IN THE SUPREME COURT OF THE STATE OF NEVADA

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Tracie K. Lindeman
Clerk of Supreme Court

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LUIS HIDALGO, III,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

_____/

CASE NO. 67640

PETITION FOR REHEARING

COMES NOW, Appellant, Luis Hidalgo III, and petitions the Panel of JJ Cherry, Douglas and Gibbons for a rehearing relative to the Order of Affirmance

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Docket 67640 Document 2016-16495

filed May 11, 2016. This Petition is brought pursuant to NRAP 40, and is based upon points of law that Appellants believes the Court has overlooked or misapprehended.

DATED this 25 day of May, 2016.

Respectfully submitted,

LAW OFFICES OF RICHARD F. CORNELL
150 Ridge Street, Second Floor
Reno, NV 89501

By: _____
Richard F. Cornell

MEMORANDUM OF POINTS AND AUTHORITIES

I. APPELLANT'S FIFTH, SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO A FAIR TRIAL, TO DUE PROCESS OF LAW, AND TO EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL AND ON DIRECT APPEAL WERE IMPINGED WHEN TRIAL COUNSEL FAILED TO OBJECT TO INSTRUCTIONS NO. 19, 20 AND 22. (AOB AT 47-54; ARB AT 9-12)

The Panel's summary conclusion is at OoA at 2. Appellant's position is premised upon the fact that Instruction Nos. 19 and 22 define the theory of culpability for second degree murder based on a conspiracy theory, without referencing the necessity of finding implied malice in either instruction. Summarily the Panel stated: "To the extent Appellant argues that second degree

murder is not a general intent crime pursuant to Ho v. Carey, 332 F.3d 587, 592 (9th Cir. 2003), his reliance on Ho is misplaced because Ho addressed California law."

That is not what Appellant argued at all. He argued that the failure of these instructions - which Appellant's counsel actually drafted - to mention anything regarding the *requirement of implied malice* render them defective under Nevada law; and if this case were in front of the federal courts under 28 U.S.C. §2254, they would be constrained to agree pursuant to Ho.

California law requires a finding of implied malice in order for a second degree murder conviction to stand. California Penal Code §§ 187(a), 188, 189. Nevada law requires likewise . NRS 200.020(2) and 200.030(5).

In California, a conviction of second degree murder requires proof of malice aforethought - that is, implied malice - and can be proven when the defendant commits an act that results in death, knowing that his conduct endangers the life of another, and does so with disregard for life. See: People v. Nieto Benitez (1992) 4 Cal. 4th 91, 102, 13 Cal. Rptr.2d 864, 870, 840 P.2d 969, 974; People v. Guillen (2014) 227 Cal. App. 4th 924, 988, 174 Cal. Rptr.3d 703, 749; People v. McNally (2015) 236 Cal. App. 4th 1419, 1426, 187 Cal. Rptr.3d 391, 396-97.

That is also the rule of law in Nevada per McCurdy v. State, 107 Nev. 275,

277-78, 809 P.2d 1265, 1266 (1991): When a defendant engages in an act which is malignantly reckless and death or serious bodily injury is likely to result from it, and death in fact results from it, the evidence is sufficient to uphold a second degree murder conviction.

Instructions Nos. 19 and 22, however, say absolutely nothing about malice, about implied malice, about an abandoned and malignant heart, or about engaging in conduct with knowledge that it endangers the life of another and doing so with disregard for life. As noted at AOB at 49, what these unobjected - to instructions told the jury was this: If the jury found that Appellant joined a conspiracy to batter the victim non-lethally, even if the Appellant was not considered a "co-conspirator" by the other conspirators, even if he did nothing in furtherance of the conspiracy to batter or to kill the victim, and even if his knowledge of the conspiracy was so slight that he could not have foreseen that someone like Counts (whether or not he knew Counts or that Counts was a member of a conspiracy to batter) would kill someone like this victim, that nevertheless made him a second degree murderer.

Clearly, that lowers the burden of proof that the State had in proving the implied malice element of second degree murder, and therefore is a Constitutional violation. In that sense, Ho is perfectly congruent with this case. The vice of

these instructions is not "general intent versus specific intent"; it is in the absence of any reference to malice aforethought, one of the *prima facie* elements of second degree murder. As the Ninth Circuit stated, when a jury instruction [in this case, two jury instructions] omit a necessary element of the crime, constitutional error occurs. Ho, 332 F.3d at 592, and cases cited therein.

II. APPELLANT'S FIFTH, SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO THE FAIR TRIAL, TO DUE PROCESS OF LAW, AND TO EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL AND ON DIRECT APPEAL WERE IMPINGED WHEN TRIAL COUNSEL FAILED TO TENDER INSTRUCTIONS THAT MORE PRECISELY FOCUSED THE JURY'S ATTENTION ON THE "CAUSATION ELEMENT" OF SECOND DEGREE MURDER. (AOB AT 54-58; ARB AT 12-14)

On this sub issue of Ground III, the Panel stated: "Regarding second degree felony murder, even assuming that the jury was not properly instructed pursuant to Labastida v. State, 115 Nev. 298, 307, 986 P.2d 443, 449 (1999), Appellant failed to demonstrate that trial counsel were deficient or that he was prejudiced, given the evidence presented at trial and the theories of vicarious liability alleged in the charging document." (OoA at 2)

This statement is ambiguous to the undersigned. But the undersigned takes it to mean that in Nevada, if one joins a conspiracy to batter non-lethally, and quite unforeseeably a co-conspirator instead kills the victim, the one who joined the

conspiracy does not have to be proven to be a cause in fact or the proximate cause of the homicide in order to be found guilty of second degree murder.

Respectfully, if that is what the Panel meant to say, the Panel really needs to revisit this decision, because that simply cannot be correct as a matter of law.

As pointed out at ARB at 10-11and 13-14, "felony second degree murder" is a creature of the judiciary, not of the legislature, and simply is a method of proving malice for purposes of second degree murder. The same is true regarding the "conspiracy theory" pursuant to Bolden v. State, 121 Nev. 908, 124 P.3d 191 (2005). But because these are "judge-made theories" and not legislative mandates, the Court cannot - without doing violence to the federal constitution - construe these "judge-made theories" in such a way as to conflict with what the legislature has already proscribed as the elements of second degree murder.

In fact, that point is made very clear in Bolden: This Court did not allow "conspiracy theory liability" to do away with the requirement of proving specific intent to commit the underlying crimes, in that case relative to charges of burglary and first degree kidnapping. Bolden, 121 Nev. at 915-22, 124 P.3d at 196-201. As this Court noted, the legislature never has adopted the rule of vicarious liability of Pinkerton v. United States, 328 U.S. 640 (1946). Bolden, 121 Nev. at 918, 124 at 198. Had the legislature done so, that might have been one thing; but otherwise,

it is repugnant to our system of jurisprudence, where guilt is generally personal to the defendant, to impose punishment, not for the socially harmful agreement to which the defendant is a party but for substantive offenses in which he did not participate. Id, 121 Nev. at 920, 124 P.3d at 199, and cases cited therein.

The rule of law in Nevada for decades has been that in *any* criminal homicide case, the State must prove that the criminal agency of the defendant is responsible for the death of the victim. Frutiger v. State, 111 Nev. 1385, 1389, 907 P.2d 158, 160 (1995); Azbill v. State, 84 Nev. 345, 350-51, 440 P.2d 1014, 1017 (1968). That is to say, in all criminal homicide cases, the State must prove that the defendant's acts were a substantial factor in causing the victim's death. Lay v. State, 110 Nev. 1189, 1192, 886 P.2d 448, 450 (1994).

To put it another way, for criminal liability to attach where a crime victim dies, a defendant's actions must have been an actual contributory cause of death, in the sense that they forged a link in a chain of causes which actually brought about the victim's death. People v. Pratcher, 134 A.D.3d 1522, 1524-25, 22 N.Y.Supp.3d 757, 760 (2015).

In this case, the jury was not properly instructed pursuant to Labastida, and needed to be in order to match the Appellant's theory of the case at trial. Even if we assume that he joined a conspiracy to batter, his co-conspirators ignored what

the Appellant had to say. Accordingly, his statements in joining the conspiracy could not have been a substantial factor in causing the victim's death. Nothing in Bolden - which is not even a criminal homicide case - absolved the State of the responsibility of proving that the Appellant's criminal agency was responsible for the death of Mr. Hadland.

Again, by failing to give this instruction, the trial court eliminated the necessity of proof of the element of "death by criminal agency", and thereby lowered the State's burden of proof, thus making it easier for the State to obtain a conviction than it should have. The Panel really needs to revisit this issue as well, since the implication that a "vicarious liability theory" relieves the State of that burden is simply unconstitutionally wrong.

III. APPELLANT'S FIFTH, SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO A FAIR TRIAL, TO DUE PROCESS OF LAW, AND TO EFFECTIVE ASSISTANCE COUNSEL AT TRIAL AND ON DIRECT APPEAL WERE IMPINGED WHEN COUNSEL FAILED AND REFUSED TO TENDER A JURY INSTRUCTION THAT OUT-OF-COURT STATEMENTS MADE BY CO-CONSPIRATORS MAY NOT BE CONSIDERED AGAINST THE DEFENDANT IF THE STATEMENTS THEMSELVES ARE THE ONLY EVIDENCE OF THE DEFENDANT'S PARTICIPATION IN THE CONSPIRACY. COUNSEL ALSO FAILED TO RAISE THE ISSUE HEREIN ON DIRECT APPEAL AS AN ASSIGNMENT OF PLAIN ERROR. (AOB AT 40-47; ARB AT 4-9)

At page 3 of the OoA, the Panel simply defaulted to McDowell v. State, 103

Nev. 527, 529, 746 P.2d 149, 150 (1987) for the proposition that Instruction No. 40 is consistent with Nevada law, even as against this particular attack; and defaulted to Crawford v. Washington, 541 U.S. 36, 56 (2004) and Lilly v. Virginia, 527 U.S. 116, 137 (1999) for the proposition that co-conspirator statements made in the course and scope and during the existence of conspiracy are immune from a Sixth Amendment attack.

Here is the problem: We are not talking about admission of Carroll's out-of-court statements concerning what this Appellant supposedly said; we are talking about a jury instruction that enables the jury properly to consider or disregard the admitted statements. We are not saying that counsel should have objected to the admission of the statements on Confrontation Clause grounds; we are saying that counsel should have proposed a jury instruction, telling the jury to disregard the statements if they were to find that those statements were the sole evidence of Appellant's "participation" in the conspiracy.

Bourjaily v. United States, 483 U.S. 171 (1987), which is the source for the Lilly and Crawford cites, has been put into proper context in federal court by an amendment to Fed. R. Evid. Rule 801(d)(2) in 1997. Per the rule as amended, the out-of-court statement may be considered, but by itself does not establish the existence of the conspiracy or the defendant's participation in it. We quote

directly from the 1997 comments under Rule 801:

> "Rule 801(d)(2) has been amended in order to respond to three issues raised by Bourjaily [*supra*]. First, the amendment codifies the holding in Bourjaily by stating expressly that a court shall consider the contents of a co-conspirator's statement in determining "the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered." According to Bourjaily, Rule 104(a) requires these preliminary questions to be established by a preponderance of the evidence.
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> Second, the amendment resolves an issue on which the Court had reserved decision. It provides that the contents of the declarant's statement do not alone suffice to establish a conspiracy in which the declarant and the defendant participated. The court must consider in addition the circumstances surrounding the statement, such as the identity of the speaker, the context in which the statement was made, or evidence corroborating the contents of the statement in making its determination as to each preliminary question. This amendment is in accordance with existing practice. Every court of appeals that has resolved this issue requires some evidence in addition to the contents of the statement. [numerous citations from nine different circuit courts of appeal omitted]."

While NRS 51.035 has not been amended at all since it was first enacted in 1971, we note that the amendment to Fed. R. Evid. Rule 801 occurred based upon circuit court of appeal authority throughout the country that pre-dated said amendment. Our question to this Honorable Court is: Why aren't you doing the same thing? Why would you allow someone to be sentenced to 20 years to life based merely on second-hand statements, and without regard to his actions (or non actions) and without regard to the context of the statements, and also without regard to the reliability of the persons supposedly making the statements? How

do you explain this?

Whatever explanation this Court can make, it must do so in light of this language from Crawford:

> "Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of "reliability." Certainly none of the authorities discussed above acknowledges any general reliability exception to the common-law rule. Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation. To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular matter: By testing in the crucible of cross-examination. The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but how reliability can best be determined." [cites omitted]
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> Crawford, 541 U.S. at 61, 124 S.Ct. at 1370.

Could the Framers have envisioned a 20-year-to-life sentence based on un-cross-examined out-of-court statements from a notoriously unreliable (and unavailable) source, with absolutely no evidence of this defendant's acts corroborating the supposed statements? Crawford seems to answer that question with: No way! What we are saying, consistently with every circuit court of appeals in the United States, is that the evidence should be admitted, but the jury should be instructed to disregard it if there is no such indicia of reliability presented. If every circuit court of appeals in the United States requires such an

instruction, to where Rule 801(d)(2) simply is codified to reflect that fact as well as the concerns of Bourjaily, then why is this Honorable Court so resistant to that rule of law?

Hopefully this Honorable Court will grant rehearing and explain. But in so explaining, hopefully this Court will not simply default to McDowell. McDowell at 103 Nev. at 529-30, 746 P.2d at 150, simply does not address the type of jury instruction that this ground references.

IV. APPELLANT'S FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS TO A FAIR TRIAL, TO DUE PROCESS OF LAW, AND TO EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL WERE IMPINGED WHEN COUNSEL DID NOT SEEK A "MORALES" SEVERANCE IN THE MIDDLE OF TRIAL IN ORDER TO GAIN THE ADMISSION OF JAYSON TAOIPU'S TESTIMONY FROM THE COUNTS TRIAL. AOB AT 58-67; ARB AT 15-18)

The Panel's summary conclusion here is that "the trial court did not decline to admit [the testimony of Taoipu] based on prejudice to Appellant's co-defendant and therefore a severance would not have been granted on this basis." (OoA at 3)

Unfortunately, this misses the much greater point of this ground. It is true that on direct appeal this Court ruled that the trial court did not err in excluding the out-of-court testimony of Taoipu under its interpretation of NRS 51.325. But what cannot be disputed is that based upon Byford v. State, 116 Nev. 215, 225-26, 994 P.2d 700, 708 (2000), Taoipu's sworn testimony from the Counts trial should

have been admitted, not only because Taoipu had no apparent motive to lie as an unindicted percipient witness, but also because the issues in both trials were the same: Who said and did what, where, when and why?

Of greater concern, as noted by the Ninth Circuit in Lumbery v. Hornbeak, 605 F.3d 754, 760-61 (9th Cir.), *cert denied*, 131 S.Ct. 798 (2010), the question is not whether the rules of evidence bar admission of the testimony; the question is whether it is unreasonable for the state court to conclude that the exclusion of the evidence did not violate the Appellant's due process right to present a defense and receive a fair trial. Lumbery, 605 F.3d at 760, citing Chia v. Cambria, 360 F.3d 997, 1003 (9th Cir. 2004) and Rice v. McCann, 339 F.3d 546, 549 (7th Cir. 2003). As Mr. Arrascada testified, Taoipu's testimony was critical for this Appellant because it put into issue who actually made the "bats and bags statement" - the principal evidence upon which the State bases its murder conviction against this Appellant. That testimony was critical, because without the "bats and bags" statement attributed to this Appellant, the evidence against this Appellant goes from "precious thin" to "microscopically thin!"

It may be argued that this Court is free to interpret NRS 51.325 as it wishes, and there is nothing that the federal courts later can do about it. But that is not exactly true. Where the state court misapplies an evidentiary rule to prohibit a

defendant from presenting material factual matters, the court violates the defendant's Sixth Amendment rights. See: Alvarez v. Ercole, 763 F.3d 223, 231-32 (2d. Cir. 2014). State supreme court interpretations of state law are binding on federal courts unless the federal court determines the interpretations to be untenable, or a veiled to attempt to avoid review of the federal question raised. Powell v. Ducharme, 998 F.2d 710, 713 (9th Cir. 1993). And while the federal courts are bound by state court's interpretation of a state statute, that means the definition of a meaning of a particular word or phrase, not the characterization of the practical effect of the statute. Wisconsin v. Mitchell, 508 U.S. 476, 484 (1993).

In light of Byford, a federal court can ask the question: "How can the Nevada Supreme Court interpret NRS 51.325 one way in Byford, then a different way without referencing Byford in Hidalgo, in order to justify keeping out critical evidence that Hidalgo wishes to present at his trial"?

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Respectfully, this Petition should be granted and that question should be answered now, so that the federal court does not have to ask and answer it later.

DATED this 25 day of May, 2016.

Respectfully submitted,

LAW OFFICES OF RICHARD F. CORNELL
150 Ridge Street, Second Floor
Reno, NV 89501

By: _____
Richard F. Cornell

IN THE SUPREME COURT OF THE STATE OF NEVADA

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LUIS HIDALGO, III,

Appellant,

CASE NO. 67640

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 Petition for Rehearing before signing it; to the best of my knowledge, information and belief, the Petition 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 Petition complies with all applicable Nevada Rules of Appellate Procedure, including the requirements of NRAP 28(e) that every factual assertion

in the petition 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 Petition also meets the applicable page limitation of Rule 40(b)(3), because it contains less than 4,667 words, to wit: 3,238.

DATED this 25 day of May, 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 to be , electronically filed by E-Flex, a true and correct copy of the foregoing document, addressed to:

Giancarlo Pesci
Clark County District Attorney Office
Regional Justice Center
200 Lewis Avenue
Las Vegas, Nevada 89155-2211

DATED this 25th day of May, 2016.

Marianne Tom
Legal Assistant to Richard F. Cornell