THE COURT: So the next issue --

MS. SHELL: The next issue that I think deserves further consideration --

THE COURT: The death penalty issue? Oh.

MS. SHELL: Actually I would first turn to the failure to fund the joint defense that was -- took place with the three different defendants who went to trial as we laid out in our papers. It's very clear as was explored at a hearing before this Court, part of which took place under seal, that the primary reason Ms. Espindola turned State's witness and left the joint defense agreement is because she felt that her defense and the other attorneys' defenses weren't being adequately funded. And there was a lot of animosity about that, there was a lot of anger, and it would be very interesting to know because I haven't yet been able to get anyone to tell me anything that's kind of crazy on the record what exactly happened, how much money was owed, and how the fact that Ms. Espindola's defense wasn't funded, she didn't get the investigator she needed when the case was still eligible for the death penalty.

She also didn't get any sort of -- there was a lot of mitigation that she wanted to be done in preparation if the case went dead that just wasn't done in this case, and because of that she was very angry. She was angry at Mr. Gentile, she was angry at my client, and we don't know how that anger perhaps shaded her testimony, I guess that's the way I put it. I think that would be worth further exploration.

THE COURT: I knew she was angry but there may have been more of a back story than the funding issue as I recall from what was discussed at some point regarding -- I mean, this was a long trial and there were many hearings so I'm kind of relying on my memory here. I can't pinpoint when somebody said something. If I remember, there was some discussion at some point about Ms. Espindola's motivation. It may have even been in cross-examination of her.

Mr. DiGiacamo, do you want to respond to that issue on the, I don't know, bias as a result of the funding going more towards Mr. Hidalgo than to Ms. Espindola?

MR. DIGIACOMO: Yes, because I think we have to remember why we're here. We're here on a petition for post-conviction relief claiming --

THE COURT: Ineffective assistance --

MR. DIGIACOMO: -- I had the ineffective assistance of counsel.

THE COURT: -- of Mr. Gentile.

MR. DIGIACOMO: Correct. And that right to counsel, the ineffective constitutional Sixth Amendment right attached after Ms. Espindola entered her plea, after there was this transaction that occurred that related. So as to their first two grounds, they're not cognizable because he had no Sixth Amendment right to counsel unless one of those two contexts required, you know, had an ongoing conflict afterwards, and obviously there wasn't. She was out and, you know, the money was already transferred. So there's no ongoing conflict between those two.

As to Ms. Espindola, I sort of understood what the Court was saying, but maybe the Court doesn't recall that during the jury trial Ms. Espindola waived her right to attorney-client privilege and Mr. Oram testified to the communications that occurred during the joint defense agreement. So I'm not sure what needs to be flushed out in an evidentiary hearing.

THE COURT: Right, add to the record.

MR. DIGIACOMO: Unless there is some proof that what it is that was said -- and as you -- if you recall, even stuff that happened before the joint defense agreement, Mr. DePalma and the investigator -- his mind skipping my name (sic) -- came in and testified to alleged statements that she made at that particular point in time.

So unless there's some factual basis that we don't know about --

THE COURT: Right, some question of fact that we need to flush out to add to the record, to complete the record, there's no need for an evidentiary hearing, and as I sit here and think about it, I don't know what question of fact that would be that we need to have, you know, sworn testimony on. I think the record on these questions is complete. That was kind of my take on it. You know, unless somebody can point me to a question of fact that needs to be resolved, one way or the other to make a complete record for review, I -- you know, there's no need to supplement the record.

So, moving on?

MS. SHELL: And, Your Honor, relatedly, and the investigator's name was Don Dibble (phonetic) by the way.

MR. DIGIACOMO: Right.

MS. SHELL: Moving on to my next argument which is related is how did this joint defense agreement affect Mr. Gentile's ability to cross-examine Ms. Espindola? As we discussed in our briefing, you know, once you enter into a joint defense agreement, you create sort of this quasi attorney-client relationship. Even though Mr. Gentile wasn't representing Ms. Espindola, anything that came up during those joint defense meetings, including, I would argue, any meetings that took place while Ms. Espindola was still in jail. Mr. Hidalgo wasn't under indictment at that point, he went and visited her with Mr. Gentile and Mr. Oram in prison, they discussed matters -- I don't know what because I don't have anyone other than Mr. Hidalgo to tell me what they talked about. I would like to know what she talked about with him and what Mr. Gentile may have learned that was either inculpatory -- this is, like, either impeachment evidence or exculpatory evidence that he learned from Miss Espindola during the joint defense meetings, and how that affected his ability to cross-examine her once she turns State's witness and testified in trial.

THE COURT: Mr. Digiacomo?

MR. DIGIACOMO: Yes, there was a waiver at the time of trial. He was not bound by any privilege at the time of the cross-examination and, if you recall, he not only cross-examined Ms. Espindola, but Mr. Oram as well, and Mr. Oram did testify to the content of that -- of those meetings in front of the jury. So that's in the record. Unless there is some allegation that something was said in those meetings that wasn't true, then there's no reason for an -- to have an evidentiary hearing, and there is no affidavit from anybody saying, no, Annabel actually said this in the meeting, not what Mr. Oram said.

THE COURT: Which was inconsistent with the testimony.

MR. DIGIACOMO: Correct, and Mr. Oram's testimony was this was her version of events, her same version of events as the first day I met her and in every meeting I've ever been to with her, whether Mr. Gentile was there or not, that was her version of events. So unless there was something different that -- there's no allegation that there is something different. It's just I want to know and that's not the basis for an evidentiary hearing.

THE COURT: Counsel, anything else?

MS. SHELL: Your Honor, I -- no, at this point, no.

THE COURT: All right. You know, as I said when I read through this, I thought to myself, well, what would we need to add to the record? And I couldn't really think of anything, frankly, where there was a question that we needed to resolve one way or the other, where we needed to supplement the evidence through testimony.

So for that reason, I don't see the reason for an evidentiary hearing. So I'm going to decide this based on the merits on the briefs. Now, counsel, do you have anything you want to add? I think we've kind of touched on a lot of these issues, but anything else you want to add?

MS. SHELL: Your Honor, no. I mean, again, I would just reiterate I do think we are entitled to an evidentiary hearing. I know there's some other issues --

THE COURT: I mean, I -- like I said, I would be happy to give you an evidentiary hearing if I could, you know, if anybody could point to one issue that needed to be developed or, you know, some fact, question, that's still out there that is important for the record, but I just don't see it. I don't see what we would be expanding, you know what I mean? What -- where would we go with this, and no one's really articulated anything that says -- I say, oh, yes, okay, we do need to expand the record in this way, so.

MS. SHELL: Well, Your Honor, I mean, I appreciate Your Honor's position. I just feel that there are, particularly going back to my first argument about the sale of the properties, I just -- there's something that's very strange about the way that that transfer of properties took place. It wasn't just about transferring the Bermuda Sands LLC to Mr. Gentile. It was also about the -- what I believe is an undervalued sale of the three -- there was Satin Saddle, Lacy's, and I think Palomino Club, LLC.

THE COURT: Wasn't there also Bonita's Chicas or something, or no?

MR. DIGIACOMO: Bonita's Chicas, yes.

THE COURT: Yeah.

MS. SHELL: There's a -- there's like a -- it's hard to keep track of all the LLC's. It's not that I --

THE COURT: I see some Bonita's Chicas patrons among us.

MS. SHELL: All of those LLC's were transferred to Mr. Gentile's son -- Adam Gentile --

THE COURT: Right.

MS. SHELL: -- and that's a little strange. Also, I didn't see anywhere in the record that it was disclosed during trial or prior to trial that Mr. Gentile had hired Mr. Hidalgo as a consultant which, to me, you know, there is -- there is something fishy going on there. I'm sorry I'm not being more articulate, but --

THE COURT: Right, but it has to go to Mr. Gentile's ability to represent Mr. Hidalgo so even if -- I mean, I don't know where you're going with this consultant idea that he's kind of paying him back some of the money from the clubs that were transferred to Mr. Gentile. I mean, is that the idea?

MS. SHELL: Well, I mean it's --

THE COURT: That he's like, kind of, you know, that there was money due and owing back from these valuable properties?

MS. SHELL: I think there is that which is an interesting question.

THE COURT: Is that where -- what you're suggesting?

MS. SHELL: Well, no, actually my head was going more towards because Mr. Hidalgo essentially entered into an employee relationship with Mr. Gentile, and I know that when I used to have a boss, and I don't now which is very nice, but when I had a boss who signed my checks, you tend to defer to them even when perhaps it's not in your best interest. So perhaps this employee relationship with Mr. Gentile affected the attorney-client relationship in a way that doesn't comport with constitutional standards.

THE COURT: Mr. DiGiacomo?

MR. DIGIACOMO: Where's the affidavit from Mr. Hidalgo that asserts, like, this was the problem, or this was the problem and, thus, this didn't happen or that didn't happen. None of that is within the pleading and they're not entitled to an evidentiary hearing based on, hey, there might have been an issue.

THE COURT: All right. Here's what I'm going to do. I'm going to issue a decision on the merits on this from chambers. I think we've already -- the Court's already made it clear. I don't see the need for an evidentiary hearing on any of the issues raised --

MR. DIGIACOMO: Can I add one small thing I saw --

THE COURT: -- by -- yes.

MR. DIGIACOMO: Their -- when reading the brief, this was done by appellate division obviously, I lived through it, and the record is huge. Just on the issue of the joinder of the two defendants, if you recall --.

THE COURT: I think --

MR. DIGIACOMO: -- was the State's motion, and --

THE COURT: Right.

MR. DIGIACOMO: -- the Court had indicated during the motion, look, State, if you're seeking the death penalty, I am not joining this. If you drop it --

THE COURT: Right, and that was because I had had -- although it was upheld by the Supreme Court to have a death case and a non-death case, having presided over one, I felt that it's better to have the non-death proceedings separate from the death proceedings. That was the reason for that, not based that I felt that I had to do that, but that was my feeling.

MR. DIGIACOMO: No, no, but the Court --

THE COURT: Does that comport with your recollection?

MR. DIGIACOMO: I -- my recollection is they were all facing death and the issue was at a penalty hearing maybe that Mr. H would have to point at the son, and the son would have to point to Mr. H saying I had a bad father, and that created an issue.

THE COURT: Oh, that's right. That was the issue. That was the issue, because he would be pointing out things about his father which I think probably might have been compelling evidence, frankly.

MR. DIGIACOMO: Right. And you essentially gave the State a choice which was drop death and I'll join them; if you don't drop death I won't join them. At that point, we reached out --

THE COURT: You made a logistical, tactical decision.

MR. DIGIACOMO: -- to the defense and said let's drop the death penalty -- you waive penalty so we don't even have that issue if it comes up in a non-death situation --

THE COURT: Right.

MR. DIGIACOMO: -- and proceed. And so just so the record is clear, there was clearly not only a strategy but, certainly, there couldn't have been prejudice because we could have done it without Mr. Gentile's agreement. This was the indication of the Court.

THE COURT: Right. And the other thing, just to clarify, that's not clear on the record, I think the Court made it clear that if the conflict went away that I wouldn't be severing the defendants, so --

MR. DIGIACOMO: Right.

THE COURT: -- if anything, I agree with you, it benefited Mr. Gentile's client.

MS. SHELL: But, then, I was going to say it's not Mr. Gentile we were concerned about --

THE COURT: All right. I'll issue a decision from chambers. Look for something Monday.

MR. DIGIACOMO: Thank you, Judge.

MS. SHELL: Thank you, Your Honor.

THE COURT: All right.

PROCEEDING CONCLUDED AT 10:32 A.M.

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

Susan Schofield

SUSAN SCHOFIELD
Court Recorder/Transcriber

DISTRICT COURT
CLARK COUNTY, NEVADA

Felony/Gross Misdemeanor	COURT MINUTES	August 15, 2016

08C241394 The State of Nevada vs Luis Hidalgo Jr

ELECTRONICALLY SERVED
08/15/2016 10:43:30 AM

August 15, 2016	3:00 AM	Petition for Writ of Habeas Corpus

HEARD BY: Adair, Valerie **COURTROOM:** RJC Courtroom 11C

COURT CLERK: Jill Chambers

RECORDER:

REPORTER:

PARTIES PRESENT:

JOURNAL ENTRIES

- Petition for Writ of Habeas Corpus is DENIED for the reasons set forth by the State in its Opposition. The Court further finds that there is no reason to expand the record through an evidentiary hearing.

The State is to prepare a detailed order.

CLERK S NOTE: Counsel is to ensure a copy of the forgoing minute order is distributed to all interested parties; additionally, a copy of the foregoing minute order was distributed to the listed Service Recipients in the Wiznet E-Service system. jmc 8/15/16

Electronically Filed
09/19/2016
CLERK OF THE COURT

NEO

DISTRICT COURT
CLARK COUNTY, NEVADA

LUIS HIDALGO, JR.,

Petitioner,

vs.

THE STATE OF NEVADA,

Respondent,

Case No: 08C241394
Consolidated with 05C212667
Dept No: XXI

NOTICE OF ENTRY OF FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

PLEASE TAKE NOTICE that on September 16, 2016, the court entered a decision or order in this matter, a true and correct copy of which is attached to this notice.

You may appeal to the Supreme Court from the decision or order of this court. If you wish to appeal, you must file a notice of appeal with the clerk of this court within thirty-three (33) days after the date this notice is mailed to you. This notice was mailed on September 19, 2016.

STEVEN D. GRIERSON, CLERK OF THE COURT

/s/ Chaunte Pleasant
Chaunte Pleasant, Deputy Clerk

CERTIFICATE OF MAILING

I hereby certify that on this 19 day of September 2016, I placed a copy of this Notice of Entry in:

☑ The bin(s) located in the Regional Justice Center of:
Clark County District Attorney's Office
Attorney General's Office – Appellate Division-

☑ The United States mail addressed as follows:

Luis Hidalgo, Jr. # 1038133
1200 Prison Road
Lovelock, NV 89419

Margaret A. McLetchie, Esq.
701 E. Bridger Ave., Ste. 520
Las Vegas, NV 89101

/s/ Chaunte Pleasant
Chaunte Pleasant, Deputy Clerk

PA3812

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09/16/2016 03:07:47 PM

CLERK OF THE COURT

FCL
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200 Lewis Avenue
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Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

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

Defendant.

CASE NO: 08C241394

DEPT NO: XXI

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

DATE OF HEARING: AUGUST 11, 2016 & AUGUST 15, 2016
TIME OF HEARING: 3:00 AM

THIS CAUSE having come on for hearing before the Honorable VALERIE ADAIR, District Judge, on the 11th day of August, 2016, the Petitioner not being present, being represented by ALINA SHELL, Esq., the Respondent being represented by STEVEN B. WOLFSON, Clark County District Attorney, by and through MARC DIGIACOMO, Chief Deputy District Attorney, and the Court having considered the matter, including briefs, transcripts, arguments of counsel, and documents on file herein, now therefore, the Court makes the following findings of fact and conclusions of law:

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FINDINGS OF FACT, CONCLUSIONS OF LAW

STATEMENT OF FACTS

In May of 2005, Defendant ("Mr. H") was the owner of the Palomino Club ("Palomino" or "the club"), which is Las Vegas's only all-nude strip club licensed to serve alcohol. On the afternoon of May 19, 2005, Mr. H's romantic partner of 18 years, Anabel Espindola ("Espindola"), received a phone call from Deangelo Carroll ("Carroll"); Carroll was an employee of the Palomino serving as a "jack of all trades" handling promotions, disc jockeying, and other assorted duties. Espindola was the Palomino's general manager and handled all of the club's financial and management affairs. During the call, Carroll informed Espindola that the victim in this case, T.J. Hadland ("Hadland"), a recently fired Palomino doorman, had been "badmouthing" the Palomino to taxicab drivers. A week prior to this news, Mr. H's son and co-defendant, Luis Hidalgo, III ("Little Lou"), had informed Mr. H that Hadland had been falsifying Palomino taxicab voucher tickets in order to generate unauthorized kickbacks from the drivers.[1] In response, Mr. H ordered that Hadland be fired.[2]

The Palomino was not in a good financial state and Mr. H was having trouble meeting the $10,000.00 per week payment due to Dr. Simon Sturtzer from whom he purchased the club in early 2003. Taxicab drivers are a critically important form of advertising for strip clubs generally. Because of the Palomino's location in North Las Vegas, revenue generated through taxicab drop-offs was very important to the club's operation. Due to a legal dispute among the area strip clubs regarding bonus payments to taxicab drivers, all payments were suspended during the period encompassing May 19-20, 2005; the Palomino was the only club permitted to continue paying taxi drivers for dropping off customers.

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[1] The Palomino paid cash bonuses to taxi drivers for each person a driver dropped off. The club accomplished this by having a doorman, such as Hadland, provide a ticket or voucher to the driver, which reflected the number of passengers (customers) dropped off. Apparently, Hadland was inflating the number of passengers taxi drivers dropped off in exchange for the driver agreeing to kick back to Hadland some of the bonus paid out by the club for these phantom customers.

[2] Mr. H had also received prior reports that, at other times, Hadland was selling Palomino VIP passes to arriving customers in exchange for cash, which deprived the taxicab drivers of bonuses for bringing customers to the club, and diverted the passes from their intended purpose of attracting patrons local to the club. This practice created a problem for the club because taxi drivers would begin disputing their entitlement to be paid bonuses.

At the time Espindola took Carroll's call, she was at Simone's Auto Body, which was a body-shop/collision repair business also owned by Mr. H and managed by Espindola.[3] After taking Carroll's call, Espindola informed Mr. H and Little Lou of Carroll's news about Hadland disparaging the club. Upon hearing the news, Little Lou became enraged and began yelling at Mr. H, demanding of Mr H: "You're not going to do anything?" and stating "That's why nothing ever gets done." Little Lou told Mr. H, "You'll never be like Rizzolo and Galardi. They take care of business."[4] He further criticized Mr. H by pointing out that Rizzolo had once ordered an employee to beat up a strip club patron.[5] Mr. H became angry, telling Little Lou to mind his own business. Little Lou again told Mr. H, "You'll never be like Galardi and Rizzolo," and then stormed out of Simone's heading for the Palomino.

Visibly angered, Mr. H walked out of Espindola's office and sat on Simone's reception area couch. At approximately 6:00 or 7:00 pm, Espindola and a still visibly-angered Mr. H drove from Simone's to the Palomino. Once at the Palomino, Espindola went into Mr. H's office, which was her customary workplace at the club. Approximately half an hour later, Carroll arrived at the club and knocked on the office door, which Mr. H answered. Mr. H and Carroll had a short conversation and then walked out the office door together. A short time later, Mr. H came back into the office and directed Espindola to speak with him out of earshot of Palomino technical consultant, Pee-Lar "PK" Handley, who was nearby. Mr. H instructed Espindola to call Carroll and tell Carroll to "go to Plan B."

Espindola went to the back of the office and attempted to contact Carroll by "direct connect" ("chirp") through her and Carroll's Nextel cell phones. Carroll called Espindola back on Count's cellular phone, and Espindola instructed Carroll that Mr. H wanted Carroll to "switch to Plan B." Carroll protested that "we're here" and "I'm alone" with Hadland, and he

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[3] Financially, Simone's was breaking even at the time of this case's underlying events, but the business never turned a profit.

[4] Frederick John "Rick" Rizzolo was the owner of a Las Vegas strip club known as Crazy Horse Too, and Jack Galardi is the owner of Cheetah's strip club as well as a number of other clubs in Atlanta, Georgia.

[5] Mr. H had previously enlisted his own employee, Carroll, to physically harm the boyfriend of Mr. H's daughter whom the boyfriend had caused to use methamphetamine; Espindola later intervened to stop Carroll from harming the boyfriend. This evidence came in after Mr. H attempted to suggest to the jury that he was unlike Gillardi and Rizzolo. The evidence was not admitted as to Little Lou.

told Espindola that he would get back to her. Espindola and Carroll's phone connection was then cut off. At that point, Espindola knew "something bad" was going to happen to Hadland. She attempted to call Carroll back, but could not reach him. Espindola returned to the office and informed Mr. H that she had instructed Carroll to go to "Plan B," after which Mr. H left the office with Handley.

Earlier in the day, May 19, 2005, at approximately noon, Carroll was at his apartment with Rontae Zone ("Zone") and Jayson Taoipu ("Taoipu"), who were both "flyer boys" working unofficially for the Palomino. Zone and Taoipu worked alongside Carroll and performed jobs Carroll delegated to them in exchange for being paid "under the table" by Carroll. Zone and Taoipu would pass out Palomino flyers to taxis at cabstands. Zone lived at the apartment with Carroll, Carroll's wife, and Zone's pregnant girlfriend, Crystal Payne. Zone and Taoipu had been friends for several years.

While at the apartment, Carroll informed Zone and Taoipu that Little Lou had told him Mr. H wanted a "snitch" killed. Carroll asked Zone if he would be "into" doing something like that, and Zone responded "No," he would not. Carroll also asked the same question of Taoipu who indicated he was "down," *i.e.*, interested in helping out. Later when Taoipu and Zone were in the Palomino's white Chevrolet Astro Van with Carroll, Carroll told them that Little Lou had instructed Carroll to obtain some baseball bats and trash bags to use in aid of killing the person. After the initial noontime conversation about killing someone on Mr. H's behalf, Zone observed Carroll using the phone, but he could not hear what Carroll was talking about. At some point after the noon conversation and after Zone observed him using the phone, Carroll informed Zone and Taoipu that Mr. H would pay $6,000.00 to the person who actually killed the targeted victim.

A couple hours later while the three were still in the van, Carroll again discussed on the phone having an individual "dealt with," *i.e.*, killed, although Zone did not know the specific person to be killed. Carroll produced a .22 caliber revolver with a pearl green handle and displayed it to Zone and Taoipu as if it were the weapon to be utilized in killing the targeted victim. Carroll attempted to give the revolver to Zone who refused to take it. Taoipu was

willing to take the revolver from Carroll and did so. Carroll also produced some bullets for the gun and placed them in Zone's lap, but Zone dumped the bullets onto the van's floor where Taoipu picked them up and put them in his own lap.[6]

The three then proceeded back to Carroll's apartment where Carroll instructed Zone and Taoipu to dress in all black so they could go out and work promoting the Palomino. The three then used the Astro van to go out promoting, returned briefly to Carroll's apartment for a second time, and again left the apartment to go promoting. On this next trip, however, Carroll took them to a residence on F Street where they picked up Kenneth "KC" Counts ("Counts"). Zone had no idea they were traveling to pick up Counts whom he had never previously met. Once at Counts' house, Carroll went inside the house and emerged ten minutes later accompanied by Counts who was dressed in dark clothing, including a black hooded sweatshirt and black gloves. Counts entered the Astro van and seated himself in the back passenger seat next to Zone who was seated in the rear passenger seat directly behind the driver. Taoipu was seated in the front, right-side passenger seat.

At the time, Zone believed they were headed out to do more promoting for the Palomino. As Carroll drove onto Lake Mead Boulevard, Zone realized they were not going to be promoting because there are no taxis or cabstands at Lake Mead. Carroll told Zone and the others that they were going to be meeting Hadland and were going to "smoke [marijuana] and chill" with Hadland.[7] Carroll continued driving toward Lake Mead.

On the drive up, Zone observed Carroll talking on his cell phone and he heard Carroll tell Hadland that Carroll had some marijuana for Hadland. Carroll was also using his phone's walkie-talkie function to chirp. Little Lou chirped Carroll and they conversed. Carroll spoke with Espindola who told him to "Go to Plan B," and then to "come back" to the Palomino. Zone recalled Carroll responding "We're too far along Ms. Anabel. I'll talk to you later," and terminated the conversation. After executing a left turn, Carroll lost the signal for his cell

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[6] Carroll would attempt a second time, unsuccessfully, to give the bullets to Zone when they were back at Carroll's apartment.

[7] Zone had been smoking marijuana throughout the day; on the ride to Lake Mead, Zone, Carroll, Counts, and Taoipu smoked one "blunt" or cigar of marijuana.

phone and was unable to communicate with it, so he began driving back to areas around the lake where his cell phone service would be re-established.

Carroll was able to describe a place for Hadland to meet him along the road to the lake. Hadland arrived driving a Kia Sportage, executed a U-turn, and pulled to the side of the road. Hadland walked up to the driver's side window where Carroll was seated and began having a conversation with Carroll; Zone and Taoipu were still seated in the rear right passenger's seat and front right passenger's seat, respectively. As Carroll and Hadland spoke, Counts opened the van's right-side sliding door and crept out onto the street, moving first to the front of the van, then back to its rear, and back to its front again. Counts then snuck up behind Hadland and shot him twice in the head. One bullet entered Hadland's head near the left ear, passed through his brain, and exited out the top of his skull. The other bullet entered through Hadland's left cheek, passed through and destroyed his brain stem, and was instantly fatal.

A stack of Palomino Club flyers fell out of the vehicle near Hadland's body when Counts re-entered or exited the vehicle. Counts then hurriedly hopped back into the van and Carroll drove off. Counts then questioned both Zone and Taoipu as to whether they were carrying a firearm and why they had not assisted him. Zone responded that he did not have a gun and had nothing to do with the plan. Taoipu responded that he had a gun, but did not want to inadvertently hit Carroll with gunfire.

Carroll then drove the four through Boulder City and to the Palomino, where Carroll exited the van and entered the club. Carroll met with Espindola and Mr. H in the office. He sat down in front of Mr. H and informed him "It's done," and stated "He's downstairs." Mr. H instructed Espindola to "Go get five out of the safe." Espindola queried, "Five what? $500?," which caused Mr. H to become angry and state "Go get $5,000 out of the safe." Espindola followed Mr. H's instructions and withdrew $5,000.00 from the office safe, a substantial sum in light of the Palomino's financial condition. Espindola placed the money in front of Carroll who picked it up and walked out of the office. Alone with Mr. H, Espindola asked Mr. H, "What have you done?" to which Mr. H did not immediately respond, but later asked "Did he do it?"

Ten minutes after entering the Palomino, Carroll emerged from the club, got Counts, and then went back in the club accompanied by Counts. Counts then emerged from the club, got into a yellow taxicab minivan driven by taxicab driver Gary McWhorter, and left the scene.[8] Carroll again emerged from the Palomino about thirty minutes later and drove the van first to a self-serve car wash and then back to his house, all the while accompanied by Zone and Taoipu. Zone was very shaken up about the murder and did not say much after they returned to his and Carroll's apartment.

The next morning, May 20, 2005, Espindola and Mr. H awoke at Espindola's house after a night of gambling at the MGM. Mr. H appeared nervous and as though he had not slept; he told Espindola he needed to watch the television for any news. While watching the news, they observed a report of Hadland's murder; Mr. H said to Espindola, "He did it." Espindola again asked Mr. H, "What did you do?" and Mr. H responded that he needed to call his attorney.

Meanwhile, that same morning, Carroll slashed the tires on the van and, accompanied by Zone, used another car to follow Taoipu who drove the van down the street to a repair shop. Carroll paid $100.00 cash to have all four tires replaced. Carroll, Zone, and Taoipu subsequently went to a Big Lots store where Carroll purchased cleaning supplies, after which Carroll cleaned the interior of the Astro van. Carroll, Zone, Taoipu, Zone's girlfriend, Carroll's wife and kids, and some other individuals ate breakfast at an International House of Pancakes restaurant later that day; Carroll paid for the party's breakfast. At some point also, Carroll, accompanied by Zone, went to get a haircut.

Carroll then drove himself, Zone, and Taoipu in the Astro van to Simone's where Mr. H, Little Lou, and Espindola were present. Carroll made Zone and Taoipu wait in the van while he went into Simone's; Carroll emerged about thirty minutes later and directed Zone and Taoipu inside where they sat on a couch in Simone's central office area. While at Simone's, Zone observed Carroll speaking with Mr. H in between trips to a back room, and he also

[8] Counts had to go back into the Palomino to obtain some change because McWhorter did not have change for the $100.00 bill Counts tried to pay him with.

observed Carroll speaking with Espindola. Carroll then went into a back room of Simone's, but emerged later to direct Zone and Taoipu into the bathroom. Carroll expressed disappointment in Zone and Taoipu for not involving themselves in Hadland's murder, and he told them they had missed the opportunity to make $6,000.00. He informed Zone and Taoipu that Counts received $6,000.00 for his part in Hadland's murder. After Carroll, Zone, and Taoipu left Simone's, Carroll told Zone that Mr. H had instructed Carroll that the "job was finished and that [they] were just to go home."

Las Vegas Metropolitan Police Department ("LVMPD") detectives identified Carroll as possibly involved in the murder after speaking with Hadland's girlfriend, Paijik Karlson, and because his name showed as the last person called from Hadland's cell phone. On May 20, 2005, Detective Martin Wildemann spoke with Mr. H and inquired about Carroll, requesting any contact information Mr. H might have for Carroll; Mr. H told Detective Wildemann he had no contact information for Carroll and that Wildemann should speak with one of the Palomino managers, Ariel aka Michelle Schwanderlik, who could put the detectives in touch with Carroll.

At approximately 7:00 pm, the detectives returned to the Palomino where they found Carroll who agreed to accompany them back to their office for an interview. After the interview, the detectives took Carroll back to his apartment where they encountered Zone who agreed to come to their office for an interview. Carroll then told Zone within earshot of the detectives: "Tell them the truth, tell them the truth. I told them the truth." Zone recalled Carroll also saying: "If you don't tell the truth, we're going to jail." Zone interpreted Carroll's statements to mean that Zone should fabricate a story that tended to exculpate Carroll, himself, and Taoipu. Zone gave the police a voluntary statement on May 21, 2005. Also on that day, Carroll brought Taoipu to the detectives' office for an interview.

Meanwhile on May 21, 2005, Mr. H and Espindola consulted with attorney Jerome A. DePalma, Esq., and defense attorney Dominic Gentile, Esq.'s investigator, Don Dibble. The next morning, May 22, 2005, a completely distraught Mr. H said to Espindola, "I don't know what I told him to do." Espindola responded by again asking Mr. H, "What have you done?"

to which Mr. H responded, "I don't know what I told him to do. I feel like killing myself." Espindola asked Mr. H if he wanted her to speak to Carroll and Mr. H responded affirmatively. Espindola arranged through Mark Quaid, parts manager for Simone's, to get in touch with Carroll.

On the morning of May 23, 2005, LVMPD Detective Sean Michael McGrath and Federal Bureau of Investigation (FBI) agent Bret Shields put an electronic listening device on Carroll's person; the detectives intended for Carroll to meet at Simone's with Mr. H and the other co-conspirators. Prior to Carroll arriving at Simone's, Mr. H and Espindola engaged in a conversation by passing handwritten notes back and forth. In this conversation, Mr. H instructed Espindola that she should tell Carroll to meet Arial and resign from working at the Palomino under a pretext of taking a leave of absence to care for his sick son. He further instructed Espindola to warn Carroll that if something bad happens to Mr. H then there would be no one to support and take care of Carroll. After the conversation, Espindola tore the notes up and flushed them down a toilet in the women's bathroom at Simone's.

When Carroll arrived at Simone's, Espindola directed him to Room 6 where he met with Little Lou. Espindola joined them and asked Carroll if he was wearing "a wire," to which Carroll responded, "Oh come on man. I'm not fucking wired. I'm far from fucking wired," and he lifted his shirt up. Mr. H was present in his office at Simone's while the three met in Room 6. In the course of the conversation among Carroll, Espindola, and Little Lou, Espindola informed Carroll: "Louie is panicking, he's in a mother fucking panic, cause I'll tell you right now . . . if something happens to him we all fucking lose. Every fucking one of us." Little Lou informed Carroll that "[Mr. H]'s all ready to close the doors and everything and hide go into exile and hide." Espindola emphasized the importance of Carroll not defecting from Mr. H:

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

Carroll, who had been prepared by detectives to make statements calculated to elicit incriminating responses, initiated the following exchange: [9]

> Carroll: Hey what's done is done, you wanted him fucking taken care of we took care of him . . .
>
> Espindola: Why are you saying that shit, what we really wanted was for him to be beat up, then anything else, _____mother fucking dead.

Carroll also stated to Little Lou: "You . . . not gonna fucking[. . .] what the fuck are you talking about don't worry about it . . . you didn't have nothing to do with it," to which Little Lou had no response.

Espindola again emphasized that Carroll should not talk to the police and she would arrange an attorney for him:

> Espindola: _____all I'm telling you is all I'm telling you is stick to your mother fucking story_____Stick to your fucking story. Cause I'm telling you right now it's a lot easier for me to try to fucking get an attorney to get you fucking out than it's gonna be for everybody to go to fucking jail. I'm telling you once that happens we can kiss everything fucking goodbye, all of it . . . your kids' salvation and everything else . . . . It's all gonna depend on you.

Little Lou also instructed Carroll to remain quiet and what Carroll should tell police if confronted: "[whispering] . . . _____don't say shit, once you get an attorney, we can say_____TJ, they thought he was a pimp and a drug dealer at one time_____I don't know shit, I was gonna get in my car and go promote but they started talking about drugs and pow pow." He also promised to support Carroll should Carroll go to prison for conspiracy:

> Little Lou: . . . How much is the time for a conspiracy_____
>
> Carroll: [F]ucking like 1 to 5 it aint shit.
>
> Little Lou: In one year I can buy you twenty-five thousand of those [savings bonds],___thousand dollars___one year, you'll come out and you'll have a shit load of money_____I'll take care of your son I'll put em in a nice condo_____

[9] The audio recordings of Carroll's conversations are of poor quality and inaudible portions are indicated by blanks.

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During this May 23rd wiretapped conversation, Little Lou also solicited Zone and Taoipu's murder. In response to Carroll's claims that Zone and Taoipu were demanding money and threatening to defect to the police, Little Lou proposed killing both young men:

> Carroll: They're gonna fucking work deals for themselves, they're gonna get me for sure cause I was driving, they're gonna get KC because he was the fucking trigger man. They're not gonna do anything else to the other guys cause they're fucking snitching.
>
> Little Lou: Could you have KC kill them too, we'll fucking put something in their food so they die rat poison or something.
>
> Carroll: We can do that too.
>
> Little Lou: And we get KC last.
>
> . . .
>
> Little Lou: Listen____You guys smoke weed right, after you have given them money and still start talking they're not gonna expect rat poisoning in the marijuana and give it to them_____
>
> Espindola: I'll get you some money right now.
>
> Little Lou: Go buy rat poison____and take_____back to the club…Here, [d]rink this right.
>
> Carroll: [W]hat is it?
>
> Little Lou: Tanguerey, [*sic*] you stir in the poison_____
>
> Espindola: Rat poison is not gonna do it I'm telling you right now_____
>
> Little Lou: [Y]ou know what the fuck you got to do.
>
> Espindola:_____takes so long_____not even going to fucking kill him.

At the end of the meeting, Espindola stated she would give Carroll some money and promised to financially contribute to Carroll and his son, as well as arrange for an attorney for Carroll. After the meeting, Carroll provided the detectives $1,400.00 and a bottle of Tanqueray, which he stated were given to him by Espindola and Little Lou, respectively.[10]

[10] Espindola would later testify Mr. H gave her only $600 to give to Carroll, which she did in fact give to Carroll on the 23rd.

On May 24, 2005, the detectives again outfitted Carroll with a wire and sent him back to Simone's. After Carroll's unexpected arrival, Espindola again directed him to Room 6 where the two again meet with Little Lou while Mr. H was present in the body shop's kitchen area. During the conversation, Carroll and Espindola engaged in an extended colloquy regarding their agreement to harm Hadland:

> Carroll: You know what I'm saying, I did everything you guys asked me to do. You told me to take care of the guy; I took care of him.
>
> Espindola: O.K. wait, listen, listen to me (Unintelligible)
>
> Carroll: I'm not worried.
>
> Espindola: Talk to the guy, not fucking take care of him like get him out of the fucking way (Unintelligible). God damn it, I fucking called you.
>
> Carroll: Yeah, and when I talked to you on the phone, Ms. Anabel, I specifically I specifically said, I said "if he's by himself, do you still want me to do him in."
>
> Espindola: I I . . .
>
> Carroll: You said Yeah.
>
> Espindola: I did not say "yes."
>
> Carroll: you said if he's with somebody, then beat him up.
>
> Espindola: I said go to plan B, -- fucking Deangelo, Deangelo you just told admitted to me that you weren't fucking alone I told you 'no', I fucking told you 'no' and I kept trying to fucking call you and you turned off your mother fucking phone.
>
> Carroll: I never turned off my phone.
>
> Espindola: I couldn't reach you.
>
> Carroll: I never turned off my phone. My phone was on the whole fucking night.
>
> . . .
>
> Carroll: Ms. Anabel

Espindola: I couldn't fucking reach you, as soon as you spoke and told me where you were I tried calling you again and I couldn't fucking reach you.

At some point in this May 24 meeting, Espindola left the room to go speak with Mr. H. She informed Mr. H that Carroll wanted more money and Mr. H instructed her to give Carroll some money. After Carroll returned from Simone's, he gave the detectives $800.00, which Espindola had provided to him.[11] After Carroll's second wiretapped meeting, detectives took Little Lou and then Espindola into custody for the murder of Hadland.

STATEMENT OF THE CASE

On February 13, 2008, the State filed an Indictment charging Defendant Luis Hidalgo, Jr., aka, Luis Alonso Hidalgo ("Defendant") as follows: Count 1 – Conspiracy to Commit Murder (Felony – NRS 200.010, 200.030, 199.480); and Count 2 – Murder With Use of a Deadly Weapon (Felony – NRS 200.010, 200.030, 193.165). On March 7, 2008, the State filed a Notice of Intent to Seek Death Penalty.

The State filed an Amended Indictment on May 1, 2008, which made changes to the language of the Indictment but did not modify the substance of the counts against Defendant. The State similarly filed an Amended Notice of Intent to Seek Death Penalty on June 18, 2008.

On June 25, 2008, the State filed a Motion to Consolidate Case No. C241394 into Case No. C212667, seeking to join Defendant's case with that of his son, Luis Hidalgo, III, a co-conspirator in the murder. On December 8, 2008, the Hidalgo defendants jointly filed an Opposition to the Motion to Consolidate. The State filed a Response on December 15, 2008. On January 16, 2009, Defendant withdrew his Opposition to the Motion to Consolidate, the State withdrew its Notice of Intent to Seek Death Penalty, and the District Court issued an Order Granting State's Motion to Consolidate.

The joint trial of the Hidalgo defendants began on January 27, 2009. On February 17, 2009, the jury returned the following verdict as to Defendant: Count 1 – Guilty of Conspiracy

[11] If Carroll had these amounts of cash on him prior to detectives sending him out on the surveillance operations, Detective McGrath would have noticed because that amount of currency would have made Carroll's wallet much bigger. Espindola testified at trial that she thinks she gave Carroll $500.00 on the 24th.

to Commit a Battery with a Deadly Weapon or Battery Resulting in Substantial Bodily Harm; and Count 2 – Guilty of Second Degree Murder with Use of a Deadly Weapon.

On March 10, 2009, Defendant filed a Motion for Judgment of Acquittal, or in the Alternative, a New Trial. The State filed its Opposition on March 17, 2009. Defendant filed a Reply to the State's Opposition on April 17, 2009. Defendant filed his Supplemental Points and Authorities on April 27, 2009. On May 1, 2009, the Court deferred its ruling on the Motion for Judgment of Acquittal and invited additional briefing on the Motion. On June 23, 2009, the court found that there was sufficient evidence to warrant not upsetting the jury verdict and denied Defendant's Motion for Judgment of Acquittal, or in the Alternative, a New Trial. On the same date, the matter proceeded to sentencing.

On June 23, 2009, Defendant was adjudged guilty and sentenced as follows: Count 1 – 12 months in the Clark County Detention Center; and Count 2 – life imprisonment in the Nevada Department of Corrections with parole eligibility beginning after 120 months, plus an equal and consecutive term of 120 months to life for the deadly weapon enhancement, Count 2 to run concurrent with Count 1. Defendant was given 184 days credit for time served. The Judgment of Conviction was filed on July 10, 2009.[12]

Defendant filed a Notice of Appeal on July 16, 2009. The Nevada Supreme Court issued its Order of Affirmance on June 21, 2012. On July 27, 2012, the Nevada Supreme Court issued an Order Denying Rehearing. The Nevada Supreme Court issued an Order Denying En Banc Reconsideration on November 13, 2012. Remittitur issued on April 10, 2013.

On December 31, 2013, Defendant filed a Petition for Writ of Habeas Corpus ("Petition"), a Memorandum of Points and Authorities In Support of Petition for Writ of Habeas Corpus ("Memorandum"), a Motion to Proceed in Forma Pauperis and a Motion for Appointment of Counsel. On January 21, 2014, the Court appointed post-conviction counsel. On February 4, 2014, Margaret A. McCletchie, Esq., confirmed as counsel.

[12] 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.

On February 29, 2016, Petitioner, through counsel, filed the instant Supplemental Memorandum of Points and Authorities in Support of Petition for Writ of Habeas Corpus (Post-Conviction) ("Supplement"). The State filed its Response to the Supplement on May 18, 2016. On August 11, 2016, this Court heard argument. On August 15, 2016, this Court denied habeas relief.

The Court now orders that Petitioner's Petition be DISMISSED, as Petitioner received effective assistance of trial and appellate counsel.

I. Defendant Received Effective Assistance of Counsel

Claims of ineffective assistance of counsel are analyzed under the two-pronged test articulated in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984), wherein the defendant must show: (1) that counsel's performance was deficient, and (2) that the deficient performance prejudiced the defense. Id. at 687, 104 S. Ct. at 2064. "A court may consider the two test elements in any order and need not consider both prongs if the defendant makes an insufficient showing on either one." Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1997).

"Surmounting Strickland's high bar is never an easy task." Padilla v. Kentucky, 559 U.S. 356, 371, 130 S. Ct. 1473, 1485 (2010). The question is whether an attorney's representations amounted to incompetence under prevailing professional norms, "not whether it deviated from best practices or most common custom." Harrington v. Richter, 562 U.S. 86, 88, 131 S. Ct. 770, 778 (2011). Further, "[e]ffective counsel does not mean errorless counsel, but rather counsel whose assistance is '[w]ithin the range of competence demanded of attorneys in criminal cases.'" Jackson v. Warden, Nevada State Prison, 91 Nev. 430, 432, 537 P.2d 473, 474 (1975) (quoting McMann v. Richardson, 397 U.S. 759, 771, 90 S. Ct. 1441, 1449 (1970)).

The court begins with the presumption of effectiveness and then must determine whether the defendant has demonstrated by a preponderance of the evidence that counsel was ineffective. Means v. State, 120 Nev. 1001, 1011-1012, 103 P.3d 25, 32-33 (2004). The role of a court in considering alleged ineffective assistance of counsel is "not to pass upon the

merits of the action not taken but to determine whether, under the particular facts and circumstances of the case, trial counsel failed to render reasonably effective assistance." Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978) (citing Cooper v. Fitzharris, 551 F.2d 1162, 1166 (9th Cir. 1977)).

In considering whether trial counsel was effective, the court must determine whether counsel made a "sufficient inquiry into the information . . . pertinent to his client's case." Doleman v State, 112 Nev. 843, 846, 921 P.2d 278, 280 (1996) (citing Strickland, 466 U.S. at 690–91, 104 S. Ct. at 2066). Then, the court will consider whether counsel made "a reasonable strategy decision on how to proceed with his client's case." Doleman, 112 Nev. at 846, 921 P.2d at 280 (citing Strickland, 466 U.S. at 690–91, 104 S. Ct. at 2066). Counsel's strategy decision is a "tactical" decision and will be "virtually unchallengeable absent extraordinary circumstances." Doleman, 112 Nev. at 846, 921 P.2d at 280.

This analysis does not indicate that the court should "second guess reasoned choices between trial tactics, nor does it mean that defense counsel, to protect himself against allegations of inadequacy, must make every conceivable motion no matter how remote the possibilities are of success." Donovan, 94 Nev. at 675, 584 P.2d at 711 (citing Cooper, 551 F.2d at 1166 (9th Cir. 1977)). In essence, the court must "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland, 466 U.S. at 690, 104 S. Ct. at 2066. However, counsel cannot be deemed ineffective for failing to make futile objections, file futile motions, or for failing to make futile arguments. Ennis v. State, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006).

In order to meet the second "prejudice" prong of the test, the defendant must show a reasonable probability that, but for counsel's errors, the result of the trial would have been different. McNelton v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694, 104 S. Ct. at 2068.

Claims asserted in a petition for post-conviction relief must be supported with specific factual allegations, which if true, would entitle the petitioner to relief. Hargrove v. State, 100

Nev. 498, 502, 686 P.2d 222, 225 (1984). "Bare" or "naked" allegations are not sufficient, nor are those belied and repelled by the record. Id.; see also NRS 34.735(6).

A. Counsel Was Not Encumbered With an Unwaived Actual Conflict of Interest

A defendant has a constitutional right under the Sixth Amendment to the effective assistance of counsel unhindered by conflicting interests. Holloway v. Arkansas, 435 U.S. 475, 98 S. Ct. 1173 (1978); Coleman v. State, 109 Nev. 1, 3, 846 P.2d 276, 277 (1993); Harvey v. State, 96 Nev. 850, 619 P.2d 1214 (1980). Where the trial court is unaware of the potential conflict of interest, to establish a claim of ineffective assistance of counsel based on a conflict of interest, a defendant must show that the conflict of interest adversely affected his attorney's performance. Mickens v. Taylor, 535 U.S. 162, 173, 122 S. Ct. 1237, 1244-45 (2002). "[U]ntil a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance." Cuyler v. Sullivan, 446 U.S. 335, 350, 100 S. Ct. 1708, 1719 (1980). An actual conflict of interest which adversely affects a lawyer's performance will result in a presumption of prejudice to the defendant. Id.; Mickens, 535 U.S. at 166, 122 S. Ct. at 1237. Mannon v. State, 98 Nev. 224, 226, 645 P.2d 433, 434 (1982).

The United States Supreme Court has defined an actual conflict under the Sixth Amendment as "a conflict of interest that adversely affects counsel's performance." Mickens, 535 U.S. at 172, 122 S. Ct. at 1244. Quoting the Second Circuit's definition of an actual conflict as defined in United States v. Levy, 25 F.3d 146, 155 (2d Cir. 1994), the Ninth Circuit Court of Appeals has stated:

> An attorney has an actual, as opposed to a potential, conflict of interest when, during the course of the representation, the attorney's and the defendant's interests diverge with respect to a material factual or legal issue or to a course of action.

United States v. Baker, 256 F.3d 855, 860 (9th Cir. 2001). Similarly, in Clark v. State, 108 Nev. 324, 326, 831 P.2d 1374, 1376 (1992), the Nevada Supreme Court defined an actual conflict as one where the personal interests of the attorney are in clear conflict with that of the

client, such as in dual representation situations or in instances when the attorney has a personal interest in the outcome of his client's case such that it adversely affects his representation. Id.

Conflicts relating to dual representation can be waived. "Under the Sixth Amendment, criminal defendants 'who can afford to retain counsel have a qualified right to obtain counsel of their choice.'" Ryan v. Eighth Judicial Dist. Ct., 123 Nev. 419, 426, 168 P.3d 703, 708 (2007) (quoting United States v. Ray, 731 F.2d 1361, 1365 (9th Cir. 1984)). However, this interest, in cases of dual representation, often conflicts with the right to conflict-free counsel. Id.

Despite this potential conflicts between the right to choose retained counsel and the right to conflict-free counsel, "[b]ecause there can be a benefit in a joint defense against common criminal charges, there is no per se rule against dual representation." Ryan v. Eighth Judicial Dist. Ct., 123 Nev. 419, 426, 168 P.3d 703, 708 (2007) (citing Holloway v. Arkansas, 435 U.S. 475, 482-83, 98 S. Ct. 1173 (1978)). And, on balance of the two conflicting interests, "there is a strong presumption in favor of a non-indigent criminal defendant's right to counsel of her own choosing . . . [and] [t]his presumption should rarely yield to the imposition of involuntary conflict-free representation." Id. at 428, 168 P.3d at 709. That being said, "when a defendant knowingly, intelligently, and voluntarily waives her right to conflict-free representation, she also waives her right to seek a mistrial arising out of such conflicted representation. Further, the waiver is binding on the defendant throughout trial, on appeal, and in habeas proceedings. Thus, the defendant cannot subsequently seek a mistrial arising out of the conflict that he waived and "cannot . . . be heard to complain that the conflict he waived resulted in ineffective assistance of counsel." Id. at 429, 168 P.3d at 710.

In Ryan, the Nevada Supreme Court directed district courts, in assessing joint representation cases, to conduct extensive canvasses to (1) determine whether each of the defendants have made a knowing, intelligent, and voluntary waiver of their right to conflict-free representation; and (2) advise each defendant that a waiver of the right to conflict-free representation means that they cannot seek a mistrial or raise claims of ineffective assistance of counsel based on any conflict caused by the dual representation. There is also a third

requirement, imposed on defense counsel – attorneys must advise the defendants of their right to consult with independent counsel to advise them on the potential conflict of interest and the consequences of waiving the right to conflict-free representation, and must advise the clients to seek the advice of independent counsel before the attorney engages in the dual representation. Id. at 430, 168 P.3d at 710-11. If the clients choose not to seek the advice of independent counsel, the clients must expressly waive the right to do so before agreeing to any waiver of conflict-free representation. Id.

Prior to Little Lou's representation by separate counsel, the Nevada Supreme Court determined that Gentile's pre-arrest representation of Defendant and his representation of Little Lou did not create a conflict of interest. Hidalgo v. Eighth Judicial Dist. Court, 124 Nev. 330, 333, 184 P.3d 369, 372 (2008) ("Based on the affidavits submitted by Hidalgo, his counsel, and Hidalgo's father, we perceive no current or potential conflict sufficient to warrant counsel's disqualification at this time."). Additionally, after this decision, this Court conducted an extensive evidentiary hearing on whether he knowingly and voluntarily waived any conflict resulting from joint representation and whether he was informed of the necessary requirements.

Defendant first provided background concerning his work experience and his relationship with Mr. Gentile. He testified that although he was born in El Salvador, he received schooling in the United States and reads and writes the English language. Recorder's Transcript Re: Hearing: Potential Conflict, February 13, 2013, at 83 (filed under seal). He had extensive experience in the justice system, and worked at a Sheriff's Office in Northern California. Id. at 81. He cited an experience in his twenties with law enforcement where he was initially arrested but the charges were ultimately dismissed. Id. at 85. He cited the specific section of the California Penal Code (Cal. Penal Code § 849(a)) under which his case was dismissed. Id. He met trial counsel through prior litigation, when he was representing an opposing party. Id. at 88. Initially, he retained Gentile to counsel him, considering the potential that criminal charges would be filed against him. Id. at 92-93. Gentile then involved himself in Little Lou's case when Little Lou's case was before the Nevada Supreme Court during

litigation of a writ of mandamus. Id. at 93. He asked Mr. Gentile to represent his son. Id. at 150. Defendant acknowledged he was waiving his rights to raise a claim relating to the dual representation and any impact it had on Defendant's defense. Id. at 152-53. He determined that it was in his best interest to waive the conflict and continue dual representation. Id. at 154.

Subsequently, Defendant testified that he spoke to two independent counsel concerning potential conflicts of interest – Michael Cristalli, Esq., and Amy Chelini, Esq. Id. at 102. He spoke to these attorneys after he learned Espindola would be testifying. Id. at 104. He was advised by these attorneys as to the fact he could not claim ineffective assistance based on any conflicts of interest. Id. at 105-06. He understood what the attorneys were telling him. Id. at 106.

Mr. Cristalli testified that he spoke with Defendant about the potential conflicts that would result from joint representation. Id. at 108-09. Cristalli was not compensated for his advice. Id. at 111. He focused on the issues raised in Ryan. Id. at 114. Ms. Chelini testified to the same effect. Id. at 116-18. She also noted that Defendant was "more than confident with Mr. Gentile and is more than happy to sign any waiver and understands the consequences of doing such." Id. at 117.

Thus, Defendant effectively waived any claim arising from Mr. Gentile's dual representation of him and his son. Accordingly, this claim is denied.

Also, based on the discussion below, Mr. Gentile did not have a conflict of interest based on the grounds raised in the Supplement.

i. Counsel and Defendant's Fee Agreement, Involving the Purchase of Bermuda Sands LLC by Counsel, Was Not Improper

Defendant first claims that Mr. Gentile rendered ineffective assistance due to a conflict of interest relating to Defendant's agreement to sell his interest in Bermuda Sands LLC to Gentile in exchange for legal representation. Supplement at 31. The claim in essence is that Gentile committed an ethical violation by allegedly violating Nevada Rule of Professional Conduct ("NRPC") 1.8(a) which states:

> A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other

pecuniary interest adverse to a client unless:

> (1) The transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;
> (2) The client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and
> (3) The client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

Supplement at 30.

First, and most importantly, even *if* Defendant could show a violation under the Nevada Rules of Professional Conduct by Gentile, it is irrelevant to a claim of ineffective assistance due to an actual conflict of interest under the Sixth Amendment standard. Nix v. Whiteside, 475 U.S. 157, 165, 106 S. Ct. 988, 993 (1986) ("[B]reach of an ethical standard does not necessarily make out a denial of the Sixth Amendment guarantee of assistance of counsel."). Also, the professional obligations of the Nevada Rules of Professional Conduct, by their plain language, do not create an independent basis for relief in a criminal case. NRPC 1.0A provides guidance on interpreting the rules and specifically indicates that the rules are not meant to be used in litigation outside the context of a bar complaint:

> Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. In addition, violation of a Rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. Nevertheless, since the Rules do establish standards of conduct by lawyers, a lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct.

NRPC 1.0A(d). Instead, Defendant is required to show that any conflict of interest "adversely affect[ed] counsel's performance," Mickens, 535 U.S. at 172, 122 S. Ct. at 1244, and were in clear conflict with the Defendant's interests, Clark, 108 Nev. at 326, 831 P.2d at 1376. Defendant has failed to show that Mr. Gentile's representation was adversely affected by his business dealings with Defendant or that Gentile's interests were in *clear* conflict with Defendant's interests. He instead focuses only on whether Gentile's conduct violated NRPC 1.8(a).

Defendant does not even establish a violation of NRPC 1.8(a).[13] He claims that because Gentile entered into a purchase agreement with Defendant to transfer Defendant's interest in Bermuda Sands LLC, in exchange for $500,000, and because this agreement was done without a valuation of the asset prior to the transaction, there was a violation of the rule. Supplement at 31. He also points to sale of other LLCs to Mr. Gentile's son for $30,000, and use of Defendant as a consultant, as evidence that this ethical rule was violated. Id. However, at the evidentiary hearing concerning Gentile's joint representation of Defendant and Little Lou, Defendant testified that *he* had offered to enter a property transaction to pay the fee for legal representation of him, Little Lou and Espindola. Recorder's Transcript Re: Hearing: Potential Conflict, February 13, 2013, at 96-101. Defendant consulted independent counsel, Mark Nicoletti, who he had known previously and had used for business transactions. *Nicoletti* drafted the fee agreement. Id. The agreement was to transfer Defendant's interest in the LLCs controlling the club and owning the property, as well as the note on the property in exchange for Gentile's representation and the legal fees of Espindola and Little Lou. Id. This testimony clearly establishes that Defendant entered into this business transaction knowingly and voluntarily, with advice from independent counsel, and that he proposed the transaction

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[13] Also, if Defendant's counsel was actually concerned as to whether Mr. Gentile violated the NRPC, the State imagines she would have reported his conduct to the State Bar of Nevada. In fact, the rules *impose* a duty to report, as "[a] lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority." NRPC 8.3(a). ~~It is *professional misconduct* to violate this rule and any other rule as contained in the NRPC. NRPC 8.4. One would think that if counsel indeed thought Mr. Gentile strong-armed Defendant into an unfair transaction, it would raise a substantial question as to his honesty and trustworthiness as an attorney. Yet, no evidence of a bar complaint has been shown.~~

himself in order to pay for legal fees. Defendant was a sophisticated businessman who conducted an arms-length transaction with Gentile in order to secure his representation. Both parties assumed risks but obtained benefits in the transaction – Defendant assumed the risk that he was paying less for the property than fair market value, in exchange for an open line of credit to fund his, Little Lou's and Espindola's defenses, while Gentile assumed the risk that the property would be unprofitable or that legal fees would exceed the value of the property. Accordingly, the testimony at the evidentiary hearing alone satisfies the rule and shows that the transaction was entirely fair.

Also, the terms of the agreement were fair. That the property was not subjected to a valuation is irrelevant. And Defendant's allegation that this transaction was unfair because the property was undervalued, is a bare, naked assertion that should be summarily rejected by this Court. Hargrove, 100 Nev. at 502-03, 686 P.2d at 225.

Defendant received another substantial benefit from the fee agreement, beyond that of legal representation. Notably, trial testimony established that pre-Hadland's murder, the Palomino was not in a good financial state and Defendant was having trouble meeting the $10,000.00 per *week* payment due to Dr. Simon Sturtzer (through Windrock LLC) from whom he purchased the club in early 2003. Recorder's Transcript of Proceedings: Jury Trial – Day 9, February 6, 2009, at 20-29, 80; Recorder's Transcript of Proceedings: Jury Trial – Day 10, February 9, 2009, at 5. As Defendant acknowledges, Gentile through an LLC acquired the note on which Defendant was obligated to pay and negotiated a new note to Windrock LLC with a much lower principal and monthly payment. Defendant's Appendix for Supplemental Petition for Writ of Habeas Corpus Under Seal ("Sealed App'x") at 8; Recorder's Transcript Re: Hearing: Potential Conflict, February 13, 2013, at 77. Accordingly, Defendant was relieved from an obligation to pay the exorbitant weekly payment due on the note, that he had trouble making even before the murder mired the Palomino Club in scandal. Defendant clearly received this benefit in addition to the benefit of legal representation through his fee agreement with Gentile. The additional agreements between Gentile, Gentile's son, and Defendant do not

contradict this, and just show that Defendant found creative ways to satisfy his debts for legal services provided by Gentile.[14]

Additionally, once again, Defendant fails to show that any unfairness within the business deal created an *actual* conflict under the Sixth Amendment, as he cannot show that this transaction affected counsel's representation in the instant criminal matter. Mickens, 535 U.S. at 172, 122 S. Ct. at 1244; Clark, 108 Nev. at 326, 831 P.2d at 1376. All claims of a violation of NRPC 1.8(a) and the Sixth Amendment right to counsel are bare allegations that are undeserving of relief or an evidentiary hearing. Accordingly, they are denied by this Court.

ii. Counsel's Alleged Failure to Fully Fund Little Lou's and Espindola's Defenses Fails to Show a Conflict of Interest or Ineffective Assistance

Defendant next claims that Gentile's "apparent failure" to fully fund Little Lou's and Espindola's defenses prejudiced him, because "Espindola's belief that Mr. Gentile was not paying for her defense led to her decision to testify against [Defendant] and his son." Supplement at 32.

Defendant provides no authority for the proposition that Gentile was required under the Sixth Amendment of the United States Constitution to monetarily placate Defendant's co-conspirators so as to induce them not to testify. This failure is fatal, and is thus construed as an admission that he was not, and is not, entitled to an evidentiary hearing on this issue. District Court Rule 13(2); Eighth Judicial District Court Rule 3.20(b); Polk v. State, 126 Nev. ___, ___, 233 P.3d 357, 360-61 (2010). Further, this Court need not address arguments that are not supported with precedent. Edwards v. Emperor's Garden Rest., 122 Nev. 317, 330, n.38, 130 P. 3d 1280, n.38 (2006) (court need not consider claims unsupported by relevant authority); State, Dept. of Motor Vehicles and Public Safety v. Rowland, 107 Nev. 475, 479, 814 P.2d 80, 83 (1991) (unsupported arguments are summarily rejected on appeal); Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) ("It is appellant's responsibility to present relevant authority and cogent argument; issues not so presented need not be addressed by this court.");

[14] One would think that had Defendant considered the bargain between him and Gentile unconscionable, he would seek relief under contract law for recission or reformation of the agreement, or otherwise seek excusal of his performance under the agreement on this ground. Yet, a review of Odyssey reveals no such contract action.

Randall v. Salvation Army, 100 Nev. 466, 470-71, 686 P.2d 241, 244 (1984) (court may decline consideration of issues lacking citation to relevant legal authority); Holland Livestock v. B & C Enterprises, 92 Nev. 473, 533 P.2d 950 (1976) (failure to offer citation to relevant legal precedent justifies affirmation of the judgment below).

Nonetheless, the claim is meritless. First, it is belied by the record. Hargrove, 100 Nev. at 502-03, 686 P.2d at 225. During the evidentiary hearing on the issue of dual representation, Mr. Gentile, as an officer of the court, stated that Espindola was distraught by the loss of JoNell Thomas to the defense team. While Oram represented that Espindola wanted certain investigation done, Gentile recommended that they not yet spend funds on penalty-phase investigation, considering that the Nevada Supreme Court had not yet ruled on the mandamus issue concerning the alleged aggravating circumstances. Recorder's Transcript Re: Hearing: Potential Conflict, February 13, 2013, at 76. He also represented that Oram was paid $60,000 for his work. Id. Gentile disbursed money, when it became available, to the other attorneys, not to himself. Id. at 77. These representations belie the claim that Espindola's defense was underfunded.

Second, Defendant unreasonably assumes that the Joint Defense Agreement and funding of the defenses of his co-defendants meant that they could never testify against him. This expectation cannot be supported by the Joint Defense Agreement, as it informed Defendant, through his independent counsel at the time (Gentile), of the consequences of a joint defense. Gentile had authority to execute this agreement from Defendant. Sealed App'x at 35.

The Joint Defense Agreement informed Defendant that any member of the Joint Defense Agreement could become a witness in the criminal case. Id. It also informed Defendant that any member could withdraw from the agreement. Sealed App'x at 36. Finally, it explicitly informed Defendant that each client had independent counsel and each counsel had a duty to represent his or her client zealously, even if this meant advising the client to cooperate with the State. Sealed App'x at 37.

Finally, Mr. Oram's testimony during the evidentiary hearing on the issue of dual

representation does not establish that Espindola turned on Defendant due to any failure to fund her defense. Instead, Espindola was concerned about the independence of Oram and the fact that Defendant held the power of the purse. Recorder's Transcript Re: Hearing: Potential Conflict, February 13, 2013, at 44-45. She also was dissatisfied when JoNell Thomas left the case and believed that it was for a lack of financing (however, Ms. Thomas in fact left the case after taking a position with the Clark County Special Public Defender). Id. at 45-46. This testimony indicates that Defendant's *control* of the financing of her defense, rather than the funding itself, was what she was concerned about. She wanted independent counsel, not a puppet who acceded to the demands of Gentile and Defendant. She wanted assurances that her attorney was acting in her best interest rather than Defendant's or Little Lou's.

Oram had an ethical obligation to act in Espindola's best interest and abide by her wishes concerning the ultimate resolution of the matter, whether it be to take a negotiation offered by the State or proceed to trial. See NRPC 1.2(a) ("[A] lawyer *shall* abide by a client's decision concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. . . . In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.") (emphasis added); NRPC 1.8(f)(2) (attorney receiving compensation for representation by a third-party must exercise independence of professional judgment and not allow interference with the attorney-client relationship). Oram would have an *actual* conflict under the Sixth Amendment were he to set aside Espindola's best interest and accede to Defendant's desire to use Espindola for Defendant's defense.

Oram represented Espindola's best interest by securing her an extremely beneficial negotiation with the State. The State allowed her to plead guilty to Voluntary Manslaughter With Use of a Deadly Weapon (Category B Felony – NRS 200.040, 200.050, 200.080), and agreed to make no recommendation at sentencing in exchange for her testimony against Defendant and Little Lou. See Guilty Plea Agreement, Case No. 05C212667-3, filed February 4, 2008, at 1. Prior to this agreement, Espindola was facing the potential of a life sentence as

she was charged with Murder with Use of a Deadly Weapon. Information, Case No. 05C212667-3, filed June 20, 2005, at 2-3. Instead of a life sentence, Espindola was sentenced to 24 to 72 months in the Nevada Department of Corrections, plus an equal and consecutive term of 24 to 72 months for use of a deadly weapon. Judgment of Conviction, Case No. 05C212667-3, filed February 17, 2011. With the 1,379 days credit for time served granted to her, she was very close to parole eligibility even with the consecutive sentences. Id. She received an enormous benefit from the negotiation with the State and received superb representation from Oram. Accordingly, Defendant cannot show a causal connection between the alleged failure to fund Espindola's defense and the deficiency and prejudice prongs as required by Strickland – Espindola and Oram acted in Espindola's best interest, rather than Defendant's, in securing the negotiation, and the negotiation was not fueled by vindictiveness or resentment toward Defendant. This claim is denied.

In addition, Defendant provides nothing but a naked assertion in relation to the funding of Little Lou's defense. Defendant fails to show that the defense was underfunded, and fails to show how any failure to fund his son's defense prejudiced him, especially considering that father and son proceeded to trial together. Pursuant to Hargrove, this claim is denied. Hargrove, 100 Nev. at 502-03, 686 P.2d at 225.

iii. Espindola's Alleged Participation in the Joint Defense Agreement and Her Subsequent Decision to Turn State's Evidence Did Not Create an Irreconcilable Conflict of Interest

Defendant also claims that the Joint Defense Agreement and Espindola's ultimate decision to testify against Defendant and Little Lou created an irreconcilable conflict of interest. Supplement at 32-33. This claim has no merit and is accordingly denied.

First, Defendant provides only mere speculation in his claim that "Espindola's counsel undoubtedly participated in joint defense meetings, during which Mr. Gentile could have gleaned information which prevented him from effectively cross-examining Espindola when she testifies as a State's witness" and "[i]t is possible that Mr. Gentile had learned information during the joint defense meetings which would have provided fertile ground for impeachment." Supplement at 34. While Defendant points to specific meetings between he,

Oram, Espindola, and Gentile, he does not establish that the subject matter of these meetings constituted fodder for cross-examination. In fact, the substance of these meetings appear to be the funding requests outlined above and instruction for Espindola not to speak with DeAngelo Carrol, which would not be important for cross-examination.

Second, Defendant waived any conflict of interest that could be asserted in the event a co-defendant testified. Even after the Ninth Circuit decided United States v. Henke, 222 F.3d 633, 637 (9th Cir. 2000), courts bound by its precedent have found that conflicts of interest arising from an agreement may be waived. In United States v. Stepney, 246 F. Supp. 2d 1069, 1085 (N.D. Cal. 2003), the United States District Court for the Northern District of California found appropriate the following waiver provision, taken from the American Law Institute-American Bar Association model joint defense agreement:

> Nothing contained herein shall be deemed to create an attorney-client relationship between any attorney and anyone other than the client of that attorney and the fact that any attorney has entered this Agreement shall not be used as a basis for seeking to disqualify any counsel from representing any other party in this or any other proceeding; and no attorney who has entered into this Agreement shall be disqualified from examining or cross-examining any client who testifies at any proceeding, whether under a grant of immunity or otherwise, because of such attorney's participation in this Agreement; and the signatories and their clients further agree that a signatory attorney examining or cross-examining any client who testifies at any proceeding, whether under a grant of immunity or otherwise, may use any Defense Material or other information contributed by such client during the joint defense; and it is herein represented that each undersigned counsel to this Agreement has specifically advised his or her respective client of this clause and that such client has agreed to its provisions.

The court specifically noted the advantages of this sort of provision:

> Under this regime, all defendants have waived any duty of confidentiality for purposes of cross-examining testifying defendants, and generally an attorney can cross-examine using any and all materials, free from any conflicts of interest. This form of waiver also places the loss of the benefits of the joint defense agreement only on the defendant who makes the choice to testify. Defendants who testify for the government under a grant of immunity lose nothing by this waiver. Those that testify on their own behalf have already made the decision to waive their Fifth Amendment right against self-incrimination and to admit evidence

> through their cross-examination that would otherwise be inadmissible.
>
> The conditional waiver of confidentiality also provides notice to defendants that their confidences may be used in cross-examination, so that each defendant can choose with suitable caution what to reveal to the joint defense group. Although a limitation on confidentiality between a defendant and his own attorney would pose a severe threat to the true attorney-client relationship, making each defendant somewhat more guarded about the disclosures he makes to the joint defense effort does not significantly intrude on the function of joint defense agreements.

Id. at 1085-86; see also United States v. Almeida, 341 F.3d 1318, 1326 (11th Cir. 2003) ("We hold that when each party to a joint defense agreement is represented by his own attorney, and when communications by one co-defendant are made to the attorneys of other co-defendants, such communications do not get the benefit of the attorney-client privilege in the event that the co-defendant decides to testify on behalf of the government in exchange for a reduced sentence."); United States v. Reeves, 2011 U.S. Dist. LEXIS 139127, *42 (D.N.J. Dec. 2, 2011) (accepting a waiver of conflict of interests in a joint defense agreement).[15]

Here, while not a verbatim form of the ALI-ABA waiver, the Joint Defense Waiver provided for a waiver to the same effect. Defendant and his co-defendants agreed in the Joint Defense Agreement that, in the event that one of them became a witness for the State, that would *not* create a conflict of interest so as to require disqualification. Sealed App'x at 35. The Joint Defense Agreement also acknowledged that each client was informed that if a member defected, his or her counsel could be in possession of information previously shared, including confidences. Id. Also, the Agreement specified that nothing in it was intended to create an attorney-client relationship and information obtained pursuant to the Agreement could not be used to disqualify a member of the joint defense group. Id. Defendant then knowingly and intelligently waived *any* conflict of interest that might otherwise be available based upon the sharing of information pursuant to the Agreement. He was advised of the risks but determined

[15] Citation to Reeves is permissible pursuant to Rule 32.1(a) of the Federal Rules of Appellate Procedure, which prohibits a court from restricting citation to "federal judicial opinions, orders, judgments, or other written dispositions that have been ... issued on or after January 1, 2007." Accord Gibbs v. United States, 865 F. Supp. 2d 1127, 1133 n.3 (M.D. Fla. 2012), aff'd, 517 Fed. App'x. 664 (2013) (although an unpublished opinion is not binding, it is persuasive authority).

that the benefits of the Agreement outweighed the risks. Id. Thus, this agreement constituted a knowing and voluntary waiver of any claim of a conflict of interest based on Espindola's previous membership within the joint defense group. Defendant cannot now claim that there was an irreconcilable conflict of interest, because his informed choice to enter the Joint Defense Agreement extinguished any claim of such.

While Henke is merely persuasive, see Blanton v. North Las Vegas Mun. Ct., 103 Nev. 623, 633, 748 P.2d 494, 500 (1987) (decisions of federal courts not binding), and Nevada courts have not determined whether a Joint Defense Agreement can create an attorney-client relationship between a lawyer and another member of the joint defense agreement, the case is nonetheless distinguishable. Notably, a limited attorney-client relationship was *implied* from the joint defense agreement in Henke. Here, however, the plain language of the joint defense agreement provided that *no such relationship was created* from the joint defense group. "[A]bsent some countervailing reason, contracts will be construed from the written language and enforced as written." Ellison v. California State Auto. Ass'n, 106 Nev. 601, 603, 797 P.2d 975, 977 (1990). There is no reason the law should imply an attorney-client relationship when Defendant has explicitly agreed that no such relationship existed.

Further, in Henke, the parties asserted confidentiality and threatened legal action if confidences were not protected. Henke, 222 F.3d at 638. In contrast, here the Joint Defense Agreement waived all conflicts of interest and acknowledged that information obtained during joint defense meetings could be in the hands of a defecting member should he or she choose to testify.

Finally, the court in Henke relied on the fact that the confidential information *had* in fact been exchanged, and distinguished cases where joint defense meetings would not create a conflict of interest:

> There may be cases in which defense counsel's possession of information about a former co-defendant/government witness learned through joint defense meetings will not impair defense counsel's ability to represent the defendant or breach the duty of confidentiality to the former co-defendant. Here, however, counsel told the district court that this was not a situation where they could

> avoid reliance on the privileged information and still fully uphold their ethical duty to represent their clients.

Henke, 222 F.3d at 638. Here, as stated above, Defendant has not shown that his counsel obtained confidential information from the joint defense meetings. Thus, he cannot establish a conflict of interest, even under Henke, that would have disqualified Gentile from representing him.

Finally, Defendant again fails to satisfy the Sixth Amendment test for determining an actual, rather than a potential, conflict of interest, as he fails to show that counsel's performance was hindered. Clark, 108 Nev. at 326, 831 P.2d at 1376. Instead, Mr. Gentile vigorously cross-examined Espindola. He questioned Espindola's motives to testify, including the possibility of the death penalty, her mother's illness, and Defendant's infidelity. Recorder's Transcript of Proceedings: Jury Trial – Day 10, February 9, 2009, at 102-20, 146-47. Further, he specifically asked her about joint defense meetings and meetings that lead to the joint defense. He questioned Espindola about a meeting where Gentile and Oram were present and where Espindola listened to the Carroll recordings. Id. at 81. He questioned Espindola about the meeting with his partner, Jerry DePalma, Esq., and questioned her veracity when she claimed that she said nothing of substance to DePalma that day. Id. at 85-87. He also cross-examined her about another meeting between him and her, along with Defendant and Oram, directly citing the Joint Defense Agreement. Id. at 135-36. Gentile was in no way hindered in his cross-examination by the Joint Defense Agreement, and Defendant has failed to meet his burden of showing an actual conflict of interest. Accordingly, this claim is denied.

B. Counsel Made a Reasonable Strategic Decision in Conceding the State's Motion to Consolidate Defendant's and Little Lou's Cases

Defendant next complains that his counsel rendered ineffective assistance because he conceded the State's Motion to Consolidate and withdrew his Opposition. Supplement at 35.

Notably, the Nevada Supreme Court recently rejected Little Lou's claim regarding his counsel's conceding the consolidation motion in his appeal from the denial of his habeas petition. See Hidalgo, III (Luis) v. State, No. 67640 (Order of Affirmance, filed May 11, 2016, at 3-4) (attached as State's Exhibit B). While Little Lou's claim was raised on different

grounds, concerning the exclusion of evidence he claims would have been admitted were the cases not tried together, this recent denial is persuasive. Id.

However, Defendant acknowledges that this decision was made in exchange for the State's withdrawal of its Notice of Intent to Seek the Death Penalty. Id.; Recorder's Transcript of Hearing Re: Motions, January 16, 2009, at 1. This bargain was clearly a reasonable strategy decision that must be respected by this Court. After lengthy efforts to attempt to remove execution as a possible punishment, including the writ proceedings before the Nevada Supreme Court, Gentile's conceding the Motion to Consolidate won the war by taking death off the table and sparing Defendant the ultimate punishment. While Defendant now states that "[t]he limited impact of the removal of the death penalty is evident in the jury's conviction of both Hidalgos for Second Degree Murder, rather than First Degree Murder," he speaks with the benefit of hindsight – at the time, the threat of the death penalty was real, and efforts to strike all statutory aggravators had fallen short. Notably, the Strickland standard does not ask counsel to act with clairvoyance – it asks counsel to act reasonable at the time the decision in question is being made. At the time the Motion to Consolidate was before this Court, the death penalty remained a possibility, and counsel's decision was well-reasoned.

In addition, the decision was a sound one, considering that the Motion to Consolidate would likely succeed.[16] In order to promote efficiency and equitable outcomes, Nevada law favors trying multiple defendants together. Jones v. State, 111 Nev. 848, 853, 899 P.2d 544, 547 (1995). As a general rule, defendants who are indicted together shall be tried together, absent a compelling reason to the contrary. Rowland v. State, 118 Nev. 31, 44, 39 P.3d 114, 122 (2002). "A district court should grant a severance only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." Chartier v. State, 124 Nev. 760, 765, 191 P.3d 1182, 1185 (2008) (quoting Marshall v. State, 118 Nev. 642, 646, 56 P.3d 376, 378

[16] Defendant appears to complain of efforts to move this case to the same department as Little Lou's case. Supplement at 35. This decision was reasonable in light of Defendant's initial desire to have the same attorney as Little Lou. In addition, Defendant cannot show any prejudice, as the State could have sought consolidation even absent the case being sent to the same department.

(2002)); see also NRS 174.165.

Generally speaking, severance is proper only in two instances. The first is where the codefendants' theories of defense are so antagonistic that they are "'mutually exclusive" such that "'the core of the codefendant's defense is so irreconcilable with the core of the defendant's own defense that the acceptance of the codefendant's theory by the jury precludes acquittal of the defendant." Chartier, 124 Nev. at 765, 191 P.3d at 1185 (quoting Rowland, 118 Nev. at 45, 39 P.3d at 122-23) (alteration omitted). The second instance is "where a failure to sever hinders a defendant's ability to prove his theory of the case." Id. at 767, 191 P.3d at 1187.

Even when one of the above situations are presented, a defendant must also show that there is "a serious risk that a joint trial would compromise a specific trial right . . . or prevent the jury from making a reliable judgment about guilt or innocence." Marshall, 118 Nev. at 647, 56 P.3d at 379 (quoting Zafiro v. United States, 506 U.S. 534, 539, 113 S. Ct. 933, 938 (1993)). To show prejudice from an improper joinder "requires more than simply showing that severance made acquittal more likely; misjoinder requires reversal only if it has a substantial and injurious effect on the verdict." Chartier, 124 Nev. at 764-65, 191 P.3d at 1185 (quoting Marshall, 118 Nev. at 647, 56 P.3d at 379). Further, "some level of prejudice exists in a joint trial, error in refusing to sever joint trials is subject to harmless-error review." Id.

Defendant claims that he suffered spill-over prejudice due to his being tried along with Little Lou. Supplement at 36. However, there was no such effect. While he claims that "more" evidence implicated Little Lou than him, Carroll's conversations with Espindola and Espindola's testimony implicate Defendant and would have been entirely admissible at a trial where he was the sole defendant. Espindola's testimony served as the connection between Little Lou's actions and Defendant's orders, as she established that Defendant had ordered Carroll to switch to "Plan B." Recorder's Transcript of Proceedings: Jury Trial – Day 9, February 6, 2009, at 70. While Defendant tries to undercut Espindola's testimony as "circumstantial at best," this testimony was damning, specific, and showed that Defendant was part of the conspiracy to cause harm to Hadland. There was no spill-over prejudice that would

warrant severance, and Defendant was proven equally culpable within the conspiracy so as to make any lack of severance benign.

In addition, while Defendant claims that his defense was antagonistic to his son's, they were not. Supplement at 38. Both defendant's closing arguments focused on claiming that neither joined the conspiracy or aided and abetted Carroll in killing Hadland. Recorder's Transcript of Proceedings: Jury Trial – Day 13, February 12, 2009, at 145-79, 180-24. At no point in the argument did Little Lou's counsel claim that Defendant had joined the conspiracy and Little Lou had not.

Defendant again focuses on the evidence implicating Little Lou, but this evidence equally implicated Defendant, along with Espindola's testimony, and would have been admissible were Defendant tried alone. Also, Defendant's complaints about the father-son relationship resulting in guilt by association are mere speculation and would have been insufficient to show antagonistic defenses or spill-over warranting severance. Finally, Defendant's claim that Little Lou's defense team "would essentially be tasked with defending [Defendant] at the expense of their client's child," clearly cannot establish prejudice to *Defendant*, considering that he would be the beneficiary of such divided attention. Supplement at 38.

Therefore, it is clear that severance would have been unwarranted and counsel's efforts to prevent it would have been futile. Ennis, 122 Nev. at 706, 137 P.3d at 1103. Instead of losing the Motion to Consolidate outright, counsel instead secured Defendant a windfall by conceding the Motion and removing death as a sentencing option. These tactics were entirely reasonable in light of the threat of execution, and should be respected by this Court. This claim is accordingly denied.

C. Defendant Received Effective Assistance of Appellate Counsel

Defendant also alleges counsel was ineffective while the case was in appellate posture. Supplement at 39-41. However, appellate counsel is not required to raise every issue that Defendant felt was pertinent to the case. The United States Supreme Court has held that there is a constitutional right to effective assistance of counsel in a direct appeal from a judgment of

conviction. Evitts v. Lucey, 469 U.S. 387, 396-97, 105 S. Ct. 830, 835-37 (1985); see also Burke v. State, 110 Nev. 1366, 1368, 887 P.2d 267, 268 (1994). The federal courts have held that in order to claim ineffective assistance of appellate counsel, the defendant must satisfy the two-prong test of deficient performance and prejudice set forth by Strickland. Williams v. Collins, 16 F.3d 626, 635 (5th Cir. 1994); Hollenback v. United States, 987 F.2d 1272, 1275 (7th Cir. 1993); Heath v. Jones, 941 F.2d 1126, 1130 (11th Cir. 1991).

There is a strong presumption that counsel's performance was reasonable and fell within "the wide range of reasonable professional assistance." See United States v. Aguirre, 912 F.2d 555, 560 (2nd Cir. 1990). All appeals must be "pursued in a manner meeting high standards of diligence, professionalism and competence." Burke, 110 Nev. at 1368, 887 P.2d at 268. Finally, in order to prove that appellate counsel's alleged error was prejudicial, a defendant must show that the omitted issue would have had a reasonable probability of success on appeal. Duhamel v. Collins, 955 F.2d 962, 967 (5th Cir. 1992); Heath, 941 F.2d at 1132; Lara v. State, 120 Nev. 177, 184, 87 P.3d 528, 532 (2004); Kirksey, 112 Nev. at 498, 923 P.2d at 1114.

The defendant has the ultimate authority to make fundamental decisions regarding his case. Jones v. Barnes, 463 U.S. 745, 751, 103 S. Ct. 3308, 3312 (1983). However, the defendant does not have a constitutional right to "compel appointed counsel to press nonfrivolous points requested by the client, if counsel, as a matter of professional judgment, decides not to present those points." Id. In reaching this conclusion the United States Supreme Court has recognized the "importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." Id. at 751-752, 103 S. Ct. at 3313. In particular, a "brief that raises every colorable issue runs the risk of burying good arguments . . . in a verbal mound made up of strong and weak contentions." Id. at 753, 103 S. Ct. at 3313. The Court also held that, "for judges to second-guess reasonable professional judgments and impose on appointed counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy." Id. at 754, 103 S. Ct. at 3314. The Nevada Supreme Court has similarly concluded that

appellate counsel may well be more effective by not raising every conceivable issue on appeal. Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

1. Counsel Was Not Ineffective For Any Failure to Raise the Severance Issue on Appeal

Defendant complains that, after counsel conceded the Motion to Consolidate in order to take death off the table, counsel did not raise the issue on appeal. Supplement at 39. As discussed above, the decision to concede the Motion to Consolidate was a reasonable strategy in light of the State's agreement to withdraw its Notice of Intent to Seek the Death Penalty and the lack of merit to any opposition to the Motion to Consolidate. Additionally, there was no ineffective assistance of appellate counsel because, in light of counsel's agreement to withdraw opposition to the Motion to Consolidate, the doctrine of invited error precluded raising this issue on appeal. LaChance v. State, 130 Nev. ___, ___, 321 P.3d 919, 928 (2014); Pearson v. Pearson, 110 Nev. 293, 297, 871 P.2d 343, 345 (1994). Further, this issue would have been considered waived on appeal since it was not litigated in the trial court. Dermody v. City of Reno, 113 Nev. 207, 210-11, 931 P.2d 1354, 1357 (1997); Guy v. State, 108 Nev. 770, 780 839 P.2d 578, 584 (1992), cert. denied, 507 U.S. 1009, 113 S. Ct. 1656 (1993); Davis v. State, 107 Nev. 600, 606, 817 P.2d 1169, 1173 (1991). Nor will the Nevada Supreme Court consider an issue that is initially raised before the lower court but then abandoned. Buck v. Greyhound Lines, Inc., 105 Nev. 756, 766, 783 P.2d 437, 443 (1989). Considering this, counsel's failure to raise this issue on direct appeal did not constitute deficient performance nor cause Defendant prejudice. This is especially true in light of the lack of any prejudice suffered due to the consolidation, as discussed *supra* and incorporated here. Accordingly, this claim is denied.

2. Counsel Was Not Ineffective For Not Raising Claims of Error Relating to the "Hearsay" During Zone's Testimony

Defendant next contends that counsel should have raised as a claim of error the Court's overruling the objection to Zone's testimony concerning Carroll's statement to him while in presence of the police. Supplement at 40-42. The statement was, "if you don't tell the truth, we're going to jail." Recorder's Transcript of Proceedings: Jury Trial – Day 6, February 3, 2009, at 137. Defendant also notes that Detective McGrath testified to the same statement, that

Carroll told Zone, "tell them the truth, tell them the truth. I told them the truth." Recorder's Transcript of Proceedings: Jury Trial – Day 7, February 4, 2009, at 180-81.

Hearsay is defined as an out-of-court statement "offered in evidence to prove the truth of the matter asserted." NRS 51.035. Here, Defendant claims the statement was "clearly to establish the credibility of Zone's own testimony." Supplement at 41. That is not the test – the test is whether the statement is offered in evidence to prove the truth of the matter asserted. NRS 51.035. The truth of the matter of Carroll's statement, as testified to by Zone, is that if Zone did not tell the truth, Zone and Carroll would go to jail. That was not relevant to the State's case, nor was it relevant to the jury's determination of the Defendant's guilt. Instead, as revealed during cross-examination by Little Lou's counsel, the statement was shown relevant for its effect on the listener (Zone), because Zone interpreted the statement to mean Zone should fabricate a story that tended to exculpate Carroll, himself, and Taoipu. Recorder's Transcript of Proceedings: Jury Trial – Day 7, February 4, 2009, at 97-99. It was *not* introduced to show that Zone's testimony was truthful, as Defendant states, but rather to explain why Zone was hesitant to tell the truth at first. Id. at 97. Because the statement was not introduced for the truth of the matter asserted, it was non-hearsay and entirely admissible.

The second statement, as testified to by McGrath, comprises of two commands ("tell them the truth") and one declarative statement ("I told them the truth"). The commands are in the imperative form, and of necessity *assert nothing*. They do not operate to state a fact, but rather encourage the listener to do something. Thus, the statements were non-hearsay and were clearly introduced for their effect on Zone. While the final statement is in declarative form, and asserts that Carroll told the truth, it was not relevant for that purpose – again, it was relevant to the effect on the listener (Zone) and that it encouraged him to withhold the true story at first. Therefore, none of these statements constituted hearsay.

Even if they did constitute hearsay, their admission was harmless, especially in light of Espindola's testimony which established that Carroll was acting pursuant to Defendant's directions when he killed Hadland. Knipes v. State, 124 Nev. 927, 935, 192 P.3d 1178, 1183 (2008) (to warrant reversal, evidentiary error must have substantial and injurious effect or

influence on the jury's verdict). Because any error would not have warranted reversal, briefing the issue would have been futile and expended space which could be used for issues with a greater likelihood of success. Therefore, Defendant cannot show deficient performance or prejudice and this claim is denied.

D. Defendant's Pro Per Claims Must Be Denied

Within his initial Petition, Defendant made eight claims for relief. Each are insufficient to warrant relief and must be denied.

First, Defendant claims that counsel was ineffective for failing to request a verdict form that separated the two alternate theories relating to the Conspiracy charge: "Conspiracy to Commit Battery with Substantial Bodily Harm" and "Conspiracy to Commit Battery with a Deadly Weapon," rather than "Conspiracy to Commit Battery with a Deadly Weapon or With Substantial Bodily Harm." Memorandum at 5-6. The jury was fully instructed as to the status of this charge as a lesser-included offense, was instructed that it had to find Defendant guilty beyond a reasonable doubt to convict him of this crime, and this minor difference in the verdict form would not have made a difference in the trial. Instructions to the Jury: Instructions Nos. 15, 22-24, filed February 17, 2009. As such, Defendant cannot show deficient performance or prejudice in relation to this claim and it is therefore denied.

Second, Defendant claims that counsel was ineffective in conflating "context" with "adoptive admission" in relation to Carroll's statements, and that his statements were erroneously admitted. Memorandum at 6-7. While he cites the Nevada Supreme Court's acknowledgement of this conflation, it was in regard to a jury instruction given by the Court, and the discussion did not concern the admissibility of the statements. Hidalgo, Jr. (Luis) v. State, No. 54209 (Order of Affirmance, filed June 21, 2012, at 3 n.4). As the Nevada Supreme Court determined that the statements were admissible (see *infra*), this conflation did not result in the admission of Carroll's statements, and Defendant cannot show deficient performance or prejudice. Accordingly, this claim is denied.

Third, Defendant claims that he was not identified at trial, there was confusion between him and Little Lou, and his conviction must be reversed because the State failed to meet its

burden. This claim is not appropriate for post-conviction review and was appropriate for direct appeal. See NRS 34.810(1)(b)(2) (providing that a post-conviction petition must be dismissed if "the grounds for the petition could have been raised in a direct appeal"); NRS 34.724(2) (stating that a post-conviction petition is not a substitute for the remedy of a direct review); Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994) ("[C]laims of ineffective assistance of trial and appellate counsel must first be pursued in post-conviction proceeding . . . . [A]ll other claims that are appropriate for a direct appeal must be pursued on direct appeal, or they will be *considered waived in subsequent proceedings.*") (emphasis added). In any event, Espindola had a long-term sexual relationship with Defendant, clearly knew who he was, and implicated him in the plot to kill Hadland. This claim is denied.

Fourth, Defendant complains of his counsel's concession of the severance issue. This claim is disposed of *supra.*

Fifth, Defendant complains about Espindola's testimony and the use of conversations between him and her against him. These claims are considered waived in the instant proceedings for failure to raise them on direct appeal, and are generally not legal arguments but rather complaints that Espindola turned on him and her motives for testifying. This claim relates to the sole province of the jury – credibility – and must be denied. To the extent Defendant complains that counsel failed to impeach Espindola with evidence of a jailhouse romance between her and another woman, the decision on how to cross-examine a witness is one of strategy, and best left to counsel. Rhyne v. State, 118 Nev. 1, 8, 38 P.3d 163, 167 (2002) ("[T]he trial lawyer alone is entrusted with decisions regarding legal tactics such as deciding what witnesses to call."). The record reveals that Mr. Gentile vigorously cross-examined Espindola and Defendant cannot show deficient performance or prejudice. Therefore, this claim is denied.

Sixth, Defendant repeats his direct appeal complaint that his Confrontation Clause rights were violated by use of Carroll's statements during his trial. The Nevada Supreme Court rejected this claim:

//

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 Carroll's statements being introduced into evidence. 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. 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)).

In Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (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, 46 V.I. 704 (3d Cir. 2005) ("[I]f a Defendant [6] 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.

Hidalgo, Jr. (Luis) v. State, No. 54209 (Order of Affirmance, filed June 21, 2012, at 2-5). Where an issue has already been decided on the merits by the Nevada Supreme Court, the Court's ruling is law of the case, and the issue will not be revisited. Pellegrini v. State, 117 Nev. 860, 884, 34 P.3d 519, 535 (2001); see McNelton v. State, 115 Nev. 396, 990 P.2d 1263, 1276 (1999); Hall v. State, 91 Nev. 314, 315-16, 535 P.2d 797, 798-99 (1975); see also Valerio v. State, 112 Nev. 383, 386, 915 P.2d 874, 876 (1996); Hogan v. Warden, 109 Nev. 952, 860 P.2d 710 (1993). A Defendant cannot avoid the doctrine of law of the case by a more detailed and precisely focused argument. Hall, 91 Nev. at 316, 535 P.2d at 798-99; see also Pertgen v. State, 110 Nev. 557, 557-58, 875 P.2d 316, 362 (1994). Therefore, consideration of this ground is partially barred by the doctrine of law of the case and the claim is denied.

Seventh, Defendant claims that trial counsel was ineffective for failing to request a jury instruction that prohibited finding the use of a deadly weapon if the jury found him guilty of murder under a conspiracy liability theory. The Nevada Supreme Court recently rejected the same claim in Little Lou's appeal from the denial of his habeas petition. Hidalgo v. State, Docket No. 67640 at 2-3 (Order of Affirmance, May 11, 2016) ("Because the deadly weapon enhancement was not applied to the conspiracy conviction, appellant failed to demonstrate that counsel was ineffective.").

Defendant conflates the crime of conspiracy, with the commission of a crime pursuant to a theory of liability of conspiracy. Given that the instruction he asserts trial counsel should have requested would have been an inaccurate statement of law, it would have been rejected.

"It is not error for a court to refuse an instruction when the law in that instruction is adequately covered by another instruction given to the jury." Rose v. State, 123 Nev. 194, 205, 163 P.3d 408, 415 (2007) (quoting Doleman v. State, 107 Nev. 409, 416, 812 P.2d 1287, 1291 (1991)). Further, district courts are not required to give misleading, inaccurate, or duplicitous instructions, and defendants are not entitled to dictate the specific wording of the

instructions. Crawford v. State, 121 Nev. 746, 754, 121 P.3d 582, 589 (2005). A jury may not be given instructions which are a misstatement of law. Id. at 757, 121 P.3d at 591; see also Barron v. State, 105 Nev. 767, 773, 783 P.2d 444, 448 (1989) (while a defendant has a right to a jury instruction on his theory of the case, the instruction "must correctly state the law").

Here, Defendant failed to demonstrate that his trial counsel erred in not offering a jury instruction, or filing a NRS 175.381(2) motion, pursuant to Moore v. State, 117 Nev. 659, 662-663, 27 P.3d 447, 450 (2001), arguing that Moore prevented an enhancement under NRS 193.165 for his conviction for Second Degree Murder. In Moore, the jury found Moore guilty of First Degree Murder with Use of a Deadly Weapon, Robbery with Use of a Firearm, and Conspiracy to Commit Robbery with Use of a Firearm. Moore, 117 Nev. at 660-61, 27 P.3d at 448. Moore was sentenced to equal and consecutive terms on each of the 3 counts pursuant to NRS 193.165, including his conviction for Conspiracy to Commit Robbery. Id. The Nevada Supreme Court concluded and ruled as follows:

> Following the plain import of the term "uses" in NRS 193.165(1), we conclude that it is improper to enhance a sentence for conspiracy using the deadly weapon enhancement. Accordingly, we reverse Moore's sentence in part and remand this case to the district court with instructions to vacate the second, consecutive term of Moore's sentence for conspiracy. We affirm Moore's conviction and sentence in all other respects.

Id. at 663, 27 P.3d at 450. The Nevada Supreme Court affirmed the deadly weapon enhancement on the Murder and Robbery convictions, and only reversed its application to the Conspiracy conviction. Id. Notably, the Nevada Supreme Court found Moore was guilty of robbery and murder under a conspiracy theory, stating, "Moore conspired with three others to rob the occupants of an apartment at gunpoint. While carrying out the armed robbery, one of the conspirators shot and killed a man who the conspirators believed was delivering drugs to the apartment." Id. at 660, 27 P.3d at 448.

Defendant's claim is premised upon a conflation of the crime of conspiracy, with liability for the commission of a crime pursuant to a conspiracy. Conspiring to commit a crime is separate and distinct from conspiracy liability for committing a crime. See Bolden v. State, 121 Nev. 908, 912–13, 915–23, 124 P.3d 194, 196–201 (2005) (affirming a conviction for

conspiracy to commit robbery and/or kidnapping, but reversing charges including robbery and kidnapping for insufficient evidence to sustain those convictions under conspiracy liability) receded from on other grounds, Cortinas v. State, 124 Nev. 1013, 1026–27, 195 P.3d 315, 324 (2008); Batt v. State, 111 Nev. 1127, 1130–31 & n.3, 901 P.2d 664, 666 & n.3 (1995) (declining to extend a conspiracy charge to encompass notice of conspiracy liability because they involve two distinct crimes). Although a defendant has committed the crime of conspiracy, and may be liable therefor, upon making the agreement, Nunnery v. Eighth Judicial Dist. Ct., 124 Nev. 447, 480, 186 P.3d 886, 888 (2008), a defendant is not liable for committing a crime, under a liability theory or otherwise, until the crime has been completed. Further, the State may proceed upon a conspiracy theory without including an additional charge of conspiracy. Walker v. State, 116 Nev. 670, 673–74, 6 P.3d 477, 479 (2000).

Thus, the instruction Defendant claims counsel was ineffective for not requesting is based upon a misinterpretation of Nevada law, because Moore only prohibits a deadly weapon enhancement on a conviction and sentence for a charge of conspiracy, not a conviction for murder on a conspiracy theory of liability. Moore, 117 Nev. at 663, 27 P.3d at 450. Also, Fiegehen v. State, 121 Nev. 293, 301-305, 113 P.3d 305, 310-312 (2005), merely held that where a jury convicts a defendant of first-degree murder, via a felony-murder theory, as a matter of law, the verdict was sufficient under NRS 200.030(3) even though it did not designate between 1st and 2nd degree murder. Fiegehen, 121 Nev. at 301-305, 113 P.3d at 310-312. To the extent Defendant asserts that the jury could not have found him guilty of murder under an aiding and abetting theory because he was convicted of second degree murder, and Counts was convicted of first degree murder, the State notes that Defendant and Counts were tried separately, and Defendant has offered no proof that the jury knew the result of Counts' trial. Additionally, ~~Court~~ Defendant presumably means Deangelo Carroll as Kenneth Counts was acquitted of Murder with use of a Deadly weapon.

Accordingly, even if counsel had proffered the now-requested instruction, the Court would have properly rejected it because the Court is not required to give jury instructions containing inaccurate or incorrect statements of law. Crawford, 121 Nev. at 754, 757, 121 P.3d at 589, 591; Barron, 105 Nev. 767, 773, 783 P.2d 444, 448. Therefore, Defendant cannot

demonstrate that his trial counsel's conduct fell below an objective standard of reasonableness and also cannot demonstrate that there was a reasonable probability that the outcome of the trial would have been different if counsel had offered any Moore instruction or filed a NRS 175.381(2) motion on the same basis. Strickland, 466 U.S. at 687–688, 694, 697, 104 S .Ct. at 2065, 2068–2069; Kirksey, 112 Nev. 980, 987, 923 P.2d 1102, 1107. Had he done so, his actions would have been futile, and counsel is not ineffective for failing to take futile actions. Ennis, 122 Nev. at 706, 137 P.3d at 1103. Accordingly, this claim is denied.

Eighth, Defendant alleges that trial and appellate counsel should have challenged Jury Instruction No. 40 on the basis that the Nevada Supreme Court should reevaluate the McDowell standard due to Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354 (2004), and Davis v. Washington, 547 U.S. 813, 126 S. Ct. 2266 (2006), and their alleged effect on United States v. Bourjaily, 483 U.S. 171, 107 S. Ct. 2775 (1987). The Nevada Supreme Court recently rejected Little Lou's claim of error on this ground. See Hidalgo v. State, Docket No. 67640 at 3 (Order of Affirmance, May 11, 2016).

Defendant appears to argue that co-conspirator statements should no longer be admissible because they are either inherently unreliable, and thus subject to Crawford's Confrontation Clause requirement of cross-examination, or inherently unreliable and thus inadmissible hearsay. However, Defendant misconstrues the holdings in Crawford and the other cases to which he refers.

McDowell ruled:

> According to NRS 51.035(3)(e), an out-of-court statement of a co-conspirator made during the course and in furtherance of the conspiracy is admissible as nonhearsay against another co-conspirator. Pursuant to this statute, it is necessary that the co-conspirator who uttered the statement be a member of the conspiracy at the time the statement was made. It does not require the co-conspirator against whom the statement is offered to have been a member at the time the statement was made.
>
> The federal position is consistent with our interpretation. In construing Federal Rule of Evidence 801(d)(2)(E), which is analogous to NRS 51.035(3)(e), the federal courts have consistently held that extra-judicial statements made by one co-conspirator during the conspiracy are admissible, without violation of the Confrontation Clause, against a co-conspirator

> who entered the conspiracy after the statements were made. See U.S. v. Gypsum, 333 U.S. 364, 68 S.Ct. 525, 92 L.Ed. 746 (1948); U.S. v. Davis, 809 F.2d 1194 (6th Cir.1987).

103 Nev. at 529–30, 746 P.2d at 150 (1987). In Bourjaily, the United States Supreme Court similarly concluded that co-conspirator statements did not invoke the protections of the Confrontation Clause. 483 U.S. at 181-84, 107 S. Ct. at 2782-83 (1987). The decision in Bourjaily was based on the Confrontation Clause test set forth in Ohio v. Roberts, 448 U.S. 56, 63, 100 S. Ct. 2531, 2537 (1980), and concluded that no independent inquiry into the reliability of co-conspirator statements was necessary prior to admission because they qualified under a deeply rooted hearsay exemption. Bourjaily, 483 U.S. at 181-84, 107 S. Ct. at 2782-83. Defendant alleges that Crawford and Davis somehow change the long-standing rule that co-conspirator statements are not subject to the Confrontation Clause requirement for cross-examination but his argument is meritless.

In Crawford, the United States Supreme Court replaced the Roberts Confrontation Clause test, which provided that a hearsay statement from a declarant was admissible when "it falls under a "firmly rooted hearsay exception" or bears "particularized guarantees of trustworthiness." 448 U.S. at 66, 100 S. Ct. 2531. The Court ruled that:

> Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law—as does Roberts, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether. Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination. We leave for another day any effort to spell out a comprehensive definition of "testimonial." Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed.

Id. at 68, 124 S. Ct. at 1374. The Court further noted that without a prior opportunity to cross-examine the framers did not intend to allow the admission of testimonial hearsay; therefore, the only exceptions/exemptions to the hearsay rule which should continue to be exempt from the Confrontation Clause were those that existed historically and did not involve testimonial hearsay "for example, business records or *statements in furtherance of a conspiracy.*" Id. at

55-56, 124 S. Ct. 1354, 1366-67 (emphasis added). Thus, Crawford specifically excluded co-conspirator statements from the reach of the Confrontation Clause. Id.

Given that any request by counsel or argument on appeal would have been futile, Defendant has not shown he received ineffective assistance. Ennis, 122 Nev. at 706, 137 P.3d at 1103. Therefore, this claim is denied.

Lastly, Defendant alleges cumulative error. While the Nevada Supreme Court has noted that some courts do apply cumulative error in addressing ineffective assistance claims, it has not specifically adopted this approach. See McConnell v. State, 125 Nev. 243, 250 n.17, 212 P.3d 307, 318 n.17 (2009). However, the Eighth Circuit Court of Appeals has concluded that "a habeas petitioner cannot build a showing of prejudice on a series of errors, none of which would by itself meet the prejudice test." Middleton v. Roper, 455 F.3d 838, 851 (8th Cir. 2006), cert. denied, 549 U.S. 1134, 127 S. Ct. 980 (2007) (quoting Hall v. Luebbers, 296 F.3d 685, 692 (8th Cir. 2002)).

Even if the Court applies cumulative error analysis to Defendant's claims of ineffective assistance, Defendant fails to demonstrate cumulative error warranting reversal. A cumulative error finding in the context of a Strickland claim is extraordinarily rare and requires an extensive aggregation of errors. See, e.g., Harris By and Through Ramseyer v. Wood, 64 F.3d 1432, 1438 (9th Cir. 1995). Because Defendant fails to demonstrate that any claim warrants relief under Strickland, there is nothing to cumulate.

Defendant fails to demonstrate cumulative error sufficient to warrant reversal. In addressing a claim of cumulative error, the relevant factors are: (1) whether the issue of guilt is close; (2) the quantity and character of the error; and (3) the gravity of the crime charged. Mulder v. State, 116 Nev. 1, 17, 992 P.2d 845, 854-5 (2000). As demonstrated by the facts *supra*, the evidence against Defendant was strong and eliminates the possibility of prejudice from any omission by counsel (should deficient performance be found by this Court). Further, even assuming that some or all of Defendant's allegations of deficiency had merit, he has failed to establish that, when aggregated, the errors deprived him of a reasonable likelihood of a better outcome at trial. Therefore, even if counsel was in any way deficient, there is no

reasonable probability that Defendant would have received a better result but for the alleged deficiencies. Further, even if Defendant had made such a showing, he has certainly not shown that the cumulative effect of these errors was so prejudicial as to undermine the Court's confidence in the outcome of his case. Therefore, Defendant's cumulative error claim is denied.

II. Defendant Is Not Entitled to an Evidentiary Hearing

Defendant requests an evidentiary hearing throughout his Petition. NRS 34.770 determines when a defendant is entitled to an evidentiary hearing:

> 1. The judge or justice, upon review of the return, answer and all supporting documents which are filed, shall determine whether an evidentiary hearing is required. A petitioner must not be discharged or committed to the custody of a person other than the respondent *unless an evidentiary hearing is held.*
> 2. If the judge or justice determines that the petitioner is not entitled to relief and an evidentiary hearing is not required, he shall dismiss the petition without a hearing.
> 3. If the judge or justice determines that an evidentiary hearing is required, he shall grant the writ and shall set a date for the hearing.

The Nevada Supreme Court has held that if a petition can be resolved without expanding the record, then no evidentiary hearing is necessary. Mann v. State, 118 Nev. 351, 356, 46 P.3d 1228, 1231 (2002); Marshall v. State, 110 Nev. 1328, 1331, 885 P.2d 603, 605 (1994). A defendant is entitled to an evidentiary hearing if his petition is supported by specific factual allegations, which, if true, would entitle him to relief unless the factual allegations are repelled by the record. Marshall, 110 Nev. at 1331, 885 P.2d at 605; Hargrove, 100 Nev. at 503, 686 P.2d at 225 (holding that "[a] defendant seeking post-conviction relief is not entitled to an evidentiary hearing on factual allegations belied or repelled by the record"). "A claim is 'belied' when it is contradicted or proven to be false by the record as it existed at the time the claim was made." Mann, 118 Nev. at 354, 46 P.3d at 1230 (2002).

Here, an evidentiary hearing is unwarranted because the petition may be resolved without expanding the record. Mann, 118 Nev. at 356, 46 P.3d at1231; Marshall, 110 Nev. at 1331, 885 P.2d at 605. As explained above, Defendant's claims are bare/belied by the record, and otherwise fail to sufficiently allege ineffective assistance of counsel. Additionally, this

Court has already held an evidentiary hearing on potential conflicts of interest and there is a sufficient record to deny the claims alleging a conflict of interest presented in the Supplement. Therefore, no evidentiary hearing is warranted in order to deny such claims. Hargrove, 100 Nev. at 503, 686 P.2d at 225. Accordingly, Defendant's request for an evidentiary hearing is denied.

III. Defendant is Not Entitled to Discovery

Rules regarding post-conviction discovery are found in NRS 34.780(2). NRS 34.780(2) reads:

> *After the writ has been granted* and a date set for the hearing, a party may invoke any method of discovery available under the Nevada Rules of Civil Procedure if, and to the extent that, the judge or justice *for good cause* shown grants leave to do so.

(emphasis added). Post-conviction discovery is not available until "after the writ has been granted." Id. Here, the Petition and Supplement are denied without an evidentiary hearing. Therefore, Defendant is not entitled to discovery.

ORDER

THEREFORE, IT IS HEREBY ORDERED that the Petition for Post-Conviction Relief shall be, and it is, hereby denied.

DATED this 8th day of September, 2016.

Valerie Adair

VALERIE ADAIR
DISTRICT JUDGE

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

BY Jonathan VanBoskerck for
JONATHAN VANBOSKERCK
Chief Deputy District Attorney
Nevada Bar #006528

CERTIFICATE OF SERVICE

I certify that on the 7th day of September, 2016, I e-mailed a copy of the foregoing State's Opposition to Petitioner Luis Hidalgo, Jr.'s Motion for Order Appointing Margaret a. McLetchie as Court-Appointed Counsel, to:

MARGARET A. MCLETCHIE, Esq.
maggie@nvlitigation.com

BY /s/ T. Driver
T. DRIVER
Secretary for the District Attorney's Office

tgd/M-1

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CLERK OF THE COURT

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

DISTRICT COURT
CLARK COUNTY, NEVADA

LUIS HIDALGO, JR., Petitioner, vs. STATE OF NEVADA, Respondent.	CASE NO.: 08C241394 DEPT. NO.: XXI **NOTICE OF APPEAL**

NOTICE IS HEREBY GIVEN that LUIS HIDALGO, JR., Petitioner in the above entitled case, hereby appeals to the Nevada Supreme Court from the denial of his Petition for Writ of Habeas Corpus on August 19, 2016 pursuant to Nevada Rule of Appellate Procedure 4(b)(1)(A).

DATED this 28 day of SEPTEMBER, 2016.

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

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OCT 03 2016
CLERK OF THE COURT

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b)(2)(B) I hereby certify that on the _____day of _____, 2016, mailed a true and correct copy of the foregoing NOTICE OF APPEAL by depositing the same in the United States mail, first-class postage pre-paid, to the following addresses:

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Certified by: _____
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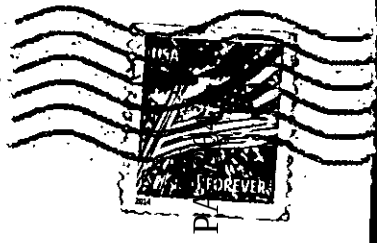

CLERK OF THE COURT
200 LEWIS AVENUE
LAS VEGAS, NEV. 89155

89101$6300

NORTHERN NEVADA CORRECTIONAL CENTER

SEP 29 2016

Register of Actions
Case No. 08C241394

The State of Nevada vs Luis Hidalgo Jr

Case Type:	Felony/Gross Misdemeanor
Date Filed:	02/13/2008
Location:	Department 21
Cross-Reference Case Number:	C241394
Defendant's Scope ID #:	1579522
Lower Court Case Number:	07GJ00101
Supreme Court No.:	54209 71458

Related Case Information

Related Cases
05C212667-1 (Consolidated)
05C212667-2 (Consolidated)
05C212667-3 (Consolidated)
05C212667-4 (Consolidated)
05C212667-5 (Consolidated)

Party Information

Defendant	Hidalgo Jr , Luis Also Known As Hidalgo , Luis A	Lead Attorneys Margaret A. McLetchie Retained 702-728-5300(W)
Plaintiff	State of Nevada	Steven B W olfson 702-671-2700(W)

Charge Information

Charges: Hidalgo Jr , Luis	Statute	Level	Date
1. CONSPIRACY TO COMMIT A CRIME	199.480	Gross Misdemeanor	01/01/1900
1. MURDER.	200.010	Gross Misdemeanor	01/01/1900
1. DEGREES OF MURDER	200.030	Gross Misdemeanor	01/01/1900
2. MURDER.	200.010	Felony	01/01/1900
2. DEGREES OF MURDER	200.030	Felony	01/01/1900
2. USE OF A DEADLY WEAPON OR TEAR GAS IN COMMISSION OF A CRIME.	193.165	Felony	01/01/1900

Events & Orders of the Court

DISPOSITIONS

01/01/1900 (Judicial Officer: User, Conversion)
1. CONSPIRACY TO COMMIT A CRIME
Not Guilty

01/01/1900 (Judicial Officer: User, Conversion)
1. MURDER.
Not Guilty

01/01/1900 (Judicial Officer: User, Conversion)
1. DEGREES OF MURDER
Not Guilty

01/01/1900 (Judicial Officer: User, Conversion)
2. MURDER.
Not Guilty

01/01/1900 (Judicial Officer: User, Conversion)
2. DEGREES OF MURDER
Not Guilty

01/01/1900 (Judicial Officer: User, Conversion)
2. USE OF A DEADLY WEAPON OR TEAR GAS IN COMMISSION OF A CRIME.
Not Guilty

06/23/2009 (Judicial Officer: User, Conversion)
1. CONSPIRACY TO COMMIT A CRIME
Guilty

PA3865

06/23/2009 (Judicial Officer: User, Conversion)
1. MURDER.
Guilty

06/23/2009 (Judicial Officer: User, Conversion)
1. DEGREES OF MURDER
Guilty

06/23/2009 (Judicial Officer: User, Conversion)
2. MURDER.
Guilty

06/23/2009 (Judicial Officer: User, Conversion)
2. DEGREES OF MURDER
Guilty

06/23/2009 (Judicial Officer: User, Conversion)
2. USE OF A DEADLY WEAPON OR TEAR GAS IN COMMISSION OF A CRIME.
Guilty

06/23/2009 (Judicial Officer: User, Conversion)
1. CONSPIRACY TO COMMIT A CRIME
Converted Disposition:
Sentence# 0001: Minimum 12 Months to Maximum 12 Months Placement: CCDC
Converted Disposition:
Sentence# 0002: CREDIT FOR TIME SERVED Minimum 184 Days to Maximum 184 Days

06/23/2009 (Judicial Officer: User, Conversion)
2. MURDER.
Converted Disposition:
Sentence# 0001: LIFE WITH POSSIBILITY OF PAROLE
Converted Disposition:
Sentence# 0002: LIFE WITH POSSIBILITY OF PAROLE Cons/Conc: Consecutive w/Charge Item: 0004 and
Sentence#: 0001

OTHER EVENTS AND HEARINGS

02/11/2008 Grand Jury Indictment (11:30 AM) ()
GRAND JURY INDICTMENT Court Clerk: Denise Trujillo Reporter/Recorder: Kristen Lunkwitz Heard By: Kathy Hardcastle
Parties Present
Minutes
Result: Matter Heard

02/13/2008 Indictment
(GRAND JURY) INDICTMENT Fee $0.00
08C2413940001.tif pages

02/13/2008 Hearing
GRAND JURY INDICTMENT
08C2413940002.tif pages

02/13/2008 Hearing
INITIAL ARRAIGNMENT
08C2413940003.tif pages

02/13/2008 Bench W arrant
NO BAIL BENCH WARRANT ISSUED
08C2413940004.tif pages

02/13/2008 Order
ORDER OF INTENT TO FORFEIT
08C2413940005.tif pages

02/13/2008 Warrant
INDICTMENT WARRANT
08C2413940006.tif pages

02/14/2008 Warrant
INDICTMENT WARRANT RETURN
08C2413940008.tif pages

02/20/2008 Initial Arraignment (1:30 PM) ()
INITIAL ARRAIGNMENT Court Clerk: Roshonda Mayfield Reporter/Recorder: Kiara Schmidt Heard By: Kevin Williams
Parties Present
Minutes
Result: Matter Heard

02/21/2008 Reporters T ranscript
REPORTER'S TRANSCRIPT OF PROCEEDINGS- GRAND JURY
08C2413940012.tif pages

02/22/2008 Hearing
STATUS CHECK: TRIAL SETTING VC 3/10/08
08C2413940009.tif pages

02/26/2008 Motion
DEFT'S MOTION FOR BAIL HEARING VC 3/10/08
08C2413940013.tif pages

02/26/2008 Motion
DEFT'S MOTION FOR BAIL HEARING VY 3/26/08
08C2413940036.tif pages

02/26/2008 Status Check (9:30 AM) ()
STATUS CHECK: TRIAL SETTING VC 3/10/08 Court Clerk: Denise Husted Reporter/Recorder: Janie Olsen Heard By: Adair, Valerie
Parties Present
Minutes
Result: Matter Continued

02/26/2008 Status Check (9:30 AM) ()
STATUS CHECK: VA 3/1/08

03/01/2008 Hearing
STATUS CHECK: VA 3/1/08
08C2413940015.tif pages

03/03/2008 Status Check (9:30 AM) ()
STATUS CHECK: TRIAL SETTING VC 3/10/08
Result: Matter Continued

03/03/2008 Motion (9:30 AM) ()
DEFT'S MOTION FOR BAIL HEARING VC 3/10/08 Heard By: Valerie Adair
Result: Matter Continued

03/07/2008 Notice of Intent to Seek Death Penalty
NOTICE OF INTENT TO SEEK DEATH PENALTY
08C2413940016.tif pages

03/10/2008 Expert W itness List
NOTICE OF EXPERT WITNESSES
08C2413940017.tif pages

03/11/2008 Status Check (9:30 AM) ()
STATUS CHECK: TRIAL SETTING VC 3/10/08 Court Clerk: Denise Husted Reporter/Recorder: Janie Olsen
Result: Vacate

03/11/2008 Motion (9:30 AM) ()
DEFT'S MOTION FOR BAIL HEARING VC 3/10/08 Heard By: Valerie Adair
Result: Vacate

03/13/2008 Notice
NOTICE OF EVIDENCE IN AGGRAVATION
08C2413940019.tif pages

03/15/2008 Motion
PLTF'S MTN TO COMPEL HANDWRITING EXAMPLARS/10
08C2413940018.tif pages

03/17/2008 Motion
DEFT'S MTN FOR COURT TO ALLOW PRESENTATION OF EVID TO THE JURY /11
08C2413940020.tif pages

03/17/2008 Motion
DEFT'S MTN TO STRIKE DEATH PENALTY AS UNCONSTITUIIONAL /12
08C2413940021.tif pages

03/17/2008 Motion
DEFT'S MTN TO PROHIBIT ARGUMENT ON DETERRENCE OR TO PERMIT EVID OF LACK /13
08C2413940022.tif pages

03/17/2008 Motion
DEFT'S MTN TO STRIKE NOTICE OF INTENT TO SEEK DEATH PENALTY /14
08C2413940023.tif pages

03/17/2008 Notice of W itnesses and/or Expert W itnesses
DEFENDANT LUIS A HIDALGO JRS NOTICE OF EXPERT WITNESSES
08C2413940027.tif pages

03/18/2008 Motion
DEFT'S MTN TO PROHIBIT THE STATE OF NV/15
08C2413940024.tif pages

03/18/2008 Motion
DEFT'S MTN TO STRIKE DEATH PENALTY/16
08C2413940025.tif pages

03/18/2008 Motion
DEFT'S MTN TO DECLARE AS UNCONSTITUTIONAL/17
08C2413940026.tif pages

03/18/2008 Motion
DEFT'S MTN TO BIFURCATE PENALTY PHASE PROCEEDINGS /18
08C2413940028.tif pages

03/18/2008 Motion
DEFT'S MTN FOR DISCLOSURE OF INTERCEPTED COMMUNICATIONS /19
08C2413940029.tif pages

03/18/2008 Motion
DEFT'S MTN TO STRIKE NTC OF INTENT TO SEEK DEATH /20
08C2413940030.tif pages

03/19/2008 Motion
DEFT'S MTN FOR PRETRIAL RELEASE ON BAIL WITH CONDITIONS OF HOME CONFINEMENT/21
08C2413940031.tif pages

03/19/2008 Motion
DEFT'S MTN FOR DISCLOSURE OF EXISTENCE OF ELECTRONIC SURVEILLANCE/22
08C2413940032.tif pages

03/19/2008 Certificate
CERTIFICATE OF SERVICE
08C2413940037.tif pages

03/20/2008 Motion
DEFT'S MTN TO DISMISS COUNT ONE OF INDICTMENT/25
08C2413940035.tif pages

03/20/2008 Motion to Compel (9:30 AM) ()
PLTF'S MTN TO COMPEL HANDWRITING EXAMPLARS/10 Court Clerk: Denise Husted Reporter/Recorder: Janie Olsen Heard By: Valerie Adair
Parties Present
Minutes
Result: Granted

03/21/2008 Supplement
DEFENDANT LUIS HIDALGO JRS SUPPLEMENT TO MOTION FOR PRETRIAL RELEASE ON BAIL WITH CONDITIONS OF HOME CONFINEMENT AND ELECTRONIC MONITORCING CONDITIONS OF HOME CONFINEMENT AND ELECTRONIC MONITORCING
08C2413940038.tif pages

03/25/2008	Motion to Dismiss (9:30 AM) () DEFT'S MTN TO DISMISS COUNT ONE OF INDICTMENT/25 Heard By: Valerie Adair Result: Matter Continued
03/26/2008	Opposition STATES OPPOSITION TO DEFTS MTN FOR PRETRIAL RELEASE ON BAIL WITH CONDITONS OF HOME CONFINEMENT AND ELECTRONIC MONITORING OF HOME CONFINEMENT AND ELECTRONIC MONITORING 08C2413940040.tif pages
03/27/2008	CANCELED Calendar Call (9:30 AM) () Vacated Result: Vacate
03/27/2008	Motion (9:30 AM) () DEFT'S MTN FOR COURT TO ALLOW PRESENTATION OF EVID TO THE JURY /11 Heard By: Valerie Adair Result: Matter Continued
03/27/2008	Motion to Strike (9:30 AM) () DEFT'S MTN TO STRIKE DEATH PENALTY AS UNCONSTITUIIONAL /12 Heard By: Valerie Adair Result: Matter Continued
03/27/2008	Motion (9:30 AM) () DEFT'S MTN TO PROHIBIT ARGUMENT ON DETERRENCE OR TO PERMIT EVID OF LACK /13 Heard By: Valerie Adair Result: Matter Continued
03/27/2008	Motion to Strike (9:30 AM) () DEFT'S MTN TO STRIKE NOTICE OF INTENT TOSEEK DEATH PENALTY /14 Heard By: Valerie Adair Result: Matter Continued
03/27/2008	Motion (9:30 AM) () DEFT'S MTN TO PROHIBIT THE STATE OF NV/15 Heard By: Valerie Adair Result: Matter Continued
03/27/2008	Motion to Strike (9:30 AM) () DEFT'S MTN TO STRIKE DEATH PENALTY/16 Heard By: Valerie Adair Result: Matter Continued
03/27/2008	Motion (9:30 AM) () DEFT'S MTN TO DECLARE AS UNCONSTITUTIONAL/17 Heard By: Valerie Adair Result: Matter Continued
03/27/2008	Motion to Bifurcate (9:30 AM) () DEFT'S MTN TO BIFURCATE PENALTY PHASE PROCEEDINGS /18 Heard By: Valerie Adair Result: Matter Continued
03/27/2008	Motion (9:30 AM) () DEFT'S MTN FOR DISCLOSURE OF INTERCEPTEDCOMMUNICATIONS /19 Heard By: Valerie Adair Result: Matter Continued
03/27/2008	Motion to Strike (9:30 AM) () DEFT'S MTN TO STRIKE NTC OF INTENT TO SEEK DEATH /20 Heard By: Valerie Adair Result: Matter Continued
03/27/2008	Motion (9:30 AM) () DEFT'S MTN FOR PRETRIAL RELEASE ON BAIL WITH CONDITIONS OF HOME CONFINEMENT/21 Court Clerk: Denise Husted Reporter/Recorder: Cheryl Carpenter Heard By: Valerie Adair Parties Present Minutes Result: Matter Heard
03/27/2008	CANCELED Motion (9:30 AM) () Vacated Result: Vacate
03/28/2008	Hearing DECISION: BAIL AMOUNT 08C2413940039.tif pages
03/31/2008	Reporters T ranscript REPORTER'S TRANSCRIPT DEFENDANTS MOTION FOR PRETRIAL RELEASE ON BAIL WITH CONDITIONS OF HOME CONFINEMENT AND ELECTRONIC MONITORING CONDITIONS OF HOME CONFINEMENT AND ELECTRONIC MONITORING 08C2413940041.tif pages
03/31/2008	CANCELED Jury T rial (10:00 AM) () Vacated Result: Vacate
04/01/2008	Motion (9:30 AM) () DEFT'S MTN TO PROHIBIT THE STATE OF NV/15 Heard By: Valerie Adair Result: Matter Continued
04/01/2008	Motion to Strike (9:30 AM) () DEFT'S MTN TO STRIKE DEATH PENALTY/16 Heard By: Valerie Adair Result: Matter Continued
04/01/2008	Motion (9:30 AM) () DEFT'S MTN TO DECLARE AS UNCONSTITUTIONAL/17 Heard By: Valerie Adair Result: Matter Continued
04/01/2008	Motion to Bifurcate (9:30 AM) () DEFT'S MTN TO BIFURCATE PENALTY PHASE PROCEEDINGS /18 Heard By: Valerie Adair Result: Matter Continued
04/01/2008	Motion (9:30 AM) () DEFT'S MTN FOR DISCLOSURE OF INTERCEPTEDCOMMUNICATIONS /19 Heard By: Valerie Adair Result: Matter Continued
04/01/2008	Motion to Strike (9:30 AM) () DEFT'S MTN TO STRIKE NTC OF INTENT TO SEEK DEATH /20 Heard By: Valerie Adair Result: Matter Continued
04/01/2008	Motion (9:30 AM) () DEFT'S MTN FOR PRETRIAL RELEASE ON BAIL WITH CONDITIONS OF HOME CONFINEMENT/21 Heard By: Valerie Adair Result: Matter Continued
04/01/2008	Motion (9:30 AM) () DEFT'S MTN FOR DISCLOSURE OF EXISTENCE OF ELECTRONIC SURVEILLANCE/22 Heard By: Valerie Adair Result: Matter Continued

PA3868

04/01/2008 Decision (9:30 AM) ()
DECISION: BAIL AMOUNT Court Clerk: Denise Husted Reporter/Recorder: Janie Olsen Heard By: Valerie Adair
Parties Present
Minutes
Result: Granted

04/03/2008 Bond
BOND - #AS1M-1155 - $650,000.00
08C2413940042.tif pages

04/03/2008 Reporters T ranscript
REPORTER'S TRANSCRIPT MOTIONS
08C2413940043.tif pages

04/07/2008 Opposition
STATES OPPOSITION TO DEFENDANTS MOTION TO STRIKE NOTICE OF INTENT TO SEEK DEATH BASED UPON UNCONSTITUTIONAL WEIGHING EQUATION DEATH BASED UPON UNCONSTITUTIONAL WEIGHING EQUATION
08C2413940045.tif pages

04/07/2008 Opposition
OPPOSITION TO DEFENDANTS MOTION TO BIFURCATE PENALTY PHASE PROCEEDINGS
08C2413940046.tif pages

04/07/2008 Opposition
OPPOSITION TO DEFENDANTS MOTION TO STRIKE NOTICE OF INTENT TO SEEK DEATH PENALTY BASED UPON UNCONSTITUTIONALITY OF LETHAL INJECTION PENALTY BASED UPON UNCONSTITUTIONALITY OF LETHAL INJECTION
08C2413940047.tif pages

04/07/2008 Opposition
OPPOSITION TO MOTION TO PROHIBIT THE STATE OF NEVADA FROM INTRODUCINGEVIDENCE AND AREGUMENT REGARDING MITIGATING CIRCUMSTANCES THAT ARE NOT APPLICABLE TO LUIS HIDALGO JR EVIDENCE AND AREGUMENT REGARDING MITIGATING CIRCUMSTANCES THAT ARE NOT APPLICABLE TO LUIS HIDALGO JR
08C2413940049.tif pages

04/07/2008 Opposition
OPPOSITION TO DEFENDANTS MTOION TO STRIKE THE DEATH PENALTY BASED UPON UNCONSTITUTIONALITY UNCONSTITUTIONALITY
08C2413940050.tif pages

04/07/2008 Opposition
STATES OPPOSITION TO DEFENDANTS MOTION TO DISMISS COUNT ONE OF THE INDICTMENT FOR DUPLICITY OR IN THE ALTERNATIVE FOR AN ELECTION INDICTMENT FOR DUPLICITY OR IN THE ALTERNATIVE FOR AN ELECTION
08C2413940051.tif pages

04/07/2008 Opposition
STATES OPPOSITION TO DEFENDANTS MOTION FOR COURT TO ALLOW PRESENTATION OFUNFAIRNESS FO A DEATH SENTENCE EVIDENCE TO THE JURY OF THE DISPROPORTIONALITY AND ARBITRARINESS AND UNFAIRNESS FO A DEATH SENTENCE EVIDENCE TO THE JURY OF THE DISPROPORTIONALITY AND ARBITRARINESS AND
08C2413940052.tif pages

04/07/2008 Response
RESPONSE TO MOTION FOR DISCLOSURE OF INTERCEPTED COMMUNICATIONS
08C2413940053.tif pages

04/07/2008 Opposition
STATES OPPOSITION TO DEFENDANTS HIDALGO AND ESPINDOLAS MOTION TO STRIKE THEDEATH PENALTY AS UNCONSTITUTIONAL BASED ON ITS ALLOWANCE OF INHERENTLY UNRELIABLE EVIDENCE DEATH PENALTY AS UNCONSTITUTIONAL BASED ON ITS ALLOWANCE OF INHERENTLY UNRELIABLE EVIDENCE
08C2413940054.tif pages

04/07/2008 Opposition
STATES OPPOSITION TO DEFENDANTS MOTION TO PROHIBIT ARGUMENT ON DETERENCE OR IN THE ALTERNATIVE TO PERMIT EVIDENCE OF LACK OF DETERRENCE IN THE ALTERNATIVE TO PERMIT EVIDENCE OF LACK OF DETERRENCE
08C2413940055.tif pages

04/07/2008 Opposition
OPPOSITION TO DEFENDANTS MOTION TO DECLARE AS UNCONSTITUTIONAL THE UNBRIDLED DISCRETION OF PROSECUTION TO SEEK THE DEATH PENALTY UNBRIDLED DISCRETION OF PROSECUTION TO SEEK THE DEATH PENALTY
08C2413940056.tif pages

04/09/2008 Motion
STATE'S MTN TO CONDUCT VIDEOTAPED TESTIMONY OF A COOPERATING WITNESS/28
08C2413940044.tif pages

04/09/2008 Opposition
OPPOSITION TO DEFENDANTS MOTION TO STRIKE NOTICE OF INTENT TO SEEK DEATH PENALTY BASED UPON UNCONSTITUTIONALITY OF LETHAL INJECTION PENALTY BASED UPON UNCONSTITUTIONALITY OF LETHAL INJECTION
08C2413940048.tif pages

04/10/2008 Motion (9:30 AM) ()
DEFT'S MTN FOR COURT TO ALLOW PRESENTATION OF EVID TO THE JURY /11 Heard By: Valerie Adair
Result: Matter Continued

04/10/2008 Motion to Strike (9:30 AM) ()
DEFT'S MTN TO STRIKE DEATH PENALTY AS UNCONSTITUIIONAL /12 Heard By: Valerie Adair
Result: Matter Continued

04/10/2008 Motion (9:30 AM) ()
DEFT'S MTN TO PROHIBIT ARGUMENT ON DETERRENCE OR TO PERMIT EVID OF LACK /13 Heard By: Valerie Adair
Result: Matter Continued

04/10/2008 Motion to Strike (9:30 AM) ()
DEFT'S MTN TO STRIKE NOTICE OF INTENT TOSEEK DEATH PENALTY /14 Heard By: Valerie Adair
Result: Matter Continued

04/10/2008 Motion (9:30 AM) ()
DEFT'S MTN TO PROHIBIT THE STATE OF NV/15 Heard By: Valerie Adair
Result: Matter Continued

04/10/2008 Motion to Strike (9:30 AM) ()
DEFT'S MTN TO STRIKE DEATH PENALTY/16 Heard By: Valerie Adair
Result: Matter Continued

04/10/2008 Motion (9:30 AM) ()
DEFT'S MTN TO DECLARE AS UNCONSTITUTIONAL/17 Heard By: Valerie Adair

PA3869

Result: Matter Continued
04/10/2008 Motion to Bifurcate (9:30 AM) ()
DEFT'S MTN TO BIFURCATE PENALTY PHASE PROCEEDINGS /18 Heard By: Valerie Adair
Result: Matter Continued
04/10/2008 Motion (9:30 AM) ()
DEFT'S MTN FOR DISCLOSURE OF INTERCEPTEDCOMMUNICATIONS /19 Heard By: Valerie Adair
Result: Matter Continued
04/10/2008 Motion to Strike (9:30 AM) ()
DEFT'S MTN TO STRIKE NTC OF INTENT TO SEEK DEATH /20 Heard By: Valerie Adair
Result: Matter Continued
04/10/2008 Motion (9:30 AM) ()
DEFT'S MTN FOR PRETRIAL RELEASE ON BAIL WITH CONDITIONS OF HOME CONFINEMENT/21 Court Clerk: Denise Husted Reporter/Recorder: Cheryl Carpenter Heard By: Valerie Adair
Result: Matter Continued
04/10/2008 Motion (9:30 AM) ()
DEFT'S MTN FOR DISCLOSURE OF EXISTENCE OF ELECTRONIC SURVEILLANCE/22 Heard By: Valerie Adair
Result: Matter Continued
04/10/2008 Motion to Dismiss (9:30 AM) ()
DEFT'S MTN TO DISMISS COUNT ONE OF INDICTMENT/25 Heard By: Valerie Adair
Result: Matter Continued
04/10/2008 Motion (9:30 AM) ()
STATE'S MTN TO CONDUCT VIDEOTAPED TESTIMONY OF A COOPERATING WITNESS/28 Heard By: Valerie Adair
Result: Matter Continued
04/15/2008 Motion (9:30 AM) ()
DEFT'S MTN FOR COURT TO ALLOW PRESENTATION OF EVID TO THE JURY /11 Heard By: Valerie Adair
Result: Matter Continued
04/15/2008 Motion to Strike (9:30 AM) ()
DEFT'S MTN TO STRIKE DEATH PENALTY AS UNCONSTITUIIONAL /12 Heard By: Valerie Adair
Result: Matter Continued
04/15/2008 Motion (9:30 AM) ()
DEFT'S MTN TO PROHIBIT ARGUMENT ON DETERRENCE OR TO PERMIT EVID OF LACK /13 Heard By: Valerie Adair
Result: Matter Continued
04/15/2008 Motion to Strike (9:30 AM) ()
DEFT'S MTN TO STRIKE NOTICE OF INTENT TOSEEK DEATH PENALTY /14 Heard By: Valerie Adair
Result: Matter Continued
04/15/2008 Motion (9:30 AM) ()
DEFT'S MTN TO PROHIBIT THE STATE OF NV/15 Heard By: Valerie Adair
Result: Matter Continued
04/15/2008 Motion to Strike (9:30 AM) ()
DEFT'S MTN TO STRIKE DEATH PENALTY/16 Heard By: Valerie Adair
Result: Matter Continued
04/15/2008 Motion (9:30 AM) ()
DEFT'S MTN TO DECLARE AS UNCONSTITUTIONAL/17 Heard By: Valerie Adair
Result: Matter Continued
04/15/2008 Motion to Bifurcate (9:30 AM) ()
DEFT'S MTN TO BIFURCATE PENALTY PHASE PROCEEDINGS /18 Heard By: Valerie Adair
Result: Matter Continued
04/15/2008 Motion (9:30 AM) ()
DEFT'S MTN FOR DISCLOSURE OF INTERCEPTEDCOMMUNICATIONS /19 Heard By: Valerie Adair
Result: Matter Continued
04/15/2008 Motion to Strike (9:30 AM) ()
DEFT'S MTN TO STRIKE NTC OF INTENT TO SEEK DEATH /20 Heard By: Valerie Adair
Result: Matter Continued
04/15/2008 Motion (9:30 AM) ()
DEFT'S MTN FOR DISCLOSURE OF EXISTENCE OF ELECTRONIC SURVEILLANCE/22 Heard By: Valerie Adair
Result: Matter Continued
04/15/2008 Motion to Dismiss (9:30 AM) ()
DEFT'S MTN TO DISMISS COUNT ONE OF INDICTMENT/25 Heard By: Valerie Adair
Result: Matter Continued
04/15/2008 Motion (9:30 AM) ()
STATE'S MTN TO CONDUCT VIDEOTAPED TESTIMONY OF A COOPERATING WITNESS/28 Heard By: Valerie Adair
Result: Matter Continued
04/16/2008 Opposition
OPPOSITION TO STATES MTN TO CONDUCT VIDEOTAPED TESTIMONY OF COOPERATING
08C2413940201.tif pages
04/16/2008 Filed Under Seal
FILED UNDER SEAL EXHIBIT 2 TO OPPOSITION TO STATE'S MTN TO CONDUCT VIDEOTAPED TESTIMONY - SEALED TESTIMONY - SEALED
08C2413940202.tif pages
04/16/2008 Motion to Strike (9:30 AM) ()
DEFT'S MTN TO STRIKE DEATH PENALTY/16 Heard By: Valerie Adair
Result: Matter Continued
04/17/2008 Hearing
TRIAL SETTING
08C2413940057.tif pages
04/17/2008 Motion
ALL PENDING MOTIONS 4/17/08
08C2413940058.tif pages
04/17/2008 Hearing
STATUS CHECK: AFFIDAVIT
08C2413940059.tif pages
04/17/2008 Hearing
STATUS CHECK: TRIAL SETTING
08C2413940060.tif pages

PA3870

04/17/2008 Motion (9:30 AM) ()
DEFT'S MTN FOR COURT TO ALLOW PRESENTATION OF EVID TO THE JURY /11 Heard By: Valerie Adair
Result: Motion Not Addressed

04/17/2008 Motion to Strike (9:30 AM) ()
DEFT'S MTN TO STRIKE DEATH PENALTY AS UNCONSTITUIIONAL /12 Heard By: Valerie Adair
Result: Denied

04/17/2008 Motion (9:30 AM) ()
DEFT'S MTN TO PROHIBIT ARGUMENT ON DETERRENCE OR TO PERMIT EVID OF LACK /13 Heard By: Valerie Adair
Result: Denied

04/17/2008 Motion to Strike (9:30 AM) ()
DEFT'S MTN TO STRIKE NOTICE OF INTENT TOSEEK DEATH PENALTY /14 Heard By: Valerie Adair
Result: Denied

04/17/2008 Motion (9:30 AM) ()
DEFT'S MTN TO PROHIBIT THE STATE OF NV/15 Heard By: Valerie Adair
Result: Matter Continued

04/17/2008 Motion to Strike (9:30 AM) ()
DEFT'S MTN TO STRIKE DEATH PENALTY/16 Heard By: Valerie Adair
Result: Denied

04/17/2008 Motion (9:30 AM) ()
DEFT'S MTN TO DECLARE AS UNCONSTITUTIONAL/17 Heard By: Valerie Adair
Result: Denied

04/17/2008 Motion to Bifurcate (9:30 AM) ()
DEFT'S MTN TO BIFURCATE PENALTY PHASE PROCEEDINGS /18 Heard By: Valerie Adair
Result: Denied

04/17/2008 Motion (9:30 AM) ()
DEFT'S MTN FOR DISCLOSURE OF INTERCEPTEDCOMMUNICATIONS /19 Heard By: Valerie Adair
Result: Matter Continued

04/17/2008 Motion to Strike (9:30 AM) ()
DEFT'S MTN TO STRIKE NTC OF INTENT TO SEEK DEATH /20 Heard By: Valerie Adair
Result: Denied

04/17/2008 Motion (9:30 AM) ()
DEFT'S MTN FOR DISCLOSURE OF EXISTENCE OF ELECTRONIC SURVEILLANCE/22 Heard By: Valerie Adair
Result: Matter Continued

04/17/2008 Motion to Dismiss (9:30 AM) ()
DEFT'S MTN TO DISMISS COUNT ONE OF INDICTMENT/25 Heard By: Valerie Adair
Result: Matter Continued

04/17/2008 Motion (9:30 AM) ()
STATE'S MTN TO CONDUCT VIDEOTAPED TESTIMONY OF A COOPERATING WITNESS/28 Heard By: Valerie Adair
Result: Matter Continued

04/17/2008 All Pending Motions (9:30 AM) ()
ALL PENDING MOTIONS 4/17/08 Court Clerk: Denise Husted Reporter/Recorder: Debra Winn Heard By: Valerie Adair
Parties Present
Minutes
Result: Matter Heard

04/24/2008 CANCELED Calendar Call (9:30 AM) ()
Vacated
Result: Vacate

04/28/2008 CANCELED Jury T rial (10:00 AM) ()
Vacated
Result: Vacate

05/01/2008 Indictment
AMENDED (GRAND JURY) INDICTMENT
08C2413940065.tif pages

05/01/2008 Opposition
OPPOSITION TO STATES MOTION TO CONDUCT VIDEOTAPED TESTIMONY OF A CO OPERATING WITNESS OPERATING WITNESS
08C2413940066.tif pages

05/01/2008 Affidavit
AFFIDAVIT OF CHRISTOPHER J LALLI
08C2413940067.tif pages

05/01/2008 Motion (9:30 AM) ()
DEFT'S MTN FOR DISCLOSURE OF INTERCEPTEDCOMMUNICATIONS /19 Heard By: Valerie Adair
Result: Matter Continued

05/01/2008 Motion (9:30 AM) ()
DEFT'S MTN FOR DISCLOSURE OF EXISTENCE OF ELECTRONIC SURVEILLANCE/22 Heard By: Valerie Adair
Result: Matter Continued

05/01/2008 Motion (9:30 AM) ()
STATE'S MTN TO CONDUCT VIDEOTAPED TESTIMONY OF A COOPERATING WITNESS/28 Heard By: Valerie Adair
Result: Denied

05/01/2008 CANCELED Conversion Hearing T ype (9:30 AM) ()
Vacated
Result: Vacate

05/01/2008 Status Check (9:30 AM) ()
STATUS CHECK: AFFIDAVIT Heard By: Valerie Adair
Result: Matter Continued

05/01/2008 Status Check (9:30 AM) ()
STATUS CHECK: TRIAL SETTING Heard By: Valerie Adair
Result: Granted

05/01/2008 All Pending Motions (9:30 AM) ()
ALL PENDING MOTIONS 5/1/08 Court Clerk: Denise Husted Reporter/Recorder: Janie Olsen Heard By: Valerie Adair
Parties Present
Minutes
Result: Matter Heard

PA3871

05/02/2008 Motion
ALL PENDING MOTIONS 5/1/08
08C2413940064.tif pages
05/05/2008 Reporters T ranscript
REPORTER'S TRANSCRIPT OF MOTIONS
08C2413940068.tif pages
05/22/2008 Reporters T ranscript
REPORTER'S TRANSCRIPT RE DEFTS MOTION FOR DISCLOSURE OF THE EXISTENCE OFELECTRONICE SURVEILLANCE INTERCEPTED COMMUNICATIONS STATES MOTION TO CONDUCT VIDEOTAPED TESTIMONY OF A COOPERATING WITNESS STATUS CHECK RE AFFIDAVIT TRIAL SETTING ELECTRONICE SURVEILLANCE INTERCEPTED COMMUNICATIONS STATES MOTION TO CONDUCT VIDEOTAPED TESTIMONY OF A COOPERATING WITNESS STATUS CHECK RE AFFIDAVIT TRIAL SETTING
08C2413940069.tif pages
06/03/2008 Motion (9:30 AM) ()
DEFT'S MTN FOR DISCLOSURE OF INTERCEPTEDCOMMUNICATIONS /19 Heard By: Valerie Adair
Result: Matter Continued
06/03/2008 Motion (9:30 AM) ()
DEFT'S MTN FOR DISCLOSURE OF EXISTENCE OF ELECTRONIC SURVEILLANCE/22 Heard By: Valerie Adair
Result: Matter Continued
06/03/2008 Status Check (9:30 AM) ()
STATUS CHECK: AFFIDAVIT Heard By: Valerie Adair
Result: Matter Continued
06/03/2008 All Pending Motions (9:30 AM) ()
ALL PENDING MOTIONS 6-3-08 Relief Clerk: REBECCA FOSTER Reporter/Recorder: Janie Olsen Heard By: Valerie Adair
Minutes
Result: Matter Heard
06/05/2008 Motion
ALL PENDING MOTIONS 6-3-08
08C2413940070.tif pages
06/17/2008 Motion (9:30 AM) ()
DEFT'S MTN FOR DISCLOSURE OF INTERCEPTEDCOMMUNICATIONS /19 Heard By: Valerie Adair
Result: Matter Heard
06/17/2008 Motion (9:30 AM) ()
DEFT'S MTN FOR DISCLOSURE OF EXISTENCE OF ELECTRONIC SURVEILLANCE/22 Heard By: Valerie Adair
Result: Matter Heard
06/17/2008 Status Check (9:30 AM) ()
STATUS CHECK: AFFIDAVIT Heard By: Valerie Adair
Result: Matter Heard
06/17/2008 All Pending Motions (9:30 AM) ()
ALL PENDING MOTIONS 6/17/08 Court Clerk: Denise Husted Reporter/Recorder: Janie Olsen Heard By: Valerie Adair
Parties Present
Minutes
Result: Matter Heard
06/18/2008 Motion
ALL PENDING MOTIONS 6/17/08
08C2413940071.tif pages
06/18/2008 Notice of Intent to Seek Death Penalty
AMDNED NOTICE OF INTENT TO SEEK DEATH PENALTY
08C2413940072.tif pages
06/25/2008 Motion
DEFT'S MTN TO CONSOLIDATE WITH C241394/39
08C2413940073.tif pages
07/03/2008 Reporters T ranscript
REPORTER'S TRANSCRIPT STATUS CHECK TRIAL SETTING AFFIDAVIT DEFTS MTN FORDISCLOSURE OF EXISTENCE OF ELECTRONIC SURVEILLANCE DEFTS MTN FOR DISCLOSURE OF INTERCEPTED COMMUNICATIONS DISCLOSURE OF EXISTENCE OF ELECTRONIC SURVEILLANCE DEFTS MTN FOR DISCLOSURE OF INTERCEPTED COMMUNICATIONS
08C2413940074.tif pages
07/10/2008 Motion to Consolidate (9:30 AM) ()
DEFT'S MTN TO CONSOLIDATE WITH C241394/39 Heard By: Valerie Adair
Result: Matter Continued
07/22/2008 Motion to Consolidate (9:30 AM) ()
DEFT'S MTN TO CONSOLIDATE WITH C241394/39 Court Clerk: Denise Husted Reporter/Recorder: Janie Olsen Heard By: Valerie Adair
Parties Present
Minutes
Result: Off Calendar
08/12/2008 Motion to Consolidate (9:30 AM) ()
DEFT'S MTN TO CONSOLIDATE WITH C241394/39 Court Clerk: Denise Husted Reporter/Recorder: Janie Olsen Heard By: Valerie Adair
Result: Matter Continued
08/14/2008 CANCELED Calendar Call (9:30 AM) ()
Vacated
Result: Vacate
08/18/2008 CANCELED Jury T rial (10:00 AM) ()
Vacated
Result: Vacate
08/28/2008 Reporters T ranscript
REPORTER'S TRANSCRIPT OF HEARING RE ARRAIGNMENT
08C2413940077.tif pages
11/13/2008 Hearing
STATE'S REQUEST STATUS CHECK ON MTN TO CONSOLIDATE C212667
08C2413940078.tif pages
11/20/2008 Request (9:30 AM) ()

PA3872

STATE'S REQUEST STATUS CHECK ON MTN TO CONSOLIDATE C212667 Court Clerk: Denise Husted Reporter/Recorder: Janie Olsen Heard By: Adair, Valerie

Parties Present

Minutes

Result: Matter Continued

12/08/2008 Opposition
DEFTS LUIS HIDALGO JR AND LUIS HIDALGO IIIS OPPOSITION TO THE MTN TO CONSOLIDATE CASE NO C241394 INTO C212667 CONSOLIDATE CASE NO C241394 INTO C212667
08C2413940080.tif pages

12/09/2008 Motion
DEFT'S MTN TO STRIKE THE AMENDED NTC TO SEEK DEATH/43
08C2413940079.tif pages

12/15/2008 Response
RESPONSE TO DEFT LUIS HIDALGO JR AND LUIS HIDALGO IIIS OPPOSITION TO CONSOLIDATE CASE NO C241394 INTO C212667 CONSOLIDATE CASE NO C241394 INTO C212667
08C2413940081.tif pages

12/15/2008 Response
RESPONSE TO DEFT LUIS HIDALGO JR AND LUIS HIDALGO IIIS OPPOSITION TO CONSOLIDATE CASE NO C241394 INTO C212667 CONSOLIDATE CASE NO C241394 INTO C212667
08C2413940089.tif pages

12/19/2008 Motion
ALL PENDING MOTIONS 12/19/08
08C2413940082.tif pages

12/19/2008 Request (9:30 AM) ()
STATE'S REQUEST STATUS CHECK ON MTN TO CONSOLIDATE C212667 Heard By: Valerie Adair
Result: Matter Continued

12/19/2008 Motion to Strike (9:30 AM) ()
DEFT'S MTN TO STRIKE THE AMENDED NTC TO SEEK DEATH/43
Result: Matter Continued

12/19/2008 All Pending Motions (9:30 AM) ()
ALL PENDING MOTIONS 12/19/08 Relief Clerk: Carole D'Aloia Reporter/Recorder: Janie Olsen Heard By: Valerie Adair

Parties Present

Minutes

Result: Matter Heard

12/23/2008 Motion
DEFT'S MTN TO STRIKE THE AMENDED NTC TO SEEK DEATH/45
08C2413940083.tif pages

12/29/2008 Reporters T ranscript
RECORDER'S TRANSCRIPT OF HEARING RE STATES REQUEST FOR STATUS CHECK ON MTN TO CONSOLIDATE TO CONSOLIDATE
08C2413940084.tif pages

12/31/2008 Opposition
STATES OPPOSITION TO DEFT LUIS A HIDALGO JRS AMENDED MTN TO STRIKE THE AMENDED NOTICE TO SEEK DEATH PENALTY AMENDED NOTICE TO SEEK DEATH PENALTY
08C2413940085.tif pages

01/02/2009 Jury List
DISTRICT COURT JURY LIST
08C2413940107.tif pages

01/05/2009 Notice of W itnesses and/or Expert W itnesses
DEFT LUIS A HIDALGO JRS SUPPLEMENTAL NOTICE OF EXPERT WITNESSES
08C2413940086.tif pages

01/07/2009 Motion
STATE'S MTN TO REMOVE MR GENTILE AS ATTORNEY OR REQ WAIVERS /46
08C2413940087.tif pages

01/08/2009 Motion
DEFT'S MTN FOR FAIR & ADEQUATE VOIR DIRE/47
08C2413940088.tif pages

01/09/2009 Motion
ALL PENDING MOTIONS 1/9/09
08C2413940196.tif pages

01/09/2009 Request (9:30 AM) ()
STATE'S REQUEST STATUS CHECK ON MTN TO CONSOLIDATE C212667 Heard By: Valerie Adair
Result: Matter Continued

01/09/2009 Motion to Strike (9:30 AM) ()
DEFT'S MTN TO STRIKE THE AMENDED NTC TO SEEK DEATH/43
Result: Matter Heard

01/09/2009 CANCELED Motion to Strike (9:30 AM) ()
Vacated
Result: Vacate

01/09/2009 All Pending Motions (9:00 AM) ()
ALL PENDING MOTIONS 1/9/09 Court Clerk: Denise Husted Reporter/Recorder: Janie Olsen Heard By: Valerie Adair

Parties Present

Minutes

Result: Matter Heard

01/12/2009 Motion
DEFT'S MTN TO SUPPRESS EVIDENCE /48
08C2413940090.tif pages

01/12/2009 Reporters T ranscript
REPORTER'S TRANSCRIPT - STATES REQUEST STATUS CHECK ON MOTION TO CONSOLIDATE DEFENDANTS MOTION TO STRIKE THE AMENDED NOTICE TO SEEK DEATH PENALTY DEFENDANTS MOTION TO STRIKE THE AMENDED NOTICE TO SEEK DEATH PENALTY
08C2413940092.tif pages

01/13/2009 Motion
STATES MTN IN LIMINE TO EXCLUDE THE TESTIMONY/49
08C2413940091.tif pages

01/16/2009 Motion
ALL PENDING MOTIONS 1-16-09
08C2413940093.tif pages

01/16/2009 Waiver
WAIVER OF RIGHTS TO A DETERMINATION OF PENALTY BY THE TRIAL JURY
08C2413940094.tif pages

01/16/2009 Order
ORDER GRANTING THE STATES MOTION TO CONSOLIDATE C241394 INTO C212667
08C2413940095.tif pages

01/16/2009 Notice of W itnesses and/or Expert W itnesses
SUPPLEMENTAL NOTICE OF WITNESSES
08C2413940096.tif pages

01/16/2009 Notice of W itnesses and/or Expert W itnesses
SUPPLEMENTAL NOTICE OF WITNESSES
08C2413940097.tif pages

01/16/2009 Notice of W itnesses and/or Expert W itnesses
SUPPLEMENTAL NOTICE OF WITNESSES
08C2413940098.tif pages

01/16/2009 Request (9:30 AM) ()
STATE'S REQUEST STATUS CHECK ON MTN TO CONSOLIDATE C212667 Court Clerk: Denise Husted Reporter/Recorder: Janie Olsen Heard By: Valerie Adair
Result: Matter Continued

01/16/2009 Motion (9:30 AM) ()
STATE'S MTN TO REMOVE MR GENTILE AS ATTORNEY OR REQ WAIVERS /46 Heard By: Valerie Adair
Result: Matter Resolved

01/16/2009 Motion (9:30 AM) ()
DEFT'S MTN FOR FAIR & ADEQUATE VOIR DIRE/47 Heard By: Valerie Adair
Result: Moot

01/16/2009 All Pending Motions (9:30 AM) ()
ALL PENDING MOTIONS 1-16-09 Relief Clerk: REBECCA FOSTER Reporter/Recorder: Janie Olsen Heard By: Valerie Adair
Parties Present
Minutes
Result: Matter Heard

01/20/2009 Opposition
STATES OPPOSITION TO DEFT LUIS A HIDALGO JRS MTN TO SUPPRESS EVIDENCE
08C2413940099.tif pages

01/20/2009 Motion (9:30 AM) ()
STATE'S MTN TO REMOVE MR GENTILE AS ATTORNEY OR REQ WAIVERS /46 Heard By: Valerie Adair
Result: Matter Continued

01/20/2009 Motion (9:30 AM) ()
DEFT'S MTN FOR FAIR & ADEQUATE VOIR DIRE/47 Heard By: Valerie Adair
Result: Matter Continued

01/20/2009 Motion in Limine (9:30 AM) ()
STATES MTN IN LIMINE TO EXCLUDE THE TESTIMONY/49 Heard By: Valerie Adair
Result: Matter Continued

01/22/2009 Calendar Call (9:30 AM) ()
CALENDAR CALL Heard By: Valerie Adair
Result: Matter Heard

01/22/2009 Motion to Suppress (10:15 AM) ()
DEFT'S MTN TO SUPPRESS EVIDENCE /48 Heard By: Valerie Adair
Result: Denied

01/22/2009 Motion in Limine (10:15 AM) ()
STATES MTN IN LIMINE TO EXCLUDE THE TESTIMONY/49 Heard By: Valerie Adair
Result: Matter Heard

01/22/2009 All Pending Motions (9:30 AM) (Judicial Officer Adair, Valerie)
Minutes
Result: Matter Heard

01/23/2009 Hearing
DECISION:MATTERS ADDRESSED ON 1/22/09
08C2413940101.tif pages

01/23/2009 Hearing
STATE'S REQUEST FOR CLARIFICATION
08C2413940102.tif pages

01/23/2009 Decision (10:50 AM) (Judicial Officer Adair, Valerie)
DECISION:MATTERS ADDRESSED ON 1/22/09 Court Clerk: Denise Husted Heard By: Valerie Adair
Parties Present
Minutes
Result: Matter Heard

01/26/2009 CANCELED Jury T rial (10:00 AM) ()
Vacated
Result: Vacate

01/26/2009 Request (10:00 AM) (Judicial Officer Adair, Valerie)
STATE'S REQUEST FOR CLARIFICATION
Minutes
Result: Matter Heard

01/27/2009 Jury T rial (12:30 PM) ()
TRIAL BY JURY Court Clerk: Denise Husted Reporter/Recorder: Janie Olsen Heard By: Adair, Valerie
Parties Present

Minutes
Result: Matter Continued

01/28/2009 Jury Trial (10:30 AM) ()
TRIAL BY JURY Court Clerk: Denise Husted Reporter/Recorder: Janie Olsen Heard By: Adair, Valerie
Parties Present
Minutes
Result: Matter Continued

01/29/2009 Subpoena Duces Tecum
SUBPOENA - CRIMINAL
08C2413940105.tif pages

01/29/2009 Memorandum
LUIS A HIDALGO JRS TRIAL MEMORANDUM - REDACTED
08C2413940106.tif pages

01/29/2009 Jury Trial (9:30 AM) ()
TRIAL BY JURY Court Clerk: Denise Husted Reporter/Recorder: Janie Olsen Heard By: Adair, Valerie
Parties Present
Minutes
Result: Matter Continued

01/30/2009 Jury Trial (10:00 AM) ()
TRIAL BY JURY Court Clerk: Denise Husted Reporter/Recorder: Janie Olsen Heard By: Adair, Valerie
Parties Present
Minutes
Result: Matter Continued

02/02/2009 Jury List
DISTRICT COURT JURY LIST
08C2413940108.tif pages

02/02/2009 Notice of Witnesses and/or Expert Witnesses
SUPPLEMENTAL NOTICE OF WITNESSES
08C2413940109.tif pages

02/02/2009 Notice of Witnesses and/or Expert Witnesses
SUPPLEMENTAL NOTICE OF WITNESSES
08C2413940110.tif pages

02/02/2009 Jury Trial (10:30 AM) ()
TRIAL BY JURY Court Clerk: Denise Husted Reporter/Recorder: Janie Olsen Heard By: Adair, Valerie
Parties Present
Minutes
Result: Matter Continued

02/03/2009 Reporters Transcript
RECORDER'S TRANSCRIPT OF HEARING RE - EXCERPT OF PROCEEDINGS- STATES OPENING STATEMENT - HEARD 02-02-09
STATEMENT - HEARD 02-02-09
08C2413940111.tif pages

02/03/2009 Jury Trial (10:30 AM) ()
TRIAL BY JURY Court Clerk: Denise Husted Reporter/Recorder: Janie Olsen Heard By: Adair, Valerie
Parties Present
Minutes
Result: Matter Continued

02/04/2009 Jury Trial (10:30 AM) ()
TRIAL BY JURY Court Clerk: Denise Husted Reporter/Recorder: Janie Olsen Heard By: Adair, Valerie
Parties Present
Minutes
Result: Matter Continued

02/05/2009 Reporters Transcript
RECORDER'S TRANSCRIPT OF HEARING RE EXCERPT OF PROCEEDINGS - HEARD 02-04-09
08C2413940113.tif pages

02/05/2009 Jury Trial (9:00 AM) ()
TRIAL BY JURY Court Clerk: Denise Husted Reporter/Recorder: Janie Olsen Heard By: Adair, Valerie
Parties Present
Minutes
Result: Matter Continued

02/06/2009 Reporters Transcript
RECORDER'S TRANSCRIPT OF HEARING RE - EXCERPT OF PROCEEDINGS RONTAE ZONES TESTIMONY - HEARD 02-03-09
TESTIMONY - HEARD 02-03-09
08C2413940112.tif pages

02/06/2009 Jury Trial (9:30 AM) ()
TRIAL BY JURY Court Clerk: Denise Husted Reporter/Recorder: Janie Olsen Heard By: Adair, Valerie
Parties Present
Minutes
Result: Matter Continued

02/09/2009 Reporters Transcript
RECORDER'S TRANSCRIPT OF HEARING RE EXCERPT OF PROCEEDINGS - ANABEL ESPINDOLAS TESTIMONY - HEARD 02-06-09
ESPINDOLAS TESTIMONY - HEARD 02-06-09
08C2413940114.tif pages

02/09/2009 Reporters Transcript
RECORDER'S TRANSCRIPT OF HEARING RE EXCERPT OF PROCEEDINGS - ANABEL ESPINDOLAS TESTIMONY - HEARD 02-06-09
ESPINDOLAS TESTIMONY - HEARD 02-06-09

08C2413940115.tif pages

02/09/2009 Jury Trial (9:00 AM) ()
TRIAL BY JURY Court Clerk: Denise Husted Reporter/Recorder: Janie Olsen Heard By: Adair, Valerie
Parties Present
Minutes
Result: Matter Continued

02/10/2009 Notice of Witnesses and/or Expert Witnesses
DEFENDANTS FIRST SUPPLEMENTAL NOTICE OF WITNESSES
08C2413940116.tif pages

02/10/2009 Reporters Transcript
REPORTER'S TRANSCRIPT RE EXCERPT OF PROCEEDINGS OF ANABEL EXPINDOLAS TESTIMONY TESTIMONY
08C2413940118.tif pages

02/10/2009 Jury Trial (9:30 AM) ()
TRIAL BY JURY Court Clerk: Denise Husted Reporter/Recorder: Janie Olsen Heard By: Adair, Valerie
Parties Present
Minutes
Result: Matter Continued

02/11/2009 Jury Trial (9:30 AM) ()
TRIAL BY JURY Court Clerk: Denise Husted Reporter/Recorder: Janie Olsen Heard By: Adair, Valerie
Parties Present
Minutes
Result: Matter Continued

02/12/2009 Proposed Verdict Forms Not Used at Trial
PROPOSED VERDICT FORMS NOT USED AT TRIAL
08C2413940119.tif pages

02/12/2009 Jury Trial (9:30 AM) ()
TRIAL BY JURY Court Clerk: Denise Husted Reporter/Recorder: Janie Olsen Heard By: Adair, Valerie
Parties Present
Minutes
Result: Matter Continued

02/13/2009 Jury List
AMENDED DISTRICT COURT JURY LIST
08C2413940122.tif pages

02/13/2009 Jury Trial (9:30 AM) ()
TRIAL BY JURY Court Clerk: Denise Husted Reporter/Recorder: Janie Olsen Heard By: Adair, Valerie
Parties Present
Minutes
Result: Matter Continued

02/17/2009 Judgment
VERDICT
08C2413940124.tif pages

02/17/2009 Instructions to the Jury
INSTRUCTIONS TO THE JURY - INSTRUCTION NO 1
08C2413940127.tif pages

02/17/2009 Proposed Verdict Forms Not Used at Trial
PROPOSED VERDICT FORMS NOT USED AT TRIAL
08C2413940141.tif pages

02/17/2009 Jury Trial (9:30 AM) ()
TRIAL BY JURY Court Clerk: Denise Husted Reporter/Recorder: Janie Olsen Heard By: Valerie Adair
Parties Present
Minutes
Result: Matter Heard

02/18/2009 Conversion Case Event Type
SENTENCING VJ 5/1/09
08C2413940117.tif pages

02/18/2009 Motion
ANABEL ESPINDOLA O.R. RELEASE/BAIL REDUCE/55 VA 2/18/09
08C2413940120.tif pages

02/18/2009 Motion
DEFT ANABEL ESPINDOLA'S MTN FOR OWN RECOG RELEASE, FOR HOUSE ARREST/56
08C2413940121.tif pages

02/24/2009 Ex Parte
EX PARTE APPLICATION TO EXTEND TIME TO FILE MTN FOR NEW TRIAL
08C2413940125.tif pages

02/24/2009 Ex Parte Order
DEFENDANTS LUI EX PARTE ORDR TO EXTEND TIME TO FILE MTN FOR NEW TRIAL
08C2413940126.tif pages

02/24/2009 CANCELED Motion for Own Recognizance Release/Setting Reasonable Bail (9:30 AM) ()
Vacated
Result: Vacate

02/24/2009 Motion for Own Recognizance Release/Setting Reasonable Bail (9:30 AM) ()
DEFT ANABEL ESPINDOLA'S MTN FOR OWN RECOG RELEASE, FOR HOUSE ARREST/56 Relief Clerk: Sharon Chun Reporter/Recorder: Janie Olsen Heard By: Valerie Adair
Minutes
Result: Matter Heard

03/10/2009 Motion
DEFT'S MTN FOR JUDGMENT OF ACQUITTAL/272

08C2413940128.tif pages

03/10/2009 Motion
DEFT'S MTN FOR JUDGMENT OF ACQUITTAL/273
08C2413940129.tif pages

03/11/2009 Request
SUPPLEMENT TO LUIS A HIDALGO JRS MTN FOR JUDGMENT OF ACQUITTAL OR IN THE ALTERNATIVE A NEW TRIAL ALTERNATIVE A NEW TRIAL
08C2413940130.tif pages

03/17/2009 Opposition
STATES OPPOSITION TO DEFTS LUIS HIDALGO JRS MTN FOR JUDGMENT OF ACQUITTAL OR IN THE ALTERNATIVE A NEW TRIAL THE ALTERNATIVE A NEW TRIAL
08C2413940131.tif pages

03/20/2009 Order
STIPULATION AND ORDER TO CONTINUE HEARING ON DEFTS LUIS A HIDALGO JRS ANDLUIS A HIDALGO IIIS MTNS FOR JUDGMENT OF ACQUITTAL OR IN THE ALTERNATIVE A NEW TRIAL LUIS A HIDALGO IIIS MTNS FOR JUDGMENT OF ACQUITTAL OR IN THE ALTERNATIVE A NEW TRIAL
08C2413940132.tif pages

03/23/2009 Notice
NOTICE OF ENTRY OF ORDER TO CONTINUE HEARING ON DEFTS LUIS A HIDALGO JRS ANDLUIS A HIDALGO IIIS MTNS FOR JUDGMENT OF ACQUITTAL OR IN THE ALTERNATIVE A NEW TRIAL LUIS A HIDALGO IIIS MTNS FOR JUDGMENT OF ACQUITTAL OR IN THE ALTERNATIVE A NEW TRIAL
08C2413940133.tif pages

03/24/2009 Motion for Judgment (9:30 AM) ()
DEFT'S MTN FOR JUDGMENT OF ACQUITTAL/272
Result: Matter Continued

03/24/2009 Motion for Judgment (9:30 AM) ()
DEFT'S MTN FOR JUDGMENT OF ACQUITTAL/273 Heard By: Valerie Adair
Result: Matter Continued

04/17/2009 Reply
REPLY TO STATES OPPOSITION TO DEFT LUIS A HIDALGO JRS MTN FOR JUDGMENT OF ACQUITTAL OR IN THE ALTERNATIVE A NEW TRIAL ACQUITTAL OR IN THE ALTERNATIVE A NEW TRIAL
08C2413940135.tif pages

04/21/2009 Motion for Judgment (9:30 AM) ()
DEFT'S MTN FOR JUDGMENT OF ACQUITTAL/272
Result: Vacate

04/21/2009 Motion for Judgment (10:30 AM) ()
DEFT'S MTN FOR JUDGMENT OF ACQUITTAL/273 Court Clerk: Denise Husted Reporter/Recorder: Janie Olsen Heard By: Adair, Valerie
Parties Present
Minutes
Result: Matter Continued

04/27/2009 Points and Authorities
SUPPLEMENTAL POINTS AND AUTHORITIES TO DEFT LUIS A HIDALGO JRS MTN FOR JUDGMENT OF ACQUITTAL OR IN THE ALTERNATIVE A NEW TRIAL OF ACQUITTAL OR IN THE ALTERNATIVE A NEW TRIAL
08C2413940136.tif pages

05/01/2009 Hearing
STATUS CHECK: SENTENCING
08C2413940137.tif pages

05/01/2009 Hearing
STATUS CHECK: SENTENCING
08C2413940139.tif pages

05/01/2009 Motion for Judgment (10:30 AM) ()
DEFT'S MTN FOR JUDGMENT OF ACQUITTAL/273 Court Clerk: Denise Husted Reporter/Recorder: Janie Olsen Heard By: Valerie Adair
Parties Present
Minutes
Result: Matter Heard

05/01/2009 CANCELED Status Check (9:30 AM) ()
Vacated
Result: Vacate

05/05/2009 Bench W arrant
BENCH WARRANT RETURN VA 5/5/09
08C2413940138.tif pages

05/05/2009 CANCELED Sentencing (9:30 AM) ()
Vacated
Result: Vacate

05/07/2009 CANCELED Bench W arrant Return (9:30 AM) ()
Vacated
Result: Vacate

06/02/2009 Conversion Case Event T ype
SENTENCING
08C2413940140.tif pages

06/02/2009 Status Check (9:30 AM) ()
STATUS CHECK: SENTENCING Relief Clerk: Shelly Landwehr/sl Reporter/Recorder: Janie Olsen Heard By: Valerie Adair
Parties Present
Minutes
Result: Matter Heard

06/19/2009 Objection
LUIS A HIDALGO JRS OBJECTIONS TO THE SUPPLEMENTAL PRESENTENCE INVESTIGATION REPORT REPORT
08C2413940142.tif pages

PA3877

06/19/2009 Memorandum
LUIS A HIDALGO JRS SENTENCING MEMORANDUM
08C2413940143.tif pages

06/19/2009 Memorandum
LUIS A HIDALGO IIIS SENTENCING MEMORANDUM
08C2413940144.tif pages

06/23/2009 Order
ORDER DIRECTING THE DEPT OF PAROLE AND PROB ATION TO MAKE THE FOLLOWINGCORRECTIONS TO THE PRESENTENCE INVESTIGATION REPORTS FOR THE ABOVE REFERENCED DEFENDANTS CORRECTIONS TO THE PRESENTENCE INVESTIGATION REPORTS FOR THE ABOVE REFERENCED DEFENDANTS
08C2413940155.tif pages

06/23/2009 Order
ORDER DIRECTING THE DEPT OF PAROLE AND PROBATION TO MAKE THE FOLLOWINGCORRECTIONS TO THE PRESENTENCE INVESTIGATION REPORTS FOR THE ABOVE REFERENCED DEFENDANTS CORRECTIONS TO THE PRESENTENCE INVESTIGATION REPORTS FOR THE ABOVE REFERENCED DEFENDANTS
08C2413940197.tif pages

06/23/2009 Sentencing (10:00 AM) (Judicial Officer Adair, Valerie)
SENTENCING Court Clerk: Denise Husted Reporter/Recorder: Janie Olsen Heard By: Valerie Adair
Parties Present
Minutes
Result: Granted

07/06/2009 Ex Parte Order
EX PARTE ORDER TO SEAL EX-PARTE APPLICATION TO DECLARE LUIS A HIDALGO III INDIGENT FOR PURPOSES OF APPOINTING APPELLATE COUNSEL III INDIGENT FOR PURPOSES OF APPOINTING APPELLATE COUNSEL
08C2413940145.tif pages

07/06/2009 Ex Parte
EX PARTE APPLICATION REQUESTING THAT DEFT LUIS A HIDALGO JR BE DECLARED INDIGENT FOR PURPOSES OF APPOINTING APPELLATE COUNSEL INDIGENT FOR PURPOSES OF APPOINTING APPELLATE COUNSEL
08C2413940146.tif pages

07/06/2009 Ex Parte Order
EX PARTE ORDER DECLARING LUIS HIDALGO III INDIGENT FOR PURPOSES OF APPOINTING APPELLATE COUNSEL APPELLATE COUNSEL
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07/06/2009 Ex Parte
EX PARTE APPLICATION REQUESTING THAT DEFT LUIS A HIDALGO III BE DECLARED INDIGENT FOR PURPOSES OF APPOINTING APPELLATE COUNSEL INDIGENT FOR PURPOSES OF APPOINTING APPELLATE COUNSEL
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07/06/2009 Ex Parte
EX PARTE APPLICATION REQUESTING THAT DEFT LUIS A HIDALGO JRS EX PARTEAPPOINTING APPELLATE COUNSEL BE SEALED APPLICATION REQUESTING AN ORDER DECLARING HIM INDIGENT FOR PURPOSES OF APPOINTING APPELLATE COUNSEL BE SEALED APPLICATION REQUESTING AN ORDER DECLARING HIM INDIGENT FOR PURPOSES OF
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07/10/2009 Judgment
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07/10/2009 Judgment
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07/13/2009 Reporters T ranscript
RECORDER'S TRANSCRIPT OF HEARING RE SENTENCING - HEARD 6-23-09
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07/16/2009 Notice of Appeal
LUIS A HIDALGO JRS NOTICE OF APPEAL
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07/16/2009 Notice of Appeal
LUIS A HIDALGO IIIS NOTICE OF APPEAL
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07/30/2009 Statement
CASE APPEAL STATEMENT
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07/30/2009 Request
REQUEST FOR TRANSCRIPTS OF PROCEEDINGS
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07/30/2009 Request
REQUEST FOR TRANSCRIPTS OF PROCEEDINGS
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07/30/2009 Statement
CASE APPEAL STATEMENT
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07/31/2009 Request
REQUEST FOR TRANSCRIPTS OF PROCEEDINGS
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08/11/2009 Hearing
MINUTE ORDER RE: JUDGMENT OF CONVICTION
08C2413940163.tif pages

08/11/2009 Ex Parte Order
EX PARTE ORDER ORDERING THE STATE OF NEVADA TO PAY FOR DISTRICT COURTTRANSCRIPTS OF PROCEEDINGS ON BEHALF OF LUIS A HIDALGO JR DUE TO HIS INDIGENCY TRANSCRIPTS OF PROCEEDINGS ON BEHALF OF LUIS A HIDALGO JR DUE TO HIS INDIGENCY
08C2413940164.tif pages

08/11/2009 Minute Order (3:30 PM) ()
MINUTE ORDER RE: JUDGMENT OF CONVICTION Court Clerk: Denise Husted Heard By: Valerie Adair
Minutes
Result: Matter Heard

PA3878

08/17/2009 Notice

	NOTICE OF ENTRY OF ORDER 08C2413940165.tif pages
08/18/2009	Judgment AMENDED JUDGMENT OF CONVICTION 08C2413940166.tif pages
08/21/2009	Ex Parte Order EX PARTE ORDER ORDERING THE STATE OF NEVADA TO PAY FOR DISTRICT COURTTRANSCRIPTS OF PROCEEDINGS ON BEHALF OF LUIS A HIDALGO III DUE TO HIS INDIGENCY TRANSCRIPTS OF PROCEEDINGS ON BEHALF OF LUIS A HIDALGO III DUE TO HIS INDIGENCY 08C2413940167.tif pages
08/21/2009	Ex Parte LUIS A HIDALGO IIIS EX PARTE APPLICATION REQUESTING THE STATE OF NEVADA TO PAY FOR TRANSCRIPTS OF DISTRICT COURT PROCEEDINGS DUE TO HIS INDIGENCY FOR TRANSCRIPTS OF DISTRICT COURT PROCEEDINGS DUE TO HIS INDIGENCY 08C2413940168.tif pages
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11/20/2009	Reporters T ranscript RECORDER'S TRANSCRIPT OF HEARING RE STATUS CHECK - HEARD 06-26-07 08C2413940169.tif pages
11/20/2009	Reporters T ranscript REPORTER'S TRANSCRIPT OF PROCEEDINGS - DEFTS LUIS HIDALGO IIISMTN FORJUDGMENT OF ACQUITTAL OR IN THE ALTERNATIVE FOR A NEW TRIAL - DEFT LUIS HIDALGO JRS MTN FOR JUDGMENT OF ACQUITTAL - HEARD 05-01-09 JUDGMENT OF ACQUITTAL OR IN THE ALTERNATIVE FOR A NEW TRIAL - DEFT LUIS HIDALGO JRS MTN FOR JUDGMENT OF ACQUITTAL - HEARD 05-01-09 08C2413940170.tif pages
11/20/2009	Reporters T ranscript RECORDER'S TRANSCRIPT OF HEARING RE DEFENDANTS MOTIONS - HEARD 02-11-08 08C2413940171.tif pages
11/20/2009	Reporters T ranscript RECORDER'S TRANSCRIPT OF HEARING RE MOTIONS - HEARD 01-16-09 08C2413940172.tif pages
11/20/2009	Reporters T ranscript REPORTER'S TRANSCRIPT OF PROCEEDINGS - CALENDAR CALL - STATES MTN IN LIMINETO EXCLUDE TESTIMONY OF VALERIE FRIDLAND - DEFT LUIS HIDALGO JRS MTN TO SUPPRESS EVIDENCE - HEARD 01-22-09 TO EXCLUDE TESTIMONY OF VALERIE FRIDLAND - DEFT LUIS HIDALGO JRS MTN TO SUPPRESS EVIDENCE - HEARD 01-22-09 08C2413940173.tif pages
11/20/2009	Reporters T ranscript RECORDER'S TRANSCRIPT OF HEARING RE STATES MTN TO CONSOLIDATE WITH C241394 STATES MTN TO CONSOLIDATE WITH C212667 - HEARD 07-22-08 STATES MTN TO CONSOLIDATE WITH C212667 - HEARD 07-22-08 08C2413940174.tif pages
11/20/2009	Reporters T ranscript RECORDER'S TRANSCRIPT OF HEARING RE DEFTS MTN FOR AUDIBILITY HEARING AND TRANSCRIPT APPROVAL - HEARD 02-05-08 TRANSCRIPT APPROVAL - HEARD 02-05-08 08C2413940175.tif pages
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12/17/2009 Motion
DEFT'S PRO PER MTN TO WITHDRAW CNSL/283
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12/29/2009 Hearing
STATUS CHECK: DEFENDANT'S PRO PER MOTION TO WITDRAW
08C2413940192.tif pages
12/29/2009 Motion (9:30 AM) ()
DEFT'S PRO PER MTN TO WITHDRAW CNSL/283 Court Clerk: Denise Husted Reporter/Recorder: Janie Olsen Heard By: Valerie Adair
Parties Present
Minutes
Result: Matter Heard
01/19/2010 Status Check (9:30 AM) ()
STATUS CHECK: DEFENDANT'S PRO PER MOTIONTO WITDRAW Court Clerk: Denise Husted Reporter/Recorder: Janie Olsen Heard By: Valerie Adair
Minutes
Result: Matter Heard
01/25/2010 Motion
DEFT'S PRO PER MTN FOR PRODCUTION OF DOCUMNE
08C2413940193.tif pages
02/09/2010 CANCELED Motion (9:30 AM) ()
Vacated
Result: Vacate
04/28/2010 Motion
DEFT'S MTN FOR DISCOVERY RE: EXPERT TESTIMON
08C2413940194.tif pages
04/30/2010 Motion
DEFT'S MTN TO SUPPRESS /289
08C2413940195.tif pages
05/11/2010 CANCELED Motion (9:30 AM) ()
Vacated
Result: Vacate
05/11/2010 CANCELED Motion to Suppress (9:30 AM) ()
Vacated
Result: Vacate
06/03/2010 Petition
PTN FOR WRIT OF HABEAS CORPUS VQ 6/30/10
08C2413940200.tif pages
07/01/2010 CANCELED Petition for W rit of Habeas Corpus (9:30 AM) ()
Vacated
Result: Vacate
10/28/2010 Motion to Amend
Motion to Amend Record
10/29/2010 Errata
Errata to Motion to Amend Record
11/09/2010 Motion to Amend (9:30 AM) (Judicial Officer Adair, Valerie)
Motion to Amend Record
Parties Present
Minutes
Result: Matter Heard
11/12/2010 Transcript of Proceedings
Transcript of Proceedings Jury Trial - Day 13 - Feb. 12, 2009
12/29/2010 Motion to Amend
Motion to Amend Record
01/07/2011 Response
State's Respons to Defendant Hidalgo, Jr.'s December 29, 2010 Motion to Amend Record
01/11/2011 Motion to Amend (9:30 AM) (Judicial Officer Adair, Valerie)
Defendant's Motion to Amend Record
Parties Present
Minutes
Result: Denied
01/21/2011 Recorders T ranscript of Hearing
Recorder's Transcript of Hearing Re: Defendant's Motion To Amend Record - 01/11/2011
04/17/2013 NV Supreme Court Clerks Certificate/Judgment - Affirmed
Nevada Supreme Court Clerk's Certificate Judgment - Affirmed; Rehearing Denied; Petition Denied
12/31/2013 Petition for W rit of Habeas Corpus
Petition for Writ of Habeas Corpus (Post Conviction)
12/31/2013 Motion for Leave to Proceed in Forma Pauperis
12/31/2013 Motion for Appointment
Motion for Appointment of Counsel
12/31/2013 Memorandum of Points and Authorities
Memorandum of Points and Authorities In Support of Petition for Writ of Habeas Corpus
01/08/2014 Order for Petition for W rit of Habeas Corpus
01/08/2014 Notice of Hearing
Notice of Hearings
01/09/2014 Notice of Hearing
Notice of Hearing
01/13/2014 Response

State's Response To Defendant's Pro Per Motion For Appointment Of Counsel
01/21/2014 Request (9:30 AM) (Judicial Officer Adair, Valerie)
State's Request: Defendant's Motion for Appointment of Counsel
Minutes
Result: Granted
01/28/2014 Order for Production of Inmate
Order For Production Of Inmate - Luis Hidalgo, Jr., Aka, Luis Alonso Hidalgo, BAC # 1038134
02/04/2014 Status Check (9:30 AM) (Judicial Officer Adair, Valerie)
Status Check: Confirmation of Counsel
Parties Present
Minutes
Result: Briefing Schedule Set
03/11/2014 CANCELED Petition for W rit of Habeas Corpus (9:30 AM) (Judicial Officer Adair, Valerie)
Vacated - Moot
03/11/2014 CANCELED Petition to Proceed in Forma Pauperis (9:30 AM) (Judicial Officer Adair, Valerie)
Vacated - Moot
Defendant - Motion for Leave to Proceed in Forma Pauperis
03/11/2014 CANCELED Motion for Appointment of Attorney (9:30 AM) (Judicial Officer Adair, Valerie)
Vacated
Defendant - Motion for Appointment of Counsel
07/21/2014 Stipulation and Order
Stipulated Extension of Habeas Petition Dates and Order
07/21/2014 Notice of Entry of Order
Notice of Entry of Order
12/18/2014 Stipulation and Order
Stipulated Extension of Habeas Petition Dates and Proposed Order
12/18/2014 Notice of Entry of Order
Notice of Entry of Order
04/03/2015 Filed Under Seal
Ex Parte Motion and Order to File Under Seal
04/03/2015 Filed Under Seal
Proposed Order for Ex Parte Motion for Paralegal Services-*Motion for Supplemental Fees
04/03/2015 Filed Under Seal
Ex Parte Motion for Paralegal Services-Motion for Supplemental Fees
06/17/2015 Motion
Motion and Notice of Motion for an extension of Time to File Supplement Petition for Writ of Habeas Corpus (Third Request)
06/26/2015 Filed Under Seal
Ex Parte Motion and Order to File Under Seal
06/26/2015 Filed Under Seal
Ex Parte Motion for Investigator- Motion for Supplemental Fees
06/30/2015 Motion for Order Extending T ime (9:30 AM) (Judicial Officer Adair, Valerie)
Defendant's Motion and Notice of Motion for an extension of Time to File Supplement Petition for Writ of Habeas Corpus (Third Request)
Parties Present
Minutes
Result: Hearing Set
07/07/2015 Notice of Change of Firm Name
Notice of Change of Law Firm Affiliation
07/13/2015 Filed Under Seal
Order for Ex Parte Motion for Investigation-Motion for Supplemental Fees
07/13/2015 Filed Under Seal
Proposed Order to File Under Seal
08/04/2015 Notice of Change of Address
Notice of Change of Address
10/29/2015 Motion
Motion and Notice of Motion for an Extension of Time to File Supplemental Petition for Writ of Habeas Corpus (Fourth Request)
11/04/2015 Opposition
State's Opposition to Defendant's Motion for an Extension of Time to File Supplemental Petition for Writ of Habeas Corpus
11/10/2015 Motion (9:30 AM) (Judicial Officer Adair, Valerie)
Defendant's Motion for An Extension of Time to File Supplemental Petition for Writ of Habeas Corpus
Parties Present
Minutes
11/17/2015 Reset by Court to 11/10/2015
Result: Briefing Schedule Set
11/17/2015 CANCELED Petition for W rit of Habeas Corpus (9:30 AM) (Judicial Officer Adair, Valerie)
Vacated
09/04/2014 Reset by Court to 11/04/2014
11/04/2014 Reset by Court to 05/14/2015
05/14/2015 Reset by Court to 11/17/2015
01/13/2016 Recorders T ranscript of Hearing
Recorder's Transcript Re: Defendant's Motion for an Extension of Time to File Supplemental Petition for Writ of Habeas Corpus
01/14/2016 Filed Under Seal
Ex Parte Motion and Order to File Under Seal
01/14/2016 Filed Under Seal
Ex Parte Declaration of Margaret A. McLetchie in Support of Petitioner's Motion For An Extension of Time to File Supplemental Petition For Writ of Habeas Corpus Under Seal
01/14/2016 Order Shortening T ime
Unopposed Motion and Notice of Motion for an Extension of Time to File Supplemental Petition for Writ of Habeas Corpus and Application for Order on Shortening Time (Fifth Request)
01/15/2016 Order

Order to Prepare Transcripts
01/15/2016 Notice of Entry of Order
Notice of Entry of Order
01/21/2016 Motion (9:30 AM) (Judicial Officer Adair, Valerie)
Petitioner's Motion for Extension of Time to File Supplemental Petition for Writ of Habeas Corpus on OST
Parties Present
Minutes
Result: Briefing Schedule Set
02/16/2016 CANCELED Petition for W rit of Habeas Corpus (9:30 AM) (Judicial Officer Adair, Valerie)
Vacated
02/29/2016 Exhibits
Petitioner's Appendix for Supplemental Petition for Writ of Habeas Corpus - Volume 1
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Petitioner's Appendix for Supplemental Petition for Writ of Habeas Corpus - Volume 6
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Petitioner's Appendix for Supplemental Petition for Writ of Habeas Corpus - Volume 20
02/29/2016 Exhibits
Petitioner's Appendix for Supplemental Petition for Writ of Habeas Corpus - Volume 12
02/29/2016 Supplemental
Supplemental Memorandum of Points and Authorities in Support of Petition for Writ of Habeas Corpus (Post-Conviction)
03/08/2016 Supplement
Supplement to Petitioner's Supplemental Memorandum in Support of Petition for Writ of Habeas Corpus (Post-Conviction)
03/09/2016 Filed Under Seal
Ex Parte Motion and Order to File Under Seal
03/09/2016 Filed Under Seal
Petitioner's Appendix for Supplemental Petition for Writ of Habeas Corpus Under Seal
05/10/2016 CANCELED Hearing (9:30 AM) (Judicial Officer Adair, Valerie)
Vacated
Petition for Writ of Habeas Corpus
05/18/2016 Response
State's Response to Defendant's Supplemental Petition for Writ of Habeas Corpus
06/21/2016 CANCELED Hearing (9:30 AM) (Judicial Officer Adair, Valerie)
Vacated - per Secretary
Defendant's Peitition for Writ of Habeas Corpus
02/16/2016 Reset by Court to 06/21/2016
06/21/2016 Stipulation and Order
Stipulated Extension of Habeas Petition Dates and [Proposed] Order
06/21/2016 Notice of Entry of Order
Notice of Entry of Order
07/21/2016 Reply
Reply to State's Response to the Supplemental Memorandum of Points and Authorities in Support of the Petition for Writ of Habeas Corpus (Post-Conviction)
07/28/2016 Petition for W rit of Habeas Corpus (9:30 AM) (Judicial Officer Adair, Valerie)
07/28/2016, 08/11/2016, 08/15/2016
Petition for Writ of Habeas Corpus
Parties Present
Minutes
06/28/2016 Reset by Court to 07/28/2016
07/28/2016 Reset by Court to 07/28/2016

PA3882

	Result: Matter Continued
08/11/2016	Motion for Appointment Petitioner Luis Hidalgo, Jr.'s Motion for Order Appointing Margaret A. McLetchie as Court-Appointed Counsel
08/15/2016	Opposition State's Opposition to Petitioner Luis Hidalgo, Jr.'s Motion for Order Appointing Margaret A. McLetchie as Court-Appointed Counsel
08/23/2016	Motion for Appointment of Attorney (9:30 AM) (Judicial Officer Adair, Valerie) Petitioner Luis Hidalgo, Jr.'s Motion for Order Appointing Margaret A. McLetchie as Court-Appointed Counsel Parties Present Minutes
	Result: Denied
09/16/2016	Findings of Fact, Conclusions of Law and Order
09/19/2016	Notice of Entry Notice of Entry of Findings of Fact, Conclusions of Law and Order
10/03/2016	Notice of Appeal (criminal) Notice of Appeal
10/03/2016	Case Appeal Statement Case Appeal Statement
10/04/2016	Case Appeal Statement
10/18/2016	Order Order Denying Petitioner Luis Hidalgo Jr.'s Motion for Order Appointing Margaret A. McLetchie as Court-Appointed Counsel
12/15/2016	Further Proceedings (9:30 AM) (Judicial Officer Adair, Valerie) Appointment of counsel per 11/22/16 Supreme Court Order Parties Present Minutes
	Result: Matter Heard
01/11/2017	Request Request for Transcripts of Proceedings
01/20/2017	Recorders T ranscript of Hearing Recorder's Transcript Re: State's Request: Defendant's Motion for Appointment of Counsel January 24, 2014
02/07/2017	Recorders T ranscript of Hearing Recorder's Transcript Re: Petition for Writ of Habeas Corpus, August 11, 2016
02/13/2017	Criminal Order to Statistically Close Case Criminal Order to Statistically Close Case

Financial Information

	Defendant Hidalgo Jr, Luis			
	Total Financial Assessment			1,672.00
	Total Payments and Credits			1,606.54
	Balance Due as of 07/1 1/2017			65.46
02/24/2009	Transaction Assessment			4.00
02/24/2009	Conversion Payment	Receipt # 01491222		(4.00)
10/20/2009	Transaction Assessment			350.00
11/02/2009	Conversion Payment	Receipt # 01508804	LUIS HIDALGO JR.	(175.00)
05/24/2010	Conversion Payment	Receipt # 01524275	Luis Hidalgo Jr.	(109.54)
07/02/2013	Transaction Assessment			1,318.00
07/02/2013	Payment (Window)	Receipt # 2013-80062-CCCLK	LAW OFFICES ALVERSON TAYLOR	(1,318.00)

IN THE SUPREME COURT OF THE STATE OF NEVADA

LUIS HIDALGO, JR.,
Appellant,

vs.

THE STATE OF NEVADA,
Respondent.

Case No. 71458

Electronically Filed
Jul 25 2017 08:27 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

APPELLANT'S APPENDIX VOLUME XXII

Appeal from Eighth Judicial District Court, Clark County

The Honorable Valerie Adair, District Judge

District Court Case No. 08C241394

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

Docket 71458 Document 2017-24568

INDEX TO APPELLANT'S APPENDIX

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

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

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

CERTIFICATE OF SERVICE

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

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

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

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

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

/s/ Pharan Burchfield
Employee, McLetchie Shell LLC

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CLERK OF THE COURT

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Attorneys 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

SUPPLEMENT TO PETITIONER'S SUPPLEMENTAL MEMORANDUM IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)

COMES NOW, Petitioner LUIS HIDALGO, JR., by and through his attorney of record, MARGARET A. MCLETCHIE, and hereby supplements his Supplemental Memorandum in Support of Petition for Writ of Habeas Corpus (Post-Conviction) with the signed Declaration attached hereto as Exhibit 1. This Supplement is supported by the attached memorandum.

DATED this 8th day of March, 2016.

/s/ Margaret A. McLetchie
Margaret A. McLetchie, Nevada Bar No. 10931
MCLETCHIE SHELL LLC
701 East Bridger Ave., Suite 520
Las Vegas, NV 89101
Attorney for Petitioner Luis Hidalgo, Jr.

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MEMORANDUM

Petitioner Luis Hidalgo Jr. was convicted of Second Degree Murder With Use Of A Deadly Weapon, and Conspiracy to Commit A Battery With A Deadly Weapon Or Battery Resulting In Substantial Bodily Harm. The Court imposed two consecutive sentences of one hundred and twenty (120) months to Life for the Second Degree Murder charge plus a concurrent sentence of twelve (12) months for the Conspiracy charge.

On February 29, 2016. Mr. Hidalgo submitted his Supplemental Memorandum in Support of Petition for Writ of Habeas Corpus (Post-Conviction) to this Court. In his Supplemental Memorandum, Mr. Hidalgo relied on facts included in a declaration regarding his representation by trial counsel in this matter. (*See* Supplemental Memorandum at p. 22:13-18; 23:5-17.) At the time of filing, Mr. Hidalgo had affirmed and signed the aforementioned declaration, but it had not been received by undersigned counsel. (*See* Supplemental Memorandum at p.22, n.2.)

Mr. Hidalgo now submits the attached declaration, which he executed on February 26, 2016, for inclusion in the record in this matter.

DATED this 8th day of March, 2016

/s/ Margaret A. McLetchie
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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b)(2)(B) I hereby certify that on the 8th day of March, 2016, I mailed a true and correct copy of the foregoing SUPPLEMENT TO PETITIONER'S SUPPLEMENTAL MEMORANDUM IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION) 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

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

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

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EXHIBIT 1

DECLARATION OF LUIS HIDALGO, JR.

Under penalty of perjury, I, Luis Hidalgo, Jr., do hereby state and declare as follows:

1. I have personal knowledge of the facts set forth herein, except where stated to be upon information and belief, and where so stated, I believe them to be true.

2. I am over the age of eighteen (18) years and am mentally competent.

3. That I retained Dominic Gentile to represent me in Clark County District Court Case No. 08C241394.

4. That in exchange for representing me and providing for the joint defense of my co-defendants, Luis Hidalgo, III and Anabel Espindola, I sold Mr. Gentile my membership interests in Palomino Club LLC, Lacy's LLC, Club Satin Saddle, LLC, and Bermuda Sands, LLC.

5. It was my understanding that Mr. Gentile was supposed to pay all costs and expense associated with my defense, and was also supposed to pay for all costs, fees, and expenses for the representation of Luis Hidalgo, III and Anabel Espindola by other attorneys.

6. It is my understanding that Mr. Gentile did not pay Luis Hidalgo, III or Anabel Espindola's attorneys.

7. I believe that Mr. Gentile's failure to pay Luis Hidalgo, III and Anabel Espindola's attorney's prejudiced my defense.

I declare under the penalty of perjury the foregoing is true and correct to the best of my recollection.

Executed on 26th day of February, 2016, at Las Vegas, Nevada.

LUIS HIDALGO, JR.

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CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

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

Defendant.

CASE NO: 08C241394

DEPT NO: XXI

STATE'S RESPONSE TO DEFENDANT'S SUPPLEMENTAL PETITION FOR WRIT OF HABEAS CORPUS

DATE OF HEARING: JUNE 28, 2016
TIME OF HEARING: 9:30 AM

COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through JONATHAN E. VANBOSKERCK, Chief Deputy District Attorney, and hereby submits the attached Points and Authorities in Response to Defendant's Supplemental Petition for Writ of Habeas Corpus.

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

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POINTS AND AUTHORITIES

STATEMENT OF THE CASE

On February 13, 2008, the State filed an Indictment charging LUIS HIDALGO, JR., aka Luis Alonso Hidalgo (hereinafter "Defendant" or "Mr. H") as follows: COUNT 1 – Conspiracy to Commit Murder (Felony – NRS 200.010, 200.030, 199.480); and COUNT 2 – Murder With Use of a Deadly Weapon (Felony – NRS 200.010, 200.030, 193.165). On March 7, 2008, the State filed a Notice of Intent to Seek Death Penalty.

The State filed an Amended Indictment on May 1, 2008, which made changes to the language of the Indictment but did not modify the substance of the counts against Defendant. The State similarly filed an Amended Notice of Intent to Seek Death Penalty on June 18, 2008.

On June 25, 2008, the State filed a Motion to Consolidate Case Number C241394 into Case Number C212667, seeking to join Defendant's case with that of his son, Luis Hidalgo III (hereinafter "Little Lou"), a co-conspirator in the murder. On December 8, 2008, the Hidalgo defendants jointly filed an Opposition to the Motion to Consolidate. The State filed a Response on December 15, 2008. On January 16, 2009, Defendant withdrew his Opposition to the Motion to Consolidate, the State withdrew its Notice of Intent to Seek Death Penalty, and the District Court issued an Order Granting State's Motion to Consolidate.

The joint trial of the Hidalgo defendants began on January 27, 2009. On February 17, 2009, the jury returned the following verdict as to Defendant: COUNT 1 – Guilty of Conspiracy to Commit a Battery with a Deadly Weapon or Battery Resulting in Substantial Bodily Harm; and COUNT 2 – Guilty of Second Degree Murder with Use of a Deadly Weapon.

On March 10, 2009, Defendant filed a Motion for Judgment of Acquittal, or in the Alternative, a New Trial. The State filed its Opposition on March 17, 2009. Defendant filed a Reply to the State's Opposition on April 17, 2009. Defendant filed his Supplemental Points and Authorities on April 27, 2009. On May 1, 2009, the Court deferred its ruling on the Motion for Judgment of Acquittal and invited additional briefing on the Motion. On June 23, 2009, the court found that there was sufficient evidence to warrant not upsetting the jury verdict and

denied Defendant's Motion for Judgment of Acquittal, or in the Alternative, a New Trial. On the same date, the matter proceeded to sentencing.

On June 23, 2009, Defendant was adjudged guilty and sentenced as follows: COUNT 1 – 12 months in the Clark County Detention Center (CCDC); and COUNT 2 – Life imprisonment in the Nevada Department of Corrections (NDC) with parole eligibility beginning after 120 months, plus an equal and consecutive term of 120 months to Life for the deadly weapon enhancement, COUNT 2 to run concurrent with COUNT 1. Defendant was given 184 days credit for time served. The Judgment of Conviction was filed on July 10, 2009.[1]

Defendant filed a Notice of Appeal on July 16, 2009. The Nevada Supreme Court issued its Order of Affirmance on June 21, 2012. On July 27, 2012, the Nevada Supreme Court issued an Order Denying Rehearing. The Nevada Supreme Court issued an Order Denying En Banc Reconsideration on November 13, 2012. Remittitur issued on April 10, 2013.

On December 31, 2013, Defendant filed a Petition for Writ of Habeas Corpus ("Petition"), a Memorandum of Points and Authorities In Support of Petition for Writ of Habeas Corpus ("Memorandum"), a Motion to Proceed in Forma Pauperis and a Motion for Appointment of Counsel. On January 21, 2014, the Court appointed post-conviction counsel. On February 4, 2014, Margaret A. McCletchie, Esq., confirmed as counsel.

On February 29, 2016, Defendant, through counsel, filed the instant Supplemental Memorandum of Points and Authorities in Support of Petition for Writ of Habeas Corpus (Post-Conviction) ("Supplement"). The State responds as follows, and respectfully requests that this Court order that Defendant's Petition and Supplement be DENIED.

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[1] 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.

STATEMENT OF FACTS[2]

In May of 2005, Mr. H was the owner of the Palomino Club ("Palomino" or "the club"), which is Las Vegas's only all-nude strip club licensed to serve alcohol. On the afternoon of May 19, 2005, Mr. H's romantic partner of 18 years, Anabel Espindola ("Espindola"), received a phone call from Deangelo Carroll ("Carroll"); Carroll was an employee of the Palomino serving as a "jack of all trades" handling promotions, disc jockeying, and other assorted duties. Espindola was the Palomino's general manager and handled all of the club's financial and management affairs. During the call, Carroll informed Espindola that the victim in this case, T.J. Hadland ("Hadland"), a recently fired Palomino doorman, had been "badmouthing" the Palomino to taxicab drivers. A week prior to this news, Mr. H's son and co-defendant, Luis Hidalgo, III ("Little Lou"), had informed Mr. H that Hadland had been falsifying Palomino taxicab voucher tickets in order to generate unauthorized kickbacks from the drivers.[3] In response, Mr. H ordered that Hadland be fired.[4]

The Palomino was not in a good financial state and Mr. H was having trouble meeting the $10,000.00 per week payment due to Dr. Simon Sturtzer from whom he purchased the club in early 2003. Taxicab drivers are a critically important form of advertising for strip clubs generally. Because of the Palomino's location in North Las Vegas, revenue generated through taxicab drop-offs was very important to the club's operation. Due to a legal dispute among the area strip clubs regarding bonus payments to taxicab drivers, all payments were suspended during the period encompassing May 19-20, 2005; the Palomino was the only club permitted to continue paying taxi drivers for dropping off customers.

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[2] This Statement of Facts is derived from the Statement of Facts contained in the State's Answering Brief on direct appeal. Minor edits have been made to correct errors and/or improve sentence structure.

[3] The Palomino paid cash bonuses to taxi drivers for each person a driver dropped off. The club accomplished this by having a doorman, such as Hadland, provide a ticket or voucher to the driver, which reflected the number of passengers (customers) dropped off. Apparently, Hadland was inflating the number of passengers taxi drivers dropped off in exchange for the driver agreeing to kick back to Hadland some of the bonus paid out by the club for these phantom customers.

[4] Mr. H had also received prior reports that, at other times, Hadland was selling Palomino VIP passes to arriving customers in exchange for cash, which deprived the taxicab drivers of bonuses for bringing customers to the club, and diverted the passes from their intended purpose of attracting patrons local to the club. This practice created a problem for the club because taxi drivers would begin disputing their entitlement to be paid bonuses.

At the time Espindola took Carroll's call, she was at Simone's Auto Body, which was a body-shop/collision repair business also owned by Mr. H and managed by Espindola.[5] After taking Carroll's call, Espindola informed Mr. H and Little Lou of Carroll's news about Hadland disparaging the club. Upon hearing the news, Little Lou became enraged and began yelling at Mr. H, demanding of Mr. H: "You're not going to do anything?" and stating "That's why nothing ever gets done." Little Lou told Mr. H, "You'll never be like Rizzolo and Galardi. They take care of business."[6] He further criticized Mr. H by pointing out that Rizzolo had once ordered an employee to beat up a strip club patron.[7] Mr. H became angry, telling Little Lou to mind his own business. Little Lou again told Mr. H, "You'll never be like Galardi and Rizzolo," and then stormed out of Simone's heading for the Palomino.

Visibly angered, Mr. H walked out of Espindola's office and sat on Simone's reception area couch. At approximately 6:00 or 7:00 pm, Espindola and a still visibly-angered Mr. H drove from Simone's to the Palomino. Once at the Palomino, Espindola went into Mr. H's office, which was her customary workplace at the club. Approximately half an hour later, Carroll arrived at the club and knocked on the office door, which Mr. H answered. Mr. H and Carroll had a short conversation and then walked out the office door together. A short time later, Mr. H came back into the office and directed Espindola to speak with him out of earshot of Palomino technical consultant, Pee-Lar "PK" Handley, who was nearby. Mr. H instructed Espindola to call Carroll and tell Carroll to "go to Plan B."

Espindola went to the back of the office and attempted to contact Carroll by "direct connect" ("chirp") through her and Carroll's Nextel cell phones. Carroll called Espindola back on Count's cellular phone, and Espindola instructed Carroll that Mr. H wanted Carroll to "switch to Plan B." Carroll protested that "we're here" and "I'm alone" with Hadland, and he told Espindola that he would get back to her. Espindola and Carroll's phone connection was then cut off. At that point, Espindola knew "something bad" was going to happen to Hadland.

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[5] Financially, Simone's was breaking even at the time of this case's underlying events, but the business never turned a profit.

[6] Frederick John "Rick" Rizzolo was the owner of a Las Vegas strip club known as Crazy Horse Too, and Jack Galardi is the owner of Cheetah's strip club as well as a number of other clubs in Atlanta, Georgia.

[7] Mr. H had previously enlisted his own employee, Carroll, to physically harm the boyfriend of Mr. H's daughter whom the boyfriend had caused to use methamphetamine; Espindola later intervened to stop Carroll from harming the boyfriend. This evidence came in after Mr. H attempted to suggest to the jury that he was unlike Gillardi and Rizzolo. The evidence was not admitted as to LHIAL37

She attempted to call Carroll back, but could not reach him. Espindola returned to the office and informed Mr. H that she had instructed Carroll to go to "Plan B," after which Mr. H left the office with Handley.

Earlier in the day, May 19, 2005, at approximately noon, Carroll was at his apartment with Rontae Zone ("Zone") and Jayson Taoipu ("Taoipu"), who were both "flyer boys" working unofficially for the Palomino. Zone and Taoipu worked alongside Carroll and performed jobs Carroll delegated to them in exchange for being paid "under the table" by Carroll. Zone and Taoipu would pass out Palomino flyers to taxis at cabstands. Zone lived at the apartment with Carroll, Carroll's wife, and Zone's pregnant girlfriend, Crystal Payne. Zone and Taoipu had been friends for several years.

While at the apartment, Carroll informed Zone and Taoipu that Little Lou had told him Mr. H wanted a "snitch" killed. Carroll asked Zone if he would be "into" doing something like that, and Zone responded "No," he would not. Carroll also asked the same question of Taoipu who indicated he was "down," *i.e.*, interested in helping out. Later when Taoipu and Zone were in the Palomino's white Chevrolet Astro Van with Carroll, Carroll told them that Little Lou had instructed Carroll to obtain some baseball bats and trash bags to use in aid of killing the person. After the initial noontime conversation about killing someone on Mr. H's behalf, Zone observed Carroll using the phone, but he could not hear what Carroll was talking about. At some point after the noon conversation and after Zone observed him using the phone, Carroll informed Zone and Taoipu that Mr. H would pay $6,000.00 to the person who actually killed the targeted victim.

A couple hours later while the three were still in the van, Carroll again discussed on the phone having an individual "dealt with," *i.e.*, killed, although Zone did not know the specific person to be killed. Carroll produced a .22 caliber revolver with a pearl green handle and displayed it to Zone and Taoipu as if it were the weapon to be utilized in killing the targeted victim. Carroll attempted to give the revolver to Zone who refused to take it. Taoipu was willing to take the revolver from Carroll and did so. Carroll also produced some bullets for

the gun and placed them in Zone's lap, but Zone dumped the bullets onto the van's floor where Taoipu picked them up and put them in his own lap.[8]

The three then proceeded back to Carroll's apartment where Carroll instructed Zone and Taoipu to dress in all black so they could go out and work promoting the Palomino. The three then used the Astro van to go out promoting, returned briefly to Carroll's apartment for a second time, and again left the apartment to go promoting. On this next trip, however, Carroll took them to a residence on F Street where they picked up Kenneth "KC" Counts ("Counts"). Zone had no idea they were traveling to pick up Counts whom he had never previously met. Once at Counts' house, Carroll went inside the house and emerged ten minutes later accompanied by Counts who was dressed in dark clothing, including a black hooded sweatshirt and black gloves. Counts entered the Astro van and seated himself in the back passenger seat next to Zone who was seated in the rear passenger seat directly behind the driver. Taoipu was seated in the front, right-side passenger seat.

At the time, Zone believed they were headed out to do more promoting for the Palomino. As Carroll drove onto Lake Mead Boulevard, Zone realized they were not going to be promoting because there are no taxis or cabstands at Lake Mead. Carroll told Zone and the others that they were going to be meeting Hadland and were going to "smoke [marijuana] and chill" with Hadland.[9] Carroll continued driving toward Lake Mead.

On the drive up, Zone observed Carroll talking on his cell phone and he heard Carroll tell Hadland that Carroll had some marijuana for Hadland. Carroll was also using his phone's walkie-talkie function to chirp. Little Lou chirped Carroll and they conversed. Carroll spoke with Espindola who told him to "Go to Plan B," and then to "come back" to the Palomino. Zone recalled Carroll responding "We're too far along Ms. Anabel. I'll talk to you later," and terminated the conversation. After executing a left turn, Carroll lost the signal for his cell phone and was unable to communicate with it, so he began driving back to areas around the lake where his cell phone service would be re-established.

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[8] Carroll would attempt a second time, unsuccessfully, to give the bullets to Zone when they were back at Carroll's apartment.

[9] Zone had been smoking marijuana throughout the day; on the ride to Lake Mead, Zone, Carroll, Counts, and Taoipu smoked one "blunt" or cigar of marijuana.

Carroll was able to describe a place for Hadland to meet him along the road to the lake. Hadland arrived driving a Kia Sportage, executed a U-turn, and pulled to the side of the road. Hadland walked up to the driver's side window where Carroll was seated and began having a conversation with Carroll; Zone and Taoipu were still seated in the rear right passenger's seat and front right passenger's seat, respectively. As Carroll and Hadland spoke, Counts opened the van's right-side sliding door and crept out onto the street, moving first to the front of the van, then back to its rear, and back to its front again. Counts then snuck up behind Hadland and shot him twice in the head. One bullet entered Hadland's head near the left ear, passed through his brain, and exited out the top of his skull. The other bullet entered through Hadland's left cheek, passed through and destroyed his brain stem, and was instantly fatal.

A stack of Palomino Club flyers fell out of the vehicle near Hadland's body when Counts re-entered or exited the vehicle. Counts then hurriedly hopped back into the van and Carroll drove off. Counts then questioned both Zone and Taoipu as to whether they were carrying a firearm and why they had not assisted him. Zone responded that he did not have a gun and had nothing to do with the plan. Taoipu responded that he had a gun, but did not want to inadvertently hit Carroll with gunfire.

Carroll then drove the four through Boulder City and to the Palomino, where Carroll exited the van and entered the club. Carroll met with Espindola and Mr. H in the office. He sat down in front of Mr. H and informed him "It's done," and stated "He's downstairs." Mr. H instructed Espindola to "Go get five out of the safe." Espindola queried, "Five what? $500?" which caused Mr. H to become angry and state "Go get $5,000 out of the safe." Espindola followed Mr. H's instructions and withdrew $5,000.00 from the office safe, a substantial sum in light of the Palomino's financial condition. Espindola placed the money in front of Carroll who picked it up and walked out of the office. Alone with Mr. H, Espindola asked Mr. H, "What have you done?" to which Mr. H did not immediately respond, but later asked "Did he do it?"

Ten minutes after entering the Palomino, Carroll emerged from the club, got Counts, and then went back in the club accompanied by Counts. Counts then emerged from the club,

got into a yellow taxicab minivan driven by taxicab driver Gary McWhorter, and left the scene.[10] Carroll again emerged from the Palomino about thirty minutes later and drove the van first to a self-serve car wash and then back to his house, all the while accompanied by Zone and Taoipu. Zone was very shaken up about the murder and did not say much after they returned to his and Carroll's apartment.

The next morning, May 20, 2005, Espindola and Mr. H awoke at Espindola's house after a night of gambling at the MGM. Mr. H appeared nervous and as though he had not slept; he told Espindola he needed to watch the television for any news. While watching the news, they observed a report of Hadland's murder; Mr. H said to Espindola, "He did it." Espindola again asked Mr. H, "What did you do?" and Mr. H responded that he needed to call his attorney.

Meanwhile, that same morning, Carroll slashed the tires on the van and, accompanied by Zone, used another car to follow Taoipu who drove the van down the street to a repair shop. Carroll paid $100.00 cash to have all four tires replaced. Carroll, Zone, and Taoipu subsequently went to a Big Lots store where Carroll purchased cleaning supplies, after which Carroll cleaned the interior of the Astro van. Carroll, Zone, Taoipu, Zone's girlfriend, Carroll's wife and kids, and some other individuals ate breakfast at an International House of Pancakes restaurant later that day; Carroll paid for the party's breakfast. At some point also, Carroll, accompanied by Zone, went to get a haircut.

Carroll then drove himself, Zone, and Taoipu in the Astro van to Simone's where Mr. H, Little Lou, and Espindola were present. Carroll made Zone and Taoipu wait in the van while he went into Simone's; Carroll emerged about thirty minutes later and directed Zone and Taoipu inside where they sat on a couch in Simone's central office area. While at Simone's, Zone observed Carroll speaking with Mr. H in between trips to a back room, and he also observed Carroll speaking with Espindola. Carroll then went into a back room of Simone's, but emerged later to direct Zone and Taoipu into the bathroom. Carroll expressed disappointment in Zone and Taoipu for not involving themselves in Hadland's murder, and he

[10] Counts had to go back into the Palomino to obtain some change because McWhorter did not have change for the $100.00 bill Counts tried to pay him with.

told them they had missed the opportunity to make $6,000.00. He informed Zone and Taoipu that Counts received $6,000.00 for his part in Hadland's murder. After Carroll, Zone, and Taoipu left Simone's, Carroll told Zone that Mr. H had instructed Carroll that the "job was finished and that [they] were just to go home."

Las Vegas Metropolitan Police Department ("LVMPD") detectives identified Carroll as possibly involved in the murder after speaking with Hadland's girlfriend, Paijik Karlson, and because his name showed as the last person called from Hadland's cell phone. On May 20, 2005, Detective Martin Wildemann spoke with Mr. H and inquired about Carroll, requesting any contact information Mr. H might have for Carroll; Mr. H told Detective Wildemann he had no contact information for Carroll and that Wildemann should speak with one of the Palomino managers, Ariel aka Michelle Schwanderlik, who could put the detectives in touch with Carroll.

At approximately 7:00 pm, the detectives returned to the Palomino where they found Carroll who agreed to accompany them back to their office for an interview. After the interview, the detectives took Carroll back to his apartment where they encountered Zone who agreed to come to their office for an interview. Carroll then told Zone within earshot of the detectives: "Tell them the truth, tell them the truth. I told them the truth." Zone recalled Carroll also saying: "If you don't tell the truth, we're going to jail." Zone interpreted Carroll's statements to mean that Zone should fabricate a story that tended to exculpate Carroll, himself, and Taoipu. Zone gave the police a voluntary statement on May 21, 2005. Also on that day, Carroll brought Taoipu to the detectives' office for an interview.

Meanwhile on May 21, 2005, Mr. H and Espindola consulted with attorney Jerome A. DePalma, Esq., and defense attorney Dominic Gentile, Esq.'s investigator, Don Dibble. The next morning, May 22, 2005, a completely distraught Mr. H said to Espindola, "I don't know what I told him to do." Espindola responded by again asking Mr. H, "What have you done?" to which Mr. H responded, "I don't know what I told him to do. I feel like killing myself." Espindola asked Mr. H if he wanted her to speak to Carroll and Mr. H responded affirmatively.

Espindola arranged through Mark Quaid, parts manager for Simone's, to get in touch with Carroll.

On the morning of May 23, 2005, LVMPD Detective Sean Michael McGrath and Federal Bureau of Investigation (FBI) agent Bret Shields put an electronic listening device on Carroll's person; the detectives intended for Carroll to meet at Simone's with Mr. H and the other co-conspirators. Prior to Carroll arriving at Simone's, Mr. H and Espindola engaged in a conversation by passing handwritten notes back and forth. In this conversation, Mr. H instructed Espindola that she should tell Carroll to meet Arial and resign from working at the Palomino under a pretext of taking a leave of absence to care for his sick son. He further instructed Espindola to warn Carroll that if something bad happens to Mr. H then there would be no one to support and take care of Carroll. After the conversation, Espindola tore the notes up and flushed them down a toilet in the women's bathroom at Simone's.

When Carroll arrived at Simone's, Espindola directed him to Room 6 where he met with Little Lou. Espindola joined them and asked Carroll if he was wearing "a wire," to which Carroll responded, "Oh come on man. I'm not fucking wired. I'm far from fucking wired," and he lifted his shirt up. Mr. H was present in his office at Simone's while the three met in Room 6. In the course of the conversation among Carroll, Espindola, and Little Lou, Espindola informed Carroll: "Louie is panicking, he's in a mother fucking panic, cause I'll tell you right now . . . if something happens to him we all fucking lose. Every fucking one of us." Little Lou informed Carroll that "[Mr. H]'s all ready to close the doors and everything and hide go into exile and hide." Espindola emphasized the importance of Carroll not defecting from Mr. H:

> "Yeah but . . . if the cops can't go nowhere with you, the shits gonna have to, fucking end, they gonna have to go someplace else, they're still gonna dig. They are gonna keep digging, they're gonna keep looking, they're gonna keep on, they're gonna keep on looking. [pause] Louie went to see an attorney not just for him but for you as well, just in case. Just in case . . . we don't want it to get to that point, I'm telling you because if we have to get to that point, you and Louie are gonna have to stick together."

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Carroll, who had been prepared by detectives to make statements calculated to elicit incriminating responses, initiated the following exchange: [11]

> Carroll: Hey what's done is done, you wanted him fucking taken care of we took care of him . . .
>
> Espindola: Why are you saying that shit, what we really wanted was for him to be beat up, then anything else, mother fucking dead.

Carroll also stated to Little Lou: "You . . . not gonna fucking [. . .] what the fuck are you talking about don't worry about it . . . you didn't have nothing to do with it," to which Little Lou had no response.

Espindola again emphasized that Carroll should not talk to the police and she would arrange an attorney for him:

> Espindola: _____all I'm telling you is all I'm telling you is stick to your mother fucking story. Stick to your fucking story. Cause I'm telling you right now it's a lot easier for me to try to fucking get an attorney to get you fucking out than it's gonna be for everybody to go to fucking jail. I'm telling you once that happens we can kiss everything fucking goodbye, all of it . . . your kids' salvation and everything else . . . . It's all gonna depend on you.

Little Lou also instructed Carroll to remain quiet and what Carroll should tell police if confronted: "[whispering] . . . _____don't say shit, once you get an attorney, we can say_____TJ, they thought he was a pimp and a drug dealer at one time. I don't know shit, I was gonna get in my car and go promote but they started talking about drugs and pow pow." He also promised to support Carroll should Carroll go to prison for conspiracy:

> Little Lou: . . . How much is the time for a conspiracy_____.
>
> Carroll: [F]ucking like 1 to 5 it aint shit.
>
> Little Lou: In one year I can buy you twenty-five thousand of those [savings bonds], thousand dollars one year, you'll come out and you'll have a shit load of money_____I'll take care of your son I'll put em in a nice condo_____.

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[11] The audio recordings of Carroll's conversations are of poor quality and inaudible portions are indicated by blanks.

During this May 23rd wiretapped conversation, Little Lou also solicited Zone and Taoipu's murder. In response to Carroll's claims that Zone and Taoipu were demanding money and threatening to defect to the police, Little Lou proposed killing both young men:

> Carroll: They're gonna fucking work deals for themselves, they're gonna get me for sure cause I was driving, they're gonna get KC because he was the fucking trigger man. They're not gonna do anything else to the other guys cause they're fucking snitching.
>
> Little Lou: Could you have KC kill them too, we'll fucking put something in their food so they die rat poison or something.
>
> Carroll: We can do that too.
>
> Little Lou: And we get KC last.
>
> . . .
>
> Little Lou: Listen____You guys smoke weed right, after you have given them money and still start talking they're not gonna expect rat poisoning in the marijuana and give it to them_____.
>
> Espindola: I'll get you some money right now.
>
> Little Lou: Go buy rat poison____and take_____back to the club…Here, [d]rink this right.
>
> Carroll: [W]hat is it?
>
> Little Lou: Tanguerey, [*sic*] you stir in the poison_____.
>
> Espindola: Rat poison is not gonna do it I'm telling you right now.
>
> Little Lou: [Y]ou know what the fuck you got to do.
>
> Espindola: _____takes so long_____not even going to fucking kill him.

At the end of the meeting, Espindola stated she would give Carroll some money and promised to financially contribute to Carroll and his son, as well as arrange for an attorney for Carroll. After the meeting, Carroll provided the detectives $1,400.00 and a bottle of Tanqueray, which he stated were given to him by Espindola and Little Lou, respectively.[12]

[12] Espindola would later testify Mr. H gave her only $600.00 to give to Carroll, which she did in fact give to Carroll on the 23rd.

On May 24, 2005, the detectives again outfitted Carroll with a wire and sent him back to Simone's. After Carroll's unexpected arrival, Espindola again directed him to Room 6 where the two again meet with Little Lou while Mr. H was present in the body shop's kitchen area. During the conversation, Carroll and Espindola engaged in an extended colloquy regarding their agreement to harm Hadland:

Carroll: You know what I'm saying, I did everything you guys asked me to do. You told me to take care of the guy; I took care of him.

Espindola: O.K. wait, listen, listen to me (Unitelligible)

Carroll: I'm not worried.

Espindola: Talk to the guy, not fucking take care of him like get him out of the fucking way (Unintelligible). God damn it, I fucking called you.

Carroll: Yeah, and when I talked to you on the phone, Ms. Anabel, I specifically I specifically said, I said "if he's by himself, do you still want me to do him in."

Espindola: I I . . .

Carroll: You said Yeah.

Espindola: I did not say "yes."

Carroll: You said if he's with somebody, then beat him up.

Espindola: I said go to plan B, -- fucking Deangelo, Deangelo you just told admitted to me that you weren't fucking alone I told you 'no', I fucking told you 'no' and I kept trying to fucking call you and you turned off your mother fucking phone.

Carroll: I never turned off my phone.

Espindola: I couldn't reach you.

Carroll: I never turned off my phone. My phone was on the whole fucking night.

. . .

Carroll: Ms. Anabel

Espindola: I couldn't fucking reach you, as soon as you spoke and told me where you were I tried calling you again and I couldn't fucking reach you.

At some point in this May 24 meeting, Espindola left the room to go speak with Mr. H. She informed Mr. H that Carroll wanted more money and Mr. H instructed her to give Carroll some money. After Carroll returned from Simone's, he gave the detectives $800.00, which Espindola had provided to him.[13] After Carroll's second wiretapped meeting, detectives took Little Lou and then Espindola into custody for the murder of Hadland.

ARGUMENT

I. Defendant Received Effective Assistance of Counsel

Claims of ineffective assistance of counsel are analyzed under the two-pronged test articulated in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984), wherein the defendant must show: 1) that counsel's performance was deficient, and 2) that the deficient performance prejudiced the defense. Id. at 687, 104 S. Ct. at 2064. "A court may consider the two test elements in any order and need not consider both prongs if the defendant makes an insufficient showing on either one." Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1997).

"Surmounting Strickland's high bar is never an easy task." Padilla v. Kentucky, 559 U.S. 356, 371, 130 S. Ct. 1473, 1485 (2010). The question is whether an attorney's representations amounted to incompetence under prevailing professional norms, "not whether it deviated from best practices or most common custom." Harrington v. Richter, 562 U.S. 86, 88, 131 S. Ct. 770, 778 (2011). Further, "[e]ffective counsel does not mean errorless counsel, but rather counsel whose assistance is '[w]ithin the range of competence demanded of attorneys in criminal cases.'" Jackson v. Warden, Nevada State Prison, 91 Nev. 430, 432, 537 P.2d 473, 474 (1975) (quoting McMann v. Richardson, 397 U.S. 759, 771, 90 S. Ct. 1441, 1449 (1970)).

The court begins with the presumption of effectiveness and then must determine whether the defendant has demonstrated by a preponderance of the evidence that counsel was ineffective. Means v. State, 120 Nev. 1001, 1011-1012, 103 P.3d 25, 32-33 (2004). The role

[13] If Carroll had these amounts of cash on him prior to detectives sending him out on the surveillance operations, Detective McGrath would have noticed because that amount of currency would have made Carroll's wallet much bigger. Espindola testified at trial that she thinks she gave Carroll $500.00 on the 24th.

of a court in considering alleged ineffective assistance of counsel is "not to pass upon the merits of the action not taken but to determine whether, under the particular facts and circumstances of the case, trial counsel failed to render reasonably effective assistance." Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978) (citing Cooper v. Fitzharris, 551 F.2d 1162, 1166 (9th Cir. 1977)).

In considering whether trial counsel was effective, the court must determine whether counsel made a "sufficient inquiry into the information . . . pertinent to his client's case." Doleman v State, 112 Nev. 843, 846, 921 P.2d 278, 280 (1996) (citing Strickland, 466 U.S. at 690–91, 104 S. Ct. at 2066). Then, the court will consider whether counsel made "a reasonable strategy decision on how to proceed with his client's case." Doleman, 112 Nev. at 846, 921 P.2d at 280 (citing Strickland, 466 U.S. at 690–91, 104 S. Ct. at 2066). Counsel's strategy decision is a "tactical" decision and will be "virtually unchallengeable absent extraordinary circumstances." Doleman, 112 Nev. at 846, 921 P.2d at 280.

This analysis does not indicate that the court should "second guess reasoned choices between trial tactics, nor does it mean that defense counsel, to protect himself against allegations of inadequacy, must make every conceivable motion no matter how remote the possibilities are of success." Donovan, 94 Nev. at 675, 584 P.2d at 711 (citing Cooper, 551 F.2d at 1166 (9th Cir. 1977)). In essence, the court must "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland, 466 U.S. at 690, 104 S. Ct. at 2066. However, counsel cannot be deemed ineffective for failing to make futile objections, file futile motions, or for failing to make futile arguments. Ennis v. State, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006).

In order to meet the second "prejudice" prong of the test, the defendant must show a reasonable probability that, but for counsel's errors, the result of the trial would have been different. McNelton v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694, 104 S. Ct. at 2068.

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Claims asserted in a petition for post-conviction relief must be supported with specific factual allegations, which if true, would entitle the petitioner to relief. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). "Bare" or "naked" allegations are not sufficient, nor are those belied and repelled by the record. Id.; see also NRS 34.735(6).

a. Counsel Was Not Encumbered With an Unwaived Actual Conflict of Interest

A defendant has a constitutional right under the Sixth Amendment to the effective assistance of counsel unhindered by conflicting interests. Holloway v. Arkansas, 435 U.S. 475, 98 S. Ct. 1173 (1978); Coleman v. State, 109 Nev. 1, 3, 846 P.2d 276, 277 (1993); Harvey v. State, 96 Nev. 850, 619 P.2d 1214 (1980). Where the trial court is unaware of the potential conflict of interest, to establish a claim of ineffective assistance of counsel based on a conflict of interest, a defendant must show that the conflict of interest adversely affected his attorney's performance. Mickens v. Taylor, 535 U.S. 162, 173, 122 S. Ct. 1237, 1244-45 (2002). "[U]ntil a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance." Cuyler v. Sullivan, 446 U.S. 335, 350, 100 S. Ct. 1708, 1719 (1980). An actual conflict of interest which adversely affects a lawyer's performance will result in a presumption of prejudice to the defendant. Id.; Mickens, 535 U.S. at 166, 122 S. Ct. at 1237. Mannon v. State, 98 Nev. 224, 226, 645 P.2d 433, 434 (1982).

The United States Supreme Court has defined an actual conflict under the Sixth Amendment as "a conflict of interest that adversely affects counsel's performance." Mickens, 535 U.S. at 172, 122 S. Ct. at 1244. Quoting the Second Circuit's definition of an actual conflict as defined in United States v. Levy, 25 F.3d 146, 155 (2d Cir. 1994), the Ninth Circuit Court of Appeals has stated:

> An attorney has an actual, as opposed to a potential, conflict of interest when, during the course of the representation, the attorney's and the defendant's interests diverge with respect to a material factual or legal issue or to a course of action.

United States v. Baker, 256 F.3d 855, 860 (9th Cir. 2001). Similarly, in Clark v. State, 108 Nev. 324, 326, 831 P.2d 1374, 1376 (1992), the Nevada Supreme Court defined an actual

conflict as one where the personal interests of the attorney are in clear conflict with that of the client, such as in dual representation situations or in instances when the attorney has a personal interest in the outcome of his client's case such that it adversely affects his representation. Id.

Conflicts relating to dual representation can be waived. "Under the Sixth Amendment, criminal defendants 'who can afford to retain counsel have a qualified right to obtain counsel of their choice.'" Ryan v. Eighth Judicial Dist. Ct., 123 Nev. 419, 426, 168 P.3d 703, 708 (2007) (quoting United States v. Ray, 731 F.2d 1361, 1365 (9th Cir. 1984)). However, this interest, in cases of dual representation, often conflicts with the right to conflict-free counsel. Id.

Despite this potential conflicts between the right to choose retained counsel and the right to conflict-free counsel, "[b]ecause there can be a benefit in a joint defense against common criminal charges, there is no per se rule against dual representation." Ryan v. Eighth Judicial Dist. Ct., 123 Nev. 419, 426, 168 P.3d 703, 708 (2007) (citing Holloway v. Arkansas, 435 U.S. 475, 482-83, 98 S. Ct. 1173 (1978)). And, on balance of the two conflicting interests, "there is a strong presumption in favor of a non-indigent criminal defendant's right to counsel of her own choosing . . . [and] [t]his presumption should rarely yield to the imposition of involuntary conflict-free representation." Id. at 428, 168 P.3d at 709. That being said, "when a defendant knowingly, intelligently, and voluntarily waives her right to conflict-free representation, she also waives her right to seek a mistrial arising out of such conflicted representation. Further, the waiver is binding on the defendant throughout trial, on appeal, and in habeas proceedings. Thus, the defendant cannot subsequently seek a mistrial arising out of the conflict that he waived and "cannot . . . be heard to complain that the conflict he waived resulted in ineffective assistance of counsel." Id. at 429, 168 P.3d at 710.

In Ryan, the Nevada Supreme Court directed district courts, in assessing joint representation cases, to conduct extensive canvasses to: 1) determine whether each of the defendants have made a knowing, intelligent, and voluntary waiver of their right to conflict-free representation; and 2) advise each defendant that a waiver of the right to conflict-free representation means that they cannot seek a mistrial or raise claims of ineffective assistance

of counsel based on any conflict caused by the dual representation. There is also a third requirement, imposed on defense counsel – attorneys must advise the defendants of their right to consult with independent counsel to advise them on the potential conflict of interest and the consequences of waiving the right to conflict-free representation, and must advise the clients to seek the advice of independent counsel before the attorney engages in the dual representation. Id. at 430, 168 P.3d at 710-11. If the clients choose not to seek the advice of independent counsel, the clients must expressly waive the right to do so before agreeing to any waiver of conflict-free representation. Id.

Before going into the specific arguments by Defendant in his Supplement relating to counsel's potential conflict, the State notes that, prior to Little Lou's representation by separate counsel, the Nevada Supreme Court determined that Gentile's pre-arrest representation of Defendant and his representation of Little Lou did not create a conflict of interest. Hidalgo v. Eighth Judicial Dist. Court, 124 Nev. 330, 333, 184 P.3d 369, 372 (2008) (attached as Exhibit 1) ("Based on the affidavits submitted by Hidalgo, his counsel, and Hidalgo's father, we perceive no current or potential conflict sufficient to warrant counsel's disqualification at this time."). Additionally, after this decision, this Court conducted an extensive evidentiary hearing on whether he knowingly and voluntarily waived any conflict resulting from joint representation and whether he was informed of the necessary requirements.

Defendant first provided background concerning his work experience and his relationship with Mr. Gentile. He testified that although he was born in El Salvador, he received schooling in the United States and reads and writes the English language. Recorder's Transcript Re: Hearing: Potential Conflict, February 13, 2013, at 83 (filed under seal). He had extensive experience in the justice system, and worked at a Sheriff's Office in Northern California. Id. at 81. He cited an experience in his twenties with law enforcement where he was initially arrested but the charges were ultimately dismissed. Id. at 85. He cited the specific section of the California Penal Code (Cal. Penal Code § 849(a)) under which his case was dismissed. Id. He met trial counsel through prior litigation, when he was representing an opposing party. Id. at 88. Initially, he retained Gentile to counsel him, considering the

potential that criminal charges would be filed against him. Id. at 92-93. Gentile then involved himself in Little Lou's case when Little Lou's case was before the Nevada Supreme Court during litigation of a writ of mandamus. Id. at 93. He asked Mr. Gentile to represent his son. Id. at 150. Defendant acknowledged he was waiving his rights to raise a claim relating to the dual representation and any impact it had on Defendant's defense. Id. at 152-53. He determined that it was in his best interest to waive the conflict and continue dual representation. Id. at 154.

Subsequently, Defendant testified that he spoke to two independent counsel concerning potential conflicts of interest – Michael Cristalli, Esq., and Amy Chelini, Esq. Id. at 102. He spoke to these attorneys after he learned Espindola would be testifying. Id. at 104. He was advised by these attorneys as to the fact he could not claim ineffective assistance based on any conflicts of interest. Id. at 105-06. He understood what the attorneys were telling him. Id. at 106.

Mr. Cristalli testified that he spoke with Defendant about the potential conflicts that would result from joint representation. Id. at 108-09. Cristalli was not compensated for his advice. Id. at 111. He focused on the issues raised in Ryan. Id. at 114. Ms. Chelini testified to the same effect. Id. at 116-18. She also noted that Defendant was "more than confident with Mr. Gentile and is more than happy to sign any waiver and understands the consequences of doing such." Id. at 117.

Thus, Defendant effectively waived any claim arising from Mr. Gentile's dual representation of him and his son.

Also, based on the discussion below, Mr. Gentile did not have a conflict of interest based on the grounds raised in the Supplement.

1. Counsel and Defendant's Fee Agreement, Involving the Purchase of Bermuda Sands LLC by Counsel, Was Not Improper

Defendant first claims that Mr. Gentile rendered ineffective assistance due to a conflict of interest relating to Defendant's agreement to sell his interest in Bermuda Sands LLC to Gentile in exchange for legal representation. Supplement at 31. The claim in essence is that

Gentile committed an ethical violation by allegedly violating Nevada Rule of Professional Conduct ("NRPC") 1.8(a) which states:

> A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:
> (1) The transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;
> (2) The client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and
> (3) The client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

Supplement at 30.

First, and most importantly, even *if* Defendant could show a violation under the Nevada Rules of Professional Conduct by Gentile, it is irrelevant to a claim of ineffective assistance due to an actual conflict of interest under the Sixth Amendment standard. Nix v. Whiteside, 475 U.S. 157, 165, 106 S. Ct. 988, 993 (1986) ("[B]reach of an ethical standard does not necessarily make out a denial of the Sixth Amendment guarantee of assistance of counsel"). Also, the professional obligations of the Nevada Rules of Professional Conduct, by their plain language, do not create an independent basis for relief in a criminal case. NRPC 1.0A provides guidance on interpreting the rules and specifically indicates that the rules are not meant to be used in litigation outside the context of a bar complaint:

> Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. In addition, violation of a Rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. Nevertheless, since the Rules do establish standards of

> conduct by lawyers, a lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct.

NRPC 1.0A(d). Instead, Defendant is required to show that any conflict of interest "adversely affect[ed] counsel's performance," Mickens, 535 U.S. at 172, 122 S. Ct. at 1244, and were in clear conflict with the Defendant's interests, Clark, 108 Nev. at 326, 831 P.2d at 1376. Defendant has failed to show that Mr. Gentile's representation was adversely affected by his business dealings with Defendant or that Gentile's interests were in *clear* conflict with Defendant's interests. He instead focuses only on whether Gentile's conduct violated NRPC 1.8(a).

Defendant does not even establish a violation of NRPC 1.8(a).[14] He claims that because Gentile entered into a purchase agreement with Defendant to transfer Defendant's interest in Bermuda Sands LLC, in exchange for $500,000, and because this agreement was done without a valuation of the asset prior to the transaction, there was a violation of the rule. Supplement at 31. He also points to sale of other LLCs to Mr. Gentile's son for $30,000, and use of Defendant as a consultant, as evidence that this ethical rule was violated. Id. However, at the evidentiary hearing concerning Gentile's joint representation of Defendant and Little Lou, Defendant testified that *he* had offered to enter a property transaction to pay the fee for legal representation of him, Little Lou and Espindola. Recorder's Transcript Re: Hearing: Potential Conflict, February 13, 2013, at 96-101. Defendant consulted independent counsel, Mark Nicoletti, who he had known previously and had used for business transactions. *Nicoletti* drafted the fee agreement. Id. The agreement was to transfer Defendant's interest in the LLCs controlling the club and owning the property, as well as the note on the property in exchange for Gentile's representation and the legal fees of Espindola and Little Lou. Id. This testimony clearly establishes that Defendant entered into this business transaction knowingly and

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[14] Also, if Defendant's counsel was actually concerned as to whether Mr. Gentile violated the NRPC, the State imagines she would have reported his conduct to the State Bar of Nevada. In fact, the rules *impose* a duty to report, as "[a] lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority." NRPC 8.3(a). It is *professional misconduct* to violate this rule and any other rule as contained in the NRPC. NRPC 8.4. One would think that if counsel indeed thought Mr. Gentile strong-armed Defendant into an unfair transaction, it would raise a substantial question as to his honesty and trustworthiness as an attorney. Yet, no evidence of a bar complaint has been shown.

voluntarily, with advice from independent counsel, and that he proposed the transaction himself in order to pay for legal fees. Defendant was a sophisticated businessman who conducted an arms-length transaction with Gentile in order to secure his representation. Both parties assumed risks but obtained benefits in the transaction – Defendant assumed the risk that he was paying less for the property than fair market value, in exchange for an open line of credit to fund his, Little Lou's and Espindola's defenses, while Gentile assumed the risk that the property would be unprofitable or that legal fees would exceed the value of the property. Accordingly, the testimony at the evidentiary hearing alone satisfies the rule and shows that the transaction was entirely fair.

Also, the terms of the agreement were fair. That the property was not subjected to a valuation is irrelevant. And Defendant's allegation that this transaction was unfair because the property was undervalued, is a bare, naked assertion that should be summarily rejected by this Court. Hargrove, 100 Nev. at 502-03, 686 P.2d at 225.

Defendant received another substantial benefit from the fee agreement, beyond that of legal representation. Notably, trial testimony established that pre-Hadland's murder, the Palomino was not in a good financial state and Defendant was having trouble meeting the $10,000.00 per *week* payment due to Dr. Simon Sturtzer (through Windrock LLC) from whom he purchased the club in early 2003. Recorder's Transcript of Proceedings: Jury Trial – Day 9, February 6, 2009, at 20-29, 80; Recorder's Transcript of Proceedings: Jury Trial – Day 10, February 9, 2009, at 5. As Defendant acknowledges, Gentile through an LLC acquired the note on which Defendant was obligated to pay and negotiated a new note to Windrock LLC with a much lower principal and monthly payment. Defendant's Appendix for Supplemental Petition for Writ of Habeas Corpus Under Seal ("Sealed App'x") at 8; Recorder's Transcript Re: Hearing: Potential Conflict, February 13, 2013, at 77. Accordingly, Defendant was relieved from an obligation to pay the exorbitant weekly payment due on the note, that he had trouble making even before the murder mired the Palomino Club in scandal. Defendant clearly received this benefit in addition to the benefit of legal representation through his fee agreement with Gentile. The additional agreements between Gentile, Gentile's son, and Defendant do

not contradict this, and just show that Defendant found creative ways to satisfy his debts for legal services provided by Gentile.[15]

Additionally, once again, Defendant fails to show that any unfairness within the business deal created an *actual* conflict under the Sixth Amendment, as he cannot show that this transaction affected counsel's representation in the instant criminal matter. Mickens, 535 U.S. at 172, 122 S. Ct. at 1244; Clark, 108 Nev. at 326, 831 P.2d at 1376. All claims of a violation of NRPC 1.8(a) and the Sixth Amendment right to counsel are bare allegations that are undeserving of relief or an evidentiary hearing. Accordingly, they should be denied by this Court.

2. Counsel's Alleged Failure to Fully Fund Little Lou's and Espindola's Defenses Fails to Show a Conflict of Interest or Ineffective Assistance

Defendant next claims that Gentile's "apparent failure" to fully fund Little Lou's and Espindola's defenses prejudiced him, because "Espindola's belief that Mr. Gentile was not paying for her defense led to her decision to testify against [Defendant] and his son." Supplement at 32.

Defendant provides no authority for the proposition that Gentile was required under the Sixth Amendment of the United States Constitution to monetarily placate Defendant's co-conspirators so as to induce them not to testify. This failure should be fatal, and should be construed as an admission that he was not, and is not, entitled to an evidentiary hearing on this issue. District Court Rule 13(2); Eighth Judicial District Court Rule 3.20(b); Polk v. State, 126 Nev. ___, ___, 233 P.3d 357, 360-61 (2010). Further, this Court need not address arguments that are not supported with precedent. Edwards v. Emperor's Garden Rest., 122 Nev. 317, 330, n.38, 130 P. 3d 1280, n.38 (2006) (court need not consider claims unsupported by relevant authority); State, Dept. of Motor Vehicles and Public Safety v. Rowland, 107 Nev. 475, 479, 814 P.2d 80, 83 (1991) (unsupported arguments are summarily rejected on appeal); Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) ("It is appellant's responsibility to

[15] One would think that had Defendant considered the bargain between him and Gentile unconscionable, he would seek relief under contract law for recission or reformation of the agreement, or otherwise seek excusal of his performance under the agreement on this ground. Yet, a review of Odyssey reveals no such contract action.

present relevant authority and cogent argument; issues not so presented need not be addressed by this court."); Randall v. Salvation Army, 100 Nev. 466, 470-71, 686 P.2d 241, 244 (1984) (court may decline consideration of issues lacking citation to relevant legal authority); Holland Livestock v. B & C Enterprises, 92 Nev. 473, 533 P.2d 950 (1976) (failure to offer citation to relevant legal precedent justifies affirmation of the judgment below).

Nonetheless, the claim is meritless. First, it is belied by the record. Hargrove, 100 Nev. at 502-03, 686 P.2d at 225. During the evidentiary hearing on the issue of dual representation, Mr. Gentile, as an officer of the court, stated that Espindola was distraught by the loss of JoNell Thomas to the defense team. While Oram represented that Espindola wanted certain investigation done, Gentile recommended that they not yet spend funds on penalty-phase investigation, considering that the Nevada Supreme Court had not yet ruled on the mandamus issue concerning the alleged aggravating circumstances. Recorder's Transcript Re: Hearing: Potential Conflict, February 13, 2013, at 76. He also represented that Oram was paid $60,000 for his work. Id. Gentile disbursed money, when it became available, to the other attorneys, not to himself. Id. at 77. These representations belie the claim that Espindola's defense was underfunded.

Second, Defendant unreasonably assumes that the Joint Defense Agreement and funding of the defenses of his co-defendants meant that they could never testify against him. This expectation cannot be supported by the Joint Defense Agreement, as it informed Defendant, through his independent counsel at the time (Gentile), of the consequences of a joint defense. Gentile had authority to execute this agreement from Defendant. Sealed App'x at 35.

The Joint Defense Agreement informed Defendant that any member of the Joint Defense Agreement could become a witness in the criminal case. Id. It also informed Defendant that any member could withdraw from the agreement. Sealed App'x at 36. Finally, it explicitly informed Defendant that each client had independent counsel and each counsel had a duty to represent his or her client zealously, even if this meant advising the client to cooperate with the State. Sealed App'x at 37.

Finally, Mr. Oram's testimony during the evidentiary hearing on the issue of dual representation does not establish that Espindola turned on Defendant due to any failure to fund her defense. Instead, Espindola was concerned about the independence of Oram and the fact that Defendant held the power of the purse. Recorder's Transcript Re: Hearing: Potential Conflict, February 13, 2013, at 44-45. She also was dissatisfied when Jonell Thomas left the case and believed that it was for a lack of financing (however, Ms. Thomas in fact left the case after taking a position with the Clark County Special Public Defender). Id. at 45-46. This testimony indicates that Defendant's *control* of the financing of her defense, rather than the funding itself, was what she was concerned about. She wanted independent counsel, not a puppet who acceded to the demands of Gentile and Defendant. She wanted assurances that her attorney was acting in her best interest rather than Defendant's or Little Lou's.

Oram had an ethical obligation to act in Espindola's best interest and abide by her wishes concerning the ultimate resolution of the matter, whether it be to take a negotiation offered by the State or proceed to trial. See NRPC 1.2(a) ("[A] lawyer *shall* abide by a client's decision concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. . . . In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.") (emphasis added); NRPC 1.8(f)(2) (attorney receiving compensation for representation by a third-party must exercise independence of professional judgment and not allow interference with the attorney-client relationship). Oram would have an *actual* conflict under the Sixth Amendment were he to set aside Espindola's best interest and accede to Defendant's desire to use Espindola for Defendant's defense.

Oram represented Espindola's best interest by securing her an extremely beneficial negotiation with the State. The State allowed her to plead guilty to Voluntary Manslaughter With Use of a Deadly Weapon (Category B Felony – NRS 200.040, 200.050, 200.080), and agreed to make no recommendation at sentencing in exchange for her testimony against Defendant and Little Lou. See Guilty Plea Agreement, Case No. 05C212667-3, filed February

4, 2008, at 1. Prior to this agreement, Espindola was facing the potential of a Life sentence as she was charged with Murder With Use of a Deadly Weapon. Information, Case Number 05C212667-3, filed June 20, 2005, at 2-3. Instead of a Life sentence, Espindola was sentenced to 24 to 72 months in the NDC, plus an equal and consecutive term of 24 to 72 months for use of a deadly weapon. Judgment of Conviction, Case Number 05C212667-3, filed February 17, 2011. With the 1,379 days credit for time served granted to her, she was very close to parole eligibility even with the consecutive sentences. Id. She received an enormous benefit from the negotiation with the State and received superb representation from Oram. Accordingly, Defendant cannot show a causal connection between the alleged failure to fund Espindola's defense and the deficiency and prejudice prongs as required by Strickland – Espindola and Oram acted in Espindola's best interest, rather than Defendant's, in securing the negotiation, and the negotiation was not fueled by vindictiveness or resentment toward Defendant. This claim should be denied.

In addition, Defendant provides nothing but a naked assertion in relation to the funding of Little Lou's defense. Defendant fails to show that the defense was underfunded, and fails to show how any failure to fund his son's defense prejudiced him, especially considering that father and son proceeded to trial together. Pursuant to Hargrove, this claim should be denied. Hargrove, 100 Nev. at 502-03, 686 P.2d at 225.

3. Espindola's Alleged Participation in the Joint Defense Agreement and Her Subsequent Decision to Turn State's Evidence Did Not Create an Irreconcilable Conflict of Interest

Defendant also claims that the Joint Defense Agreement and Espindola's ultimate decision to testify against Defendant and Little Lou created an irreconcilable conflict of interest. Supplement at 32-33. This claim has no merit.

First, Defendant provides only mere speculation in his claim that "Espindola's counsel undoubtedly participated in joint defense meetings, during which Mr. Gentile could have gleaned information which prevented him from effectively cross-examining Espindola when she testifies as a State's witness" and "[i]t is possible that Mr. Gentile had learned information during the joint defense meetings which would have provided fertile ground for

impeachment." Supplement at 34. While Defendant points to specific meetings between he, Oram, Espindola, and Gentile, he does not establish that the subject matter of these meetings constituted fodder for cross-examination. In fact, the substance of these meetings appear to be the funding requests outlined above and instruction for Espindola not to speak with DeAngelo Carrol, which would not be important for cross-examination.

Second, Defendant waived any conflict of interest that could be asserted in the event a co-defendant testified. Even after the Ninth Circuit decided United States v. Henke, 222 F.3d 633, 637 (9th Cir. 2000), courts bound by its precedent have found that conflicts of interest arising from an agreement may be waived. In United States v. Stepney, 246 F. Supp. 2d 1069, 1085 (N.D. Cal. 2003), the United States District Court for the Northern District of California found appropriate the following waiver provision, taken from the American Law Institute-American Bar Association model joint defense agreement:

> Nothing contained herein shall be deemed to create an attorney-client relationship between any attorney and anyone other than the client of that attorney and the fact that any attorney has entered this Agreement shall not be used as a basis for seeking to disqualify any counsel from representing any other party in this or any other proceeding; and no attorney who has entered into this Agreement shall be disqualified from examining or cross-examining any client who testifies at any proceeding, whether under a grant of immunity or otherwise, because of such attorney's participation in this Agreement; and the signatories and their clients further agree that a signatory attorney examining or cross-examining any client who testifies at any proceeding, whether under a grant of immunity or otherwise, may use any Defense Material or other information contributed by such client during the joint defense; and it is herein represented that each undersigned counsel to this Agreement has specifically advised his or her respective client of this clause and that such client has agreed to its provisions.

The court specifically noted the advantages of this sort of provision:

> Under this regime, all defendants have waived any duty of confidentiality for purposes of cross-examining testifying defendants, and generally an attorney can cross-examine using any and all materials, free from any conflicts of interest. This form of waiver also places the loss of the benefits of the joint defense agreement only on the defendant who makes the choice to testify. Defendants who testify for the government under a grant of immunity lose nothing by this waiver. Those that testify on their own behalf have already made the decision to waive their Fifth

> Amendment right against self-incrimination and to admit evidence through their cross-examination that would otherwise be inadmissible.
>
> The conditional waiver of confidentiality also provides notice to defendants that their confidences may be used in cross-examination, so that each defendant can choose with suitable caution what to reveal to the joint defense group. Although a limitation on confidentiality between a defendant and his own attorney would pose a severe threat to the true attorney-client relationship, making each defendant somewhat more guarded about the disclosures he makes to the joint defense effort does not significantly intrude on the function of joint defense agreements.

Id. at 1085-86; see also United States v. Almeida, 341 F.3d 1318, 1326 (11th Cir. 2003) ("We hold that when each party to a joint defense agreement is represented by his own attorney, and when communications by one co-defendant are made to the attorneys of other co-defendants, such communications do not get the benefit of the attorney-client privilege in the event that the co-defendant decides to testify on behalf of the government in exchange for a reduced sentence."); United States v. Reeves, 2011 U.S. Dist. LEXIS 139127, *42 (D.N.J. Dec. 2, 2011) (accepting a waiver of conflict of interests in a joint defense agreement).[16]

Here, while not a verbatim form of the ALI-ABA waiver, the Joint Defense Waiver provided for a waiver to the same effect. Defendant and his co-defendants agreed in the Joint Defense Agreement that, in the event that one of them became a witness for the State, that would *not* create a conflict of interest so as to require disqualification. Sealed App'x at 35. The Joint Defense Agreement also acknowledged that each client was informed that if a member defected, his or her counsel could be in possession of information previously shared, including confidences. Id. Also, the Agreement specified that nothing in it was intended to create an attorney-client relationship and information obtained pursuant to the Agreement could not be used to disqualify a member of the joint defense group. Id. Defendant then knowingly and intelligently waived *any* conflict of interest that might otherwise be available based upon the sharing of information pursuant to the Agreement. He was advised of the risks but determined that the benefits of the Agreement outweighed the risks. Id. Thus, this

[16] Citation to Reeves is permissible pursuant to Rule 32.1(a) of the Federal Rules of Appellate Procedure, which prohibits a court from restricting citation to "federal judicial opinions, orders, judgments, or other written dispositions that have been ... issued on or after January 1, 2007." Accord Gibbs v. United States, 865 F. Supp. 2d 1127, 1133 n.3 (M.D. Fla. 2012), aff'd, 517 Fed. App'x. 664 (2013) (although an unpublished opinion is not binding, it is persuasive authority).

agreement constituted a knowing and voluntary waiver of any claim of a conflict of interest based on Espindola's previous membership within the joint defense group. Defendant cannot now claim that there was an irreconcilable conflict of interest, because his informed choice to enter the Joint Defense Agreement extinguished any claim of such.

While Henke is merely persuasive, see Blanton v. North Las Vegas Mun. Ct., 103 Nev. 623, 633, 748 P.2d 494, 500 (1987) (decisions of federal courts not binding), and Nevada courts have not determined whether a Joint Defense Agreement can create an attorney-client relationship between a lawyer and another member of the joint defense agreement, the case is nonetheless distinguishable. Notably, a limited attorney-client relationship was *implied* from the joint defense agreement in Henke. Here, however, the plain language of the joint defense agreement provided that *no such relationship was created* from the joint defense group. "[A]bsent some countervailing reason, contracts will be construed from the written language and enforced as written." Ellison v. California State Auto. Ass'n, 106 Nev. 601, 603, 797 P.2d 975, 977 (1990). There is no reason the law should imply an attorney-client relationship when Defendant has explicitly agreed that no such relationship existed.

Further, in Henke, the parties asserted confidentiality and threatened legal action if confidences were not protected. Henke, 222 F.3d at 638. In contrast, here the Joint Defense Agreement waived all conflicts of interest and acknowledged that information obtained during joint defense meetings could be in the hands of a defecting member should he or she choose to testify.

Finally, the court in Henke relied on the fact that the confidential information *had* in fact been exchanged, and distinguished cases where joint defense meetings would not create a conflict of interest:

> There may be cases in which defense counsel's possession of information about a former co-defendant/government witness learned through joint defense meetings will not impair defense counsel's ability to represent the defendant or breach the duty of confidentiality to the former co-defendant. Here, however, counsel told the district court that this was not a situation where they could avoid reliance on the privileged information and still fully uphold their ethical duty to represent their clients.

Henke, 222 F.3d at 638. Here, as stated above, Defendant has not shown that his counsel obtained confidential information from the joint defense meetings. Thus, he cannot establish a conflict of interest, even under Henke, that would have disqualified Gentile from representing him.

Finally, Defendant again fails to satisfy the Sixth Amendment test for determining an actual, rather than a potential, conflict of interest, as he fails to show that counsel's performance was hindered. Clark, 108 Nev. at 326, 831 P.2d at 1376. Instead, Mr. Gentile vigorously cross-examined Espindola. He questioned Espindola's motives to testify, including the possibility of the death penalty, her mother's illness, and Defendant's infidelity. Recorder's Transcript of Proceedings: Jury Trial – Day 10, February 9, 2009, at 102-20, 146-47. Further, he specifically asked her about joint defense meetings and meetings that lead to the joint defense. He questioned Espindola about a meeting where Gentile and Oram were present and where Espindola listened to the Carroll recordings. Id. at 81. He questioned Espindola about the meeting with his partner, Jerry DePalma, Esq., and questioned her veracity when she claimed that she said nothing of substance to DePalma that day. Id. at 85-87. He also cross-examined her about another meeting between him and her, along with Defendant and Oram, directly citing the Joint Defense Agreement. Id. at 135-36. Gentile was in no way hindered in his cross-examination by the Joint Defense Agreement, and Defendant has failed to meet his burden of showing an actual conflict of interest. Accordingly, this claim should be denied.

b. Counsel Made a Reasonable Strategic Decision in Conceding the State's Motion to Consolidate Defendant's and Little Lou's Cases

Defendant next complains that his counsel rendered ineffective assistance because he conceded the State's Motion to Consolidate and withdrew his Opposition. Supplement at 35. Notably, the Nevada Supreme Court recently rejected Little Lou's claim regarding his counsel's conceding the consolidation motion in his appeal from the denial of his habeas petition. See Hidalgo, III (Luis) v. State, No. 67640 (Order of Affirmance, filed May 11, 2016, at 3-4) (attached as State's Exhibit B). While Little Lou's claim was raised on different

grounds, concerning the exclusion of evidence he claims would have been admitted were the cases not tried together, this recent denial is persuasive. Id.

However, Defendant acknowledges that this decision was made in exchange for the State's withdrawal of its Notice of Intent to Seek the Death Penalty. Id.; Recorder's Transcript of Hearing Re: Motions, January 16, 2009, at 1. This bargain was clearly a reasonable strategy decision that must be respected by this Court. After lengthy efforts to attempt to remove execution as a possible punishment, including the writ proceedings before the Nevada Supreme Court, Gentile's conceding the Motion to Consolidate won the war by taking death off the table and sparing Defendant the ultimate punishment. While Defendant now states that "[t]he limited impact of the removal of the death penalty is evident in the jury's conviction of both Hidalgos for Second Degree Murder, rather than First Degree Murder," he speaks with the benefit of hindsight – at the time, the threat of the death penalty was real, and efforts to strike all statutory aggravators had fallen short. Notably, the Strickland standard does not ask counsel to act with clairvoyance – it asks counsel to act reasonable at the time the decision in question is being made. At the time the Motion to Consolidate was before this Court, the death penalty remained a possibility, and counsel's decision was well-reasoned.

In addition, the decision was a sound one, considering that the Motion to Consolidate would likely succeed.[17] In order to promote efficiency and equitable outcomes, Nevada law favors trying multiple defendants together. Jones v. State, 111 Nev. 848, 853, 899 P.2d 544, 547 (1995). As a general rule, defendants who are indicted together shall be tried together, absent a compelling reason to the contrary. Rowland v. State, 118 Nev. 31, 44, 39 P.3d 114, 122 (2002). "A district court should grant a severance only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." Chartier v. State, 124 Nev. 760, 765, 191 P.3d 1182, 1185 (2008) (quoting Marshall v. State, 118 Nev. 642, 646, 56 P.3d 376, 378 (2002)); see also NRS 174.165.

[17] Defendant appears to complain of efforts to move this case to the same department as Little Lou's case. Supplement at 35. This decision was reasonable in light of Defendant's initial desire to have the same attorney as Little Lou. In addition, Defendant cannot show any prejudice, as the State could have sought consolidation even absent the case being sent to the same department.

Generally speaking, severance is proper only in two instances. The first is where the co-defendants' theories of defense are so antagonistic that they are "'mutually exclusive" such that "'the core of the co-defendant's defense is so irreconcilable with the core of the defendant's own defense that the acceptance of the co-defendant's theory by the jury precludes acquittal of the defendant." Chartier, 124 Nev. at 765, 191 P.3d at 1185 (quoting Rowland, 118 Nev. at 45, 39 P.3d at 122-23) (alteration omitted). The second instance is "where a failure to sever hinders a defendant's ability to prove his theory of the case." Id. at 767, 191 P.3d at 1187.

Even when one of the above situations are presented, a defendant must also show that there is "a serious risk that a joint trial would compromise a specific trial right . . . or prevent the jury from making a reliable judgment about guilt or innocence." Marshall, 118 Nev. at 647, 56 P.3d at 379 (quoting Zafiro v. United States, 506 U.S. 534, 539, 113 S. Ct. 933, 938 (1993)). To show prejudice from an improper joinder "requires more than simply showing that severance made acquittal more likely; misjoinder requires reversal only if it has a substantial and injurious effect on the verdict." Chartier, 124 Nev. at 764-65, 191 P.3d at 1185 (quoting Marshall, 118 Nev. at 647, 56 P.3d at 379). Further, "some level of prejudice exists in a joint trial, error in refusing to sever joint trials is subject to harmless-error review." Id.

Defendant claims that he suffered spill-over prejudice due to his being tried along with Little Lou. Supplement at 36. However, there was no such effect. While he claims that "more" evidence implicated Little Lou than him, Carroll's conversations with Espindola and Espindola's testimony implicate Defendant and would have been entirely admissible at a trial where he was the sole defendant. Espindola's testimony served as the connection between Little Lou's actions and Defendant's orders, as she established that Defendant had ordered Carroll to switch to "Plan B." Recorder's Transcript of Proceedings: Jury Trial – Day 9, February 6, 2009, at 70. While Defendant tries to undercut Espindola's testimony as "circumstantial at best," this testimony was damning, specific, and showed that Defendant was part of the conspiracy to cause harm to Hadland. There was no spill-over prejudice that would

warrant severance, and Defendant was proven equally culpable within the conspiracy so as to make any lack of severance benign.

In addition, while Defendant claims that his defense was antagonistic to his son's, they were not. Supplement at 38. Both defendant's closing arguments focused on claiming that neither joined the conspiracy or aided and abetted Carroll in killing Hadland. Recorder's Transcript of Proceedings: Jury Trial – Day 13, February 12, 2009, at 145-79, 180-24. At no point in the argument did Little Lou's counsel claim that Defendant had joined the conspiracy and Little Lou had not.

Defendant again focuses on the evidence implicating Little Lou, but this evidence equally implicated Defendant, along with Espindola's testimony, and would have been admissible were Defendant tried alone. Also, Defendant's complaints about the father-son relationship resulting in guilt by association are mere speculation and would have been insufficient to show antagonistic defenses or spill-over warranting severance. Finally, Defendant's claim that Little Lou's defense team "would essentially be tasked with defending [Defendant] at the expense of their client's child," clearly cannot establish prejudice to *Defendant*, considering that he would be the beneficiary of such divided attention. Supplement at 38.

Therefore, it is clear that severance would have been unwarranted and counsel's efforts to prevent it would have been futile. Ennis, 122 Nev. at 706, 137 P.3d at 1103. Instead of losing the Motion to Consolidate outright, counsel instead secured Defendant a windfall by conceding the Motion and removing death as a sentencing option. These tactics were entirely reasonable in light of the threat of execution, and should be respected by this Court. This claim should be denied.

c. Defendant Received Effective Assistance of Appellate Counsel

Defendant also alleges counsel was ineffective while the case was in appellate posture. Supplement at 39-41. However, appellate counsel is not required to raise every issue that Defendant felt was pertinent to the case. The United States Supreme Court has held that there is a constitutional right to effective assistance of counsel in a direct appeal from a judgment of

conviction. Evitts v. Lucey, 469 U.S. 387, 396-97, 105 S. Ct. 830, 835-37 (1985); see also Burke v. State, 110 Nev. 1366, 1368, 887 P.2d 267, 268 (1994). The federal courts have held that in order to claim ineffective assistance of appellate counsel, the defendant must satisfy the two-prong test of deficient performance and prejudice set forth by Strickland. Williams v. Collins, 16 F.3d 626, 635 (5th Cir. 1994); Hollenback v. United States, 987 F.2d 1272, 1275 (7th Cir. 1993); Heath v. Jones, 941 F.2d 1126, 1130 (11th Cir. 1991).

There is a strong presumption that counsel's performance was reasonable and fell within "the wide range of reasonable professional assistance." See United States v. Aguirre, 912 F.2d 555, 560 (2nd Cir. 1990). All appeals must be "pursued in a manner meeting high standards of diligence, professionalism and competence." Burke, 110 Nev. at 1368, 887 P.2d at 268. Finally, in order to prove that appellate counsel's alleged error was prejudicial, a defendant must show that the omitted issue would have had a reasonable probability of success on appeal. Duhamel v. Collins, 955 F.2d 962, 967 (5th Cir. 1992); Heath, 941 F.2d at 1132; Lara v. State, 120 Nev. 177, 184, 87 P.3d 528, 532 (2004); Kirksey, 112 Nev. at 498, 923 P.2d at 1114.

The defendant has the ultimate authority to make fundamental decisions regarding his case. Jones v. Barnes, 463 U.S. 745, 751, 103 S. Ct. 3308, 3312 (1983). However, the defendant does not have a constitutional right to "compel appointed counsel to press nonfrivolous points requested by the client, if counsel, as a matter of professional judgment, decides not to present those points." Id. In reaching this conclusion the United States Supreme Court has recognized the "importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." Id. at 751-752, 103 S. Ct. at 3313. In particular, a "brief that raises every colorable issue runs the risk of burying good arguments . . . in a verbal mound made up of strong and weak contentions." Id. at 753, 103 S. Ct. at 3313. The Court also held that, "for judges to second-guess reasonable professional judgments and impose on appointed counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy." Id. at 754, 103 S. Ct. at 3314. The Nevada Supreme Court has similarly concluded that

appellate counsel may well be more effective by not raising every conceivable issue on appeal. Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

1. Counsel Was Not Ineffective For Any Failure to Raise the Severance Issue on Appeal

Defendant complains that, after counsel conceded the Motion to Consolidate in order to take death off the table, counsel did not raise the issue on appeal. Supplement at 39. As discussed above, the decision to concede the Motion to Consolidate was a reasonable strategy in light of the State's agreement to withdraw its Notice of Intent to Seek the Death Penalty and the lack of merit to any opposition to the Motion to Consolidate. Additionally, there was no ineffective assistance of appellate counsel because, in light of counsel's agreement to withdraw opposition to the Motion to Consolidate, the doctrine of invited error precluded raising this issue on appeal. LaChance v. State, 130 Nev. ___, ___, 321 P.3d 919, 928 (2014); Pearson v. Pearson, 110 Nev. 293, 297, 871 P.2d 343, 345 (1994). Further, this issue would have been considered waived on appeal since it was not litigated in the trial court. Dermody v. City of Reno, 113 Nev. 207, 210-11, 931 P.2d 1354, 1357 (1997); Guy v. State, 108 Nev. 770, 780 839 P.2d 578, 584 (1992), cert. denied, 507 U.S. 1009, 113 S. Ct. 1656 (1993); Davis v. State, 107 Nev. 600, 606, 817 P.2d 1169, 1173 (1991). *Nor will the Nevada Supreme Court consider an issue that is initially raised before the lower court but then abandoned.* Buck v. Greyhound Lines, Inc., 105 Nev. 756, 766, 783 P.2d 437, 443 (1989). Considering this, counsel's failure to raise this issue on direct appeal did not constitute deficient performance nor cause Defendant prejudice. This is especially true in light of the lack of any prejudice suffered due to the consolidation, as discussed *supra* and incorporated here. Accordingly, this claim must be denied.

2. Counsel Was Not Ineffective For Not Raising Claims of Error Relating to the "Hearsay" During Zone's Testimony

Defendant next contends that counsel should have raised as a claim of error the Court's overruling the objection to Zone's testimony concerning Carroll's statement to him while in presence of the police. Supplement at 40-42. The statement was, "if you don't tell the truth,

we're going to jail." Recorder's Transcript of Proceedings: Jury Trial – Day 6, February 3, 2009, at 137. Defendant also notes that Detective McGrath testified to the same statement, that Carroll told Zone, "tell them the truth, tell them the truth. I told them the truth." Recorder's Transcript of Proceedings: Jury Trial – Day 7, February 4, 2009, at 180-81.

Hearsay is defined as an out-of-court statement "offered in evidence to prove the truth of the matter asserted." NRS 51.035. Here, Defendant claims the statement was "clearly to establish the credibility of Zone's own testimony." Supplement at 41. That is not the test – the test is whether the statement is offered in evidence to prove the truth of the matter asserted. NRS 51.035. The truth of the matter of Carroll's statement, as testified to by Zone, is that if Zone did not tell the truth, Zone and Carroll would go to jail. That was not relevant to the State's case, nor was it relevant to the jury's determination of the Defendant's guilt. Instead, as revealed during cross-examination by Little Lou's counsel, the statement was shown relevant for its effect on the listener (Zone), because Zone interpreted the statement to mean Zone should fabricate a story that tended to exculpate Carroll, himself, and Taoipu. Recorder's Transcript of Proceedings: Jury Trial – Day 7, February 4, 2009, at 97-99. It was *not* introduced to show that Zone's testimony was truthful, as Defendant states, but rather to explain why Zone was hesitant to tell the truth at first. Id. at 97. Because the statement was not introduced for the truth of the matter asserted, it was non-hearsay and entirely admissible.

The second statement, as testified to by McGrath, comprises of two commands ("tell them the truth") and one declarative statement ("I told them the truth"). The commands are in the imperative form, and of necessity *assert nothing*. They do not operate to state a fact, but rather encourage the listener to do something. Thus, the statements were non-hearsay and were clearly introduced for their effect on Zone. While the final statement is in declarative form, and asserts that Carroll told the truth, it was not relevant for that purpose – again, it was relevant to the effect on the listener (Zone) and that it encouraged him to withhold the true story at first. Therefore, none of these statements constituted hearsay.

Even if they did constitute hearsay, their admission was harmless, especially in light of Espindola's testimony which established that Carroll was acting pursuant to Defendant's

directions when he killed Hadland. Knipes v. State, 124 Nev. 927, 935, 192 P.3d 1178, 1183 (2008) (to warrant reversal, evidentiary error must have substantial and injurious effect or influence on the jury's verdict). Because any error would not have warranted reversal, briefing the issue would have been futile and expended space which could be used for issues with a greater likelihood of success. Therefore, Defendant cannot show deficient performance or prejudice and this claim must be denied.

d. Defendant's Pro Per Claims Must Be Denied

Within his initial Petition, Defendant made eight claims for relief. Each are insufficient to warrant relief and must be denied.

First, Defendant claims that counsel was ineffective for failing to request a verdict form that separated the two alternate theories relating to the Conspiracy charge: "Conspiracy to Commit Battery with Substantial Bodily Harm" and "Conspiracy to Commit Battery with a Deadly Weapon," rather than "Conspiracy to Commit Battery with a Deadly Weapon or With Substantial Bodily Harm." Memorandum at 5-6. The jury was fully instructed as to the status of this charge as a lesser-included offense, was instructed that it had to find Defendant guilty beyond a reasonable doubt to convict him of this crime, and this minor difference in the verdict form would not have made a difference in the trial. Instructions to the Jury: Instructions Nos. 15, 22-24, filed February 17, 2009. As such, Defendant cannot show deficient performance or prejudice in relation to this claim.

Second, Defendant claims that counsel was ineffective in conflating "context" with "adoptive admission" in relation to Carroll's statements, and that his statements were erroneously admitted. Memorandum at 6-7. While he cites the Nevada Supreme Court's acknowledgement of this conflation, it was in regard to a jury instruction given by the Court, and the discussion did not concern the admissibility of the statements. Hidalgo, Jr. (Luis) v. State, No. 54209 (Order of Affirmance, filed June 21, 2012, at 3 n.4). As the Nevada Supreme Court determined that the statements were admissible (see *infra*), this conflation did not result in the admission of Carroll's statements, and Defendant cannot show deficient performance or prejudice.

Third, Defendant claims that he was not identified at trial, there was confusion between him and Little Lou, and his conviction must be reversed because the State failed to meet its burden. This claim is not appropriate for post-conviction review and was appropriate for direct appeal. See NRS 34.810(1)(b)(2) (providing that a post-conviction petition must be dismissed if "the grounds for the petition could have been raised in a direct appeal"); NRS 34.724(2) (stating that a post-conviction petition is not a substitute for the remedy of a direct review); Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994) ("[C]laims of ineffective assistance of trial and appellate counsel must first be pursued in post-conviction proceeding. . . . [A]ll other claims that are appropriate for a direct appeal must be pursued on direct appeal, or they will be *considered waived in subsequent proceedings*.") (emphasis added). In any event, Espindola had a long-term sexual relationship with Defendant, clearly knew who he was, and implicated him in the plot to kill Hadland. This claim must be denied.

Fourth, Defendant complains of his counsel's concession of the severance issue. The State incorporates its response *supra*.

Fifth, Defendant complains about Espindola's testimony and the use of conversations between him and her against him. These claims are considered waived in the instant proceedings for failure to raise them on direct appeal, and are generally not legal arguments but rather complaints that Espindola turned on him and her motives for testifying. This claim relates to the sole province of the jury – credibility – and must be denied. To the extent Defendant complains that counsel failed to impeach Espindola with evidence of a jailhouse romance between her and another woman, the decision on how to cross-examine a witness is one of strategy, and best left to counsel. Rhyne v. State, 118 Nev. 1, 8, 38 P.3d 163, 167 (2002) ("[T]he trial lawyer alone is entrusted with decisions regarding legal tactics such as deciding what witnesses to call."). The record reveals that Mr. Gentile vigorously cross-examined Espindola and Defendant cannot show deficient performance or prejudice.

Sixth, Defendant repeats his direct appeal complaint that his Confrontation Clause rights were violated by use of Carroll's statements during his trial. The Nevada Supreme Court rejected this claim:

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 Carroll's statements being introduced into evidence. 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. 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)).

In Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (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, 46 V.I. 704 (3d Cir. 2005) ("[I]f a Defendant [6] 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.

Hidalgo, Jr. (Luis) v. State, No. 54209 (Order of Affirmance, filed June 21, 2012, at 2-5). Where an issue has already been decided on the merits by the Nevada Supreme Court, the Court's ruling is law of the case, and the issue will not be revisited. Pellegrini v. State, 117 Nev. 860, 884, 34 P.3d 519, 535 (2001); see McNelton v. State, 115 Nev. 396, 990 P.2d 1263, 1276 (1999); Hall v. State, 91 Nev. 314, 315-16, 535 P.2d 797, 798-99 (1975); see also Valerio v. State, 112 Nev. 383, 386, 915 P.2d 874, 876 (1996); Hogan v. Warden, 109 Nev. 952, 860 P.2d 710 (1993). A Defendant cannot avoid the doctrine of law of the case by a more detailed and precisely focused argument. Hall, 91 Nev. at 316, 535 P.2d at 798-99; see also Pertgen v. State, 110 Nev. 557, 557-58, 875 P.2d 316, 362 (1994). Therefore, consideration of this ground is partially barred by the doctrine of law of the case.

Seventh, Defendant claims that trial counsel was ineffective for failing to request a jury instruction that prohibited finding the use of a deadly weapon if the jury found him guilty of murder under a conspiracy liability theory. The Nevada Supreme Court recently rejected the same claim in Little Lou's appeal from the denial of his habeas petition. State's Exhibit B at 2-3 ("Because the deadly weapon enhancement was not applied to the conspiracy conviction, appellant failed to demonstrate that counsel was ineffective.").

Defendant conflates the crime of conspiracy, with the commission of a crime pursuant to a theory of liability of conspiracy. Given that the instruction he asserts trial counsel should have requested would have been an inaccurate statement of law, it would have been rejected.

"It is not error for a court to refuse an instruction when the law in that instruction is adequately covered by another instruction given to the jury." Rose v. State, 123 Nev. 194, 205, 163 P.3d 408, 415 (2007) (quoting Doleman v. State, 107 Nev. 409, 416, 812 P.2d 1287, 1291 (1991)). Further, district courts are not required to give misleading, inaccurate, or duplicitous instructions, and defendants are not entitled to dictate the specific wording of the

instructions. Crawford v. State, 121 Nev. 746, 754, 121 P.3d 582, 589 (2005). A jury may not be given instructions which are a misstatement of law. Id. at 757, 121 P.3d at 591; see also Barron v. State, 105 Nev. 767, 773, 783 P.2d 444, 448 (1989) (while a defendant has a right to a jury instruction on his theory of the case, the instruction "must correctly state the law").

Here, Defendant failed to demonstrate that his trial counsel erred in not offering a jury instruction, or filing a NRS 175.381(2) motion, pursuant to Moore v. State, 117 Nev. 659, 662-663, 27 P.3d 447, 450 (2001), arguing that Moore prevented an enhancement under NRS 193.165 for his conviction for Second Degree Murder. In Moore, the jury found Moore guilty of First Degree Murder with Use of a Deadly Weapon, Robbery with Use of a Firearm, and Conspiracy to Commit Robbery with Use of a Firearm. Moore, 117 Nev. at 660-61, 27 P.3d at 448. Moore was sentenced to equal and consecutive terms on each of the 3 counts pursuant to NRS 193.165, including his conviction for Conspiracy to Commit Robbery. Id. The Nevada Supreme Court concluded and ruled as follows:

> Following the plain import of the term "uses" in NRS 193.165(1), we conclude that it is improper to enhance a sentence for conspiracy using the deadly weapon enhancement. Accordingly, we reverse Moore's sentence in part and remand this case to the district court with instructions to vacate the second, consecutive term of Moore's sentence for conspiracy. We affirm Moore's conviction and sentence in all other respects.

Id. at 663, 27 P.3d at 450. The Nevada Supreme Court affirmed the deadly weapon enhancement on the Murder and Robbery convictions, and only reversed its application to the Conspiracy conviction. Id. Notably, the Nevada Supreme Court found Moore was guilty of robbery and murder under a conspiracy theory, stating, "Moore conspired with three others to rob the occupants of an apartment at gunpoint. While carrying out the armed robbery, one of the conspirators shot and killed a man who the conspirators believed was delivering drugs to the apartment." Id. at 660, 27 P.3d at 448.

Defendant's claim is premised upon a conflation of the crime of conspiracy, with liability for the commission of a crime pursuant to a conspiracy. Conspiring to commit a crime is separate and distinct from conspiracy liability for committing a crime. See Bolden v. State, 121 Nev. 908, 912–13, 915–23, 124 P.3d 194, 196–201 (2005) (affirming a conviction for

conspiracy to commit robbery and/or kidnapping, but reversing charges including robbery and kidnapping for insufficient evidence to sustain those convictions under conspiracy liability) receded from on other grounds, Cortinas v. State, 124 Nev. 1013, 1026–27, 195 P.3d 315, 324 (2008); Batt v. State, 111 Nev. 1127, 1130–31 & n.3, 901 P.2d 664, 666 & n.3 (1995) (declining to extend a conspiracy charge to encompass notice of conspiracy liability because they involve two distinct crimes). Although a defendant has committed the crime of conspiracy, and may be liable therefor, upon making the agreement, Nunnery v. Eighth Judical Dist. Ct., 124 Nev. 447, 480, 186 P.3d 886, 888 (2008), a defendant is not liable for committing a crime, under a liability theory or otherwise, until the crime has been completed. Further, the State may proceed upon a conspiracy theory without including an additional charge of conspiracy. Walker v. State, 116 Nev. 670, 673–74, 6 P.3d 477, 479 (2000).

Thus, the instruction Defendant claims counsel was ineffective for not requesting is based upon a misinterpretation of Nevada law, because Moore only prohibits a deadly weapon enhancement on a conviction and sentence for a charge of conspiracy, not a conviction for murder on a conspiracy theory of liability. Moore, 117 Nev. at 663, 27 P.3d at 450. Also, Fiegehen v. State, 121 Nev. 293, 301-305, 113 P.3d 305, 310-312 (2005), merely held that where a jury convicts a defendant of first-degree murder, via a felony-murder theory, as a matter of law, the verdict was sufficient under NRS 200.030(3) even though it did not designate between 1st and 2nd degree murder. Fiegehen, 121 Nev. at 301-305, 113 P.3d at 310-312. To the extent Defendant asserts that the jury could not have found him guilty of murder under an aiding and abetting theory because he was convicted of second degree murder, and Counts was convicted of first degree murder, the State notes that Defendant and Counts were tried separately, and Defendant has offered no proof that the jury knew the result of Counts' trial.

Accordingly, even if counsel had proffered the now-requested instruction, the Court would have properly rejected it because the Court is not required to give jury instructions containing inaccurate or incorrect statements of law. Crawford, 121 Nev. at 754, 757, 121 P.3d at 589, 591; Barron, 105 Nev. 767, 773, 783 P.2d 444, 448. Therefore, Defendant cannot

demonstrate that his trial counsel's conduct fell below an objective standard of reasonableness and also cannot demonstrate that there was a reasonable probability that the outcome of the trial would have been different if counsel had offered any Moore instruction or filed a NRS 175.381(2) motion on the same basis. Strickland, 466 U.S. at 687–688, 694, 697, 104 S .Ct. at 2065, 2068–2069; Kirksey, 112 Nev. 980, 987, 923 P.2d 1102, 1107. Had he done so, his actions would have been futile, and counsel is not ineffective for failing to take futile actions. Ennis, 122 Nev. at 706, 137 P.3d at 1103.

Eighth, Defendant alleges that trial and appellate counsel should have challenged Jury Instruction No. 40 on the basis that the Nevada Supreme Court should reevaluate the McDowell standard due to Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354 (2004), and Davis v. Washington, 547 U.S. 813, 126 S. Ct. 2266 (2006), and their alleged effect on United States v. Bourjaily, 483 U.S. 171, 107 S. Ct. 2775 (1987). The Nevada Supreme Court recently rejected Little Lou's claim of error on this ground. State's Exhibit B at 3.

Defendant appears to argue that co-conspirator statements should no longer be admissible because they are either inherently unreliable, and thus subject to Crawford's Confrontation Clause requirement of cross-examination, or inherently unreliable and thus inadmissible hearsay. However, Defendant misconstrues the holdings in Crawford and the other cases to which he refers.

McDowell ruled:

> According to NRS 51.035(3)(e), an out-of-court statement of a co-conspirator made during the course and in furtherance of the conspiracy is admissible as nonhearsay against another co-conspirator. Pursuant to this statute, it is necessary that the co-conspirator who uttered the statement be a member of the conspiracy at the time the statement was made. It does not require the co-conspirator against whom the statement is offered to have been a member at the time the statement was made.
>
> The federal position is consistent with our interpretation. In construing Federal Rule of Evidence 801(d)(2)(E), which is analogous to NRS 51.035(3)(e), the federal courts have consistently held that extra-judicial statements made by one co-conspirator during the conspiracy are admissible, without violation of the Confrontation Clause, against a co-conspirator who entered the conspiracy after the statements were made. See U.S. v. Gypsum, 333 U.S. 364, 68 S.Ct. 525, 92 L.Ed. 746 (1948); U.S. v. Davis, 809 F.2d 1194 (6th Cir.1987).

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103 Nev. at 529–30, 746 P.2d at 150 (1987). In Bourjaily, the United States Supreme Court similarly concluded that co-conspirator statements did not invoke the protections of the Confrontation Clause. 483 U.S. at 181-84, 107 S. Ct. at 2782-83 (1987). The decision in Bourjaily was based on the Confrontation Clause test set forth in Ohio v. Roberts, 448 U.S. 56, 63, 100 S. Ct. 2531, 2537 (1980), and concluded that no independent inquiry into the reliability of co-conspirator statements was necessary prior to admission because they qualified under a deeply rooted hearsay exemption. Bourjaily, 483 U.S. at 181-84, 107 S. Ct. at 2782-83. Defendant alleges that Crawford and Davis somehow change the long-standing rule that co-conspirator statements are not subject to the Confrontation Clause requirement for cross-examination but his argument is meritless.

In Crawford, the United States Supreme Court replaced the Roberts Confrontation Clause test, which provided that a hearsay statement from a declarant was admissible when "it falls under a "firmly rooted hearsay exception" or bears "particularized guarantees of trustworthiness." 448 U.S. at 66, 100 S. Ct. 2531. The Court ruled that:

> Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law—as does Roberts, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether. Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination. We leave for another day any effort to spell out a comprehensive definition of "testimonial." Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed.

Id. at 68, 124 S. Ct. at 1374. The Court further noted that without a prior opportunity to cross-examine the framers did not intend to allow the admission of testimonial hearsay; therefore, the only exceptions/exemptions to the hearsay rule which should continue to be exempt from the Confrontation Clause were those that existed historically and did not involve testimonial hearsay "for example, business records or *statements in furtherance of a conspiracy.*" Id. at

55-56, 124 S. Ct. 1354, 1366-67 (emphasis added). Thus, Crawford specifically excluded co-conspirator statements from the reach of the Confrontation Clause. Id.

Given that any request by counsel or argument on appeal would have been futile, Defendant has not shown he received ineffective assistance. Ennis, 122 Nev. at 706, 137 P.3d at 1103.

Lastly, Defendant alleges cumulative error. While the Nevada Supreme Court has noted that some courts do apply cumulative error in addressing ineffective assistance claims, it has not specifically adopted this approach. See McConnell v. State, 125 Nev. 243, 250 n.17, 212 P.3d 307, 318 n.17 (2009). However, the Eighth Circuit Court of Appeals has concluded that "a habeas petitioner cannot build a showing of prejudice on a series of errors, none of which would by itself meet the prejudice test." Middleton v. Roper, 455 F.3d 838, 851 (8th Cir. 2006), cert. denied, 549 U.S. 1134, 127 S. Ct. 980 (2007) (quoting Hall v. Luebbers, 296 F.3d 685, 692 (8th Cir. 2002)).

Even if the Court applies cumulative error analysis to Defendant's claims of ineffective assistance, Defendant fails to demonstrate cumulative error warranting reversal. A cumulative error finding in the context of a Strickland claim is extraordinarily rare and requires an extensive aggregation of errors. See, e.g., Harris By and Through Ramseyer v. Wood, 64 F.3d 1432, 1438 (9th Cir. 1995).

Because Defendant fails to demonstrate that any claim warrants relief under Strickland, there is nothing to cumulate.

Defendant fails to demonstrate cumulative error sufficient to warrant reversal. In addressing a claim of cumulative error, the relevant factors are: 1) whether the issue of guilt is close; 2) the quantity and character of the error; and 3) the gravity of the crime charged. Mulder v. State, 116 Nev. 1, 17, 992 P.2d 845, 854-5 (2000). As demonstrated by the facts *supra*, the evidence against Defendant was strong and eliminates the possibility of prejudice from any omission by counsel (should deficient performance be found by this Court). Further, even assuming that some or all of Defendant's allegations of deficiency had merit, he has failed to establish that, when aggregated, the errors deprived him of a reasonable likelihood of a

better outcome at trial. Therefore, even if counsel was in any way deficient, there is no reasonable probability that Defendant would have received a better result but for the alleged deficiencies. Further, even if Defendant had made such a showing, he has certainly not shown that the cumulative effect of these errors was so prejudicial as to undermine the Court's confidence in the outcome of his case. Therefore, Defendant's cumulative error claim should be denied.

II. Defendant Is Not Entitled to an Evidentiary Hearing

Defendant requests an evidentiary hearing throughout his Petition. NRS 34.770 determines when a defendant is entitled to an evidentiary hearing:

> 1. The judge or justice, upon review of the return, answer and all supporting documents which are filed, shall determine whether an evidentiary hearing is required. A petitioner must not be discharged or committed to the custody of a person other than the respondent *unless an evidentiary hearing is held.*
> 2. If the judge or justice determines that the petitioner is not entitled to relief and an evidentiary hearing is not required, he shall dismiss the petition without a hearing.
> 3. If the judge or justice determines that an evidentiary hearing is required, he shall grant the writ and shall set a date for the hearing.

The Nevada Supreme Court has held that if a petition can be resolved without expanding the record, then no evidentiary hearing is necessary. Mann v. State, 118 Nev. 351, 356, 46 P.3d 1228, 1231 (2002); Marshall v. State, 110 Nev. 1328, 1331, 885 P.2d 603, 605 (1994). A defendant is entitled to an evidentiary hearing if his petition is supported by specific factual allegations, which, if true, would entitle him to relief unless the factual allegations are repelled by the record. Marshall, 110 Nev. at 1331, 885 P.2d at 605; Hargrove, 100 Nev. at 503, 686 P.2d at 225 (holding that "[a] defendant seeking post-conviction relief is not entitled to an evidentiary hearing on factual allegations belied or repelled by the record"). "A claim is 'belied' when it is contradicted or proven to be false by the record as it existed at the time the claim was made." Mann, 118 Nev. at 354, 46 P.3d at 1230 (2002).

Here, an evidentiary hearing is unwarranted because the petition may be resolved without expanding the record. Mann, 118 Nev. at 356, 46 P.3d at1231; Marshall, 110 Nev. at 1331, 885 P.2d at 605. As explained above, Defendant's claims are bare/belied by the record,

and otherwise fail to sufficiently allege ineffective assistance of counsel. Additionally, this Court has already held an evidentiary hearing on potential conflicts of interest and there is a sufficient record to deny the claims alleging a conflict of interest presented in the Supplement. Therefore, no evidentiary hearing is warranted in order to deny such claims. Hargrove, 100 Nev. at 503, 686 P.2d at 225. Accordingly, Defendant's request for an evidentiary hearing must be denied.

III. Defendant is Not Entitled to Discovery at this Juncture

Rules regarding post-conviction discovery are found in NRS 34.780(2). NRS 34.780(2) reads:

> *After the writ has been granted* and a date set for the hearing, a party may invoke any method of discovery available under the Nevada Rules of Civil Procedure if, and to the extent that, the judge or justice *for good cause* shown grants leave to do so.

(emphasis added). Post-conviction discovery is not available until "after the writ has been granted." Id. Here, the Petition and Supplement must not be granted, and instead be dismissed without an evidentiary hearing. Therefore, Defendant is not entitled to discovery.

CONCLUSION

Based upon the foregoing, the State respectfully requests that Defendant's Petition and Supplement be DENIED.

DATED this 18th day of May, 2016.

Respectfully submitted,

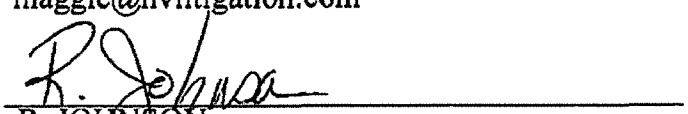
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY _____
JONATHAN E. VANBOSKERCK
Chief Deputy District Attorney
Nevada Bar #006528

CERTIFICATE OF SERVICE

I certify that on the 18th day of May, 2016, I e-mailed a copy of the foregoing State's Response to Defendant's Supplemental Petition for Writ of Habeas Corpus, to:

MARGARET A. MCLETCHIE, Esq.
maggie@nvlitigation.com

BY 
R. JOHNSON
Secretary for the District Attorney's Office

MB/JEV/rj/M-1

PA3757

EXHIBIT 1

124 Nev., Advance Opinion 33

IN THE SUPREME COURT OF THE STATE OF NEVADA

LUIS HIDALGO, III,
Petitioner,
vs.
THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE DONALD M. MOSLEY, DISTRICT JUDGE,
Respondents,
and
THE STATE OF NEVADA,
Real Party in Interest.

No. 48233

FILED

MAY 29 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

Petition for rehearing of Hidalgo v. District Court, 123 Nev. ___, 173 P.3d 1191 (2007) (opinion withdrawn February 21, 2008). Original petition for a writ of mandamus or prohibition challenging the district court's order denying petitioner's motion to strike the State's notice of intent to seek the death penalty.

Petition for rehearing granted; petition for writ of mandamus granted in part.

Gordon & Silver, Ltd., and Dominic P. Gentile and Paola M. Armeni, Las Vegas,
for Petitioner.

Catherine Cortez Masto, Attorney General, Carson City; David J. Roger, District Attorney, Steven S. Owens, Chief Deputy District Attorney,

PA3759
08-13426

Giancarlo Pesci, Marc P. DiGiacomo, and Nancy A. Becker, Deputy District Attorneys, Clark County,
for Real Party in Interest.

Michael Pescetta, Assistant Federal Public Defender, Las Vegas; Philip J. Kohn, Public Defender, and Howard Brooks, Deputy Public Defender, Clark County; David M. Schieck, Special Public Defender, Clark County,
for Amici Curiae Federal Public Defender for District of Nevada, Nevada Attorneys for Criminal Justice, Clark County Public Defender, and Clark County Special Public Defender.

BEFORE THE COURT EN BANC.

OPINION ON REHEARING

PER CURIAM:

On December 27, 2007, this court issued an opinion in this case granting a petition for a writ of mandamus.[1] Subsequently, the real party in interest filed a rehearing petition. On February 21, 2008, this court withdrew the prior opinion pending resolution of the petition for rehearing. After reviewing the rehearing petition and answer, as well as the briefs and appendix, we conclude that rehearing is warranted under NRAP 40(c)(2), and we grant the petition for rehearing. We now issue this opinion in place of our prior opinion.

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[1]Hidalgo v. Dist. Ct., 123 Nev. ___, 173 P.3d 1191 (2007) (opinion withdrawn February 21, 2008).

In this opinion, we consider whether solicitation to commit murder is a felony involving the use or threat of violence to the person of another within the meaning of the death penalty aggravator defined in NRS 200.033(2)(b). We conclude that it is not. We also consider whether the State's notice of intent to seek the death penalty against petitioner satisfies the requirements of SCR 250(4)(c). We conclude that it does not. However, we conclude that the State should be allowed to amend the notice of intent to cure the deficiency. Accordingly, we grant the writ petition in part and instruct the district court to strike the two aggravating circumstances alleging solicitation to commit murder as prior violent felonies pursuant to NRS 200.033(2) and to allow the State to amend its notice of intent to seek the death penalty with respect to the factual allegations supporting the pecuniary gain aggravator.[2]

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

FACTS

Petitioner Luis Hidalgo III is awaiting trial on one count of conspiracy to murder Timothy Hadland, one count of first-degree murder for Hadland's death (under alternative theories of principal, aiding and abetting, and coconspirator liability), and two counts of solicitation to commit the murders of two alleged witnesses to Hadland's death. The State subsequently filed a timely notice of intent to seek the death penalty alleging three aggravating circumstances. The first and second aggravators are based on NRS 200.033(2)(b) and allege the two solicitation counts, assuming Hidalgo is found guilty of them, as prior felonies involving the use or threat of violence to another person.[3] The third aggravator alleges that Hadland's murder was committed by a person, for himself or another, to receive money or any other thing of monetary value pursuant to NRS 200.033(6).

On December 12, 2005, Hidalgo moved the district court to strike the State's notice of intent. The district court heard argument on the motion in March and September of 2006 and denied the motion from

[3]NRS 200.033(2) permits the State to allege as an aggravating circumstance any felony involving the use or threat of violence that is charged in the same indictment or information as the first-degree murder count. Specifically, the statute provides that "[f]or the purposes of this subsection, a person shall be deemed to have been convicted at the time the jury verdict of guilt is rendered."

the bench on September 8, 2006. This original petition challenges the district court's ruling.[4]

DISCUSSION

"This court may issue a writ of mandamus to compel the performance of an act which the law requires as a duty resulting from an office or where discretion has been manifestly abused or exercised arbitrarily or capriciously."[5] The writ will issue where the petitioner has no "plain, speedy and adequate remedy in the ordinary course of law."[6] The decision to entertain a mandamus petition lies within the discretion of this court, and this court considers whether "judicial economy and sound judicial administration militate for or against issuing the writ."[7] "Additionally, this court may exercise its discretion to grant mandamus relief where an important issue of law requires clarification."[8] The instant

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[4]Anabel Espindola was charged with the same offenses and given notice of the same aggravators as Hidalgo. On April 9, 2008, we granted Espindola's motion to dismiss her from this original proceeding because she had reached a plea agreement with the State.

[5]Redeker v. Dist. Ct., 122 Nev. 164, 167, 127 P.3d 520, 522 (2006); see also NRS 34.160.

[6]NRS 34.170; Redeker, 122 Nev. at 167, 127 P.3d at 522.

[7]Redeker, 122 Nev. at 167, 127 P.3d at 522.

[8]Id.

petition presents such issues. Further, considerations of judicial economy militate in favor of exercising our discretion to intervene by way of extraordinary writ at this time. Therefore, we have addressed the merits of the petition in this opinion.

Aggravators one and two: solicitation to commit murder as a prior felony involving the use or threat of violence under NRS 200.033(2)(b)

Hidalgo argues that solicitation to commit murder cannot serve as a prior-violent-felony aggravating circumstance because it is not "[a] felony involving the use or threat of violence to the person of another" within the meaning of NRS 200.033(2)(b). We agree.

The crime of solicitation to commit murder is defined in NRS 199.500(2), which provides that "[a] person who counsels, hires, commands or otherwise solicits another to commit murder, if no criminal act is committed as a result of the solicitation, is guilty" of a felony. The elements of solicitation do not involve the use of violence to another, regardless of the crime solicited. The remaining question is whether solicitation of a violent crime can be considered an offense involving the threat of violence to the person of another. We conclude that it cannot.

As this court observed in Sheriff v. Schwarz, "[u]nlike other criminal offenses, in the crime of solicitation, 'the harm is the asking—

nothing more need be proven."[9] Solicitation is criminalized, of course, because it carries the risk or possibility that it could lead to a consummated crime. But as this court stated in Redeker v. District Court, a risk or potential of harm to others "does not constitute a 'threat' under NRS 200.033(2)(b)."[10]

Other jurisdictions have concluded that solicitation to commit murder cannot support an aggravator based on a prior felony involving the use or threat of violence to another person. For instance, in Elam v. State, the Supreme Court of Florida held that solicitation to commit murder could not support an aggravator based on a prior felony involving the use or threat of violence to the person, concluding that "[a]ccording to its statutory definition, violence is not an inherent element" of solicitation.[11] Citing Elam and other precedent, a Florida appellate court reached a similar conclusion in Lopez v. State that the crime of solicitation does not itself involve a threat of violence:

> "The gist of criminal solicitation is enticement" of another to commit a crime. No agreement is needed, and criminal solicitation is committed even though the person solicited would never have

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[9]108 Nev. 200, 202, 826 P.2d 952, 954 (1992) (quoting People v. Miley, 204 Cal. Rptr. 347, 352 (Ct. App. 1984)).

[10]122 Nev. at 175, 127 P.3d at 527.

[11]636 So. 2d 1312, 1314 (Fla. 1994).

> acquiesced to the scheme set forth by the defendant. Thus, the general nature of the crime of solicitation lends support to the conclusion that solicitation, by itself, does not involve the threat of violence even if the crime solicited is a violent crime.[12]

The Supreme Court of Arizona addressed this issue in State v. Ysea.[13] The Ysea court considered whether solicitation to commit aggravated assault could support the aggravating factor of a prior felony involving "'the use or threat of violence on another person.'"[14] The court concluded that it could not because the statutory definition of solicitation did not require an act or a threat of violence as an element of the crime.[15]

The decisions in Elam, Lopez, and Ysea are not precisely on point because those courts relied on the statutory elements of the crime of solicitation, whereas we have held that the sentencer can look beyond the statutory elements to the charging documents and jury instructions to determine whether a prior felony conviction, after trial, involved the use or

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[12]864 So. 2d 1151, 1152-53 (Fla. Dist. Ct. App. 2003) (citations omitted).

[13]956 P.2d 499, 502 (Ariz. 1998).

[14]Id. (quoting Ariz. Rev. Stat. § 13-703(F)(2)).

[15]Id.

threat of violence.[16] However, the court in Elam dealt with a Florida statute that particularized solicitation to commit a capital felony.[17] And the courts in both Lopez and Ysea expressly concluded that regardless of the violent nature of the crime solicited, solicitation itself is not a crime involving a threat of violence.

Obviously, the nature of the crime Hidalgo allegedly solicited is itself violent. But this does not transform soliciting murder into threatening murder within our view of the meaning of the statute. As the Ysea court put it, "the mere solicitation to commit an offense cannot be equated with the underlying offense. . . . [S]olicitation is a crime of communication, not violence, and the nature of the crime solicited does not transform the crime of solicitation into an aggravating circumstance."[18]

The State claims that California and Oklahoma both allow solicitation to commit murder to support a prior-violent-felony aggravator. However, the cases the State cites are not helpful to the State's position.

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[16]See Redeker v. Dist. Ct., 122 Nev. 164, 172, 127 P.3d 520, 525 (2006).

[17]636 So. 2d at 1314; Fla. Stat. Ann. § 777.04(2), (4)(b) (West 1991). Nevada's solicitation statute similarly particularizes solicitation to commit murder: NRS 199.500(2) makes solicitation of murder a felony, while NRS 199.500(1) provides that solicitation of kidnapping or arson is a gross misdemeanor.

[18]956 P.2d at 503.

The defendant in the Oklahoma case stipulated that his two prior convictions involved the use or threat of violence, and the case contains no useful analysis of this issue.[19] In the California case, while the defendant was in jail awaiting trial on a charge of killing his wife by lying in wait, he solicited a friend to murder a witness by lying in wait. Evidence of the solicitation was admitted not to establish any prior violent felony, but as proof of the defendant's consciousness of guilt and that he killed his wife while lying in wait.[20]

We conclude that the threat provision of NRS 200.033(2)(b) was meant to apply in cases like Weber v. State,[21] which the State cites for the proposition that force need not be an element of the crime underlying the prior-violent-felony aggravator. In Weber, we upheld two prior-violent-felony aggravators based on sexual assaults of a minor girl.[22] We noted that the elements of sexual assault do not include the use or threat of violence, and we concluded there was "no evidence of overt violence or overt threats of violence by Weber" against the victim during the two

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[19]Woodruff v. State, 846 P.2d 1124, 1144 (Okla. Crim. App. 1993).

[20]People v. Edelbacker, 766 P.2d 1, 8, 15 (Cal. 1989).

[21]121 Nev. 554, 119 P.3d 107 (2005).

[22]Id. at 586, 119 P.3d at 129.

assaults.[23] But we also concluded that the evidence showed "at least implicit" threats of violence that were perceived by the minor girl herself and enabled the sexual assaults to occur.[24] We therefore concluded that the sexual assaults could properly support the aggravator.[25] In this case, there are no allegations that Hidalgo made threats of violence, implicit or explicit, that were perceived as such by the intended victims.

We conclude that solicitation to commit murder, although it solicits a violent act, is not itself a felony involving the use or threat of violence within the meaning of NRS 200.033(2)(b). We therefore conclude that the first two aggravators must be stricken.

Aggravator three: murder to receive money or any other thing of monetary value under NRS 200.033(6)

Hidalgo argues that the State's notice of intent to seek the death penalty violates SCR 250 in alleging the third aggravating circumstance pursuant to NRS 200.033(6)—"[t]he murder was committed by a person, for himself or another, to receive money or any other thing of monetary value." SCR 250(4)(c) provides that the notice of intent to seek death "must allege all aggravating circumstances which the state intends

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[23]Id.

[24]Id.

[25]Id.

to prove and allege with specificity the facts on which the state will rely to prove each aggravating circumstance." Furthermore, "a defendant cannot be forced to gather facts and deduce the State's theory for an aggravating circumstance from sources outside the notice of intent to seek death. Under SCR 250, the specific supporting facts are to be stated directly in the notice itself."[26]

The State's notice alleges in pertinent part:

> The murder was committed by a person, for himself or another, to receive money or any other thing of monetary value, to-wit by: by [Espindola] (a manager of the PALOMINO CLUB) and/or [Hidalgo] (a manager of the PALOMINO CLUB) and/or Luis Hidalgo, Jr. (the owner of the PALOMINO CLUB) procuring DEANGELO CARROLL (an employee of the PALOMINO CLUB) to beat and/or kill TIMOTHY JAY HADLAND; and/or LUIS HIDALGO, JR. indicating that he would pay to have a person either beaten or killed; and/or by LUIS HIDALGO, JR. procuring the injury or death of TIMOTHY JAY HADLAND to further the business of the PALOMINO CLUB; and/or [Hidalgo] telling DEANGELO CARROLL to come to work with bats and garbage bags; thereafter, DEANGELO CARROLL procuring KENNETH COUNTS and/or JAYSON TAOIPU to kill TIMOTHY HADLAND;

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[26]Redeker v. Dist. Ct., 122 Nev. 164, 168-69, 127 P.3d 520, 523 (2006).

> thereafter, by KENNETH COUNTS shooting TIMOTHY JAY HADLAND; thereafter, [Hidalgo, Jr.] and/or [Espindola] providing six thousand dollars ($6,000) to DEANGELO CARROLL to pay KENNETH COUNTS, thereafter, KENNETH COUNTS receiving said money; and/or by [Espindola] providing two hundred dollars ($200) to DEANGELO CARROLL and/or by [Espindola] and/or [Hidalgo] providing fourteen hundred dollars ($1400) and/or eight hundred dollars ($800) to DEANGELO CARROLL and/or by [Espindola] agreeing to continue paying DEANGELO CARROLL twenty-four (24) hours of work a week from the PALOMINO CLUB even though DEANGELO CARROLL had terminated his position with the club and/or by [Hidalgo] offering to provide United States Savings Bonds to DEANGELO CARROLL and/or his family.

This quoted portion of the notice includes a number of specific factual allegations. But the State's repeated use of "and/or" to connect the numerous allegations undercuts rather than bolsters the notice's specificity. The State is permitted to plead alternative fact scenarios in support of an aggravator, but the notice of intent must still be coherent, with a clear statement of the facts and how the facts support the aggravator. The notice here is not a clear statement of how the facts support the aggravator. When a notice connects a string of facts with "and/or," it permits the finding of the aggravator based on any of the facts taken separately as well as together. If the State pleads its notice in this

manner, each separate fact must support the aggravator, not just any of the facts taken together. The notice here, however, fails in this regard.

SCR 250(4)(c) is "intended to ensure that defendants in capital cases receive notice sufficient to meet due process requirements."[27] In interpreting whether the manner in which a notice of intent is pleaded satisfies the due process concerns of SCR 250(4)(c), we look to other notice pleading requirements for guidance. A charging document in a criminal case, for example, serves a similar purpose to a notice of intent. NRS 173.075 provides that a charging document "must be a plain, concise and definite written statement of the essential facts constituting the offense charged." To satisfy this requirement, "the [charging document] standing alone must contain the elements of the offense intended to be charged and must be sufficient to apprise the accused of the nature of the offense so that he may adequately prepare a defense."[28] Although there are obvious differences in the purposes of a charging document and a notice of intent

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[27]State v. Dist. Ct. (Marshall), 116 Nev. 953, 959, 11 P.3d 1209, 1212 (2000).

[28]Laney v. State, 86 Nev. 173, 178, 466 P.2d 666, 669 (1970); see Sheriff v. Levinson, 95 Nev. 436, 437, 596 P.2d 232, 233 (1979) ("[T]he prosecution is required to make a definite statement of facts constituting the offense in order to adequately notify the accused of the charges and to prevent the prosecution from circumventing the notice requirement by changing theories of the case.").

to seek the death penalty, their primary function is the same, i.e., to provide the defendant with notice of what he must defend against at trial and a death penalty hearing, respectively.

Although the State is not required to include exhaustively detailed factual allegations to satisfy SCR 250(4)(c), the notice of intent must provide a simple, clear recitation of the critical facts supporting the alleged aggravator, presented in a comprehensible manner. Here, the principal problem with the notice of intent in this case is not the lack of factual detail. Rather, the State has alleged the factual allegations supporting the pecuniary gain aggravator in an incomprehensible format such that it fails to meet the due process requirements of SCR 250(4)(c).

In addition to the confusing "and/or" format, one example of a lack of clarity in the notice of intent appears in the State's allegation that "[Hidalgo's father] procure[ed] the injury or death of [Hadland] to further the business of the PALOMINO CLUB." Although this allegation identified a victim and asserted that the murder was motivated by monetary gain, i.e., furthering the business, it lacked sufficient specificity because it failed to explain how the business would be furthered by Hadland's murder. The submissions before this court indicate that Hadland verbally discouraged cab drivers from bringing customers to the Palomino Club and that the Club had suffered a marked decline in business as a result. However, absent from the notice of intent is any fact explaining how Hadland's murder benefited the Palomino Club's business interest. We conclude that the phrase in the notice of intent "to further

the business" is impermissibly vague. As the State may amend its notice of intent, it must provide specific factual allegations as to how Hadland's murder furthered the business interests of the Palomino Club if the State intends to pursue this factual allegation at trial.

Although the notice of intent fails to clearly explain the factual allegations supporting the pecuniary gain aggravator, we conclude that the State should be allowed to amend the notice of intent to remedy the deficiency. Allowing the State to amend the notice to remedy any confusion, vagueness, or ambiguity present in the pecuniary gain aggravator will not prejudice Hidalgo or render subsequent proceedings unfair. By amending the notice, the State will not be including events or circumstances not already alleged in the notice. Rather, the State would be merely clarifying factual allegations in the notice.

Further, allowing the State to amend the notice of intent under the particular facts of this case would not contravene any statute or decision by this court. We have published only two decisions in which we struck notices of intent to seek the death penalty that were not compliant with SCR 250(4)(c)—Redeker v. District Court[29] and State v. District Court (Marshall).[30] However, both of these cases are distinguishable from the instant case.

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[29]122 Nev. 164, 127 P.3d 520 (2006).

[30]116 Nev. 953, 11 P.3d 1209 (2000).

In Redeker, this court concluded that the State's notice of intent to seek the death penalty failed to allege with specificity any facts showing that Redeker had been convicted previously of a felony involving the use or threat of violence to the person of another.[31] In particular, the State alleged that Redeker had been convicted of second-degree arson; however, although the notice of intent clearly identified the crime by title, date, location, case number, and victim, none of the allegations indicated that the second-degree arson was a crime of violence or threatened violence to the person of another.[32] We rejected the State's suggestion that it be allowed to amend its notice of intent to allege additional facts in the same manner as it would amend a charging document.[33] In doing so, we observed that the State had opposed Redeker's contention that aggravators must be alleged in a charging document based on a probable cause determination and indicated that the State's position was inconsistent with its argument that it be allowed to amend the notice of intent as it would a charging document: "[T]he State proposes that we allow it to evade the charging requirements of SCR 250 but enjoy the

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[31]122 Nev. at 168, 127 P.3d at 523.

[32]Id.

[33]Id. at 169, 127 P.3d at 523.

benefits, while avoiding the burdens, of the indictment/information process."[34]

Redeker is distinguishable from the instant case. In Redeker, this court concluded that the notice of intent compelled Redeker to speculate about facts not included in the notice of intent that would have established that his second-degree arson conviction was a violent felony.[35] Here, the issue is not that the notice of intent lacked factual specificity, compelling Hidalgo to speculate about evidence beyond what was included in the notice of intent. Rather, our overarching concern in this case is that the State's factual allegations as pleaded are unclear and confusing. Further, this court's rejection of the State's argument in favor of amending the notice of intent in Redeker is unique to the particular circumstances in that case. Moreover, in Redeker, we concluded that even if the State had included specific factual allegations it believed established Redeker's second-degree arson conviction as a crime involving the threat or use of violence to another person, the factual allegations failed to support the aggravator.[36]

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[34]Id.

[35]Id. at 168-69, 127 P.3d at 523.

[36]Id. at 169, 127 P.3d at 523.

We reject any interpretation of Redeker as suggesting that the State can never amend a notice of intent to cure any deficiencies in the factual allegations supporting an aggravator where, as here, they are not pleaded in a clear and comprehensible manner. Therefore, we expressly limit the holding in Redeker to the particular facts and circumstances in that case.

The other published decision in which this court struck a notice of intent based on SCR 250(4)(c) is State v. District Court (Marshall), where we upheld a district court's decision to deny the State's motion to file untimely notices of intent to seek the death penalty against two defendants.[37] Marshall thus focused on the timing requirement in SCR 250(4)(c) rather than the sufficiency of the notice. Here, Hidalgo was made aware by the filing of a timely notice of intent that the State intended to seek the death penalty and the factual allegations supporting the pecuniary gain aggravator.

To the extent Hidalgo contends that allowing the State to amend the notice of intent would render the notice untimely without a showing of good cause, we find that argument unpersuasive under the particular facts of this case. SCR 250(4)(d) provides that "[u]pon a showing of good cause, the district court may grant a motion to file a late notice of intent to seek the death penalty or of an amended notice alleging

[37]116 Nev. 953, 968, 11 P.3d 1209, 1218 (2000).

additional aggravating circumstances." (Emphasis added.) Here, the State is not seeking to amend its notice of intent to allege new aggravators but rather to clarify the factual allegations supporting the pecuniary gain aggravator, which was alleged in a timely notice of intent. This circumstance sets Hidalgo's case apart from the situation in Marshall, where the State simply neglected to follow SCR 250(4)(c)'s timing requirement and failed to demonstrate good cause for the delay.[38]

Although the notice of intent is deficient under SCR 250(4)(c) to the extent that it fails to provide a clear, comprehensible expression of the factual allegations to support the pecuniary gain aggravator, we conclude that the appropriate remedy is to allow the State to amend the notice of intent to cure this deficiency. We further conclude that allowing the State to amend the notice of intent to further explain its allegation that Hadland's murder served to further the business interests of the Palomino Club will not violate Hidalgo's due process rights.

CONCLUSION

For the reasons stated above, we grant this petition in part. The clerk of this court shall issue a writ of mandamus instructing the district court to strike the two aggravating circumstances alleging solicitation to commit murder as prior violent felonies pursuant to NRS

[38]Id. at 964, 11 P.3d at 1215.

200.033(2) and to allow the State to amend its notice of intent to seek the death penalty to declare the factual allegations supporting the pecuniary gain aggravator in a clear, comprehensible manner and to further explain its allegation that the victim's murder served to further the business interests of the Palomino Club.

_____, C.J.
Gibbons

_____, J.
Hardesty

_____, J.
Parraguirre

_____, J.
Douglas

_____, J.
Cherry

_____, J.
Saitta

MAUPIN, J., concurring in part and dissenting in part:

The majority correctly concludes that, under SCR 250, the imprecise language of the State's notice of intent to seek the death penalty fails to clearly explain how the facts alleged support the aggravating circumstance defined by NRS 200.033(6), i.e., that "[t]he murder was committed by a person, for himself or another, to receive money or any other thing of monetary value." I further concur with the majority that the State should be allowed to amend the notice of intent to remedy this deficiency. However, I would hold that the crime of solicitation to commit murder necessarily involves the communication of a "threat of violence to the person of another."[1] I do not read NRS 200.033(2)(b) to require that such a "threat of violence" must be perceived by the intended victim. Rather, I understand the aggravating circumstance to encompass a threat of violence that is communicated to another regardless of whether the threatened victim is aware of it. Therefore, I dissent from the majority's conclusion that the aggravating circumstances alleged against petitioner under NRS 200.033(2)(b) must be stricken.

Maupin, J.

[1]NRS 200.033(2)(b).

EXHIBIT 2

IN THE SUPREME COURT OF THE STATE OF NEVADA

LUIS ALONSO HIDALGO, III,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 67640

FILED

MAY 11 2016

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying appellant's postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Valerie Adair, Judge.

Appellant contends that the district court erred by denying his claims of ineffective assistance of counsel. To prove ineffective assistance of counsel, a petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *Warden v. Lyons*, 100 Nev. 430, 432-33, 683 P.2d 504, 505 (1984) (adopting the test in *Strickland*); *see Kirksey v. State*, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996) (applying *Strickland* to appellate counsel). We give deference to the district court's factual findings if supported by substantial evidence and not clearly erroneous but review the court's application of the law to those facts de novo. *Lader v. Warden*, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005).

First, appellant contends that the district court erred by denying his claim that trial counsel were ineffective for failing to tender appropriate instructions regarding second-degree murder. Specifically, appellant challenges the instructions relating to co-conspirator liability

and second-degree felony murder. Regarding the co-conspirator liability instructions, appellant failed to demonstrate that the instructions given at trial were inaccurate. *See Bolden v. State*, 121 Nev. 908, 923, 124 P.3d 191, 201 (2005) (holding that "vicarious coconspirator liability may be properly imposed for general intent crimes only when the crime in question was a 'reasonably foreseeable consequence' of the object of the conspiracy"). To the extent appellant argues that second-degree murder is not a general intent crime pursuant to *Ho v. Carey*, 332 F.3d 587, 592 (9th Cir. 2003), his reliance on *Ho* is misplaced because *Ho* addressed California law. Regarding second-degree felony murder, even assuming that the jury was not properly instructed pursuant to *Labastida v. State*, 115 Nev. 298, 307, 986 P.2d 443, 449 (1999), appellant failed to demonstrate that trial counsel were deficient or that he was prejudiced given the evidence presented at trial and the theories of vicarious liability alleged in the charging document. Therefore, we conclude that the district court did not err by denying this claim.[1]

Second, appellant contends that the district court erred by denying his claim that trial counsel were ineffective for failing to challenge the deadly-weapon enhancement based on *Moore v. State*, 117 Nev. 659, 663, 27 P.3d 447, 450 (2001) (holding that "it is improper to enhance a sentence for conspiracy using the deadly weapon enhancement."). Because the deadly weapon enhancement was not applied to the conspiracy conviction, appellant failed to demonstrate that counsel was ineffective. To the extent appellant challenges the instruction given at trial based on

[1]For the same reasons, we conclude the district court did not err by denying appellant's claim regarding appellate counsel.

Brooks v. State, 124 Nev. 203, 180 P.3d 657 (2008), no relief is warranted because the instruction complied with *Brooks*; moreover, appellant has challenged the instruction for the first time on appeal. Therefore, we conclude that the district court did not err by denying this claim.

Third, appellant contends that the district court erred by denying his claim that trial counsel were ineffective for failing to proffer an instruction regarding the admissibility of co-conspirator statements that was consistent with the Federal Rules of Evidence, and appellate counsel was ineffective for failing to argue that the admission of his co-conspirator's statements violated *Crawford v. Washington*, 541 U.S. 36, 56 (2004). Appellant failed to demonstrate that the instructions given at trial were incorrect or that the statements should not have been admitted. *See McDowell v. State*, 103 Nev. 527, 529, 746 P.2d 149, 150 (1987) (adopting the "slight evidence" standard in Nevada); *see also Crawford*, 541 U.S. at 56 (recognizing that statements made in furtherance of a conspiracy are nontestimonial); *Lilly v. Virginia*, 527 U.S. 116, 137 (1999) (recognizing that statements made in the furtherance of a conspiracy are reliable). Therefore, he fails to demonstrate that counsel were ineffective. Accordingly, we conclude that the district court did not err by denying this claim.

Fourth, appellant contends that the district court erred by denying his claim that trial counsel were ineffective for failing to seek a severance during trial to admit evidence that was favorable to him but unfavorable to his codefendant. We disagree because the trial court did not decline to admit the evidence based on prejudice to appellant's codefendant and therefore a severance would not have been granted on this basis. Because appellant failed to demonstrate that a severance

would have been granted under the circumstances, trial counsel were not ineffective. Therefore, we conclude that the district court did not err by denying this claim.

Fifth, appellant contends that the district court erred by denying his claim that trial counsel were ineffective for failing to seek a severance of the solicitation counts. Appellant failed to demonstrate that a severance would have been granted because the counts were clearly connected together. *See Weber v. State*, 121 Nev. 554, 573, 119 P.3d 107, 120 (2005). Therefore counsel were not ineffective. Accordingly, we conclude that the district court did not err by denying this claim.

Sixth, appellant contends that cumulative error entitles him to relief. Because we have found no error, there are no errors to cumulate.

Having considered appellant's contentions and concluded that no relief is warranted, we

ORDER the judgment of the district court AFFIRMED.

Douglas, J.
Douglas

Cherry, J.
Cherry

Gibbons, J.
Gibbons

cc: Hon. Valerie Adair, District Judge
Richard F. Cornell
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

LUIS HIDALGO, JR., Petitioner, vs. THE STATE OF NEVADA, Respondent.	Case No.: 08C241394 Dept. No.: XXI **Hearing Date: July 28, 2016** **Hearing Time: 9:30 a.m.**

REPLY TO STATE'S RESPONSE TO THE SUPPLEMENTAL MEMORANDUM OF POINTS AND AUTHORTIES IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)

COMES NOW, Petitioner, LUIS HIDALGO JR., by and through his attorney, MARGARET A. MCLETCHIE, and files his REPLY TO STATE'S RESPONSE TO THE SUPPLEMETNAL MEMORANDUM OF POINTS AND AUTHORTIES IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION.) This Reply is made and based on the following points and authorities, the papers and pleadings on file herein, together with oral argument at the time of hearing.

DATED this 21st day of July, 2016.

/s/Margaret A. McLetchie
Margaret A. McLetchie, Nevada Bar No. 10931
MCLETCHIE SHELL LLC
Attorney for Petitioner Luis Hidalgo, Jr.

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POINTS AND AUTHORITIES

I. INTRODUCTION

The State predicates its Response to Hidalgo Jr.'s conflict of interest claims with a lengthy diatribe regarding the permissibility of dual representation and the law on conflict waivers. (*See generally* Response at pp. 17-36.) However, Hidalgo Jr. has made no claim in his petition, or supplemental petition, that trial counsel was conflicted in his representation of Hidalgo Jr. based solely on his concurrent representation of Ms. Espindola and Hidalgo Jr. Instead, trial counsel created numerous conflicts of his own doing. First, trial counsel entered into a specious financial arrangement, ostensibly to provide representation for Hidalgo Jr., Hidalgo III, and Ms. Espindola, which ultimately profited only trial counsel. Second, trial counsel did not follow this financial agreement and underfunded the defense of Hidalgo III and Ms. Espindola that damaged Hidalgo Jr.'s defense and likely resulted in Ms. Espindola's decision to turn state's witness and testify against Hidalgo Jr. Finally, trial counsel orchestrated a joint defense agreement which likely hampered his ability to fully cross-examine Ms. Espindola at the time of trial and/or resulted in the disclosure of confidential information to the State.

Consequently, the conflicts that Hidalgo Jr. has raised in his Supplemental Petition have little to nothing to do with the execution of a conflict waiver, or the mere fact of dual representation. Rather, Hidalgo Jr. asserts that trial counsel's pursuit of his own financial interests created real and pervasive conflict that affected his ability to provide effect assistance of counsel. Further, trial counsel was also ineffective for creating and entering into a joint defense agreement that hamstrung his ability to cross-examine Ms. Espindola when she eventually became a defense witness—a move which was precipitated by trial counsel's failure to fund Ms. Espindola's defense. Trial counsel also provided ineffective assistance by conceding the motion to consolidate. Additionally, Hidalgo Jr.'s appellate counsel was ineffective for failing to failing to raise a claim on appeal regarding the admission of hearsay statements from witnesses Rontae Zone and Detective Sean Michael McGrath.

/ / /

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II. ARGUMENT

A. Trial Counsel's Fee Agreement was Self-Serving and Warrants Further Investigation.

The State's Response focuses at length on whether a violation of the Nevada Rules of Professional Conflict create a per se claim for ineffective assistance of counsel and rather narrowly concludes that it is "irrelevant." (*See* Response at p. 21:12-14.) In support of this position, the State cites to *Nix v. Whiteside*, 475 U.S. 157, 165 (1986.) In the *Nix* case, however, the Supreme Court acknowledged that professional codes are simply "guides" for what is reasonable behavior for an attorney under the *Strickland* standard, holding that:

> When examining attorney conduct, a court must be careful not to narrow the wide range of conduct acceptable under the Sixth Amendment so restrictively as to constitutionalize particular standards of professional conduct and thereby intrude into the state's proper authority to define and apply the standards of professional conduct applicable to those it admits to practice in its courts.

Id. As such, the Court in *Nix* was simply wary of giving too much credence to nationwide codes such as the American Bar Association Model Rules and acknowledged the relative autonomy of the states in setting reasonable practice guidelines for attorneys. In this case, Hidalgo Jr. has alleged that trial counsel violated the Nevada Rules of Professional Conflict. While it is certainly true that a violation of these rules does not constitute per se ineffective assistance of counsel in a criminal case, it is certainly persuasive evidence that trial counsel acted inappropriately according to the standards that the State of Nevada has determined are reasonable for an attorney.

The State also asserts in a footnote that if counsel believes that trial counsel violated the Rules of Professional Conduct, she should file a complaint with the State Bar of Nevada, and also insinuates that undersigned counsel is perhaps violating NRPC 8.3(a) by not having filed such a complaint. (*See* Response at p. 22, n. 14.) This argument is, at best, a complete red herring. As noted throughout Hidalgo Jr.'s Supplemental Petition and this Reply, the record in this case raises substantial questions regarding trial counsel performance and his compliance with the Rules of Professional Conduct that merit further investigation and an

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evidentiary hearing to determine whether counsel provided effective assistance to Hidalgo Jr. NRPC 8.3(a) requires an attorney to report another attorney's misconduct if he or she "***knows*** that another lawyer has committed a violation of the Rules of Professional Conduct. . . ." (emphasis added). Given the number of unanswered questions in this case, it is impossible ***know*** at this point with any certain whether trial counsel violated the Rules of Professional Conduct. It therefore would be both foolhardy and likely a violation Rule 8.3 to file a report absent further discovery and an evidentiary hearing.

In this case, trial counsel entered into a financial agreement with a desperate client facing possible capital murder charges, and thereby acquired an extremely profitable business venture. However, the case file undersigned counsel obtained from trial counsel is devoid of documents addressing or itemizing the billing for the defense of Hidalgo Jr. or his co-defendants. (McLetchie Dec. ¶¶ 4-6.)

Further investigation of how this transaction translated into actual legal expenditures is vital given the assertions of Ms. Espindola that her attorneys were underfunded. Moreover, it is unclear at this point what impact Hidalgo Jr.'s incarceration had on the financial agreement. It is also unclear whether trial counsel had personal incentive in either direction that impacted his ability to provide a full and fair defense for Hidalgo Jr. At the very least, this unconventional arrangement warrants further discovery and an evidentiary hearing to determine its impact on Hidalgo Jr.'s defense.

B. Counsel's Failure to Fund Hidalgo III and Espindola's Defense Demonstrates a Conflict of Interest and Ineffective Assistance of Counsel.

In its Response, the State makes the rather sardonic argument that the Sixth Amendment does not require defense counsel to pay "co-conspirators to induce them not to testify." (Response at p. 24:16-18.) The State's belittlement of Hidalgo Jr.'s concern aside, in this case, trial counsel took it upon himself to fund the defense of Hidalgo III and Espindola in the specious financial arrangement referenced above. When trial counsel failed to fulfill his obligations to co-defendants' counsel, trial counsel not only made it difficult for those counsel to conduct investigations and generally fund a defense (which ultimately

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pushed Ms. Espindola into accepting a deal), but also created animosity between Hidalgo Jr. and Ms. Espindola, who were romantically involved prior to their incarceration. While it is certainly not constitutionally mandated that counsel should provide money to potential witnesses, it should be universally recognized that a "reasonable" attorney would not set out to actively antagonize a potential cooperating witness.

The issue is not that Ms. Espindola was induced to tell the truth when trial counsel failed to fund her defense, but that Ms. Espindola was induced to hurt her former lover, whom trial counsel had led her to believe had abandoned her. This is not the behavior of a reasonable attorney, and it likely had an enormous impact on the outcome of Hidalgo Jr.'s case. As such, this claim warrants further investigation and an evidentiary hearing to address this serious concern.

C. Counsel was Ineffective for Creating a Joint Defense Agreement.

In his Supplemental Petition, Hidalgo Jr. contended that trial counsel was unreasonably restrained from effective cross-examination of Ms. Espindola due to the implied attorney-client privilege that such agreements create. *See U.S. v. Henke*, 222 F.3d 633, 637 (9th Cir. 2000). The State attempted to counter this argument by pointing to a provision of the joint defense agreement that states that "nothing in this Agreement is intended to create any attorney-client privilege for the purpose of the determination of conflicts of interest." (PA 35.) However, the agreement additionally contains provisions that are in direct conflict with this statement. For example, the first paragraph of the joint defense agreement specifically states that "any past and future communications" among the members of the joint defense agreement are "confidential and are protected from disclosure to any third party by the Rules of Non-Disclosure." (SA 32.) From the record, it is unclear exactly how trial counsel interpreted the contract and what effect it had on his effective defense.

However, the issue in this case is not contract law, but whether trial counsel's entry into this joint defense agreement was ineffective, and whether his continued representation of Hidalgo Jr. after Espindola became a witness for the State was ineffective. If the State's contention that trial counsel proceeded as if there was no conflict is correct, then his decision

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to enter into the joint defense agreement was flawed at best. Essentially, the State has suggested that trial counsel entered into a joint defense with Hidalgo Jr.'s co-defendants—during the course of which he revealed trial strategy and the confidences of his client—without the minimum protection of attorney-client privilege in the event that a witness decided to cooperate with the State. Such an agreement could not be in the best interest of his client, and undoubtedly contributed to Hidalgo Jr.'s conviction through the testimony of Ms. Espindola.

The record shows that Ms. Espindola provided "evidence" to the State in exchange for a plea agreement. However, the exact extent of that information and whether she obtained this information under the auspices of the joint defense agreement is unclear. (PA 88.) Therefore, further discovery and an evidentiary hearing on the matter is required.

D. Trial Counsel's Decision to Concede the Motion to Consolidate was Unreasonable.

In its Response, the State makes the conclusory claim that counsel's decision to concede the Motion to Consolidate in exchange for the withdraw of the Notice of Intent to Seek the Death Penalty was a reasonable strategic decision. (*See* Response at pp. 31:23-32:26.) However, the likelihood that Hidalgo Jr. would receive the death penalty in connection with this case was remote. Trial counsel, as a reasonably qualified attorney practicing in capital defense, should have been aware of such. In Clark County Nevada, only 14% of death penalty cases result in a death sentence.[1] A reasonable capital defense attorney in Clark County would be aware of the remote possibility that a death sentence would be applied by a jury. Further, it is telling that the State was willing to trade a possible death sentence in order to try Hidalgo Jr. and his son together. From this offer, it is evident that the State either lacked the confidence that death would be imposed, or had significant incentive to try the Hidalgos together.

Moreover, the reasonableness of trial counsel's decision to concede the Motion to Consolidate is specious given that he was under an agreement to fund the defense of both

[1] *See* http://www.deathpenaltyinfo.org/documents/ClarkNVCostReport.pdf at p.11 (last accessed July 5, 2016).

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Hidalgo Jr. and Hidalgo III. If two trials were conducted in this case, the expense of the defense would undoubtedly increase. This cost would presumably be borne by trial counsel, as per the financial agreement, thus giving him personal incentive to concede the Motion to Consolidate.

Additionally, the State claimed that the Motion to Consolidate was likely to succeed. Aside from the fact that it seems unlikely that the State would take the death penalty off the table in exchange for conceding a Motion that was likely to succeed, the State's arguments are conclusory at best.

First, the State claimed that there was no spill-over prejudice due to the extensive evidence against Hidalgo III in comparison to Hidalgo Jr because that evidence would have been admissible against Hidalgo Jr. at his trial. (Response at pp. 33:18-34:23.) However, the State ignores the fact that Hidalgo Jr. was tried and convicted for an additional count regarding an alleged solicitation to commit the murder of DeAngelo Carroll, with which Mr. Hidalgo was not charged. (PA 203.) None of the evidence against Hidalgo III on that count would have been admissible against Hidalgo Jr. if he were tried alone, because it was simply not relevant. This evidence certainly served to make Hidalgo III appear not only guilty of attempting to have Mr. Carroll killed, but suggested that Hidalgos had a motive in killing Mr. Carroll; namely, that Mr. Carroll could implicate them in the killing of Timothy Hadland.

Further, Hidalgo Jr. was not alleged to have been present during the surreptitious conversations recorded by Carroll and played at trial. As such, the statements made by Carroll on those tapes could arguably only be played at the trial of Hidalgo Jr. to provide "context" for the co-conspirators statements. (PA 3337); *See also United States v. Hendricks*, 395 F.3d 173, 184 (3d Cir. 2005.) However, those same statements could be admissible against Hidalgo III, who was present for the recordings, as "adoptive admissions." *See Maginnis v. State,* 93 Nev. 173, 175, 561 P.2d 922, 923 (1977); NRS 51.035(3)(b); *see also* PA 2918.[2] The mere fact that the jury was expected to listen to these recordings and apply a

[2] At the time of trial on the matter, trial counsel repeatedly conflated the terms "adoptive admission" and "context" regarding the admissibility of these statements. While Hidalgo Jr. attempted to address this issue on appeal, the Court refused to consider the matter because

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different standard of consideration to the same piece of evidence demonstrates the spill-over prejudice that Hidalgo Jr. suffered as a result of being tried with Hidalgo III.

Second, the State misconstrues Hidalgo Jr.'s argument regarding the antagonistic defenses in this case. The State claims that the Hidalgo Jr. would be the "beneficiary" of his defense team defending his interests over that of his son. (Response at p. 34:13-16.) However, this argument ignores that trial counsel instituted a joint defense agreement over the interests of his client. Further, this argument coldly assumes that the State of Nevada does not recognize the difficulty inherent in a parent implicating their child in a murder in order to defend themselves. Finally, due to the close familial relationship between the co-defendants, it is likely the jury concluded that Hidalgo Jr. and his son acted in collusion. Given this strong presumption, counsel is likely to conclude that the only defense for Hidalgo Jr. was the argument that both father and son were innocent.

Given the numerous prejudicial issues that a joint trial presented in this case, it is likely that the Motion to Consolidate would have been granted. As such, it was unreasonable for trial counsel to concede the motion for the "benefit" of the notice to withdraw the death penalty.

E. Appellate Counsel was Not Precluded from Raising the Issue of Joinder on Appeal.

In his Supplemental Petition, Hidalgo Jr. acknowledged that the record regarding trial counsel's concession of the Motion to Consolidate was not entirely clear. As such, he raised the alternative argument that in the event that trial counsel contests that he conceded the motion or that the issue should have been raised on appeal. However, the State utterly ignored this argument and contends that the issue could not be raised on appeal because the motion was conceded. (Response at p. 36:6-14.) As such, the State has failed to address Hidalgo Jr.'s argument on this issue, and has further demonstrated that discovery is warranted in this matter to determine the exact negotiation that occurred regarding the concession of the Motion to Consolidate.

Attorney Gentile had acquiesced to the use of the term "adoptive admission." (PA 3334, n. 4.) This error was raised by Hidalgo Jr. in his pro se Petition for Writ of Habeas Corpus and is preserved for the purposes of argument on this matter. (PA 3425-3426.)

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F. Appellate Counsel was Deficient for Failing to Brief the Hearsay Issue on Appeal.

The State argued that the statements of Rontae Zone and Detective McGrath regarding Mr. Carroll informing Mr. Zone "to tell the truth" are not hearsay under the auspices of Nev. Rev. Stat. § 51.035, and that this testimony was allegedly introduced to demonstrate that Mr. Zone was hesitant to tell the truth after Carroll made this statement to him. (*See* Response at p. 37:16-18.) However, this interpretation is not corroborated by the record. At the time of trial, the State offered the testimony of both Mr. Zone and Detective McGrath. During his testimony, Detective McGrath stated that he interviewed Mr. Zone and that his story was allegedly consistent with Mr. Carroll's third statement on the matter. (PA 1130, 1638.) There was simply no issue presented at trial that Mr. Zone was hesitant to give his statement. As such, there is no reason to introduce testimony regarding his hesitancy.

The clearer reason for the introduction of this testimony was to establish that Mr. Zone was telling the truth because he was informed to do so by Mr. Carroll. If the statement was introduced for this reason, then it the statement constituted inadmissible hearsay. *See* Nev. Rev. Stat. § 51.035. Given the importance of Mr. Zone' testimony, the admission of hearsay statements that tend to prove his truthfulness cannot constitute harmless error. That Ms. Espindola also implicated Hidalgo Jr. in her testimony does not render the introduction of these statements harmless, especially in light of the questionable motivations for Ms. Espindola's testimony. Consequently, a reasonable attorney would have brought this issue on appeal.

G. Hidalgo Jr. is Entitled to an Evidentiary Hearing and Discovery.

The State argues that the instant petition can be decided based upon the pleadings and that neither further discovery nor an evidentiary hearing is required. (*See generally* Response at pp. 47-48.) However, this conclusory argument does not address the fact that the parties are still unclear as to the exact nature of the financial agreement entered into between trial counsel and Hidalgo Jr. Knowing this is critical to determining whether the agreement negatively impacted trial counsel's ability to provide Hidalgo Jr. with constitutionally adequate representation. The State's argument further ignores that the parties

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are unclear as to how trial counsel apportioned defense funds, what services were performed, what investigation was conducted, or the full effect of trial counsel's withholding of defense funds. Finally, the State fails to consider that the record is unclear regarding trial counsel's concession to the Motion to Consolidate, and whether it was sound strategy for appellate counsel to omit the hearsay issue on appeal.

A post-conviction habeas petitioner is entitled to a post-conviction evidentiary hearing when he asserts claims supported by specific factual allegations not belied by the record that, if true, would entitle him to relief. *McConnell v. State*, 212 P.3d 307, 313, 125 Nev. Adv. Rep. 24 (2009). In this case, Hidalgo Jr. has raised several specific factual allegations that are not contradicted by the record. Further, if these allegations are true, Hidalgo Jr. has a cognizable claim for ineffective assistance of counsel. Consequently, Hidalgo Jr. is entitled to an evidentiary hearing and to conduct discovery to prepare for the hearing.

III. CONCLUSION

For the foregoing reasons, the accused herein respectfully request that this Court grant appropriate relief requested in the Petition for Writ of Habeas Corpus (Post-Conviction.)

DATED this 21st day of July, 2016.

/s/Margaret A. McLetchie
Margaret A. McLetchie, Nevada Bar No. 10931
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CERTIFICATE OF MAILING

Pursuant to NRCP 5(b)(2)(B) I hereby certify that on the 21st day of July, 2016, I mailed a true and correct copy of the foregoing REPLY TO STATE'S RESPONSE TO THE SUPPLEMENTAL MEMORANDUM OF POINTS AND AUTHORTIES IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION) by depositing the same in the United States mail, first-class postage fully pre-paid, to the following address:

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

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

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

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

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DECLARATION OF MARGARET A. MCLETCHIE

Under the penalty of perjury, I, Margaret A. McLetchie, do hereby state and declare as follows:

1. I am a partner in the law firm of McLetchie Shell, LLC and have been appointed to represent Petitioner Luis Hidalgo Jr. in the instant matter.

2. I have personal knowledge of the matters contained herein.

3. I have reviewed the discovery in this matter, as well as the documents that my office received from prior counsel.

4. In examining these materials, I have found no documentation addressing or itemizing the billing for the defense of Hidalgo Jr, or his co-defendants Anabel Espindola and Luis Hidalgo III.

5. It is my understanding that Hidalgo Jr. does not have any itemized billing in his possession.

6. Documentation regarding what hours were expended and what expenses were paid as part of the financial agreement between trial counsel and Hidalgo Jr. is crucial to understanding the quality of representation provided by trial counsel, and by the attorneys retained to represent his co-defendants, Anabel Espindola and Luis Hidalgo III.

7. Hidalgo Jr. asserts in his Petition for Writ of Habeas Corpus that trial counsel failed to fund the defense of Ms. Espindola, as per the financial agreement, and thus created animosity between Ms. Espindola, a testifying witness, and Hidalgo Jr.

8. As this information is not currently available, discovery and an evidentiary hearing are required to determine exactly how this financial transaction unfolded and the impact that it had on Hidalgo Jr.'s representation.

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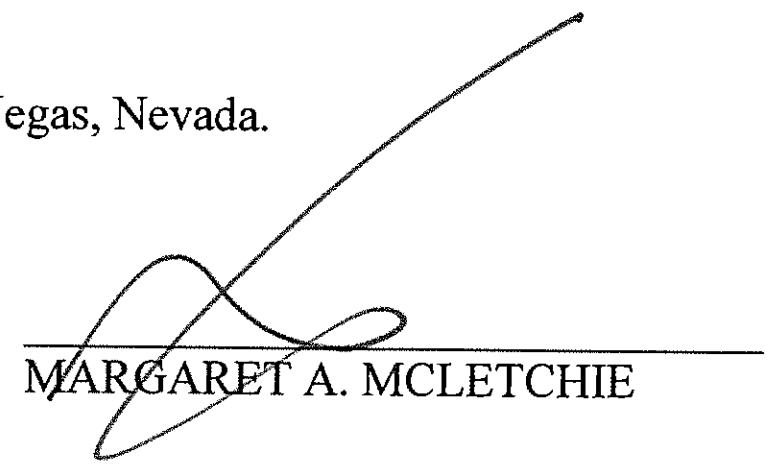
I declare under penalty of perjury the foregoing is true and correct to the best of my recollection.

Executed on July 21, 2016, at Las Vegas, Nevada.



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CLERK OF THE COURT

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DISTRICT COURT
CLARK COUNTY, NEVADA

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

BEFORE THE HONORABLE VALERIE ADAIR, DISTRICT COURT JUDGE

THURSDAY, AUGUST 11, 2016

RECORDER'S TRANSCRIPT RE:
PETITION FOR WRIT OF HABEAS CORPUS

APPEARANCES:

For the Plaintiff: MARC DIGIACOMO, ESQ.
Deputy District Attorney

For the Defendant: ALINA SHELL, ESQ.

RECORDED BY: SUSIE SCHOFIELD, COURT RECORDER

LAS VEGAS, NEVADA, THURSDAY, AUGUST 11, 2016 10:13 A.M.

THE COURT: All right. I'll call the matter for Ms. Shell. I see Mr. DiGiacomo is here. And, Ms. Shell, would you approach the bench?

[Colloquy between Court and Ms. Shell regarding law clerk disclosure]

This is on for -- let me grab the file. This is on, as you know, for the defendant's petition. And, Ms. Shell, did you have anything to add? And then I actually had a question.

MS. SHELL: Your Honor, I think I -- you know, unless you -- well, I'll answer Your Honor's specific questions. I think we've laid out pretty thoroughly in our briefing while we're entitled to an evidentiary hearing in this matter.

THE COURT: The only -- I mean, I'll just kind of give you a heads up for both of you where I'm leaning. The only thing I can really see that we might need to get into on an evidentiary hearing is Ms. Espindola's version of events. So, I guess, what would you really like to sort of develop in an evidentiary hearing?

MS. SHELL: Well, obviously, Your Honor, we think we're entitled to a hearing on all the issues.

THE COURT: Right.

MS. SHELL: But if I was going to point out the specifics, I think there are a couple of areas where I think further inquiry, maybe some additional discovery is required.

So the first is, obviously, as we briefed in our papers, Mr. Hidalgo's prior counsel, Mr. Gentile, purchased as part of the --

THE COURT: Right, and that was one I kind of rejected because I don't really see where the conflict of that is on the -- I mean, I think it was well known that he received the payment of the club which was then operated by his son, so I don't know really what record

needing to develop on that.

MS. SHELL: Well, Your Honor, my curiosity --

THE COURT: Do you know what I'm saying?

MS. SHELL: I do see what you're saying and my answer to that is --

THE COURT: What else do we need to know?

MS. SHELL: The -- well --

THE COURT: I mean, it's either appropriate or it's inappropriate, and payment was made regardless of the outcome. I mean, he got the club, and payment -- so payment was made regardless of the outcome of the trial or any litigation. So I guess my question is what else do we need to know? Like, what do you want to develop on that factual question?

MS. SHELL: The thing that stood out for me, Your Honor, was that prior to the exchange of the LLC's for legal services, there was actually no valuation conducted on the property in the LLC. The LLC held three other LLC's and all of this was fairly lucrative LLC's, especially the ones associated with the strip clubs, and, you know, I've been doing civil practice for a year so it's just enough to make me dangerous but also make me have some questions about how if you're going to sell property, why there was no valuation conducted first to establish what the value was.

I mean, really, the attorney had Mr. Hidalgo over a barrel, he was desperate for representation, and I think that raises some serious issues about whether his -- whether his representation was completely conflict trade.

THE COURT: I guess, but what I'm saying is what do we need to develop on that? It's either a conflict or it's not a conflict by way of the way a payment was made. I don't know that we need to -- what on the record do we need to find out, or ask about, or develop, that's kind of what the Court is saying.

MS. SHELL: Right.

THE COURT: You know, I think we can all accept it was a lucrative asset because of the grandfathered-in liquor license that's unique to that property. I think there was some evidence that came out at some point that it was listed for $17,000,000 or something like that, whether -- you know, things are worth what people are willing to pay for them is the other thing. You know, I think it's clear on the record and this Court certainly will accept that it was a lucrative asset.

In terms of him being desperate for representation, you know, he could have had appointed counsel.

MS. SHELL: Perhaps, Your Honor, you know, I can't read my client's mind and tell you why he decided to go with Mr. Gentile.

THE COURT: Well he probably thought Mr. Gentile would do a better job than appointed counsel. I mean, I can -- I'm assuming that would be why.

MS. SHELL: I would assume so as well.

THE COURT: I don't think there's a big mystery there. And Mr. Gentile obviously enjoys a very good reputation as a criminal defense attorney in this community, so I just -- I'm still not hearing, like, what else do we need to know on that issue of the conflict regarding payment that we don't already know?

MS. SHELL: I think that that's -- my position is that position, Your Honor.

Turning to the -- I'll go to the next subject.

THE COURT: Okay. I mean, if you said, oh, this is what we need to know, I might consider it but I still don't know that there's anything else that needs to become part of this record regarding the manner of payment. And I think, you know, that was well known, at least to me, from the outset. So that would just be my comment on that.

MS. SHELL: Okay.