standard is appropriately employed by the trial judge in both preliminary fact and conditional relevance situations under application of both NRS 47.060 and 47.070, the jury has to make a

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determination of the existence of the conspiracy and membership in it of the speaker and the defendant by application of the beyond a reasonable doubt standard. See United States v. Gere, 662 F. 2d 1291, 1294 (9th Cir. 1981); United States v. Nickerson, 606 F. 2d 156, 157 (6th Cir. 1979); See also State v. Phelps, 96 N.J. 500, 516-517, 476 A. 2d 1199, 1207-1208 (N.J. 1984).

The jury applies ONLY the reasonable doubt standard, able to consider the co-conspirators statements in making that determination once the co-conspirator statements are admitted by the Court . The jury does NOT determine anew whether it can consider the hearsay statements. That is precisely the holding of the federal cases that the State so cavalierly dismisses without analysis in its Opposition. Under the Federal Rules of Evidence, once a trial judge makes a preliminary determination under the federal equivalent of NRS 47.060 or 47.070 that the preliminary questions of fact have been satisfied to make a statement admissible as that of a co-conspirator, the courts have held that there is no reason to instruct the jury that it is required to make an identical determination independently of the court. Whether such a statement can be considered at all is for the court alone to determine. United States v. Hagman, 950 F. 2d 175 (5th Cir 1991). See United States v. Elam, 678 F.2d 1234, 1249-50 (5th Cir.1982); United States v. Ascarrunz, 838 F.2d 759, 762 (5th Cir.1988).

In the case *sub judice* Instruction #40 never even mentioned the necessity of applying the beyond a reasonable doubt standard. It reiterated for the jury the standard of admissibility, a concept and procedure irrelevant and confusing to the jury's function and duties. It was met with an objection by Luis A. Hidalgo, Jr. and rose to the level of a structural defect in the proceedings mandating a new trial.

V. CONCLUSION

Based upon the foregoing this Court is empowered to enter a judgment of acquittal, at least in part, and a motion for a new trial as to the remainder of the guilty verdicts in this case

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and, as a matter of doing substantial justice, should do so.

Dated this 17th day of April, 2009.

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Attorneys for Defendant LUIS A. HIDALGO, JR.

CERTIFICATE OF SERVICE

The undersigned, an employee of Gordon Silver, hereby certifies that on the 17th day of April, 2009, she served a copy of the Reply to State's Opposition to Defendant Luis A. Hidalgo, Jr.'s Motion for Judgment of Acquittal or, in the Alternative, a New Trial, by facsimile, and by placing said copy in an envelope, postage fully prepaid, in the U.S. Mail at Las Vegas, Nevada, said envelope addressed to:

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DISTRICT COURT

CLARK COUNTY, NEVADA

STATE OF NEVADA, Plaintiff, vs. LUIS A. HIDALGO, III, #1849634, LUIS A. HIDALGO, JR., #1579522 Defendant.	CASE NO. C212667/C241394 DEPT. XXI

DECLARATION OF DOMINIC P. GENTILE, ESQ., IN SUPPORT OF REPLY TO STATE'S OPPOSITION TO LUIS A. HIDALGO, JR.'S MOTION FOR JUDGMENT OF ACQUITTAL OR, IN THE ALTERNATIVE, A NEW TRIAL

I, Dominic P. Gentile, do declare as follows:

1. I am the attorney for Luis A. Hidalgo, Jr. in this matter and have been since its inception.

2. I am responsible for preparation and argument of the post trial motions in this case.

3. I made the tactical decision to file a motion for judgment of acquittal and a motion for a new trial based upon my professional judgment that the evidence submitted at the trial was not sufficient to meet the standard of beyond a reasonable doubt and the jury was improperly instructed as to the standard of admissibility of co-conspirator statements when it

should not have been permitted to consider the issue at all. This latter instruction (#40) which was given over the objection of Luis A. Hidalgo Jr., invited jury confusion as to what the State's burden of proof was and is, in my mind, an integral part of the trial to be considered by this Court in determining the merit of the defendant's position in the post-trial motions.

4. There were a number of objections and language changes to the jury instructions at the instruction conference. I assigned my executive assistant, Adele Johansen, the task of retrieving from the Clerk of the Court a set of the Instructions that bore a file stamp. Because I was not confident that I had a complete copy of the jury instructions - as given to the jury by the Court - in time to be certain as to the precise language used, I needed an extension of time to file the motions.

5. Starting on Monday, February 23, 2009, I personally called Deputy District Attorneys DiGiacomo and Pesci as well as Assistant District Attorney Christopher Lalli to seek an agreement to an extension of time for filing post-trial motions. Mr. Lalli returned my call on Monday February 23, 2009 and we spoke on that day. When I made him aware of the fact that I was getting no responses from the prosecutors in the case, Mr. Lalli advised me that he would reach out for them and either have them call me or he would call me himself.

6. On the morning of Tuesday, February 24, 2009 approached I called Mr. Lalli again as I had not heard from anyone. I told him that I would have Paola Armeni bring him the stipulations for his signature. He advised me that he needed to speak with Messrs. DiGiacomo and/or Pesci before he would agree to the extension but he didn't think it would be a problem.

7. As the noon hour came and passed I became uneasy about the situation. I asked Ms. Johansen and Paola Armeni to call chambers to see if the Court would entertain an *ex parte* application for an extension if we could not reach the prosecutors for their agreement. At that time Ms. Armeni was already out of the office and in the federal courthouse. Ms. Johansen prepared the *ex parte* Order and I signed it. I did not notice that it was different from the stipulations that we had prepared and referenced only the Motion for New Trial. That is entirely my fault and no one else's.

8. Ms. Armeni called me by telephone and said that she was in the reception room of

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Mr. Lalli's office. She advised me that she had been waiting for him for quite some time and was told that he was in a meeting. It was then that we decided to present the *ex parte* Order to chambers out of concern that it needed to be entered before the end of the day.

9. My tactical decision to file a Motion for Judgment of Acquittal is based upon my belief that consideration of the sufficiency of the evidence is crucial to the overarching impact of the trial error flowing from the erroneous jury instruction and improper delegation to the jury of the ability to review the Court's exclusive province in determining the admissibility of the statements of co-conspirators. It is my belief, and the basis of my tactical decision to move for judgment of acquittal, that only by making its own determination as to the sufficiency of the evidence - which perforce leads to the realization as to how it conflicted on important points and elements - can the Court give fair evaluation to the Motion for New Trial.

10. I definitely did not fail to timely file a motion seeking an extension of time for filing the motion for judgment of acquittal as a tactical or strategic move. The basis of the failure to file was negligence and ineffectiveness on my part and I believe that my performance fell far below that expected of a reasonably competent lawyer in these circumstances.

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

Dated this 17 day of April, 2009.

DOMINIC P. GENTILE

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CERTIFICATE OF SERVICE

The undersigned, an employee of Gordon Silver, hereby certifies that on the 17 day of April, 2009, she served a copy of the Declaration of Dominic P. Gentile, Esq., in Support of Reply to State's Opposition to Luis A. Hidalgo's Motion for Judgment of Acquittal or, in the Alternative, a New Trial, by facsimile, and by placing said copy in an envelope, postage fully prepaid, in the U.S. Mail at Las Vegas, Nevada, said envelope addressed to:

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DISTRICT COURT

CLARK COUNTY, NEVADA

STATE OF NEVADA, Plaintiff, vs. LUIS A. HIDALGO, III, #1849634, LUIS A. HIDALGO, JR., #1579522 Defendant.	CASE NO. C212667/C241394 DEPT. XXI

DECLARATION OF ADELE L. JOHANSEN, IN SUPPORT OF REPLY TO STATE'S OPPOSITION TO LUIS A. HIDALGO, JR.'S MOTION FOR JUDGMENT OF ACQUITTAL OR, IN THE ALTERNATIVE, A NEW TRIAL

I, Adele L. Johansen, do declare as follows:

1. I am an employee of Gordon Silver working under the direct supervision of Dominic P. Gentile.

2. I was involved in the attempts to retrieve the official jury instructions that were filed with the Court in this matter and was told by Court personnel that they were not in the file. This was the reason for the need to enlarge the time for filing the motion to extend time for filing the post trial motions in this matter.

3. On Tuesday, February 24, 2009, Paola Armeni and Dominic Gentile attempted to telephone Deputy District Attorneys Marc DiGiacomo, Giancarlo Pesci and Christopher Lalli to

obtain a stipulation to extend the time for filing of Defendants' Motion for Judgment of Acquittal or, in the Alternative, a New Trial. I placed the calls for them, as is our customary practice. Ms. Armeni prepared a Stipulation in hopes of a response to the numerous phone calls that were made to the three District Attorneys employees. Copies of those documents are attached hereto. I personally saw Ms. Armeni leave this office with those documents, as I removed them from the printer and handed them to her.

4. When no such return phone calls were received, Mr. Gentile directed me to prepare an Ex Parte Application to Extend Time and an Order for Ms. Armeni to take over to the Courthouse, along with the Stipulation that Ms. Armeni prepared and already had in her possession. (An unsigned copy of said Stipulation and Order is attached hereto for the Court's convenience.) Ms. Armeni was to go to the District Attorney's office and wait for Mr. DiGiacomo, Mr. Pesci or Mr. Lalli to return to sign the Stipulation. However, if they did not return, Ms. Armeni would take the Ex Parte Application to Extend Time and Order to the Judge for signature.

4. My husband was having surgery on Thursday and had to go to the doctor and hospital for testing on Tuesday, February 24, 2009, and I had to leave the office by 1:30 p.m. to take him to the doctor's office and hospital. All of the forgoing was done prior to me leaving the office.

5. I apparently through inadvertence did not include the entire name of the motion in the Ex Parte Application and omitted Judgment of Acquittal, which should have been included in the title of the motion.

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

Dated this 17 day of April, 2009.

ADELE L. JOHANSEN

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CERTIFICATE OF SERVICE

The undersigned, an employee of Gordon Silver, hereby certifies that on the 17 day of April, 2009, she served a copy of the Declaration of Dominic P. Gentile, Esq., in Support of Reply to State's Opposition to Luis A. Hidalgo's Motion for Judgment of Acquittal or, in the Alternative, a New Trial, by facsimile, and by placing said copy in an envelope, postage fully prepaid, in the U.S. Mail at Las Vegas, Nevada, said envelope addressed to:

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DISTRICT COURT

CLARK COUNTY, NEVADA

STATE OF NEVADA,

Plaintiff,

vs.

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

Defendant.

CASE NO. C212667/C241394
DEPT. XXI

STIPULATION AND ORDER TO EXTEND DEADLINE FOR MOTION FOR JUDGMENT OF ACQUITTAL OR, IN THE ALTERNATIVE, A NEW TRIAL

IT IS HEREBY STIPULATED by and between Plaintiff, The State of Nevada, by and through its counsel, Marc DiGiacomo, Chief Deputy District Attorney, Giancarlo Pesci, Deputy District Attorney and David J.J. Roger, District Attorney and Defendants Luis A. Hidalgo III and Luis A. Hidalgo Jr., by and through their counsel, Dominic P. Gentile, Esq., and Paola M. Armeni, Esq., of the law firm of Gordon Silver, and Luis A. Hidalgo, III, by and through his

attorneys of record, John L Arrascada, Esq., of the law firm of Arrascada & Arrascada, and Christopher W. Adams, Esq., of the law firm of Christopher W. Adams, P.C., and hereby stipulate that the time for filing Defendant's Motion for Judgment of Acquittal or, in the Alternative, a New Trial be extended to and including Tuesday, March 10, 2009.

DATED this 24th day of February, 2009.

DAVID J.J. ROGER, District Attorney

_____
MARC DiGIACOMO
State Bar No. 6955
Deputy District Attorney
GIANCARLO PESCI
State Bar No. 7135
Deputy District Attorney
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DATED this 24th day of February, 2009

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ORDER

Upon Stipulation of the parties, and good cause appearing therefore,

IT IS HEREBY ORDERED that Defendants' Motion for Judgment of Acquittal, or in the Alternative, for New Trial be extended to and including Tuesday, March 10, 2009.

DATED this ____ day of _____, 2009.

VALERIE ADAIR, District Court Judge
Department XXI

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SUPP
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Attorneys for Defendant LUIS A. HIDALGO, JR.

DISTRICT COURT

CLARK COUNTY, NEVADA

STATE OF NEVADA, Plaintiff, vs. LUIS A. HIDALGO, III, #1849634, LUIS A. HIDALGO, JR., #1579522 Defendant.	CASE NO. C212667/C241394 DEPT. XXI

SUPPLEMENTAL POINTS AND AUTHORITIES TO DEFENDANT LUIS A. HIDALGO, JR.'S MOTION FOR JUDGMENT OF ACQUITTAL OR, IN THE ALTERNATIVE, A NEW TRIAL

Hearing Date: May 1, 2009
Hearing Time: 10:30 a.m.

COMES NOW the Defendant, Luis A. Hidalgo, Jr., by and through his attorneys, Dominic P. Gentile, Esq., and Paola M. Armeni, Esq., of the law firm of Gordon Silver, and pursuant to the Court's request files herewith additional points and authorities in support of his request to make a proffer or submit a declaration that encompasses communications received from the foreperson and two additional jury members that will establish that the jury deliberately ignored the Court's Instruction not to consider the statements made by Deangelo Carroll on the surreptitious tape recordings as substantive evidence and engaged in jury misconduct.

I. SALIENT FACTS PERTINENT TO THIS MEMORANDUM

At the hearing on the Motion for Judgment of Acquittal or, in the alternative, for a New Trial, Dominic P. Gentile, counsel for Luis A. Hidalgo Jr., attempted to make a proffer of a communication that he had with the foreperson of the jury and two additional jurors wherein they disclosed to him that the jurors considered evidence that they had been instructed by the Court not to consider in the manner in which they did. This communication took place in the presence of all counsel for both defendants and Donald Dibble, the investigator for Luis A. Hidalgo Jr. He also advised the Court that the foreperson, Mr. Wallace, was asked to set out in an affidavit or declaration the facts they he orally communicated to the defense in the aforementioned meeting. The prosecutor objected to this proffer, contending that it was barred by the Nevada Statutes, although he was unable to articulate which sections of the statutes provided the bar. Defense counsel called to the Court's attention NRS 50.065 and argued that it did not provide such a bar in this instance. The Court refused to take the proffer at that time and ordered this briefing on the law to take place, which it further allowed to be accompanied by a proffer that did not reveal anything improper.

The essence of the objection and allegation of jury misconduct requiring a new trial is bottomed in the jurors ignoring the admonition given to them at the time of the introduction into evidence of the audio tapes made surreptitiously at the direction of the law enforcement investigators by Deangelo Carroll on May 23 and 24, 2005. Although Luis A. Hidalgo Jr. objected to the introduction of these tapes in their entirety as to him, the Court ruled that the jury would be permitted to consider the statements of Anabel Espindola and Luis A. Hidalgo III, but not those of Deangelo Carroll, as to Luis A. Hidalgo Jr.'s membership in the conspiracy that existed prior to the death of Timothy Hadland. The Court reiterated this ruling in Instruction #40[1] wherein it stated:

> the statements of a co-conspirator after he has withdrawn from the conspiracy were not offered, and may not be considered by you, for the truth of the matter asserted. They were only offered to give context to the statements made by the

[1] Instruction #40 was objected to by Luis A. Hidalgo Jr. on additional grounds not related to the juror misconduct involved in this specific issue.

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other individuals who are speaking, or as adoptive admissions or as other circumstantial evidence in the case.

The proffer contained in the Declaration of Paola M. Armeni attached hereto does not reveal the effect that consideration of the evidence had on the jury's deliberations or the minds of the jurors and their decision making process, as it does not reveal the content of the statement but merely the manner in which it was used in violation of the instructions. It does disclose that the statements of Deangelo Carroll on the tape were used as if their content was true, which could only be done if they were made during the course of and in furtherance of the conspiracy and binding upon Luis A. Hidalgo Jr. That use was in direct contravention and disobedience to the Court's instructions in that regard.

II. THE FAILURE OF THE JURY TO OBEY THE COURT'S INSTRUCTIONS AS TO THE LIMITATIONS ON THE USE OF DEANGELO CARROLL'S STATEMENTS ON THE TAPES IS MISCONDUCT THAT MANDATES A NEW TRIAL.

A jury's failure to follow a district court's instruction is intrinsic juror misconduct. A new trial must be granted unless it appears, beyond a reasonable doubt, that no prejudice has resulted from the jury misconduct. The defendant must prove the nature of the jury misconduct and that there is a reasonable possibility that the misconduct affected the verdict. The defendant may only prove the misconduct using objective facts and not the "state of mind or deliberative process of the jury." Valdez v. State, 124 Nev. 97, 196 P.3d 465, 475 (Nev. 2008). A sitting juror commits misconduct by failing to follow the instructions and admonitions given by the trial court. See People v. Whitaker, 2009 WL 904485 (Cal App 2 dist 2009) citing In re Hamilton, 20 Cal 4th 273, 295 (Cal 1999). A juror who disobeys his obligation to apply the law as outlined by the trial court is more likely than not going to have a demonstrable impact on the deliberative process and require removal of the juror or a new trial. See State v. Sullivan, 157 N.H. 124, 139, 949 A. 2d 140, 152 (N.H. 2008). The test is whether the juror performed his duties in accordance with the court's instructions and his oath. See Weber v. State, 121 Nev. 554, 119,). 3d 107, 125 (Nev. 2005). A juror who will not weigh and consider all the facts and circumstances shown by the evidence for the purpose of doing equal and exact justice between

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the State and the accused should not be allowed to decide the case. McKenna v. State, 96 Nev. 811, 618 P.2d 348, 349 (Nev. 1980).

Although the prosecutor cited no Nevada authority to the Court at the time of the hearing, the only citation being provided by defense counsel, NRS 50.065, subd. 2, provides:

> Upon an inquiry into the validity of a verdict or indictment:
>
> (a) A juror shall not testify concerning the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith.

When read together with NRS 48.025, which provides that all relevant evidence is admissible unless excluded by statute or by the Constitution, the statute does allow juror testimony regarding objective facts, or overt conduct, which constitutes juror misconduct.

The Nevada rule is substantially the same as that proposed by the Federal Advisory Committee in 1969. 46 F.R.D. 161, at 289-90. In its published notes, the Committee observed: "The familiar rubric that a juror may not impeach his verdict, dating from Lord Mansfield's time, is a gross oversimplification." Id. at 290. See McNally v. Walkowski, 85 Nev. 696, 462 P.2d 1016 (1969). The Committee continued, "The jurors are the persons who know what really happened. Allowing them to testify as to matters other than their own inner reactions involves no particular hazard to the values sought to be protected (by the prohibition of juror testimony). The rule is based upon this conclusion." 46 F.R.D. at 291. Thus, so long as the court excludes from its consideration those portions of the affidavits which deal with "mental processes" or the "effect" upon jurors of the alleged misconduct and focuses on objective facts, overt and capable of ascertainment by any observer, without regard to the state of mind of any juror, the court proceeds properly under the rule. Barker v. State, 95 Nev. 309, 594 P.2d 719, 721 (Nev. 1979). Nevada law allows juror testimony regarding objective facts or overt conduct constituting juror misconduct. Whether or not the jurors considered alleged words of Carroll in contravention of the instructions is an objective fact verifiable and subject to being corroborated by any member of the jury who was present when the juror urging its consideration spoke the words to do so. What Carroll actually said or was believed by the jurors to have to have said on the tapes is not at

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issue under these circumstances. Whether it was heard accurately or should have been believed or weighed against the defendants is of no consequence to the determination. The fact that it was done in violation of the jurors oath to follow the instructions of the court is the act of misconduct that is the focus of the inquiry. See Bushnell v. State, 95 Nev. 570, 599 P. 2d 1038, 1041 (Nev. 1979).

III. CONCLUSION

Because the Foreperson has refused to provide an affidavit setting out what he told counsel on at least two occasions and the investigator on a third, this Court should either accept as true the facts set out in the Declaration of Paola M Armeni attached hereto or hold a hearing at which the Foreperson can be called as a witness and examined by the Court or counsel to establish the fact that juror misconduct took place by the jury ignoring and failing to follow the instructions of the Court with regard to not using the statements of Deangelo Carroll on the tape recordings for the truth of their assertions. Upon finding that this was done, the Court must find that a new trial is in order and grant the instant Motion.

Dated this 27th day of April, 2009.

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Attorneys for Defendant LUIS A. HIDALGO, JR.

CERTIFICATE OF SERVICE

The undersigned, an employee of Gordon Silver, hereby certifies that on the 27 day of April, 2009, she served a copy of the Supplemental Points and Authorities to Defendant Luis A. Hidalgo, Jr.'s Motion for Judgment of Acquittal or, in the Alternative, a New Trial, by facsimile, and by placing said copy in an envelope, postage fully prepaid, in the U.S. Mail at Las Vegas, Nevada, said envelope addressed to:

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

Giancarlo Pesci
Clark County District Attorney
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ADELE L. JOHANSEN, an employee of
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DISTRICT COURT

CLARK COUNTY, NEVADA

STATE OF NEVADA, Plaintiff, vs. LUIS A. HIDALGO, III, #1849634, LUIS A. HIDALGO, JR., #1579522 Defendant.	CASE NO. C212667/C241394 DEPT. XXI

DECLARATION OF PAOLA M. ARMENI, ESQ., IN SUPPORT OF SUPPLEMENTAL POINTS AND AUTHORITIES TO LUIS A. HIDALGO, JR.'S MOTION FOR JUDGMENT OF ACQUITTAL OR, IN THE ALTERNATIVE, A NEW TRIAL

I, Paola M. Armeni, do declare as follows:

1. I am one of the attorneys for Luis A. Hidalgo, Jr. in this matter and have been since its inception.

2. I was one of the trial attorneys in this matter and attended the post-verdict debriefing of jurors Kirk Wallace, Alicia Jackson, and Gina Ryeczyk with Dominic P. Gentile, Donald Dibble, Chris Adams, John Arrascada and Jaclyn Hall at the Regional Justice Center immediately after the verdict was rendered on February 17, 2009.

3. During that debriefing the foreperson, Mr. Wallace, as well as jurors Mrs. Jackson and Ms. Ryeczyk informed us that on Friday February 13, 2009, at the close of deliberations for

the day, all three of them were in possession of a reasonable doubt as that term is defined by the instructions.

4. All three jurors advised us that on February 17, 2009, at the suggestion of another juror whom they named, they considered the statements of Deangelo Carroll contained in the surreptitious tape recordings made by him on May 23 and 24, 2005, for the truth of the matter asserted in the statements by Carroll.

5. It was after considering those statements for their truth, and not as instructed by the Court in Instruction #40, that they changed their vote.

6. Although all three jurors told us specifically what it was that they heard Carroll say on the tapes that caused them to change their votes, I am not revealing that information in this affidavit as I believe that it may transgress the Court's ruling as to the scope of the permitted proffer.

7. On or about March 9, 2009, I was contacted by the jury foreman, Kirk Wallace regarding his previous conversations with Dominic Gentile and Don Dibble in reference to a possible affidavit.

8. It was also my understanding from Mr. Wallace that he contacted the District Attorney's involved in this case, although I cannot recall specifically if he spoke to Mr. DiGiacomo or Mr. Pesci, it is my belief that he did have a conversation with one of them regarding the request for an affidavit from the defense.

9. I spoke at length with Mr. Wallace regarding the case and his willingness to sign an affidavit.

10. Mr. Wallace reiterated what was previously discussed the day the jury returned a guilty verdict, specifically that the jurors took into consideration the statements of Deangelo Carroll on May 23 and 24, 2005 as the truth. It was identical to what he and the other jurors told us on February 17, 2009 and confirmed that they used Carroll's statements for the truth of the assertions therein.

11. Based on my conversation with Mr. Wallace, I drafted an affidavit for his consideration. Although the affidavit included specifically what it was he and the two other

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jurors heard Carroll say on the tapes that caused them to change their votes, I am not revealing that information in this affidavit as I believe that it may transgress the Court's ruling as to the scope of the permitted proffer.

12. I asked Mr. Wallace if he would be willing to review the affidavit and sign it. He stated that I could fax him the proposed affidavit but he wanted to think about it and speak to his father regarding the same. I faxed Mr. Wallace the affidavit.

13. On or about March 10, 2009, I received a voice message from Mr. Wallace stating that he would not sign the affidavit. One of the reasons he stated for not signing the affidavit was that he did not feel comfortable signing the affidavit without speaking to the other jurors.

14. I am unaware if Mr. Wallace had subsequent conversations with any of the District Attorneys in this matter after the draft of the affidavit was sent to him.

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

Dated this 27th day of April, 2009.

PAOLA M. ARMENI, ESQ.

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DISTRICT COURT

CLARK COUNTY, NEVADA

C241394

STATE OF NEVADA,

Plaintiff,

vs.

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

Defendant.

CASE NO. C212667/C241394
DEPT. XXI

LUIS A. HIDALGO JR.'S SENTENCING MEMORANDUM

Hearing Date: June 23, 2009
Hearing Time: 10:00 a.m.

COMES NOW the Defendant, Luis A. Hidalgo Jr. (hereinafter, "Luis Jr."), by and through his attorneys, Dominic P. Gentile, Esq. and Paola M. Armeni, Esq., of the law firm of Gordon Silver and hereby submits this Sentencing Memorandum and exhibits in connection with his sentencing presently scheduled for June 23, 2009 at 10:00a.m. This Memorandum sets forth Luis Jr.'s position regarding the appropriate sentence to be imposed.

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Dated this 19th day of June, 2009.

GORDON SILVER

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UNDERLYING CHARGES AND FACTS SURROUNDING THE INCIDENT

Despite the jury verdict, Luis Jr. maintains his innocence as to the conspiracy and murder conviction. Luis Jr. admitted during the trial that he paid money to Deangelo Carroll to be given to Kenneth Counts; however, did not participate nor have any knowledge of a plan to murder or harm Timothy Hadland and only paid the money out of fear after the fact.

BACKGROUND

Luis Jr. is a 58 year old man who has resided in Las Vegas since approximately 1999. Born in El Salvador, Luis Jr. moved to the United States, specifically, the State of California, at the age of 7 ½. Luis Jr. as a young man was involved with law enforcement. He was the first Community Service Officer in California, acting as a liaison between the community and the San Bernardino Police Department. Luis Jr. also worked with the Sheriff's office in Redwood City, as an ID Clerk. Although Luis Jr. enjoyed working with the police departments, he eventually went to work for his father in his auto body and towing business.

Luis Jr. has demonstrated through his life so much kindness to others. While he worked for the family auto body/towing business, the business participated in an important program for the City of San Bruno towing inoperable vehicles for free and dropping off tires and batteries for free.[1] Luis Jr. separate and apart from the business also individually was very active and

[1] See Exhibit 1.

dedicated to his community and more specifically the children of that community. He worked for approximately 25 years with the Junior 49ers[2] and Berkeley Farms Programs. These programs were both geared towards children. The children loved him. A close friend of Luis Jr.'s, Rodolfo Villalta, remembers one child enthusiastically and with admiration telling him that "Louie is awesome![3]" For his work with both these programs, he received two (2) Proclamations from the City and County of San Francisco, Mayor Willie Brown, Jr. declared December 10, 1996 and January 27, 1999 as LUIS HIDALGO DAY in San Francisco[4]. In 1998, the NFL Alumni San Francisco Chapter named Luis Jr. Man of the Year[5].

When Luis moved to Las Vegas in 1999, he began to run the Palomino Club and eventually became the owner of the Palomino Club and Simone's Auto Plaza. He continued to run both businesses until 2005. Luis' dedication to the community did not end while in California. Prior to Luis Jr. being incarcerated, co-defendant Anabel Espindola would continually introduce inmates to Luis Jr. and ask for his assistance in helping them. Luis Jr. would oblige with money and sometimes a place to stay. In January 2007, Luis Jr. took on an immense responsibility of taking caring of a baby boy that belonged to one of the inmates who had no one to assist her with the child[6]. Luis Jr. loved and nurtured the baby. He provided the newborn with a secure and loving environment. He took care of the baby for 6 months until the baby's mother picked up her son and never looked back.

CRIMINAL BACKGROUND

Luis Jr. has no prior criminal history.

MEDICAL BACKGROUND

Prior to being incarcerated at the Clark County Detention Center, Luis Jr. was under the

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[2] See Exhibit 2.

[3] See Exhibit 3.

[4] See Exhibit 4.

[5] See Exhibit 5.

[6] See Exhibit 6.

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care of two separate physicians and had approximately eight diagnoses. These diagnoses are as follows: Diabetes Mellitus, Hyperlipidemia, Hypertension, Edema, HDL deficiency, HTN benign, Angina Pectoris, Right Bundle Branch Block and Left Anterior Fascicular Block[7]. Luis Jr. also has additional medical concerns which include: Congestive Heart failure, chest pain, abnormal stress test and tobacco use disorder[8]. Due to his various health problems, Luis was prescribed approximately five (5) medications that he had to take daily which include Metoprolo, Metformin, Diovan, Avandaryl, Simvastatin and Aspirin.[9] Luis Jr. has also fallen victim to two strokes in the last couple years with the most recent one hindering his motor skills of half of his peripheral extremities[10].

Currently, Luis Jr. continues to be under a doctor's care in the Clark County Detention Center, receiving numerous medications.

FAMILY/FRIENDS SUPPORT

Luis Jr. is fortunate to have the support of family and numerous friends. This support has been present through this entire criminal justice process. As the court may already be aware, his wife, daughter, daughter–in-law and close family friends, the Villalta family[11], were often a fixture in the courtroom during many if not all the court proceedings including the trial. There is not one court appearance since the inception of this case, in that Luis Jr. has not had support in the gallery. Their presence alone should signify the tremendous love they have for Luis Jr.

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[7] See Exhibit 7.

[8] See Exhibit 7.

[9] See Exhibit 8.

[10] See Exhibit 9.

[11] Letters were written on Luis Jr.'s behalf by the Villalta family. See Exhibits 3, 6, 9.

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CONDUCT WHILE ON BAIL

Perhaps, even more significant than Luis Jr.'s conduct while on bail is Luis Jr.'s conduct prior to the current criminal charges coming to fruition. Despite being a suspect in the murder of Timothy Hadland since the incident occurred in May, 2005, Luis Jr. remained in Las Vegas, never attempting to evade the jurisdiction of the State of Nevada.

Ultimately, Luis Jr. was arrested in February, 2008. On April 1, 2008, while the case was still a death penalty case, this Honorable Court ordered that bail be set in the amount of $650,000 with a condition of house arrest[12]. Luis Jr. was subsequently released from the Clark County Detention Center on April 3, 2008 and remained out on bail until the jury returned their verdict on February 17, 2009. While on bail, Luis Jr. remained trouble free and in full compliance with his house arrest. Despite, no longer owning the Palomino Club or Simone's Auto Plaza, Luis Hidalgo actively sought employment and eventually, maintained a clothing booth at the indoor swap meet.

OTHER DFENDANTS

Unique to this case, is the outcomes of all the other defendants. Rontae Zone although not a named defendant but clearly an accomplice was not even charged. Kenneth Counts the person who was identified by three (3) different people as the shooter is acquitted of the murder and the only reason he is doing a significant amount of time is due to him receiving small habitual treatment. Jayson Taoipu strikes a deal with the prosecution and receives probation. Anabel Espindola, who clearly was involved from the evidence presented at trial, is currently on bond with no sentencing date and when she does get sentenced will receive probation. On less evidence that was presented for all the above people's involvement in the death of Timothy Hadland, Luis Jr. is the one that will be punished the most severely.

CONCLUSION

Luis Jr. is a man who has dedicated his life to the community and whose community

[12] See Exhibit 10.

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turned its back on him on February 17, 2009 when they found him guilty of crimes that he did not commit. Luis Jr. is a 58 year old man who is in poor health. Prior to these accusations, Luis Jr. in his 58 years has never been accused of being anything but law abiding. These factors need to be taken into consideration when the Court determines what Luis Jr.'s sentence should be. The Court's hands are tied in the fact that it cannot go beyond the two options of sentencing provided in NRS 200.030. However, the Court can and should sentence Luis Jr. to the less severe sentence of the definite term of 25 years with parole eligibility at 10 years for Count 1 – Murder in the 2nd degree and equal and consecutive term as mandated by law for the deadly weapon enhancement with Count 2 running concurrent to Count 1.

Dated this 19th day of June, 2009.

Respectfully Submitted;

GORDON SILVER

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(702) 796-5555
Attorneys for Defendant LUIS A. HIDALGO, JR

CERTIFICATE OF SERVICE

The undersigned, an employee of Gordon Silver, hereby certifies that on the 19th day of June, 2009, she served a copy of Luis A. Hidalgo Jr.'s Sentencing Memorandum, by facsimile, and by placing said copy in an envelope, postage fully prepaid, in the U.S. Mail at Las Vegas, Nevada, said envelope addressed to:

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

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

Anna Dang, an employee of
GORDON SILVER

EXHIBIT 1

PA3166

HID PA03000

Proclamation

City Council of the City of San Bruno, State of California

WHEREAS, inoperable vehicles stored on private property can damage the environment, provide places where vermin can live, and are a known indicator of blight;

WHEREAS, residential storage of tires and batteries create a fire and health hazard;

WHEREAS, disposal of these vehicles and parts is expensive and inconvenient for residents;

WHEREAS, the abatement cost to the City is significant; and

WHEREAS, spring is the traditional season for cleaning up;

NOW, THEREFORE, I, Ed Simon, Mayor of the City of San Bruno hereby proclaim the month of April as

RAVE (Remove Abateable Vehicles Easily) MONTH

in San Bruno, allowing residents to have inoperable vehicles towed for free and to drop off batteries and tires for free, as well; and express the sincere appreciation to those companies donating their services to make the RAVE program possible: VP Towing, Peninsula Tow, San Bruno Auto Center, Hanlon Tire and Howard Jones Battery Disposal.

Ed Simon, Mayor

Dated this 14th day of March, 1994

EXHIBIT 2

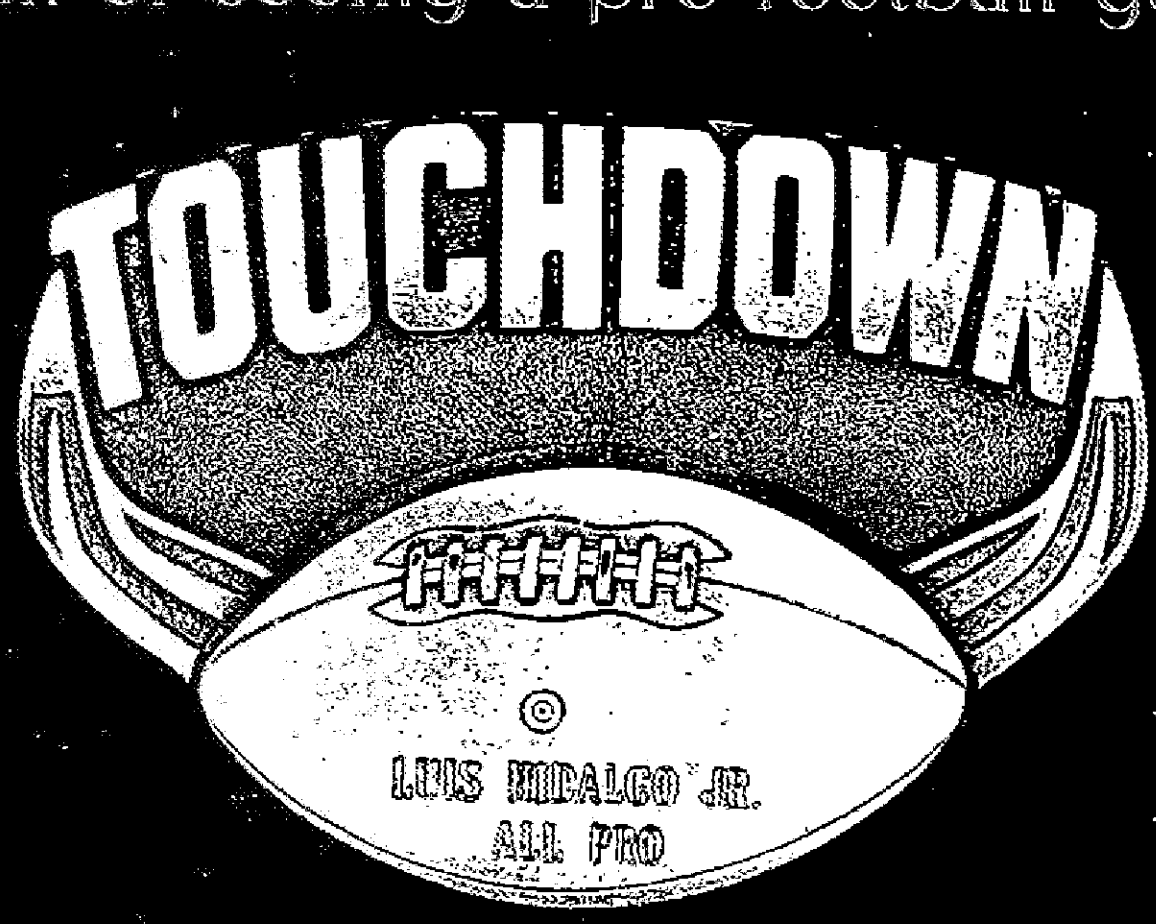
PA3169

HID PA03003

Luis Hidalgo Jr.

1973 - 1998

The San Francisco FORTY NINERS
THANK YOU for twenty-five
years of service and support
in helping the young people
of our community realize their
dream of seeing a pro football game



PA3171

HID PA03005

EXHIBIT 3

To The Honorable Valerie Adair,

I hope you will read my letter, and take into consideration my following plea.

There is no lesson that Luis Hidalgo Jr. could learn in a life sentence that he has not learned in the past twelve months under house arrest. I do not believe the imprisonment of this man is a demonstration of justice, nor a fair punishment for his crimes. He is a good person. Unfortunately, Luis lawyers did not take the opportunity to show the jury what a great citizen Luis is. Despite his faults, it is my opinion Luis is a person worthy of admiration. I admire him for his community involvements in the San Francisco Bay Area, his professional career as a police officer, and his career as owner of one of the most respected auto body repair facilities for more than three decades. More importantly, I support him as a human being who, flaws included, has demonstrated so much kindness to others.

The Luis Hidalgo I know is a man who supports his community. For thirty years Louis managed the San Francisco 49er Juniors, a non profit organization put together by Berkeley Farms and the 49ers Association. One day I was stopped by one of the participants, a young child, who enthusiastically and admiringly informed me, "Loui is awesome!" During those thirty years Luis never walked around the field with bodyguards, he never demanded anything, nor took advantage of his popularity. He is a simple citizen who knows how to help and improve his community by serving the most valuable asset of any community, the children. The Luis I know constantly strives to inspire children to be strong, educated, self-less, and confident in themselves. Luis developed the 49er Juniors Program to be an opportunity for children to have an experience outside their confined and seemingly hopeless environment in the inner city, and explore a new experience outside their own community. This is the Luis I know, a man for others.

Luis is a good person with so much more to offer his fellow citizens. Please take into consideration the Luis I know on the day of his sentencing.

Thank you.

Rodolfo Eliseo Villalta
10665 Gilespie St
Las Vegas NV 89183

PA3174

HID PA03008

EXHIBIT 4

PA3175

HID PA03009

Proclamation

City and County of San Francisco

WHEREAS, our nation's children are our most precious resource and our very future; **and**

WHEREAS, **Luis Hildalgo.** has fully demonstrated this understanding by his most admirable and dedicated support of the **Junior 49ers Program; and**

WHEREAS, the **Junior 49ers Program** for over 40 years has touched, inspired, and enriched the lives of children throughout the Bay Area by providing an opportunity for them to attend **49ers** football games— games they may not otherwise attend because of stadium sellouts or financial reasons; **and**

WHEREAS, for twenty years **Luis Hildalgo** has volunteered his time to the **Junior 49ers Program.** Every year, because of his efforts, thousands of children from our community have directly benefited from the program; **now**

THEREFORE BE IT RESOLVED, that I, Willie L. Brown, Jr., Mayor of the City and County of San Francisco, in honor of **Luis Hildalgo's** contributions to this important program, do hereby proclaim **December 10, 1996** as. . .

LUIS HILDALGO DAY in San Francisco!

IN WITNESS WHEREOF, *I have hereunto set my hand and caused the Seal of the City and County of San Francisco to be affixed.*

Willie Lewis Brown, Jr.
Mayor

Proclamation

City and County of San Francisco

WHEREAS, in 1973, Luis Hidalgo Jr. started with the Berkeley Farms Program; and

WHEREAS, for the past 25 years Luis Hidalgo has donated his time as a volunteer; and

WHEREAS, Luis Hidalgo has remained committed to the program with the children as his first priority; and

WHEREAS, in the last 25 years his job has been to coordinate the activity at Candlestick Park in overseeing game day logistics and Berkeley Farms activities; and

WHEREAS, Luis Hidalgo has currently coordinated with the NFL Alumni San Francisco Chapter the presentation of a player's jersey donated by the NFL Alumni to the mascot; now

THEREFORE BE IT RESOLVED, that I, Willie L. Brown, Jr. Mayor of the City and County of San Francisco, do hereby proclaim January 27, 1999 as...

LUIS HIDALGO DAY

in San Francisco!

IN WITNESS WHEREOF, I have hereunto set my hand and caused the Seal of the City and County of San Francisco to be affixed.

PA3177

Willie Lewis Brown, Jr.HID PA03011
Mayor

EXHIBIT 5

PA3179

HID PA03013

NFL ALUMNI

SAN FRANCISCO CHAPTER

Luis Hidalgo Jr.

MAN of the YEAR

1998

Twenty-Five years of service to
the youth of the bay area

EXHIBIT 6

PA3182

HID PA03016

To the Honorable Valerie Adair,

This letter is in regards to Luis Hidalgo Jr.

I am writing this letter in hope that after reading it you will come to know the Luis Hidalgo I am acquainted with.

Mr. Luis Hidalgo has been a family friend of mine for the past 40 years. Our fathers worked together in California, and as a result Luis and I have maintained a close friendship. In the late seventies my husbands decided to further his education and establish a career in the United States. The Hidalgo's generously offered my husband a job to help make his transition as a foreign student in America as easy as possible. Luis Hidalgo's selfless generosity earned my husband's eternal respect and loyalty. When Luis Hidalgo Jr. decided to modernize his family's auto body shop, he hired my husband, a computer programmer, to install their computer system. Again, my husband and family have always had high regards and respect for Luis Hidalgo. In 2001, my husband, along with many other dotcomers in the Bay Area, lost his job. My husband was jobless with a family to support. More important, my husband now had our children's education to pay for. Our son was now in college, and our daughter was attending a prestigious college preparatory. When Luis discovered my husband's unemployment, he offered my husband work until he could get back on his feet. In 2002 my husband and I agreed upon our daughter's high school graduation the following year, we would uproot from California to Las Vegas. Luis again offered my husband a job at the body shop, and later at the Palomino.

In all the years I have known Luis Hidalgo I have never known him to be violent or vindictive. On the contrary, I have seen him reach out and help many people with advice, jobs, loans, and on occasion, with a temporary roof over their head. Luis Hidalgo is a man with the ability to empathize for those around him. In January of 2007, Luis explained he would be helping an inmate, a woman without anyone to help with her child. When I went to visit Luis, I surprisingly found a three day old newborn. I watched Luis love and nurture a baby, even though he had recently suffered from a stroke, and was regaining his motor skills. Luis went above and beyond the expectations of a legal guardian. He not only provided a newborn with a safe home, food, and clothes, but also purchased everything available for a baby. More importantly, Luis made the newborn feel wanted, secure, and loved. Six months later the baby's mother came and picked up her son, and never looked back. When I asked Luis how he could not feel used he replied, "It was meant for me to give him a clean start."

I have been at Luis side almost every day the last two years, and I have seen him lose the son that had always been at his side, the woman he loved, both of his businesses and the respect he was accustomed to. Yet through all his losses Luis has held his head up high, waiting for the day when his innocence would be revealed.

On the last day of his trial, Luis failed to receive the justice he deserved.

As a judge I expect and assume you are a person with immense integrity, and it is to this integrity that I appeal for compassion, mercy, and above all, justice.

Sincerely,

Carmen Villalta

Carmen Villalta

EXHIBIT 7

EXHIBIT 7

PA3186

HID PA03020

STATEMENT OF TODAY'S TRANSACTIONS

Date : 12/04/2007
Account Number : 349463
Patient Name : Hidalgo, Luis A
Sex : M
Address : 10485 RANCHO DESTINO RD
City, State, Zip : LAS VEGAS, NV 89183
Medical Record # : 349463
Home Phone Number : 702/454-7930
Date of Birth : 11/28/1950
Patient Type : COMMERCIAL
<<Referring Physician : GONG, ROBERT>>

C	INSURANCE CARRIER	INSURED	INSURED ID	GROUP ID
P	UNITED HEALTHCARE	LUIS HIDALGO	801441778	503777

PROBLEM LIST:
1. - Diabetes Mellitus 250.0
2. - Hyperlipidemia 272.4
3. - HDL defiency 272.5
4. Tobacco Use Disorder 305.1
5. - Hypertension 401.9
6. - Angina Pectoris 413.9
7. Right Bundle Branch Block And Left Anterior Fascicular Block 426.52
8. - Congestive Heart Failure 428.0
9. - Edema 782.3
10. Chest pain 786.50
11. Chest pain 786.50
12. - Abnormal Test-Abnormal Exercise Stress Test 794.30

DATE	OFFICE PROCEDURES AND SERVICES	CHARGE	DIAGNOSIS	PROV
12/04/07	OFFICE VISIT-ESTABLISHED LVL4	110.00	401.9	JNG
12/04/07	ELECTROCARDIOGRAM	120.00	413.9	JNG
12/04/07	GUARANTOR ON-ACCT PAY	.00	0	

TOTAL CHARGES : 230.00
TOTAL COPAY/CO-INS : .00
PAYMENTS TODAY : 23.00
REMITTANCE :

NEXT SCHEDULED APPOINTMENT

Appt Date	Appt Time	Provider	Facility
12/19/07	10:45 AM	Jeannette Nee, M.D.	_GRV

Please call our office (702) 731-8224 within 24 hours to re-schedule should you be unable to meet your appointment.

Thank you.

EXHIBIT 8

PA3189

HID PA03023

CVS CAREMARK | CAREMARK MAIL SERVICE INVOICE/RECEIPT

0000004301846050O9

627619782

Balance Due Upon Receipt
$0.00

LUIS A. HIDALGO JR
10485 RANCHO DESTINO ROAD
LAS VEGAS, NV 89183

Please return the top portion of this form with your payment.
See reverse side for payment or refund options.

Retain the bottom portion of this form for your records.

Summary for Order: 000000430184605
Date: 12/12/2007

Name / Rx#	Quantity	Days Supply	Drug Name / NDC	Benefit Provider Paid	Co-Pay Amount
LUIS A. HIDALGO JR Rx# 639530457	90 EA	90	Metoprolo Er TAB SUC 50MG NDC 00185028210	$9.78	$17.00
LUIS A. HIDALGO JR Rx# 639530460	90 EA	90	Simvastatin TAB 40MG NDC 00339646311	$0.00	$11.49
LUIS A. HIDALGO JR Rx# 639530472	60 EA	30	Metformin TAB 500MG NDC 68382002810	$0.00	$6.00
LUIS A. HIDALGO JR Rx# 639530456	90 EA	90	Diovan Hct TAB 160/12.5 NDC 00078031534	$100.53	$70.00
LUIS A. HIDALGO JR Rx# 643887030	90 EA	90	Avandaryl TAB 4/4MG NDC 00007315313	$220.07	$35.00

Your physician authorized a change in this drug therapy.
Information regarding this prescription is enclosed.

Shipping Charge		$0.00
Total for this Order	$330.38	$139.49
Previous Account Balance		$0.00
Payment Received with this Order by VISA		- $139.49
Balance Due Upon Receipt		$0.00

A Balance Due may not reflect payments recently mailed separate from this order.

Thank you for your participation. Please remember that you can order refills online at **www.caremark.com**
If you have any questions, you can contact Caremark Customer Care at **1-800-378-8851**

EXHIBIT 9

To the Honorable Valerie Adair,

This letter is my attempt to show why Luis Hidalgo is a good person who deserves a second chance.

Luis Hidalgo was a police officer in the Bay Area for San Bruno, and a successful business man in the Bay Area and Las Vegas. More importantly, he reached out to inner city children for 30 years through his work with Berkeley Farms. His work with inner city children earned the respect of the 49ers, and acknowledgement from the NFL. Yes, he lacks perfection, but no one is perfect. Despite his imperfection, he is a person who can learn from his mistake. For this reason I ask and hope for compassion from the court.

I seek compassion from the court with respect to Mr. Hidalgo's health. He suffers from diabetes, hypertension, high cholesterol, high blood pressure, and survived two strokes. His most recent stroke in 2007 greatly hindered the motor skills of half of his peripheral extremities. All of Mr. Hidalgo's health conditions require medication, a strict diet, and lack of stress. I fear Mr. Hidalgo's age, health conditions, and stresses accompanied by imprisonment will eventually lead to another stroke with a hopeless outcome.

Mr. Hidalgo has lost his businesses, his home, and the respect he once had. A year ago a man who once enforced the law found himself being punished by the law. He spent a month in jail followed by a year under house arrest. In spite of his losses, he fails to show anger and resentment. Instead, Mr. Hidalgo sought solace in God through the Catholic Church. During a time of immense frustration, Mr. Hidalgo found a positive outlet of support through his faith, and bible study. Yes, Mr. Hidalgo lacks perfection, but he is a person who can learn and grow from his imperfection. If given a second chance he can earn back the respect of his community. For these reasons I plead for compassion from the court.

Sincerely,

Jacqueline E. Villalta

EXHIBIT 10

PA3195

HID PA03029

District Case Inquiry - Minutes

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Case 08-C-241394-C **Just Ct. Case#** 07-GJ-00101 **Status** ACTIVE

Plaintiff State of Nevada **Attorney** Roger, David J.

Defendant Hidalgo Jr, Luis **Attorney** Gentile, Dominic P.

Judge Adair, Valerie **Dept.** 21

Event 04/01/2008 at 09:30 AM DECISION: BAIL AMOUNT

Heard By Adair, Valerie

Officers Denise Husted, Court Clerk
Janie Olsen, Reporter/Recorder

Parties	0000 - S1	State of Nevada	Yes
	007135	Pesci, Giancarlo	Yes
	006955	Di Giacomo, Marc P.	Yes
	0001 - D1	Hidalgo Jr, Luis	Yes
	001923	Gentile, Dominic P.	Yes

Mr. Gentile stated that Mr. Hidalgo Jr. never used his father's identification when visiting the jail. He stated that after investigating the situation, there was a problem with the jails computer system, and once the mistake was made, it continually defaulted to the wrong Hidalgo. Following further arguments by Mr. Gentile and Mr. DiGiacomo, COURT ORDERED,

BAIL IS SET at $650,000.00 with House Arrest. FURTHER, the Defendant is to SURRENDER HIS PASSPORT and is to have NO CONTACT WHATSOEVER with Ms. Espindola. Colloquy regarding trial date. Counsel advised the State will be moving to consolidate this case with the other case. Mr. Gentile advised he will maintain the passport until he finds out where it is to be surrendered.

CUSTODY

Due to time restraints and individual case loads, the above case record may not reflect all information to date.

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TRAN

ORIGINAL

2009 JUL 13 P 3:35

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, vs. LUIS ALONSO HIDALGO, aka LUIS ALONSO HIDALGO, III, LUIS HIDALGO JR., aka LUIS A. HIDALGO, Defendants.	CASE NO. C212667 CASE NO. C241394 DEPT. XXI

BEFORE THE HONORABLE VALERIE ADAIR, DISTRICT COURT JUDGE

TUESDAY, JUNE 23, 2009

RECORDER'S TRANSCRIPT OF HEARING RE:
SENTENCING

APPEARANCES:

FOR THE STATE:	MARC DIGIACOMO, ESQ. Chief Deputy District Attorney GIANCARLO PESCI, ESQ. Chief Deputy District Attorney
FOR THE DEFENDANTS:	DOMINIC P. GENTILE, ESQ. PAOLA M. ARMENI, ESQ. JOHN L. ARRASCADA, ESQ. CHRISTOPHER ADAMS, ESQ.

RECORDED BY: JANIE L. OLSEN, COURT RECORDER/TRANSCRIBER

RECEIVED
JUL 13 2009
CLERK OF THE COURT

LAS VEGAS, CLARK COUNTY, NV., TUES., JUNE 23, 2009

THE COURT: All right. This is the time for State of Nevada versus Luis Hidalgo III and Luis Hidalgo Jr,, both of whom are present in custody with all of their attorneys. This is the time set for the rendition of sentencing.

Is there any reason we cannot proceed with sentencing at this time? And then I have some preliminary matters to address.

Before we do that, Mr. Adams, you had an issue with an order?

MR. ADAMS: Yes, ma'am, related to a matter which we'd previously addressed about U.S. savings bonds belonging to Mr. Hidalgo III were introduced into evidence. The parties have reached a stipulation to release those into the custody of Mr. Arrascada on behalf of Mr. Hidalgo III. We're making copies of the stipulation and our proposed order for the Court, and we will work on that. We'll substitute in either photocopies or actual photographs of the evidence, and we agree that nothing about the authenticity of the savings bonds is an issue related to our case.

THE COURT: All right.

MR. DI GIACOMO: And Mr. Bunin has signed that on behalf of Mr. Figler -- on behalf of Mr. Carroll, which is the outstanding defendant set for trial.

THE COURT: All right. As soon as that's presented to the Court, the Court will sign that releasing the bonds.

Before we move into the sentencing, there are some outstanding matters that I just want to address on the record. This is not a substitute for the more detailed written decision which will be forthcoming and has not been filed yet with the clerk.

The defense raised some interesting and important issues with respect for the motion for judgment of acquittal and the motion for new trial which the Court has spent some time carefully considering. I want to address just on the record right now the most important points and the Court's reasoning, and again, this is not a substitute.

With respect to the purported juror misconduct with -- according to the defense -- misusing the jury instructions and the consideration of the words of Deangelo Carroll on the audiotape reconciling that with the, I believe it's the Meyer decision, which says, Misuse of the instructions is juror misconduct and then goes on in the same sentence, I believe, to say, But you can't consider the thoughts and deliberations.

I think that this case is distinguishable in that that case it was clear that they had considered punishment, and the Court said, Well, that could have impacted their deliberations. It did not require the individual jury members or the jury foreman to come in and to say how that had impacted their consideration of guilt.

The Court said, Well, it might have, and that was something that -- in terms of them having considered the punishment, that was something that was disclosed publicly.

This case, I think, goes to the very heart of how the jurors evaluated the evidence, what evidence they found to be important, and I think that goes to the essence of the deliberative process, and I think that that exactly is the kind of thing that our statute seeks to prevent.

Additionally, with respect to the purported misconduct in considering the statement of Deangelo Carroll, I would just note that that could even be considered an adoptive admission by Ms. Espindola and Mr. Hidalgo III in their response or lack

of response to that comment made by Mr. Carroll. So to that extent it could be considered as the Court had previously ruled -- again, that's an issue for appeal rightly or wrongly -- that for purposes of the conversation of the cover-up the conspiracy was still ongoing and that there was a new conspiracy with respect to the solicitation for murder allegations relating to Kenneth Counts.

With respect to the verdict form where we separated battery and then battery with substantial bodily harm and/or battery with a deadly weapon, perhaps the better verdict form would have been battery with substantial bodily harm with a deadly weapon, battery with substantial bodily harm without a deadly weapon. That was not, according to my recollection, offered.

I think that if you consider the totality of the jury instructions with respect to the use of a deadly weapon, any potential problem in not separating those out I don't think is fatal to the verdict because again, there were other instructions relating to the use of a deadly weapon and what not, and I think that that takes care of it.

Again, no one gave a verdict form saying battery with substantial bodily harm with a deadly weapon, battery with substantial bodily harm without a deadly weapon. To just separate it out other than that wouldn't have made any sense because you could have found both obviously that they intended battery with substantial bodily harm and battery with a deadly weapon.

With respect to the interpretation of the evidence to support the verdict which was raised, obviously, by both, you know, defendants, I certainly think that there was enough evidence here to support, you know, at the end of the day I don't know whether or not they conspired to kill Timothy Hadland. I don't know whether or not they conspired to commit substantial bodily harm or not. That's me personally, but I think there certainly was sufficient evidence that the conspiracy went beyond a

THE COURT: That would be the clerk's -- my preference would be to redact those lines so that we have a copy that is publicly accessible and then to have a complete copy placed under as a, like a Court's exhibit or placed under seal.

MR. DI GIACOMO: I'm just saying that someone needs to withdraw it currently from the file.

THE COURT: All right. Ms. Husted will do that.

MR. DI GIACOMO: 'Cause it's on Blackstone currently.

THE COURT: Do you understand the order, Ms. Husted?

THE CLERK: I do.

THE COURT: And just for the record it's lines --

THE CLERK: 18 through 21, page 2.

THE COURT: Yeah, 18 starting with Luis Jr., and 21 --

MR. DI GIACOMO: The whole line would be fine.

THE COURT: All right. The whole line.

Those housekeeping matters aside, is the State ready to proceed with their argument?

MR. DI GIACOMO: And I'm going to be somewhat brief. I have a few items to give to the Court; I've shown the defense counsel. The family has photos of Mr. Hadland in real life, and there is a letter from the family that we've provided to the defense related to their position of sentencing.

Obviously, the choice for the Court is really from the State's point of view whether or not you give him a life sentence or you give him a term of years.

I'd like to address Luis Hidalgo III first because there's an additional sentencing consideration for the Court. I'm not going to get lengthy into arguing for substantials, consecutive time from the solicitation to commit murder counts, but

those counts are wholly independent of the murder in this case, and the fact that the defendant committed those at a separate period of time is indicative that there are different victims, and while the Court may not see them as victims certainly he solicited an individual that he knows has already committed a murder to kill two more people and certainly consecutive time would be appropriate.

So that leads us to the murder count. I recognize that the legislature as to both defendants provides the Court the possibility of giving a term of years in a case that involves second degree murder, and as the Court knows, second degree murder is a broad range of activity, and that activity can be as minor as an inherently dangerous felony that never intended harm to an individual all the way up to intentional murder without premeditation and deliberation, and I heard the Court earlier say that these individuals intended to commit substantial harm to Timothy Hadland. I can't imagine the legislature thought that a term of years is appropriate for that type of behavior.

It's certainly the position of the State of Nevada that Timothy Hadland's life had more value than a term of years, and it's our position that they both deserve a life sentence.

As to their sentencing memorandum, there are two issues I'd like to correct to the Court. It has always been the State's position, and I don't think the Court would dispute this, had a jury determined that Kenneth Counts was the shooter, he would have not received a term of years.

In addition to that, they represent that the Court is going to give Anabel Espindola probation at some future point in time. It's my belief based upon the times that I've been in this courtroom that that statement is not an accurate probability of occurrence, and I do not think that it's appropriate to sentence these

two individuals based upon either the sentence of Ms. Espindola or the sentence of Mr. Counts. They are responsible and accountable for their actions they took in this case, and certainly Mr. Hadland and his family are entitled to a life sentence for the individuals for the actions that they took, and I'll submit it to the Court.

THE COURT: All right. Thank you.

Who would like to speak -- well, would the attorneys like to address the Court first, or would you like to have your clients address the Court first?

MR. GENTILE: Your Honor, I'll address the Court first.

THE COURT: All right. Thank you.

MR. GENTILE: It's almost four decades I've been doing this, and I can't remember another day that I've dreaded as much as I did this morning because candidly I didn't anticipate it in advance.

It is rare in my career that I would allow a person to testify in his own behalf at trial, but that happened here for two reasons. Number one, because from the very beginning, day one, when I flew back from San Diego and met with Mr. Hidalgo and Anabel Espindola and from what I was told by Mr. DePalma and Don Dibble about what occurred the day before I met with them, this account of what occurred never changed, not once.

The jury's acted. Nothing's going to change that now and certainly not in this courtroom, but I looked at two things here that just don't warrant a life sentence. One, the fact of the matter is even according to Anabel Espindola whose credibility not only did we assail, but I don't think anybody really believes that she told the truth in this courtroom, but even with all of her bias she conceded that she was the one who learned from Deangelo Carroll that Timothy Hadland had been talking badly about the Palomino Club and that she was the one who told Luis

Hidalgo Jr., about that.

His response to that and his testimony about his response to that has never been refuted. Nobody testified that there was some discussion that took place between him and anybody else wherein a murder or a serious beating was even discussed. The jury, of course, found not enough evidence for a conspiracy that an agreement was made to murder him. They did find that either one or the other of the objectives of the conspiracy --

THE COURT: Or possibly both.

MR. GENTILE: Or possibly both, kind of hard to have both, I think, but maybe. You can maybe pistol whip somebody, I guess. That's what they came back with, and I look to Luis Hidalgo Jr.'s testimony in this case, which was never refuted. Anabel Espindola didn't come in and say, no, that didn't happen. And what did he say? He said that he told Deangelo Carroll to tell his friend to stop spreading shit, specifically talk badly about the club.

I have to tell you I doubt very much that there's a business person in any business who if confronted with such a communication, that being that someone's talking badly about the club, and if they knew that the person who was reporting it was a friend of that person as was the facts here, wouldn't tell that person, well, tell him to stop it, and from that coupled with Timothy Hadland's not saying no to making a trip to get drunk -- Timothy Hadland is dead today, that's a shame. We all feel that way. I think you're going to hear that from Mr. Hidalgo when he speaks to you, but it was not intended, and a life sentence really should be reserved for those situations where it was.

This is a second degree murder. The legislature has spoken to second degree murder in allowing a life sentence, but on the facts that are before you on

this case where there is no evidence, there is no evidence that there was a deliberate murder that took place here or that there was anything in the nature of something that was foreseeable that this man would die, and with the absence of those facts in this case, it seems to me that the proper and just sentence in this case should be a term of years of 10 to 25 years.

There has to be a consecutive sentence because of the enhancement with the weapon. We, of course, recognize that the Supreme Court has spoken to the starting date of the new statute and its application. Hopefully someday maybe some federal court, maybe a supreme court, if we are not successful on appeal, will see it differently. And so we are asking you, recognizing that as it stands right now you can't, but we are asking you to make his consecutive sentence also the minimum. This man is old and sick.

By the way, I don't know that you are going to do this so I'm going to ask you to do it. Would you please attach our sentencing memo to the presentence report so that it goes with him to the institution. The reason for that --

THE COURT: It indicates the prescriptions that he's taking and his --

MR. GENTILE: Exactly.

THE COURT: -- diagnosis.

MR. GENTILE: Exactly.

And so that having been said, I can honestly say, and it doesn't matter, and I couldn't say this to a jury 'cause ethics prohibit that, but I can say it to you, I believe in the innocence of my client, even today, even with the jury having said what they said.

Hopefully someday this verdict will be changed. It's not going to bring Timothy Hadland back. Nobody wanted him dead in the first place, most certainly

not Luis Hidalgo Jr., and we're asking essentially for the most lenient sentence that you can impose.

He would like to address the Court and the family at this time.

THE COURT: All right. Thank you.

Mr. Hidalgo Jr., what if anything would you like to say?

THE DEFENDANT HIDALGO JR: Well, first of all, I would like to sympathize with the family, and I'm going to say I've been hearing a lot of things, you know, from the Court about evidence and so on and so forth. But I stand firm today like I did at the very beginning.

Mr. Hadland and I only came in contact three or four times. I never disliked the man simply enough because I never knew the man. All I ever did was to say hello. He greeted me well. It was fine with me. I did not know very much about him at all whatsoever, none. I had no reason at all whatsoever to go ahead and do any harm to this gentleman at all whatsoever. None.

I don't function that way. I'm not that kind of person. He was a good man. All I know is that what happened, what was offered to me was information that he was talking about the club which to me didn't mean a damn thing. It didn't bother me at all whatsoever. None. Absolutely not at all.

I sympathize with the fact that he died, definitely. I'm sorry about that, but I can definitely assure you that I had nothing to do with his death or beating suggestions and all whatsoever to do any harm at all to him at all whatsoever. And I know that there's conversations that talk about evidence this and evidence that. What evidence?

Three years later I get arrested. I'm not the one that got caught on tape. I was never on tape. Ms. Espindola was. She definitely is deeper in this

situation than anybody else is. The way I look at it personally, a trophy needed to be obtained; the prosecution got it. There was nobody else more important in this case other than to go after me. If not, you would have gone ahead and done it way before that.

Ms. Espindola was facing a death penalty. She was facing two or three conspiracies. What happened? And then she gets to go home free because she turns State's evidence against me, and I'm the one that the least had anything to do with it. And I don't understand why it is, but I just sincerely hope, please, if you have to push the issue with somebody, find out who actually killed Mr. Hadland, because the other gentleman who was accused he got off. He got acquitted. The other two weren't even charged.

So I really don't understand, really, is this justice? No. The other two gentlemen were in the van when all this occurred. They weren't even charged. Everybody got probation or otherwise. My son and I are the ones that are getting the rap for it.

I stand firm again today telling you the same thing I would have, and I would have told the same story two days after this occurred when we sent, obviously, the first letter to the prosecution and tell them that I wanted to come down and tell them what I knew of the case. But here we are before you.

I understand that what I'm saying is not going to change your mind, Your Honor. I'm 58 years old. I'm sick. Okay. I ask for leniency for my son for being stupid, for thinking, obviously, the gentleman was his friend. They know it. They know that my son all he did was just converse, talk. Other than that, somebody else put this thing together, and it wasn't me.

And we have a gentleman, obviously, who keeps eluding everybody,

and his trial hasn't started, his trial which should have been the first one. Now it's into next year. What's going on? I don't know. But I can assure you I had nothing to do with it. I didn't suggest, direct it, anybody, and I was not a thump in the law.

THE COURT: All right. Thank you.

Just to correct the record, Mr. Counts was sentenced to prison. The Court gave him the maximum sentence that I could give given the charge for which he was convicted by the jury, and as is clear on the record, he was adjudged a habitual criminal. The Court imposed the maximum prison sentence the Court could impose.

With respect to Mr. Carroll, the State has been trying and wanted Mr. Carroll to be the first trial out, and there's a separate record that has been made on the issue with why Mr. Carroll did not go to trial that I don't need to, I think, address here.

With respect to Ms. Espindola, she has not been sentenced. The negotiation that Ms. Espindola received is up to the State. The sentence will be up to me, and as Mr. DiGiacomo pointed out, I think the Court's opinion has already been made on that.

Now moving to Mr. Hidalgo III, would -- Mr. Arrascada, would you like to address the Court first or would you like your client?

MR. ARRASCADA: No, Your Honor, I'd like to address the Court.

THE COURT: All right. Thank you.

MR. ARRASCADA: Your Honor, regarding Luis Hidalgo III, what we'd like the Court to do regarding sentencing is focus on what is a just sentence as we did in our sentencing memorandum that we provided the Court. We're not going to argue facts or lack thereof. That's when we go up to the Supreme Court.

Mr. Hidalgo III on our advice is not going to be making a statement to the Court, but I can tell the Court that myself, Mr. Adams, Mr. Hidalgo III and throughout -- throughout our representation and throughout this entire trial have felt and expressed our sincerest condolences to the Hadland family --

THE COURT: And I just have to interrupt you. I was just going through everything to make sure I hadn't overlooked the sentencing memo. We did not receive a sentencing memo on behalf of Mr. Hidalgo III. We received the sentencing memo on behalf of Mr. Hidalgo Jr., and the objections on behalf of Mr. Hidalgo Jr., but that's all that we have. And like I said, I just went through my stack to make sure it wasn't my oversight, but we don't have anything.

MR. DI GIACOMO: Judge, I'll just give you my copy if you want to -- it's fairly short if the Court wants to read it.

MR. ARRASCADA: Your Honor, we'd ask that you review it before we continue.

THE COURT: Okay. Do you want us to take a break for the Court to review it?

MR. ARRASCADA: If you would, please.

THE COURT: All right. I'm now reading the letters that have been attached in support of Mr. Hidalgo III, just so you know why it's taking a few minutes. There are a number of letters that have been written in response of Mr. Hidalgo III, and I'm now reading those.

I've read all the letters as well as the memo.

MR. ARRASCADA: Your Honor, just for the record, it was filed with the court clerk downstairs. A courtesy copy was not provided to you for delay.

THE COURT: There's a delay, just so you know, between the time -- we are

now paperless, so there is a delay between the time the documents are filed and they're actually scanned into the system and available for review by the Court, but there's no harm because I have taken the time to read the -- a lot of the things frankly I was aware of. Many of the things in the letters from people that grew up and have known Mr. Hidalgo III are consistent with the behavior the Court has observed during the trial and the numerous hearings. There's no prejudice. I have read everything and considered it.

MR. ARRASCADA: Thank you, Your Honor. Your Honor, then I'd like to proceed with my sentencing argument on behalf of Mr. Hidalgo III.

Your Honor, I agree to a point with the recommendation from the division, but as you can see in our memorandum and the presentation I'm about to make that we do disagree regarding the sentence they recommend for the second degree murder with the weapon enhancement.

We believe based on the argument I'm about to present that Mr. Hidalgo III, should receive in his youth, and his ability to rehabilitate warrants the term of years of 10 to 25 years. We do believe the division is very correct and accurate when they recommend on Counts 3, 4, and 5 that that time run concurrent to the second degree murder conviction or Count 1, and we're going to urge the Court that you do so.

Your Honor, when I said we're not going to reargue facts today, it's as I said, that's an issue now for the Supreme Court, but what we'd like you to focus on is the four principles of sentencing which are rehabilitation, retribution, deterrence and incapacitation.

As the Court knows, Mr. Hidalgo has been incapacitated for over four years in this matter, and from what I understand, the time in the Clark County

Detention Center it's like serving time in dog years. It -- there is no yard time. There is no programming. Mr. Hidalgo has not seen sunlight above his head in four years, but during all that time he has not had any major infractions. He has done his time. The goals of incapacitation and deterrence and even retribution have already been met regarding Luis Hidalgo III.

What I'd like the Court to focus on is rehabilitation, and that is a significant factor regarding any sentencing, and what we're asking you to do by imposing the term of years and running all of the other offences concurrent provides to Mr. Hidalgo a degree a hope. And when you're looking at rehabilitation, hope is significant, and a term of years indicates to Mr. Hidalgo as I believe the Court has just even stated, that you've noticed all of these tremendously good qualities and characteristics about Mr. Hidalgo III while he's been present through these numerous years in court.

THE COURT: I don't think that's what I said. I said some of the things regarding his behavior are consistent. I mean that he tries to be affable. He tried to be affable with court staff. He tried to be affable and was affable with the correction officers. You know, he tried to make jokes and things like that, and that was consistent with what I observed. He was a compliant prisoner. He was respectful to the correction officers, things like that, and I noticed that.

MR. ARRASCADA: And, Your Honor, that respect that you're noticing is an indication of through rehabilitation that Mr. Hidalgo III can be a functioning, productive member of our society. Because of that, Your Honor, we're going to ask that you impose the term of years -- he's 27 years old, and what does a term of years actually do? As I said, it gives hope of release, but regardless, if you follow the sentence we're recommending that you do, at a minimum, at a minimum Mr.

Hidalgo will serve 20 years in prison before he even gets to see the parole board, at a minimum.

And we need to look at his age, 27, the fact that he has no prior history whatsoever contacts with law enforcement and the fact of how will he -- who will he be and how will he do when he's reintegrated into society, and through the most trying of times the Court, as you put on the record, has noticed some characteristics or qualities, I'd like to call them, that are indicative of what he will do or how he will do when he is released.

And the term of years accomplishes all of the goals, Your Honor, of incapacitation, deterrence, retribution. It becomes a sentence that is equitable in light of all the other players involved, and it provides to Mr. Hidalgo the incentive to continue to program in the prison to do all the right things, to get a -- take college classes if available, to work his way towards being a model prisoner so that he's going through rehabilitation because he will have hope of someday not being incarcerated with the term of years if you impose it.

We're going to urge that you impose the term of years based on these reasons, and with that we submit, Your Honor.

THE COURT: All right. Thank you, Mr. Arrascada.

MR. GENTILE: Your Honor, there's one other thing.

And thank you, Mr. Pesci, for bringing it to our attention, and I mean that sincerely.

In the sentencing memorandum for Mr. Hidalgo Jr., a couple of the exhibits make reference to the same subject matter that we sealed, Exhibit 3, the first large paragraph, and Exhibit 9, the last paragraph.

THE COURT: All right. So you're --

MR. GENTILE: And so we're making this -- whoa, first and last paragraph, first full paragraph. It starts off with, Luis Hidalgo was --

THE COURT: So you want the first full paragraph as well as the last paragraph redacted?

MR. GENTILE: Right. Exactly.

THE COURT: And, Ms. Husted, did you get that?

The State has no objection to that?

MR. DI GIACOMO: That's correct, Judge.

THE COURT: And again, the redacted will be public record and the unredacted will be sealed and be part of the total record in the case, and that's for --

MR. GENTILE: Thank you.

MR. ARRASCADA: Your Honor, I'm sorry, one other issue I do want to bring up regarding the weapon enhancement. We do recognize the Nevada Supreme Court has spoken. Having been counsel in the Petrocelli case I don't see how it jibes with the ruling regarding the weapon enhancement. Notwithstanding that, Your Honor, we would ask that you impose the term of 4 to 10 years on the weapon enhancement, which would be under the new statute realizing the Supreme Court has spoken, and this may be an issue someday for a federal court.

THE COURT: Okay. And I would just put on the record that with respect to those areas that defense has sought to have redacted, the State has made no opposition to that. That is all information that has come out during the trial and during the various hearings of this case. So that information already is out there for purposes of the record in this case. That was all -- I think most of that came out in the trial, most if not all came out in the trial. So that information is public.

All right. We can hear from the speakers.

MR. DI GIACOMO: Yes.

THE COURT: Ma'am, please come on up here to the witness stand and just remain standing facing our court clerk who will administer the oath to you.

(Speaker sworn.)

THE CLERK: Please be seated and please state and spell your name.

THE WITNESS: Doris Emily Gibbs, G-i-b-b-s.

THE COURT: What would you like to say to me?

THE WITNESS: First I'd like to thank the Courts for their time and allowing me to speak today on behalf of my children and my extended Hadland family.

When the Hidalgo father-son team chose to do this crime, there were more victims than just Tim, also known as T.J. There are the family members that T.J. left behind. I'd like the Court to visualize a little four-year-old boy dressed in a yellow rain coat covered in soot with a little plastic red fireman hat watching and acting out the movies from Backdraft sceneries every day. And then last April this child fulfilled his dream and graduated third in his class from the fire academy.

On his way home that day, he called me up all excited because he was now a fireman. He said, I wish I could call dad and tell him. This entire great moment was tainted because his dad was not there to share this moment or to even share the memories of his childhood.

Then there's my daughter. I'd like you to imagine a young girl going through some major medical problems, no father to call or come and stay with you. Imagine that young girl going through a divorce, major medical and dealing with the murder of her father.

When she was born he had planted a tree in our backyard, an apple tree because she was the apple of his eye. She's in the military based far from

either side of her family, going through and dealing with all this all on her own.

And then there's my oldest son. He worked with his dad pouring concrete out here in Vegas, and he also worked at Home Depot. He got a major promotion a few months ago, and he could not call his dad or share this great news. I could not even imagine being 21 years old and getting a call that your dad is at the morgue.

This was a good child, respected, hard-working kid with good morals, good citizenship who's had, I believe, one speeding ticket his entire life, and these men who thought they were above the law dealt him a life sentence.

My mother passed away 39 years ago, and last year I got married, and on that day I missed my mother terribly. She died of an aneurysm, something that is explainable.

My kids will still miss their father, and this will still make no sense to any of them in 40 years. They still will not be able to explain it to their family. They will not be able to explain it to their children because in Girl Scouts you learn sticks and stones may break your bones, but words will never harm you. But this makes no sense. My kids will never experience another joy, reason to celebrate or just need to speak with their dad ever again because of these men's actions.

When their children are born, when they get married, when they experience life's great moments and sad times, they will never be able to share these moments with their dad ever again. These men handed them a life sentence.

I had the privilege to sit in this courtroom during trial, and I watched the Hidalgos and the way that they acted during trial, but when the jury left the courtroom, I saw different Hidalgos. They were joking, laughing; they showed no respect for the families that was sitting in the room. They were arrogant. At one

point, Hidalgo III even called his lawyers the dream team.

I don't know who these men thought they are, but I do know that after what I witnessed in this courtroom that they have no remorse of their crimes. They might act like they are, but it's not for their crime; it's for themselves. They're remorseful because they were caught, tried and found guilty.

One prime example is that after Tim was murdered, they then began to plan the murder of two more people, young kids, and if they would have succeeded, they would have had two more families dealt life sentences.

I know Mr. H has some medical issues, and I'm sure his family will plead to this; however, please remember that when Mr. Hadland, my beloved father-in-law had a stroke last fall, his son could not be there to support his father or his mother, and when he passed away a few weeks ago, Tim wasn't there to console his mother or his grieving children, and I'm sure that Hidalgo III has family, brothers and sisters, but please remember their family, friends, and neighbors, whoever, can visit them in prison, and that's a whole lot more than Tim or Tim's family can do.

That night on that desert road they handed Tim a death sentence, and they handed his loved ones a life sentence. What was once fiction to my children is now a reality, something that they will have to live with and deal with for the rest of their lives.

I ask the Court today for -- after a long four years to hand these two men the same that they handed my children. Please remember they aren't remorseful for their actions, only that they were caught, tried and found guilty. Their family can still visit them in prison, which is a whole lot more than Tim's family can do.

I ask that you please give them the maximum sentence that this Court

is allowed to give, and I'd like to thank you for your time.

THE COURT: All right. Thank you.

Please, to the witness stand just up those couple of stairs, and just remain standing facing that lady right there.

(Speaker sworn.)

THE CLERK: Please be seated. And please state and spell your name.

THE WITNESS: Allana, A-l-l-a-n-a, Hadland, H-a-d-l-a-n-d.

THE COURT: Thank you. What would you like to say to me?

THE WITNESS: My father was and still is the love of my life. He may not have been the most wonderful man in the world. He did do drugs and everything else, but he was the best father I could have ever asked for. He always told me that the happiest day of his life was the day that I was born, and as my mom stated, he planted me an apple tree, and I was his angel, and I have a tattoo on my back of an angel for him.

One of the proudest moments he had as a father was signing my pre-enlistment papers into the military. He had a sticker on the back of his truck that said, "My daughter's in the Air Force." He bragged about me being in the military all the time.

After I moved to Nebraska we talked every -- every day before I went to bed. Sometimes in the mornings when he would be on his way home from work at the Palomino Club I would be on my way to work, and we would talk for the drive. When I would iron my uniform we would talk and iron together. When I had a bad day, somehow he had ESP and knew, and even if it was just the sound of him singing to my voicemail, it made me feel better. It always helped.

On May 19, 2005, I talked to my dad for the last time before I went to

bed. He was excited about going camping, and we were making plans for him to come and see me that summer in Nebraska to see where I lived and what I did. I woke up about 12 -- 2 o'clock in the morning Nebraska time, which would be 12 here, freezing cold and shaking. Mind you, the weather's the same here as it is there, just more humid there. So for me to be cold is not right, and I knew something was wrong.

I went to work the next day and at 11 o'clock I went to lunch, and the coroner's office called and told me that my father was found dead at the lake last night. I was 19, and I was the first person to know that my dad was dead, and I didn't know what to do or who to talk to. And then I went home and I called my uncle because I wasn't going to be the one to call my grandma and say, hey, guess what, we're living a movie.

I don't believe it. At the time I told them that they were crazy and playing a very dirty joke on me, and today I still don't believe it. I still sit by the phone on my birthday four years later waiting for my dad to call. I sit in my office at work waiting for flowers because he sent me flowers at work every year, at school or work.

After he died I couldn't make that drive to work anymore. I had to move because driving the route that I took to talk to him I couldn't take it. I didn't iron my uniform for almost a year because ironing was not an option for me. For the first couple of months I called voicemail, and I'd listen to his voice. It would help a little bit, and then his phone got turned off, and now I'll never hear the sound of my father's voice again. My father will never tell me that he loves me again. He'll never sing to my voicemail. He'll never answer the phone and say, Hey, baby.

He wasn't there with me when I got married; he didn't walk me down

the aisle. When I found out my husband had a girlfriend, he wasn't there to do what dad's usually do and have a talk with their son-in-laws. He wasn't there when I got divorced. I have reoccurring bone tumors in my arm, and I'm in extreme pain 24 hours a day, and my dad's not there to comfort me.

Because of the murder and the constant back and forth with courts, I have officially been diagnosed with post-traumatic stress disorder. I take antidepressants, antianxiety pills, sleep aids, probably more medication than any 23-year-old person should take just to keep myself from having a nervous breakdown. And every time I start getting better, somehow there's an appeal done, and court is delayed a few more months, and it sets me back. It brings back all the pain every time, and usually it's worse, and it's like all the victims become -- keep becoming victims and the defendants are just sitting back laughing because they're just hanging out, in my opinion.

I don't understand how someone's life can be valued at $5,000. My father's life wasn't -- could not be valued in dollar amounts. To me it -- nothing will ever replace what was taken from me. I will always look at the picture that I have of my father and miss him. I'll always have to tell my children about my dad and how much all he wanted was for us to have kids, four of us each because he had four children so he wanted us to all have four kids so that he could have grandbabies out the wazoo.

To me a couple years in prison isn't -- doesn't justify what was done to my father. Nobody can play God but God, and to shoot somebody in the head, that's playing God. Nobody should have that right. The rest of my life I have to deal with the fact that I live in a movie because to me all this ever was was a movie and then only in movies do people get murdered, not in real life. And then on May 20th,

2005, I woke up and I was in a movie.

And that's all.

THE COURT: Thank you.

Just please remain standing facing our court clerk.

(Speaker sworn.)

THE CLERK: Please be seated, and please state and spell your name.

THE WITNESS: Jennifer Hadland, J-e-n-n-i-f-e-r, H-a-d-l-a-n-d.

THE COURT: Thank you. What would you like to say to me?

THE WITNESS: I was 14 years old when my dad was killed, and I graduated from high school two weeks ago on his birthday. I'm not going to say much because I'm going to start crying, but like my sister said, $5,000 doesn't put a price on my dad's life, and I will never have him back.

When I get married, I won't have my father there. When my sister was married he wasn't there. He wasn't there to teach me how to drive. He won't be there when I have kids. I don't think it's right that they got to do what they did and get away with it, and just because they're in jail doesn't mean that they're getting away with it, but it doesn't mean that I'll have my father back 'cause they're in jail.

People can say whatever they want; it will never bring my dad back. I'll never be able to have him hug me. I'll never be able to see him. He'll never tell me that he loves me again.

They can still talk to their family. They can still see their family. They can live, they can breathe, they can eat. Yeah, it's from a jail cell, but it's better than nothing. The pain that they have brought to me and my family is more than anybody will ever have in this world. I've sat in here every single day for their trial, for the Kenneth Counts trial, and I'll do it again for Deangelo's trial, and I still don't believe.

I still wake up on my dad's birthday and want to call him. I still wake up on Father's Day and want to call him. I've actually woken up dialing his number. I woke up that day, and I saw it on the news. I saw his girlfriend's car, and I knew he had gone to the lake that night, and I went to school anyways. I got told by my mother and a counselor that I would never see my father again. I was supposed to go to this house that weekend. I was going to stay with him that summer, and I couldn't.

I'm the youngest of four children, and I love my brothers and my sister with all my heart, and they loved my father and we -- and I loved him too. He'll never be completely gone. He'll always be loved. He'll always be missed.

My entire family sits here, and we've all gone through these trials, and it's still unbelievable. I have nothing else to say. I'm going to break.

THE COURT: Thank you for coming and speaking to me.

MR. DI GIACOMO: That's it, Judge.

THE COURT: Mr. Hidalgo Jr., and Mr. Hidalgo III, if you'll please stand.

All right. Mr. Hidalgo Jr., pursuant to the jury's verdict in this case, you are hereby adjudged guilty of Count No. 1, Second degree murder with use of a deadly weapon and Count No. 2, Conspiracy to commit battery with a deadly weapon or Conspiracy to commit battery with substantial bodily harm, a gross misdemeanor.

In addition to the $25 administrative assessment, the $150 DNA analysis fee and the fact that you have to submit to a test for genetic markers on Count No. 1, you're sentenced to a minimum term of 120 months in the Nevada Department of Corrections and a maximum term of life and an equal and consecutive 120 months to life.

On Count No.2, the Conspiracy, you are sentenced to 12 months in the Clark County Detention Center. That is imposed concurrently with the time you received on Count No. 1. And you are entitled to --

What is the correct credit for time served?

MR. DI GIACOMO: It's 184, Judge, but it's actually -- Count 1 is the Conspiracy, Count 2 is the murder.

THE COURT: I'm sorry. It was wrong in the PSI.

MR. DI GIACOMO: Okay.

THE COURT: So it should be corrected to Count 1 being the Conspiracy and Count 2 being the Second degree murder with use of a deadly weapon which is imposed concurrently.

As to Mr. Hidalgo III --

So Count 1 is the conspiracy, Count 2 is the Second degree murder, and Counts 3 and 4 are the solicitation; is that right?

MR. DI GIACOMO: That's correct, Judge.

THE COURT: Okay. That was also incorrect in the PSI.

Mr. Hidalgo III, by virtue of the jury's verdict, you are hereby adjudged guilty of Count No. 1, Conspiracy to commit battery with a deadly weapon or Conspiracy to commit battery with substantial bodily harm, a gross misdemeanor. Count No. 2, Second degree murder with use of a deadly weapon, Count No. 3, Solicitation to commit murder, and Count No. 4, Solicitation to commit murder.

In addition to the $25 administrative assessment, the $150 DNA analysis fee and the fact that you must submit to a test for genetic markers, on Count No. 1, Conspiracy, you're sentenced to 12 months in the Clark County Detention Center.

On Count No. 2, Second degree murder with use of a deadly weapon, you're sentenced to a minimum term of 120 months in the Nevada Department of Corrections and a maximum term of life with an equal and consecutive 120 to life. That is imposed concurrently with the time I gave you on Count No. 1.

On Count 3, Solicitation to commit murder, you're sentenced to a minimum term of 24 months in the Nevada Department of Corrections, a maximum term of 72 months in the Nevada Department of Corrections. That is imposed concurrent with the time I gave you on Counts No. 1 and 2.

On Count No. 4, Solicitation to commit murder you're sentenced to a minimum term of 24 months in the Nevada Department of Corrections, a maximum term of 72 months. That is also imposed concurrently with the time you were given on the other counts. And the correct credit for time served is 1,492 days.

MR. DI GIACOMO: That's correct, Your Honor.

THE COURT: All right. Thank you.

MR. GENTILE: Your Honor, I don't believe you read the credit for time served with respect to Mr. Hidalgo Jr.

THE COURT: Oh, I apologize.

MR. DI GIACOMO: 184

THE COURT: And the correct time is 184 days credit for time served.

MR. DI GIACOMO: Judge, one housekeeping matter. Do you want a short order on the motion for new trials, or do you want a written order drafted up on the findings here?

THE COURT: If you would do a draft that would be great.

MR. DI GIACOMO: Can I send an order down for the transcripts so I can have a transcript of it?

THE COURT: Of course.

MR. DI GIACOMO: Thank you, Judge.

-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.

JANIE L. OLSEN
Recorder/Transcriber

EXPR APP
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DISTRICT COURT

CLARK COUNTY, NEVADA

STATE OF NEVADA, Plaintiff, vs. LUIS A. HIDALGO, III, #1849634, LUIS A. HIDALGO, JR., #1579522 Defendant.	CASE NO. C212667 (C241394) DEPT. XXI

EX-PARTE APPLICATION REQUESTING THAT DEFENDANT LUIS A. HIDALGO JR.'S _EX-PARTE_ APPLICATION REQUESTING AN ORDER DECLARING HIM INDIGENT FOR PURPOSES OF APPOINTING APPELLATE COUNSEL BE SEALED

COMES NOW, Defendant, LUIS A. HIDALGO, JR., by and through his counsel DOMINIC P. GENTILE, ESQ., and PAOLA M. ARMENI, ESQ. of the law firm of GORDON SILVER, and hereby requests an Order sealing the *Ex-Parte* Application submitted for purposes of requesting an Order declaring Luis A. Hidalgo Jr. indigent for purposes of appointing appellate counsel. The reason for this request is that the *Ex-Parte* Application contains confidential information, i.e. Luis A. Hidalgo Jr.'s social security number and birth date.

Dated this 1st day of July, 2009.

GORDON SILVER

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JOC

ORIGINAL

FILED

2009 JUL 10 A 8:27

CLERK OF THE COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

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

Defendant.

CASE NO. C241394

DEPT. NO. XXI

JUDGMENT OF CONVICTION

(JURY TRIAL)

The Defendant previously entered a plea of not guilty to the crimes of COUNT 1 – CONSPIRACY TO COMMIT MURDER (Category B Felony), in violation of NRS 199.480, 200.010, 200.030, and COUNT 2 – MURDER WITH USE OF A DEADLY WEAPON (Category A Felony), NRS 200.010, 200.030, 193.165; and the matter having been tried before a jury and the Defendant having been found guilty of the crimes of COUNT 1 – CONSPIRACY TO COMMIT A BATTERY WITH A DEADLY WEAPON (Gross Misdemeanor), in violation of NRS 199.480, 200.481, COUNT 2 – SECOND DEGREE MURDER WITH USE OF A DEADLY WEAPON (Category A Felony), NRS 200.010, 200.030, 193.165; thereafter, on the 23RD day of June, 2009, the Defendant

was present in court for sentencing with his counsel, DOMINIC GENTILE, ESQ., and PAOLO ARMENI, ESQ., and good cause appearing,

THE DEFENDANT IS HEREBY ADJUDGED guilty of said offenses and, in addition to the $25.00 Administrative Assessment Fee and $150.00 DNA Analysis Fee including testing to determine genetic markers, the Defendant is SENTENCED to the Nevada Department of Corrections (NDC) as follows: AS TO COUNT 1 - TO TWELVE (12) MONTHS in the Clark County Detention Center (CCDC); AS TO COUNT 2 - TO LIFE with a MINIMUM parole eligibility of ONE HUNDRED TWENTY (120) MONTHS, plus an EQUAL and CONSECUTIVE term of LIFE with a MINIMUM parole eligibility of ONE HUNDRED TWENTY (120) MONTHS for the Use of a Deadly Weapon, COUNT 2 to run CONCURRENT with COUNT 1, with ONE HUNDRED EIGHTY-FOUR (184) DAYS credit for time served.

DATED this 25th day of June , 2009

Valerie Adair

VALERIE ADAIR
DISTRICT JUDGE

NOTC
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C241394

DISTRICT COURT

CLARK COUNTY, NEVADA

STATE OF NEVADA, Plaintiff, vs. LUIS A. HIDALGO, III, #1849634, LUIS A. HIDALGO, JR., #1579522 Defendant.	CASE NO. C212667/C241394 DEPT. XXI **LUIS A. HIDALGO, JR.S' NOTICE OF APPEAL**

COMES NOW the Defendant, Luis A. Hidalgo, Jr., by and through his attorney, Dominic P. Gentile, Esq., of the law firm of Gordon Silver, hereby appeals all pretrial motions, the judgment of conviction, the jury verdict and all post-trial motions. The judgment of conviction was entered on July 10, 2009.

Dated this 14th day of July, 2009.

GORDON SILVER

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Attorney for Defendant LUIS A. HIDALGO, JR.

CERTIFICATE OF SERVICE

The undersigned, an employee of Gordon Silver, hereby certifies that on the 16 day of July, 2009, she served a copy of Notice of Appeal, by facsimile, and by placing said copy in an envelope, postage fully prepaid, in the U.S. Mail at Las Vegas, Nevada, said envelope addressed to

Marc DiGiacomo
Deputy District Attorney
Regional Justice Center
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ADELE L. JOHANSEN, an employee of
GORDON SILVER

JOC

ORIGINAL

DISTRICT COURT

CLARK COUNTY, NEVADA

2009 AUG 18 A 9:19

THE STATE OF NEVADA,

Plaintiff,

-vs-

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

Defendant.

CASE NO. C241394

DEPT. NO. XXI

AMENDED JUDGMENT OF CONVICTION

(JURY TRIAL)

The Defendant previously entered a plea of not guilty to the crimes of COUNT 1 – CONSPIRACY TO COMMIT MURDER (Category B Felony), in violation of NRS 199.480, 200.010, 200.030, and COUNT 2 – MURDER WITH USE OF A DEADLY WEAPON (Category A Felony), NRS 200.010, 200.030, 193.165; and the matter having been tried before a jury and the Defendant having been found guilty of the crimes of COUNT 1 – CONSPIRACY TO COMMIT A BATTERY WITH A DEADLY WEAPON (Gross Misdemeanor), in violation of NRS 199.480, 200.481, COUNT 2 – SECOND DEGREE MURDER WITH USE OF A DEADLY WEAPON (Category A Felony), NRS 200.010, 200.030, 193.165; thereafter, on the 23RD day of June, 2009, the Defendant was present in court for sentencing with his counsel, DOMINIC GENTILE, ESQ., and PAOLO ARMENI, ESQ., and good cause appearing,

THE DEFENDANT WAS ADJUDGED guilty of said offenses and, in addition to the $25.00 Administrative Assessment Fee and $150.00 DNA Analysis Fee including testing to determine genetic markers, the Defendant was SENTENCED to the Nevada Department of Corrections (NDC) as follows: AS TO COUNT 1 - TO TWELVE (12) MONTHS in the Clark County Detention Center (CCDC); AS TO COUNT 2 - TO LIFE with a MINIMUM parole eligibility of ONE HUNDRED TWENTY (120) MONTHS, plus an EQUAL and CONSECUTIVE term of LIFE with a MINIMUM parole eligibility of ONE HUNDRED TWENTY (120) MONTHS for the Use of a Deadly Weapon, COUNT 2 to run CONCURRENT with COUNT 1, with ONE HUNDRED EIGHTY-FOUR (184) DAYS credit for time served.

THEREAFTER, on the 11th day of August, 2009, a Minute Order was prepared reflecting: It having been brought to the attention of the Court by Defense Counsel in this matter that the Judgment of Conviction, filed on July 10, 2009, contained an error as to the exact count the Defendant was found guilty of at time of trial, the Court does HEREBY ORDER that an AMENDED JUDGMENT OF CONVICTION be filed to reflect that the Defendant was found GUILTY of COUNT 1 – CONSPIRACY TO COMMIT A BATTERY WITH A DEADLY WEAPON OR BATTERY RESULTING IN SUBSTANTIAL BODILY HARM, in place and stead of Conspiracy to Commit Battery with a Deadly Weapon.

DATED this 14TH day of August, 2009

VALERIE ADAIR
DISTRICT JUDGE