IN THE SUPREME COURT OF THE STATE OF NEVADA

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Tracie K. Lindeman
Clerk of Supreme Court

LUIS A, HIDALGO, JR.

Appellant,

vs.

THE STATE OF NEVADA

Respondent.

CASE NO. 54209

PETITION FOR REHEARING PURSUANT TO NEVADA RULE OF APPELLATE PROCEDURE 40

STANDARD OF REVIEW

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

INSTRUCTION NUMBER FORTY IS A MISAPPLICATION OF NRS 47.070

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

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

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

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

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

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

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

INSTRUCTION NUMBER FORTY CONFUSED THE JURY REGARDING THE BURDEN OF PROOF NECESSARY TO CONVICT MR. H OF CONSPIRACY AND THE INSTRUCTION ACTUALLY REDUCED THE STATE'S BURDEN

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

[1] Instructions number fifteen, sixteen, seventeen and eighteen are the four conspiracy instructions.

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

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

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

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

Dated this 9th day of July, 2012.

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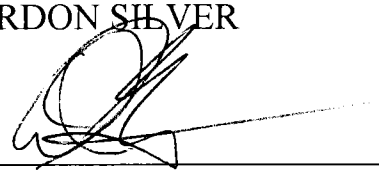

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CERTIFICATE OF COMPLIANCE

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

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

DATED this 9th day of July, 2012.

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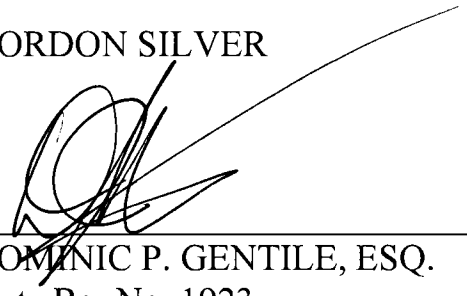

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CERTIFICATE OF SERVICE

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

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