IN THE SUPREME COURT OF THE STATE OF NEVADA

LUIS A, HIDALGO, JR.

Appellant,

vs.

THE STATE OF NEVADA

Respondent.

CASE NO. 54209

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

INSTRUCTION #40 WAS STRUCTURAL ERROR AND THEREFORE REVERSIBLE *PER SE* UNDER POST-BOLDEN NEVADA CONSPIRACY JURISPRUDENCE

I. The Constitutions of the United States of America and the State of Nevada Require that the Underlying Conspiracy and Its Membership Be Proven Beyond a Reasonable Doubt to Support Vicarious Liability for a Coconspirator's General Intent Offenses

The State takes the position that "[e]ven if Hidalgo's jury were somehow confused and convicted him under an unconstitutional 'slight evidence' standard, any prejudice is limited to the conspiracy count" and did not impact the Second Degree Murder conviction.[1] The State says that because the jury's verdict "acquitted [the Petitioner] of conspiracy to commit murder and convicted instead on conspiracy to commit battery" this somehow demonstrates that the conviction for second degree murder was of necessity "on a theory other than conspiracy liability".[2] In addition to begging the question of how the State could make such a statement, it demonstrates the State's lack of comprehension of the law and mechanics that must be employed when determining vicarious liability for the acts of coconspirators in Nevada. However, it provides an ideal analytical starting

[1] See Answer to Petition for En Banc Reconsideration, page 10, line 22 to page 11, line 6.

[2] See Answer to Petition for En Banc Reconsideration, page 11, lines 1 to 6.

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point to demonstrate why Instruction #40 requires *per se* reversal in this case. In short, if the conspiracy conviction was tainted by the "slight evidence" instruction, any general intent crime conviction inextricably linked to it falls like dominoes. See Skilling v. United States, ___ U.S. ___, 130 S. Ct. 2896, 2935 (2010).

In recent years this Court has undertaken the task of studying and clarifying the law of vicarious liability for the criminal activity of others. In Sharma v. State, 118 Nev. 648, 56 P. 3d 868 (2002) this Court held that to be found liable as an aider and abettor under NRS 193.330(1) for any specific intent offense, one is required to possess the intent to accomplish the offense and the State must prove it beyond a reasonable doubt. Id. 56 P. 3d at 872, fn. 17. There was no problem in Sharma with the burden of proof instruction, only the instruction on the elements of aiding and abetting for a specific intent offense. Therefore, the Sharma Court used a harmless error analysis and, noting that the defendant spent a good deal of his time at trial contesting specific intent, deemed it harmful and reversible error. Id. 56 P. 3d at 873-834. Here, Luis A. Hidalgo Jr.'s defense was that he had neither a desire for, knowledge of or involvement in the harm to Timothy Hadland until after it occurred. Both at the trial and at the oral argument before the panel of this Court, the State conceded its case was entirely based upon vicarious liability once the First Degree Murder and Conspiracy to Commit Murder charges failed.[3]

In Bolden v. State, 121 Nev. 908, 124 P. 3d 191 (2005), this Court decided

[3] See Transcript of Oral Argument by State, 23 AAA 4262 ("if you really think that the only plan was to beat and the consequences naturally tend to destroy...that's your second degree murder"); 23 AAA 4263 ("...the State's not arguing that...Mr. H physically pulled the trigger"); 23 AAA 4265 ("...each member of the criminal conspiracy is liable, responsible, for each act and bound by each declaration of every other member"); 23 AAA 4266-4267 ("Then there are general intent crimes...you'll have the instructions with you on the definition...Under a conspiracy for a general intent crime, the liability is different...because for a general intent crime, a conspirator's legally responsible for the crime that follows...The probable and natural consequences of the object of the conspiracy...they are responsible for that, even if its past the original plan...even if it was not intended as part of the original plan, and even ...if the conspirator was not present at the time, because you run that risk when you conspire with people to go out and beat somebody..");

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an issue that was not directly raised by the litigants. In Bolden the defendant challenged the sufficiency of the evidence upon which his conviction was based. The Court found it necessary to *sua sponte* examine the jury instructions regarding the State's theory of vicarious coconspirator liability and concluded that they did not accurately state the law and "that the error cannot be held harmless under the circumstances of this case." Id. 124 P. 3d at 193. Once again the instructions on burden of proof were not at issue. It was the "probable and natural consequences of the object of the conspiracy" language in the instruction dealing with liability for a coconspirator's acts that was scrutinized and rejected. Id. 124 P. 3d at 196.

In Bolden this Court declined to adopt Pinkerton v. United States, 328 U.S. 640, 66 S. Ct. 1180 (1946) which holds that "reasonable foreseeability" that criminal acts which take place in pursuit of the execution of the object of a conspiracy is enough to hold a coconspirator criminally liable for those acts even if (1) they were specific intent offenses; and, (2) the person being held vicariously liable never actually intended that they occur. The Bolden Court expressly rejected Pinkerton's 60 years of progeny and held that where a specific intent crime is either the object of the conspiracy or occurs in its pursuit, a coconspirator who did not personally take part in the offense as a principal may only be vicariously liable for it if the State can prove beyond a reasonable doubt that he had the specific intent to commit such a substantive offense. Id. 124 P. 3d at 200. On the other hand, if the crime for which vicarious liability is sought is one of general intent, the natural and probable consequences doctrine remains applicable in Nevada. Id. 124 P. 3d at 201. It is that latter aspect of Bolden that gives rise to the problem with Instruction #40 in this case and requires reversal.

In this case the jury was properly instructed as to the need to find that the defendants had the specific intent to commit murder in order to find them guilty of

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Count One – Conspiracy to Commit Murder[4] and Count Two's First Degree Murder component.[5] The jury was also instructed properly as to the lesser included offenses in both of the Counts in the Indictment. The jury was made aware that it could find that the object of the conspiracy alleged in Count One was not murder but rather either of two general intent offenses: (1) to commit a battery with a deadly weapon or resulting in substantial bodily harm[6] or, (2) to commit a simple battery.[7] The jury was also made aware that, absent proof of a defendant's specific intent to commit murder as the object of the conspiracy or as a principal/aider and abettor, First Degree Murder was not an available verdict.[8]

It is clear from the jury's verdict that it rejected the proposition that the State had proven – even under the "slight evidence" standard – that the object of the conspiracy and/or the substantive offense were accompanied by the specific intent to commit murder. 24 AAA 4500-4501[9]. It is equally clear that the jury found that the object of the conspiracy was a general intent offense – either battery with a deadly weapon or with substantial bodily harm. 24 AAA 4500. The logical structure of the jury instructions and the analytical path that they set forth mandated that, because the jury found that the object of the conspiracy was a general intent offense, it could also find the defendant guilty of Second Degree

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[4] See Jury Instructions #4 (24 AAA 4450), #15 (24 AAA 4462), #18 (24 AAA 4465), #19 (24 AAA 4466), #22 (24 AAA 4469), #23 (24 AAA 4470) and Verdict (24 AAA 4500).

[5] See Jury Instructions #4 (24 AAA 4450), #12 (24 AAA 4459), #19 (24 AAA 4466) and Verdict (24 AAA 4501).

[6] See Jury Instructions #4 (24 AAA 4451), #18 (24 AAA 4465), #19 (24 AAA 4466), #22 (24 AAA 4469), #23 (24 AAA 4470), #25 (24 AAA 4472), #29 (24 AAA 4476) and Verdict (24 AAA 4501).

[7] See Jury Instructions #4 (24 AAA 4451), #18 (24 AAA 4465), #19 (24 AAA 4466), #22 (24 AAA 4469), #24 (24 AAA 4471), #25 (24 AAA 4472), #29 (24 AAA 4476) and Verdict (24 AAA 4501).

[8] See Jury Instructions #12 (24 AAA 4459), #18 (24 AAA 4465), #19 (24 AAA 4466), #20 (24 AAA 4467), #22 (24 AAA 4469) and #29 (24 AAA 4476).

[9] Attached hereto as Exhibit "A".

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Murder employing the natural and probable consequences doctrine. The jury followed that structured path to that conclusion.[10] The instructions had a domino effect, as they do in all conspiracy cases. If the jury finds guilt as to the conspiracy it need do nothing more other than determine if the substantive charges were its "natural and probable consequences" and therefore "foreseeable" in order to convict a coconspirator for vicarious liability.

What the jury did here is consistent with the law of vicarious liability for the acts of a coconspirator announced in Bolden. It represents the "trial mechanism" as that term was used by the United States Supreme Court in Arizona v. Fulminante, 499 U.S. 279, 309, 111 S. Ct. 1246 (1991), as it applies to conspiracy cases with associated substantive charges. In post-Bolden conspiracy cases in Nevada, once a finding of guilt as a member of a conspiracy is made, the analysis of the vicarious liability component for general intent offenses that are committed as the "probable and natural consequences" of the object of the conspiracy is by its nature "mechanical" in application, in contradistinction to specific intent offenses that are objects of or performed in furtherance of the object of the conspiracy. The latter require the jury to analyze evidence of the specific intent of the passive coconspirator. However, in deciding Bolden this Court clearly did not intended that the determination of the existence and membership of a conspiracy that in turn permits the application of the natural and probable consequences doctrine to lead to a conviction for the general intent crime of Second Degree Murder on a vicarious liability theory, could ever be based upon anything other than proof beyond a reasonable doubt.

The law requires that the entry point to the analytical path of vicarious liability set out in Bolden be a determination – *employing the beyond a reasonable doubt standard* – of the existence of the conspiracy and the defendants membership in it.

[10] See Instructions #19 (24 AAA 4466) and #22 (24 AAA 4469).

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United States v. Chavez, 549 F. 3d 119, 125 (2nd Cir. 2008) (*citing* United States v. Huezo, 546 F. 3d 174, 180 (2nd Cir. 2008). *See* In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 1071 (1970); Cage v. Louisiana, 498 U.S. 39, 111 S.Ct. 328, 329 (1990)(due process clause requires *every fact necessary to constitute the crime be proven beyond a reasonable doubt*). Instruction #40 placed the Court's *imprimatur* on employing the "slight evidence" standard for that determination. Any instruction - particularly one that is "unnecessary"[11] because it has nothing to do with the jury's function or duty in the trial - that places that entryway at a point lower than a beyond a reasonable doubt threshold, damages the constitutionally necessary structure of the analytical path for determining vicarious liability. Moreover, because of the inclusion of Instruction #40, it is impossible to conduct any analysis that can result in substantial certainty that (1) its "slight evidence" standard did not act as the basis for the finding by the jury of the existence of and Petitioner's membership in the conspiracy to commit a general intent offense, and (2) that a subsequent 'domino effect' flowing from that finding did not result in the verdict as to the Second Degree Murder charge. A clear and non-confusing instruction that only the beyond a reasonable doubt standard should be applied by

[11] "While we agree that it was unnecessary to instruct the jury regarding the evidentiary threshold applied by a district court in admitting coconspirator statements, we disagree that the jury was confused as to the State's burden of proof." See Order of Affirmance, page 8. At the oral argument before the panel of this Court, counsel for Luis A. Hidalgo Jr. called its attention to the fact that he intentionally did NOT move to strike the coconspirators statements either at the end of the State's case in chief or at the close of evidence, thus conceding their admissibility on the "slight evidence" standard of McDowell v. State, 103 Nev. 527, 529, 746 P.2d 149 (Nev. 1987). This case is NOT, as the State suggests in its Answer at page 9, about the "admissibility and consideration of coconspirator statements". Therefore, United States v. Huezo, 546 F.3d 174 (2d Cir. 2008), United States v. Partin, 552 F.. 2d 621 (5th Cir. 1977) and the other federal cases presented to this Court by Petitioner Hidalgo Jr. provide influential authority.

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the jury to each and every element of a criminal offense before guilt can be found is a "basic protection" without which "a criminal trial cannot reasonably serve its function as a vehicle for determination of guilt or innocence...and no criminal punishment may be regarded as fundamentally fair." Rose v. Clark, 478 U.S. 570-577-578, 106 S.Ct. 3101 (1986)(internal citations omitted). Anything less must necessarily result in having the effect of substantially reducing the State's burden of proof on the substantive count(s) for which one found to have been a member of the conspiracy is being scrutinized by the jury for vicarious liability. It is precisely for that reason that, in the narrow context of this case and others similarly situated wherein vicarious liability for general intent offenses flows from the conspiracy conviction, the giving on Instruction #40 is reversible *per se.*

II. The Presence of Reversible Error *per se* is Inescapable[12]

Whether an error is mere "trial error" which can be subject to harmless error review or rises to "structural error" which is reversible *per se* is determined not only by the difficulty of assessing the effect of the error but also by analyzing the "fundamental unfairness" of the error, or the "irrelevance of harmlessness" test. Structural error need not "'always' or 'necessarily' render a trial fundamentally unfair and unreliable." It must "affec[t] the framework within which the trial proceeds." United States v. Gonzalez-Lopez, 548 U.S. 140, 126 U.S. 2557, 2563-2564 (2006). It cannot be gainsaid that such is the situation here.

The issue before the Court in this case is the most fundamental aspect of the framework of a criminal trial in which a conspiracy conviction can lead to vicarious liability for a general intent offense: the necessity of being certain that the burden of proof employed by the jury in finding the defendant guilty of the predicate conspiracy was "beyond a reasonable doubt". In Sullivan v. Louisiana,

[12] As this Court directed the State to address the "issue of whether the giving of Jury Instruction 40 was per se reversible error", this Reply will limit itself to that issue.

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508 U.S. 275, 113 S.Ct. 2078 (1993) the United States Supreme Court held that the Sixth Amendment to the Constitution of the United States "includes, of course, as its most important element, the right to have the jury, rather than the judge, reach the requisite finding of 'guilty'." Id. 113 S.Ct. at 2080. The Due Process Clause of the Fifth Amendment requires that the state prosecutor bear the burden of proving all elements of the offense charged by persuading the fact-finder "beyond a reasonable doubt" of the facts necessary to establish each of those elements. Id. at 2080. "It would not satisfy the Sixth Amendment to have a jury determine that the defendant is *probably* guilty.." Id. at 2081. The instruction at issue in Sullivan was identical with the one given in Cage. Id. at 2080. In Cage the charge to the jury did at one point contain an accurate instruction as to beyond a reasonable doubt being the required standard of proof. Cage, at 111 S. Ct. at 329. Thus the record before the United States Supreme Court in both cases contained an accurate instruction as to the standard but an additional instruction that created a problem with ascertaining what the jury actually did with them when viewed together. The Sullivan Court made an attempt to apply the harmless error analysis in Chapman v. California, 386 U.S. 18, 87 S.Ct. 824 (1967) but found it impossible. Sullivan stated:

> "... the question it instructs the reviewing court to consider is not what effect the constitutional error might generally be expected to have upon a reasonable jury, but rather what effect it had upon the guilty verdict in the case at hand. Harmless-error review looks...to the basis on which 'the jury *actually rested* its verdict'. The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error. That must be so, because to hypothesize a guilty verdict that was never in fact rendered – no matter how unescapable the findings to support that verdict might be – would violate the jury-trial guarantee."

Sullivan, 113 S.Ct. at 2081-2082.

In finding the situation before it defied harmless error analysis, the Sullivan

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Court went on to hold that "the essential connection to a 'beyond a reasonable doubt' factual finding cannot be made where the instructional error consists of a misdescription of the burden of proof which vitiates *all* the jury's findings. A reviewing court can only engage in pure speculation – its view of what a reasonable jury would have done. And when it does that, 'the wrong entity judge[s] the defendant guilty." Id. at 2082. By directing the jury to apply the "slight evidence" standard as to the existence of the conspiracy and the defendants membership in it – over the objection of the defendants – the record before this Court provides no safe harbor for any of the jury's findings regarding the Second Degree Murder charges. Throughout these proceedings the State has never suggested that Luis A. Hidalgo Jr.'s liability for that offense was on any other theory than vicarious liability. The evidence is uncontroverted that he was not at the scene of the homicide.

A jury instruction that undercuts a proper beyond a reasonable doubt instruction results in vitiating its efficacy. See Cool v. United States, 409 U.S. 100, 102-103, 93 S. Ct. 354 (1972); Sandstrom v. Montana, 442 U.S. 510, 521, 99 S.Ct. 2450 (1979). The United States Court of Appeals for the Ninth Circuit has recently applied Sullivan under circumstances wherein a proper beyond a reasonable doubt instruction was rendered ineffective by another instruction that resulted in lowering the burden of proof. Doe v. Busby, 661 F. 3d 1101 (9th Cir. 2011). The jury in Doe was given a correct beyond a reasonable doubt instruction but was also given an instruction that allowed it to consider evidence of prior uncharged crimes on a preponderance of the evidence standard as to whether they occurred and told that, if it found that they did occur, the instructions permitted them to lead to a conviction of murder. The Ninth Circuit applied structural error analysis and affirmed the district court's grant of a writ of habeas corpus. In the course of doing so, the Ninth Circuit conducted a plenary review of prior United

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States Supreme Court and Ninth Circuit authority following the Sullivan decision. It held:

> "Misstating the correct burden of proof is in the category of errors that cannot be balanced or offset by the consideration of competing evidence. Not only is the judge's misstatement of the burden of proof not an evidentiary issue for the fact finder, the error occurs after the taking of evidence and necessarily impacts the whole of the trial because the judge has allowed the properly received evidence to be filtered through ... "an unconstitutional lens...When the jury heard the preponderance instruction in tandem with the reasonable doubt instruction and without a reconciliation from the trial court, the jurors were left to guess what standard to apply...While we presume jurors follow the instructions they are given, we cannot equally assume they can sort out legal contradictions."

Doe v. Busby, 661 F. 3d 1001, 1022-1023(emphasis added).

This Court has recognized the validity of that last observation made by the Ninth Circuit in Doe. *See* CuIverson v.State, 106 Nev. 484, 488, 797 P. 2d 238, 240 (1990) ("a juror should not be expected to be a legal expert"). Instruction #40 was a confusing and misleading statement of inapplicable law. Jury instructions that tend to confuse or mislead the jury are erroneous. Id. at 106 Nev. 488. Over the objection of the defendants, this jury was directed to consider the essential elements of the crime of conspiracy on less than a beyond a reasonable doubt standard. It was also instructed that if it found the defendants to be members of the conspiracy it could find them guilty of the general intent offenses that were its natural and probable consequences.

It is respectfully submitted that even had no objection been made to Instruction #40 this Court could have treated it as plain error and reversed without making a harmless error analysis. See United States v. Colon-Pagan, 1 F.3d 80 (1st Cir. 1993) (reversing under plain error doctrine where burden of proof erroneous).

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III. CONCLUSION

The problem before the Court repeats itself in every conspiracy trial wherein lesser included general intent substantive offenses are presented to the jury allowing them to convict on the "natural and probable consequences" test. If Instruction #40 is given under those circumstances, it invites the jury to convict based upon a finding of existence of and membership in the conspiracy by "slight" evidence and then using that finding plus the "natural and probable consequences" test to find guilt for substantive offenses such as Second Degree Murder in this case. The district courts of Nevada need to be directed not to do so in the future under similar circumstances. The risks are too great and there is no need for a jury to act as a court of review of the judicial decision to admit the coconspirator testimony.

This Court should grant the Petition for Reconsideration En Banc, reverse the conviction of Luis A. Hidalgo Jr. and remand to the trial court for a new trial.

Dated this 9th day of October, 2012.

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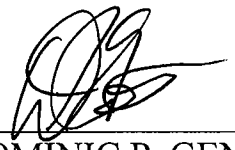
CERTIFICATE OF COMPLIANCE

I hereby certify that this Reply to 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 contains 3212 words or 262 lines of text..

DATED this 9th day of October, 2012.

GORDON SILVER



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CERTIFICATE OF SERVICE

The undersigned, an employee of Gordon Silver, hereby certifies that on the 9 day of October, 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 "A"

VER

ORIGINAL

FILED IN OPEN COURT
EDWARD A. FRIEDLAND
CLERK OF THE COURT
FEB 17 2009
3:05 pm
BY: Denise Husted
DENISE HUSTED, DEPUTY

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,
Plaintiff,
-vs-
LUIS HIDALGO, JR.,
Defendant.

CASE NO: C241394
DEPT NO: XXI

VERDICT

We, the jury in the above entitled case, find the Defendant LUIS HIDALGO, JR., as follows:

COUNT 1 – CONSPIRACY TO COMMIT MURDER

(please check the appropriate box, select only one)

□ Guilty of Conspiracy To Commit Murder

X Guilty of Conspiracy To Commit A Battery With A Deadly Weapon or Battery Resulting In Substantial Bodily Harm

□ Guilty of Conspiracy To Commit A Battery

□ Not Guilty

We, the jury in the above entitled case, find the Defendant LUIS HIDALGO, JR., as follows:

COUNT 2 – MURDER WITH USE OF A DEADLY WEAPON

(please check the appropriate box, select only one)

- ☐ Guilty of First Degree Murder With Use of a Deadly Weapon
- ☐ Guilty of First Degree Murder
- ☒ Guilty of Second Degree Murder With Use of a Deadly Weapon
- ☐ Guilty of Second Degree Murder
- ☐ Guilty of Involuntary Manslaughter
- ☐ Not Guilty

DATED this 17 day of February, 2009

Dan Wall
FOREPERSON