IN THE SUPREME COURT OF THE STATE OF NEVADA

LUIS A, HIDALGO, JR.

Appellant,

vs.

THE STATE OF NEVADA

Respondent.

CASE NO. 54209

PETITION FOR *EN BANC* RECONSIDERATION PURSUANT TO NRAP 40A

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

I. The Essence of the Issue Presented

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

[1] Appellant's Amended Appendix will be referred to hereinafter as "AAA."

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

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

II. The Problem is Systemic and Impacts All Conspiracy Cases

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

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

III. The Problem is Unique to Nevada

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

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

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

[3] 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 find that the **fulfillment of the**

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IV. The Problem in Context

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

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

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

(continued)
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. (emphasis added.)

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

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

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

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

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

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

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

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

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

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

[6] Circuit Judge Newman's opinion was joined by the entire panel which included now United States Supreme Court Justice Sonia Sotomayor, and circulated and adopted by the entire Second Circuit Court of Appeals.

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

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

Conclusion

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

Instruction #40 was far more than "unnecessary." It was not applicable to the jury's role in deciding two of the essential elements of conspiracy – its existence and its membership – and because of its reduction of the burden of proof on those elements it was confusing and inaccurate. [7] Therefore, this Court should

[7] "Jurors should neither be expected to be legal experts nor make legal inferences with respect to the meaning of the law; rather, they should be provided with

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

Dated this 10 day of August, 2012.

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(continued)

applicable legal principles by accurate, clear, and complete instructions specifically tailored to the facts and circumstances of the case." Crawford v. State, 121 Nev. 744, 754 (2005). This Court has previously decried the use of the word "slight" in a jury instruction, reversing and remanding for a new trial because of the impact that it may have had on the jury's decision. Driscoll v. Erreguible, 87 Nev. 97, 482 P.d 291 (1971).

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CERTIFICATE OF COMPLIANCE

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

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

DATED this 10th day of August, 2012.

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CERTIFICATE OF SERVICE

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

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EXHIBIT "1"

INSTRUCTION NO. 40

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

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

The statements of a co-conspirator after he has withdrawn from the conspiracy were not offered, and may not be considered by you, for the truth of the matter asserted. They were only offered to give context to the statements made by the other individuals who are speaking, as or adoptive admissions or other circumstantial evidence in the case.

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