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 REPLY BRIEF

APPEAL FROM JUDGMENT AFTER JURY TRIAL AND SENTENCING

Second Judicial District
State of Nevada

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Predictably, the State argues that per Tellis v. State, 84 Nev. 587, 591, 445 P.2d 938, 941 (1968), as long as the general instructions given to the jury are not incorrect, a trial judge need do no more than tell the jury during deliberation to simply refer back to them, regardless of the circumstances.

Appellant strongly disagrees. The State's position is inconsistent with this statement of law from Bollenbach v. United States, 326 U.S. 607, 612-13, 66 S.Ct. 402, 405, 90 L.Ed. 350 (1946):

> ". . . . [T]he jurors were confused concerning the relation of knowingly disposing of stolen securities after their interstate journey had ended to the charge of conspiring to transport such securities. Discharge of the jury's responsibility for drawing appropriate conclusions from the testimony depended on discharge of the judge's responsibility to give the jury their required guidance by a lucid statement of the relevant legal criteria. When a jury makes explicit its difficulties the trial judge should clear them away with concrete accuracy."

The State would have this Court apply Bollenbach only when the trial judge attempts to give a specific answer to a deliberation question, and gives the wrong one. While that happened in Bollenbach, the applicable principle of law clearly is

not limited to that situation. The Illinois Court of Appeals stated the principle in People v. Carter, 905 N.E.2d 874, 886 (Ill. App. 2009) as follows:

> "The trial court has a duty to instruct the jury when clarification is requested, the original instructions are insufficient, or the jurors are manifestly confused. [cites omitted] A trial court may exercise its discretion and properly decline to answer a jury's inquiries where the instructions are readily understandable and sufficiently explain the relevant law, where further instructions would serve no useful purpose or would potentially mislead the jury, when the jury's inquiry involves a question of fact, or if the giving of an answer would cause the court to express an opinion which would likely direct a verdict one way or another. [cite omitted] However, jurors are entitled to have their inquiries answered. Thus, the general rule is that the trial court has a duty to provide instruction to the jury where it has posed an explicit question or requested clarification on a point of law arising from facts about which there is doubt or confusion. [cite omitted] **This is true even though the jury was properly instructed originally.** [cite omitted] When a jury makes explicit its difficulties, the court should resolve them with specificity and accuracy. [cite omitted] If the question asked by the jury is unclear, it is the court's duty to seek clarification of it. [cite omitted] The failure to answer or the giving of a response which provides no answer to the particular question of law posed has been held to be prejudicial error. [cite omitted]"

Accord: People v. Oram, 217 P.3d 883, 895 (Colo. App. 2009).

And as this Court stated in Lamb v. State, 127 Nev. Ad. Op. 3, 251 P.3d 700, 711 (2011), when jurors submit a question during deliberations, the court, in consultation with the parties, should supply a prompt, complete and responsive answer or should explain to the jurors why it cannot do so.

Consistently with Carter and Oram, we are not attempting to have the Court

overrule Tellis. There are some situations where the answer to the jury deliberation question of "refer back to the jury instructions already given" would be appropriate. This, however, is not such an instance.

Two cases squarely on all fours, both reversing judgments of conviction, are instructive. The first is Rogers v. State, 681 S.E.2d 693, 697-99 (Ga. App. 2009). There, the Georgia Court of Appeals held that in a sale of controlled substance case, the trial judge should have answered the question of "what constitutes the completion of a sale?" with a specific answer, other than "refer back to the instructions; the jury is the sole finder of fact." That response was insufficient and constituted error, and the error was not harmless because there was evidence in the record from which the jury might have concluded that the State failed to prove a completed sale on the date alleged in the indictment.

The second is State v. Baby, 946 A.2d 463, 488 -89 (Md. App. 2008). There, the Maryland Court of Appeals reversed a sexual assault conviction, where the jury's questions sought clarification of the effect of a victim's post - penetration withdrawal of consent during a rape. The Maryland Court of Appeals held that the trial court erred in failing to give a supplemental instruction designed to clarify the jury's confusion on the legal issue central to the case. Referring to the prior jury instruction defining rape, which was correct but did not specifically

address the issue of post - penetration withdrawal of consent, was insufficient as a matter of law.

Turning to this case, and as noted at AOB at 27-28, Instruction No. 17 at AAv20: 4980 does not explicitly state whether a person who has no knowledge of a conspiracy but whose actions contribute to someone else's conspiracy can be guilty of conspiracy. The correct answer to that is "no," as both counsel stated to Judge Steinheimer; and one can infer the negative answer from Instruction No. 17. But Instruction No. 17 is not explicit in that regard. That is why the jury asked the question.

And undeniably the question of whether and when this Appellant joined the conspiracy that Rudnik described was central to the outcome of the case. There was ample evidence in this record, referencing the testimonies of Evanson, Nickerson, Fearn, Siemer, and the Appellant, that no such conspiracy existed. At least one juror may have thought that the facts of the case were that a conspiracy did exist, but only between Rudnik and a few other Vago members; and that Appellant simply did not hear of the "plan to hit Pettigrew." If those were the facts, then a correctly instructed, reasonable jury simply could not find Appellant guilty of first degree murder on our facts (See: Ground II). And if the trial judge had answered the question correctly with the "no" answer stipulated on first

reaction by both parties, we can be reasonably confident that at least one juror would not have returned the first degree murder verdict that this jury returned.

For all the State had said in distinguishing Appellant's cited authority, its unwillingness to discuss Brooks v. State, 124 Nev. 203, 211, 180 P.3d 657, 662 (2008) [reversed, discussed at AOB at 30-31] is most insightful. If Appellant had tendered a "theory of the case instruction" that said "even if you find that there was a conspiracy to murder, if you also find that Ernesto Gonzalez did not join that conspiracy, you may not find him guilty either of conspiracy to murder or a first degree murder based on a conspiracy theory," and the trial court had refused to give it, Brooks would have constrained this Honorable Court to reverse this conviction - especially in cumulation with the other trial errors herein.

II. 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.

The State's positions appear to be these: 1) Jury Instruction No. 34 was a thorough, complete and most importantly, accurate description of the law - not only of self-defense but defense-of-others. Therefore, Appellant was not prejudiced by the trial court's failure to give his "theory of the case instruction" or

a correct modification thereof. 2) To the extent the law requires the trial judge to give a correct theory of the case instruction, the Court should overrule Carter v. State, 121 Nev. 759, 121 P.3d 592 (2005) and Crawford v. State, 121 Nev. 744, 121 P.3d 582 (2005), and review the issue only in post-conviction *habeas*, if at all.

The State is absolutely wrong on both counts. The reasons why, however, require an even more detailed analysis of the defense-of-others doctrine.

As pointed out at AOB: 32, 34 and 35, the jury instruction in question, which rolled self-defense and defense - of - others into one defense as though they were interchangeable, allowed the trial prosecutor argue to the jury seven different times why this case was not a "self-defense case." Appellant concedes that it is not, for the reason stated at AOB at 33-34.

However, as Jury Instruction No. 34 stated, consistently with Culverson v. State, 106 Nev. 484, 489, 797 P.2d 238, 240-41 (1990) and Runion v. State, 116 Nev. 1041, 1051, 13 P.3d 52, 59 (2000), self-defense is not available to an original aggressor (who does not thereafter retreat), that is, an original instigator. The trial prosecutor's consistent position was that because Rudnik, a Vago, was the initial aggressor or instigator, Gonzalez, also a Vago, did not and could not enjoy the defense of self-defense (or defense of others, inferentially).

If it had been made clear to the jury, however, that the actual defense in this

case was defense of others, not self-defense, a properly instructed jury would have realized that the trial prosecutor's argument was untrue legally.

Defense of another contains three elements: 1) There was an appearance of death or great bodily harm to a person; 2) The defendant believed the person was in immediate danger of death or great bodily harm from the victim and killed the victim to prevent the death or great bodily harm; and 3) The apparent danger would have caused a reasonable person in the same circumstances to act as the defendant did. State v. Gallegos, 22 P.3d 689, 691 (N.M. App. 2001). That formulation of the law does not put the burden on the defendant to decide in a split second whether the person being defended "has a life worth saving." And, more importantly, it is perfectly consistent with the statutory language of NRS 200.160.

Two cases on point are People v. Silva, 987 P.2d 909, 916 (Colo. App. 1999) [reversed and remanded] and State v. Mark, 231 P.3d 478, 495-97 (Haw. 2010) [reversed and remanded]. In Silva, the Colorado Court of Appeals stated as follows:

> "As a general rule, a person coming to the aid of a third party with a reasonable belief that his or her intervention is necessary to prevent injury to the third party is entitled to assert defense of others to absolve or mitigate a charge of assault of homicide. **The affirmative defense of defense of others is not absolutely barred by the wrongful actions of the third party**. See: Bendinelli & Edsall, *Defense of others: Origins, Requirements, Limitations and Ramifications, 5 Regent U.L.Rev. 153 (1995) (tracing*

development of doctrine of defense of others).

> The majority of jurisdictions today, for public policy reasons, allow a defendant to assert some form of defense of others based on a reasonable belief by a defendant that intervention was necessary to protect the person he or she perceived as being under attack. [Cite omitted];

Moreover, Silva makes clear that the "provocation limitation" relative to defense-of-others does not apply to a defendant whose victim is not present when the initial provocation occurs. Silva, 987 P.2d at 914. *A fortiorari*, the "initial deadly aggressor" limitation should not apply to defense-of-others when the defendant is not present at the time the provocation begins, and therefore is not in the position to judge who started the fight that resulted in imminent danger or death to the person being protected. That of course is exactly the case here, absent Rudnick's conspiracy testimony (See: Ground III).

In Mark, the Hawaii Supreme Court stated:

> "However, as Petitioner stated, **an intervenor's right to react is not strictly coterminous with a participant's right to self-defense. [cites omitted]** This statement is supported by the commentary to HRS § 703-305, which, as noted *supra* at note 23, states that "this formulation covers situations in which the other's infirmity, infancy, or other physical condition makes him especially unable to protect himself or susceptible to injury, **even though the actor, in a similar predicament, might not himself have been justified in using force. As the commentary makes evident, it is possible that defendant could be justified in using force to protect another person, even if the defendant himself or herself was not justified in using force for self protection. Therefore, contrary to the ICA's conclusion, it does not follow that a jury's rejection of a**

defendant's defense of self-defense, as in this case, would necessarily result in its rejection of a defense of defense of others, and, accordingly, the ICA also erred in this aspect of its reasoning."

Mark, 231 P.3d at 497.

Thus, a properly instructed jury would have been constrained to ask and answer these questions: 1) At the time Gonzalez came on the scene - not before that, but at that time - were Garcia, Ramirez (who had been shot by Pettigrew and/or Villagrana) and the other Vagos being stomped by Pettigrew and Villagrana - i.e., the ones Gonzalez actually was protecting - in imminent danger of death or significant bodily injury? 2) At the time Gonzalez came on the scene - not before then, but at that time - did he know that Garcia, Ramirez and the others being stomped had been the initial instigator aggressors?

Based on this entire record - not the one the State has abbreviated - a reasonable and correctly instructed jury would have answered those questions "yes" and "no", therefore would have found the doctrine of defense-of-others to be applicable, and would not have found Appellant guilty of any crime absent a "conspiracy" finding.

Faced with a specter of reversal if this Honorable Court follows the law throughout the country on point, the State argues that Carter and Crawford should be overruled. Several insurmountable problems attend to that position.

First, this Court has simply said nothing indicating sympathy to that position since handing down Carter and Crawford a mere ten years ago. In fact, in Sanchez-Dominguez v. State, 130 Nev. Ad. Op. 10, 318 P.3d 1068, 1072-76 (2014), this Court was faced with the legal of issue of whether a felony murder can attend where the felony "ends" before the homicide "begins". There, as this Court noted, the defense theory of the case at trial was to answer that question "no", and in that regard, that trial counsel tendered three inaccurate or unnecessary instructions. All seven Justices of this Court reached the merits of the issue of what the jury instruction in question "should have looked like" as a matter of plain error. Nobody on this Court even considered overruling Carter and Crawford.

Secondly, there is a sound constitutional policy reason for reaching the merits: In a jury trial, the participants have many things to do; but the duty to ensure that the defendant obtain a fair trial falls solely and squarely on the shoulders of the trial judge. A constitutionally fair trial most certainly includes an accurate statement of the law to the jury on the elements of the charged offense and the elements of the theory-of-the-case defense. And deciding that the trial judge can give an inaccurate or incomplete "theory of the case instruction", and allow trial counsel to "flesh it out" in argument, is no answer.

This case is a classic example. If Rudnik is the sole initial instigator, but

Appellant is not around to see or hear the instigation, does that mean Appellant loses all right to defense-of-others? Mr. Hall forcefully believes the answer to that question to be "yes." But NRS 200.160 implicitly disagrees with Mr. Hall, and the above - cited cases and authorities explicitly disagree with Mr. Hall. When the law is less than clear, we cannot blame Mr. Hall on an assertion of "prosecutorial misconduct." Therefore, if his arguments turn out to be wrong, as they are, and thus lower the State's burden of proof necessary to obtain a conviction, as they do, the only practical way to review the issue is through plain error on the proposed and rejected theory-of-the-case jury instruction.

In sum, whether singly or in cumulation with the other trial errors, this cause should be reversed and remanded for a new, constitutionally fair trial where the jury is completely and accurately instructed on the theory of defense of others.

III. 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.

The State argues that the proposed instruction was "defective" in several respects. Without conceding the point, the traverse is simple: Even if the State is correct, where the defendant is entitled to an accomplice distrust instruction, it is

plain reversible error not to give it per Champion v. State, 87 Nev. 542, 544, 490 P.2d 1056, 1057 (1971). *A fortiori*, if the defendant is entitled to an accomplice distrust instruction, as Appellant certainly was, then the duty falls squarely on the trial judge, a la Carter, to make sure that the instruction given is accurate.

Next, the State quibbles with the language of the proposed instruction because of Rudnick's testimony that he was not expecting any "favorable consideration" at his sentencing in exchange for his testimony. As pointed out at AOB at 41-42, Rudnick perjured himself on this point; but the Court need not go that far in rejecting the State's contention.

In order to be entitled to the instruction, the issue is very direct: Was the witness an accomplice? Based upon how the State charged the case in the original indictment, (AAv1: 1-10) unquestionably Rudnick was an accomplice. And see: United States v. Bernard, *infra*.

In California, the "accomplice distrust" instruction, per the California Jury Instructions Criminal [CALJIC] (2014), looks like this:

> "An accomplice is a person who is subject to prosecution for the identical offense charged against the defendant on trial or by reason of aiding and abetting or being a member of a criminal conspiracy.
>
> To the extent that an accomplice [or a co-defendant] gives testimony that intends to incriminate [the] defendant, it should be viewed with caution. This does not mean, however, that you may arbitrarily disregard that

testimony. You should give that testimony the weight you think it deserves after examining it with care and caution and in the light of all the evidence in this case." CALJIC, § 3.10, 3.18.

In federal court, the standard accomplice distrust instruction, as set forth in 1A O'Malley, Grenig & Lee, Federal Jury Practice and Instructions 6th edition (2008) looks like this:

> "The testimony of an alleged accomplice, someone who said he participated in the commission of a crime, must be examined and weighed by the jury with greater care than the testimony of a witness who did not participate in the commission of that crime.
>
> [Gary Rudnick] may be considered to be an alleged accomplice in this case.
>
> The fact an alleged accomplice has entered a plea of guilty to the offense charged is not evidence of the guilt of any other person [including the defendant].
>
> The jury must determine whether the testimony of the accomplice has been affected by self-interest, or by an agreement [he] may have with the government, or by [his own] interest in the outcome of this case, or by prejudice against the defendant." (Id. at §15.04)

Next, the State contends that the proposed instruction invaded the province of the jury. Again, if the State were correct that would be all the more reason why the trial judge would have the *sua sponte* duty to correct it as opposed to refuse to give it. But otherwise, the requirement to give an accomplice distrust instruction goes back to Caminetti v. United States, 242 U.S. 470, 495, 37 S.Ct. 192, 198, 61 L.Ed. 442 (1917).

Finally, the State argues that the instruction was not required because Rudnick's testimony was corroborated, "including the video record of Gonzalez firing the fatal shots." Of course, Rudnick's testimony regarding Appellant's lawful activities was indeed corroborated, including and especially the video - which does not capture Rudnick at the time Appellant fired the fatal shots, as Rudnick had run away. But absent Rudnick's "conspiracy testimony," the independent "corroborating evidence" in fact "corroborated" lawful activities, i.e., the lawful acting in defense of others. Put another way, absent Rudnick's "conspiracy" testimony, if Appellant had been a member of the Sparks Police Department and otherwise had acted exactly as Appellant did, there is no possible way that the Washoe County District Attorney's Office ever would have prosecuted him for anything!

That being the case, this case is indistinguishable from United States v. Bernard, 625 F.2d 854, 857 (9th Cir. 1980), wherein the Ninth Circuit reversed a conviction for failing to give an accomplice distrust instruction. The Ninth Circuit noted that the fact that lawful activities of the defendant were corroborated does not justify the trial court refusing to give an accomplice distrust instruction, if the defendant's unlawful activities rest solely on the word of the accomplice. Bernard, 625 F.2d at 857. The Ninth Circuit also noted that, as argued above, all

that is necessary for the instruction is that the witness be an accomplice, as "accomplice testimony is inevitably suspect and unreliable." Bernard, 625 F.2d at 857, and cases cited therein. But the Ninth Circuit also noted that the prejudice caused by a failure to give a cautionary instruction about accomplice testimony is increased when the witness' testimony may be considered otherwise unreliable. Bernard, 625 F.2d at 858.

Given all of the factors mentioned at AOB at 15-20 - that is, the "charge bargain;" the inherent incredibility of Rudnick's story on direct examination; Rudnick's waffling of his story on Rudnick's cross-examination; his intercepted statements to his wife while he was in jail, reflecting his belief that he would be granted probation if he did everything "Karl" wanted him to do; and Rudnick's ultimate denial of responsibility for the death of Pettigrew - the prejudice caused by the failure to give a cautionary instruction here was manifest.

The failure to give an accomplice distrust instruction on this record constituted reversible error even by itself - but undeniably in cumulation with the other trial errors herein as well.

IV. THE TRIAL COURT ABUSED ITS DISCRETION AND VIOLATED APPELLANT'S RIGHTS 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 OF THE TRIAL.

The State contends that the rule of Richmond v. State, 118 Nev. 924, 929-32, 59 P.3d 1249 (2002) does not apply because the district court did not make a definitive ruling pre-trial on point; and because trial counsel did not renew the motion, the issue is reviewed for plain error only. The State is wrong.

First, unquestionably Appellant filed a pre-trial motion to bifurcate the enhancement evidence of the gang enhancement testimony in a proceeding subsequent to the trial on the murder charge. (See: AAv3: 595-99)

Second, on the same day as that motion, the State filed its motion, to admit gang enhancement evidence and testimony during the State's case-in-chief. (See: AAv3: 608-649; AAv3: 650-660; AAv3: 661-AAv6: 1402)

Third, there is no question that the trial court conducted a lengthy pre-trial hearing on these motions. (See: AAv7: 1714-AAv11: 2553) The trial "OMG gang experts" were Les Skelton and Eric Bennett. (See: AOB at 20-22) At that multiple-day pre-trial hearing, Mr. Skelton testified at AAv9: 2095-2191.

And fourth, the trial court entered lengthy pre-trial orders on the motions at AAv11: 2554-2561 and 2562-2574. Therein, the Court discussed in detail Somee v. State, 124 Nev. 434, 446, 187 P.3d 152, 160-61 (2008) for the proposition that

gang affiliation evidence is not character evidence but is relevant to prove the charged crime. (AAv11: 2556-57) Thus, as the trial court noted, the evidence of the "criminality of the Vagos" is admissible under NRS 193.168(7) and is not subject to the scrutiny of Petrocelli v. State, 101 Nev. 46, 692 P. 2d 503 (1985) unless the State raises specific instances of prior conduct of this Appellant. (Id. at 2557) The court further noted that evidence in support of the NRS 193.168 enhancement may or may not be *res gestae*. (Id. at 2557-58) The court further concluded that experts "such as Jorge Gil-Blanco" may qualify as expert witnesses to testify per NRS 193.168. (Id. at 2558-59) I.e., police officers such as Mr. Skelton and Mr. Bennett could testify at the guilt phase in order to establish the NRS 193.168(7) enhancement. (See: Id. at 2560)

Quite obviously, the trial court did not consider whether incidences between the Vagos and the Hells Angels occurring in places such as Chino Valley, Arizona or Bakersfield, California could be admissible under NRS 48.045(2) against Appellant, because the court believed those incidences were relevant, and officers such as Gil-Blanco or Skelton (or Bennett) could testify to them, under NRS 193.168(7), at the guilt phase of Appellant's trial per Somee.

Importantly, nothing in either of the two court orders indicates any ruling "without prejudice." In these lengthy orders, the trial court allowed "OMG

experts" such as Gil-Blanco, Skelton and Bennett to testify in the guilt phase, consistently with NRS 193.168(7), in order to establish "gang criminality" necessary under that statute and necessary under Origel-Candido v. State, 114 Nev. 378, 382-83, 956 P.2d 1378, 1380-81 (1998). (See: AOB at 49, 51)

Therefore, per Richmond, the issue is preserved for appellate review.

As to the merits, the State points to People v. Hernandez, 94 P.3d 1080 (Cal. 2004) for the proposition that the trial court is not required by law to bifurcate the trial of the charged offense from the trial of the gang enhancement allegation. Appellant agrees to that extent. See: 94 P.3d at 1085-86. Nevertheless, the judgement of conviction needs to be reversed just based on Hernandez' principles for these reasons:

1. The issue of whether the guilt phase trial and the gang enhancement trial should be bifurcated occurs on a case-by-case basis. There can be cases where the "gang criminality evidence" is so extraordinarily prejudicial, and of so little relevance to the charged offense, that it threatens to sway the jury to convict regardless of the defendant's actual guilt. See: 94 P.3d at 1086.

2. Bifurcation of the trial of the gang enhancement is unnecessary where the evidence supporting the gang enhancement allegation would be admissible at trial on the issue of guilt. Ramirez v. Almager, 619 F.Supp.2d 881, 899 (C.D. Cal.

2008), citing Hernandez. And, as Appellant has conceded, gang affiliation is *res gestae* under NRS 48.035(3), and thus evidence that the Appellant was affiliated with the Vagos does not implicate either NRS 48.045(2) or 48.035(3). (See: AOB at 44-45) But "gang affiliation" evidence, by itself - when applied to this motorcycle club, 99% of whom are doctors, lawyers, businessmen and other perfectly law - abiding individuals - is not terribly prejudicial.

3. Hernandez ultimately stands for this unremarkable proposition: In any case involving a sentencing enhancement when a jury must find the fact of the enhancement beyond a reasonable doubt, the defendant is entitled to bifurcation of the aggravated portion of the charge, where the evidence in support of the enhancement has no or limited probative value regarding the elements of the charge on which the defendant is being tried. See: State v. Brillon, 995 A.2d 557, 561-66 (Vt. 2010) [reversed and remanded]; State v. Nichols, 33 P.3d 1172, 1176 (Ariz. App. 2001) [vacated and remanded].

Here, the evidence is undisputed: Appellant had nothing whatsoever to do with incidences occurring in Bakersfield, Chino Valley, Williams, Arizona, Hollister, California or Lake County, California. For that matter, neither Villagrana nor Pettigrew had anything to do with those incidences, either. For that matter, there is no evidence in this record that either Appellant, Pettigrew or

Villagrana even knew about those incidences. Those incidences simply have no probative value on the issue of why Appellant would discharge a weapon at either Pettigrew or Villagrana on September 23, 2011.

Therein lies the error of the trial court's thinking. This Court did indeed hold in Somee that evidence under 193.168(7) can be received without regard to NRS 48.045(2). But if the enhancement proceeding is not going to be bifurcated, then it can only come in at the guilt phase under NRS 193.168(7) if it could also come in under NRS 48.045(2). The Arizona, Southern California, and Lake County incidences clearly are "gang criminality acts" that have nothing whatsoever to do with this Appellant's motive on September 23, 2011. Thus, Mr. Skelton's and Mr. Bennett's testimonies clearly were classically prejudicial to this Appellant at the guilt phase of his trial.

4. The Hernandez court also concluded that when gang enhancement evidence is presented in the State's case-in-chief at the guilt phase, upon request the court should give a limiting instruction regarding the jury's weight of that evidence - i.e., not to consider the "gang criminality evidence" as proof of the criminal charge but as proof only of the gang enhancement. 94 P.3d at 1083, 1087-89. Of course, no such instruction was given here.

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V. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING THE MOTION IN LIMINE AND ALLOWING "GANG CRIMINALITY EVIDENCE" TO BE HEARD BY THE JURY.

The State criticizes the Appellant's Opening Brief in this regard, and the State is correct. Appellant shall now clarify that which he managed to confuse previously:

In fairness to the Appellant, the court below created confusion by reading Somee to mean that, where the State charges a gang enhancement, the evidence comes in without regard to NRS 48.045(2). But the relief that Appellant seeks is a retrial where the State's OMG experts, Skelton and Bennett, do not testify at all. (AOB at 54) And his position is premised not upon what those two OMG experts testified to, but upon what Jorge Gil-Blanco, probably the pre-eminent "OMG Motorcycle Club" expert in the United States, testified to prior to trial. (See: AOB at 50, citing AAv7: 1634-35)

So, all of this begs the question: If a jury can hear NRS 193.168(7) evidence without regard to NRS 48.045(2), what if any is the standard of review for admitting and reviewing such evidence? Somee does not directly answer that question. However, it implies at 124 Nev. 446 that the standard is the same as the standard viz. NRS 48.045(2). I.e., it is not the Jackson v. Virginia, 443 U.S. 307 (1979) standard.

As explained above, if the enhancement portion of the trial is not going to be bifurcated, then to be admissible the NRS 193.168(7) evidence must also be admissible under NRS 48.045(2). Accordingly, the familiar standard is: Admission of uncharged misconduct is a decision within the district court's discretionary authority, and is not reversed absent manifest error. Braunstein v. State, 118 Nev. 68, 72, 40 P.3d 413, 416 (2002). However, gang evidence, such as gang affiliation evidence, to be admissible under NRS 48.045(2), must be proven by clear and convincing evidence. Butler v. State, 120 Nev. 879, 889, 102 P.3d 71, 78-79 (2004), and cases cited therein.

And therein lies the difficulty of this issue for the State. For purposes of NRS 193.168(7), particularly as explained in Origel-Candido, the question is whether gang members commit felonies as a common activity knowingly and for the benefit of the gang, i.e., whether Vago members regularly engage in violent felonious acts against Hell's Angels in order to expand Vagos' territories.

Given that the threshold for admission of such evidence of that theory is "clear and convincing evidence", the testimony of Mr. Gil-Blanco simply disenables the trial court from allowing experts such as Bennett and Skelton to testify at all.

Clear and convincing evidence is evidence which is beyond or greater than

a mere preponderance of the evidence. Albert H. Wohlers & Co. v. Bartgis, 114 Nev. 1249, 1260, 969 P.2d 949, 957 (1998). The clear and convincing evidence standard adequately conveys to the fact finder a level of subjective certainty about his factual conclusions. Santosky v. Kramer, 455 U.S. 745, 769, 102 S.Ct. 1388, 1403, 71 L.Ed.2d 599 (1982).

Accordingly, evidence which is not diminished in value, impeached, contradicted or questioned qualifies as a matter of law as clear and convincing evidence. Laniger v. Arden, 82 Nev. 28, 33-34, 409 P.2d 891, 894 (1966). Generally, clear and convincing evidence is not established where the evidence on point is conflicting. See: Todkill v. Todkill, 88 Nev. 231, 237-38, 495 P.2d 629 (1972).

This Court at the least implied that standard relative to NRS 48.045(2) in Meek v. State, 112 Nev. 1288, 1294-95, 930 P.2d 1104, 1108 (1996).

Here, it would be one thing if the conflicts were minor, or they came from Skelton and Bennett but they were able to explain them away. But how does one explain away the top "OMG expert" in the country? Gil-Blanco says the issue of whether the "Vagos" are a criminal gang relative to the Hell's Angels goes by area by area. In Sacramento they are not. In San Francisco they are. So that begs the question: What about San Jose?

Both prior to trial and during trial, there was simply no evidence that the San Jose Vagos' members regularly engaged in felonies for the benefit of the San Jose Vagos as against the Hell's Angels in San Jose. Indeed, there was no evidence that any San Jose ever engaged in an act or violence against any San Jose Hell's Angel prior to September 23, 2011! Therefore, the "gang criminality evidence" simply could not come in under NRS 48.045(2), as it was not proven clearly and convincingly. That being the case, it should not have come in under NRS 193.168(7), either.

VI. 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.

This issue squarely presents the question of what instructions the prosecutor must give to the grand jury before its deliberation. All can or should agree that the prosecutor has the duty to advise the grand jury of the essential elements of the charges presented before they return an indictment thereon. State v. Gallegos, 206 P.3d 993, 997 (N.M. 2009). However, all can or should agree that in most cases, the prosecutor can discharge that duty simply by reading from the relevant penal

statutes. O'Meara v. Gottsfield, 851 P.2d 1375, 1377 (Ariz. 1993).

But does the prosecutor have the duty to instruct the grand jury in any other regard? The State relies upon Schuster v. Eighth Judicial District Court ex rel County of Clark, 123 Nev. 187, 160 P.3d 873 (2007) for the simple answer: No. To the extent that Schuster holds or means that a prosecutor never has a duty to instruct the grand jury on the elements of self-defense or any other justification defense, that is a classic case of "bad facts make bad law." The Court should distinguish or clarify Shuster to so state. After all, as pointed out at AOB at 59, self-defense and defense of others negate the "unlawfulness element" of murder (or any other charged crime), and therefore the burden falls upon the State to disprove self-defense or defense - of - others when it *legitimately* is an issue. When self-defense arises in a self-serving out-of-court statement by the defendant that does not erase the proposition that he was the initial deadly aggressor, then self-defense is not a legitimate issue. Those, of course, are the facts of Schuster.

But nationwide, the duty to instruct the grand jury on a justification defense arises, but only when the facts known to the prosecutor clearly indicate or establish the appropriateness of the instruction. See: State v. Hogan, 764 A.2d 1012, 1025 (N.J. Super. 2001), citing State v. Chong, 949 P.2d 122 (Haw. 1997); People v. Wilson, 645 N.Y. Supp.2d 498, 499 (N.Y.A.D. 1996); People v.

Brunson, 641 N.Y. Supp.2d 935, 936 (N.Y.A.D. 1996).

And that leads to the subject of uncharged misconduct. As pointed at AOB at 57, uncharged misconduct that does not fall within any category of NRS 48.045(2) is not admissible before the grand jury, any more than it is inadmissible at trial. If anything, uncharged misconduct would be even more inadmissible before the grand jury than it would at trial, because at trial the reviewer must know what category in NRS 48.045(2)(a) is at issue. See: Rosky v. State, 121 Nev. 184, 197, 111 P.3d 690, 698 (2005). At the stage of a grand jury proceeding, we simply do not know whether "motive" "mistake" "identity" or "common scheme or plan" are at issue. Thus, at the grand jury proceeding, uncharged misconduct all the more tends to be purely propensity evidence, that is not legal evidence either per NRS 48.045(2) or 172.135(2).

Therefore, even more so than at trial, introduction of uncharged misconduct at the grand jury requires a limiting instruction. Compare: People v. Winant, 684 N.Y. Supp.2d 836, 840 (N.Y. Co. Ct. 1998).

The profound problems with this grand jury proceeding are as follows: Per the State's informant, Jimmy Evanson, the "code of the Vagos" is to engage in defense of others when they are attacked. And that is or may be perfectly lawful activity per NRS 200.160. The trial prosecutor chose to present that evidence; he

had to know that that evidence reflects and establishes a behavior pattern of acting lawfully or at the very least potentially acting lawfully. Therefore, the grand jury needed an instruction on defense of others, when that justification defense applies, and when it does not.

And as argued throughout, the problem also was that at trial, the State could not have obtained this conviction without the testimony of Rudnick. However, Rudnick was a co-defendant at the time of indictment, not a witness. So, the State used the uncharged misconduct of "gang criminality" to establish the conspiracy needed for the conviction, without regard to a limiting instruction. Surely, Schuster cannot even remotely be read as allowing a prosecutor to do that! If that is what Schuster means, then all of this Honorable Court's language in Tavares v. State, 117 Nev. 725, 732-33, 30 P.3d 1128, 1132-33 (2001) simply was meaningless jargon to be ignored in the name of expediency!

The case got to district court pre-trial by means of faulty process. The indictment consequently must be dismissed without prejudice.

VII. 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.

Based on the Court's Order of April 24, 2014, but only for that reason, Appellant submits the issue on the Opening Brief.

VIII. CONCLUSION

The State's conclusion is that because Appellant shot a man in the back and the crime was caught on video, this is a simple case to decide. Once again, the State is wrong. One can shoot another in the back and still have it be a justifiable homicide, depending upon other circumstances. See: Allen v. State, 97 Nev. 394, 398, 632 P. 2d 1153 (1981). Self-defense can also attend where the victim has not committed a felonious act against the defendant before the defendant shoots him, again depending upon other circumstances. See: Davis v. State, 130 Nev. Ad. Op. 16, 321 P. 3d 867, 871-72 (2014). If self-defense can attend in those circumstances, defense-of-others can attend even more so.

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Obviously, this case deserves far more careful consideration than the State gives it. And when the Court engages in said careful consideration, it will deem itself constrained to reverse and remand for a new trial.

DATED this 30 day of April, 2015.

Respectfully submitted,

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IN THE SUPREME COURT OF THE STATE OF NEVADA

★ ★ ★ ★ ★ ★

ERNESTO MANUEL GONZALEZ,
Appellant,

CASE NO. 64249

v.

THE STATE OF NEVADA,

Respondent.
_____/

ATTORNEY'S CERTIFICATE

I, RICHARD F. CORNELL, hereby certify as follows, pursuant to NRAP 28A, and NRAP 32(a)(8):

I have read this Appellant's Reply Brief before signing it; to the best of my knowledge, information and belief, the Brief is not frivolous or interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

The Brief complies with all applicable Nevada Rules of Appellate Procedure, including the requirements of NRAP 28(e) that every factual assertion in the brief regarding matters in the record is supported by appropriate references

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 Roman14-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), because it contains less than 7,000 words, to wit: 6,869.

DATED this 30 day of April, 2015.

Richard F. Cornell,
Attorney for Appellant

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
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Reno, NV 89501

DATED this 30th day of April, 2015.

Marianne Tom-Kadlic
Legal Assistant