

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

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4  
5       LUIS HIDALGO, JR.,

6                                    Appellant,

7       v.

8       THE STATE OF NEVADA,

9                                    Respondent.

CASE NO: 54209

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Tracie K. Lindeman  
Clerk of Supreme Court

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

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

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

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

19                                    Respectfully submitted,

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

23                                    BY */s/ Steven S. Owens*

24                                    STEVEN S. OWENS  
25                                    Chief Deputy District Attorney  
26                                    Nevada Bar #004352

27                                    Attorney for Respondent  
28

1 **MEMORANDUM**

2 On June 21, 2012, a panel of this Court issued an unpublished Order  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

11 **Standard of Review for En Banc Reconsideration**

12 En banc reconsideration of a panel decision is disfavored, and this Court will  
13 only reconsider a matter when necessary to ensure consistency in its decisions or  
14 when the case implicates important precedential, public policy, or constitutional  
15 issues. NRAP 40A(a). This Court has granted en banc reconsideration when  
16 necessary to clarify and extend existing precedent or to reconcile it with statutory  
17 authority. See e.g., Bass-Davis v. Davis, 122 Nev. 442, 134 P.3d 103 (2006); City  
18 of Las Vegas v. Walsh, 121 Nev. 899, 124 P.3d 203 (2005); Ronning v. State, 116  
19 Nev. 32, 992 P.2d 260 (2000). But where legal opinions are consistent, en banc  
20 reconsideration is unwarranted. Skender v. Brunsonbuilt Const. and Development  
21 Co., 123 Nev. \_\_\_, 171 P.3d 745 (2007). Matters presented in the briefs and oral  
22 arguments may not be reargued in the petition, and no point may be raised for the  
23 first time. NRAP 40A(c). The practice of instructing the jury on when it may  
24 consider coconspirator statements as evidence under NRS 51.035(3)(e), does not  
25 implicate any constitutional right or structural error. Because there was no  
26 reasonable likelihood the jury confused the law pertaining to coconspirator  
27 statements with the reasonable doubt burden of proof, any error was harmless.  
28

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

16 Hidalgo's reliance upon federal authority condemning the use of the "slight  
17 evidence" standard is also unavailing. Aside from being mere dicta, the issue in  
18 Huezo was the sufficiency of the evidence for conspiracy and the case had nothing  
19 at all to do with instructing a jury on the admissibility of co-conspirator statements.  
20 United States v. Huezo, 546 F.3d 174 (2<sup>nd</sup> Cir. 2008). The concurring judges did  
21 not believe that "slight evidence" should be part of the substantive definition of the  
22 elements of conspiracy out of concern it would undermine the reasonable doubt  
23 standard. Huezo, 546 F.3d at 184-89. Likewise, the admissibility and  
24 consideration of coconspirator statements was not at issue in Partin, where the  
25 "slight evidence" language appeared in an instruction to the jury on the definition  
26 and elements of the substantive crime of conspiracy. United States v. Partin, 552  
27 F.2d 621 (1977).  
28

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

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

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

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

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

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

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

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

14 Respectfully submitted,

15 STEVEN B. WOLFSON  
16 Clark County District Attorney  
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18 BY /s/ Steven S. Owens

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1 **CERTIFICATE OF COMPLIANCE**

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

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

12 Respectfully submitted,

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1                                   **CERTIFICATE OF SERVICE**

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

5                                   CATHERINE CORTEZ MASTO  
6                                   Nevada Attorney General

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10                                  Chief Deputy District Attorney

11                                  /s/ *jennifer garcia*

12                                  \_\_\_\_\_  
13                                  Employee,  
14                                  Clark County District Attorney's Office

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