IN THE SUPREME COURT OF THE STATE OF NEVADA

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ERNESTO MANUEL GONZALEZ,
Appellant,

CASE NO. 64249

v.

THE STATE OF NEVADA,

Respondent.
_____/

ANSWER TO PETITION FOR REHEARING

COMES NOW, Appellant, Ernesto Manuel Gonzalez, and responds to the Court's Order of January 22, 2016, directing an answer to the Petition for Rehearing, filed January 19, 2016, as follows:

I. THE PETITION IS IMPROPERLY FILED IN FORM AND CONTENT, AND IS FILED FOR THE APPARENT PURPOSE OF DELAY.

This case was vetted prior to December 31, 2015 about as thoroughly as a Nevada Supreme Court case gets vetted. We had a 68-page Opening Brief; a 31-page Answering Brief; and a 29-page Reply Brief. We had a full oral argument before the Court *en banc* in early September of 2015. And we had a published

opinion, no. 99 on the year, agreed upon by all seven Justices, with a finding of four significant trial errors.

Intuitively, it would seem that for the State to succeed on a petition such as this, it would have to convince at least four of the seven Justices that they were just plain wrong to concur with the Opinion; there were not four significant errors in this case, but only zero, or maybe one harmless error; and accordingly four Justices should change their minds within a matter of months.

Granted, this is a high-profile murder case. Also granted, this Court very rarely reverses judgments of conviction in high-profile murder cases. But there is no "high-profile murder case exception" contained in NRAP 40.

Per NRAP 40(c) (1), the Court cannot consider points raised for the first time on a petition for rehearing. State v. Ceja, 53 Nev. 281, 285, 2 P.2d 124, 128 (1931); Ainsworth v. Combined Insurance Co., 105 Nev. 237, 244, 794 P.2d 1003, 1009 (1989). And that is so, even if the point is based on a United States Supreme Court case, if that case was in existence at the time of briefing and was not raised at that time. See: Stanfill v. State, 99 Nev. 499, 501, 665 P.2d 1146, 1147 (1983).

Similarly, matters presented in the briefs and oral arguments may not be reargued in the Petition for Rehearing. NRAP 40(c)(1). And, rehearings are not granted to review matters of no material consequence. Whitehead v. Commission

on Judicial Discipline, 110 Nev. 380, 389, 873 P.2d 946, 952 (1994).

NRAP 40(a)(2) requires the petitioner, when complaining of overlooked material issues of law, to cite to references to the pages in the brief where the petitioner raised the issue in question. And when complaining of the overlooking and misapprehension of a material fact in the record, the petitioner must cite to the appendix where the overlooked fact may be found. NRAP 40(a)(2).

In this case, Respondent has not followed any of these rules. It has not cited to pages in its brief where it raised the issues it now complains of. It has not cited to the record in terms of facts that the Court overlooked. Rather, it has raised issues either not heretofore raised or thoroughly vetted.

The standard of review on harmless error has been developed in this Court for decades. It was thoroughly restated in Rose v. State, 123 Nev. 194, 211, 163 P.3d 408, 419 (2007) as follows:

> "The cumulative effect of errors may violate a Defendant's constitutional right to a fair trial even though errors are harmless individually. If the Defendant's fair trial rights are violated because of the cumulative effect of errors, this Court will reverse the conviction. The relevant facts to consider when deciding whether cumulative error requires reversal are: 1) Whether the issue of guilt is close, (2) The quantity and character of the error, and (3) The gravity of the crime charged."

That standard does not speak to, prohibit, or qualify the cumulation of preserved error and plain error. Nor should it; error is error. But since the State

did not raise this point in its brief or at oral argument, now is not the time to raise it.

Even more remarkably, the State says nothing in its Petition regarding the first assignment of error, or "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." (AOB at 26-31; ARB at 1-5; Opinion at 3-6) The Court easily could have reversed on that error alone. As the Court indicated, the issue of conspiracy to murder went to the heart of the charged offenses. The gravity of the crime charged is extreme, and the character of that error is very substantial. Thus, even if the Court were to agree with the State on every other contention, it would not matter. The State ultimately is complaining of matters that are of no material consequence.

A petition for rehearing cannot be filed for the apparent purpose of delay, and with the improper result - if not the intent - of subjecting the appellant to further odium. In Re Hermann, 100 Nev. 149, 151, 679 P.2d 246, 247 (1984). This, we fear, is exactly what has happened here. Mr. Gonzalez remains a resident of the Department of Corrections, High Desert State Prison. He cannot return to

the Washoe County Jail, an unconvicted felon, until this Court issues its remittitur. This Petition for Rehearing, which must be denied, subjects him to further public odium.

Even so, the Petition for Rehearing gives the Court the opportunity to refine its opinion in certain respects, if the Court wishes to go there.

II. 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.
(AOB at 37-43; ARB at 11-15; Opinion at 10-13)

The State's Petition in this regard violates the most basic rule of petitions for rehearing; it re-vets an issue that has been about as thoroughly vetted as an issue can be, and with nothing new.

Everything the Court said on this issue in Advanced Opinion 99 is not only correct, but is perfectly consistent with United States v. Bernard, 625 F.2d 854, 857 (9th Cir. 1980). The fact that lawful activities of a defendant are 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.

The video in this case indeed corroborates the fact of a homicide. But

homicide committed in defense of others is a lawful homicide (NRS 200.160).

And that is what the video shows. The undersigned has studied it. The video - which this Court has in its possession - shows the homicide victim, Pettigrew, a member of the Hells Angels, with his gun out (albeit not in "execution style") and kicking a Vago, Wiggins, in the head. It also shows Villagrana, the co-defendant and also a Hells Angel, with his gun out after having shot Garcia, also a Vago, in Garcia's stomach. And it shows all of this prior to Appellant discharging the fatal gun shots.

If that isn't a "defense of others" case, by itself, the undersigned is hard pressed to understand what would be. And by her trial testimony as referenced at oral argument, Detective Walsh of the Sparks Police Department concurs.

What turns this from a justifiable homicide, theoretically, into a murder is Rudnick's highly controverted testimony of Pastor Palafox's "green light" direction in the Vagos International meeting a few hours prior. That testimony is not only uncorroborated, it is severely impeached. Yet, that severely impeached testimony is the linchpin of the State's case. And unquestionably, per the charging document, Rudnick is an accomplice - just as the Court stated in Opinion no. 99.

This issue has been vetted to death. There simply is no lawful reason to revisit it.

III. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING THE MOTION IN LIMINE AND ALLOWING "GANG CRIMINALITY EVIDENCE" TO BE HEARD BY THE JURY.
(AOB at 43-49; ARB at 15-21; Opinion at 13-15)

The State's Petition is centered on the proposition that this a "plain error issue." The State is plain wrong.

That was the State's position in its Answering Brief. Hence, at ARB at 16-18, Appellant went to great pains to explain the record on appeal. Those cites to the record are incorporated herein by this reference.

The Appellant filed a pre-trial motion to bifurcate the enhancement evidence of the gang enhancement testimony to a proceeding subsequent to the trial on the murder charge. The trial court conducted a lengthy pre-trial hearing on this and other NRS 48.045(2) motions. The court entered lengthy pre-trial orders on the motions. The court below read Somee v. State, 124 Nev. 434, 446, 187 P.3d 152, 160-61 (2008) to mean that if the State files a gang enhancement charge in the indictment or information, the evidence comes in without regard to NRS 48.045.

The Court may wish to use the Petition for Rehearing to distinguish Somee, given that the result in this case is a published opinion, if it so chooses. In no way can or should either Somee or NRS 193.168(7) be read to have repealed NRS

48.045(2) by "judicial" fiat.

The State relied upon People v. Hernandez, 94 P.3d 1080 (Cal. 2004) in its brief on the merits of this issue, and the Court cited Hernandez at page 13 of the Opinion. Consistently with Hernandez, this Court could and should distinguish Somee, and hold that even where the State files an NRS 193.168(7) gang enhancement in the charging document, the "gang criminality evidence" as opposed to the "gang membership evidence", which is *res gestae*, may come into evidence only if it is cross-admissible under NRS 48.045(2).

Precisely for the reasons stated at pp. 14-15 of the Opinion, this evidence was not relevant and not admissible under NRS 48.045(2). In the prior criminal episodes between the Hells Angels and Vagos in places such as Chino, California and Scotts Valley, Arizona, there is simply no evidence that either Appellant or Mr. Pettigrew were even present. Accordingly, those incidences are not even relevant under NRS 48.015. See: Taylor v. State, 109 Nev. 849, 852, 858 P.2d 843, 845 (1993) [reversed]. At its heart, this case is quite simple: Rudnick stupidly and drunkenly started the fracas over a perceived personal slight to him and him alone; Pettigrew and Villagrana elevated the fracas with extreme violence; and before Wiggins could be stomped to death or Garcia could die, Appellant ended it. Nothing that happened in places such as Scotts Valley,

Arizona, or Chino, California in any way could possibly be relevant to motive in this case!

As this Court stated in Tavares v. State, 117 Nev. 725, 30 P.3d 1128 (2001):

> "We have often held that the use of uncharged bad act evidence to convict a defendant is heavily disfavored in our criminal justice system because bad acts are often are irrelevant and prejudicial and force the accused to defend against vague and unsubstantiated charges. The principal concern with admitting such act is that the jury will be unduly influenced by the evidence, and thus convict the accused because it believes the accused is a bad person."

Tavares, 117 Nev. at 730, 30 P.3d at 1131.

Tavares involved a reversal on the plain error standard regarding the giving of an erroneous flight instruction and the failure to give another limiting use of prior bad act testimony instruction. If this were the only assignment of error in this case - which it is not - the consideration of this issue - even on a plain error standard, which again it is not - would easily warrant a reversal under the facts of this case. For this reason as well, the Petition is utterly without merit.

IV. 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.
(AOB at 31-37; ARB at 5-11; Opinion at 6-10)

The parties can agree on one thing: This was a plain error issue in this appeal. And the parties should be able to agree, conceptually, that it is error to give a jury instruction with two theories of defense, one of which is unsupported by the record, and to make them interchangable - exactly for the reasons that occurred in this case. When a trial court does that, it opens the door for the prosecutor to argue vociferously relative to the theory of defense that is not supported by the record - as Mr. Hall did seven times during his closing argument[1] - and thus make it appear that the defendant does not enjoy a defense at all.

Based upon the other clear errors in this case, the Court easily could reverse without reference to this assignment of error. However, even where reversal obviates the need to reach an assignment of error, this Court may address instructional issues in order to eliminate uncertainty in the event of retrial. See: Jimenez v. State, 112 Nev. 610, 623, 918 P.2d 687, 695 (1996).

In this case, if the "conspiracy to murder" angle is eliminated, then the matter comes down to defense of others. In that instance, the question of what a "Nevada defense of others" instruction should look like is absolutely critical to the proper outcome of this case; and unlike self-defense, the bar and bench do not have a good opinion out of this Court that addresses that issue.

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[1]See: cites at AOB at 34.

And in that regard, the answer should be very simple: The jury should be instructed based on the precise verbiage of NRS 200.160(1) - nothing more, nothing less. But nothing in NRS 200.160(1) in any way implies that the viability of the defense depends upon whether the person being defended "has a life worth saving." That is, nothing in the statute disqualifies the defense if the person being defended "just so happens to be the primary initial aggressor." In that sense, defense of others and self-defense are very different concepts.

Based on the instruction given, and based upon Mr. Hall's argument, Appellant had the duty to stop Pettigrew in "mid stomp," ask him whether he so happened to be the primary initial aggressor in the fight; and when he responded in the negative - even if lying -, to allow Pettigrew then to stomp Wiggins to death.

That construction of the law not only is nowhere contained in the body of NRS 200.160(1), but it is positively absurd! As pointed out in the authorities at ARB at 7-9[2] the law of defense of others throughout the country does not impose the "initial deadly aggressor" disqualifier of self-defense into the substantive law of defense of others - at least not to a defendant who is not present when the initial provocation occurs, as here.

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[2]State v. Gallegos, 22 P.3d 689, 691 (N.M. App. 2001); People v. Silva, 987 P.2d 909, 916 (Colo. App. 1999); and State v. Mark, 231 P.3d 478, 495-97 (Haw. 2010).

If the Court is to do anything with this Petition other than summarily deny it, the Court should deny it and affirm as modified, making clear to the parties that defense of others does not require that the person slain is not the initial deadly aggressor. That requirement nowhere appears in NRS 200.160(1), and it certainly should not become common law.

V. CONCLUSION

For all of the reasons stated, then, this Petition should be denied. If the Court wishes to modify Advanced Opinion 99 by distinguishing Somee and by making clear that a defense of others instruction should be couched in terms of the precise verbiage of NRS 200.160(1), it may - and should - do so. But otherwise, the Petition should be denied. The bottom line of reversing and remanding for a new trial is the correct result, and the one that all seven Justices of this Court reached.

DATED this 4th day of February, 2016.

Respectfully submitted,

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ATTORNEY'S CERTIFICATE

I, RICHARD F. CORNELL, hereby certify as follows, pursuant to NRAP 40(b)(3), and NRAP 32(a)(7):

I have read this Answer to Petition for Rehearing 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 40(b)(3) that every factual assertion in the Answer To Petition for Rehearing 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 Answer to Petition for Rehearing also meets the applicable page limitation of Rule 40(b)(3) and 32(a)(7), because it contains less than 4,667 words, to wit: 2,774.

DATED this 4th day of February, 2016.

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
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Reno, NV 89501

DATED this 4th day of February, 2016.

Marianne Tom-Kadlic
Legal Assistant