IN THE SUPREME COURT OF THE STATE OF NEVADA

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ERNESTO MANUEL GONZALEZ,

Appellant.

v.

THE STATE OF NEVADA,

Respondent.

_____/

CASE NO. 64249

APPELLANT'S APPENDIX, VOLUME XXII

APPEAL FROM JUDGMENT AFTER JURY TRIAL AND SENTENCING

Second Judicial District
State of Nevada

THE HONORABLE CONNIE J. STEINHEIMER, PRESIDING

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

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

Instruction No. 24

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

Instruction No. 45

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

Instruction No. 46

Exhibit 3

Exhibit 3

CODE 3755

FILED

AUG 06 2013

JOEY HASTINGS, CLERK
By: DEPUTY CLERK

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

STATE OF NEVADA,

Plaintiff,

vs.

ERNESTO MANUEL GONZALEZ,

Defendant.

Case No. CR11-1718B

Dept. No. 4

REFUSED INSTRUCTIONS – DEFENDANT A - E

(SEE ATTACHED DOCUMENT)

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5255

Defendant Ernesto Gonzalez asserts as his theory of defense that he acted in lawful defense of another. If you find that Defendant Ernesto Gonzalez acted in lawful defense of another as set forth in these instructions you cannot convict him of Counts I, II, IV, V, VI, VII.

Carter v. State, 121 Nev. 759, 147 P.3d 1101 (2006);

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

Defendant's Rejected

Instruction No. A

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

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

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

D

Defendant's Rejected

Instruction No. B

14/13

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

Legislative Counsel Bureau's annotations to NRS 48.025, citing to *Buchanan v. State*, 119 Nev. 201, at 217, 69 P.3d 694 (2003) ("Circumstantial evidence alone can certainly sustain a criminal conviction. However, to be sufficient, all the circumstances taken together must exclude to a moral certainty every hypothesis but the single one of guilt."); *Kinna v. State*, 84 Nev. 642, 646, 447 P.2d 32, 34 (1968) ("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. Snyder*, 41 Nev. 453, at 461, 172 P. 364 (1918) ("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. Fronhofer*, 38 Nev. 448, at 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.").

D

Defendant's Rejected

Instruction No. C

15

5258

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

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

D

Defendant's Rejected
Instruction No. D

71

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

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

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

D

Defendant's Rejected

Instruction No. E

820

5260

Exhibit 4

Exhibit 4

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

THE HONORABLE CONNIE STEINHEIMER, DISTRICT JUDGE

-oOo-

STATE OF NEVADA,	)	
Plaintiff,	)	Case No. CR11-1718B
vs.	)	
ERNESTO MANUEL GONZALEZ,	)	Dept. No. 4
Defendant.	)	

PARTIAL TRANSCRIPT OF PROCEEDINGS

TELEPHONIC CONFERENCE

WEDNESDAY, AUGUST 7, 2013

RENO, NEVADA

Reported By: MARCIA FERRELL, CCR No. 797

APPEARANCES:

For the Plaintiff:	KARL S. HALL DEPUTY DISTRICT ATTORNEY 1 S. Sierra St., 4th Floor RENO, NEVADA 89520
For the Defendant Gonzalez:	DAVID R. HOUSTON ATTORNEY AT LAW 432 Court St. RENO, NEVADA 89501 KENNETH E. LYON III ATTORNEY AT LAW 10389 Double R. Blvd. RENO, NEVADA 89521

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

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

THE COURT: Hello, counsel.

MR. HALL: Yes.

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

MR. HOUSTON: No.

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

MR. HOUSTON: No.

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

MR. HALL: Right, it's --

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

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

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

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

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

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

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

the act or conspiring with others, through vicarious liability.

So you want me to answer both questions no?

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

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

THE COURT: Correct.

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

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

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

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

interpret instruction number 17.

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

THE COURT: It says: 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.

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

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

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

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

MR. HALL: Right.

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

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

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

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

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

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

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

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

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

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

THE COURT: What would you say, Karl?

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

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

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

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

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

MR. HOUSTON: Yes. Because --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(Recess.)

THE COURT: Gentlemen?

MR. HOUSTON: Yes.

THE COURT: This is the judge.

MR. HALL: Yes, your Honor.

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

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

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

THE COURT: Okay. The first question was -- remember, it said legal question. And then it said 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, question mark. The Court is going to answer it, "It is not proper for the Court to give you additional instruction on how to interpret instruction number 17. You must consider all the instructions in light of all the other instructions."

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

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

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

You can lodge your objection.

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

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

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

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

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

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

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

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

THE COURT: Okay, thank you, gentlemen.

MR. HALL: Thank you.

MR. HOUSTON: Thanks.

(Proceedings recessed.)

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STATE OF NEVADA,)
)
COUNTY OF LYON.)

I, MARCIA L. FERRELL, Certified Court 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 Fernley, Nevada, this 8th day of August, 2013.

/s/ Marcia L. Ferrell

Marcia L. Ferrell, CSR #797

Exhibit 5

Exhibit 5

CODE

FILED

AUG 07 2013

JOEY ORSTREICH, CLERK
By: DEPUTY CLERK

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

STATE OF NEVADA,

Plaintiff,

vs.

ERNESTO MANUEL GONZALEZ,

Defendant.

Case No. CR11-1718B

Dept. No. 4

JURY QUESTION, COURT RESPONSE – NUMBER TWO

Question:

Legal Question:

Looking at Instruction no. 17: If a person has no knowledge of a conspiracy but their actions contribute to someone elses' 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?

Juror #6

Answer:

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

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

Signed: Connie J. Steinheimer
DISTRICT JUDGE

Exhibit 6

Exhibit 6

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

Instruction No. _____

Southern Pacific Co. v. Watkins, 83 Nev. 471 (1967); State v. Lewis, 59 Nev. 282 (1939); State v. McLane

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

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

Instruction No. _____

Southern Pacific Co. v. Watkins.
83 Nev. 371, 492 (1967)

There are rules of evidence that control what can be received in evidence. When a lawyer asks a question or offers an exhibit in evidence and a lawyer on the other side thinks that it is not permitted by the rules of evidence, that lawyer may object. If I overrule the objection, the question may be answered or the exhibit received. If I sustain the objection, the question cannot be answered, or the exhibit cannot be received. Whenever I sustain an objection to a question, you must ignore the question and must not guess what the answer would have been.

Sometimes I may order that evidence be stricken from the record and that you disregard or ignore the evidence. That means that when you are deciding the case, you must not consider the evidence that I told you to disregard.

Instruction No. _____ 9th Cir. Criminal Jury Instruction 1.6

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

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

Instruction No. _____ 9th Cir. Criminal Jury Instruction 3.7

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

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

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

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

Instruction No. _____ Crane v. State, 88 Nev.684, 687 (1972)

A Third Information Supplementing Indictment is a formal method of accusing a defendant of a crime. It is not evidence of any kind against the accused, and does not create any presumption or permit any inference of guilt.

Instruction No. _____ State V. Logan, 59 Nev. 24 (1938

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

Instruction No. _____

NRS 175.201; Cordova v. State, 116 Nev. 664 (2000); Doyle v. State, 112 Nev. 879 (1996)

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

Instruction No._____ NRS 175.211

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

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

NRS 193.190; Garcia v. D.Ct., 117 Nev. 697 (2001); Chambers v. State, 113 Nev.974(1997); Powell v. State, 113 Nev. 258 (1997)

Instruction No. _____

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

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

NRS 193.200; Powell v. State, 113 Nev. 258 1997; Manning v. Warden, 99 Nev. 82 (1993); Owens v. State, 100 Nev. 286, 289 (1984); Jensen v. Sheriff, 89 Nev.123, 126 (1973); Wilson v. State, 85 Nev. 88, 90 (1969); State v. McNeil, 53 Nev. 428 (1931); State vs. Rhodig, 101 Nev. 608, 611 (1985); Grant v. State, 117 Nev. 427 (2001); Mathis vs. State, 82 Nev. 402; 406, (1966); State vs. Thompson, 31 Nev. 209 (1909).

Instruction No. _____

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

Instruction No. _____ NRS 193.017

The word "willfully" when used in criminal statutes relates to an act or omission which is done intentionally, deliberately, or designedly, as distinguished from an act or omission done accidentally, inadvertently or innocently.

Robey v. State, 96 Nev. 459, 611 P. 2d 209 (1980), City Council of Reno v. Reno Newspapers, 105 Nev. 886, 894, 784 P 2d 974 (1989), Schertz v. State, 109 Nev. Ad. Op. No. 58 (1993)

Instruction No._____

The word "willfully," when applied to the intent with which an act is done or omitted and as used in my instructions, implies simply a purpose or willingness to commit the act or to make the omission in question. The word does not require in its meaning any intent to violate law, or to injure another, or to acquire any advantage.

Instruction No. _____

Childers v. State
100 Nev. 280, 283 (1984)

Neither side is required to call as witnesses all persons who may have been present at any of the events disclosed by the evidence or who may appear to have some knowledge of these events, or to produce all objects or documents mentioned or suggested by the evidence.

Instruction No. _____ People v. Simms, 10 CA 3d. 299 (1970)

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

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

Instruction No. _____ NRS 47.040

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

1. A person is liable as a co-conspirator when two or more parties make an agreement to commit an illegal act. The existence of a conspiracy is usually established by inference from the conduct of the parties.
2. A person may also be found liable for a crime as an aider and abettor provided the State proves that the defendant aids or abets in the commission of a crime if he or she directly or indirectly counsels, encourages, hires, commands, induces or otherwise procures another to commit a crime

Instruction No. _____

Nunnery v. Dist. Ct., 124 Nev. 477, 480, 186 P.3d 886, 888 (2008).

A conspiracy is an agreement between two or more persons for an unlawful purpose. A person who knowingly does any act to further the object of a conspiracy, or otherwise participates therein, is criminally liable as a conspirator; however, mere knowledge or approval of, or acquiescence, the object and purpose of a conspiracy without an agreement to cooperate in achieving such object or purpose does not make one a party to conspiracy. Conspiracy is seldom susceptible of direct proof and is usually established by inference from the conduct of the parties. A conspiracy conviction may be supported by a coordinated series of acts in furtherance of the underlying offense, sufficient to infer the existence of an agreement.

Instruction No. _____

Doyle v. State, 112 Nev. 879, 894, 921 P.2d 901, 911 (1996)

An aider and abettor to a crime is equally as culpable as the actual perpetrator of the crime.

A person is liable for the commission of the crime of challenge to fight if he or she commits the acts constituting the offense, or if he or she aids and abets another person in committing the acts constituting the offense.

A person aids and abets in the commission of a crime of challenge to fight if he or she:

Aids, promotes, encourages or instigates, by act or advice, the commission of such crime with the intention that the crime be committed.

The following elements of the offense must be proven beyond a reasonable doubt.

1. The person does any act;
2. To assist another;
3. In committing the crime of Affray and/or Challenge to Fight;

Instruction No. _____ Bolden v. State, 121 Nev. 908, 914, 124

The elements of the crime Affray are:

1. Two or more persons;
2. by agreement;
3. fight in a public place;
4. to the terror of the citizens of this state;

Instruction No. _____ NRS 203.050

The elements of a Challenge to Fight Resulting in Death with the Use of a Deadly Weapon are:

1. A person upon previous concert and agreement;
2. Fights with any other person; or
3. Gives, sends or authorizes any other person to give or send a challenge verbally or in writing to fight any other person, the person giving, sending or accepting the challenge to fight is guilty of the crime of challenge to fight;
4. Should death ensue to a person in such fight, or should a person die from injuries received in such fight, the person causing or having any agency in causing the death, either by fighting, or by giving, sending for himself or herself or for any other person, or in receiving for himself or herself or for any other person, the challenge to fight is guilty of murder in the first degree.

Instruction No. _____ NRS 200.450

Count II of the Third Information Supplementing Indictment charges both defendants as principles to the crime of a Challenge to Fight Resulting in Death. If you find that the State has proven the elements of that crime beyond a reasonable doubt, one or both of the defendants are guilty of Murder in the First Degree. The Challenge to Fight charge does not require the State to prove that the killing was perpetrated maliciously with premeditation or deliberation.

Count IX of the Third Information Supplementing Indictment charges ERNESTO MANUEL GONZALEZ with Murder of the First Degree under two alternative theories as allowed by law. Murder of the First Degree is murder which is perpetrated by means of lying in wait or committed maliciously with premeditation and deliberation.

With respect to ERNESTO MANUEL GONZALEZ you must unanimously agree that the defendant is guilty of murder based upon one or more of the alternative theories of Challenge to fight, premeditated and deliberate murder and/or lying in wait. However, it is not necessary that you unanimously agree upon the specific theory by which the murder was committed.

In other words, if six of you agree that the defendant committed the murder by actually killing the victim with malice, premeditation and deliberation and three of you agree that the defendant committed the murder by lying in wait and three of you agree that the defendant committed the crime of Challenge to Fight Resulting in Death, GONZALEZ is guilty of first degree murder.

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The elements of each of these two different alternative theories of murder are set forth elsewhere in these instructions.

Instruction No. _____ NRS 200.010, NRS 200.030, NRS 200.450

In regard to Count II of the Third Information Supplementing Indictment the State has alleged a Challenge to Fight Resulting in Death. The State has alleged that ERNESTO MANUEL GONZALEZ actually committed the killing as a result of a challenge to fight. The State alleged Murder of the First Degree in Count X based upon a theory that the killing was done maliciously with premeditation, deliberation and/or by lying in wait, as allowed by law.

In order to find ERNESTO MANUEL GONZALEZ guilty of murder of the first degree you must unanimously agree that the State proved beyond a reasonable doubt one or more of the alleged theories of liability. However, it is not necessary that you unanimously agree upon the specific theory by which the murder was committed.

In other words, if three of you agree that ERNESTO MANUEL GONZALEZ committed the murder resulting from a challenge to fight, and three of you agree that the defendant committed the killing with malice aforethought, deliberation and premeditation, and six of you agree that he lied in wait to commit the killing, then you may properly find ERNESTO MANUEL GONZALEZ guilty of Murder of the First Degree.

Instruction No. _____ Schad v. Arizona 501 U.S.624 (1991)

In regard to Count II of the Third Information Supplementing Indictment the State has alleged that CESAR VILLIGRANA committed the crime of murder of the first degree as a result of an alleged challenge to fight. When a person dies from injuries received in such a fight, the person causing or having any agency in causing the death, either by fighting or by giving or sending for himself or for any other person, the challenge to fight he or she is guilty of murder of the first degree. Specifically the State has alleged that the defendant is guilty of the offense by virtue of alternate theories of liability as allowed by law:

1. Conspiring with Jeffrey Pettigrew to fight, or by

2. Aiding and abetting Jeffrey Pettigrew in the fight.

You must unanimously agree that the defendant is guilty of murder based upon one or more of the above two alternative theories. However, it is not necessary that you unanimously agree upon the specific theory by which the murder was committed.

If six of you agree that the defendant agreed (conspired) with Jeffrey Pettigrew to fight in a public place after a challenge to fight was issued and accepted by fighting; and six of you agree that the defendant aided and abetted Jeffrey Pettigrew after the challenge to fight was issued and accepted by fighting, then you may properly find the defendant guilty of murder.

Instruction No. _____ Schad v. Arizona 501 U.S.624 (1991)

The allegation of Murder of the first degree contained in Count II pursuant to a Challenge to Fight theory does not require the State to prove that the killing was committed with malice aforethought, deliberation and premeditation. The State is only required to prove the elements of a challenge to fight beyond a reasonable doubt.

Instruction No. _____ NRS 200.450

The crime of Battery with a Deadly Weapon consists of the following elements:

1. The defendant did willfully and unlawfully;

2. Use force or violence;

3. Upon the person of another;

4. With the use of a deadly weapon.

Instruction No. _____ NRS 200.481

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

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

Instruction No. _____ NRS 202.287

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. _____ NRS202.350

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. _____ NRS 200.010

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

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

Instruction No. _____ NRS 200.020

Malice aforethought, as used in the definition of murder, means the intentional doing of a wrongful act without legal cause or excuse, or what the law considers adequate provocation. The condition of mind described as malice aforethought may arise, not alone from anger, hatred, revenge or from particular ill will, spite or grudge toward the person killed, but may also result from any unjustifiable or unlawful motive or purpose to injure another, which proceeds from a heart fatally bent on mischief, or with reckless disregard of consequences and social duty.

"Aforethought" does not imply deliberation or the lapse of considerable time. It only means the required mental state must precede rather than follow the act.

Guy v. State, 108 Nev. 770, 839 P.2d 578 (1992), citing Thedford v. Sheriff, 86 Nev. 741; 476 P.2d 25, 27 (1970)

Instruction No. _____

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.

Instruction No. _____ NRS 200.030

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

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

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

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

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

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

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

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

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

Instruction No. _____

Byford v. State, 116 Nev. 215, (2000).

Manslaughter is the unlawful killing of a human being without malice express or implied, and without a mixture of deliberation. Manslaughter may be voluntary, upon a sudden heat of passion, caused by a provocation apparently sufficient to make the passion irresistible; or, involuntary, in the commission of the unlawful act, or a lawful act without due caution or circumspection.

Instruction No. ____ NRS 200.040

In cases of voluntary manslaughter, there must be a serious and highly provoking injury inflicted upon the person killing, sufficient to excite an irresistible passion in a reasonable person, or an attempt by the person killed to commit a serious personal injury on the person killing.

The killing must be the result of that sudden, violent impulse of passion supposed to be irresistible, for, if there should appear to have been an interval between the assault or provocation given for the killing, sufficient for the voice of reason and humanity to be heard, the killing shall be attributed to deliberate revenge and punished as murder.

Instruction No. _____

NRS 200.050
NRS 200.060

Involuntary manslaughter is the killing of a human being, without any intent to do so, in the commission of an unlawful act, or in the commission of a lawful act which probably might produce such a consequence in an unlawful manner.

Instruction No. _____ NRS 200.070

Lying in wait is defined by law as watching, waiting, and concealment from the person killed with the intention of killing or inflicting bodily injury upon that person.

Instruction No. _____

Collman v. State, 116 Nev. 687, 717, 7 P.3d 426, 445 (2000)

If you find the defendant committed the offense of First Degree Murder, Second Degree Murder, or Voluntary Manslaughter, then you must further determine whether the defendant used a firearm or other deadly weapon during the commission of the offense. You should indicate your finding by checking the appropriate box on the verdict form. The burden is on the State to prove beyond a reasonable doubt that a firearm or other deadly weapon was used during the commission of the offense.

A deadly weapon is defined as follows:

1. Any instrument which, if used in the ordinary manner contemplated by its design and construction, will or is likely to cause substantial bodily harm or death; or
2. Any weapon, device, instrument, material or substance which, under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing substantial bodily harm or death.

Instruction No. ____

Mitchell v. State, 114 Nev. 1417 (1998); Jones v. State, 111 Nev. 848 (1995)

The Third Information Supplementing the Indictment in Count IX charges ERNESTO MANUEL GONZALEZ with Murder which includes the offense of Murder in the First Degree and also necessarily includes the lesser included offenses of Murder in the Second Degree, Voluntary Manslaughter and Involuntary Manslaughter. The defendant may only be convicted of one of these offenses.

You should first examine the evidence as it applies to Murder in the First degree. If you unanimously agree that the defendant is guilty of Murder in the First Degree, you should sign the appropriate Verdict form and request the bailiff to return you to court.

If you can not agree that the defendant is guilty of Murder in the First Degree, you should then examine the evidence as it applies to Murder in the Second Degree. If you unanimously agree that the defendant is guilty of Murder in the Second Degree, you should sign the appropriate Verdict form and ask the bailiff to return you to court.

If you can not unanimously agree that the defendant is guilty of Murder in the Second Degree, then you should examine the evidence as it applies to Voluntary Manslaughter. If you unanimously agree that the defendant is guilty of the crime of Voluntary Manslaughter, you should sign the appropriate Verdict form and request the bailiff to return you to court.

If you can not unanimously agree that the defendant is guilty of Voluntary Manslaughter, then you should examine the evidence as it applies to Involuntary Manslaughter. If you

unanimously agree that the defendant is guilty of the crime of Involuntary Manslaughter, you should sign the appropriate Verdict form and request the bailiff to return you to court.

The defendant, of course, can be found Not Guilty of all the offenses enumerated.

Instruction No. _____

Green v. State, 119 Nev. 542 2003)

To constitute the crime of Murder there must be in addition to the death an unlawful act which was a proximate cause of the death. The proximate cause of a death is a cause which, in natural and continuous sequence, produces the death, and without which the death would not have occurred.

There may be more than one proximate cause of a death. When the conduct of two or more persons is a substantial factor in bringing about the death of the victim, each person is a proximate cause of the death. A criminal defendant will not be relieved of criminal liability for Murder when his action was a substantial factor in bringing about the death of the victim, even if the actions of another person also contribute to bringing about the death.

Instruction No. _____

Lay v. State, 110 Nev. 1189, 866 P.2d 444 (1994)

The elements of the offense of conspiracy to commit murder are as follow:

1. Two or more persons agree;

2. to unlawfully kill another human being.

Instruction No. _____ NRS 199.480 and NRS 200.010 and NRS 200.030

A person is qualified to testify as an expert if he or she has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his or her testimony relates.

Duly qualified experts may give their opinions on questions in controversy at a trial. To assist you in deciding such questions, you may consider the opinion with the reasons given for it, if any, by the expert who gives the opinion. You may also consider the qualifications and credibility of the expert.

You are not bound to accept an expert opinion as conclusive, but should give to it the weight to which you find it to be entitled. You may disregard any such opinion if you find it to be unreasonable.

Instruction No. _____

NRS 50.275
CALJIC 2.80

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

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

Instruction No. _____

Runion v. State, 116 Nev. 1041 (2000)

If you find that there was a challenge to fight issued and accepted between the Hells Angels and the Vagos, and that the parties voluntarily entered into mutual combat with the deceased, knowing, or having reason to believe, that it would or probably may result in death or serious bodily injury to himself or to the deceased, the defendant cannot claim self-defense or defense of others.

Instruction No. _____

Wilmeth v. State, 96 Nev. 403, 610 P.2d 735 (1980).

During an attack upon a group, a defendant's intent to kill need not be directed at any one individual. It is enough if the intent to kill is directed at the group.

Ewell v. State, 105 Nev. 897, 899, 785 P.2d 1028, 1029 (1989) (approving, as accurate statement of the law, instruction that "During an attack upon a group, a defendant's intent to kill need not be directed at any one individual. It is enough if the intent to kill is directed at the group"); Ochoa v. State, 115 Nev. 194, 197-200, 981 P.2d 1201, 1203-1205 (1999) ("the doctrine of transferred intent is applicable to all crimes where an unintended victim is harmed as a result of the specific intent to harm an intended victim whether or not the intended victim is injured")

Instruction No. _____

Evidence that the defendant, Ernesto Manuel Gonzalez fled the scene immediately after the commission of a crime to evade arrest supports an inference of consciousness of guilt.

Instruction No. _____

Rosky v. State, 121 Nev. 184, 199, 111 P.3d 690, 699-700 (2005).

A criminal gang means:

1. Any combination of persons;

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

   a. Has a common name or identifying symbol

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

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

Instruction No. _____ NRS 193.168

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. _____ NRS 193.168

Gang evidence is not admissible to show that the defendant is a bad person or has a criminal propensity. It allows such evidence to be considered only on the issues germane to the gang enhancement, the motive for the crime and the credibility of witnesses.

Instruction No. _____

People v. Samaniego, 172 Cal.App.4th 1148, 1167 (2009

You are not called upon to return a verdict as to the guilt or innocence of any other person than the defendant. If the evidence convinces you beyond a reasonable doubt of the guilt of the accused, you should so find, even though you may believe one or more other persons are also guilty.

Instruction No. _____

Guy v. State, 108 Nev. 770, 839 P.2d 578 (1992)

To the jury alone belongs the duty of weighing the evidence and determining the credibility of the witnesses. The degree of credit due a witness should be determined by his or her character, conduct, manner upon the stand, fears, bias, impartiality, reasonableness or unreasonableness of the statements he or she makes, and the strength or weakness of his or her recollections, viewed in the light of all the other facts in evidence.

If the jury believes that any witness has willfully sworn falsely, they may disregard the whole of the evidence of any such witness.

Instruction No. _____

State v. Larkin, 11 Nev. 314; Collman v. State, 116 Nev. 687; Barron v. State, 1005 Nev. 767; State v. Martel, 32 Nev. 395, 397.

Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause the jury to discredit such testimony. Two or more persons witnessing an incident or transaction may see or hear it differently; an innocent misrecollection, like failure to recollect, is not an uncommon experience. In weighing the effect of a discrepancy, consider whether it pertains to a matter of importance, or an unimportant detail, and whether the discrepancy results from innocent error or willful falsehood.

See generally: State v. Martel, 32 Nev. 395 (1910); State v. Larkin, 11 Nev. 314; Barron v. State, 105 Nev. 767 (1989); Lay v. State, 110 Nev. 1189 (1994); Quillen v. State, 112 Nev. 1369 (1996); Wilson v. State, 96 Nev. 422 (1980); Shuff v. State, 86 Nev. 736 (1970) (1970)

Instruction No._____

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

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

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

Instruction No. _____

NRS 50.275; State v. Bourdlais, 70 Nev. 233, 253, 254; (1954); State v. Watts, 52 Nev. 453. 474 (1930)

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

Instruction No. _____

Sherman v. State, 114 Nev. 998 (1998);
Moore v. State, 88 Nev. 74 (1972)

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

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

Instruction No. _____

Howard v. State, 102 Nev. 572 (1986); Biondiv. State, 101 Nev. 252 (1985); NRS 175.221; Nevius v. State, 101 Nev. 238 (1985)

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

Instruction No. _____

State v. Hall, 54 Nev. 213 (1932);
Wilkins v. State, 96 Nev. 367 (1980)

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.

_____
DISTRICT JUDGE

Instruction No. _____ 9th Cir. Criminal Jury Instr. 7.1 & 7.5

Exhibit 7

Exhibit 7

CODE: 2630
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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,

vs.

ERNESTO MANUEL GONZALEZ,

Defendant.

Case No. CR11-1718

Dept. No. 4

OBJECTIONS TO STATE'S PROPOSED JURY INSTRUCTIONS

Comes now, Ernesto Manuel Gonzalez, by and through his attorneys, David R. Houston, Esq. and Ken Lyon, Esq., and enters his Objections to the State's Proposed Jury Instructions. These objections are based upon the attached memorandum of points and authorities, Exhibit 1 (State's Proposed Jury Instructions), the records and pleadings on file in this case, and any oral argument which the court may require at the hearing on the instructions.

MEMORANDUM OF POINTS AND AUTHORITIES

Because the State's proposed jury instructions are unnumbered, this memorandum refers to them by the page numbers used in Exhibit 1, which contain the State's proposed instructions as delivered to Mr. Gonzalez.

1. State's proposed jury instructions p. 4:

Nothing that counsel say during the trial is evidence in the case. The evidence in a case consists of the testimony of the witnesses and all physical or documentary evidence which has been admitted.

This instruction is an incomplete effort to merge fragments of 9th Cir. Criminal Jury Instructions 3.6 and 3.7 -- the instructions on what is and is not evidence at trial. The full instructions look like this:

3.6 WHAT IS EVIDENCE

The evidence you are to consider in deciding what the facts are consists of:

1. the sworn testimony of any witness; and
2. the exhibits received in evidence; and
3. any facts to which the parties have agreed.

3.7 WHAT IS NOT EVIDENCE

In reaching your verdict you may consider only the testimony and exhibits received in evidence. The following things are not evidence and you may not consider them in deciding what the facts are:

1. Questions, statements, objections, and arguments by the lawyers are not evidence. The lawyers are not witnesses. Although you must consider a lawyer's questions to understand the answers of a witness, the lawyer's questions are not evidence. Similarly, what the lawyers have said in their opening statements, [will say in their] closing arguments and at other times is intended to help you interpret the evidence, but it is not evidence. If the facts as you remember them differ from the way the lawyers state them, your memory of them controls.

2. Any testimony that I have excluded, stricken, or instructed you to disregard is not evidence. In addition, some evidence was received only for a limited purpose; when I have instructed you to consider certain evidence in a limited way, you must do so.

3. Anything you may have seen or heard when the court was not in session is not evidence. You are to decide the case solely on the evidence received at the trial.[1]

2. State's proposed jury instructions p. 5:

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

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[1] *Manual of Model Criminal Jury Instructions for the District Courts of the Ninth Circuit*, Ninth Circuit Jury Instructions Committee (2010), Instructions 3.6 and 3.7 at pp. 40-41.

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

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

You should not be concerned with the type of evidence but rather the relative convincing force of the evidence. *Crane v. State*, 88 Nev. 684, 504 P.2d 12 (1972)

This proposed instruction starts off with a quote from the *Crane* instructions, but then adds self-serving verbiage which doesn't appear in the holding. Mr. Gonzalez suggests the actual language of the instructions, approved by the Nevada Supreme Court in their holding in *Crane*, is more appropriate to this case:

"There are two classes of evidence recognized and admitted in Courts of Justice, upon either of which juries may lawfully find the accused guilty of crime. One is direct or positive testimony of any eye witness to the commission of the crime, and the other is proof by testimony of a chain of circumstances pointing sufficiently strong to the commission of the crime by the defendants, and which is known as circumstantial evidence.

"Such evidence may consist of any acts, declarations or circumstances admitted in evidence tending to prove the commission of the crime.

"If you are satisfied of defendants' guilt beyond a reasonable doubt, it matters not whether your judgment of their guilt is based upon direct and positive evidence or on indirect and circumstantial evidence, or upon both."

"If the evidence in this case is susceptible of two constructions or interpretations, each of which appears to you to be reasonable, and one of which points to the guilt of the defendants, and the other to their innocence, it is your duty, under the law, to adopt that interpretation which will admit of the defendants' innocence, and reject that which points to their guilt.

"You will notice that this rule applies only when both of the two possible opposing conclusions appear to you to be reasonable. If, on the other hand, one of the possible conclusions should appear to you to be reasonable and the other to be unreasonable, it would be your duty to adhere to the reasonable deduction and to reject the unreasonable, bearing in mind, however, that even if the reasonable deduction points to defendants' guilt, the entire proof must carry the convincing force required by law to support a verdict of guilt."[2]

and to these instructions should be added this one:

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[2] *Crane v. State*, 88 Nev. 684, at 687, fn. 3 and 4, 504 P.2d 12 (1972). See also *Terrano v. State*, 59 Nev. 247, at 260, 91 P.2d 67 (1939) ("The court instructs the jury that if the jury finds facts established by the evidence beyond a reasonable doubt which may consistently lead to a theory of innocence as well as to a theory of guilt, you are bound to follow the theory of innocence and acquit the defendant.")

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

3. State's proposed jury instructions p. 7:

Every person charged with the commission of a crime shall be presumed innocent unless the contrary is proved by competent evidence, and the burden rests upon the prosecution to establish every element of the crime with which the defendant is charged beyond a reasonable doubt.

This proposed instruction on the presumption of innocence is only a part of the usual instruction. Consequently, there are a number of things left out entirely, like "reasonable doubt . . . that the Defendant is the person who committed the offense" and "If you have a reasonable doubt as to the guilt of the Defendant, he is entitled to a verdict of not guilty." The full instruction should look like this:

The Defendant is presumed innocent until the contrary is proved. This presumption places upon the State the burden of proving beyond a reasonable doubt every material element of the crime charged and that the Defendant is the person who committed the offense.

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

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[3] The jury instruction offered here is taken from the Legislative Counsel Bureau's annotations to NRS 48.025, citing to *Buchanan v. State*, 119 Nev. 201, at 217, 69 P.3d 694 (2003) ("Circumstantial evidence alone can certainly sustain a criminal conviction. However, to be sufficient, all the circumstances taken together must exclude to a moral certainty every hypothesis but the single one of guilt."); *Kinna v. State*, 84 Nev. 642, 646, 447 P.2d 32, 34 (1968) ("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. Snyder*, 41 Nev. 453, at 461, 172 P. 364 (1918) ("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. Fronhofer*, 38 Nev. 448, at 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.").

If you have a reasonable doubt as to the guilt of the Defendant, he is entitled to a verdict of not guilty.[4]

4. State's proposed jury instructions pp. 21-22:

Count II of the Third Information Supplementing Indictment charges both defendants as principles to the crime of a Challenge to Fight Resulting in Death. If you find that the State has proven the elements of that crime beyond a reasonable doubt, one or both of the defendants are guilty of Murder in the First Degree. The Challenge to Fight charge does not require the State to prove that the killing was perpetrated maliciously with premeditation or deliberation.

Count IX of the Third Information Supplementing Indictment charges ERNESTO MANUEL GONZALEZ with Murder of the First Degree under two alternative theories as allowed by law. Murder of the First Degree is murder which is perpetrated by means of lying in wait or committed maliciously with premeditation and deliberation. With respect to ERNESTO MANUEL GONZALEZ you must unanimously agree that the defendant is guilty of murder based upon one or more of the alternative theories of Challenge to fight, premeditated and deliberate murder and/or lying in wait. However, it is not necessary that you unanimously agree upon the specific theory by which the murder was committed.

In other words, if six of you agree that the defendant committed the murder by actually killing the victim with malice, premeditation and deliberation and three of you agree that the defendant committed the murder by lying in wait and three of you agree that the defendant committed the crime of Challenge to Fight Resulting in Death, GONZALEZ is guilty of first degree murder.

The elements of each of these two different alternative theories of murder are set forth elsewhere in these instructions.

This proposed instruction misstates the law. While the State may plead and argue alternative theories of liability in a single count,[5] without requiring jury unanimity on one of the alternative theories,[6] it has cited to no authority which permits a less than unanimous verdict reached by patching together different theories of liability contained in different counts and based on different statutory provisions.

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[4] *Bolin v. State*, 114 Nev. 503, at 530, 960 P.2d 784 (1998); *Evans v. State*, 112 Nev. 1172, at 1190-91, 926 P.2d 265 (1996); *Barone v. State*, 109 Nev. 778, at 780, 858 P.2d 27 (1993); *Lord v. State*, 107 Nev. 28, 806 P.2d 548 (1991); *Beets v. State*, 107 Nev. 957, at 963, 821 P.2d 1044 (1991).

[5] 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."

[6] *Schad v. Arizona*, 501 U.S. 624, at640-43 (1991); *Walker v. State*, 113 Nev. 853, at 870, 944 P.2d 762 (1997).

The State's change of theory at mid-trial, in which multiple counts become a single offense for purposes of jury consideration, violates the rule against multiplicity.[7]

> A multiplicitous indictment is "one charging the same offense in more than one count."[8] An indictment that charges a single offense in several counts violates the rule against multiplicity.[9] We have stated that "[t]he general test for multiplicity is that offenses are separate if each requires proof of an additional fact that the other does not."[10] It follows that " ' "[o]ffenses are . . . not multiplicitous when they occur at different times and different places, because they cannot then be said to arise out of a single wrongful act." ' "[11]

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

5. State's proposed jury instructions p. 23

> In regard to Count II of the Third Information Supplementing Indictment the State has alleged a Challenge to Fight Resulting in Death. The State has alleged that ERNESTO MANUEL GONZALEZ actually committed the killing as a result of a challenge to fight. The State alleged Murder of the First Degree in Count X[15] based upon a theory that the killing was done maliciously with premeditation, deliberation and/or by lying in wait, as allowed by law.
>
> In order to find ERNESTO MANUEL GONZALEZ guilty of murder of the first degree you must unanimously agree that the State proved beyond a reasonable doubt one

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[7] *Milanovich v. United States*, 365 U.S. 551 at 554-55 (1961).
[8] Citing to *United States v. Sue*, 586 F.2d 70, at 71 n.1 (8th Cir. 1978).
[9] Citing to *United States v. UCO Oil Co.*, 546 F.2d 833, 835 (9th Cir. 1976).
[10] *Gordon v. District Court*, 112 Nev. 216, 229, 913 P.2d 240, 249 (1996).
[11] *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).
[12] *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).
[13] *United States v. Reed*, 639 F.2d 896, 904 (2d Cir. 1981).
[14] See the State's proposed jury instruction at p. 23, discussed next in sequence.
[15] The State apparently means Count IX here, rather than X of the Third Information Supplementing Indictment, which charges conspiracy rather than "Murder of the First Degree."

or more of the alleged theories of liability. However, it is not necessary that you unanimously agree upon the specific theory by which the murder was committed.

In other words, if three of you agree that ERNESTO MANUEL GONZALEZ committed the murder resulting from a challenge to fight, and three of you agree that the defendant committed the killing with malice aforethought, deliberation and premeditation, and six of you agree that he lied in wait to commit the killing, then you may properly find ERNESTO MANUEL GONZALEZ guilty of Murder of the First Degree. *Schad v. Arizona*, 501 U.S.624 (1991)

This Instruction suffers from the same defects as the one discussed above, by confusing Counts II and VI.

6. State's proposed jury instructions p. 31:

Malice aforethought, as used in the definition of murder, means the intentional doing of a wrongful act without legal cause or excuse, or what the law considers adequate provocation. The condition of mind described as malice aforethought may arise, not alone from anger, hatred, revenge or from particular ill will, spite or grudge toward the person killed, but may also result from any unjustifiable or unlawful motive or purpose to injure another, which proceeds from a heart fatally bent on mischief, or with reckless disregard of consequences and social duty.

"Aforethought" does not imply deliberation or the lapse of considerable time. It only means the required mental state must precede rather than follow the act.

The second paragraph of this instruction misstates the law, and tends to lower the State's burden of proof. The first part of it is based on an instruction in *Kazalyn v. State*, ***but omits the element of unlawful purpose and design***:

"Malice aforethought does not imply deliberation or the lapse of any considerable time between the malicious intention to injure another and the actual execution of the intention ***but denotes rather an unlawful purpose and design in contradistinction to accident and mischance***."[16]

The second sentence of the paragraph glosses over the nature of the required mental state, which was misstated in the first sentence, as though there was no more to consider on the subject. This tends to mislead the jury, since there is more to the subject than the instruction discusses.

[16] 108 Nev. 67, at 76, 825 P.2d 578 (1992), citing to *Payne v. State*, 81 Nev. 503, at 508-09, 406 P.2d 922 (1965).

Kazalyn instructions were later disapproved by the Nevada Supreme Court[17] because of their under-emphasis of the deliberation factor, and the tendency to erase the distinction between first and second degree murder – a defect shared by this proposed instruction.

7. State's proposed jury instructions p. 32:

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

This proposed instruction skips over the intent requirements to prove the crime, avoids stating any theory of Mr. Gonzalez's committing second degree murder, and omits every element of the crime as charged in this case. Since the State's charging language in Count V of the Fourth Amended Information is both confused and confusing, the State has an obligation to the jury to clarify it. It certainly isn't for Mr. Gonzalez or this Court to guess what the prosecutor had in mind when the count was drafted.

8. State's proposed jury instructions p. 35:

> Manslaughter is the unlawful killing of a human being without malice express or implied, and without a mixture of deliberation. Manslaughter ***may*** be voluntary, upon a sudden heat of passion, caused by a provocation apparently sufficient to make the passion irresistible; or, involuntary, in the commission of the unlawful act, or a lawful act without due caution or circumspection.
> NRS 200.040

This proposed instruction misstates NRS 200.040(2), which uses the mandatory word "***must***" instead of the permissive "may."

9. State's proposed jury instructions p. 36:

> In cases of voluntary manslaughter, there must be a serious and highly provoking injury inflicted upon the person killing, sufficient to excite an irresistible passion in a reasonable person, or an attempt by the person killed to commit a serious personal injury on the person killing.
>
> The killing must be the result of that sudden, violent impulse of passion supposed to be irresistible, for, if there should appear to have been an interval between the assault or provocation given for the killing, sufficient for the voice of reason and humanity to be heard, the killing shall be attributed to deliberate revenge and punished as murder. NRS 200.050; NRS 200.060

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[17] See *Byford v. State*, 116 Nev. 215, at 234-37, 994 P.2d 700 (2000).

Since there is no evidence that Mr. Pettigrew inflicted "a serious and highly provoking injury" upon Mr. Gonzalez, "sufficient to excite an irresistible passion in a reasonable person, or an attempt by the person killed to commit a serious personal injury on the person killing," it is difficult to see why this proposed instruction has been included, other than that it would tend to inflame the jury against Mr. Gonzalez by emphasizing a supposed lack of provocation.

10. State's proposed jury instructions pp. 40-41:

> The Third Information supplementing the Indictment in Count IX (now Count VI in the Fourth Amended Information) charges ERNESTO MANUEL GONZALES with Murder which includes the offense of Murder in the First Degree and also necessarily includes the lesser included offenses of Murder in the Second Degree, Voluntary Manslaughter and Involuntary Manslaughter.
>
> The defendant may only be convicted of one of these offenses.
>
> You should first examine the evidence as it applies to Murder in the First degree. If you unanimously agree that the defendant is guilty of Murder in the First Degree, you should sign the appropriate Verdict form and request the bailiff to return you to court.
>
> If you can not agree that the defendant is guilty of Murder in the First Degree, you should then examine the evidence as it applies to Murder in the Second Degree. If you unanimously agree that the defendant is guilty of Murder in the Second Degree, you should sign the appropriate Verdict form and ask the bailiff to return you to court.
>
> If you can not unanimously agree that the defendant is guilty of Murder in the Second Degree, then you should examine the evidence as it applies to Voluntary Manslaughter. If you unanimously agree that the defendant is guilty of the crime of Voluntary Manslaughter, you should sign the appropriate Verdict form and request the bailiff to return you to court.
>
> If you can not unanimously agree that the defendant is guilty of Voluntary Manslaughter, then you should examine the evidence as it applies to Involuntary Manslaughter. If you unanimously agree that the defendant is guilty of the crime of Involuntary Manslaughter, you should sign the appropriate Verdict form and request the bailiff to return you to court.
>
> The defendant, of course, can be found Not Guilty of all the offenses enumerated. *Green v. State*, 119 Nev. 542 (2003)

The phrasing of this lengthy proposed "transition instruction" overemphasizes the importance of a conviction of the defendant. The idea that the jury might "of course" find the defendant not guilty appears only at the end of the instruction, as though it was an afterthought. This phrasing suggests that the Court believes the defendant should be convicted of something, with acquittal only as a last resort. To avoid interfering with the jury's deliberations, Mr. Gonzalez suggests this instruction, based on the

decision in *State v. LeBlanc*, 924 P.2d 441, at 442 (Ariz. 1996), cited to in the State's authority, *Green v. State*, 119 Nev. 542, at 546, 80 P.3d 93 (2003):

> The Information in this case charges Open Murder, which includes the offense of Murder in the First Degree and also necessarily includes the lesser included offenses of Murder in the Second Degree, and Involuntary Manslaughter.
>
> The defendant may only be convicted of one of these offenses. You may find him not guilty of any or all of them.
>
> The jury may deliberate on a lesser offense if it either (1) finds the defendant not guilty on the greater charge, or (2) after reasonable efforts cannot agree whether to acquit or convict on that charge.
>
> You cannot find the defendant guilty of the lesser offense unless you find that the State has proved each element of the lesser offense beyond a reasonable doubt.

The *Standard Arizona Criminal Jury Instructions*[18] (No. 22) phrase their "transition instructions" this way, which is both fairly and concisely stated:

> The crime of [_____] includes the lesser offense of [_____]. You may consider the lesser offense of [_____] if either
>
> 1. you find the defendant not guilty of [insert the greater offense]; or
>
> 2. after full and careful consideration of the facts, you cannot agree on whether to find the defendant guilty or not guilty of [insert the greater offense].
>
> You cannot find the defendant guilty of [insert the lesser offense] unless you find that the State has proved each element of [insert the lesser offense] beyond a reasonable doubt.

11. State's proposed jury instructions p. 48:

> If you find that there was a challenge to fight issued and accepted between the Hells Angels and the Vagos, and that the parties voluntarily entered into mutual combat with the deceased, knowing, or having reason to believe, that it would or probably may result in the death or serious bodily injury to himself or to the deceased, defendant cannot claim self-defense or defense of others. *Wilmeth v. State*, 96 Nev. 403, 610 P.2d 735 (1980).

This proposed instruction is a misstatement of NRS 200.450, which applies to individuals persons, and not to groups. This is obvious from the common law meaning of the term "challenge to fight": "A challenge to fight is a summons or invitation, given by one person to another, to engage in a

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[18] *Standard Arizona Criminal Jury Instructions* (2008), p. 26, available online at http://www.azbar.org/media/58832/standard_criminal_instr.pdf

personal combat; a request to fight a duel. A criminal offense."[19] This meaning is also clear from the language of the statute itself, which refers to "a person" rather than collective challenges from one group to another, and is directed only against the persons giving, sending, receiving or accepting the personal challenge:

> **NRS 200.450 Challenges to fight; penalties.**
>
> 1. If a person, upon previous concert and agreement, fights with any other person or gives, sends or authorizes any other person to give or send a challenge verbally or in writing to fight any other person, the person giving, sending or accepting the challenge to fight any other person shall be punished:
>
> (a) If the fight does not involve the use of a deadly weapon, for a gross misdemeanor; or
>
> (b) If the fight involves the use of a deadly weapon, for a category B felony by imprisonment in the state prison for a minimum term of not less than 1 year and a maximum term of not more than 6 years, and may be further punished by a fine of not more than $5,000.
>
> 2. A person who acts for another in giving, sending, or accepting, either verbally or in writing, a challenge to fight any other person shall be punished:
>
> (a) If the fight does not involve the use of a deadly weapon, for a gross misdemeanor; or
>
> (b) If the fight involves the use of a deadly weapon, for a category B felony by imprisonment in the state prison for a minimum term of not less than 1 year and a maximum term of not more than 6 years, and may be further punished by a fine of not more than $5,000.
>
> 3. Should death ensue to a person in such a fight, or should a person die from any injuries received in such a fight, the person causing or having any agency in causing the death, either by fighting or by giving or sending for himself or herself or for any other person, or in receiving for himself or herself or for any other 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.
>
> [1911 C&P § 161; RL § 6426; NCL § 10108]—(NRS A 1967, 472; 1977, 884; 1979, 1426; 1995, 1189; 1999, 2)

This meaning is emphasized by the fact that every reported Nevada case dealing with this statute or its predecessor statutes have involved one-on-one mutual combat situations between individuals.[20] Even assuming the statutory language and the limited application in case law is

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[19] *Black's Law Dictionary*, [unabridged, 1968] p. 291, citing to *Steph. Crim. Dig.* 40; 3 *East*, 581; *State v. Perkins*, 6 Blackf. (Ind.) 20.

[20] *Wilmeth v. State*, 96 Nev. 403, at 405-06, 610 P.2d 735 (1980) ("The statute proscribes the conveyance or acceptance of a challenge to fight when such a fight or confrontation results. . . . Criminal responsibility in the context of this case is

somehow vague – and it isn't – the legislative intent underlying the statute was to prohibit individual combat pursuant to a personal challenge.

This point is obvious from a review of the previous versions of NRS 200.450, which were statutes for the suppression of the practice of personal dueling. Here is the first set of statutes enacted by the Territorial Legislature, from An Act concerning crimes and punishments, approved November 26, 1863:

> **Dueling.**
> 4689. SEC. 35. If any person shall, by previous appointment or agreement, fight a duel with a rifle, shotgun, pistol, bowie knife, dirk, smallsword, backsword, or other dangerous weapon, and in so doing shall kill his antagonist, or any person or persons, or shall inflict such wound as that the party or parties injured shall die thereof within one year thereafter, every such offender shall be deemed guilty of murder in the first degree, and upon conviction thereof shall be punished accordingly.
> **Disfranchised, When.**
> 4690. SEC. 36. Any person who shall engage in a duel with any deadly weapon, although no homicide ensue, or shall challenge another to fight such duel, or shall send or deliver any verbal or written message purporting or intending to be such challenge, although no duel ensue, shall be punished by imprisonment in the state prison not less than two nor more than ten years, and shall be incapable of voting or holding any office of trust or profit under the laws of this state.
> **Competent Witness.**
> 4691. SEC. 37. Any and every person who shall be present at the time of fighting any duel with deadly weapons, either as second, aid, surgeon, or spectator, or who shall advise or give assistance to such duel, shall be a competent witness against any person offending against any of the provisions of this Act, and may be compelled to appear and give evidence before any Justice of the Peace, grand jury, or court, in the same manner as other witnesses; but the testimony so given shall not be used in any prosecution or proceeding, civil or criminal, against the person so testifying.
> **Posting for Not Fighting.**
> 4692. SEC. 38. If any person shall post another, or, in writing, or print, or orally shall use any reproachful or contemptuous language to, or concerning another, for not fighting a duel, or for not sending or accepting a challenge, he shall he imprisoned in the state prison for a term not less than six months nor more than one year, and fined in any sum not less than five hundred nor exceeding one thousand dollars.

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predicated upon the issuance or acceptance of a challenge to fight and upon the fact that some fights occur."); *State v. Grimmett*, 33 Nev. 531, at 533-34, 112 P. 273 (1910) (no challenge or acceptance under the circumstances of the case); *Ex parte Finlen*, 20 Nev. 141, at 154, 18 P. 827 (1888) ("Before petitioner can bring this case within the influence of the statute under consideration, in this proceeding, it must appear by the evidence, without material conflict — first, that there was a previous agreement between himself and the deceased to fight; and, second, that each did fight the other.")

Penalty for Dueling—Acting as Second—Deemed Manslaughter.

4693. SEC. 39. If any person or persons, with or without deadly weapons, upon previous concert and agreement, fight one with the other, or give or send, or authorize any other person to give or send, a challenge, verbally or in writing, to fight any other person, the person or persons giving, sending, or accepting a challenge to fight any other person, with or without weapons, upon conviction thereof shall be punished by imprisonment in the state prison not less than two years, or more than five years; and every person who shall act for another in giving, sending, or accepting, either verbally or in writing, a challenge, to fight any other person, upon conviction thereof they, or either or any of them, shall be punished by imprisonment in the state prison not less than two years or more than five years. Should death ensue to any person in such fight, or should any person die from any injuries received in such fight within one year and one day, the person or persons causing, or having any agency in causing such death, either by fighting or by giving or sending for himself, or for any other person, or in receiving for himself, or for any other person, such challenge to fight, shall be deemed guilty of manslaughter, and punished accordingly. As amended, Stats. 1877, 75.[21]

This was the statute that caused Samuel Clemens ("Mark Twain") to flee Nevada in 1864, after he challenged a Virginia City newspaper editor to personal combat in a duel.[22]

The Statute was renumbered in 1911, but not substantially changed in form or meaning:

6422. Dueling—Death by deemed murder.

SEC. 157. If any person shall, by previous appointment or agreement, fight a duel with a rifle, shotgun, pistol, bowie knife, dirk, smallsword, backsword, or other dangerous weapon, and in so doing shall kill his antagonist, or any person or persons, or shall inflict such wound as that the party or parties injured shall die thereof within one year thereafter, every such offender shall be deemed guilty of murder in the first degree, and upon conviction thereof shall be punished accordingly.

See sec. 2823.

6423. Disfranchisement for dueling.

SEC. 158. Any person who shall engage in a duel with, any deadly weapon, although no homicide ensue, or shall challenge another to fight such duel, or shall send or deliver any verbal or written message purporting or intending to be such challenge, although no duel ensue, shall be punished by imprisonment in the state prison not less than two nor more

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[21] *General statutes of the state of Nevada, in force from 1861 to 1885, Inclusive* (1886), secs 4598-4602, pp. 1020-21; *Compiled laws of Nevada in force from 1861 to 1900* (1901), p. 914.

[22] "By breakfast-time the news was all over town that I had sent a challenge and Steve Gillis had carried it. Now that would entitle us to two years apiece in the penitentiary, according to the brand-new law. Judge [John Wesley] North sent us no message as coming from himself, but a message *came* from a close friend of his. He said it would be a good idea for us to leave the territory by the first stage-coach. This would sail next morning, at four o'clock—and in the meantime we would be searched for, but not with avidity; and if we were in the Territory after that stage-coach left, we would be the first victims of the new law. Judge North was anxious to have some object-lessons for that law, and he would absolutely keep us in the prison the full two years." (from Mark Twain's "Chapters From My Autobiography", *North American Review*, December 21, 1906)

than ten years, and shall be incapable of voting or holding any office of trust or profit under the laws of this state.

See secs. 250, 370, 371.

6424. Competent witness in trial for dueling.

SEC. 159. Any and every person who shall be present at the time of fighting any duel with deadly weapons, either as second, aid, surgeon, or spectator, or who shall advise or give assistance to such duel, shall be a competent witness against any person offending against any of the provisions of section 157 or 158, and may be compelled to appear and give evidence before any justice of the peace, grand jury, or court, in the same manner as other witnesses; but the testimony so given shall not be used in any prosecution or proceeding, civil or criminal, against the person so testifying.

6425. Posting—for not fighting duel, penalty.

SEC. 160. If any person shall post another, or, in writing, or print, or orally shall use any reproachful or contemptuous language to, or concerning another, for not fighting a duel, or for not sending or accepting a challenge, he shall be imprisoned in the state prison for a term not less than six months nor more than one year, and fined in any sum not less than five hundred nor exceeding one thousand dollars.

6426. Penalty for dueling—Acting as second Deemed manslaughter.

SEC. 161. If any person or persons, with or without deadly weapons, upon previous concert and agreement, fight one with the other or give or send, or authorize any other person to give or send, a challenge verbally or in writing, to fight any other person, the person or persons giving, sending or accepting a challenge to fight any other person, with or without weapons, upon conviction thereof shall be punished by imprisonment in the state prison not less than two years, or more than five years; and every person who shall act for another in giving, sending, or accepting, either verbally or in writing, a challenge, to fight any other person, upon conviction thereof they, or either, or any of them, shall be punished by imprisonment in the state prison not less than two years or more than five years. Should death ensue to any person in such fight, or should any person die from any injuries received in such fight within one year and one day, the person or persons causing, or having any agency in causing such death, either by fighting or by giving or sending for himself, or for any other person, or in receiving for himself, or for any other person, such challenge to fight, shall be deemed guilty of manslaughter, and punished accordingly. *Ex Parte Finlen*, 20 Nev. 141 (1888).[23]

Even assuming, without conceding, that NRS 200.450 is vague as to its ambit and the underlying legislative intent, the fact that no reported case has construed it as broadly as the State now urges, requires strict construction of the statute pursuant to the rule of lenity.[24]

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[23] *Revised Nevada statutes of 1912 vol. 2*, pp. 1840-41.

[24] *State v. Lucero*, 127 Nev. Adv. Op. No. 7, at p. 7, 249 P.3d 1226, at 1228 (2011); *Moore v. State*, 122 Nev. at 32, 126 P.3d at 511 (2006) ("Unless a statute is ambiguous, we attribute the plain meaning to the statute's language. "An ambiguity arises where the statutory language lends itself to two or more reasonable interpretations." Where a statute is deemed ambiguous, the Legislature's intent controls. "We look to reason and public policy to discern legislative intent." Finally, the rule of lenity demands that ambiguities in criminal statutes be liberally interpreted in the accused's favor." [numerous citations omitted].)

12. State's proposed jury instructions p. 48:

> Evidence that the defendant, Ernesto Manuel Gonzalez fled the scene immediately after the commission of a crime to evade arrest supports an inference of consciousness of guilt. *Rosky v. State*, 121 Nev. 184, P.3d 690, 699-700 (2005).

This statement is not a quote from the *Rosky* case, nor is it a jury instruction. It's not even a particularly accurate statement of the law, since it omits the requirements for such an instruction. Under Nevada law, a district court may properly give a flight instruction if the State presents evidence of flight and the record supports the conclusion that the defendant fled with consciousness of guilt and to evade arrest. Here is a proper jury instruction on flight, approved by the Nevada Supreme Court and cited to in the *Rosky* case:

> The flight of a person after the commission of a crime is not sufficient in itself to establish guilt; however, if flight is proved, it is circumstantial evidence in determining guilt or innocence.
>
> The essence of flight embodies the idea of deliberately going away with consciousness of guilt and for the purpose of avoiding apprehension or prosecution. The weight to which such circumstance is entitled is a matter for the jury to determine.[25]

13. State's proposed jury instructions p. 53:

> "To the jury alone belongs the duty of weighing the evidence and determining the credibility of the witnesses. The degree of credit due a witness should be determined by his or her character, conduct, manner upon the stand, fears, bias, impartiality, reasonableness or unreasonableness of the statements he or she makes, and the strength or weakness of his or her recollections, viewed in the light of all the other facts in evidence.
>
> ***If the jury believes that any witness has willfully sworn falsely, they may disregard the whole of the evidence of any such witness.***"

The second paragraph of this instruction misstates the law, because it has omitted the factors of materiality and corroboration. In place of that paragraph, the instruction should read:

> "You are further instructed that if the jury believe from the evidence that any witness has willfully sworn falsely on this trial as to any matter or thing ***material to the issues in this case***, then the jury are at liberty to disregard his entire testimony,

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[25] *Walker v. State*, 113 Nev. 853, at 870 fn. 4, 944 P.2d 762 (1997).

except in so far as it has been corroborated by other credible evidence, or by facts or circumstances proved on the trial."[26]

or "If you believe that a witness has lied about any ***material fact*** in the case, you may disregard the entire testimony of that witness or any portion of his testimony ***which is not proved by other evidence.***"[27]

14. State's proposed jury instructions p. 54:

"***Inconsistencies or discrepancies in the testimony of a witness***, or between the testimony of different witnesses, may or may not cause the jury to discredit such testimony. Two or more persons witnessing an incident or transaction may see or hear it differently; ***an innocent misrecollection***, like failure to recollect, is not an uncommon experience. In weighing the affect of a discrepancy, ***consider whether it pertains to a matter of importance***, or an unimportant detail, and whether the discrepancy results from ***innocent error or willful falsehood***."

This proposed instruction is basically an attempt to guide the jury on their assessment of the credibility of witnesses – a matter which is left solely to the jury's unfettered discretion to determine. The rule is, when there is conflicting testimony presented, ***it is for the jury to determine what weight and credibility to give to the testimony.***[28] The usual instruction reads:

> In deciding the facts in this case, you may have to decide which testimony to believe and which testimony not to believe. You may believe everything a witness says, or part of it, or none of it.
>
> In considering the testimony of any witness, you may take into account:
>
> (1) the witness's opportunity and ability to see or hear or know the things testified to;
>
> (2) the witness's memory;
>
> (3) the witness's manner while testifying;
>
> (4) the witness's interest in the outcome of the case, if any;
>
> (5) the witness's bias or prejudice, if any;
>
> (6) whether other evidence contradicted the witness's testimony;
>
> (7) the reasonableness of the witness's testimony in light of all the evidence; and
>
> (8) any other factors that bear on believability.

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[26] *State v. Burns*, 27 Nev. 289, at 293, 74 Pac. 983 (1904).

[27] *Barron v. State*, 105 Nev. 767, at 775 fn. 3, 783 P.2d 444 (1989).

[28] *McNair v. State*, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992) ("it is the jury's function, not that of the court, to assess the weight of the evidence and determine the credibility of witnesses."); see also *Lay v. State*, 110 Nev. 1189, 1192, 886 P.2d 448, 450 (1994) ("[I]t is exclusively within the province of the trier of fact to weigh evidence and pass on the credibility of witnesses and their testimony.").

The weight of the evidence as to a fact does not necessarily depend on the number of witnesses who testify about it. [29]

15. State's proposed jury instructions p. 55:

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

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

The opinions of experts are to be considered by you in connection with all other evidence in the case. The same rules apply to expert witnesses that apply to other witnesses in determining the weight or value of such testimony. NRS 50.275. *State v. Bourdlais*, 70 Nev. 233, 253, 254 (1954); *State v. Watts*, 52 Nev. 453, 474 (1930)

This proposed instruction doesn't match the language of the instruction given in the cases cited to by the State. Mr. Gonzalez prefers the original wording of the instruction used in those cases:

While you are not bound by the testimony of expert witnesses, still, in considering such testimony, the professional standard and experience of such witnesses must be taken into consideration in arriving at a verdict; and you should consider the character, the capacity, the skill, the opportunities for observation, the state of mind of the expert, the nature of the case and all its developed facts. The opinions of experts are to be considered by you in connection with all other evidence in the case. You are not to act upon them to the exclusion of other testimony. You are to apply the same rules to the testimony of experts that are applicable to other witnesses in determining its weight. Taking into consideration the opinions of experts and giving them just weight, you are to determine for yourselves from the whole evidence whether the defendant is guilty as he stands charged beyond a reasonable doubt.[30]

16. State's proposed jury instructions p. 57:

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

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[29] *Manual of Model Criminal Jury Instructions for the District Courts of the Ninth Circuit*, Ninth Circuit Jury Instructions Committee (2010), Instruction 3.9, at p. 43.

[30] *State v. Bourdlais*, 70 Nev. 233, at 254-55, 265 P.2d 761 (1954); citing to the instruction quoted in *State v. Watts*, 52 Nev. 453, at 474, 290 P. 732 (1930).

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

The second paragraph of this instruction misstates the law and should be stricken. The correct statement is: "A verdict may never be influenced by prejudice or public opinion."[31] An anti-sympathy instruction is only appropriate once a defendant has been convicted and there is no longer a presumption of innocence. If Mr. Gonzalez ***were already convicted and the proceedings had reached the penalty phase***, the Nevada Supreme Court has approved this language:

> [T]he jury's verdict "may never be influenced by sympathy, prejudice or public opinion" but "should be the product of sincere judgment and sound discretion in accordance with these rules of law." This court has upheld such instruction ***where***, as here, ***the jury was properly instructed to consider any mitigating evidence***.[32]

17. State's proposed jury instructions p. 58:

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

This is a garbled part, and only part, of an *Allen* charge which is given to the jury when it appears hopelessly deadlocked. If this instruction is given at all, it should only be when the jury appears to be deadlocked, and the instruction should be given in full, not just a garbled part of it. The approved instruction, to be given when and if the jury is apparently deadlocked, is:

> "The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto. Your verdict must be unanimous."
>
> "It is your duty, as jurors, to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an

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[31] *Johnson v. State*, 122 Nev. 1344, at 1356, 148 P.3d 767 (2006), cert. denied, 128 S.Ct. 1061 (2008).
[32] *Leonard v. State*, 117 Nev. 53, at 79, 17 P.3d 397 (2001); *Wesley v. State*, 112 Nev. 503, at 519, 916 P.2d 793, 803-04 (1996).

impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views and change your opinion if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict."

"You are not partisans. You are judges—judges of the facts. Your sole interest is to ascertain the truth from the evidence in the case."[33]

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 ___ day of August, 2013.

DAVID R. HOUSTON, ESQ.
Nevada Bar No. 2131
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Reno, Nevada 89501
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[33] *Staude v. State*, 112 Nev. 1, at 6 fn. 1, 908 P.2d 1373 (1996); *Wilkins v. State*, 96 Nev. 367, 373-74 n.2, 609 P.2d 309, 313 n.2 (1980) (quoting *ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Trial by Jury*, Commentary to § 5.4 (1968)).

Exhibit 8

Exhibit 8

CODE:
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LAW OFFICE OF DAVID R. HOUSTON
432 Court Street
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(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,

vs.

ERNESTO MANUEL GONZALEZ (B),

Defendant.

Case No. CR11-1718

Dept. No. 4

/

DEFENDANT GONZALEZ'S PROPOSED JURY INSTRUCTIONS

* * * * *

Defendant Ernesto Manuel Gonzalez respectfully submits his proposed jury instructions for use in this case, pursuant to the Court's scheduling Order. He asks leave to amend, correct or supplement them, based on the facts and circumstances which may come to light during the trial of this matter.

///

///

There are two classes of evidence recognized and admitted in Courts of Justice, upon either of which juries may lawfully find the accused guilty of crime. One is direct or positive testimony of any eye witness to the commission of the crime, and the other is proof by testimony of a chain of circumstances pointing sufficiently strong to the commission of the crime by the defendants, and which is known as circumstantial evidence.

Such evidence may consist of any acts, declarations or circumstances admitted in evidence tending to prove the commission of the crime.

If you are satisfied of defendants' guilt beyond a reasonable doubt, it matters not whether your judgment of their guilt is based upon direct and positive evidence or on indirect and circumstantial evidence, or upon both.

Crane v. State, 88 Nev. 684, at 687, fn. 3 and 4, 504 P.2d 12 (1972).

Instruction No. _____

5361

There are two classes of evidence recognized and admitted in Courts of Justice, upon either of which juries may lawfully find the accused guilty of crime. One is direct or positive testimony of any eye witness to the commission of the crime, and the other is proof by testimony of a chain of circumstances pointing sufficiently strong to the commission of the crime by the defendants, and which is known as circumstantial evidence.

Such evidence may consist of any acts, declarations or circumstances admitted in evidence tending to prove the commission of the crime.

If you are satisfied of defendants' guilt beyond a reasonable doubt, it matters not whether your judgment of their guilt is based upon direct and positive evidence or on indirect and circumstantial evidence, or upon both.

Instruction No. _____

5362

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

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

Powell v. State, 113 Nev. 258, at 262 fn. 6, 934 P.2d 224 (1997).

Instruction No. _____

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

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

Instruction No. _____

5364

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

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

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

Instruction No. _____

5365

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

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

Instruction No. _____

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

Legislative Counsel Bureau's annotations to NRS 48.025, citing to *Buchanan v. State*, 119 Nev. 201, at 217, 69 P.3d 694 (2003) ("Circumstantial evidence alone can certainly sustain a criminal conviction. However, to be sufficient, all the circumstances taken together must exclude to a moral certainty every hypothesis but the single one of guilt."); *Kinna v. State*, 84 Nev. 642, 646, 447 P.2d 32, 34 (1968) ("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. Snyder*, 41 Nev. 453, at 461, 172 P. 364 (1918) ("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. Fronhofer*, 38 Nev. 448, at 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.").

Instruction No. _____

5367

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

Instruction No. _____

To the jury alone belongs the duty of weighing the evidence and determining the credibility of the witnesses. The degree of credit due a witness should be determined by his or her character, conduct, manner upon the stand, fears, bias, impartiality, reasonableness or unreasonableness of the statements he or she makes, and the strength or weakness of his or her recollections, viewed in the light of all the other facts in evidence.

You are further instructed that if the jury believe from the evidence that any witness has willfully sworn falsely on this trial as to any matter or thing material to the issues in this case, then the jury are at liberty to disregard his entire testimony, except in so far as it has been corroborated by other credible evidence, or by facts or circumstances proved on the trial.

State v. Burns, 27 Nev. 289, at 293, 74 Pac. 983 (1904).

Instruction No. _____

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You are further instructed that if the jury believe from the evidence that any witness has willfully sworn falsely on this trial as to any matter or thing material to the issues in this case, then the jury are at liberty to disregard his entire testimony, except in so far as it has been corroborated by other credible evidence, or by facts or circumstances proved on the trial.

Instruction No. _____

While you are not bound by the testimony of expert witnesses, still, in considering such testimony, the professional standard and experience of such witnesses must be taken into consideration in arriving at a verdict; and you should consider the character, the capacity, the skill, the opportunities for observation, the state of mind of the expert, the nature of the case and all its developed facts. The opinions of experts are to be considered by you in connection with all other evidence in the case. You are not to act upon them to the exclusion of other testimony. You are to apply the same rules to the testimony of experts that are applicable to other witnesses in determining its weight. Taking into consideration the opinions of experts and giving them just weight, you are to determine for yourselves from the whole evidence whether the defendant is guilty as he stands charged beyond a reasonable doubt.

State v. Bourdlais, 70 Nev. 233, at 254-55, 265 P.2d 761 (1954); citing to the instruction quoted in *State v. Watts*, 52 Nev. 453, at 474, 290 P. 732 (1930).

Instruction No. _____

While you are not bound by the testimony of expert witnesses, still, in considering such testimony, the professional standard and experience of such witnesses must be taken into consideration in arriving at a verdict; and you should consider the character, the capacity, the skill, the opportunities for observation, the state of mind of the expert, the nature of the case and all its developed facts. The opinions of experts are to be considered by you in connection with all other evidence in the case. You are not to act upon them to the exclusion of other testimony. You are to apply the same rules to the testimony of experts that are applicable to other witnesses in determining its weight. Taking into consideration the opinions of experts and giving them just weight, you are to determine for yourselves from the whole evidence whether the defendant is guilty as he stands charged beyond a reasonable doubt.

Instruction No. _____

Witnesses were allowed to testify as experts and to give opinions. You must consider the opinions, but you are not required to accept them as true or correct. The meaning and importance of any opinion are for you to decide. In evaluating the believability of an expert witness, follow the instructions about the believability of witnesses generally. In addition, consider the expert's knowledge, skill, experience, training, and education, the reasons the expert gave for any opinion, and the facts or information on which the expert relied in reaching that opinion. You must decide whether information on which the expert relied was true and accurate. You may disregard any opinion that you find unbelievable, unreasonable, or unsupported by the evidence.

An expert witness may be asked a hypothetical question. A hypothetical question asks the witness to assume certain facts are true and to give an opinion based on the assumed facts. It is up to you to decide whether an assumed fact has been proved. If you conclude that an assumed fact is not true, consider the effect of the expert's reliance on that fact in evaluating the expert's opinion.

If the expert witnesses disagreed with one another, you should weigh each opinion against the others. You should examine the reasons given for each opinion and the facts or other matters on which each witness relied. You may also compare the experts' qualifications.

Judicial Council of California Criminal Jury Instructions [CALCRIM] (2012), Instruction No. 332 available online at http://www.courts.ca.gov/partners/documents/calcrim_juryins.pdf

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An expert witness may be asked a hypothetical question. A hypothetical question asks the witness to assume certain facts are true and to give an opinion based on the assumed facts. It is up to you to decide whether an assumed fact has been proved. If you conclude that an assumed fact is not true, consider the effect of the expert's reliance on that fact in evaluating the expert's opinion.

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Instruction No. _____

If the evidence in this case is susceptible of two constructions or interpretations, each of which appears to you to be reasonable, and one of which points to the guilt of the defendants, and the other to their innocence, it is your duty, under the law, to adopt that interpretation which will admit of the defendants' innocence, and reject that which points to their guilt.

You will notice that this rule applies only when both of the two possible opposing conclusions appear to you to be reasonable. If, on the other hand, one of the possible conclusions should appear to you to be reasonable and the other to be unreasonable, it would be your duty to adhere to the reasonable deduction and to reject the unreasonable, bearing in mind, however, that even if the reasonable deduction points to defendants' guilt, the entire proof must carry the convincing force required by law to support a verdict of guilt.

Crane v. State, 88 Nev. 684, at 687, fn. 3 and 4, 504 P.2d 12 (1972). See also *Terrano v. State*, 59 Nev. 247, at 260, 91 P.2d 67 (1939) ("The court instructs the jury that if the jury finds facts established by the evidence beyond a reasonable doubt which may consistently lead to a theory of innocence as well as to a theory of guilt, you are bound to follow the theory of innocence and acquit the defendant.")

Instruction No. _____

If the evidence in this case is susceptible of two constructions or interpretations, each of which appears to you to be reasonable, and one of which points to the guilt of the defendants, and the other to their innocence, it is your duty, under the law, to adopt that interpretation which will admit of the defendants' innocence, and reject that which points to their guilt.

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Instruction No. _____

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

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

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

Instruction No. _____

5377

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

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

Instruction No. _____

You have heard testimony from _____, a witness who had criminal charges pending against him. If you believe that testimony was given in the expectation that he would receive favored treatment from the government in connection with his case, you should consider the extent to which or whether his testimony may have been influenced by this factor. In addition, you should examine the testimony of _____ with greater caution than that of other witnesses.

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Instruction No. _____

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Instruction No. _____

A person who engages in mutual combat or who starts a fight has a right to self-defense only if:

1. He actually and in good faith tried to stop fighting;

AND

2. He indicated, by word or by conduct, to his opponent, in a way that a reasonable person would understand, that he wanted to stop fighting and that he had stopped fighting;

AND

3. If the fight was mutual combat, he gave his opponent a chance to stop fighting.

If the defendant meets these requirements, he then had a right to self-defense if the opponent continued to fight.

However, if the defendant used only non-deadly force, and the opponent responded with such sudden and deadly force that the defendant could not withdraw from the fight, then the defendant had the right to defend himself with deadly force and was not required to try to stop fighting, or communicate the desire to stop to the opponent, or give the opponent a chance to stop fighting.

A fight is mutual combat when it began or continued by mutual consent or agreement. That agreement may be expressly stated or implied and must occur before the claim to self-defense arose.

Judicial Council of California Criminal Jury Instructions [CALCRIM] (2012), Instruction No. 3471, available online at http://www.courts.ca.gov/partners/documents/calcrim_juryins.pdf

Instruction No. _____

A person who engages in mutual combat or who starts a fight has a right to self-defense only if:

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AND

2. He indicated, by word or by conduct, to his opponent, in a way that a reasonable person would understand, that he wanted to stop fighting and that he had stopped fighting;

AND

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A fight is mutual combat when it began or continued by mutual consent or agreement. That agreement may be expressly stated or implied and must occur before the claim to self-defense arose.

Instruction No. _____

The right to use force in self-defense or defense of another continues only as long as the danger exists or reasonably appears to exist. When the attacker withdraws or no longer appears capable of inflicting any injury, then the right to use force ends.

Judicial Council of California Criminal Jury Instructions [CALCRIM] (2012), Instruction No. 3474, available online at http://www.courts.ca.gov/partners/documents/calcrim_juryins.pdf

Instruction No. _____

The right to use force in self-defense or defense of another continues only as long as the danger exists or reasonably appears to exist. When the attacker withdraws or no longer appears capable of inflicting any injury, then the right to use force ends.

Instruction No. _____

The defendant is charged in Counts I (Conspiracy to Engage in an Affray), II (Challenge to Fight Resulting in Death), IX (Murder with a Deadly Weapon), and X (Conspiracy to Commit Murder) with participation in a Conspiracy.

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

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

Bolden v. State, 121 Nev. 908, at 912-13, 124 P.3d 191 (2005); *Nunnery v. District Court*, 124 Nev. 477, at 480-81, 186 P.3d 886 (2008).

Instruction No. _____

5385

The defendant is charged in Counts I (Conspiracy to Engage in an Affray), II (Challenge to Fight Resulting in Death), IX (Murder with a Deadly Weapon), and X (Conspiracy to Commit Murder) with participation in a Conspiracy.

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

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

Instruction No. _____

As charged in this case, the elements which the State must prove are:

1. Two or more persons;

2. An agreement between them;

3. To accomplish a specific purpose or object;

AND

4. That purpose or object is unlawful.

Bolden v. State, 121 Nev. 908, at 912-13, 124 P.3d 191 (2005); *Nunnery v. District Court*, 124 Nev. 477, at 480-81, 186 P.3d 886 (2008).

Instruction No. _____

5387

As charged in this case, the elements which the State must prove are:

1. Two or more persons;

2. An agreement between them;

3. To accomplish a specific purpose or object;

AND

4. That purpose or object is unlawful.

Instruction No. _____

5388

The object of the conspiracy alleged in Count I is the commission of an affray. The alleged conspirators are the defendant, Messrs. Rudnick, Pettigrew and Villagrana, and/or their respective gang members.

The object of the conspiracy alleged in Count II is to commit the offense of challenge to fight. The alleged conspirators are the defendant, Messrs. Rudnick, Pettigrew and Villagrana, and/or their respective gang members.

The object of the conspiracy alleged in Counts VI and VII is to kill someone. The alleged conspirators are the defendant, Mr. Rudnick, and other Vagos gang members or associates.

Fourth Information Supplementing Indictment, p. 2, ll. 8-11 (Count I); p. 3, ll. 1-5 and 12-17 (Count II); p. 9, ll. 16-19 (Count VI); p. 10, ll. 6-10 (Count VII).

Instruction No. _____

The object of the conspiracy alleged in Count I is the commission of an affray. The alleged conspirators are the defendant, Messrs. Rudnick, Pettigrew and Villagrana, and/or their respective gang members.

The object of the conspiracy alleged in Count II is to commit the offense of challenge to fight. The alleged conspirators are the defendant, Messrs. Rudnick, Pettigrew and Villagrana, and/or their respective gang members.

The object of the conspiracy alleged in Counts VI and VII is to kill someone. The alleged conspirators are the defendant, Mr. Rudnick, and other Vagos gang members or associates.

Instruction No. _____

The crime of Conspiracy to Engage in an Affray as charged in this case includes the crime of Affray. If:

1 Any of you are not convinced beyond a reasonable doubt that the defendant is guilty of Conspiracy to Engage in an Affray;

AND

2 All of you are convinced beyond a reasonable doubt that the defendant is guilty of the crime of Affray, you may find the defendant guilty of Affray.

In order for the defendant to be found guilty of the lesser crime of Affray, the government must prove each of the following elements beyond a reasonable doubt:

1. An agreement by two or more persons;

AND

2. The agreement is to fight in a public place;

AND

3. The fight results in the terror of the citizens of this state.

It is not necessary that the fight result from a previous conspiracy among the persons fighting, though the persons fighting must agree to fight, and do fight one another.

NRS 203.050.

Instruction No. _____

5391

The crime of Conspiracy to Engage in an Affray as charged in this case includes the crime of Affray. If:

1 Any of you are not convinced beyond a reasonable doubt that the defendant is guilty of Conspiracy to Engage in an Affray;

AND

2 All of you are convinced beyond a reasonable doubt that the defendant is guilty of the crime of Affray, you may find the defendant guilty of Affray.

In order for the defendant to be found guilty of the lesser crime of Affray, the government must prove each of the following elements beyond a reasonable doubt:

1. An agreement by two or more persons;

AND

2. The agreement is to fight in a public place;

AND

3. The fight results in the terror of the citizens of this state.

It is not necessary that the fight result from a previous conspiracy among the persons fighting, though the persons fighting must agree to fight, and do fight one another.

Instruction No. _____

5392

The crime of Conspiracy to Engage in an Affray as charged in this case includes the lesser crime of Riot. If:

1. Any of you are not convinced beyond a reasonable doubt that the defendant is guilty of Conspiracy to Engage in an Affray;

AND

2 All of you are convinced beyond a reasonable doubt that the defendant is guilty of the lesser crime of Riot, you may find the defendant guilty of Riot.

In order for the defendant to be found guilty of the lesser crime of Riot, the government must prove each of the following elements beyond a reasonable doubt:

1. Two or more persons shall actually do an unlawful act of violence, either with or without a common cause of quarrel

OR

2. Even do a lawful act, in a violent, tumultuous and illegal manner.

It is not necessary that the act of violence result from an agreement of any sort between the persons committing it.

NRS 203.070(2).

Instruction No. _____

The crime of Conspiracy to Engage in an Affray as charged in this case includes the lesser crime of Riot. If:

1. Any of you are not convinced beyond a reasonable doubt that the defendant is guilty of Conspiracy to Engage in an Affray;

AND

2 All of you are convinced beyond a reasonable doubt that the defendant is guilty of the lesser crime of Riot, you may find the defendant guilty of Riot.

In order for the defendant to be found guilty of the lesser crime of Riot, the government must prove each of the following elements beyond a reasonable doubt:

1. Two or more persons shall actually do an unlawful act of violence, either with or without a common cause of quarrel

OR

2. Even do a lawful act, in a violent, tumultuous and illegal manner.

It is not necessary that the act of violence result from an agreement of any sort between the persons committing it.

Instruction No. _____

A person may be guilty of a crime in two ways. One, he or she may have directly committed the crime. I will call that person the perpetrator. Two, he or she may have aided and abetted a perpetrator, who directly committed the crime. A person is guilty of a crime whether he or she committed it personally or aided and abetted the perpetrator.

Judicial Council of California Criminal Jury Instructions [CALCRIM] (2012), Instruction No. 400, available online at http://www.courts.ca.gov/partners/documents/calcrim_juryins.pdf

Instruction No. _____

A person may be guilty of a crime in two ways. One, he or she may have directly committed the crime. I will call that person the perpetrator. Two, he or she may have aided and abetted a perpetrator, who directly committed the crime. A person is guilty of a crime whether he or she committed it personally or aided and abetted the perpetrator.

Instruction No. _____

The defendant is charged in Count II (Challenge to Fight Resulting in Death), and Count V (Murder of the Second Degree with the Use of a Deadly Weapon) with Aiding and Abetting.

In Count II, the defendant is accused of aiding and abetting Messrs. Rudnick, Pettigrew and Villagrana to commit an act of challenge to fight by "counseling each other in furtherance of issuing or accepting a challenge to fight, and/or by providing backup to each other, and/or congregating in a group in order to fight together, and/or encouraging each other to engage in or accept the challenge to fight, and/or each group encircling members of the opposing group, and/or participating in a stand-off situation and/or intimidating members of the rival gang, and/or harassing members of the rival gang, and/or otherwise acting in concert."

In Count V, the defendant is accused of aiding and abetting Messrs. Rudnick and Pettigrew in the commission of an affray by shooting Mr. Pettigrew.

Fourth Information Supplementing Indictment, p. 3, ll. 5-8; p. 4, ll. 10-20 (Count II); p. 8, ll. 4-12 (Count V).

Instruction No. _____ 5397

The defendant is charged in Count II (Challenge to Fight Resulting in Death), and Count V (Murder of the Second Degree with the Use of a Deadly Weapon) with Aiding and Abetting.

In Count II, the defendant is accused of aiding and abetting Messrs. Rudnick, Pettigrew and Villagrana to commit an act of challenge to fight by "counseling each other in furtherance of issuing or accepting a challenge to fight, and/or by providing backup to each other, and/or congregating in a group in order to fight together, and/or encouraging each other to engage in or accept the challenge to fight, and/or each group encircling members of the opposing group, and/or participating in a stand-off situation and/or intimidating members of the rival gang, and/or harassing members of the rival gang, and/or otherwise acting in concert."

In Count V, the defendant is accused of aiding and abetting Messrs. Rudnick and Pettigrew in the commission of an affray by shooting Mr. Pettigrew.

Instruction No. _____

5398

To prove that the defendant is guilty of a crime based on aiding and abetting that crime, the State must prove that:

1. The perpetrator committed the crime;

2. The defendant knew that the perpetrator intended to commit the crime;

3. Before or during the commission of the crime, the defendant intended to aid and abet the perpetrator in committing the crime;

AND

4. The defendant's words or conduct did in fact aid and abet the perpetrator's commission of the crime.

Someone aids and abets a crime if he or she knows of the perpetrator's unlawful purpose and he or she specifically intends to, and does in fact, aid, facilitate, promote, encourage, or instigate the perpetrator's commission of that crime.

If all of these requirements are proved, the defendant does not need to actually have been present when the crime was committed to be guilty as an aider and abettor.

If you conclude that defendant was present at the scene of the crime or failed to prevent the crime, you may consider that fact in determining whether the defendant was an aider and abettor. However, the fact that a person is present at the scene of a crime or fails to prevent the crime does not, by itself, make him or her an aider and abettor.

The State has the burden of proving beyond a reasonable doubt that the defendant did not withdraw. If the State has not met this burden, you may not find the defendant guilty under an aiding and abetting theory.

Judicial Council of California Criminal Jury Instructions [CALCRIM] (2012), Instruction No. 401, available online at http://www.courts.ca.gov/partners/documents/calcrim_juryins.pdf

Instruction No. _____

To prove that the defendant is guilty of a crime based on aiding and abetting that crime, the State must prove that:

1. The perpetrator committed the crime;

2. The defendant knew that the perpetrator intended to commit the crime;

3. Before or during the commission of the crime, the defendant intended to aid and abet the perpetrator in committing the crime;

AND

4. The defendant's words or conduct did in fact aid and abet the perpetrator's commission of the crime.

Someone aids and abets a crime if he or she knows of the perpetrator's unlawful purpose and he or she specifically intends to, and does in fact, aid, facilitate, promote, encourage, or instigate the perpetrator's commission of that crime.

If all of these requirements are proved, the defendant does not need to actually have been present when the crime was committed to be guilty as an aider and abettor.

If you conclude that defendant was present at the scene of the crime or failed to prevent the crime, you may consider that fact in determining whether the defendant was an aider and abettor. However, the fact that a person is present at the scene of a crime or fails to prevent the crime does not, by itself, make him or her an aider and abettor.

The State has the burden of proving beyond a reasonable doubt that the defendant did not withdraw. If the State has not met this burden, you may not find the defendant guilty under an aiding and abetting theory.

Instruction No. _____

The defendant is charged in Count II with Challenge to Fight Resulting in Death. The elements of the crime of Challenge to Fight Resulting in Death are:

1. A verbal or written challenge to fight;

AND

2. The challenge is given by one combatant to another;

AND

3. There is a previous concert and agreement with the other combatant to fight;

AND

4. A subsequent fight by the combatants pursuant to the challenge;

AND

5. A death ensuing in that fight;

AND

6. The defendant is either the challenger, the person who accepts the challenge, or a person who gives, sends, or receives such a challenge.

The State has the burden of proving each of these factual elements beyond a reasonable doubt. If one or more of the factual elements of the offense are not proved beyond a reasonable doubt, you must acquit the defendant of this charge.

NRS 200.450(1) (challenge to fight, verbal or written, previous concert and agreement) and (3) ("such a fight;" limited definition of agency).

Instruction No. _____

The defendant is charged in Count II with Challenge to Fight Resulting in Death. The elements of the crime of Challenge to Fight Resulting in Death are:

1. A verbal or written challenge to fight;

AND

2. The challenge is given by one combatant to another;

AND

3. There is a previous concert and agreement with the other combatant to fight;

AND

4. A subsequent fight by the combatants pursuant to the challenge;

AND

5. A death ensuing in that fight;

AND

6. The defendant is either the challenger, the person who accepts the challenge, or a person who gives, sends, or receives such a challenge.

The State has the burden of proving each of these factual elements beyond a reasonable doubt. If one or more of the factual elements of the offense are not proved beyond a reasonable doubt, you must acquit the defendant of this charge.

Instruction No. _____

5402

A "challenge to fight" is a summons or invitation, given by one person to another, to engage in a personal combat; a request to fight a duel. A criminal offense.

"Previous" means antecedent, prior.

"Agreement" means a coming together or knitting of minds; a coming together in opinion or determination; the coming together in accord of two minds on a given proposition; a concord of understanding and intention between two or more parties with respect to the effect upon their relative rights and duties.

Black's Law Dictionary, (4th revised edition, 1968) pp. 89 ("agreement"), 291 ("challenge to fight"), 1352 ("previous").

Instruction No. _____

5403

A "challenge to fight" is a summons or invitation, given by one person to another, to engage in a personal combat; a request to fight a duel. A criminal offense.

"Previous" means antecedent, prior.

"Agreement" means a coming together or knitting of minds; a coming together in opinion or determination; the coming together in accord of two minds on a given proposition; a concord of understanding and intention between two or more parties with respect to the effect upon their relative rights and duties.

Instruction No. _____

If you find there was no verbal or written challenge to fight, you must acquit the defendant of this charge.

If you find there was no previous concert and agreement between Messrs. Rudnick and Pettigrew to fight, you must find the defendant not guilty of this charge.

If you find that there was no previous concert and agreement between the defendant and Mr. Pettigrew to fight, you must find the defendant not guilty of this charge.

Wilmeth v. State, 96 Nev. 403, at 405-06, 610 P.2d 735 (1980) ("The statute proscribes the conveyance or acceptance of a challenge to fight when such a fight or confrontation results. . . . Criminal responsibility in the context of this case is predicated upon the issuance or acceptance of a challenge to fight and upon the fact that some fights occur."); *State v. Grimmett*, 33 Nev. 531, at 533-34, 112 P. 273 (1910) (no challenge or acceptance under the circumstances of the case); *Ex parte Finlen*, 20 Nev. 141, at 154, 18 P. 827 (1888) ("Before petitioner can bring this case within the influence of the statute under consideration, in this proceeding, it must appear by the evidence, without material conflict — first, that there was a previous agreement between himself and the deceased to fight; and, second, that each did fight the other."); NRS 200.450(1) ("previous concert and agreement," "verbal or written") and (3) ("such a fight").

Instruction No. _____

If you find there was no verbal or written challenge to fight, you must acquit the defendant of this charge.

If you find there was no previous concert and agreement between Messrs. Rudnick and Pettigrew to fight, you must find the defendant not guilty of this charge.

If you find that there was no previous concert and agreement between the defendant and Mr. Pettigrew to fight, you must find the defendant not guilty of this charge.

Instruction No. _____

The crime of Challenge to Fight Resulting in Death with the Use of a Deadly Weapon as charged in this case includes the lesser crime of Affray. If:

1 Any of you are not convinced beyond a reasonable doubt that the defendant is guilty of Challenge to Fight Resulting in Death with the Use of a Deadly Weapon ;

AND

2 All of you are convinced beyond a reasonable doubt that the defendant is guilty of the lesser crime of Affray, you may find the defendant guilty of Affray.

In order for the defendant to be found guilty of the lesser crime of Affray, the government must prove each of the following elements beyond a reasonable doubt:

1. An agreement by two or more persons;

AND

2. The agreement is to fight in a public place;

AND

3. The fight results in the terror of the citizens of this state.

It is not necessary that the fight result from a previous concert and agreement between the persons fighting.

NRS 203.050.

Instruction No. _____

5407

The crime of Challenge to Fight Resulting in Death with the Use of a Deadly Weapon as charged in this case includes the lesser crime of Affray. If:

1 Any of you are not convinced beyond a reasonable doubt that the defendant is guilty of Challenge to Fight Resulting in Death with the Use of a Deadly Weapon ;

AND

2 All of you are convinced beyond a reasonable doubt that the defendant is guilty of the lesser crime of Affray, you may find the defendant guilty of Affray.

In order for the defendant to be found guilty of the lesser crime of Affray, the government must prove each of the following elements beyond a reasonable doubt:

1. An agreement by two or more persons;

AND

2. The agreement is to fight in a public place;

AND

3. The fight results in the terror of the citizens of this state.

It is not necessary that the fight result from a previous concert and agreement between the persons fighting.

Instruction No. _____

5408

The crime of Challenge to Fight Resulting in Death with the Use of a Deadly Weapon as charged in this case includes the lesser crime of Riot. If:

1 Any of you are not convinced beyond a reasonable doubt that the defendant is guilty of Challenge to Fight Resulting in Death with the Use of a Deadly Weapon ;

AND

2 All of you are convinced beyond a reasonable doubt that the defendant is guilty of the lesser crime of Riot, you may find the defendant guilty of Riot.

In order for the defendant to be found guilty of the lesser crime of Riot, the government must prove each of the following elements beyond a reasonable doubt:

1. Two or more persons shall actually do an unlawful act of violence, either with or without a common cause of quarrel

OR

2. Even do a lawful act, in a violent, tumultuous and illegal manner.

It is not necessary that the fight result from an agreement of any sort between the persons fighting.

NRS 203.070(2).

Instruction No. _____

5409

The crime of Challenge to Fight Resulting in Death with the Use of a Deadly Weapon as charged in this case includes the lesser crime of Riot. If:

1 Any of you are not convinced beyond a reasonable doubt that the defendant is guilty of Challenge to Fight Resulting in Death with the Use of a Deadly Weapon ;

AND

2 All of you are convinced beyond a reasonable doubt that the defendant is guilty of the lesser crime of Riot, you may find the defendant guilty of Riot.

In order for the defendant to be found guilty of the lesser crime of Riot, the government must prove each of the following elements beyond a reasonable doubt:

1. Two or more persons shall actually do an unlawful act of violence, either with or without a common cause of quarrel

OR

2. Even do a lawful act, in a violent, tumultuous and illegal manner.

It is not necessary that the fight result from an agreement of any sort between the persons fighting.

Instruction No. _____

5410

The defendant is charged in Counts II (Challenge to Fight Resulting in Death with the Use of a Deadly Weapon), V (Murder of the Second Degree with the Use of a Deadly Weapon), VI (Murder with a Deadly Weapon), and VII (Conspiracy to Commit Murder) with the special circumstance of committing one or more of the crimes 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.

Fourth Information Supplementing Indictment, p. 5, ll. 21-24 (Count II); p. 7, ll. 18-22; (Count V); p. 8, ll. 20-23 (Count VI); p. 9, ll. 9-10 (Count VII).

Instruction No. _____

The defendant is charged in Counts II (Challenge to Fight Resulting in Death with the Use of a Deadly Weapon), V (Murder of the Second Degree with the Use of a Deadly Weapon), VI (Murder with a Deadly Weapon), and VII (Conspiracy to Commit Murder) with the special circumstance of committing one or more of the crimes 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.

Instruction No. _____

To prove that this special circumstance is true, the State must prove that:

1. The defendant intentionally committed one or more of the offenses charged in Counts II, V, VI and VII of the Fourth Information Supplementing Indictment;

2. At the time of the offense the defendant knew that the gang commonly engaged in felony criminal activity;

3. That he committed the crime or crimes for the benefit of, at the direction of, or in affiliation with, the criminal gang;

AND

4. That he committed the crime or crimes with the specific intent to promote, further or assist the activities of the criminal gang.

NRS 193.168(1).

Instruction No. _____

To prove that this special circumstance is true, the State must prove that:

1. The defendant intentionally committed one or more of the offenses charged in Counts II, V, VI and VII of the Fourth Information Supplementing Indictment;

2. At the time of the offense the defendant knew that the gang commonly engaged in felony criminal activity;

3. That he committed the crime or crimes for the benefit of, at the direction of, or in affiliation with, the criminal gang;

AND

4. That he committed the crime or crimes with the specific intent to promote, further or assist the activities of the criminal gang.

Instruction No. _____

"Benefit" means advantage, profit, fruit or privilege.

"Direction" means the act of governing, management, or superintendence.

"Affiliation" imports less than membership in an organization, but more than sympathy, and a working alliance to bring to fruition the proscribed program of a proscribed organization, as distinguished from mere co-operation with a proscribed organization in lawful activities, is essential.

"Promote" means to contribute to growth, enlargement or prosperity of, to forward, to further, to encourage, or to advance.

"Assist" means to help, aid, succor, lend countenance or encouragement to; participate in as an auxiliary.

Black's Law Dictionary, (4th revised edition, 1968) pp. 80 ("affiliation); 155 ("assist"); 200 ("benefit"); 547 ("direction"); and 1379 ("promote").

Instruction No. _____

5415

"Benefit" means advantage, profit, fruit or privilege.

"Direction" means the act of governing, management, or superintendence.

"Affiliation" imports less than membership in an organization, but more than sympathy, and a working alliance to bring to fruition the proscribed program of a proscribed organization, as distinguished from mere co-operation with a proscribed organization in lawful activities, is essential.

"Promote" means to contribute to growth, enlargement or prosperity of, to forward, to further, to encourage, or to advance.

"Assist" means to help, aid, succor, lend countenance or encouragement to; participate in as an auxiliary.

Instruction No. _____

A "criminal gang" is any ongoing organization, association, or group of three or more persons, whether formal or informal:

1. That has a common name or common identifying symbol;

2. That has particular conduct, status and customs indicative of it;

AND

3. That has, as one of its common activities, the commission of felony crimes, not including the crimes specifically charged in this case.

NRS 193.168(8).

Instruction No. _____

A "criminal gang" is any ongoing organization, association, or group of three or more persons, whether formal or informal:

1. That has a common name or common identifying symbol;

2. That has particular conduct, status and customs indicative of it;

AND

3. That has, as one of its common activities, the commission of felony crimes, not including the crimes specifically charged in this case.

Instruction No. _____

"Common" means usual, ordinary or frequent, customary or habitual.

Black's Law Dictionary, (4th revised edition, 1968) p. 344.

Instruction No. _____

5419

"Common" means usual, ordinary or frequent, customary or habitual.

Instruction No. _____

5420

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

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

Instruction No. _____

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

Instruction No. _____

You may consider evidence of gang activity only for the limited purpose of deciding whether the defendant acted with the intent, purpose, and knowledge that are required to prove the gang-related enhancements and special circumstance allegations charged.

You may also consider this evidence when you evaluate the credibility or believability of a witness and when you consider the facts and information relied on by an expert witness in reaching his or her opinion.

You may not consider this evidence for any other purpose. You may not conclude from this evidence that the defendant is a person of bad character or that he has a disposition to commit crime.

Judicial Council of California Criminal Jury Instructions [CALCRIM] (2012), Instruction No. 1403, available online at http://www.courts.ca.gov/partners/documents/calcrim_juryins.pdf

Instruction No. _____

You may consider evidence of gang activity only for the limited purpose of deciding whether the defendant acted with the intent, purpose, and knowledge that are required to prove the gang-related enhancements and special circumstance allegations charged.

You may also consider this evidence when you evaluate the credibility or believability of a witness and when you consider the facts and information relied on by an expert witness in reaching his or her opinion.

You may not consider this evidence for any other purpose. You may not conclude from this evidence that the defendant is a person of bad character or that he has a disposition to commit crime.

Instruction No. _____

The Defendant is charged in Count III with Carrying a Concealed Weapon and in Count IV with Discharging a Firearm in a Structure.

The defendant is not guilty of Count III (Carrying a Concealed Weapon) and/or Count IV (Discharging a Firearm in a Structure) if he acted because of legal necessity.

In order to establish this defense, the defendant must prove that:

1. He acted in an emergency to prevent a significant bodily harm or evil to someone else;

2. He had no adequate legal alternative;

3. The defendant's acts did not create a greater danger than the one avoided;

4. When the defendant acted, he actually believed that the act was necessary to prevent the threatened harm or evil;

5. A reasonable person would also have believed that the act was necessary under the circumstances;

AND

6. The defendant did not substantially contribute to the emergency.

The defendant has the burden of proving this defense by a preponderance of the evidence. This is a different standard of proof than proof beyond a reasonable doubt. To meet the burden of proof by a preponderance of the evidence, the defendant must prove that it is more likely than not that each of the six listed items is true.

Judicial Council of California Criminal Jury Instructions [CALCRIM] (2012), Instruction No. 3403, available online at http://www.courts.ca.gov/partners/documents/calcrim_juryins.pdf

Instruction No. _____

The Defendant is charged in Count III with Carrying a Concealed Weapon and in Count IV with Discharging a Firearm in a Structure.

The defendant is not guilty of Count III (Carrying a Concealed Weapon) and/or Count IV (Discharging a Firearm in a Structure) if he acted because of legal necessity.

In order to establish this defense, the defendant must prove that:

1. He acted in an emergency to prevent a significant bodily harm or evil to someone else;

2. He had no adequate legal alternative;

3. The defendant's acts did not create a greater danger than the one avoided;

4. When the defendant acted, he actually believed that the act was necessary to prevent the threatened harm or evil;

5. A reasonable person would also have believed that the act was necessary under the circumstances;

AND

6. The defendant did not substantially contribute to the emergency.

The defendant has the burden of proving this defense by a preponderance of the evidence. This is a different standard of proof than proof beyond a reasonable doubt. To meet the burden of proof by a preponderance of the evidence, the defendant must prove that it is more likely than not that each of the six listed items is true.

Instruction No. _____

The Defendant is charged with various types of murder in Counts II (Challenge to Fight Resulting in Death with the Use of a Deadly Weapon), V (Murder of the Second Degree with the Use of a Deadly Weapon) and VI (Murder with a Deadly Weapon).

The defendant is not guilty of murder if he was justified in killing someone in defense of another. The defendant acted in lawful defense of another if:

1. The defendant reasonably believed that someone else was in imminent danger of being killed or suffering great bodily injury;

2. The defendant reasonably believed that the immediate use of deadly force was necessary to defend against that danger;

AND

3. The defendant used no more force than was reasonably necessary to defend against that danger.

Belief in future harm is not sufficient, no matter how great or how likely the harm is believed to be. The defendant must have believed there was imminent danger of death or great bodily injury to someone else. Defendant's belief must have been reasonable and he must have acted only because of that belief. The defendant is only entitled to use that amount of force that a reasonable person would believe is necessary in the same situation. If the defendant used more force than was reasonable, the killing was not justified.

When deciding whether the defendant's beliefs were reasonable, consider all the circumstances as they were known to and appeared to the defendant and consider what a reasonable person in a similar situation with similar knowledge would have believed.

If the defendant's beliefs were reasonable, the danger does not need to have actually existed.

The defendant's belief that someone else was threatened may be reasonable even if he relied on information that was not true. However, the defendant must actually and reasonably have believed that the information was true.

A defendant is not required to retreat. He or she is entitled to stand his or her ground and defend [himself or herself] another and, if reasonably necessary, to pursue an assailant until the danger of death or great bodily injury has passed. This is so even if safety could have been achieved by retreating.

Great bodily injury means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.

The State has the burden of proving beyond a reasonable doubt that the killing was not justified. If the State has not met this burden, you must find the defendant not guilty of murder.

Judicial Council of California Criminal Jury Instructions [CALCRIM] (2012), Instruction No. 505, available online at http://www.courts.ca.gov/partners/documents/calcrim_juryins.pdf

Instruction No. _____

The Defendant is charged with various types of murder in Counts II (Challenge to Fight Resulting in Death with the Use of a Deadly Weapon), V (Murder of the Second Degree with the Use of a Deadly Weapon) and VI (Murder with a Deadly Weapon).

The defendant is not guilty of murder if he was justified in killing someone in defense of another. The defendant acted in lawful defense of another if:

1. The defendant reasonably believed that someone else was in imminent danger of being killed or suffering great bodily injury;

2. The defendant reasonably believed that the immediate use of deadly force was necessary to defend against that danger;

AND

3. The defendant used no more force than was reasonably necessary to defend against that danger.

Belief in future harm is not sufficient, no matter how great or how likely the harm is believed to be. The defendant must have believed there was imminent danger of death or great bodily injury to someone else. Defendant's belief must have been reasonable and he must have acted only because of that belief. The defendant is only entitled to use that amount of force that a reasonable person would believe is necessary in the same situation. If the defendant used more force than was reasonable, the killing was not justified.

When deciding whether the defendant's beliefs were reasonable, consider all the circumstances as they were known to and appeared to the defendant and consider what a reasonable person in a similar situation with similar knowledge would have believed.

If the defendant's beliefs were reasonable, the danger does not need to have actually existed.

The defendant's belief that someone else was threatened may be reasonable even if he relied on information that was not true. However, the defendant must actually and reasonably have believed that the information was true.

A defendant is not required to retreat. He or she is entitled to stand his or her ground and defend another and, if reasonably necessary, to pursue an assailant until the danger of death or great bodily injury has passed. This is so even if safety could have been achieved by retreating.

Great bodily injury means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.

The State has the burden of proving beyond a reasonable doubt that the killing was not justified. If the State has not met this burden, you must find the defendant not guilty of murder.

Instruction No. _____

5430

A killing is justifiable when committed in the lawful defense of the slayer, his child, or of any other person in his or her presence or company, when there is reasonable ground to apprehend a design on the part of the person slain to commit a felony or to do some great personal injury to the slayer or to any such person, and there is imminent danger of such design being accomplished.

NRS 200.160(1).

Instruction No. _____

5431

A killing is justifiable when committed in the lawful defense of the slayer, his child, or of any other person in his or her presence or company, when there is reasonable ground to apprehend a design on the part of the person slain to commit a felony or to do some great personal injury to the slayer or to any such person, and there is imminent danger of such design being accomplished.

Instruction No. _____

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 ___ day of July, 2013.

DAVID R. HOUSTON, ESQ.
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Attorney for Defendant

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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,

vs.

ERNESTO MANUEL GONZALEZ (B),

Defendants.

Case No. CR11-1718

Dept. No. 4

/

DEFENDANT GONZALEZ'S PROPOSED ADDITIONAL JURY INSTRUCTIONS

* * * * *

Defendant Ernesto Manuel Gonzalez respectfully submits his proposed additional jury instructions for use in this case, based on the facts and circumstances which have come to light during the trial of this matter.

///

///

The defendant is charged in Count IV with maliciously and wantonly discharging a handgun.

The defendant is charged in Counts V and VI with acts of malice.

"Wanton" means reckless, heedless, malicious, characterized by extreme recklessness, foolhardiness, recklessly disregardful of the rights or safety of others or of consequences.

"Malice" and "maliciously" import an evil intent, wish or design to vex, annoy or injure another person. Malice may be inferred from an act done in willful disregard of the rights of another, or an act wrongfully done without just cause or excuse, or an act or omission of duty betraying a willful disregard of social duty.

"Malice" can be express or implied. Express malice is that deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof. Malice shall be implied when no considerable provocation appears, or when all the circumstances of the killing show an abandoned and malignant heart.

The legal defense of defense of self or others justifies a homicide and negates the element of malice.

If you find that the defendant did not act maliciously or wantonly in discharging a handgun, as charged, you must acquit the defendant of Count IV.

If you find that the killing of Mr. Pettigrew was not an act of malice, as that term is defined in these instructions, you must acquit the defendant of Counts V and VI.

Black's Law Dictionary, (4th revised edition 1968) p. 1753 ("wanton"); NRS 193.0175 ("malice" and maliciously"); NRS 200.020 (Express and implied malice); NRS 202.287(1) (discharging a firearm); NRS 200.010(1) (murder); allegations of Count IV at p. 6, ll. 21-22 ("did maliciously and wantonly discharge a .40 caliber handgun"), Count V at p. 7, l. 10 ("did maliciously fire deadly weapons"); and Count VI at p. 8, l. 7 ("with malice aforethought"); *Collman v. State*, 116 Nev. 687, at 714, 7 P.3d 426 (2000) (negates malice); *Kelso v. State*, 95 Nev. 37, at 42, 588 P.2d 1035 (1979) (negates malice).

Instruction No. _____

5435

The defendant is charged in Count IV with maliciously and wantonly discharging a handgun.

The defendant is charged in Counts V and VI with acts of malice.

"Wanton" means reckless, heedless, malicious, characterized by extreme recklessness, foolhardiness, recklessly disregardful of the rights or safety of others or of consequences.

"Malice" and "maliciously" import an evil intent, wish or design to vex, annoy or injure another person. Malice may be inferred from an act done in willful disregard of the rights of another, or an act wrongfully done without just cause or excuse, or an act or omission of duty betraying a willful disregard of social duty.

"Malice" can be express or implied. Express malice is that deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof. Malice shall be implied when no considerable provocation appears, or when all the circumstances of the killing show an abandoned and malignant heart.

The legal defense of defense of self or others justifies a homicide and negates the element of malice.

If you find that the defendant did not act maliciously or wantonly in discharging a handgun, as charged, you must acquit the defendant of Count IV.

If you find that the killing of Mr. Pettigrew was not an act of malice, as that term is defined in these instructions, you must acquit the defendant of Counts V and VI.

Instruction No. _____

If you find that the defendant did not specifically intend to aid, facilitate, promote, encourage, or instigate any challenge to fight, or to fight based on such a challenge, you must acquit the defendant of aiding or abetting in Count II.

Extrapolation from the elements recited in *Judicial Council of California Criminal Jury Instructions* [CALCRIM] (2012), Instruction No. 401, available online at http://www.courts.ca.gov/partners/documents/calcrim_juryins.pdf to NRS 200.450(1) (challenge to fight, verbal or written, previous concert and agreement) and (3) ("such a fight;" limited definition of agency).

Instruction No. _____

5437

If you find that the defendant did not specifically intend to aid, facilitate, promote, encourage, or instigate any challenge to fight, or to fight based on such a challenge, you must acquit the defendant of aiding or abetting in Count II.

Instruction No. _____

If you find that the defendant did not give, send, or receive any challenge to fight for himself or another, or fight based on such a challenge, you must acquit the defendant of Count II.

NRS 200.450(1) (challenge to fight, verbal or written, previous concert and agreement) and (3) ("such a fight"); NRS 200.450 (1) and (2) (limiting agency to those parties).

Instruction No. _____

5439

If you find that the defendant did not give, send, or receive any challenge to fight for himself or another, or fight based on such a challenge, you must acquit the defendant of Count II.

Instruction No. _____

5440

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 ___ day of _____, 2013.

DAVID R. HOUSTON, ESQ.
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Exhibit 9

Exhibit 9

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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,

vs.

ERNESTO MANUEL GONZALEZ (B),

Defendants.

Case No. CR11-1718

Dept. No. 4

/

DEFENDANT GONZALEZ'S PROPOSED ADDITIONAL JURY INSTRUCTIONS

* * * * *

Defendant Ernesto Manuel Gonzalez respectfully submits his proposed additional jury instructions for use in this case, based on the facts and circumstances which have come to light during the trial of this matter.

///

///

The defendant is charged in Count IV with maliciously and wantonly discharging a handgun.

The defendant is charged in Counts V and VI with acts of malice.

"Wanton" means reckless, heedless, malicious, characterized by extreme recklessness, foolhardiness, recklessly disregardful of the rights or safety of others or of consequences.

"Malice" and "maliciously" import an evil intent, wish or design to vex, annoy or injure another person. Malice may be inferred from an act done in willful disregard of the rights of another, or an act wrongfully done without just cause or excuse, or an act or omission of duty betraying a willful disregard of social duty.

"Malice" can be express or implied. Express malice is that deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof. Malice shall be implied when no considerable provocation appears, or when all the circumstances of the killing show an abandoned and malignant heart.

The legal defense of defense of self or others justifies a homicide and negates the element of malice.

If you find that the defendant did not act maliciously or wantonly in discharging a handgun, as charged, you must acquit the defendant of Count IV.

If you find that the killing of Mr. Pettigrew was not an act of malice, as that term is defined in these instructions, you must acquit the defendant of Counts V and VI.

Black's Law Dictionary, (4th revised edition 1968) p. 1753 ("wanton"); NRS 193.0175 ("malice" and maliciously"); NRS 200.020 (Express and implied malice); NRS 202.287(1) (discharging a firearm); NRS 200.010(1) (murder); allegations of Count IV at p. 6, ll. 21-22 ("did maliciously and wantonly discharge a .40 caliber handgun"), Count V at p. 7, l. 10 ("did maliciously fire deadly weapons"); and Count VI at p. 8, l. 7 ("with malice aforethought"); *Collman v. State*, 116 Nev. 687, at 714, 7 P.3d 426 (2000) (negates malice); *Kelso v. State*, 95 Nev. 37, at 42, 588 P.2d 1035 (1979) (negates malice).

Instruction No. ____

The defendant is charged in Count IV with maliciously and wantonly discharging a handgun.

The defendant is charged in Counts V and VI with acts of malice.

"Wanton" means reckless, heedless, malicious, characterized by extreme recklessness, foolhardiness, recklessly disregardful of the rights or safety of others or of consequences.

"Malice" and "maliciously" import an evil intent, wish or design to vex, annoy or injure another person. Malice may be inferred from an act done in willful disregard of the rights of another, or an act wrongfully done without just cause or excuse, or an act or omission of duty betraying a willful disregard of social duty.

"Malice" can be express or implied. Express malice is that deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof. Malice shall be implied when no considerable provocation appears, or when all the circumstances of the killing show an abandoned and malignant heart.

The legal defense of defense of self or others justifies a homicide and negates the element of malice.

If you find that the defendant did not act maliciously or wantonly in discharging a handgun, as charged, you must acquit the defendant of Count IV.

If you find that the killing of Mr. Pettigrew was not an act of malice, as that term is defined in these instructions, you must acquit the defendant of Counts V and VI.

Instruction No. _____

If you find that the defendant did not specifically intend to aid, facilitate, promote, encourage, or instigate any challenge to fight, or to fight based on such a challenge, you must acquit the defendant of aiding or abetting in Count II.

Extrapolation from the elements recited in *Judicial Council of California Criminal Jury Instructions* [CALCRIM] (2012), Instruction No. 401, available online at http://www.courts.ca.gov/partners/documents/calcrim_juryins.pdf to NRS 200.450(1) (challenge to fight, verbal or written, previous concert and agreement) and (3) ("such a fight;" limited definition of agency).

Instruction No. _____

If you find that the defendant did not specifically intend to aid, facilitate, promote, encourage, or instigate any challenge to fight, or to fight based on such a challenge, you must acquit the defendant of aiding or abetting in Count II.

Instruction No. _____

54447

If you find that the defendant did not give, send, or receive any challenge to fight for himself or another, or fight based on such a challenge, you must acquit the defendant of Count II.

NRS 200.450(1) (challenge to fight, verbal or written, previous concert and agreement) and (3) ("such a fight"); NRS 200.450 (1) and (2) (limiting agency to those parties).

Instruction No. _____

5448

If you find that the defendant did not give, send, or receive any challenge to fight for himself or another, or fight based on such a challenge, you must acquit the defendant of Count II.

Instruction No. _____

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 ___ day of _____, 2013.

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5450

Exhibit 10

Exhibit 10

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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,

vs.

ERNESTO MANUEL GONZALEZ,

Defendant.

Case No. CR11-1718

Dept. No. 4

/

DEFENDANT'S SECOND PROPOSED ADDITIONAL JURY INSTRUCTIONS

* * * * *

Defendant Ernesto Manuel Gonzalez respectfully submits his second proposed additional jury instructions for use in this case, based on the facts and circumstances which have come to light during the trial of this matter.

///

///

5952

The object of the conspiracy alleged in Count I of the Fourth Amended Information is the commission of an affray. The alleged conspirators are the defendant, Messrs. Rudnick, Pettigrew and Villagrana, and/or their respective gang members. The State has the burden of proving beyond a reasonable doubt that the defendant entered into a pre-existing agreement for this purpose.

If the State has not proven beyond a reasonable doubt that the defendant agreed with one or more of these persons to fight in a public place to the terror of the citizens of Nevada, you must acquit the defendant of Count I.

NRS 199.480, NRS 203.050, Count I of Fourth Amended Information

Instruction No. _____

5453

The object of the conspiracy alleged in Count I of the Fourth Amended Information is the commission of an affray. The alleged conspirators are the defendant, Messrs. Rudnick, Pettigrew and Villagrana, and/or their respective gang members. The State has the burden of proving beyond a reasonable doubt that the defendant entered into a pre-existing agreement for this purpose.

If the State has not proven beyond a reasonable doubt that the defendant agreed with one or more of these persons to fight in a public place to the terror of the citizens of Nevada, you must acquit the defendant of Count I.

Instruction No. ____

If the State has not proven beyond a reasonable doubt that the defendant gave, sent, received or accepted any verbal or written challenge to fight, for himself or another, or to fight based on such a challenge, you must acquit the defendant of Count II.

NRS 200.450(1) and (3).

Instruction No. _____

If the State has not proven beyond a reasonable doubt that the defendant gave, sent, received or accepted any verbal or written challenge to fight, for himself or another, or to fight based on such a challenge, you must acquit the defendant of Count II.

Instruction No. _____

If the State has not proven beyond a reasonable doubt that the defendant specifically intended to, and did, aid, facilitate, promote, encourage, or instigate any verbal or written challenge to fight, or to fight based on such a challenge, you must acquit the defendant of aiding or abetting liability in Count II.

Extrapolation from the elements recited in Judicial Council of California Criminal Jury Instructions [CALCRIM] (2012), Instruction No. 401, available online at http://www.courts.ca.gov/partners/documents/calcrim_juryins.pdf to NRS 200.450(1) (challenge to fight, verbal or written, previous concert and agreement) and (3) ("such a fight;" limited definition of agency).

Instruction No. _____

If the State has not proven beyond a reasonable doubt that the defendant specifically intended to, and did, aid, facilitate, promote, encourage, or instigate any verbal or written challenge to fight, or to fight based on such a challenge, you must acquit the defendant of aiding or abetting liability in Count II.

Instruction No. _____

If the State has not proven beyond a reasonable doubt that the defendant specifically agreed with Messrs. Rudnick, Pettigrew and Villagrana, and/or their respective gang members to give, send, receive or accept any verbal or written challenge to fight, or to fight based on such a challenge, you must acquit the defendant of conspiracy liability in Count II.

NRS 199.480, NRS 200.450(1) and (3).

Instruction No. _____

If the State has not proven beyond a reasonable doubt that the defendant specifically agreed with Messrs. Rudnick, Pettigrew and Villagrana, and/or their respective gang members to give, send, receive or accept any verbal or written challenge to fight, or to fight based on such a challenge, you must acquit the defendant of conspiracy liability in Count II.

Instruction No. _____

If the State has not proven beyond a reasonable doubt that the defendant concealed a firearm upon his person, you must acquit the defendant of Count III.

NRS 202.350.

Instruction No. ____

If the State has not proven beyond a reasonable doubt that the defendant concealed a firearm upon his person, you must acquit the defendant of Count III.

Instruction No. _____

When words such as "knowingly," "willfully," "maliciously," or "with malice" are charged, the State has the burden of proving, beyond a reasonable doubt, that intent for each and every element of the crime.

Garcia v. Sixth Judicial Dist. Court, 117 Nev. 697, at 701, 30 P.3d 1110 (2001) ("When an intent requirement is set forth in a criminal statute such as "knowingly," the intent must be proven as to each element of the crime to sustain a conviction."), citing to *State of Nevada v. District Court*, 108 Nev. 1030, at 1032-33, 842 P.2d 733 (1992) and *Harris v. State*, 83 Nev. 404, at 407, 432 P.2d 929 (1967)

Instruction No. _____

When words such as "knowingly," "willfully," "maliciously," or "with malice" are charged, the State has the burden of proving, beyond a reasonable doubt, that intent for each and every element of the crime.

Instruction No. _____

Counts IV, V and VI of the Fourth Amended Information charge the defendant with acts of malice.

Malice is an element of these offenses, which the State must prove beyond a reasonable doubt. Malice is not subsumed by willfulness, deliberation, and premeditation. The legal defense of defense of self or others justifies a homicide and negates the element of malice. The fact that not every murder requires a specific intent to kill does not relieve the State of the burden to prove some kind of malice to establish murder.

If the State has not proven beyond a reasonable doubt that the defendant acted wantonly or maliciously in discharging a handgun, as charged, you must acquit the defendant of Count IV.

If the State has not proven beyond a reasonable doubt that the killing of Mr. Pettigrew was an act of malice, as that term is defined in these instructions, you must acquit the defendant of Counts V and VI.

Counts IV, V and VI of the Fourth Amended Information, *Collman v. State*, 116 Nev. 687 at 714-15, 7 P.3d 426 (2000), citing to *Kelso v. State*, 95 Nev. 37, at 42, 588 P.2d 1035 (1979) and *State v. Vaughan*, 22 Nev. 285, at 299-302, 39 P. 733 (1895).

Instruction No. _____

Counts IV, V and VI of the Fourth Amended Information charge the defendant with acts of malice.

Malice is an element of these offenses, which the State must prove beyond a reasonable doubt. Malice is not subsumed by willfulness, deliberation, and premeditation. The legal defense of defense of self or others justifies a homicide and negates the element of malice. The fact that not every murder requires a specific intent to kill does not relieve the State of the burden to prove some kind of malice to establish murder.

If the State has not proven beyond a reasonable doubt that the defendant acted wantonly or maliciously in discharging a handgun, as charged, you must acquit the defendant of Count IV.

If the State has not proven beyond a reasonable doubt that the killing of Mr. Pettigrew was an act of malice, as that term is defined in these instructions, you must acquit the defendant of Counts V and VI.

Instruction No. _____

The object of the conspiracy alleged in Count VI of the Fourth Amended Information is to kill someone. The alleged conspirators are the defendant, Mr. Rudnick, and other Vagos members or associates. The State has the burden of proving beyond a reasonable doubt that the defendant entered into a pre-existing agreement for this purpose.

If the State has not proven beyond a reasonable doubt that the defendant previously agreed with Mr. Rudnick or other Vagos members to kill someone, you must acquit the defendant of conspiracy liability for Count VI.

Count VI of the Fourth Amended Information,
NRS 199.480.

Instruction No. ____

5467

The object of the conspiracy alleged in Count VII of the Fourth Amended Information is to kill someone. The alleged conspirators are the defendant, Mr. Rudnick, and other Vagos members or associates. The State has the burden of proving beyond a reasonable doubt that the defendant entered into a pre-existing agreement with one or more of these persons for this purpose.

If you find the State has not proven beyond a reasonable doubt that the defendant previously agreed with Mr. Rudnick or other Vagos members and associates to kill someone, you must acquit the defendant of Count VII.

Instruction No. _____

The defendant is charged in Counts II (Challenge to Fight Resulting in Death with the Use of a Deadly Weapon), V (Murder of the Second Degree with the Use of a Deadly Weapon), VI (Murder with a Deadly Weapon), and VII (Conspiracy to Commit Murder) of the Fourth Amended Information with the special circumstance of committing one or more of the crimes 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.

If you find the defendant committed the offense of Challenge to Fight Resulting in Death with the Use of a Deadly Weapon, Murder of the Second Degree with the Use of a Deadly Weapon, Murder with a Deadly Weapon or Conspiracy to Commit Murder, then you must further determine whether the defendant committed the crime 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. You should indicate your finding by checking the appropriate box(es) on the verdict form.

The burden is on the State to prove beyond a reasonable doubt the existence of a criminal gang, in which felonious action is a common denominator of the gang. The State must also prove, beyond a reasonable doubt, that the defendant, in each of these offenses, knew that the Vagos were a criminal gang, as that term is defined in these instructions, and with that knowledge, committed the crime 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.

Counts II, V, VI and VII of the Fourth Amended Information; *Origel-Candido v. State*, 114 Nev. 378, at 383, 956 P.2d 1378 (1998); NRS 193.168(8); *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

Instruction No. _____

The defendant is charged in Counts II (Challenge to Fight Resulting in Death with the Use of a Deadly Weapon), V (Murder of the Second Degree with the Use of a Deadly Weapon), VI (Murder with a Deadly Weapon), and VII (Conspiracy to Commit Murder) of the Fourth Amended Information with the special circumstance of committing one or more of the crimes 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.

If you find the defendant committed the offense of Challenge to Fight Resulting in Death with the Use of a Deadly Weapon, Murder of the Second Degree with the Use of a Deadly Weapon, Murder with a Deadly Weapon or Conspiracy to Commit Murder, then you must further determine whether the defendant committed the crime 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. You should indicate your finding by checking the appropriate box(es) on the verdict form.

The burden is on the State to prove beyond a reasonable doubt the existence of a criminal gang, in which felonious action is a common denominator of the gang. The State must also prove, beyond a reasonable doubt, that the defendant, in each of these offenses, knew that the Vagos were a criminal gang, as that term is defined in these instructions, and with that knowledge, committed the crime 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.

Instruction No. _____

If the State has not proved, beyond a reasonable doubt, that felonious action is a common denominator of the Vagos, you must acquit the defendant of the special circumstances (gang enhancement) feature of Counts II, V, VI and VII.

Origel-Candido v. State, 114 Nev. 378, at 383, 956 P.2d 1378 (1998); NRS 193.168(8).

Instruction No. _____

If the State has not proved, beyond a reasonable doubt, that felonious action is a common denominator of the Vagos, you must acquit the defendant of the special circumstances (gang enhancement) feature of Counts II, V, VI and VII.

Instruction No. _____

5472

If the State has not proved, beyond a reasonable doubt, that the defendant knew that felonious action is a common denominator of the Vagos, you must acquit the defendant of the special circumstances (gang enhancement) feature of Counts II, V, VI and VII.

If the State has not proved, beyond a reasonable doubt, that the defendant specifically intended his acts to promote, further or assist the activities of the Vagos, you must acquit the defendant of the special circumstances (gang enhancement) feature of Counts II, V, VI and VII.

If the State has not proved, beyond a reasonable doubt, that the crime or crimes allegedly committed by the defendant were for the benefit of, at the direction of, or in affiliation with the Vagos, you must acquit the defendant of the special circumstances (gang enhancement) feature of Counts II, V, VI and VII.

NRS 193.168(1) and (8).

Instruction No. _____

5473

If the State has not proved, beyond a reasonable doubt, that the defendant knew that felonious action is a common denominator of the Vagos, you must acquit the defendant of the special circumstances (gang enhancement) feature of Counts II, V, VI and VII.

If the State has not proved, beyond a reasonable doubt, that the defendant specifically intended his acts to promote, further or assist the activities of the Vagos, you must acquit the defendant of the special circumstances (gang enhancement) feature of Counts II, V, VI and VII.

If the State has not proved, beyond a reasonable doubt, that the crime or crimes allegedly committed by the defendant were for the benefit of, at the direction of, or in affiliation with the Vagos, you must acquit the defendant of the special circumstances (gang enhancement) feature of Counts II, V, VI and VII.

Instruction No. _____

It is not necessary to the justification of defense of another that Mr. Wiggins was seriously or critically injured by Messrs. Pettigrew and Villagrana. The issue which you must decide is whether the defendant reasonably believed that Mr. Wiggins was in imminent danger of being killed or suffering great bodily injury. You must consider all the circumstances as they were known to and appeared to the defendant and consider what a reasonable person in a similar situation with similar knowledge would have believed.

If the defendant's beliefs were reasonable, the danger does not need to have actually existed.

The defendant's belief that someone else was threatened may be reasonable even if he relied on information that was not true. However, the defendant must actually and reasonably have believed that the information was true.

The State has the burden of proving beyond a reasonable doubt that the defendant acted unreasonably in going to the defense of Mr. Wiggins. If the State has not proved, beyond a reasonable doubt, that the defendant acted unreasonably, you must acquit the defendant of Counts IV, V and VI.

Judicial Council of California Criminal Jury Instructions [CALCRIM] (2012), Instruction No. 505, available online at http://www.courts.ca.gov/partners/documents/calcrim_juryins.pdf specifically applied to the facts of this case.

Instruction No. _____

5475

It is not necessary to the justification of defense of another that Mr. Wiggins was seriously or critically injured by Messrs. Pettigrew and Villagrana. The issue which you must decide is whether the defendant reasonably believed that Mr. Wiggins was in imminent danger of being killed or suffering great bodily injury. You must consider all the circumstances as they were known to and appeared to the defendant and consider what a reasonable person in a similar situation with similar knowledge would have believed.

If the defendant's beliefs were reasonable, the danger does not need to have actually existed.

The defendant's belief that someone else was threatened may be reasonable even if he relied on information that was not true. However, the defendant must actually and reasonably have believed that the information was true.

The State has the burden of proving beyond a reasonable doubt that the defendant acted unreasonably in going to the defense of Mr. Wiggins. If the State has not proved, beyond a reasonable doubt, that the defendant acted unreasonably, you must acquit the defendant of Counts IV, V and VI.

Instruction No. _____

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 ___ day of August, 2013.

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Exhibit 11

Exhibit 11

CODE: 1885
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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,

vs.

ERNESTO MANUEL GONZALEZ,

Defendant.

Case No. CR11-1718

Dept. No. 4

/

DEFENDANT'S THIRD PROPOSED ADDITIONAL JURY INSTRUCTION

* * * * *

Defendant Ernesto Manuel Gonzalez respectfully submits his third proposed additional jury instructions for use in this case, based on the facts and circumstances which have come to light during the trial of this matter.

///

///

5479

You have heard testimony from the State's expert witnesses regarding the Hells Angels and Vagos, for purposes of the alleged special circumstances (gang enhancement) charged by the State in Counts II, V, VI and VII of the Fourth Amended Information. The State's expert witness testimony is not evidence that the defendant committed the underlying charges contained in Counts II, V, VI and VII of the Fourth Amended Information, and you must not consider it for that purpose. The State must prove beyond a reasonable doubt that the defendant committed one or more of the offenses alleged in Counts II, V, VI and VII of the Fourth Amended Information before any of the expert witness testimony may be considered. You should weigh the testimony from the State's expert witnesses regarding the Hells Angels and Vagos ***only*** after you have unanimously decided that the defendant committed the underlying offense or offenses. Their testimony is relevant only for that purpose, and no other.

Adaptation of Judicial Council of California Criminal Jury Instructions [CALCRIM] (2012), Instruction No. 1403 to the facts of this case; instruction available online at http://www.courts.ca.gov/partners/documents/calcrim_juryins.pdf

Instruction No. _____

5480

You have heard testimony from the State's expert witnesses regarding the Hells Angels and Vagos, for purposes of the alleged special circumstances (gang enhancement) charged by the State in Counts II, V, VI and VII of the Fourth Amended Information. The State's expert witness testimony is not evidence that the defendant committed the underlying charges contained in Counts II, V, VI and VII of the Fourth Amended Information, and you must not consider it for that purpose. The State must prove beyond a reasonable doubt that the defendant committed one or more of the offenses alleged in Counts II, V, VI and VII of the Fourth Amended Information before any of the expert witness testimony may be considered. You should weigh the testimony from the State's expert witnesses regarding the Hells Angels and Vagos ***only*** after you have unanimously decided that the defendant committed the underlying offense or offenses. Their testimony is relevant only for that purpose, and no other.

Instruction No. _____

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 ___ day of August, 2013.

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Exhibit 12

Exhibit 12

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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,

vs.

ERNESTO MANUEL GONZALEZ,

Defendant.

Case No. CR11-1718

Dept. No. 4

/

DEFENDANT'S FOURTH PROPOSED ADDITIONAL JURY INSTRUCTION

* * * * *

Defendant Ernesto Manuel Gonzalez respectfully submits his third proposed additional jury instructions for use in this case, based on the facts and circumstances which have come to light during the trial of this matter.

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///

The defendant's theory of the case is that he did not agree with anyone to assist, participate in, or instigate any fight. He says that he acted only in the lawful defense of another -- Mr. Wiggins -- in shooting Mr. Pettigrew.

In order for you to convict the defendant of Counts I, II, IV, V, VI and VII, the State must prove, beyond a reasonable doubt, that the contrary is true.

If the State has not proven, beyond a reasonable doubt, that the defendant agreed with one or more other persons to assist, participate in, or instigate any fight, you must acquit the defendant of Counts I, II, and VII. Then you must consider whether the defendant acted in lawful defense of another.

The defendant acted in lawful defense of another if:

1. The defendant reasonably believed that someone else was in imminent danger of being killed or suffering great bodily injury;

2. The defendant reasonably believed that the immediate use of deadly force was necessary to defend against that danger;

AND

3. The defendant used no more force than was reasonably necessary to defend against that danger.

The defendant must have believed there was imminent danger of death or great bodily injury to someone else. The defendant's belief must have been reasonable and he must have acted only because of that belief. The defendant is only entitled to use that amount of force that a reasonable person would believe is necessary in the same situation. If the defendant used more force than was reasonable, the killing was not justified.

When deciding whether the defendant's beliefs were reasonable, consider all the circumstances as they were known to and appeared to the defendant and consider what a reasonable person in a similar situation with similar knowledge would have believed.

If the defendant's beliefs were reasonable, the danger does not need to have actually existed.

The defendant's belief that someone else was threatened may be reasonable even if he relied on information that was not true. However, the defendant must actually and reasonably have believed that the information was true.

A defendant is not required to retreat. He or she is entitled to stand his or her ground and defend another and, if reasonably necessary, to pursue an assailant until the danger of death or great bodily injury has passed. This is so even if safety could have been achieved by retreating.

Great bodily injury means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.

The State has the burden of proving beyond a reasonable doubt that the killing was not justified. If the State has not met this burden, you must find the defendant not guilty of Counts II, IV, V, VI and VII.

Judicial Council of California Criminal Jury Instructions [CALCRIM] (2012), Instruction No. 505, available online at http://www.courts.ca.gov/partners/documents/calcrim_juryins.pdf

Instruction No. _____

The defendant's theory of the case is that he did not agree with anyone to assist, participate in, or instigate any fight. He says that he acted only in the lawful defense of another -- Mr. Wiggins -- in shooting Mr. Pettigrew.

In order for you to convict the defendant of Counts I, II, IV, V, VI and VII, the State must prove, beyond a reasonable doubt, that the contrary is true.

If the State has not proven, beyond a reasonable doubt, that the defendant agreed with one or more other persons to assist, participate in, or instigate any fight, you must acquit the defendant of Counts I, II, and VII. Then you must consider whether the defendant acted in lawful defense of another.

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AND

3. The defendant used no more force than was reasonably necessary to defend against that danger.

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When deciding whether the defendant's beliefs were reasonable, consider all the circumstances as they were known to and appeared to the defendant and consider what a reasonable person in a similar situation with similar knowledge would have believed.

If the defendant's beliefs were reasonable, the danger does not need to have actually existed.

The defendant's belief that someone else was threatened may be reasonable even if he relied on information that was not true. However, the defendant must actually and reasonably have believed that the information was true.

A defendant is not required to retreat. He or she is entitled to stand his or her ground and defend another and, if reasonably necessary, to pursue an assailant until the danger of death or great bodily injury has passed. This is so even if safety could have been achieved by retreating.

Great bodily injury means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.

The State has the burden of proving beyond a reasonable doubt that the killing was not justified. If the State has not met this burden, you must find the defendant not guilty of Counts II, IV, V, VI and VII.

Instruction No. _____

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 ___ day of August, 2013.

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* * *

THE STATE OF NEVADA,

Plaintiff,

vs.

ERNESTO MANUEL GONZALEZ,

Defendant.

Case No. CR11-1718

Dept. No. 4

REPLY TO OPPOSITION TO 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 enters his reply to the State's opposition to his motion to strike redundant convictions in this case. This reply 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.

ARGUMENT

In his motion to strike, Mr. Gonzalez argued that his murder convictions on Counts II, V and VI in this case were redundant, and consequently two of them should be stricken or vacated prior to this Court rendering a judgment. In support of this argument, Mr. Gonzalez noted that there was only one claimed murder, but three separate convictions. Mr. Gonzalez pointed out that the charges all involved a single killing, that two of them (Counts V and VI) were alleged in separate counts as violations of a single statute – NRS 200.030 -- and the third (Count II) was a violation of the same statute upon conviction. Mr. Gonzalez argued that it was clear from the language of the statutes that the legislature did not intend multiple murder convictions where there was only one killing, and under that circumstance, Nevada case law required that the Court vacate the redundant convictions.

In its Opposition, the State proposed[1] that the Court "merge" Counts V and VI, and impose a single sentence for Counts II, V and VI. This proposal, however, does not resolve the objection raised by Mr. Gonzalez in his motion -- the problem of multiple convictions for a single crime. As Mr. Gonzalez pointed out, the Nevada Supreme Court requires redundant convictions to be stricken or vacated.[2]

The problem created by the multiple convictions is not just a matter of Nevada law. The Double Jeopardy clause of the U. S. Constitution prohibits multiple convictions, as well as multiple punishments for a single offense.[3] A single sentence for the offenses does not cure the issue of multiple convictions, because the United States Supreme Court has held that multiple convictions for

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[1] Opposition to Motion to Strike Redundant Convictions ("Opposition"), p. 2, ll. 16-24.

[2] *Wilson v. State*, 121 Nev. 345, at 355, 114 P.3d 285 (2005); *Firestone v. State*, 120 Nev. 13, at 18, 83 P.3d 279 (2004); *Ebeling v. State*, 120 Nev. 401, at 404, 91 P.3d 599 (2004); *Crowley v. State*, 120 Nev. 30, at 33, 83 P.3d 282 (2004), *Braunstein v. State*, 118 Nev. 68, at 79, 40 P.3d 413 (2002); *Williams v. State*, 118 Nev. 536, at 549, 50 P.3d 1116 (2002); *Servin v. State*, 117 Nev. 775, at 789-90, 32 P.3d 1277 (2001); *Wood v. State*, 115 Nev. 344, at 350-51, 990 P.2d 786 (1999); *Dossey v. State*, 114 Nev. 904, at 909, 964 P.2d 782 (1998); *State v. Koseck*, 113 Nev. 477, at 479, 936 P.2d 836 (1997); *Jenkins v. District Court*, 109 Nev. 337, at 339-40, 849 P.2d 1055 (1993); *Townsend v. State*, 103 Nev. 113, at 121, 734 P.2d 705 (1987).

[3] *North Carolina v. Pearce*, 395 U.S. 711, at 717 (1969), overruled on other grounds by *Alabama v. Smith*, 490 U.S. 794 (1989). ("'If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offence. And . . . there has never been any doubt of [this rule's] entire and complete protection of the party when a second punishment is proposed in the same court, on the same facts, for the same statutory offense' " (quoting *Ex parte Lange*, 85 U.S. (18 Wall.) 163, at 168 (1873)).

the same offense are also punishment and consequently are prohibited by the Fifth Amendment to the U. S. Constitution.[4]

The next issue raised in the State's Opposition is whether the three murder convictions for one killing involve "a single offense." The State's position on the question is equivocal.

The jury convicted Mr. Gonzalez of two counts of first degree murder (Counts II and VI) and one count of second degree murder (Count V) for killing one man. Counts V and VI are different degrees of murder, and are both violations of only one statute -- NRS 200.030. These convictions clearly involve a single offense.

Is Count II any different? NRS 200.450(3) makes a death resulting from a challenge to fight first degree murder in violation of NRS 200.030.

> Should death ensue to a person in such a fight, or should a person die from any injuries received in such a fight, the person causing or having any agency in causing the death, either by fighting or by giving or sending for himself or herself or for any other person, or in receiving for himself or herself or for any other 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).

The phrase used in NRS 200.450(3) -- "is guilty of murder in the first degree" -- is as clear an expression as the English language permits. There is no ambiguity there to interpret. The statute describes an alternative ***means*** of committing first degree murder, not a separate ***offense***.

Neither NRS 200.030 nor NRS 200.450(3) authorize a second, or a third conviction for killing the same person based on various theories of liability or alternative means of commission. There are three convictions here, and Mr. Pettigrew can only be murdered once.

The legislature did not intend multiple convictions, nor did it intend multiple punishments for a single offense of murder. There is no precedent for it in either statute or common law, and the idea is

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

contrary to both common sense and the rules of statutory interpretation.[5] The guilty verdicts on the three murder counts are redundant convictions for a single crime.

II.

CONCLUSION.

The remedy for redundant convictions in Nevada is to strike or vacate them prior to sentencing.[6] Mr. Gonzalez asks the Court to do that here.

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 12th day of ~~August~~ Sept, 2013.

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[5] *Construction Indus. v. Chalue*, 119 Nev. 348, 351, 74 P.3d 595, 597 (2003) ("When a statute is unambiguous it should be given its plain meaning."); *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). ("[A] court should normally presume that a legislature did not intend multiple punishments for the same offense absent a clear expression of legislative intent to the contrary."); *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) (criminal statutes must be "strictly construed and resolved in favor of the defendant.").

[6] *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); *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.");

CERTIFICATE OF SERVICE

The undersigned does hereby affirm that I am an Employee of the Law Office of David R. Houston and that on this date, I caused to be hand-delivered a true and correct copy of the within document, to the below-named:

Karl Hall, Esq.
District Attorney's Office
One South Sierra Street
4th Floor
Reno, Nevada 89501

DATED this 13th day of September, 2013

Emily A. Heavrin