IN THE SUPREME COURT OF THE STATE OF NEVADA

LUIS A, HIDALGO, JR.

Appellant,

vs.

THE STATE OF NEVADA

Respondent.

CASE NO. 54209

MOTION TO FILE APPELLANT'S OPENING BRIEF IN EXCESS OF THIRTY PAGES

COMES NOW Appellant, Luis A. Hidalgo, Jr., by and through counsel, Dominic P. Gentile, Esq., of the law firm of Gordon Silver, and hereby moves the Court for an order permitting the filing of Appellant's Opening Brief in excess of the limitations of NRAP 32(a)(7)(A).

This Motion is made and based on the Affidavit of Dominic P. Gentile attached hereto.

Dated this 2nd day of February, 2011.

GORDON SILVER

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AFFIDAVIT OF DOMINIC P. GENTILE

STATE OF NEVADA)
)
COUNTY OF CLARK)

I, DOMINIC P. GENTILE, having first been duly sworn, deposes and states that:

1. I am an attorney duly licensed to practice before all Courts in the State of Nevada.

2. I am the attorney of record for the Defendant/Appellant, Luis A. Hidalgo, Jr., in the instant matter.

3. There are five issues presented to the Court. One of the issues, Issue B, requires as its standard for review complete review of the evidence in the case.

4. Another issue, issue A, is structural error and needs no prejudice analysis if the Court so agrees. However, the Court may opt for such an alternative analysis, which also requires a complete review of the evidence in the case.

5. There are twenty-five (25) volumes of the Appendix, and the Statement of Facts started out as eighty-eight (88) pages, but I managed to distill it to twenty-eight (28) pages. I have made every attempt to be more succinct but cannot do so in good faith without being disingenuous with the Court as to the true state of the evidence.

6. Issue A is being joined by Luis Hidalgo III, Appellant in Case No. 54272, and who was Luis A. Hidalgo, Jr.'s co-defendant in the trial in the District Court, and as a result, he may also need a complete evidentiary review if the Court deems the error not structural.

7. The final draft of the statement of facts and the brief indicate that the issues involved cannot be adequately presented to the Court within the limitations of NRAP 32(a)(7)(A).

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Further, affiant sayeth naught.

DOMINIC P. GENTILE

SUBSCRIBED and SWORN to before me this 2 day of February, 2011

NOTARY PUBLIC in and for said County and State

NOTARY PUBLIC
STATE OF NEVADA
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ADELE L. JOHANSEN
No: 92-2829-1
My Appointment Expires Aug. 31, 2012

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CERTIFICATE OF SERVICE

The undersigned, an employee of Gordon Silver, hereby certifies that on the 2nd day of February, 2011, she served a copy of the Motion to File Appellant's Opening Brief in Excess of Thirty Pages, by placing said copy in an envelope, postage fully prepaid, in the U.S. Mail at Las Vegas, Nevada, said envelope addressed to

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IN THE SUPREME COURT OF THE STATE OF NEVADA

LUIS A. HIDALGO, JR.

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

Docket No. 54209

Direct Appeal from a Judgment of Conviction
Eighth Judicial District Court
The Honorable Valerie Adair, District Judge
District Court Case No. C212667/C241394

APPELLANT LUIS A. HIDALGO, JR.'S OPENING BRIEF

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I. STATEMENT OF JURISDICTION

Luis A. Hidalgo Jr. (hereafter "H")[1] was found guilty by a jury of conspiracy to commit battery with a deadly weapon and/or causing substantial bodily harm and second degree murder with the use of a deadly weapon in case C241394 in the Eighth Judicial District Court. 24 ROA 4500. A judgment of conviction was entered July 10, 2009, sentencing him to consecutive terms of life imprisonment with the possibility of parole. 25 ROA 4656-4657. The notice of appeal was timely filed on July 16, 2009. 25 ROA 4658-4659. This Court has jurisdiction over this appeal pursuant to NRS 177.015(3).

II. STATEMENT OF ISSUES PRESENTED FOR REVIEW

A. Did the trial court commit reversible error when it instructed the jury that existence of the conspiracy and H's membership in it could be established by 'slight evidence'?

B. Was there sufficient corroboration of the accomplice testimony to support the verdict?

C. Did the intentional failure by the State to record an accomplice witness's plea negotiation proffer violate H's right to due process of law and a fair trial ?

D. Was H's right to confrontation violated by admitting into evidence statements by a purported co-conspirator who both sides agreed had withdrawn from the conspiracy when he made them?

E. Was the district court's denial, without a hearing, of H's Motion for New Trial based upon juror misconduct an abuse of discretion?

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[1] Appellant and his son, Luis A. Hidalgo III, have identical names and are both appealing their convictions in this matter. The use of the appellation 'H' and 'III' is as an economical aid to the Court to distinguish between them, is artificial and is not intended to demean their dignity.

III. STATEMENT OF THE CASE

This case was consolidated with one filed in May, 2005, charging Kenneth Counts ("Counts"), Luis Alonso Hidalgo III ("III"), Anabel Espindola ("Anabel") and Deangelo Reshawn Carroll ("Deangelo") with Conspiracy to Commit Murder and Murder of Timothy J. Hadland ("TJ"), and Anabel and III with soliciting the murder of Ronte Zone ("Zone") and Jayson Taoipu ("JJ"). 1 ROA 1-3. 5 ROA 916-918. All were denied bail and facing the death penalty. 1 ROA 4, 9-25. A writ issued from this Court striking the death penalty, later modified to allow amendment. 1 ROA 188-192; 3 ROA 516-529. Less than one month before the trial of III and Anabel, the State amended its notice of intent to seek the death penalty (3 ROA 530-533) and filed a petition for rehearing in this Court. 3 ROA 534-548. Soon thereafter, while the State's petition for rehearing was pending and after being in jail (hereinafter "CCDC") since May 24, 2005 (32 months and 11 days), Anabel cut a deal with the State. Under the terms of her February 2, 2008 plea agreement she entered a "fictional plea" to "voluntary manslaughter with use of a deadly weapon." 3 ROA 549-557. In exchange for her testimony, the State agreed that her sentence could include the possibility of probation and that it would not argue against it. Id. The agreement also provided that she could be released from jail and placed on house arrest as soon as she testified under cross-examination. Id. and 5 ROA 822. [2]

[2] Anabel's sentencing in case C212667 is set for February 10, 2011, over three years after she agreed to testify against H. 25 ROA 4667. Because of the close relationship between the two cases, this Court can take judicial notice of the fact that as of the filing of this brief, Anabel has still not been sentenced. Mack v. Estate of Mack, __Nev __, 206 P.3d 98, 106 (2009).

H was thereafter charged on vicarious liability theories for the murder of TJ. The State presented Anabel's testimony to a grand jury and obtained an indictment. 3 ROA 574-575, 4 ROA 724-727. H was released on bail pending trial, notwithstanding that he was facing the death penalty at that time. 4 ROA 789. Trial commenced on January 27, 2009 and the case went to the jury on February 12, 2009. The verdict was returned on February 17, 2009. 24 ROA 4500-4501. H's timely filed post-trial motions were supplemented after discovering evidence of jury misconduct. 24 ROA 4506-4523; 24 ROA 4558-4566. The district court denied the motions on May 1, 2009. 25 ROA 4660-4663. H received consecutive sentences of life with the possibility of parole for second degree murder with use of a deadly weapon and conspiracy to commit battery with use of a weapon on June 29, 2009 and judgment of conviction was entered July 10, 2009. 25 ROA 4656-4657. The notice of appeal was timely filed on July 16, 2009. 25 ROA 4658-4659.

IV. STATEMENT OF FACTS.

A. Preliminary Statement

H is an American citizen who emigrated from El Salvador in 1957. 21 ROA 3959. He moved to Las Vegas in 1999 from Northern California, where he worked for a Sheriff's Department and owned an auto body shop. 21 ROA 3960-3962. In Las Vegas he opened the same type of business, Simone's Auto Plaza (hereinafter "Simone's") in which his investment partner was the doctor who introduced angioplasty to the United States. 21 ROA 3965-3968.. The doctor owned the Palomino Club ("the Club") and the real estate upon which it sat but later sold it to H. 21 ROA 3967-3968, 3974.

H, who had never before been charged with a criminal offense, was convicted and sentenced to consecutive life terms when he was fifty-eight years old and in poor health. 15 ROA 2859; 25 ROA 4656-4657. This was solely because of Anabel's testimony. 4 ROA 724-727. She had served thirty-two months in jail awaiting trial and facing the death penalty prior to making a deal with the State for probation and release from confinement. She was required to provide testimony against H to secure that deal Id. The State acknowledged that it did not have sufficient evidence to charge H without Anabel. 14 ROA 2724; 15 ROA 2837-2838.

H never contested the evidence concerning the murder, as it was clear that he was not present. The State's theory was that H was a co-conspirator or aider and abettor in the murder. 5 ROA 836-838. The defense was that H did neither, knew of no impending harm to TJ and reacted out of fear when he later paid the gangster/killer who demanded it. 23 ROA 4292,4306.

B. Statement of Facts Relevant to Assignments of Error

1. The Criminal Investigation

TJ's body was found on a desolate road near Lake Mead before midnight on May 19, 2005. 12 ROA 2814-2815. TJ had been shot twice. 13 ROA 2370-2391. The autopsy revealed .07 grams per milliliter of alcohol, and marijuana metabolite present in TJ's blood. 13 ROA 2383; 2386-2387. According to TJ's girlfriend, they had been camping at Lake Mead that evening when TJ received a phone call from Deangelo, a former co-worker at the Club. 12 ROA 2231,2241. TJ worked at the Club until a few weeks prior to his death. 12 ROA 2208, 2215. After receiving the call, TJ left her alone at Lake

Mead in the dark- over her objections because she had never camped before - and drove her KIA to meet Deangelo to get marijuana. 12 ROA 2215, 2221-2222. He never returned. 12 ROA 2222. TJ had $40 or $50 with him when he left. 12 ROA 2235.[3]

At the crime scene, Detective McGrath found a phone in the KIA and noted that the last call on the phone was to "Deangelo." 14 ROA 2653, 2660.[4] He learned the next

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[3] Only $6.03 was found at the crime scene. 12 ROA 2292.

[4] Records relating to several telephone/direct-connect devices involving subscribers H, III, Anabel, Deangelo, TJ and Counts were introduced at trial.. 13 ROA 2326-2396. **Not a single call or direct connect "chirp" came to or from H's phone** among the series of communications between Anabel, Deangelo, Counts and TJ before or after TJ was shot. 13 ROA 2354; 19 ROA 2594.

Anabel's phone received a call from Counts' phone on May 19, 2005 at 11:10:12 p.m. that lasted 1.4 minutes. 19 ROA 3615. Anabel's phone called back to Counts' phone at 11:12:58 pm but it shows 0 seconds duration. 19 ROA 3616. At 3:51:35 on May 19, 2005, phone #239-2350 (P.K. Handley's phone, see below) called Anabel's phone for 2.2 minutes. 19 ROA 3615. Deangelo's home phone called Anabel's phone at 4:58:56 p.m. on May 19, 2005 for 1.1 minutes and again at 7:27:05 p.m. for 3.75 minutes. 19 ROA 3622. There were also two phone calls, one inbound one outbound, between Deangelo's home phone and III's cell phone between 7:42:58 p.m. and 8:07:31 p.m. on 5/19/05 and two additional calls from Anabel's phone to Deangelo's home phone at 8:13 and 8:15 p.m. on that date. 19 ROA 3623. Anabel called #239-2350 at 8:42:16 p.m. for a duration of 1.33 minutes on that date as well. 19 ROA 3624. Deangelo's cell phone chirped TJ's at 10:39 p.m. and then Anabel's for 25.7 seconds at 10:42:07 and again at 10:45:25 for 8.3 seconds. Anabel chirped Deangelo for 12.6 seconds at 10:45:35 p.m. 19 ROA 3624-2635.

Eight minutes later, Deangelo chirped TJ at 10:53:41 and again at 10:54:52 p.m., the second for 20.7 seconds. 19 ROA 3625-3626. The 9-1-1 call reporting TJ's body in the road came in at 11:44 p.m. 19 ROA 3625-3626. At 11:08:06 Anabel chirped Deangelo. At 11:08:10 Deangelo chirped Anabel for a duration of 13 seconds. 19 ROA 3626-3627. At 11:10:12 Counts phone called Anabel for 84 seconds. 19 ROA 3627. At 11:12:58 Anabel called Counts' phone for 0 seconds. Id. At 11:13:21 Deangelo chirped TJ for 13.6 seconds. 19 ROA 3628. It is the last known communication prior to his death. 19 ROA 3626- 3627. At 11:37:35 Anabel chirped Deangelo for 0 seconds and at 11:37:41 Deangelo called Anabel for 21.2 seconds. 19 ROA 3627.

At trial, Anabel contended that she didn't speak with Deangelo after he left the Club with the $5,000 she gave him until May 23, 2005 at Simone's. 17 ROA 3232-3233. However, the phone records reflect that starting on May 20, 2005, 12:10:45 **PM** (12+ hours after previous chirp) Deangelo called Anabel for 30.5 seconds. 19 ROA 3628. At 2:53:19 PM Anabel called Deangelo for 7.4 seconds. Id. At 2:53:25 PM Deangelo called Anabel for 16 seconds. 19 ROA 3629. At 2:53:31 PM Deangelo chirped Anabel 35.4 seconds and at 2:54:13 PM Deangelo

morning that Deangelo worked at the Club. 14 ROA 2660-2661. Detective Wildemann called H and made an appointment to meet him at the Club. 19 ROA 3570-3571. H confirmed that Deangelo worked at the Club. 19 ROA 3572, 3604. H advised Wildemann to come back later that night and speak with Ariel, an employee, to obtain Deangelo's records. 19 ROA 3572, 3604-3605.

That evening McGrath and Wildemann were at the Club interviewing Ariel when Deangelo arrived. 19 ROA 3572, 3605; 14 ROA 2665-2666. The detectives asked Deangelo to accompany them to an interview. 14 ROA 2667; 19 ROA 3572, 3606. He complied and was interviewed on videotape. 14 ROA 2667. He gave "at least" three versions regarding the death of TJ. 19 ROA 3573. Detectives then located Zone at Deangelo's home. 14 ROA 2668-2669. After Deangelo told Zone to "tell the truth"[5], 14 ROA 2669-2670, Zone was interviewed on videotape. 14 ROA 2671. His statement was consistent with the 3rd version of Deangelo's. 19 ROA 3579. Hours later SWAT officers forcefully removed Counts, an "extremely violent" known gang member, from the ceiling of a home and arrested him. 14 ROA 2653, 2679, 15 ROA 2860-2862.

On May 23, 2005, detectives wired Deangelo with a digital recorder and sent him into Simone's because they "didn't think they had enough" evidence to charge anyone from the Club with the murder. 14 ROA 2724; 15 ROA 2837-2838. Deangelo was directed to speak with H. 14 ROA 2672, 2705-2707; 15 ROA 2848. When he exited,

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chirped Anabel for 8.1 seconds. 19 ROA 3628-3630. Perhaps these calls resulted in the "blur" that she describes in her testimony set out below.

[5] Zone testified that what Deangelo meant by this was to tell a story that would help him out. 14 ROA 2587.

Deangelo (who had not been searched previously) gave the detective $1400 cash and a bottle of gin. 14 ROA 2707. The digital recording was found to be of very poor quality, 14 ROA 2708, 2711, but established that Deangelo had made no attempt to speak to H. 15 ROA 2749-2751. The detectives decided to try again the following day and sent Deangelo into Simone's wired. 14 ROA 2712-2714. Deangelo again wasn't searched before entry and on departure he gave the detectives $800.00 along with the recorder. 15 ROA 2759,14 ROA 2713-2714. Although he had been specifically directed to do so, Deangelo again made no request or attempt to speak with H, who was observed by detectives to be inside before Deangelo entered and to leave hours after his departure.15 ROA 2749-2751, 2832, 19 ROA 3588-3589. [6]

After Deangelo left Simone's on May 24, 2005, Anabel and III were arrested. 15 ROA 2766; 19 ROA 3590. Search warrants were executed at Simone's and the Club. While many items were found linking Anabel to Deangelo and the van used to kill TJ 12 ROA 2264-5, 2290, 2295; 19 ROA 3590, 3603-07, the only piece of forensic evidence that had anything to do with H was a note in H's handwriting which said "we may be under surveills(sp). Keep your mouth shut" found on the pool table in the waiting area of Simone's. 18 ROA 3449-3475, 19 ROA 3606.

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[6] McGrath testified that some of the information supplied by Deangelo proved to be incorrect, unsupported or false. 15 ROA 2833. At trial, McGrath acknowledged his continued doubts about Deangelo's credibility. 15 ROA 2834.

2. Testimony of Zone.

Zone was interviewed by Metro shortly after the murder. He had never met or spoken to H and his sole source of information about him was Deangelo, his friend and roommate, whom he knew was a convicted felon, liar and braggart. 13 ROA 2392; 14 ROA 2501-2504, 2507, 2551-2552. On May 19, 2005, Zone smoked marijuana all day (as he did every day, believing it made him "smarter", while admitting it didn't help his memory of that day's events). 14 ROA 2521-2522, 2556-2557. He worked for Deangelo passing out flyers for the Club and around noon that day he was with him and JJ in the van when Deangelo asked him if he was into hurting someone. 13 ROA 2397, 2401-2402; 14 ROA 2505-2506. Later Deangelo mentioned someone had to be "dealt with." 13 ROA 2403. Deangelo also pulled out a .22 revolver. Id. JJ was given an unloaded gun and Zone was given bullets. 14 ROA 2524, 2559. Zone never heard Deangelo talking about this matter on the phone. 13 ROA 2408. They went back to Deangelo's house to get ready for work. 13 ROA 2405. They later went to pick up Counts. 13 ROA 2409. Zone thought they were going out to promote again but instead they drove to Lake Mead, smoking pot along the way. 13 ROA 2412, 2415-2417. During the drive, there was no conversation as to the purpose of the trip amongst the group. 13 ROA 2413, 2414.

Deangelo spoke on the phone during the drive to Lake Mead. 13 ROA 2413. Zone heard Anabel on the phone say "go to plan B." 14 ROA 2575. The phone signal faded while they were there. 13 ROA 2417. Deangelo also phoned TJ and said that they were coming to smoke with him. 14 ROA 2600; 13 ROA 2415. When he drove to meet them, TJ got out of the KIA and walked towards the driver's side of the van, where

Deangelo was sitting. 13 ROA 2422. Counts got out of the van, snuck up on TJ and shot him in the head twice.[7] 13 ROA 2423. No one else exited the van. 13 ROA 2423-2424. Counts reentered the van and Deangelo drove off. 13 ROA 2424. They drove to the Club and Deangelo went inside while the others remained in the van. 13 ROA 2426. Ten minutes later, he came back and got Counts to go inside with him. 13 ROA 2426-2427. JJ and Zone did not enter the Club. 13 ROA 2427. Counts came back out and got in a yellow taxi cab in front of the Club and left. 13 ROA 2427. Deangelo exited about 30 minutes later and the three went back to his house. 13 ROA 2427-2428.

The next day, May 20, 2005, Deangelo replaced the tires and cleaned the van. 13 ROA 2428-2430. [8] Later that day, Deangelo, JJ and Zone went to Simone's in the van.13 ROA 2432-2433. JJ and Zone waited on a couch and Deangelo went to the back of the building. 13 ROA 2433. Zone did not hear any conversations or see anyone at that time. 13 ROA 2434. Deangelo told Zone that they should have stuck with the plan and that he was disappointed they weren't involved and indicated Counts had been paid $6,000 for what they were supposed to have done. 13 ROA 2434-2435. It was not until that day that he heard Deangelo mention that other people had put him up to shooting TJ. 14 ROA 2576. Zone admitted to telling several lies in previous statements and that Deangelo had spoken with him before speaking to police officers about trying to put "a truth" together; a story that would help him out. 14 ROA 2586-7.

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[7] During his testimony in the Counts trial, Zone claimed that he could not identify Counts. 14 ROA 2580.

[8] Zone previously testified that they washed the car immediately after leaving the Club on the night of the incident before heading home. 13 ROA 2430.

3. Testimony of Anabel

Anabel had been with H for about 15 years prior to her arrest. 17 ROA 3206. She managed Simone's and H managed the Club. 17 ROA 3186, 3328. 17 ROA 3186. Both TJ and Deangelo had worked at the club as doormen and passing out VIP cards and flyers. 17 ROA 3187, 3202. H and Deangelo did not have a relationship or association outside of work. 16 ROA 3002. About one week before the murder she heard III and H discussing the possibility that TJ was falsifying tickets and getting kickbacks from cabbies. 16 ROA 3004. H said "watch TJ." 16 ROA 3008. A day or two later H told Ariel that TJ needed to be fired and Anabel issued his final check. 16 ROA 3007-3008. [9]

On May 19, 2005, Deangelo called Anabel and told her that TJ had been "bad mouthing" the Club. 16 ROA 3011-3013. She told H and III this information. 16 ROA 3013, 3015. H did not react. 16 ROA 3015. III became angry and vocal about how something had to be done about it. 16 ROA 3015-3016. She says that III told H that "Rizzolo or Galardi" would do something about it and that is why his father would never be as successful as them. 16 ROA 3015. H did not respond, but instead told III to mind his own business. 16 ROA 3017. She says that III stormed out of the room and left. 16 ROA 3018. She and H later went to the Club and shortly after they arrived, Deangelo came to H's office and had a short conversation which Anabel did not hear. 16 ROA 3035-3036. Later, H went into the office where Pilar Handley ("PK") was with Anabel. 16 ROA 3037; 17 ROA 3228. H told Anabel to go into the room behind the office and to call Deangelo and tell him to "go to plan B." 17 ROA 3227; 16 ROA 3037-3038. When

[9] See testimony of Pilar Handley, *below*, wherein he says that Anabel fired TJ.

she called him, Deangelo said he was "already here" and the call disconnected. 16 ROA 3038-3041. She tried to call him back with no success. 16 ROA 3044. She told H that she called Deangelo while PK was still in the room. H and PK walked out of the room.16 ROA 3045. Later that night, Deangelo came back while H was in the office. 16 ROA 3045-3046. She claims that Deangelo said "its done" and H told her to get $5,000 out of the safe, which she did. 16 ROA 3046-3047. Deangelo took the money and departed. 16 ROA 3049. Anabel still claimed to be in the dark about what happened to TJ 17 ROA 3226.[10]

Anabel claims that Friday May 20th, was "somewhat of a blur".[11] 16 ROA 3056-3057. She says that when he saw a story on the morning news about a death at Lake Mead, H said he needed to call his attorney. 16 ROA 3054. She and H met with attorney Jerome DePalma on Saturday, May 21 but she only spoke to DePalma for a minute or two and was instructed to leave and waited in the car. 16 ROA 3058, 3065, 3069-72. She testified that no one else was present with DePalma and if he were to testify (as he later did) that he had a detailed conversation with her about this matter, he would be lying. 17

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[10] However, it is clear from the conversation she had with Deangelo when he was wired that he told her what had happened to TJ before the surreptitious recording. On the tape Deangelo says "We were gonna call it quits, and fuckin' KC got mad and *I told you he went fucking stupid and fuckin' shot the dude, not nothing we could fuckin' do about it."* 17 ROA 3241-3242. To which Anabel responded "You should have fuckin' turned your ass around before this guy—knowing that you had people in the fuckin' car that could pinpoint you, that this motherfucker had his wife, you should have motherfuckin' turned around on the road. Id. Don't give a fuck what KC said. You know what, bad deal, turn around." 17 ROA 3241. This evidence, coupled with the May 20th calls set out in footnote 4, calls into question Anabel's self-portrayal of her role. 17 ROA 3242.

[11] Footnote 4 establishes that she at spoke with Deangelo several times on that day.

ROA 3239-40.[12] The next day, Anabel and H met with Dominic Gentile and Don Dibble. 16 ROA 3080. Gentile said not to speak with Deangelo as he may be wired. 16 ROA 3081. After meeting with Gentile, H was calm but then he got nervous again and the next morning H said "I don't know what I told him to do." 16 ROA 3082. Anabel asked "what have you done" and H said "I feel like killing myself". 16 ROA 3083. Anabel asked H if he wanted her to speak with Deangelo and he replied "yes." 16 ROA 3084.

On May 23rd, Anabel summoned Deangelo to Simone's. She claims she'd not spoken to him since he left the Club on the night of May 19th. 16 ROA 3050; 17 ROA 3232-3233.[13] When Deangelo arrived she put him in a room with III. 16 ROA 3086, 3089. She asked Deangelo if he was wearing a wire. 17 ROA 3349. H was not present in the room. 16 ROA 3089. 16 ROA 3092. She believed she spoke with H in her office while getting the $600 for Deangelo 16 ROA 3085, 3094. She could not explain the source of the other $800 that Deangelo gave to the detectives. Id. On May 24, Deangelo again arrived at Simone's and told Anabel he needed to talk to her. 16 ROA 3096. She took him to a room where III was in bed. Id. Anabel left the room and went to talk to H in the kitchen. 16 ROA 3098. She told H that Deangelo wanted more money and she gave

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[12] In spite of their sworn testimony to the contrary (see below), Anabel denied speaking with Jerome DePalma and Don Dibble about the events of May 19, 2005. 17 ROA 3290. She did not recall ever seeing Exhibit 200-I until she commenced testifying at trial. 17 ROA 3306-3307. Neither did she recall having Exhibit E with her when she went to see Jerome DePalma but acknowledged that the only persons at issue at the time of the visit with DePalma were TJ and Deangelo and their social security numbers are on the exhibit in her handwriting. 17 ROA 3308-3309. .

[13] This testimony is contradicted by the phone records detailed in footnote 4 and the surreptitious tape recordings made by Deangelo at LVMPD direction.

it to him . 16 ROA 3100-01. Anabel was driving H to the Club later that day when the car was pulled over and she was arrested and taken in for a videotape recorded interview. 16 ROA 3102-3105. After initially answering questions, she stopped when the detectives revealed that her conversations with Deangelo had been recorded. 16 ROA 3107-3108. 17 ROA 3255-3257.[14]

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[14] Anabel acknowledged at trial that she is "pronoun sensitive" and understands how to use them. 17 ROA 3245. Yet she consistently used the word "I" in her conversations with Deangelo. 17 ROA 3234-3236. When Deangelo said he needed more money, she responded "where the fuck am **I** supposed to get more money?" ... "look, if **I** tell Louie that these motherfuckers are asking for money and if not they're going to go to the cops, Louie's gonna freak. **I** – **me** – **my** personal – **me** personally have about, uh, shit, how much do **I** have, maybe six bills? **I**'ll fuckin' give it to you". 17 ROA 3237. Anabel told Deangelo "All right, **I**'m gonna have to find an in-between person to talk to you, somebody **I** can trust. It might be—if a person calls, looks for you, she'll say it Boo. **I'm Boo.**" Id. After Deangelo asked her whether he is to come back to work, Anabel responded "This is what **I** need you to do". 17 ROA 3238. She asked Deangelo "**I**'ve been thinking...your son is still sick, right? ..."Listen, what **I'm** going to tell you, **I'm** going to give you some money so you can maintain yourself. 17 ROA 3240-3241. **I** need you to go in tonight and see Ariel and tell her.." Id.

Later in the recording Anabel warned Deangelo "All **I'm** tellin' you is stick to your motherfucking story. Stick to your fucking story, 'cause **I'm** telling you right now it's a lot easier for **me** to try to fucking get an attorney to get you fuckin' out than its gonna be for everybody to go to fuckin' jail. **I'm** telling you once that happens we can kiss every fuckin' thing goodbye, all of it, your kid's salvation and everything else, it's all gonna depend on you." 17 ROA 3243.

In the May 23rd recording, Anabel advised Deangelo "All right. Have your wife get in contact with ---see if she can find any ---'cause **I'm** gonna go ahead and talk to this guy, as well, and this motherfucker, **I'm** tellin' you, he's fucking outrageous, he's gonna want you—**I** know he's gonna want you to go ahead and rat the other guys out, and there ain't no fuckin' way. And **I'll** tell you what everybody is gonna—**I'll** tell you what, everybody is gonna fuckin' die, we're all gonna be under the fuckin' trigger." Id. 17 ROA 3244.

Anabel agained warned Deangelo " And if **I** lose the shop and **I** lose the club, **I** can't help you or your family,". 17 ROA 3245. She continued "**I'll** tell you right now **I'm** going to tell Louie that you are done" ... "like **I** said, you need a motherfucking prepaid phone so **I** can call you when **I** need to talk to you." 17 ROA 3246.

On the recording Anabel told Deangelo "**I** used my money last night in the fucking—for change money, so **I** got no change, fucking---this is it, **I** have no more. **I** got like $11 to my name." 17 ROA 3247. She admitted in court, however, that when arrested the next day she had $2300 in cash in her purse and there was $151,000 in cash in the safe at the Club. Id.

Court Exhibit 3 is the transcript of the May 24, 2005 surreptitiously recorded conversation that she helped prepare. On it, after Deangelo said "I did everything you guys asked

She learned at a hearing on January 15, 2008, that the State had challenged the decision by this Court striking the death penalty. 17 ROA 3263. When she returned to her cell, she called H and described what the prosecutors had said in court as "all lies." 17 ROA 3265. Up until then, Anabel and H were still in a relationship. 16 ROA 3111, 17 ROA 3299. At her request H assisted inmates she had met in custody by giving them housing, money or other aid. 17 ROA 3295-3298. H took care of an inmate's baby for five months. 17 ROA 3296. Anabel received a letter claiming that H and one of the females she asked him to help were having an affair. 17 ROA 3299-3300. Anabel told H that he had one week to make her bail. 17 ROA 3291. At the same time, she began speaking to her attorney regarding making a deal with the State. 17 ROA 3266-3267. She knew that the State wanted her assistance in being able to charge H. 17 ROA 3280. Prior to speaking with the State, she went over all of the hearing transcripts, tape recordings, police reports and witness statements with her attorney. 17 ROA 3259. Anabel had no objection to the State recording her plea negotiation proffer and doesn't know why it

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me to do. You told me to 'take care of' the guy and I took care of him." Id. Anabel said "Talk to the guy, not fucking 'take care of' him. Goddamn it, **I** fuckin' called you." Id. Then, after Deangelo said "And when I talked to you on the phone, Ms. Anabel, I said ---specifically said, I said, if he's by himself do you still want me to do him in. You said 'yeah'", Anabel responded "I did not say 'yeah'." When Deangelo responded "you said 'if he is with somebody then just beat him up'," Anabel responded "**I** said to go to Plan B, fuckin' Deangelo. And, Deangelo, you're just minutes away. **I** told you 'no'. **I** fuckin' told you 'no'." Id. At 3:39 of the May 24, 2005 recorded conversation between her and Deangelo, Anabel stated "All **I'm** tellin' you is denial because **I'm---I'm** fucking saying and **I** already said **I** don't know shit, **I** don't know shit, fucking and **I** don't know a motherfucking thing and that's how **I** got to fuckin' play it and that's how **I** told everybody else to play it." 17 ROA 3250.

didn't happen. 17 ROA 3270-3271. The statement lasted a couple of hours with two Deputy District Attorneys, two detectives and her attorney there. 17 ROA 3271-3272.

After she was debriefed, her plea agreement and agreement to testify were signed. 5 ROA 812-824. Days later she entered a guilty plea to a "fictional charge" of Voluntary Manslaughter with Use of a Deadly Weapon. 16 ROA 3115 3117. At her change of plea she stated that she "assisted all the co-conspirators" and was not asked for any other factual basis by the judge. 17 ROA 3277. She did not say that she agreed to kill someone or knew that someone was to be killed. 17 ROA 3277. Her lawyer told her that making the phone call to Deangelo regarding "plan B...come back" – even without having any idea that the telephone call was part of a plan to harm TJ – made her complicit in the crime. 18 ROA 3247. She has never been advised of the law of aiding and abetting or conspiracy. Id. She entered the guilty plea because she believed her lawyer. 18 ROA 3428-3429. Based upon what her lawyer told her, although she didn't know of any facts indicating prospectively that TJ was going to be harmed, she became a conspirator in a murder by (1) paying money to Deangelo that night after it occurred; (2) paying money to Deangelo four days after the murder of TJ to give to Zone and JJ; and (3) participating in the conversation with Deangelo four days after the murder of TJ. 18 ROA 3430-3435.

The plea agreement also provided that she would be eligible for probation and would be released from the CCDC and placed on house arrest after being cross-examined. 16 ROA 3119; 17 ROA 3281. In exchange, she needed to testify as a State witness. 17 ROA 3286. When she entered her change of plea she knew that the State

could be successful in reinstating the death penalty against her and she didn't want that to happen. Id. She feared if she testified at her own trial as a defendant the jury may not believe her and she could be executed. 17 ROA 3278. By making the deal with the State, she didn't have to take the chance of the jury not believing her. 17 ROA 3277-3279. At the time that she made her deal with the State she knew that they wanted her to testify against H because he had not been charged. Id. She knew that she was transitioning from the death penalty to probation and no worse than a sentence of between 8 and 20 years in prison. 17 ROA 3281. She had already served four years in custody waiting for trial. 17 ROA 3280-3281. She also knew that the State must remain silent at sentencing and make no recommendation and if she is sentenced to prison it is nothing like what a murder sentence would be. 17 ROA 3281-3282. Over a year has passed since she entered her plea and no presentence report interview has occurred. 17 ROA 3385.. 25 ROA 4664.[15] She was told by her attorney that she needed to testify before she would be interviewed for the presentence report. 17 ROA 3281-3286.

4. Defense Testimony

Kevin Kelly's testimony addressed the State's claim that H had a financial motive to want TJ dead. He has been a Nevada lawyer since 1979. 19 ROA 3673. He was a military intelligence officer in Viet Nam, Laos, Cambodia and Thailand. Id. He has owned a gentlemen's club named Spearmint Rhino since 1999. 19 ROA 3636-3640. He became involved in a trade organization which held monthly meetings to deal with

[15] Indeed, as of the date of the filing of this brief, she has still not been sentenced. See footnote 2, above.

problems common to the industry, one of which was clubs making payments to cab drivers and diverting customers from other clubs. 19 ROA 3640-3642. Cooperation of cabdrivers is an important source of business to clubs. Some clubs would pay cabdrivers more than other clubs and it created a problem in the industry. Members reached an agreement that all would pay the same, but allowed the Club and to pay $5-$10 more because of it remote location. 19 ROA 3643. The Club was a member and H frequently attended meetings. 19 ROA 3642-3644. Kelly has had former employees leave his club and speak badly of it, but it didn't affect business. 19 ROA 3644-3645. Talking badly about a club won't hurt it; not paying cabdrivers will. 19 ROA 3644-3646.

Michelle Schwanderlik testified that she also uses the name "Ariel" and has worked at the Club for almost ten years. 19 ROA 3661-3663. She was working there in May 2005 as the Office and Floor Manager. 19 ROA 3664. She did the hiring and firing of employees, payroll, opening, scheduling, etc. Id. H would arrive and leave with Anabel. Id. Ariel would always report banks, etc., to Anabel and never saw H become involved with it until Anabel was arrested. Id. On May 19, 2005, she was in her office about 7 or 8 p.m. and Deangelo was there. 19 ROA 3672-3673. She knew him about one year by then and he was "never truthful" and would be caught in lies by her and others "all the time." Id. H told her to come upstairs and bring Deangelo with her. Id. When they arrived in H's office, they both "got chewed out" for the way Deangelo had been leaving the van in poor condition. 19 ROA 3674. Anabel was either in the kitchen area or back of office when this occurred. Deangelo left H's office when she did. Id. When

they arrived downstairs, Deangelo left the Club. 19 ROA 3675-3676. She next saw Deangelo after midnight on May 20, 2005. Id.

Kathleen Crouse lives in San Bruno, California and has known H since 1971. 19 ROA 3695-3698. He was her former husband's police partner for three and one half to four years. Id. She became very good friends with H, speaks with him by phone at least once a month and in her opinion he is "very truthful." Id.

Jerome DePalma is a 64 years old, semi-retired attorney. 19 ROA 3702-3704. He has practiced law with Gentile under the firm name Gentile DePalma in Illinois and then Nevada. He is godfather to Gentile's son. Id. He knew that he was going to testify and retrieved his notes from May 21, 2005 so that he could use them to refresh his memory. Id. The notes were produced to the District Attorney before his testimony. 19 ROA 3708. On May 21, 2005, at the request of Gentile, DePalma went to his office to meet for about an hour with H and Anabel. 19 ROA 3710. Investigator Dibble was present before, during and after that meeting. Id. Anabel was in the meeting the whole time except for going to the bathroom once. Id. He doesn't recall ever telling her that she couldn't remain in the office. 19 ROA 3713-3714. Most of what was said during the hour long meeting was said by her. H did not say very much at the meeting, but sat by passively and listened to what was being said by DePalma and Anabel. 19 ROA 3713-3714. She was "very animated" and "very vocal." Id.

Anabel said the following during the meeting: (1) a detective visited the Club and wanted information about an employee who worked there named Deangelo. Id.; (2) Deangelo was a "jack of all trades" and worked at the Club and she had seen him there on

Thursday night May 19, 2005. Id; (3) she overheard H tell Deangelo to tell TJ to "stop spreading shit" on Thursday night. Id.; (4) she had heard Deangelo say when he came back "it's done" and that "one of my home boys shot him". 19 ROA 3716; (5) she heard H respond "what the fuck are you talking about?" Id.; (6) she saw a black man on a camera and heard H say, "What the fuck did you do?" Id.; (7) she received a call from Deangelo that TJ had been bad-mouthing the Club. Id.; (8) that there was a suspicion that TJ may have been selling drugs out of the Club and illegally dealing with cab drivers by getting kickbacks. Id.; (9) TJ and Deangelo's relationship was that their kids played together and wives knew and visited each other and that TJ and a girl named Amy were seeing each other. 19 ROA 3717; (10) she counted out $5,000 and gave it to Deangelo because she had taken what Deangelo said about the other black man on the television camera as threatening them by saying "you better take care of us." 19 ROA 3718.

Anabel and H provided DePalma the information about H's address and telephone numbers. Id. Most of what is reflected on the notes taken at the meeting was said by Anabel. Id. He can attribute the statements to Anabel because, as to H, "I wondered if he could speak because he was quiet the whole time." 19 ROA 3710-3721. Anabel told him the information about a one hour interview by Detectives Bardy and Keiger that appears in the notes. 19 ROA 3723-3725. She provided the information contained in the notes as to "asked by Metro lying concerning the crime." Id. DePalma's recollection is that every note had Anabel as its source. Id. Both H and Anabel suspected TJ of things. Id. Anabel told DePalma that H suspected TJ of spreading rumors. Exhibit 241 is DePalma's notes from the May 21, 2005 interview of Anabel and H. 19 ROA 3730. Before that interview,

all DePalma knew was generally that the police had visited the Club. DePalma only learned of TJ's murder about half-way through the interview; the notes reflect that H said that he paid $5000 to Deangelo to give to the "homeboy" because he felt threatened. 19 ROA 3731-3732. Exhibit 241 reflects that 604-9646 is Anabel's cellular phone. 19 ROA 3735.

Don Dibble testified that he was an investigator at Gordon Silver, working under Gentile's direction. 19 ROA 3736-3738. He worked for LVMPD and its predecessor Clark County Sheriff's Department from 1968 until 1992. Id. He was a detective, and spent his final years in the homicide division prior to retiring. Id. On May 21, 2005, he had been working for Gentile for a little over a month. Id. When directed by Gentile to DePalma's law office all he knew was that a client needed some immediate attention and Gentile was in San Diego in trial. Id. He was to learn facts and report back to Gentile. Id. He did not recall knowing the name H before he arrived at DePalma's office. Id. DePalma and he talked for a while before H and Anabel arrived. Id. They all went in to DePalma's office and met for 45 minutes to an hour. Id.

When H and Anabel left, DePalma and Dibble called Gentile and suggested that he fly in the next day to meet with H and Anabel. 19 ROA 3739 While he doesn't recall if either H or Anabel were taking notes, he does recall discussing surveillance with them. Id. H would give a short response if asked a direct question; Anabel did 80% or more of the talking. Id. During the meeting with H and Anabel, Dibble learned that they had an employee who had come into their office and informed them that he had been out with someone at a meeting or a site with another former employee and that a party unknown to

either H or Anabel had just simply gone crazy, pulled a gun out and shot the ex-employee in the head for no reason. The guy panicked and came back, told them that the person who had done the shooting was demanding money and they gave him $5,000 out of fear. 19 ROA 3740. On May 22, 2005, Dibble and Gentile met with H and Anabel. 20 ROA 3745-3746. Gentile asked Anabel to leave the room because he needed to meet with H privately. Id. She returned to the room when the meeting ended.

Rudolfo Villalta has known the Hidalgo family for 42 years. Id. He went to work for H in San Francisco in 1982 and he worked for H at Simone's and the Club. 20 ROA 3749-3751 He has spent almost every day in the last 34 years with H, who is very truthful. 20 ROA 3763-3764.

Pilar Handley ("PK") testified that he was in the USAF from 1990 to 1994, was stationed in Las Vegas in 1991 and has lived here ever since then. 20 ROA 3775-3777 PK started doing work at the Club in 2000. In May 2005 there was a problem at the Club getting cabs to take customers to other locations. 20 ROA 3783-3788. PK noticed that TJ was not on his post outside the Club so that cabs could see him. Id. He saw TJ sitting on a shoeshine stand and told him to go outside. Id. TJ responded in a manner that caused PK to create a written report and give it to Anabel. Id. Anabel later terminated TJ and asked PK to notify him of it "to make sure he left without any problems." Id. PK had spoken to H about observing TJ and Deangelo selling VIP passes in front of the Club. Id. VIP passes are for free admission. Id. If the customer used a VIP card, there was no admission fee. Id. The cab driver would either not be paid or paid less than what they were expecting if the VIP card was used. Id. H used the term "Plan B" with PK in

describing the method and amount of payment to cab drivers. 20 ROA 3789. It meant 'pay across the board' both as to VIP passes and regular admission as opposed to "Plan A" which was to differentiate between them as to how much was to be paid. Id.

On the night of May 19, 2005, PK was at the Club to meet a client. 20 ROA 3790. He was making sure they were picked up by the Club limo on time. On a previous occasion Deangelo failed to do so. Id. When PK arrived early that evening, there was once again a problem. 20 ROA 3790-3796. Deangelo was away in the van and the limo was out in front of the Club. Id. The clients were to be picked up after 9 p.m. Id. When he walked outside and saw the limo it was about 8 pm. Id. PK first called Cheryl, who attempted to chirp Deangelo. 21 ROA 3845-3850. He then tried to call III on his cell phone and then went upstairs to the office where H, III and Anabel were, and told them they should fire Deangelo. Id. He was "not happy" with him and voiced his concerns with his character. Id. He watched III try to call and Anabel tried to chirp Deangelo when he didn't answer III's phone call, but the chirp kept going out of range. Id. He then left the office when he saw them arguing about what should happen to Deangelo and how irresponsible he was. Id. A lot of people were chewed out by H as to why they couldn't reach Deangelo and didn't know where he was. 21 ROA 3851.

Deangelo was off of work when TJ was fired from the Club. 21 ROA 3822. Days afterwards, when PK saw Deangelo for the first time since TJ's firing, Deangelo told him "don't put me in with TJ." 21 ROA 3822-3823. After midnight on May 20, 2005, he saw Deangelo again by the entrance to the Club. Id. He "looked like he had woken up ...from a bad dream or a bad trip or something like that. Id. He was wild and kind of out of it."

Id. Deangelo said "I need to see Anabel, I need to see H, I fucked up." Id. PK thought he was speaking about not picking up PK's clients and said to him "you're damned right you fucked up...you did it again." 21 ROA 3825-3827. Deangelo asked PK to come outside so that he could talk to him and PK replied, "I got nothing to say to you, get out of my face." Id. Deangelo went outside and came back in. Id. It was the last time PK ever saw Deangelo. 21 ROA 3828. PK's cell phone number is 702-239-2350. 21 ROA 3831.[16]. He was the one using his phone on May 19th. 21 ROA 3823.

Carlos Cordon has known H for about 50 years, since he was 8. 21 ROA 3885-3888. They worked and spoke together every day for 15 years. H is a very truthful person. 21 ROA 3888-3889.

Obi Perez is 28 years old and has three children. She met Anabel in CCDC where they became like sisters; Perez still feels that way about her. 21 ROA 3913-3914. In the Spring of 2007, Anabel was crying when she came back from court. 21 ROA 3914-3915. She told Perez that she was afraid that she was going to receive the death penalty. Id. Anabel said that she contacted Deangelo because she was mad at the guy that got killed. Id. She said that the guy also had issues with Deangelo but didn't say what they were. Id. Anabel never mentioned any involvement of either H or III. Id. She said that Deangelo and his "fellas" were only supposed to "fuck him up" and went too far. Id. She said that the guy that went camping had been there before and that is why she knew where he was going to be. Id. She said she told Deangelo to fuck him up and it turned out they killed him. Id. She said that he contacted her afterwards and told her TJ had died and she said

[16] See footnote 4

"what the fuck did you guys do?" in those words. 21 ROA 3916. She doesn't know if what Anabel told her was true, only that she said it. Id.

The first time she told anyone what Anabel said to her was a few days before she testified at trial. 21 ROA 3933. The first person she told was Gentile. Id. She didn't want to hurt Anabel's deal, so she was afraid to tell anyone, but thought it was the right thing to do. 21 ROA 3937-3939. Perez got out of jail on August 29, 2007 and visited Anabel on four occasions, three times in September 2007, once in October. 21 ROA 3935-3346. On one occasion Anabel told Perez that she had suspicions H was being unfaithful. 21 ROA 3917. When Perez was released from CCDC Anabel loaned her a truck. Id. H picked her up from the CCDC and took her to his house and gave her the keys and the truck. Id. There came a time when she lived at H's house, but never in a boyfriend/girlfriend relationship. Id. Anabel asked her to live there and tell her what was going on, but nothing ever happened. 21 ROA 3918-3919. Perez didn't need to stay at H's. Id. She stayed there because Anabel wanted "to see if she was doing the right thing...by staying...in the relationship" with H. Id. Later Perez told her that H was not having an affair, as she had never seen him do so. 21 ROA 3925-3926. The last time she visited Anabel was October 30, 2007. At times when Anabel came back from court she would tell Perez about deals that were offered to her that required her to go to prison. . 21 ROA 3923-3924

Defense Exhibit I, a phone call made by Deangelo to his wife from the CCDC on February 23, 2007 was played for the jury. 21 ROA 3942; 22 ROA 4142. In it, he

admitted that he was high on cocaine the night that TJ was murdered. 21 ROA 3938; 22 ROA 4142.

H testified that he was an intern for the South San Francisco Police Department and then worked for Chevron Oil. 21 ROA 3961-3965. He attended College of San Mateo and became one of the first community service officers, a liaison position between the police department and the public. Id. He obtained an AA degree in police science and criminology and became a San Bruno police officer. Id. He then went to work for his father's automobile repair facility in Daly City when he was about 20 years old. Id. He helped establish the shop with his father. Id. He has lived in Las Vegas since 1999. Id. H met Dr Simon Stertzer in the Bay area about ten years before moving to Las Vegas. Id. Stertzer influenced him to open another auto body repair shop in Las Vegas. 21 ROA 3965-3968. H became involved with the Club because Stertzer wanted to invest more in Las Vegas. Id. Stertzer acquired the Club in 2000 or 2001 and brought H in. Prior to that H had never spent any time in a strip club nor had he ever owned one. 21 ROA 3968-3973. His average work day was between 10 and 14 hours. 21 ROA 3973-3977. Anabel moved to Las Vegas when H did. I21 ROA 3977-3979d. She worked at both Simone's and the Club. Id. At Simone's she dealt with closing files, billing, insurance companies, estimates, quality control, hire and fire employees, correspondence, update software, handle the money and cook. Id. At the Club she would do the banks, closing reports, cab payout reports, oversee the entire office staff, monitor the internal surveillance cameras and do all of this from H's office. Id.

From late 2001 to May 19, 2005, the cabs were not always paid the same amount per customer dropped off. 21 ROA 4984-3985. A competitor club would start paying more, forcing the other clubs to raise the payout. Id. When he first took over, the Club was paying cab drivers $15 per customer. Id. The Club also used VIP cards offering free admission to attract local clientele that didn't arrive by cab. 19 ROA 3986-3987. This became a problem when Club employees started to sell them to make money. Id. Some even counterfeited VIP cards. 19 ROA 3988-3989. He never retaliated against anyone who did this. Id. He knew that in any cash business you face problems with employees. Id. He had the legal advice of the Gordon Silver law firm on employment matters since 2001 and followed it. 21 ROA 3986-3990.

He knew who TJ was but only spoke with him three or four times. 21 ROA 3991-3993. Several people reported to H that TJ was suspected of conducting himself contrary to the best interests of the Club, but H never saw it occur. Id. H didn't know that TJ had been fired until a week or week and a half after it happened. Id.

H is sure that (1) Anabel did not tell him that Deangelo called her and said that TJ was badmouthing the Club; (2) his son did not become angry and say "you'll never be like Rizzolo and Galardi" (his son has never said anything like that to him); (3) he did not become angry and silent in response. Id. H testified that Deangelo said to him and Anabel "I heard that TJ is badmouthing the Club." 21 ROA 3996-3998. That is when H heard it for the first time. Id. H responded "so what, what's the big deal, what's the problem?" Id. He was already furious at Deangelo. Id. Deangelo said something to Anabel that was stupid like "it's kind of like job security." Id. Deangelo was looking at Anabel when he

said it as if H wasn't in the room. Id. He said "well maybe I should go and talk to him" and H said "what for?" 21 ROA 3999. Anabel said "if you're going to go talk to him, talk to him on your own. That's entirely up to you." Id. H then said to Deangelo "I didn't know that you had that kind of a close relationship with him." Id. Deangelo said their families visit each other and they smoke dope together. Id. H said "I don't want to hear it" and told Deangelo to leave, which he did. Id. III was not in the room when H heard about TJ badmouthing from Deangelo. 21 ROA 4000. H wasn't bothered by TJ badmouthing the Club because it was petty to him. 21 ROA 3999-4001. "One person is going to stop the industry? You've got to be kidding me." Id. As long as the cabdrivers are making money they will continue to bring patrons. Id.

H felt "awful" about the fact that a man died. 21 ROA 4002-4003. He "never asked, insinuated, or otherwise for anybody to do anything in the Club or anytime in my entire life in 58 years. Never. I would never do such a thing." Id. H never asked Deangelo to harm anyone. Anabel favored Deangelo and that is why he was still working there. Id. "How many times her and I argued. I want him out. Id. She always said 'no, no, no.'" Id. That is the only reason Deangelo was still there. Id. H never had any idea that someone was going to harm TJ before Deangelo came into the Club "sweating like a pig...profusely. Id. Shaking." 21 ROA 4003-4004. Deangelo said "I fucked up. I fucked up" and starts fumbling his words but says "the dude got out of the car and put a bullet in the guy's head." Id. H looked at Deangelo and said: "What the fuck did you do?" Id. Anabel stood up from the chair, grabbed her hands, covered her face and said "Oh my God, oh my God, oh my God." 21 ROA 4005. She then made a gesture and said: "you

stupid, stupid man, what the hell have you done?" Id. H "was stunned," "flabbergasted" when he saw the reaction in Anabel. Deangelo said "there's nothing we can do about it now" and that they were smoking dope on the way up there. Id. He then said "the guy wants money." Id.

When Deangelo said that, H got up from his chair and said "for what?" 21 ROA 4005-4007. Deangelo said "the guy wants five" and H said "five what?" Anabel said "five what?" as well. Id. Deangelo said "$5000" and said that the guy was a gang member with the Crips. Id. Deangelo said "you better not fuck with my boy. You don't want to fuck with my boy." Id. At that point H was in great fear because the guy was a gang member. Id. He had experience with gangs in law enforcement and according to H "You just don't take gang members lightly." Id. H looked at Anabel and she looked at him like "what are we going to do?" 21 ROA 4007-4008. H waived his hand like "go for it." Id. There was between $150,000 and $160,000 in currency in the safe in the room behind his office. Id. He didn't know who or how many people were involved. Id. H was in "major fear," which "will make you do a lot of stupid things." Id. That is why he paid the money instead of calling the police. Id. H testified that it was not true that he called Anabel into the kitchenette and asked her to call Deangelo and tell him to "go to Plan B." Id. He never told her to call Deangelo at all that night. Id. Nor did he call Deangelo. Id. H may have used "plan B" at times in the past to describe systems of cab payouts. 21 ROA 4009. There was even a "plan C" at times. Id. "Plan B" related to how to pay the cabbies. 21 ROA 4055. Anabel knew that from having discussed it with H. Id.

When H met with a detective on May 20, 2005, he did not tell him what had happened because he did not know what the Crips members were planning 21 ROA 4009. H realized he should have told the detective what he knew and regretted that he did not. Id. But at that time he feared for his son, his father, Anabel and himself, because he had been threatened, and he knew he was dealing with members of a gang, but didn't know who they were. 21 ROA 2010; 21 ROA 4046-4049. Instead, he directed Dangelo to his office to the detectives. 21 ROA 4013. When Anabel testified that they didn't want to go back to the Club because they were afraid, it was true. 21 ROA 4051. They were afraid of Deangelo and his friends and the Club was a location that they knew they could be found. Id.

Exhibit 200-I-A is H's handwriting. 21 ROA 4018-4019. It was created at DePalma's office as part of H's notes from the meeting on the same type of pad from the same company as Exhibit E, which bears Anabel's handwriting. Id. H had no idea how it became torn or how it wound up in a public area of Simone's. Id. He wrote the note but it wasn't intended for anyone. Id. He also wrote other notes at the DePalma meeting but doesn't know where they are. Id. He took them when he left DePalma's office and put them in the vehicle. Id.

H told Anabel to fire Deangelo on May 21, 2005. 21 ROA 4021-4022. H hasn't spoken to Deangelo since May 20, 2005 at the Club, when he told him that the detectives were in Ariel's office and wanted to talk to him. 21 ROA 4024-4025 He never asked Anabel to speak to Deangelo for him. Id. Deangelo has never attempted to speak to H since then. Id. H doesn't dispute that he was in Simone's when Deangelo came in on

May 23, 2005, but he didn't see him. Id. He did not know that Deangelo was in the building that day seeking more money. Id.

Although he heard Anabel say on the May 23, 2005 tape-recording that he was "in a panic," it wasn't true. Id. He was "concerned, worried, not in a panic." 21 ROA 4028. He felt that he had a problem but thought that he and Anabel were following the advice of his lawyer. Id. H never told Anabel that he wanted to kill himself. Id. H has no idea why III would say that H was ready to close the Club, Simone's and go into exile. He wasn't doing any of that. 21 ROA 4052-4053. H had Anabel pay the $5000 not because he had anything to do with the killing but because he took what Deangelo said as true and was in fear. 21 ROA 4030-4031. H was still in fear when he signed the final check for Deangelo and told Anabel to fire him. 21 ROA 4034-4035. Either H or Anabel told DePalma that they took Deangelo's statement as a threat. 21 ROA 4037-4038. If Anabel said it, H did not disavow it to DePalma. Id. Anabel did 90% of the talking. Id. Among the statements of Deangelo's that Anabel reported to DePalma was that the shooter was outside and he was a Crip. 21 ROA 4058-4060. They also told DePalma that Deangelo said (1) the guy is a gang member from the Crips; (2) he's demanding money; (3) you don't want to fuck with my boy. Id. H didn't know the shooter's name at the time of meeting with DePalma. Id. Neither did he know what he looked like or how many members there were in the Crips. Id.

5. State's Rebuttal

Christopher Oram testified that he was hired to represent Anabel shortly after her arrest. ROA 4095-4097. Id. He met with her at CCDC 80 to 90 times. Id. She told him in

late May 2005 and numerous times later that H told her to "go and make a phone call and say 'go to plan B' and then to return to where he was." 22 ROA 4101-4102. Anabel described for him Deangelo being in H's office and saying "it's done" and Anabel "putting $5000 down." 22 ROA 4101-4102. Anabel never said it was because H was scared of Deangelo or any other person. Id. He did not make any notes from the 80 to 90 meetings with Anabel in preparation for a murder case that once carried the death penalty. Nor does he "have independent recollection of everything my clients have said to me. My, --no, not a chance." 22 ROA 4120-4021.

V. SUMMARY OF ARGUMENT

The judgment should be reversed outright because the accomplice witnesses were not sufficiently corroborated by independent evidence of H's involvement in the charged offenses to sustain it. In the alternative, reversal and remand is appropriate because (1) the district court instructed the jury to apply the "slight evidence" standard in determining the existence of a conspiracy and H's membership in it, a standard to be used only in determining admissibility of evidence, an exclusively judicial function; (2) the State intentionally failed to make a recording of the key accomplice witness's plea negotiation proffer, thereby violating H's right to due process of law and a fair trial under the circumstances of this case; (3) the admission into evidence of out-of-court statements by Deangelo, who didn't testify at trial and was a police operative and not a co-conspirator when they were made, violated the H's right to confrontation and cross-examination; and, (4) the jury disobeyed a critical instruction limiting its use of the out-of-court statement made by Deangelo, yet the district court refused to conduct a hearing on the matter.

VI. ARGUMENT

A. The Court's Instruction to the Jury that Existence of the Conspiracy and H's Membership in it Could be Established by 'Slight Evidence' Requires Reversal

1. Standard of Review

Whether a jury instruction accurately states applicable law is a legal question subject to de novo review. Berry v. State, __ Nev. __, 212 P. 3d 1085, 1091 (2009). A district court's decision settling jury instructions is reviewed for abuse of discretion or judicial error. Judicial error occurs when the court reaches an incorrect result in the intentional exercise of the judicial function, that is, when a judge renders an incorrect decision in deciding a judicial question. In re Humboldt River System (Marble), 77 Nev. 244, 248, 362 P. 2d 265, 267 (1961). Jury instructions that tend to confuse or mislead the jury are erroneous. Culverson v.State, 106 Nev. 484, 488, 797 P. 2d 238, 240 (1990) ("a juror should not be expected to be a legal expert. Jury instructions should be clear and unambiguous."); Rowland v. State, 96 Nev. 300, 302, 608 P. 2d 500 (1980) ("Instructions ...must be given clearly, simply and concisely, in order to avoid misleading the jury"). While structural error such as an unconstitutional burden of proof instruction is self-evident and needs no prejudice analysis, the trial transcript and/or statement of evidence adduced at trial must be considered where an erroneous instruction is subject to a harmless error analysis. See Carver v. El-Sabawi, M.D., 121 Nev. 11, 14-15, 107 P. 3d 1283, 1285 (2005). The error here was structural, but the record before this Court mandates reversal under either analysis. The evidence against H was, at most, slight.

The opening language of Instruction #40 (24 ROA 4487) articulated the standard that the trial court must apply when deciding admissibility of the evidence.[17] In objecting, Defense counsel advised the court that Instruction #40 did not deal with the substantive law of conspiracy that the jury must apply but rather the admissibility of evidence - a matter that was the exclusive province of the trial judge. 23 ROA 4211-4213.

2. The Beyond a Reasonable Doubt Standard of Proof is a Constitutional Imperative

The Due Process Clause of the Fifth Amendment of the United States Constitution "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068 (1970). Labastida v. State, 115 Nev. 298, 303, 989 P. 2d 443, 447 (1999). A jury instruction that "creat[es] an artificial barrier to the consideration of relevant defense testimony putatively credible ... reduce[s] the level of proof necessary for the Government to carry its burden [and] ... is plainly inconsistent with the constitutionally rooted presumption of innocence." Cool v. United States, 409 U.S. 100, 104, 93 S.Ct. 354 (1972). When an instructional error consists of an inaccurate

[17] Instruction #40 commenced: "Whenever there is slight evidence that a conspiracy existed, and that the defendant was one of the members of the conspiracy, then the statements and the acts by any person likewise a member may be considered by the jury as evidence in the case as to the defendant found to be a member, even though the statements and acts may have occurred in the absence and without the knowledge of the defendant, provided such statements and acts were knowingly made and done during the continuance of such conspiracy, and in furtherance of some object or purpose of the conspiracy. This holds true, even if the statement was made by the co-conspirator prior to the time the defendant entered the conspiracy, so long as the co-conspirator was a member of the conspiracy at the time"

description of the burden of proof to be employed, it vitiates all of the jury's findings and violates the Sixth Amendment right to a trial by jury in addition to the Fifth Amendment Due Process clause. It is structural error in the constitution of the trial mechanism which defies harmless error standards and requires automatic reversal. Sullivan v. Louisiana, 508 U.S. 275, 113 S. Ct. 2078, 2082 (1993).

3. Identical Issues, Separate Roles, Different Standards: Admissibility or Liability?

From the first direct address to the venire panel (6 ROA 1023; 10 ROA 1967), in the Trial Memorandum (8 ROA 1441-1494), in the opening statement (12 ROA 2119-2122), during the instruction settlement conference (23 ROA 4185-87), the jury charge (24 ROA 4462 & 4473) and in closing argument (23 ROA 4287-4321), H put forth as his defense that he never joined any conspiracy and had no prospective knowledge of any impending or intended harm to the victim. There was no dispute that H was not at the scene of the offense or connected to the murder weapon. The State's case relied entirely on accomplice testimony of purported co-conspirators, including as a chief component out-of-court statements by Deangelo[18] to Zone. Even as augmented by Deangelo's consensual tape recordings, the prosecution team believed that it lacked probable cause to charge H until Anabel became a witness. 13 ROA 2724. Thus, the jury's use of out-of-court statements was essential to the State's case. The challenged instruction that directed the jury to employ a reduced burden of proof on the conspiracy theory was prejudicial.

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[18] Despite making two surreptitious tape recordings of Anabel and III at the LVMPD's direction, Deangelo did not testify at the trial. Both Zone and Anabel testified to his out-of-court statements. It appears that the jury used some of his statements during the surreptitious recordings for the truth of his assertions, contrary to their instructions. See Argument V., *below.*

It has been said that Nevada "jumped the gun" when it adopted the Preliminary Draft of the Federal Rules of Evidence. Wright & Graham, Federal Practice & Procedure, §5051 (2nd ed.). No other state did so. No decisions exist interpreting the precise language of the Nevada statutes at issue herein: NRS 47.060, which deals with who initially determines admissibility[19], and NRS 47.070, which concerns the relative roles of the judge and jury when evidence requires additional facts to be proven in order to make it relevant.[20] The judge sits as a fact finder under both provisions. Under the first his ruling is final unless additional predicate facts are necessary to make the evidence relevant, in which case it is preliminary and triggers the second into action. The specific category of evidence at issue *sub judice* is "a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy". NRS 51.035-3(e). Where an objection is made to such evidence at the time of its being offered, as it was in this case, [21] NRS 47.060 mandates that the judge alone makes the determination of its admissibility.

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[19] 1. Preliminary questions concerning ... the admissibility of evidence shall be determined by the judge, subject to the provisions of N.R.S. 47.070.

2. In making his determination he is not bound by the rules of evidence provisions of this Title except the provisions of chapter 49 of NRS with respect to privileges.

[20] 1. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the judge shall admit it upon the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

2. If under all the evidence upon the issue the jury might reasonably find that the fulfillment of the condition is not established, the judge shall instruct the jury to consider the issue and to disregard the evidence unless they find the condition was fulfilled.

3. If under all the evidence upon the issue the jury could not reasonably find that the condition was fulfilled, the judge shall instruct the jury to disregard the evidence.

[21] A standing objection was allowed by the district court to all out-of-court statements by persons alleged to be co-conspirators. 13 ROA 2398, 2478-2488, 2715-2716.. 14 ROA 2493-2500.

This Court has declined the opportunity to adopt the United States Supreme Court's holding in Bourjaily v. United States, 483 U.S. 171, 107 S.Ct. 2775 (1987) on two pertinent points. It has decided that "slight evidence" of the existence of a conspiracy and mutual membership in it of the declarant and the non-offering party is all that is necessary for the judge to admit what would otherwise be excluded hearsay, so long as the statement is made during the course and in furtherance of the conspiracy. McDowell v. State, 103 Nev. 527, 529, 746 P. 2d 149 (Nev. 1987) (declining to adopt "preponderance of the evidence" standard). This Court also requires that before an out-of-court statement by an alleged co-conspirator may be admitted into evidence against a defendant, the existence and membership of the conspiracy must be established by evidence independent of the statement itself. Wood v State, 115 Nev 344, 349 (Nev. 1999). See Carr v. State, 96 Nev. 238, 239, 607 P. 2d 114, 116 (1980). Thus, unlike Bourjaily, the out-of-court statements themselves may not be considered by the judge in deciding whether NRS 51.035-3(e) conditions have been established. This Court has never addressed whether the jury should be instructed to apply the "slight evidence" standard where the exclusively judicial decision to admit evidence requires resolution of the identical issues to be ultimately determined by the jury under a beyond a reasonable doubt standard. This case presents that opportunity.

NRS 47.060, when read in light of McDowell, Wood and Carr, in its first paragraph, requires the judge to find that "slight evidence", independent of the statement itself, of the existence of the conspiracy and the defendant's and declarant's membership in it, is contained in the record. If so, the statement is admitted if it was made during the

existence and in furtherance of the conspiracy. All of that deals with the law of admissibility of the evidence. The judge is not concerned at that point as to sufficiency to convict. Bourjaily v. United States, 483 U.S. 171, 107 S.Ct. 2775, 2778 (1987) ("The inquiry made by a court concerned with [admissibility] is not whether the proponent of the evidence wins or loses his case on the merits, but whether the evidentiary Rules have been satisfied. Thus, the evidentiary standard is unrelated to the burden of proof on the substantive issues). At that juncture the judge's use of the lower standard of proof does no violence to the beyond a reasonable doubt standard the jury must apply. "Once a trial judge makes a preliminary determination under [NRS 47.060 & 47.070] that the requirements of [NRS 51.035-3(e)] have been satisfied, there is no reason to instruct the jury that it is required to make an identical determination independently of the court: whether such a statement can be considered at all is for the court alone to determine." United States v. Hagmann, 950 F. 2d 175, 181 n.11 (5th Cir. 1991), cert. denied 506 U.S. 835 (1992), rehearing denied 506 U.S. 982 (1992) (bracketed material substituted for federal equivalents in original).

Simply stated, a jury cannot be expected to apply the "slight evidence" standard to the identical elements to which they must also apply the beyond a reasonable doubt standard under the substantive law of conspiracy. And the law doesn't ask or demand it of the jury.

As the charge to the jury herein invited finding H vicariously liable for the murder because of membership in the conspiracy (24 ROA 4465) by applying a constitutionally impermissible standard, the infectious instruction undermines confidence in the verdict.

See Perez v. United States, 968 A.2d 39, 102 (D.C. Ct. App. 2009). Many courts have recognized the impropriety of instructing the jury as to the quantum of proof employed by the trial judge in admitting co-conspirators statements. In United States v. Martinez de Ortiz, 907 F.2d 629 (7th Cir. 1990)(en banc) the court addressed the mechanics of deciding the admissibility of such evidence. As here, the defendant conceded that a conspiracy existed, defending on the theory that she was not a member. Unlike the case *sub judice*, the defendant was at hand when the substantive crime occurred and uttered the word "kilo" in the presence of the cooperating witness. The court postulated that while that might be enough to support a conviction, "the case is much stronger with the two kinds of hearsay" that the prosecution introduced. Martinez de Ortiz, 907 F.2d at 631. It held "..the jury does not decide the hearsay question. The question for the jury is one of the substantive law of conspiracy. Conspirators, like agents, are mutual partners. Declarations by others count against the accused only if the accused has joined the conspiracy personally....Unless her words and deeds place her among the conspirators, other persons statements are (substantively) irrelevant." Martinez de Ortiz, 907 F.2d at 632-33. It explained "the judge's decision is conclusive...the jury may not re-examine the question whether there is 'enough' evidence of the defendant's participation to allow the hearsay to be used." Martinez de Ortiz, 907 F.2d at 633. To do so allows the jury to second guess the judge's decision to admit the statements; to impermissibly sit in review of the judge's legal determination. To present this issue to the jury unnecessarily confuses them as to the proper burden of proof of the conspiracy charge in the indictment. Once the judge rules that the prerequisites to NRS 51.035-3(e) have been

met, the jury does not revisit the issue and can consider the co-conspirator statements for all purposes in its determination as to whether there has been proof beyond a reasonable doubt that the defendant is guilty of conspiracy. Martinez de Ortiz, 907 F.2d at 634-635.

In other words, the statements are not "conditionally relevant," as that term is used in NRS 47.070, as to the membership in the conspiracy. In determining whether the alleged conspiracy existed or the defendant was a member, the jury can consider the actions and statements of all of the alleged participants that the judge admitted into evidence. United States v. Stephenson, 53 F.3d 836, 847 (7th Cir. 1995). In United States v. Bell, 573 F.2d 1040 (8th Cir. 1978) the court held "[a]fter a ruling on the record that the out-of-court declaration is admissible (as a co-conspirator's statement) the court may submit the case to the jury. The court should not charge the jury on the admissibility of the co-conspirator's statement, but should, of course, instruct that the government is required to prove the ultimate guilt of the defendant beyond a reasonable doubt." 573 F.2d at 1044-1045. See United States v. Ammar, 714 F.2d 238, 249 (3rd Cir. 1983) (once admitted, co-conspirator statements should go to the jury without further instruction); United States v. Vinson, 606 F.2d 149, 153 (6th Cir. 1979) (once admitted statements go to jury, judge should not describe to the jury the government's burden of proof on the preliminary question); People v. Vega, 413 Mich. 773, 780, 321 N.W.2d 675 (Mich. 1982) (trial judge must make determination of admissibility, not jury.).

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4. Vicarious Liability and Conditional Relevancy

Co-conspirator statements are, however, "conditionally relevant" under NRS 47.070 for other purposes. If the jury is satisfied beyond a reasonable doubt that the defendant was a member of the conspiracy, the statements can then be used to determine for which, if any, substantive offenses committed by co-conspirators the defendant may be held vicariously liable. Martinez de Ortiz, 907 F.2d at 635. That is, the statements are only relevant as to the vicarious liability issue if the defendant has first been found to be a member of the conspiracy beyond a reasonable doubt. United States v. Collins, 966 F.2d 1214, 1223 (7th Cir. 1992). Nevada does not follow the doctrine of vicarious liability announced in Pinkerton v. United States, 328 U.S. 640, 66 S.Ct. 1180 (1946), which makes one conspirator liable for a crime committed by another if it was foreseeable and committed in furtherance of the conspiracy. Bolden v. State, 121 Nev. 908, 921-922, 124 P.3d 191 (2005). For specific intent offenses the accused must have the requisite statutory intent. For general intent offenses, if the offense was a reasonably foreseeable consequence of the object of the conspiracy, the defendant may be criminally liable for his co-conspirators acts even if he did not intend the precise harm or result.[22] Bolden, 121 Nev. at 923; Sharma v. State, 118 Nev. 648, 56 P.3d 868 (2002).

By allowing the jury to consider the "slight evidence" standard for determining membership in the conspiracy, the challenged instruction undermines confidence in the verdict and mandates reversal. The Indictment charged alternative substantive offenses

[22] "We caution the State that this court will not hesitate to revisit the doctrine's applicability to general intent crimes if it appears that the theory of liability is alleged for crimes too far removed and attenuated from the object of the conspiracy. " Bolden v. State, 121 Nev. at 923.

as objects of the conspiracy. Some were specific intent and some were general intent offenses. The jury returned a verdict of guilty as to a conspiracy to commit battery with a deadly weapon[23] or with substantial bodily harm, both of which are general intent crimes.[24] It was instructed that it could use either of them as the predicate for finding the defendant guilty of murder in the second degree. 24 ROA 4466 & 4469. This allowed the jury to find the predicate conspiracy upon less than a reasonable doubt standard and violated both the due process clause of the Fifth Amendment and the jury trial right of the Sixth Amendment. It deprived the jury of its essential deliberative tool - the applicable law upon which to evaluate the facts. The danger of confusion and erroneous conviction on the charges that were tied to the conspiracy exacerbates the gravity of the error. See People v. Duncan, 610 N.W.2d 551, 554-555 (Mich. 2000).

The decision that "slight evidence" existed of H's membership in the conspiracy was already made twice before the jury received the case. The judge made it when she admitted the evidence and so did the grand jury when it voted a True Bill. Sheriff, Clark County v. Burcham, ____ Nev. ___, 198 P.3d 326, 328 (2008) (grand jury may find probable cause based upon *slight* or marginal evidence). Yet neither can direct a guilty

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[23] The record is bereft of any evidence that H knew of any weapon being possessed or used by Deangelo or anyone else until after Deangelo returned to the Club after the homicide. The State failed to prove he had knowledge the armed offender was armed and had the ability to exercise control over the firearm. Brooks v. State, 180 P.3d 657, 659 (Nev. 2008).

[24] H proposed a verdict form that separated battery with substantial bodily harm from battery with a deadly weapon. 24 ROA 4502-4504. Although recognizing the idea as "fine" pretrial 5 ROA 999, the judge rejected it without announcing her reasons, an independent, additional ground for reversal here. Allstate Insurance Company v. Miller, __Nev. __. 212 P. 3d 318, 332-333 (Nev. 2009). At sentencing, the judge acknowledged that separating the crimes in the verdict form would have been better. 25 ROA 4627.

verdict as to a criminal charge no matter how clear the defendant's culpability. Rose v. Clark, 478 U.S. 570, 578, 106 S.Ct. 3101(1986). Nor does it cure the problem created by an erroneous or confusing instruction on burden of proof that the jury was also given a correct definition of reasonable doubt. Collins v. State, 111 Nev. 56, 57-58, 888 P. 2d 926, 927 (1995). The essential connection to a beyond a reasonable doubt factual finding cannot be made where the instructional error consists of a "misdescription" of the burden of proof and the reviewing court can only engage in pure speculation. Sullivan v. Louisiana, 508 U.S. 275, 281, 113 S.Ct. 2078 (1993).

Under the circumstances here, the consequences of the erroneous instruction are unquantifiable and indeterminate, and therefore not subject to harmless error analysis. See Wegner v. State, 116 Nev. 1149, 14 P.3d 25, 29-30 (2000). Since the only issues that the jury needed to resolve to convict H of conspiracy and the general intent objects were the existence of the conspiracy and his membership in it - the same issues that the judge had to resolve to admit the co-conspirator statements - the erroneous instruction left no additional facts that needed to be decided by the jury. Therefore, the jury made no other factual findings that can be said with requisite certainty to have been decided beyond a reasonable doubt. It is structural error mandating reversal and remand. Powell v. Galaza, 328 F.3d 558, 566 (9th Cir. 2003).

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B. As the State's Case Was Entirely Dependent Upon the Testimony of Accomplices, There Was Insufficient Evidence to Convict. [25]

1. Standard of Review

Historically, this Court engages in an independent review of the record to determine compliance with NRS 175.291. See, Heglemeier v. State, 111 Nev. 1244, 1251 (1995); Eckert v. State, 91 Nev. 183 (1975). No Nevada case succinctly articulates a discreet standard of review.

2. H's Convictions Must be Reversed as the Testimony of his "Accomplices" was Insufficiently Corroborated

At trial, the State presented the testimony of two accomplice witnesses, Anabel and Zone, to prove that H conspired to harm TJ. As Nevada's legislature deems accomplice testimony as inherently unreliable, NRS 175.291 mandates:

> "a conviction shall not be had on the testimony of an accomplice unless he is corroborated by other evidence which in itself, and without aid of the testimony of the accomplice, tends to connect the defendant with the commission of the offense; and the corroboration shall not be sufficient if it merely shows the commission of the offense or the circumstances thereof."

An accomplice is defined as "one who is liable to prosecution for the identical offense charged against the defendant at the trial in the case in which the testimony of the

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[25] H's state and federal constitutional rights to due process of law and equal protection were violated because there was insufficient evidence produced at his trial to convict him of the charges as the State failed to introduce sufficient evidence to corroborate the statements of his alleged accomplices. U.S. Const. amend. V, VI, XIV; Nevada Const. Art. I, Sec. 3, 6 and 8; Art. IV, Sec. 21. Where a state statute imposes mandatory requirements for the protection of a defendant's rights, the statute creates an expectation protected by the Due Process Clause. Hicks v. Oklahoma, 447 U.S. 343, 346 (1980). Liberty interests protected by the Due Process Clause arise from two sources, the Due Process Clause itself and the laws of the States. Ford v. Wainwright, 477 U.S. 399, 428 (1986). Here, because NRS 175.291 was not enforced, H's right to Due Process has been violated. U.S. Const. amend. XIV.

accomplice is given." NRS 175.291; see also Cutler v. State, 93 Nev. 329 (1977). Clearly both Anabel and Zone were accomplices to the murder and conspiracy charged against H.[26] Thus, their testimony was required to be: (1) corroborated independently of other accomplices; and, (2) the corroborated evidence must have connected H to the commission of the charged offense. See NRS 175. 291. Both elements must be satisfied for a conviction to stand.

Accomplice testimony "ought to be received with suspicion, and with the very greatest of care and caution, and ought not be passed upon by the jury under the same rules governing other apparently credible witnesses." Crawford v. United States, 212 U.S. 183, 204 (1909). By enacting NRS 175. 291, the Nevada Legislature acknowledged" one who has participated criminally in a given criminal venture shall be deemed to have such character, and such motives, that his testimony alone shall not rise to the dignity of proof beyond a reasonable doubt." Austin v. State, 87 Nev. 731, 491 P.2d 724 (1971). The indelible principal that a conviction cannot be had based on accomplice testimony alone has long been recognized by this Court. See State v. Carey, 34 Nev. 309 (1912) ("Unless there [is] corroborating evidence, it would be the duty of the jury to acquit for by the statute conviction cannot be had upon the uncorroborated testimony of an accomplice"). Corroborative evidence is not sufficient if it requires any of the accomplice's testimony to form the link between the defendant and the crime, or if it

[26] Although Zone was not charged, an examination of his testimony indicates that this was more likely an exercise of prosecutorial discretion than an absence of evidence. Accomplice status is a question of fact. Rowland v. State, 118 Nev. 31, 41, 39 P. 3d 114 (Nev. 2002).

tends to connect the defendant with the perpetrators and not the crime. See Glossip v. State, 157 P. 3d 143, 152 (Ok. Cr. App. 2007).

The test for determining sufficiency of corroborating evidence requires that the accomplice testimony be removed and the remaining evidence examined to determine whether it provides an independent connection between the defendant and the crime charged, People v. Morton, 139 Cal. 719 (Cal. 1903). This Court has often found that the remaining evidence was insufficient to convict the defendant. In Eckert, the defendant was convicted of homicide after allegedly shooting the victim near a bar on Boulder highway. Eckert, 91 Nev. at 195. During trial, an accomplice to the crime testified that Eckert threatened to shoot the victim for no reason and then ordered the two accomplices to fire shots into the victim. Trial evidence revealed that two of the guns used to kill the victim were the same types of weapons that Eckert previously purchased. Eckert, 91 Nev. at 184. Additionally, when Eckert purchased the weapons he signed a federal form for one of the guns which was later identified as the murder weapon. Id. Eckert was convicted of murder and on appeal he argued his conviction was based on uncorroborated accomplice testimony. Eckert, 91 Nev. at 185. This Court determined that the following facts lacked sufficient corroborative value: (1) Eckert purchased two of the weapons at a shooting range; (2) the victim was killed by three different weapons of the type in possession of the three defendants; and, (3) one of the weapons purchased by Eckert was identified as the murder weapon. This Court reversed the conviction finding that the "dangers are too great in view of the self-purposes to be served by the accomplice

to suggest that the content of this record supply the needed corroboration to uphold the defendant's conviction." Eckert, 91 Nev. at 186. [27]

Similarly, in Heglemeier this Court found there was insufficient evidence to sustain a conviction based on accomplice testimony. Heglemeier, 111 Nev. at 1245. At Heglemeier's trial, in addition to accomplice testimony, the state presented strong evidence of Heglemeier's connection to the murder weapon. Heglemeier, 111 at 1249. Nonetheless, this Court reversed the conviction, finding that "[a]lthough the State did introduce some evidence that might be construed as tending to connect Heglemeier with the crime, we conclude that the evidence is insufficient, as a matter of law, to corroborate [the accomplice's] testimony." Heglemeier, 111 Nev. at 1251.

Here, just as in Eckert and Heglemeier, it is clear that the non-accomplice evidence was insufficient corroboration to the testimony by the State's two accomplice witnesses, Zone and Anabel. Anabel was the state's key witness. Until she provided her testimony, H had never been charged because even after an exhaustive investigation the State knew it did not have probable cause to connect him with the crimes. 14 ROA 2724; 15 ROA 2837-2838. Zone's testimony (recounting statements made to him by Deangelo) was based upon information received by the State early in its investigation, years before Anabel cut her deal. Had Zone's retelling of Deangelo's statements provided sufficient evidence against H, he would have been charged years earlier. The only independent

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[27] Such "self-purposes" are patent here. Anabel's testimony was procured under a plea bargain made when she was under threat of execution and resulted in her release from custody and plea to a fictitious offense, fabricated for the purpose, for which she has yet to be sentenced. 25 ROA 4667. Zone avoided being charged while knowledgeable and present before, during and after the murder.

evidence produced at trial which could tend to connect H to the events surrounding TJ's death was the fact H and Anabel gave Deangelo $5,000 after TJ was killed. 21 ROA 4007. "[W]here the connecting evidence shows no more than an opportunity to commit a crime, simply proves suspicion, or is equally consonant with a reasonable explanation pointing toward innocent conduct on the part of the defendant, the evidence is to be deemed insufficient." Heglemeier, 111 Nev. at 1250-1251.

H provided a reasonable explanation as to why he agreed that Anabel give the $5,000 to Deangelo to hand over to an unidentified gangster/killer who was in the building at the time: FEAR! 21 ROA 4005-4010. Specifically, Deangelo said "you don't want to fuck with my boy." 21 ROA 4006. H testified that he paid Counts because he was afraid for his family's safety. 21 ROA 4010.[28] It is reasonable that H would be concerned for his family's safety as H had experience with gang members and knew that "you don't take a gang member lightly." 21 ROA 4007.

There was no evidence linking H to the commission of the crimes other than what came from the mouths of (1) Zone, retelling through his drug addled memory, Deangelo's statements; (2) Anabel and III in the recordings made by Deangelo after the object of the conspiracy to harm TJ was achieved, and (3) Anabel at trial after her probation was in sight and execution no longer a danger. No rational motive was suggested; no fingerprints were found which could connect H to the events; no evidence was produced that H was ever aware that anything was going to be done (other than H's own testimony

[28] Jerome DePalma's testimony and Exhibit 241 (notes from his meeting with H and Anabel on May 21, 2005) corroborate this. 19 ROA 3716-3732.

that Deangelo volunteered to speak with TJ) and certainly not that a weapon would be used or substantial bodily harm would occur to TJ. No incriminatory statement of H was intercepted or reported by any non-accomplice trial witness who heard H utter it; and no phone calls were made between H and any of the other alleged accomplices prior to the murder of TJ. Most importantly, there was insufficient probable cause to even arrest H until Anabel found a way out for herself and agreed to assist the State in its prosecution of H. Since there was insufficient evidence to arrest H for these crimes absent Anabel's testimony, the significance of her testimony is self-evident. Therefore, as in Eckert and Hegelmeier, when the accomplice testimony is removed from this record, there is no legally sufficient evidence to connect H to these crimes and his convictions must be reversed.

C. The Prosecutor's Intentional Failure to Memorialize Anabel's Plea Negotiation Proffer Requires Reversal in this Case.

1. Standard of Review

Because this challenge is predicated upon federal and state constitutional provisions, it is susceptible to appellate review in the absence of contemporaneous objection or motion to strike.. Hardison v. State of Nevada, 84 Nev. 125, 128, 437 P.2d 868 (1968). It is reviewed as plain error to determine if it was prejudicial and affected substantial rights. Ramirez v. State, __ Nev. ___, 235 P.3d 619, 624 (2010).

2. An Accomplice is an Inherently Unreliable Category of Witness as a Matter of Law

As explained above, NRS 175.291 renders Anabel's testimony inherently unreliable standing on its own. Austin v. State, 87 Nev. 578, 588, 491 P.2d 724 (1971),

Heglemeier v. State, 111 Nev. 1244, 903 P.2d 799 (1995); Eckert v. State, 91 Nev. 183, 533 P.2d 468 (1975) and State v. Carey, 34 Nev. 309 (1912). This Court has recognized that accomplice witnesses are "persons vulnerable to criminal prosecution [who] have incentives to dissemble as an inducement for more favorable treatment by the State," Sheriff v. Acuna, 107 Nev. 664, 667, 819 P.2d 197 (1991); and there is an inexorable "danger posed by perjured testimony concocted by persons seeking lenient treatment in connection with their own criminal problems." Acuna, 107 Nev. at 669. Because the above-quoted provisions of NRS 175.291 categorically preclude conviction of an accused on the basis of the uncorroborated testimony of accomplices, they establish a "statutory entitlement" to such corroboration, cognizable as an independent "liberty interest" arising under state law subject to the imperative of due process mandated by the Fourteenth Amendment to the Constitution of the United States.[29]

3. Anabel's Statements Were not Memorialized for the Improper Purpose of Depriving H of the Ability to Utilize Them in Cross-examination

"Due process requires the State to preserve material evidence." Steese v. State, 114 Nev. 479, 491, 960 P.2d 321, 329 (1998). The State's failure to preserve material evidence can lead to dismissal of the charges "if the defendant can show 'bad faith or connivance on the part of the government' or 'that he was prejudiced by the loss of the evidence.' " Daniels v. State, 114 Nev. 261, 267, 956 P.2d 111, 115 (1998) (quoting Howard v. State, 95 Nev. 580, 582, 600 P.2d 214, 215-16 (1979)). In Sheriff v. Acuna, 107 Nev. 664, 670, 819 P.2d 197 (1991), this Court held that "[g]enerally, it is only

[29] See footnote 25, *above*.

where the prosecution has bargained for false or specific testimony, or a specific result, that an accomplice's testimony is so tainted as to require its preclusion." 107 Nev. at 671. (Emphasis added). In so doing, the Acuna Court defined "specific trial testimony" as "testimony that is essentially consistent with the information represented to be factually true during negotiations with the State." 107 Nev. at 669. (Emphasis added). The Acuna Court insisted upon the scrupulous observation of certain constitutionally-mandated "established safeguards". And in Leslie v. State, 114 Nev. 8, 952 P.2d 966 (1998), this Court thereafter held that the foregoing constitutional safeguards required by Acuna were satisfied in that the pretrial statements of the putative accomplice in that case were memorialized by tape recording; and were therefore demonstrably consistent with her subsequent trial testimony. [30]

Here, because Anabel's plea negotiation proffers, pretrial interviews and debriefings by the State were deliberately not recorded in any manner or to any extent whatsoever, this essential assessment of the constitutional propriety of her executory bargain with the prosecution was effectively placed beyond the reach of the "full[ ] cross-examin[ation]" required by Acuna. 7 ROA 1180-1182. H was therefore denied his rights to due process of law and a fair trial as guaranteed by the Nevada and federal constitutions. See generally, Note, "Should Prosecutors Be Required To Record Their

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[30] See 15 ROA 2810-2811 re: why homicide detectives recorded Deangelo, Zone and the first interview of Anabel:

Defense Counsel: "..if you want to have an accurate record of what somebody said, the best thing to do is record it?"

Detective Sean Michael McGrath: "Yes".

Pretrial Interviews With Accomplices And Snitches?" 74 Fordham L. Rev. 257 (October, 2005). Stated differently, the proffered testimony of a bargained for witness is part of the plea bargain - part of the *quid pro quo* - and must be memorialized for the safeguards contemplated by Acuna and Leslie to provide the fodder for proper cross-examination and meaningful confrontation.

Where, as here, it is clear that the State has conspicuously deviated from an otherwise routine practice and procedure[31] and deliberately refrained from making any record whatsoever memorializing its pretrial interviews with and debriefings of Anabel, it is reasonable to infer that the State's intention was to thereby purposefully frustrate the "full cross-examination" mandated by Acuna as an essential prerequisite to the admissibility of accomplice testimony pursuant to an executory plea agreement. This conclusion is supported by the prosecutor not only announcing that no recording was made of the plea negotiation debriefing but asserting a work product privilege for any notes that were taken at it and persisting in that assertion throughout. 3 ROA 563-566. Absent a record memorializing the pretrial statements of the witness during the course and conduct of plea negotiations with the State, counsel for the accused cannot effectively and "fully cross-examine" percipient witnesses - including the putative accomplice herself - with respect to whether or not, she (1) "persuasively professe[d] to

[31] Deangelo, Zone and Anabel all were accomplices and were all videotaped during their initial interrogations in May 2005, *above.* Moreover, defense counsels' demands for recordings and/or notes of the plea negotiations proffer were repeatedly denied. 3 ROA 559, 563-566; 9 ROA 1729-1731; Notwithstanding her saying "I'll make a copy so I don't lose them", 3 ROA 566, the notes were lost by the court and are not available for this Court's review.9 ROA 3507-3509; 25 ROA 4668-4672.

have truthful information of value and a willingness to accurately relate such information at trial;" or (2) "bargained for specific trial testimony . . . that is essentially consistent with the information represented to be factually true during negotiations with the State," as contemplated by the due process safeguards prescribed in Acuna. Such a maneuver must be stopped before it becomes an ingrained practice. Not to reverse is to reduce Acuna's safeguards to platitudes.

D. Admission of Deangelo's Statements Made During the Surreptitious Recordings Violated the Confrontation Clause of the Nevada and United States Constitutions

1. Standard of Review

This Court applies *de novo* review when considering whether a defendant's confrontation clause rights have been violated. Chavez v. State, 125 Nev. __, __, 213 P. 3d 476, 484 (Nev. 2009).

2. Admissibility of Out-of-court Declarations of Deangelo

The district court recognized that the conspiracy to murder TJ ended when the payment was made to Deangelo and a subsequent, separate conspiracy occurred on May 23 & 24, 2005, to murder Counts, Zone and JJ. 5 ROA 998-1008, 1010. The objection to statements of Deangelo and the other participants in the tape recordings being admitted into evidence as to H was clearly stated to the district court many times over. 5 ROA 1004-1006; 9 ROA 1720-1736; 13 ROA 2479-2483; 14 ROA 2493-2499; 14 ROA 2715-2717. When the tapes were played over these objections, the judge instructed the jury:

> "on the tape, any discussion with respect to rat poison and/or any alleged plan to cause harm or death to Mr. Zone, Mr. Taoipu and/or Mr. Counts is not being admitted as evidence as to Mr. Hidalgo Jr."14 ROA 2734.

No further limiting instruction was given until Instruction #40 was made part of the charge to the jury. 24 ROA 4487. There, the judge instructed in relevant part:

> "The statements of a co-conspirator after he has withdrawn from the conspiracy were not offered, and may not be considered by you, for the truth of the matter asserted. They were only offered to give context to the statements made by the other individuals who are speaking, or as adoptive admissions or other circumstantial evidence in the case."

H objected to the admission of Anabel's or III's statements on the tapes as not being during the course of and in furtherance of the only conspiracy in which he was charged.[32] Deangelo's statements on the tape recordings made at the behest of law enforcement were admitted over objection in clear violation of H's right to confront witnesses as guaranteed by the Constitutions of the State of Nevada and United States of America as they were clearly testimonial when made. Medina v. State, 122 Nev. 346, 143 P.3d 471, 476 (Nev. 2006). See City of Las Vegas v. Walsh, 121 Nev. 899, 124 P. 3d 203 (Nev. 2005); Flores v. State, 121 Nev. 706, 120 P.3d 1170 (Nev. 2005).. And since H was not a party to the conversation, he could not be held to have made an adoptive admission. Maginnis v. State, 93 Nev. 173, 175, 561 P. 2d 922, 923 (Nev. 1977).

In Crawford v. Washington, 541 U.S. 36, 68, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) the Court held that the Confrontation Clause bars the use of a testimonial statement made by a witness who is unavailable for trial unless the defendant had an opportunity to previously cross-examine the witness regarding the witness's statement. In

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[32] H argued that the conspiracy ended with TJ's death and relied upon Grunewald v. United States, 353 U.S. 391, 77 S. Ct. 963 (1957); Krulewich v. United States, 336 U.S. 440, 443-444, 69 S.Ct. 716, 718-719 (1949) and Lutwak v. United States, 344 U.S. 604, 617-618, 73 S.Ct. 481, 489-490 (1953). Anabel testified at trial. III did not.

Crawford, the United States Supreme Court did not define "testimonial" for purposes of the Confrontation Clause analysis, but it did give examples of what would qualify as testimonial. The Court listed "affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially" as the "core class" of testimonial statements. It is noteworthy that Crawford itself dealt with a tape recording of an interview made by police. Deangelo was a police operative and the tape was clearly made with an intention of using it as evidence in a criminal prosecution.[33]

Deangelo did not testify at trial because he was himself a charged defendant. The State could have immunized him and still used any evidence it had obtained, prior to granting immunity, in his prosecution, but it chose not to do so. It should not be allowed to have it both ways. It isn't even arguable that these statements were not "testimonial". They should not have come into evidence in the State's case in chief against H and reversal is required.

E. The District Court Abused Its Discretion When It Denied H a New Trial Based on Juror Misconduct.

At the close of trial after the jury returned its verdict, counsel for H had a conversation with the foreperson and two additional jurors. During this discussion, the jurors revealed to H's attorneys that they considered evidence that they had been instructed by the district court not to consider in the manner in which they did. Specifically, the jurors disclosed that they considered the out-of-court statements made

[33] See testimony of Detective McGrath: 14 ROA 2723-2724; 15 ROA 2837-2841.

by Deangelo while wearing a wire on May 23 & 24, 2005, for the truth of the matter asserted. 24 ROA 4564-4566. After the issue of this juror misconduct was brought it's attention, the district court required briefing on whether the juror misconduct warranted a new trial. 24 ROA 4558-4566. Briefing on this issue was completed and H's request for a new trial based on juror misconduct was ultimately denied. 25 ROA 4660-4663. For the reasons set forth below, the district court erred in denying the request for a new trial based on juror misconduct. As such, H's convictions must be reversed.

1. Standard of Review

A denial of a motion for a new trial based upon juror misconduct will be upheld absent an abuse of discretion by the district court. Absent clear error, the district court's findings of fact will not be disturbed. Meyer v. State, 119 Nev. 554, 80 P.3d 447 (2003).

2. The Court Abused its Discretion by Failing to Grant a New Trial As the Jury Disobeyed the Court's Instructions on the Limitations of the Use of Deangelo Statements on the Tapes

The essence of the allegation of jury misconduct requiring reversal is that the jurors ignored the judge's instruction not to take Deangelo's statements on the tapes "for the truth of the matter asserted". Although H objected to the introduction of these tapes in their entirety as to him, the court ruled that the jury would be permitted to consider the statements of Anabel and III, but not those of Deangelo, as to H's membership in the conspiracy that existed prior to the death of TJ. 13 ROA 2480-2487; 14 ROA 2494-2495. The proffer contained in the Declaration of Paola M. Armeni did not reveal the content of the statement by Deangelo on the tape but merely that they were used as if their assertion was true. That use was in direct disobedience to Instruction #40. The

statement itself was revealed by both Ms. Armeni and Deputy District Attorney DiGiacomo at the judge's direction in the hearing on the motion. 24 ROA 4567-4593. Ignoring both the State's and defense's versions of the transcripts of the tapes - both of which had Anabel, a participant in the taped conversations, as a contributing drafter - the jury found that Deangelo used the word "he" (where Anabel herself did not so find) in reference to H on the tapes. The jury accepted that statement as truthful and used it as the basis of finding H guilty. Id.

A jury's failure to follow a district court's instruction is intrinsic juror misconduct. A new trial must be granted unless it appears, beyond a reasonable doubt, that no prejudice has resulted from the jury misconduct. The defendant must prove the nature of the jury misconduct and that there is a reasonable possibility that the misconduct affected the verdict. The defendant may only prove the misconduct using objective facts and not the "state of mind or deliberative process of the jury." Valdez v. State, 124 Nev. 97, 196 P.3d 465, 475 (2008). A sitting juror commits misconduct by failing to follow the instructions and admonitions given by the trial court. See People v. Whitaker, 2009 WL 904485 (Cal App 2 dist 2009) citing In re Hamilton, 20 Cal 4th 273, 295 (Cal 1999). A juror who disobeys his obligation to apply the law as outlined by the trial court is more likely than not going to have a demonstrable impact on the deliberative process and require removal of the juror or a new trial. See State v. Sullivan, 157 N.H. 124, 139, 949 A. 2d 140, 152 (N.H. 2008). The test is whether the juror performed his duties in accordance with the court's instructions and his oath. See Weber v. State, 121 Nev. 554, 119, P. 3d 107, 125 (2005). NRS 50.065, subd. 2, provides:

> Upon an inquiry into the validity of a verdict or indictment: (a) A juror shall not testify concerning the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith.

When read together with NRS 48.025, which provides that all relevant evidence is admissible unless excluded by statute or by the Constitution, the statute does allow juror testimony regarding objective facts, or overt conduct, which constitutes juror misconduct. Thus, so long as the court excludes from its consideration those portions of the affidavits which deal with "mental processes" or the "effect" upon jurors of the alleged misconduct and focuses on objective facts, overt and capable of ascertainment by any observer, without regard to the state of mind of any juror, the court proceeds properly under the rule. Barker v. State, 95 Nev. 309, 594 P.2d 719, 721 (1979).

Here, whether or not the jurors considered alleged words of Deangelo in contravention of the instructions is an objective fact verifiable and subject to being corroborated by any member of the jury who was present when the juror urging its consideration spoke the words to do so. What Deangelo was believed by the jurors to have said on the tapes is not at issue under these circumstances. Whether it was heard accurately or should have been believed or weighed against H is of no consequence to the determination of this issue. The fact that it was done in violation of the jurors oath to follow the instructions of the court is the act of misconduct that is the focus of the inquiry. See Bushnell v. State, 95 Nev. 570, 599 P. 2d 1038, 1041 (1979).

Juror misconduct clearly occurred as the jury ignored and failed to follow the instructions of the district court with regard to not using the statement of Deangelo after

withdrawal from the conspiracy for the truth of the assertion. Additionally, the district court abused its discretion by failing to grant a new trial based on the misconduct or in the alternative to hold a hearing at which the foreperson would have been called as a witness to establish the fact that juror misconduct took place. For these reasons, H's convictions must be reversed. At a minimum the case should be remanded to the district court to conduct an evidentiary hearing to allow for testimonial proof from percipient witnesses.

VII. CONCLUSION

For the foregoing reasons, this Court should recognize that there is an absence of judicial confidence in the outcome of the trial in this case. The errors are both cumulative and substantial and the evidence slight Valdez v. State, 124 Nev. 97, 196 P.3d 465, 482 (Nev. 2008)(cumulative error can require reversal even where evidence sufficient). A reversal is the only cure. Retrial is only necessary if the Court rejects the sufficiency of the evidence argument, in which case a remand should take place.

DATED this _____ day of February, 2011.

Respectfully submitted,

GORDON SILVER

By: _____

DOMINIC P. GENTILE, ESQ.
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CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this appellate brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular, N.R.A.P. 28(c), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this _____ day of February, 2011.

GORDON SILVER

By:_____
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CERTIFICATE OF SERVICE

The undersigned hereby declares that on the 2 day of February, 2011, I deposited a true and correct copy of the foregoing APPELLANT LUIS A. HIDALGO, JR.'S OPENING BRIEF in the United States Mail, postage fully prepaid, addressed to the following:

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