

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2023

LUIS ALONSO HIDALGO III, *Petitioner*,

v.

TIM GARRETT, et al., *Respondents*.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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THE QUESTIONS PRESENTED

1. Did the Ninth Circuit err when Petitioner Hidalgo made a substantial showing of the denial of a constitutional right as to the failure of counsel to sever the joined trial and related charges as to Petitioner Hidalgo and Petitioner Hidalgo's father?
2. Did the Ninth Circuit err when Petitioner Hidalgo made a substantial showing of the denial of a constitutional right as to his several convictions solely from alleged out-of-court statements?
3. Did the Ninth Circuit err when Petitioner Hidalgo made a substantial showing of the denial of a constitutional right as to the denial of exculpatory testimony in a joint trial with Petitioner Hidalgo's father?
4. Did the Ninth Circuit err when Petitioner Hidalgo made a substantial showing of the denial of a constitutional right as to being improperly convicted of two separate counts for use of a deadly weapon?

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I.

PRAYER FOR RELIEF

Luis Alonso Hidalgo III petitions for a writ of certiorari to review the decision of United States Court of Appeals for the Ninth Circuit that denied Luis Alonso Hidalgo III his request for certificate of appealability. The basis of this petition is that the Ninth Circuit erroneously decided that Luis Alonso Hidalgo III has not shown that “jurists of reason would find it debatable whether the petition states a valid claim of the denial of constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” For the reasons stated herein, Luis Alonso Hidalgo III’s petition should be granted.

II.

OPINION BELOW

The United States Court of Appeals for the Ninth Circuit entered an order that denied Luis Alonso Hidalgo III a certificate of appealability in an appeal from a district court denied petition for writ of habeas corpus. *Luis Alonso Hidalgo III v. Tim Garrett, et al.*, No. 22-16516 (9th Cir. July 25, 2023). *Appendix A*.

III.

BASIS FOR JURISDICTION

On July 25, 2023, the United States Court of Appeals for the Ninth Circuit delivered an order that denied Luis Alonso Hidalgo III a request for certificate of appealability. *Appendix A*. This is the final judgment for which a writ of certiorari is sought. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

IV.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED IN THE CASE

Pursuant to Title 28 United States Code Section 2253(c):

- (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—
 - (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
 - (B) the final order in a proceeding under section 2255.
- (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.
- (3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

V.

STATEMENT OF THE CASE

A. Jurisdiction of the Courts of First Instance.

The district court had jurisdiction under 18 U.S.C. § 3231. The Ninth Circuit Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 1291 and 28 U.S.C. § 2253(a).

B. Facts Material to the Questions Presented.

a. Murder of Timothy Hadland.

In the evening of May 19, 2005, Timothy Hadland was camping at the Lake Mead recreation area with his girlfriend. Mr. Hadland met with Deangelo Carroll to buy some marijuana. Mr. Carroll hired three associates to accompany Mr. Carroll and kill Mr. Hadland. Mr. Hadland's body was later discovered with two gunshot wounds.

Mr. Carroll asserted that Petitioner's father, Hidalgo Sr., the owner of a

gentleman's club called The Palomino Club, hired Mr. Carroll to commit the murder. Mr. Carroll was later asked by law enforcement to wear an undercover wire to try and obtain more information as to the purported reason for the murder. Said recordings included conversations with Petitioner Hidalgo.

b. Charges and State Pretrial Proceedings.

The charges against Petitioner Hidalgo were: (i) Conspiracy to Commit Murder; (ii) Murder with Use of a Deadly Weapon; (iii) Solicitation to Commit Murder; and (iv) Solicitation to Commit Murder. Unlike Petitioner Hidalgo's father that was later added as a co-defendant, Petitioner Hidalgo's charges included two counts of solicitation to commit murder.

On September 16, 2005, attorney Stephen Stein filed a motion to be appointed as counsel for Petitioner Hidalgo. The court granted the motion on September 21, 2005. At a June 30, 2006 hearing, the trial court agreed that Defendants Carroll and Taoipu would be severed from Petitioner Hidalgo's case. In or around July of 2006, the parties entered into a joint defense agreement.

At a December 7, 2006 hearing, defense counsel Gentile advised that he would be substituting as counsel for Petitioner Hidalgo. In December of 2006, Gentile, as counsel for Petitioner Hidalgo, argued against a conflict of interest in representing Petitioner Hidalgo as well as potential defendant Hidalgo Sr. The argument was that a conflict had not arisen yet because Hidalgo Sr. had not been charged. Gentile presented declarations in support of his opposition to a conflict of interest.

In December of 2006, Gentile formally substituted as counsel of record for Petitioner Hidalgo in the place and stead of attorney Stephen Stein. On November 20, 2007, Paola Armeni, another attorney in Gentile's law firm, substituted in for Petitioner Hidalgo instead of attorney Robert Draskovich. At a hearing on February 5, 2008, the state advised that it would be seeking to indict Petitioner's father, Hidalgo Sr. The state brought up the actual conflict that will likely exist once Petitioner's father is also charged in the case, to which Gentile responded with:

From day one – well, I shouldn't say from day one – from the beginning of the case in being, in other words, once the charges were filed, there has been a joint defense agreement in existence between [Petitioner Hidalgo] who was charged, Ms. Espindola who was charged and [Hidalgo Sr.] who was not charged.

Gentile proceeded to argue that any conflict could be cleared up through a canvass and submitted affidavits of counsel.

On January 7, 2008, Gentile on behalf of Petitioner Hidalgo, filed pretrial motions, including a motion to sever from capital defendant Kenneth Counts. On February 20, 2008, Gentile filed a motion to dismiss count one of the information, or in the alternative motion to strike references to counts three and four. The motion was based upon an allegation that Petitioner Hidalgo cannot be held liable for a conspiracy after the object of the conspiracy has been accomplished.

On February 5, 2008, the prosecution advised it added Petitioner's father as a defendant. On February 12, 2008, the prosecution filed a memorandum of law regarding joint representation of Petitioner Hidalgo and Hidalgo, Sr. On February 13,

2008, the state indicted Hidalgo, Sr. for: (1) conspiracy to commit murder, and (2) murder with use of a deadly weapon.

On February 14, 2008, the trial court heard the defense's motion for an audibility hearing and transcript approval, as well as the issues raised with one legal counsel representing both Petitioner Hidalgo and Petitioner's father. The prosecution raised specific concerns of antagonistic defenses, as well as that if there is a conviction then the "first thing that's going to be argued by [Petitioner] is going to be I got railroaded, I should've taken a deal against my dad or vice versa." The trial court raised the issue of Petitioner Hidalgo not being able to testify against his father:

I think what [the prosecutor] is saying is that you could avoid a potential harsh conviction of conspiracy to commit murder and murder if you provided testimony against your father and received a favorable negotiation. I don't know exactly what they offered you, but I certainly do know, and as you do, that voluntarily [*sic*] manslaughters were given by – to the other – to the other defendants.

And, you know, that – again, I'm just reiterating, I think, what we went over a lot yesterday. That's just something that you need to be aware of and you need to factor that into your consideration of whether or not you want to waive the conflict.

Because as I told you yesterday, you won't be able to come back in and say, well, wait a minute, I should've taken that better deal and my – my attorney didn't properly advise me because of the conflict with him representing my father.

Petitioner Hidalgo agreed to have Gentile and Ms. Armeni represent him, and signed a waiver of conflict form.

On June 25, 2008, the state filed a motion to consolidate Petitioner Hidalgo's

case with his father's case. A joint opposition to the prosecution's motion was filed by Petitioner's father and Petitioner Hidalgo, with Gentile as the lead counsel. The prosecution argued that the "most" that the two defendants have been able to argue as to the reasoning for a separate trial would be the difference in evidence, with one defendant having surreptitious recordings, while the other did not have surreptitious recordings.

At a state court hearing after the writ of mandamus, the prosecution raised the issue regarding the joinder of the trials of Petitioner Hidalgo and Hidalgo Sr., asking the trial court whether a motion was required. The trial court responded:

I think to protect the record because they are two separate cases the reason I said what I did is normally I'll separate a noncapital from a capital. If they're both capital, then in my view there's obviously less reason to separate it, but I think you still need to file a formal written motion to protect the record.

And Mr. Gentile may argue persuasively that they shouldn't be consolidated. So I'm going to keep an open mind as to any other reason not to have them together, but I think that's what we need to do.

Gentile advised that he would not be representing both Petitioner Hidalgo and Hidalgo Sr. if the two defendants were going to be consolidated for trial.

At a hearing on July 22, 2008 on the prosecution's motion to consolidate, the trial court advised that its preference would be to try Petitioner Hidalgo and Hidalgo Sr. separately and successively. Gentile indicated his assent to separate trials, and advised that he knew "for sure" they would "file a challenge to the notice of intent to seek the death penalty" as to Petitioner Hidalgo. At a hearing, attorney Gentile

advised that he is willing to represent both Petitioner Hidalgo and Petitioner's father so long as the cases were not consolidated.

At a hearing on November 20, 2008, it was advised that Chris Adams, Esq. and John Arrascata, Esq. would be representing Petitioner Hidalgo instead of Gentile. On November 21, 2008, attorneys Arrascata and Adams substituted in on behalf of Petitioner Hidalgo. On December 8, 2008, Mr. Arrascata filed a motion to strike the amended notice of intent to seek death penalty. On January 7, 2009, the state filed a motion to remove Gentile as counsel, or, in the alternative, to require waivers after Petitioner and his father had "true independent counsel to advise them." Within said motion, the state noted that it was a "true anomaly" for a defense counsel to represent a defendant in a criminal case and then "mid-case" switch to another defendant, Petitioner's father.

On January 9, 2009, Christopher Adams, Esq. became co-counsel for Petitioner Hidalgo. At a hearing on January 9, 2009 on the motion to consolidate, Gentile conceded that the notice of intent to seek death penalty was proper as to the "murder for hire" allegations. Mr. Arrascata argued that the death penalty notice should be stricken against Petitioner Hidalgo because it was unconstitutionally vague. The trial court responded with a concern as to Petitioner Hidalgo's death notice being on a whole new theory than the prior death notice(s).

Gentile argued that there was one thing that he and counsel for Petitioner Hidalgo "absolutely agree[d] on" at that point – that at the guilt phase of trial both

Petitioner Hidalgo and Hidalgo Sr. have “the same defense and that is that prior to the death of Timothy Hadland they knew nothing about it.” Petitioner Hidalgo’s counsel Mr. Arrascada later stated that he did “not see” that there were antagonistic defenses between Petitioner Hidalgo and Hidalgo Sr. in the guilt phase of the proceedings. The trial court found “no problem” with joining the defendants together in the guilt phase as well as utilizing the notice of death penalty against both.

At a January 16, 2009 hearing, the parties agreed on the conflict and consolidation motions, so long as the state withdrew its notice of intent to seek the death penalty against both defendants. The trial court granted the state’s motion to consolidate, with an order entered on January 16, 2009.

At a January 2009 pretrial hearing, the parties discussed the underlying charges as it related to Petitioner Hidalgo versus Petitioner’s father. Gentile argued that it was going to be difficult to separate Petitioner Hidalgo and Hidalgo Sr., and that there were potentially separate conspiracies at issue. The trial court found that there were two conspiracies, one relating to Timothy Hadland, and the other relating to Kenneth Counts. The trial court ruled that the issue of Petitioner Hidalgo’s solicitation of murder is “up to the defense to bring in,” and that the trial court could not say “for certain that it was part of the first conspiracy.”

c. Trial.

The joint jury trial of Petitioner Hidalgo and his father started on January 27, 2009. Ms. Espindola testified that Petitioner Hidalgo alleged Mr. Hadland was taking

too much money on promotional payouts related to the number of people attending the Palomino Club. Hidalgo Sr. then stated that Mr. Hadland needed to be fired, and Ms. Espindola issued Mr. Hadland his final check. Ms. Espindola later spoke with Mr. Carroll, who advised that Mr. Hadland was working at another strip club, and “bad mouthing” the Palomino Club. Ms. Espindola testified that she later told Petitioner Hidalgo and Hidalgo, Sr., and Petitioner Hidalgo was “angry” about it. Petitioner Hidalgo suggested that in other cases someone would be sent to beat up the person. Hidalgo, Sr. then got angry, and told Petitioner Hidalgo to “mind his own business.” Ms. Espindola admitted that:

- a. Petitioner Hidalgo was not there when Ms. Espindola paid Mr. Carroll.
- b. Petitioner Hidalgo had left the room after being told by his father to “mind his business.”
- c. Petitioner Hidalgo did not speak to his father or Ms. Espindola at any time during the subject evening.
- d. Petitioner Hidalgo did not enter into any agreement as to killing Mr. Hadland, or even speaking to or hurting Mr. Hadland.
- e. Petitioner Hidalgo was not being serious on the undercover recording when discussing rat poison, and Petitioner Hidalgo never mentioned it again.
- f. Hidalgo Sr., alone, gave the order to Mr. Carroll.
- g. Ms. Espindola did not know why Hidalgo, Sr. told her to call Mr. Carroll, instead of simply calling Mr. Carroll himself.

During a break, counsel for Petitioner Hidalgo made a record as to Ms. Espindola testifying that the plea agreement called for an admission that she conspired with

Petitioner Hidalgo to commit the offense. Petitioner Hidalgo's counsel argued that a curative instruction was not enough, and that the jury was prejudiced by hearing the information. Counsel moved for a mistrial. The trial court denied the motion.

The trial court carried out a Fifth Amendment admonition with Hidalgo Sr., and then Petitioner Hidalgo. The prosecution argued that the defense's admission of the testimony of Jason Taoipu would mean that the entire statement was admissible, and the admissibility of the entire statement is prejudicial to Hidalgo Sr. Petitioner Hidalgo's counsel argued the relevance of the information within the statement, including a conversation about "bats and bags." The parties and the trial court then argued the admissibility of the entire statement, its relevance, and/or the portions that should not be included in trial.

The parties then preliminarily discussed how jury instructions were to be addressed. Petitioner Hidalgo's counsel advised that it would be putting on a case in chief as to Petitioner Hidalgo, and provided to the court an affidavit of an investigator as to attempts to locate Mr. Taoipu to testify. The trial court made a finding that Mr. Taoipu was an unavailable witness. Petitioner Hidalgo's counsel moved to admit the testimony from Mr. Taoipu as to what he heard regarding a conversation about "baseball bats and garbage bags."

Mr. Taoipu had testified that Ms. Espindola, and not Petitioner Hidalgo, had discussed "baseball bats and trash bags." Petitioner Hidalgo's counsel argued that it was exculpatory evidence. Petitioner Hidalgo's counsel argued that not admitting the

testimony affects Petitioner's due process rights, and his right to a fair trial. Counsel for Hidalgo Sr. argued against the admission, as portions of the testimony were inculpatory as to Hidalgo Sr., and a constitutional violation. The trial court denied Petitioner Hidalgo's request to have the testimony admitted.

During settling of jury instructions, the defense also wanted to include a jury instruction that one cannot joint a conspiracy after the completion of the crime that was its object. The prosecution argued that there can be more than one conspiracy, and that a conspiracy continues until the parties have "successfully gotten away and concealed the crime." The trial court determined Petitioner Hidalgos' knowledge of the crime and his discussion "can be evidence of the conspiracy."

The parties argued over a proposed instruction as to whether one can be convicted for use of a deadly weapon when not actually utilizing any weapon. The parties debated when the conspiracy ended as to Mr. Carroll, with the trial court suggesting the conspiracy ended when Mr. Carroll was contacted by law enforcement. The trial court ruled that a jury instruction include the language that any statements of a coconspirator after he withdrew from the conspiracy were not offered and cannot be considered by the jury for the truth of the matter asserted. Defense counsel objected, and the trial court added in language that the statements may be considered to give context to the statements made by other individuals who are speaking as other circumstantial evidence. The prosecution then wanted to add a jury instruction definition of an adoptive admission.

The trial court allowed part of the defense's proposed instruction as to accessory after the fact, but not all of it that went to the "theory of the defense." The trial court also denied Petitioner Hidalgo's request to include an instruction on entrapment. Following the reading of the jury instructions to the jury, Petitioner Hidalgo's counsel re-raised the "bats and bags issue as it relates to" Mr. Taoipu. Defense counsel argued that because they were not allowed to put evidence in through Mr. Taoipu, that any reference to "bats and bags" be stricken.

The jury found Petitioner Hidalgo guilty of:

- a. Count 1, Guilty of conspiracy to commit a battery with a deadly weapon or battery resulting in substantial bodily harm.
- b. Count 2, Guilty of second-degree murder with use of a deadly weapon.
- c. Count 3, Guilty of solicitation to commit murder;
- d. Count 4, Guilty of solicitation to commit murder.

The sentence for Petitioner Hidalgo for each count was:

1. 12 months;
 2. 120 months to life, with an equal and consecutive term of 120 months to life, concurrent with Count 1;
 3. 24 months to 72 months, concurrent with Counts 1 and 2;
 4. 24 months to 72 months, concurrent with all other counts.
- d. State Appeal and Post-Conviction Proceedings.

Petitioner filed his notice of appeal on July 16, 2009. On June 21, 2012, the matter was resolved through an order of affirmance. On May 13, 2013, the United State Supreme Court denied Petitioner Hidalgo's petition for writ of certiorari.

Petitioner filed his counseled post-conviction petition on January 22, 2014. An evidentiary hearing was held on December 15, 2014. One witness testified, Petitioner

Hidalgo's trial counsel John Arrascada. Attorney Arrascada testified that:

- a. He had worked with defense counsel Gentile many times before, including at least two other high-profile murder trials.
- b. He used the same investigator as Gentile.
- c. He did not file a severance motion essentially in exchange for the state withdrawing its "death notice."
- d. There was nothing in the transcript involving Jayson Taoipu that would have implicated Petitioner Hidalgo, and Petitioner Hidalgo was unable to have certain exculpatory testimony introduced at trial as to who made the comment about "bats and bags."
- e. They tried to introduce prior testimony of Mr. Taoipu, the admission of which was "strongly" objected to by counsel for Hidalgo Sr.
- f. He did not ask for a severance at the time that counsel for Hidalgo Sr. "strongly" objected, and he testified during the hearing he should have done so.
- g. The severance issue did not arise until towards the end of trial, during the defense's presentation of the case.
- h. To this day, Petitioner Hidalgo's counsel regrets not requesting a severance of the trial.
- i. He did not recollect thinking about or proposing a jury instruction that if found guilty on the conspiracy theory, that Petitioner Hidalgo could not be enhanced for the deadly weapon.
- j. He should have moved for severance even if there was no issue with Mr. Taoipu's testimony.
- k. He failed to ask for a severance, and only made his objection based upon a violation of due process rights.

The court denied the petition. Findings of Fact, Conclusions of Law, and an Order were entered on March 12, 2015.

Mr. Hidalgo appealed the denial of his petition. An order of affirmance was entered on May 11, 2016. Remittitur issued on October 21, 2016.

e. Federal Post-Conviction Litigation.

Petitioner Hidalgo filed his federal habeas petition on October 25, 2016. A first amended petition was filed on January 25, 2018 through appointed counsel. A second amended petition was filed on September 27, 2018, and a third amended petition was filed on December 4, 2020.

On November 15, 2021, this Court issued an Order as to the third amended petition, finding in part that: (1) multiple claims in the third amended petition do not relate back to the original petition, and were dismissed, (2) three claims in the third amended petition either do not relate back to the original petition or are redundant to other claims in the third amended petition, and were dismissed. On September 23, 2022, the federal district court issued an order that denied the third amended petition, and denied a certificate of appealability.

f. United States Court of Appeals for the Ninth Circuit Request for Certificate of Appealability.

On October 2, 2022, Petitioner Hidalgo filed a notice of appeal to the United States Court of Appeals for the Ninth Circuit. On November 22, 2022, Petitioner Hidalgo filed a request for certificate of appealability. On July 25, 2023, the United States Court of Appeals for the Ninth Circuit denied Petitioner Hidalgo's request for certificate of appealability. This petition follows.

VI.

REASONS SUPPORTING ALLOWANCE OF THE WRIT

This writ should be granted to allow this Court to correct the erroneous decision by the Ninth Circuit Court of Appeals that affirmed the decision of the federal district court in denying a request for certificate of appealability. The issues raised in this petition state a valid claim of the denial of a constitutional right for: (1) ineffective assistance of counsel in failing to sever the joint trial and counts as to Petitioner Hidalgo from Petitioner Hidalgo's father, (2) convictions based upon out-of-court statements, (3) denial of ability to have exculpatory statements admitted at trial, and (4) convictions for separate counts for use of a deadly weapon. It is thus respectfully requested that Petitioner Hidalgo's petition for writ of certiorari be granted.

A. Luis Alonso Hildalgo III's Petition Should be Granted When Conflicted Trial Counsel and Later Trial Counsel Failed to Sever the Trial From Hidalgo, Sr., Causing Structural Error.

Petitioner Hidalgo's petition should be granted as to his claim for ineffective assistance of counsel in not seeking a severance of the joint trial with Hidalgo Sr. The failure to move to sever the trials in order to include Mr. Taoipu's previously sworn, cross-examined testimony was an intractable part of Petitioner's Sixth Amendment right to present his defense. *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973); *Su Chia v. Cambra*, 360 F.3d 997, 1004-07 (9th Cir. 2004) (exclusion of declarant's out-of-court statements exonerating defendant violated his Sixth Amendment rights). Excluding this testimony also implicated the Fifth, Sixth and Fourteenth Amendment

rights to a fair trial and to due process of law. The prosecutor elicited Mr. Taoipu's testimony on who said "bring the bats and bags." There was no correction or change of this testimony. *Napue v. Illinois*, 360 U.S. 264, 270 (1959); *United States v. Price*, 566 F.3d 900, 910 n. 11 (9th Cir. 2009).

The prosecution called Mr. Taoipu as its witness in the shooter's trial held approximately one year prior to Petitioner Hidalgo's trial. Mr. Taoipu's testified in the shooter's trial that Mr. Carroll told them that he called Ms. Espindola and Ms. Espindola was talking about baseball bats and trash bags. Mr. Taoipu was a witness for the prosecution in the shooter's trial, and thus his motive for testifying would not have changed had he been a testifying witness in Petitioner Hidalgo's case.

In a joint trial Petitioner Hidalgo was not able to admit the testimony of Mr. Taoipu. The question is whether Mr. Taoipu's testimony had "sufficient *indicia* of reliability" to be admitted, not whether it was critical or important to the prosecution's case. *United States v. Mohawk*, 20 F.3d 1480, 1488 (9th Cir. 1994) (reversed on other grounds); *United States v. Collins*, 478 F.2d 837, 838-39 (5th Cir. 1973); *United States v. Ciak*, 102 F.3d 38, 43-44 (2d. Cir. 1996); *see also* Fed. R. Evid. 804(b)(1)(B). In federal habeas corpus, the court will not rely upon the "adequate and independent state grounds" theory of procedural default, so as to avoid review of the federal constitution issue, where a state law did not clearly support the existence of the alleged procedural requirement. *Ulster County Court v. Allen*, 442 U.S. 140, 150-51 (1979); *Ford v. Georgia*, 498 U.S. 411, 424 (1991).

The driving force behind denying Petitioner Hidalgo his Sixth Amendment right to present his defense is that the evidence rightfully would have been damaging to his co-defendant father. The evidence was critical to the defense when the convictions were based upon alleged statements by Petitioner Hidalgo, and the evidence would have refuted the same. Even or especially when the issue arose in the middle of trial, Mr. Taoipu's former sworn testimony should have been admitted Fed. R. Evid. Rule 804(b)(1)(B).

The remedy for this constitutional violation should have been a severance of the trials. Trial counsel admitted at the evidentiary hearing that he wanted Mr. Taoipu's exculpatory testimony to be included at trial, however did not seek a severance in order to avoid a death penalty notice. Trial counsel did not find anything in the transcript of Mr. Taoipu's testimony which would have been damaging to Luis Hidalgo, III's defense.

Trial counsel did not consider seeking a severance in the middle of trial in order to admit the testimony of Mr. Taoipu, and in hindsight trial counsel regretted that he did not do so.

Trial counsel should have acknowledged the inherent bias and spillover prejudice that existed during a joint trial, especially one that had counsel that formerly representing Petitioner Hidalgo now representing his co-defendant father. Counsel for Petitioner Hidalgo counsel for his co-defendant father, and counsel for Ms. Espindola entered into a joint defense agreement. The prosecution noted that it was a "true anomaly" for a defense counsel to represent a defendant in a criminal case and then

“mid-case” switch to another defendant, Petitioner Hidalgo’s father.

To deny Petitioner Hidalgo this important right equals structural error in the denial of counsel. The representation of Petitioner Hidalgo and then later his father impinged the ability to provide “competent and diligent representation” to each client pursuant to the Sixth Amendment. There is no reason to believe how Petitioner Hidalgo could have constitutionally waived such a conflict due to the inability to provide effective assistance under Sixth Amendment principles. The representation of Petitioner Hidalgo’s father is “directly adverse” to Petitioner Hidalgo, or, at the very least, there was a “significant risk” that the prior representation of Petitioner Hidalgo materially limited trial counsel’s responsibilities to Petitioner Hidalgo.

Moreover, trial counsel knew about Mr. Taiopu’s severed case for a significant amount of time. At a June 30, 2006 hearing, the trial court agreed that Defendants Carroll and Taoipu would be severed from Petitioner Hidalgo’s case. Even if a pre-trial severance motion is not made, is made and denied, or is made but then waived, this does not end the counsel and the court's duty to later seek a severance when one becomes necessary. *Zafiro v. United States*, 506 U.S. 534, 537 (1993) (a "continuing duty at all stages of the trial to grant a severance if prejudice appears"). Equally as clear, a theory of ineffective assistance of counsel can attend to counsel who fails to file or make a severance motion that is meritorious. *Hernandez v. Cowan*, 200 F.3d 995, 998-1000 (7th Cir. 2000).

Based upon *Byford v. State*, 116 Nev. 215, 225-26, 994 P.2d 700, 708 (2000), Mr.

Taoipu's sworn testimony from the shooter's trial should have been admitted, not only because Mr. Taoipu had no apparent motive to lie as an unindicted percipient witness, but also because the trials involved the same offense conduct. As noted by the Ninth Circuit in *Lumbery v. Hornbeak*, 605 F.3d 754, 760-61 (9th Cir), *cert denied*, 131 S.Ct. 798 (2010), the question is not whether the rules of evidence bar admission of the testimony; the question is whether it is unreasonable for the state court to conclude that the exclusion of the evidence did not violate the defendant's due process right to present a defense and receive a fair trial. 605 F.3d at 760, citing *Su Chia v. Cambria*, 360 F.3d 997, 1003 (9th Cir. 2004) and *Rice v. McCann*, 339 F.3d 546, 549 (7th Cir. 2003).

Where the state court misapplied an evidentiary rule to prohibit a defendant from presenting material factual matters, the court violated the defendant's Sixth Amendment rights. *Alvarez v. Ercole*, 763 F.3d 223, 231-32 (2d. Cir. 2014). Mr. Taoipu's testimony was critical for Petitioner Hidalgo because it clarified who actually made the "bats and bags" statement, and the failure by trial counsel to pursue the evidence violated Petitioner Hidalgo's Sixth Amendment rights. Petitioner Hidalgo respectfully requests that his petition be granted on this basis.

B. Luis Alonso Hidalgo III's Petition Should be Granted When Petitioner Hidalgo was Convicted Solely Upon Alleged Out-of-Court Statements.

Trial and appellate counsel was ineffective in failing to raise arguments or jury instructions as to the effect of out-of-court statements, in denial of Petitioner Hidalgo's Fifth, Sixth and Fourteenth Amendment rights to a fair trial, due process of law and

effective assistance of counsel on trial and direct appeal. Had this conviction occurred in federal court, the giving of this instruction would have constituted reversible error for the reasons counsel argued, pursuant to *United States v. Ammar*, 714 F.2d 238, 249 (3d. Cir. 1983) and *United States v. Tracy*, F.3d 1186, 1199 (2d. Cir. 1993). Post *Crawford v. Washington*, 541 U.S. 36 (2004), no reasonable interpretation of the Confrontation Clause would allow admissibility of hearsay statements of a co-conspirator who is an unavailable witness, when the circumstances make the statements anything but inherently reliable. In federal court, post *Crawford* and *Bourjaily*, out-of-court statements made by a co-conspirator may not be considered against a defendant if the statement themselves are the only evidence of the defendant's participation in the conspiracy. *United States v. Padilla*, 203 F.3d 156, 162 (2d. Cir. 2000); *United States v. Clark*, 24 18 F.3d 1337, 1341-42 (6th Cir.) *cert denied*, 513 U.S. 852 (1994); *United States v. Gordon*, 844 F.2d 1397, 1402 (9th Cir. 1998).

Independent of Petitioner Hidalgo's out of-court statements to coconspirators, there is no evidence that Petitioner Hidalgo joined the conspiracy to kill or even to injure the victim. Counsel failed and refused to tender a jury instruction that out-of-court statements made by co-conspirators may not be considered if the statements themselves are the only evidence of participation in the conspiracy. A proper instruction to tender and to give to the jury would have read:

[o]ut-of-court statements made by co-conspirators may not be considered against the defendant if the statement themselves are the only evidence of the defendant's participation in the conspiracy. The Court as

conditionally admitted co-conspirators' statements made during and in furtherance of a conspiracy of which the State charges both the declarant and the defendant [Luis Hidalgo, III] were members. However, if you find that there is no evidence independent of those statements that the said defendant joined the conspiracy [to batter or kill or otherwise harm the victim], you are instructed to disregard those statements.

Trial counsel admitted that he could not remember a reason for not making the subject argument and simply had to defer to the jury instructions themselves and the settling of the same. Had said instruction been given, a reasonable juror would not have convicted Petitioner Hidalgo.

A "strategy" of lowering the prosecution's burden of proof and making it easier to convict than should be as a matter of law, cannot be deemed a "reasonable" strategy. *Bourjaily v. United States*, 483 U.S. 171 (1987), the source for *Lilly* and *Crawford*, was put into proper context in federal court by an amendment to Fed. R. Evid. 801(d)(2) in 1997. Per the amended rule, the out-of-court statement may be considered, but by itself does not establish the existence of the conspiracy or the defendant's participation.

The 1997 comments for Rule 801 provide:

Rule 801(d)(2) has been amended in order to respond to three issues raised by *Bourjaily [supra]*. First, the amendment codifies the holding in *Bourjaily* by stating expressly that a court shall consider the contents of a coconspirator's statement in determining 'the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered.'

According to *Bourjaily*, Rule 104(a) required the preliminary questions to be established by a preponderance of the evidence. Second, the amendment resolves an issue on which the trial court had reserved decision. The contents of the declarant's

statement do not alone suffice to establish a conspiracy in which the declarant and the defendant participated. The circumstances surrounding the statement, such as the identity of the speaker, the context in which the statement was made, or evidence corroborating the contents of the statement in making its determination as to each preliminary question, are to be considered. The amendment to Fed. R. Evid. Rule 801 occurred based upon Circuit Court authority that pre-dated the amendment.

Petitioner Hidalgo was convicted on hearsay statements without regard to action or inaction of Petitioner Hidalgo, and without regard to the context of the statements or the reliability of the person reporting the statements. Under *Crawford*:

[w]here testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence much less to amorphous notions of 'reliability'. Certainly none of the authorities discussed above acknowledges any general reliability exception to the common-law rule. Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation. To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: By testing in the crucible of cross-examination. The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be a little dissent), but how reliability can best be determined.

Crawford, 541 U.S. at 61, 124 S.Ct. at 1370. The evidence could be admitted, but the jury should have been instructed to disregard the statements if there was no such indicia of reliability presented. Petitioner Hidalgo respectfully requests that the petition be granted on this basis.

C. Luis Alonso Hidalgo III's Petition Should be Granted When the Exculpatory Statements of Carroll and Taoipu Were Not Admitted at Trial.

- a. Denial of exculpatory statements from Carroll that Petitioner Hidalgo had "nothing to do with it."

The trial court violated Petitioner Hidalgo's Fifth, Sixth and Fourteenth Amendment rights when the trial court failed to admit a recorded statement of Mr. Carroll which exculpated Petitioner Hidalgo, specifically that Petitioner Hidalgo had "nothing to do with it." During trial, Petitioner Hidalgo moved to introduce the recorded statement by Mr. Carroll for the truth of the matter asserted and as substantive evidence. Just prior to trial, the prosecution advised that Mr. Carroll, the person that wore the secret body wire and conducted the recordings of Petitioner Hidalgo and others, would not be testifying at trial.

After the jury was seated, there were additional arguments by the parties as to transcripts, including (1) addition to a transcript as to a specific mention of the victim by name, and (2) the former representation of Petitioner Hidalgo by Gentile related to the transcripts. The trial court ruled that the transcript would not go back to the jury during deliberations. At the beginning of the seventh day of trial, the trial court inquired as to the use of the undercover wire during testimony. Counsel for Petitioner Hidalgo's father argued that the entire recording is not admissible.

The trial court posited that the tape would be used as an adoptive admission as to what Ms. Espindola or Petitioner Hidalgo said. The prosecutor stated that it would not be an adoptive admission because Petitioner Hidalgo never acknowledged Mr.

Carroll's statements. The prosecutor stated that there was no acknowledgment by Petitioner Hidalgo as to what statement is in any manner and meaning. The trial court admitted that there was a favorable statement for Petitioner Hidalgo, that Petitioner Hidalgo "didn't have anything to do with it."

The precedent outlined in *Su Chia v. Cambra*, 360 F.3d 997 (9th Cir. 2004) directs a finding that prejudicial constitutional error occurred in this trial. In *Su Chia*, the district court's denial of an inmate's petition for writ of habeas corpus was reversed and the case was remanded with instructions to grant the writ because the exclusion of statements was an unreasonable application of clearly established federal law as determined by the Supreme Court of the United States. *Id.*, at 1008. The excluded statements included the shooter telling authorities that the petitioner had nothing to do with the conspiracy. *Id.*, at 999. In reversing the decision of the district court, this Court concluded that the statements were both "reliable and crucial" to the defense of the petitioner. *Id.*, at 1008.

Defense counsel argued during trial the Ninth Circuit case of *United States v. Straub*, 538 F.3d 1147 (9th Cir. 2008) as to granting a witness immunity and being able to utilize the testimony for the defense. In *Straub*, this Court reversed the denial of a defendant's request to compel use immunity, with a judgment of acquittal entered as to certain counts unless the prosecution granted issue immunity or re-tried the case without the testimony. *Id.*, at 1166.

The parties agreed that the unavailability of witness Mr. Carroll will need to be

addressed to the jury. The parties later argued the admissibility of the tape without a transcript, and the trial court allowed the parties to each pass out their version of the transcript while the tape was being played, with the transcript not to be made part of the evidence. Defense counsel objected again, and the trial court admitted the recording “subject to the record that’s already been made.”

The court originally ruled that the statement could only be used to impeach Ms. Espindola and not as substantive evidence. The trial court later ruled that the statements made by Mr. Carroll when Mr. Carroll was acting as a police informant or agent cannot be considered for the truth of the matter asserted. The trial court issued, over counsel's objection, Jury Instruction No. 40 which stated, in relevant part, that the "statements of the co-conspirator after he has withdrawn from the conspiracy were not offered, and may not be considered by you, for the truth of the matter asserted."

Under Nevada law, once properly admitted for impeachment purposes, an adoptive admission is regarded as non-hearsay and as substantive evidence. *Crowley v. State*, 120 Nev. 30, 35, 83 P.3d 282, 286 (2004). The court allowed Mr. Carroll's statement to be considered as an "adoptive admission" by Ms. Espindola, but instructed the jury that the statement may not be considered for the truth of the matter asserted.

The trial court's ruling denied Petitioner Hidalgo the opportunity to present a full and fair defense as promised by the due process clause in the Fourteenth Amendment of the United States Constitution and the right to present a defense clause of the Sixth Amendment. Pursuant to *Su Chia v. Cambria*, the exclusion of Mr.

Carroll's statements that Petitioner Hidalgo had "nothing to do" with it was an unreasonable application of clearly established federal law, as the statements were both "reliable and crucial" to the defense of the petitioner. *Id.*, at 1008.

Petitioner Hidalgo was not able to question Mr. Carroll in order to obtain the testimony that would support the recorded information. Mr. Carroll was not provided immunity in order to testify, in violation of the precedent outlined in *United States v. Straub*, 538 F.3d 1147. Similar to *Straub*, the recorded testimony of Mr. Carroll was crucial to its case against Petitioner Hidalgo as it comprised virtually all of the evidence against him. The admission of only certain parts of the recordings denied the defense the ability not only to include contradictory exculpatory statements but also cross-examine Mr. Carroll on the statements made that were arguably, or actually, inculpatory. Petitioner Hidalgo respectfully requests that the petition be granted on this basis.

- b. Denial of exculpatory statements from Taoipu that someone other than Petitioner Hidalgo made statements regarding "bats and bags."

The trial court violated Petitioner Hidalgo's Fifth, Sixth and Fourteenth Amendment rights when the trial court failed to admit the testimony of Jayson Taoipu that someone else made statements about "bats and bags" other than Petitioner Hidalgo. Trial counsel moved to admit the testimony from Mr. Taoipu as to what he heard regarding a conversation about "baseball bats and garbage bags." Counsel sought to admit Mr. Taoipu's testimony for purposes of demonstrating Petitioner

Hidalgo's innocence in the conspiracy to kill Mr. Hadland.

The prosecution presented Mr. Taoipu as its witness at the shooter's trial, and during direct examination Mr. Taoipu testified that it was Mr. Carroll, and not Petitioner Hidalgo, who told them that he had called Ms. Espindola and Ms. Espindola was talking about baseball bats and trash bags. Following the reading of the jury instructions to the jury, defense counsel re-raised the "bats and bags issue as it relates to" Mr. Taoipu. Defense counsel argued that because they were not allowed to put evidence in through Mr. Taoipu, that any reference to "bats and bags" be stricken. The prosecutor admitted that if the jury was going to make specific findings that it will be "more confusing than just reading the instructions," and result in more post-trial litigation.

The jury found that the criminal objective of the conspiracy was to engage in a battery causing substantial bodily harm, not necessarily with the use of a deadly weapon. If the conspiracy was completed on the making of that agreement, a deadly weapon as a matter of law cannot be used in conscious furtherance of that objective, and therefore the deadly weapon enhancement cannot be applied. The "conspiracy" that Petitioner Hidalgo supposedly joined did not involve a plan to shoot Mr. Hadland. There was additionally no evidence that Petitioner Hidalgo knew before the fact that the shooter was going to obtain a gun and shoot Mr. Hadland. Thus, no rational juror would have returned a guilty verdict on the deadly weapon enhancement, even if acting rationally in returning a guilty verdict to second degree murder.

The excluded testimony was inconsistent with and impeached the testimony of Rontae Zone. However, the jury was not allowed to hear it. The trial court's holding was that Mr. Taoipu's former testimony would "open the door to other statements that Taoipu made in his trial testimony that would inculcate" Petitioner Hidalgo, and also were prejudicial to co-defendant Hidalgo Sr. The trial court's ruling violated the Sixth Amendment right to present witnesses in order to establish a defense. *Washington v. Texas*, 388 U.S. 14, 17-19 (1967). Petitioner Hidalgo respectfully requests that the petition be granted on this basis.

D. Luis Alonso Hildalgo III's Petition Should be Granted When Petitioner Hidalgo was Convicted of Two Separate Counts for Use of a Deadly Weapon.

A deadly weapon sentencing enhancement cannot apply to a conviction for conspiracy. *Moore v. State*, 117 Nev. 659, 662-63, 27 P.3d 447,450 (2001). Petitioner Hidalgo was denied his Fifth, Sixth and Fourteenth Amendment rights to a fair trial, due process of law and effective assistance of counsel on trial and direct appeal when counsel failed to tender a jury instruction or argue that a deadly weapon enhancement should not be found if there was a finding of guilt as to second-degree murder on a conspiracy theory absent evidence of use of a weapon as part of that conspiracy.

In Nevada, a conspiracy does not require an overt act; the crime is completed when the unlawful agreement is reached. Therefore, a defendant cannot "use" a deadly weapon to commit a crime which is completed before the deadly weapon has ever been used. *Moore*, 117 Nev. at 662-63, 27 P.3d at 450.

In this case, there was no evidence that Petitioner Hidalgo knew before the fact that another person was going to "take care of T.J." by shooting or killing him. As such, the deadly weapon enhancement cannot be applied as a matter of law. *Brooks v. State*, 124 Nev. 203, 206-10, 180 P.3d 657, 659-62 (2008). The jury in this case was given the opportunity in its verdict to find the defendant guilty of second-degree murder without the use of a deadly weapon. Had defense counsel tendered an instruction pursuant to *Moore*, that if the jury found the defendant guilty of a conspiracy to commit battery and conspiracy to commit murder then it must not find guilt as to the deadly weapon enhancement, then it is reasonably likely that the jury would not have found Petitioner Hidalgo responsible for another person's use of the weapon.

This argument could have been additionally or alternatively raised within seven days after the verdict. Had counsel raised the issue via a post-verdict motion, the trial would have been able to entertain the arguments. *See* Nev. Rev. Stat. § 175.381(2); *see also* Nev. Rev. Stat. § 193.165. Counsel was ineffective in failing to seek the giving of a *Moore* instruction, and in failing to file a timely motion, causing Petitioner Hidalgo to suffer prejudice when this issue was ultimately not brought before the trial court.

The jury in this case found that the criminal objective of the conspiracy was to engage in a battery causing substantial bodily harm, not as a mandatory consequence of with the use of a deadly weapon. If the conspiracy was completed on the making of that agreement, a deadly weapon as a matter of law cannot be used in conscious

furtherance of that objective, and therefore the deadly weapon enhancement cannot be applied.

Pursuant to *Jackson v. Virginia*, 443 U.S. 307 (1979), *Lay v. State*, 110 Nev. 1189, 1192, 886 P. 2d 448, 450 (1994) (Nevada standard); and *State v. Rhodia*, 101 Nev. 608, 610, 707 P. 2d 549, 550 (1985) (citing *Jackson*), the evidence was insufficient as a matter of law to support the weapons enhancement. Pursuant to *Moore*, where a deadly weapon enhancement was based on a conspiracy theory, the jury was to review the facts as they occurred at the time of the unlawful agreement, and not any other time frame. Pursuant to *Brooks*, the deadly weapon enhancement cannot apply to a defendant who did not know that his co-conspirator was going to use a deadly weapon.

The conspiracy that Petitioner Hidalgo was alleged to have joined did not involve a plan to shoot and kill someone. There was no evidence that Petitioner Hidalgo knew before the fact that any other person was going to shoot and kill someone. No rational juror would have concluded otherwise, and would not have returned a verdict with a deadly weapon enhancement, even if returning a guilty verdict as to second-degree murder. The evidence was insufficient as a matter of law to support a judgment of conviction on the charge of conspiracy to commit battery with a deadly weapon or resulting in substantial bodily harm and thus could not support vicarious liability as a conspirator for second-degree murder. Petitioner Hidalgo respectfully requests that the petition be granted on this basis.

E. Luis Alonso Hidalgo III's Petition Should be Granted When Petitioner Hidalgo was Convicted in a Joint Trial with Hidalgo Sr., Despite Vast Differences in the Amount and Type of Evidence Between Co-Defendants.

Petitioner Hidalgo was denied his Fifth, Sixth and Fourteenth Amendment rights to a fair trial, due process of law and effective assistance of counsel on trial and direct appeal when trial counsel failed to file a motion to sever the trials of the solicitation of murder counts, which occurred after the murder of Mr. Hadland, from the murder and conspiracy to murder counts regarding Mr. Hadland. Petitioner Hidalgo was also denied effective assistance of counsel in counsel not seeking a severance of the trial counts, despite large differences in the evidence between the co-defendants and counts.

The evidence in support of Petitioner Hidalgo's participation statements Petitioner Hidalgo was alleged to have made. Events occurring after the charged crime do not, beyond propensity evidence, explain why the defendant committed the offense, unless it explains the desire to hide the charged offense. *Richmond v. State*, 118 Nev. 924, 932-33, 59 P.3d 1249, 1255 (2002). If Petitioner Hidalgo arguably solicited the murder of one or more others after the fact, this does not explain why Petitioner Hidalgo joined a conspiracy to harm Mr. Hadland. Based upon the recording by Mr. Carroll, Petitioner Hidalgo had nothing to do with the murder of Mr. Hadland.

In *United States v. Brown*, 880 F.3d 1012, 1014-15 (9th Cir. 1989), the Ninth Circuit reversed a murder conviction, stating that since motive is not an element of the offense, the prior bad act evidence must show motive that is relevant to establish

defendant's specific intent to commit the charged murder. The evidence established at most the defendant's propensity for violence, as the acts could not be linked as the reason for killing the postal worker. *Id.*, at 1015. The uncharged misconduct was found to be inadmissible. *Id.*

Here, the conspiracy to batter was only as to Mr. Hadland, not as to any other person. If Petitioner Hidalgo was not involved in that conspiracy, then Petitioner Hidalgo would have had no motive to do harm to any other person. There would no reason for Petitioner Hidalgo to rid of witnesses for himself, since Petitioner Hidalgo did nothing to cause Mr. Hadland's death. Pursuant to *United States v. Brown*, at worst, the solicitation evidence establishes Petitioner Hidalgo's propensity to "talk smack." But "talking smack," by itself, cannot be the foundation of a murder prosecution, absent action evidencing an intent to engage in violence.

Finally, had Petitioner Hidalgo's trial counsel obtained a severance, trial counsel would have been able to pursue a viable and supported theory of defense as to Carroll being motivated to commit the acts at issue on his own. In 2020, an investigator interviewed witness Mr. Handley, that stated:

1. Mr. Hadland and Carroll were both engaging in the same "scam" related to the sale of VIP entrance cards, with Mr. Hadland being caught, and Carroll not having been caught as of the time Mr. Hadland was suspended from employment.
2. Carroll expressed to Mr. Handley that he was afraid of being "ratted out" on the VIP card scam/scheme, and being implicated for pocketing money that would otherwise go to the Palomino Club. Carroll expressed said fear of being implicated in the VIP scam to Mr. Handley directly after the

subject murder.

3. Carroll did not want to lose his job as he is an ex-felon, and was panicking about Mr. Hadland talking to management about Carroll also being involved in the VIP card scam.
4. Mr. Carroll killed Mr. Hadland out of fear of losing his job.

This missing testimony shows another example of the failures by trial counsel to pursue a defense, especially as compared to the large weight of the evidence against Petitioner Hidalgo's father. Petitioner Hidalgo respectfully requests that the petition be granted on this basis.

VII.

CONCLUSION

For the foregoing reasons, Luis Alonso Hidalgo III respectfully asks this Court to grant this petition for writ of certiorari.

Dated: October 23, 2023.

Respectfully submitted,

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