

IN THE SUPREME COURT OF THE STATE OF NEVADA

Electronically Filed
Nov 13 2014 03:26 p.m.
Tracie K. Lindeman
Clerk of Supreme Court

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ERNESTO MANUEL GONZALEZ,

CASE NO. 64249

Appellant.

v.

THE STATE OF NEVADA,

Respondent.

APPELLANT'S APPENDIX, VOLUME XXI

**APPEAL FROM JUDGMENT AFTER
JURY TRIAL AND SENTENCING**

Second Judicial District
State of Nevada

THE HONORABLE CONNIE J. STEINHEIMER, PRESIDING

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ERNESTO MANUEL GONZALEZv. THE STATE OF NEVADA
No. 64249

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1 Counts II, V, and VI contain multiple theories of liability.

2 For example:

3 Count II contains vicarious liability theories of conspiracy and
4 aiding and abetting;

5 Count V contains two theories of liability, conspiracy as well
6 as alleging that the defendant committed the crime; and

7 Count VI contains theories of liability on the charge of Murder
8 in the First Degree, these are: Premeditated and deliberate murder
9 and murder by lying in wait.

10 The law does not require, you the jury, to reach a unanimous
11 decision upon a specific theory of liability within each count so
12 long as you are all unanimous in rendering a decision on liability as
13 to each count.

1 A witness who has special knowledge, skill, experience,
2 training or education in a particular science, profession or
3 occupation is an expert witness. An expert witness may give an
4 opinion as to any matter in which the witness is skilled.

5 You should consider such expert opinion and weigh the
6 reasons, if any, given for it. You are not bound, however, by such
7 an opinion. Give it the weight to which you deem it entitled,
8 whether that be great or slight, and you may reject it, if, in your
9 judgment, the reasons given for it are unsound.

10 The opinions of experts are to be considered by you in
11 connection with all other evidence in the case. The same rules apply
12 to expert witnesses that apply to other witnesses in determining the
13 weight or value of such testimony.

1 You are the sole judges of the credibility of each witness
2 who has testified and of the weight to be given to the testimony of
3 each. If you should find the evidence in this case to be in conflict,
4 then it is your sworn duty to reconcile the conflict if you can, so
5 as to make one harmonious story of it all. If you cannot reconcile
6 these conflicts, then it is your duty to give credit to that portion
7 of the testimony which you believe is worthy of credit, and you may
8 disregard that portion of the testimony which you do not believe to
9 be worthy of credit.
10

11 In considering the credibility of witnesses and in
12 considering any conflict in testimony, you should take into
13 consideration each witness' means of knowledge; strength of memory
14 and opportunity for observations; the reasonableness or
15 unreasonableness of the testimony; the consistency or inconsistency
16 of testimony; the motives actuating the witness; the fact, if it is a
17 fact, that the testimony has been contradicted, the witness' bias or
18 prejudice or interest in the outcome of this litigation; the ability
19 to have acquired the knowledge of the facts to which the witness
20 testified; the manner and demeanor upon the witness stand; and the
21 apparent truthfulness of the testimony as well as all other facts and
22 circumstances shown by the evidence which affect the credibility of
23 the testimony.
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1 Neither side is required to call as witnesses all persons
2 who may have been present at any of the events disclosed by the
3 evidence or who may appear to have some knowledge of these events, or
4 to produce all objects or documents mentioned or suggested by the
5 evidence.
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1 You are not called upon to return a verdict as to the guilt
2 or innocence of any other person than the defendant. If the evidence
3 convinces you beyond a reasonable doubt of the guilt of the accused,
4 you should so find, even though you may believe one or more other
5 persons are also guilty.

1 A separate crime is charged against the defendant in each count.
2 You must decide each count separately. Your verdict on one count
3 should not control your verdict on any other count. If you find the
4 state failed to prove an element of a particular count you must find
5 the defendant not guilty as to that count.

1 The flight of a person immediately after the commission of
2 a crime is not sufficient in itself to establish his guilt, but is a
3 fact which, if proved, may be considered by you in the light of all
4 other proved facts in deciding the question of his guilt or
5 innocence. The weight to which such circumstance is entitled is a
6 matter for the jury to determine.

1 On arriving at a verdict in this case, you shall not
2 discuss or consider the subject of penalty or punishment as that is a
3 matter which will be decided later and must not in any way affect
4 your decision as to the innocence or guilt of the defendant.
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Instruction No. 43

5008

1 Although you are to consider only the evidence in the case
2 in reaching a verdict, you must bring to the consideration of the
3 evidence your everyday common sense and judgment as reasonable men
4 and women. Thus, you are not limited solely to what you see and hear
5 as the witnesses testify. You may draw reasonable inferences which
6 you feel are justified by the evidence, keeping in mind that such
7 inferences should not be based on speculation or guess.

8 A verdict may never be influenced by sympathy, passion,
9 prejudice, or public opinion. Your decision should be the product of
10 sincere judgment and sound discretion in accordance with these rules
11 of law.

1 It is your duty as jurors to consult with one another and
2 to deliberate, with a view of reaching an agreement, if you can do so
3 without violence to your individual judgment. You each must decide
4 the case for yourself, but should do so only after a consideration of
5 the case with your fellow jurors, and you should not hesitate to
6 change an opinion when convinced that it is erroneous. However, you
7 should not be influenced to vote in any way on any question submitted
8 to you by the single fact that a majority of the jurors, or any of
9 them, favor such a decision. In other words, you should not
10 surrender your honest convictions concerning the effect or weight of
11 evidence for the mere purpose of returning a verdict or solely
12 because of the opinion of the other jurors.

Upon retiring to the jury room you will select one of your number to act as foreperson, who will preside over your deliberations and who will sign a verdict to which you agree.

When all twelve (12) of you have agreed upon a verdict, the foreperson should sign and date the same and request the Bailiff to return you to court.

Connie J. Steinheimer
DISTRICT JUDGE

67



CR11-1718B DC-9900048222-001
STATE VS ERNESTO MANUEL GON 6 Pages
District Court 08/06/2013 04:00 PM
Washoe County
NACBART 3755

1 **CODE 3755**

FILED

AUG 06 2013

JOE WASTINGS, CLERK
By: *[Signature]*
DEPUTY CLERK

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6 **IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**
7 **IN AND FOR THE COUNTY OF WASHOE**

8
9 **STATE OF NEVADA,**

10 **Plaintiff,**

Case No. CR11-1718B

11 **vs.**

Dept. No. 4

12 **ERNESTO MANUEL GONZALEZ,**

13 **Defendant.**

14 _____
15 **REFUSED INSTRUCTIONS – DEFENDANT A - E**

16 **(SEE ATTACHED DOCUMENT)**

17 **///**

18 **///**

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22 **///**

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5012

1 Defendant Ernesto Gonzalez asserts as his theory of defense that he acted in lawful defense of
2 another. If you find that Defendant Ernesto Gonzalez acted in lawful defense of another as set forth in
3 these instructions you cannot convict him of Counts I, ~~II~~^{III} IV, V, VI, VII.
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Carter v. State, 121 Nev. 759, 147 P.3d 1101 (2006);

Crawford v. State, 121 Nev. 744, 121 P.3d 582

Defendants Rejected
Instruction No. A

5013

1 Before you may rely on circumstantial evidence to conclude that a fact necessary to find the
2 defendant guilty has been proved, you must be convinced that the State have proved each fact essential
3 to that conclusion beyond a reasonable doubt.

4 Also, before you may rely on circumstantial evidence to conclude that the defendant had the
5 required intent or mental state, you must be convinced that the only reasonable conclusion supported
6 by the circumstantial evidence is that the defendant had the required intent or mental state. If you can
7 draw two or more reasonable conclusions from the circumstantial evidence, and one of those
8 reasonable conclusions supports a finding that the defendant did have the required intent or mental
9 state and another reasonable conclusion supports a finding that the defendant did not, you must
10 conclude that the required intent or mental state was not proved by the circumstantial evidence.
11 However, when considering circumstantial evidence, you must accept only reasonable conclusions and
12 reject any that are unreasonable.

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18 *Judicial Council of California Criminal Jury*
19 *Instructions [CALCRIM] (2012), Instruction No.*
20 *225, available online at*
http://www.courts.ca.gov/partners/documents/calcrim_juryins.pdf

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D

Defendant's Rejected

Instruction No. B

5014

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1 For circumstantial evidence, alone, to be sufficient to sustain a conviction, the circumstances all
2 taken together must: (1) exclude to a moral certainty every hypothesis but the single one of guilt; and
3 (2) establish that single hypothesis of guilt beyond a reasonable doubt.
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7 Legislative Counsel Bureau's annotations to NRS
8 48.025, citing to *Buchanan v. State*, 119 Nev. 201,
9 at 217, 69 P.3d 694 (2003) ("Circumstantial
10 evidence alone can certainly sustain a criminal
11 conviction. However, to be sufficient, all the
12 circumstances taken together must exclude to a
13 moral certainty every hypothesis but the single one
14 of guilt."); *Kinna v. State*, 84 Nev. 642, 646, 447
15 P.2d 32, 34 (1968) ("If the circumstances, all taken
16 together, exclude to a moral certainty every
17 hypothesis but the single one of guilt, and establish
18 that one beyond a reasonable doubt, they are
19 sufficient."); *State v. Snyder*, 41 Nev. 453, at 461,
20 172 P. 364 (1918) ("If the circumstances, all taken
21 together, exclude to a moral certainty every
22 hypothesis but the single one of guilt, and establish
23 that one beyond a reasonable doubt, they are
24 sufficient."); *State v. Rover*, 13 Nev. 17, at 23
25 (1878) ("The evidence against the accused must be
such as to exclude, to a moral certainty, every
hypothesis but that of his guilt of the offense
imputed to him.").

1 The fact that individual members committed felony crimes which benefitted the gang does not
2 lead necessarily to the conclusion that felonious action is a common denominator of the gang.
3 Likewise, just because certain members of a hypothetical group play musical instruments, it does not
4 follow that the group is an orchestra.

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6 *Origel-Candido v. State*, 114 Nev. 378, at 383, 956 P.2d 1378
7 (1998).
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25 Defendant's Rejected

26 Instruction No. D

5018

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1 You have heard testimony from _____, a witness who had criminal charges pending
2 against him. That testimony was given in the expectation that he would receive favored treatment from
3 the government in connection with his case;

4 For this reason, in evaluating the testimony of _____, you should consider the extent to
5 which or whether his testimony may have been influenced by this factor. In addition, you should
6 examine the testimony of _____ with greater caution than that of other witnesses.
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16 *Instruction 4.9, Manual of Model Criminal Jury*
17 *Instructions for the District Courts of the Ninth*
18 *Circuit, Ninth Circuit Jury Instructions Committee*
19 *(2010), citing to United States v. Tirouda, 394 F.3d*
20 *683, at 687-88 (9th Cir.2005), cert. denied, 547*
21 *U.S. 1005 (2006).*
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FILED

AUG 07 2013

JOEY HASTINGS, CLERK

By: LLANORIS
DEPUTY CLERK

STATE OF NEVADA,

Plaintiff,

Case No. CR11-1718B

VS.

Dept. No. 4

ERNESTO MANUEL GONZALEZ,

Defendant.

JURY QUESTION #2, NO RESPONSE

(SEE ATTACHED DOCUMENT)

III

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III

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III

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III

5018

Item #6

Legal question:

Looking at Instruction No 17: If a person has no knowledge of a conspiracy but their actions contribute to someone else's plan, are they guilty of conspiracy?

And another question:

People in here are wondering if a person can only be guilty of 2nd degree murder or 1st. Can it be both?

1 CODE

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AUG 07 2013

JOEY HASTINGS, CLERK
By: *[Signature]*
DEPUTY CLERK

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6 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
7 IN AND FOR THE COUNTY OF WASHOE
8

9 STATE OF NEVADA,

10 Plaintiff,

Case No. CR11-1718B

11 vs.

Dept. No. 4

12 ERNESTO MANUEL GONZALEZ,

13 Defendant.
14

15 JURY QUESTION, COURT RESPONSE – NUMBER TWO

16 Question:

17 Legal Question:

18 Looking at Instruction no. 17: If a person has no knowledge of a conspiracy but
19 their actions contribute to someone elses' plan, are they guilty of conspiracy?

20 And another question:

21 People in here are wondering if a person can only be guilty of 2nd degree murder or
22 1st. Can it be both?

23
24 Juror #6

25 Answer:

26
27 To Legal Question: It is improper for the Court to give you additional instruction on
28 how to interpret Instruction no. 17. You must consider all the instructions in light of all the
other instructions.

5020

CR11-1718B DC-9900048222-006
STATE VS ERNESTO MANUEL GONZALEZ
District Court 08/07/2013 04:00 PM
Washoe County 1890
Number

To And another question: You must reach a decision on each count separate and apart from each other count.

Signed: Connie I. Steinheimer
DISTRICT JUDGE

69

CODE 4245

FILED

AUG 07 2013

JOEY HASTINGS, CLERK
By: *[Signature]*
DEPUTY CLERK

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

Case No. CR11-1718B

v.

Dept. No. 4

ERNESTO MANUEL GONZALEZ,

Defendant.

VERDICT

We, the jury in the above-entitled matter, find the
defendant, ERNESTO MANUEL GONZALEZ, GUILTY of COUNT I. CONSPIRACY TO
ENGAGE IN AN AFFRAY.

DATED this 7th day of Aug, 2013.

[Signature]
FOREPERSON

CODE 4245

FILED

AUG 07 2013

JOEY HASTINGS, CLERK
By: *[Signature]*
DEPUTY CLERK

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

Case No. CR11-1718B

v.

Dept. No. 4

ERNESTO MANUEL GONZALEZ,

Defendant.

VERDICT

We, the jury in the above-entitled matter, find the
defendant, ERNESTO MANUEL GONZALEZ, GUILTY of COUNT II. CHALLENGE TO
FIGHT RESULTING IN DEATH.

If you have found the Defendant guilty, you must answer the
following questions:

Was a deadly weapon used to commit the crime?

X Yes _____ No

Was the crime committed knowingly for the benefit of, at the
direction of, or in affiliation with a criminal gang, with the
specific intent to promote, further or assist the activities of the
gang?

X Yes _____ No 7th day of Aug, 2013.

[Signature]
FOREPERSON

5023

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AUG 07 2013

JOE HASTINGS, CLERK
By: *[Signature]*
DEPUTY CLERK

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

Case No. CR11-1718B

v.

Dept. No. 4

ERNESTO MANUEL GONZALEZ,

Defendant.

VERDICT

We, the jury in the above-entitled matter, find the
defendant, ERNESTO MANUEL GONZALEZ, GUILTY of COUNT III. CARRYING A
CONCEALED WEAPON.

DATED this 7th day of Aug., 2013.

[Signature]
FOREPERSON

5024

CODE 4245

FILED

AUG 07 2013

JOEY HASTINGS, CLERK
By: [Signature]
DEPUTY CLERK

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

Case No. CR11-1718B

v.

Dept. No. 4

ERNESTO MANUEL GONZALEZ,

Defendant.

VERDICT

We, the jury in the above-entitled matter, find the
defendant, ERNESTO MANUEL GONZALEZ, GUILTY of COUNT IV. DISCHARGING
A FIREARM IN A STRUCTURE.

DATED this 7th day of Aug., 2013.

[Signature]
FOREPERSON

5025

CODE 4245

FILED

AUG 07 2013

JOE HASTINGS, CLERK
By: [Signature]
DEPUTY CLERK

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

Case No. CR11-1718B

v.

Dept. No. 4

ERNESTO MANUEL GONZALEZ,

Defendant.

VERDICT

We, the jury in the above-entitled matter, find the
defendant, ERNESTO MANUEL GONZALEZ, GUILTY of COUNT V. MURDER OF THE
SECOND DEGREE.

If you have found the Defendant guilty you must answer the
following questions:

Was a deadly weapon used to commit the crime?

X Yes _____ No

Was the crime committed knowingly for the benefit of, at the
direction of, or in affiliation with a criminal gang, with the
specific intent to promote, further or assist the activities of the
gang?

X Yes _____ No 7th day of Aug., 2013.

FOREPERSON

5026

CODE 4245

FILED

AUG 07 2013

JOEY HASTINGS, CLERK
By: *[Signature]*
DEPUTY CLERK

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

Case No. CR11-1718B

v.

Dept. No. 4

ERNESTO MANUEL GONZALEZ,

Defendant.

VERDICT

We, the jury in the above-entitled matter, find the
defendant, ERNESTO MANUEL GONZALEZ, GUILTY of COUNT VI. MURDER of
the FIRST DEGREE.

If you have found the Defendant guilty you must answer the
following questions:

Was a deadly weapon used to commit the crime?

X Yes _____ No

Was the crime committed knowingly for the benefit of, at the
direction of, or in affiliation with a criminal gang, with the
specific intent to promote, further or assist the activities of the
gang? X Yes _____ No

DATED this 7th day of Aug, 2013.

[Signature]
FOREPERSON

5017

CODE 4245

FILED

AUG 07 2013

JOEY HASTINGS, CLERK
By: *[Signature]*
DEPUTY CLERK

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

Case No. CR11-1718B

v.

Dept. No. 4

ERNESTO MANUEL GONZALEZ,

Defendant.

VERDICT

We, the jury in the above-entitled matter, find the
defendant, ERNESTO MANUEL GONZALEZ, GUILTY of COUNT VII. CONSPIRACY
TO COMMIT MURDER.

DATED this 7th day of Aug., 2013.

[Signature]
FOREPERSON



CR11-1718B DC-9900048222-014
STATE VS ERNESTO MANUEL GONZALEZ
District Court 08/07/2013 05:20 PM
Washoe County 4235

CODE 4235

FILED

AUG 07 2013

JOE HASTINGS CLERK
By: [Signature]
DEPUTY CLERK

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

STATE OF NEVADA,

Plaintiff,

Case No. CR11-1718B

vs.

Dept. No. 4

ERNESTO MANUEL GONZALEZ,

Defendant.

UNUSED VERDICT FORMS

(PLEASE SEE ATTACHED)

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1 CODE 4245

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6 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,
7 IN AND FOR THE COUNTY OF WASHOE.

8 * * *

9 THE STATE OF NEVADA,

10 Plaintiff,

Case No. CR11-1718B

11 v.

Dept. No. 4

12 ERNESTO MANUEL GONZALEZ,

13 Defendant.

14 unused VERDICT

15 We, the jury in the above-entitled matter, find the
16 defendant, ERNESTO MANUEL GONZALEZ, NOT GUILTY of COUNT I.
17 CONSPIRACY TO ENGAGE IN AN AFFRAY.

18 DATED this ____ day of ____, 20__.

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21 FOREPERSON
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6 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,
7 IN AND FOR THE COUNTY OF WASHOE.

8 * * *

9 THE STATE OF NEVADA,

10 Plaintiff,

Case No. CR11-1718B

11 v.

Dept. No. 4

12 ERNESTO MANUEL GONZALEZ,

13 Defendant.

14 ~~Unused~~ VERDICT

15 We, the jury in the above-entitled matter, find the
16 defendant, ERNESTO MANUEL GONZALEZ, NOT GUILTY of COUNT II.
17 CHALLENGE TO FIGHT RESULTING IN DEATH.

18 DATED this ____ day of ____, 20__.

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1 CODE 4245

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6 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,
7 IN AND FOR THE COUNTY OF WASHOE.

8 * * *

9 THE STATE OF NEVADA,

10 Plaintiff,

Case No. CR11-1718B

11 v.

Dept. No. 4

12 ERNESTO MANUEL GONZALEZ,

13 Defendant.

14 ~~Unused~~ VERDICT

15 We, the jury in the above-entitled matter, find the
16 defendant, ERNESTO MANUEL GONZALEZ, NOT GUILTY of COUNT III.
17 CARRYING A CONCEALED WEAPON.

18 DATED this _____ day of _____, 20____.

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22 FOREPERSON

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1 CODE 4245

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6 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,
7 IN AND FOR THE COUNTY OF WASHOE.

8 * * *

9 THE STATE OF NEVADA,

10 Plaintiff,

Case No. CR11-1718

11 v.

Dept. No. 4

12 ERNESTO MANUEL GONZALEZ,

13 Defendant.

14 ~~Unused~~ VERDICT

15 We, the jury in the above-entitled matter, find the
16 defendant, ERNESTO MANUEL GONZALEZ, NOT GUILTY of COUNT IV.
17 DISCHARGING A FIREARM IN A STRUCTURE.

18 DATED this ____ day of ____, 20__.

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22 FOREPERSON

1 CODE 4245

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6 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,
7 IN AND FOR THE COUNTY OF WASHOE.

8 * * *

9 THE STATE OF NEVADA,

10 Plaintiff,

Case No. CR11-1718B

11 v.

Dept. No. 4

12 ERNESTO MANUEL GONZALEZ,

13 Defendant.

14 ~~Unused~~ VERDICT

15 We, the jury in the above-entitled matter, find the
16 defendant, ERNESTO MANUEL GONZALEZ, NOT GUILTY of COUNT V. MURDER OF
17 THE SECOND DEGREE.

18 DATED this ____ day of _____, 20__.

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22 FOREPERSON

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26 5034

1 CODE 4245

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6 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,
7 IN AND FOR THE COUNTY OF WASHOE.

8 * * *

9 THE STATE OF NEVADA,

10 Plaintiff,

Case No. CR11-1718B

11 v.

Dept. No. 4

12 ERNESTO MANUEL GONZALEZ,

13 Defendant.

14 ~~Unused~~ VERDICT

15 We, the jury in the above-entitled matter, find the
16 defendant, ERNESTO MANUEL GONZALEZ, NOT GUILTY of COUNT VI. MURDER
17 of the FIRST DEGREE.

18 DATED this _____ day of _____, 20____.

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23 FOREPERSON

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26 5035

1 CODE 4215

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6 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,
7 IN AND FOR THE COUNTY OF WASHOE.

8 * * *

9 THE STATE OF NEVADA,

10 Plaintiff,

Case No. CR11-1718B

11 v.

Dept. No. 4

12 ERNESTO MANUEL GONZALEZ,

13 Defendant.

14 Unused VERDICT

15 We, the jury in the above-entitled matter, find the
16 defendant, ERNESTO MANUEL GONZALEZ, NOT GUILTY of COUNT VII.
17 CONSPIRACY TO COMMIT MURDER.

18 DATED this _____ day of _____, 20____.

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22 FOREPERSON

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1 CODE 4050

FILED

AUG 07 2013

JOEY HASTINGS, CLERK
By: *[Signature]*
DEPUTY CLERK

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6 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
7 IN AND FOR THE COUNTY OF WASHOE

8
9 STATE OF NEVADA,

10 Plaintiff,

Case No. CR11-1718B

11 vs.

Dept. No. 4

12 ERNESTO MANUEL GONZALEZ,

13 Defendant.

14
15 Stipulation to Waive Separate Penalty Hearing

16
17 Comes now, Ernesto Manuel Gonzalez, by and through his counsel of record, David
18 R. Houston Esq., and the State of Nevada, by and through Deputy District Attorney Karl S.
19 Hall Esq., and enters into this stipulation to waive a separate penalty hearing pursuant to
20 NRS 175.552(2). This Waiver of the Separate Penalty hearing before the impaneled jury
21 is done knowingly, willingly and voluntarily with a full understanding of the rights given up
22 by this stipulation. I understand that the Trial Judge will now preside over the sentencing
23 process and render a sentence deemed appropriate under all of the facts and
24 circumstances presented at trial and at sentencing.

25 *[Signature]* 8/7/13
26 Ernesto Manuel Gonzalez

[Signature]
27 David R. Houston Esq. 8-7-13

28 Karl S. Hall Esq. 8/7/13

5037

CR11-1718B DC-9600048222-015
STATE VS ERNESTO MANUEL GONZ 1 Page
District Court 08/07/2013 07:00 PM
Washoe County
4050
narrat

71

CODE:
1 DAVID R. HOUSTON, ESQ.
2 Nevada Bar No. 2131
3 LAW OFFICE OF DAVID R. HOUSTON
4 432 Court Street
5 Reno, Nevada 89501
6 (775) 786-4188
7 Attorney for Defendant

8 **IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,**
9 **IN AND FOR THE COUNTY OF WASHOE.**

10 * * *

11 THE STATE OF NEVADA,

12 Plaintiff,

Case No. CR11-1718

13 vs.

Dept. No. 4

14 ERNESTO MANUEL GONZALEZ,

15 Defendant.

16
17 **MOTION FOR A NEW TRIAL**

18 Comes now, Ernesto Manuel Gonzalez, by and through his attorneys, David R. Houston, Esq.
19 and Kenneth E. Lyon III, Esq., and moves this Court for its Order granting a new trial in this case.
20 This Motion is based upon NRS 176.515, the attached memorandum of points and authorities, the
21 records and pleadings on file in this case, and any oral argument which the court may require at the
22 hearing on the motion.

23 The exhibits attached to this Motion are Exhibit 1 (Fourth Information Supplementing
24 Indictment); Exhibit 2 (Jury Instructions); Exhibit 3 (Defendant's Refused Instructions); Exhibit 4 (Jury
25 Questions transcript); and Exhibit 5 (Jury Questions and Court Response).

26 **MEMORANDUM OF POINTS AND AUTHORITIES**

I.

STATEMENT OF FACTS

The State charged Mr. Gonzalez in a seven count information with an assortment of criminal offenses arising out of a brawl between the Hells Angels and Vagos motorcycle associations at the Sparks Nugget on September 23, 2011.¹ The case went to trial. During the course of the trial, Mr. Gonzalez contended that Counts II, V and VI were multiple versions of a single offense – the killing of Mr. Pettigrew, and that the multiplicitous charges could prejudice Mr. Gonzalez by claiming that several crimes of murder had been committed when there was really only one. Consequently, Mr. Gonzalez asked the Court to direct the State to elect the charge on which it wanted to proceed. The Court denied Mr. Gonzalez's motion.

Toward the close of the trial, the Court and counsel conferred on the jury instructions to be given. Counsel for Mr. Gonzalez objected to certain proposed instructions by the State, and proposed others. The Court decided the matter and chose which instructions would ultimately be given,² after rejecting several of Mr. Gonzalez's proposed instructions.³

When the jury retired to deliberate, it had two legal questions for the Court. During a telephone conference with counsel on August 7, 2013, the Court determined not to answer either question directly despite the arguments of counsel.⁴ The two jury questions, and the Court's response, were:

Juror number 6: "Legal question. Looking at instruction number 17; if a person has no knowledge of a conspiracy, but their actions contribute to someone else's plan, are they guilty of conspiracy?"⁵

The Court's answer was: "It is not proper for the Court to give you additional instruction on how to interpret instructions in light of all the other instructions."

¹ Exhibit 1 (Fourth Information Supplementing Indictment).

² Exhibit 2 (Jury Instructions).

³ Exhibit 3 (Defendant's Refused Instructions).

⁴ Exhibit 4 (Jury Questions transcript); Exhibit 5 (Jury Questions and Court Response)

⁵ Exhibit 4 (Jury Questions transcript), p. 3, ll. 9-13; Exhibit 5 (Jury Questions and Court Response).

1 And another question: People in here are wondering if a person can only be guilty of second
2 degree murder, or first. Can it be both?"⁶

3 The Court's answer was: "You must reach a decision on each count separate and apart from
4 each other count."

5 Within less than an hour, the jury reached a verdict, which convicted Mr. Gonzalez on all
6 counts of the information.

7 Mr. Gonzalez contends that (1) some of the Court's rulings on the jury instructions, and the
8 resulting jury confusion effectively stripped Mr. Gonzalez of his only defense in the case; and (2) the
9 Court's denial of Mr. Gonzalez's motion to compel the State to choose among the three murder charges
10 caused additional jury prejudice and confusion. Taken together, these factors deprived Mr. Gonzalez of
11 his right to a fair trial.

12 II.

13 ARGUMENT

14 A. The right of a defendant to present his case.

15 1. The requirements of Due Process.

16 The due process clauses of the Fifth Amendment,⁷ made applicable to the States by Section 1
17 of the Fourteenth Amendment⁸ to the United States Constitution, and Article 1, Section 8, paragraph 5
18 of the Constitution of the State of Nevada,⁹ impose procedural¹⁰ and substantive¹¹ restrictions on any
19
20

21 ⁶ Exhibit 4 (Jury Questions transcript), p. 3, ll. 15-19; Exhibit 5 (Jury Questions and Court Response).

22 ⁷ **Prosecution by presentment, indictment; double jeopardy; self-incrimination; due process; property taken for public use.** No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

24 ⁸ **Section 1. Citizenship; privileges and immunities; due process; equal protection.** All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

26 ⁹ "No person shall be deprived of life, liberty, or property, without due process of law."

1 government taking of the life, liberty or property of persons. Substantive due process prohibits
2 arbitrary government interference with a defendant's fundamental rights rooted in American history
3 and conscience.¹²

4 In criminal trials, due process requires that there be an opportunity to present every available
5 defense,¹³ and fundamental fairness requires that a defendant be afforded a meaningful opportunity to
6 present a complete defense.¹⁴ In Nevada, a defendant's right to propose jury instructions is on an equal
7 footing with that of the State, because standard instructions in criminal cases generally articulate the
8 State's theory of the case.¹⁵

9 The defense has the right to have the jury instructed on its theory of the case as disclosed by the
10 evidence, no matter how weak or incredible that evidence may be.¹⁶ A defendant's jury instructions
11 may be phrased as a "duty to acquit" ("If . . ., you must acquit"),¹⁷ and a positive instruction as to the
12 elements of the crime does not justify refusing a properly worded negatively phrased 'position' or
13 'theory' instruction ("You cannot convict the defendant, if . . .").¹⁸ Specific jury instructions that
14
15

16 ¹⁰ See *Dist. Atty's Office v. Osborne*, 557 U.S. 52, at 67 (2009), citing and quoting *Jones v. Flowers*, 547 U.S. 220, at 226-
39 (2006) (holding due process ensures procedural limitations on the government's power to strip away protected
entitlements, such as liberty interests).

17 ¹¹ *Medina v. California*, 505 U.S. 437, 446 (1992), citing and quoting *Patterson v. New York*, 432 U.S. 197, 202 (1977),
(stating that due process in the criminal context requires adherence to fundamental principles of justice rooted in American
traditions and conscience).

18 ¹² *Medina v. California*, 505 U.S. 437, at 445 (1992); *Gagnon v. Scarpelli*, 411 U.S. 778, at 790 (1973) (holding
fundamental fairness is the touchstone of due process); *Patterson v. New York*, 432 U.S. 197, at 201-02 (1977); *Lisenba v.*
California, 314 U.S. 219, at 222 (1941) (defining due process as the relatively indeterminable fundamental fairness
essential to the very concept of justice); *Hurtado v. California*, 110 U.S. 516, at 532 (1884) (stating that the substantive due
process clause acts as a bulwark against arbitrary government action).

21 ¹³ *Hoagland v. State*, 126 Nev. Adv. Op. No. 37 at p. 4 (2010), citing to *Lindsey v. Normet*, 405 U.S. 56, at 66 (1972), and
quoting *American Surety Co. v. Baldwin*, 287 U.S. 156, at 168 (1932); see also *Washington v. Texas*, 388 U.S. 14, at 19
(1967).

22 ¹⁴ *California v. Trombetta*, 467 U.S. 479, at 485 (1984).

23 ¹⁵ *Carter v. State*, 121 Nev. 759, at 767 fn. 21, 121 P.3d 592 (2005).

24 ¹⁶ *Hoagland v. State*, 126 Nev. Adv. Op. No. 37 at p. 4 (2010); *Rosas v. State*, 122 Nev. 1258, at 1266, 147 P.3d 1101
(2006); *Crawford v. State*, 121 Nev. 744, at 751, 121 P.3d 582 (2005); *Vallery v. State*, 118 Nev. 357, 372, 46 P.3d 66
(2002); *Margetts v. State*, 107 Nev. 616, at 619, 818 P.2d 392 (1991); *Geary v. State*, 110 Nev. 261, at 264-65, 871 P.2d
927 (1994); *Harris v. State*, 106 Nev. 667, at 670, 799 P.2d 1104 (1990); *Brooks v. State*, 103 Nev. 611, at 613, 747 P.2d
893 (1987); *Roberts v. State*, 102 Nev. 170, at 172-73, 171 P.2d 1115 (1986); *Williams v. State*, 99 Nev. 530, at 531, 665
P.2d 260 (1983); *Barger v. State*, 81 Nev. 548, at 552, 407 P.2d 584 (1965).

25 ¹⁷ *Carter v. State*, 121 Nev. 759, at 765-67, 121 P.3d 592 (2005).

26 ¹⁸ *Crawford v. State*, 121 Nev. 744, at 753, 121 P.3d 582 (2005).

1 remind jurors that they may not convict the defendant if proof of a particular element is lacking
2 ("Unless . . . , you must acquit.") should be given upon request.¹⁹

3 **2. The jury instructions.**

4 In this case, Mr. Gonzalez's only defense was that the killing was an act in defense of another.
5 Mr. Wiggins was lying on the floor, and without any particular provocation, Messrs. Pettigrew and
6 Villagrana commenced to beat him. When Mr. Pettigrew drew back to give Mr. Wiggins a kick in the
7 head with one of his large, heavy steel-toed boots, Mr. Gonzalez shot and killed Mr. Pettigrew.

8 Unfortunately for Mr. Gonzalez, he happened to be a member of a motorcycle club, Mr.
9 Pettigrew was a member of a rival motorcycle club, and the incident took place in a popular local
10 family resort. These circumstances naturally produced outrage among genteel members of the public,
11 many of whom patronized the resort and took their friends and family there. Consequently, there was
12 a strong possibility of jury prejudice in this case from the start.

13 The State's Fourth Information Supplementing Indictment alleged a number of different
14 theories on which Mr. Gonzalez might be convicted of murder. The charges theorized that Mr.
15 Gonzalez deliberately killed Mr. Pettigrew by lying in wait for him, that Mr. Gonzalez conspired with
16 other members of his club to kill Mr. Pettigrew, that Mr. Gonzalez was a party to a duel involving Mr.
17 Pettigrew, that Mr. Gonzalez aided and abetted Mr. Rudnick and Mr. Pettigrew in a fist fight by
18 shooting Mr. Pettigrew, and that Mr. Gonzalez maliciously and recklessly fired a pistol in a crowded
19 room, disregarding the danger to others. The charging document alleged one or another form of
20 murder in three separate counts, claimed that Mr. Gonzalez and others were members of a "criminal
21 gang," and declared that Mr. Gonzalez killed Mr. Pettigrew in connection with this criminal gang. The
22 State's information, written in a dense and orotund prose style, repeatedly emphasizes the association
23 of Mr. Gonzalez and his supposed crimes with the "criminal gang" – the motorcycle club to which he
24 belonged.

25
26 ¹⁹ *Crawford v. State*, 121 Nev. 744, at 753, 121 P.3d 582 (2005); *Brooks v. State*, 103 Nev. 611, at 613-14, 747 P.2d 893 (1987); *Margetts v. State*, 107 Nev. 616, at 620, 818 P.2d 392 (1991).

1 To prove its case, the State called a variety of witnesses, many of whom were unsavory
2 characters with self-serving stories. After nearly two weeks, the State rested. Mr. Gonzalez testified in
3 his own behalf, saying he had not agreed with anyone to fight, and only wanted to save Mr. Wiggins
4 from being soccer-kicked in the head by Mr. Pettigrew.

5 Counsel for the State and Mr. Gonzalez then sat down with the Court to settle jury instructions.
6 Each counsel had previously offered proposed instructions, some of which were merged or ignored,
7 and some of which were refused by the Court.

8 Because Mr. Gonzalez testified, the major issues in the case involved his state of mind and his
9 credibility, as well as the credibility of the witnesses who testified against him. The bulk of the
10 problems with the jury instructions are in this area.

11 Notwithstanding the strictures of case law, Mr. Gonzalez did not stand on an equal footing with
12 the State when the Court chose the instructions it ultimately gave. The instructions on the mental
13 elements of the charged offenses – intent and knowledge – are weak and obscure, which gave the
14 advantage to the State and its prolix theories of liability. Instructions Nos. 10, 13, 16A and 18 are
15 noticeably deficient here, because they leave a question of how much a defendant has to know and
16 intend in order to be liable for the crime.

17 For example, the instruction on the law of conspiracy (No. 17)²⁰ correctly states the law, as far
18 as it goes. However, the Court did not give the other explanatory instructions which accompanied it.
19 In isolation, and without further clarification, the instruction is unclear as to whether the defendant
20 must be a party to the unlawful agreement, or even have knowledge of a conspiracy by others, to be
21 liable. The first question posed by the jury raised this very point, but the Court declined to clarify it.

22 The instruction on the crime of challenge to fight (No. 20), given by the Court, contains the
23 suggestion that a person can be vicariously liable for a death without being the challenger, the
24 challenged party, or one who gives, sends, receives or accepts the challenge. The instruction is unclear
25 as to whether the challenge to fight must be made by one individual to another person, or by an entire
26

²⁰ This instruction was offered by Mr. Gonzalez.

1 group to another group. Where the statute requires a written or verbal challenge to fight, the
2 instruction omits this element. The law also restricts liability to a certain group of named persons and
3 circumstances ("such a fight"), while these limitations go unmentioned in the instruction. The
4 resulting ambiguities expand the statute beyond its plain meaning. NRS 200.450 has never been
5 interpreted so broadly, and the jury instruction violates the common law rule that criminal statutes are
6 to be strictly construed.²¹

7 The same is true of the instruction on aiding and abetting (No. 18). The instruction leaves an
8 open question in the mind of lay jurors as to whether the alleged aider and abettor need even be aware
9 that he is assisting someone else to commit a crime. The jury's first question to the Court suggests that
10 at least some of the jurors were confused on this issue, which the Court's answer did nothing to clarify.

11 Finally, the State's "stripping" instruction (No. 35), given by the Court, is equally overbroad. It
12 goes further than the plain meaning of the narrowly-crafted language of NRS 200.450, which restricts
13 the parties who can be held liable. The instruction creates a much larger cast of potential defendants
14 by referring to anyone who "fights." Furthermore, at noted above, it is not clear from this instruction
15 what knowledge or intent is required for liability. The only clear feature of the instruction is that it
16 strips a defendant of the ability to invoke the defense of another.

17 Mr. Gonzalez did not stand on an equal footing with the State when it came to his own
18 proposed instructions. The Court refused those stating that Mr. Gonzalez's theory of the case, if
19 believed by the jury, required acquittal;²² that attempted to clarify the interaction of circumstantial
20 evidence on the issue of intent;²³ that required moral certainty before using circumstantial evidence;²⁴

23 ²¹ *Barber v. Thomas*, 560 U.S. ___, ___, 130 S. Ct. 2499, at 2508-09 (2010); *Bifulco v. United States*, 447 U.S. 381, at 387
24 (1980); see also *State v. Lucero*, 127 Nev. Adv. Op. No. 7, at 7, 249 P.3d 1226 (2011); *Moore v. State*, 122 Nev. 27 at 32,
25 126 P.3d 508 (2006); *State v. Stull*, 112 Nev. 18, 23, 909 P.2d 1180 (1996); *Demosthenes v. Williams*, 97 Nev. 611, at 614,
637 P.2d 1203 (1981); *Ward v. State*, 93 Nev. 501, 569 P.2d 399 (1977); *Sheriff v. Hanks*, 91 Nev. 57, at 60, 530 P.2d 1191
(1975); *Ex parte Davis*, 33 Nev. 309, at 318, 110 P. 1131 (1910).

26 ²² Exhibit 3 (Defendant's Refused Instructions), Instruction A.

²³ Exhibit 3 (Defendant's Refused Instructions), Instruction B.

²⁴ Exhibit 3 (Defendant's Refused Instructions), Instruction C.

1 that emphasized the State's burden of proof in establishing a "criminal gang;"²⁵ and that instructed the
2 jurors to be skeptical of plea-bargained testimony.²⁶

3 **3. The jurors' questions, and their answers.**

4 All of these problems came to a head when the jurors asked their two questions. These
5 questions were purely legal. They did not deal with the application of facts to the law, and both
6 counsel agreed the questions should both be answered "no."

7 The first question ("Looking at instruction number 17; if a person has no knowledge of a
8 conspiracy, but their actions contribute to someone else's plan, are they guilty of conspiracy?")²⁷ made
9 it obvious that at least some of the jurors were confused about the knowledge required for conspirator
10 liability, and by inference, of the knowledge required for aider and abettor liability. As argued above,
11 the instructions given were vague on that same point. Over the strenuous objections of counsel for Mr.
12 Gonzalez, the Court declined to answer the question, and referred the jurors back to the same
13 instructions which had already confused them.

14 The second question of the jurors ("People in here are wondering if a person can only be guilty
15 of second degree murder, or first. Can it be both?")²⁸ showed further confusion about the nature of the
16 multiplicitous charges, discussed below. The straightforward and correct answer would have been
17 "no," perhaps adding "because there was only one killing." The Court's answer, however, was "You
18 must reach a decision on each count separate and apart from each other count."

19 Within less than an hour, the jury was back with their unanimous verdict – Mr. Gonzalez was
20 guilty on all counts.

21 The rule of law is that instructions on every aspect of the case must be given clearly, simply
22 and concisely, in order to avoid misleading the jury or in any way overemphasizing either party's
23 case.²⁹ That requirement wasn't met in this case, and as the Nevada Supreme Court has remarked:

24
25 ²⁵ Exhibit 3 (Defendant's Refused Instructions), Instruction D.

26 ²⁶ Exhibit 3 (Defendant's Refused Instructions), Instruction E.

27 ²⁷ Exhibit 4 (Jury Questions transcript), p. 3, ll. 9-13; Exhibit 5 (Jury Questions and Court Response).

28 ²⁸ Exhibit 4 (Jury Questions transcript), p. 3, ll. 15-19; Exhibit 5 (Jury Questions and Court Response).

29 ²⁹ *Roland v. State*, 96 Nev. 300, at 301-02, 608 P.2d 500, 501 (1980).

1 "Although charging to the limit may be justified to cover developing nuances of proof, the jury should
2 have received an instruction limiting the number of conviction alternatives. The failure to do so was
3 error."³⁰

4 **B. The multiplicitous charges**

5 Mr. Gonzalez has already pointed out that there was a danger of prejudice in his case from the
6 beginning, created by the fact of his membership in a motorcycle club and that the claimed crimes took
7 place in a popular local resort. This distinct possibility of prejudice in this case increased with the
8 State's frequently repeated charges that the two motorcycle clubs were "criminal gangs" and by
9 inference, that Mr. Gonzalez was a criminal gangster. The gratuitous and stereotypical portrayal, seen
10 in scores of motion picture and television shows produced over the last sixty years, of motorcycle
11 clubs as lawless, roving bands of hoodlums also added to the danger of prejudice.

12 The State's multiplicitous charges, alleged the unlawful killing of Mr. Pettigrew in three
13 separate and different murder counts, added to that potential for prejudice. Multiple indictments create
14 the impression of more criminal activity than in fact occurred,³¹ and in this case gave the false
15 impression that Mr. Gonzalez, a middle aged office worker with a family, was in fact a one-man crime
16 wave.

17 The Nevada Supreme Court has not directly confronted the question of whether multiplicitous
18 charging can impermissibly prejudice a criminal defendant. Federal courts, however, have recognized
19 that allowing the government to prosecute multiplicitous charges may prejudice a defendant by falsely
20 suggesting to a jury that a defendant has committed not one but several crimes.³² "Once such a
21 message is conveyed to the jury, the risk increases that the jury will be diverted from a careful analysis
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25 ³⁰ *Albitre v. State*, 103 Nev. 281, at 284, 738 P.2d 1307 (1987).

26 ³¹ *United States v. Duncan*, 850 F.2d 1104, at 1108 n. 4 (6th Cir.1988); see also *United States v. Marquardt*, 786 F.2d 771,
at 778 (7th Cir.1986)

³² *United States v. Johnson*, 130 F.3d 1420, at 1426 (10th Cir. 1997); *United States v. Morehead*, 959 F.2d 1489, at 1505
(10th Cir.1992).

1 of the conduct at issue, and will reach a compromise verdict or assume that defendant is guilty on at
2 least some of the charges.³³

3 That risk was manifest here. Another risk is that a defendant may also be prejudiced based on
4 the varying strength of the evidence on each multiplicitous count:

5 We recognize . . . that the filing of multiple charges may be prejudicial
6 where the evidence of guilt as to some of the alleged offenses may be weak or
7 inconclusive. Under such circumstances, there is a risk that the jury may have
8 returned a verdict of guilty on counts as to which it may have otherwise formed a
reasonable doubt, solely because of the strength of the evidence on the remaining
counts.³⁴

9 Mr. Gonzalez believes that he was prejudiced by the State's proliferation of charges in this
10 case, and that what started as a risk became a reality with the jury's second question ("People in here
11 are wondering if a person can only be guilty of second degree murder, or first. Can it be both?")³⁵ and
12 the Court's answer "You must reach a decision on each count separate and apart from each other
13 count." This confirmed to the jurors that Mr. Gonzalez really was a one-man crime wave, and that the
14 Court thought the jury should "throw the book at him."

15 III.

16 CONCLUSION

17 Mr. Gonzalez contends that these errors, taken in combination, deprived him of the right to a

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25 ³³ *United States v. Johnson*, 130 F.3d 1420, at 1426 (10th Cir. 1997), citing to *United States v. Clarridge*, 811 F.Supp. 697,
702 (D.D.C.1992).

26 ³⁴ *United States v. Sherman*, 821 F.2d 1337, at 1340 (9th Cir. 1987).

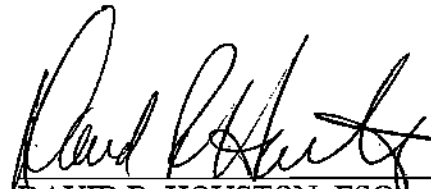
³⁵ Exhibit 4 (Jury Questions transcript), p. 3, ll. 15-19; Exhibit 5 (Jury Questions and Court Response).

1 fair trial, and asks this Court to order a new one.

2 **AFFIRMATION PURSUANT TO NRS 239B.030.**

3 The party executing this document hereby affirms that this document submitted for recording
4 does not contain the social security number of any person or persons, pursuant to NRS 239B.230.

5 Dated this 14 day of August, 2013.

6
7
8 

9 DAVID R. HOUSTON, ESQ.
10 Nevada Bar No. 2131
11 LAW OFFICE OF DAVID R.
12 HOUSTON
13 432 Court Street
14 Reno, Nevada 89501
15 (775) 786-4188
16 Attorney for Defendant
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INDEX OF EXHIBITS

1. Fourth Information Supplementing Indictment filed July 22, 2013
2. Jury Instructions filed August 7, 2013
3. Refused Instructions – Defendant A-E filed August 6, 2013
4. Jury Question Transcript dated August 7, 2013
5. Jury Question, Court Response – Number Two filed August 7, 2013

Exhibit 1

Exhibit 1

DA # 434444

SPD 11-8996

CODE 1795

Richard A. Gammick

#001510

P.O. Box 30083

Reno, NV 89520-3083

(775) 328-3200

Attorney for Plaintiff

FILED

JUL 22 2013 @ 11:00 a.m.

JOEY HASTINGS, CLERK

By: msgao
DEPUTY CLERK

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

Case No. CR11-1718 **B**

v.

Dept. No. 4

~~CESAR VILLACRANA (A),~~

~~and~~

ERNESTO MANUEL GONZALEZ (B),

Defendants.

Fourth

~~THIRD~~ INFORMATION SUPPLEMENTING INDICTMENT

RICHARD A. GAMMICK, District Attorney within and for the
County of Washoe, State of Nevada, in the name and by the authority
of the State of Nevada, informs the above entitled Court that ~~CESAR~~
~~VILLACRANA~~ and ERNESTO MANUEL GONZALEZ, the defendants above named,
have committed the crimes of:

///

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1 COUNT I. CONSPIRACY TO ENGAGE IN AN AFFRAY, a violation of
2 NRS 199.480 and NRS 203.050, a gross misdemeanor, in the manner
3 following, to wit:

4 That the said defendants, STUART GARY RUDNICK, also known
5 as "JABBERS" and ERNESTO MANUEL GONZALEZ, both Vagos gang members and
6 CESAR VILLAGRANA and JEFFREY PETTIGREW, both Hell's Angels gang
7 members did, at Sparks township, within the County of Washoe, State
8 of Nevada, on or about the 23rd day of September A.D., 2011, conspire
9 with their respective gang members and/or each other to engage in an
10 affray, and in furtherance of the conspiracy, defendant CESAR
11 VILLAGRANA and ERNESTO MANUEL GONZALEZ shot rival gang members.

12 COUNT II. CHALLENGE TO FIGHT RESULTING IN DEATH WITH THE
13 USE OF A DEADLY WEAPON, a violation of NRS 200.450, NRS 200.010. NRS
14 200.030, NRS 193.165, NRS 199.480, 195.020 and NRS 193.168, a felony,
15 in the manner following, to wit:

16 That the said defendants, STUART GARY RUDNICK, also known
17 as "JABBERS", CESAR VILLAGRANA and ERNESTO MANUEL GONZALEZ, did on or
18 about the 23rd day of September A.D., 2011, while within John
19 Ascuaga's Nugget, at Sparks Township, Washoe County, Nevada, cause,
20 give or send a challenge to fight and/or have agency in causing the
21 death of another after a challenge to fight resulting in the death of
22 a human being.

23 The Defendants above named are responsible under one or
24 more of the following principles of criminal liability, to wit:
25 1) by the Defendants directly committing the acts constituting the
26 offense; and/or 2) by the Defendants, having the intent to commit

1 challenge to fight or to accept a challenge to fight, conspiring with
2 each other to commit the offense of challenge to fight or to accept
3 such a challenge to fight whereby each co-conspirator is vicariously
4 liable for the acts of the other co-conspirators when the acts are
5 done in furtherance of the conspiracy; and/or 3) by the Defendants
6 having the intent to commit the crime of challenge to fight, and
7 aiding and abetting each either directly or indirectly whether
8 present or not.

9 Specifically, that the said defendant, STUART GARY RUDNICK,
10 also known as "JABBERS", a Vagos gang member, did upon previous
11 concert and agreement, give or send a challenge to fight to Hell's
12 Angel gang member JEFFREY PETTIGREW and JEFFREY PETTIGREW's co-
13 conspirator and fellow Hell's Angel gang member and agent, defendant
14 CESAR VILLAGRANA. That JEFFREY PETTIGREW and his fellow gang
15 member(s) and co-conspirator accepted the challenge to fight and did
16 fight with defendant STUART GARY RUDNICK, also known as "JABBERS" and
17 his co-conspirators, other Vagos gang members, which fight involved
18 the use of deadly weapons. That said fight ended with the shooting
19 death of JEFFREY PETTIGREW, a human being who died on or about the
20 24th day of September A.D., 2011, by Vagos gang member and co-
21 conspirator, defendant ERNESTO MANUEL GONZALEZ, and/or

22 That the said defendant, Vagos gang member, GARY STUART
23 RUDNICK, also known as "JABBERS" and Hell's Angel gang member JEFFREY
24 PETTIGREW did verbally challenge each other to fight and did directly
25 or indirectly, counsel, encourage, hire, command, induce or otherwise
26 procure other Vagos gang members and Hell's Angel gang members, and

1 ERNESTO MANUEL GONZALEZ and CESAR VILLAGRANA to fight and did either
2 by fighting or by giving or sending for himself or herself or for any
3 other person, the challenge to fight or by receiving for themselves
4 or for any other person, the challenge to fight, did cause a fight
5 where deadly weapons were used during said fight by STUART GARY
6 RUDNICK'S, also known as "JABBERS" and JEFFREY PETTIGREW'S respective
7 agents, defendants CESAR VILLAGRANA and ERNESTO MANUEL GONZALEZ
8 resulting in the death of JEFFREY PETTIGREW who died from a gunshot
9 wound on the 24th of September, 2011.

10 And that CESAR VILLAGRANA and ERNESTO MANUEL GONZALEZ,
11 being responsible as principles to the fight did aid and abet GARY
12 STUART RUDNICK, also known as "JABBERS" and JEFFREY PETTIGREW in the
13 fight by said defendants counseling each other in furtherance of
14 issuing or accepting a challenge to fight, and/or by providing backup
15 to each other, and/or congregating in a group in order to fight
16 together, and/or encouraging each other to engage in or accept the
17 challenge to fight, and/or each group encircling members of the
18 opposing group, and/or participating in a stand-off situation and/or
19 intimidating members of the rival gang, and/or harassing members of
20 the rival gang, and/or otherwise acting in concert.

21 That said challenge to fight and the subsequent fight was
22 committed knowingly for the benefit of, at the direction of, or in
23 affiliation with, a criminal gang, with the specific intent to
24 promote, further or assist the activities of the criminal gang.

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1 COUNT III. BATTERY WITH A DEADLY WEAPON, a violation of
2 NRS 200.481(2)(e) and NRS 193.168, a felony, in the manner following,
3 to wit:

4 That the said defendant, CESAR VILLAGRANA, on or about the
5 23rd day of September A.D., 2011, at Sparks Township, within the
6 County of Washoe, State of Nevada, did willfully and unlawfully use
7 force and violence upon the person of DIEGO GARCIA at John Ascuaga's
8 Nugget, 1100 Nugget Avenue, in the City of Sparks, Washoe County,
9 Nevada, with a deadly weapon, to wit: a firearm, by shooting DIEGO
10 GARCIA in the leg.

11 That said battery with the use of a deadly weapon was
12 committed knowingly for the benefit of, at the direction of, or in
13 affiliation with, a criminal gang, with the specific intent to
14 promote, further or assist the activities of the criminal gang.

15 COUNT IV. DISCHARGING A FIREARM IN A STRUCTURE a violation
16 of NRS 202.287, a felony, in the manner following, to wit:

17 That the said defendant, CESAR VILLAGRANA, on or about the
18 23rd day of September A.D., 2011, at Sparks Township, within the
19 County of Washoe, State of Nevada, did maliciously and wantonly
20 discharge a 9mm handgun while inside of John Ascuaga's Nugget
21 Hotel/Casino, located at 1100 Nugget Avenue in the City of Sparks,
22 Washoe County, Nevada, an area designated as a populated area in
23 Washoe County, Nevada.

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1 COUNT V. CARRYING A CONCEALED WEAPON, a violation of NRS
2 202.350, a felony, (F200) in the manner following, to wit:

3 That the said defendant, CESAR VILLAGRANA, on or about the
4 23rd day of September A.D., 2011, at Sparks Township, within the
5 County of Washoe, State of Nevada, did willfully and unlawfully,
6 carry and have concealed upon his person a certain handgun at John
7 Ascuaga's Nugget located at 1100 Nugget Avenue in Sparks, Washoe
8 County, Nevada.

9 III
10 COUNT VI. CARRYING A CONCEALED WEAPON, a violation of NRS
11 202.350, a felony, (F200) in the manner following, to wit:

12 That the said defendant, ERNESTO MANUEL GONZALEZ, on or
13 about the 23rd day of September A.D., 2011, at Sparks Township,
14 within the County of Washoe, State of Nevada, did willfully and
15 unlawfully, carry and have concealed upon his person a certain
16 handgun at John Ascuaga's Nugget located at 1100 Nugget Avenue in
17 Sparks, Washoe County, Nevada.

18 IV
19 COUNT VII. DISCHARGING A FIREARM IN A STRUCTURE a
20 violation of NRS 202.287, a felony, in the manner following, to wit:

21 That the said defendant, ERNESTO MANUEL GONZALEZ, on or
22 about the 23rd day of September A.D., 2011, at Sparks Township,
23 within the County of Washoe, State of Nevada, did maliciously and
24 wantonly discharge a .40 caliber handgun while inside of John
25 Ascuaga's Nugget Hotel/Casino, located at 1100 Nugget Avenue in the
26 City of Sparks, Washoe County, Nevada, an area designated as a
populated area in Washoe County, Nevada.

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~~V~~
COUNT VIII. MURDER OF THE SECOND DEGREE WITH THE USE OF A

DEADLY WEAPON, a violation of NRS 200.010, NRS 200.030, NRS 193.165
and NRS 193.168, a felony, committed in the manner following to wit:

That the said Defendants ERNESTO MANUEL GONZALEZ a Vagos gang member and, CESAR VILLAGRANA a Hell's Angel gang member, on or about the 23rd day of September, 2011, did aid and abet GARY STUART RUDNICK, also known as "JABBERS" a Vagos gang member and JEFFERY PETTIGREW a Hell's Angel gang member in the commission of an affray with the use of a deadly weapon, that during the course of the affray the said defendants did maliciously fire deadly weapons inside of John Ascuaga's casino, located in a congested area in Sparks, Washoe County, Nevada. That the said discharging of handguns during the affray was in general malignant recklessness of others' lives and safety of other people or in disregard of social duty and as a foreseeable consequence of the shooting, JEFFREY PETTIGREW, a human being, was killed and murdered suffering multiple gunshot wounds from which he died on September 24th, 2011.

That said affray and discharge of a handgun inside of a structure with the use of a deadly weapon was committed knowingly for the benefit of, at the direction of, or in affiliation with, a criminal gang, with the specific intent to promote, further or assist the activities of the criminal gang.

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VI
COUNT IX. MURDER WITH A DEADLY WEAPON, a violation of NRS

200.010 and NRS 200.030, NRS 193.165, NRS 193.168 a felony, (F720) in
the manner following:

That the said defendant ERNESTO MANUEL GONZALEZ on the 23rd day of September A.D., 2011, or thereabout, and before the filing of this Information, at and within the County of Washoe, State of Nevada, did willfully, unlawfully, and with malice aforethought, kill and murder JEFFREY PETTIGREW, a human being, by means of shooting into the body of JEFFREY PETTIGREW with a deadly weapon, to wit: a pistol, thereby inflicting mortal injuries upon the said JEFFREY PETTIGREW from which he died on September 24, 2011, said killing being (1) willful, deliberate, and premeditated; and/or (2) committed by Defendant lying in wait to commit the killing, said Defendant being responsible under one or more of the following principles of criminal liability, to wit: (1) by directly committing the act; and/or (2) by Defendant conspiring with GARY RUDNICK and other Vagos members or associates, with the specific intent that a killing occur, whereby each conspirator is vicariously liable for the foreseeable acts made in furtherance of the conspiracy.

Further, that the murder was committed knowingly for the benefit of, at the direction of, or in affiliation with, a criminal gang, and with the specific intent to promote, further or assist the activities of the criminal gang, to wit: the Vagos.

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VII
COUNT ~~X~~. CONSPIRACY TO COMMIT MURDER, a violation of NRS

199.480, NRS 200.010, NRS 200.030, a felony, in the manner following:

That the said defendant ERNESTO MANUEL GONZALEZ on the 23rd day of September A.D., 2011, or thereabout, and before the filing of this Information, at and within the County of Washoe, State of Nevada, did willfully, unlawfully, did conspire with GARY RUDNICK and other Vagos members or associates to kill and murder JEFFEREY PETTIGREW, a human being, and in furtherance of the conspiracy did commit the acts in Count ~~IX~~ VI, said acts being incorporated by this reference as though fully set forth here.

All of which is contrary to the form of the Statute in such case made and provided, and against the peace and dignity of the State of Nevada

AFFIRMATION PURSUANT TO NRS 239B.030

The undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

Dated this ~~10th~~ day of July, 2013.

22nd July 2013

RICHARD A. GAMMICK
District Attorney

By /s/ Amos Stege

AMOS STEGE
9200

Deputy District Attorney

PCN SPPD0022354C-GONZALEZ
PCN SPPD0022064C-GONZALEZ
PCN SPPD0022352C-VILLAGRANA

0701CR111718LDTHIRDSUPPIND

Exhibit 2

Exhibit 2

CR11-17188
DC-9903048222-002
STATE VS ERNESTO MANUEL GO 55 Pages
District Court 08/07/2013 07:30 AM
Washoe County 1985
NACOURT

FILED

AUG 07 2013

JOEY HASTINGS CLERK
By: *[Signature]*
DEPUTY CLERK

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,
Plaintiff,
v.
ERNESTO MANUEL GONZALEZ (B)
Defendant.

Case No. CR11-1718
Dept. No. 4

LADIES AND GENTLEMEN OF THE JURY:

It is my duty as judge to instruct you in the law that applies to this case, and it is your duty as jurors to follow the law as I shall state it to you, regardless of what you may think the law is or ought to be. On the other hand, it is your exclusive province to determine the facts in the case, and to consider and weigh the evidence for that purpose. The authority thus vested in you is not an arbitrary power, but must be exercised with sincere judgment, sound discretion, and in accordance with the rules of law stated to you.

Instruction No. 1

5061

1 If in these instructions, any rule, direction or idea is
2 stated in varying ways, no emphasis thereon is intended by me and
3 none must be inferred by you. For that reason, you are not to single
4 out any certain sentence, or any individual point or instruction, and
5 ignore the others, but you are to consider all the instructions as a
6 whole and to regard each in the light of all the others.

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26 Instruction No. 2

5062

1 If, during this trial, I have said or done anything which
2 has suggested to you that I am inclined to favor the position of
3 either party, you will not be influenced by any such suggestion.

4 I have not expressed, nor intended to express any opinion
5 as to which witnesses are or are not worthy of belief, what facts are
6 or are not established, or what inference should be drawn from the
7 evidence. If any expression of mine has seemed to indicate an
8 opinion relating to any of these matters, I instruct you to disregard
9 it.

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26 Instruction No. 3

1 It is the duty of attorneys on each side of a case to object
2 when the other side offers testimony or other evidence which counsel
3 believes is not admissible.

4 When the court has sustained an objection to a question,
5 the jury is to disregard the question and may draw no inference from
6 the wording of it or speculate as to what the witness would have said
7 if permitted to answer.

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26 Instruction No. 4

5064

1 Nothing that counsel say during the trial is evidence in
2 the case.

3 The evidence in a case consists of the testimony of the
4 witnesses and all physical or documentary evidence which has been
5 admitted.

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26 Instruction No. 5

1 A reasonable doubt is one based on reason. It is not mere
2 possible doubt, but is such a doubt as would govern or control a
3 person in the more weighty affairs of life. If the minds of the
4 jurors, after the entire comparison and consideration of all the
5 evidence, are in such a condition that they can say they feel an
6 abiding conviction of the truth of the charge, there is not a
7 reasonable doubt. Doubt to be reasonable must be actual, not mere
8 possibility or speculation.

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26 Instruction No. 6

1 In every crime there must exist a union or joint operation
2 of act and intent.

3 The burden is always upon the prosecution to prove both act
4 and intent beyond a reasonable doubt.

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26 Instruction No. 7

1 Every person charged with the commission of a crime shall
2 be presumed innocent unless the contrary is proven by competent
3 evidence beyond a reasonable doubt. The burden rests upon the
4 prosecution to establish every element of the crime with which the
5 defendant is charged beyond a reasonable doubt.

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26 Instruction No. 8

1 There are two kinds of evidence: direct and
2 circumstantial. Direct evidence is direct proof of a fact, such as
3 testimony of an eyewitness. Circumstantial evidence is indirect
4 evidence, proof of a chain of facts from which you could find that
5 another fact exists, even though it has not been proved directly.
6 Such evidence may consist of any acts, declarations or circumstances
7 of the crime. You are entitled to consider both kinds of evidence.
8 The law permits you to give equal weight to both, but it is for you
9 to decide how much weight to give to any evidence.

10 If you are satisfied of the defendant's guilt beyond a
11 reasonable doubt, it matters not whether your judgment of guilt is
12 based upon direct or positive evidence or upon indirect and
13 circumstantial evidence or upon both.

14 It is for you to decide whether a fact has been proved by
15 circumstantial evidence. In making that decision, you must consider
16 all the evidence in the light of reason, common sense and experience.

17 You should not be concerned with the type of evidence but
18 rather the relative convincing force of the evidence.

1 Intent may be proved by circumstantial evidence. It rarely
2 can be established by any other means. While witnesses may see and
3 hear and thus be able to give direct evidence of what a defendant
4 does or fails to do, there can be no eyewitness account of a state of
5 mind with which the acts were done or omitted, but what a defendant
6 does or fails to do may indicate intent or lack of intent to commit
7 the offense charged.

8 In determining the issue as to intent, the jury is entitled
9 to consider any statements made and acts done or omitted by the
10 accused, and all facts and circumstances in evidence which may aid
11 determination of state of mind.

1 A Fourth Information Supplementing Indictment is a formal
2 method of accusing a defendant of a crime. It is not evidence of any
3 kind against the accused, and does not create any presumption or
4 permit any inference of guilt.
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Instruction No. 11

5071

1 The defendant ERNESTO MANUEL GONZALEZ is being tried upon
2 anFourth Information Supplementing Indictment which was filed on the
3 22ndday of July, 2013, in the Second Judicial District Court,
4 charging the said defendant ERNESTO MANUEL GONZALEZ, with:

5 COUNT I. CONSPIRACY TO ENGAGE IN AN AFFRAY, a violation of
6 NRS 199.480 and NRS 203.050, a gross misdemeanor, in the manner
7 following, to wit:

8 That the said defendants, STUART GARY RUDNICK, also known
9 as "JABBERS" and ERNESTO MANUEL GONZALEZ, both Vagos gang members and
10 CESAR VILLAGRANA and JEFFREY PETTIGREW, both Hell's Angels gang
11 members did, at Sparks township, within the County of Washoe, State
12 of Nevada, on or about the 23rd day of September A.D., 2011, conspire
13 with their respective gang members and/or each other to engage in an
14 affray, and in furtherance of the conspiracy, defendant CESAR
15 VILLAGRANA and ERNESTO MANUEL GONZALEZ shot rival gang members.

16 COUNT II. CHALLENGE TO FIGHT RESULTING IN DEATH WITH THE
17 USE OF A DEADLY WEAPON, a violation of NRS 200.450, NRS 200.010, NRS
18 200.030, NRS 193.165, NRS 199.480, 195.020 and NRS 193.168, a felony,
19 in the manner following, to wit:

20 That the said defendants, STUART GARY RUDNICK, also known
21 as "JABBERS", CESAR VILLAGRANA and ERNESTO MANUEL GONZALEZ, did on or
22 about the 23rd day of September A.D., 2011, while within John
23 Ascuaga's Nugget, at Sparks Township, Washoe County, Nevada, cause,
24 give or send a challenge to fight and/or have agency in causing the

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1 death of another after a challenge to fight resulting in the death of
2 a human being.

3 The Defendants above named is responsible under one or more
4 of the following principles of criminal liability, to wit:

5 1) by the Defendants directly committing the acts constituting the
6 offense; and/or 2) by the Defendants, having the intent to commit
7 challenge to fight or to accept a challenge to fight, conspiring with
8 each other to commit the offense of challenge to fight or to accept
9 such a challenge to fight whereby each co-conspirator is vicariously
10 liable for the acts of the other co-conspirators when the acts are
11 done in furtherance of the conspiracy; and/or 3) by the Defendants
12 having the intent to commit the crime of challenge to fight, and
13 aiding and abetting each either directly or indirectly whether
14 present or not.

15 Specifically, that the said defendant, STUART GARY RUDNICK,
16 also known as "JABBERS", a Vagos gang member, did upon previous
17 concert and agreement, give or send a challenge to fight to Hell's
18 Angel gang member JEFFREY PETTIGREW and JEFFREY PETTIGREW's co-
19 conspirator and fellow Hell's Angel gang member and agent, defendant
20 CESAR VILLAGRANA. That JEFFREY PETTIGREW and his fellow gang
21 member(s) and co-conspirator accepted the challenge to fight and did
22 fight with defendant STUART GARY RUDNICK, also known as "JABBERS" and
23 his co-conspirators, other Vagos gang members, which fight involved
24 the use of deadly weapons. That said fight ended with the shooting
25 death of JEFFREY PETTIGREW, a human being who died on or about the

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1 24th day of September A.D., 2011, by Vagos gang member and co-
2 conspirator, defendant ERNESTO MANUEL GONZALEZ, and/or

3 That the said defendant, Vagos gang member, GARY STUART
4 RUDNICK, also known as "JABBERS" and Hell's Angel gang member JEFFREY
5 PETTIGREW did verbally challenge each other to fight and did directly
6 or indirectly, counsel, encourage, hire, command, induce or otherwise
7 procure other Vagos gang members and Hell's Angel gang members, and
8 ERNESTO MANUEL GONZALEZ and CESAR VILLAGRANA to fight and did either
9 by fighting or by giving or sending for himself or herself or for any
10 other person, the challenge to fight or by receiving for themselves
11 or for any other person, the challenge to fight, did cause a fight
12 where deadly weapons were used during said fight by STUART GARY
13 RUDNICK'S, also known as "JABBERS" and JEFFREY PETTIGREW'S respective
14 agents, defendants CESAR VILLAGRANA and ERNESTO MANUEL GONZALEZ
15 resulting in the death of JEFFREY PETTIGREW who died from a gunshot
16 wound on the 24th of September, 2011.

17 And that CESAR VILLAGRANA and ERNESTO MANUEL GONZALEZ,
18 being responsible as a principle to the fight, did aid and abet GARY
19 STUART RUDNICK, also known as "JABBERS" in the fight by said
20 defendants counseling each other in furtherance of issuing or
21 accepting a challenge to fight, and/or by providing backup to each
22 other, and/or congregating in a group in order to fight together,
23 and/or encouraging each other to engage in or accept the challenge to
24 fight, and/or each group encircling members of the opposing group,
25 and/or participating in a stand-off situation and/or

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1 intimidating members of the rival gang, and/or harassing members of
2 the rival gang, and/or otherwise acting in concert.

3 That said challenge to fight and the subsequent fight was
4 committed knowingly for the benefit of, at the direction of, or in
5 affiliation with, a criminal gang, with the specific intent to
6 promote, further or assist the activities of the criminal gang.

7 COUNT III. CARRYING A CONCEALED WEAPON, a violation of NRS
8 202.350, a felony, in the manner following, to wit:

9 That the said defendant, ERNESTO MANUEL GONZALEZ, on or
10 about the 23rd day of September A.D., 2011, at Sparks Township,
11 within the County of Washoe, State of Nevada, did willfully and
12 unlawfully, carry and have concealed upon his person a certain
13 handgun at John Ascuaga's Nugget located at 1100 Nugget Avenue in
14 Sparks, Washoe County, Nevada.

15 COUNT IV. DISCHARGING A FIREARM IN A STRUCTURE a violation
16 of NRS 202.287, a felony, in the manner following, to wit:

17 That the said defendant, ERNESTO MANUEL GONZALEZ, on or
18 about the 23rd day of September A.D., 2011, at Sparks Township,
19 within the County of Washoe, State of Nevada, did maliciously and
20 wantonly discharge a .40 caliber handgun while inside of John
21 Ascuaga's Nugget Hotel/Casino, located at 1100 Nugget Avenue in the
22 City of Sparks, Washoe County, Nevada, an area designated as a
23 populated area in Washoe County, Nevada.

24 COUNT V. MURDER OF THE SECOND DEGREE WITH THE USE OF A
25 DEADLY WEAPON, a violation of NRS 200.010, NRS 200.030, NRS 193.165
26 and NRS 193.168, a felony, committed in the manner following to wit:

1 That the said Defendants ERNESTO MANUEL GONZALEZ a Vagos
2 gang member and, CESAR VILLAGRANA, a Hell's Angel gang member, on or
3 about the 23rd day of September, 2011, did aid and abet GARY STUART
4 RUDNICK, also known as "JABBERS" a Vagos gang member and JEFFERY
5 PETTIGREW, a Hell's Angel gang member in the commission of an affray
6 with the use of a deadly weapon, that during the course of the affray
7 the said defendants did maliciously fire deadly weapons inside of
8 John Ascuaga's casino, located in a congested area in Sparks, Washoe
9 County, Nevada. That the said discharging of handguns during the
10 affray was in general malignant recklessness of others' lives and
11 safety of other people or in disregard of social duty and as a
12 foreseeable consequence of the shooting, JEFFREY PETTIGREW, a human
13 being, was killed and murdered suffering multiple gunshot wounds from
14 which he died on September 24th, 2011.

15 That said affray and discharge of a handgun inside of a
16 structure with the use of a deadly weapon was committed knowingly for
17 the benefit of, at the direction of, or in affiliation with, a
18 criminal gang, with the specific intent to promote, further or assist
19 the activities of the criminal gang.

20 COUNT VI. MURDER WITH A DEADLY WEAPON, a violation of NRS
21 200.010 and NRS 200.030, NRS 193.165, NRS 193.168 a felony, in the
22 manner following:

23 That the said defendant ERNESTO MANUEL GONZALEZ on the 23rd
24 day of September A.D., 2011, or thereabout, and before the filing of
25 this Information, at and within the County of Washoe, State of
26 Nevada, did willfully, unlawfully, and with malice aforethought, kill

1 and murder JEFFREY PETTIGREW, a human being, by means of shooting
2 into the body of JEFFREY PETTIGREW with a deadly weapon, to wit: a
3 pistol, thereby inflicting mortal injuries upon the said JEFFREY
4 PETTIGREW from which he died on September 24, 2011, said killing
5 being (1) willful, deliberate, and premeditated; and/or (2) committed
6 by Defendant lying in wait to commit the killing, said Defendant
7 being responsible under one or more of the following principles of
8 criminal liability, to wit: (1) by directly committing the act;
9 and/or (2) by Defendant conspiring with GARY RUDNICK and other Vagos
10 members or associates, with the specific intent that a killing occur,
11 whereby each conspirator is vicariously liable for the foreseeable
12 acts made in furtherance of the conspiracy.

13 Further, that the murder was committed knowingly for the
14 benefit of, at the direction of, or in affiliation with, a criminal
15 gang, and with the specific intent to promote, further or assist the
16 activities of the criminal gang, to wit: the Vagos.

17 COUNT VII. CONSPIRACY TO COMMIT MURDER, a violation of NRS
18 199.480, NRS 200.010, NRS 200.030, a felony, in the manner following:

19 That the said defendant ERNESTO MANUEL GONZALEZ on the 23rd
20 day of September A.D., 2011, or thereabout, and before the filing of
21 this Information, at and within the County of Washoe, State of
22 Nevada, did willfully, unlawfully, conspire with GARY RUDNICK and
23 other Vagos members or associates to kill and murder JEFFREY
24 PETTIGREW, a human being, and in furtherance of the conspiracy did
25 commit the acts in Count VI, said acts being incorporated by this
26 reference as though fully set forth here.

1 To the charges stated in the Fourth information Supplementing
2 Indictment, the defendant, ERNESTO MANUEL GONZALEZ, plead "NOT
3 GUILTY".
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Instruction No. 12

5078

1 "Knowingly," imports a knowledge that the facts exist which
2 constitutes the act or omission of a crime, and does not require
3 knowledge of its unlawfulness. Knowledge of any particular fact may
4 be inferred from the knowledge of such other facts as should put an
5 ordinarily prudent person upon inquiry.
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26 Instruction No. 13

5079

1 The word "willfully" when applied to the intent element of
2 the charges contained in Counts I, II, III, means an act done or
3 omitted and implies simply a purpose or willingness to commit the act
4 or to make the omission in question. The word does not require in
5 its meaning any intent to violate law, or to injure another, or to
6 acquire any advantage.

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26 Instruction No. 14

5080

1 The word "willfully" when applied in criminal statutes,
2 charged in Counts IV, V, VI and VII relates to an act or omission
3 which is done intentionally, deliberately or designedly, as
4 distinguished from an act or omission done accidentally,
5 inadvertently or innocently.
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26 Instruction No. 15

1 A person may be found liable for the commission of a crime if
2 the State proves beyond a reasonable doubt that he or she committed
3 the crime; or by proving that the defendant is liable by virtue of
4 the doctrine of vicarious liability as an aider and abettor or as a
5 co-conspirator.

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26 Instruction No. 116

1 In order for the defendant to be held accountable for Counts V,
2 VI and/or VII under theories of vicarious liability (aiding and
3 abetting and/or conspiracy) the State must prove beyond a reasonable
4 doubt the defendant had the specific intent to commit the crime
5 charged.
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Instruction No. 16A

5083

1 The defendant is charged in Count I (Conspiracy to Engage in an Affray), Count II (Challenge
2 to Fight Resulting in Death), Count VI (Murder with a Deadly Weapon), and Count VII (Conspiracy to
3 Commit Murder) with participation in a conspiracy.

4 A conspiracy is an agreement between two or more persons for an unlawful purpose. A person
5 who knowingly does any act to further the object of a conspiracy, or otherwise participates therein, is
6 criminally liable as a conspirator. Evidence of a coordinated series of acts furthering the underlying
7 offense is sufficient to infer the existence of an agreement and support a conspiracy conviction.
8 However, absent an agreement to cooperate in achieving the purpose of a conspiracy, mere knowledge
9 of, acquiescence in, or approval of that purpose does not make one a party to conspiracy.

10 The unlawful agreement or object is the essence of the crime of conspiracy. The crime is
11 completed upon the making of an unlawful agreement regardless of whether the object of the
12 conspiracy is effectuated.

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26 Instruction No. 17

1 Aider and Abettor liability Defined

2 Every person concerned in the commission of a felony, gross
3 misdemeanor or misdemeanor, whether the person directly commits the
4 act constituting the offense, or aids or abets in its commission, and
5 whether present or absent; and every person who, directly or
6 indirectly, counsels, encourages, hires, commands, induces or
7 otherwise procures another to commit a felony, gross misdemeanor or
8 misdemeanor is a principal, and shall be proceeded against and
9 punished as such.

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26 Instruction No. 18

5085

1 The elements of the crime of Affray are:

- 2 1. Two or more persons;
- 3 2. By agreement;
- 4 3. Fight in a public place;
- 5 4. To the terror of the citizens of this state.

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26 Instruction No. 19

5086

1 The Elements of the Crime of Challenge to Fight Resulting in
2 Death are:

- 3 1. A person;
- 4 2. Upon previous concert and agreement;
- 5 3. Fights with any other person, or;
- 6 4. Gives, sends or authorizes any other person to give or
7 send a challenge to fight verbally or in writing to any
8 other person and a fight occurs;
- 9 5. A person having any agency in causing the death by either
10 fighting, or by giving or sending or receiving for himself
11 or herself or any other person, the challenge to fight,
12 and
- 13 6. Death ensues to a person in such a fight, or dies from any
14 injuries received in such a fight.

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26 Instruction No. 20

5087

The elements of carrying a concealed weapon are as follows:

1. The Defendant did unlawfully;
2. Carry concealed upon his or her person any;
3. Pistol, revolver or other firearm.

Instruction No. 21

5088

1 The crime of discharging a firearm within a structure
2 consists of the following elements:

- 3 1. A Defendant within a structure did;
- 4 2. maliciously or wantonly;
- 5 3. discharge a firearm within the structure; and
- 6 4. the structure was located in an area designated as a
7 populated area for the purpose of prohibiting the
8 discharge of weapons.

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26 Instruction No. 22

5089

The elements of the crime of Murder are:

1. The defendant did willfully and unlawfully;
2. kill a human being;
3. with malice aforethought, either express or implied.

Instruction No. 23

5090

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Murder is divided into two degrees.

Murder of the first degree is murder which is willful,
deliberate and premeditated.

Murder of the second degree is all other kinds of murder.

1 Malice aforethought, as used in Counts IV, V and VI in this
2 case, means the intentional doing of a wrongful act without legal
3 cause or excuse, or what the law considers adequate provocation. The
4 condition of mind described as malice aforethought may arise, not
5 alone from anger, hatred, revenge or from particular ill will, spite
6 or grudge toward a person, but may also result from any unjustifiable
7 or unlawful motive or purpose to injure another, which proceeds from
8 a heart fatally bent on mischief, or with reckless disregard of
9 consequences and social duty.

1 "Wanton conduct" is defined as reckless, heedless, malicious,
2 characterized by extreme recklessness, foolhardiness, recklessly
3 disregardful of the rights or safety of others or of consequences.
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26 Instruction No. 216

1 Express malice is that deliberate intention to unlawfully
2 take away the life of a fellow creature, which is manifested by
3 external circumstances capable of proof.

4 Malice may be implied when no considerable provocation
5 appears or when all the circumstances of the killing show an
6 abandoned and malignant heart.

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26 Instruction No. 27

5094

1 Murder of the first degree is murder which is perpetrated
2 by means of any kind of willful, deliberate, and premeditated
3 killing. All three elements--willfulness, deliberation, and
4 premeditation--must be proven beyond a reasonable doubt before an
5 accused can be convicted of first-degree murder.

6 Willfulness is the intent to kill. There need be no
7 appreciable space of time between formation of the intent to kill and
8 the act of killing.

9 Deliberation is the process of determining upon a course of
10 action to kill as a result of thought, including weighing the reasons
11 for and against the action and considering the consequences of the
12 action.

13 A deliberate determination may be arrived at in a short
14 period of time. But in all cases the determination must not be
15 formed in passion, or if formed in passion, it must be carried out
16 after there has been time for the passion to subside and deliberation
17 to occur. A mere unconsidered and rash impulse is not deliberate,
18 even though it includes the intent to kill.

19 Premeditation is a design, a determination to kill,
20 distinctly formed in the mind by the time of the killing.

21 Premeditation need not be for a day, an hour, or even a
22 minute. It may be as instantaneous as successive thoughts of the
23 mind. For if the jury believes from the evidence that the act
24 constituting the killing has been preceded by and has been the

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1 result of premeditation, no matter how rapidly the act follows the
2 premeditation, it is premeditated.

3 The law does not undertake to measure in units of time the
4 length of the period during which the thought must be pondered before
5 it can ripen into an intent to kill which is truly deliberate and
6 premeditated. The time will vary with different individuals and
7 under varying circumstances.

8 The true test is not the duration of time, but rather the
9 extent of the reflection. A cold, calculated judgment and decision
10 may be arrived at in a short period of time, but a mere unconsidered
11 and rash impulse, even though it includes an intent to kill, is not
12 deliberation and premeditation as will fix an unlawful killing as
13 murder of the first degree.

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26 Instruction No. 28

5096

1 Lying in wait is defined by law as watching, waiting, and
2 concealment from the person killed with the intention of killing or
3 inflicting bodily injury upon that person.
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26 Instruction No. 29

5097

1 If you find the defendant committed the offense of
2 Challenge to Fight Resulting in Death, First Degree Murder, or Second
3 Degree Murder then you must further determine whether the defendant
4 used a firearm. You should indicate your finding by checking the
5 appropriate box on the verdict forms. The burden is on the State to
6 prove beyond a reasonable doubt that a firearm or other deadly weapon
7 was used during the commission of the offenses.

8 You are instructed that a firearm is a deadly weapon.
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26 Instruction No. 30

5098

1 A criminal gang means:

2 1. Any combination of persons;

3 2. Organized formally or informally, so constructed that
4 the organization will continue its operation even if
5 individual members enter or leave the organization
6 which:

7 a. Has a common name or identifying symbol

8 b. Has particular conduct, status and custom indicative
9 of it; and

10 c. Has as one of its common activities engaging in
11 criminal activity punishable as a felony, other
12 than the conduct which constitutes the primary
13 offense.

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26 Instruction No. 31

5099

The Elements of the Gang Enhancement are as follows:

1. The defendant committed the crime;
2. For the benefit of, at the direction of, or in affiliation with a criminal gang;
3. With specific intent to promote, further or assist the activities of the criminal gang.

Instruction No. 32

5100

1 Gang evidence is not admissible to show that the defendant is a
2 bad person or has a criminal propensity. You may only consider such
3 evidence in your determination as to whether the Vagos is a criminal
4 gang and whether the Defendant committed the offenses in Count II, V,
5 and VI knowingly for the benefit of, at the direction of, or in
6 affiliation with, a criminal gang, with the specific intent to
7 promote, further or assist the activities of the criminal gang.

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26 Instruction 33

1 The killing of another person in self-defense or defense of
2 another is justified and not unlawful when the person who does the
3 killing actually and reasonably believes:

4 1. That there is imminent danger that the assailant will either
5 kill him or any other person in his presence or company or cause
6 great bodily injury to him or any other person in his presence
7 or company; and

8 2. That it is absolutely necessary under the circumstances for him
9 to use in self-defense or defense of another force or means that
10 might cause the death of the other person, for the purpose of
11 avoiding death or great bodily injury to himself or any other
12 person in his presence or company.

13 A bare fear of death or great bodily injury is not sufficient to
14 justify a killing. To justify taking the life of another in self-
15 defense or defense of another, the circumstances must be sufficient
16 to excite the fears of a reasonable person placed in a similar
17 situation. The person killing must act under the influence of those
18 fears alone and not in revenge.

19 An honest but unreasonable belief in the necessity for self-
20 defense or defense of another does not negate malice.

21 The right of self-defense or defense of another is not available
22 to an original aggressor, that is a person who has sought a quarrel
23 with the design to force a deadly issue and thus through his fraud,
24 contrivance, or fault, to create a real or apparent necessity for
25 making a felonious assault.

1 However, where a person, without voluntarily seeking, provoking,
2 inviting, or willingly engaging in a difficulty of his own free will,
3 is attacked by an assailant, he has the right to stand his ground and
4 need not retreat when faced with the threat of deadly force.

5 Actual danger is not necessary to justify a killing in self-
6 defense or defense of another. A person has a right to defend from
7 apparent danger to the same extent as he would from actual danger.
8 The person killing is justified if:

- 9 1. He is confronted by the appearance of imminent danger which
10 arouses in his mind an honest belief and fear that he or
11 another in his presence, is about to be killed or suffer great
12 bodily injury; and
- 13 2. He acts solely upon these appearances and his fear and actual
14 beliefs; and
- 15 3. A reasonable person in a similar situation would believe
16 himself or another in his presence to be in like danger.

17 The killing is justified even if it develops afterward that the
18 person was mistaken about the extent of the danger.

19 If evidence of self-defense, or defense of others is present,
20 the State must prove beyond a reasonable doubt that the defendant did
21 not act in self-defense or defense of others. If you find that the
22 State has failed to prove beyond a reasonable doubt that the
23 defendant did not act in self-defense or defense of others, you must
24 find the defendant not guilty.

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26 Instruction No. 34

1 If you find that the defendant conspired and/ or aided and
2 abetted Gary Rudnick in issuing or accepting a challenge to fight and
3 that the respective parties involved in the fight voluntarily entered
4 into mutual combat knowing, or having reason to believe that it would
5 probably or may result in death or serious bodily injury to himself
6 or to others, no party having any agency in causing the death, either
7 by fighting or by giving or sending for himself or herself or any
8 other person, or in receiving for himself or herself or for any other
9 person, the challenge to fight is entitled to claim self-defense or
10 defense of others.
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Instruction 35

5104

Counts II, V, and VI contain multiple theories of liability.

For example:

Count II contains vicarious liability theories of conspiracy and aiding and abetting;

Count V contains two theories of liability, conspiracy as well as alleging that the defendant committed the crime; and

Count VI contains theories of liability on the charge of Murder in the First Degree, these are: Premeditated and deliberate murder and murder by lying in wait.

The law does not require, you the jury, to reach a unanimous decision upon a specific theory of liability within each count so long as you are all unanimous in rendering a decision on liability as to each count.

Instruction No. 36

5185

1 A witness who has special knowledge, skill, experience,
2 training or education in a particular science, profession or
3 occupation is an expert witness. An expert witness may give an
4 opinion as to any matter in which the witness is skilled.

5 You should consider such expert opinion and weigh the
6 reasons, if any, given for it. You are not bound, however, by such
7 an opinion. Give it the weight to which you deem it entitled,
8 whether that be great or slight, and you may reject it, if, in your
9 judgment, the reasons given for it are unsound.

10 The opinions of experts are to be considered by you in
11 connection with all other evidence in the case. The same rules apply
12 to expert witnesses that apply to other witnesses in determining the
13 weight or value of such testimony.

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26 Instruction No. 37

1 You are the sole judges of the credibility of each witness
2 who has testified and of the weight to be given to the testimony of
3 each. If you should find the evidence in this case to be in conflict,
4 then it is your sworn duty to reconcile the conflict if you can, so
5 as to make one harmonious story of it all. If you cannot reconcile
6 these conflicts, then it is your duty to give credit to that portion
7 of the testimony which you believe is worthy of credit, and you may
8 disregard that portion of the testimony which you do not believe to
9 be worthy of credit.

10 In considering the credibility of witnesses and in
11 considering any conflict in testimony, you should take into
12 consideration each witness' means of knowledge; strength of memory
13 and opportunity for observations; the reasonableness or
14 unreasonableness of the testimony; the consistency or inconsistency
15 of testimony; the motives actuating the witness; the fact, if it is a
16 fact, that the testimony has been contradicted, the witness' bias or
17 prejudice or interest in the outcome of this litigation; the ability
18 to have acquired the knowledge of the facts to which the witness
19 testified; the manner and demeanor upon the witness stand; and the
20 apparent truthfulness of the testimony as well as all other facts and
21 circumstances shown by the evidence which affect the credibility of
22 the testimony.
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1 Neither side is required to call as witnesses all persons
2 who may have been present at any of the events disclosed by the
3 evidence or who may appear to have some knowledge of these events, or
4 to produce all objects or documents mentioned or suggested by the
5 evidence.
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Instruction No. 39

5108

1 You are not called upon to return a verdict as to the guilt
2 or innocence of any other person than the defendant. If the evidence
3 convinces you beyond a reasonable doubt of the guilt of the accused,
4 you should so find, even though you may believe one or more other
5 persons are also guilty.
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Instruction No. 40

1 A separate crime is charged against the defendant in each count.
2 You must decide each count separately. Your verdict on one count
3 should not control your verdict on any other count. If you find the
4 state failed to prove an element of a particular count you must find
5 the defendant not guilty as to that count.

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26 Instruction 41

5110

1 The flight of a person immediately after the commission of
2 a crime is not sufficient in itself to establish his guilt, but is a
3 fact which, if proved, may be considered by you in the light of all
4 other proved facts in deciding the question of his guilt or
5 innocence. The weight to which such circumstance is entitled is a
6 matter for the jury to determine.

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26 Instruction No. 42

5111

1 On arriving at a verdict in this case, you shall not
2 discuss or consider the subject of penalty or punishment as that is a
3 matter which will be decided later and must not in any way affect
4 your decision as to the innocence or guilt of the defendant.

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25 Instruction No. 43
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5112

1 Although you are to consider only the evidence in the case
2 in reaching a verdict, you must bring to the consideration of the
3 evidence your everyday common sense and judgment as reasonable men
4 and women. Thus, you are not limited solely to what you see and hear
5 as the witnesses testify. You may draw reasonable inferences which
6 you feel are justified by the evidence, keeping in mind that such
7 inferences should not be based on speculation or guess.

8 A verdict may never be influenced by sympathy, passion,
9 prejudice, or public opinion. Your decision should be the product of
10 sincere judgment and sound discretion in accordance with these rules
11 of law.
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26 Instruction No. 44

1 It is your duty as jurors to consult with one another and
2 to deliberate, with a view of reaching an agreement, if you can do so
3 without violence to your individual judgment. You each must decide
4 the case for yourself, but should do so only after a consideration of
5 the case with your fellow jurors, and you should not hesitate to
6 change an opinion when convinced that it is erroneous. However, you
7 should not be influenced to vote in any way on any question submitted
8 to you by the single fact that a majority of the jurors, or any of
9 them, favor such a decision. In other words, you should not
10 surrender your honest convictions concerning the effect or weight of
11 evidence for the mere purpose of returning a verdict or solely
12 because of the opinion of the other jurors.

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26 Instruction No. 45

5714

Upon retiring to the jury room you will select one of your number to act as foreperson, who will preside over your deliberations and who will sign a verdict to which you agree.

Conrad I. Steinheimer
DISTRICT JUDGE

FILED

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Joey Orduna Hastings

Clerk of the Court

Transaction # 3922526

Exhibit 3

Exhibit 3

5716

CR11-1718B DC-9900048222-001
STATE VS ERNESTO MANUEL GON 5 Pages
District Court 08/06/2013 04:00 PM
Washoe County 3755
narcourt

1 **CODE 3755**

FILED

AUG 06 2013

JOEY HASTINGS, CLERK
By: *[Signature]*
DEPUTY CLERK

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6 **IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**
7 **IN AND FOR THE COUNTY OF WASHOE**

8
9 **STATE OF NEVADA,**

10 **Plaintiff,**

Case No. CR11-1718B

11 **vs.**

Dept. No. 4

12 **ERNESTO MANUEL GONZALEZ,**

13 **Defendant.**

14
15 **REFUSED INSTRUCTIONS - DEFENDANT A - E**

16 **(SEE ATTACHED DOCUMENT)**

17 **///**

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5117

1 Defendant Ernesto Gonzalez asserts as his theory of defense that he acted in lawful defense of
2 another. If you find that Defendant Ernesto Gonzalez acted in lawful defense of another as set forth in
3 these instructions you cannot convict him of Counts I, ~~II~~^{III} IV, V, VI, VII.
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Carter v. State, 121 Nev. 759, 147 P.3d 1101 (2006);

Crawford v. State, 121 Nev. 744, 121 P.3d 582

25 Defendant's Rejected
26

Instruction No. A

5118

1 Before you may rely on circumstantial evidence to conclude that a fact necessary to find the
2 defendant guilty has been proved, you must be convinced that the State have proved each fact essential
3 to that conclusion beyond a reasonable doubt.

4 Also, before you may rely on circumstantial evidence to conclude that the defendant had the
5 required intent or mental state, you must be convinced that the only reasonable conclusion supported
6 by the circumstantial evidence is that the defendant had the required intent or mental state. If you can
7 draw two or more reasonable conclusions from the circumstantial evidence, and one of those
8 reasonable conclusions supports a finding that the defendant did have the required intent or mental
9 state and another reasonable conclusion supports a finding that the defendant did not, you must
10 conclude that the required intent or mental state was not proved by the circumstantial evidence.

11 However, when considering circumstantial evidence, you must accept only reasonable conclusions and
12 reject any that are unreasonable.

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18 *Judicial Council of California Criminal Jury*
19 *Instructions [CALCRIM] (2012), Instruction No.*
20 *225, available online at*
http://www.courts.ca.gov/partners/documents/calcrim_juryins.pdf

21
22 D

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24 Defendant's Rejected

26 Instruction No. B

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5119

1 For circumstantial evidence, alone, to be sufficient to sustain a conviction, the circumstances all
2 taken together must: (1) exclude to a moral certainty every hypothesis but the single one of guilt; and
3 (2) establish that single hypothesis of guilt beyond a reasonable doubt.

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7 Legislative Counsel Bureau's annotations to NRS
8 48.025, citing to *Buchanan v. State*, 119 Nev. 201,
9 at 217, 69 P.3d 694 (2003) ("Circumstantial
10 evidence alone can certainly sustain a criminal
11 conviction. However, to be sufficient, all the
12 circumstances taken together must exclude to a
13 moral certainty every hypothesis but the single one
14 of guilt."); *Kinna v. State*, 84 Nev. 642, 646, 447
15 P.2d 32, 34 (1968) ("If the circumstances, all taken
16 together, exclude to a moral certainty every
17 hypothesis but the single one of guilt, and establish
18 that one beyond a reasonable doubt, they are
19 sufficient."); *State v. Snyder*, 41 Nev. 453, at 461,
20 172 P. 364 (1918) ("If the circumstances, all taken
21 together, exclude to a moral certainty every
22 hypothesis but the single one of guilt, and establish
23 that one beyond a reasonable doubt, they are
24 sufficient."); *State v. Fronhofer*, 38 Nev. 448, at
25 461, 150 P. 846 (1915) (where circumstances alone
are relied upon, "if there be no probable hypothesis
of guilt consistent, beyond a reasonable doubt, with
the facts of the case, the defendant must be
acquitted."); *State v. Mandich*, 24 Nev. 336, 54 P.
516 (1898) ("If the circumstances, all taken
together, exclude to a moral certainty every
hypothesis but the single one of guilt, and establish
that one beyond a reasonable doubt, they are
sufficient."); *State v. Rover*, 13 Nev. 17, at 23
(1878) ("The evidence against the accused must be
such as to exclude, to a moral certainty, every
hypothesis but that of his guilt of the offense
imputed to him.").

Defendants Rejected
Instruction No. C

D

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5120

1 The fact that individual members committed felony crimes which benefitted the gang does not
2 lead necessarily to the conclusion that felonious action is a common denominator of the gang.
3 Likewise, just because certain members of a hypothetical group play musical instruments, it does not
4 follow that the group is an orchestra.

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7 *Origel-Candido v. State*, 114 Nev. 378, at 383, 956 P.2d 1378
8 (1998).
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D

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25 Defendant's Rejected
26 Instruction No. D

71

5121

1 You have heard testimony from _____, a witness who had criminal charges pending
2 against him. That testimony was given in the expectation that he would receive favored treatment from
3 the government in connection with his case;

4 For this reason, in evaluating the testimony of _____, you should consider the extent to
5 which or whether his testimony may have been influenced by this factor. In addition, you should
6 examine the testimony of _____ with greater caution than that of other witnesses.

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16 Instruction 4.9, *Manual of Model Criminal Jury*
17 *Instructions for the District Courts of the Ninth*
18 *Circuit*, Ninth Circuit Jury Instructions Committee
19 (2010), citing to *United States v. Tirouda*, 394 F.3d
20 683, at 687-88 (9th Cir.2005), cert. denied, 547
21 U.S. 1005 (2006).
22
23
24

D

25 Defendant's Rejected
26

Instruction No. E

B20

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FILED

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Joey Orduna Hastings

Clerk of the Court

Transaction # 3922526

Exhibit 4

Exhibit 4

5123

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5 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

6 IN AND FOR THE COUNTY OF WASHOE

7 THE HONORABLE CONNIE STEINHEIMER, DISTRICT JUDGE

8 -oOo-

9 STATE OF NEVADA,)

10 Plaintiff,) Case No. CR11-1718B

11 vs.)

12 ERNESTO MANUEL GONZALEZ,) Dept. No. 4

13 Defendant.)

14 _____)
15
16 PARTIAL TRANSCRIPT OF PROCEEDINGS

17 TELEPHONIC CONFERENCE

18 WEDNESDAY, AUGUST 7, 2013

19 RENO, NEVADA
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24 Reported By: MARCIA FERRELL, CCR No. 797

5124

APPEARANCES:

For the Plaintiff:

KARL S. HALL

DEPUTY DISTRICT ATTORNEY

1 S. Sierra St., 4th Floor

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10389 Double R. Blvd.

RENO, NEVADA 89521

5125

1 RENO, NEVADA, WEDNESDAY, AUGUST 7, 2013, 3:52 P.M.

2 --oOo--

3 (The following proceedings were held in
4 chambers. Defendant is not present,
5 counsel appearing telephonically.)

6 THE COURT: Hello, counsel.

7 MR. HALL: Yes.

8 THE COURT: The jury has sent out the following
9 question: Juror number 6: Legal question. Looking at
10 instruction number 17, colon, if a person has no, underlined,
11 knowledge of a conspiracy, but their actions contribute to
12 someone else's plan, comma, are they guilty of conspiracy,
13 question mark.

14 MR. HOUSTON: No.

15 THE COURT: And another question underlined, colon.
16 People in here are wondering if a person can only be guilty
17 of second degree murder, or first. Can it be both. Question
18 mark.

19 MR. HOUSTON: No.

20 THE COURT: Mr. Houston, legally your answer may be
21 correct as to the first question, but not the second.

22 MR. HALL: Right, it's --

23 THE COURT: Gentlemen, you have to identify when
24 you speak.

5726

1 MR. HALL: This is Karl. They can't convict him of
2 both first and second. But if they have no knowledge of a
3 conspiracy, then they can't be guilty of conspiracy.

4 MR. HOUSTON: If they have no knowledge of the
5 conspiracy, we agree, they can't be guilty of the conspiracy.
6 But judge -- this is David Houston, I'm sorry. I was a
7 little confused. Did I hear the question correctly as to
8 whether the same person on the same, quote, victim could be
9 convicted of both second and first degree?

10 THE COURT: It is not indicating whether it's the
11 same -- the question doesn't enumerate that. The question
12 just says can you only be guilty of second degree murder or
13 first.

14 MR. HOUSTON: I think the answer to that would be
15 yes, you can only be guilty of second degree or first degree,
16 I don't think you could be guilty of both.

17 MR. HALL: Right. This is Karl, I would agree with
18 that. One or the other.

19 THE COURT: I'm just reviewing your charging
20 document. The second degree murder charge would be the count
21 5, which results from participating in an affray and
22 discharging a handgun. And the murder with a deadly weapon
23 charge, count 6, is -- results from willful, deliberate and
24 premeditated, or committed by lying in wait. Either by doing

1 the act or conspiring with others, through vicarious
2 liability.

3 So you want me to answer both questions no?

4 MR. HOUSTON: That would be our preference, your
5 Honor. Dave Houston here.

6 MR. HALL: Well, you could probably clarify it and
7 say that he could be guilty under any one of the three
8 theories. If he aids and abets, yes. If he did it as a --
9 as a principal who committed the crime. But if he has no
10 knowledge of the conspiracy, no. Not under a conspiracy
11 theory.

12 THE COURT: Correct.

13 MR. HOUSTON: Your Honor, Dave Houston here. Their
14 question is pretty simple in reference to the conspiracy, and
15 without editorializing and adding more, the answer
16 straightforwardly would be no.

17 THE COURT: Well, I have a little bit of a problem
18 with that, Mr. Houston, because 17 isn't a complete statement
19 of what they have to find for conspiracy.

20 MR. HOUSTON: Right, the question was if you have
21 no knowledge of the conspiracy, but somehow your actions may
22 assist, can you be found guilty of the conspiracy.

23 THE COURT: No, the first part of the question is
24 looking at instruction number 17. They're asking me to

1 interpret instruction number 17.

2 MR. HOUSTON: Right, and your Honor, Dave Houston
3 again, can you read the question one more time to us? On the
4 conspiracy issue?

5 THE COURT: It says: Looking at instruction number
6 17. If a person has no knowledge of a conspiracy, but their
7 actions contribute to someone else's plan, are they guilty of
8 conspiracy.

9 MR. HOUSTON: And I think the straightforward legal
10 answer to that is no.

11 MR. HALL: Right, and I'm saying that they -- if
12 they aid and abet in the plan, then the answer is yes.

13 MR. HOUSTON: Well, but that would be adding to an
14 answer that's not part of the question. They have an aiding
15 and abetting instruction.

16 THE COURT: I guess my feeling is that I should
17 have them look at instructions 16, 16A, and 17.

18 MR. HALL: Right.

19 MR. HOUSTON: Your Honor, Dave Houston again. We
20 would prefer if we weren't directing the jury's attention to
21 an instruction that's not part of a question. I think their
22 question is very straightforward. Without knowledge, can you
23 be guilty of a conspiracy. And the answer is, just in a
24 straightforward sense, no.

5129

1 THE COURT: Okay. If I answer that question, I'm
2 instructing the jury further. If they're asking me to give
3 them an analysis of instruction number 17, I would have to
4 tell them they can't use instruction number 17 to make a
5 determination as to conspiracy, they must consider all of the
6 instructions. 16, 16A both are required.

7 I think it's very important that, since you all ask
8 me to do the intent instruction, that they review 16A, not
9 just 17.

10 MR. HALL: Right, I would agree with that.

11 MR. HOUSTON: Your Honor, I am not certain. I do
12 not have my jury instructions in front of me, can you tell me
13 again what 16A is, please?

14 THE COURT: In order for the defendant to be held
15 accountable for counts 5, 6 and/or 7 under theories of
16 vicarious liability, aiding and abetting and/or conspiracy,
17 the State must prove beyond a reasonable doubt the defendant
18 had the specific intent to commit the crime charged.

19 MR. HOUSTON: Okay. Yeah, that's fine, I thought
20 it was something else. Dave Houston here, sorry.

21 THE COURT: No, my concern is I can't instruct them
22 as to the law. I mean yes, I can say what we all think the
23 answer is under the law, but now I'm instructing them
24 further. What I normally can do is encourage them to read

1 the whole packet. I think 16, 16A and 17 should be read all
2 together. All of them should be read all together.

3 MR. HALL: I agree with that, and I would recommend
4 or request that that's the answer. This is Karl.

5 THE COURT: What would you say, Karl?

6 MR. HALL: I would say that 17, 17A, the
7 instructions that you just mentioned, should be read
8 together. And consider the whole packet when reaching your
9 decision on a verdict.

10 MR. HOUSTON: And your Honor, excuse me, this is
11 Houston. I know the Court is going to do what it will, but
12 just for the record purposes, we believe there's a
13 straightforward question. If there are additional questions
14 after the fact that may require additional instructions be
15 read to them, or advised they should read, then clearly that
16 can happen at this point. It seems to me to be a very
17 straightforward question regarding knowledge, and is it
18 required to be a conspirator. And the answer is it is
19 required to be a conspirator. If they don't have knowledge,
20 they're not a conspirator.

21 I don't think they're asking anything else. I
22 think what we're doing is assuming or anticipating -- and I
23 really don't think that's the purpose, if they haven't asked
24 the question. We're then leading their thought process. And

1 again, I don't think that's appropriate.

2 THE COURT: So Mr. Houston, if the question were if
3 a person has no knowledge of a conspiracy, but their actions
4 contribute to someone else's plan, are they guilty of
5 conspiracy, you think I can answer that question?

6 MR. HOUSTON: Yes. Because --

7 THE COURT: Why. Give me some law that says I can
8 give that kind of an answer.

9 MR. HOUSTON: Your Honor, the conspiracy law
10 requires knowledge.

11 THE COURT: I agree, but tell me where I can answer
12 the jury question like that.

13 MR. HOUSTON: I don't understand where, it's a very
14 simple answer, and the answer is no. It doesn't require
15 anything more than that. I think it's even in the
16 instruction, your Honor, concerning the conspiracy.

17 THE COURT: Okay, I will not do that. I think it's
18 improper for the Court to give an answer as to what the
19 verdict should be.

20 MR. HOUSTON: Well, I think what you're doing then,
21 your Honor, is you're anticipating a question and you're
22 leading their deliberation, and I think that's improper, as
23 well. So over my objection, I'm sure the Court will do
24 whatever it's comfortable with.

1 THE COURT: Well, I guess my -- if I can't get a
2 consensus of opinion on what to do, I'll tell the jury to
3 review all the instructions.

4 MR. HOUSTON: Well, I think Karl and I had a
5 consensus, your Honor, before you brought up the fact that
6 you wanted to read other instructions.

7 THE COURT: Well, I wasn't going to --

8 MR. HALL: We agreed on the law, in terms of
9 interpretation of it, but I agree that you're not supposed to
10 further instruct the jury on how to interpret it, when we
11 have sufficient instructions. So it's for the jury to
12 consider, to answer the question.

13 MR. HOUSTON: Well, I think the purpose is --
14 Houston again -- to answer the question with as least
15 disturbance as possible to the jury's deliberation process.
16 And quite frankly, I think that's easily done. If the Court
17 disagrees, certainly the Court will do as it sees fit. But I
18 truly believe, your Honor, you're guiding the deliberation at
19 that point. I don't think that's the purpose of answering a
20 question.

21 MR. HALL: I don't think you're guiding
22 deliberations when you're telling them to look at the
23 instructions and read them. This is Karl, and I disagree
24 with that.

1 MR. HOUSTON: Well, I'd certainly read the
2 instruction that pertains to the specific question, not what
3 we assume to be the thought process or problem.

4 THE COURT: Okay, do you all have any input on the
5 second question?

6 MR. HALL: Right. Well, he can only be convicted
7 of murder of the first degree or murder of the second degree.

8 MR. HOUSTON: I think we would agree, your Honor,
9 Houston again, that you can only be convicted of one or the
10 other, you can't be convicted of both.

11 THE COURT: Okay. Counsel, will you hold on,
12 please. Thank you.

13 (Recess.)

14 THE COURT: Gentlemen?

15 MR. HOUSTON: Yes.

16 THE COURT: This is the judge.

17 MR. HALL: Yes, your Honor.

18 THE COURT: We're back on the record. Can you both
19 hear me?

20 MR. HALL: Yes. This is Karl, I can hear your.

21 MR. HOUSTON: Yes, this is Ken and Dave, we can
22 hear you.

23 THE COURT: Okay. The first question was --
24 remember, it said legal question. And then it said looking

1 at instruction number 17. If a person has no knowledge of a
2 conspiracy, but their actions contribute to someone else's
3 plan, are they guilty of conspiracy, question mark. The
4 Court is going to answer it, "It is not proper for the Court
5 to give you additional instruction on how to interpret
6 instruction number 17. You must consider all the
7 instructions in light of all the other instructions."

8 Second question: And another question. People in
9 here are wondering if a person can only be guilty of second
10 degree murder or first, period. Can it be both, question
11 mark.

12 The Court proposes to answer that question: "You
13 must reach a decision on each count separate and apart from
14 each other count."

15 Counsel, I know that you both thought I should
16 answer that question no, but in reviewing the charging
17 document and the instructions, I do not believe that's a
18 proper answer for the Court. So I'm not going to follow
19 that, I'm going to give the answer that I just said.

20 You can lodge your objection.

21 MR. HOUSTON: Your Honor, on behalf of Gonzalez, we
22 would lodge our objections to question number 1. I think
23 it's a very straightforward question, with a very
24 straightforward answer. I think knowledge is required to be

1 a member of a conspiracy. I think failing to answer the
2 question doesn't provide the appropriate guidance the jury is
3 entitled to.

4 As far as question number 2, think it begs the rule
5 of logic to suggest an individual can be convicted of both
6 second degree and first degree murder concerning one victim.
7 And as a consequence, again I think the answer is easily
8 ascertained as a no, as opposed to failing to answer the
9 question in its most simplistic form. And I think it also
10 then presents again a problem of not appropriately guiding
11 the jury. And we would submit it on that basis.

12 MR. HALL: This is Karl. I think the answer to
13 question 1 is the proper answer. I think that is the usual
14 answer to questions regarding jury instructions, because it's
15 typically improper to reinstruct the jury once they have been
16 instructed. So they are typically required to consider each
17 instruction in light of all the other instructions. I think
18 that is totally proper and consistent with Nevada law.

19 With respect to question two, I think if we allow
20 them to find him guilty on each count, I think that's going
21 to create a problem later when trying to determine if we're
22 going -- whether they convicted him of first degree or second
23 degree. So I would propose that the answer to that question
24 be no, to avoid confusion and litigation down the road, or --

1 if there's a unanimous decision. I guess if there's a
2 unanimous decision on one, you have the lesser included, we
3 could argue which one we're going to sentence him on, whether
4 it's going to be second degree or first degree. That's my
5 issue. So.

6 THE COURT: Mr. Hall, I want to remind you that you
7 charged, as a separate and distinct offense, second degree
8 murder. It is not being considered by the jury as a lesser
9 included.

10 MR. HALL: Right. Right, then -- yeah. If they
11 convict him of first degree murder, then we'll sentence him
12 on the first degree murder, and -- I agree with the Court,
13 then, you're right. So I would agree with the Court's
14 proposed responses to questions 1 and 2.

15 THE COURT: Okay, thank you, gentlemen.

16 MR. HALL: Thank you.

17 MR. HOUSTON: Thanks.

18 (Proceedings recessed.)

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1 STATE OF NEVADA,)
2)
3 COUNTY OF LYON.)
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6 I, MARCIA L. FERRELL, Certified Court Reporter of the
7 Second Judicial District Court of the State of Nevada, in and
8 for the County of Washoe, do hereby certify:

9 That I was present in Department No. 4 of the
10 above-entitled Court and took stenotype notes of the
11 proceedings entitled herein, and thereafter transcribed the
12 same into typewriting as herein appears;

13 That the foregoing transcript is a full, true and
14 correct transcription of my stenotype notes of said
15 proceedings.

16 Dated at Fernley, Nevada, this 8th day of August, 2013.
17
18

19 /s/ Marcia L. Ferrell

20 Marcia L. Ferrell, CSR #797
21
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Exhibit 5

Exhibit 5

CR11-1718B
DC-900848222-005
STATE VS ERNESTO MANUEL GONZALEZ
District Court 08/07/2013 04:00 PM
Washoe County 1690
MAR 01 2013

1 CODE

FILED

AUG 07 2013

JOEY HASTINGS, CLERK
By: [Signature] DEPUTY CLERK

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6 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
7 IN AND FOR THE COUNTY OF WASHOE
8

9 STATE OF NEVADA,

10 Plaintiff,

Case No. CR11-1718B

11 vs.

Dept. No. 4

12 ERNESTO MANUEL GONZALEZ,

13 Defendant.
14

15 JURY QUESTION, COURT RESPONSE – NUMBER TWO

16 Question:

17 Legal Question:

18 Looking at Instruction no. 17: If a person has no knowledge of a conspiracy but
19 their actions contribute to someone elses' plan, are they guilty of conspiracy?

20 And another question:

21 People in here are wondering if a person can only be guilty of 2nd degree murder or
22 1st. Can it be both?

23
24 Juror #6

25 Answer:

26
27 To Legal Question: It is improper for the Court to give you additional instruction on
28 how to interpret Instruction no. 17. You must consider all the instructions in light of all the
other instructions.

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To And another question: You must reach a decision on each count separate and
apart from each other count.

Signed: Connie I. Steinheimer
DISTRICT JUDGE

5741

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CODE: 2475
DAVID R. HOUSTON, ESQ.
Nevada Bar No. 2131
LAW OFFICE OF DAVID R. HOUSTON
432 Court Street
Reno, Nevada 89501
(775) 786-4188
Attorney for Defendant

**IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF WASHOE.**

* * *

THE STATE OF NEVADA,

Plaintiff,

Case No. CR11-1718

vs.

Dept. No. 4

ERNESTO MANUEL GONZALEZ,

Defendant.

MOTION TO STRIKE REDUNDANT CONVICTIONS

Comes now, Ernesto Manuel Gonzalez, by and through his attorneys, David R. Houston, Esq. and Kenneth E. Lyon III, Esq., and moves this Court for its Order striking redundant convictions in this case. This Motion is based upon the attached memorandum of points and authorities, the records and pleadings on file in this case, and any oral argument which the court may require at the hearing on the motion.

MEMORANDUM OF POINTS AND AUTHORITIES

I.

STATEMENT OF FACTS

1 The State charged Mr. Gonzalez in a seven count information with an assortment of criminal
2 offenses arising out of a brawl between the Hells Angels and Vagos motorcycle associations at the
3 Sparks Nugget on September 23, 2011. At trial, a jury convicted Mr. Gonzalez on all counts of the
4 information on August 7, 2013.

5 Mr. Gonzalez contends that three of these charges are redundant, and moves this Court for its
6 Order striking or vacating the redundant convictions. The three convictions at issue are those
7 involving Counts II, V and VI of the State's information.

8 II.

9 ARGUMENT

10 A redundant conviction occurs when a jury convicts a defendant on multiple counts, each of
11 which, as charged, punish the same illegal act.¹ The convictions can be redundant when the facts
12 forming the basis for two crimes overlap,² when the statutory language indicates one rather than
13 multiple criminal violations was contemplated,³ or when legislative history shows that an ambiguous
14 statute was intended to assess one punishment.⁴

15 The analysis used to determine redundant convictions is different from that used in a double
16 jeopardy analysis. To determine whether convictions are redundant, the Nevada Supreme Court first
17 looks at the facts as charged, to determine if the counts allege a single gravamen.⁵ The question is
18

19 ¹ *Skiba v. State*, 114 Nev. 612, at 616 n.4, 959 P.2d 959, 961 n.4 (1998).

20 ² *Jefferson v. State*, 95 Nev. 577, 599 P.2d 1043 (1979).

21 ³ *Ebeling v. State*, 120 Nev. 401, at 404, 91 P.3d 599 (2004)

22 ⁴ *Carter v. State*, 98 Nev. 331, at 334-35, 647 P.2d 374 (1982) (prohibiting the imposition of multiple sentence
23 enhancements pursuant to two different statutes and noting that "[w]here the legislative intent of a criminal statute is
24 ambiguous, the statute must be strictly construed against imposition of a penalty for which it does not provide clear
25 notice").

26 ⁵ *Firestone v. State*, 120 Nev. 13, at 18, 83 P.3d 279 (2004) (The Legislature has stated that the violation is simply leaving
the scene of an accident. Since there was only one accident, and one "leaving," the statute allows only one charge of
leaving the scene of an accident, regardless of the number of people involved.); *Crowley v. State*, 120 Nev. 30, 83 P.3d 282
(2004) (sexual assault and lewdness convictions for the same continuous act redundant); *Skiba v. State*, 114 Nev. 612, at
615-16, 959 P.2d 959, 961 (1998) (the gravamen of the charges, battery with the use of a deadly weapon and battery
causing substantial bodily harm, and battery causing substantial bodily harm, was that the defendant hit the victim with a
broken beer bottle); *Dossey v. State*, 114 Nev. 904, at 908-09, 964 P.2d 782 (1998) (gravamen of driving under the
influence, driving while having 0.10 percent or more by weight of alcohol in the blood and having a blood alcohol content
of 0.10 percent or more by weight of alcohol in the blood within two hours of driving charges was that defendant was
driving while intoxicated); *Albitre v. State*, 103 Nev. 281, at 284, 738 P.2d 1307 (1987) ("The gravamen of all the charges

1 whether the material or significant part of each charge is the same even if the offenses are not the
2 same.⁶ If the gravamen of the offenses is the same, the Court then looks to whether the legislature
3 intended multiple punishments for one wrongful act. If the answer to the first question is yes and the
4 answer to the second question is no, the convictions are redundant.

5 In this case, the gravamen of the acts charged in Counts II, V and VI is the unlawful killing of
6 Mr. Pettigrew by Mr. Gonzalez. Count V charges Murder of the second degree, in violation of NRS
7 200.030, and Count VI charges Murder with a deadly weapon, also in violation of NRS 200.030, with
8 a choice by the jury of whether the murder is of the first or second degree. Here, Count V is a lesser
9 included offense of Count VI, because Count VI necessarily includes Count V.

10 Count II alleges a challenge to fight resulting in death, a violation of NRS 200.450(3). It
11 involves a different statute, and has different elements from the charge in Count VI. However, the
12 language of the statute expressly merges the offense charged in Count II with first degree murder under
13 NRS 200.030, so the gravamen is the same. NRS 200.450(3) reads, in pertinent part:

14 Should death ensue to a person in such a fight, or should a person die from
15 any injuries received in such a fight, the person causing or having any agency in
16 causing the death, either by fighting or by giving or sending for himself or herself
17 or for any other person, or in receiving for himself or herself or for any other
18 person, the challenge to fight, ***is guilty of murder in the first degree*** which is a
category A felony ***and shall be punished as provided in subsection 4 of NRS***
200.030. (emphasis added).

19 Where the gravamen of the charges is the same, as it is here, the Nevada Supreme Court looks
20 to the statutes to see if the legislature intended separate punishments for each of the different means in
21 which the law could be violated.⁷

22
23 is that Albitre proximately caused the death of two persons by operating a vehicle in a reckless and unsafe manner due to
24 her intoxication. The State has simply compounded the convictions by eliminating the aspect of alcohol from the four
counts under question. We are convinced that the Legislature never intended to permit the State to proliferate charges as to
one course of conduct by adorning it with chameleonic attire.").

25 ⁶ *Salazar v. State*, 119 Nev. 224, at 227-28, 70 P.3d 749, 751 (2003); *State of Nevada v. District Court*, 116 Nev. 127, at
136, 994 P.2d 692 (2000).

26 ⁷ *Salazar v. State*, 119 Nev. 224, at 227-28, 70 P.3d 749, 751 (2003); *Albitre v. State*, 103 Nev. 281, at 283, 738 P.2d 1307
(1987).

1 In this case, the issue is whether the legislature intended more than one punishment for a single
2 murder. A court should normally presume that a legislature did not intend multiple punishments for
3 the same offense absent a clear expression of legislative intent to the contrary.⁸ Furthermore, criminal
4 statutes must be "strictly construed and resolved in favor of the defendant."⁹


5 In the case of a single murder, there is no indication that the legislature intended to punish the
6 offender more than once for that offense -- there is only one death -- so the three convictions are
7 redundant.

8 The remedy for redundant convictions in Nevada is to strike or vacate them prior to
9 sentencing.¹⁰ Mr. Gonzalez asks the Court to do that here.

10 **AFFIRMATION PURSUANT TO NRS 239B.030.**

11 The party executing this document hereby affirms that this document submitted for recording
12 does not contain the social security number of any person or persons, pursuant to NRS 239B.230.

13 Dated this 13th day of August, 2013.

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23 ⁸ *Firestone v. State*, 120 Nev. 13, at 16, 83 P.3d 279 (2004); *Talancon v. State*, 102 Nev. 294, at 300, 721 P.2d 764 (1986).

24 ⁹ *Firestone v. State*, 120 Nev. 13, at 16, 83 P.3d 279 (2004); *Anderson v. State*, 95 Nev. 625, 629, 600 P.2d 241, 243 (1979); *Sheriff v. Hanks*, 91 Nev. 57, 60, 530 P.2d 1191, 1193 (1975); *Smith v. District Court*, 75 Nev. 526, 528, 347 P.2d 526, 527 (1959).

25 ¹⁰ *Firestone v. State*, 120 Nev. 13, at 18, 83 P.3d 279 (2004); *Dossey v. State*, 114 Nev. 904, at 909, 964 P.2d 782 (1998);
26 *State v. Koseck*, 113 Nev. 477, at 479, 936 P.2d 836 (1997) ("redundant convictions that do not comport with legislative intent" should be stricken); *Jenkins v. District Court*, 109 Nev. 337, at 339-40, 849 P.2d 1055 (1993) ("Albitre simply precludes the district court from entering redundant convictions against the defendant in the event the proceedings result in a finding of guilt with respect to more than one of the alternative charges against petitioner.");

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**IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF WASHOE.**

* * *

THE STATE OF NEVADA,

Plaintiff,

Case No. CR11-1718

vs.

Dept. No. 4

ERNESTO MANUEL GONZALEZ,

Defendant.

/

MOTION TO COMPEL ELECTION BETWEEN MULTIPLICITOUS MURDER COUNTS

Comes now, Ernesto Manuel Gonzalez, by and through his attorneys, David R. Houston, Esq. and Kenneth E. Lyon III, Esq., and moves this Court for its Order compelling the State to elect a single murder count to submit to the jury in this case. This Motion is based upon the attached memorandum of points and authorities, the records and pleadings on file in this case, and any oral argument which the court may require at the hearing on the instructions.

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I.**

3 **STATEMENT OF FACTS**

4 The State has gone through a number of Amended Informations Supplementing Indictment in
5 this case, the most recent of which has been the Fourth. The case originally had multiple defendants,
6 but now only one remains – Mr. Gonzalez. As the other defendants left the case following plea
7 bargains, the State did not re-draft its charges. Mr. Villagrana was the last to leave the defendants'
8 dock, mid-way through Mr. Gonzalez's trial. With only Mr. Gonzalez left in the case, it is obvious that
9 the Fourth Amended Information Supplementing Indictment charges Mr. Gonzalez with three separate
10 and distinct murder counts, all arising out of one allegedly wrongful act, namely, the shooting of Mr.
11 Pettigrew.

12 This problem became apparent when the State submitted its proposed jury instructions during
13 the trial. These proposed jury instructions call for the jury to consider the murder charges in Counts II,
14 V and VI as a single count for purposes of their deliberations, and would permit a conviction based on
15 a cross-over of juror votes between the different counts. The jury unanimity issue was addressed in
16 Mr. Gonzalez's objections to the State's proposed jury instructions, but this hardly deals with the
17 constitutional issues involved in the State's oversight. Consequently, Mr. Gonzalez has filed this
18 Motion.

19 **II.**

20 **ARGUMENT**

21 While the State may plead and argue alternative theories of liability in a single count,¹ without
22 requiring jury unanimity on one of the alternative theories,² an indictment or information charging the
23 same offense in more than one count is "multiplicitous" and thereby defective.³

24
25 ¹ See NRS 173.075(2) "It may be alleged in a *single* count that the means by which the defendant committed the offense are
unknown or that the defendant committed it by one or more specified means."

26 ² *Schad v. Arizona*, 501 U.S. 624, at 640-43 (1991); *Walker v. State*, 113 Nev. 853, at 870, 944 P.2d 762 (1997).

³ *United States v. Harris*, 959 F.2d 246, 250 (D.C. Cir.) (per curiam), cert. denied, 113 S. Ct. 362 (1992); *United States v. Swaim*, 757 F.2d 1530, 1536 (5th Cir.), cert. denied, 474 U.S. 825 (1985).

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1 The State's change of theory at mid-trial, in which multiple counts become a single offense for
2 purposes of jury consideration, violates the rule against multiplicity.⁴

3 A multiplicitous indictment is "one charging the same offense in more than one
4 count."⁵ An indictment that charges a single offense in several counts violates the rule
5 against multiplicity.⁶ We have stated that "[t]he general test for multiplicity is that
6 offenses are separate if each requires proof of an additional fact that the other does not."⁷
7 It follows that "[o]ffenses are . . . not multiplicitous when they occur at different times
8 and different places, because they cannot then be said to arise out of a single wrongful
9 act."⁸

10 To avoid unfair prejudice to the defendant, the State must elect between multiplicitous counts
11 before trial.⁹ Multiplicitous charges "improperly prejudice a jury by suggesting that a defendant has
12 committed not one but several crimes."¹⁰ Multiplicitous counts also afford the State an unfair
13 advantage by increasing the likelihood that the jury will convict on at least one count, if only as the
14 result of a compromise verdict. The fact that even the State is confused about the differences between
15 the charges in Counts II, V and VI highlights the potential for jury confusion and prejudice.

16 If a defendant raises a timely multiplicity objection, the proper remedy is to require the State to
17 elect between the multiplicitous counts.¹¹ Consequently, Mr. Gonzalez moves this Court for its Order
18 compelling the State to elect one of the three murder charges on which it wishes to proceed.

19 **AFFIRMATION PURSUANT TO NRS 239B.030.**

20 The party executing this document hereby affirms that this document submitted for recording

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23 ⁴ *Milanovich v. United States*, 365 U.S. 551 at 554-55 (1961).

24 ⁵ Citing to *United States v. Sue*, 586 F.2d 70, at 71 n.1 (8th Cir. 1978).

25 ⁶ Citing to *United States v. UCO Oil Co.*, 546 F.2d 833, 835 (9th Cir. 1976).

26 ⁷ *Gordon v. District Court*, 112 Nev. 216, at 229, 913 P.2d 240 (1996).

⁸ *Bedard v. State*, 118 Nev. 410, at 413, 48 P.3d 46 (2002), quoting *State v. Woods*, 825 P.2d 514, 521 (Kan. 1992) (quoting
State v. Howard, 763 P.2d 607, 610 (Kan. 1988)).

⁹ *United States v. Bradsby*, 628 F.2d 901, 905 (5th Cir. 1980); *Gordon v. District Court*, 112 Nev. 216, 229, 913 P.2d 240,
249 (1996).

¹⁰ *United States v. Langford*, 946 F.2d 798 at 802 (11th Cir. 1991); *United States v. Reed*, 639 F.2d 896, 904 (2d Cir. 1981).

¹¹ *Bedard v. State*, 118 Nev. 410, at 413, 48 P.3d 46 (2002); *Gordon v. District Court*, 112 Nev. 216, at 229, 913 P.2d 240
(1996); see also *United States v. Bradsby*, 628 F.2d 901, 905 (5th Cir. 1980); *United States v. Martorana*, 629 F.Supp. 509,
511 (D. Me. 1986); *United States v. Lopez*, 585 F.Supp. 1391, 1392-93 (D.P.R. 1984).

1 does not contain the social security number of any person or persons, pursuant to NRS 239B.230.

2 Dated this 6 day of August, 2013.

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9 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,
10
11 IN AND FOR THE COUNTY OF WASHOE.

12 * * *

13 THE STATE OF NEVADA,

14 Plaintiff,

Case No. CR11-1718B

15 v.

Dept. No. 4

16 ERNESTO MANUEL GONZALEZ,

17 Defendant.

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OPPOSITION TO MOTION FOR NEW TRIAL

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, and KARL S. HALL, Chief Deputy District Attorney, and files this OPPOSITION TO MOTION FOR NEW TRIAL. This Opposition is based upon the attached Memorandum of Points and Authorities and all other pleadings and papers on file herein.

MEMORANDUM OF POINTS AND AUTHORITIES

STATEMENT OF RELEVANT FACTS

ERNESTO MANUEL GONZALEZ ("GONZALEZ") was indicted along with GARY STUART RUDNICK ("RUDNICK") and CESAR VILLAGRANA ("VILLAGRANA") on November 9, 2011 after a deadly brawl erupted in John Ascuaga's Nugget on September 23, 2011. Gonzalez was indicted

1 on charges of Conspiracy to Engage in an Affray, Challenge to Fight
2 Resulting in Death, Carrying a Concealed Weapon, Discharging a
3 Firearm in a Structure, Murder of the First Degree, Murder of the
4 Second Degree and Conspiracy to Commit Murder. Gonzalez defended the
5 case by claiming defense of others.

6 In this Motion Gonzalez claims that this Court's rulings on
7 jury instructions "effectively stripped Mr. Gonzalez of his only
8 defense in the case" (Mtn p.3 ll 7-8). At page five of his Motion
9 Gonzalez states that his only defense was defense of Mr. Wiggins.
10 The factual basis claimed for defense of another as set forth in his
11 motion is simply not accurate. Specifically, Gonzalez claims
12 Wiggins was attacked without provocation and that Cesar Villagrana
13 and Jeffrey Pettigrew beat [Wiggins]. That allegation is not true.
14 Gonzalez' misstatement of fact continues in the next sentence where
15 Gonzalez states, "When Mr. Pettigrew drew back to give Mr. Wiggins a
16 kick in the head with one of his large, heavy steel-toed boots, Mr.
17 Gonzalez shot and killed Mr. Pettigrew." The evidence contradicts
18 this assertion. Mr. Pettigrew was not wearing steel-toed boots, and
19 Pettigrew had backed away from Wiggins into the center of the walkway
20 just before being shot in the back five times.

21 Gonzalez fails to mention that the Vagos were the initial
22 aggressors; fails to mention that Wiggins was part of a mob of Vagos
23 attacking two men associated with the Hells Angels; Wiggins never
24 complained to police or anyone else of any injury and photographs
25 taken on scene depict Wiggins uninjured smiling for the camera.

26 ///

Likewise, Gonzalez misrepresents the charges by claiming that Gonzalez was a party to a "duel". (Mtn. p.5 ll 14-19). Gonzalez was right in one respect where he states that the State called witnesses of unsavory character. Their names are Robert Wiggins and John Siemer, both of whom provided self-serving stories which were ultimately rejected by the jury. Gonzalez was found guilty by a jury of all charges. Now Gonzalez complains that he was denied a fair trial.

In support of the instant Motion, Gonzalez claims: 1) Counts II, V and VI were in violation of the doctrine of "multiplicitous charges" and 2) Unfair jury instructions which deprived Gonzalez of his theory of defense of others.

Gonzalez is mistaken.

ARGUMENT

I. Standard of Review

NRS 176.515(4) has been interpreted to allow the trial court to grant a motion for a new trial when the district judge disagrees with the jury's verdict after an independent evaluation of the evidence. Washington v. State, 98 Nev. 601 at 603, 655 P.2d 531 at 532 (1982) (noting that retrial permitted where trial judge disagrees with jury's resolution of conflicting evidence). The issue presented by the Defendant's motion is whether the Court agrees with the verdict based on the evidence or whether the Defendant should be allowed to re-litigate the Court's trial rulings.

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1 The Trial Court in this case settled and gave the
2 appropriate jury instructions which properly informed the jury
3 regarding controlling Nevada law.

4 Gonzalez claims that the instructions regarding intent and
5 knowledge are weak and obscure. Any specific challenge to the
6 instructions is omitted from the motion. What is conveniently
7 overlooked is the fact that Gonzalez testified under oath that he
8 intended to kill not only Mr. Pettigrew but Cesar Villagrana as well.
9 The issue of knowledge and intent were clearly proven beyond a
10 reasonable doubt.

11 Neither the Nevada legislature or Nevada Supreme Court are
12 in agreement with the flaws claimed in jury instructions 10, 13, 16A
13 and 18 which are firmly rooted in Nevada law.¹

14 Gonzalez at page six of his Motion complains about the
15 conspiracy instruction (number 17) that he proposed. Gonzalez admits
16 instruction No. 17 is an accurate statement of law yet argues that
17 NRS 200.450 cannot be subject to a conspiracy. His analysis is
18 flawed. An agreement to commit an illegal act is a crime. Further,
19 NRS has been reviewed by the Nevada Supreme Court which held that the
20 statute is not ambiguous or subject to challenge based upon
21

22 ¹ Instruction 10 is supported by Mathis v. State, 82 Nev. 402, 406, 419 P.2d 775,777
23 (1996) (quoting State v. Thompson, 31 Nev. 209, 217, 101 P. 557, 560 (1909); see
24 also NRS 193.200 ("intention is manifested by the circumstances connected with the
25 perpetration of the offense, and the sound mind and discretion of the person
26 accused."). Instruction 13 is a quote from NRS 193.017 which defines "knowingly"
when the work is used to define the required intent in a general intent crime.
Instruction 15 likewise is a specific intent instruction directing the jury to find
specific intent to convict Gonzalez of Counts IV, V, VI and VII. Instruction 16A
also clearly required the State to prove that Gonzalez had the specific intent to
commit the crimes alleged in Counts V, VI and/or VII. Instruction 18 is derived
from NRS 195.020 and is not misleading or confusing. See Nelson v. State 123 Nev.
534, 170 P.3d 517 (2007). The given jury instructions were hardly weak or obscure.

1 vagueness. Wilmeth v. State, 96 Nev. 403, 610 P.2d 735 (1980).
2 NRS 200.450 plainly states that other persons may be involved in a
3 challenge to fight stating that any person having "agency" in causing
4 the death" is liable for Murder. Reason and public policy
5 prohibiting gang fights in casinos support the application of NRS
6 200.450 in this case. See State v. Catanio, 120 Nev. 1030, 102 P.3d
7 588 (2004).

8 Defendant's argument as to instruction 20 (challenge to
9 fight) should be rejected. The instruction given accurately states
10 the law (as defined in NRS 200.450). The Defendant also stipulated
11 to the instruction as given. His argument must also fail with
12 respect to the aiding and abetting instruction (number 18) given
13 because it is an accurate statement of the law and the Defendant did
14 not object to the instruction.

15 Gonzalez is vicariously liable for the offenses charged in
16 Counts I, II and VII. Gonzalez himself admitted that he committed
17 all other crimes alleged but claimed innocence based upon defense of
18 others. Gonzalez was involved from the beginning in the Oyster Bar
19 when he was protecting his San Jose Vagos president and at the end
20 when he shot Pettigrew. Gonzalez admitted that he intended to kill
21 both Pettigrew and Villagrana. It was clear to the Hells Angels
22 present in the Oyster Bar, the Oyster Bar tenders, Nugget Security
23 personnel, and many patrons that a fight was brewing. Nugget
24 surveillance video clearly depicts a concerted effort to attack the
25 Hells Angels after Pettigrew punched Rudnick.

26 ///

1 Jury instruction number 35 is supported by Nevada law
2 pursuant to Wilmeth v. State, 96 Nev. 403, 610 P.2d 735 (1980). A
3 person or group of people who voluntarily enter into mutual combat
4 are not entitled to then assert self-defense or defense of others.
5 Id. Counsel for Gonzalez recognized this instruction as an accurate
6 statement of Nevada law when they failed to object to the
7 instruction. The State's position on this issue is also soundly
8 supported by firmly rooted Nevada law. Runion v. State, 116 Nev.
9 1041, 1052, 13 P.3d 52, 59 (2000).

10 The Defendant's complaints about the Court not using his
11 proposed instructions should be rejected. The Court accepted at
12 least one of the Defendant's proposed instructions (that related to
13 conspiracy). The Court properly rejected proposed instruction A.
14 The Court noted that instruction 34, as in the Runion decision, is
15 positively worded as a "duty to acquit" instruction. Furthermore,
16 the Defendant's proposed instruction A was inaccurate because not all
17 of the counts would be exculpated by defense of others. The Court
18 ensured that an accurate duty to acquit/theory of the case
19 instruction (related to defense of others) was included in
20 instruction 34.

21 Proposed instruction D was correctly rejected by the Court
22 because the jury was properly instructed on circumstantial evidence.
23 The Supreme Court has rejected such "two or more conclusions"
24 instructions under Bails. See, Bails v. State, 92 Nev. 95, 545 P.2d
25 1155 (1976).

26 ///

1 Defendant's proposed instruction C was properly rejected by
2 the Court. The jury was previously instructed on reasonable doubt.
3 Furthermore, the instruction is not applicable because the case was
4 not based on circumstantial evidence alone.

5 Proposed instruction D was properly denied as merely being
6 dicta from the Origel-Candido case. The jury was properly instructed
7 on the gang enhancement.

8 Instruction E was properly denied by the Court². The jury
9 was properly instructed on credibility of witnesses. Indeed the
10 Defendant never asked for the Crowe instruction, which relates to the
11 credibility of paid informants in drug cases. Crowe v. State,
12 84 Nev. 358, 441 P.2d 90 (1968) (modified as it relates to accomplices
13 by Tellis v. State, 84 Nev. 587, 445 P.2d 938 (1968)). Further, the
14 Court ruled that it could not make a finding of expectation of
15 favorable treatment by Mr. Rudnick.

16
17 **Gonzalez' Proposed Instructions and Jury Questions**

18 The Court complied with NRS 175.451. The Court's response
19 was accurate and neutral.³ The first question posed by the Jury was
20

21 ² Instruction E did not fully track Instruction 4.9 of Ninth Circuit Model Criminal
22 Jury Instructions. The full model instruction reads:
You have heard testimony from [name of witness], a witness who

23 [received immunity. That testimony was given in exchange for a promise by the
24 government that [the witness will not be prosecuted] [the testimony will not be
used in any case against the witness]];

25 [received [benefits] [compensation] [favored treatment] from the government in
connection with this case];

26 ³ "The trial judge has wide discretion in the manner and extent he answers a jury's
questions during deliberation. If he is of the opinion the instructions already
given are adequate, correctly state the law and fully advise the jury on the
procedures they are to follow in their deliberation, his refusal to answer a

1 clearly a question of fact as to whether or not the defendant had
2 knowledge of the conspiracy to fight and/or commit murder. Judge
3 Steinheimer correctly referred the Jury to the instructions given.
4 Jury instruction 17 clearly states that a person must "knowingly" do
5 an act in furtherance of the conspiracy in order to be liable as a
6 co-conspirator. Redirecting the jury to the instructions given prior
7 to deliberations was the proper procedure in the case. See NRS
8 175.161(1) (a district court "may not charge the jury in respect to
9 matters of fact.").

10 11 Multiplicitous Charges

12 The charging document contained several theories of
13 liability for the murder of Mr. Pettigrew. Counsel for both parties
14 agreed on the record that the murder charges would merge for purposes
15 of sentencing should the jury convict Gonzalez of all three murder
16 charges. Since the charges merge, Gonzalez suffers no prejudice
17 resulting from the jury's verdicts on counts II, V, and VI. See
18 Jackson v. State, 291 P.3d 1274 (2012) (Since there is only one
19 punishment for the murder of Pettigrew there is no violation of
20 Nevada's redundancy doctrine.)⁴

21 The Defendant attempts to cobble together an argument on
22 "multiplicity" by citing a raft of cases outside of the 9th Circuit.
23

24 question already answered in the instructions is not error." Tellis v. State, 84
25 Nev. 587, 445 P.2d 938 (1968).

26 ⁴ Defendant quotes dicta in Albitre v. State to suggest that the Court should have
answered the jury question in a way that limited the number of verdicts as to Count
V and VI. However, the analysis in Albitre was rejected in Jackson v. State.
Jackson v. State, 291 P.3d 1274 (2012). The Defendant requested that no option be
given to the jury for lesser offenses. Put another way, he requested a simple yes

1 He fails to explain why the Jackson decision does not apply. See
2 Jackson v. State, supra. He also does not mention the obvious-the
3 verdicts are based on overwhelming evidence, including video
4 evidence, of the Defendant's guilt.

5 If the Court is to be persuaded by Federal jurisprudence,
6 the Court should look to U.S. v. Jose. U.S. v. Jose, 425 F.3d 1237
7 (9th Cir. 2005).

8 "Prosecutors should not be discouraged from charging
9 defendants with greater and lesser included offenses in
10 separate counts under the same indictment. Indeed, if they
11 fail to try the lesser and greater included offenses
12 together in one trial, they may not, consistently with the
13 protections of the Double Jeopardy Clause, later try the
14 defendant for the related offense in a subsequent trial
15 under a separate indictment. Although "[a] jury is
16 generally instructed not to return a verdict on a lesser
17 included offense once it has found the defendant guilty of
18 the greater offense," it is entirely appropriate for a
19 judge to instruct a jury to render a verdict on a greater
20 offense and its lesser included predicates. As the
21 government suggested at oral argument, this way of doing
22 things presents a "cleaner package" to the jury. (internal
23 citations omitted).

24 CONCLUSION

25 In conclusion, the colorful yet deceptive and unhelpful
26 rendition of facts, law and circumstances propounded by Gonzalez in
this Motion for New Trial amounts to nothing more than "chameleonic
attire" language designed to discredit the validity of the jury's
verdicts. However, Gonzalez fails to support his motion with law or
analysis of applicable law. This case involved mutual combat between
the Vagos and Hells Angels and clearly Gonzalez rightfully convicted

or no for each count. For that reason, the jury properly considered a verdict as
to each count.

1 of Murder of the First Degree. Gonzalez will be sentences for one
2 murder - enough said.

3
4 AFFIRMATION PURSUANT TO NRS 239B.030

5 The undersigned does hereby affirm that the preceding
6 document does not contain the social security number of any person.

7 Dated this 22nd day of August, 2013.

8 RICHARD A. GAMMICK
9 District Attorney
Washoe County, Nevada

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12 By /s/ Karl S. Hall
13 KARL S. HALL
14 Chief Deputy District Attorney
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8
9 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,
10
11 IN AND FOR THE COUNTY OF WASHOE.

12 * * *

13 THE STATE OF NEVADA,

14 Plaintiff,

Case No. CR11-1718B

15 v.

Dept. No. 4

16 ERNESTO MANUEL GONZALEZ,

17 Defendant.

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OPPOSITION TO DEFENDANT'S MOTION TO STRIKE

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, and AMOS STEGE, Deputy District Attorney, and files this Opposition to Defendant's Motion to Strike which was filed on August 13, 2013. This Opposition is based upon the attached Points and Authorities and all other pleadings and papers on file herein.

Statement of Facts

On August 7, 2013 the Defendant was convicted at jury trial of seven counts related to the fatal brawl at John Ascuaga's Nugget on September 23, 2011. The Defendant specifically requested that no instructions on lesser included offenses be given to the jury. Count

1 II charges Challenge to Fight Resulting in Death with Use of a Deadly
2 Weapon, Count V charges Murder of the Second Degree with the Use of a
3 Deadly Weapon. Count VI charges Murder with a Deadly Weapon (First
4 Degree Murder). Defendant waived his right to have the jury
5 determine the sentence for First Degree Murder.

6 On August 8, 2013 the Court formally released the jury. At
7 that time the Court found that the verdicts as to Counts II, V, and
8 VI were not inconsistent and did not strike them. See Exhibits 1,
9 transcript of August 8, 2013. Further, the Defendant requested that
10 the Court merge the two first degree murder findings (Count II and
11 Count VI) into one. The State agreed to the merger. The Court ruled
12 that the Counts related to the killing (II, V, and VI) would merge.

13 The Defendant now brings a motion to strike convictions
14 contained in Counts II, IV, and VI.

15 ARGUMENT

16 The Defendant asked the Court to treat Count II and VI as a
17 merged single count. The Court agreed and stated that there will be
18 only one sentence for first degree murder. The Court should hold the
19 Defendant to the relief he previously requested.

20 If the Defendant's previous request for merger is reversed
21 by the Court, the Court should not strike the jury verdict. The
22 proper course of action is to merge Count IV and Count VI, as Second
23 Degree is a lesser included of First Degree Murder. Count II and
24 Count VI should result in one sentence under NRS 200.030(4)(b). This
25 conclusion can be reached in two ways.

26 ///

1 First, Challenge to Fight may be treated as a theory of
2 first degree murder. Even though Challenge to Fight was charged in a
3 separate count, there is no basis to strike it as a theory of murder.
4 Nevada follows the rule in Schad, whereby "when conflicting or
5 alternative theories of criminal agency are offered through the
6 medium of competent evidence, the jury need only achieve unanimity
7 that a criminal agency in evidence was the cause of death; the jury
8 need not achieve unanimity on a single theory of criminal agency".
9 Tabish v. State, 119 Nev. 293, 72 P.3d 584 (2003), see Schad v.
10 Arizona, 501 U.S. 624, 111 S.Ct. 2491 (1991). Just as there would be
11 improper to strike a theory of liability if charged in a single
12 count, it would be improper to strike the challenge to fight theory
13 as charged separately in Count II.

14 A second analysis would lead to the same result. If the
15 Court sees Challenge to Fight as a separate offense, a multiple
16 punishment analysis under Jackson v. State prevents the Court from
17 striking any of the verdicts in question. Jackson v. State, ____
18 Nev____, 291 P.3d 1274 (2012). The Court in Jackson explicitly
19 rejected its previous "redundancy" analysis. Id. at 1282
20 ("Consistent with Barton, we disapprove of Salazar, Skiba, Albitre,
21 and their "redundancy" progeny to the extent that they endorse a
22 fact-based "same conduct" test for determining the permissibility of
23 cumulative punishment.") Instead the Court analysis starts with
24 legislative authorization. As stated by the Court,

25 "[T]he proper focus is on legislative
26 authorization, beginning with an analysis of the
statutory text. If the Legislature has
authorized-or interdicted-cumulative punishment,

1 that legislative directive controls. Absent
2 express legislative direction, the Blockburger
3 test is employed. Blockburger licenses multiple
4 punishment unless, analyzed in terms of their
5 elements, one charged offense is the same or a
6 lesser-included offense of the other." Id.
7 Applied to the instant case, the Legislature stated that under NRS
8 200.450 a person guilty of challenge to fight resulting in death "is
9 guilty of murder in the first degree". It has not interdicted
10 multiple punishments. Compare, Wood v. State, 115 Nev. 344, 990 P.2d
11 786, (1999) (exclusionary clause in solicitation to commit murder
12 statute prohibits multiple punishment for conspiracy to commit murder
13 and solicitation to commit murder).

14 Assuming that there is no clear legislative direction, the
15 Blockburger test shows that Count II and Count VI are separate
16 offenses. First Degree Murder and Challenge to Fight each contains
17 an element that the other does not. Specifically, Count II contains
18 the element of sending or receiving a challenge that Count VI does
19 not. Count VI requires malice aforethought, which Count II does not.
20 As such, there is no prohibition on multiple punishments under
21 Jackson. Nonetheless, this Court should merge Counts II, V, and VI
22 for sentencing purposes.

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1 CONCLUSION

2 For the reasons stated above, the Court should deny the
3 Defendant's motion.

4 AFFIRMATION PURSUANT TO NRS 239B.030

5 The undersigned does hereby affirm that the preceding
6 document does not contain the social security number of any person.

7 Dated this 22nd day of August, 2013.

8 RICHARD A. GAMMICK
9 District Attorney
10 Washoe County, Nevada

11
12 By /S/ Amos Stege
13 AMOS STEGE
14 Deputy District Attorney

1 CERTIFICATE OF SERVICE BY E-FILING

2 I certify that I am an employee of the Washoe County
3 District Attorney's Office and that, on this date, I electronically
4 filed the foregoing with the Clerk of the Court by using the ECF
5 system which will send a notice of electronic filing to the
6 following:

7 David R. Houston
8 432 Court Street
9 Reno, NV 89501

10 Kenneth E. Lyon, III
11 10389 Double R Blvd.
12 Reno, NV 89521

13 DATED this 22nd day of August, 2013.

14 /s/LORI DELANO
15 LORI DELANO
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INDEX OF EXHIBITS

EXHIBIT 1 TRANSCRIPT OF PROCEEDINGS DATED
AUGUST 08, 2013
NUMBER OF PAGES: 13

FILED
Electronically
08-22-2013:10:19:37 AM
Joey Orduna Hastings
Clerk of the Court
Transaction # 3942665

EXHIBIT 1

EXHIBIT 1

1 Code No. 4185

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4
5 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

6 IN AND FOR THE COUNTY OF WASHOE

7 THE HONORABLE CONNIE J. STEINHEIMER, DISTRICT JUDGE

8 -oOo-

9 STATE OF NEVADA,)

10 Plaintiff,)

Case No. CR11-1718B

11 vs.)

12 ERNESTO MANUEL GONZALEZ,)

Dept. No. 4

13 Defendant.)
14 _____)
15)

16 TRANSCRIPT OF PROCEEDINGS

17
18 August 8, 2013

19 RENO, NEVADA
20
21
22

23 Reported By: DENISE PHIPPS, CCR No. 234, RDR, CRR
24

1 APPEARANCES:

2 For the Plaintiff:

3 KARL SCHLEIGH HALL
4 Deputy District Attorney
5 Washoe County

6 AMOS STEGE
7 Deputy District Attorney
8 Washoe County

9 For the Defendant:

10 KENNETH E. LYON III
11 Attorney at Law
12 10389 Double R. Blvd.
13 Reno, Nevada 89521

14 - and -

15 DAVID R. HOUSTON
16 Attorney at Law
17 432 Court Street
18 Reno, Nevada 89501
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1 RENO, NEVADA, THURSDAY, AUGUST 8, 2013, 7:30 A.M.

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3
4 (Proceedings conducted outside the presence of the jury.)
5

6 THE COURT: This is the time set for further
7 hearings. It's my understanding that Mr. Gonzalez has
8 decided to waive the jury penalty phase.

9 MR. HOUSTON: That's correct, Your Honor.

10 THE COURT: And, Ms. Clerk, do you have it in
11 writing?

12 THE CLERK: I do.

13 THE COURT: Mr. Hall.

14 MR. HALL: For the record, I would indicate that
15 the State also stipulated to waiving the penalty hearing
16 in front of the impanelled jury. We did that yesterday in
17 writing pursuant to NRS 175.155. So we would also agree
18 to waive the jury sentencing.

19 THE COURT: Okay. And counsel for Mr. Gonzales,
20 he has waived his appearance here this morning for the
21 excusing of the jury?

22 MR. HOUSTON: Yes, Your Honor. That's correct,
23 Your Honor, I believe Mr. Gonzales made clear that he
24 didn't wish to be present for this morning's proceedings.

1 THE COURT: Now, counsel, before I excuse the
2 jury and discharge them, I want to make sure that everyone
3 has had an opportunity to review the verdicts and there is
4 no issue with regard to the verdicts or any further
5 inquiry to be made of the jury.

6 Mr. Houston.

7 MR. HOUSTON: Your Honor, we do, on the other
8 hand, feel there are inconsistent verdicts in this case.
9 The jury has found the defendant guilty of the second
10 degree murder of Jethro Pettigrew and the first degree
11 murder of Jethro Pettigrew.

12 And understanding, of course, we have one
13 decedent, we feel it's inconsistent for the jury to have
14 found him guilty of both second degree as well as first
15 degree. And I think it bespeaks of some of the confusion
16 that we felt existed by virtue of the instruction problem.

17 THE COURT: Instruction problem?

18 MR. HOUSTON: Yes, Your Honor. If the Court will
19 recall, the Court made inquiry concerning the jury's
20 questions, the first question.

21 THE COURT: The question that came out?

22 MR. HOUSTON: Exactly.

23 THE COURT: Okay. Mr. Hall.

24 MR. HALL: Your Honor, the verdicts are totally

1 consistent. I think the Court is aware, and counsel
2 should be aware, that second degree murder, based upon a
3 theory of malice aforethought, is a lesser included of
4 first degree murder, which includes the additional
5 elements of premeditation and deliberation and malice.

6 So it's actually a lesser included. It's totally
7 consistent. Those two counts were not pled in the
8 alternative, as the Court recognized. And the jury was,
9 therefore, required to make a decision, a unanimous
10 decision on both counts.

11 So in light of the fact that it is a lesser
12 included, containing exactly the same elements, they're
13 totally consistent with each other. Those counts would
14 obviously merge. And that's our position on that issue.

15 MR. HOUSTON: Your Honor, just for the record,
16 second degree was pled as a separate count. It wasn't
17 found as a lesser included. The consequence of a finding
18 of guilty on a separate count seems inconsistent with the
19 finding of guilt on the first degree count.

20 THE COURT: As I understand it, neither party is
21 asking me to inquire of the jury or ask them for any
22 further findings; is that correct?

23 MR. HALL: That's correct.

24 MR. HOUSTON: Your Honor, we'd submit that to the

1 Court.

2 THE COURT: The Court, in reviewing Count V,
3 finding that Count V charges murder of the second degree
4 with the use of a deadly weapon, and it alleges that the
5 death occurred during the course of an affray and that
6 there was a general malignant recklessness, which -- and a
7 disregard of social duty, which was a foreseeable
8 consequence of the death, the foreseeable consequence of
9 that behavior was the death.

10 In addition, Count VI charges murder with a
11 deadly weapon. And it does allege with malice
12 aforethought, premeditated, deliberate and willful killing
13 of Mr. Pettigrew by the defendant, either by a principle
14 of conspiracy or actually committing the act. Because
15 those allegations were charged in separate counts and not
16 as lesser included as requested by the defense, the Court
17 finds that the jury was required to reach a verdict as to
18 both counts.

19 In addition, that because the verdicts are not
20 inherently inconsistent, they can stand and no further
21 inquiry is necessary of the jury. However, the Court will
22 and would have instructed the jury that they can't
23 sentence on -- they'd have to -- the charges would merge
24 anyway.

1 We also have Count II which was alleged as a
2 challenge to fight resulting in the death with the use of
3 a deadly weapon, which carries a penalty the same as first
4 degree murder and would be treated the same as first
5 degree murder. And there's no indication that that's a
6 conflict or inherent inconsistency.

7 So, therefore, I am going to allow the verdicts
8 of the jury to stand and not inquire further of the jury
9 with regard to those verdicts.

10 MR. HOUSTON: Your Honor, would this be the
11 appropriate time to discuss the merger of the counts as
12 far as the position of the defense?

13 THE COURT: Yes.

14 MR. HOUSTON: Your Honor, I think as the Court
15 has touched upon, there were alternative-type first degree
16 findings. The jury has, of course, found that. We would
17 ask the Court to merge the counts in reference to the
18 first degree finding into one first degree count.

19 We also believe there were two enhancements
20 found. I believe the State and counsel would be in
21 agreement on the fact that while they both would stand for
22 purposes of sentencing, they would be concurrent to one
23 another, consecutive to the primary count with which they
24 enhance, or to which they enhance.

1 THE COURT: Okay. Counsel?

2 MR. HALL: We agree.

3 THE COURT: The Court agrees that there's only
4 one sentence for first degree murder. And I also will be
5 merging the second degree finding into it because there's
6 only one death. So there's one sentence that will be the
7 result of the convictions as to those three counts. The
8 other counts will be dealt with separately.

9 It's my intention at this time to allow the
10 waiver of the jury to stand and set this matter for
11 penalty hearing before the Court in the future.

12 I'd like to do that and excuse the jury all at
13 the same time. But perhaps you can look at your calendar
14 for the week of -- first week of October.

15 MR. HOUSTON: Your Honor, I think State and
16 counsel have had the opportunity to confer together and we
17 suggest to the Court Thursday, October 3rd.

18 THE CLERK: That will work. We can do it in the
19 morning at 9:00.

20 MR. HOUSTON: 9:00. Thank you, Your Honor.

21 THE COURT: Will the bailiff please bring the
22 jury in.

23 (Jury entered.)

24 (Proceedings conducted in the presence of the jury.)

1 THE COURT: Please be seated. The record should
2 reflect that the jury and alternates are present.

3 Good morning, ladies and gentlemen of the jury.
4 Last night, when I sent you away, I told you that you
5 would be coming back here this morning and that we would
6 have a hearing this morning and you would be deliberating
7 again with regard to the penalty with the first degree
8 murder conviction.

9 The defendant, who is found guilty by a jury of
10 first degree murder, has an absolute right to have the
11 jury that heard the case decide the penalty.

12 However, last night the defendant requested that
13 I sentence him instead of you, and he did so after
14 conferring with his attorneys.

15 After a conference between his attorneys and the
16 State, the State agreed that they would allow the waiver
17 to stand.

18 This morning we have put it on the record again.
19 The waiver is still in place. Therefore, you will not be
20 required to decide the penalty in this case.

21 We will set the sentencing out. We have a
22 tentative date in October. And what will happen is we
23 will refer this case to the Division of Parole and
24 Probation, who will make a report to me and recommendation

1 on some of the counts especially, and then I will have a
2 hearing, just like you would have, and the parties can
3 bring their witnesses, both mitigating witnesses, if there
4 are some for Mr. Gonzales, as well as victim impact
5 statements from the family of Mr. Pettigrew by the State,
6 and then I will decide the penalty and sentence the
7 defendant.

8 Now, this has been a long trial. We want to
9 thank you. I join with the attorneys and the staff of the
10 Sheriff's Office as well as the staff of the Second
11 Judicial District Court in thanking you.

12 You've been a wonderful jury to work with. We
13 haven't had anyone late any day in three weeks. That's
14 amazing. We only lost one of your number, which, again,
15 is very amazing.

16 And during the trial we've noticed that you've
17 paid close attention to all the evidence, and we want to
18 thank you for that.

19 I know that jury service, as I told you at the
20 very beginning, is difficult. I know it is an imposition,
21 and for many of you it was a hardship. So we understand
22 that. And we want to thank you for your service. Your
23 community thanks you.

24 And I hope you have a better understanding now of

1 how our system works and how important juries are. Next
2 time you read in the paper that the silly jury made a
3 decision that was so out of hand, I hope you remember your
4 deliberative process and your experience as a juror and
5 you give that jury a little bit more credence and
6 understand that maybe they heard something you hadn't
7 heard on the news and made that decision in the same
8 manner you did, thoughtfully and consideratively.

9 Now, you have not been using your names. We
10 haven't used them here in court. And I have required you
11 to not talk about your service. You may now discuss your
12 service if you so desire. It's your choice. And it's
13 your choice whether or not you tell people which kind of a
14 jury you were on or anything about your service.

15 No one can compel you to do that, and I will not
16 be compelling you to do that. But if you choose to talk
17 about your service, you may do so. And all the
18 admonitions I gave you before you're released from.

19 Now, in a few minutes I'm going to have you come
20 into my chambers and I will visit with you personally.
21 But I want to at this time thank you again and tell you
22 that we will be setting that sentencing date.

23 The defendant also waived his right to be present
24 here this morning. So his attorneys are here on his

1 behalf. The clerk will now set the date for sentencing.

2 THE CLERK: October 3rd at 9:00 a.m.

3 THE COURT: Any objection to the date, counsel?

4 MR. HOUSTON: No, Your Honor.

5 MR. HALL: No objection.

6 THE COURT: Thank you, ladies and gentlemen of
7 the jury. If you'll go back into the jury room, gather up
8 your belongings, and the bailiff will bring you into my
9 chambers.

10 (Jury excused.)

11 THE COURT: Counsel, anything further for this
12 morning?

13 MR. HALL: Nothing further, Your Honor.

14 MR. HOUSTON: Nothing, Your Honor. Thank you.

15 THE COURT: Thank you, counsel, Court's in
16 recess.

17 (Proceedings concluded at 7:45 a.m.)

STATE OF NEVADA)
)
COUNTY OF WASHOE)

I, DENISE PHIPPS, Certified Shorthand
Reporter of the Second Judicial District Court of the
State of Nevada, in and for the County of Washoe, do
hereby certify:

That I was present in Department No. 4 of the
above-entitled Court and took stenotype notes of the
proceedings entitled herein, and thereafter transcribed
the same into typewriting as herein appears;

That the foregoing transcript is a full, true
and correct transcription of my stenotype notes of said
proceedings.

DATED: At Reno, Nevada, this 15th day of
August, 2013.

 /s/ Denise Phipps

DENISE PHIPPS, CCR No. 234, RDR, CRR

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Joey Orduna Hastings

Clerk of the Court

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CODE: 3795

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Attorney for Defendant

**IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF WASHOE.**

* * *

THE STATE OF NEVADA,

Plaintiff,

Case No. CR11-1718

vs.

Dept. No. 4

ERNESTO MANUEL GONZALEZ,

Defendant.

REPLY TO OPPOSITION TO MOTION FOR A NEW TRIAL

Comes now, Ernesto Manuel Gonzalez, by and through his attorneys, David R. Houston, Esq. and Kenneth E. Lyon III, Esq., and enters his reply to the State's opposition to his motion for a new trial in this case. This reply is based upon NRS 176.515, the attached memorandum of points and authorities, the records and pleadings on file in this case, and any oral argument which the court may require at the hearing on the motion.

The exhibits attached to this reply are Exhibit 6 (State's Proposed Jury Instructions), Exhibit 7 (Defendant's Objections to State's Proposed Jury Instructions), Exhibit 8 (Defendant's Proposed Jury Instructions), Exhibit 9 (Defendant's Additional Proposed Instructions), Exhibit 10 (Defendants 2d

1 Additional Proposed Instructions), Exhibit 11 (Defendant's 3d Additional Proposed Instructions), and
2 Exhibit 12 (Defendant's 4th Additional Proposed Instructions).¹

3 **MEMORANDUM OF POINTS AND AUTHORITIES**

4 **I.**

5 **ARGUMENT.**

6 In his motion for a new trial, Mr. Gonzalez contended that (1) some of the Court's rulings on
7 the jury instructions, and the resulting jury confusion effectively stripped Mr. Gonzalez of his only
8 defense in the case; and (2) the Court's denial of Mr. Gonzalez's motion to compel the State to choose
9 among the three murder charges caused additional jury prejudice and confusion. Taken together, Mr.
10 Gonzalez argued, these factors deprived him of his right to a fair trial, as guaranteed by the due process
11 clauses of the Fifth Amendment,² made applicable to the States by Section 1 of the Fourteenth
12 Amendment³ to the United States Constitution, and Article 1, Section 8, paragraph 5 of the
13 Constitution of the State of Nevada.⁴

14 In its Opposition, the State's writer appears to have lost his temper at the onset, and never
15 regained it. The tone of the pleading is testy, and it is poorly documented as well. It provides no
16 citations or authority to support its claims of misrepresentation by the defense,⁵ is mistaken about the
17 statutory basis for Mr. Gonzalez's motion,⁶ and is confused about what the portion it cites actually

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20 ¹ These documents, while not filed by the Court, are nevertheless part of the trial record pursuant to NRS 175.161(5).

21 ² **Prosecution by presentment, indictment; double jeopardy; self-incrimination; due process; property taken for**
22 **public use.** No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or
23 indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in
24 time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or
25 limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or
26 property, without due process of law; nor shall private property be taken for public use, without just compensation.

³ **Section 1. Citizenship; privileges and immunities; due process; equal protection.** All persons born or naturalized in
the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they
reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United
States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any
person within its jurisdiction the equal protection of the laws.

⁴ "No person shall be deprived of life, liberty, or property, without due process of law."

⁵ Opposition to Motion for a New Trial ("Opposition"), at p. 2, ll. 10-25; p. 3, ll. 1-2.

⁶ The basis for the motion is NRS 176.515(1) ("The court may grant a new trial to a defendant if required as a matter of law
..."), not NRS 176.515(4) as claimed by the State at p. 3, ll. 16-24 of its Opposition.

1 says.⁷ The writer has also apparently forgotten his initial agreement with defense counsel over the
2 correct answers to the jury's two questions;⁸ now the State claims the Court's answers were proper and
3 involved a question of fact rather than law.⁹

4 Generally the State's Opposition is a series of peevish one or two-line responses, few of which
5 refer to any portion of the record to provide factual support for its claims. A few, however, are worth a
6 response.

7 Mr. Gonzalez argued in his motion that:

8 In criminal trials, due process requires that there be an opportunity to
9 present every available defense,¹⁰ and fundamental fairness requires that a
10 defendant be afforded a meaningful opportunity to present a complete defense.¹¹
11 In Nevada, a defendant's right to propose jury instructions is on an equal footing
12 with that of the State, because standard instructions in criminal cases generally
13 articulate the State's theory of the case.¹²

14 The defense has the right to have the jury instructed on its theory of the
15 case as disclosed by the evidence, no matter how weak or incredible that evidence
16 may be.¹³ A defendant's jury instructions may be phrased as a "duty to acquit"
17 ("If . . . , you must acquit"),¹⁴ and a positive instruction as to the elements of the
18 crime does not justify refusing a properly worded negatively phrased 'position' or
19 'theory' instruction ("You cannot convict the defendant, if . . .").¹⁵ Specific jury
20 instructions that remind jurors that they may not convict the defendant if proof of

21 ⁷ NRS 176.515(4) establishes the time limit for filing a motion for a new trial. It does not authorize "the trial court to grant
22 a motion for a new trial when the district judge disagrees with the jury's verdict after an independent evaluation of the
23 evidence." If the district judge disagrees with the jury's verdict the applicable statute is NRS 175.381(2), and it directs the
24 court to enter a judgment of acquittal for the defendant, not grant a new trial.

25 ⁸ At Exhibit 4 to Mr. Gonzalez's motion for a new trial, p. 4, ll. 1-3 and 14-18; p. 5, ll. 3-11; contrast this with the
26 representations made in the State's opposition at p. 7, ll. 17-19 and p. 8, ll. 1-9.
⁹ Opposition, at p. 7, l. 9 and p. 8, ll. 1-9.

¹⁰ *Hoagland v. State*, 126 Nev. Adv. Op. No. 37 at p. 4 (2010), citing to *Lindsey v. Normet*, 405 U.S. 56, at 66 (1972), and
quoting *American Surety Co. v. Baldwin*, 287 U.S. 156, at 168 (1932); see also *Washington v. Texas*, 388 U.S. 14, at 19
(1967).

¹¹ *California v. Trombetta*, 467 U.S. 479, at 485 (1984).

¹² *Carter v. State*, 121 Nev. 759, at 767 fn. 21, 121 P.3d 592 (2005).

¹³ *Hoagland v. State*, 126 Nev. Adv. Op. No. 37 at p. 4 (2010); *Rosas v. State*, 122 Nev. 1258, at 1266, 147 P.3d 1101
(2006); *Crawford v. State*, 121 Nev. 744, at 751, 121 P.3d 582 (2005); *Vallery v. State*, 118 Nev. 357, 372, 46 P.3d 66
(2002); *Margetts v. State*, 107 Nev. 616, at 619, 818 P.2d 392 (1991); *Geary v. State*, 110 Nev. 261, at 264-65, 871 P.2d
927 (1994); *Harris v. State*, 106 Nev. 667, at 670, 799 P.2d 1104 (1990); *Brooks v. State*, 103 Nev. 611, at 613, 747 P.2d
893 (1987); *Roberts v. State*, 102 Nev. 170, at 172-73, 171 P.2d 1115 (1986); *Williams v. State*, 99 Nev. 530, at 531, 665
P.2d 260 (1983); *Barger v. State*, 81 Nev. 548, at 552, 407 P.2d 584 (1965).

¹⁴ *Carter v. State*, 121 Nev. 759, at 765-67, 121 P.3d 592 (2005).

¹⁵ *Crawford v. State*, 121 Nev. 744, at 753, 121 P.3d 582 (2005).

1 a particular element is lacking ("Unless . . . , you must acquit.") should be given
2 upon request.¹⁶

3 To this, the State responded: "The Defendant's complaints about the Court not using his proposed
4 instructions should be rejected. The Court accepted *at least one* of the Defendant's proposed
5 instructions (that related to conspiracy)."¹⁷ (emphasis added).

6 Well, Mr. Gonzalez proposed some *sixty-four* jury instructions in this case.¹⁸ The writer of this
7 brief found one other instruction proposed by Mr. Gonzalez which the Court actually gave, for a total
8 of *two*. There may even be one or two more. This scant selection falls rather short of the "stands on an
9 equal footing" language of *Carter*,¹⁹ and prevented Mr. Gonzalez from adequately presenting his
10 theory of the case and his defense. The problem cannot be blamed on defective instructions either,
11 since most of Mr. Gonzalez's proposals were based on Nevada and California law, and accompanied
12 by citations to relevant authority to prove it.

13 While a defendant is not entitled to numerical parity in the Court's choice of jury instructions,
14 he/she is entitled to a meaningful opportunity to present a complete defense.²⁰ Mr. Gonzalez did not
15 get that opportunity here. The Court refused those instructions stating that Mr. Gonzalez's theory of
16 the case, if believed by the jury, required acquittal;²¹ that attempted to clarify the interaction of
17 circumstantial evidence on the issue of intent;²² that required moral certainty before using
18 circumstantial evidence;²³ that emphasized the State's burden of proof in establishing a "criminal
19 gang;"²⁴ and that instructed the jurors to be skeptical of plea-bargained testimony.²⁵

20
21 ¹⁶ *Crawford v. State*, 121 Nev. 744, at 753, 121 P.3d 582 (2005); *Brooks v. State*, 103 Nev. 611, at 613-14, 747 P.2d 893
(1987); *Margetts v. State*, 107 Nev. 616, at 620, 818 P.2d 392 (1991).

22 ¹⁷ Opposition, p. 6, ll 10-13.

23 ¹⁸ See Exhibit 7 (Opposition to State's Proposed Jury Instructions) – 12 instructions; Exhibit 8 (Defendant's Proposed Jury
Instructions) – 35 instructions; Exhibit 9 (Defendant's Additional Jury Instructions) – 3 instructions; Exhibit 10
(Defendant's 2d Additional Jury Instructions) – 12 instructions; Exhibit 11 (Defendant's 3d Additional Jury Instructions) – 1
instruction; and Exhibit 12 (Defendant's 4th Additional Jury Instructions) – 1 instruction.

24 ¹⁹ *Carter v. State*, 121 Nev. 759, at 767 fn. 21, 121 P.3d 592 (2005).

25 ²⁰ *California v. Trombetta*, 467 U.S. 479, at 485 (1984).

²¹ Exhibit 3 (Defendant's Refused Instructions), Instruction A.

²² Exhibit 3 (Defendant's Refused Instructions), Instruction B.

²³ Exhibit 3 (Defendant's Refused Instructions), Instruction C.

²⁴ Exhibit 3 (Defendant's Refused Instructions), Instruction D.

²⁵ Exhibit 3 (Defendant's Refused Instructions), Instruction E.

1 In regard to vicarious liability – a key issue in the trial – the State's writer notes: "NRS 200.450
2 plainly states that other persons may be involved in a challenge to fight stating that any person having
3 "agency" in causing the death" is liable for Murder." What the State's writer fails to note, and which
4 some of Mr. Gonzalez's rejected jury instructions tried to point out, is that NRS 200.450(3) restricts
5 "agency" liability to an enumerated class of persons involved in a specific kind of fight:

6 Should death ensue to a person *in such a fight*, or should a person die
7 from any injuries received *in such a fight*, the person causing or having any
8 agency in causing the death, *either by fighting or by giving or sending for*
9 *himself or herself or for any other person, or in receiving for himself or herself*
10 *or for any other person, the challenge to fight*, is guilty of murder in the first
11 degree which is a category A felony and shall be punished as provided in
12 subsection 4 of NRS 200.030. (emphasis added).

13 The State's instruction, and the instruction ultimately given, by contrast, ignore those restrictions and
14 impermissibly expand the concept of criminal liability under it.²⁶

15 In discussing another aspect of vicarious liability, the State remarked:²⁷

16 Gonzalez claims that the instructions regarding intent and knowledge are
17 weak and obscure. Any specific challenge to the instructions is omitted from the
18 motion. What is conveniently overlooked is the fact that Gonzalez testified under
19 oath that he intended to kill not only Mr. Pettigrew but Cesar Villagrana as well.
20 The issue of knowledge and intent were clearly proven beyond a reasonable
21 doubt.

22 Actually, a substantial part of Mr. Gonzalez's motion is devoted to explaining how the
23 instructions regarding intent and knowledge were deficient when it came to the problem of conspirator
24 and aiding and abetting liability – the issue which confused the jury, and resulted in their first question
25 to the Court. As for Mr. Gonzalez's intent to shoot Mr. Pettigrew, no one has made that an issue in
26 these pleadings. Mr. Gonzalez's contention at trial was that he was acting in defense of another, not
27 that he fired his pistol accidentally.

²⁶ See the State's formulation at Opposition, p. 9, ll. 24-25; p. 10, l. 1 ("This case involved mutual combat between the Vagos and Hells Angels and clearly Gonzalez [was] rightfully convicted of Murder of the First Degree.")

²⁷ Opposition, p. 4, ll. 4-10.

1 The State claims in its Opposition²⁸ that Mr. Gonzalez did not object to some of the
2 instructions. The State's writer may not recall that Mr. Gonzalez specifically objected in writing to
3 seventeen of the State's proposed instructions, showed where they were in error, and gave alternative
4 jury instructions for twelve of them.²⁹ In addition to that, Mr. Gonzalez proposed a number of other
5 instructions to be used in lieu of those offered by the State, and a number of supplemental clarifying
6 instructions as well. It is understandable why the State would choose to ignore these implicit
7 objections by Mr. Gonzalez, since they undercut the State's argument on this point, but a reviewing
8 court may take a different view of the issue.

9 On the issue of multiplicitous charges the State contends:

10 The charging document contained several theories of liability for the
11 murder of Mr. Pettigrew. Counsel for both parties agreed on the record that the
12 murder charges would merge for purposes of sentencing should the jury convict
13 Gonzalez of all three murder charges. Since the charges merge, Gonzalez suffers
14 no prejudice resulting from the jury's verdicts on counts II, V, and VI. See
15 Jackson v. State, 291 P.3d 1274 (2012) (Since there is only one punishment for
16 the murder of Pettigrew there is no violation of Nevada's redundancy doctrine.)³⁰

17 This analysis ignores the prejudicial effect of multiplicitous charges on the jury, which Mr. Gonzalez
18 raised in his motion. The State's reasoning also ignores the U. S. Supreme Court holdings that
19 convictions themselves are punishment, and that multiple convictions for a single offense violate the
20 Double Jeopardy clause of the Constitution.³¹ A single sentence does not cure that defect, as Mr.
21 Gonzalez has argued in his motion to strike redundant convictions and in reply to the State's opposition
22 to that motion.

23 There are a number of other errors and misconceptions in the State's opposition, but as they are
24 irrelevant to the main points raised in his motion for a new trial, Mr. Gonzalez will pass on the
25 temptation to answer them.

26 ²⁸ Opposition, p. 5, ll. 10-14; p. 6, ll. 5-7.

²⁹ Exhibit 7 (Opposition to State's Proposed Jury Instructions). Mr. Gonzalez also pointed out (at pp. 10-14) the State's
attempt to expand the scope of NRS 200.450 beyond its plain meaning.

³⁰ Opposition, p. 8, ll. 12-20.

³¹ *Rutledge v. United States*, 517 U.S. 292, at 301-307 (1996); *Ball v. United States*, 470 U.S. 856, at 861-65 (1985).

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II.

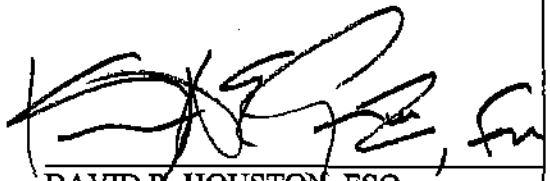
CONCLUSION

Mr. Gonzalez contends that the various errors described in his motion for a new trial, taken in combination, deprived him of the right to a fair trial, and asks this Court to order a new one.

AFFIRMATION PURSUANT TO NRS 239B.030.

The party executing this document hereby affirms that this document submitted for recording does not contain the social security number of any person or persons, pursuant to NRS 239B.230.

Dated this 27 day of August, 2013.



DAVID R. HOUSTON, ESQ.
Nevada Bar No. 2131
LAW OFFICE OF DAVID R.
HOUSTON
432 Court Street
Reno, Nevada 89501
(775) 786-4188
Attorney for Defendant

INDEX OF EXHIBITS

1. Fourth Information Supplementing Indictment filed July 22, 2013
2. Jury Instructions filed August 7, 2013
3. Refused Instructions – Defendant A-E filed August 6, 2013
4. Jury Question Transcript dated August 7, 2013
5. Jury Question, Court Response – Number Two filed August 7, 2013
6. State's Proposed Jury Instructions
7. Defendant's Objections to State's Proposed Jury Instructions
8. Defendant's Proposed Jury Instructions
9. Defendant's Additional Proposed Jury Instructions
10. Defendant's Second Proposed Additional Jury Instructions
11. Defendant's Third Proposed Additional Jury Instructions
12. Defendant's Fourth Proposed Additional Jury Instructions

FILED

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Joey Orduna Hastings

Clerk of the Court

Transaction # 3955157

Exhibit 1

Exhibit 1

5189

DA # 434444

SPD 11-8996

FILED

JUL 22 2013 @ 11:00 a.m.

CODE 1795

Richard A. Gammick

#001510

P.O. Box 30083

Reno, NV 89520-3083

(775) 328-3200

Attorney for Plaintiff

JOEY HASTINGS, CLERK
By: [Signature]
DEPUTY CLERK

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

Case No. CR11-1718 B

v.

Dept. No. 4

~~CESAR VILLAGRANA (A),~~

~~and~~

ERNESTO MANUEL GONZALEZ (B),

Defendants.

Fourth

~~THIRD~~ INFORMATION SUPPLEMENTING INDICTMENT

RICHARD A. GAMMICK, District Attorney within and for the
County of Washoe, State of Nevada, in the name and by the authority
of the State of Nevada, informs the above entitled Court that ~~CESAR~~
~~VILLAGRANA~~ and ERNESTO MANUEL GONZALEZ, the defendants above named,
have committed the crimes of:

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1 COUNT I. CONSPIRACY TO ENGAGE IN AN AFFRAY, a violation of
2 NRS 199.480 and NRS 203.050, a gross misdemeanor, in the manner
3 following, to wit:

4 That the said defendants, STUART GARY RUDNICK, also known
5 as "JABBERS" and ERNESTO MANUEL GONZALEZ, both Vagos gang members and
6 CESAR VILLAGRANA and JEFFREY PETTIGREW, both Hell's Angels gang
7 members did, at Sparks township, within the County of Washoe, State
8 of Nevada, on or about the 23rd day of September A.D., 2011, conspire
9 with their respective gang members and/or each other to engage in an
10 affray, and in furtherance of the conspiracy, defendant CESAR
11 VILLAGRANA and ERNESTO MANUEL GONZALEZ shot rival gang members.

12 COUNT II. CHALLENGE TO FIGHT RESULTING IN DEATH WITH THE
13 USE OF A DEADLY WEAPON, a violation of NRS 200.450, NRS 200.010. NRS
14 200.030, NRS 193.165, NRS 199.480, 195.020 and NRS 193.168, a felony,
15 in the manner following, to wit:

16 That the said defendants, STUART GARY RUDNICK, also known
17 as "JABBERS", CESAR VILLAGRANA and ERNESTO MANUEL GONZALEZ, did on or
18 about the 23rd day of September A.D., 2011, while within John
19 Ascuaga's Nugget, at Sparks Township, Washoe County, Nevada, cause,
20 give or send a challenge to fight and/or have agency in causing the
21 death of another after a challenge to fight resulting in the death of
22 a human being.

23 The Defendants above named are responsible under one or
24 more of the following principles of criminal liability, to wit:

25 1) by the Defendants directly committing the acts constituting the
26 offense; and/or 2) by the Defendants, having the intent to commit

1 challenge to fight or to accept a challenge to fight, conspiring with
2 each other to commit the offense of challenge to fight or to accept
3 such a challenge to fight whereby each co-conspirator is vicariously
4 liable for the acts of the other co-conspirators when the acts are
5 done in furtherance of the conspiracy; and/or 3) by the Defendants
6 having the intent to commit the crime of challenge to fight, and
7 aiding and abetting each either directly or indirectly whether
8 present or not.

9 Specifically, that the said defendant, STUART GARY RUDNICK,
10 also known as "JABBERS", a Vagos gang member, did upon previous
11 concert and agreement, give or send a challenge to fight to Hell's
12 Angel gang member JEFFREY PETTIGREW and JEFFREY PETTIGREW's co-
13 conspirator and fellow Hell's Angel gang member and agent, defendant
14 CESAR VILLAGRANA. That JEFFREY PETTIGREW and his fellow gang
15 member(s) and co-conspirator accepted the challenge to fight and did
16 fight with defendant STUART GARY RUDNICK, also known as "JABBERS" and
17 his co-conspirators, other Vagos gang members, which fight involved
18 the use of deadly weapons. That said fight ended with the shooting
19 death of JEFFREY PETTIGREW, a human being who died on or about the
20 24th day of September A.D., 2011, by Vagos gang member and co-
21 conspirator, defendant ERNESTO MANUEL GONZALEZ, and/or

22 That the said defendant, Vagos gang member, GARY STUART
23 RUDNICK, also known as "JABBERS" and Hell's Angel gang member JEFFREY
24 PETTIGREW did verbally challenge each other to fight and did directly
25 or indirectly, counsel, encourage, hire, command, induce or otherwise
26 procure other Vagos gang members and Hell's Angel gang members, and

1 ERNESTO MANUEL GONZALEZ and CESAR VILLAGRANA to fight and did either
2 by fighting or by giving or sending for himself or herself or for any
3 other person, the challenge to fight or by receiving for themselves
4 or for any other person, the challenge to fight, did cause a fight
5 where deadly weapons were used during said fight by STUART GARY
6 RUDNICK'S, also known as "JABBERS" and JEFFREY PETTIGREW'S respective
7 agents, defendants CESAR VILLAGRANA and ERNESTO MANUEL GONZALEZ
8 resulting in the death of JEFFREY PETTIGREW who died from a gunshot
9 wound on the 24th of September, 2011.

10 And that CESAR VILLAGRANA and ERNESTO MANUEL GONZALEZ,
11 being responsible as principles to the fight did aid and abet GARY
12 STUART RUDNICK, also known as "JABBERS" and JEFFREY PETTIGREW in the
13 fight by said defendants counseling each other in furtherance of
14 issuing or accepting a challenge to fight, and/or by providing backup
15 to each other, and/or congregating in a group in order to fight
16 together, and/or encouraging each other to engage in or accept the
17 challenge to fight, and/or each group encircling members of the
18 opposing group, and/or participating in a stand-off situation and/or
19 intimidating members of the rival gang, and/or harassing members of
20 the rival gang, and/or otherwise acting in concert.

21 That said challenge to fight and the subsequent fight was
22 committed knowingly for the benefit of, at the direction of, or in
23 affiliation with, a criminal gang, with the specific intent to
24 promote, further or assist the activities of the criminal gang.

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1 COUNT III. BATTERY WITH A DEADLY WEAPON, a violation of
2 NRS 200.481(2)(e) and NRS 193.168, a felony, in the manner following,
3 to wit:

4 That the said defendant, CESAR VILLAGRANA, on or about the
5 23rd day of September A.D., 2011, at Sparks Township, within the
6 County of Washoe, State of Nevada, did willfully and unlawfully use
7 force and violence upon the person of DIEGO GARCIA at John Ascuaga's
8 Nugget, 1100 Nugget Avenue, in the City of Sparks, Washoe County,
9 Nevada, with a deadly weapon, to wit: a firearm, by shooting DIEGO
10 GARCIA in the leg.

11 That said battery with the use of a deadly weapon was
12 committed knowingly for the benefit of, at the direction of, or in
13 affiliation with, a criminal gang, with the specific intent to
14 promote, further or assist the activities of the criminal gang.

15 COUNT IV. DISCHARGING A FIREARM IN A STRUCTURE a violation
16 of NRS 202.287, a felony, in the manner following, to wit:

17 That the said defendant, CESAR VILLAGRANA, on or about the
18 23rd day of September A.D., 2011, at Sparks Township, within the
19 County of Washoe, State of Nevada, did maliciously and wantonly
20 discharge a 9mm handgun while inside of John Ascuaga's Nugget
21 Hotel/Casino, located at 1100 Nugget Avenue in the City of Sparks,
22 Washoe County, Nevada, an area designated as a populated area in
23 Washoe County, Nevada.

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1 COUNT V. CARRYING A CONCEALED WEAPON, a violation of NRS
2 202.350, a felony, (F200) in the manner following, to wit:

3 That the said defendant, CESAR VILLAGRANA, on or about the
4 23rd day of September A.D., 2011, at Sparks Township, within the
5 County of Washoe, State of Nevada, did willfully and unlawfully,
6 carry and have concealed upon his person a certain handgun at John
7 Ascuaga's Nugget located at 1100 Nugget Avenue in Sparks, Washoe
8 County, Nevada.

9 ~~III~~
 COUNT VI. CARRYING A CONCEALED WEAPON, a violation of NRS
10 202.350, a felony, (F200) in the manner following, to wit:

11 That the said defendant, ERNESTO MANUEL GONZALEZ, on or
12 about the 23rd day of September A.D., 2011, at Sparks Township,
13 within the County of Washoe, State of Nevada, did willfully and
14 unlawfully, carry and have concealed upon his person a certain
15 handgun at John Ascuaga's Nugget located at 1100 Nugget Avenue in
16 Sparks, Washoe County, Nevada.

17 ~~IV~~
 COUNT VII. DISCHARGING A FIREARM IN A STRUCTURE a
18 violation of NRS 202.287, a felony, in the manner following, to wit:

19 That the said defendant, ERNESTO MANUEL GONZALEZ, on or
20 about the 23rd day of September A.D., 2011, at Sparks Township,
21 within the County of Washoe, State of Nevada, did maliciously and
22 wantonly discharge a .40 caliber handgun while inside of John
23 Ascuaga's Nugget Hotel/Casino, located at 1100 Nugget Avenue in the
24 City of Sparks, Washoe County, Nevada, an area designated as a
25 populated area in Washoe County, Nevada.

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~~V~~
COUNT VIII. MURDER OF THE SECOND DEGREE WITH THE USE OF A

DEADLY WEAPON, a violation of NRS 200.010, NRS 200.030, NRS 193.165
and NRS 193.168, a felony, committed in the manner following to wit:

That the said Defendants ERNESTO MANUEL GONZALEZ a Vagos gang member and, CESAR VILLAGRANA a Hell's Angel gang member, on or about the 23rd day of September, 2011, did aid and abet GARY STUART RUDNICK, also known as "JABBERS" a Vagos gang member and JEFFERY PETTIGREW a Hell's Angel gang member in the commission of an affray with the use of a deadly weapon, that during the course of the affray the said defendants did maliciously fire deadly weapons inside of John Ascuaga's casino, located in a congested area in Sparks, Washoe County, Nevada. That the said discharging of handguns during the affray was in general malignant recklessness of others' lives and safety of other people or in disregard of social duty and as a foreseeable consequence of the shooting, JEFFREY PETTIGREW, a human being, was killed and murdered suffering multiple gunshot wounds from which he died on September 24th, 2011.

That said affray and discharge of a handgun inside of a structure with the use of a deadly weapon was committed knowingly for the benefit of, at the direction of, or in affiliation with, a criminal gang, with the specific intent to promote, further or assist the activities of the criminal gang.

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VI
COUNT IX. MURDER WITH A DEADLY WEAPON, a violation of NRS

200.010 and NRS 200.030, NRS 193.165, NRS 193.168 a felony, (F720) in
the manner following:

That the said defendant ERNESTO MANUEL GONZALEZ on the 23rd day of September A.D., 2011, or thereabout, and before the filing of this Information, at and within the County of Washoe, State of Nevada, did willfully, unlawfully, and with malice aforethought, kill and murder JEFFREY PETTIGREW, a human being, by means of shooting into the body of JEFFREY PETTIGREW with a deadly weapon, to wit: a pistol, thereby inflicting mortal injuries upon the said JEFFREY PETTIGREW from which he died on September 24, 2011, said killing being (1) willful, deliberate, and premeditated; and/or (2) committed by Defendant lying in wait to commit the killing, said Defendant being responsible under one or more of the following principles of criminal liability, to wit: (1) by directly committing the act; and/or (2) by Defendant conspiring with GARY RUDNICK and other Vagos members or associates, with the specific intent that a killing occur, whereby each conspirator is vicariously liable for the foreseeable acts made in furtherance of the conspiracy.

Further, that the murder was committed knowingly for the benefit of, at the direction of, or in affiliation with, a criminal gang, and with the specific intent to promote, further or assist the activities of the criminal gang, to wit: the Vagos.

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VII
COUNT ~~X~~ CONSPIRACY TO COMMIT MURDER, a violation of NRS

199.480, NRS 200.010, NRS 200.030, a felony, in the manner following:

That the said defendant ERNESTO MANUEL GONZALEZ on the 23rd day of September A.D., 2011, or thereabout, and before the filing of this Information, at and within the County of Washoe, State of Nevada, did willfully, unlawfully, did conspire with GARY RUDNICK and other Vagos members or associates to kill and murder JEFFEREY PETTIGREW, a human being, and in furtherance of the conspiracy did commit the acts in Count ~~IX~~ VII, said acts being incorporated by this reference as though fully set forth here.

All of which is contrary to the form of the Statute in such case made and provided, and against the peace and dignity of the State of Nevada

AFFIRMATION PURSUANT TO NRS 239B.030

The undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

Dated this ~~10th~~ day of July, 2013.

22nd July 2013

RICHARD A. GAMMICK
District Attorney

By Amos Stege

AMOS STEGE
9200

Deputy District Attorney

PCN SPPD0022354C-GONZALEZ
PCN SPPD0022064C-GONZALEZ
PCN SPPD0022352C-VILLAGRANA

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Exhibit 2

Exhibit 2

CR11-1718B
DC-990048222-002
STATE VS ERNESTO MANUEL GO 65 Pages
District Court 08/07/2013 07 39 AM
Washoe County
NACOURT

FILED

AUG 07 2013

JOE HASTINGS CLERK
By: *[Signature]*
DEPUTY CLERK

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

Case No. CR11-1718

v.

Dept. No. 4

ERNESTO MANUEL GONZALEZ (B)

Defendant.

LADIES AND GENTLEMEN OF THE JURY:

It is my duty as judge to instruct you in the law that applies to this case, and it is your duty as jurors to follow the law as I shall state it to you, regardless of what you may think the law is or ought to be. On the other hand, it is your exclusive province to determine the facts in the case, and to consider and weigh the evidence for that purpose. The authority thus vested in you is not an arbitrary power, but must be exercised with sincere judgment, sound discretion, and in accordance with the rules of law stated to you.

Instruction No. 1

5199

1 If in these instructions, any rule, direction or idea is
2 stated in varying ways, no emphasis thereon is intended by me and
3 none must be inferred by you. For that reason, you are not to single
4 out any certain sentence, or any individual point or instruction, and
5 ignore the others, but you are to consider all the instructions as a
6 whole and to regard each in the light of all the others.

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26 Instruction No. 2

1 If, during this trial, I have said or done anything which
2 has suggested to you that I am inclined to favor the position of
3 either party, you will not be influenced by any such suggestion.

4 I have not expressed, nor intended to express any opinion
5 as to which witnesses are or are not worthy of belief, what facts are
6 or are not established, or what inference should be drawn from the
7 evidence. If any expression of mine has seemed to indicate an
8 opinion relating to any of these matters, I instruct you to disregard
9 it.

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26 Instruction No. 3

1 It is the duty of attorneys on each side of a case to object
2 when the other side offers testimony or other evidence which counsel
3 believes is not admissible.

4 When the court has sustained an objection to a question,
5 the jury is to disregard the question and may draw no inference from
6 the wording of it or speculate as to what the witness would have said
7 if permitted to answer.

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26 Instruction No. 4

1 Nothing that counsel say during the trial is evidence in
2 the case.

3 The evidence in a case consists of the testimony of the
4 witnesses and all physical or documentary evidence which has been
5 admitted.
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26 Instruction No. 5

1 A reasonable doubt is one based on reason. It is not mere
2 possible doubt, but is such a doubt as would govern or control a
3 person in the more weighty affairs of life. If the minds of the
4 jurors, after the entire comparison and consideration of all the
5 evidence, are in such a condition that they can say they feel an
6 abiding conviction of the truth of the charge, there is not a
7 reasonable doubt. Doubt to be reasonable must be actual, not mere
8 possibility or speculation.

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26 Instruction No. 6

1 In every crime there must exist a union or joint operation
2 of act and intent.

3 The burden is always upon the prosecution to prove both act
4 and intent beyond a reasonable doubt.

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26 Instruction No. 7

5205

1 Every person charged with the commission of a crime shall
2 be presumed innocent unless the contrary is proven by competent
3 evidence beyond a reasonable doubt. The burden rests upon the
4 prosecution to establish every element of the crime with which the
5 defendant is charged beyond a reasonable doubt.
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26 Instruction No. 8

5206

1 There are two kinds of evidence: direct and
2 circumstantial. Direct evidence is direct proof of a fact, such as
3 testimony of an eyewitness. Circumstantial evidence is indirect
4 evidence, proof of a chain of facts from which you could find that
5 another fact exists, even though it has not been proved directly.
6 Such evidence may consist of any acts, declarations or circumstances
7 of the crime. You are entitled to consider both kinds of evidence.
8 The law permits you to give equal weight to both, but it is for you
9 to decide how much weight to give to any evidence.

10 If you are satisfied of the defendant's guilt beyond a
11 reasonable doubt, it matters not whether your judgment of guilt is
12 based upon direct or positive evidence or upon indirect and
13 circumstantial evidence or upon both.

14 It is for you to decide whether a fact has been proved by
15 circumstantial evidence. In making that decision, you must consider
16 all the evidence in the light of reason, common sense and experience.

17 You should not be concerned with the type of evidence but
18 rather the relative convincing force of the evidence.
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26 Instruction No. 9

5207

1 Intent may be proved by circumstantial evidence. It rarely
2 can be established by any other means. While witnesses may see and
3 hear and thus be able to give direct evidence of what a defendant
4 does or fails to do, there can be no eyewitness account of a state of
5 mind with which the acts were done or omitted, but what a defendant
6 does or fails to do may indicate intent or lack of intent to commit
7 the offense charged.

8 In determining the issue as to intent, the jury is entitled
9 to consider any statements made and acts done or omitted by the
10 accused, and all facts and circumstances in evidence which may aid
11 determination of state of mind.
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26 Instruction No. 10

5208

1 A Fourth Information Supplementing Indictment is a formal
2 method of accusing a defendant of a crime. It is not evidence of any
3 kind against the accused, and does not create any presumption or
4 permit any inference of guilt.
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Instruction No. 11

5209

1 The defendant ERNESTO MANUEL GONZALEZ is being tried upon
2 anFourth Information Supplementing Indictment which was filed on the
3 22ndday of July, 2013, in the Second Judicial District Court,
4 charging the said defendant ERNESTO MANUEL GONZALEZ, with:

5 COUNT I. CONSPIRACY TO ENGAGE IN AN AFFRAY, a violation of
6 NRS 199.480 and NRS 203.050, a gross misdemeanor, in the manner
7 following, to wit:

8 That the said defendants, STUART GARY RUDNICK, also known
9 as "JABBERS" and ERNESTO MANUEL GONZALEZ, both Vagos gang members and
10 CESAR VILLAGRANA and JEFFREY PETTIGREW, both Hell's Angels gang
11 members did, at Sparks township, within the County of Washoe, State
12 of Nevada, on or about the 23rd day of September A.D., 2011, conspire
13 with their respective gang members and/or each other to engage in an
14 affray, and in furtherance of the conspiracy, defendant CESAR
15 VILLAGRANA and ERNESTO MANUEL GONZALEZ shot rival gang members.

16 COUNT II. CHALLENGE TO FIGHT RESULTING IN DEATH WITH THE
17 USE OF A DEADLY WEAPON, a violation of NRS 200.450, NRS 200.010, NRS
18 200.030, NRS 193.165, NRS 199.480, 195.020 and NRS 193.168, a felony,
19 in the manner following, to wit:

20 That the said defendants, STUART GARY RUDNICK, also known
21 as "JABBERS", CESAR VILLAGRANA and ERNESTO MANUEL GONZALEZ, did on or
22 about the 23rd day of September A.D., 2011, while within John
23 Ascuaga's Nugget, at Sparks Township, Washoe County, Nevada, cause,
24 give or send a challenge to fight and/or have agency in causing the

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1 death of another after a challenge to fight resulting in the death of
2 a human being.

3 The Defendants above named is responsible under one or more
4 of the following principles of criminal liability, to wit:

5 1) by the Defendants directly committing the acts constituting the
6 offense; and/or 2) by the Defendants, having the intent to commit
7 challenge to fight or to accept a challenge to fight, conspiring with
8 each other to commit the offense of challenge to fight or to accept
9 such a challenge to fight whereby each co-conspirator is vicariously
10 liable for the acts of the other co-conspirators when the acts are
11 done in furtherance of the conspiracy; and/or 3) by the Defendants
12 having the intent to commit the crime of challenge to fight, and
13 aiding and abetting each either directly or indirectly whether
14 present or not.

15 Specifically, that the said defendant, STUART GARY RUDNICK,
16 also known as "JABBERS", a Vagos gang member, did upon previous
17 concert and agreement, give or send a challenge to fight to Hell's
18 Angel gang member JEFFREY PETTIGREW and JEFFREY PETTIGREW's co-
19 conspirator and fellow Hell's Angel gang member and agent, defendant
20 CESAR VILLAGRANA. That JEFFREY PETTIGREW and his fellow gang
21 member(s) and co-conspirator accepted the challenge to fight and did
22 fight with defendant STUART GARY RUDNICK, also known as "JABBERS" and
23 his co-conspirators, other Vagos gang members, which fight involved
24 the use of deadly weapons. That said fight ended with the shooting
25 death of JEFFREY PETTIGREW, a human being who died on or about the

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1 24th day of September A.D., 2011, by Vagos gang member and co-
2 conspirator, defendant ERNESTO MANUEL GONZALEZ, and/or

3 That the said defendant, Vagos gang member, GARY STUART
4 RUDNICK, also known as "JABBERS" and Hell's Angel gang member JEFFREY
5 PETTIGREW did verbally challenge each other to fight and did directly
6 or indirectly, counsel, encourage, hire, command, induce or otherwise
7 procure other Vagos gang members and Hell's Angel gang members, and
8 ERNESTO MANUEL GONZALEZ and CESAR VILLAGRANA to fight and did either
9 by fighting or by giving or sending for himself or herself or for any
10 other person, the challenge to fight or by receiving for themselves
11 or for any other person, the challenge to fight, did cause a fight
12 where deadly weapons were used during said fight by STUART GARY
13 RUDNICK'S, also known as "JABBERS" and JEFFREY PETTIGREW'S respective
14 agents, defendants CESAR VILLAGRANA and ERNESTO MANUEL GONZALEZ
15 resulting in the death of JEFFREY PETTIGREW who died from a gunshot
16 wound on the 24th of September, 2011.

17 And that CESAR VILLAGRANA and ERNESTO MANUEL GONZALEZ,
18 being responsible as a principle to the fight, did aid and abet GARY
19 STUART RUDNICK, also known as "JABBERS" in the fight by said
20 defendants counseling each other in furtherance of issuing or
21 accepting a challenge to fight, and/or by providing backup to each
22 other, and/or congregating in a group in order to fight together,
23 and/or encouraging each other to engage in or accept the challenge to
24 fight, and/or each group encircling members of the opposing group,
25 and/or participating in a stand-off situation and/or

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1 intimidating members of the rival gang, and/or harassing members of
2 the rival gang, and/or otherwise acting in concert.

3 That said challenge to fight and the subsequent fight was
4 committed knowingly for the benefit of, at the direction of, or in
5 affiliation with, a criminal gang, with the specific intent to
6 promote, further or assist the activities of the criminal gang.

7 COUNT III. CARRYING A CONCEALED WEAPON, a violation of NRS
8 202.350, a felony, in the manner following, to wit:

9 That the said defendant, ERNESTO MANUEL GONZALEZ, on or
10 about the 23rd day of September A.D., 2011, at Sparks Township,
11 within the County of Washoe, State of Nevada, did willfully and
12 unlawfully, carry and have concealed upon his person a certain
13 handgun at John Ascuaga's Nugget located at 1100 Nugget Avenue in
14 Sparks, Washoe County, Nevada.

15 COUNT IV. DISCHARGING A FIREARM IN A STRUCTURE a violation
16 of NRS 202.287, a felony, in the manner following, to wit:

17 That the said defendant, ERNESTO MANUEL GONZALEZ, on or
18 about the 23rd day of September A.D., 2011, at Sparks Township,
19 within the County of Washoe, State of Nevada, did maliciously and
20 wantonly discharge a .40 caliber handgun while inside of John
21 Ascuaga's Nugget Hotel/Casino, located at 1100 Nugget Avenue in the
22 City of Sparks, Washoe County, Nevada, an area designated as a
23 populated area in Washoe County, Nevada.

24 COUNT V. MURDER OF THE SECOND DEGREE WITH THE USE OF A
25 DEADLY WEAPON, a violation of NRS 200.010, NRS 200.030, NRS 193.165
26 and NRS 193.168, a felony, committed in the manner following to wit:

1 That the said Defendants ERNESTO MANUEL GONZALEZ a Vagos
2 gang member and, CESAR VILLAGRANA, a Hell's Angel gang member, on or
3 about the 23rd day of September, 2011, did aid and abet GARY STUART
4 RUDNICK, also known as "JABBERS" a Vagos gang member and JEFFERY
5 PETTIGREW, a Hell's Angel gang member in the commission of an affray
6 with the use of a deadly weapon, that during the course of the affray
7 the said defendants did maliciously fire deadly weapons inside of
8 John Ascuaga's casino, located in a congested area in Sparks, Washoe
9 County, Nevada. That the said discharging of handguns during the
10 affray was in general malignant recklessness of others' lives and
11 safety of other people or in disregard of social duty and as a
12 foreseeable consequence of the shooting, JEFFREY PETTIGREW, a human
13 being, was killed and murdered suffering multiple gunshot wounds from
14 which he died on September 24th, 2011.

15 That said affray and discharge of a handgun inside of a
16 structure with the use of a deadly weapon was committed knowingly for
17 the benefit of, at the direction of, or in affiliation with, a
18 criminal gang, with the specific intent to promote, further or assist
19 the activities of the criminal gang.

20 COUNT VI. MURDER WITH A DEADLY WEAPON, a violation of NRS
21 200.010 and NRS 200.030, NRS 193.165, NRS 193.168 a felony, in the
22 manner following:

23 That the said defendant ERNESTO MANUEL GONZALEZ on the 23rd
24 day of September A.D., 2011, or thereabout, and before the filing of
25 this Information, at and within the County of Washoe, State of
26 Nevada, did willfully, unlawfully, and with malice aforethought, kill

1 and murder JEFFREY PETTIGREW, a human being, by means of shooting
2 into the body of JEFFREY PETTIGREW with a deadly weapon, to wit: a
3 pistol, thereby inflicting mortal injuries upon the said JEFFREY
4 PETTIGREW from which he died on September 24, 2011, said killing
5 being (1) willful, deliberate, and premeditated; and/or (2) committed
6 by Defendant lying in wait to commit the killing, said Defendant
7 being responsible under one or more of the following principles of
8 criminal liability, to wit: (1) by directly committing the act;
9 and/or (2) by Defendant conspiring with GARY RUDNICK and other Vagos
10 members or associates, with the specific intent that a killing occur,
11 whereby each conspirator is vicariously liable for the foreseeable
12 acts made in furtherance of the conspiracy.

13 Further, that the murder was committed knowingly for the
14 benefit of, at the direction of, or in affiliation with, a criminal
15 gang, and with the specific intent to promote, further or assist the
16 activities of the criminal gang, to wit: the Vagos.

17 COUNT VII. CONSPIRACY TO COMMIT MURDER, a violation of NRS
18 199.480, NRS 200.010, NRS 200.030, a felony, in the manner following:

19 That the said defendant ERNESTO MANUEL GONZALEZ on the 23rd
20 day of September A.D., 2011, or thereabout, and before the filing of
21 this Information, at and within the County of Washoe, State of
22 Nevada, did willfully, unlawfully, conspire with GARY RUDNICK and
23 other Vagos members or associates to kill and murder JEFFREY
24 PETTIGREW, a human being, and in furtherance of the conspiracy did
25 commit the acts in Count VI, said acts being incorporated by this
26 reference as though fully set forth here.

1 To the charges stated in the Fourth information Supplementing
2 Indictment, the defendant, ERNESTO MANUEL GONZALEZ, plead "NOT
3 GUILTY".
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Instruction No. 12

1 "Knowingly," imports a knowledge that the facts exist which
2 constitutes the act or omission of a crime, and does not require
3 knowledge of its unlawfulness. Knowledge of any particular fact may
4 be inferred from the knowledge of such other facts as should put an
5 ordinarily prudent person upon inquiry.

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26 Instruction No. 13

5217

1 The word "willfully" when applied to the intent element of
2 the charges contained in Counts I, II, III, means an act done or
3 omitted and implies simply a purpose or willingness to commit the act
4 or to make the omission in question. The word does not require in
5 its meaning any intent to violate law, or to injure another, or to
6 acquire any advantage.

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26 Instruction No. 14

1 The word "willfully" when applied in criminal statutes,
2 charged in Counts IV, V, VI and VII relates to an act or omission
3 which is done intentionally, deliberately or designedly, as
4 distinguished from an act or omission done accidentally,
5 inadvertently or innocently.
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Instruction No. 15

1 A person may be found liable for the commission of a crime if
2 the State proves beyond a reasonable doubt that he or she committed
3 the crime; or by proving that the defendant is liable by virtue of
4 the doctrine of vicarious liability as an aider and abettor or as a
5 co-conspirator.
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26 Instruction No. 116

1 In order for the defendant to be held accountable for Counts V,
2 VI and/or VII under theories of vicarious liability (aiding and
3 abetting and/or conspiracy) the State must prove beyond a reasonable
4 doubt the defendant had the specific intent to commit the crime
5 charged.
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26 Instruction No. 16A

5221

1 The defendant is charged in Count I (Conspiracy to Engage in an Affray), Count II (Challenge
2 to Fight Resulting in Death), Count VI (Murder with a Deadly Weapon), and Count VII (Conspiracy to
3 Commit Murder) with participation in a conspiracy.

4 A conspiracy is an agreement between two or more persons for an unlawful purpose. A person
5 who knowingly does any act to further the object of a conspiracy, or otherwise participates therein, is
6 criminally liable as a conspirator. Evidence of a coordinated series of acts furthering the underlying
7 offense is sufficient to infer the existence of an agreement and support a conspiracy conviction.
8 However, absent an agreement to cooperate in achieving the purpose of a conspiracy, mere knowledge
9 of, acquiescence in, or approval of that purpose does not make one a party to conspiracy.

10 The unlawful agreement or object is the essence of the crime of conspiracy. The crime is
11 completed upon the making of an unlawful agreement regardless of whether the object of the
12 conspiracy is effectuated.

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26 Instruction No. 17

1 Aider and Abettor Liability Defined

2 Every person concerned in the commission of a felony, gross
3 misdemeanor or misdemeanor, whether the person directly commits the
4 act constituting the offense, or aids or abets in its commission, and
5 whether present or absent; and every person who, directly or
6 indirectly, counsels, encourages, hires, commands, induces or
7 otherwise procures another to commit a felony, gross misdemeanor or
8 misdemeanor is a principal, and shall be proceeded against and
9 punished as such.

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26 Instruction No. 18

1 The elements of the crime of Affray are:

2 1. Two or more persons;

3 2. By agreement;

4 3. Fight in a public place;

5 4. To the terror of the citizens of this state.

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26 Instruction No. 19

1 The Elements of the Crime of Challenge to Fight Resulting in
2 Death are:

- 3 1. A person;
- 4 2. Upon previous concert and agreement;
- 5 3. Fights with any other person, or;
- 6 4. Gives, sends or authorizes any other person to give or
7 send a challenge to fight verbally or in writing to any
8 other person and a fight occurs;
- 9 5. A person having any agency in causing the death by either
10 fighting, or by giving or sending or receiving for himself
11 or herself or any other person, the challenge to fight,
12 and
- 13 6. Death ensues to a person in such a fight, or dies from any
14 injuries received in such a fight.

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26 Instruction No. 20

5215

The elements of carrying a concealed weapon are as follows:

1. The Defendant did unlawfully;
2. Carry concealed upon his or her person any;
3. Pistol, revolver or other firearm.

Instruction No. 21

1 The crime of discharging a firearm within a structure
2 consists of the following elements:

- 3 1. A Defendant within a structure did;
- 4 2. maliciously or wantonly;
- 5 3. discharge a firearm within the structure; and
- 6 4. the structure was located in an area designated as a
7 populated area for the purpose of prohibiting the
8 discharge of weapons.

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26 Instruction No. 22

5227

The elements of the crime of Murder are:

1. The defendant did willfully and unlawfully;
2. kill a human being;
3. with malice aforethought, either express or implied.

Instruction No. 23

5228

1 Murder is divided into two degrees.

2 Murder of the first degree is murder which is willful,
3 deliberate and premeditated.

4 Murder of the second degree is all other kinds of murder.
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26 Instruction No. 24

5229

1 Malice aforethought, as used in Counts IV, V and VI in this
2 case, means the intentional doing of a wrongful act without legal
3 cause or excuse, or what the law considers adequate provocation. The
4 condition of mind described as malice aforethought may arise, not
5 alone from anger, hatred, revenge or from particular ill will, spite
6 or grudge toward a person, but may also result from any unjustifiable
7 or unlawful motive or purpose to injure another, which proceeds from
8 a heart fatally bent on mischief, or with reckless disregard of
9 consequences and social duty.

1 "Wanton conduct" is defined as reckless, heedless, malicious,
2 characterized by extreme recklessness, foolhardiness, recklessly
3 disregardful of the rights or safety of others or of consequences.
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26 Instruction No. 26

1 Express malice is that deliberate intention to unlawfully
2 take away the life of a fellow creature, which is manifested by
3 external circumstances capable of proof.

4 Malice may be implied when no considerable provocation
5 appears or when all the circumstances of the killing show an
6 abandoned and malignant heart.

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26 Instruction No. 27

5132

1 Murder of the first degree is murder which is perpetrated
2 by means of any kind of willful, deliberate, and premeditated
3 killing. All three elements--willfulness, deliberation, and
4 premeditation--must be proven beyond a reasonable doubt before an
5 accused can be convicted of first-degree murder.

6 Willfulness is the intent to kill. There need be no
7 appreciable space of time between formation of the intent to kill and
8 the act of killing.

9 Deliberation is the process of determining upon a course of
10 action to kill as a result of thought, including weighing the reasons
11 for and against the action and considering the consequences of the
12 action.

13 A deliberate determination may be arrived at in a short
14 period of time. But in all cases the determination must not be
15 formed in passion, or if formed in passion, it must be carried out
16 after there has been time for the passion to subside and deliberation
17 to occur. A mere unconsidered and rash impulse is not deliberate,
18 even though it includes the intent to kill.

19 Premeditation is a design, a determination to kill,
20 distinctly formed in the mind by the time of the killing.

21 Premeditation need not be for a day, an hour, or even a
22 minute. It may be as instantaneous as successive thoughts of the
23 mind. For if the jury believes from the evidence that the act
24 constituting the killing has been preceded by and has been the

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1 result of premeditation, no matter how rapidly the act follows the
2 premeditation, it is premeditated.

3 The law does not undertake to measure in units of time the
4 length of the period during which the thought must be pondered before
5 it can ripen into an intent to kill which is truly deliberate and
6 premeditated. The time will vary with different individuals and
7 under varying circumstances.

8 The true test is not the duration of time, but rather the
9 extent of the reflection. A cold, calculated judgment and decision
10 may be arrived at in a short period of time, but a mere unconsidered
11 and rash impulse, even though it includes an intent to kill, is not
12 deliberation and premeditation as will fix an unlawful killing as
13 murder of the first degree.

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26 Instruction No. 28

5234

1 Lying in wait is defined by law as watching, waiting, and
2 concealment from the person killed with the intention of killing or
3 inflicting bodily injury upon that person.
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26 Instruction No. 29

5935

1 If you find the defendant committed the offense of
2 Challenge to Fight Resulting in Death, First Degree Murder, or Second
3 Degree Murder then you must further determine whether the defendant
4 used a firearm. You should indicate your finding by checking the
5 appropriate box on the verdict forms. The burden is on the State to
6 prove beyond a reasonable doubt that a firearm or other deadly weapon
7 was used during the commission of the offenses.

8 You are instructed that a firearm is a deadly weapon.
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26 Instruction No. 30

1 A criminal gang means:

2 1. Any combination of persons;

3 2. Organized formally or informally, so constructed that
4 the organization will continue its operation even if
5 individual members enter or leave the organization
6 which;

7 a. Has a common name or identifying symbol

8 b. Has particular conduct, status and custom indicative
9 of it; and

10 c. Has as one of its common activities engaging in
11 criminal activity punishable as a felony, other
12 than the conduct which constitutes the primary
13 offense.

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26 Instruction No. 31

The Elements of the Gang Enhancement are as follows:

1. The defendant committed the crime;
2. For the benefit of, at the direction of, or in affiliation with a criminal gang;
3. With specific intent to promote, further or assist the activities of the criminal gang.

Instruction No. 32

1 Gang evidence is not admissible to show that the defendant is a
2 bad person or has a criminal propensity. You may only consider such
3 evidence in your determination as to whether the Vagos is a criminal
4 gang and whether the Defendant committed the offenses in Count II, V,
5 and VI knowingly for the benefit of, at the direction of, or in
6 affiliation with, a criminal gang, with the specific intent to
7 promote, further or assist the activities of the criminal gang.

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26 Instruction 33

1 The killing of another person in self-defense or defense of
2 another is justified and not unlawful when the person who does the
3 killing actually and reasonably believes:

4 1. That there is imminent danger that the assailant will either
5 kill him or any other person in his presence or company or cause
6 great bodily injury to him or any other person in his presence
7 or company; and

8 2. That it is absolutely necessary under the circumstances for him
9 to use in self-defense or defense of another force or means that
10 might cause the death of the other person, for the purpose of
11 avoiding death or great bodily injury to himself or any other
12 person in his presence or company.

13 A bare fear of death or great bodily injury is not sufficient to
14 justify a killing. To justify taking the life of another in self-
15 defense or defense of another, the circumstances must be sufficient
16 to excite the fears of a reasonable person placed in a similar
17 situation. The person killing must act under the influence of those
18 fears alone and not in revenge.

19 An honest but unreasonable belief in the necessity for self-
20 defense or defense of another does not negate malice.

21 The right of self-defense or defense of another is not available
22 to an original aggressor, that is a person who has sought a quarrel
23 with the design to force a deadly issue and thus through his fraud,
24 contrivance, or fault, to create a real or apparent necessity for
25 making a felonious assault.

1 However, where a person, without voluntarily seeking, provoking,
2 inviting, or willingly engaging in a difficulty of his own free will,
3 is attacked by an assailant, he has the right to stand his ground and
4 need not retreat when faced with the threat of deadly force.

5 Actual danger is not necessary to justify a killing in self-
6 defense or defense of another. A person has a right to defend from
7 apparent danger to the same extent as he would from actual danger.
8 The person killing is justified if:

- 9 1. He is confronted by the appearance of imminent danger which
10 arouses in his mind an honest belief and fear that he or
11 another in his presence, is about to be killed or suffer great
12 bodily injury; and
- 13 2. He acts solely upon these appearances and his fear and actual
14 beliefs; and
- 15 3. A reasonable person in a similar situation would believe
16 himself or another in his presence to be in like danger.

17 The killing is justified even if it develops afterward that the
18 person was mistaken about the extent of the danger.

19 If evidence of self-defense, or defense of others is present,
20 the State must prove beyond a reasonable doubt that the defendant did
21 not act in self-defense or defense of others. If you find that the
22 State has failed to prove beyond a reasonable doubt that the
23 defendant did not act in self-defense or defense of others, you must
24 find the defendant not guilty.

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26 Instruction No. 34

1 If you find that the defendant conspired and/ or aided and
2 abetted Gary Rudnick in issuing or accepting a challenge to fight and
3 that the respective parties involved in the fight voluntarily entered
4 into mutual combat knowing, or having reason to believe that it would
5 probably or may result in death or serious bodily injury to himself
6 or to others, no party having any agency in causing the death, either
7 by fighting or by giving or sending for himself or herself or any
8 other person, or in receiving for himself or herself or for any other
9 person, the challenge to fight is entitled to claim self-defense or
10 defense of others.

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26 Instruction 35

Counts II, V, and VI contain multiple theories of liability.

For example:

Count II contains vicarious liability theories of conspiracy and aiding and abetting;

Count V contains two theories of liability, conspiracy as well as alleging that the defendant committed the crime; and

Count VI contains theories of liability on the charge of Murder in the First Degree, these are: Premeditated and deliberate murder and murder by lying in wait.

The law does not require, you the jury, to reach a unanimous decision upon a specific theory of liability within each count so long as you are all unanimous in rendering a decision on liability as to each count.

Instruction No. 36

5243

1 A witness who has special knowledge, skill, experience,
2 training or education in a particular science, profession or
3 occupation is an expert witness. An expert witness may give an
4 opinion as to any matter in which the witness is skilled.

5 You should consider such expert opinion and weigh the
6 reasons, if any, given for it. You are not bound, however, by such
7 an opinion. Give it the weight to which you deem it entitled,
8 whether that be great or slight, and you may reject it, if, in your
9 judgment, the reasons given for it are unsound.

10 The opinions of experts are to be considered by you in
11 connection with all other evidence in the case. The same rules apply
12 to expert witnesses that apply to other witnesses in determining the
13 weight or value of such testimony.

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26 Instruction No. 37

1 You are the sole judges of the credibility of each witness
2 who has testified and of the weight to be given to the testimony of
3 each. If you should find the evidence in this case to be in conflict,
4 then it is your sworn duty to reconcile the conflict if you can, so
5 as to make one harmonious story of it all. If you cannot reconcile
6 these conflicts, then it is your duty to give credit to that portion
7 of the testimony which you believe is worthy of credit, and you may
8 disregard that portion of the testimony which you do not believe to
9 be worthy of credit.

10 In considering the credibility of witnesses and in
11 considering any conflict in testimony, you should take into
12 consideration each witness' means of knowledge; strength of memory
13 and opportunity for observations; the reasonableness or
14 unreasonableness of the testimony; the consistency or inconsistency
15 of testimony; the motives actuating the witness; the fact, if it is a
16 fact, that the testimony has been contradicted, the witness' bias or
17 prejudice or interest in the outcome of this litigation; the ability
18 to have acquired the knowledge of the facts to which the witness
19 testified; the manner and demeanor upon the witness stand; and the
20 apparent truthfulness of the testimony as well as all other facts and
21 circumstances shown by the evidence which affect the credibility of
22 the testimony.

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26 Instruction No. 38

1 Neither side is required to call as witnesses all persons
2 who may have been present at any of the events disclosed by the
3 evidence or who may appear to have some knowledge of these events, or
4 to produce all objects or documents mentioned or suggested by the
5 evidence.
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Instruction No. 39

1 You are not called upon to return a verdict as to the guilt
2 or innocence of any other person than the defendant. If the evidence
3 convinces you beyond a reasonable doubt of the guilt of the accused,
4 you should so find, even though you may believe one or more other
5 persons are also guilty.

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26 Instruction No. 40

1 A separate crime is charged against the defendant in each count.
2 You must decide each count separately. Your verdict on one count
3 should not control your verdict on any other count. If you find the
4 state failed to prove an element of a particular count you must find
5 the defendant not guilty as to that count.

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26 Instruction 41

5248

1 The flight of a person immediately after the commission of
2 a crime is not sufficient in itself to establish his guilt, but is a
3 fact which, if proved, may be considered by you in the light of all
4 other proved facts in deciding the question of his guilt or
5 innocence. The weight to which such circumstance is entitled is a
6 matter for the jury to determine.

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26 Instruction No. 42

5249

1 On arriving at a verdict in this case, you shall not
2 discuss or consider the subject of penalty or punishment as that is a
3 matter which will be decided later and must not in any way affect
4 your decision as to the innocence or guilt of the defendant.
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Instruction No. 43