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 OPENING BRIEF

APPEAL FROM JUDGMENT AFTER JURY TRIAL AND SENTENCING

Second Judicial District
State of Nevada

THE HONORABLE CONNIE J. STEINHEIMER, PRESIDING

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I. STATEMENT OF THE CASE

Appellant was indicted (AAv1: 1-10). The State then filed four supplemental informations, the last one on the morning of trial. (AAv1: 11-64) This high - profile case has to do with the shooting between the Vagos and the Hell's Angels in the Sparks Nugget during the Street Vibrations festival of 2011. As the Court will see, based upon the evidence presented together with the State's successful theory of the case, the State could have put every Hell's Angel and every Vago in the world in the Nevada Department of Corrections for the rest of their lives, if the State had wanted to do so. But, the only one who obtained that status was Ernesto Gonzalez, who fired the fatal shot that stopped the fight, which the others had started.

Per the Fourth Information Supplementing Indictment, the charging document upon which the State ultimately proceeded,[1] Appellant was charged

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[1]Originally, the State proceeded against Stuart Gary Rudnick, also known as "Jabbers," Cesar Villagrana and Ernesto Manuel Gonzalez. (AAv1: 1) As the Court will see, Rudnick is the "Vago" who started the whole fight when he was personally affronted by the seemingly innocuous behavior of the homicide victim, a Hell's Angel named Pettigrew. For his part, Rudnick obtained a lesser charge (resulting in a short prison sentence) in exchange for his testimony. Villagrana was the Hell's Angel who up the ante by firing gunshots at the crowd, well before Appellant ended the fight with his fatal gunshot. For his part, Villagrana was allowed to plead to a lesser offense and received a sentence of term of years. Unlike Rudnick, he did not have to testify; and unlike Appellant, he did not have to face the specter of his "club" as a "criminal gang" and accordingly be sentenced

with: Conspiracy to engage in an affray (NRS 199.480 and 203.050), a gross misdemeanor; challenge to fight resulting in death with a use of a deadly weapon (NRS 200.450, 200.010, 200.030, 193.165, 199.480, 195.020 and 193.168); carrying a concealed weapon, a felony (NRS 202.350); discharging a firearm in a structure (NRS 202.287); murder of the second degree with a use of a deadly weapon (NRS 200.010, 200.030, 193.165, and 193.168); murder with a deadly weapon (NRS 200.010, 200.030, 193.165, and 193.168); and conspiracy to commit murder (NRS 199.480, 200.010, and 200.030). (AAv1: 56-64)

Ultimately, Appellant was found guilty as charged (AAv11: 5022-5036).

Pretrial, Appellant filed a Motion to Dismiss Indictment or in the Alternative Petition for Writ of *Habeas Corpus* (AAv2: 402-10), contending that the indictment was really was not aimed at Appellant, but at the Vagos. (See: Id.) That Motion was denied. (See: AAv3: 483-510)

Unsatisfied, Appellant filed a second Motion to Dismiss. (AAv3: 511-562) This, too, was denied. (AAv3: 574-86) Appellant sought mandamus relief, but this Honorable Court denied his writ petition. (AAv3: 587-89).

Appellant next sought an Order Bifurcating the Enhancement Evidence, such that the "criminal gang evidence" come in only post verdict. (See: AAv3:

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harshly.

593-99) The State opposed that motion (AAv3: 600-07). The State also filed a Motion to Admit Evidence of other Crimes, Wrongs or Acts, and a Motion for an Order Permitting Presentation of Gang Enhancement Evidence During the Guilt Phase. (See: AAv3: 608-649, 650- AAv6: 1402) This resulted in a multi-day evidentiary hearing. (See: AAv7: 1549-AAv11: 2553) Ultimately, the court below ruled that the evidence could come in during the guilt phase in order to prove the gang enhancement, "pursuant" to Somee v. State, 124 Nev. 434, 446, 187 P.3d 152 (2008), regardless of NRS 48.045(2) and Petrocelli v. State[2]. (AAv11: 2554-60).

In its companion order granting in part and denying in part the State's Motion to Admit Evidence of Other Crimes, Wrongs or Acts, the trial court repeated much of its analysis with respect to uncharged misconduct. The trial court found that the incident of a year prior resulting from an unprosecuted traffic stop was not proven by clear and convincing evidence. (Id. at 2571) The trial court found that, however, that photographs depicting Appellant and other individuals visibly displaying firearms would be admissible both as to motive and as to the gang enhancement, and prejudice could be minimized through a limiting instruction (Id. at 2572-73) However, a video of Appellant firing a semi-

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[2]101 Nev. 46, 692 P.2d 503 (1985).

automatic weapon was inadmissible, as its prejudice significantly outweighed its probative value. (Id. at 2573)

After Mr. Villagrana plead guilty on the morning of day one to a lesser charge not implicating a gang enhancement (See: AAv11: 2575-2592), the case proceeded to a 12-day jury trial, including *voir dire*. (See: AAv11: 2593-AAv20: 4956) Critically, during deliberations the jury asked two questions that cut to the heart of the legal issues involved: "If a person has no knowledge of the conspiracy but their actions contribute to someone else's plan, are they guilty of conspiracy?" And secondly, "People in here are wondering if a person can only be guilty of second degree murder or first. Can it be both?" (AAv21: 5019) The court refused to answer these questions (AAv21: 5020), even though both counsel agreed that the answer to first question is: "No." Shortly after the non-answers the jury found Appellant guilty as charged including the "gang enhancement." (AAv21: 5022-36)

Subsequent to the jury verdict, Appellant filed a "Motion to Strike Redundant Convictions." (AAv21: 5142-45) He also filed a Motion for a New Trial. (AAv21: 5038-5141) In the Motion for New Trial, Appellant complained about the non-response to the deliberation questions posed, and also complained of some of the court's rulings on the jury instructions, which effectively stripped

him of his defense in the case. (See: AAv21: 5038-5048; AAv21: 5170-74)

Appellant waived his right to be sentenced by the jury. (AAv21: 5037) At sentencing, the Court denied the Motion to Strike, on the grounds that certain counts would merge in the judgment of conviction. (AAv23: 542-43) As to the Motion for New Trial, the trial court rejected all of Appellant's attacks on the verdict (AAv23: 5543-5549), and accordingly denied the motion. (AAv23: 5549)

Accordingly, the trial court imposed its judgment on the date of sentencing, October 3, 2013, then entered a corrected judgment on October 4, 2013. (AAv23: 5572-74; 5575-77) Per the corrected judgment, Counts II and V were merged with Count VI. (Id. at 5576) Appellant was punished by 12 months in the county jail viz. Count I; 12 months to 48 months viz. Count III; 35 months to 156 months viz. Count IV; and 24 months to 96 months viz. Count VII. Those sentences were ordered to run concurrently with each other. As to Count VI, Appellant was punished with a sentence with life imprisonment with a possible of parole after 20 years, with a consecutive term of imprisonment of 8 years to 20 years for the weapons enhancement. Because of the weapon enhancement, the gang enhancement penalty was not imposed pursuant to NRS 193.169. That sentence was ordered to be served concurrently with the sentences imposed in Counts I, III, IV and VII. (Id. at 5576)

Appellant filed his Notice of Appeal on October 15, 2013. (AAv23: 5578-5580) This Court has jurisdiction pursuant to NRAP 4(b) and NRS 177.015(3).

II. STATEMENT OF FACTS

To obtain this conviction the State called **36 witnesses**. Appellant called one, himself. Appellant presents important witness testimonies by groups:

A. Testimony of police and "non motorcycle-riding lay witnesses"

Bill Pritchard, the surveillance supervisor at John Ascuaga's Nugget (AAv11: 2628), testified that on September 23, 2011 the Hell's Angels (hereinafter "HA's") had their booth outside the Nugget on Victorian Ave. (Id. at 2647) The Vagos congregated primarily in the pavilion area, near the west tower of the Nugget. (Id. at 2655) Per the images captured on video, the fight between the HA's and the Vagos broke out at about 11:25 p.m.. (Id. at 2680) At the beginning of the fight Appellant was not participating, but rather, was backing off. (Id. at 2686)

Cesar Villagrana, a member of the HA's, was shooting his gun at 11:26 p.m.. (Id. at 2742) At that point, either Jethro Pettigrew (the ultimate victim) or Villagrana pistol-whipped someone. (Id. at 2744-45) By 11:26 p.m. the HA's and the Vagos fought with one another.

Pettigrew fell from gunshots at 11:27 p.m.. (AAv12: 2757, 2791) Pettigrew

was shot in the back. (AAv11: 2651) When the fight first broke out, however, Appellant ran behind the fish tank and checked his gun at the bar. (Id. at 2673-75)

George Messina, the security supervisor at the Nugget working the swing shift on September 23, 2011 (AAv12: 2776), added that he was called to an altercation in the area of the Oyster Bar of the Nugget at about 10:30 p.m.. At that time there was potential for violence between the HA's and the Vagos. (Id. at 2782-83) However, when Sparks PD Sgt. Walsh responded, the tensions between the two groups had eased. (Id. at 2874) (See also: AAv13:3036-37).

Thereafter, Mr. Messina saw a group of HA's talking to a group of Vagos. He then saw Pettigrew strike one of the Vagos in the face within seconds of the confrontation. (AAv12 at 2790, 2811) Mr. Messina then saw Pettigrew and Villagrana pull out guns and started shooting randomly after people started fighting and breaking glass. (Id. at 2791, 2811)

Frank Pesarin, a site manager for Street Vibrations (AAv17: 4026), worked with an HA named Bobby Vieira as a vendor. (Id. at 4030) Mr. Vieira had booked his slot outside of the Nugget about eight months in advance. (Id. at 4032) In the 18 prior years of the Street Vibrations event, Mr. Pesarin knew that there had been a *rivalry* between the HA's and the Vagos, but *not* a *problem*. Mr. Vieira's attitude was "I'm too old for this." (Id. at 4036) In fact, everything

between the Vagos and HA's was fine on the first two days of the event. (Id. at 4035) Typically, fights between motorcycle clubs involve other members joining in, but appear to be *spontaneous*. (Id. at 4060)

Steve Moore, a bartender employed at the Nugget (AAv17: 4241-42), was walking with a cocktail waitress to turn in his money and keys at the end of his shift, when he heard a loud noise. (Id. at 4242-43) He hit the ground with his coworker, looked up, and saw Villagrana and a Vago engaged in a fight. (Id. at 4245) The Vago ran away, while Villagrana went behind some slots, stepped out, and raised his gun. (Id. at 4247-48) Villagrana ejected the magazine in his gun and put a new one in. (Id. at 4249) Villagrana looked like someone who was looking for someone else to shoot. (AAv18: 4255) Although the witness saw the shooting of Pettigrew, his eyes were focused on Villagrana, who appeared to be the most aggressive person there. (Id. at 4253; AAv17:4249) Very few of the Vagos were actually involved in the fight. (AAv18: 4274) The witness heard two or three gunshots before he saw Villagrana shoot his gun. (AAv18: 4258)

B. Testimony of "Vago" witnesses

Richard Nickerson, a member of the San Jose Vagos since 2009 (AAv13: 3104), testified that Diego Garcia, aka "Boo Boo," and Caesar Morales are members of the San Jose Vagos. (Id. at 3104-05) Appellant, aka "Romeo,"

likewise is a member of the San Jose Vagos. (Id. at 3105-07) "Ta Ta" is the international president of the Vagos, and "Dragon Man" is the international sergeant at arms. (Id. at 3116-17)

As of September 23, 2011 there was **no rivalry** between the HA's and the Vagos. (Id. at 3107) He had experienced verbal run ins with certain HA members before he joined the San Jose Vagos. (Id. at 3108) However, the San Jose Vagos coexisted with the San Jose HA's and also with the Mongols. (Id. at 3109)

Mr. Nickerson was on the casino floor, while Appellant went to get a bottle of water, when the incident occurred. (Id. at 3139) Mr. Nickerson heard the bartender say, "not in my bar!" He then heard Pettigrew say, "you want [to get] shot, motherfucker?" [sic] (Id. at 3140) He then heard gunshots, and saw Cesar Villagrana shooting at everybody. (Id. at 3140-41) Mr. Nickerson immediately hid behind some slot machines. (Id. at 3141)

When Mr. Nickerson left Reno, he knew that Mr. Garcia had been shot in the leg. (Id. at 3145-46) (See also: AAv17:4102-03, 4108).

There was never a Vago meeting where Appellant agreed to kill Mr. Pettigrew. (Id. at 3161-62) Pettigrew never tried to stop the Vagos from opening a chapter in San Jose. (Id. at 3162)

Jimmy Evanson, the president of the "Southern California Riviera" chapter on September 23, 2011 (AAv12: 2843-44), testified that everyone associated with the Vagos, regardless of chapter, had to go to "Street Vibrations". (Id. at 2845) The Vagos held an international meeting on September 23, 2011 at 8 a.m.. More than 400 Vagos attended. (Id. at 2846)

After the meeting, Mr. Evanson went to the Oyster Bar at about 10:15 p.m.. There he saw a Vago named "Jabbers" having an issue with Jethro Pettigrew. "Jabbers" was Gary Rudnick, while Pettigrew, an extremely respected individual through the world of the HA's, was known as "the Godfather of San Jose." (Id. at 2847-49) Rudnick was the vice president of the *Los Angeles* chapter of the Vagos. (Id. at 2857)

At approximately 11:13 p.m., Evanson tried to calm everyone down. He spoke with Bobby Vieria, shook his hand, and both said, "we're too old for this shit." [sic] (Id. at 2855-56) The problem was that Pettigrew touched "Jabber's" back on his "cut," indicating that Jabbers should buy him a beer, and "Jabbers" took it in the wrong context. (Id. at 2857, 2863)

Rudnick, however, kept taunting Pettigrew over the perceived slight. (Id. at 2858, 2862) Pettigrew became perturbed, because Rudnick would not stop. (Id. at 2858)

Mr. Evanson became very concerned, and called "Ta Ta," (Id. at 3865) However, they went upstairs and talked with "Dragon", who had the decision making authority on whether to fight. (Id. at 2870) The decision was to stop and relax. (Id. at 2871)

When the fight started, Pettigrew was hit from behind after Morales hit a HA in a head with a bottle, in response to a punch being thrown. (Id. at 2882-83) Pettigrew then pulled out a gun and everyone got down when Pettigrew started firing it. (Id. at 2883-84) During the melee, the witness' club's vice president, Leo Ramirez, was shot in the stomach. (Id. at 2892)

The HA's are all individually run, with each charter its own separate entity. (Id. at 2919)

The Vagos have doctors, lawyers, and family men as members. (Id. at 2928) "Jabbers" is one of the bad people in the club. (Id. at 2929) The witness did not really know much about the Appellant. (Id.) Rudnick was ejected from the L.A. club because of what he did in this case. (Id. at 2932-33)

During the international convention of the Vagos, no one was angry with the HA's in particular. (Id. at 2943) There was never a meeting at the Nugget where anyone talked about killing Pettigrew. (Id. at 2971)

The witness was aware of at least three people - himself, Rocky Siemer, and

"Top Hat" - who told Rudnick that evening to leave Pettigrew alone. (Id. at 2948) Before the fight broke out, Pettigrew was not doing anything to cause a problem with the Vagos. (Id. at 2964-65)

When the melee ensued, no Vago immediately pulled out a firearm and started shooting a HA. (Id. at 2966) The Vagos went into a protective mode. (Id.) The Vagos consider themselves to be "brothers." (Id. at 2967)

Greg Fearn, the president of the Lake County (California) chapter of the Vagos (AAv13: 3195-96), was aware that as of the beginning of that evening, the HA's and the Vagos' did not have any issues with each other. (Id. at 3197)

At the beginning of the melee, Mr. Fearn saw Pettigrew throw a punch and knock Rudnick down. (Id. at 3206) Pettigrew then reached into his bag, pulled out a gun, and fired two to three shots in the direction of Rudnick. (Id. at 3206-07) Pettigrew, while cussing at "Jabbers," pistol whipped the witness. (Id. at 3207, 3214) Pettigrew had a look in his face similar to a "wild coyote." (Id. at 3237) After Pettigrew fired off his rounds, someone else kicked Pettigrew in his head. (Id. at 3223)

The whole incident was very spontaneous. (Id. at 3237) There had been no discussion about attacking any HA before the fight broke out. (Id. at 3232)

Robert Wiggins, the vice president of the Orange County chapter of the

Vagos (AAv14: 3407, 3412), is a general contractor by trade. (Id. at 3407) The Vagos wear green, and their "cut", or patch on the back of the vest, is a "loki," or Norse God.

Mr. Wiggins is friends with HA members. Everyone gets along. They have mutual respect. (Id. at 3428) However, during the fight two HA's were kicking him in his head, throat and chest. (Id. at 3417-20) That occurred while HA's were shooting guns. (Id. at 3415, 3439) Initially, Villagrana pointed his gun at the witness while standing over him. (Id. at 3474) From the video, Villagrana fired seven or eight shots (Id. at 3488), but was not shooting at the time Pettigrew was shot. (Id. at 3490)

John Siemer (aka "Cocky Rocky"), a "nomad" with the Vagos (i.e., not affiliated with any particular chapter) (AAv14: 3491-92) testified that after the Oyster Bar incident, he went to talk to Pettigrew, shook hands with him, told Rudnick to "rest your fucking neck" [sic], and thought that everyone had agreed to go their own way for the night. (Id. at 3492-93)

The HA's and the Vagos are not gangs; they are clubs. (AAv14: 3496) For a Vago, picking a fight with a HA's president would not give one any credibility; rather it would be seen as an "act of stupidity." (Id. at 3496-97)

In his opinion, there is simply was no way that any Vago would ever agree

to kill Pettigrew. (Id. at 3521) The idea simply makes no sense at all. (Id. at 3526-27) The Vagos simply would not do such a thing in a casino, with families present. (Id. at 3527)

Leonard Ramirez, the vice president of south coast Riviera chapter of the Vagos (AAv15: 3563), was shot in the stomach during the melee (Id. at 3567), and almost died in the hospital thereafter. (Id. at 3580-81)

When they arrived at the Nugget, the HA's, including Pettigrew, had been very respectful to the Vagos. One of the HA's mottos is, "show respect and get respect." There was never a plan that evening to attack Mr. Pettigrew. (Id. at 3578-80)

C. Testimony of "Hell's Angels witnesses"

Donald Sandy, a member of the San Jose HA's, came up to Reno in September of 2011 with Pettigrew and Villagrana and Jimmy Arnett. (AAv15: 3617-18) About 12 to 14 HA's were at the Oyster Bar that evening. Everyone was in a good mood. (Id. at 3619-20)

Throughout the day, a number of Vagos came up to them, from just a few to 100. (Id. at 3620) Some of the Vagos talked to Pettigrew to ease the tension. (Id.) Pettigrew came to the witness and said there was a mutual agreement; nothing would happen that weekend. (Id. at 3622)

The witness walked away with Pettigrew, Villagrana, and several others. They walked by a group of Vagos. Someone asked Pettigrew if everything would be okay. Pettigrew said "yes," and touched the man on his shoulder. (Id. at 3624) The next he knew, punches were being thrown, bottles were crashed, and people were screaming. (Id. at 3625) He saw Pettigrew draw his gun. (Id. at 3625) He also saw Villagrana pull out his gun. (Id. at 3626)

While ducking down, the witness saw Pettigrew wave his gun and fire. (Id. at 3631-32) He heard two to three shots. (Id. at 3631) He then saw the Appellant come around the corner, raise his gun up, and shoot Pettigrew in the back four to five times. (Id. at 3631) Pettigrew literally died in the witness' arms. (Id. at 20)

At the time the Appellant came in with the gun, Pettigrew was in process of kicking someone. (Id. at 3677)

Henry Tyrell, a member of the San Jose Hell's Angels (AAv15: 3332) was not aware of any specific tension between the HA's and Vagos at the time of the Oyster Bar incident. (See: AAv15: 3333-3336)

D. Testimony of Gary Rudnick, aka "Jabbers"

On direct examination, Rudnick testified as follows:

He had been a member of the Vagos for about ten years. (AAv15: 3731) He understood that the Vagos have problems with the HA's and with the Mongols,

although he personally did not have any problems with the HA's. (Id. at 3736) He personally did not know any member of the HA's. (Id. at 3737)

Mr. Rudnick was the vice president of the Los Angeles chapter. (Id. at 3738)

Rudnick drove his motorcycle to Reno in September of 2011. His wife flew in to meet him there. (Id. at 3748) The witness had heard about an incident on Highway 99 in California between some HA's and some Vagos. (Id. at 3750)

The Vagos had a national officer's meeting at 8 p.m. in the Nugget. (AAv16: 3752) The concern was that the HA's had disrespected the Vagos at Bakersfield, and the agreement was supposed to be that the HA's would stay at a different hotel. (Id. at 3753) "Ta Ta" then put the "green light" on Pettigrew, i.e., to kill him, and Appellant agreed to do so. (Id. at 3754)[3]

The witness had dinner at the Oyster Bar with his wife. When he came out, approximately 15 to 20 HA's were there. (AAv16: 3755) The witness got a telephone call from "someone" entitled the "911 call," indicating that there would be an incident. (Id. at 3757-58)

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[3]Mr. Rudnick never explained why the international president of the entire Vago organization would direct a San Jose Vago to murder a San Jose Hell's Angel, over an incident that did not occur in San Jose. The Court may take judicial notice that Highway 99 in central California runs through Bakersfield, but does not run through San Jose.

Rudnick then went into the Oyster Bar to have a beer. (Id. at 3758) Someone kept tapping him on the back of his cut (patch). That is a sign of disrespect. (Id. at 3760) Rudnick became angry and confronted the man, Pettigrew, suggesting that he buy a beer for everybody. (Id. at 3761)

Tensions arose. "Dragon" and "Cocky Rocky" came down and told Rudnick to leave. (Id. at 3761) Rudnick was aggravated because Pettigrew would not apologize to him. (Id. at 3762)[4] After Rudnick walked towards the disco, "Dragon Man" told him not to let any HA's get to the elevator. Rudnick was going to stop Pettigrew and talk to him. He believed that all of the others would surround the HA's. He believed that all of the San Jose Vagos were in on the plan, including Appellant. (Id. at 3764-65)

Rudnick then testified that he walked up to Pettigrew and asked, "are we cool?" Pettigrew responded, "I don't talk to bitches." Rudnick responded, "I'm not a bitch. I'm just asking if everything is cool." Pettigrew then took a swing at Rudnick. (Id. at 3766-67)[5] Pettigrew pulled out his gun (Id. at 3768) and pistol

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[4]Missing in this story is how a personal affront by Pettigrew to Rudnick, a member of the Los Angeles Vagos, could rationally lead to a plot to murder Pettigrew involving Gonzalez, a member of the San Jose Vagos, when Gonzalez was not even there at time of the personal affront.

[5]This supposed plan to murder Pettigrew was not explained as including a Los Angeles Vago genuinely seeking a truce from Pettigrew, who of course would

whipped a Vago, before shooting another Vago. (Id. at 3771) Then more gunfire went off. (Id.) Then Appellant shot Pettigrew in the back. (Id.)

After the incident, "Dragon Man" sent 10 Vagos to Rudnick's home to take his motorcycle. He was ejected from the Vagos, i.e., he was "out bad," for starting the whole incident. (Id. at 3778)[6]

Rudnick explained that when Cocky Rocky said to "let it go," he thought that meant Pettigrew was not going to get past the elevator. (Id. at 3795)

Rudnick plead guilty to the charge of conspiracy to commit murder, carrying a potential penalty of 4 to 10 years in prison. However, he never agreed to kill anybody, (Id. at 3807-08) He was hoping to get probation, but the prosecutor had not made him any promises. (Id. at 3809)

In addition to the points made in the above footnotes, on cross-examination facts were brought out that further shed light on Rudnick's incredibility:

1. While Rudnick was in jail before making bail, he told his wife that if he did everything "Karl" (Hall, the trial prosecutor) wanted to, he would get

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react by throwing a punch at the Los Angeles Vago, and then for Pettigrew to pull his gun and begin shooting at people, so that the "planned murder" of Pettigrew by a San Jose Vago would appear to be defense of others.

[6]Missing in Rudnick's description of "the plan" was a "plan" to appear to place the blame on Rudnick after the fact by a number of Vagos doing that to him.

probation. (Id. at 3813) Rudnick admitted that he said that, but "he was lying to his wife." (Id. at 3814)

2. Eric Bennett (see below) promised him a new identity and a new place to live, rent free for a year, in exchange for his cooperation. (Id. at 3819)

3. Before he bailed, Rudnick told his wife that he was going to withhold information from the State unless they did something for him. (Id. at 3833) He was "going crazy in jail." (Id. at 3825-26) Rudnick was upset with Bennett, but hoped that Mr. Hall would uphold "his end of the deal." (Id. at 3836)

4. When Rudnick joined the Vagos, it was a clean-and-sober charter, and there were a number of good people in the Vagos, including professionals. (AAv16: 3848)

5. In his assistance to the State, Rudnick told Bennett he (Rudnick) has smuggled kilos of cocaine and methamphetamine from Mexico to the United States. He admitted to being one of the criminals in the Vagos, but further admitted that not all members were. (Id. at 3862-63)

6. Rudnick admitted that he had brought his wife to a number of Vagos' events. He would never purposely expose her to danger. (Id. at 3889-90).

7. With respect to the murder plan, Rudnick claimed that he chose to participate, knowing that the plan would be videotaped and carried out in front of

dozens of witnesses. (Id. at 3916) There was no back up plan, no escape plan, and no game plan as part of this plan to murder. (Id. at 3915)

8. Importantly, Rudnick told the police that the "green light" meant that if the murder did not happen that night it would happen some other time. (Id. at 3923)

9. Per Rudnick, Pettigrew actually caused the fight. (Id. at 3932) Per Rudnick, his only purpose in the events leading to Pettigrew's death was to get an apology from Pettigrew. (Id. at 3933) When Pettigrew attacked him and Appellant walked away, there was no plan to shoot Pettigrew at that point. (Id. at 3934) When Pettigrew pulled his gun, Rudnick went into hiding. (Id. at 3934-35)

10. The term "green light" simply means "green light"; it does not mean "kill him." (Id. at 3963)

11. He did not think any of this was his fault. The only reason he plead guilty was because his attorney advised him to do so. (Id. at 3979)

E. Testimony of "OMG Gang Experts"

Les Skelton, a detective with the Arizona Department of Public Safety (AAv18: 4432-33), has been involved in the investigations of "outlaw motorcycle gangs" (OMG's), such as the HA's and the Vagos. (Id. at 4435) He investigated a shootout between the HA's and the Vagos in Chino Valley, Arizona in August of

2010. (Id. at 4435) He testified that the HA's and the Vagos claim "territory" based on their "side rockers" on their vests, which indicate where they are from. (AAv16: 448-49) However, the Vagos will stand up for each other, meaning for example to help one another out if someone gets into a fight. Fights generally are over "respect." (Id. at 4450-51)

The Vagos commonly commit crimes punishable as felonies in the state of Arizona. Someone who cooperates with law enforcement acts contrary to Vago rules. (Id. at 4452-53)

This witness' opinion was that the Vagos in San Jose had a territorial battle with the HA's in San Jose. Removing Pettigrew would take away power and control from the HA's and would allow the Vagos to expand in San Jose and enhance "their street credibility." (Id. at 4455-56) However, the witness had no personal knowledge or specific knowledge about any dispute between the San Jose Hell's Angel's and the Vagos as of September of 2011. (AAv18: 4488) And, there was no history of HA's and Vagos shooting each other especially during national runs (such as Street Vibrations). (Id. at 4483)

Per the American Motorcyclist Association, 99% of people riding motorcycles are law biding citizens. The remaining 1% cause the problems. (Id. at 4468)

Eric Bennett, a detective with the San Bernardino Police Department (AAv19: 4501) knew of a Vago in Idaho who was rewarded for claiming a murder that "benefitted" the club. (Id. at 4507) He knew of incidents between the Vagos and the HA's in May of 2010 in Bakersfield, where the HA's were the aggressors (Id. at 4510); and a shootout in Chino Valley in the summer of 2010 (Id.), two incidences in Hollister, California and Williams, Arizona in 2010; and an incident in Lake County, California, where again the HA's were the aggressors. (Id.) The Vagos engage in criminal activity, but not all the time. (Id. at 4516) His guess is that 15 to 20 Vagos had committed felonies over the years (Id. at 4526); but worldwide, there are approximately 1,000 Vagos members. (Id. at 4525)

This witness monitored 100,000 phone calls in an investigation of Vagos. Only three involved the Appellant, and his name was mentioned in only three to four others. None of those conversations concerned any criminal enterprise or anything illegal on the Appellant's part. (Id. at 4543-4545) There was nothing in the intercepted calls referencing any HA from San Jose. (Id. at 4546)

G. Testimony of Appellant

Ernesto Gonzales is a native of Nicaragua who had owned janitorial businesses in San Jose for approximately 22 years. (AAv19:4614-17) He became interested in the Vagos when he lived in Hawaii, and when he moved back to the

Bay Area, the closest chapter was in San Jose. Thus, he joined the San Jose Vagos. (Id. 4619-22). Not all of the Vagos chapters are the same in terms of how one goes about getting patched. (Id. at 4628-29).

Several years prior to the within incident, Appellant was accosted on the freeway near San Francisco by someone who didn't like him. That person threw bottles at Appellant. For that reason he purchased a weapon for protection. The case involving the police's discovery of the weapon was dismissed. (Id. at 4630-31).

Appellant had been to Street Vibrations in 2009 and 2010 and had no problems with the HA's at that time. (Id. at 4633-34). San Jose has both a Vagos and an HA charter. The two clubs coexist and are respectful to one another. (Id. at 4634). Appellant did not personally know any of the HA's in San Jose and had never met Pettigrew. (Id. at 4635-36).

Appellant rode up from San Jose with eight other Vagos to Street Vibrations on September 23, 2011, arriving in Sparks at about 4:30 p.m.. (Id. at 4636). There was a general meeting of the Vagos at 8:00 p.m. at the Nugget. (Id. at 4637). There was never a discussion regarding a "green light" on Mr. Pettrigrew. (Id. at 4638). And Rudnick to Appellant no such thing.

Later, he was in the Nugget talking with Mr. Fearn when he saw HA's

coming toward them. He then saw Rudnick and Pettigrew talking, and decided he better walk away. (Id. at 4642-43). He saw Pettigrew hit Fearn two times with a bottle, and saw Villagrana also come towards him with a bottle. (Id. at 4644.) He dashed away to a disco, saw a firearm on the counter, threw his bottle away, picked up the gun, and put it in his pants. (Id. at 4644).

Appellant then heard gunshots. He saw Pettigrew waving his gun in the air. Appellant went to leave. (Id. at 4644). He thought the fight was done, when he saw "someone" kicking a man on the ground and pulling out a gun. That is when Appellant went behind the bank of slot machines and fired his gunshots. (Id. at 4645). Panicked, he then ran out of the Nugget, threw his gun away, and ended up across the street a different hotel. (Id. at 4645).

Appellant emphasized two points on cross examination: 1) There is simply no way that "Ta Ta" would authorize a fight with the Hell's Angels in a casino, with all of the families present. (Id. at 4713-14); 2) When he shot his gun, he had a "defenseless brother" on the ground being kicked to death. (Id. at 4727).

III. STATEMENT OF ISSUES

Did the trial court abuse its discretion and violate Appellant's Fifth, Sixth and Fourteenth Amendment rights to a fair trial and to due process of law in the following regards:

A. By refusing to address the jury's request for supplemental instructions during deliberation that implicated the heart of the case and the elements of the charged offenses;

B. By refusing to give the jury instruction relative to the Appellant's theory of the case, whether as proposed or modified;

C. By refusing to give an accomplice distrust instruction relative to Rudnick;

D. By refusing to bifurcate the presentation of the "gang enhancement evidence" in a penalty phase only, instead allowing such evidence at the guilt phase trial.

Additionally: E. Was the evidence presented to the jury and sufficient as a matter of law upon which to find a gang enhancement? If so, did the trial court abuse its discretion in denying the motion in limine and allowing "gang criminality evidence" to be heard by the jury?

F. Did the trial court violate Appellant's statutory rights to a fair grand jury hearing by allowing the state to introduce gang enhancement evidence to the Grand Jury, in lieu of proper proof of a conspiracy, and without an appropriate limiting instruction? Alternatively, should the Grand Jury have been instructed on the defense of others based upon the evidence presented?

G. Did the trial court commit reversible in merging the second degree murder conviction into first degree murder, rather than the other way around under the facts and circumstances of this case?

IV. ARGUMENT

A. THE TRIAL COURT ABUSED ITS DISCRETION AND VIOLATED APPELLANT'S FIFTH, SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO A FAIR TRIAL AND TO DUE PROCESS OF LAW, WHEN IT REFUSED TO ADDRESS THE JURY'S REQUEST FOR SUPPLEMENTAL INSTRUCTIONS DURING DELIBERATION THAT IMPLICATED THE HEART OF THE CASE AND THE ELEMENTS OF THE CHARGED OFFENSES.

A. Standard of Review

A district court has broad discretion with respect to jury instructions, and absent an abuse of discretion or judicial error, this Court will uphold a district court's decision regarding a jury instruction. Brooks v. State, 124 Nev. 203, 206, 180 P.3d 657, 659 (2009).

In closing argument, the State's theory was that this could not be a self defense case because the Vagos were the initial aggressors by reason of Rudnick's challenge to fight. (See: AAv20:4823, 4825, 4827, 4839, 4916, 4917-18) The defense theory was that Appellant was not in a conspiracy, because one simply could not believe Rudnick, and there was no other evidence to suggest that he was.

(Id. at 4878-79) After the jury received the case[7] the jury sent out two legal questions. The first one read:

> "If a person has no knowledge of a conspiracy but their actions contribute to someone's plan, are they guilty of conspiracy?" (AAv20:4927-28. And See: AAv21:5019)

Immediately, defense counsel's answer to the question was "no." (Id. at 4928) The jury had a second question:

> "People in here are wondering if a person can only be guilty of a second degree murder, or first. Can it be both?" (Id. at 4928; and see: AAv21:5020)

Again, defense counsel responded immediately: "No." (Id. at 4928) And the trial prosecutor agreed with defense counsel. He stated:

> "This is Karl. They can't convict of both first and second. But if they have no knowledge of conspiracy, then they can't be guilty of conspiracy." (Id. at 4928)

The trial court, however, believed that the jury was asking her to interpret Instruction No. 17. (Id. at 4930) That instruction read:

> "... 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 a support a conspiracy conviction. However, absent an to cooperate and achieve the purpose of a

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[7] AAv20:4920-21.

conspiracy, mere knowledge, acquiescence in, or approval of that purpose does not make one a party to a 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." (AAv20:4980)

Because trial counsel could not cite the court a case on the spot requiring her to answer the questions, she refused to do so. (AAv20:4933-34) Thus, her answer to the jury was:

"It is improper for Court to give you additional instructions on how to interpret Instruction No. 17. You must consider all the instructions in light of all the other instructions."

"You must reach a decision on each count separate and apart from each other." (AAv21:5020-21)

The jury shortly reached its guilty verdict on all counts. (AAv20:4939)

Post verdict, Appellant filed a motion for new trial. (AAv21:5038-5141) Among other things, he complained of the court's refusal to answer these questions. (See: AAv21:5045-46) In denying the motion, the court concluded that it complied with NRS 175.451 and cases construing that statute.

B. Argument

The trial court hangs its hat on Tellis v. State, 84 Nev. 587, 591, 445 P.2d 938, 941 (1968): "The trial judge has wide discretion in the manner and extent he

answers a jury's questions during deliberation. If he is of the opinion the instructions already given are adequate, correctly state the law, and fully advise the jury on the procedures they are to follow in their deliberation, his refusal to answer a question already answered in instructions is not error."

Nationwide the law is not quite that straightforward, in light of Bollenbach, *infra.*

The decision to issue additional jury instructions during deliberation generally indeed lies within the sound discretion of the trial court. However, when a jury requests clarification regarding legal principles governing a case, the trial court has a **duty** to respond promptly, **completely** and **accurately** to the jury's inquiry. State v. Juan, 242 P.3d 314, 320-321 (N.M. 2010) [reversed and remanded], citing Bollenbach v. United States, 326 U.S. 607, 612-13, 66 S.Ct. 402, 405 (1946). The duty is especially incumbent when the jury's question of the court indicates an erroneous understanding of the law (State v. Campbell, 250 P.3d 235, 239 (Wash. App. 2011)), meaning questions regarding the central elements of the charged offense. (People v. Hoover, 165 P.3d 784, 796 (Colo. App. 2006)). And this is true even when the original instruction normally would have been sufficient to apprise the jury of the governing law. State v. Stieben, 256 P.3d 796, 799 (Kan. 2011) [reversed]. The rebuttable presumption that the jury understands

and heeds the court's instructions disappears when the jury sends out questions demonstrating that it has a fundamental misunderstanding of an instruction given. People v. Manier, 197 P.3d 254, 259 (Colo. App. 2008) [reversed in part]. And see: Lamb v. State, 127 Nev. Adv. Op. 3, 251 P.3d 700, 711 (2011), citing ABA Principles for Juries and Jury Trial, Principle 15(D) (2005).

No matter how clear Instruction No. 17 was in the mind of the State and the court below, it is was not clear to this jury. This jury needed a simple answer to the question: if a person has no knowledge of a conspiracy but his/her actions contribute to someone else's plan, is s/he guilty of conspiracy? Instruction No. 17 did not answer that question to the jury's satisfaction.

A defendant is entitled to an instruction advising the jury that absent an agreement to cooperate in achieving a criminal purpose, mere knowledge of, acquiescence in, or approval of that purpose does not establish a conspiracy. Brooks v. State, *supra*, 124 Nev. at 211, 180 P.3d at 662 [reversed]. To be guilty of a conspiracy, there must be separate and distinct evidence of an agreement between the defendant and coconspirators to achieve a criminal purpose. Garcia v. State, 121 Nev. 327, 344-45, 113 P.3d 836, 847 (2005) [reversed; in a case with only one co-conspirator, there cannot be an agreement with such a person whom the defendant does not know.]

Had the jury's question been answered in the succinct manner suggested by both counsel, i.e. "no," the jury acting reasonably would have realized that the State's theory of criminality simply did not work under these facts. That is, if Appellant had no knowledge of a conspiracy, he could not be guilty of a conspiracy theory even if his actions contributed to someone else's conspiracy that he did not know of. Had the jury so concluded, clearly it would not have found Appellant guilty of Count I as it did. It also would not have found him guilty of Count VII, or conspiracy to commit murder as it did. But it also would not have found him guilty of murder with a deadly weapon, Count VI, since it was based on a conspiracy theory. (See: AAv1:63) For that matter, Count II, or challenge to fight resulting in death with the use of a deadly weapon, was also based on a conspiracy theory. Id. at 57-58. Unquestionably, this error was not harmless beyond a reasonable doubt. Whether individually or in cumulation with the other trial errors in this case, a reversal of the judgment of conviction absolutely must follow.

B. THE TRIAL COURT ABUSED ITS DISCRETION AND VIOLATED APPELLANT'S RIGHTS TO A FAIR TRIAL AND TO DUE PROCESS OF LAW UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, WHEN IT REFUSED TO GIVE THE JURY INSTRUCTION RELATIVE TO THE APPELLANT'S THEORY OF THE CASE, WHETHER AS

GIVEN OR MODIFIED.

A. Standard of Review

As noted in Brooks v. State, *supra*, although the Court's handling of jury instructions is reviewed for abuse of discretion, a tougher standard becomes utilized when the instruction in question is a defense theory of the case instruction. When an accurate theory of the case instruction is tendered and not given, and is not substantially covered in given instructions, the Court usually considers itself constrained to reverse.[8] Affirmance happens typically when the given instructions reasonably adequately cover the refused instruction, and the evidence of guilt is overwhelming. See: Crawford, 121 Nev. at 756-57, 121 P.3d at 590.

In this case, the trial court gave a very comprehensive instruction on self defense that simply referenced defense of another. (AAv20:4998-99) In other words, per the trial court, anything that could legally be said about the theory of defense of another is fully encompassed in the theory of self-defense.

As a self-defense instruction, Appellant did not object. (AAv20:477) However, Appellant tendered a theory of the case instruction, instruction no. A,

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[8] Carter v. State, 121 Nev. 759, 767, 121 P.3d 592 (2005), unless it is clear beyond a reasonable doubt that the guilty verdict actually rendered was surely unattributable to the error. Crawford v. State, 121 Nev. 744, 756 n.30, 121 P.3d 582, 590 (2005).

which stated:

> "Defendant Ernesto Gonzalez asserts as his theory of defense that he acted in lawful defense of another. If you find that Defendant Ernesto Gonzales acted in lawful defense of another as set forth in these instructions, you cannot convict him of Counts I, II, III, IV, V, VI [and] VII. (AAv21:5013)

The court rejected his instruction on the theory that Instruction No. 34 adequately covered the defense of the defense of another. (See: AAv20:4778-80)

B. Argument

This ground is extremely problematic for the State on three fronts:

First, this case does not work as a self-defense case. In the first place, neither Villagrana nor Pettigrew specifically aimed their revolvers at Appellant when Appellant shot Pettigrew. Second, Appellant shot Pettigrew in his back multiple times. Clearly, those are not the hallmarks of a self-defense case. But as a defense of others case, the theory was very plausible. Appellant simply was not present when Rudnick's quarrel elevated into Pettigrew and Villagrana's gunfire. By the time Gonzales came to the scene with his gun, Pettigrew was kicking a Vago on the ground, and both had their guns out, ready to shoot the next Vago in his eyesight. From Gonzales' reasonable point of view, the only way to put a stop to the fight was to shoot the perpetrator; and stepping out in view of an armed man, who had fired his gun multiple times already, in order to shoot him would be

imprudent.

Rolling the self-defense and defense of other instruction into one, however, made it look like the Appellant's defense actually was self-defense. Exploiting the mistake, the trial prosecutor emphasized over and over to the jury why this case could not be self-defense. (See: AAv20:4823, 4825, 4827, 4839, 4905, 4916, 4917-18) Continuously in his argument, the trial prosecutor referenced why the Appellant was not entitled to a finding of self-defense. Only at AAv20:4915 did he off-handedly reference defense of another.

Secondly, we acknowledge that self-defense and defense of others have similarities. For example, both self-defense and defense of others are the same as to the state having the burden of proof on those "defenses." See: Barone v. State, 109 Nev. 778, 781, 858 P.2d 27, 29 (1993). However, the two defenses are not exactly the same thing. If they were, the legislature would not have enacted NRS 200.160, which states:

> "Homicide is **also justifiable** when committed: 1. In the lawful defense of the slayer, or his or her husband, wife, parent, child, brother or sister, **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 slaying 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; or 2. In the actual resistance of an attempt to commit a felony upon the slayer, in his or her presence, or upon or in a dwelling, or other**

place of abode in which the slayer is.

On its face, NRS 200.160, unlike the self-defense doctrine, does not excuse the act of someone who is reasonably mistaken regarding the imminent danger; rather, there must be imminent danger. And NRS 200.160 does not draw the distinction re whether the person being protected was associated with the suspect or was an initial non-violent aggressor, violent aggressor, or innocent; if that person finds him or herself in the position where he or she is inevitably is going to be killed, the suspect may kill the slayer and be justified in doing so.

That distinction is critical in this case. In the above-referenced portions of the trial prosecutor's argument, he emphasized that self-defense was not available to Appellant because another Vago, Rudnick, was the initial aggressor. However debatable that point is relative to self-defense, it is absolutely wrong with respect to defense of others. By the time Appellant came on to the scene with his gun, Rudnick was gone. Appellant was protecting not the life of Rudnick, but the life of the Vago whom Pettigrew was kicking to death and the other Vagos whom Pettigrew and Villagrana were prepared to shoot to death.

The one recent case of this Court that touches upon the defense of others doctrine at all is Batson v. State, 113 Nev. 669, 941 P.2d 478 (1997), and it may not be a perfect analogy to this case since it involves a victim who was a police

officer. Nonetheless, the principles of law of Batson are: 1) A person may defend another against an officer's use of force if excessive force is witnessed and serious harm is imminent; 2) A defendant may invoke the privilege of defense of others against such an officer to the extent that the victim (in that case, the defendant's wife) could have invoked the privilege of self-defense against the officer; 3) The individual acting in defense of another against the police officer may only use that force reasonably necessary to remove the threat of imminent serious bodily harm to that person. Batson, 113 Nev. at 674, 676, 941 P.2d at 481-82, 483.

Had the jury been instructed per Batson and/or NRS 200.160, a jury's attention reasonably would have been focused in this manner: Appellant saw Villagrana and Pettigrew shoot and kick other Vagos; Gonzalez reasonably assessed serious, imminent harm to the Vagos other than Ramirez and Garcia, who had already been shot; the Vagos on the ground who had nothing to do with Rudnick, clearly could have invoked the privilege of self-defense against Pettigrew and Villagrana; and given what Pettigrew and Villagrana had done, it was reasonably necessary for Appellant to remove their threat to the remaining Vagos by using deadly force against them or either of them.

The third reason this assignment of errors is problematic for the State is, as the State will point out, neither the instruction given nor the proposed defense

instruction purported to define defense of others in the light either of NRS 200.160 or Batson. But that does not matter. Per Carter this Court held that trial courts must give a complete and accurate theory of the case instruction even though the instruction requested is incomplete. That is, if a proposed defense instruction is poorly drafted, a district court has an affirmative obligation to correct the proposed instruction, or to incorporate the substance of such an instruction in one drafted by the court. Carter, 121 Nev. at 765, 121 P.3d at 596 [reversed]. Accord: Crawford.

Thus, in the final analysis this assignment is informed by these basic legal propositions: in every criminal case a defendant is entitled to have the jury instructed on any theory of the defense that the evidence discloses, however improbable the evidence supporting it may be. It makes no difference which side presents the evidence. Allen v. State, 97 Nev. 394, 398, 632 P.2d 1153, 1155 (1981). Generally, a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor - even where there are multiple inconsistent defenses. Mathews v. United States, 485 U.S.58, 62, 63 (1988).

Whether singularly or in accumulation with the other trial court errors, a reversal of the judgment conviction must necessarily follow.

C. THE TRIAL COURT ABUSED ITS DISCRETION AND

VIOLATED APPELLANT'S FEDERAL CONSTITUTIONAL RIGHTS TO A FAIR TRIAL AND TO DUE PROCESS OF LAW UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, WHEN IT REFUSED TO GIVE AN ACCOMPLICE DISTRUST INSTRUCTION RELATIVE TO RUDNICK.

A. Standard of Review

As stated above, the standard of review is abuse of discretion.

However, the term "discretion" implies the absence of a hard and fast rule. The establishment of a clearly-defined rule would be the end of discretion. Goodman v. Goodman, 68 Nev. 484, 487, 236 P.2d 306, 306 (1951). A manifest abuse of discretion is a clearly erroneous interpretation or application of the law. State v. Eighth Judicial Dist. Ct. (Armstrong), 127 Nev. Ad. Op. 84, 267 P.3d 777, 780 (2011). Thus, an abuse of discretion occurs when the District Court's decision is arbitrary or capricious, or if it exceeds the bounds of law or reason. Jackson v. State, 117 Nev. 116, 120, 17 P.3d 998, 1001 (2001).

During the settlement of jury instructions, Appellant tendered Instruction No. E which the trial court rejected. It read as follows:

> "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 than that of other witnesses."

This instruction is taken verbatim from Instruction 4.9 *Manual of Model Criminal Jury Instructions for District Court of the Ninth Circuit* (2010). The District Court rejected this instruction on the basis that the principle was "adequately covered" in the given instructions. (AAv20:4781)

In his motion for new trial, Appellant renewed the failure to give this instruction as a ground for new trial at AAv21:5045. But in denying the motion for new trial, at AAv23:5546, the Court below justified the failure to give this instruction on the basis that it was based on a Ninth Circuit pattern instruction, and there was no Nevada authority in support thereof.

B. Argument

Rejected Instruction No. E clearly is aimed at Rudnick. It is an accomplice distrust instruction. An accomplice is someone who is liable to prosecution for the identical offense charged against the appellant. Globensky v. State, 96 Nev. 113, 117, 605 P.2d 215, 218 (1980). Per the original Indictment, AAv1:1-10, Rudnick clearly is an accomplice to Gonzalez as charged.

An accomplice distrust instruction is required when an accomplice's

testimony is uncorroborated, and it is favored even when it is corroborated. Buckley v. State, 95 Nev. 602, 604-05, 600 P.2d 227, 228-29 (1979), and cases cited therein [harmless error there]. An accomplice distrust instruction is required only when the accomplice's testimony is uncorroborated. See: King v. State, 116 Nev. 349, 355, 998 P.2d 1172, 1175 (2000); Browning v. State, 120 Nev. 347, 367, 91 P.3d 39, 53 (2004).

But where the accomplice's testimony in uncorroborated and the accomplice's testimony is central to the State's case, it is plain reversible error not to give the distrust instruction, even where counsel fails to seek it. Champion v. State, 87 Nev. 542, 544, 490 P.2d 1056, 1057 (1971).

This whole case hinged on Rudnick's testimony. Without a conspiracy theory, this case was about as compelling for a finding of "defense of others" as could be imagined. The prosecution's theory of that defense not attending depended upon a conspiracy to kill Pettigrew before Rudnick started the argument. Did that actually happen? As we have seen, Rudnick says it did on direct examination; but Nickerson, Evanson, Fearn, Siemer and the Appellant testified emphatically that it did not. And as shown above, on its face Rudnick's story was incredible: additionally, Rudnick waffled on it considerably in cross-examination.

Nevertheless, by its verdict, the jury evidently believed this man's direct

testimony. The only argument the State could credibly make to uphold the trial court's discretion on a different theory is that counsel thoroughly explored the plea bargain on cross-examination, and on its face and per Rudnick's testimony he gained no consideration - other, of course, than having the charges reduced to where a life sentence would be off the table.[9]

But that argument ignores not only the "charge bargain" nature of the deal, it also ignores the rest of the testimony. As stated below, Rudnick was not willing to cooperate with the State unless he thought he would get consideration from the State in the free world. He thought, regardless of what the plea bargain said, that he was going to get probation after his testimony.

Moreover, trial counsel pointed out in the argument in the motion for new trial some unrebutted facts: after the guilty verdict herein, Rudnick's counsel became very angry at Mr. Hall because she believed, the language of the plea bargain to the contrary notwithstanding, that the State would not object to a grant of probation for Mr. Rudnick. The State in fact argued for prison time at

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[9] The State could also quibble about its wording. Presumably it won't because of Carter v. State, *supra*, i.e., the trial judge's duty to amend applicable but poorly stated defense instructions.

Rudnick's sentencing, and got it. (See: AAv23:5511-13)[10] But as counsel pointed out, even though that occurred after the fact, the plea bargain as it was granted Rudnick a substantial benefit: he had an opportunity for probation and had a plea bargain that took a life sentence off the table.

Because Rudnick's testimony was so central to the State's conspiracy theory of the case and because it was so questionable and controverted, we respectfully submit that Champion constrains this Court's exercise of discretion. The instruction absolutely should have been given - both as a matter of Ninth Circuit law and as a matter of Nevada law. Clearly, this error is not harmless beyond a reasonable doubt. And, relative to the importance of Rudnick to this case, the accomplice distrust instruction can truly be viewed as a "theory of defense" instruction, on par with the "defense of others" instruction, and thus a Sixth Amendment constitutional issue per Mathews.

Clearly, nowhere in the jury instructions given was any type of instruction referencing a caution or reason to distrust Rudnick's testimony, or an admonition to consider his testimony with more care than other witnesses, ever given.

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[10] The trial court expressed concern that Rudnick's counsel sat through his testimony in this case, and did not seek to correct her client's testimony that there were no guarantees or expectation of probation when he so testified. (See: AAv23:5512-13) The same "concern" should attend with the trial prosecutor.

Consequently, whether singularly or in accumulation with the other errors herein, this error warrants a reversal of the judgment of conviction.

D. THE TRIAL COURT ABUSED ITS DISCRETION AND VIOLATED APPELLANT'S RIGHT UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION TO A FAIR TRIAL AND TO DUE PROCESS OF LAW, WHEN IT REFUSED TO BIFURCATE THE PRESENTATION OF THE "GANG ENHANCEMENT EVIDENCE" IN A PENALTY PHASE ONLY, AND INSTEAD ALLOWED SUCH EVIDENCE AT THE GUILT PHASE TRIAL.

A. Standard of Review

This Court reviews decisions regarding severance of charges for an abuse of discretion. Morales v. State, 122 Nev. 966, 969, 143 P.3d at 463, 465 (2006).

B. Argument

The State and the court below believe that Somee v. State, 124 Nev. 434, 446, 187 P.3d 152, 160-61 (2008) and Butler v. State, 120 Nev. 879, 889, 102 P.3d 71, 79 (2004) stand for these propositions: 1) All the State has to do is charge a gang enhancement in the indictment or information, and evidence that the defendant is affiliated with a criminal gang that is involved in the commission of felonies as a common activity will automatically come in - even if that evidence would otherwise be inadmissible per NRS 48.045(2); 2) All the State has to do is charge a gang enhancement, and evidence of the criminal activity of the gang is

necessarily "*res gestae*." Therefore, the evidence comes in, whether or not the State ultimately can prove the gang enhancement pursuant to NRS 193.168.

Respectfully, if Somee and Butler mean that, then this Court has managed to tip the Federal Constitution on its head. See: Zafiro v. United States, 506 U.S. 534, 539 (1993).

First off, Somee actually holds that where evidence is relevant to the gang enhancement for the charged crime and the defendant is charged with the gang enhancement, the evidence is admissible without regard to NRS 48.045(2), and the NRS 48.045(2) limiting instruction need not be given. Somee, 124 Nev. at 446, 187 P.3d at 160-61. This Honorable Court did not address in Somee the issue of whether the evidence in support of a gang enhancement should be heard in a bifurcated trial.

Secondly, Butler holds that the defendant's gang affiliation is *res gestae* under NRS 48.035(3). We agree. And the mere fact that a defendant is affiliated with a motorcycle gang such as the Hell's Angel or the Vagos does not implicate either NRS 48.045(2) or 48.035(3). See: United States v. Hodges, 315 F.3d 794, 801 (7th Cir. 2003); State v. Peppers, 276 P.3d 148, 157-58 (Kan. 2012). But the mere fact that an accused is associated with a motorcycle club such as the Hell's Angels or the Vagos, in and of itself, is not terribly prejudicial. After all, the First

Amendment protects the rights of citizens in this country to associate with one another in a motorcycle club. See: Burgess v. Storey County Board of Commissioners, 116 Nev. 121, 125, 992 P.2d 856, 859 (2000); United States v. Rubio, 727 F.2d 786, 791 (9th Cir. 1983). And it is well known - as well as established in this record - that motorcycle clubs such as the Vagos or the HA's include professionals such as doctors and lawyers.

But by no stretch can it possibly be said that evidence that the members of the "gang" in question regularly commit felonies for the benefit of the "gang" is *res gestae.* That proposition simply cannot be squared with Bellon v. State, 121 Nev. 436, 444, 117 P.3d 176, 181 (2005) [reversed]: Admission of evidence under NRS 48.045(3) is limited to uncharged acts or crimes that are so closely related to the act in controversy that the witness cannot describe the act without referring to the other uncharged act or crime.

So, the fact that Appellant was a " San Jose Vago" on September 23, 2011 is *res gestae.* The "fact" that other "Vagos" in places such as Arizona and Southern California in 2010 or so have engaged in felonies for the "benefit" of their clubs cannot by any stretch of the imagination be called "*res gestae.*"

Thirdly, there cannot be any question but that evidence that the defendant on trial belongs to a "gang" ordinarily is an "act" under NRS 48.045. See: Tinch

v. State, 113 Nev. 1170, 1176, 946 P.2d 1061, 1065 (1997); Lara v. State, 120 Nev. 177, 180, 87 P.3d 528, 530 (2004). If the "gang evidence" provides evidence establishing the accused's motive for committing the charged offense, then its probative value outweighs its prejudice. See also: Qualls v. State, 114 Nev. 900, 904, 961 P.2d 765, 767 (1998).

But it simply cannot be denied that evidence that an accused belongs to a gang and "criminally conducts himself accordingly" is inherently prejudicial. Gang affiliation evidence under those circumstances is likely to be damaging to a defendant in the eyes of the jury, as gangs suffer from poor public relations. And common membership in any group, whether it be gang or a church group, makes it more likely that two people are involved in a given activity together, whether or not it is illegal. This is why it is critical that not only the prosecution prove that the accused committed the offense, but that the "gang" in question regularly engages in that sort of criminal activity. United States v. Irvin, 87 F.3d 860, 864 (7th Cir. 1996) [reversed in part]. If the gang evidence does nothing more than deflect the jury's attention from the immediate charges and cause it to prejudge the accused because of his disreputable past as a member of a disreputable gang, such evidence denies that person a fair opportunity to defend against the offense that is charged. United States v. Roark, 924 F.2d 1426, 1434 (9th Cir. 1990), citing

Michelson v. United States, 335 U.S. 469, 476 (1948).

Fourthly, both this Court and the Nevada legislature have a history of bifurcating guilt and penalty phase evidence, when the State seeks an enhancement or an extra charge in a multi-charge indictment that, by itself, would prejudice the defense of the guilt phase charges.

For example, in multiple count prosecutions, severance of the trial of a count of ex-felon in possession of a weapon is required. Brown v. State, 114 Nev. 1118, 1126, 967 P.2d 1126, 1131 (1998). While the "bifurcated trial" can be heard by the same jury that hears the other guilt phase evidence, immediately after a guilty verdict on the other charges and before that jury is discharged, per Morales v. State, 122 Nev. at 976-70, 143 P.3d at 465-66, nevertheless it must be heard in a bifurcated proceeding.

Similarly, a defendant who faces a sentence enhancement for driving under the influence, domestic battery or habitual criminal is so adjudicated after the guilt phase of his jury trial. Prior thereto, the felony convictions that ground the enhancement do not come into evidence in the guilt phase, except for impeachment purposes (in some cases). See: NRS 484C.400(2); NRS 200.485(4); NRS 207.010-014. Even in a capital murder prosecution where the jury imposes the sentence, there is a strict limitation of what evidence can be considered, and

none before a conviction for the underlying offense occurs. See: Ring v. Arizona, 536 U.S. 584 (2002); NRS 175.552.

Clearly, "gang criminal activity" evidence (as opposed to "gang affiliation" evidence") is at least as prejudicial as evidence of prior convictions in a habitual offender or enhanced felony DUI or enhanced felony domestic battery proceeding. And all of these situations have one thing in common: In no possible way can such evidence be considered "*res gestae*" within the meaning of Bellon.

As explained below, on top of everything else the State did not truly prove that the "gang" with which Appellant was actually affiliated engaged in the conduct proscribed by NRS 193.168. But although the admission of uncharged misconduct is adjudicated under an "abuse of discretion" standard, it remains the case that on account of the potentially highly prejudicial nature of uncharged bad act evidence, improper admission of such evidence, or admission of such evidence without an appropriate limiting instruction, typically will not constitute harmless error. See: Tavares v. State, 117 Nev. 725, 732-33, 30 P.3d 1128, 1132-33 (2001). This error, singly or in accumulation with the other trial errors herein[11] should cause a reversal of the judgment of conviction herein.

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[11]See: Chambers v. Mississippi, 410 U.S. 289 (1973); DeChant v. State, 116 Nev. 918, 927, 10 P.3d 108, 113-14 (2000).

E. THE EVIDENCE PRESENTED TO THE JURY WAS INSUFFICIENT AS A MATTER OF LAW UPON WHICH TO FIND A GANG ENHANCEMENT. THEREFORE, THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING THE MOTION IN LIMINE AND ALLOWING ANY "GANG CRIMINALITY EVIDENCE" TO BE HEARD BY THE JURY.

A. Standard of Review

Relative to the gang enhancement, the due process clause of the United States Constitution protects an accused against a conviction except on proof beyond a reasonable doubt of every act necessary to constitute the enhancement. Origel-Candido v. State, 114 Nev. 378, 382, 956 P.2d 1378 1380 (1998). In other words, the standard of review is the same as Jackson v. Virginia, 443 U.S. 307 (1979).

B. Argument

The pre-trial evidentiary hearing in this case was extraordinarily lengthy, conducted over four months. At that time, Mr. Villagrana was a defendant in the case, and by far the vast majority of the proffered evidence pre-trial related to the Hell's Angels as a criminal outlaw motorcycle gang. The main witness in that regard was Jorge Gil-Blanco. Perhaps because of that, everyone managed to overlook the most important testimony on this issue of Mr. Gil-Blanco relative to the Vagos on day one of the hearing:

"Q. Now, would it be fair to say that the Hell's Angels do not get along with the Vagos?

A. **It's area by area.** In certain areas, where some of the Vagos and Hell's Angels have grown up together for a long time, sometimes they get along. It's certain charters that kind of come in and - I'll give an example. At the Easy Rider Show in Sacramento about a year ago, about the height of all this time, the Sac Hell's Angels had a booth set up to sell their support t-shirts. The Vagos show up, they actually walk up to the table, they hug each other, they've known each other for a long time. But Richmond and I believe - I don't know if it was - definitely Richmond and another bay area charter, Oakland or Frisco show up, the Vagos were escorted outside, the gloves started coming on, and the Vagos left. There was obvious tension between the groups at that time. **So it's area-by-area as to what's going on.**" (AAv7: 1634-35)

In other words, the issue is <u>not</u> whether the "Vagos" are a criminal outlaw motorcycle gang within the meaning of NRS 193.168. Rather, the issue is: Are the **<u>San Jose Vagos</u> a criminal, outlaw motorcycle gang within the meaning of that statute?**

And the critical sub issue is focused by the trial testimony. Per Jimmy Evanson, the "Vago informant" called by the State, the Vagos have an international charter, but the Hell's Angels do not. Each charter is its own separate entity. Again, the issue is regional, certainly not national. And per Frank Pesarin, the Street Vibrations coordinator, while there is rivalry between the HA's and the Vagos, there is not a problem. Fights between the two clubs appear to be <u>spontaneous</u> - and that is especially true in a crowded casino during a special event

like Street Vibrations.

And as the Court has seen, per the testimonies of both Mr. Sandy and Mr. Tyrell, both HA's, there was no evidence of any specific tension between the San Jose HA's and San Jose Vagos at the beginning of Street Vibrations. They all came to Sparks to have a good time; but thanks to "Jabbers," a Los Angeles Vago, the good time turned into hell.

Per this Court in Origel-Candido the gang enhancement statute of NRS 193.168(3)(b) requires that the trier of fact find beyond a reasonable doubt that the defendant committed the primary offense knowingly for the benefit of the gang. Thus, while expert testimony may be admitted in that regard, it must address whether the gang members commit felonies as a common activity - that is, as a "common denominator" of the gang - not "merely" that the gang is "benefitted" by the felony crimes committed. Origel-Candido, 114 Nev. at 382-83, 956 P.2d at 1381.

The State will undoubtedly criticize Origel-Candido because the statute does not require that the other felonies committed in fact benefit the gang. However well that argument may work in other cases, it is immaterial here. The fact remains that the evidence must show that the other members of "the gang" who regularly commit felonies do so with specific intent to promote, further or

assist the activities of the criminal gang.

And while a gang expert's testimony on point is relevant and admissible, a gang expert's testimony alone is insufficient to find an offense to be gang related. Rather, the expert testimony must be accompanied by some substantive factual evidentiary basis from which the jury can reasonably infer that the crime was gang related. People v. Ochoa, (2009) 179 Cal. App. 4th 650, 657, 660, 102 Cal. Rptr.3d 108, 114, 117, and cases cited therein; People v. Rios, (2013) 222 Cal. App. 4th 542, 573-74, 165 Cal. Rptr.3d 687, 712-13.

Here, neither Mr. Skelton nor Mr. Bennett could point to any criminal activities engaged in by members of the San Jose Vagos that specifically intended to promote, further or assist the activities of the San Jose Vagos. That absence of evidence is fatal to the finding of the gang enhancement in this case.

It simply is not enough for an expert like Mr. Skelton to say the the San Jose Vagos and the San Jose HA's had a territorial battle, and removing Pettigrew would somehow take away power and control from the HA's and allow the Vagos to expand in San Jose and enhance "their street credibility." He based that opinion upon incidences in Chino Valley, Arizona and San Bernardino, California among other places; but there is simply no evidence of that kind of thing going in

San Jose.[12]

All of the evidence - both from the San Jose HA's and San Jose Vagos - were that the two charters coexisted peacefully prior to September 23, 2011. There simply was no dispute over territory or anything else between the two clubs at the time the 2011 Street Vibrations event started. There is no evidence that the San Jose Vagos are a "criminal gang" at all, and certainly no evidence that the shooting of Jethro Pettigrew was done for the specific purpose of promoting or assisting the activities of the San Jose Vagos.

The State will argue that the error is harmless because per NRS 193.169(1), the court could not impose consecutive enhancements under NRS 193.165 and 193.168, and in fact did not do so here. We agree, but that both misses the point and accentuates a bigger point. If this were a bonafide murder, and if the State wanted to obtain an enhanced sentence, all it had to do was allege the deadly weapon enhancement of 193.165. Alleging a gang enhancement, and then allowing gang experts to talk about the criminal acts that go on with the Chino Valley, Arizona Vagos and the San Bernardino, California Vagos, among others,

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[12]The opinion makes no sense for an additional reason: How is an incident started by a Los Angeles Vago in a casino in Sparks, Nevada supposed to enhance "street credibility" over territory in San Jose, California? The theory is simply nonsensical!

did nothing but paint Appellant with a broad brush of criminality, simply because he is affiliated with the San Jose Vagos. When uncharged misconduct simply is not relevant to any issue under NRS 48.015, the admission of uncharged misconduct evidence tends to be reversible error. See: Taylor v. State, 109 Nev. 849, 852-53, 858 P.2d 843, 845-46 (1993). That is, the problem here is not simply fixing a sentence that was already fixed; the problem is having a new, fair trial where experts such as Mr. Bennett and Mr. Skelton do not testify at all.

This error, singly or in cumulation with the other trial errors herein, should cause reversal of the judgment of conviction herein.

F. THE TRIAL COURT VIOLATED APPELLANT'S STATUTORY RIGHTS TO A FAIR GRAND JURY HEARING WHEN IT ALLOWED THE STATE TO INTRODUCE GANG ENHANCEMENT EVIDENCE TO THE GRAND JURY, IN LIEU OF PROPER PROOF OF A CONSPIRACY, AND WITHOUT AN APPROPRIATE LIMITING INSTRUCTION. THE GRAND JURY ALSO SHOULD HAVE BEEN INSTRUCTED ON DEFENSE OF OTHERS, BASED UPON THE EVIDENCE PRESENTED.

A. Standard of Review

The Court has not fairly set the standard of review on direct appeal, in view of the fact that the law that develops grand jury practice generally comes to the bar through extraordinary writs. For that reason, the undersigned believes that the standard of review is probably de novo review. Compare: Lay v. State, 110 Nev.

1189, 1197-99, 886 P.2d 448, 453-54 (1994).

The Grand Jury met on this case over three judicial days. On October 25, 2011, the State called John Patton and Peter Grimm.[13] Mr. Grimm continued his testimony on day two. (See: AAv1:108-125). On day three, or the day that the grand jury returned the indictment, the State called five confidential witnesses, Heather Kohls, Michael Ives, Yeadon Sturtivant, Matthew Mutert, Jean Marie Walsh, Ellen Clark, M.D., Kerri Heward, Jorge Gil-Blanco, and John Patton. On that date, the prosecutor lodged for the Grand Jury a set of jury instructions that instructed (only) on the theories of conspiracy, principal liability as an aider and abettor, affray, battery with a deadly weapon, discharge of a firearm in a structure, carrying a concealed weapon, the elements of murder, and the elements of challenge to fight. (AAv1:134-35) The confidential witnesses were the surveillance director at the Nugget (Id. at 144); the Director of Security at the Nugget (Id. at 171); a percipient witness who worked at the Nugget (Id. at 228-29); another percipient witness inside of the Nugget at the time of the shooting

[13] Mr. Grimm did not testify at trial. He is a criminal investigator with the Washoe County District Attorney's office. He testified to the proposition that the Vagos and Hell's Angels are outlaw motorcycle gangs. (AAv1:84-92).

(AAv2:273-75) and a Vago (Id. at 315-16).[14] At no time, however, did the "Vago witness" testify to any "meeting" of the Vagos earlier that evening, where "Ta Ta" allegedly put the "green light" on Pettigrew. But in his description of the Vago hierarchy and Hell's Angel hierarchy, he did not give any particularized description of the San Jose Vagos. He did say, however, that the Hell's Angels separately incorporate each charter. (See: Id. at 337).

The Grand Jury asked the Vago witness, however, whether Appellant was "following the code". The witness responded that the "code" is that "when you get into a situation [like this] is to protect. ... It is a thing that happens, and it is a protective mode to go in because of the guns and shooting of other Vagos individuals that got shot first by the Hell's Angels automatically puts them into the mode and of the need to shoot one of them." (Id. at 347).

However, the State's gang expert, Jorge Gil-Blanco, testified (AAv2:351-388), as did Mr. Patton to the proposition that the Vagos and the Hell's Angels are criminal outlaw motorcycle gangs.

B. Argument

The grand jury can receive none but legal evidence, and the best evidence in

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[14] Based upon the testimony, it appears that this witness likely was Jimmy Evanson. (See: AAv2:314-350).

degree, to the exclusion of hearsay or secondary evidence. NRS 172.135(2). It is true that a defendant is properly subject to indictment if the evidence submitted, without reference to inadmissible evidence, is sufficient to sustain the indictment. Franklin v. State, 89 Nev. 382, 387-88, 513 P.2d 1252, 1256 (1973); Avery v. State, 122 Nev. 278, 285, 129 P.3d 664, 669 (2006). But therein lies the problem. If evidence of a defendant's uncharged criminal conduct would be inadmissible at trial, then it is generally inadmissible before the grand jury. People v. Farley, 882 N.Y. Supp. 2d 879, 881 (N.Y. Cr. Ct. 2009). See also: Lane v. Second Judicial District Court, 104 Nev. 427, 442-45, 760 P.2d 1245, 1254-57 (1988) [state may not present evidence to grand jury that is inadmissible per NRS 48.069 and 50.090]. In this case, as we have explained at pp. 46-47, above, uncharged misconduct includes "gang evidence" within its scope.

Here, the State introduced gang evidence to establish the NRS 193.168 enhancement, which the Grand Jury found. However, the Grand Jury was never instructed to limit its consideration of the "gang criminality" evidence to that issue.

Thus, for the Grand Jury's purposes the "gang criminality" evidence was the evidence of conspiracy supporting the State's conspiracy theory throughout this Indictment. As such, the gang evidence was pure propensity evidence, of the kind

clearly disallowed by NRS 48.045 (2)(a). See: Mortensen v. State, 115 Nev. 273, 281, 986 P.2d 1105, 1110 (1999). Or if it is allowed, Tavares requires that it be accompanied by a limiting instruction. See also: Meek v. State, 112 Nev. 1288, 1295, 930 P.2d 1104, 1108 (1996).

The State's response will be per Schuster v. Eighth Judicial Dist. Ct, Ex Rel County of Clark, 123 Nev. 187, 160 P.3d 873 (2007), the State is not required to instruct the Grand Jury on anything other than the elements of the crimes charged in the indictment. Schuster, 123 Nev. at 190, 191-94, 160 P.3d at 875, 876-77. However, Schuster talks about whether the State's statutory duty to present known exculpatory evidence translates into a duty to instruct the Grand Jury regarding the law of self-defense. Here, we are not talking about that. We are talking about the Grand Jury's consideration of the "gang criminality" evidence only for its limited presented purpose, or the NRS 193.168 enhancement.

The problem here is that at trial the State absolutely needed Rudnick's testimony in order to establish its "conspiracy theory" that ran throughout the Indictment. Rudnick in November of 2011, of course, was an indicted co-defendant, not a witness. So, the State utilized its "gang criminality evidence" in order to establish its "conspiracy evidence." But that is improper under NRS 48.045(2). The State can only do that to show the defendant's intent, motive,

absence of mistake, etc. However, the Grand Jury did not know that. Rather, they believed that slight, marginal evidence of the conspiracy existed based on the "gang criminality" evidence which, as it turned out, is inadmissible for that purpose.

That leads to second sub issue, which is whether the Court should distinguish Schuster.

It should be noted that the facts of Schuster did not involve a perfect self-defense case. Rather, Schuster involved a physical confrontation where the defendant fired a gun, killing and injuring two unarmed teenagers. Schuster's theory of self-defense was based upon his uncorroborated statement to the police. Under those circumstances, the State certainly did not have the duty to instruct the grand jury on the law regarding self-defense.

Nevertheless, it must be kept in mind that the burden of proving self-defense is not on the defendant, but rather, is on the State to disprove it. That is because self-defense negates the "unlawfulness element" of murder. St. Pierre v. State, 96 Nev. 887, 891, 620 P.2d 1240, 1242 (1980). As noted above, the same principle applies to defense of others, per Barone. Since the State is obligated to present some evidence, however slight and marginal, on each element of the indictable offense in order for a proper indictment to return, per Grant v. Sheriff,

95 Nev. 211, 212, 591 P.2d 1145, 1146 (1979), it should follow that where the evidence presents a complete, perfect defense of self-defense or defense of others, in that instance the grand jury must be so instructed.

In New York, the rule of law is that a prosecutor need not instruct the grand jury on a defense that is merely suggested by the evidence, but must instruct the grand jury on complete defenses which the evidence completely supports, thus potentially eliminating a needless or unfounded prosecution. People v. Mujahid, 846 N.Y. Supp. 2d 708, 710 (N.Y.A.D. 2007). This Court should agree with New York, distinguish Schuster, and refine the principle: while the prosecutor need not instruct the grand jury on self-defense where the evidence merely suggests that self-defense might be in existence, where the evidence the prosecutor presents establishes a complete defense, such that the defendant did not act unlawfully as a matter of law, the prosecutor must instruct the grand jury on the defense. See also: Oliver v. State, 101 Nev. 308, 703 P.2d 869 (1985) [Entrapment as a matter of law established on direct appeal. Reversed with directions.]

So distinguished, the "Vago witness'" testimony reveals the need for a perfect defense of others instruction. Thus, the Grand Jury in this case should have been instructed on defense of others consistent with NRS 200.160. Based on that informant's testimony, defense of others wasn't merely "suggested"; it was

completely established and not contradicted by any other evidence.

Therefore, the trial court committed reversible error for either of these reasons in not granting Appellant's pre-trial petition for writ of habeas corpus.

G. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN MERGING SECOND DEGREE MURDER INTO FIRST DEGREE MURDER AND DISMISSING COUNT V, MURDER IN THE SECOND DEGREE WITH THE USE OF A DEADLY WEAPON. IN FACT, IT SHOULD HAVE BEEN THE OTHER WAY AROUND BECAUSE THE CONVICTIONS ARE REDUNDANT, AND BECAUSE THE SECOND DEGREE MURDER CONVICTION SPECIFICALLY FITS THE FACTS OF THIS CASE. COUNT VI SHOULD HAVE BEEN DISMISSED, NOT COUNT V. IF THE JUDGMENT OF CONVICTION IS NOT REVERSED, THEN IT SHOULD BE CORRECTED ACCORDINGLY.

A. Standard of Review

When issues of redundant convictions arise, it appears that the court reviews the matter *de novo*.

In this case, Count V alleged a specific crime of second degree murder at AAv1:62. It specifically alleged that Appellant aided and abetted Rudnick and Pettigrew, in that the discharging of hand guns during the affray was in general malignant reckless [disregard] of other's lives and safety of other people and in disregard of social duty and a foreseeable consequence of the shooting, Pettigrew was killed and murdered. (AAv1:62) Count VI, on the other hand, was simply a

charge of open murder with a deadly weapon, alleging a first degree murder theory of either willful, deliberate and premeditated killing or killing committed by the Defendant lying in wait to commit the killing, and alleged either conspiracy or a direct commission of the act. (AAv1:63)

The jury in fact returned guilty verdicts both as to Count V, murder of the second degree (AAv21:5026) and as to Count VI, murder of the first degree (AAv21:5027).

After the jury reached their verdicts, Appellant filed a motion to strike redundant convictions six days later. (AAv21:5142-45)[15] Appellant argued that the convictions were redundant, and the remedy was to strike or vacate the redundant convictions prior to sentencing. And in reply, Appellant objected to the State's proposal simply to merge counts V and VI and impose a single sentence for Counts II, V and VI. (AAv22:5491)

At the time of sentencing after further argument at sentencing the Court noted that it already merged Counts II, V and VI on August 8, 2013. (AAv23:5542) Accordingly, with the merger, there would not be multiple punishments for the same offense and therefore the motion to strike was denied.

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[15] One day prior to the jury reaching its verdict, Appellant filed a motion to compel election between "multiplicitous murder counts". (AAv21:5146-49) The trial court promptly denied that motion. (AAv20:4816)

sentencing purposes, the court merged Counts II and V into VI and thus imposed a sentence relative to first degree murder, of life imprisonment with the possibility of parole after 20 years in the Department of Corrections. (Id. at 5567-68).

B. Argument

All may agree that Counts II, V and VI constitute redundant convictions. Redundant convictions that do not comport with legislative intent should be stricken. Albitre v. State, 103 Nev. 281, 283, 738 P.2d 1037, 1309 (1987). A claim that convictions are redundant stems from the legislation itself and the conclusion that it was not the legislative intent to separately punish multiple acts that occur and make up one course of criminal conduct. Wilson v. State, 121 Nev. 345, 355, 114 P.3d 285, 292 (2005). When determining whether convictions are redundant the question is whether a material or significant part of each charge is the same even if the offenses are not the same. Thus, where a defendant is convicted of two offenses that, as charged punish the exact same illegal act, the convictions are redundant. State of Nevada v. District Court, 116 Nev. 127, 136, 994 P.2d 692, 698 (2000). The issue is whether the gravamen of the charged offenses is the same such that it can be said that the legislature did not intend multiple convictions. (Id. at 136, 994 P.2d at 698).

Counts II, V and VI involve the same fact pattern, all centering on the

conspiracy to fight resulting in Pettigrew's death and all were aimed at criminal responsibility for Pettigrew's death. The issue is which convictions stands. The answer for this case is: Count V or the second degree murder conviction. Here is why:

The second degree murder conviction is based upon the "conspiracy theory" of Bolden v. State, 121 Nev. 908, 915-23, 124 P.3d 191, 196-201 (2005), overruled on other grounds, Cortinas v. State, 124 Nev. 1013, 1026, 195 P.3d 315, 324 (2008). Per Bolden the Court rejected vicarious liability of co-conspirators per Pinkerton v. United States, 328 U.S. 640 (1946) for specific intent crimes. That is, a defendant in such crimes must act with specific intent to commit a charged offense, and cannot be found guilty based on "the natural and probable consequences" of his act as a co-conspirator. But, co-conspirator liability can apply to a general intent defense, provided the crime in question is a reasonably foreseeable consequence of the object of the conspiracy.

Co-conspirator liability cannot exist with first degree murder, because first degree murder requires that the killer have the specific intent to kill. Byford v. State, 116 Nev. 215, 234, 994 P.2d 700, 713 (2000). However, second degree murder, which typically is an impulsive act not involving a dispassionate weighing process in consideration of consequences before acting, is typically based on

implied malice, which can be thought of as a general intent plus a type of fact pattern revealing malice. See: Byford, 115 Nev. at 232-37, 994 P.2d at 712-15;. And see: McCurdy v. State, 107 Nev. 275, 277-78, 809 P.2d 1265, 1266-67 (1991) and cases cited therein. Accordingly, while a vicarious liability theory would not work for first degree murder, it might with respect to second degree murder.

Throughout closing arguments, as noted above, the trial prosecutor insisted that Appellant had no defense because this was a conspiracy case involving a fight that was started by his co-conspirator, Rudnick. At the same time, the facts at the scene certainly do not support the proposition that Appellant started the fight or was acting in concert with Rudnick when Rudnick started the fight. The State's whole theory of criminality presupposes Rudnick's believability regarding "Ta Ta" "green lighting" the murder of Pettigrew before the fact, with Appellant's knowledge and participation therein. That being the case, and that being the State's theory in order to avoid self-defense, it clearly sacrificed a first degree murder conviction in favor of a second as was specifically alleged in Count V.

This situation has several analogies in the law. For example, the penalty provisions of a statute that gives the prosecutor the discretionary power to determine whether to charge an offense as a felony, gross misdemeanor or misdemeanor constitutes arbitrary law enforcement is an unlawful delegation of

legislative power. Only the legislature can promulgate which law will apply to a clearly designated set of facts. Accordingly, the offense can only be published as misdemeanor. Lapinski v. State, 84 Nev. 611, 613-14, 446 P.2d 645, 647-48 (1968).

Following the logic of Lapinksi, it is an unlawful delegation of legislative power to allow the State to take the precise same set of facts and determine whether it should be punished as first or second degree murder. When the State does that, the remedy is to make the offense punishable by the lowest degree, or second degree murder.

Another way to look at the situation is this: A charge of open murder encompasses all lesser included offenses, including second degree murder, as well as voluntary manslaughter and involuntary manslaughter. Thedford v. Sheriff, 86 Nev. 741, 745 476 P.2d 25, 28, (1970), and cases cited therein. So, when the State alleged open murder in Count VI, it necessarily alleged second degree murder. But the law also is that a specific statute dealing with the subject at issue prevails over a general statute. Hardison v. State, 104 Nev. 530, 534, 763 P.2d 52, 55 (1988). Therefore, the specific theory should prevail over the general theory. Since Count V was a specific fact driven theory but Count VI was only a general charge, Count V should prevail over Count VI. And that means that the

conviction should be for second degree murder, not first.

Another way to look at it is: by analogy Bolden is a new law since 2005 relative to "conspiracy theory." When the legislature enacts a statute that takes the same criminal conduct and makes it a lesser offense, it repeals by implication a different statute that makes the same facts a greater offense. See: Washington v. State, 117 Nev. 735, 739-43, 30 P.3d 1134, 1137-39 (2001). On that analogy, the fact-driven specific newer theory of conspiracy supersedes by implication an older general theory of (open) first degree murder.

Finally, as a matter of fundamental fairness, if this Honorable Court is going to reject all of the other assignment of error, that must mean that it finds that the bottom line of this case is that Appellant entered into a conspiracy with Rudnick to fight Pettigrew, and should have forseen that the natural and foreseeable consequence of that agreement would be the death of Pettigrew. Because of that, he enjoys no self-defense and no defense of others defense - even though a police officer in Gonzalez's identical situation absolutely would enjoy a defense of others defense. If that is the ruling of this Honorable Court, then this Honorable Court is defining a second degree murder, not a first. It is only fair in that instance that this Court reduce the degree of murder to second.

While this Court should not see the need to reach this assignment of error, if

it does, that in the name of fundamental fairness should be what this Court does.

V. CONCLUSION

Based on the accumulation of profound trial and grand jury error in this case, the Court should deem itself constrained to reverse the judgment of conviction and remand for new proceedings. If the Court disagrees, the Court absolutely should reduce the degree of murder in this to second degree murder and remand for resentencing in accordance therewith.

Respectfully submitted this 13 day of November, 2014.

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By: _____
Richard F. Cornell

to the record on appeal.

Further, I certify that the document complies with the formatting requirements of Rule 32(a)(4)(6). Specifically, the brief is 2.0 spaced; it uses a mono-spaced type face which is Times New Roman 14-point; it is in a plain style; and the margins on all four sides are at least one (1) inch.

The Brief also meets the applicable page limitation of Rule 32(a)(7), pending grant of the accompanying Motion for Leave to File Oversized Brief. It is 68 pages in length and it contains 15,789 words.

DATED this 3 day of November, 2014.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to N.R.C.P. 5(b), I certify that I am an employee of LAW OFFICES OF RICHARD F. CORNELL, and that on this date I caused a true and correct copy of the foregoing document to be delivered by Reno Carson Messenger Service, addressed to:

Washoe County District Attorney's Office
Appellate Division
One S. Sierra St., 7th Floor
Reno, NV 89501

DATED this 13 day of November, 2014.

Marianne Tom-Kadlic
Legal Assistant