

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

2           LUIS HIDALGO, JR.,

3                   Appellant,

4           vs.

5                   THE STATE OF NEVADA,  
6                   Respondent.

Electronically Filed  
Jul 25 2017 08:25 a.m.  
Elizabeth A. Brown  
Clerk of Supreme Court  
Case No. 71458

7                   **APPELLANT'S APPENDIX VOLUME XXI**

8                   Appeal from Eighth Judicial District Court, Clark County

9                   The Honorable Valerie Adair, District Judge

10                  District Court Case No. 08C241394

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18           MCLETSCHIE SHELL LLC  
19           Margaret A. McLetchie (Bar No. 10931)  
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22           *Counsel for Appellant, Luis Hidalgo, Jr.*

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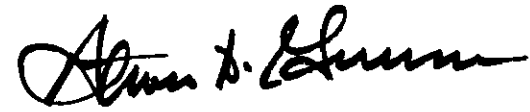
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**EIGHTH JUDICIAL DISTRICT COURT**

**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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DATED this 29<sup>th</sup> day of February, 2016.

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**CERTIFICATE OF SERVICE**

Pursuant to NRCP 5(b)(2)(B) I hereby certify that on the 29<sup>th</sup> day of February, 2016,  
I mailed a true and correct copy of the foregoing VOLUME XIX: 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  
An Employee of McLetchie Shell LLC

# EXHIBIT “D”

1 TRAN

**COPY**

**FILED**

NOV 24 2009

3 DISTRICT COURT

*Alfonso J. Delacruz*  
CLERK OF COURT

4 CLARK COUNTY, NEVADA

6 THE STATE OF NEVADA,

7 Plaintiff,

8 vs.

9 LUIS ALONSO HIDALGO III and LUIS

10 HIDALGO, JR.,

11 Defendants.

CASE NO. C212667/ C241394  
DEPT. XXI

12

13 BEFORE THE HONORABLE VALERIE ADAIR, DISTRICT COURT JUDGE

14 WEDNESDAY, FEBRUARY 11, 2009

15 RECORDER'S TRANSCRIPT OF HEARING RE:

16 JURY TRIAL

17 APPEARANCES:

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CHRISTOPHER W. ADAMS, ESQ.

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FOR LUIS HIDALGO, JR:

DOMINIC P. GENTILE, ESQ.

23

PAOLA M. ARMENI, ESQ.

24

25 RECORDED BY: JANIE L. OLSEN, COURT RECORDER

JRP TRANSCRIBING

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CHRISTOPHER ORAM

Having been called as a witness and being first duly sworn testified as follows:

THE CLERK: Thank you. And please state and spell your name.

THE WITNESS: My name is Christopher Oram. My last name is spelled O-R-A-M, M as in Mary.

DIRECT EXAMINATION

BY MR. DIGIACOMO:

Q Sir, how are you employed?

A I'm an attorney.

Q How long have you been an attorney?

A Since 1991, about 17 years.

Q And what is your main area of practice?

A Exclusively criminal law.

Q Exclusively criminal law?

A Yes.

Q Is there a particular type of criminal law that you have recently been -- well, not recently, that you specialize in?

A Right. I don't specialize. I handle a tremendous amount of murder cases.

Q Okay. You've had a lot of them.

A I've had many, many.

Q Okay. And I'm sorry, how long have you been an attorney? You said 17 years? Since '91 you said?

A Yes, 1991.

MR. GENTILE: May we approach?

1 THE COURT: Of course.

2 (Conference at the bench)

3 BY MR. DIGIACOMO:

4 Q Did there come a point in time when you represented, or I guess still  
5 do, an individual by the name of Anabel Espindola?

6 A Yes. Shortly after her arrest I was retained on this case, and I have  
7 represented her until today.

8 Q And how is it that you came to know Anabel Espindola? How did  
9 that work?

10 A I was contacted by Dominic Gentile who asked me if I would be  
11 willing to take the case. I had --

12 MR. ADAMS: Objection. Relevance, Your Honor.

13 THE COURT: That's sustained.

14 BY MR. DIGIACOMO:

15 Q Well, after whatever conversation you had, did you eventually meet  
16 Ms. Espindola?

17 A I did.

18 Q And where did you meet her at?

19 A The Clark County Detention Center.

20 Q And do you recall of the top of your head the day you met her?

21 A No, I -- I don't. I've had a chance to review my visitation records,  
22 and I believe somewhere approximately May 24<sup>th</sup>, I believe.

23 Q Okay. And how many times do you -- did you count off how many  
24 times you visited her between then and the end of the records that were provided  
25 to you?

1           A    I did. I don't know if I did it accurately. I would say -- I counted  
2 approximately 85. It could be between 80 and 90 times I saw her.

3           Q    Specifically did you go back and look to see how many times you  
4 met her in the first couple of days she was in the Clark County Detention Center?

5           A    I believe I meet her the 24<sup>th</sup>, 25<sup>th</sup>, 26<sup>th</sup>, 27<sup>th</sup>, 28<sup>th</sup>, I believe.

6           Q    And during that time period do you have any conversations with Ms.  
7 Espindola?

8           A    Yes, and the conversations are lengthy.

9           Q    And do those conversations ever entail her describing to you the  
10 circumstances of why she wound up in jail?

11          A    Yes, of course. I mean, that's going to be the first thing I do, pretty  
12 close to the first thing I do when I go in and I speak to somebody.

13          Q    Okay. So you want to know what it is that's going on; correct?

14          A    Yes, and we talk about the case, you know, different techniques on  
15 talking about a case, but, yes, you address the case pretty much right away.

16          Q    And during this initial time period did you get a story as to -- or her  
17 version of events as to what happened to cause her to wind up in jail?

18          A    Yes.

19          Q    And I don't want to go too specific in this, but you're her lawyer. You  
20 were here in court when she testified; correct?

21          A    Yes, I was.

22          Q    Okay. And let me ask the question this way. Was the story she told  
23 in court on direct examination consistent with the story she told you in the first  
24 couple days you met with her?

25               MR. ADAMS: Objection, Your Honor. May we approach?

1 THE COURT: Okay.

2 (Conference at the bench)

3 BY MR. DIGIACOMO:

4 Q During the course of your early representation of Ms. Espindola, did  
5 she describe for you a phone call between Mr. Carroll and herself?

6 A Yes.

7 Q On May 19<sup>th</sup>?

8 A I -- I don't recall the date of the phone call right off -- right off hand,  
9 but I remember. Is this the one where -- plan B?

10 Q No, I want to talk about Deangelo Carroll's phone call.

11 A Okay.

12 Q All right? Do you remember Ms. Espindola testifying to Deangelo  
13 Carroll calling her while she's at Simone's Auto Plaza --

14 A Correct.

15 Q -- early in the day that TJ's is --

16 A Correct.

17 MR. GENTILE: I object.

18 MR. ADAMS: Your Honor, I object.

19 MR. GENTILE: This is not rebuttal. We're -- we're saying that that  
20 call did happen.

21 THE COURT: Right. That's sustained.

22 MR. DIGIACOMO: Well, I'm -- I got to -- that's my foundational  
23 question for the next question.

24 THE COURT: Well, just ask the next question. I mean --

25 MR. DIGIACOMO: Okay. Well, I'll ask the next question.

1 BY MR. DIGIACOMO:

2 Q Did she tell you during the course of this that she relayed the  
3 information she got from Deangelo Carroll to Mr. H and Little Lou at Simone's?

4 A Yes.

5 Q Okay. During the course of your representation of her early on, did  
6 she tell you that her relaying that information to Mr. H and Little Lou caused an  
7 argument between the two of them?

8 A She said that there was an argument, sort of what she described  
9 here where they're talking about Rick Rizzolo. Is that the one you're talking  
10 about? Yes, that -- that occurred.

11 Q Okay. Did she -- and I don't want to go through every single thing  
12 that she testified to, so I'm going to cut to some of the, kind of the points. Later in  
13 the evening on the 19<sup>th</sup>, did she describe for you a conversation with Mr. H  
14 involving plan B?

15 MR. GENTILE: Your Honor, I have to have an objection with respect  
16 to time predicate. I mean, this whole thing is about a time predicate. If he has  
17 notes that he's reflected on from a specific day, we're entitled to those notes. But  
18 he has to establish a time predicate.

19 THE COURT: Meaning when the conversation between Ms.  
20 Espindola and Mr. Oram occurred?

21 MR. GENTILE: That's correct.

22 THE COURT: All right.

23 MR. GENTILE: If it's un-refreshed recollection, then, you know, it's  
24 almost four years old. So if there's -- if there's notes, we should have them.

25 THE COURT: All right.

1 BY MR. DIGIACOMO:

2 Q Let me back you up. Prior to -- well, let me ask you this first of all.  
3 Are there notes to this?

4 A The notes that I was -- that I had in this case from any discussion I  
5 had with Ms. Espindola I have provided to the Court and to the defense.

6 Q Okay. So they have everything, all the notes that you took in this  
7 case?

8 A Yes.

9 THE COURT: And -- and those don't reflect the early meetings that  
10 you're testifying about now?

11 THE WITNESS: There -- there would be no notes from any single  
12 meetings.

13 THE COURT: Okay.

14 MR. DIGIACOMO:

15 Q Why not?

16 THE COURT: Now, let me ask you this. Mr. DiGiacomo referenced  
17 a time period of early May when you first met with Ms. Espindola --

18 THE WITNESS: Yes.

19 THE COURT: -- at the jail.

20 THE WITNESS: Yes.

21 MR. DIGIACOMO: Late May.

22 THE COURT: I'm sorry, late May of 2005. I want you at this point in  
23 time, if he asks you about a statement, to reference just that timeframe of late  
24 May 2005. Any conversations that may have occurred later than that, if she  
25 didn't tell you in early May, then just indicate that wasn't something in early May.

1 THE WITNESS: Or late May?

2 THE COURT: Or, sorry, late May.

3 THE WITNESS: Okay.

4 THE COURT: It's been a long day.

5 THE WITNESS: No, I understand.

6 THE COURT: It's been a long three weeks, frankly.

7 THE WITNESS: I can see that.

8 BY MR. DIGIACOMO:

9 Q And I think I was at the -- plan B conversation. You know what  
10 conversation I'm talking about?

11 A I do.

12 Q Okay. And does Ms. Espindola describe for you in late May of 2005  
13 a conversation between herself and Mr. H where the subject of plan B came up?

14 A Yes.

15 Q And did she tell you what it is that Mr. H told her to do related to plan  
16 B?

17 A To go and make a phone call and say to go to plan B, and then to  
18 return to where he was.

19 THE COURT: When did she tell you this?

20 MR. ORAM: She told me that in the very first meetings.

21 THE COURT: The late May meetings?

22 MR. ORAM: Yes, the late May meetings --

23 THE COURT: Okay.

24 MR. ORAM: -- and she would have told me numerous times after  
25 that point.

1 THE COURT: Okay.

2 BY MR. DIGIACOMO:

3 Q And I was going to get to that. Right now I'm going to focus on you  
4 she tells you a story, basically, or she gives you a version of events in late May  
5 and we'll talk about the progression thereafter. Does she describe for you a  
6 situation where Deangelo Carroll comes back to the office with Mr. H present  
7 saying it's done. Did she describe that for you?

8 A Yes.

9 Q And did she describe for you the discussion that she just testified to  
10 related to the money that was paid?

11 A Putting \$5,000 down?

12 Q Yes.

13 A Yes.

14 Q Did she at any point during this five day or the late May period ever  
15 tell you that Mr. H paid the money because he was scared of Deangelo or any  
16 other person?

17 A No.

18 Q Okay. Did she thereafter describe for you kind of the events of  
19 Friday, Saturday, Sunday, leading into the Monday wire?

20 A Yes, she described that in detail.

21 Q Okay. Specifically in this first five day period, did you learn that she  
22 wound up at Jerome DePalma's law office?

23 A I learned that she had been at Dominic Gentile's office on two  
24 occasions.

25 Q Okay.



1           A    Okay.

2           Q    So you knew that she had been to Dominic's office on two  
3 occasions. Did you know that she had met with Jerome DePalma on one of  
4 those occasion?

5           A    I knew that she had met just briefly and there was no discussion, but  
6 that there had been something that had occurred with Dominic which had -- there  
7 was quite a bit of discussion about.

8           Q    Okay.

9           A    But almost nothing with Mr. DePalma.

10          Q    So in her discussions with you, this is in late May, she's telling you  
11 she didn't talk substantively to Jerome DePalma?

12          A    She doesn't say it that way. She talks about how she met with an  
13 attorney, and that she went into the attorney's office and she talked all about this  
14 statute, this funny statute. Well, I knew what she was talking about because I  
15 had seen this statute. Okay? And she said that there was the discussion, which  
16 she has described, with Mr. Gentile where she plays with the TV or breaks the  
17 TV, and I'd heard that story numerous times.

18          Q    Okay. What about the day before? Had you ever heard the story  
19 about Jerome DePalma's office?

20          A    Yes, I had heard what she had said. But when I sat in the back of  
21 the courtroom and heard was there a lengthy discussion with Jerry DePalma, I  
22 had never heard such a thing.

23          Q    You never had heard any of that?

24          A    Never.

25          Q    At some point -- I'm showing you, and this is a copy.

1 MR. DIGIACOMO: If I can have State's proposed exhibit -- or  
2 State's Exhibit 241.

3 Q Did you receive a copy of that, I guess it was today?

4 A Yes.

5 Q Had you ever seen that before?

6 A No.

7 Q Okay. Have you had a chance to read through it?

8 A I have.

9 Q Have you ever -- well, I guess we can go by line by line, but is that  
10 information consistent whatsoever with the information that Anabel Espindola  
11 provided you in the first couple -- the first -- the last days of May?

12 A This is --

13 Q Or is that too broad of a question?

14 A Yeah, I couldn't -- I looked over the six pages. There were certain  
15 things I was looking for, but there was some stuff that I saw in there that -- in  
16 other words where she counted out money. There's something in there about  
17 how she counted out money. And I had never heard that that she counted out  
18 money, just simply got it. And she was always very accurate, I placed it on the  
19 table.

20 Q I'm going to show you a couple of things, Counsel. It appears to be  
21 a -- see the star there in front of you? It says Luis said to Deangelo Carroll to tell  
22 TJ to stop spreading shit.

23 A Okay.

24 Q Did Ms. Espindola ever explain that to you?

25 MR. GENTILE: Your Honor --

1 MR. ARRASCADA: We object.  
2 MR. ADAMS: Objection.  
3 MR. GENTILE: How is this rebuttal?  
4 THE COURT: Yeah, that's sustained.  
5 MR. DIGIACOMO: Well, what do you mean how is it not rebuttal?  
6 This is their witness, Jerome DePalma. I am entitled to ask --  
7 THE COURT: Well, and Mr. Oram was not Jerome DePalma's  
8 attorney, nor did he have any conversations with Jerome DePalma, nor --  
9 MR. GENTILE: This happened five days before he got involved in  
10 the case. This was the first statement she ever made.  
11 MR. DIGIACOMO: My question is what she never told her lawyer.  
12 THE COURT: Well, how does he know?  
13 MR. ARRASCADA: Well, how --  
14 MR. ADAMS: That should be --  
15 MR. ARRASCADA: -- would he know?  
16 MR. ADAMS: That's a question for her, Your Honor.  
17 THE COURT: I mean, he can't speculate as to why she didn't tell  
18 him unless she said I'm not telling you what I told Jerome DePalma, but  
19 according to him, she didn't tell Jerome DePalma anything. So --  
20 MR. GENTILE: No.  
21 MR. DIGIACOMO: That's --  
22 MR. GENTILE: No, no, no. He didn't say that.  
23 THE COURT: Oh, okay, you're right.  
24 MR. GENTILE: He said that she didn't tell him that she told Jerome  
25 DePalma. She said she didn't tell Jerome DePalma anything.

1 THE COURT: Thank you, Mr. Gentile. You're correct.

2 MR. GENTILE: Thank you. I just want the record to be clear.

3 THE COURT: You're correct. I misspoke.

4 MR. GENTILE: Thank you.

5 THE COURT: The Court misspoke. Not the first time, not the last  
6 time.

7 BY MR. DIGIACOMO:

8 Q I'm going to ask it a different way. Would having this information  
9 have been helpful to you in your defense early on in this case?

10 A I did a bail hearing in Boulder City where I had to argue --

11 THE COURT: I think that was just a --

12 MR. ARRASCADA: Objection.

13 MR. ADAMS: Objection to --

14 THE COURT: -- yes or a no question.

15 MR. ADAMS: -- improper.

16 THE WITNESS: Yes.

17 MR. GENTILE: Yeah, I mean --

18 THE WITNESS: Yes, it would have been helpful.

19 MR. ADAMS: What is it rebutting, Your Honor? I don't -- I'm  
20 confused.

21 THE COURT: That's sustained.

22 MR. DIGIACOMO: So I can't rebut --

23 THE COURT: Well, I mean, what --

24 MR. DIGIACOMO: The fact that --

25 THE COURT: -- would've been help --

1 MR. DIGIACOMO: -- they're claiming she --

2 THE COURT: No, no, no. What would've been helpful to Mr. Oram  
3 and what he could've utilized in Boulder City or in this Court or in Judge Mosley's  
4 department or anywhere else isn't really relevant to what Ms. Espindola told him  
5 or didn't tell him. The only thing you're allowed to rebut is what Ms. Espindola  
6 told him. What he would've liked to know, what he would've done with it, how  
7 could it could've benefited his case, you know, that's -- if we were -- Mr. Oram,  
8 you know --

9 MR. DIGIACOMO: Let me rephrase the question.

10 THE COURT: Okay.

11 BY MR. DIGIACOMO:

12 Q During the time period that you were representing Ms. Espindola,  
13 this is before the preliminary hearing or leading up to the preliminary hearing, you  
14 had discussions with her; correct?

15 A Yes.

16 Q And some of those discussions -- well, do any of those discussions  
17 relate to give me evidence that helpful to you?

18 A Do I ask her that?

19 Q Yes.

20 A Yes, if there's helpful evidence, obviously that the most important  
21 thing that, as a defense attorney, we need.

22 MR. ADAMS: And objection --

23 MR. ARRASCADA: And, again --

24 MR. ADAMS: -- as to relevance, Your Honor.

25 MR. ARRASCADA: Judge, again, this is improper rebuttal.

1 MR. DIGIACOMO: This is not improper rebuttal.

2 THE COURT: Well, okay, Mr. DiGiacomo, once again, you know, if  
3 she made statements to him prior to the preliminary hearing that have been  
4 called into question by the defense, you may ask Mr. Oram about those  
5 statements.

6 MR. DIGIACOMO: Well, how about the lack of her making those  
7 statements when she has a really good motive to?

8 MR. ARRASCADA: Judge, he's not --

9 THE COURT: That's not what I was allowing, so that is sustained as  
10 to that.

11 MR. DIGIACOMO: May we approach?

12 THE COURT: You may, but --

13 (Conference at the bench)

14 THE COURT: Mr. Oram, I have a couple of juror questions here.  
15 You testified that up until today you were Anabel Espindola's attorney.

16 We're -- we're in session guys. Oh, I'm sorry. My fault. My  
17 bad. Mr. DiGiacomo --

18 (Conference at the bench)

19 THE COURT: All right. Mr. Oram, a juror wants to know when  
20 you -- initially when Mr. DiGiacomo was questioning you stated that you are  
21 Anabel's attorney up until today. Do you anticipate being Ms. Espindola's  
22 attorney through her sentencing?

23 THE WITNESS: Oh, yes. And I'm sorry, when I said that I meant  
24 that I have represented her continuously from late May when this occurred until  
25 this very day, and I will continue on representing her until the case is finished.

1 THE COURT: All right. Thank you. That was it.

2 Go ahead.

3 MR. DIGIACOMO: Now, am I allowed to continue?

4 THE COURT: Subject to what I already -- what I already told you.

5 MR. DIGIACOMO: Thank you.

6 BY MR. DIGIACOMO:

7 Q Would exculpatory information be helpful to you in preparation to  
8 that bail hearing?

9 MR. GENTILE: I have the same objection.

10 THE COURT: All right. I'll let him just answer that one question and  
11 then that's it.

12 MR. ADAMS: For the record, Judge, joined --

13 THE COURT: All right.

14 MR. ADAMS: -- objection joined by the Third.

15 BY MR. DIGIACOMO:

16 A Could you repeat it?

17 Q Would exculpatory information be helpful to you for the bail hearing  
18 in Boulder City?

19 A Yes.

20 Q And did Ms. Espindola provide you any of the exculpatory  
21 information that is contained in State's proposed Exhibit --

22 MR. GENTILE: Objection.

23 MR. ADAMS: Objection.

24 THE COURT: Sustained.

25 MR. DIGIACOMO: [inaudible].

1 THE COURT: Mr. DiGiacomo, move on.

2 MR. DIGIACOMO: Okay.

3 BY MR. DIGIACOMO:

4 Q Did she provide you -- all right. Without referencing 241, did she -- I  
5 guess -- I guess --

6 MR. GENTILE: I fail to see the humor here. This is supposed to be  
7 rebuttal.

8 MR. DIGIACOMO: And I'm -- we're rebutting Jerome DePalma.

9 THE COURT: Right. But Mr. Oram was permitted to be called to  
10 rebut --

11 MR. GENTILE: How could he rebut Jerome DePalma --

12 THE COURT: -- Anabel --

13 MR. GENTILE: -- when he wasn't there?

14 THE COURT: -- Anabel Espindola's -- the charge by the defense of  
15 Anabel Espindola's recent fabrications. And so as to those statements, he  
16 certainly can -- can testify.

17 And we have more juror questions, Jeff.

18 MR. GENTILE: And, Your Honor, for the record, he's rebutting Mr.  
19 DePalma and Mr. Dibble who corroborated Mr. DePalma at this trial.

20 MR. DIGIACOMO: And he -- he can give that closing argument  
21 later, but I appreciate that.

22 THE COURT: All right. A juror wants to know what is it -- well, you  
23 know what, I'll -- we'll explain that later.

24 Go on, Mr. DiGiacomo.

25 /////



1 BY MR. DIGIACOMO:

2 Q Why would exculpatory information be helpful to you?

3 A Because exculpatory information is something I could try to present  
4 to a judge to say, listen, this is the bail that you've got it set at, please lower the  
5 bail, we have this information, in the end we'll prevail on this case, and judge's  
6 will listen to something like that.

7 Q And during the time of your representation of Ms. Espindola, did you  
8 ever receive a copy of 241, other than what I gave you?

9 A No.

10 Q Let's talk about a few other things that Ms. Espindola told you in that  
11 early May period -- I'm sorry, late May period. During the course of her  
12 conversations with you did she describe for you what Mr. H said to her to that  
13 caused her to go into the room on -- on -- or caused her to call Deangelo Carroll  
14 to Simone's Auto Plaza on -- on May 23<sup>rd</sup>, that Monday?

15 A I -- I -- yes, she did. She described -- she described what she  
16 testified in here over and over again.

17 Q Early on in the case?

18 A Early on.

19 Q Now, the jury has heard some testimony that sometime in July the  
20 State of Nevada filed what's known as a notice of intent to seek the death  
21 penalty.

22 A Okay.

23 Q Correct?

24 A I don't know if it was July, but I'll take your word for it.

25 MR. GENTILE: Can we have a year?

1 MR. DIGIACOMO: 2006.  
2 MR. GENTILE: 2005 maybe?  
3 BY MR. DIGIACOMO:  
4 Q July of 2005; correct?  
5 A I know that you filed your notice of intent to seek the death penalty. I  
6 do not know what month.  
7 Q And that's -- that notice cannot be filed prior to the preliminary  
8 hearing; correct?  
9 A Right.  
10 Q Okay. And --  
11 MR. GENTILE: How is this rebuttal?  
12 THE COURT: Sustained.  
13 MR. ADAMS: How is it --  
14 THE COURT: Sustained.  
15 MR. ADAMS: -- rebuttal?  
16 THE COURT: Sustained. Thank you.  
17 MR. DIGIACOMO: Well, isn't that the basis of the fabrication? Don't  
18 I have to establish the timing?  
19 THE COURT: Well, please approach.  
20 (Conference at the bench)  
21 MR. DIGIACOMO: Judge, I pass the witness.  
22 THE COURT: Cross.  
23 MR. GENTILE: Can I have this marked please.  
24 THE CLERK: It's J.  
25 MR. GENTILE: Thank you.

1 CROSS-EXAMINATION

2 BY MR. GENTILE:

3 Q Mr. Oram, you have been given a copy of -- is that 281 that you have  
4 there? Is that the number of Mr. DePalma's notes?

5 A No.

6 Q Okay.

7 A I don't have that.

8 Q Let me give you 281.

9 MS. ARMENI: 241.

10 Q 241.

11 THE COURT: Is that 241? You don't have --

12 THE WITNESS: No, I don't.

13 THE COURT: -- a copy of Mr. DePalma's --

14 THE WITNESS: No.

15 THE COURT: -- notes all?

16 THE WITNESS: Oh. You know what, I'm sorry. I do. It's a copy. I  
17 have that.

18 BY MR. GENTILE:

19 Q All right. Well, I'm going to put it up here anyway.

20 A Okay. Do you want me to look at the --

21 Q Okay. Can you see up at the top here where he has the date,  
22 5/231/05?

23 A Yes.

24 Q Okay. His testimony in this case was that this being --

25 MR. DIGIACOMO: Well, objection as to what his testimony was and

1 telling --

2 MR. GENTILE: Okay.

3 MR. DIGIACOMO: -- the witness it.

4 MR. GENTILE: That's okay.

5 THE COURT: Okay.

6 BY MR. GENTILE:

7 Q However long this meeting took, Mr. DePalma made one, two, three,  
8 four, five, six pages of notes. Do you see that?

9 A Yes.

10 Q Okay. And you've been given a copy of this?

11 A I have.

12 Q Okay. Now, if I understand you correctly, and I'm just looking at the  
13 jail records here, you -- you've seen a copy of the jail records.

14 A I have. Today, Mr. Gentile.

15 Q Just today only?

16 A Today. I may have seen them a long time ago, but in terms of --

17 Q All right.

18 A -- a total one today.

19 Q I'm going to -- I'm going to see if you recall these visits. Okay?

20 A Sure.

21 Q According to these records you met with Anabel on the 25<sup>th</sup> of May  
22 at 6:18 -- of 2005, at 6:18 p.m. Now, that's pretty close to 45 months ago by the  
23 way I'm counting.

24 A It's a long time. It's a long time ago.

25 Q And then you met the next day at 8:37 a.m. That would be the 26<sup>th</sup>.

1 A Okay.

2 Q And then the 27<sup>th</sup> at 1:09 p.m.

3 A Yes.

4 Q And then the 28<sup>th</sup> --

5 A Isn't that in the late evening?

6 Q Wait a minute, wait a minute.

7 A It's in the evening. 6:57?

8 Q 6:57 p.m. on the 28<sup>th</sup>.

9 A Right.

10 Q And then on the 31<sup>st</sup> at 6:22.

11 A Okay.

12 Q All right. And you're saying that those were lengthy meetings?

13 A They were. Most of --

14 Q Most of them. Okay.

15 A Yes, I can --

16 Q That's just May. We just finished May. Okay? Now, do you have

17 notes from those meetings?

18 A I -- I never take notes from a meeting at the Clark County Detention

19 Center.

20 Q Okay. Well, now, let me ask you something. In the year 2005, May,

21 was this the only the case that you had?

22 A No, no, no. I have many, many, many cases, many murders.

23 Q Many, many?

24 A Many murder cases.

25 Q Tell me. Just in the year 2005 how many?

1 A Closed, convictions, appeals, everything?  
2 Q Well, no, I don't even want to go there. Okay. How many clients did  
3 you have between -- in the last 45 months?  
4 A Mr. Gentile, if I -- if I estimate, I just know it's not --  
5 Q Hundreds?  
6 A In the last 45 months, I would think so.  
7 Q You probably couldn't make a living if you didn't have at least a  
8 couple hundred clients; right?  
9 A Yes, but I couldn't tell you with any degree --  
10 Q Right.  
11 A -- of certainty.  
12 Q No, I understand. I understand. And I don't want you to -- I'm not  
13 looking for one.  
14 A Okay.  
15 Q Okay?  
16 A This was one of the big ones, though. One of the --  
17 Q I understand. And because it was a big one it was important to you;  
18 right?  
19 A Very.  
20 Q Right. And you certainly didn't want to get one case mixed up with  
21 another --  
22 A I don't.  
23 Q -- am I right?  
24 A I don't let that happen.  
25 Q Right?

1 A Not murder cases.

2 Q And if I understand you correctly then, you're giving us testimony  
3 that you don't make notes whenever you're interviewing any client at any time?

4 A No, that's not true.

5 Q That's not true?

6 A That's inaccurate.

7 Q All right.

8 A Okay.

9 Q Then thank you. Is it just this case that you did not make any notes  
10 on?

11 A No. No, that's an -- that's an inaccurate statement. I take notes --

12 Q I didn't ask you anything else.

13 A Okay.

14 Q Okay? But on these dates --

15 A Yes, sir.

16 Q -- you didn't take any notes?

17 A No.

18 Q All right. I'm correct?

19 A You're correct.

20 Q Okay. Now, let's talk about June. You saw her --

21 MR. GENTILE: And will the Court take judicial notice that the notice  
22 of death in this case was filed on July 6, 2005.

23 THE COURT: As against Anabel Espindola?

24 MR. GENTILE: As against Anabel Espindola.

25 MR. DIGIACOMO: I haven't checked, but it's probably close.

1 THE COURT: Okay. You know, I don't have it in front of me in my  
2 file, but the Court certainly can take judicial notice of the date in which the notice  
3 of death was filed.

4 BY MR. GENTILE:

5 Q Okay. Then July -- June 10, 2005, you met with Anabel at 8:32 in  
6 the morning. June 15<sup>th</sup> -- am I correct?

7 A If it says that, I would presume so.

8 Q Okay. June the 15<sup>th</sup> you met with her at 1:48 in the afternoon.

9 A If that's what the records reflect.

10 Q On June the 18<sup>th</sup> you and I both met with her at 2:28 in the  
11 afternoon.

12 A Very possible.

13 Q You know, I -- never mind. On June the 22<sup>nd</sup> you met with her at  
14 2:00 in the afternoon.

15 A Yes.

16 Q On June the 24<sup>th</sup> you met with her at 8:30 in the morning.

17 A Mr. Gentile, I presume the times and stuff. I'm saying that because  
18 that's what it says. I know I saw her many times, so I'm -- I'm saying that's  
19 accurate because that's what the record says.

20 Q You don't --

21 THE COURT: But you don't independently --

22 THE WITNESS: No.

23 THE COURT: -- remember --

24 THE WITNESS: When he's --

25 THE COURT: -- these dates?



1 THE WITNESS: -- saying these things, I couldn't tell you, Mr.  
2 Gentile.

3 BY MR. GENTILE:

4 Q No, I understand that.

5 A Okay.

6 Q But you don't have any particular reason to doubt that these were  
7 logged in. Now, when it says you -- you met with her at 8:30 in the morning,  
8 clearly it took you some time to get processed at the jail, to go over to where her  
9 unit was, go upstairs, wait for her, then bring her -- then bring her to you?

10 A Right.

11 Q So, I mean, you might not have actually seen her until maybe as late  
12 as 9:00?

13 A And -- and visiting ends at 10:00.

14 Q Correct.

15 A Right.

16 Q All right. But the point is that that's when you go to the jail.

17 A Correct, sir.

18 Q And that's when you logged in.

19 A Yeah, when they -- when they do the sign in and stuff.

20 Q Right. And then that's the only times you saw her in jail. So you  
21 only saw her one, two, three, four -- four times in jail; right?

22 A Yes.

23 Q Okay. And so you don't have any notes of those either?

24 A I don't have any notes of any.

25 Q All right. And now July. Actually, you didn't see her in July until after

1 the notice of death. So you saw her one, two, three, four, five, six, seven, eight,  
2 nine, ten, eleven times prior to the notice of intention to seek death.

3 A If that's when it was filed, yes.

4 Q Well -- yeah, well --

5 A I have no dispute that that -- that's when it was filed.

6 Q Now -- and you said, I think, that you saw her maybe 85 or 90 times  
7 overall.

8 A Between 80 and 90. I think I counted 85.

9 Q Okay. Between 80 and 90. Let's say it's 80. Let's say it's just 80.

10 A Sure.

11 Q And in all of those 80 times that you saw her --

12 A Yes, sir.

13 Q -- you only have two pages of notes?

14 A I don't even have two pages of notes. They're notes she took and I  
15 circled them.

16 Q I see. And this has been marked proposed Exhibit J.

17 A Yes, sir.

18 Q Is that -- do you recognize that document?

19 A Yes.

20 Q Okay. And what is that document?

21 A It appears that it's Anabel Espindola's writing about in preparation  
22 for trial, perhaps character witnesses or mitigation witnesses. And it appears that  
23 she's written names and addresses, phone numbers. And then what I have done  
24 in several areas is I have circled the name and said known 15 years, four or five  
25 years.

1 Q All right. So essentially those markings on those -- on those two  
2 pages are the only markings that you have made on paper of your  
3 communications with Anabel Espindola?

4 A Correct.

5 Q In a minimum of 80 visits?

6 A Correct.

7 Q In preparation for a case, a murder case --

8 A Yes, sir.

9 Q -- that once carried the death penalty for her?

10 A Yes, sir.

11 MR. GENTILE: I move these into evidence at this time.

12 MR. DIGIACOMO: No objection.

13 THE COURT: All right.

14 (Defense Exhibit J is admitted)

15 BY MR. GENTILE:

16 Q Now, you've had hundreds of cases in that period?

17 A Yes, sir.

18 Q And are you telling us that you have independent recollection of  
19 everything that was said to you by your hundreds of clients in the last 45 months  
20 so that you don't need to refresh your recollection?

21 A No, I don't have independent recollection of everything my clients  
22 have said to me. My -- no, not a chance.

23 MR. GENTILE: Nothing further.

24 THE COURT: Anything, Mr. Adams?

25 /////

1 CROSS-EXAMINATION

2 BY MR. ADAMS:

3 Q Let me show you what's been marked as Defendant's J for  
4 identification purposes.

5 A Yes, sir.

6 Q Jerry DePalma's name is not on there anywhere; is it?

7 A You know, I didn't -- I didn't look at it.

8 Q Sure. Look away.

9 A There's so many names. I'll take your word for it. Have you looked  
10 at it?

11 Q I -- well, I did very briefly because we just got it. But they're your full  
12 notes in the case, so don't let me put words in your mouth.

13 A No, they're not my full notes from the case.

14 Q Well, they're your full notes related to anything from the client.

15 A Yes, that's correct.

16 Q All right. Because you have all these other notes.

17 A And I have a lot back in my office too.

18 Q All right. But related to anything she said to you, and you wrote  
19 down contemporaneously or at the same time, that's it.

20 A Yes, with the exception of -- the -- there was some other little  
21 witness that was written that I talked about previously.

22 Q Right. So, on there is Jerry DePalma's name mentioned? And I'll  
23 tell you if you find it, I'll be surprised.

24 A Okay, then, no.

25 Q Take your time.

1 A No, no, no. I'll take your word for it.

2 Q How about Don Dibble?

3 A No. Don Dibble was the investigator for the two gentlemen.

4 Q Right. And just so we're clear, because apparently you're here  
5 testifying about Anabel Espindola, on May the 19<sup>th</sup> you weren't at the -- 2005,  
6 were you at the Palomino Club?

7 A No, sir.

8 Q Were you back in the office?

9 A No, and if I was, I wouldn't admit it.

10 Q All right. You might've been downstairs where the nice people have  
11 pole; is that what you're saying?

12 A No.

13 Q All right. Well, on the 21<sup>st</sup> --

14 THE COURT: Are you taking the Fifth on that?

15 THE WITNESS: I'm taking the Fifth on that. Can I leave?

16 BY MR. ADAMS:

17 Q On the 21<sup>st</sup> of May, 2005, you weren't at Mr. DePalma's office; were  
18 you?

19 A Was I at Mr. DePalma's office? No, sir.

20 Q And do you know Don Dibble?

21 A I do. I know Don Dibble.

22 Q Have you worked with him?

23 A I -- yes.

24 Q Do you know him to be an honest person or do you have an opinion  
25 on him?

1 A You know what, with regard to -- do you want to know my history  
2 with him?

3 Q I want to know if you --

4 A I haven't -- I haven't --

5 Q -- know him well enough to know if the man is honest.

6 A I have not really had -- he did the Sapphires case with me a couple  
7 of years ago with Mr. Gentile and Ms. Armeni, but I have not had many dealings  
8 with Mr. Dibble over the last ten years.

9 Q Is Mr. Dibble dishonest?

10 A I -- sir, I just haven't had enough dealings to make --

11 THE COURT: So you don't have an opinion --

12 THE WITNESS: Yes, I don't --

13 THE COURT: -- one way or the other?

14 THE WITNESS: -- have an opinion is what I'm saying.

15 THE COURT: All right. Thank you.

16 Move on.

17 BY MR. ADAMS:

18 Q Were you at Mr. Gentile's office on the 22<sup>nd</sup>?

19 A No.

20 Q Were you at Simone's on the 23<sup>rd</sup> when I a body wire was done that  
21 I suspect you've listened to on more than one occasion.

22 A Ad nauseam, yes, and I was not there.

23 Q You were not there.

24 A No.

25 Q Your first meeting was several days after this meeting at Jerry

1 DePalma's office?

2 A Yes, sir.

3 Q Now, you said you have had 80 meetings with Anabel Espindola and  
4 you have these notes?

5 A Correct. And I'm relying upon the printout from the jail for the --

6 Q But you said you do write down notes in other people's cases, other  
7 client's cases.

8 A And in this one.

9 Q Well, notes from the client.

10 A Just --

11 Q Do you have clients that you take notes when you meet with them?

12 A Yes, but it's very, very brief. Name, address, social security number,  
13 prior record.

14 Q You wouldn't have something as comprehensive and thorough as  
15 six pages of notes from a single meeting?

16 A I think it would be absolutely foolish to do that.

17 Q All right. And that's -- that's -- but when you're taking down notes,  
18 do you intentionally put the wrong information in the notes?

19 A Do I put misinformation in the notes?

20 Q Yeah. Do you write in some sort of code that no one else would  
21 understand if they say your notes?

22 A I -- I suppose if I was trying to hide something.

23 Q Right. But you don't try to hide something when the notes are made  
24 for yourself; right?

25 A Yeah, I don't try to hide things.

1 Q Right. And if you were meeting with a client and writing down notes,  
2 you would want them to be accurate notes; right?

3 A Yes, sir.

4 Q So if you picked up a file 18 months later the notes would help you  
5 remember the case and the person and the circumstance; right?

6 A You would want notes to be accurate yes.

7 Q Right. So you could provide the best representation for the client.

8 A Not on notes with dis -- you mean notes with discussions with the  
9 client?

10 Q Yeah.

11 A No. No, you wouldn't do that.

12 Q So you wouldn't put down accurate information?

13 A I just wouldn't put it down ever.

14 Q All right.

15 A Ever.

16 Q All right. You don't know 00 you have no firsthand knowledge what  
17 was said in Mr. DePalma's office on May the 21<sup>st</sup>?

18 A I wasn't there.

19 Q All right. Thank you.

20 THE COURT: Redirect.

21 MR. DIGIACOMO: Just very, very briefly.

22 REDIRECT EXAMINATION

23 BY MR. DIGIACOMO:

24 Q You -- there was a bunch of questions about Don Dibble; correct?

25 A Yes, sir.



1 Q Okay. You said you worked with him on a Sapphires case; correct?

2 A Yes.

3 Q Okay.

4 A I didn't really work with him. He had had the co-defendant. I -- I  
5 didn't -- he was there like he is here today, but he was not my client's  
6 investigator. He did some work.

7 Q Okay. During the 33 months that you represented Anabel Espindola  
8 prior to the entry of her plea, did you have contact with Don Dibble that related to  
9 this case?

10 A Yes.

11 Q You didn't know anything about the DePalma meeting?

12 A No.

13 MR. DIGIACOMO: Nothing further.

14 THE COURT: Mr. Gentile, anything else?

15 RECROSS-EXAMINATION

16 BY MR. GENTILE:

17 Q Did you ever ask?

18 A Yes, as a matter of fact, I asked all the meetings and attorneys that  
19 she had met with in --

20 Q No, no, no. I didn't mean did you ask your client.

21 A Oh, I'm sorry.

22 Q I didn't mean that.

23 A I'm sorry.

24 Q Did you ever ask Mr. Dibble?

25 A I -- I talked to Mr. Dibble about --

1 Q No, did you ever ask Mr. Dibble if he had had any meetings with  
2 Anabel Espindola prior to your getting into the case?

3 A Yes, sir.

4 Q And he told you, no, he did not?

5 A No, he didn't say it that way. He just told me that there had been  
6 brief -- there had been brief things, but that he didn't have -- he didn't tell me  
7 anything substantive whatsoever.

8 Q So he --

9 A Nothing.

10 Q -- didn't discuss what was revealed at those things, at those  
11 meetings?

12 A No, Mr. Gentile, that's not accurate. I was given briefings of what my  
13 client had said, what my client had told people, including you, and I was never  
14 told of this.

15 Q You were given briefings by Mr. Dibble?

16 A I was told by Mr. Dibble, Ms. Armeni, you. What had happened  
17 when I came into the case, I had to know something about the case and I was  
18 sort of briefed on what had happened, and I remember specifically some things  
19 that Mr. Dibble told me.

20 Q Okay. But he did not tell you about the meeting at DePalma's  
21 office?

22 A No, sir.

23 Q Now, you're not -- you're not saying that that meeting did not  
24 happen?

25 A I wasn't -- I wasn't there. I couldn't --

1 Q You wouldn't call Mr. Dibble a liar in this courtroom; would you, sir?

2 A Sir, I wasn't there. And unless I could have proof of what happened,  
3 I couldn't say whether anybody was a liar.

4 Q You know Mr. Dibble's reputation in this community. That you do  
5 know. You may not have worked with him, but you do know his reputation.

6 A Well, I -- I don't mean to -- I worked with Don a lot when I was a  
7 baby lawyer.

8 Q Right.

9 A For a few years, yeah.

10 Q For a few years.

11 A Yes.

12 Q You formed an opinion at that point in time as to his truthfulness; did  
13 you not? As a matter of fact, Mr. Oram --

14 MR. DIGIACOMO: Hold on, Judge. I'd ask -- I -- let him answer the  
15 question.

16 THE COURT: Are you talking about when Don Dibble was a  
17 homicide detective and you were a new --

18 THE WITNESS: No.

19 THE COURT: -- criminal defense attorney?

20 THE WITNESS: No. That --

21 THE COURT: Okay. That was just a yes or a no question.

22 Mr. Gentile or -- I don't know if there is a question.

23 MR. DIGIACOMO: Can he answer the question as to whether or not  
24 he has an opinion?

25 /////

1 BY MR. GENTILE:

2 Q Do you have an opinion as to Don Dibble's character for  
3 truthfulness?

4 A No.

5 MR. GENTILE: Nothing further.

6 THE COURT: Mr. Adams, anything else?

7 MR. ADAMS: We request a limiting instruction as to Luis Hidalgo III.

8 THE COURT: All right. That's overruled.

9 Mr. DiGiacomo, anything else?

10 MR. DIGIACOMO: No, Judge.

11 THE COURT: Any juror questions?

12 All right. Mr. Oram, thank you for your testimony.

13 THE WITNESS: Thank you very much.

14 THE COURT: Please don't discuss your testimony with anyone else  
15 who may be a witness in this case. You are excused at this time.

16 Ladies and gentlemen, we are going to go ahead and take our  
17 evening recess. But before I tell you what time to come back I need to see  
18 counsel at the bench.

19 (Conference at the bench)

20 THE COURT: State?

21 MR. DIGIACOMO: The State rests, Judge.

22 THE COURT: Any surrebuttal?

23 MS. ARMENI: No, Your Honor.

24 MR. ADAMS: We just have an issue --

25 MR. GENTILE: There was no rebuttal.

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

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

**Supreme Court No. 54209**  
District Court Case No. C241394

**NOTICE OF ORAL ARGUMENT SETTING**

DATE: April 26, 2012

TO: Gordon & Silver, Ltd./Paola M. Armeni  
Clark County District Attorney/Nancy A. Becker, Deputy District Attorney  
Attorney General/Carson City/Catherine Cortez Masto, Attorney General  
Gordon & Silver, Ltd./Dominic P Gentile  
Gordon & Silver, Ltd./Margaret W. Lambrose  
Clark County District Attorney/Steven S. Owens, Chief Deputy District Attorney

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

**Date:** June 13, 2012  
**Time:** 1:30 PM  
**Length:** 30 minutes  
**Location:** Regional Justice Center  
200 Lewis Avenue  
Courtroom – 17<sup>th</sup> Floor  
La Vegas, NV 89101

**BEFORE:** Southern Panel 12  
Justices Douglas, Gibbons, Parraguirre

Notification List

Electronic

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

Paper

Luis A. Hidalgo, Jr.

1  
2  
3 IN THE SUPREME COURT OF THE STATE OF NEVADA

4 Electronically Filed  
5 Jun 05 2012 09:01 a.m.  
6 Tracie K. Lindeman  
Clerk of Supreme Court

6 LUIS A, HIDALGO, JR.

7 Appellant,

CASE NO. 54209

8 vs.

9 THE STATE OF NEVADA

APPELLANT'S NOTICE OF  
SUPPLEMENTAL AUTHORITIES  
[NRAP 31(e)]

10 Respondent.

11  
12 COMES NOW Appellant, Luis A. Hidalgo, Jr., by and through counsel, Dominic P.  
13 Gentile, Esq., of the law firm of Gordon Silver, and pursuant to Nevada Rule of Appellate  
14 Procedure 31(e) files with the Court this Notice of Supplemental Authorities to aid the Court in  
15 deciding this matter.

16 Dated this 4th day of June, 2012.

17 GORDON SILVER

18 

19 DOMINIC P. GENTILE, ESQ.  
20 Nevada Bar No. 1923  
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21 Las Vegas, Nevada 89169  
(702) 796-5555  
22 Attorney for Appellant  
LUIS HIDALGO, JR.

23  
24 **LIST OF SUPPLEMENTAL AUTHORITIES, LEGAL PROPOSITIONS FOR WHICH**  
25 **THEY STAND AND PAGES OF BRIEF BEING SUPPLEMENTED**

- 26 1. THE FOLLOWING CASES SUPPLY JUDICIALLY RECOGNIZED DEFINITION OF  
27 THE TERM "SLIGHT EVIDENCE" AND SHOULD BE INCLUDED AS A NEW  
28 FOOTNOTE IMMEDIATELY AFTER THE PENULTIMATE SENTENCE IN THE  
FIRST FULL PARAGRAPH ON PAGE 36, OF APPELLANT'S OPENING BRIEF

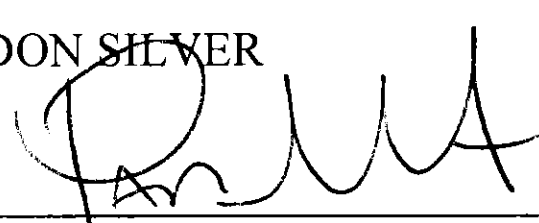
- 1 a. State v. Cyrus, 297 Conn. 829, 852, 1 A. 3d 59, 72(fn.3) (Conn. 2010) (equivalent  
2 of "suspicion").
- 3 b. In re Foster, 271 Md. 449, 475, 318 A. 2d 523, 537 (Md. 1974) (equivalent of  
4 "suspicion").
- 5 c. State v. Barick, 143 Mont. 273, 283, 389 P. 2d 170, 175 (Mont. 1964) (equivalent  
6 of suspicion).

7 2. THE FOLLOWING CASE AND STATUTE STAND FOR THE PROPOSITION THAT  
8 IT IS PREJUDICIAL FOR THE JUDGE TO INSTRUCT THE JURY AS TO HOW IT  
9 DECIDED THE SAME FACTUAL QUESTION IN RULING ON ADMISSIBILITY IF  
10 THE JURY MUST ALSO DECIDE IT IN DETERMINING THE MERITS OF THE  
11 CASE. THEY SHOULD BE INCLUDED AT PAGE 9 OF APPELLANT'S REPLY  
12 BRIEF AT THE END OF THE PARAGRAPH CARRIED OVER FROM THE  
13 PRECEDING PAGE. A NEW SENTENCE SHOULD PRECEED THEIR INCLUSION:  
14 "MOREOVER, THE CALIFORNIA SUPREME COURT RECENTLY PUBLISHED  
15 AN OPINION CONTRADICTING THE UNPUBLISHED CASES RELIED UPON BY  
16 RESPONDENT."

- 17 a. State v. Blacksher , 52 Cal. 4th 769, 834, 259 P. 3d 370, 422 (Cal. 2011).
- 18 b. California Evidence Code § 405(b).

19 Respectfully submitted this 4<sup>th</sup> day of June, 2012.

20 GORDON SILVER

21   
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IN THE SUPREME COURT OF THE STATE OF NEVADA

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

No. 54209

**FILED**

**JUN 21 2012**

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY *[Signature]*  
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of conspiracy to commit battery with a deadly weapon and second-degree murder with the use of a deadly weapon. Eighth Judicial District Court, Clark County; Valerie Adair, Judge.

Appellant Luis Hidalgo, Jr., was charged with conspiring to murder his former employee, T.J. Hadland. In his defense, Hidalgo contended that any incriminating evidence merely suggested that he learned of the murder after the fact and attempted to help his alleged coconspirators cover up the murder.<sup>1</sup>

Hidalgo's jury found that although he did not conspire to have Hadland killed, he did conspire to have Hadland severely beaten. Concluding that Hadland's death was a reasonably foreseeable consequence of such a beating, the jury convicted Hidalgo of second-degree murder in addition to conspiracy to commit battery with a deadly weapon.

---

<sup>1</sup>The parties are familiar with the facts, and we do not recount them further except as necessary to our disposition.

Hidalgo now appeals, contending that the following alleged trial errors warrant reversal of his convictions: (1) his Confrontation Clause rights were violated when statements from a non-testifying coconspirator were admitted into evidence, (2) testimony from an accomplice was not sufficiently corroborated by other evidence, (3) a jury instruction referring to “slight evidence” confused the jury as to the State’s burden of proof, and (4) the district court committed plain error in permitting a witness to testify even though the State failed to tape-record its plea negotiation with the witness.<sup>2</sup> We conclude that Hidalgo’s contentions fail, and we therefore affirm.

Hidalgo’s Confrontation Clause rights were not violated

In the days following Hadland’s murder, law enforcement officers procured the cooperation of one of Hidalgo’s coconspirators, Deangelo Carroll. Namely, Carroll agreed to tape-record his conversations with other coconspirators in an attempt to obtain incriminating statements from the coconspirators.

At trial, the State sought to introduce two tape-recorded conversations between Carroll, Anabel Espindola, and Luis Hidalgo, III. Because Carroll was unavailable to testify at trial, Hidalgo objected to

---

<sup>2</sup>Hidalgo also contends that the district court committed reversible error when it gave the jury a verdict form that did not separate battery with substantial bodily harm from battery with a deadly weapon. Because Hidalgo repeatedly told the district court that he had no problem with these two theories being combined on the verdict form, we do not consider this argument on appeal. Carter v. State, 121 Nev. 759, 769, 121 P.3d 592, 599 (2005) (“A party who participates in an alleged error is estopped from raising any objection on appeal.”).

Carroll's statements being introduced into evidence.<sup>3</sup> The district court admitted Carroll's statements but instructed the jury that it should consider Carroll's statements for context only. On appeal, Hidalgo contends that this limiting instruction was insufficient to avoid a violation of his Confrontation Clause rights.<sup>4</sup> We disagree.

"[W]hether a defendant's Confrontation Clause rights were violated is 'ultimately a question of law that must be reviewed de novo.'" Chavez v. State, 125 Nev. 328, 339, 213 P.3d 476, 484 (2009) (quoting United States v. Larson, 495 F.3d 1094, 1102 (9th Cir. 2007)).

---

<sup>3</sup>Hidalgo's appellate briefs do not make clear whether he is also challenging the admission of Espindola's and Hidalgo, III's statements. To the extent that he is, we agree with the district court's conclusion that these statements were admissible under NRS 51.035(3)(e), the coconspirator exception to the hearsay rule.

Hidalgo's suggestion that the conspiracy to harm Hadland ended upon his death is in direct conflict with Nevada law. Crew v. State, 100 Nev. 38, 46, 675 P.2d 986, 991 (1984) ("[T]he duration of a conspiracy is not limited to the commission of the principal crime, but extends to affirmative acts of concealment."). Nor does Hidalgo's reliance on federal law help his argument. See Dutton v. Evans, 400 U.S. 74, 82-83 (1970) (concluding that it is constitutional for a state to admit statements made in the concealment phase of a conspiracy even though the Supreme Court has construed Fed. R. Evid. 801(d)(2)(e), the federal counterpart to NRS 51.035(3)(e), more narrowly).

<sup>4</sup>Hidalgo also argues that the district court improperly instructed the jury that Carroll's statements could be considered as "adoptive admission[s]." A review of the record demonstrates that it was Hidalgo who first equated "context" with "adopt[ive] admission" and acquiesced throughout trial in treating these two concepts as synonymous. Thus, Hidalgo cannot properly raise this argument on appeal. Carter, 121 Nev. at 769, 121 P.3d at 599 ("A party who participates in an alleged error is estopped from raising any objection on appeal.").

In Crawford v. Washington, 541 U.S. 36 (2004), the Supreme Court held that the Confrontation Clause prohibits introduction of testimonial hearsay when the declarant is unavailable to testify. Id. at 51, 59 n.9; see also NRS 51.035(1) (defining “[h]earsay” as an out-of-court statement that is used “to prove the truth of the matter asserted”). Thus, if a testimonial statement is introduced for a purpose other than its substantive truth, no Confrontation Clause violation occurs. Crawford, 541 U.S. at 59 n.9 (“The Clause . . . does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.”).

In light of Crawford, several federal courts have addressed the identical issue presented here. These courts have held that no Confrontation Clause violation occurs if a non-conspirator’s statements are introduced simply to provide “context” for the coconspirators’ statements. See, e.g., United States v. Hendricks, 395 F.3d 173, 184 (3d Cir. 2005) (“[I]f a Defendant or his or her coconspirator makes statements as part of a reciprocal and integrated conversation with a government informant who later becomes unavailable for trial, the Confrontation Clause does not bar the introduction of the informant’s portions of the conversation as are reasonably required to place the defendant or coconspirator’s nontestimonial statements into context.”); United States v. Tolliver, 454 F.3d 660, 666 (7th Cir. 2006) (“Statements providing context for other admissible statements are not hearsay because they are not offered for their truth.”); United States v. Eppolito, 646 F. Supp. 2d 1239, 1241 (D. Nev. 2009) (“[The informant’s] recorded statements have been offered [to] give context to Defendants’ statements. Because [the

informant's] statements are not hearsay, the Confrontation Clause and Crawford do not apply.”).

Consequently, Hidalgo's Confrontation Clause rights were not violated when the district court instructed the jury to consider Carroll's statements for context only.<sup>5</sup>

Accomplice testimony was sufficiently corroborated

Espindola, who was an accomplice to the Hadland conspiracy, testified for the State at Hidalgo's trial. On appeal, Hidalgo argues that the only evidence of his guilt came from Espindola's testimony. Because Nevada statutorily prohibits the conviction of a defendant based solely on

---

<sup>5</sup>Nor did the district court abuse its discretion in denying Hidalgo's motion for a new trial based on the jurors' alleged disregard for the context-only instruction. Meyer v. State, 119 Nev. 554, 561, 80 P.3d 447, 453 (2003) (“A denial of a motion for a new trial based upon juror misconduct will be upheld absent an abuse of discretion by the district court.”).

In order to show that juror misconduct warrants a new trial, “[t]he defendant must, through admissible evidence, demonstrate the nature of the juror misconduct and that there is a reasonable probability that it affected the verdict.” Id. at 565, 80 P.3d at 456 (emphases added). Here, Hidalgo failed to satisfy this standard. His only evidence that the jurors considered Carroll's statements for their truth was an affidavit from his own attorney stating that a juror had told her as much. This affidavit, as the district court pointed out, was inadmissible hearsay.

Nor did Hidalgo demonstrate how considering Carroll's statements for their truth may have affected the verdict. The only onerous statement that Hidalgo has identified is the following: “[Hidalgo] wanted [Hadland] . . . taken care of [and] we took care of him.” If the jurors had considered this statement for its truth and had factored it into their deliberation, they would have convicted Hidalgo of first-degree murder.

the testimony of an accomplice, see NRS 175.291(1), Hidalgo concludes that his convictions must be reversed.<sup>6</sup> We disagree.

NRS 175.291(1) states that an accomplice's testimony must be "corroborated by other evidence which in itself, and without the aid of the testimony of the accomplice, tends to connect the defendant with the commission of the offense." Id. As explained below, significant incriminating evidence corroborated Espindola's testimony.

The strongest corroborating evidence was the fact that Hidalgo paid Carroll \$5,000 immediately after Hidalgo learned of Hadland's murder. Hidalgo's actions in the days following the murder further corroborated his guilt. Namely, upon speaking with detectives on the afternoon following the murder, Hidalgo told the detectives nothing about the previous night's \$5,000 payment and chose not to give them Carroll's contact information. Hidalgo's repeated visits with his attorney in the days thereafter likewise suggested that Hidalgo was concerned about some legal troubles.

Hidalgo's guilt was further corroborated by the fact that detectives, upon searching Hidalgo's place of business in the wake of his coconspirators' arrests, discovered a note in Hidalgo's handwriting that

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<sup>6</sup>We reject Hidalgo's argument that Rontae Zone was also an accomplice. NRS 175.291(2) defines "accomplice" as "one who is liable to prosecution[] for the identical offense charged against the defendant." Based upon the evidence presented at trial, the jury could easily have found that Zone played no role in the conspiracy to harm Hadland, and it therefore could have treated Zone's testimony as corroborative. Cutler v. State, 93 Nev. 329, 334, 566 P.2d 809, 812 (1977) (stating that a witness's status as an accomplice is a question for the jury). In this regard, Zone's testimony provided an evidentiary basis for the deadly-weapon enhancements.

said, “[W]e may be under surveill[ance]. Keep your mouth shut.” If this were not enough, Espindola’s tape-recorded statements prior to being arrested clearly implicated Hidalgo in the conspiracy. See Cheatham v. State, 104 Nev. 500, 505-06, 761 P.2d 419, 423 (1988) (accepting as corroborative an “unguarded, thought-to-be-confidential statement” made by an accomplice prior to testifying).

In sum, and without recounting additional incriminating evidence, Espindola’s testimony was more than sufficiently corroborated for purposes of satisfying NRS 175.291(1).<sup>7</sup>

A jury instruction referring to “slight evidence” did not confuse the jury

“A statement by a coconspirator of a [defendant] during the course and in furtherance of the conspiracy” may be considered as substantive evidence that the defendant was likewise a member of the conspiracy. NRS 51.035(3)(e). Before admitting such a statement into evidence, however, the district court must determine that “slight evidence” of a conspiracy existed at the time the coconspirator uttered the statement. McDowell v. State, 103 Nev. 527, 529, 746 P.2d 149, 150 (1987).

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<sup>7</sup>Hidalgo’s reliance upon Heglemeier v. State, 111 Nev. 1244, 903 P.2d 799 (1995), is misplaced. In Heglemeier, we held that “[w]here the connecting evidence . . . is equally consonant with a reasonable explanation pointing toward innocent conduct on the part of the defendant, the evidence is to be deemed insufficient.” 111 Nev. at 1250-51, 903 P.2d at 803-04 (quotation omitted). Here, Hidalgo’s explanation for all of the aforementioned evidence is that he was in fear of an unknown gang member. This explanation belies common sense in numerous respects, and Hidalgo’s attempt to analogize his facts to those in Heglemeier is therefore unavailing.

While finalizing jury instructions, the State proffered the following jury instruction to encapsulate the aforementioned law:

Whenever there is slight evidence that a conspiracy existed, and that the defendant was one of the members of the conspiracy, then the statements and the acts by any person likewise a member may be considered by the jury as evidence in the case as to the defendant found to have been a member [of the conspiracy] . . . .

(Emphasis added). Over Hidalgo's objection, the district court gave this instruction to the jury. On appeal, Hidalgo contends that the instruction's reference to "slight evidence" improperly reduced the State's beyond-a-reasonable-doubt burden of proof.

"The district court has broad discretion to settle jury instructions, and this court reviews the district court's decision for an abuse of that discretion or judicial error." Rose v. State, 127 Nev. \_\_\_, \_\_\_, 255 P.3d 291, 295 (2011) (quoting Crawford v. State, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005)).

Here, the instruction in question accurately described the standard that a district court must apply when considering whether to admit a statement into evidence under the coconspirator exception to the hearsay rule. Thus, the instruction did not misstate the law, and the district court did not commit judicial error in giving it. Id.

Nonetheless, Hidalgo contends that the district court committed reversible error by giving the instruction because its reference to "slight evidence" may have confused the jury as to the State's burden of proof. While we agree that it was unnecessary to instruct the jury regarding the evidentiary threshold applied by a district court in



admitting coconspirator statements, we disagree that the jury was confused as to the State's burden of proof.<sup>8</sup>

The record demonstrates that the complained-of instruction was 1 of 52 that were given to the jury. Of this 52, 10 referred to "reasonable doubt." Most notably, one of these instructions expressly specified that "the State [has] the burden of proving beyond a reasonable doubt every material element of the crime charged and that the Defendant is the person who committed the offense." The instruction that followed immediately thereafter proceeded to define "reasonable doubt" and reminded the jury, "If you have a reasonable doubt as to the guilt of the Defendant, he is entitled to a verdict of not guilty."

Moreover, Hidalgo repeatedly emphasized in his closing argument that the State had the burden of proving his guilt "beyond a reasonable doubt," going so far as to tell the jury that "the concept of reasonable doubt is sacred." For its part, the State did not comment on the "slight evidence" instruction during its closing arguments.

Because "we presume that the jury followed the district court's orders and instructions," Allred v. State, 120 Nev. 410, 415, 92 P.3d 1246, 1250 (2004), we conclude that the jury was not confused as to the State's burden of proof.

Permitting Espindola to testify was not plain error

As part of a plea agreement reached with the State, Espindola testified against Hidalgo prior to her own sentencing. The State did not

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<sup>8</sup>For this reason, we reject Hidalgo's contention that this jury instruction amounted to structural error. In contrast to Sullivan v. Louisiana, 508 U.S. 275, 278-80 (1993), in which the Supreme Court found structural error in a burden-of-proof jury instruction, the instruction at issue here did not actually reduce the State's burden of proof.


tape-record its plea negotiation with Espindola, which Hidalgo believes was deliberate. Specifically, Hidalgo contends that the State chose not to tape-record the negotiation so that it could conceal the fact that it was negotiating for scripted testimony. For the first time on appeal, Hidalgo contends that the district court should have prevented Espindola from testifying due to the State's allegedly improper motive in not tape-recording the plea negotiation.

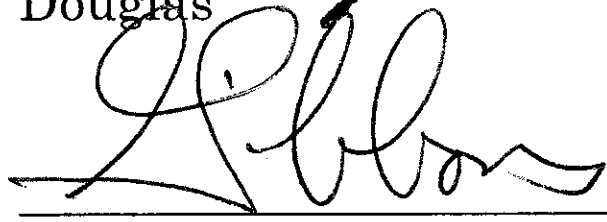
“When an error has not been preserved, this court employs plain-error review.” Valdez v. State, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008). In conducting plain-error review, the complained-of error must, “[a]t a minimum, . . . be clear under current law.” Saletta v. State, 127 Nev. \_\_\_, \_\_\_, 254 P.3d 111, 114 (2011) (quotation omitted).

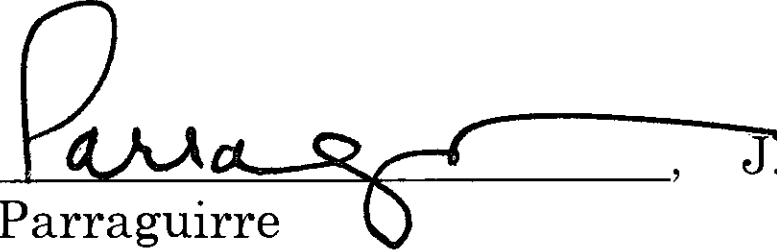
Here, current law squarely contradicts Hidalgo's stance. Namely, in Sheriff v. Acuna, 107 Nev. 664, 819 P.2d 197 (1991), we held that a prosecutor may negotiate a plea bargain with a potential witness and withhold the witness's bargained-for benefit until after the witness has testified in favor of the State. Id. at 669, 819 P.2d at 200. To prevent the State from “bargain[ing] for testimony so particularized that it amounts to following a script,” we held that district courts should employ three safeguards: (1) make sure the terms of the plea agreement are fully disclosed to the jury, (2) allow defense counsel to fully cross-examine the witness concerning the plea bargain's terms, and (3) give the jury a cautionary instruction. Id.

The record in this case demonstrates that the district court employed all three of these safeguards. Thus, absent any legal duty on the State's part to tape-record its plea negotiation with Espindola, the district court did not commit plain error in allowing her to testify. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, J.  
Douglas

  
\_\_\_\_\_, J.  
Gibbons

  
\_\_\_\_\_, J.  
Parraguirre

cc: Hon. Valerie Adair, District Judge  
Gordon & Silver, Ltd.  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk

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2  
3 IN THE SUPREME COURT OF THE STATE OF NEVADA

4  
5 LUIS A, HIDALGO, JR.

6 Appellant,

7 vs.

8 THE STATE OF NEVADA

9 Respondent.

CASE NO. 54209

Electronically Filed  
Jul 09 2012 04:21 p.m.  
Tracie K. Lindeman  
Clerk of Supreme Court

10  
11 **PETITION FOR REHEARING PURSUANT TO NEVADA**  
12 **RULE OF APPELLATE PROCEDURE 40**

13 **STANDARD OF REVIEW**

14 Nevada Rule of Appellate Procedure 40(c) provides that “..... rehearing is  
15 appropriate when the Court has “overlooked or misapprehended a material  
16 question of fact or law or when [it has] overlooked, misapplied or failed to  
17 consider legal authority directly controlling a dispositive issue in the appeal.”  
18 Boulder Oaks Community Ass’n v. B&J Andrews, 125 Nev. 397, 399, 215 P.3d  
19 27, 28 (2009).

20 **INSTRUCTION NUMBER FORTY IS A MISAPPLICATION OF NRS**  
21 **47.070**

22 In the order affirming the judgment of conviction, this Court incorrectly  
23 found that jury instruction number forty was an accurate statement of the law.  
24 NRS 47.070 provides:

- 25 1. When the **relevancy** of evidence depends upon the fulfillment of a  
26 **condition of fact**, the judge shall **admit it upon the introduction of**  
27 **evidence sufficient** to support a finding of the fulfillment of the  
28 condition.  
2. If **under all the evidence** upon the issue the jury might reasonably

1 find that **the fulfillment of the condition** is not established, **the judge**  
2 **shall instruct the jury** to consider the issue and to disregard the  
evidence **unless they find the condition was fulfilled**.

3 3. If **under all the evidence** upon the issue the jury could not  
4 reasonably find that the condition was fulfilled, **the judge shall**  
5 **instruct the jury** to disregard the evidence.

6 In terms of procedural mechanics there are two parts to this statute. First,  
7 under NRS 47.070(1), the court makes a decision to admit potentially relevant  
8 evidence after sufficient facts have been presented to support a finding that the  
9 condition will be fulfilled. In the case *sub judice* as in all trials where a charge of  
10 conspiracy is under consideration, the evidence was conditionally admitted during  
11 the proponent's (State's) case- in-chief. Slight evidence is the standard that is  
12 applied by the court to the question of "fulfillment of the condition" at this  
13 juncture. McDowell v. State, 103 Nev. 527, 746 P. 2d 149 (1987). The court alone  
14 makes the decision as to admissibility. The "condition" that must be fulfilled to  
15 make the evidence relevant is identical to what the jury must later determine as to  
16 the issue of guilt or innocence: the existence of and membership in the conspiracy  
17 of the declarant and the defendant.

18 The second mechanical aspect of the statute arises at the close of evidence  
19 when the court is directed to revisit the conditionally admitted evidence "under all  
20 of the evidence upon the issue". At this point NRS 47.070(2) gives the court the  
21 option of instructing the jury to consider the issue and to disregard the evidence  
22 unless they find the condition was fulfilled. Alternatively, pursuant to NRS  
23 47.070(3) the court can determine that the jury could not reasonably find that the  
24 condition was fulfilled. Under that option, the court is required instruct the jury to  
25 disregard the evidence. Clearly, the "slight evidence" standard does not apply at  
26 this point because a weighing of evidence pro and con is mandated by the statute.  
27 NRS 47.070(2) places that function with the jury, as it must, since they are the sole  
28

1 judges of weight and credibility under our constitution. State v. McKay, 63 Nev.  
2 118, 154, 165 P. 2d 389, 405 (1946) (citing Nevada Constitution Article 6, Section  
3 4). Here, instruction number forty instructed the jury under NRS 47.070(1),  
4 directing them to apply an evidentiary standard designed for a function with which  
5 they have neither connection nor duty. The court totally failed to properly apply  
6 NRS 47.070(2). Therefore, instruction number forty is clearly an erroneous  
7 statement of law as it failed to instruct the jury that it was required to consider the  
8 issue and disregard the evidence unless it found the condition (existence and  
9 membership in the charged conspiracy) was fulfilled by an appropriate legal  
10 standard that governs at this final stage of the trial after all evidence is in.  
11 Whatever that standard is, it cannot be “slight evidence” when the jury is  
12 simultaneously being asked to find the same elements beyond a reasonable doubt.

13 **INSTRUCTION NUMBER FORTY CONFUSED THE JURY REGARDING**  
14 **THE BURDEN OF PROOF NECESSARY TO CONVICT MR. H OF**  
15 **CONSPIRACY AND THE INSTRUCTION ACTUALLY REDUCED THE**  
16 **STATE’S BURDEN**

17 In its order affirming the judgment of conviction, this Court found that  
18 although jury instruction number forty was “unnecessary” the jury was not  
19 confused regarding the burden of proof required to convict Mr. H of conspiracy  
20 because the burden was referenced in ten other jury instructions. However, the  
21 Court overlooked the fact that the four jury instructions<sup>1</sup> pertaining to conspiracy  
22 each: (1) failed to internally instruct the jury on the beyond a reasonable doubt  
23 burden; and, (2) failed to instruct the jury that existence of and membership in the  
24 conspiracy are elements of conspiracy.<sup>2</sup> However instruction 40 did precisely that  
25 as to two of the elements and with the lowest possible burden of proof – “slight

26 <sup>1</sup> Instructions number fifteen, sixteen, seventeen and eighteen are the four conspiracy instructions.

27 <sup>2</sup> It is well settled that in order to find a defendant guilty of conspiracy the jury is required to determine beyond a  
28 reasonable doubt that: (1) a conspiracy existed; and, (2) the defendant was a member in it. Bolden v. State, 121 Nev.  
908, 124 P.3d 191 (2005).

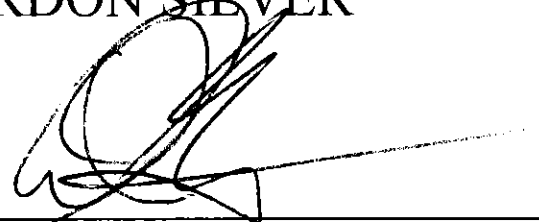
1 as to two of the elements and with the lowest possible burden of proof – “slight  
2 evidence” – attached to them. Moreover, instruction number 40 sequentially  
3 followed the other beyond reasonable doubt as burden of proof instructions while  
4 introducing for the first and only time two elements of conspiracy that received no  
5 other mention in the charge as a whole. Therefore, whether the burden of proof  
6 language was stated ten times in instructions unrelated to conspiracy is irrelevant  
7 in this case.

8 In reaching its decision to affirm the judgment of conviction, the Court  
9 found that Mr. H was not prejudiced by instruction number forty because another  
10 one of the jury instructions “expressly specified that the State has the burden of  
11 proving beyond a reasonable doubt every material element of the crime charged  
12 and that the Defendant is the person who committed the offense.” However, as  
13 none of the four jury instructions pertaining to conspiracy spoke of the elements in  
14 the same terms that were used in instruction number 40, there was no way for the  
15 jury to know that those mentioned in instruction 40 were also material elements of  
16 the crime of conspiracy, particularly in light of the separation of instruction  
17 number 40 from the earlier conspiracy instructions in the sequence in which they  
18 were delivered to the jury. Specifically, instruction number forty states:  
19 “[w]henver there is **slight evidence** that a conspiracy existed, and the **defendant**  
20 **was one of the members of the conspiracy**, then the statements and the acts of  
21 any person likewise a member may be considered by the jury as evidence in the  
22 case as to the defendant **found** to have been a member...” Simply stated, the only  
23 time the jury was given an instruction regarding the elements of existence and  
24 membership in the conspiracy it was also instructed that those elements only  
25 needed to be proven by slight evidence. No magic number of beyond reasonable  
26 doubt instructions could have remedied the harm created by the fact that the burden  
27 of proof instructions in conjunction with instruction number forty were incurably  
28

1 This Court also found that structural error was not the correct standard of  
2 review because instruction number forty did not actually reduce the State's burden  
3 of proving that Mr. H was guilty of conspiracy beyond a reasonable doubt.  
4 However, the State bears the burden of proving each element of a crime charged  
5 beyond a reasonable doubt and must "persuade the factfinder 'beyond a reasonable  
6 doubt' of the facts necessary to establish each of those elements..." Sullivan v.  
7 Louisiana, 508 U.S. 275, 277-8 (1993). When a jury instruction actually reduces  
8 the State's burden of proof as to an element in express terms it is structural error.  
9 Sullivan, 508 U.S. 275, 278-80 (1993).

10 Dated this 9th day of July, 2012.

11 GORDON SILVER



12  
13  
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State Bar No. 1923

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I hereby certify that this Petition for Rehearing complies with the formatting requirement of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft(r) Word 2010 in Times New Roman 14-pt.

I further certify that this brief complies with the page or type-volume limitations of NRAP 40 or 40A because it does not exceed ten (10) pages.

DATED this 9<sup>th</sup> day of July, 2012.

# GORDON SILVER

  
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**CERTIFICATE OF SERVICE**

The undersigned, an employee of Gordon Silver, hereby certifies that on the 9 day of July, 2012, she served a copy of the Petition for Rehearing Pursuant to Nevada Rule of Appellate Procedure 40, by Electronic Service, in accordance with the Master Service List as follows:

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

  
ADELE L. JOHANSEN, an employee  
Of GORDON SILVER

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

No. 54209

**FILED**

JUL 27 2012

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY *Angela*  
DEPUTY CLERK

ORDER DENYING REHEARING

Rehearing denied. NRAP 40(c).

It is so ORDERED.

*Douglas*, J.  
Douglas

*Gibbons*, J.  
Gibbons

*Parraguirre*, J.  
Parraguirre

cc: Hon. Valerie Adair, District Judge  
Gordon & Silver, Ltd.  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk

1  
2 IN THE SUPREME COURT OF THE STATE OF NEVADA  
3

4 LUIS A, HIDALGO, JR.

5 Appellant,

6 vs.

7 THE STATE OF NEVADA

8 Respondent.  
9

Electronically Filed  
Aug 10 2012 02:50 p.m.  
CASE NO. 54209  
Tracie K. Lindeman  
Clerk of Supreme Court  
**PETITION FOR *EN BANC*  
RECONSIDERATION PURSUANT  
TO NRAP 40A**

10 NRAP 40A(a)(2) recognizes that *en banc* reconsideration is appropriate  
11 when the proceeding involves substantial precedential, constitutional, or public  
12 policy value. For the reasons below, the issues presented here meet those criteria.

13 **I. The Essence of the Issue Presented**

14 Jury Instruction #40, directed the jury to apply a “slight evidence” test in  
15 determining two essential elements of a conspiracy: (1) its existence, and (2) its  
16 membership. 24 Appellant’s Amended Appendix<sup>1</sup> 4487. See also “Jury Instruction  
17 #40” attached hereto as Exhibit 1. It did so over the specific objection of the  
18 Petitioner on the grounds that it addressed the law of *admissibility* of evidence - a  
19 judicial function with which the jury is not to be concerned - and not the  
20 substantive law of conspiracy that the jury must apply at that stage of the  
21 proceedings. 23 AAA 4212-4213. The instruction was preceded by others  
22 articulating the proof beyond a reasonable doubt standard, but none of them  
23 expressly addressed the elements of “existence” of and “membership” in a criminal  
24 conspiracy in clear terms. That standard of proof is constitutionally mandated as to  
25 each element of an offense in a criminal trial. In re Winship, 397 U.S. 358 (1970);  
26 Labastida v. State, 115 Nev. 298, 303, 989 P. 2d 443, 447 (1999). To permit  
27

28 <sup>1</sup> Appellant’s Amended Appendix will be referred to hereinafter as “AAA.”

1 otherwise is structural error mandating reversal, Sullivan v. Louisiana, 508 U.S.  
2 275, 113 S. Ct. 278 (1993), as it is plainly inconsistent with the constitutionally  
3 rooted presumption of innocence. Cool v. United States, 409 U.S. 100, 93 S. Ct.  
4 354 (1972).

5 Petitioner has no quarrel with the “slight evidence” standard being used to  
6 decide the *admissibility* of co-conspirators statements. McDowell v. State, 103  
7 Nev. 527, 746 P. 2d 149 (1987). However, the question presented in this case is  
8 one that was left unanswered by McDowell: “should the standard utilized by the  
9 court in deciding *admissibility* be employed by the jury in it’s decision process?”  
10 The answer is “no” for two reasons: (1) the standard for *admission* of the evidence  
11 is less than beyond a reasonable doubt; and (2) the jury should not be deciding  
12 questions of *admissibility*. The instruction has a pernicious impact upon confidence  
13 that the elements of the crime – which are **identical** to the predicates for *admission*  
14 of the evidence - were decided by the jury beyond a reasonable doubt. A jury must  
15 not be required to apply the “slight evidence” standard to the **identical** elements to  
16 which they must also apply the beyond a reasonable doubt standard.

## 17 **II. The Problem is Systemic and Impacts All Conspiracy Cases**

18 As the State told the Court at oral argument on June 13, 2012: “The  
19 argument [of the Petitioner] is that this instruction should never be given to a jury.  
20 Well... **it’s the same instruction that’s been given in every conspiracy case**  
21 **we’ve ever had in the last, well, thirteen years that I’ve been here.**” Official  
22 Nevada Supreme Court Oral Argument Recording commencing at 11min.48sec.  
23 (emphasis added.) The State acknowledged that: “[I]n Nevada, it is an unresolved  
24 issue of statutory interpretation whether a jury may be charged with also making an  
25 admissibility determination regarding co-conspirator statements,” (Respondent’s  
26 Answering Brief at page 16, lines 19-21), and “the Court is free to now permit or  
27 prohibit Nevada’s district courts from instructing their juries to make the  
28

1 admissibility determination regarding co-conspirator statements. **The law would**  
2 **probably benefit from the Court's guidance and Mr. H's case does present the**  
3 **question.**" Respondent's Answering Brief at page 24, lines 24 – 28. (emphasis  
4 added). Thus, the substantial precedential, constitutional and public policy value of  
5 an *en banc* decision in this matter, as required by NRAP 40A(a)(2), is satisfied.

### 6 **III. The Problem is Unique to Nevada**

7 Every Nevada court bound by Title 4 of the Nevada Revised Statutes faces a  
8 serious problem when called upon to instruct a jury at the conclusion of a case in  
9 which NRS 51.035-3(c), (d) or (e) was the bases for the admission of evidence. If  
10 the charges, claims or defenses contain elements **identical** to the conditions that  
11 must be met for *admissibility* under NRS 51.035(3)(c), (d) or (e), the "slight  
12 evidence" instruction invites confusion of the jurors and reduction of the burden of  
13 proof they must apply in deciding the merits. Jury instructions that tend to confuse  
14 or mislead are erroneous. Culverson v.State, 106 Nev. 484, 488, 797 P. 2d 238,  
15 240 (1990).

16 It has been said that Nevada "jumped the gun" when it adopted the  
17 Preliminary Draft of the Federal Rules of Evidence. Wright & Graham, Federal  
18 Practice & Procedure, §5051 (2<sup>nd</sup> ed.). No other state did so. Therefore, unless this  
19 Court addresses the issue, trial courts cannot look to the law of other jurisdictions  
20 in deciding this important recurring question. No decisions exist interpreting the  
21 language of the Nevada statutes at issue herein: NRS 47.060, which deals with who  
22 determines *admissibility*<sup>2</sup>, and NRS 47.070, which concerns the relative roles of the  
23 judge and jury in determining *relevancy*.<sup>3</sup>

24  
25 <sup>2</sup> 1. Preliminary questions concerning ... the admissibility of evidence shall be  
26 determined by the judge, subject to the provisions of N.R.S. 47.070. 2. In making  
his determination he is not bound by the rules of evidence provisions of this Title  
except the provisions of chapter 49 of NRS with respect to privileges.

27 <sup>3</sup> 1. When the relevancy of evidence depends upon the fulfillment of a condition of  
28 fact, the **judge shall admit** it upon the introduction of evidence **sufficient to**  
**support a finding of the fulfillment of the condition.** 2. If **under all the**  
**evidence upon the issue** the jury might reasonably find that the **fulfillment of the**

1       **IV.     The Problem in Context**

2       Under NRS 47.060 the court's ruling on *admissibility* is final. NRS 47.070 is  
3       only triggered when additional predicate facts are necessary to make evidence  
4       *relevant*. The specific category of evidence at issue *sub judice* is "a statement by a  
5       co-conspirator of a party during the course and in furtherance of the conspiracy."  
6       NRS 51.035-3(e). However, the problem also exists when NRS 51.035-3(c) or (d)  
7       are employed for the admission of evidence in criminal and civil cases. Where an  
8       objection is made at the time it is offered, as it was in this case, <sup>4</sup> NRS 47.060  
9       mandates that the judge makes the determination of its admissibility.

10       For NRS 51.035-3(e) to apply, the existence and membership of the  
11       conspiracy must be established by evidence independent of the statement itself.  
12       Wood v State, 115 Nev. 344, 349 (1999). See Carr v. State, 96 Nev. 238, 239, 607  
13       P. 2d 114, 116 (1980). If the court decides that "slight evidence" exists  
14       independent of the statement, it is deemed not hearsay, it is admitted and can be  
15       considered by the jury. This Court has never addressed whether the jury should  
16       revisit the issue of *admissibility*. Neither has it decided whether NRS 47.070  
17       applies to this situation and, if it does, what quantum of evidence the state and  
18       federal Constitutions require as "*sufficient to support a finding of the condition*"  
19       now that "*all the evidence upon the issue*" has been received in a trial. It has  
20       never suggested that the jury should be instructed to apply the "slight evidence"  
21       standard. All conspiracy cases and trial courts cry out for guidance on this issue.

22       When making the decision as to *admissibility* a trial judge is not concerned  
23       with sufficiency to convict. Bourjaily v. United States, 483 U.S. 171, 107 S.Ct.

24       \_\_\_\_\_ (continued)

25       **condition is not established**, the judge shall instruct the jury to consider the issue  
26       and to disregard the evidence unless they find the condition was fulfilled. 3. If  
27       **under all the evidence upon the issue** the jury could not reasonably find that the  
28       condition was fulfilled, the **judge shall instruct the jury** to disregard the  
evidence. (emphasis added.)

27       <sup>4</sup> A standing objection was allowed by the district court to all out-of-court  
28       statements by persons alleged to be co-conspirators. 13 AAA 2398, 2478-2488, 14  
AAA 2715-2716, 2493-2500.

1 2775, (1987).<sup>5</sup> The judge's use of the lower standard of proof does no violence to  
2 the beyond a reasonable doubt standard the jury must apply. "Once a trial judge  
3 makes a preliminary determination under [NRS 47.060] that the requirements of  
4 [NRS 51.035-3(e)] have been satisfied, there is no reason to instruct the jury that it  
5 is required to make an identical determination independently of the court: whether  
6 such a statement can be considered at all is for the court alone to determine."  
7 United States v. Hagmann, 950 F. 2d 175, 181 n.11 (5th Cir. 1991), cert. denied  
8 506 U.S. 835 (1992), rehearing denied 506 U.S. 982 (1992) (bracketed material  
9 substituted for federal equivalents in original). In United States v. Martinez de  
10 Ortiz, 907 F.2d 629 (7th Cir. 1990)(en banc) the court addressed the mechanics of  
11 deciding the admissibility of such evidence. It held "...the jury does not decide the  
12 hearsay question. The question for the jury is one of the substantive law of  
13 conspiracy." Martinez de Ortiz, 907 F.2d at 632-33. It explained "the judge's  
14 decision is conclusive...the jury may not re-examine the question whether there is  
15 'enough' evidence of the defendant's participation to allow the hearsay to be used."  
16 Id. at 633. To do so allows the jury to second guess the judge's decision to admit  
17 the statements; to impermissibly sit in review of the judge's legal determination.  
18 To present this issue to the jury unnecessarily confuses them as to the proper  
19 burden of proof of two elements of the conspiracy charge in the case.

20 This Court should hold that once the trial judge finds under NRS 47.060 that  
21 the prerequisites to NRS 51.035-3(e) have been met, the jury does not revisit the  
22 issue and can consider the co-conspirator statements for all purposes in its  
23 determination as to whether there has been proof beyond a reasonable doubt that  
24 the defendant is guilty of conspiracy. See Martinez de Ortiz, 907 F.2d at 634-635.  
25 In other words, the statements are not subject to "conditional relevancy," analysis

26 <sup>5</sup> "The inquiry made by a court concerned with [admissibility] is not whether the  
27 proponent of the evidence wins or loses his case on the merits, but whether the  
28 evidentiary rules have been satisfied. Thus, the evidentiary standard is unrelated to  
the burden of proof on the substantive issues."



1 as that term is used in NRS 47.070, as to the jury's decision on the conspiracy  
2 charge or claim. In determining whether the alleged conspiracy existed or the  
3 defendant was a member, the jury can consider the actions and statements of all of  
4 the alleged participants that the judge admitted into evidence. United States v.  
5 Stephenson, 53 F.3d 836, 847 (7th Cir. 1995). United States v. Bell, 573 F.2d  
6 1040, 1044-45 (8th Cir. 1978); United States v. Ammar, 714 F.2d 238, 249 (3rd  
7 Cir. 1983) (once admitted, co-conspirator statements should go to the jury without  
8 further instruction); United States v. Vinson, 606 F.2d 149, 153 (6th Cir. 1979)  
9 (once admitted statements go to jury, judge should not describe to the jury the  
10 government's burden of proof on the preliminary question); People v. Vega, 321  
11 N.W.2d 675 (Mich. 1982) (trial judge must make determination of admissibility,  
12 not jury).

13 In United States v. Martinez De Ortiz, 883 F. 2d 515 (7th Cir. 1989)  
14 (Easterbrook, J. concurring) *rehearing granted and judgment vacated on other*  
15 *grounds*, 897 F.2d 220 (7th Cir. 1990), *affirmed upon rehearing en banc*, United  
16 States v. Martinez de Ortiz, 907 F. 2d 629 (7th Cir. 1990)(*en banc*), Circuit Judge  
17 Frank Easterbrook, decried the use of the language "slight evidence" or "slight  
18 connection" in conspiracy prosecutions, stating at 883 F 2d 524-25:

19 *That we have to tease [a non-troubling interpretation] out of a*  
20 *formula with dubious alternative meanings, though, is a mark against*  
21 *its use. ... Maybe we could torture the phrase until it confessed to a*  
22 *constitutionally acceptable meaning, but why bother? ...Nothing we*  
23 *do as a judge is more important than assuring that the innocent go*  
24 *free....Conspiracy is a net in which prosecutors catch many little fish.*  
25 *We should not go out of our way to tighten the mesh. Prosecutors*  
26 *have many legitimate advantages in the criminal process. Defendants'*  
27 *great counterweight is the requirement that the prosecution establish*  
28 *guilt beyond a reasonable doubt. References to "slight evidence" and*  
*"slight connection" reduce the power of that requirement."*

1 A plenary analysis of the confusion and damage caused by the use of “slight  
2 evidence” language with juries is contained in a concurring opinion written by  
3 Circuit Judge Jon. O. Newman<sup>6</sup> in United States v. Huevo, 546 F. 3d 174, 184-189,  
4 fn.10; 191, fn.2 (2nd Cir. 2008). It recognized that “[t]he ‘slight evidence’  
5 formulation is inconsistent with the constitutional requirement that every element  
6 of an offense must be proven beyond a reasonable doubt” and “creates an  
7 unacceptable risk that juries, if the phrase is included in a charge, ...will be misled  
8 (or mislead themselves) into thinking that the defendant’s link to the conspiracy  
9 may be established by evidence insufficient to surmount the reasonable doubt  
10 standard. The vice of the ‘slight evidence’ formulation,...is that...,when stated in  
11 juxtaposition with the test for establishment of the conspiracy itself, ...may too  
12 easily be taken as an implication that proving participation in a conspiracy is  
13 subject to a lesser standard of proof than proving the existence of the conspiracy.  
14 But that implication is simply wrong.” Id. at 185.

#### 15 **V. The Compromise of the Reasonable Doubt Standard is Structural Error**

16 The Huevo court noted that the Fifth Circuit had already found that jury  
17 instructions such as the one given in this case are not subject to harmless error  
18 analysis and are *per se* reversible error, citing United States v. Partin, 552 F. 2d  
19 621, 628-629 (5th Cir. 1977) and its internal citations of earlier Fifth Circuit  
20 precedent holding that “[d]espite the lack of provable prejudice to defendant’s case  
21 because of other instructions giving the reasonable doubt standard... the erroneous  
22 instruction reduced the level of proof necessary for the government to carry its  
23 burden by possibly confusing the jury about the proper standard or even  
24 convincing jury members that a defendant’s participation in the conspiracy need  
25 not be proved beyond a reasonable doubt.” See United States v. Hall, 525 F.2d  
26

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27 <sup>6</sup> Circuit Judge Newman’s opinion was joined by the entire panel which included  
28 now United States Supreme Court Justice Sonia Sotomayor, and circulated and  
adopted by the entire Second Circuit Court of Appeals.

1 1254, 1256 (5th Cir. 1976); United States v. Malatesta, 590 F2d 1379, 1382 (5th  
2 Cir. 1979)(en banc).

3 In Cortinas v. State, 124 Nev. 1013, 195 P.3d 315, (2008), cert. denied, 130  
4 S. Ct. 416 (2009), this Court recognized that erroneous jury instructions can be  
5 structural error. Here, the instructions taken as a whole permitted the jury to find  
6 Petitioner guilty of the general intent crimes of battery with a deadly weapon or  
7 with substantial bodily harm under a theory of vicarious liability once it found him  
8 guilty of the conspiracy. Thus the impact of the confusing and “pernicious”  
9 instruction (#40) employing an improper and unconstitutional standard is clear.  
10 The evidence against Petitioner was slight at best. Nothing except the co-  
11 conspirators statements demonstrated Petitioner’s pre-event connection, knowledge  
12 or intent. The instruction permitted the jury to use an impermissible standard in  
13 deciding the issue of membership in the conspiracy.

#### 14 **Conclusion**

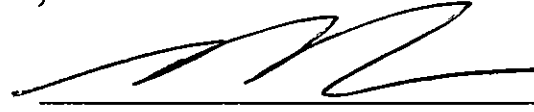
15 This case presents the opportunity to further develop the law regarding the  
16 use of co-conspirator’s statements and give guidance to the district courts on how  
17 to ensure confidence in verdicts where one is found liable because of words and  
18 acts of other persons outside of his presence. Here, the Panel was correct that the  
19 language of Instruction #40 did not misstate the law that a district court must apply  
20 when considering whether to *admit* a statement into evidence under NRS 51.035-  
21 3(e). However, in characterizing the instruction as “unnecessary” and determining  
22 that the trial court did not err in giving it, the Panel made a grave mistake.

23 Instruction #40 was far more than “unnecessary.” It was not applicable to  
24 the jury’s role in deciding two of the essential elements of conspiracy – its  
25 existence and its membership – and because of its reduction of the burden of proof  
26 on those elements it was confusing and inaccurate.<sup>7</sup> Therefore, this Court should

27  
28 <sup>7</sup> “Jurors should neither be expected to be legal experts nor make legal inferences  
with respect to the meaning of the law; rather, they should be provided with

1 grant the Petition, reconsider this case en banc, put an end to the use of this  
2 instruction in future cases and grant Petitioner a new trial.

3 Dated this 10 day of August, 2012.

4  Margaret Lamberson H626  
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9 (702) 796-5555  
10 Attorney for Appellant  
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25 \_\_\_\_\_ (continued)  
26 applicable legal principles by accurate, clear, and complete instructions specifically  
27 tailored to the facts and circumstances of the case." Crawford v. State, 121 Nev.  
28 744, 754 (2005). This Court has previously decried the use of the word "slight" in  
a jury instruction, reversing and remanding for a new trial because of the impact  
that it may have had on the jury's decision. Driscoll v. Erreguible, 87 Nev. 97, 482  
P.d 291 (1971).


1 **CERTIFICATE OF COMPLIANCE**

2 I hereby certify that this Petition for Rehearing *En Banc* complies with the  
3 formatting requirement of NRAP 32(a)(4), the typeface requirements of NRAP  
4 32(a)(5) and the type style requirements of NRAP 32(a)(6) because it has been  
5 prepared in a proportionally spaced typeface using Microsoft(r) Word 2010 in  
6 Times New Roman 14-pt.

7 I further certify that this brief complies with the page or type-volume  
8 limitations of NRAP 40 or 40A because it does not exceed ten (10) pages.

9 DATED this 10<sup>th</sup> day of August, 2012.

10 GORDON SILVER

11  
12  
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**CERTIFICATE OF SERVICE**

The undersigned, an employee of Gordon Silver, hereby certifies that on the  
10 day of August, 2012, she served a copy of the Petition for Rehearing *En*  
*Banc*, by Electronic Service, in accordance with the Master Service List as follows:

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

  
ADELE L. JOHANSEN, an employee  
Of GORDON SILVER

# EXHIBIT “1”

INSTRUCTION NO. 40

Whenever there is slight evidence that a conspiracy existed, and that the defendant was one of the members of the conspiracy, then the statements and the acts by any person likewise a member may be considered by the jury as evidence in the case as to the defendant found to have been a member, even though the statements and acts may have occurred in the absence and without the knowledge of the defendant, provided such statements and acts were knowingly made and done during the continuance of such conspiracy, and in furtherance of some object or purpose of the conspiracy.

This holds true, even if the statement was made by the co-conspirator prior to the time the defendant entered the conspiracy, so long as the co-conspirator was a member of the conspiracy at the time.

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

An adoptive admission is a statement of which a listener has manifested his adoption or belief in its truth.



IN THE SUPREME COURT OF THE STATE OF NEVADA

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

No. 54209

**FILED**

**SEP 19 2012**

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY *A. Malone*  
DEPUTY CLERK

ORDER DIRECTING ANSWER TO  
PETITION FOR EN BANC RECONSIDERATION

Appellant has petitioned this court for en banc reconsideration of the order of affirmance entered by a panel of this court on June 21, 2012. Having reviewed the petition, it appears that an answer will assist the court in resolving the issues presented. Accordingly, respondent shall have 15 days from the date of this order within which to file and serve an answer to the petition. See NRAP 40A. The answer shall be limited to the issue of whether the giving of Jury Instruction 40 was per se reversible error.

It is so ORDERED.

*Cherry*, C.J.

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

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

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5       LUIS HIDALGO, JR.,  
6                               Appellant,  
7  
8       v.  
9       THE STATE OF NEVADA,  
                              Respondent.

Electronically Filed  
Oct 02 2012 01:01 p.m.  
Tracie K. Lindeman  
Clerk of Supreme Court  
CASE NO: 54209

10                                   **ANSWER TO PETITION FOR**  
11                                   **EN BANC RECONSIDERATION**

12               COMES NOW the State of Nevada, by STEVEN B. WOLFSON, Clark  
13       County District Attorney, through his Chief Deputy, STEVEN S. OWENS, and  
14       submits this Answer to Appellant's Petition for En Banc Reconsideration filed  
15       August 10, 2012, pursuant to this Court's order dated September 19, 2012.

16               This answer is based on the following memorandum of points and  
17       authorities and all papers and pleadings on file herein.

18               Dated this 2<sup>nd</sup> day of October, 2012.

19                                   Respectfully submitted,

20                                   STEVEN B. WOLFSON  
21                                   Clark County District Attorney  
                                  Nevada Bar # 001565

22  
23                                   BY */s/ Steven S. Owens*  
24                                   \_\_\_\_\_  
                                  STEVEN S. OWENS  
                                  Chief Deputy District Attorney  
                                  Nevada Bar #004352  
25  
26                                   Attorney for Respondent  
27  
28

1 MEMORANDUM

2 On June 21, 2012, a panel of this Court issued an unpublished Order  
3 affirming a judgment of conviction pursuant to a jury verdict for conspiracy to  
4 commit battery with a deadly weapon and second-degree murder with the use of a  
5 deadly weapon. A petition for rehearing was denied unanimously on July 27,  
6 2012. On August 10, 2012, Hidalgo filed the instant Petition for En Banc  
7 Reconsideration which this Court directed the State to answer within 15 days by  
8 Order filed on September 19, 2012. The Court's Order directed the answer to be  
9 limited to the issue of "whether the giving of Jury Instruction 40 was per se  
10 reversible error."

11 Standard of Review for En Banc Reconsideration

12 En banc reconsideration of a panel decision is disfavored, and this Court will  
13 only reconsider a matter when necessary to ensure consistency in its decisions or  
14 when the case implicates important precedential, public policy, or constitutional  
15 issues. NRAP 40A(a). This Court has granted en banc reconsideration when  
16 necessary to clarify and extend existing precedent or to reconcile it with statutory  
17 authority. See e.g., Bass-Davis v. Davis, 122 Nev. 442, 134 P.3d 103 (2006); City  
18 of Las Vegas v. Walsh, 121 Nev. 899, 124 P.3d 203 (2005); Ronning v. State, 116  
19 Nev. 32, 992 P.2d 260 (2000). But where legal opinions are consistent, en banc  
20 reconsideration is unwarranted. Skender v. Brunsonbuilt Const. and Development  
21 Co., 123 Nev. \_\_\_, 171 P.3d 745 (2007). Matters presented in the briefs and oral  
22 arguments may not be reargued in the petition, and no point may be raised for the  
23 first time. NRAP 40A(c). The practice of instructing the jury on when it may  
24 consider coconspirator statements as evidence under NRS 51.035(3)(e), does not  
25 implicate any constitutional right or structural error. Because there was no  
26 reasonable likelihood the jury confused the law pertaining to coconspirator  
27 statements with the reasonable doubt burden of proof, any error was harmless.

1 The Giving of an Instruction on the Consideration of Co-Conspirator Statements is  
2 Not Structural Error

3 The jury in this case was instructed that it may not consider co-conspirator  
4 statements and acts as evidence against Hidalgo unless it first found there was  
5 “slight evidence” that a conspiracy existed and that Hidalgo was a member of the  
6 conspiracy. 24 AA 4487 (Instruction #40). The instruction is a correct statement  
7 of Nevada law. McDowell v. State, 103 Nev. 527, 529, 746 P.2d 149 (1987); NRS  
8 51.035(3)(e). On appeal, Hidalgo argues the instruction’s reference to “slight  
9 evidence” may have confused the jury and possibly reduced the State’s “beyond a  
10 reasonable doubt” burden of proof constitutionally required for conviction.  
11 Because of the risk that the jury may have convicted him based on only slight  
12 evidence, Hidalgo argues the error is structural and warrants automatic reversal.

13 The Panel concluded that although Instruction #40 was “unnecessary,” it  
14 “did not misstate the law” which a district court must apply when considering  
15 whether to admit a statement into evidence under the coconspirator exception to  
16 the hearsay rule. Because the jury was also correctly instructed on the reasonable  
17 doubt standard and a jury is presumed to follow the district court’s instructions, the  
18 Panel concluded that the jury was not confused as to the State’s burden of proof.  
19 The Panel specifically rejected Hidalgo’s contention that the instruction amounted  
20 to structural error because Instruction #40 did not “actually” reduce the State’s  
21 burden of proof.

22 The Supreme Court has recognized a special category of errors which must  
23 be corrected regardless of their effect on the outcome of the case. Arizona v.  
24 Fulminante, 499 U.S. 279, 306-12, 111 S.Ct. 1246, 1263-66 (1991). The Supreme  
25 Court has labeled this category of errors as “structural.” Id. A structural error in a  
26 criminal trial always requires reversal of a conviction because such error  
27 “necessarily render[s] a criminal trial fundamentally unfair or an unreliable vehicle  
28 for determining guilt or innocence.” Neder v. United States, 527 U.S. 1, 9, 119  
S.Ct. 1827 (1999). Structural error constitutes a “defect [ ] in the constitution of

1 the trial mechanism” which defies harmless error analysis. Fulminante, 499 U.S.  
2 at 309, 111 S.Ct. at 1265. Structural error affects the “framework within which the  
3 trial proceeds, rather than simply ... the trial process itself.” Id. at 310, 111 S.Ct. at  
4 1265. “Harmless-error analysis applies to instructional errors so long as the error  
5 at issue does not categorically vitiate all the jury’s findings.” Hedgepeth v. Pulido,  
6 129 S.Ct. 530, 532 (2008), *citing* Neder, *supra*.

7 Automatic reversal is strong medicine that should be reserved for  
8 constitutional errors that “*always*” or “*necessarily*” produce such unfairness.  
9 United States v. Gonzales-Lopez, 548 U.S. 140, 126 S.Ct. 2557 (2006). Structural  
10 errors “are the exception and not the rule.” Hedgepeth v. Pulido, 555 U.S. 57, 61,  
11 129 S.Ct. 530, 532 (2008), *citing* Rose v. Clark, 478 U.S. 570, 106 S.Ct. 3101  
12 (1986). Indeed, the Supreme Court has said that “if the defendant had counsel and  
13 was tried by an impartial adjudicator, there is a *strong presumption* that any other  
14 errors that may have occurred” are not “structural errors.” Rose, *supra*, at 579, 106  
15 S.Ct. 3101. The Supreme Court has found an error to be “structural,” and thus  
16 subject to automatic reversal, only in a “very limited class of cases.” Johnson v.  
17 United States, 520 U.S. 461, 468, 117 S.Ct. 1544 (1997) (citing Gideon v.  
18 Wainwright, 372 U.S. 335, 83 S.Ct. 792 (1963) (*complete denial of counsel*);  
19 Tumey v. Ohio, 273 U.S. 510, 47 S.Ct. 437 (1927) (*biased trial judge*); Vasquez v.  
20 Hillery, 474 U.S. 254, 106 S.Ct. 617 (1986) (*racial discrimination in selection of*  
21 *grand jury*); McKaskle v. Wiggins, 465 U.S. 168, 104 S.Ct. 944 (1984) (*denial of*  
22 *self-representation at trial*); Waller v. Georgia, 467 U.S. 39, 104 S.Ct. 2210 (1984)  
23 (*denial of public trial*); Sullivan v. Louisiana, 508 U.S. 275, 113 S.Ct. 2078 (1993)  
24 (*defective reasonable-doubt instruction*).

25 In Sullivan, *supra*, the Supreme Court unanimously held that a  
26 constitutionally-deficient reasonable doubt instruction was structural. The Court  
27 reasoned that “where the instructional error consists of a misdescription of the  
28 burden of proof, which vitiates *all* the jury’s findings,” no jury verdict of beyond-a-

1 reasonable-doubt exists upon which to base a harmless error analysis. Id. at 281,  
2 113 S.Ct. at 2082 (emphasis in original). The Court continued:

3       There being no jury verdict of guilty-beyond-a-reasonable-doubt, the  
4 question whether the *same* verdict of guilty beyond-a-reasonable-  
5 doubt would have been rendered absent the constitutional error is  
6 utterly meaningless. There is no *object*, so to speak, upon which  
7 harmless error scrutiny can operate. The most an appellate court can  
8 conclude is that a jury *would surely have found* petitioner guilty  
9 beyond a reasonable doubt-not that that jury's actual finding of guilty  
beyond a reasonable doubt *would surely not have been different*  
absent the constitutional error. That is not enough. The Sixth  
Amendment requires more than appellate speculation about a  
hypothetical jury's action, or else directed verdicts for the State would  
be sustainable on appeal; it requires an actual finding of guilty.

10 Id. at 280, 113 S.Ct. at 2082 (emphasis in original) (citations omitted). The Court  
11 concluded: “The deprivation of that right [to be found guilty beyond a reasonable  
12 doubt of every element of an offense], with consequences that are necessarily  
13 unquantifiable and indeterminate, unquestionably qualifies as ‘structural error.’ ”  
14 Id. at 281-82, 113 S.Ct. at 2083. Notably, Sullivan does not alter the rule that  
15 reasonable doubt instructions are reviewed for constitutional error by asking  
16 whether “there is a reasonable likelihood that the jury understood the instructions  
17 to allow conviction based on proof insufficient to meet the Winship standard.”  
18 Victor v. Nebraska, 511 U.S. 1, 6, 114 S.Ct. 1239 (1994), citing Estelle v.  
19 McGuire, 502 U.S. 62, 72 &n.4, 112 S.Ct. 475 (1991). Also, the Supreme Court  
20 subsequently has refused to extend Sullivan beyond situations where there is a  
21 “defective” reasonable doubt instruction.” Neder, *supra*.

22       In fact, other than Sullivan, the Supreme Court has consistently found all  
23 other kinds of instructional error are not structural but instead trial errors subject to  
24 harmless-error review. See, e.g., Neder v. United States, 527 U.S. 1, 119 S.Ct.  
25 1827 (1999) (omission of an element of an offense); California v. Roy, 519 U.S. 2,  
26 117 S.Ct. 337 (1996) (*per curiam*) (erroneous aider and abettor instruction); Pope  
27 v. Illinois, 481 U.S. 497, 107 S.Ct. 1918 (1987) (misstatement of an element of an  
28 offense); Rose v. Clark, 478 U.S. 570, 106 S.Ct. 3101 (1986) (erroneous burden-

1 shifting as to an element of an offense). Hedgpeth v. Pulido, 555 U.S. 57, 60-61,  
2 129 S. Ct. 530, 532 (2008) (instructing a jury on multiple theories of guilt, one of  
3 which is invalid).

4 Hidalgo's reliance upon Sullivan is misplaced. The error at issue in Sullivan  
5 was the giving of a defective reasonable doubt instruction which suggested a  
6 higher degree of doubt than is required for acquittal and allowed a finding of guilt  
7 based on a degree of proof below that required by the Due Process Clause. See  
8 Sullivan, supra, citing Cage v. Louisiana, 498 U.S. 39, 111 S.Ct. 328 (1990). But  
9 in this appeal, Hidalgo does not challenge the reasonable doubt instruction as  
10 defective or unconstitutional. See 24 AA 4482-3. Nor does he challenge  
11 Instruction #40 as an incorrect or unconstitutional statement of law regarding the  
12 consideration of co-conspirator statements. 24 AA 4487. Instead, Hidalgo's claim  
13 of error is that only a judge and not a jury may decide the admissibility of co-  
14 conspirator statements and that instructing on more than one burden of proof may  
15 have confused the jury.

16 Unlike the failure to correctly instruct the jury on reasonable doubt which  
17 results in no constitutional verdict that can be reviewed, the perceived risk that a  
18 jury may have confused two correct statements of law is not the kind of error  
19 which categorically vitiates all the jury's findings. The alleged possibility of juror  
20 confusion is contrary to the presumption that a jury follows the district court's  
21 instructions. Weeks v. Angelone, 528 U.S. 225, 234, 120 S.Ct. 727, 733 (2000).  
22 For example, this Court has recognized that jurors are intellectually capable of  
23 properly following instructions regarding the limited use of prior bad act evidence.  
24 Tavares v. State, 117 Nev. 725, 733, 30 P.3d 1128, 1133 (2001). Also, jurors are  
25 most certainly intellectually capable of following a clear instruction directing that  
26 they must refrain from considering testimonial hearsay in deciding a capital  
27 defendant's death eligibility, but that they may nonetheless consider such evidence  
28 in deciding whether to actually impose a death sentence on a defendant whom they

1 found eligible to receive it. Summers v. State, 122 Nev. 1326, 1333-34, 148 P.3d  
2 778, 783 (2006).

3 It stands to reason then, that jurors are capable of distinguishing between  
4 finding slight evidence of a conspiracy before considering coconspirator statements  
5 against Hidalgo and finding proof beyond a reasonable doubt of a conspiracy  
6 before conviction. Where jury instructions provided a correct definition of  
7 reasonable doubt, a prosecutor's highly improper mischaracterization of reasonable  
8 doubt in closing argument as being "if you have a gut feeling he's guilty, he's  
9 guilty" was not prejudicial error and did not warrant a mistrial. Randolph v. State,  
10 117 Nev. 970, 36 P.3d 424 (2001). The risk of juror confusion on the reasonable  
11 doubt standard in Randolph was far greater than the present case because of the  
12 unconstitutional argument lowering the burden of proof and yet it still did not  
13 result in structural error. Unlike the unconstitutional instruction in Sullivan, the  
14 risk of juror confusion in Randolph and the present case does not "categorically  
15 vitiate all the jury's findings," nor does it "always" or "necessarily" produce an  
16 unreliable or unfair result. That's because the error is not intrinsic to the  
17 framework of the case, but is dependent upon external juror misapplication of  
18 accurate jury instructions.

19 Nor does the alleged error "defy analysis by 'harmless-error' standards" by  
20 affecting the entire adjudicatory framework. To the contrary, the Panel was able to  
21 assess the likelihood of juror confusion and conduct a harmless error analysis  
22 thereby belying any claim of structural error. In rejecting the argument that the  
23 jury was confused, the Panel reasoned that the complained of instruction was only  
24 1 of 52 that were given, but that "reasonable doubt" was repeated in 10 of the  
25 instructions. Hidalgo's counsel also emphasized the reasonable doubt standard in  
26 his closing argument while the State made no mention at all of the "slight  
27 evidence" instruction. Finally, the Panel reasoned that because a jury is presumed  
28 to follow instructions and because Instruction #40 on its face did not actually



1 undermine the reasonable doubt standard, any error was harmless. The mere fact  
2 that the Panel was capable of reviewing the likelihood of juror confusion  
3 demonstrates any error was not structural.

4 While determining guilt beyond a reasonable doubt is the main function of a  
5 jury in a criminal case, it is not the only determination the jury is called upon to  
6 make. Nevada precedent requires a criminal jury to be instructed on lesser burdens  
7 of proof in making certain evidentiary determinations. For instance, juries are  
8 routinely asked to determine the corroboration of accomplice testimony by  
9 independent evidence which “tends to connect” the defendant with the commission  
10 of the offense charged. Howard v. State, 102 Nev. 572, 577, 729 P.2d 1341, 1344  
11 (1986); 24 AA 4489. The “tends to connect” standard is no less capable of causing  
12 jury confusion than the “slight evidence” standard at issue in this case, but does not  
13 result in structural error. To the contrary, the instruction must be given because the  
14 question of whether a witness was an accomplice is “clearly an issue for the jury to  
15 decide.” Id.

16 Recently, this Court observed that “[a]lthough the district court is charged  
17 with making this preliminary determination [of admissibility of text messages],  
18 because authentication is essentially a question of conditional relevancy, the jury  
19 ultimately resolves whether evidence admitted for its consideration is that which  
20 the proponent claims.” Rodriguez v. State, 273 P.3d 845, 849 (Nev. 2012). When  
21 the relevancy of evidence depends upon the fulfillment of a condition of fact (ie.,  
22 the existence of a conspiracy), “the judge shall instruct the jury to consider the  
23 issue and to disregard the evidence unless they find the condition was fulfilled.”  
24 NRS 47.070. The jury’s role in determining relevant facts which bear on the  
25 admissibility of evidence is permissible under Nevada law.

26 Juries in criminal cases are also sometimes instructed on lesser burdens of  
27 proof of preponderance or clear and convincing evidence in regards to a  
28 defendant’s burden of proving insanity or other similar affirmative defenses. The

1 Supreme Court has rejected the idea that instructing on multiple burdens of proof  
2 will confuse a jury into convicting on a standard less than proof beyond a  
3 reasonable doubt:

4 It is contended that the instructions may have confused the jury as to  
5 the distinction between the State's burden of proving premeditation  
6 and the other elements of the charge and appellant's burden of proving  
7 insanity. We think the charge to the jury was as clear as instructions to  
8 juries ordinarily are or reasonably can be, and, with respect to the  
9 State's burden of proof upon all the elements of the crime, the charge  
10 was particularly emphatic. Juries have for centuries made the basic  
11 decisions between guilt and innocence and between criminal  
responsibility and legal insanity upon the basis of the facts, as  
revealed by all the evidence, and the law, as explained by instructions  
detailing the legal distinctions, the placement and weight of the  
burden of proof, the effect of presumptions, the meaning of intent, etc.  
We think that to condemn the operation of this system here would be  
to condemn the system generally. We are not prepared to do so.

12 Leland v. State of Or., 343 U.S. 790, 800, 72 S. Ct. 1002, 1008, (1952).  
13 Instructing a criminal jury on evidentiary standards and burdens of proof less than  
14 reasonable doubt is not prejudicial per se. Juries are capable of correctly applying  
15 more than one burden of proof in making different factual determinations.

16 Hidalgo's reliance upon federal authority condemning the use of the "slight  
17 evidence" standard is also unavailing. Aside from being mere dicta, the issue in  
18 Huezo was the sufficiency of the evidence for conspiracy and the case had nothing  
19 at all to do with instructing a jury on the admissibility of co-conspirator statements.  
20 United States v. Huezo, 546 F.3d 174 (2<sup>nd</sup> Cir. 2008). The concurring judges did  
21 not believe that "slight evidence" should be part of the substantive definition of the  
22 elements of conspiracy out of concern it would undermine the reasonable doubt  
23 standard. Huezo, 546 F.3d at 184-89. Likewise, the admissibility and  
24 consideration of coconspirator statements was not at issue in Partin, where the  
25 "slight evidence" language appeared in an instruction to the jury on the definition  
26 and elements of the substantive crime of conspiracy. United States v. Partin, 552  
27 F.2d 621 (1977).

1 Unlike the practice in some federal courts, Nevada does not use the “slight  
2 evidence” standard when instructing a jury on the substantive law of conspiracy  
3 nor did such instructions in the present case contain such language. 24 AA 4462-  
4 65. Instead, the “slight evidence” language appears only in Instruction #40 which  
5 informs the jury when it may consider co-conspirator statements as evidence  
6 against Hidalgo. McDowell v. State, 103 Nev. 527, 529, 746 P.2d 149 (1987).  
7 Most federal courts stopped instructing juries on the admissibility of coconspirator  
8 statements in accord with changes in the federal rules of evidence in 1975. See  
9 Ethel R. Alston, *Admissibility of Statement by Co-Conspirator Under Rule*  
10 *801(d)(2)(e) of Federal Rules of Evidence*, 44 A.L.R. Fed. 627 (1979). Although  
11 largely abandoned, the practice was uniformly and consistently found to have been  
12 harmless error:

13 No court has held, however, that an instruction that gives the jury an  
14 opportunity to second-guess the court's decision to admit  
15 coconspirator declarations, otherwise inadmissible as hearsay, is  
16 reversible error prejudicing the defendant. To the contrary, it has been  
generally held that, so long as the court fulfills its responsibility to  
make the initial determination, such a charge only provides a windfall  
to the defendant.

17 United States v. Cont'l Group, Inc., 603 F.2d 444, 459 (3d Cir. 1979). Likewise,  
18 the Fifth Circuit has held that while it was erroneous to allow a jury to decide the  
19 admissibility of coconspirator hearsay, such an error does not affect a defendant's  
20 substantial rights and is not grounds for reversal. United States v. Sutherland, 656  
21 F.2d 1181, 1200 (5th Cir. 1981).

22 Even if Hidalgo's jury were somehow confused and convicted him under an  
23 unconstitutional “slight evidence” standard, any prejudice is limited to the  
24 conspiracy count and fails to vitiate “all” the jury's findings further demonstrating  
25 any error is not structural. Instruction #40 was limited to the jury's consideration  
26 of coconspirator statements and the existence and membership in a conspiracy.  
27 Therefore, any unlikely confusion of the burden of proof was limited to the crime  
28 of conspiracy. Instruction #40 makes no mention at all of the crime of murder.

1 Significantly, the jury acquitted Hidalgo of conspiracy to commit murder and  
2 convicted instead on conspiracy to commit a battery. 24 AA 4500. Therefore, in  
3 convicting Hidalgo of second degree murder, the jury did so on a theory other than  
4 conspiracy liability. The jury's findings and verdict as to second degree murder  
5 remain entirely unaffected by any alleged confusion about slight evidence of a  
6 conspiracy.

7 Regardless of whether the en banc court elects to weigh in on the continued  
8 viability of Instruction #40 in Nevada, its use can in nowise be deemed prejudicial  
9 per se due to the very narrow and limited definition the Supreme Court has given  
10 to structural error.

11 WHEREFORE, the State respectfully requests that the petition for en banc  
12 reconsideration be denied.

13 Dated this 2<sup>nd</sup> day of October, 2012.

14 Respectfully submitted,

15 STEVEN B. WOLFSON  
16 Clark County District Attorney  
Nevada Bar #001565

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18 BY /s/ Steven S. Owens

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1 **CERTIFICATE OF COMPLIANCE**

- 2 **1. I hereby certify** that this petition for rehearing/reconsideration or answer  
3 complies with the formatting requirements of NRAP 32(a)(4), the typeface  
4 requirements of NRAP 32(a)(5) and the type style requirements of NRAP  
5 32(a)(6) because it has been prepared in a proportionally spaced typeface using  
6 Microsoft Word 2003 in 14 point font of the Times New Roman style.  
7 **2. I further certify** that this petition complies with the page or type-volume  
8 limitations of NRAP 40 or 40A because it is either proportionately spaced, has  
9 a typeface of 14 points or more and contains no more than 4,667 words or does  
10 not exceed 10 pages.

11 Dated this 2<sup>nd</sup> day of October, 2012.

12 Respectfully submitted,

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1                                   **CERTIFICATE OF SERVICE**

2           I hereby certify and affirm that this document was filed electronically with  
3 the Nevada Supreme Court on October 2, 2012. Electronic Service of the foregoing  
4 document shall be made in accordance with the Master Service List as follows:

5                                   CATHERINE CORTEZ MASTO  
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IN THE SUPREME COURT OF THE STATE OF NEVADA

LUIS A, HIDALGO, JR.

Appellant,

vs.

THE STATE OF NEVADA

Respondent.

Electronically Filed  
Oct 09 2012 03:06 p.m.  
Tracie K. Lindeman  
Clerk of Supreme Court  
CASE NO. 54209

**LUIS A. HIDALGO, JR.'S MOTION FOR PERMISSION TO FILE A  
REPLY TO ANSWER TO PETITION FOR *EN BANC*  
RECONSIDERATION**

COMES NOW Appellant, Luis Hidalgo, Jr. by and through counsel, Dominic P. Gentile, Esq., of the law firm of Gordon Silver, and files this Motion for Permission to File a Reply to Answer to Petition for *En Banc* Reconsideration.

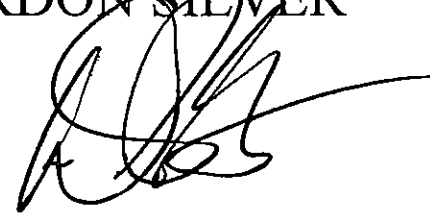
After the panel affirmed his conviction, Mr. Hidalgo, Jr. brought a Petition of En Banc Reconsideration on August 10, 2012. Thereafter, on September 19, 2012, this Court entered an Order directing the State to bring an Answer to the Petition. The State submitted its Answer on October 2, 2012.

Nevada Rule of Appellate Procedure 27(a) permits a moving party to request an order or "other relief." It is respectfully requested that this Court allow Mr. Hidaglo Jr. to bring a limited 11 page Reply to the State's Answer to the Petition For *En Banc* Reconsideration. It is necessary that Mr. Hidalgo Jr. be afforded the opportunity to reply to the State's Answer because there were misstatements of law advanced by the State that must be rectified before this issue of first impression

1 can be decided.

2  
3 Dated this 9<sup>th</sup> day of October, 2012.

4 GORDON SILVER

5 

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I further certify that this brief complies with the page or type-volume limitations of NRAP 40 or 40A because it does not exceed ten (10) pages.

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1  
2 IN THE SUPREME COURT OF THE STATE OF NEVADA  
3

4 LUIS A, HIDALGO, JR.

5 Appellant,

6 vs.

7 THE STATE OF NEVADA

8 Respondent.

CASE NO. 54209  
Electronically Filed  
Oct 12 2012 12:12 p.m.  
Tracie K. Lindeman  
REPLY TO ANSWER TO  
PETITION FOR EN BANC  
RECONSIDERATION PURSUANT  
TO NRAP 40A

9  
10 INSTRUCTION #40 WAS STRUCTURAL ERROR AND  
11 THEREFORE REVERSIBLE *PER SE* UNDER POST-BOLDEN NEVADA  
12 CONSPIRACY JURISPRUDENCE

13 I. The Constitutions of the United States of America and the State of  
14 Nevada Require that the Underlying Conspiracy and Its Membership  
15 Be Proven Beyond a Reasonable Doubt to Support Vicarious Liability  
16 for a Coconspirator's General Intent Offenses

17 The State takes the position that "[e]ven if Hidalgo's jury were somehow  
18 confused and convicted him under an unconstitutional 'slight evidence' standard,  
19 any prejudice is limited to the conspiracy count" and did not impact the Second  
20 Degree Murder conviction.<sup>1</sup> The State says that because the jury's verdict  
21 "acquitted [the Petitioner] of conspiracy to commit murder and convicted instead  
22 on conspiracy to commit battery" this somehow demonstrates that the conviction  
23 for second degree murder was of necessity "on a theory other than conspiracy  
24 liability".<sup>2</sup> In addition to begging the question of how the State could make such a  
25 statement, it demonstrates the State's lack of comprehension of the law and  
26 mechanics that must be employed when determining vicarious liability for the acts  
27 of coconspirators in Nevada. However, it provides an ideal analytical starting

28 <sup>1</sup> See Answer to Petition for En Banc Reconsideration, page 10, line 22 to page 11,  
line 6.

<sup>2</sup> See Answer to Petition for En Banc Reconsideration, page 11, lines 1 to 6.

1 point to demonstrate why Instruction #40 requires *per se* reversal in this case. In  
2 short, if the conspiracy conviction was tainted by the “slight evidence” instruction,  
3 any general intent crime conviction inextricably linked to it falls like dominoes.  
4 See Skilling v. United States, \_\_\_ U.S. \_\_\_, 130 S. Ct. 2896, 2935 (2010).

5 In recent years this Court has undertaken the task of studying and clarifying  
6 the law of vicarious liability for the criminal activity of others. In Sharma v. State,  
7 118 Nev. 648, 56 P. 3d 868 (2002) this Court held that to be found liable as an  
8 aider and abettor under NRS 193.330(1) for any specific intent offense, one is  
9 required to possess the intent to accomplish the offense and the State must prove it  
10 beyond a reasonable doubt. Id. 56 P. 3d at 872, fn. 17. There was no problem in  
11 Sharma with the burden of proof instruction, only the instruction on the elements  
12 of aiding and abetting for a specific intent offense. Therefore, the Sharma Court  
13 used a harmless error analysis and, noting that the defendant spent a good deal of  
14 his time at trial contesting specific intent, deemed it harmful and reversible error.  
15 Id. 56 P. 3d at 873-834. Here, Luis A. Hidalgo Jr.’s defense was that he had neither  
16 a desire for, knowledge of or involvement in the harm to Timothy Hadland until  
17 after it occurred. Both at the trial and at the oral argument before the panel of this  
18 Court, the State conceded its case was entirely based upon vicarious liability once  
19 the First Degree Murder and Conspiracy to Commit Murder charges failed.<sup>3</sup>

20 In Bolden v. State, 121 Nev. 908, 124 P. 3d 191 (2005), this Court decided

21 <sup>3</sup> See Transcript of Oral Argument by State, 23 AAA 4262 (“if you really think that  
22 the only plan was to beat and the consequences naturally tend to destroy...that’s  
23 your second degree murder”); 23 AAA 4263 (“...the State’s not arguing that...Mr.  
24 H physically pulled the trigger”); 23 AAA 4265 (“...each member of the criminal  
25 conspiracy is liable, responsible, for each act and bound by each declaration of  
26 every other member”); 23 AAA 4266-4267 (“Then there are general intent  
27 crimes...you’ll have the instructions with you on the definition...Under a  
28 conspiracy for a general intent crime, the liability is different...because for a  
general intent crime, a conspirator’s legally responsible for the crime that  
follows...The probable and natural consequences of the object of the  
conspiracy...they are responsible for that, even if its past the original plan...even if  
it was not intended as part of the original plan, and even ...if the conspirator was  
not present at the time, because you run that risk when you conspire with people to  
go out and beat somebody..”);

1 an issue that was not directly raised by the litigants. In Bolden the defendant  
2 challenged the sufficiency of the evidence upon which his conviction was based.  
3 The Court found it necessary to *sua sponte* examine the jury instructions regarding  
4 the State's theory of vicarious coconspirator liability and concluded that they did  
5 not accurately state the law and "that the error cannot be held harmless under the  
6 circumstances of this case." Id. 124 P. 3d at 193. Once again the instructions on  
7 burden of proof were not at issue. It was the "probable and natural consequences of  
8 the object of the conspiracy" language in the instruction dealing with liability for a  
9 coconspirator's acts that was scrutinized and rejected. Id. 124 P. 3d at 196.

10 In Bolden this Court declined to adopt Pinkerton v. United States, 328 U.S.  
11 640, 66 S. Ct. 1180 (1946) which holds that "reasonable foreseeability" that  
12 criminal acts which take place in pursuit of the execution of the object of a  
13 conspiracy is enough to hold a coconspirator criminally liable for those acts even if  
14 (1) they were specific intent offenses; and, (2) the person being held vicariously  
15 liable never actually intended that they occur. The Bolden Court expressly rejected  
16 Pinkerton's 60 years of progeny and held that where a specific intent crime is  
17 either the object of the conspiracy or occurs in its pursuit, a coconspirator who did  
18 not personally take part in the offense as a principal may only be vicariously liable  
19 for it if the State can prove beyond a reasonable doubt that he had the specific  
20 intent to commit such a substantive offense. Id. 124 P. 3d at 200. On the other  
21 hand, if the crime for which vicarious liability is sought is one of general intent, the  
22 natural and probable consequences doctrine remains applicable in Nevada. Id. 124  
23 P. 3d at 201. It is that latter aspect of Bolden that gives rise to the problem with  
24 Instruction #40 in this case and requires reversal.

25 In this case the jury was properly instructed as to the need to find that the  
26 defendants had the specific intent to commit murder in order to find them guilty of  
27  
28

1 Count One – Conspiracy to Commit Murder<sup>4</sup> and Count Two’s First Degree  
2 Murder component.<sup>5</sup> The jury was also instructed properly as to the lesser included  
3 offenses in both of the Counts in the Indictment. The jury was made aware that it  
4 could find that the object of the conspiracy alleged in Count One was not murder  
5 but rather either of two general intent offenses: (1) to commit a battery with a  
6 deadly weapon or resulting in substantial bodily harm<sup>6</sup> or, (2) to commit a simple  
7 battery.<sup>7</sup> The jury was also made aware that, absent proof of a defendant’s specific  
8 intent to commit murder as the object of the conspiracy or as a principal/aider and  
9 abettor, First Degree Murder was not an available verdict.<sup>8</sup>

10 It is clear from the jury’s verdict that it rejected the proposition that the State  
11 had proven – even under the “slight evidence” standard – that the object of the  
12 conspiracy and/or the substantive offense were accompanied by the specific intent  
13 to commit murder. 24 AAA 4500-4501<sup>9</sup>. It is equally clear that the jury found that  
14 the object of the conspiracy was a general intent offense – either battery with a  
15 deadly weapon or with substantial bodily harm. 24 AAA 4500. The logical  
16 structure of the jury instructions and the analytical path that they set forth  
17 mandated that, because the jury found that the object of the conspiracy was a  
18 general intent offense, it could also find the defendant guilty of Second Degree  
19

20 <sup>4</sup> See Jury Instructions #4 (24 AAA 4450), #15 (24 AAA 4462), #18 (24 AAA  
21 4465), #19 (24 AAA 4466), #22 (24 AAA 4469), #23 (24 AAA 4470) and Verdict  
(24 AAA 4500).

22 <sup>5</sup> See Jury Instructions #4 (24 AAA 4450), #12 (24 AAA 4459), #19 (24 AAA  
4466) and Verdict (24 AAA 4501).

23 <sup>6</sup> See Jury Instructions #4 (24 AAA 4451), #18 (24 AAA 4465), #19 (24 AAA  
24 4466), #22 (24 AAA 4469), #23 (24 AAA 4470), #25 (24 AAA 4472), #29 (24  
AAA 4476) and Verdict (24 AAA 4501).

25 <sup>7</sup> See Jury Instructions #4 (24 AAA 4451), #18 (24 AAA 4465), #19 (24 AAA  
26 4466), #22 (24 AAA 4469), #24 (24 AAA 4471), #25 (24 AAA 4472), #29 (24  
AAA 4476) and Verdict (24 AAA 4501).

27 <sup>8</sup> See Jury Instructions #12 (24 AAA 4459), #18 (24 AAA 4465), #19 (24 AAA  
4466), #20 (24 AAA 4467), #22 (24 AAA 4469) and #29 (24 AAA 4476).

28 <sup>9</sup> Attached hereto as Exhibit “A”.

1 Murder employing the natural and probable consequences doctrine. The jury  
2 followed that structured path to that conclusion.<sup>10</sup> The instructions had a domino  
3 effect, as they do in all conspiracy cases. If the jury finds guilt as to the conspiracy  
4 it need do nothing more other than determine if the substantive charges were its  
5 “natural and probable consequences” and therefore “foreseeable” in order to  
6 convict a coconspirator for vicarious liability.

7 What the jury did here is consistent with the law of vicarious liability for the  
8 acts of a coconspirator announced in Bolden. It represents the “trial mechanism” as  
9 that term was used by the United States Supreme Court in Arizona v. Fulminante,  
10 499 U.S. 279, 309, 111 S. Ct. 1246 (1991), as it applies to conspiracy cases with  
11 associated substantive charges. In post-Bolden conspiracy cases in Nevada, once a  
12 finding of guilt as a member of a conspiracy is made, the analysis of the vicarious  
13 liability component for general intent offenses that are committed as the “probable  
14 and natural consequences” of the object of the conspiracy is by its nature  
15 “mechanical” in application, in contradistinction to specific intent offenses that are  
16 objects of or performed in furtherance of the object of the conspiracy. The latter  
17 require the jury to analyze evidence of the specific intent of the passive  
18 coconspirator. However, in deciding Bolden this Court clearly did not intended that  
19 the determination of the existence and membership of a conspiracy that in turn  
20 permits the application of the natural and probable consequences doctrine to lead  
21 to a conviction for the general intent crime of Second Degree Murder on a  
22 vicarious liability theory, could ever be based upon anything other than proof  
23 beyond a reasonable doubt.

24 The law requires that the entry point to the analytical path of vicarious liability  
25 set out in Bolden be a determination – *employing the beyond a reasonable doubt*  
26 *standard* – of the existence of the conspiracy and the defendants membership in it.

27  
28 <sup>10</sup> See Instructions #19 (24 AAA 4466) and #22 (24 AAA 4469).

1 United States v. Chavez, 549 F. 3d 119, 125 (2<sup>nd</sup> Cir. 2008) (*citing United States v.*  
2 Huezo, 546 F. 3d 174, 180 (2<sup>nd</sup> Cir. 2008). *See In re Winship*, 397 U.S. 358, 90  
3 S.Ct. 1068, 1071 (1970); Cage v. Louisiana, 498 U.S. 39, 111 S.Ct. 328, 329  
4 (1990)(due process clause requires *every fact necessary to constitute the crime be*  
5 *proven beyond a reasonable doubt*). Instruction #40 placed the Court's *imprimatur*  
6 on employing the "slight evidence" standard for that determination. Any  
7 instruction - particularly one that is "unnecessary"<sup>11</sup> because it has nothing to do  
8 with the jury's function or duty in the trial - that places that entryway at a point  
9 lower than a beyond a reasonable doubt threshold, damages the constitutionally  
10 necessary structure of the analytical path for determining vicarious liability.  
11 Moreover, because of the inclusion of Instruction #40, it is impossible to conduct  
12 any analysis that can result in substantial certainty that (1) its "slight evidence"  
13 standard did not act as the basis for the finding by the jury of the existence of and  
14 Petitioner's membership in the conspiracy to commit a general intent offense, and  
15 (2) that a subsequent 'domino effect' flowing from that finding did not result in the  
16 verdict as to the Second Degree Murder charge. A clear and non-confusing  
17 instruction that only the beyond a reasonable doubt standard should be applied by  
18

19 <sup>11</sup> "While we agree that it was unnecessary to instruct the jury regarding the  
20 evidentiary threshold applied by a district court in admitting coconspirator  
21 statements, we disagree that the jury was confused as to the State's burden of  
22 proof." See Order of Affirmance, page 8. At the oral argument before the panel of  
23 this Court, counsel for Luis A. Hidalgo Jr. called its attention to the fact that he  
24 intentionally did NOT move to strike the coconspirators statements either at the  
25 end of the State's case in chief or at the close of evidence, thus conceding their  
26 admissibility on the "slight evidence" standard of McDowell v. State, 103 Nev.  
27 527, 529, 746 P.2d 149 (Nev. 1987). This case is NOT, as the State suggests in its  
28 Answer at page 9, about the "admissibility and consideration of coconspirator  
statements". Therefore, United States v. Huezo, 546 F.3d 174 (2d Cir. 2008),  
United States v. Partin, 552 F.. 2d 621 (5<sup>th</sup> Cir. 1977) and the other federal cases  
presented to this Court by Petitioner Hidalgo Jr. provide influential authority.



1 the jury to each and every element of a criminal offense before guilt can be found  
2 is a “basic protection” without which “a criminal trial cannot reasonably serve its  
3 function as a vehicle for determination of guilt or innocence...and no criminal  
4 punishment may be regarded as fundamentally fair.” Rose v. Clark, 478 U.S. 570-  
5 577-578, 106 S.Ct. 3101 (1986)(internal citations omitted). Anything less must  
6 necessarily result in having the effect of substantially reducing the State’s burden  
7 of proof on the substantive count(s) for which one found to have been a member of  
8 the conspiracy is being scrutinized by the jury for vicarious liability. It is precisely  
9 for that reason that, in the narrow context of this case and others similarly situated  
10 wherein vicarious liability for general intent offenses flows from the conspiracy  
11 conviction, the giving on Instruction #40 is reversible *per se*.

## 12 **II. The Presence of Reversible Error *per se* is Inescapable<sup>12</sup>**

13 Whether an error is mere “trial error” which can be subject to harmless error  
14 review or rises to “structural error” which is reversible *per se* is determined not  
15 only by the difficulty of assessing the effect of the error but also by analyzing the  
16 “fundamental unfairness” of the error, or the “irrelevance of harmlessness” test.  
17 Structural error need not “‘always’ or ‘necessarily’ render a trial fundamentally  
18 unfair and unreliable.” It must “affec[t] the framework within which the trial  
19 proceeds.” United States v. Gonzalez-Lopez, 548 U.S. 140, 126 U.S. 2557, 2563-  
20 2564 (2006). It cannot be gainsaid that such is the situation here.

21 The issue before the Court in this case is the most fundamental aspect of the  
22 framework of a criminal trial in which a conspiracy conviction can lead to  
23 vicarious liability for a general intent offense: the necessity of being certain that  
24 the burden of proof employed by the jury in finding the defendant guilty of the  
25 predicate conspiracy was “beyond a reasonable doubt”. In Sullivan v. Louisiana,

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27 <sup>12</sup> As this Court directed the State to address the “issue of whether the giving of  
28 Jury Instruction 40 was *per se* reversible error”, this Reply will limit itself to that  
issue.

1 508 U.S. 275, 113 S.Ct. 2078 (1993) the United States Supreme Court held that the  
2 Sixth Amendment to the Constitution of the United States “includes, of course, as  
3 its most important element, the right to have the jury, rather than the judge, reach  
4 the requisite finding of ‘guilty.’” Id. 113 S.Ct. at 2080. The Due Process Clause of  
5 the Fifth Amendment requires that the state prosecutor bear the burden of proving  
6 all elements of the offense charged by persuading the fact-finder “beyond a  
7 reasonable doubt” of the facts necessary to establish each of those elements. Id. at  
8 2080. “It would not satisfy the Sixth Amendment to have a jury determine that the  
9 defendant is *probably* guilty..” Id. at 2081. The instruction at issue in Sullivan was  
10 identical with the one given in Cage. Id. at 2080. In Cage the charge to the jury did  
11 at one point contain an accurate instruction as to beyond a reasonable doubt being  
12 the required standard of proof. Cage, at 111 S. Ct. at 329. Thus the record before  
13 the United States Supreme Court in both cases contained an accurate instruction as  
14 to the standard but an additional instruction that created a problem with  
15 ascertaining what the jury actually did with them when viewed together. The  
16 Sullivan Court made an attempt to apply the harmless error analysis in Chapman v.  
17 California, 386 U.S. 18, 87 S.Ct. 824 (1967) but found it impossible. Sullivan  
18 stated:

19 “... the question it instructs the reviewing court to consider is not what effect  
20 the constitutional error might generally be expected to have upon a reasonable  
21 jury, but rather what effect it had upon the guilty verdict in the case at hand.  
22 Harmless-error review looks...to the basis on which ‘the jury *actually rested*  
23 its verdict’. The inquiry, in other words, is not whether, in a trial that occurred  
24 without the error, a guilty verdict would surely have been rendered, but  
25 whether the guilty verdict actually rendered in *this* trial was surely  
26 unattributable to the error. That must be so, because to hypothesize a guilty  
27 verdict that was never in fact rendered – no matter how unescapable the  
28 findings to support that verdict might be – would violate the jury-trial  
guarantee.”

Sullivan, 113 S.Ct. at 2081-2082.

In finding the situation before it defied harmless error analysis, the Sullivan

1 Court went on to hold that “the essential connection to a ‘beyond a reasonable  
2 doubt’ factual finding cannot be made where the instructional error consists of a  
3 misdescription of the burden of proof which vitiates *all* the jury’s findings. A  
4 reviewing court can only engage in pure speculation – its view of what a  
5 reasonable jury would have done. And when it does that, ‘the wrong entity judge[s]  
6 the defendant guilty.” *Id.* at 2082. By directing the jury to apply the “slight  
7 evidence” standard as to the existence of the conspiracy and the defendants  
8 membership in it – over the objection of the defendants – the record before this  
9 Court provides no safe harbor for any of the jury’s findings regarding the Second  
10 Degree Murder charges. Throughout these proceedings the State has never  
11 suggested that Luis A. Hidalgo Jr.’s liability for that offense was on any other  
12 theory than vicarious liability. The evidence is uncontroverted that he was not at  
13 the scene of the homicide.

14 A jury instruction that undercuts a proper beyond a reasonable doubt  
15 instruction results in vitiating its efficacy. See Cool v. United States, 409 U.S.  
16 100, 102-103, 93 S. Ct. 354 (1972); Sandstrom v. Montana, 442 U.S. 510, 521, 99  
17 S.Ct. 2450 (1979). The United States Court of Appeals for the Ninth Circuit has  
18 recently applied Sullivan under circumstances wherein a proper beyond a  
19 reasonable doubt instruction was rendered ineffective by another instruction that  
20 resulted in lowering the burden of proof. Doe v. Busby, 661 F. 3d 1101 (9<sup>th</sup> Cir.  
21 2011). The jury in Doe was given a correct beyond a reasonable doubt instruction  
22 but was also given an instruction that allowed it to consider evidence of prior  
23 uncharged crimes on a preponderance of the evidence standard as to whether they  
24 occurred and told that, if it found that they did occur, the instructions permitted  
25 them to lead to a conviction of murder. The Ninth Circuit applied structural error  
26 analysis and affirmed the district court’s grant of a writ of habeas corpus. In the  
27 course of doing so, the Ninth Circuit conducted a plenary review of prior United  
28

1 States Supreme Court and Ninth Circuit authority following the Sullivan decision.  
2 It held:

3 “Misstating the correct burden of proof is in the category of errors that cannot  
4 be balanced or offset by the consideration of competing evidence. Not only is  
5 the judge’s misstatement of the burden of proof not an evidentiary issue for  
6 the fact finder, the error occurs after the taking of evidence and necessarily  
7 impacts the whole of the trial because the judge has allowed the properly  
8 received evidence to be filtered through ... “an unconstitutional lens...When  
9 the jury heard the preponderance instruction in tandem with the reasonable  
10 doubt instruction and without a reconciliation from the trial court, the jurors  
were left to guess what standard to apply...While we presume jurors follow  
the instructions they are given, we cannot equally assume they can sort out  
legal contradictions.”

11 Doe v. Busby, 661 F. 3d 1001, 1022-1023(emphasis added).

12 This Court has recognized the validity of that last observation made by the  
13 Ninth Circuit in Doe. See Culverson v.State, 106 Nev. 484, 488, 797 P. 2d 238,  
14 240 (1990) ("a juror should not be expected to be a legal expert"). Instruction #40  
15 was a confusing and misleading statement of inapplicable law. Jury instructions  
16 that tend to confuse or mislead the jury are erroneous. Id. at 106 Nev. 488. Over  
17 the objection of the defendants, this jury was directed to consider the essential  
18 elements of the crime of conspiracy on less than a beyond a reasonable doubt  
19 standard. It was also instructed that if it found the defendants to be members of the  
20 conspiracy it could find them guilty of the general intent offenses that were its  
21 natural and probable consequences.

22 It is respectfully submitted that even had no objection been made to  
23 Instruction #40 this Court could have treated it as plain error and reversed without  
24 making a harmless error analysis. See United States v. Colon-Pagan, 1 F.3d 80 (1<sup>st</sup>  
25 Cir. 1993) (reversing under plain error doctrine where burden of proof erroneous).


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This Court should grant the Petition for Reconsideration En Banc, reverse the conviction of Luis A. Hidalgo Jr. and remand to the trial court for a new trial.

12. 

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(702) 796-5555  
Attorney for Appellant

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## CERTIFICATE OF COMPLIANCE

I hereby certify that this Reply to Petition for Rehearing *En Banc* complies with the formatting requirement of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft(r) Word 2010 in Times New Roman 14-pt.

I further certify that this brief complies with the page or type-volume limitations of NRAP 40 or 40A because it contains 3212 words or 262 lines of text..

DATED this 9<sup>th</sup> day of October, 2012.

GORDON SILVER



---

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**CERTIFICATE OF SERVICE**

The undersigned, an employee of Gordon Silver, hereby certifies that on the  
9 day of October, 2012, she served a copy of the Petition for Rehearing *En*  
*Banc*, by Electronic Service, in accordance with the Master Service List as follows:

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

  
ADELE L. JOHANSEN, an employee  
Of GORDON SILVER

# EXHIBIT “A”



1 VER

2 ORIGINAL

FILED IN OPEN COURT  
EDWARD A. FRIEDLAND  
CLERK OF THE COURT

FEB 17 2009

DISTRICT COURT  
CLARK COUNTY, NEVADA  
37. Denise Husted 3:05 pm  
DENISE HUSTED, DEPUTY

7 THE STATE OF NEVADA,

8 Plaintiff,

9 -vs-

10 LUIS HIDALGO, JR.,

11 Defendant.

CASE NO: C241394

DEPT NO: XXI

12  
13 VERDICT

14 We, the jury in the above entitled case, find the Defendant LUIS HIDALGO, JR., as  
15 follows:

16 COUNT 1 - CONSPIRACY TO COMMIT MURDER

17 (please check the appropriate box, select only one)

18 ☐ Guilty of Conspiracy To Commit Murder

19 ☒ Guilty of Conspiracy To Commit A Battery With A Deadly Weapon or  
20 Battery Resulting In Substantial Bodily Harm

21 ☐ Guilty of Conspiracy To Commit A Battery

22 ☐ Not Guilty

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We, the jury in the above entitled case, find the Defendant LUIS HIDALGO, JR., as follows:

**COUNT 2 - MURDER WITH USE OF A DEADLY WEAPON**

*(please check the appropriate box, select only one)*

- ☐ Guilty of First Degree Murder With Use of a Deadly Weapon
- ☐ Guilty of First Degree Murder
- ☒ Guilty of Second Degree Murder With Use of a Deadly Weapon
- ☐ Guilty of Second Degree Murder
- ☐ Guilty of Involuntary Manslaughter
- ☐ Not Guilty

DATED this 17 day of February, 2009

  
FOREPERSON

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

No. 54209

**FILED**

NOV 13 2012

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY *A. Inge*  
DEPUTY CLERK

ORDER DENYING EN BANC RECONSIDERATION

Having considered the petition on file herein, we have concluded that en banc reconsideration is not warranted. NRAP 40A. Accordingly, we

ORDER the petition DENIED.

*Douglas*, J.  
Douglas

*Gibbons*, J.  
Gibbons

*Hardesty*, J.  
Hardesty

*Pickering*, J.  
Pickering

*Parraguirre*, J.  
Parraguirre

CHERRY, C.J., with whom, SAITTA, J., agrees, dissenting:

We would grant en banc reconsideration of this matter. Although we can compel en banc reconsideration pursuant to NRAP 40A(f), we elect to dissent to this order because our votes would not change the ultimate outcome of this appeal.

Cherry, C.J.  
Cherry

Saitta, J.  
Saitta

cc: Hon. Valerie Adair, District Judge  
Gordon & Silver, Ltd.  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk

Supreme Court of the United States  
Office of the Clerk  
Washington, DC 20543-0001

William K. Suter  
Clerk of the Court  
(202) 479-3011

May 13, 2013

Clerk  
Supreme Court of Nevada  
Supreme Court Building  
201 S. Carson Street, Suite 201  
Carson City, NV 89701-4780

**FILED**

**MAY 15 2013**

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY *[Signature]*  
DEPUTY CLERK

Re: Luis Hidalgo, Jr., aka Luis A. Hidalgo  
v. Nevada  
No. 12-1104  
(Your No. 54209; 54272)

Dear Clerk:

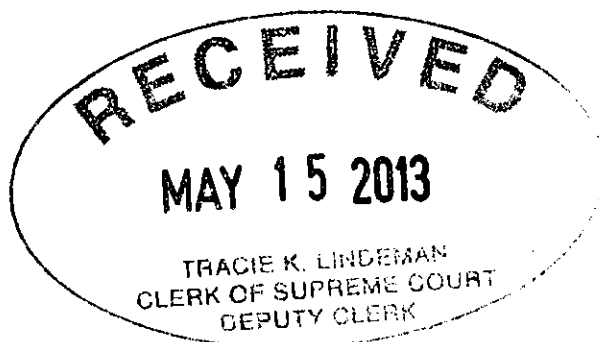
The Court today entered the following order in the above-entitled case:

The petition for a writ of certiorari is denied.

Sincerely,

*William K. Suter*

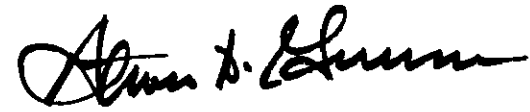
William K. Suter, Clerk



PA3582

HID PA03402

12-1442A



CLERK OF THE COURT

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

**EIGHTH JUDICIAL DISTRICT COURT**

**CLARK COUNTY, NEVADA**

LUIS HIDALGO, JR.,

Petitioner,

vs.

THE STATE OF NEVADA,

Respondent.

Case No.: 08C241394

Dept. No.: XXI

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

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

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

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

<u><b>VOLUME</b></u>	<u><b>DATE</b></u>	<u><b>DOCUMENT</b></u>	<u><b>BATES</b></u>
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



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

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

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<u>VOLUME</u>	<u>DATE</u>	<u>DOCUMENT</u>	<u>BATES</u>
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 29<sup>th</sup> day of February, 2016.

/s/ Margaret A. McLetchie  
MARGARET A. MCLETCHIE, Nevada Bar No. 10931  
**MCLETCHIE SHELL LLC**  
701 East Bridger Ave., Suite 520  
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Email: maggie@nvlitigation.com  
Attorney for Petitioner, Luis Hidalgo Jr.

McLetchie



ATTORNEYS AT LAW  
701 EAST BRIDGER AVE., SUITE 520  
LAS VEGAS, NV 89101  
(702)728-5300 (T) / (702)425-8220 (F)  
WWW.NVLITIGATION.COM

**CERTIFICATE OF SERVICE**

Pursuant to NRCP 5(b)(2)(B) I hereby certify that on the 29<sup>th</sup> day of February, 2016,  
I mailed a true and correct copy of the foregoing VOLUME XX: PETITIONER'S  
APPENDIX FOR SUPPLEMENTAL PETITION FOR WRIT OF HABEAS CORPUS by  
depositing the same in the United States mail, first-class postage pre-paid, to the following  
address:

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

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

Attorneys for Respondent

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

Case No. C241394

Dept. No. 21

FILED

DEC 31 2013

*Alfonso L. Johnson*  
CLERK OF COURT

IN THE 8<sup>th</sup> JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA  
IN AND FOR CLARK COUNTY

-oOo-

LUIS HIDALGO, JR.

Petitioner,

vs.

ISIDRO BACA, (WARDEN, NCC)

Respondent.

PETITION FOR WRIT  
OF HABEAS CORPUS  
(POST CONVICTION)

08C241394  
PWHC  
Petition for Writ of Habeas Corpus  
3313995



INSTRUCTIONS:

(1) This petition must be legibly handwritten or typewritten, signed by the petitioner and verified.

(2) Additional pages are not permitted except where noted or with respect to the facts which you rely upon to support your grounds for relief. No citation of authorities need be furnished. If briefs or arguments are submitted, they should be submitted in the form of a separate memorandum.

(3) If you want an attorney appointed, you must complete the Affidavit in Support of Request to Proceed in Forma Pauperis. You must have an authorized officer at the prison complete the certificate as to the amount of money and securities on deposit to your credit in any account in the institution.

(4) You must name as respondent the person by whom you are confined or restrained. If you are in a specific institution of the department of prisons, name the warden or head of the institution. If you are not in a specific institution of the department but within its custody, name the director of the department of prisons.

(5) You must include all grounds or claims for relief which you may have regarding your conviction or sentence. Failure to raise all grounds in this petition may preclude you from filing future petitions challenging your conviction and sentence.

RECEIVED

DEC 31 2013

CLERK OF THE COURT

(6) You must allege specific facts supporting the claims in the petition you file seeking relief from any conviction or sentence. Failure to allege specific facts rather than just conclusions may cause your petition to be dismissed. If your petition contains a claim of ineffective assistance of counsel, that claim will operate to waive the attorney-client privilege for the proceeding in which you claim your counsel was ineffective.

(7) When the petition is fully completed, the original and one copy must be filed with the clerk of the state district court for the county in which you were convicted. One copy must be mailed to the respondent, one copy to the attorney general's office, and one copy to the district attorney of the county in which you were convicted or to the original prosecutor if you are challenging your original conviction or sentence. Copies must conform in all particulars to the original submitted for filing.

#### PETITION

1. Name of institution and county in which you are presently imprisoned or where and how you are presently restrained of your liberty: NORTHERN NEVADA CORRECTIONAL CENTER,  
CARSON CITY, NEVADA

2. Name and location of court which entered the judgment of conviction under attack: EIGHTH JUDICIAL DISTRICT COURT,  
CLARK COUNTY, NEVADA

3. Date of judgment of conviction: July 10, 2009

4. Case number: C241394

5. (a) Length of sentence: TWO CONSECUTIVE LIFE TERMS  
IN PRISON

(b) If sentence is death, state any date upon which execution is scheduled: N/A

6. Are you presently serving a sentence for a conviction other than the conviction under attack in this motion?

Yes \_\_\_\_ No X

If "yes" list crime, case number and sentence being served at

this time: \_\_\_\_\_

7. Nature of offense involved in conviction being challenged: SECOND DEGREE MURDER w/USE OF DEADLY WEAPON;  
CONSPIRACY TO COMMIT BATTERY w/USE OF DEADLY WEAPON.

8. What was your plea? (check one)

(a) Not Guilty X

(b) Guilty \_\_\_\_\_

(c) Guilty but mentally ill \_\_\_\_\_

(d) Nolo Contendere \_\_\_\_\_

9. If you entered a plea of guilty or guilty but mentally ill to one count of an indictment or information, and a plea of not guilty to another count of an indictment or information, or if a plea of guilty or guilty but mentally ill was negotiated, give details: N/A

10. If you were found guilty after a plea of not guilty, was the finding made by: (check one)

(a) Jury X (b) Judge without a jury \_\_\_\_\_

11. Did you testify at the trial? Yes X No \_\_\_\_\_

12. Did you appeal from the judgment of conviction?

Yes X No \_\_\_\_\_

13. If you did appeal, answer the following:

(a) Name of court: NEVADA SUPREME COURT

(b) Case number or citation: 54209

(c) Result: ORDER OF AFFIRMANCE

(d) Date of result: APRIL 10, 2013

14. If you did not appeal, explain briefly why you did not:

N/A

15. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications or motions with respect to this judgment in any court, state or federal? Yes \_\_\_\_\_ No X

16. If your answer to No. 15 was "yes", give the following information:

(a) (1) Name of court:

N/A

(2) Nature of proceedings:

(3) Grounds raised:

(4) Did you receive an evidentiary hearing on your petition, application or motion?      Yes \_\_\_\_\_ No \_\_\_\_\_

(5) Result:

(6) Date of result:

(7) If known, citations of any written opinion or date of orders entered pursuant to such result:

(b) As to any second petition, application or motion, give the same information:

(1) Name of court:

(2) Nature of proceedings:



- (3) Grounds raised: \_\_\_\_\_
- (4) Did you receive an evidentiary hearing on your petition, application or motion? Yes \_\_\_\_ No \_\_\_\_
- (5) Result: \_\_\_\_\_
- (6) Date of result: \_\_\_\_\_
- (7) If known, citations of any written opinion or date of orders entered pursuant to such result: \_\_\_\_\_
- 

(c) As to any third or subsequent additional applications or motions, give the same information as above, list them on a separate sheet and attach.

(d) Did you appeal to the highest state or federal court having jurisdiction, the result or action taken on any petition, application or motion?

(1) First petition, application or motion?

Yes \_\_\_\_ No \_\_\_\_

Citation or date of decision: \_\_\_\_\_

(2) Second petition, application or motion?

Yes \_\_\_\_ No \_\_\_\_

Citation or date of decision: \_\_\_\_\_

(3) Third or subsequent petitions, applications or motions? Yes \_\_\_\_ No \_\_\_\_

Citation or date of decision: \_\_\_\_\_

(e) If you did not appeal from the adverse action on any petition, application or motion, explain briefly why you did not. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 1/2 by 11 inches attached to the petition. Your response may not exceed

five handwritten or typewritten pages in length.) N/A

---

17. Has any ground being raised in this petition been previously presented to this or any other court by way of petition for habeas corpus, motion, application or any other post-conviction proceeding? If so, identify: NO

(a) Which of the grounds is the same: N/A

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(b) The proceedings in which these grounds were raised:

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(c) Briefly explain why you are again raising these grounds. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 1/2 by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.)

N/A

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18. If any of the grounds listed in Nos. 23(a), (b), (c) and (d), or listed on any additional pages you have attached, were not previously presented in any other court, state or federal, list briefly what grounds were not so presented, and give your reasons for not presenting them. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 1/2 by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.) ALL GROUNDS HEREIN PROPERLY PRESENTED IN A HABEAS PETITION.

---

THIS PETITION IS TIMELY FILED.

Yes        No ~~X~~

21. Give the name of each attorney who represented you in the proceeding resulting in your conviction and on direct appeal:

DOMINIC GENTILE - TRIAL, SENTENCING, & APPEAL.

Yes        No X

HID PA03409

1 (a) Ground one:

2 SEE ACCOMPANYING SUPPORTING  
3 MEMORANDUM OF POINTS & AUTHORITIES.  
4  
5

6 Supporting Facts:

7 PETITIONER ADOPTS ALL FACTS, ARGUMENTS,  
8 AND ASSERTATIONS PRESENTED IN THE ACCOMPANYING  
9 MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT  
10 OF THE INSTANT PETITION.  
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Ground two:

Supporting Facts:

1 (c) Ground three:  
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7 Supporting Facts:  
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1 (b) Ground four:

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Ground five:

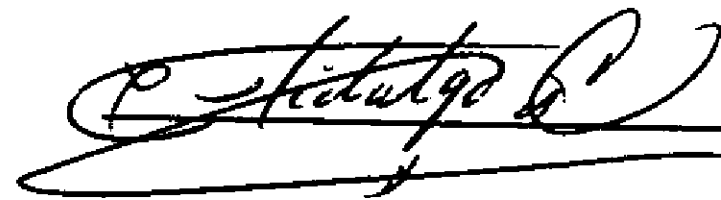
Supporting facts:



1 WHEREFORE, petitioner prays that the court grant petitioner  
2 relief to which he may be entitled in this proceeding.

3 EXECUTED at CARSON CITY NV, Nevada on the 26

4  
5 Day of December, 203.

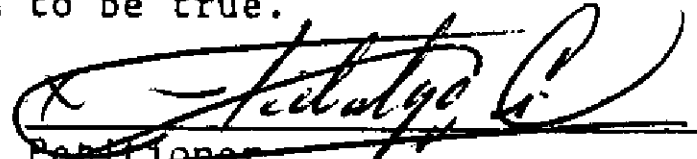
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10 Luis Hidalgo, Jr.

11 Petitioner, In Proper Person

VERIFICATION

Under penalty of perjury, the undersigned declares that he is the petitioner named in the foregoing petition and knows the contents thereof; that the pleading is true of his own knowledge, except as to those matters stated on information and belief, and as to such matters he believes them to be true.

  
Petitioner

CERTIFICATE OF SERVICE BY MAIL

I do certify that I mailed a true and correct copy of the foregoing PETITION FOR WRIT OF HABEAS CORPUS to the below addresses on this 26 day of December, 20 13, by placing same into the hands of prison law library staff for posting in the U.S. Mail, pursuant to N.R.C.P. 5:

NEVADA ATTORNEY GENERAL  
200 S. CARSON ST.  
CARSON CITY, NV 89701-4715  
£

CLARK COUNTY D.A.  
200 Lewis Ave  
LAS Vegas, NV 89155  
\_\_\_\_\_  
\_\_\_\_\_, Nevada 89\_\_\_\_\_

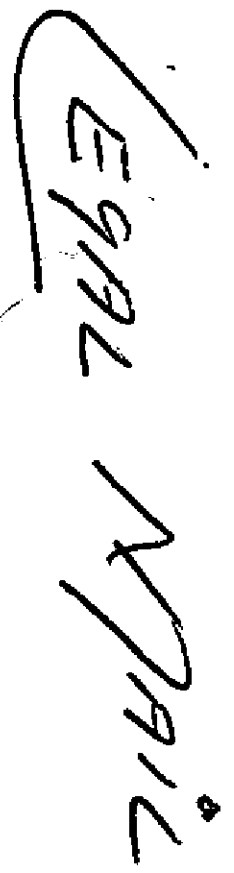
  
Signature of Petitioner In Pro Se

///

///

///

CARSON City, NEVADA 89702



CLERK OF THE COURT  
EIGHTH Judicial District Court  
200 Lewis Avenue  
Las Vegas, Nevada 89155



EGAL  
✓/AIC



Prove

LUIS HIDALGO, JR., #1038134  
NORTHERN NEVADA CORRECTIONAL CENTER  
P.O. BOX 7000  
CARSON CITY, NEVADA 89702  
PETITIONER, IN PROPER PERSON

FILED  
DEC 31 2013  
*John L. Johnson*  
CLERK OF COURT

911


DISTRICT COURT  
CLARK COUNTY, NEVADA

LUIS HIDALGO, JR.,  
PETITIONER, CASE NO. C241394  
VS. DEPT. NO. XXI  
ISIDRO BACA, (WARDEN)  
RESPONDENT.

MEMORANDUM OF POINTS AND AUTHORITIES  
IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS  
DATE OF HEARING: \_\_\_\_\_  
TIME OF HEARING: \_\_\_\_\_

COMES NOW, PETITIONER, LUIS HIDALGO, JR., IN HIS  
PROPER PERSON, AND SUBMITS THE FOLLOWING POINTS  
AND AUTHORITIES IN SUPPORT OF HIS PETITION FOR WRIT  
OF HABEAS CORPUS (POST-CONVICTION) FILED  
CONTEMPORANEOUSLY HEREWITH.

RECEIVED  
DEC 31 2013  
CLERK OF THE COURT

08C241394  
MPA  
Memorandum of Points and Authorities  
3314006  


## POINTS AND AUTHORITIES

### BRIEF CASE HISTORY AND STATEMENT OF FACTS

LUIS HIDALGO, JR. (HEREINAFTER "PETITIONER") WAS ARRESTED FOR THE DEATH OF TIMOTHY HADLAND OVER THREE (3) YEARS AFTER ALL OTHER CO-DEFENDANTS, BASED UPON THE PROSECUTION BELIEVING THE TESTIMONY OF CO-DEFENDANT ANABEL ESPINDOLA, THAT IMPLICATED PETITIONER IN AN ALLEGED CONSPIRACY TO KILL TIMOTHY HADLAND. PREVIOUSLY, MS. ESPINDOLA DID NOT IMPLICATE PETITIONER IN THE CONSPIRACY UNTIL SHE HAD SPENT OVER THREE YEARS DETAINED, WITHOUT BAIL, AND THE PROSECUTION SOUGHT THE DEATH PENALTY AGAINST MS. ESPINDOLA.

AFTER A LENGTHY JURY TRIAL OF OVER 30 DAYS, PETITIONER AND HIS CO-DEFENDANT SON, LUIS HIDALGO, III, WERE FOUND GUILTY OF CONSPIRACY TO COMMIT BATTERY WITH USE OF A DEADLY WEAPON AND SECOND DEGREE MURDER WITH USE OF A DEADLY WEAPON. ON OR ABOUT JUNE 29, 2009 PETITIONER WAS SENTENCED TO CONSECUTIVE LIFE SENTENCES FOR MURDER WITH USE OF A DEADLY WEAPON. JUDGMENT OF CONVICTION WAS ENTERED ON JULY 10, 2009.

PETITIONER TIMELY APPEALED THE JUDGMENT AND THE NEVADA SUPREME COURT AFFIRMED ON JUNE 21, 2012, REMITTITUR ISSUED ON APRIL 10, 2013. (PENDING WRIT OF CERTIORARI TO THE U.S. SUPREME COURT.) (NV. S. CT. 54209).

DURING THE PENDANCY OF PETITIONER'S APPEAL, THE FAMILY OF TIMOTHY HAOLAND INITIATED A CIVIL ACTION, PURSUANT TO A WRONGFUL DEATH, AGAINST DEFENDANTS PALAMINO CLUB, ANABEL ESPINDOLA, KENNETH COUNTS, DEANGELO CARROLL, RONTAE ZONE, JAYSON TAIPOU, LUIS HIDALGO, III, AND PETITIONER. (SEE CASE NO. A541435, FILED IN THIS COURT HONORABLE COURT.) DURING DISCOVERY OF THE CIVIL ACTION, THE PLAINTIFFS OBTAINED FURTHER FACTS, NOT PRESENTED DURING CRIMINAL PROCEEDINGS, FROM DEPOSITIONS, ADMISSIONS, AND INTERROGATORIES OF DEFENDANTS ESPINDOLA, CARROLL, ZONE, TAIPOU, AND 3<sup>RD</sup> PARTY MICHELLE SCHWANDERLUNK. DEFAULT JUDGMENTS WERE ENTERED AGAINST ESPINDOLA, TAIPOU, CARROLL, AND ZONE. LUIS HIDALGO, III AND PETITIONER WERE VOLUNTARILY DISMISSED AS DEFENDANTS BY PLAINTIFFS IN A JOINT RESOLUTION.

PETITIONER BRINGS FORTH THE INSTANT HABEAS PETITION CONTAINING GROUNDS FOR RELIEF BASED UPON PREVIOUSLY DISCOVERED EVIDENCE AND EVIDENCE REVEALED DURING THE CIVIL ACTION, THAT SHOULD HAVE BEEN PRESENTED AT TRIAL IN SUPPORT OF PETITIONER'S DEFENSE.

#### APPLICABLE LAW STANDARD FOR REVIEW

THE U.S. SUPREME COURT HELD IN STRICKLAND V. WASHINGTON, 104 S. CT. 2052, 466 US 668 (1984) THAT A CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL MUST ALSO BE FOLLOWED BY PROOF OF PREJUDICE. THE NEVADA

SUPREME COURT ADOPTED THIS STANDARD IN DAWSON V. STATE, 108 NEV. 112 (1992).

A HABEAS PETITION POST-CONVICTION IS THE PROPER VEHICLE FOR BRINGING FORTH CLAIMS OF INEFFECTIVE ASSISTANCE OF TRIAL AND APPELLATE COUNSEL.

CO/WELL V. STATE, 118 NEV. 807, 59 P.3d. 463 (2002).

THIS IS PROPER SO A DISTRICT COURT CAN CONDUCT AN EVIDENTIARY HEARING TO RESOLVE AND REVIEW FACTUAL UNCERTAINTIES. JOHNSON V. STATE, 117 NEV. 153, 17 P.3d. 1008 (2001).

HEREIN BELOW, PETITIONER, BRINGS FORTH SEVERAL, VIABLE CLAIMS FOR RELIEF BASED UPON DENIAL OF HIS STATUTORY AND CONSTITUTIONAL RIGHTS AT TRIAL AND ON DIRECT APPEAL. THIS PETITION IS TIMELY FILED PURSUANT TO NRS 34.726.

PETITIONER HAS A RIGHT TO DUE PROCESS OF LAW DURING THE LITIGATION OF THIS HABEAS PETITION.

MORAN V. MCDANIEL, 80 F.3d. 261 (9<sup>th</sup> CIR (1996). PETITIONER HAS PRESENTED CLAIMS HEREIN BELOW BASED UPON FAULTS "OUTSIDE THE RECORD" THAT DEMAND RELIEF.

MANN V. STATE, 118 NEV. 357, 46 P.3d. 1228 (2002).

PETITIONER HAS A RIGHT TO BE HEARD AT SUCH AN EVIDENTIARY HEARING, BODIE V. CONNECTICUT, 401 US 341 (1971).

PETITIONER ASSERTS THE EVIDENCE ANNEXED HERETO AS EXHIBITS IN SUPPORT OF HIS CLAIMS FOR RELIEF WILL MANDATE AN EVIDENTIARY HEARING AND RELIEF IS WARRANTED. UNDER SUCH CIRCUMSTANCES, AND WITH SUPPORTING AUTHORITY, PETITIONER PRESENTS THE FOLLOWING GROUNDS FOR RELIEF, IN SUPPORT OF THE ACCOMPANYING



PETITION FOR WRIT OF HABEAS CORPUS, FOR THIS  
COURTS REVIEW.

GROUND ONE

DEFENSE COUNSEL WAS INEFFECTIVE IN FAILING  
TO REQUEST A JURY VERDICT FORM THAT  
SEPARATED BATTERY WITH SUBSTANTIAL  
BODILY HARM FROM BATTERY WITH A DEADLY  
WEAPON. IN VIOLATION OF PETITIONER'S FIFTH,  
SIXTH, AND FOURTEENTH AMENDMENT RIGHTS TO  
EFFECTIVE ASSISTANCE OF COUNSEL, A FAIR  
TRIAL, AND DUE PROCESS OF LAW

THE JURY RETURNED A GUILTY VERDICT AS TO  
CONSPIRACY TO COMMIT BATTERY WITH A DEADLY  
WEAPON OR SUBSTANTIAL BODILY HARM, BOTH WHICH  
ARE GENERAL INTENT CRIMES. THE JURY WAS INSTRUCTED  
THAT IT COULD USE EITHER OF THEM AS THE PREDICATE  
FOR FINDING PETITIONER GUILTY OF MURDER IN THE  
SECOND DEGREE. DEFENSE COUNSEL FAILED TO REQUEST  
A SEPARATE JURY VERDICT FORM FOR THE OFFENSES,  
AND THE TRIAL JUDGE ADMITTED AT SENTENCING THAT  
SEPARATING THE CRIMES IN THE VERDICT FORM WOULD  
HAVE BEEN BETTER.

THIS ALLOWED THE JURY TO FIND THE PREDICATE  
CONSPIRACY UPON LESS THAN A REASONABLE DOUBT  
STANDARD AND VIOLATED PETITIONER'S RIGHTS TO DUE  
PROCESS OF LAW UNDER THE FIFTH AND FOURTEENTH

AMENDMENTS AS WELL AS RIGHT TO A JURY TRIAL UNDER THE SIXTH AMENDMENT. IT DEPRIVED THE JURY OF ITS ESSENTIAL DELIBERATIVE - THE APPLICABLE LAW UPON WHICH TO EVALUATE THE FACTS, THE DANGER OF CONFUSION AND ERRONEOUS CONVICTION ON THE CHARGES THAT WERE TIED TO THE CONSPIRACY EXACERBATED THE GRAVITY OF THE ERROR.

THIS GROUND FOR RELIEF WAS ERRONEOUSLY PRESENTED TO THE NEVADA SUPREME COURT ON DIRECT APPEAL BY APPELLATE COUNSEL AND THE NEVADA SUPREME COURT FAILED TO ADJUDICATE THE ISSUE FOR PROCEDURAL REASONS. (SEE ORDER OF AFFIRMANCE, "54209, PG 2, FN 2)

ACCORDINGLY, THIS CLAIM FOR RELIEF IS PRESENTED ANEW TO THIS COURT IN THE PROPER CONTEXT.

## GROUND TWO

DEFENSE COUNSEL WAS INEFFECTIVE IN CONFUSING THE JURY WITH "CONTEXT" AND "ADOPTIVE ADMISSION" AS SYNONYMOUS THUS DENYING PETITIONER OF HIS RIGHTS TO EFFECTIVE ASSISTANCE OF COUNSEL, A FAIR TRIAL AND DUE PROCESS OF LAW AS GUARANTEED BY THE FIFTH, SIXTH, AND, FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION.

THE NEVADA SUPREME COURT, IN ITS ORDER OF AFFIRMANCE OF JUNE 21, 2012 (54209) IDENTIFIED THIS ERROR OF

COUNSEL.

ON APPEAL, DEFENSE COUNSEL PRESENTED A CLAIM THAT THE LIMITING INSTRUCTION CONCERNING CO-DEFENDANTS, CARROLL'S ADMISSIONS SHOULD BE CONSIDERED FOR "CONTEXT ONLY" VIOLATED PETITIONER'S RIGHTS TO CONFRONTATION. DEFENSE COUNSEL THEREBY ADMITS HE KNEW, OR SHOULD OF KNOWN, OF THE ERROR. YET, AS THE NEVADA SUPREME COURT FOUND IN THE RECORD, IT WAS DEFENSE COUNSEL WHO FIRST PARTICIPATED IN THE ERROR BY ACQUIESCING "THROUGHOUT TRIAL IN TREATING THESE TWO CONCEPTS AS SYNONYMOUS." (ORDER OF AFFIRMANCE, PG 3, FN. 4).

COUNSEL OBJECTED TO THE STATEMENTS OF CARROLL AND THE OTHER CONSPIRACY PARTICIPANTS (THE SECOND CONSPIRACY CHARGED AGAINST HIDALGO, III AND NOT PETITIONER) IN THE TAPE RECORDINGS BEING ADMITTED INTO EVIDENCE AGAINST PETITIONER MANY TIMES DURING TRIAL. THE LIMITING INSTRUCTION GIVEN BY THE TRIAL COURT REGARDING STATEMENTS NOT ATTRIBUTABLE TO PETITIONER, COUPLED WITH DEFENSE COUNSEL'S USE OF "CONTEXT" AND "ADAPTIVE ADMISSION" DID NOT CURE THE ADMISSION OF THE PREJUDICIAL STATEMENTS ON THE TAPE RECORDINGS.

THE ENTRY OF THE STATEMENTS ALSO VIOLATED PETITIONER'S RIGHTS TO CONFRONT HIS WITNESSES AS THE PROSECUTION AND THE TRIAL COURT REFUSED TO ALLOW DEANGELO CARROLL TO TESTIFY AT PETITIONER'S TRIAL.

THIS RIGHT TO CONFRONT WITNESSES WAS

RECENTLY ADDRESSED BY THE U.S. SUPREME COURT IN CRAWFORD V. WASHINGTON, 541 U.S. 36, 124 Oct. 1354 (2004) WHEREIN THE HIGH COURT HELD A TRIAL COURT MUST BAR THE USE OF STATEMENTS MADE BY A WITNESS WHO IS UNAVAILABLE FOR TRIAL UNLESS THE DEFENDANT HAD AN OPPORTUNITY TO PREVIOUSLY CROSS-EXAMINE THE WITNESS REGARDING THE WITNESSES STATEMENT.

HERE THE RECORD IS CLEAR, PETITIONER NEVER HAD AN OPPORTUNITY TO CROSS-EXAMINE CARROLL'S STATEMENTS AT ANY TIME.

ACCORDINGLY, PETITIONER IS ENTITLED TO A NEW TRIAL WHERE HE IS EITHER 1.) ABLE TO CROSS-EXAMINE DEANGELO CARROLL, OR 2.) WHERE THE PROSECUTION IS BARRED FROM PRESENTING THE PREJUDICIAL TESTIMONY.

### GROUND THREE

PETITIONER WAS DENIED HIS FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS RIGHTS TO A FAIR TRIAL, DUE PROCESS OF LAW, AND EFFECTIVE ASSISTANCE OF COUNSEL DUE TO IMPROPER AND CONFUSING IDENTIFICATION OF PETITIONER THROUGHOUT TRIAL.

PETITIONER, LUIS HIDALGO, JR., AND HIS SON, LUIS HIDALGO, III, WERE TRIED BEFORE THE SAME JURY IN THIS ACTION. THE PROSECUTION, THE COURT, AND DEFENSE COUNSEL USED TERMS SUCH AS 'MR. H', 'LITTLE LOU', 'LOUSITO',

"MR. HILGADO", AND OTHER TERMS TO IDENTIFY OR REFER TO PETITIONER AND HIS CO-DEFENDANT SON. A MAJORITY OF THE STATES WITNESSES USED THE AFOREMENTIONED TERMS AND FAILED TO PHYSICALLY IDENTIFY PETITIONER OR HIS SON DURING THE COURSE OF THEIR RESPECTIVE TESTIMONY. DEFENSE COUNSEL FAILED TO REQUEST CLARIFICATION, AND AT TIMES, JOINED WITH THE USE OF THE CONFUSING IDENTIFICATION.

WITHOUT PROPER JURY INSTRUCTION, THIS USE OF SEVERAL DIFFERENT IDENTIFICATION MONIKERS CONFUSED THE JURY AS TO WHICH TESTIMONY WAS ATTRIBUTABLE TO PETITIONER. AS SUCH, THE VERDICTS ARE UNRELIABLE.

AN IN-COURT IDENTIFICATION OF A DEFENDANT IS ESSENTIAL TO ESTABLISH GUILT BEYOND A REASONABLE DOUBT. UNITED STATES V. WEED, 689 F.2d. 752 (7<sup>th</sup> CIR. 1982). THE CONFUSION OF IMPROPER IDENTIFICATION OF PETITIONER AT TRIAL CONFUSED THE JURY AND NO PROFFERED CIRCUMSTANTIAL EVIDENCE COULD ESTABLISH PETITIONER AS THE REFERENCED PERSONS IN THE WITNESSES USE OF MONIKERS, AS OUTLINED HEREIN ABOVE. ACCORDINGLY, THE PROSECUTION FAILED TO MEET THEIR BURDEN OF PROOF BEYOND A REASONABLE DOUBT AND PETITIONER IS ENTITLED TO RELIEF FROM JUDGMENT. U.S. V. RAMIREZ-RODRIGUEZ, 552 F.2d. 883 (9<sup>th</sup> CIR. 1977).

THE NEVADA SUPREME COURT RECOGNIZES PROPER IN-COURT IDENTIFICATION IS ESSENTIAL, ESPECIALLY, AS, HERE, THERE EXISTS NO PRE-TRIAL IDENTIFICATION OF PETITIONER. BROWNING V. STATE, 104 NEV. 274, 757 P.2d. 354 (NEV. —).

## GROUND FOUR

PETITIONER WAS DENIED HIS FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS TO A FAIR TRIAL, DUE PROCESS OF LAW, AND EFFECTIVE ASSISTANCE OF COUNSEL DUE TO THE FAILURE TO SEVER PETITIONER'S TRIAL FROM HIS CO-DEFENDANT

AS OUTLINED HEREIN ABOVE, AND ACCORDING TO COURT RECORDS, PETITIONER PROCEEDED TO A JURY TRIAL WITH HIS CO-DEFENDANT SON, LUIS HIDALGO, III. THESE DEFENDANTS WERE CHARGED WITH SIMILAR OFFENSES. HOWEVER, PETITIONER'S SON WAS CHARGED WITH CONSPIRACY TO MURDER WITNESSES AFTER THE END OF THE CONSPIRACY CHARGED TO PETITIONER. THUS, THE CHARGES IN THIS CASE WERE DISTINCT AND SEPARATE FROM EACH OTHER. PETITIONER'S DEFENSE TO HIS CHARGES WAS THAT HE LEARNED OF THE KILLING OF THE VICTIM AFTER THE FACT. LUIS HIDALGO, III'S DEFENSE WAS ACTUAL INNOCENCE.

THE PROSECUTION'S EVIDENCE, IN ALMOST ENTIRETY, RELATED TO HIDALGO, III, WITH THE EXCEPTION OF THE STATE'S CHIEF WITNESS, ANABEL ESPINDOLA. THE PROSECUTION'S INDICTMENT AGAINST PETITIONER WAS BROUGHT ALMOST THREE YEARS AFTER THE ARREST OF HIDALGO, III AND MS. ESPINDOLA, BASED SOLELY UPON MS. ESPINDOLA'S LATE STATEMENTS TO POLICE AFTER THE PROSECUTION FILED ITS INTENT TO SEEK THE DEATH PENALTY AGAINST MS. ESPINDOLA. THE PROSECUTION'S CASE AGAINST PETITIONER WAS WEAK. THE EVIDENCE WAS MINIMAL AND BASED ALMOST ENTIRELY ON MS. ESPINDOLA'S

COERCED AND TAIANTED TESTIMONY. ADDITIONALLY, DURING TRIAL THE JURY WAS CONFUSED AS TO THE EVIDENCE BEING ATTRIBUTABLE TO THE DIFFERENT CO-DEFENDANTS. (PETITIONER ADOPTS FACTS AND ARGUMENTS, AS OUTLINED IN GROUND THREE, HEREIN ABOVE, IN SUPPORT OF THE INSTANT GROUND FOR RELIEF.).

DUE TO THE DIFFERING DEFENSES AND THE PLETHORA OF CONFUSING EVIDENCE, MOSTLY ATTRIBUTABLE TO HIDALGO, III, IT WAS IMPERATIVE PETITIONER BE TRIED BEFORE A SEPARATE TRIBUNAL. IT WAS UNREASONABLE FOR DEFENSE COUNSEL TO FAIL TO REQUEST SEVERANCE ON BEHALF OF PETITIONER. AS A RESULT, PETITIONER RECEIVED AN UNFAIR TRIAL BASED UPON INEFFECTIVE ASSISTANCE OF COUNSEL.

DEFENSE COUNSEL SHOULD HAVE FILED A PRE-TRIAL MOTION PURSUANT TO NRS 174.125 REQUESTING SEVERANCE. PETITIONER WAS CLEARLY PREJUDICED AS A RESULT OF JOINER WITH HIS CO-DEFENDANT AND WAS FORCED TO TESTIFY ON HIS OWN BEHALF AT TRIAL IN AN ATTEMPT TO DEFEND HIMSELF AND CLARIFY THE CONFUSING EVIDENCE PRESENTED BY THE PROSECUTION.

PURSUANT TO NRS 174.165 PETITIONER WAS ENTITLED TO A SEPARATE TRIAL DUE TO HIS CO-DEFENDANT BEING TRIED FOR UNRELATED OFFENSES, OCCURING AFTER ALLEGED OFFENSES ATTRIBUTABLE TO PETITIONER, THAT ALLOWED THE JURY TO CONVICT PETITIONER FLOYD V. STATE, 118 NEV. 156, 42 P.3d. 249 (NEV. 2002), AND GREY V. STATE, 178 P.3d. 154 (NEV 2008).

SEVERANCE WAS REQUIRED IN THIS CASE TO ENSURE PETITIONER RECEIVED A FAIR TRIAL UNDER THE GUARANTEES OF THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION. BROWN V. STATE, 114 NEV. 1118, 967 P.2d. 1126 (NEV. 1998)

DEFENSE COUNSEL ACTED UNREASONABLE UNDER THE CIRCUMSTANCES IN FAILING TO REQUEST SEVERANCE ON BEHALF OF PETITIONER. HIS FAILURES PREJUDICED PETITIONER AND RESULTED IN AN UNFAIR TRIAL.

#### GROUND FIVE

PETITIONER WAS DENIED HIS RIGHTS TO A FAIR TRIAL AND DUE PROCESS OF LAW DUE TO INEFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION

AS OUTLINED HEREIN ABOVE, AND THE RECORD CLEARLY REFLECTS, THE STATES' CHIEF WITNESS IN THIS CASE IS ANNABEL ESPINDOLA. MS. ESPINDOLA WAS ARRESTED APPROXIMATELY THREE YEARS PRIOR TO PETITIONER. IT WAS ONLY AFTER MS. ESPINDOLA FACED THE FACT SHE WAS TO BE TRIED BEFORE A DEATH PENALTY QUALIFIED JURY THAT SHE DECIDED TO FABRICATE FACTS IMPLICATING PETITIONER IN HER CONSPIRACY FOR THE BENEFIT OF AN UNHEARD OF REDUCTION IN SENTENCE—SHE WAS EVENTUALLY ALLOWED TO PLEAD TO A MUCH LESSER CHARGE IN EXCHANGE FOR LESS THAN TEN YEARS INCARCERATION VERSUS DEATH!



WHILE MS. ESPINDOLA WAS DETAINED FOR THREE YEARS SHE HAD EXTENSIVE COMMUNICATION WITH PETITIONER AND OTHER PERSONS UNRELATED TO THIS CASE. MS. ESPINDOLA ALSO MAINTAINED CONTACT WITH SEVERAL EX-DETAINEES SHE BEFRIENDED WHILE AT CLARK COUNTY DETENTION CENTER ("CCDC"). MS. ESPINDOLA'S COMMUNICATIONS WITH PETITIONER AND THE EX-DETAINEES WAS VIA BOTH WRITTEN AND TELEPHONIC USE, AS SUPPORTED BY EXHIBITS ATTACHED HERETO AND MORE FULLY REFERENCED BELOW.

AS TESTIMONY REVEALED AT TRIAL, MS. ESPINDOLA WAS PETITIONER'S LONG-TIME MISTRESS AND HAD A ROMANTIC AFFAIR TOGETHER FOR SEVERAL YEARS. MS. ESPINDOLA HAD BEEN EMPLOYED BY PETITIONER FOR OVER FIFTEEN YEARS AND SHE WAS FINANCIALLY DEPENDANT ON PETITIONER.

DURING TELEPHONE CONVERSATIONS BETWEEN MS. ESPINDOLA, PETITIONER, AND OTHERS, FROM CCDC, SHE ATTEMPTS TO SECURE FACTS RELATING TO THE CASE (EXHIBIT ("EX") 1, INVESTIGATOR'S REFERENCE TO CCDC TELEPHONE CALLS), ATTEMPTS TO DISSUADE POTENTIAL DEFENSE WITNESSES FROM TESTIFYING, AND STATES HER PRIOR TESTIMONY IN THIS CASE ARE "LIES" (EXHIBIT 1, 1-16-08, 1-15-08, AND 1-13-08).

TELEPHONE CONVERSATIONS ALSO REVEAL THAT ON SEVERAL OCCASIONS MS. ESPINDOLA BECOMES IRATE DUE TO HER BELIEF PETITIONER WAS REFUSING TO POST BOND OR BAIL ON HER BEHALF. (CCDC TELEPHONE RECORDS OF 2-2-08, 1-31-08, 1-16-08, 1-30-08, EXHIBIT 2 COPY OF INVESTIGATOR NOTES)

LETTERS TO AND FROM MS. ESPINDOLA WHILE SHE WAS DETAINED AT CCDC REVEAL SHE SPOKE TO THIRD PARTIES CONCERNING FABRICATING FACTS TO IMPLICATE PETITIONER IN HER CONSPIRACY IN EXCHANGE FOR THE PROSECUTION PROMISING TO DISMISS THEIR INTENT TO SEEK THE DEATH PENALTY AGAINST HER.

A. EXHIBIT 3 - COMMUNICATION TO ANABEL FROM DENISE MATA (EX-DETAINEE) INFORMING MS. ESPINDOLA NOT TO "LIE" AT PETITIONER'S TRIAL AND NOT TO BE PERSUADED BY "GOSSIP".

B. EXHIBIT 4 - LETTER TO MS. ESPINDOLA FROM DENISE MATA CONCERNING MS. ESPINDOLA'S BELIEF PETITIONER WAS HAVING A ROMANTIC AFFAIR WITH ANOTHER WOMAN.

C. LETTER TO PETITIONER FROM MS. ESPINDOLA WHEREIN SHE STATES SHE IS ANGRY AT DEFENSE COUNSEL AND PETITIONER DUE TO HER CONTINUED DETAINMENT AT CCDC AND EXPECTED TO BE PAID \$2 MILLION FOR BAIL AND OTHER USES. (EXHIBIT 5)

D. LETTER FROM GENEVA EXPLAINING THAT MS. ESPINDOLA SHOULD BE CONCERNED BECAUSE PETITIONER IS NOT DETAINED AND POSSIBLY HAVING A ROMANTIC AFFAIR. (EXHIBIT 6)

E. LETTER FROM NATASHA NEWELL TO PETITIONER INFORMING PETITIONER THAT MS. ESPINDOLA HAS

TESTIFIED TO "SETTING-UP" PETITIONER THROUGH PERJURED TESTIMONY AND MS. ESPINDOLA WAS "VINDICTIVE, CRUEL, FOUL, AND EVIL." (EXHIBIT 7)

ALL THE ABOVE REFERENCED EVIDENCE WAS KNOWN AND DISCOVERED BY DEFENSE COUNSEL PRIOR TO PETITIONER'S TRIAL. HOWEVER, DEFENSE COUNSEL FAILED TO USE THE EVIDENCE, PRESENT IT TO THE JURY, AND EFFECTIVELY CROSS-EXAMINE AND/OR IMPEACH THE CREDIBILITY OF ANABEL ESPINDOLA, THE PROSECUTION'S CHIEF WITNESS AGAINST PETITIONER.

DUE TO THE STATE'S WEAK CASE AGAINST PETITIONER, BASED ALMOST ENTIRELY ON MS. ESPINDOLA'S TESTIMONY, IT WAS IMPERATIVE FOR DEFENSE COUNSEL TO USE THE AVAILABLE EVIDENCE TO EFFECTIVELY IMPEACH MS. ESPINDOLA AND ALLOW THE TRIAL JURY TO DETERMINE MS. ESPINDOLA'S CREDIBILITY IN LIGHT OF THE TRUE FACTS OF HER MOTIVE TO FABRICATE TESTIMONY. THE EVIDENCE REVEALS MS. ESPINDOLA BECAME A "SCORNED LOVER" WHEN SHE BELIEVED PETITIONER WAS HAVING AN AFFAIR WITH ANOTHER WOMAN DURING MS. ESPINDOLA'S PRE-TRIAL DETAINMENT AND THIS EVIDENCE OF MOTIVE TO FABRICATE TESTIMONY WAS CRUCIAL TO PETITIONER'S DEFENSE.

PETITIONER, LIKE ALL DEFENDANTS, HAS A RIGHT TO PRESENT EVIDENCE, AT TRIAL, IN HIS DEFENSE. THIS RIGHT EXTENDS TO EVIDENCE IN SUPPORT OF WITNESS IMPEACHMENT.

BROWN V. STATE, 877 P.2d. 1071, 110 NEV. 846 (1994).

CHAMBERS V. MISSISSIPPI, 410 U.S. 284, 93 S.Ct. 1038 (1973)

A TRIAL DEFENDANT IS ALLOWED TO CROSS-EXAMINE A STATE'S WITNESS TO ALLOW A JURY TO DETERMINE IF THE WITNESS "IS WORTHY OF BELIEF" MATTOX V. U.S., 157 U.S. 237 (1895), THUS ALLOWING THE JURY TO DETERMINE WEIGHT AND CREDIBILITY OF THE WITNESS. BOLDEN V. STATE, 624 P.2d. 20, 97 NEV 71 (1981).

IT HAS BEEN HELD BY THIS STATE'S HIGH COURT THAT DEFENSE COUNSEL IS INEFFECTIVE AND PREJUDICIAL WHEN HE FAILS TO PROPERLY CROSS-EXAMINE A STATE WITNESS. BROWN V. STATE, 877 P.2d. 1071, 110 NEV. 846 (1994).

DEFENSE COUNSEL ACTED UNREASONABLE UNDER THE CIRCUMSTANCES, IN FAILING TO USE THE PLETHORA OF EVIDENCE INDICATING MS. ESPINDOLA'S TESTIMONY WAS FABRICATED, AND SHE HAD A MOTIVE TO FABRICATE, AND RESULTED IN A CONVICTION BASED UPON THE SUSPECT PERJURED TESTIMONY OF A "SCORNEO LOVER". DEFENSE COUNSEL'S ACTIONS, AND LACK THEREOF, WERE IN VIOLATION OF PETITIONER'S SIXTH AMENDMENT RIGHTS TO EFFECTIVE ASSISTANCE OF COUNSEL AND A FAIR TRIAL.

AN EVIDENTIARY HEARING IS MANDATED CONCERNING THIS GROUND FOR RELIEF BASED UPON AVAILABILITY OF EVIDENCE "OUTSIDE THE RECORD" THAT SUPPORTS THE GRANTING OF THE INSTANT PETITION.

### GROUND SIX

PETITIONER WAS DENIED A FAIR TRIAL AND DUE PROCESS OF LAW AS GUARANTEED BY THE

FIFTH AND FOURTEENTH AMENDMENTS DUE TO INEFFECTIVE ASSISTANCE OF COUNSEL, PROSECUTORIAL MISCONDUCT, AND COURT ERROR DUE TO PETITIONER'S INABILITY TO CROSS-EXAMINE OR OTHERWISE QUESTION STATES WITNESS, DEANGELO CARROLL

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PETITIONER ADOPTS ALL FACTS AND ARGUMENTS, OUTLINED HEREIN ABOVE, IN SUPPORT OF THE INSTANT CLAIM FOR RELIEF.

DURING THE TRIAL OF PETITIONER, THE STATE OFFERED NUMEROUS STATEMENTS MADE BY DEANGELO CARROLL TO FURTHER ATTEMPT TO PROVE THE ELEMENTS OF THE CHARGED OFFENSES. WHILE THE PROSECUTION MAY CLAIM DIFFERENTLY, AT A MINIMUM, ALL EVIDENCE SUBMITTED THAT PURPORTEDLY CAME FROM ACTIONS OR STATEMENTS MADE BY MR. CARROLL, WERE AT A MINIMUM, HIGHLY PREJUDICIAL TO PETITIONER.

SINCE MR. CARROLL HAD ALSO BEEN CHARGED AS A CO-DEFENDANT IN THIS CASE, BUT DID NOT PROCEED TO TRIAL PRIOR TO PETITIONER, HE WAS NOT AVAILABLE TO TESTIFY, OR BE AVAILABLE AS A WITNESS ON BEHALF OF PETITIONER, AT PETITIONER'S TRIAL. THUS PETITIONER WAS DENIED HIS RIGHT TO CONFRONT HIS ACCUSERS AS GUARANTEED BY THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION.

TO FURTHER EXACERBATE PETITIONER'S INABILITY TO CONFRONT AND/OR CROSS-EXAMINE MR. CARROLL, THE PROSECUTION INTENTIONALLY "CONTROLLED" MR. CARROLL

HE DID NOT PROCEED TO TRIAL UNTIL AFTER THE CONVICTION OF PETITIONER, THE PROSECUTION FAILED TO MAKE MR. CARROLL AVAILABLE FOR WITNESS AT PETITIONER'S TRIAL, AND FAILED TO GRANT MR. CARROLL IMMUNITY TO ALLOW HIS AVAILABILITY AT PETITIONER'S TRIAL. ADDITIONALLY, AND PROBABLY MOST IMPORTANTLY, NEVADA DOES NOT ALLOW FOR "LIMITED" OR "USE" IMMUNITY TO MR. CARROLL, SIMILAR TO OTHER STATE AND FEDERAL JURISDICTIONS, THAT WOULD HAVE RELIEVED PETITIONER BEING DENIED HIS RIGHT TO CONFRONTATION.

DEFENSE COUNSEL WAS INEFFECTIVE AND ACTED UNREASONABLY IN FAILING TO OBJECT OR OTHERWISE REQUEST CORRECTION OF THE ABOVE ERRORS. COUNSEL SHOULD HAVE, AT A MINIMUM, REQUESTED A POSTPONEMENT OF PETITIONER'S TRIAL UNTIL AFTER MR. CARROLL'S TRIAL, THUS ALLOWING MR. CARROLL TO: 1) TESTIFY AT PETITIONER'S TRIAL OR 2) HIS TESTIMONY FROM HIS TRIAL BE USED AS EVIDENCE AT PETITIONER'S TRIAL IN SUPPORT OF HIS DEFENSE.

THE U.S. SUPREME COURT HELD IN CRAWFORD V. WASHINGTON, 541 US 36, 124 S. CT. 1354 (2004) THAT A DEFENDANT HAS A RIGHT TO CONFRONT HIS WITNESSES AND THIS RIGHT IS VIOLATED WHEN HEARSAY IS ADMITTED BY A DECLARANT THAT IS UNAVAILABLE AT TRIAL. AS A RESULT OF THE ADMISSION OF THE HIGHLY PREJUDICIAL HEARSAY EVIDENCE, PETITIONER RECEIVED AN UNFAIR TRIAL AND THE INSTANT WRIT SHOULD BE GRANTED.

## GROUND SEVEN

PETITIONER WAS DENIED HIS RIGHTS TO DUE PROCESS OF LAW AND A FAIR TRIAL AND EFFECTIVE ASSISTANCE OF TRIAL AND APPELLATE COUNSEL AS GUARANTEED BY THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS DUE TO DEFENSE COUNSEL'S AND THE COURT'S FAILURE TO PROFFER PROPER JURY INSTRUCTIONS DEFINING THE USE OF A DEADLY WEAPON IN ACCORDANCE WITH NRS 193.165

PETITIONER ADOPTS ALL FACTS AND ARGUMENTS HEREIN ABOVE IN SUPPORT OF THE INSTANT GROUND FOR RELIEF.

BASED UPON THE RATIONALE OF FIEGEHEN V. STATE 121 NEV. 293, 113 P.3d. 305 (2005), THE FACT THAT THE JURY FOUND PETITIONER GUILTY OF CONSPIRACY TO COMMIT A BATTERY, RATHER THAN CONSPIRACY TO COMMIT MURDER, AND ALSO FOUND PETITIONER GUILTY OF SECOND DEGREE MURDER, MEANS THAT THE JURY MUST HAVE ALIGHTED ON THE DEADLY WEAPON ENHANCEMENT BASED UPON THE CONSPIRACY THEORY, AS AUGMENTED BY INSTRUCTION NOS. 21 AND 23. THE JURY COULD NOT HAVE BASED THIS VERDICT UPON AN AIDING AND ABETTING THEORY, BECAUSE PURSUANT TO NRS. 195.020, AIDING AND ABETTING WOULD MAKE PETITIONER JUST AS LIABLE AS IT WOULD BE IF HE COMMITTED THE OFFENSE, MEANING THAN ON AN AIDING AND ABETTING THEORY HE WOULD BE AS GUILTY AS 'COUNTS', AND THUS WOULD HAVE BEEN FOUND GUILTY OF FIRST DEGREE MURDER.

HOWEVER, PER MOORE V. STATE, 117 NEV. 659, 27 P.3d. 447 (2001), A DEADLY WEAPON SENTENCING ENHANCEMENT CANNOT APPLY TO A CONVICTION FOR CONSPIRACY. THE RATIONALE IS THAT A CONSPIRACY DOES NOT REQUIRE AN OVERT ACT; THE CRIME (IN NEVADA) IS COMPLETED WHEN THE UNLAWFUL AGREEMENT IS REACHED. THEREFORE, A DEFENDANT CANNOT "USE" A DEADLY WEAPON TO COMMIT A CRIME WHICH IS COMPLETED BEFORE THE DEADLY WEAPON HAS EVER BEEN USED. MOORE, 117 NEV. AT 662-63, 27 P.3d. AT 450.

IN THIS CASE, THE JURY WAS GIVEN THE OPPORTUNITY IN ITS VERDICT TO FIND THE DEFENDANT GUILTY OF SECOND DEGREE MURDER WITHOUT THE USE OF A DEADLY WEAPON.

HAD DEFENSE COUNSEL TENDERED A "MOORE" INSTRUCTION, I.E., THAT IF THE JURY FOUND THE DEFENDANT GUILTY OF A CONSPIRACY TO COMMIT BATTERY AND GUILTY OF MURDER ON A CONSPIRACY THEORY, IT MUST NOT RETURN A GUILTY VERDICT AS TO THE DEADLY WEAPON ENHANCEMENT, IT IS REASONABLY LIKELY THAT THE JURY WOULD NOT FOUND PETITIONER RESPONSIBLE FOR COUNT<sup>1</sup>'S USE OF THE WEAPON.

ALTERNATIVELY, THE POINT COULD HAVE BEEN RAISED AFTER VERDICT WITHIN SEVEN DAYS ON AN NRS 175.381 (2) MOTION; AND HAD COUNSEL FILED SUCH A MOTION, THE COURT WOULD HAVE BEEN CONSTRAINED TO HAVE GRANTED IT AND TO HAVE ENTERED A JUDGMENT OF CONVICTION WITHOUT REGARD TO AN NRS 193.165 ENHANCEMENT.



ACCORDINGLY, COUNSEL WAS PREJUDICIALLY INEFFECTIVE IN FAILING TO SEEK THE GIVING OF A "MOORE" INSTRUCTION AND/OR IN FAILING TO FILE A TIMELY NRS 175.381(2) MOTION ON THIS POINT.

THERE IS NO EVIDENCE PETITIONER "USED" A WEAPON DURING, PRIOR, OR AFTER THE ALLEGED OFFENSES. AS SUCH, PETITIONER'S SENTENCE FOR USE OF A DEADLY WEAPON IS INFIRM. ALLEN V. STATE, 96 NEV. 334, 609 P.2d. 321 (1980). THE EVIDENCE IN THIS CASE DOES NOT PROVE PETITIONER USED A WEAPON THAT PRODUCED HARM OR FEAR OF HARM OR FORCE, NEITHER DID PETITIONER DISPLAY A WEAPON OR HAVE KNOWLEDGE OF A WEAPON IN AIDING IN COMMISSION OF A CRIME. THUS, THE ELEMENTS OF NRS 193.165 WERE NOT PROVEN AND THE IMPOSITION OF A LIFE SENTENCE FOR USE OF A DEADLY WEAPON MUST BE VACATED. PETITIONER WOULD NOT HAVE BEEN CONVICTED OF, OR SENTENCED PURSUANT TO NRS 193.165 IF IT WERE NOT FOR THE FAILURE OF DEFENSE COUNSEL AND THE TRIAL COURT TO PROPERLY INSTRUCT THE JURY PURSUANT TO MOORE, SUPRA.

ACCORDINGLY, THE SENTENCE IMPOSED PURSUANT TO NRS 193.165 MUST BE VACATED.

#### GROUND EIGHT

PETITIONER RECEIVED AN UNFAIR TRIAL, DENIAL OF DUE PROCESS OF LAW, AND EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY THE FIFTH, SIXTH,

AND FOURTEENTH AMENDMENTS DUE TO THE  
FAILURE OF COUNSEL AND THE TRIAL COURT TO  
PROPERLY INSTRUCT THE JURY CONCERNING THE  
USE OF OUT-OF-COURT STATEMENTS MADE BY  
CO-CONSPIRATORS

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PETITIONER ADOPTS ALL FACTS AND ARGUMENTS HEREIN  
ABOVE IN SUPPORT OF THE INSTANT GROUND FOR RELIEF.

APPELLATE COUNSEL FAILED TO PRESENT THIS CLAIM  
FOR RELIEF TO THE NEVADA SUPREME COURT ON DIRECT  
APPEAL. COUNSEL KNEW, OR SHOULD HAVE KNOWN, THE INSTANT  
CLAIM SHOULD HAVE BEEN PRESENTED TO THE NEVADA SUPREME  
COURT ON DIRECT APPEAL SINCE APPELLATE COUNSEL OBJECTED  
VIGOROUSLY TO INSTRUCTION NO. 40 AT TRIAL. COUNSEL FAILED TO  
PRESENT THIS CLAIM AS PLAIN ERROR ON APPEAL IN LIGHT  
OF THE DECISION BY THE U.S. SUPREME COURT IN U.S. V.  
BOURJAILY, 483 U.S. 171 (1987) AND THE NINTH CIRCUIT  
COURT OF APPEALS IN U.S. V. GORDON, 844 F.2d. 1397 (9th Cir  
1998).

WHILE INSTRUCTION NO. 40 WAS CONSISTANT WITH  
STATE PRECEDENT, ORDINARILY FEDERAL COURT DECISIONS ARE  
CONSIDERED PERSUASIVE AUTHORITY IN DETERMINING ISSUES  
SUCH AS THIS CLAIM. HALLMARK V. ELDRIDGE, 124 Nev. 482,  
189 P.3d. 646 (2008).

FOR WHATEVER REASON, THE NEVADA SUPREME COURT DID  
NOT OVERRULE McDOWELL V. STATE, 103 Nev. 527, 746 P.2d. 149  
(1987), EVEN THOUGH IT IS INCONSISTANT WITH FED. R. EVID.  
RULE 801 (d)(2)(E) AS CONSISTENTLY INTERPETED POST-1987, AND  
EVEN THOUGH McDOWELL POST-DATES BOURJAILY, SUPRA.

HOWEVER, BOURJAILY MUST BE RECONSIDERED IN LIGHT OF CRAWFORD V. WASHINGTON, 541 U.S. 36 (2004) AND DAVIS V. WASHINGTON, 547 U.S. 813 (2006). CRAWFORD AND DAVIS DO NOT OVERRULE BOURJAILY; BUT BOURJAILY RELIES ON OHIO V. ROBERTS, 483 U.S. AT 182, 197 S.Ct. AT 2782, BUT OHIO V. ROBERTS WAS ABROGATED BY CRAWFORD, 541 U.S. AT 60-69

BOURJAILY HOLDS THAT A STATEMENT OF A CO-CONSPIRATOR TO ANOTHER CO-CONSPIRATOR THAT TRULY HAS BEEN MADE IN THE COURSE AND SCOPE OF AND TRULY IN FURTHERANCE OF A CONSPIRACY DOES NOT, IN OF ITSELF, IMPLICATE THE CONFRONTATION CLAUSE. BUT WHILE THE OUTCOME OF BOURJAILY WAS CORRECT BASED ON ITS FACTS, SEE CRAWFORD, 541 U.S. AT 68, CRAWFORD MAKES CLEAR THAT TESTIMONIAL HEARSAY STATEMENTS ARE SUBJECT TO THE CONFRONTATION CLAUSE, WHETHER OR NOT SUCH STATEMENTS ALSO FALL WITHIN THE HEARSAY EXCEPTION. 541 U.S. AT 56. SEE: U.S. V. BAINES, 486 F. SUPP.2D 1288, 1299-1300 (D.N.M. 2007).

AS NOTED IN U.S. V. LOMBARDOZZI, 491 F.3D 61, 75-77 (2d CIR. 2007), THE CONFRONTATION CLAUSE ANALYSIS DOES NOT TURN ON WHETHER THE CO-CONSPIRATOR'S OUT-OF-COURT STATEMENT IS MADE TO THE POLICE OR NOT, THAT IS, EVEN IF A STATEMENT IS ADMISSABLE UNDER THE EVIDENTIARY RULES, THE STATEMENT MAY NEVERTHELESS IMPLICATE THE SIXTH AMENDMENT'S CONFRONTATION CLAUSE.

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'IN LOMBARDOZZI, THE STATEMENT IN QUESTION WAS MADE DURING THE CO-CONSPIRATOR'S GUILTY PLEA CANVAS, OBVIOUSLY WELL AFTER THE CONSPIRACY HAD TERMINATED. THE GOVERNMENT CONCEDED THAT INTRODUCTION OF THIS EVIDENCE VIOLATED CRAWFORD.

WALKER V. STATE, \_\_\_ S.W.3d \_\_\_, 2013 WL1154209 (TEX. APP. 2013) AT 4\*, CITING CRAWFORD AND OTHER CASES.

THE COLORADO COURT OF APPEALS HAS ENGAGED IN THE CORRECT ANALYSIS IS PEOPLES V. BAZZES, \_\_\_ P.3d. \_\_\_, 2013 WL2450721 AT 8-9\* (COLO. APP. 2013): WHEN AN OUT-OF-COURT STATEMENT MADE BY A CO-CONSPIRATOR WHO IS UNAVAILABLE FOR TESTIMONY THAT IMPLICATES THE DEFENDANT IS INTRODUCED AT TRIAL, THE SIXTH AMENDMENT CONFRONTATION CLAUSE ANALYSIS DOES NOT TURN ON WHETHER THE STATEMENT WAS MADE TO THE POLICE, OR WHEN THE CONSPIRACY TECHNICALLY ENDED; IT TURNS ON WHETHER THE STATEMENT WAS MADE UNDER CIRCUMSTANCES THAT MADE THE STATEMENT INHERENTLY RELIABLE. IF SO, THE STATEMENT IS NON TESTIMONIAL HEARSAY AND IS NOT ADMISSIBLE UNDER THE SIXTH AMENDMENT. IF NOT, IT IS TESTIMONIAL HEARSAY SUBJECT TO THE RULE OF CRAWFORD AND IS THUS INADMISSIBLE.

HERE, THE OUT-OF-COURT STATEMENTS MADE BY CO-CONSPIRATORS SHOULD NOT HAVE BEEN UTILIZED AT PETITIONER'S TRIAL TO SUPPORT HIS ALLEGED PARTICIPATION IN THE CONSPIRACY, THUS UNDERMINING THE JURY VERDICTS. AS A RESULT, PETITIONER IS ENTITLED TO A NEW TRIAL.

### GROUND NINE

PETITIONER'S CONVICTION AND SENTENCE ARE CONSTITUTIONALLY INFIRM DUE TO THE CUMULATIVE EFFECT OF TRIAL ERRORS AND INSTANCES OF INEFFECTIVE ASSISTANCE OF COUNSEL

THAT DEPRIVED PETITIONER OF HIS FIFTH,  
SIXTH, AND FOURTEENTH AMENDMENT RIGHTS  
TO A FAIR TRIAL, DUE PROCESS OF LAW, AND  
EFFECTIVE ASSISTANCE OF COUNSEL

PETITIONER ADOPTS ALL FACTS AND ARGUMENTS, OUTLINED  
HEREIN ABOVE IN SUPPORT OF THE INSTANT GROUND FOR  
RELIEF.

PETITIONER SUBMITS THE CUMULATIVE EFFECT OF  
ERRORS, AS OUTLINED IN GROUNDS 1-8, HEREIN HAVE HAD  
A SUBSTANTIAL EFFECT ON THE JURY VERDICT. THOSE ERRORS  
INCLUDE, BUT ARE NOT LIMITED TO, THE FOLLOWING:

1. COUNSEL'S FAILURE TO INVESTIGATE AND USE AVAILABLE  
EVIDENCE TO PROPERLY CROSS-EXAMINE AND IMPEACH THE  
CREDIBILITY OF THE STATE'S CHIEF WITNESS, ANABEL  
ESPINDOLA;

2. COUNSEL'S FAILURE TO REQUEST A SEVERANCE  
FROM CO-DEFENDANT;

3. COUNSEL'S AND COURT'S FAILURE TO PROPERLY  
INSTRUCT THE JURY CONCERNING USE OF A DEADLY WEAPON;

4. DEFENSE COUNSEL'S FAILURE TO REQUEST A JURY  
VERDICT FORM THAT SEPARATED BATTERY WITH SUBSTANTIAL  
BODILY HARM FROM BATTERY WITH USE OF A DEADLY WEAPON;

5. DEFENSE COUNSEL AND THE PROSECUTION CONFUSED THE JURY WITH USE OF "CONTEXT" AND "ADOPTIVE ADMISSION";

6. COUNSEL FAILING TO ENSURE PROPER IDENTIFICATION OF DEFENDANTS THROUGHOUT TRIAL;

7. FAILURE OF COUNSEL, COURT, AND PROSECUTION TO ALLOW PETITIONER TO CROSS-EXAMINE DEANGELO CARROLL;

PETITIONER ALSO ADOPTS THE ERRORS COMPLAINED OF ON DIRECT APPEAL, AND THEIR CUMULATIVE EFFECT IN COMBINATION WITH THE ABOVE ERRORS, AS FOLLOWS:

8. TRIAL COURT'S ERROR WHEN IT INSTRUCTED THE JURY IT COULD CONVICT PETITIONER OF CONSPIRACY ESTABLISHED BY ONLY "SLIGHT" EVIDENCE;

9. SUFFICIENCY OF EVIDENCE OF CORROBORATION OF THE ACCOMPLICE TESTIMONY TO SUPPORT VERDICT;

10. FAILURE OF THE STATE TO RECORD ACCOMPLICES WITNESS'S PLEA NEGOTIATION VIOLATED PETITIONER'S RIGHTS TO A FAIR TRIAL AND DUE PROCESS OF LAW;

11. PETITIONER'S RIGHTS TO CONFRONTATION VIOLATED BY ADMITTING EVIDENCE OF CO-CONSPIRATOR'S STATEMENTS AFTER HE HAD WITHDRAWN FROM THE ALLEGED CONSPIRACY;

12. THE TRIAL COURT'S DENIAL OF PETITIONER'S MOTION FOR NEW TRIAL BASED UPON JUROR MISCONDUCT.

WHILE NO SINGLE ERROR, OR CLAIM OF ERROR, MAY RISE TO A LEVEL OF HARM TO REQUIRE REVERSAL, THE CUMULATIVE EFFECT OF THESE ERRORS CAN UNDERMINE THE CONFIDENCE IN A CONVICTION.

THERE IS NO DOUBT THE SERIOUS ERRORS COMPLAINED OF HEREIN, AND ON DIRECT APPEAL, HAD A CUMULATIVE ADVERSE EFFECT ON PETITIONER'S RIGHTS TO A FAIR TRIAL.

THIS, IN ACCORDANCE WITH PARLE V. RUNNELS, 505 F.3d. 932 (9<sup>th</sup> CIR 2007), WOODS V. SINCLAIR, (CITE UNKNOWN); AND DAVIS V. WOODFORD, 384 F.3d. 628 (9<sup>th</sup> CIR 2004) THIS COURT SHOULD REVERSE PETITIONER'S CONVICTION.

### CONCLUSION

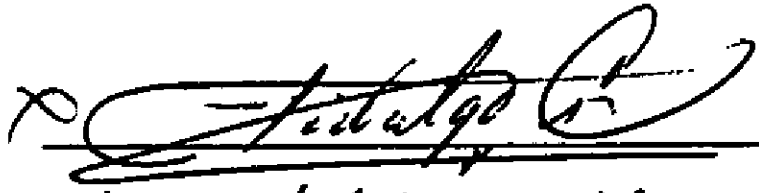
PETITIONER HAS SUBMITTED SEVERAL GROUNDS FOR RELIEF HEREIN, BASED UPON STATUTORY AND CONSTITUTIONAL VIOLATIONS, THAT DEMAND RELIEF. PETITIONER HAS ALSO SUBMITTED CLAIMS BASED UPON EVIDENCE OUTSIDE THE RECORD THAT WILL REQUIRE THIS COURT HOLD AN EVIDENTIARY HEARING TO GATHER AND EVALUATE EVIDENCE TO DETERMINE THE NEED TO ADJUDICATE CLAIMS OF ERROR HEREIN.

ADDITIONALLY, FOLLOWING PETITIONER'S TRIAL, A CIVIL ACTION WAS COMMENCED AGAINST PETITIONER AND OTHERS THAT REVEALED EVIDENCE NOT SUBMITTED AT TRIAL THAT

MITIGATES PETITIONER'S INVOLVEMENT IN THE ALLEGED OFFENSES. THE DISCOVERY EVIDENCE IS NOT IN PETITIONER'S POSSESSION AND FURTHER INVESTIGATIONS ARE NEEDED TO SECURE THE AVAILABLE EVIDENCE FROM THE CIVIL ACTION, TO BE USED IN THIS CRIMINAL ACTION. AS A RESULT, COUNSEL IS NECESSARY TO FURTHER INVESTIGATE AND PREPARE POSSIBLE SUPPLEMENTS HERETO.

WHEREFORE, BASED UPON THE FOREGOING, THE INSTANT WRIT SHOULD BE GRANTED.

DATED THIS 26 DAY OF December, 2013.

  
\_\_\_\_\_  
LUIS HIDALGO, JR.,  
PETITIONER, IN PROPER PERSON



CERTIFICATE OF SERVICE

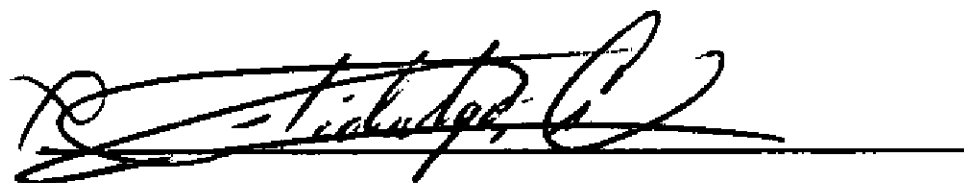
I, LUIS HIDALGO, JR., CERTIFY THAT ON THIS DATE I DID PROVIDE A COPY OF THE FOREGOING MEMORANDUM OF POINTS AND AUTHORITIES TO RESPONDENT BY PLACING SAME IN THE U.S. POSTAL SERVICE, POSTAGE FULLY PREPAID, AND ADDRESSED AS FOLLOWS:

CLARK COUNTY DISTRICT ATTORNEY  
300 LEWIS AVENUE  
LAS VEGAS, NEVADA 89155

&

NEVADA ATTORNEY GENERAL  
100 N. CARSON STREET  
CARSON CITY, NEVADA 89701-4717

DATED THIS 26 DAY OF December, 2013.



LUIS HIDALGO, JR.,

PETITIONER, IN PROPER PERSON

EXHIBIT-1

DATE	TIME	COMMENTS
01-16-08	22:58	No 3-way call/ Anabel say she detects something is wrong with me, wondering why I'm so quiet my response it's was due to her interest being elsewhere.
01-16-08	13:47	Anabel is being specific in her questions targeting directly to pinpoint specific things.
01-16-08	09:53	✓
01-16-08	09:41	conversation with Luis III
01-15-08	23:03	Anabel, Luis declines doing 3-way calls and writing letters.
01-15-08	22:51	Anabel ✓
01-15-08	22:03	Anabel 3-way call with Lacy, again Anabel was inquiring about (lover aka Chapara) Geneva Del Campo.
01-15-08	21:52	Anabel 3 way call with Lacy.
01-15-08	15:15	✓
01-15-08	15:05 : 16	Anabel admits everything said in court are lies two times (rec time 2:50 & 3:02) 2:05
01-14-08	20:30	Anabel ✓
01-14-08	20:16	Anabel talks to Rosa
01-14-08	9:02	Anabel ✓
01-13-08	23:01	Anabel She tells me not to communicate with Cherry. She explains that people just want to get money from me. She also tells me not to accept any mail just send it back without opening it.

EXHIBIT-2

THIS PAGE ADDED BY IMAGING SERVICES

SOME PAGES IN THIS DOCUMENT ARE LIGHT OR UNREADABLE  
IN ORIGINAL FORM AND HAVE BEEN DARKENED AS MUCH AS POSSIBLE.

THE IMAGES THAT FOLLOW ARE THE BEST POSSIBLE

YY/MM/DD

Vol 1/2 # 1849634

- 3/2/1 — DISCUSSION ABOUT BAIL SOMETHING ABOUT AN EXTRA \$25K
- 3/2/1 — QUESTIONING ABOUT BAIL. SOMEONE COMING TO SEE HER FOR SIGNATURE  
BAIL PERSON GOING TO SEE LUIS JR AT 9:00AM (TOMORROW) THEN WILL  
GO TO SEE ANABEL TO GET POA.
- 3/2/1 — STARTING DISCUSSING ABOUT BAIL. LUIS MADE REFERENCE ABOUT "THE  
2008-02-01 PACKAGE HAS LEFT". EXPECT THE BAIL PERSON TOMORROW MORNING.  
21:53:59 \* ANABEL ASKED LUIS TO WAIT UNTIL TUESDAY. LUIS SAID "WE CAN NOT  
STOP THE PROCESS". TALKED ABOUT MOTHER'S HEALTH CONDITION  
AND HEALTH INSURANCE. WHEN WAS IT PAID? ... FROM DECEMBER  
THROUGH MAY ... HOW ABOUT THE LITTLE HOME? LUIS: "I PAID IT  
YESTERDAY".
- 3/2/1 — TALKED ABOUT BAIL REDUCTION. ANABEL: "I DON'T SEE IT HAPPENING  
THEY ALREADY HAD ME HERE FOR OVER 2 1/2 YEARS". SHE SOUNDED  
DESPERATE. SHE IS ASKING LUIS, SHE WANTS TO SEE EVERYBODY BEFORE  
THINGS GET BAD.
- 8/1/31 — ERIC (BAIL BOND) (H) 626-794-7201 WILL (H) (102) 352-4321
- 8/1/31 — ANABEL: "I AM READY TO LEAVE" DO YOU HAVE ANY RESPONSE ABOUT THE  
BAIL? "I THINK THINGS ARE DRAGGING INTENTIONALLY" ... QUIET FOR  
A LONG TIME; ONLY LUIS TALKING. AT MINUTE 9:07 - ANABEL "I'  
GIVE YOU A WEEK; I WANT OUT". 2008-01-31 9:23:34
- 8/1/31 — LUIS TALKING MOST OF THE TIME.

Vol 1/2 # 1849634

- 8/1/16 — DISCUSSION ABOUT RELATIONSHIP. LUIS TELL ANABEL THAT THINGS  
ARE NOT THE SAME AND SHE KNOWS WHY. ALL HE CARES IS FOR THEM TO  
GET OUT.
- 8/1/3 — @ 8:57 ANABEL "I HATE BEING HERE"

2008-01-31 Luis say I'll see you tonight

1:23:34 Anabell says I want out, I want one week  
you guys have not even gone to get my clothes

Recording missing from orig. Discs -  
by date / Time. (reverse order)

Disc 1 of 2 (10 missing)

1/6/08 17:54 , 12:35 , 12:15.  
1/5/08 15:46  
1/4/08 23:10 , 22:49  
1/3/08 19:53 , 08:31  
1/2/08 23:36  
12/31/07 15:53

Disc 2 of 2 (12 missing)

✓ 2/2/08 08:38  
✓ 1/30/08 23:28 , 23:05 , 09:01 , 08:51  
1/29/08 22:41  
1/28/08 21:34 , 09:39 , 08:30  
1/27/08 23:18 , 00:40  
1/26/08 22:42

1/31/08 09:11



18/1/30 673-0400 23:28:05

:21 - 1:15 - Anabel talking about other ♀; crying  
1:16 - 1:33 - going to clean  
- wants to call back

18/1/30 23:05:59

1:22

1:38 - 1:42 Luis asks if Anabel received  
~~the money~~

1:46 - 2:00

bail

property not cash bail

2:00 - 2:30 hours

2:06 - 2:16 delay until we start trial

2:16 - 2:45 repeats bail types

2:46 - 3:07 tomorrow, Friday

3:08 - 3:20 chatting, seems distant

3:37 - 6:08

6:08 -

Sleeping habits

anxiety

bail bonds

7:47 lawyer conversation

8:11 no podria agarrar un bond

8:56 - She doesn't understand,  
Luis explains it's a special  
bond; 2 million

9:50

Continues to talk about bail

10:00

Luis tells her to calm down  
and call back

CD 2

08/1/30 9:01:27 (morning)

2:59 Anabel concerned about promises

3:25 Anabel sounds upset, argues

4:36 She wants to talk to — directly.  
Sounds frustrated.

5:19 Anabel interrupts Luis

6:09-6:15

Someone has not paid

8:08-8:33 Anabel wants to talk by phone

"You know who, right?"

8:46 Luis says he's being told to be careful. Different in jail than car

9:13 Anabel things are not good for her.

9:40 I love yous exchanged

9:20-9:38 Luis questions her.

YY/mm/dd

08/02/02

673-0400

8:38:40 (morning)

asks what she needs 00:53 - 00:59

3:23 - 4

talking about Superbowl time, party

4:43 - Anabel says its already been 10 days,  
5:10 refers to antibiotics

5:24 - 5:50

hard to hear, Luis br

A "just got to wait it out"

5:51 headache, tell each other to back  
to bed

6:09-10 If we come up this afternoon or stay the night

I love yaus are exchanged

6:23

08/02/01 673-0400

22:14:31 (evening)

08/01/30 8:51:01 (night)

:36 Luis went to bail bonds man

2:00 Luis talked many people  
about bail

3:11 15%

Luis & Anabel debate

4:08 I need to get out.  
Yo necesito salir.

4:20-4:43 Que quieres que haga gorda  
What do you want <sup>me</sup> to do?

4:48 Promises

5:05 Luis refers to lawyer

5:18 She wants to talk to the lawyer  
now.

5:26 Luis refers to finances.

6:15

6:46 She feels overwhelmed in jail.

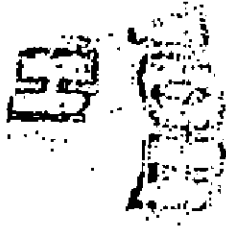
6:53 "I did not do this."

EXHIBIT-3

Denise L. Mata  
4021 ONE ST  
Las Vegas NV 89104

LAS VEGAS NV 890

OF MAY 2000 179-44



12/13

Anabel Espindola  
#1849750

330 S. Casino Center Dr.  
Las Vegas NV 89101

6284-

2910178100



Anabel

December 15, 2008  
1:41 pm.

1 Hi, I hope this letter finds you  
2 in good health. How are you doing?  
3 things are good here. I go to Court  
4 on Thursday at 8am.  
5 Hey you know I love you and respect  
6 you. This is my main reason for  
7 writing you today.

8 I'm telling you this because  
9 I know how jail is and I don't  
10 want you to hear it from anyone  
11 else.

12 I'm not sure if you know, but I'm  
13 friends with Christa, who was  
14 supposed to get out on the first  
15 So I called the # she gave me, and  
16 I spoke to ~~XXXX~~ NANU-NANU, and she wasn't  
17 out. So I called again on the  
18 5<sup>th</sup> and he offered me a job on  
19 the weekend at the swap meet.  
20 I took the job but I wanted to tell you  
21 my self. I'm helping him sell  
22 women's clothing.

23 El me dijo que te diga NANU-NANU,  
24 he said you will know what that means.  
25 Te digo algo y no te enojas?  
26 El te sigue queriendo y me lo dijo  
27 con lagrimas en los ojos, y otra  
28 cosa. La flaca te dijo puras mentiras.

Y un 7, un cruce. ~~mi casa~~ para que both victims  
Mira con el corazón en la mano  
te pido que pienses bien en lo que  
vas a ser en un momento. Si uno es  
verdad que Nani Nani tuvo algo  
que ver en todo lo que pasó.  
No es tarde para parar todo.  
Arabel piensa que si lo declaran  
culpable lo van a ejecutar a él  
y a su hijo. El hijo todavía  
pregunta por ti cuando habla.  
Mira una pregunta? Crees tu  
que si los condenan tú vas a estar  
bien? Especialmente si no es  
cierto.  
No dejes que los chismes o planes  
de los malos los destruyan. Yo  
te voy a ayudar.  
Pídalele que te me ayude.  
Yo quiero que creas y te quieras.



29 mucho. Pero no acostas de la  
30 vida de 2 personas. Porque  
31 yo te conozco y se que no vas a ser  
32 feliz con eso en tu conciencia.

33 I wish I could help you both  
34 be happy.

35 Me parte el alma ver que Nani  
36 Nani llora. Tu eres todo para  
37 el.

38 Pero el no entiende porque siendo  
39 tan inteligente tu, te dejas  
40 influenciar por esas mujeres.

41 Mira una cosa, Cherry le dijo  
42 a NANI NANI que Geneva is bragging  
43 in Smiley about how she turned  
44 you out. Not only that JDice le  
45 llamo y le dijo de una tal India.

46 I'm telling you this all happen  
47 because of third parties.  
48 All whady Bitches.

49 Only God know what really happen  
50 if you have que ver en el caso.  
51 Recuerda que no hay nada escondido  
52 ante Dios.

53 Si todo lo que vas a decir es  
54 eterno es verdad, es lo que tengas  
55 que hacer. Igual yo te voy a apoyar.  
56 My love for you will not  
57 change no matter what.

58 Sea mentira o Verdad voy tu  
59 amiga incondicional.

60 Please don't think bad of me. yo no soy  
61 como las otras pichis viejas interesadas  
62 mi unico interes es que seas feliz  
63 y que todo te calga bien.

64 My plea to you is to just be  
65 true to your self.

66 Anabel yo te apoyo what ever  
67 your decision is.

68 With much Love and respect,

69 Ps.

70 Good Bless you

71 And it will

72 always ~~be~~ pray  
73 for you

74 If it is not true how

75 does he know all that.

76 All these people who

77 are telling him that it is not true.

Nenise Mata

78

Ps. Natacha told NANU NANU

79 that she heard Geneva, Lacy,

80 and Flicia talking about how

81 they were plotting to get back

82 at NANU NANU by making up all

83 this shit making it look like

84 you ordered it.

85 Theres alot of things you dont know  
86 y que no me pertenece a mi decirlo.  
87 Pero yo te quiero un chingo Anabel  
88 y lo unico que yo quiero es verte  
feliz.

89 Por favor no te enojas con mi go.

90 Cuidate mucho, and I  
91 hope to see you soon.

92 Denise  
↓

God Bless you!

EXHIBIT-4

Denise Mata  
4021 OLIVE ST  
Las Vegas NV 89101

LAS VEGAS NV 89101

15 DEC 2008 PM 4:17

5763

18449750

5763

FOI

Anabel Espindola  
330 S. Casino Center Dr.  
Las Vegas NV 89101

0019476100

0019476100

Anakuel

December 24, 2008

1 Hey, I hope this letter finds you doing  
2 good. As for me all is good.  
3 Work is doing good. And I'm still  
4 standing strong.  
5 Bueno Paso a lo siguiente, estoy  
6 con Nani Nani, y pues me dice que  
7 todo es mentira. El no le compuso  
8 nada a Christa, nunca te engano  
9 con ella. En mi opinion you were  
10 both vaild road. You are both victims  
11 in this case.  
12 Mira con el corazon en la mano  
13 te pido que pienses bien en lo que  
14 vas a ver en tener. Si no es  
15 verdad que Nani Nani tuvo algo  
16 que ver en todo lo que paso.  
17 No es tarde para parar todo.  
18 Arabel piensa que si lo declaran  
19 culpable lo van a ejecutar a el  
20 y a su hijo. El hijo todavia  
21 pregunta por ti cuando habla.  
22 Mira una pregunta? Crees tu  
23 que si te condenan tu vas a estar  
24 feliz? Especialmente si no es  
25 cierto.  
26 No dejes que los chismes o planes  
27 de los malos los destruyan. Yo  
28 se que si te he echado para atras  
29 en ti va a ayudar.  
30 Please don't get me wrong.  
31 I just want you to stay strong.

EXHIBIT-5

Hola,

Como estas wyo. I hope that your in better  
Spirits as for me why even ask. I'm writing cause  
I need to express my feelings re all of this so  
you can understand where I'm coming from. Como  
el trato se iso con el negocio el grande y to me  
dijeron that you'd get a certain \$ amount and approx  
2 million would be set aside for bail. That's the reason you  
decided to get rid of the business so quickly and inexpensively,  
Promises were made and not kept. I believe he knew about  
the lien hes a lawyer and its a large dollar amount at the  
time he didn't worry being this was a capital case and bail  
was not an option. This is the reason he wants to proceed  
so badly it has nothing to do with us but for his benefit. No  
matter if were found guilty or innocent he can wash his hands  
of us he got a business for virtually nothing. One time when he  
came to see me & we were reviewing the <sup>audio</sup> surgenious tapes when  
I brought up the subject of bail we discussed the deal  
you both had made. then he proceeded to tell me that my mom  
would need to place her house as well as a security measure that  
I wouldn't run if I did an order of shoot to kill would be placed  
upon me. I never forgot that conversation! This is one of the reasons  
I have always been skeptical of the man. I don't believe he  
ever intended to follow through on what he said although he had  
you convinced otherwise. He lied so he could swindle the  
business away from you. For your information only it wasn't  
until el quince de este mes que el mio recibio parte pago  
por lo que se le debe only because le dijo al grande que el  
dinero que no estaba listo para proceder. Para el grande



29 wants this over with so bad makes you wonder don't it  
30 It's not for our benefit it's for his. This man made  
31 a commitment about bail that's why he got the  
32 business so cheap he needs to follow through. It  
33 would be bad for business for people to know how  
34 he swindled a man out of his business by telling  
35 him lies and giving him false hopes and making  
36 commitments he had no intention of keeping. He needs  
37 to follow through on the bail w/ his friend the bail bonds-  
38 man he claims to use all the time! If by some rare  
39 possibility the lien was just put on the property which  
40 I doubt, I bet it happened after the Supreme Court  
41 decision came in and bail became a possibility  
42 let's not forget what bldg. he moved into Gordon's  
43 Things that make you go hmmm... Not only  
44 that, that day in court the prosecutor said in  
45 open court they wanted to know where the money was  
46 coming from even though the judge discounted  
47 what was said. Maybe that made him uneasy. My  
48 point is when the club exchanged hands you were  
49 scheduled to be paid a certain amount and 2 million  
50 was to be set aside by him for bail! If he was  
51 made uneasy I don't care it's a matter of public  
52 record he got the club the RS's written stories  
53 about it. He needs to call his little bail bondsmen  
54 friend and figure this out if not I sequester you  
55 go after him for the balance of the money that  
56 is rightfully due to you. No bail then that money  
57 is due to you as part of the sale it was only held aside  
58 for use of bail. I honestly don't think he

59. Wants to hear my opinion in the  
60. matter or what I have to say! I may  
61. look like I fed off the turnip truck yesterday  
62. but it was the day before! I'm sorry for  
63. babbling and repeating myself as you can tell I'm  
64. excited. Oh yeah he said he didn't want  
65. to delay trial unless it was to our benefit (he  
66. meant his benefit) get us out on bail then it  
67. would be no way for it to postpone even for  
68. a month or two. Myo I hope you understand  
69. where I'm coming from that my anger is w/  
70. him right now he's lied to everyone. He not  
71. only made promises to you but to me as well like  
72. I said I've never forgotten what he told me when  
73. he came to see me some + we are if he'd like  
74. I'll be more than happy to remind him. Moving on  
75. el día que fue I corte in holding via la  
76. Short y esta Cabrera es loca tiene los  
77. viejos mas grandes que los tuyos <sup>mi</sup> esta  
78. Cabrera se clababa los trokes de RC + U  
79. sabes la que vende muebles se las cala la  
80. en Cal: tiene un chingo de cosas. la ultima  
81. vez que la vi me iba dar su directa <sup>se</sup> got oreid  
82. la acabo de ver otra vez aqui te la doy huarda  
83. la tiene plasm y to sabes. la hacaron por  
84. probation violation esta vez failure to check in  
85. she thinks she might get reinstated antes la agarraron  
86. por a PSV. aqui te mando su director no la pierdas  
87. Que Dios te Bendiga Siempre Mija <sup>would still 2nd wife no son  
deven & for you about  
She's + U</sup>  
88. Con Todo mi Amor y Respeto Siempre  
89. Nani Nani

Hope you like  
the PR3659  
HID PA03472

EXHIBIT-6

Mrs. De7 Camper, 10-16-07

Well mija, I'm  
over here missing you like crazy! I  
told my homeboy that he needs to  
hurry up and send your picture Back  
of mija how come you don't be sending  
me any message con la trustee?  
but you send one to la Tanya? Maybe  
I'm just trippen. So are you missing  
me? you better babe, shit or I'll kick  
your ass in a good way!! mija I  
keep thinking about the other night!  
I can't wait to be with you on  
the outs! I know I can make you  
happy!! Samn mija I feel all sad  
and shit!! I need you mija hella bad  
I hope they'll mess up and let us  
go to class again!! Oh yeah mija  
please stop talking to that stupid  
ass Bitch (Flaca) neta she went to  
court today! and my homie told me  
that they kept talking about your  
man, and how they were driving  
your car and Luis giving them money  
all the time!! I got so mad mija,  
and it wasn't just Flaca it was some  
girl with real short hair, and a tattoc  
on her left arm! Does that sound →

27 Familiar? Let me know okay! mija  
28 mom came to see me on Saturday  
29 with my grandma! I had them rolling  
30 you know me and the stupid shit.  
31 I say!! I love you so much mija, man  
32 you looked and felt so good!! mija you  
33 felt so right, we belong together &  
34 real we do!! So obi still talking  
35 shit? I don't give a fuck! I only  
36 care what you think! nēta, oh yeah  
37!! mija what the Fuck was you  
38 looking at? huh, cuz mekgrand put  
39 you on blast!! biggie told me your  
40 face got hella red!! I'm laughing  
41 my ass off right now, cuz when  
42 we were done dressing, you didn't  
43 even look my way for shit! your  
44 so crazy I I U perdija haha,  
45 your always making me laugh!!  
46 and I I that, you know god  
47 is real good for putting you in my  
48 life, neta. I'm so, so, so thankful  
49 for that!! I still got a big ass  
50 smile on my face!! I hope you  
51 like the drawing! I I you wife!  
52 neta que I do!! hurry and write  
53 back -K-  
54

UR  
Daddy

EXHIBIT-7

Lee,

5-25-08

Hello, how are you doing? A bright I hope. I truly hope this letter reaches you in the best of health and spirits. As for me I'm okay. Just trying to remain strong and focused throughout this process.

Any ways I do hope all is <sup>well</sup> with you. It's so boring here. I am so ready to go home. I wish I could go home today. I only have 10 months left in this crazy place. I can say it is making me a even stranger person. I'd instead of looking at this time as a down fall I look at it as a stepping stone to my future when I am out and will I not ever come back this time. I need and want to get home to my daughter whom I had in prison. I miss her so much I can't wait to hold her and kiss her and raise her like a father is suppose to. I will use the things I learn in here to keep me grounded in a more positive and constructive way. I will use everything I learn in here to the best of my ability. My daughter doesn't deserve any of this.

Well how are things going out there? Are you okay and are you staying in

29 ② prayer everyday. just continue to stay strong  
30 and I don't want to keep your eyes on God well  
31 your heart and your actions all need to  
32 be of God Christ like.

33 When your attorney comes to see me I  
34 would appreciate it if you gave me a 48  
35 hour advance notice so that I will not  
36 miss any classes and miss days because of  
37 it I don't attend to lose ANY days I need  
38 to go have to my Angel and have lunch  
39 with your friend.

40 I don't know if what I have to say is  
41 very helpful but you said, "It was so I will  
42 do my best I can to help you. I'm letting you  
43 know I'm very straight up no games, no lies. I  
44 know that I've been in prison and I've made a lot  
45 of bad choices but I'm a good person and I do  
46 not lie. I accept responsibility for my actions  
47 at all times. Right is Right and Wrong is  
48 wrong I broke the law and now I'm paying  
49 for my own consequences which I have no  
50 problem with that at all.

51 So I'm asking you please don't try to play  
52 games with me okay regarding your situation.  
53 I believe honestly you are an innocent man  
54 because of what I've seen and because of what  
55 I heard with my own ears. I know it's your  
56 life on the line. And I honestly hope I'm  
57 able to help with the information.  
58 I'm going to be totally honest with you I don't  
59 feel at any time you are putting  
60 me in a compromising situation I'm backing



③

61 out and acting like I don't know  
62 anything on what you are talking  
63 about what was told to me.  
64 Because I was put in totally bad  
65 situation with that paper your  
66 Attorney sent up here with me  
67 Claudial, and something Dupes or it  
68 asking if we knew you and if we  
69 wanted to speak with his attorney  
70 on your behalf concerning his  
71 case. And my counselor said, "I hope  
72 you don't want to see him basically in  
73 a round about way because these  
74 other two girls here don't live in  
75 another part of the prison right  
76 now so I have not seen them  
77 yet. Because he showed me their names  
78 and so I know he showed them names.  
79 Like I said, "I will be honest and I  
80 will help out to the best of my  
81 ability because what's happening to you  
82 is not right your lady in County is  
83 setting you up.

84 Please don't even tell Christa (green eyes)  
85 because she is a liar and she talks to  
86 those girls and talks a lot to try  
87 and fit in. I'm asking you because I  
88 still have to live here and I'm not

<sup>187</sup>  
<sup>70</sup> I'm trying to stay in here any longer if I don't  
want to because I will defend myself. Anabel  
definitely has these young girls under her  
control and they whatever she tells them  
to do. And she's not even in this facility  
that's why you're in the situation you're  
in because of what she had those girls  
going on you because she was going to get  
you. It's so crazy. I can't believe that lady  
could be that devil and do someone like  
that because she's down and it's not cool.

I'm writing in this letter because I don't  
want to talk about it on the phone or  
on paper but I will tell all I know to  
your attorney I do hope and pray it helps  
you.

<sup>104</sup>  
<sup>105</sup> You really offended me because I asked  
you not to call any of those girls because I  
told you they wouldn't say anything because  
they are her puppets and you told your  
attorney do it any way. I guess your action  
speaks louder than words.


I'll be expecting to hear from your attorney  
and once again I do hope him able to  
help in some way. And the information is  
very useful in one way or another.

So have you been eating? I hope so and  
hope you're taking care of yourself being  
careful and keeping your head up...

My phone isn't working so I hope it's  
back on by next week so I can

(5)

120 talk to you. How is your cold coming  
121 along? I do hope better. Is your arm  
122 okay? What happened to it? If you  
123 don't mind me asking.

124 So have you still been packing and  
125  unpacking? Is it coming along  
126 okay? Oh yeah when does Green Eyes  
127 go back to court? You know it does  
128 that look good.

129 Well Lou I'm going to go far and  
130 but never ever forever. But before I  
131 do I want to ask you a favor you  
132 said, "If I may need you ask." I  
133 don't feel comfortable asking. But I really  
134 don't know you that well but  
135 by phone and your letters to Green eyes.  
136 I would like to know do you think  
137 you can send me some money so I  
138 can buy some phone time to call  
139 my baby once my #'s are back  
140 working because I got my pay \$38<sup>00</sup>  
141 than work but I had to honestly  
142 buy my hygiene I will not ask again  
143 because I don't feel right doing it  
144 but I want to talk with my Angel as  
145 well as buy a few more extra things  
146 The reason I'm asking is because I  
147 Can't work because of my foot that's why.

<sup>149</sup>  
<sup>150</sup>  
<sup>53</sup> ⑥ they sent me back here because of my  
not go back to the doctors tomorrow  
the hospital Contra on the outside.  
I hope I did not offend you but if I  
did I apologize and if you can't I do truly  
understand...

Sincerely  
Natasha Newell  
# 83822 Rd.  
4370 Smiley NV  
Las Vegas, NV 89115

I'll be waiting  
for your response

**AFFIRMATION**  
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding document is

PETITION FOR WRIT OF HABEAS CORPUS, MEMORANDUM OF  
POINTS & AUTHORITIES, MOTION FOR JFF, MOTION FOR CANCEL  
(Title of Document)

filed in case number: C241394

☒ Document does not contain the social security number of any person

-OR-

☐ Document contains the social security number of a person as required by:

☐ A specific state or federal law, to wit:

\_\_\_\_\_  
(State specific state or federal law)

-or-

☐ For the administration of a public program

-or-

☐ For an application for a federal or state grant

-or-

☐ Confidential Family Court Information Sheet  
(NRS 125.130, NRS 125.230 and NRS 125B.055)

Date: 12/26/13

  
(Signature)

Luis Hidalgo, Jr.  
(Print Name)

In Proper Person  
(Attorney for)

ppcc

LUIS HIDALGO, JR., #1038134  
NORTHERN NEVADA CORRECTIONAL CENTER  
P.O. BOX 7000  
CARSON CITY, NV 89702  
PETITIONER IN PROPER PERSON

FILED  
DEC 31 2013  
Clerk of Court  
CLERK OF COURT

811

DISTRICT COURT  
CLARK COUNTY, NEVADA

LUIS HIDALGO, JR.,  
PETITIONER, CASE NO. C241394  
VS. DEPT. NO. XXI  
ISIDRO BACA, WARDEN  
RESPONDENT.

MOTION FOR APPOINTMENT OF COUNSEL


DATE OF HEARING: \_\_\_\_\_  
TIME OF HEARING: \_\_\_\_\_

COMES NOW, PETITIONER, LUIS HIDALGO, JR., IN HIS  
PROPER PERSON, AND RESPECTFULLY MOVE THIS HONORABLE  
COURT FOR APPOINTMENT OF COUNSEL ON HIS PETITION  
FOR WRIT OF HABEAS CORPUS (POST-CONVICTION) ON FILE  
HEREIN.

THIS MOTION IS BASED UPON NRS. 34.750, ALL  
PAPERS AND PLEADINGS ON FILE HEREIN, AND THE  
FOLLOWING POINTS AND AUTHORITIES.

RECEIVED  
DEC 31 2013  
CLERK OF THE COURT

RECEIVED  
DEC 31 2013  
CLERK OF THE COURT

08C241394  
MAPP  
Motion for Appointment  
3314000  


## POINTS AND AUTHORITIES

### BRIEF CASE HISTORY AND STATEMENTS OF FACT

LUIS HIDALGO, JR., (HEREINAFTER "PETITIONER") PROCEEDED TO A JURY TRIAL IN THIS COURT IN JANUARY, 2009 FOR SEVERAL FELONY CHARGES RELATED TO THE DEATH OF TIMOTHY HADLAND. THE PROSECUTION SOUGHT THE DEATH PENALTY AGAINST PETITIONER AND HIS CO-DEFENDANT, SON, LUIS HIDALGO, III. THE JURY TRIAL LASTED APPROXIMATELY 30 DAYS RESULTING IN A VERDICT OF GUILTY ON FEBRUARY 17, 2009.

PETITIONER WAS SENTENCED ON OR ABOUT JUNE 29, 2009 TO CONSECUTIVE LIFE SENTENCES FOR SECOND DEGREE MURDER WITH USE OF A DEADLY WEAPON AND CONSPIRACY TO COMMIT BATTERY WITH USE OF A DEADLY WEAPON. JUDGMENT OF CONVICTION ENTERED JULY 10, 2009.

PETITIONER TIMELY APPEALED THE CONVICTION TO THE NEVADA SUPREME COURT. THE NEVADA SUPREME COURT ISSUED AN ORDER OF AFFIRMANCE ON JUNE 21, 2012. THE NEVADA SUPREME COURT DID NOT ISSUE REMITTITUR UNTIL APRIL 10, 2013 DUE TO A PETITION FOR WRIT OF CERTIORARI BEING FILED IN THE U.S. SUPREME COURT. (NV.S. CT. 54209).

PETITIONER FILES, CONTEMPORANEOUSLY HEREWITH A PROPER PERSON PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION) WHEREIN HE PRESENTS NUMEROUS GROUNDS FOR RELIEF BASED UPON CONSTITUTIONAL AND PROCEDURAL VIOLATIONS.

" . . .

" . . .

" . . .

## ARGUMENT

NEVADA REVISED STATUTE ("NRS") 34.750 ALLOWS FOR THE APPOINTMENT OF COUNSEL IN THIS ACTION AND OUTLINES FACTORS TO BE CONSIDERED BY THIS COURT WHEN DECIDING TO APPOINT COUNSEL. THOSE FACTORS ARE:

- (A) THE ISSUES PRESENTED ARE DIFFICULT;
  - (B) THE PETITIONER IS UNABLE TO COMPREHEND THE PROCEEDINGS;
  - (C) COUNSEL IS NECESSARY TO PROCEED WITH DISCOVERY;
2. IF THE COURT DETERMINES THAT THE PETITIONER IS UNABLE TO PAY ALL NECESSARY COSTS AND EXPENSES INCIDENT TO THE PROCEEDINGS . . .

HERE, A REVIEW OF THE ACCOMPANYING PETITION DEMONSTRATES THE ISSUES ARE COMPLEX. THE PETITIONER'S TRIAL LASTED APPROXIMATELY 30 DAYS. THE CASE FILE AND TRANSCRIPTS OF THE TRIAL COMPRISE OVER 15 VOLUMES AND 8 LARGE STORAGE BOXES. PETITIONER HAS REVIEWED THE CASE FILE AND IDENTIFIED THE ISSUES CONTAINED IN HIS PROPER PERSON HABEAS PETITION. PETITIONER WAS BORN IN EL SALVADOR AND DOES NOT FULLY COMPREHEND AMERICAN LAW. PETITIONER HAS SUBMITTED A MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS INDICATING HIS INDIGENCY, HE CANNOT AFFORD TO HIRE PRIVATE COUNSEL TO LITIGATE THIS ACTION.



PETITIONER HAS BEEN CONVICTED UPON A LEGAL THEORY OF CONSPIRACY, ITSELF A DIFFICULT LEGAL THEORY TO COMPREHEND.

THE PROSECUTION'S CASE WAS WEAK, PROVEN BY THE FACT PETITIONER WAS ARRESTED 3 YEARS AFTER ALL OTHER CO-DEFENDANTS; AND CONVICTED SOLELY ON THE BASIS OF ONE CO-DEFENDANT'S TRIAL TESTIMONY.

PETITIONER ALLEGES, IN SUPPORT FOR HIS GROUNDS FOR RELIEF, THERE EXISTS FURTHER EVIDENCE OF TRIAL WITNESSES' MOTIVE TO FABRICATE AND FURTHER DISCOVERY IS NECESSARY IN THIS ACTION.

THE NEVADA SUPREME COURT HAS MANDATED THE NEED FOR APPOINTMENT OF COUNSEL IN HABEAS CORPUS ACTIONS WHEN THE ISSUES ARE COMPLEX AND PETITIONERS HAVE BEEN SENTENCED TO NUMEROUS LIFE SENTENCES, AS THIS PETITIONER. ROGERS V. STATE, 267 P3d. 802 (2011).

ACCORDINGLY, THIS COURT SHOULD APPOINT COUNSEL IN THIS ACTION AS ALLOWED BY NRS 34.750.

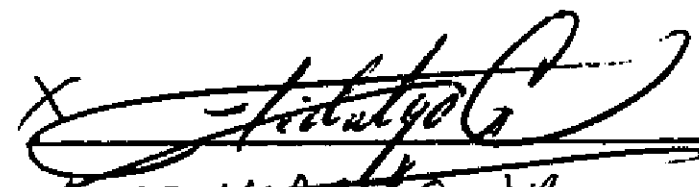
### CONCLUSION

WHEREFORE, BASED UPON THE FACTS OF THIS CASE, PETITIONER RESPECTFULLY REQUESTS THIS HONORABLE COURT APPOINT COUNSEL TO ASSIST PETITIONER IN FURTHER RESEARCH OF IDENTIFYING POTENTIAL

• • •  
• • •  
• • •

MERITORIOUS GROUNDS FOR RELIEF TO BE PRESENTED  
IN A SUPPLEMENTAL PETITION AS ALLOWED BY  
NRS 34.750 (3).

DATED THIS 26 DAY OF December, 2013.

X   
LUIS HUALZO, JR.

PETITIONER, IN PROPER PERSON

*JE*

FILED

2014 JAN -8 A 10:00

*Ann D. Schuman*  
CLERK OF THE COURT

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

LUIS HIDALGO JR.,  
Petitioner,

vs.

ISIDRO BACA (WARDEN),  
Respondent,

Case No: 08C241394  
Dept No: XXI

**ORDER FOR PETITION FOR  
WRIT OF HABEAS CORPUS**

HEARING DATE  
ALREADY ENTERED  
IN ODYSSEY

Petitioner filed a petition for writ of habeas corpus (Post-Conviction Relief) on December 31, 2013. The Court has reviewed the petition and has determined that a response would assist the Court in determining whether Petitioner is illegally imprisoned and restrained of his/her liberty, and good cause appearing therefore,


**IT IS HEREBY ORDERED** that Respondent shall, within 45 days after the date of this Order, answer or otherwise respond to the petition and file a return in accordance with the provisions of NRS 34.360 to 34.830, inclusive.

**IT IS HEREBY FURTHER ORDERED** that this matter shall be placed on this Court's

Calendar on the 11<sup>th</sup> day of March, 201 4, at the hour of 9:30 a.m. o'clock for further proceedings.

**IT IS SO ORDERED THIS** 2<sup>nd</sup> day of January, 2014.

08C241394  
OPWH  
Order for Petition for Writ of Habeas Corpus  
3338058



*Salvador Adan*  
District Court Judge

**RECEIVED**

**JAN 08 2014**

CLERK OF THE COURT

DISTRICT COURT  
CLARK COUNTY, NEVADA

DEPT NO: XXI

## //

1 **POINTS AND AUTHORITIES**

2 **STATEMENT OF THE CASE**

3 On February 13, 2008, the State filed an Indictment charging LUIS HIDALGO, JR.,  
4 aka, Luis Alonso Hidalgo (hereinafter "Defendant") as follows: COUNT 1 – Conspiracy to  
5 Commit Murder (Felony – NRS 200.010, 200.030, 199.480); and COUNT 2 – Murder With  
6 Use of a Deadly Weapon (Felony – NRS 200.010, 200.030, 193.165). On March 7, 2008,  
7 the State filed a Notice of Intent to Seek Death Penalty.

8 The State filed an Amended Indictment on May 1, 2008, which made changes to the  
9 language of the Indictment but did not modify the substance of the counts against Defendant.  
10 The State similarly filed an Amended Notice of Intent to Seek Death Penalty on June 18,  
11 2008.

12 On June 25, 2008, the State filed a Motion to Consolidate Case Number C241394 into  
13 Case Number C212667, seeking to join Defendant's case with that of his son, Luis Hidalgo,  
14 III, a co-conspirator in the murder. On December 8, 2008, the Hidalgo defendants jointly  
15 filed an Opposition to the Motion to Consolidate. The State filed a Response on December  
16 15, 2008. On January 16, 2009, the District Court issued an Order Granting State's Motion  
17 to Consolidate.

18 The joint trial of the Hidalgo defendants began on January 27, 2009. On February 17,  
19 2009, the jury returned the following verdict as to Defendant: COUNT 1 – Guilty of  
20 Conspiracy to Commit a Battery With a Deadly Weapon or Battery Resulting in Substantial  
21 Bodily Harm; and COUNT 2 – Guilty of Second Degree Murder With Use of a Deadly  
22 Weapon.

23 On March 10, 2009, Defendant filed a Motion for Judgment of Acquittal, or in the  
24 Alternative, a New Trial. The State filed its Opposition on March 17, 2009. Defendant filed  
25 a Reply to the State's Opposition on April 17, 2009. Defendant filed its Supplemental Points  
26 and Authorities on April 27, 2009. On May 1, 2009, the court deferred its ruling on the  
27 Motion for Judgment of Acquittal and invited additional briefing on the Motion. On June  
28 23, 2009, the court found that there was sufficient evidence to warrant not upsetting the jury

1 verdict and denied Defendant's Motion for Judgment of Acquittal, or in the Alternative, a  
2 New Trial. On the same date, the matter proceeded to sentencing.

3 On June 23, 2009, Defendant was adjudged guilty and sentenced as follows: COUNT  
4 1 – TWELVE (12) MONTHS in the Clark County Detention Center (CCDC); and COUNT 2  
5 – LIFE imprisonment with parole eligibility beginning after ONE HUNDRED TWENTY  
6 (120) MONTHS, plus an equal and consecutive term of ONE HUNDRED TWENTY (120)  
7 MONTHS to LIFE for the deadly weapons enhancement, COUNT 2 concurrent with  
8 COUNT 1. Defendant was given ONE HUNDRED EIGHTY-FOUR (184) DAYS credit for  
9 time served. A Judgment of Conviction was filed on July 10, 2009.<sup>1</sup>

10 Defendant filed his Notice of Appeal on July 16, 2009. The Nevada Supreme Court  
11 issued its Order of Affirmance on June 21, 2012. On July 27, 2012, the Court issued an  
12 Order Denying Rehearing. The Court issued an Order Denying En Banc Reconsideration on  
13 November 13, 2012. Remittitur issued on April 10, 2013.

14 On December 31, 2013, Defendant filed a Petition for Writ of Habeas Corpus, a  
15 Motion to Proceed in Forma Pauperis and a Motion for Appointment of Counsel. A hearing  
16 on Defendant's Petition for Writ of Habeas Corpus is currently scheduled for March 11,  
17 2014.

18 The State responds to Defendant's Motion for Appointment of Counsel as follows.

19 **ARGUMENT**

20 The State requests that the court grant Defendant's motion to appoint counsel. NRS  
21 34.750 provides:

- 22 1. A petition may allege that the petitioner is unable to pay  
23 the costs of the proceedings or to employ counsel. If the court is  
24 satisfied that the allegation of indigency is true and the petition is  
25 not dismissed summarily, the court may appoint counsel to  
26 represent the petitioner. In making its determination, the court  
27 may consider, among other things, the severity of the  
consequences facing the petitioner and whether:  
(a) The issues presented are difficult;  
(b) The petitioner is unable to comprehend the  
proceedings; or

28 <sup>1</sup> An Amended Judgment of Conviction was filed on August 19, 2009, in order to reflect that on COUNT 1, Defendant was adjudged  
guilty of Conspiracy to Commit Battery With a Deadly Weapon or Battery Resulting in Substantial Bodily Harm, rather than  
Conspiracy to Commit Battery with a Deadly Weapon.

1 (c) Counsel is necessary to proceed with discovery.

2 In Coleman v. Thompson, 501 U.S. 722 (1991), the United States Supreme Court  
3 ruled that the Sixth Amendment provides no right to counsel in post-conviction proceedings.  
4 In McKague v. Warden, 112 Nev. 159, 912 P.2d 255 (1996), the Nevada Supreme Court  
5 similarly observed that “[t]he Nevada Constitution...does not guarantee a right to counsel in  
6 post-conviction proceedings, as we interpret the Nevada Constitution’s right to counsel  
7 provision as being coextensive with the Sixth Amendment to the United States  
8 Constitution.” However, this court retains statutory discretion in appointing post-conviction  
9 counsel and may do so in cases where the defendant is serving a lengthy sentence. See NRS  
10 34.750. In Ford v. State, 281 P.3d 1172 (Nev. 2009), the Nevada Supreme Court found the  
11 district court’s failure to appoint post-conviction counsel deprived the defendant of a  
12 meaningful opportunity to litigate where Defendant was serving a lengthy sentence and the  
13 issues raised in the defendant’s Petition were complex.

14 Here, Defendant is serving two (2) consecutive sentences of ten (10) years to LIFE  
15 imprisonment after being convicted of Second Degree Murder With a Deadly Weapon on a  
16 theory of conspiracy. The issues necessitated in Defendant’s Petition are likely complex  
17 given the seriousness of Defendant’s offense and that Defendant’s conviction was the result  
18 of a lengthy jury trial. Additionally, in recent years the Nevada Supreme Court has reversed  
19 and remanded multiple appeals from denials of Petitions of Writ of Habeas Corpus where the  
20 defendant is serving a lengthy sentence, finding the failure to appoint post-conviction  
21 counsel deprived defendant of a meaningful opportunity to litigate. See, e.g., Pearce v.  
22 State, 59954, 2012 WL 3060170 (Nev. July 25, 2012); Adams v. State, 60136, 2012 WL  
23 2196421 (Nev. June 14, 2012); Rogers v. State, 59335, 2012 WL 1655975 (Nev. May 9,  
24 2012); Butler v. State, 58759, 2012 WL 1252693 (Nev. Apr. 11, 2012). As such, the State  
25 submits it is in the best interest of both the State and Defendant that counsel be appointed.

26 //

27 //

28 //

1 CONCLUSION


2 Based on the foregoing, the State respectfully requests that this Court grant  
3 Defendant's Motion for Appointment of Counsel and vacate the hearing on Defendant's pro  
4 per petition, currently scheduled for March 11, 2014, so that a supplemental briefing  
5 schedule can be set after counsel is appointed.

6 DATED this 13th day of January, 2014.

7 Respectfully submitted,

8 STEVEN B. WOLFSON  
9 Clark County District Attorney  
Nevada Bar #001565

10  
11 BY

  
12 H. LEON SIMON  
13 Chief Deputy District Attorney  
Nevada Bar #00411

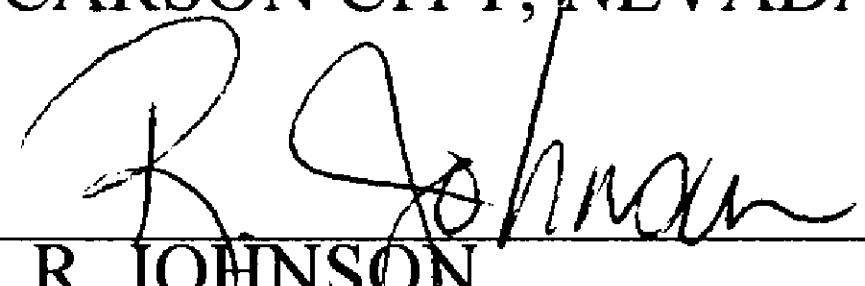
for

14  
15  
16 CERTIFICATE OF MAILING

17 I hereby certify that service of the above and foregoing was made this 13th day of  
18 January, 2014, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

19 LUIS HIDALGO, JR.,  
20 aka, Luis Alonso Hidalgo #1038134  
NORTHERN NEVADA CORRECTIONAL CENTER  
21 P.O. BOX 7000  
1721 E. SNYDER AVE.  
22 CARSON CITY, NEVADA 89702

23 BY

  
24 R. JOHNSON  
25 Secretary for the District Attorney's Office

26  
27  
28 MS/HLS/rj/M-1



11/30/2000 10:00 FAX

002

FILED # 11522-00

DEC 01 2000

IN THE OFFICE OF  
DEAN HELLER SECRETARY OF STATE

ARTICLES OF ORGANIZATION  
OF  
BERMUDA SANDS, LLC

KNOW ALL MEN BY THESE PRESENTS:

That I, the undersigned, for the purpose of association to establish a limited-liability company for the transaction of business and the promotion and conduct of the objects and purposes hereinafter stated, under the provisions of and subject to the requirements of the laws of the State of Nevada, do make, record and file these Articles of Organization in writing.

AND WE DO HEREBY CERTIFY:

1. The name of the company is:

BERMUDA SANDS, LLC

2. The name and address of the company's resident agent is Gordon & Silver, Ltd., located at 3960 Howard Hughes Parkway, 9<sup>th</sup> Floor, Las Vegas, Nevada 89109.

3. The name and address of the company's organizer is Mark C. Nicoletti, Gordon & Silver, Ltd., 3960 Howard Hughes Parkway, 9<sup>th</sup> Floor, Las Vegas, Nevada 89109.

4. The overall management and control of the business of the company shall be conducted by its member:

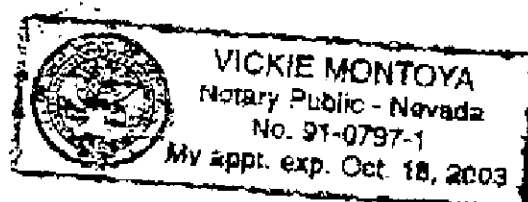
Windrock Enterprises, LLC  
6770 Bermuda Road  
Las Vegas, NV 89119

EXECUTED this 29<sup>th</sup> day of November, 2000.

  
Mark C. Nicoletti, Organizer

STATE OF NEVADA       )  
                                  ) SS.  
COUNTY OF CLARK     )

This instrument was acknowledged before me on November 29, 2000 by Mark C. Nicoletti.



  
Notary Public

11/30/2000 10:01 FAX

003

**CERTIFICATE OF ACCEPTANCE OF APPOINTMENT OF RESIDENT AGENT  
OF  
BERMUDA SANDS, LLC**

Gordon & Silver, Ltd. hereby accepts appointment as Resident Agent for the above named limited liability company.

Dated: November 29, 2000.

Gordon & Silver, Ltd.



Mark C. Nicoletti

12/01/2000 12:02 FAX

002

11/30/2000 15:00

17020973655

SIMONES AUTO PLAZA

PAGE 05

Bermuda Sands, Inc.  
6770 Bermuda Road  
Las Vegas, NV 89119

FILED # 11522-00  
DEC 01 2000  
IN THE OFFICE OF  
JAN HILL  
DEAR HELLER SECRETARY OF STATE

November 30, 2000

State of Nevada  
Office of the Secretary of State  
Corporations Division  
555 East Washington Avenue  
Second Floor  
Las Vegas, Nevada 89101

Attn: New Filing

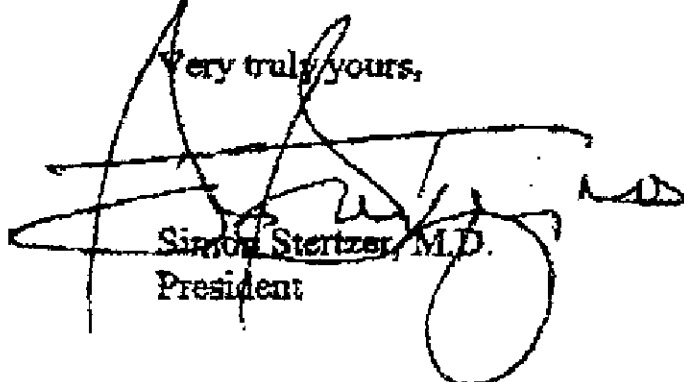
Re: Consent of Bermuda Sands, Inc., a Nevada corporation, for Articles of  
Organization of Bermuda Sands, LLC, a Nevada limited liability  
company

Dear Sir or Madam:

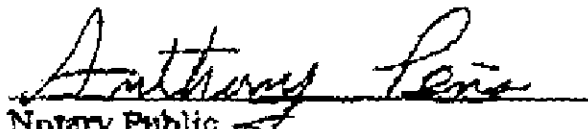
Please accept this letter as the consent of Bermuda Sands, Inc., a Nevada corporation (the  
"Company"), for Bermuda Sands, LLC, a Nevada limited liability company, to use in any manner a  
name similar to that of the Company.

Thank you for your assistance in this matter.

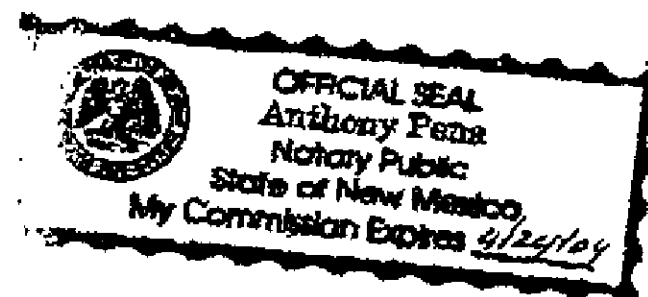
Very truly yours,

  
Simon Stetzel, M.D.  
President

Subscribed and sworn to before me  
this 30 day of November, 2000.

  
Notary Public

CHARTERED NOTARY PUBLIC STATE OF NEW MEXICO



PA3684

HID PA03497

# ANNUAL LIST OF MANAGERS OR MEMBERS AND RESIDENT AGENT OF BERMUDA SANDS, LLC

(Name of Limited-Liability Company)

FILE NUMBER  
LLC11522-2000

A NEVADA

LIMITED-LIABILITY COMPANY

FOR THE FILING PERIOD DEC 2001

TO DEC 2002

(State of Formation)

The Limited-Liability Company's duly appointed resident agent in the State of Nevada upon whom process can be served is:

GORDON & SILVER, LTD.  
3960 HOWARD HUGHES PARKWAY, 9TH FLOOR  
LAS VEGAS, NV 89109

☐ IF AGENT INFORMATION HAS CHANGED, PLEASE SEE ATTACHED  
INSTRUCTIONS ON HOW TO OBTAIN THE APPROPRIATE FORM.

Office Use Only

**FILED**  
**DEC 8 2001**  
Dean Heller  
Secretary of State

Important. Read instructions before completing and returning this form.

1. Print or type names and addresses, either residence or business, for all managers, or if none, its members. A manager, or if none, a member of the company must sign the form. **FORM WILL BE RETURNED IF UNSIGNED**
2. If there are additional managers or members, attach a list of them to this form.
3. Return the completed form with the \$85.00 filing fee. A \$50.00 penalty must be added for failure to file this form by the last day of the anniversary month of the original registration with this office.
4. Make your check payable to the Secretary of State. Your cancelled check will constitute a certificate to transact business. If you need a receipt, return page 2 certificate and **ENCLOSE A SELF-ADDRESSED STAMPED ENVELOPE**. To receive a certified copy enclose a copy of this completed form, an additional \$20.00 and appropriate instructions.
5. Return the completed form to: Secretary of State, 202 North Carson Street, Carson City, NV 89701-4201, (775) 684-5708.

FILING FEE: \$85.00

LATE PENALTY: \$50.00

NAME <b>WINDROCK ENTERPRISES, LLC</b>	TITLE(S) (Document will be rejected if Title not indicated) <input checked="" type="checkbox"/> <b>MANAGER</b> <input checked="" type="checkbox"/> <b>MEMBER</b>
PO BOX <b>6770 BERMUDA ROAD</b>	ST <b>NV</b> ZIP <b>89119</b>
NAME	TITLE(S) (Document will be rejected if Title not indicated) <input type="checkbox"/> <b>MANAGER</b> <input type="checkbox"/> <b>MEMBER</b>
PO BOX	ST ZIP
NAME	TITLE(S) (Document will be rejected if Title not indicated) <input type="checkbox"/> <b>MANAGER</b> <input type="checkbox"/> <b>MEMBER</b>
PO BOX	ST ZIP
NAME	TITLE(S) (Document will be rejected if Title not indicated) <input type="checkbox"/> <b>MANAGER</b> <input type="checkbox"/> <b>MEMBER</b>
PO BOX	ST ZIP
NAME	TITLE(S) (Document will be rejected if Title not indicated) <input type="checkbox"/> <b>MANAGER</b> <input type="checkbox"/> <b>MEMBER</b>
PO BOX	ST ZIP
NAME	TITLE(S) (Document will be rejected if Title not indicated) <input type="checkbox"/> <b>MANAGER</b> <input type="checkbox"/> <b>MEMBER</b>
PO BOX	ST ZIP

I declare, to the best of my knowledge, under penalty of perjury, that the above mentioned entity has complied with the provisions of chapter 364A of NRS.

X Signature of Manager or Member

Date

PA3685

HID PA03498

# ANNUAL LIST OF MANAGERS OR MEMBERS AND RESIDENT AGENT OF BERMUDA SANDS, LLC

(Name of Limited-Liability Company)

FILE NUMBER

LLC11522-2000

A NEVADA

(State of Formation)

LIMITED-LIABILITY COMPANY

FOR THE FILING PERIOD DEC 2002

TO DEC 2003

The Limited-Liability Company's duly appointed resident agent in the State of Nevada upon whom process can be served is:

GORDON & SILVER, LTD.  
3960 HOWARD HUGHES PARKWAY, 9TH FLOOR  
LAS VEGAS, NV 89109

☐ IF AGENT INFORMATION HAS CHANGED, PLEASE SEE ATTACHED  
INSTRUCTIONS ON HOW TO OBTAIN THE APPROPRIATE FORM.

Office Use Only

FILED

JAN 06 2003

IN THE OFFICE OF  
Don Hill  
DEAN KELLER SECRETARY OF STATE

Important. Read instructions before completing and returning this form.

1. Print or type names and addresses, either residence or business, for all managers, or if none, its members. A manager, or if none, a member of the company must sign the form. **FORM WILL BE RETURNED IF UNSIGNED**
2. If there are additional managers or members, attach a list of them to this form.
3. Return the completed form with the \$85.00 filing fee. A \$50.00 penalty must be added for failure to file this form by the last day of the anniversary month of the original registration with this office.
4. Make your check payable to the Secretary of State. Your cancelled check will constitute a certificate to transact business. If you need a receipt, return page 2 certificate and **ENCLOSE A SELF-ADDRESSED STAMPED ENVELOPE**. To receive a certified copy enclose a copy of this completed form, an additional \$20.00 and appropriate instructions.
5. Return the completed form to: Secretary of State, 202 North Carson Street, Carson City, NV 89701-4201, (775) 684-5708

FILING FEE: \$85.00

LATE PENALTY: \$50.00

NAME	TITLE(S)	(Document will be rejected if Title not indicated)		
WINDROCK ENTERPRISES, LLC		<input checked="" type="checkbox"/> MANAGER	<input checked="" type="checkbox"/> MEMBER	
PO BOX	STREET ADDRESS	CITY	ST	ZIP
6770 BERMUDA ROAD	LAS VEGAS	NV		89119
NAME	TITLE(S)	(Document will be rejected if Title not indicated)		
		<input type="checkbox"/> MANAGER	<input type="checkbox"/> MEMBER	
PO BOX	STREET ADDRESS	CITY	ST	ZIP
NAME	TITLE(S)	(Document will be rejected if Title not indicated)		
		<input type="checkbox"/> MANAGER	<input type="checkbox"/> MEMBER	
PO BOX	STREET ADDRESS	CITY	ST	ZIP
NAME	TITLE(S)	(Document will be rejected if Title not indicated)		
		<input type="checkbox"/> MANAGER	<input type="checkbox"/> MEMBER	
PO BOX	STREET ADDRESS	CITY	ST	ZIP
NAME	TITLE(S)	(Document will be rejected if Title not indicated)		
		<input type="checkbox"/> MANAGER	<input type="checkbox"/> MEMBER	
PO BOX	STREET ADDRESS	CITY	ST	ZIP

I declare, to the best of my knowledge, under penalty of perjury, that the above mentioned entity has complied with the provisions of chapter 364A of NRS.

X Signature of Manager or Member

November 20, 2002

Date

AMENDED

ANNUAL LIST OF MANAGERS OR MEMBERS AND RESIDENT AGENT OF  
BERMUDA SANDS, LLC

FILE NUMBER

11522-2000

(Name of Limited-Liability Company)

A NEVADA

LIMITED-LIABILITY COMPANY

FOR THE FILING PERIOD 2002

TO 2003

(State of Formation)

The Limited-Liability Company's duly appointed resident agent in the State of Nevada upon whom process can be served is:

JOLLEY URGAL WIRTH & WOODBURY  
3800 HOWARD HUGHES PARKWAY, 16TH FLOOR  
LAS VEGAS, NEVADA 89109☐ IF AGENT INFORMATION HAS CHANGED, PLEASE SEE ATTACHED INSTRUCTIONS ON HOW TO OBTAIN THE APPROPRIATE FORM.

Office Use Only

FILED #

JUN 17 2003

IN THE OFFICE OF  
DEAN HELLER, SECRETARY OF STATE

Important. Read instructions before completing and returning this form.

1. Print or type names and addresses, either residence or business, for all managers, or if none, its members. A manager, or if none, a member of the company must sign the form. **FORM WILL BE RETURNED IF UNSIGNED**
2. If there are additional managers or members, attach a list of them to this form.
3. Return the completed form with the \$85.00 filing fee. A \$50.00 penalty must be added for failure to file this form by the last day of the anniversary month of the original registration with this office.
4. Make your check payable to the Secretary of State. Your cancelled check will constitute a certificate to transact business. If you need a receipt, return page 2 certificate and **ENCLOSE A SELF-ADDRESSED STAMPED ENVELOPE**. To receive a certified copy enclose a copy of this completed form, an additional \$20.00 and appropriate instructions.
5. Return the completed form to: Secretary of State, 202 North Carson Street, Carson City, NV 89701-4201, (775) 684-5708.

FILING FEE: \$85.00

LATE PENALTY: \$50.00

NAME LUIS A. HILDALGO, JR.	TITLE(S) (Document will be rejected if Title not indicated) <input checked="" type="checkbox"/> MANAGER <input type="checkbox"/> MEMBER
PO BOX 6770 BERMUDA ROAD	ST NEVADA
STREET ADDRESS	CITY LAS VEGAS
	ZIP 89119
NAME	TITLE(S) (Document will be rejected if Title not indicated) <input type="checkbox"/> MANAGER <input type="checkbox"/> MEMBER
PO BOX	ST
STREET ADDRESS	CITY
	ZIP
NAME	TITLE(S) (Document will be rejected if Title not indicated) <input type="checkbox"/> MANAGER <input type="checkbox"/> MEMBER
PO BOX	ST
STREET ADDRESS	CITY
	ZIP
NAME	TITLE(S) (Document will be rejected if Title not indicated) <input type="checkbox"/> MANAGER <input type="checkbox"/> MEMBER
PO BOX	ST
STREET ADDRESS	CITY
	ZIP
NAME	TITLE(S) (Document will be rejected if Title not indicated) <input type="checkbox"/> MANAGER <input type="checkbox"/> MEMBER
PO BOX	ST
STREET ADDRESS	CITY
	ZIP

I declare, to the best of my knowledge, under penalty of perjury, that the above mentioned entity has complied with the provisions of chapter 364A of NRS.

X Signature of Manager or Member

6-12-03  
Date

PA3687

HID PA03500



DEAN HELLER  
Secretary of State  
202 North Carson Street  
Carson City, Nevada 89701-4201  
(775) 684 5708

**Certificate of Change of  
Resident Agent and/or  
Location of Registered  
Office**

FILED Use Only

JUN 17 2003

IN THE OFFICE OF  
DEAN HELLER, SECRETARY OF STATE

**General instructions for this form:**

1. Please print legibly or type; Black Ink Only.
2. Complete all fields.
3. The physical Nevada address of the resident agent must be set forth; PMB's are not acceptable.
4. Ensure that document is signed in signature fields.
5. Include the filing fee of \$30.00.

133/1

BERMUDA SANDS, LLC

Name of Entity

11522-2000

File Number

The change below is effective upon the filing of this document with the Secretary of State.

Reason for change: (check one) ☒ Change of Resident Agent ☐ Change of Location of Registered Office

The former resident agent and/or location of the registered office was:

Resident Agent: GORDON & SILVER

Street No.: 3960 HOWARD HUGHES PARKWAY, 9TH FLOOR

City, State, Zip: LAS VEGAS, NEVADA 89109

The resident agent and/or location of the registered office is changed to:

Resident Agent: JOLLEY URGAWIRTH & WOODBURY

Street No.: 3800 HOWARD HUGHES PARKWAY, 16TH FLOOR

City, State, Zip: LAS VEGAS, NEVADA 89109

Optional:

ADDITIONAL MAILING ADDRESS

CITY

STATE

ZIP

**NOTE:** For an entity to file this certificate, the signature of one officer is required.  
The certificate does not need to be notarized.

  
Signature/Title

**Certificate of Acceptance of Appointment by Resident Agent:**

I hereby accept the appointment as Resident Agent for the above-named business entity.

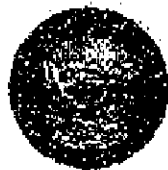
  
Authorized Signature of Resident Agent or Resident Agent Company

6/12/03  
Date

10-22-2003 13:40 FAX 7023692666

GORDON&SILVER

0011



DEAN HELLER  
Secretary of State  
202 North Carson Street  
Carson City, Nevada 89701-4201  
(775) 684 5708

**Certificate of Change of  
Resident Agent and/or  
Location of Registered  
Office**

Office Use Only:

FILED #

OCT 23 2003

**General instructions for this form:**

1. Please print legibly or type; Black ink Only.
2. Complete all fields.
3. The physical Nevada address of the resident agent must be set forth; PMB's are not acceptable.
4. Ensure that document is signed in signature fields.
5. Include the filing fee of \$30.00.

IN THE OFFICE OF

DEAN HELLER, SECRETARY OF STATE

BERMUDA SANDS, LLC

Name of Entity

LLC11522-2000

File Number

The change below is effective upon the filing of this document with the Secretary of State.

Reason for change: (check one) ☒ Change of Resident Agent ☐ Change of Location of Registered Office

The former resident agent and/or location of the registered office was:

Resident Agent: Jolley Unga Wirth & Woodbury

Street No.: 3800 Howard Hughes Parkway, Suite 1600

City, State, Zip: Las Vegas, NV 89109

The resident agent and/or location of the registered office is changed to:

Resident Agent: Gordon & Silver, Ltd.

Street No.: 3960 Howard Hughes Parkway, 9th Floor

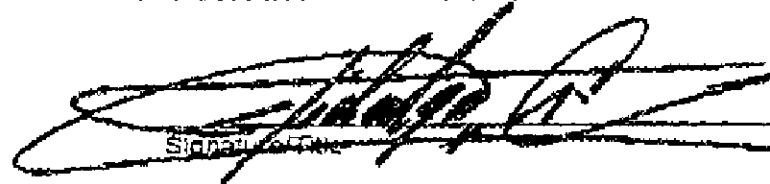
City, State, Zip: Las Vegas, NV 89109

**Optional:**

\_\_\_\_\_  
ADDITIONAL MAILING ADDRESS CITY STATE ZIP

**NOTE:** For an entity to file this certificate, the signature of one officer is required.

The certificate does not need to be notarized.

  
Signature

**Certificate of Acceptance of Appointment by Resident Agent:**  
GORDON & SILVER, LTD.

I hereby accept the appointment as Resident Agent for the above-named business entity.

By:

\_\_\_\_\_  
Authorized Signature of Resident Agent or Resident Agent Company

October 21, 2003

Date



10/28/2003 10:42 FAX 7023692886

GORDON&SILVER

005



DEAN HELLER  
Secretary of State

202 North Carson Street  
Carson City, Nevada 89701-4201  
(775) 684 5708

Amendment to  
Articles of  
Organization  
(PURSUANT TO NRS 86.221)

Office Use

FILED #

1101522-00

OCT 28 2003

IN THE OFFICE OF  
DEAN HELLER SECRETARY OF STATE

Important: Read attached instructions before completing

**Certificate of Amendment to Articles of Organization**  
**For a Nevada Limited-Liability Company**  
(Pursuant to NRS 86.221)  
- Remit in Duplicate -

1. Name of limited-liability company:

BERMUDA SANDS, LLC

2. The articles have been amended as follows (provide articles numbers, if available): \*

4. The overall management and control of the business of the company shall be conducted by its sole Manager.

HIDALGO ENTERPRISES, LLC  
6770 Bermuda Road  
Las Vegas, NV 89119

3. Indicate whether the company is managed by managers or members:

Manager managed.

4. Signature (must be signed by at least one manager or by a managing member).

Signature

\* 1) If adding managers, provide names and addresses.

2) If amending company name, it must contain the words "Limited-Liability Company," "Limited Company," or "Limited" or the abbreviations "Ltd.," "LLC," or "LC.," "LLC" or "LC." The word "Company" may be abbreviated as "Co."

**FILING FEE: \$150.00**

**IMPORTANT:** Failure to include any of the above information and remit the proper fees may cause this filing to be rejected.

PA3690

HID PA03503

## ANNUAL LIST OF MANAGER OR MEMBERS AND RESIDENT AGENT OF

FILE NUMBER

Bermuda Sands, LLC

(Name of Limited-Liability Company)

LLC11522-2000

FOR THE FILING PERIOD OF 12/2005

TO 12/2006

The corporation's duly appointed resident agent in the State of Nevada upon whom process can be served is:

Gentile DePalma, Ltd.  
3960 Howard Hughes Parkway, Suite 850  
Las Vegas, Nevada 89109

Filed in the office of

*Dean Heller*  
Dean Heller  
Secretary of State  
State of Nevada

Document Number

20060083915-44

Filing Date and Time

02/10/2006 9:41 AM

Entity Number

LLC11522-2000

A FORM TO CHANGE RESIDENT AGENT INFORMATION CAN BE FOUND ON OUR WEBSITE: [secretaryofstate.biz](http://secretaryofstate.biz)

Important: Read instructions before completing and returning this form.

THE ABOVE SPACE IS FOR OFFICE USE ONLY

**X** Return one file stamped copy. (If filing not accompanied by order instructions, file stamped copy will be sent to resident agent.)

1. Print or type names and addresses, either residence or business, for all managers, or if none, its members. A **Manager**, or if none, a **Managing Member** of the company must sign the form.  
*FORM WILL BE RETURNED IF UNSIGNED*
2. If there are additional managers or members, attach a list of them to this form.
3. Return the completed form with the \$125.00 filing fee. A \$75.00 penalty must be added for failure to file this form by the deadline. An annual list received more than 90 days before its due date shall be deemed an amended list for the previous year.
4. Make your check payable to the Secretary of State. Your canceled check will constitute a certificate to transact business.
5. **Ordering Copies:** If requested above, one file stamped copy will be returned at no additional charge. To receive a certified copy, enclose an additional \$30.00 per certification. A copy fee of \$2.00 per page is required for each additional copy generated when ordering 2 or more file stamped or certified copies. Appropriate instructions must accompany your order.
6. Return the completed form to: Secretary of State, 202 North Carson Street, Carson City, NV 89701-4201, (775) 684-5708.
7. Form must be in the possession of the Secretary of State on or before the last day of the month in which it is due. (Postmark date is not accepted as receipt date.) Forms received after due date will be returned for additional fees and penalties.

FILING FEE \$125.00

LATE PENALTY: \$75.00

NAME		(DOCUMENT WILL BE REJECTED IF TITLE NOT INDICATED)		
Philip Musso		<input checked="" type="checkbox"/> MANAGER	<input type="checkbox"/> MEMBER	
ADDRESS	CITY	ST	ZIP	
3960 Howard Hughes Parkway, Suite 850	Las Vegas	NV	89109	
NAME		(DOCUMENT WILL BE REJECTED IF TITLE NOT INDICATED)		
		<input type="checkbox"/> MANAGER	<input type="checkbox"/> MEMBER	
ADDRESS	CITY	ST	ZIP	
NAME		(DOCUMENT WILL BE REJECTED IF TITLE NOT INDICATED)		
		<input type="checkbox"/> MANAGER	<input type="checkbox"/> MEMBER	
ADDRESS	CITY	ST	ZIP	
NAME		(DOCUMENT WILL BE REJECTED IF TITLE NOT INDICATED)		
		<input type="checkbox"/> MANAGER	<input type="checkbox"/> MEMBER	
ADDRESS	CITY	ST	ZIP	
NAME		(DOCUMENT WILL BE REJECTED IF TITLE NOT INDICATED)		
		<input type="checkbox"/> MANAGER	<input type="checkbox"/> MEMBER	
ADDRESS	CITY	ST	ZIP	

I declare, to the best of my knowledge under penalty of perjury, that the above mentioned entity has complied with the provisions of NRS 360.780 and acknowledge that pursuant to NRS 369.330, it is a category C felony to knowingly offer any false or forged instrument for filing in the Office of the Secretary of State.

Title Manager

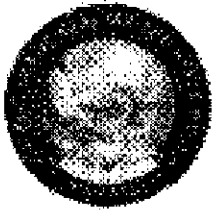
Date 2/7/06

X Signature of Manager or Managing Member

Nevada Secretary of State Form ANNUAL LIST 11-02-2005  
Revised 01-08-2005

PA3691

HID PA03504



**DEAN HELLER**  
**Secretary of State**  
 202 North Carson Street  
 Carson City, Nevada 89701-4201  
 (775) 684 5708  
 Website: secretaryofstate.biz

## Certificate of Change of Resident Agent and/or Location of Registered Office

Filed in the office of  Dean Heller Secretary of State State of Nevada	<table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="padding: 2px;">Document Number</td> <td style="padding: 2px;"><b>20060083917-66</b></td> </tr> <tr> <td style="padding: 2px;">Filing Date and Time</td> <td style="padding: 2px;"><b>02/10/2006 9:41 AM</b></td> </tr> <tr> <td style="padding: 2px;">Entity Number</td> <td style="padding: 2px;"><b>LLC11522-2000</b></td> </tr> </table>	Document Number	<b>20060083917-66</b>	Filing Date and Time	<b>02/10/2006 9:41 AM</b>	Entity Number	<b>LLC11522-2000</b>
Document Number	<b>20060083917-66</b>						
Filing Date and Time	<b>02/10/2006 9:41 AM</b>						
Entity Number	<b>LLC11522-2000</b>						

**General instructions for this form:**

1. Please print legibly or type, Black Ink Only.
2. Complete all fields.
3. The Physical Nevada address of the resident agent must be set forth;  
 PMB's are not acceptable.
4. Ensure that document is signed in signature fields.
5. Include the filing fee of \$60.00.

ABOVE SPACE IS FOR OFFICE USE ONLY

Bermuda Sands, LLC

LLC11522-2000

Name of Entity

File Number

The change below is effective upon the filing of this document with the Secretary of State.

Reason for change: (check one) ☒ Change of Resident Agent ☐ Change of Location of Registered Office

The former resident agent and/or location of the registered office was:

Resident Agent: Luis Hidalgo, Jr.

Street No.: 6770 Bermuda Rd

City, State, Zip: Las Vegas, NV, 89119

The resident agent and/or location of the registered office is changed to:

Resident Agent: Gentile DePalma, Ltd.

Street No.: 3960 Howard Hughes Parkway, Suite 850

City, State, Zip: Las Vegas, NV, 89109

Optional Mailing Address:

**NOTE:** For an entity to file this certificate, the signature of one officer is required.

Philip Musso, Manager

Signature/Title

## Certificate of Acceptance of Appointment by Resident Agent

I hereby accept the appointment as Resident Agent for the above-named business entity.

X   
 Authorized Signature of R.A. or On Behalf of R.A. Company

2/7/06

Date

*This form must be accompanied by appropriate fees.*

Nevada Secretary of State PA Change 2006  
 Page 2 of 10 10/1/05

**ANNUAL LIST OF MANAGERS OR MANAGING MEMBERS AND RESIDENT AGENT OF:**

BERMUDA SANDS, LLC

FOR THE PERIOD DEC 2006 TO 2007. DUE BY DEC 31, 2006.

The Limited-Liability Company's duly appointed resident agent in the State of Nevada upon whom process can be served is:



LLC11522-2000

GENTILE DEPALMA LTD  
 3960 HOWARD HUGHES PARKWAY  
 SUITE 850  
 LAS VEGAS NV 89109

Filed in the office of  Ross Miller Secretary of State State of Nevada	Document Number <b>20070010111-13</b> Filing Date and Time <b>01/03/2007 6:03 AM</b> Entry Number <b>LLC11522-2000</b>
--	---

**\*\* PLEASE NOTE: YOU MAY NOW FILE YOUR ANNUAL LIST ONLINE AT WWW.SECRETARYOFSTATE.BIZ \*\***

☐ IF THE ABOVE INFORMATION IS INCORRECT, PLEASE CHECK THIS BOX AND A CHANGE OF RESIDENT AGENT/ADDRESS FORM WILL BE SENT.

THE ABOVE SPACE IS FOR OFFICE USE ONLY

PLEASE READ INSTRUCTIONS BEFORE COMPLETING AND RETURNING THIS FORM.

1. Include the names and addresses, either residence or business, for all managers, or if none, its managing members. Last year's information has been preprinted. If you need to make changes, cross out the incorrect information and insert the new information above it. A manager, or if none, a managing member of the company must sign the form. **FORM WILL BE RETURNED IF UNSIGNED.**
2. If there are additional managers or managing members, attach a list of them to this form.
3. Return the completed form with the \$125.00 filing fee. A \$75.00 penalty must be added for failure to file this form by the deadline. An annual list received more than 90 days before its due date shall be deemed an amended list for the previous year.
4. Make your check payable to the Secretary of State. To receive a certified copy, enclose an additional \$30.00 and appropriate instructions.
5. Return the completed form to: Secretary of State, 202 N. Carson St., Carson City, NV 89701-4201. (775) 684-5708.
6. Form must be in the possession of the Secretary of State on or before the last day of the month in which it is due. (Postmark date is not accepted as receipt date.) Forms received after due date will be returned for additional fees and penalties.

FILING FEE: \$125.00

PENALTY: \$75.00

NAME Dominic P. Gentile	TITLE(S)	(Document will be rejected if Title not indicated) (Mark one)		
		<input type="checkbox"/> MANAGER	<input type="checkbox"/> MANAGING MEMBER	
P.O. BOX	ADDRESS	CITY	ST.	ZIP
3960 HOWARD HUGHES PARKWAY	SUITE 850	LAS VEGAS	NV	89109

NAME	TITLE(S)	(Document will be rejected if Title not indicated) (Mark one)		
		<input type="checkbox"/> MANAGER	<input type="checkbox"/> MANAGING MEMBER	
P.O. BOX	ADDRESS	CITY	ST.	ZIP

NAME	TITLE(S)	(Document will be rejected if Title not indicated) (Mark one)		
		<input type="checkbox"/> MANAGER	<input type="checkbox"/> MANAGING MEMBER	
P.O. BOX	ADDRESS	CITY	ST.	ZIP

NAME	TITLE(S)	(Document will be rejected if Title not indicated) (Mark one)		
		<input type="checkbox"/> MANAGER	<input type="checkbox"/> MANAGING MEMBER	
P.O. BOX	ADDRESS	CITY	ST.	ZIP

I declare, to the best of my knowledge under penalty of perjury, that the above mentioned entity has complied with the provisions of NRS 360.780 and acknowledge that pursuant to NRS 239.330, it is a category C felony to knowingly offer any false or forged instrument for filing in the Office of the Secretary of State.

PA3693

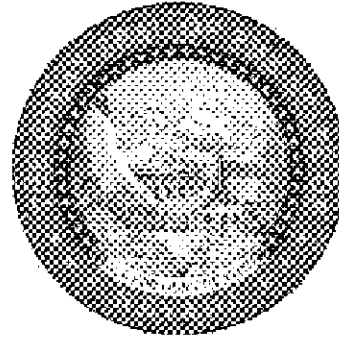
HID PA03506

X Signature of Manager or Managing Member

Date

DLCSSA2  
(REV 03/06)

STATE OF NEVADA



*BARBARA K. CEGAVSKE*  
Secretary of State

*JEFFERY LANDERFELT*  
Deputy Secretary  
for Commercial Recordings

OFFICE OF THE  
SECRETARY OF STATE

**Copy Request**

January 13, 2016

**Job Number:** C20160113-2018  
**Reference Number:** 00010183544-56  
**Expedite:**  
**Through Date:**

<b>Document Number(s)</b>	<b>Description</b>	<b>Number of Pages</b>
LLC2325-2001-001	Articles of Organization	1 Pages/1 Copies
LLC2325-2001-008	Annual List	1 Pages/1 Copies
LLC2325-2001-007	Annual List	1 Pages/1 Copies
LLC2325-2001-002	Annual List	1 Pages/1 Copies
LLC2325-2001-006	Registered Agent Resignation	2 Pages/1 Copies
20050106436-27	Acceptance of Registered Agent	1 Pages/1 Copies
20050106437-38	Annual List	1 Pages/1 Copies
20060349000-24	Registered Agent Name Change	2 Pages/1 Copies
20060351802-77	Annual List	1 Pages/1 Copies

Respectfully,

A handwritten signature in black ink that reads "Barbara K. Cegavske".

BARBARA K. CEGAVSKE  
Secretary of State

**Commercial Recording Division**  
202 N. Carson Street  
Carson City, Nevada 89701-4201  
Telephone (775) 684-5708  
Fax (775) 684-7138

PA3694

HID PA03507

03/07/2001 13:40 FAX 7023692885

GORDON & SILVER

003

**ARTICLES OF ORGANIZATION  
OF PALOMINO CLUB, LLC**

**FILED #** LLC 2325 01

**MAR 07 2001**

IN THE OFFICE OF  
*Donnell*  
DONN HELLER, SECRETARY OF STATE

**KNOW ALL MEN BY THESE PRESENTS:**

That I, the undersigned, for the purpose of establishing a limited-liability company for the transaction of business, under the provisions of and subject to the requirements of the laws of the State of Nevada, do make, record and file these Articles of Organization in writing.

**AND I DO HEREBY CERTIFY:**

1. The name of the company is:

**PALOMINO CLUB, LLC**

2. The name and address of the company's resident agent is Gordon & Silver, Ltd., located at 3960 Howard Hughes Parkway, 9<sup>th</sup> Floor, Las Vegas, Nevada 89109.

3. The name and address of the company's organizer is Mark C. Nicoletti, Esq., Gordon & Silver, Ltd., 3960 Howard Hughes Parkway, 9<sup>th</sup> Floor, Las Vegas, Nevada 89109.

4. The overall management and control of the business of the company shall be conducted by its sole member:

Bermuda Sands, LLC  
6770 Bermuda Road  
Las Vegas, NV 89119

EXECUTED this 7<sup>th</sup> day of March, 2001.

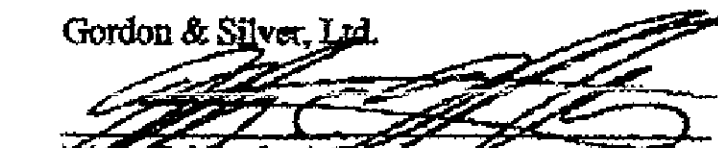
  
Mark C. Nicoletti, Esq., Organizer

**CERTIFICATE OF ACCEPTANCE OF APPOINTMENT OF RESIDENT AGENT**

Gordon & Silver, Ltd. hereby accepts appointment as Resident Agent for the above named limited liability company.

Dated: March 7<sup>th</sup>, 2001.

Gordon & Silver, Ltd.

  
Mark C. Nicoletti, Esq.

C:\DATA\COMP\03070003\Palomino2.LLCArticle01.doc

# ANNUAL LIST OF MANAGERS OR MEMBERS AND RESIDENT AGENT OF PALOMINO CLUB, LLC

FILE NUMBER

2325-2001

(Name of Limited-Liability Company)

A NEVADA

LIMITED-LIABILITY COMPANY

FOR THE FILING PERIOD MAR 2002

TO MAR 2003

(State of Formation)

The Limited-Liability Company's duly appointed resident agent in the State of Nevada upon whom process can be served is:

**GORDON & SILVER, LTD.**  
3960 HOWARD HUGHES PARKWAY, 9TH FLOOR  
LAS VEGAS, NV 89109

☐ IF AGENT INFORMATION HAS CHANGED, PLEASE SEE ATTACHED INSTRUCTIONS ON HOW TO OBTAIN THE APPROPRIATE FORM.

Office Use Only

**FILED #**  
**FEB 28 2002**  
IN THE OFFICE OF  
DEAN HELLER, SECRETARY OF STATE

Important: Read instructions before completing and returning this form.

1. Print or type names and addresses, either residence or business, for all managers, or if none, its members. A manager, or if none, a member of the company must sign the form. **FORM WILL BE RETURNED IF UNSIGNED**
2. If there are additional managers or members, attach a list of them to this form.
3. Return the completed form with the \$85.00 filing fee. A \$50.00 penalty must be added for failure to file this form by the last day of the anniversary month of the original registration with this office.
4. Make your check payable to the Secretary of State. Your cancelled check will constitute a certificate to transact business. If you need a receipt, return page 2 certificate and **ENCLOSE A SELF-ADDRESSED STAMPED ENVELOPE**. To receive a certified copy enclose a copy of this completed form, an additional \$20.00 and appropriate instructions.
5. Return the completed form to: Secretary of State, 202 North Carson Street, Carson City, NV 89701-4201, (775) 684-5708.

FILING FEE: \$85.00

LATE PENALTY: \$50.00

NAME <b>LUIS A. HILDAGO, JR.</b>	TITLE(S) (Document will be rejected if Title not indicated) <input checked="" type="checkbox"/> <b>MANAGER</b> <input type="checkbox"/> <b>MEMBER</b>
PO BOX <b>6770 BERMUDA ROAD</b>	ST <b>NV</b>
STREET ADDRESS <b>6770 BERMUDA ROAD</b>	ZIP <b>89119</b>
CITY <b>LAS VEGAS</b>	
NAME	TITLE(S) (Document will be rejected if Title not indicated) <input type="checkbox"/> <b>MANAGER</b> <input type="checkbox"/> <b>MEMBER</b>
PO BOX	ST
STREET ADDRESS	ZIP
CITY	
NAME	TITLE(S) (Document will be rejected if Title not indicated) <input type="checkbox"/> <b>MANAGER</b> <input type="checkbox"/> <b>MEMBER</b>
PO BOX	ST
STREET ADDRESS	ZIP
CITY	
NAME	TITLE(S) (Document will be rejected if Title not indicated) <input type="checkbox"/> <b>MANAGER</b> <input type="checkbox"/> <b>MEMBER</b>
PO BOX	ST
STREET ADDRESS	ZIP
CITY	
NAME	TITLE(S) (Document will be rejected if Title not indicated) <input type="checkbox"/> <b>MANAGER</b> <input type="checkbox"/> <b>MEMBER</b>
PO BOX	ST
STREET ADDRESS	ZIP
CITY	
NAME	TITLE(S) (Document will be rejected if Title not indicated) <input type="checkbox"/> <b>MANAGER</b> <input type="checkbox"/> <b>MEMBER</b>
PO BOX	ST
STREET ADDRESS	ZIP
CITY	

I declare, to the best of my knowledge, under penalty of perjury, that the above mentioned entity has complied with the provisions of chapter 364A of NRS.

X Signature of Manager or Member

Date

2-14-02

HID PA03509

**ANNUAL LIST OF MANAGERS OR MEMBERS OF:**

PALOMINO CLUB, LLC

FILE NUMBER

2325-2001

FOR THE PERIOD MAR 2003 TO 2004. DUE BY MAR 31, 2003.  
 The Limited-Liability Company's duly appointed resident agent in the State of Nevada  
 upon whom process can be served is:

RA# 63300

GORDON &amp; SILVER LTD

 3960 HOWARD HUGHES PKWY 9TH FL  
 LAS VEGAS NV 89109

FOR OFFICE USE ONLY

FILED (DATE)

 FILED #  
 MAR 12 2003

 BY THE OFFICE OF  
 DEAN KELLEY SECRETARY OF STATE

☐ IF THE ABOVE INFORMATION IS INCORRECT, PLEASE CHECK THIS BOX AND A CHANGE OF  
 RESIDENT AGENT/ADDRESS FORM WILL BE SENT.

PLEASE READ INSTRUCTIONS BEFORE COMPLETING AND RETURNING THIS FORM.

1. Include the names and addresses, either residence or business, for all managers, or if none, its members. Last year's information has been preprinted. If you need to make changes, cross out the incorrect information and insert the new information above it. A manager, or if none, a member of the company must sign the form. **FORM WILL BE RETURNED IF UNSIGNED.**
2. If there are additional managers or members, attach a list of them to this form.
3. Return the completed form with the \$85.00 filing fee. A \$50 penalty must be added for failure to file this form by the deadline indicated at the top of this form. An annual list received more than 60 days before its due date shall be deemed an amended list for the previous year.
4. Make your check payable to the Secretary of State. If you need a receipt, enclose a self-addressed stamped envelope. To receive a certified copy, enclose a copy of this completed form, an additional \$20.00 and appropriate instructions.
5. Return the completed form to: Secretary of State, 202 N. Carson St., Carson City, NV 89701-4201. (775) 684-5708.

FILING FEE: \$85.00

PENALTY: \$50.00

NAME	TITLE(S)	(Document will be rejected if Title not indicated)
LUIS A HILDAGO JR		<input type="checkbox"/> MANAGER <input type="checkbox"/> MEMBER
P.O. BOX	STREET ADDRESS	CITY ST. ZIP
MANAGER	6770 BERMUDA ROAD	LAS VEGAS NV 89119
NAME	TITLE(S)	(Document will be rejected if Title not indicated)
		<input type="checkbox"/> MANAGER <input type="checkbox"/> MEMBER
P.O. BOX	STREET ADDRESS	CITY ST. ZIP
NAME	TITLE(S)	(Document will be rejected if Title not indicated)
		<input type="checkbox"/> MANAGER <input type="checkbox"/> MEMBER
P.O. BOX	STREET ADDRESS	CITY ST. ZIP
NAME	TITLE(S)	(Document will be rejected if Title not indicated)
		<input type="checkbox"/> MANAGER <input type="checkbox"/> MEMBER
P.O. BOX	STREET ADDRESS	CITY ST. ZIP

I declare, to the best of my knowledge under penalty of perjury, that the above mentioned entity has complied with the provisions of chapter 364A of NRS.

X Signature of Manager or Member

Date

2/26/02

PA3697

HID PA03510



**ANNUAL LIST OF MANAGERS OR MEMBERS OF:**

PALOMINO CLUB, LLC

03247  
FILE NUMBERFOR THE PERIOD MAR 2004 TO 2005. DUE BY MAR 31, 2004.  
The Limited Liability Company's duly appointed resident agent in the State of Nevada  
upon whom process can be served is:

2325-2001

RA# 63300

GORDON &amp; SILVER LTD

3960 HOWARD HUGHES PKWY 9TH FL  
LAS VEGAS NV 89109

FOR OFFICE USE ONLY

FILED (DATE)

FILED #

MAR 04 2004

IN THE OFFICE OF  
DEAN HELLER, SECRETARY OF STATE☐ IF THE ABOVE INFORMATION IS INCORRECT, PLEASE CHECK THIS BOX AND A CHANGE OF  
RESIDENT AGENT/ADDRESS FORM WILL BE SENT.

PLEASE READ INSTRUCTIONS BEFORE COMPLETING AND RETURNING THIS FORM.

1. Include the names and addresses, either residence or business, for all managers, or if none, its members. Last year's information has been preprinted. If you need to make changes, cross out the incorrect information and insert the new information above it. A manager, or if none, a member of the company must sign the form. **FORM WILL BE RETURNED IF UNSIGNED.**
2. If there are additional managers or members, attach a list of them to this form.
3. Return the completed form with the \$125.00 filing fee. A \$75.00 penalty must be added for failure to file this form by the deadline. An annual list received more than 90 days before its due date shall be deemed an amended list for the previous year.
4. Make your check payable to the Secretary of State. To receive a certified copy, enclose an additional \$30.00 and appropriate instructions.
5. Return the completed form to: Secretary of State, 202 N. Carson St., Carson City, NV 89701-4201. (775) 684-5708.
6. Form must be in the possession of the Secretary of State on or before the last day of the month in which it is due. (Postmark date is not accepted as receipt date.) Forms received after due date will be returned for additional fees and penalties.

FILING FEE: \$125.00

PENALTY: \$75.00

NAME	TITLE(S)	(Document will be rejected if Title not indicated)
LUIS A HILDAGO JR		<input checked="" type="checkbox"/> MANAGER <input type="checkbox"/> MEMBER
P.O. BOX	ADDRESS	CITY ST. ZIP
MANAGER	6770 BERMUDA ROAD	LAS VEGAS NV 89119
NAME	TITLE(S)	(Document will be rejected if Title not indicated)
		<input type="checkbox"/> MANAGER <input type="checkbox"/> MEMBER
P.O. BOX	ADDRESS	CITY ST. ZIP
NAME	TITLE(S)	(Document will be rejected if Title not indicated)
		<input type="checkbox"/> MANAGER <input type="checkbox"/> MEMBER
P.O. BOX	ADDRESS	CITY ST. ZIP
NAME	TITLE(S)	(Document will be rejected if Title not indicated)
		<input type="checkbox"/> MANAGER <input type="checkbox"/> MEMBER
P.O. BOX	ADDRESS	CITY ST. ZIP

I declare, to the best of my knowledge under penalty of perjury, that the above mentioned entity has complied with the provisions of NRS 380.780 and acknowledge that pursuant to NRS 239.330, it is a category C felony to knowingly offer any false or forged instrument for filing in the Office of the Secretary of State.

*[Signature]*  
X Signature of Manager or Managing Member

Date

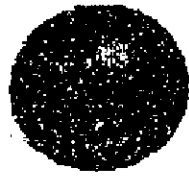
OTCS&S  
(Rev 02/00)

PA3698

HID PA05544

05/07/2004 12:27 FAX

002/003



DEAN HELLER  
Secretary of State  
202 North Carson Street  
Carson City, Nevada 89701-4201  
(775) 684-5708  
Website: secretaryofstate.biz

FILED #

LLC 2325-01

MAY 07 2004

STATE OF NEVADA  
DEAN HELLER SECRETARY OF STATE

## Certificate of Resignation of Resident Agent

Important: Read attached instructions before completing form.

ABOVE SPACES FOR OFFICE USE ONLY

### Certificate of Resignation of Resident Agent

1. The name of the resident agent who desires to resign from the following entities (one resident agent name or entity per form and fee):

Gordon & Silver, Ltd.

(Name of Resident Agent)

2. The name(s) and file number(s) of the entity(ies) for which resignation(s) is being made (use additional forms if necessary).

Wendell G. Burris, M.D. Professional Corporation  
(Name of Entity)

10797-2002  
(File Number)

Dowey Jones, LLC  
(Name of Entity)

LLC1401-2003  
(File Number)

Bermuda Sands, LLC  
(Name of Entity)

LLC11522-2000  
(File Number)

Club Sam Saddle, LLC  
(Name of Entity)

LLC2326-2001  
(File Number)

Lacy's, LLC  
(Name of Entity)

LLC2324-2001  
(File Number)

3. Other information (optional):

4. Signature of aforementioned resident agent:

5. Fees: \$100.00 for the first entity and \$1.00 for each additional entity listed.

This form must be accompanied by appropriate fees.

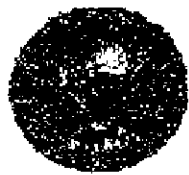
New and Revised Nevada Resignation 2001  
(Revised 11/1/2001)

PA3699

HID PA03512

05/07/2004 12:27 FAX

003/003



**DEAN HELLER**  
 Secretary of State  
 202 North Carson Street  
 Carson City, Nevada 89701-4201  
 (775) 684 5708  
 Website: secretaryofstate.biz

## Additional Page to Certificate of Resignation of Resident Agent

*Important: Indicate page number at the bottom of this page.*

ABOVE SPACE IS FOR OFFICE USE ONLY

### Additional Page to Certificate of Resignation of Resident Agent

Palomino Club, LLC

(Name of Entity)

LLC2325-2001

(File Number)

Hidalgo Enterprises, Inc.

(Name of Entity)

CS02-2004

(File Number)

(Name of Entity)

(File Number)

(Name of Entity)

(File Number)

(Name of Entity)

(File Number)

(Name of Entity)

(File Number)

(Name of Entity)

(File Number)

(Name of Entity)

(File Number)

(Name of Entity)

(File Number)

(Name of Entity)

(File Number)

(Name of Entity)

(File Number)

(Name of Entity)

(File Number)

(Name of Entity)

(File Number)

(Name of Entity)

(File Number)

Page Number

*This form must be accompanied by appropriate fees.*

Nevada Secretary of State, 202 North Carson Street, Carson City, NV 89701  
 Rev. 1/1/02

PA3700

HID PA03513



**DEAN HELLER**  
**Secretary of State**  
 202 North Carson Street  
 Carson City, Nevada 89701-4201  
 (775) 684 5708  
 Website: secretaryofstate.biz

## Resident Agent Acceptance

Filed in the office of <i>Dean Heller</i> Dean Heller Secretary of State State of Nevada	Document Number <b>20050106436-27</b> Filing Date and Time <b>03/24/2005 4:16 PM</b> Entity Number <b>LLC2325-2001</b>
--	---

### General instructions for this form:

ABOVE SPACE IS FOR OFFICE USE ONLY

1. Please print legibly or type; Black Ink Only.
2. Complete all fields.
3. Ensure that document is signed in signature field.

In the matter of Palomino Club, LLC  
(Name of business entity)

I, Luis Hidalgo  
(Name of resident agent)

hereby state that on 3/21/05 I accepted the appointment as resident agent  
(Date)

for the above named business entity. The street address of the resident agent in this state is as follows:

6770 Bermuda Rd.  
 Physical Street Address

Las Vegas, NV, NEVADA  
 City

Suite number

89119  
 Zip Code

### Optional:

Additional Mailing Address

Suite number

City State

Zip Code

### Signature:

*[Signature]* Palomino Club, LLC  
 Authorized Signature of R.A. or On Behalf of R.A. Company

3/21/05  
 Date

Nevada Secretary of State RA Acceptance 2003  
 Revised on: 11/04/03

**ANNUAL LIST OF MANAGERS OR MEMBERS OF:**

PALOMINO CLUB, LLC

FILE NUMBER

2325-2001

FOR THE PERIOD MAR 2005 TO 2006. DUE BY MAR 31, 2005.  
 The Limited-Liability Company's duly appointed resident agent in the State of Nevada  
 upon whom process can be served is:

(R/RA)

LUIS A HILDAGO JR  
 MANAGER  
 6770 BERMUDA RD  
 LAS VEGAS NV 89119

2004050

FOR OFFICE USE ONLY

Filed in the office of <i>Dean Heller</i> Dean Heller Secretary of State State of Nevada	Document Number <b>20050106437-38</b> Filing Date and Time <b>03/24/2005 4:16 PM</b> Entity Number <b>LLC2325-2001</b>
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List 125  
260

☐ IF THE ABOVE INFORMATION IS INCORRECT, PLEASE CHECK THIS BOX AND A CHANGE OF  
 RESIDENT AGENT/ADDRESS FORM WILL BE SENT.

PLEASE READ INSTRUCTIONS BEFORE COMPLETING AND RETURNING THIS FORM.

1. Include the names and addresses, either residence or business, for all managers, or if none, its members. Last year's information has been preprinted. If you need to make changes, cross out the incorrect information and insert the new information above it. A manager, or if none, a member of the company must sign the form. FORM WILL BE RETURNED IF UNSIGNED.
2. If there are additional managers or members, attach a list of them to this form.
3. Return the completed form with the \$125.00 filing fee. A \$75.00 penalty must be added for failure to file this form by the deadline. An annual list received more than 90 days before its due date shall be deemed an amended list for the previous year.
4. Make your check payable to the Secretary of State. To receive a certified copy, enclose an additional \$30.00 and appropriate instructions.
5. Return the completed form to: Secretary of State, 202 N. Carson St., Carson City, NV 89701-4201. (775) 684-5708.
6. Form must be in the possession of the Secretary of State on or before the last day of the month in which it is due. (Postmark date is not accepted as receipt date.) Forms received after due date will be returned for additional fees and penalties.

FILING FEE: \$125.00

PENALTY: \$75.00

NAME <b>LUIS A HILDAGO JR</b>	TITLE(S) <input type="checkbox"/> MANAGER <input type="checkbox"/> MEMBER	(Document will be rejected if Title not indicated)
P.O. BOX	ADDRESS <b>6770 BERMUDA ROAD</b>	CITY <b>LAS VEGAS</b> ST. <b>NV</b> ZIP <b>89119</b>
NAME	TITLE(S) <input type="checkbox"/> MANAGER <input type="checkbox"/> MEMBER	(Document will be rejected if Title not indicated)
P.O. BOX	ADDRESS	CITY ST. ZIP
NAME	TITLE(S) <input type="checkbox"/> MANAGER <input type="checkbox"/> MEMBER	(Document will be rejected if Title not indicated)
P.O. BOX	ADDRESS	CITY ST. ZIP
NAME	TITLE(S) <input type="checkbox"/> MANAGER <input type="checkbox"/> MEMBER	(Document will be rejected if Title not indicated)
P.O. BOX	ADDRESS	CITY ST. ZIP
NAME	TITLE(S) <input type="checkbox"/> MANAGER <input type="checkbox"/> MEMBER	(Document will be rejected if Title not indicated)
P.O. BOX	ADDRESS	CITY ST. ZIP

I declare, to the best of my knowledge under penalty of perjury, that the above mentioned entity has complied with the provisions of NRS 360.780 and acknowledge that pursuant to NRS 239.330, it is a category C felony to knowingly offer any false or forged instrument for filing in the Office of the Secretary of State.

X Signature of Manager or Managing Member

Date

1-31-05

PA3702

01CS9A2  
(REV 09/03)

HID PA03515



**DEAN HELLER**  
**Secretary of State**  
 202 North Carson Street  
 Carson City, Nevada 89701-4201  
 (775) 684 5708  
 Website: [secretaryofstate.biz](http://secretaryofstate.biz)

## Certificate of Name Change of Resident Agent

To be used by a Resident Agent whose name  
 has changed due to a merger, conversion, exchange,  
 sale, reorganization or amendment.

(PURSUANT TO NRS 78.110, 80.070, 86.235,  
 87.490, 88.331 AND 88A.540)

Filed in the office of <i>Dean Heller</i> Dean Heller Secretary of State State of Nevada	Document Number <b>20060349000-24</b> Filing Date and Time <b>06/01/2006 12:26 PM</b> Entity Number <b>LLC2325-2001</b>
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### General instructions for this form:

1. Please print legibly or type; Black Ink Only.
2. Complete all fields.
3. Ensure that document is signed in signature field.
4. Include the filing fee of \$100.00.

ABOVE SPACE IS FOR OFFICE USE ONLY

### Current Name of Resident Agent as filed with the Secretary of State:

LUIS HIDALGO, JR.

### New Name of Resident Agent :

GENTILE DePALMA, LTD.

Signature of Resident Agent:

*[Handwritten Signature]*  
 Authorized Signature of R.A. or On Behalf of R.A. Company

Name of business entities represented by resident agent: (use additional forms if necessary)

PALOMINO CLUB, LLC.	LLC2325-2001
Name	File Number
LACY'S, LLC.	LLC2324-2001
Name	File Number
CLUB SATIN SADDLE, LLC.	LLC2326-2001
Name	File Number
Name	File Number
Name	File Number
Name	File Number
Name	File Number

**This form must be accompanied by appropriate fees.**

Nevada Secretary of State RA Name Change 2004  
 Revised on: 05/21/04