IN THE SUPREME COURT OF THE STATE OF NEVADA

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| LUIS A. HIDALGO, JR.,, Appellant, | ) | Case No. 54209 |
| v. | ) | |
| THE STATE OF NEVADA, Respondent. | ) | |

**RESPONDENT'S ANSWERING BRIEF**

**Appeal From Judgment of Conviction**
**Eighth Judicial District Court, Clark County**

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## STATEMENT OF THE ISSUE(S)

1. Whether the district court erred in giving a use of co-conspirator statement instruction containing the words "slight evidence."
2. Whether, under the accomplice corroboration rule, the State presented sufficient independent evidence of corroboration.
3. Whether Appellant's due process and fair trial rights required the State to record the guilty plea negotiation proffer of Anabel Espindola.
4. Whether the admission of Appellant's former co-conspirator's recorded statements denied Appellant his Confrontation Clause rights.
5. Whether the district court abused its discretion in denying Appellant's motion for a new trial based on alleged juror misconduct consisting of jurors failing to comply with a jury instruction.

## STATEMENT OF THE CASE

On February 13, 2008, a grand jury returned a true bill of Indictment charging Appellant Luis Hidalgo, Jr. (Mr. H) with: Count 1 – Conspiracy to Commit Murder (Felony – NRS 200.010; 200.030; 199.480); and Count 2 – Murder with Use of a Deadly Weapon (Felony – NRS 200.010; 200.030; 193.165). 4 Appellant's Appendix (AA) 724-727. On March 7, 2008, the State filed a Notice of Intent to Seek the Death Penalty. 4 AA 784-786. On February 20, 2008, Mr. H was arraigned on the Indictment, pleaded not guilty, and invoked his right to be tried within sixty (60) days. 4 AA 779. On May 1, 2008, the State

filed an Amended Indictment, which struck from Count 1 language relating to solicitation to murder witnesses. 5 AA 836-838. On June 25, 2008, the State filed a motion to consolidate Mr. H's case with the case of his co-defendants, Luis Hidalgo, III (Little Lou), Kenneth "KC" Counts (Counts), Anabel Espindola (Espindola), Jayson "JJ" Taoipu (Taoipu), C212667, which was granted on January 16, 2009. 5 AA 917-918. Also at that time, the State withdrew its Notice of Intent to Seek the Death Penalty. 5 AA 916.

On January 27, 2009, Mr. H, along with his co-defendant and son, Little Lou, proceeded to trial. 6 AA 1015-1172. On February 17, 2009, the jury returned a verdict finding Mr. H guilty on Count 1, Conspiracy to Commit Murder, and guilty on Count 2, Second Degree Murder with Use of a Deadly Weapon. On March 10, 2009, Mr. H filed a "Motion for Judgment of Acquittal, Or, In the Alternative, a New Trial." 24 AA 4506-4523. Mr. H's motion sought to litigate, among other things, the instant grounds of appeal designated 1, 4, and 5, supra. The State filed its Opposition on March 17, 2009. 24 4524-0436. On April 17, 2009, Mr. H filed his Reply in support of the motion, and, on April 27, 2009, filed a supplemental points and authorities in support of the motion. 24 AA 4537-4557; 4558-4566. On May 1, 2009, the court heard argument on the motion and denied it, with a written order filed on August 4, 2009. 24 AA 4567-4593; 25 AA 4660-4663.

On June 23, 2009, the Court sentenced Mr. H to the following: Count 1 – twelve (12) months in the Clark County Detention Center (CCDC); and Count 2 – Life in the Nevada Department of Corrections (NDOC) with parole eligibility beginning after having served a minimum of one hundred twenty (120) months, plus an equal and consecutive term of one hundred twenty (120) months to Life for the deadly weapon enhancement, concurrent with Count 1. The Court awarded Mr. H one hundred eighty four (184) days credit for time served, and filed its Judgment of Conviction on July 10, 2009. On July 18, 2009, Mr. H filed a timely Notice of Appeal.

## STATEMENT OF THE FACTS

In May of 2005, Appellant Luis Hidalgo, Jr. (Mr. H) was the former owner of the Palomino Club (Palomino or the club), which is Las Vegas's only all-nude strip club

licensed to serve alcohol. 16 AA 3001. On the afternoon of May 19, 2005, Mr. H's romantic partner of eighteen (18) years, Anabel Espindola (Espindola), received a phone call from Deangelo Carroll (Carroll); Carroll was an employee of the Palomino serving as a "jack of all trades" handling promotions, disc jockeying, and other assorted duties. 16 AA 3001-3002; 3011-3013. Espindola was the Palomino's general manager and handled all of the club's financial and management affairs. 16 AA 2989; 3000-3001. During the call, Carroll informed Espindola that the victim in this case, T.J. Hadland (Hadland), a recently fired Palomino doorman, had been "badmouthing" the Palomino to taxicab drivers. 16 AA 3003; 3011-3013; 22 AA 4099. A week prior to this news, Mr. H's son and co-defendant, Luis Hidalgo, III (Little Lou), had informed Mr. H that Hadland had been falsifying Palomino taxicab voucher tickets in order to generate unauthorized kickbacks from the drivers. 16 AA 3004-3008.[1] In response, Mr. H ordered that Hadland be fired. 16 AA 3008-3009.[2]

The Palomino was not in a good financial state and Mr. H was having trouble meeting the $10,000.00 per month payment due to Dr. Simon Sturtzer from whom he purchased the club in early 2003. 16 AA 2988-2997; 3048; 3158. Taxicab drivers are a critically important form of advertising for strip clubs generally. 19 AA 3642:6-17. Because of the Palomino's location in North Las Vegas, revenue generated through taxicab drop-offs was very important to the club's operation. 19 AA 3642-3643. Due to a legal dispute among the area strip clubs regarding bonus payments to taxicab drivers, all payments were suspended during

[1] The Palomino paid cash bonuses to taxi drivers for each person a driver dropped off. 16 AA 3004-3005. The club accomplished this by having a doorman, such as Hadland, provide a ticket or voucher to the driver, which reflected the number of passengers (customers) dropped off. 16 AA 3004-3005. Apparently, Hadland was inflating the number of passengers taxi drivers dropped off in exchange for the driver agreeing to kick back to Hadland some of the bonus paid out by the club for these phantom customers. 16 AA 3007-3008.

[2] Mr. H had also received prior reports that, at other times, Hadland was selling Palomino VIP passes to arriving customers in exchange for cash, which deprived the taxicab drivers of bonuses for bringing customers to the club, and diverted the passes from their intended purpose of attracting patrons local to the club. 17 AA 3223-3224; 20 AA 3787-3788; 21 AA 3992-3993. This practice created a problem for the club because taxi drivers would begin disputing their entitlement to be paid bonuses. 16 AA 3224; 20 AA 3788.

the period encompassing May 19-20, 2005; the Palomino was the only club permitted to continue paying taxi drivers for dropping off customers. 13 AA 2457-2458.

At the time Espindola took Carroll's call, she was at Simone's Auto Body, which was a bodyshop/collision repair business also owned by Mr. H and managed by Espindola.[3] 16 AA 2979-2983. After taking Carroll's call, Espindola informed Mr. H and Little Lou of Carroll's news about Hadland disparaging the club. 16 AA 3013; 3015. Upon hearing the news, Little Lou became enraged and began yelling at Mr. H, demanding of Mr H: "You're not going to do anything?" and stating "That's why nothing ever gets done." 16 AA 3015. Little Lou told Mr. H, "You'll never be like Rizzolo and Galardi. They take care of business." 16 AA 3015; 22 AA 4099.[4] He further criticized Mr. H by pointing out that Rizzolo had once ordered an employee to beat up a strip club patron. 16 AA 3017.[5] Mr. H became angry, telling Little Lou to mind his own business. 16 AA 3017. Little Lou again told Mr. H, "You'll never be like Galardi and Rizzolo," and then stormed out of Simone's heading for the Palomino. 16 AA 3017.

Visibly angered, Mr. H walked out of Espindola's office and sat on Simone's reception area couch. 16 AA 3027. At approximately 6:00 or 7:00 PM, Espindola and a still visibly-angered Mr. H drove from Simone's to the Palomino. 16 AA 3028-3029. Once at the Palomino, Espindola went into Mr. H's office, which was her customary workplace at the club. 16 AA 3035. Approximately half an hour later, Carroll arrived at the club and knocked on the office door, which Mr. H answered. 16 AA 3035. Mr. H and Carroll had a short

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[3] Financially, Simone's was breaking even at the time of this case's underlying events, but the business never turned a profit. 16 AA 2985-2986; 3000.

[4] Frederick John "Rick" Rizzolo was the owner of a Las Vegas strip club known as Crazy Horse Too, and Jack Galardi is the owner of Cheetah's strip club as well as a number of other clubs in Atlanta, Georgia. 16 AA 3016-3017.

[5] Mr. H had previously enlisted his own employee, Carroll, to physically harm the boyfriend of Mr. H's daughter whom the boyfriend had caused to use methamphetamine; Espindola later intervened to stop Carroll from harming the boyfriend. 18 AA 3423-3425. This evidence came in after Mr. H attempted to suggest to the jury that he was unlike Gillardi and Rizzolo. 18 AA 3406-3422. The evidence was not admitted as to Little Lou. 18 AA 3425-3426.

conversation and then walked out the office door together. 16 AA 3035-3036. A short time later, Mr. H came back into the office and directed Espindola to speak with him out of earshot of Palomino technical consultant, Pee-Lar "PK" Handley, who was nearby. 16 AA 3037. Mr. H instructed Espindola to call Carroll and tell Carroll to "go to Plan B." 16 AA 3038.

Espindola went to the back of the office and attempted to contact Carroll by "direct connect" (chirp) through her and Carroll's Nex-tel cell phones. 16 AA 3041. Carroll called Espindola back through a land-based telephone line, and Espindola instructed Carroll that Mr. H wanted Carroll to "switch to Plan B." 16 AA 3041; 22 AA 4101. Carroll protested that "we're here" and "I'm alone" with Hadland, and he told Espindola that he would get back to her. 14 AA 2575; 16 AA 3041-3044. Espindola and Carroll's phone connection was then cut off. 16 AA 3044. At that point, Espindola knew "something bad" was going to happen to Hadland. 16 AA 3044. She attempted to call Carroll back, but could not reach him. 16 AA 3044. Espindola returned to the office and informed Mr. H that she had instructed Carroll to go to "Plan B," after which Mr. H left the office with Handley. 16 AA 3045.

Earlier in the day, May 19, 2005, at approximately noon, Carroll was at his apartment with Rontae Zone (Zone) and Taoipu, who were both "flyer boys" working unofficially for the Palomino. 13 AA 2399-2400. Zone and Taoipu worked alongside Carroll and performed jobs Carroll delegated to them in exchange for being paid "under the table" by Carroll. 13 AA 2392-2393; 2397. Zone and Taoipu would pass out Palomino flyers to taxis at cabstands. 13 AA 2392. Zone lived at the apartment with Carroll, Carroll's wife, and Zone's pregnant girlfriend, Crystal Payne. 13 AA 2392; 14 AA 2413-2514. Zone and Taoipu had been friends for several years. 13 AA 2396.

While at the apartment, Carroll informed Zone and Taoipu that Little Lou had told him Mr. H wanted a "snitch" killed. 13 AA 2399-2400; 14 AA 2591; 2638. Carroll asked Zone if he would be "into" doing something like that, and Zone responded "No," he would not. 13 AA 2400. Carroll also asked the same question of Taoipu who indicated he was "down," i.e., interested in helping out. 13 AA 2400-2401. Later when Taoipu and Zone were

in the Palomino's white Chevrolet Astro Van with Carroll, Carroll told them that Little Lou had instructed Carroll to obtain some baseball bats and trash bags to use in aid of killing the person. 13 AA 2401. After the initial noontime conversation about killing someone on Mr. H's behalf, Zone observed Carroll using the phone, but he could not hear what Carroll was talking about. 13 AA 2408. At some point after the noon conversation and after Zone observed him using the phone, Carroll informed Zone and Taoipu that Mr. H would pay $6,000.00 to the person who actually killed the targeted victim. 13 AA 2407-2408.

A couple hours later while the three were still in the van, Carroll again discussed on the phone having an individual "dealt with," i.e., killed, although Zone did not know the specific person to be killed. 13 AA 2403; 2449; 14 AA 2525; 2640. Carroll produced a .22 caliber revolver with a pearl green handle and displayed it to Zone and Taoipu as if it were the weapon to be utilized in killing the targeted victim. 13 AA 2403-2404. Carroll attempted to give the revolver to Zone who refused to take it. 13 AA 2404. Taoipu was willing to take the revolver from Carroll and did so. 13 AA 2404. Carroll also produced some bullets for the gun and placed them in Zone's lap, but Zone dumped the bullets onto the van's floor where Taoipu picked them up and put them in his own lap. 13 AA 2404-2405.[6]

The three then proceeded back to Carroll's apartment where Carroll instructed Zone and Taoipu to dress in all black so they could go out and work promoting the Palomino. 13 AA 2405-2406. The three then used the Astro van to go out promoting, returned briefly to Carroll's apartment for a second time, and again left the apartment to go promoting. 13 AA 2405-2406. On this next trip, however, Carroll took them to a residence on F Street where they picked up Kenneth "KC" Counts (Counts). 13 AA 2409. Zone had no idea they were traveling to pick up Counts whom he had never previously met. 13 AA 2409. Once at Counts' house, Carroll went inside the house and emerged ten minutes later accompanied by Counts who was dressed in dark clothing, including a black hooded sweatshirt and black gloves. 13 AA 2409-2410. Counts entered the Astro van and seated himself in the back

[6] Carroll would attempt a second time, unsuccessfully, to give the bullets to Zone when they were back at Carroll's apartment. 14 AA 2559.

passenger seat next to Zone who was seated in the rear passenger seat directly behind the driver. 13 AA 2410-2411. Taoipu was seated in the front, right-side passenger seat. 13 AA 2411.

At the time, Zone believed they were headed out to do more promoting for the Palomino. 13 AA 2412. As Carroll drove onto Lake Mead Boulevard, Zone realized they were not going to be promoting because there are no taxis or cabstands at Lake Mead. 13 AA 2412. Carroll told Zone and the others that they were going to be meeting Hadland and were going to "smoke [marijuana] and chill" with Hadland. 13 AA 2413.[7] Carroll continued driving toward Lake Mead. 13 AA 2412.

On the drive up, Zone observed Carroll talking on his cell phone and he heard Carroll tell Hadland that Carroll had some marijuana for Hadland. 13 AA 2415; 14 AA 2575; 19 AA 3625-3626. Carroll was also using his phone's walkie-talkie function to chirp. 13 AA 2418; 19 AA 3624-3628. Little Lou chirped Carroll and they conversed. 14 AA 2637. Carroll spoke with Espindola who told him to "Go to Plan B," and then to "come back" to the Palomino. 14 AA 2575; 17 AA 3346; 3358. Zone recalled Carroll responding "We're too far along Ms. Anabel. I'll talk to you later," and terminated the conversation. 14 AA 2575. After executing a left turn, Carroll lost the signal for his cell phone and was unable to communicate with it, so he began driving back to areas around the lake where his cell phone service would be reestablished. 13 AA 2418-2419.

Carroll was able to describe a place for Hadland to meet him along the road to the lake. 13 AA 2420. Hadland arrived driving a Kia Sportage sport utility vehicle (SUV), executed a U-turn, and pulled to the side of the road. 13 AA 2420-2421; 14 AA 2638. Hadland walked up to the driver's side window where Carroll was seated and began having a conversation with Carroll; Zone and Taoipu were still seated in the rear right passenger's seat and front right passenger's seat, respectively. 13 AA 2422. As Carroll and Hadland spoke, Counts opened the van's right-side sliding door and crept out onto the street, moving

[7] Zone had been smoking marijuana throughout the day; on the ride to Lake Mead, Zone, Carroll, Counts, and Taoipu smoked one "blunt" or cigar of marijuana. 13 AA 2415-2416.

first to the front of the van, then back to its rear, and back to its front again. 13 AA 2422-2423. Counts then snuck up behind Hadland and shot him twice in the head. 13 AA 2423; 14 AA 2639-2640. One bullet entered Hadland's head near the left ear, passed through his brain, and exited out the top of his skull. 13 AA 2374-2379. The other bullet entered through Hadland's left cheek, passed through and destroyed his brain stem, and was instantly fatal. 13 AA 2374-2379.

One of the group deposited a stack of Palomino Club fliers near Hadland's body. 12 AA 2190; 14 AA 2658. Counts then hurriedly hopped back into the van and Carroll drove off. 13 AA 2424. Counts then questioned both Zone and Taoipu as to whether they were carrying a firearm and why they had not assisted him. 13 AA 2424-2425. Zone responded that he did not have a gun and had nothing to do with the plan. 13 AA 2425. Taoipu responded that he had a gun, but did not want to inadvertently hit Carroll with gunfire. 13 AA 2425.

Carroll then drove the four through Boulder City and to the Palomino, where Carroll exited the van and entered the club. 13 AA 2426. Carroll met with Espindola and Mr. H in the office. 16 AA 3045-3046. He sat down in front of Mr. H and informed him "It's done," and stated "He's downstairs." 16 AA 3046-3047; 22 AA 4102. Mr. H instructed Espindola to "Go get five out of the safe." 16 AA 3047. Espindola queried, "Five what? $500?," which caused Mr. H to become angry and state "Go get $5,000 out of the safe." 16 AA 3047; 22 AA 4102; see also 21 AA 4005-4007. Espindola followed Mr. H's instructions and withdrew $5,000.00 from the office safe, a substantial sum in light of the Palomino's financial condition. 16 AA 3047-3049. Espindola placed the money in front of Carroll who picked it up and walked out of the office. 16 AA 3048-3049. Alone with Mr. H, Espindola asked Mr. H, "What have you done?," to which Mr. H did not immediately respond, but later asked "Did he do it?" 16 AA 3049-3050.

Ten minutes after entering the Palomino, Carroll emerged from the club, got Counts, and then went back in the club accompanied by Counts. 13 AA 2426. Counts then emerged from the club, got into a yellow taxicab minivan driven by taxicab driver Gary McWhorter,

and left the scene. 13 AA 2427; 2459-2460; 14 AA 2639.[8] Carroll again emerged from the Palomino about thirty minutes later and drove the van first to a self-serve car wash and then back to his house, all the while accompanied by Zone and Taoipu. 13 AA 2427-2428; 14 AA 2531-2534. Zone was very shaken up about the murder and did not say much after they returned to his and Carroll's apartment. 13 AA 2428.

The next morning, May 20, 2005, Espindola and Mr. H awoke at Espindola's house after a night of gambling at the MGM. 16 AA 3051-3053. Mr. H appeared nervous and as though he had not slept; he told Espindola he needed to watch the television for any news. 16 AA 3053-3054. While watching the news, they observed a report of Hadland's murder; Mr. H said to Espindola, "He did it." 16 AA 3054. Espindola again asked Mr. H, "What did you do?" and Mr. H responded that he needed to call his attorney. 16 AA 3054.

Meanwhile, that same morning, Carroll slashed the tires on the van and, accompanied by Zone, used another car to follow Taoipu who drove the van down the street to a repair shop. 13 AA 2429; 14 AA 2583; 19 AA 3578-3579. Carroll paid $100.00 cash to have all four tires replaced. 13 AA 2429. Carroll, Zone, and Taoipu subsequently went to a Big Lots store where Carroll purchased cleaning supplies, after which Carroll cleaned the interior of the Astro van. 13 AA 2431-2432. Carroll, Zone, Taoipu, Zone's girlfriend, Carroll's wife and kids, and some other individuals ate breakfast at an International House of Pancakes restaurant later that day; Carroll paid for the party's breakfast. 13 AA 2432; 14 AA 2565-2568; 2641. At some point also, Carroll, accompanied by Zone, went to get a haircut. 14 AA 2539-2540.[9]

Carroll then drove himself, Zone, and Taoipu in the Astro van to Simone's where Mr. H, Little Lou, and Espindola were present. 13 AA 2432-2433. Carroll made Zone and Taoipu wait in the van while he went into Simone's; Carroll emerged about thirty minutes

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[8] Counts had to go back into the Palomino to obtain some change because McWhorter did not have change for the $100.00 bill Counts tried to pay him with. 13 AA 2460.

[9] During trial, Mr. H would point to Zone's post-murder association with Carroll as evidence of Zone's complicity in the murder. In fact, however, the evidence would demonstrate overwhelmingly that Zone accompanied Carroll only out of fear. See Section II.B, infra.

later and directed Zone and Taoipu inside where they sat on a couch in Simone's central office area. 13 AA 2432-2433. While at Simone's, Zone observed Carroll speaking with Mr. H in between trips to a back room, and he also observed Carroll speaking with Espindola. 13 AA 2436; 2440-2441; 14 AA 2635-2636; 2648. Carroll then went into a back room of Simone's, but emerged later to direct Zone and Taoipu into the bathroom. Carroll expressed disappointment in Zone and Taoipu for not involving themselves in Hadland's murder, and he told them they had missed the opportunity to make $6,000.00. 13 AA 2434-2435. He informed Zone and Taoipu that Counts received $6,000.00 for his part in Hadland's murder. 13 AA 2435. After Carroll, Zone, and Taoipu left Simone's, Carroll told Zone that Mr. H had instructed Carroll that the "job was finished and that [they] were just to go home." 14 AA 2648-2649.

Las Vegas Metropolitan Police Department (LVMPD) detectives identified Carroll as possibly involved in the murder after speaking with Hadland's girlfriend, Paijik Karlson, and because his name showed as the last person called from Hadland's cell phone. 14 AA 2661; 19 AA 3569. On May 20, 2005, Detective Martin Wildemann spoke with Mr. H and inquired about Carroll, requesting any contact information Mr. H might have for Carroll; Mr. H told Detective Wildemann he had no contact information for Carroll and that Wildemann should speak with one of the Palomino managers, Ariel aka Michelle Schwanderlik, who could put the detectives in touch with Carroll. 19 AA 3572.

At approximately 7:00 PM, the detectives returned to the Palomino where they found Carroll who agreed to accompany them back to their office for an interview. 14 AA 2666-2667; 19 3572-3573. After the interview, the detectives took Carroll back to his apartment where they encountered Zone who agreed to come to their office for an interview. 19 AA 3578-3579. Carroll then told Zone within earshot of the detectives: "Tell them the truth, tell them the truth. I told them the truth." 14 AA 2669-2670. Zone recalled Carroll also saying: "If you don't tell the truth, we're going to jail." 13 AA 2439. Zone interpreted Carroll's statements to mean that Zone should fabricate a story that tended to exculpate Carroll, himself, and Taoipu. 14 AA 2586-2587. Zone gave the police a voluntary statement on May

21, 2005. 19 AA 3579. Also on that day, Carroll brought Taoipu to the detectives' office for an interview. 14 AA 2678-2679; 19 AA 3580.

Meanwhile on May 21, 2005, Mr. H and Espindola consulted with attorney Jerome A. DePalma, Esq., and defense attorney Dominic Gentile, Esq.'s investigator, Don Dibble. 19 AA 3710-3711. The next morning, May 22, 2005, a completely distraught Mr. H said to Espindola, "I don't know what I told him to do." 16 AA 3083. Espindola responded by again asking Mr. H, "What have you done?" to which Mr. H responded, "I don't know what I told him to do. I feel like killing myself." 16 AA 3083. Espindola asked Mr. H if he wanted her to speak to Carroll and Mr. H responded affirmatively. 16 AA 3084; 22 AA 4111:10-18. Espindola arranged through Mark Quaid, parts manager for Simone's, to get in touch with Carroll. 16 AA 3084-3085.

On the morning of May 23, 2005, LVMPD Detective Sean Michael McGrath and Federal Bureau of Investigation (FBI) agent Bret Shields put an electronic listening device on Carroll's person; the detectives intended for Carroll to meet at Simone's with Mr. H and the other co-conspirators. 14 AA 2704-2705. Prior to Carroll arriving at Simone's, Mr. H and Espindola engaged in a conversation by passing handwritten notes back and forth. 16 AA 3098-3099. In this conversation, Mr. H instructed Espindola that she should tell Carroll to meet Arial and resign from working at the Palomino under a pretext of taking a leave of absence to care for his sick son. 16 AA 3087; see also 22 AA 4111:10-18. He further instructed Espindola to warn Carroll that if something bad happens to Mr. H then there would be no one to support and take care of Carroll. 16 AA 3087; see also 22 AA 4111:10-18. After the conversation, Espindola tore the notes up and flushed them down a toilet in the women's bathroom at Simone's. 16 AA 3099.

When Carroll arrived at Simone's, Espindola directed him to Room 6 where he met with Little Lou. 16 AA 3086. Espindola joined them and asked Carroll if he was wearing "a wire," to which Carroll responded, "Oh come on man. I'm not fucking wired. I'm far from fucking wired," and he lifted his shirt up. 15 AA 2914; 16 AA 3089; 17 AA 3349. Mr. H was present in his office at Simone's while the three met in Room 6. 16 AA 3085; 18 AA

3441-3442. In the course of the conversation among Carroll, Espindola, and Little Lou, Espindola informed Carroll: "Louie is panicking, he's in a mother fucking panic, cause I'll tell you right now…if something happens to him we all fucking lose. Every fucking one of us." 15 AA 2915. Little Lou informed Carroll that "[Mr. H]'s all ready to close the doors and everything and hide go into exile and hide." 14 AA 2924. Espindola emphasized the importance of Carroll not defecting from Mr. H:

> "Yeah but…if the cops can't go no where with you, the shits gonna have to, fucking end, they gonna have to go someplace else, they're still gonna dig. They are gonna keep digging, they're gonna keep looking, they're gonna keep on, they're gonna keep on looking. [pause] Louie went to see an attorney not just for him but for you as well, just in case. Just in case…we don't want it to get to that point, I'm telling you because if we have to get to that point, you and Louie are gonna have to stick together."
> 15 AA 2916.

Carroll, who had been prepared by detectives to make statements calculated to elicit incriminating responses, initiated the following exchange:

> Carroll: Hey what's done is done, you wanted him fucking taken care of we took care of him…
> Espindola: Why are you saying that shit, what we really wanted was for him to be beat up, then anything else, _____mother fucking dead.
> 15 AA 2916.[10]

Carroll also stated to Little Lou: "You [] not gonna fucking[…] what the fuck are you talking about don't worry about it…you didn't have nothing to do with it," to which Little Lou had no response. 15 AA 2919.

Espindola again emphasized that Carroll should not talk to the police and she would arrange an attorney for him:

> Espindola: _____all I'm telling you is all I'm telling you is stick to your mother fucking 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 fucking out than it's gonna be for everybody to go to fucking jail. I'm telling you once that happens we can kiss everything fucking goodbye, all of it…your kids' salvation and everything else….It's all gonna depend on you.
> 15 AA 2923.

Little Lou also instructed Carroll to remain quiet and what Carroll should tell police if confronted: "[whispering]_____don't say shit, once you get an attorney, we can

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[10] The audio recordings of Carroll's conversations are of poor quality and inaudible portions are indicated by blanks.

say_____TJ, they thought he was a pimp and a drug dealer at one time_____I don't know shit, I was gonna get in my car and go promote but they started talking about drugs and pow pow." 15 AA 2921. He also promised to support Carroll should Carroll go to prison for conspiracy:

> Little Lou: …How much is the time for a conspiracy_____
> Carroll: [F]ucking like 1 to 5 it aint shit.
> Little Lou: In one year I can buy you twenty-five thousand of those [savings bonds],___thousand dollars___one year, you'll come out and you'll have a shit load of money_____I'll take care of your son I'll put em in a nice condo_____
> 15 AA 2927.

During this May 23rd wiretapped conversation, Little Lou also solicited Zone and Taoipu's murder. In response to Carroll's claims that Zone and Taoipu were demanding money and threatening to defect to the police, Little Lou proposed killing both young men:

> Carroll: They're gonna fucking work deals for themselves, they're gonna get me for sure cause I was driving, they're gonna get KC because he was the fucking trigger man. They're not gonna do anything else to the other guys cause they're fucking snitching.
> Little Lou: Could you have KC kill them too, we'll fucking put something in their food so they die rat poison or something.
> Carroll: We can do that too.
> Little Lou: And we get KC last.
> 15 AA 2920.
> …
> Little Lou: Listen____You guys smoke weed right, after you have given them money and still start talking they're not gonna expect rat poisoning in the marijuana and give it to them_____
> Espindola: I'll get you some money right now.
> Little Lou: Go buy rat poison____and take_____back to the club…Here, [d]rink this right.
> Carroll: [W]hat is it?
> Little Lou: Tanguerey, [*sic*] you stir in the poison_____
> Espindola: Rat poison is not gonna do it I'm telling you right now_____
> Little Lou: [Y]ou know what the fuck you got to do.
> Espindola:_____takes so long_____not even going to fucking kill him.
> 15 AA 2926.

At the end of the meeting, Espindola stated she would give Carroll some money and promised to financially contribute to Carroll and his son, as well as arrange for an attorney for Carroll. 15 AA 2928. After the meeting, Carroll provided the detectives $1,400.00 and a

bottle of Tanqueray, which he stated were given to him by Espindola and Little Lou, respectively. 14 AA 2707-2708.[11]

On May 24, 2005, the detectives again outfitted Carroll with a wire and sent him back to Simone's. 14 AA 2712-2713. After Carroll's unexpected arrival, Espindola again directed him to Room 6 where the two again meet with Little Lou while Mr. H was present in the body shop's kitchen area. 16 AA 3096-3097. During the conversation, Carroll and Espindola engaged in an extended colloquy regarding their agreement to harm Hadland:

> Carroll: You know what I'm saying, I did everything you guys asked me to do. You told me to take care of the guy; I took care of him.
> Espindola: O.K. wait, listen, listen to me (Unitelligible)
> Carroll: I'm not worried.
> Espindola: Talk to the guy, not fucking take care of him like get him out of the fucking way (Unintelligible). God damn it, I fucking called you.
> Carroll: Yeah, and when I talked to you on the phone, Ms. Anabel, I specifically I specifically said, I said "if he's by himself, do you still want me to do him in."
> Espindola: I I…
> Carroll: You said Yeah.
> Espindola: I did not say "yes."
> Carroll: you said if he's with somebody, then beat him up.
> Espindola: I said go to plan B, -- fucking Deangelo, Deangelo you just told admitted to me that you weren't fucking alone I told you 'no', I fucking told you 'no' and I kept trying to fucking call you and you turned off your mother fucking phone.
> Carroll: I never turned off my phone.
> Espindola: I couldn't reach you.
> Carroll: I never turned off my phone. My phone was on the whole fucking night.
> …
> Carroll: Ms. Anabel
> Espindola: I couldn't fucking reach you, as soon as you spoke and told me where you were I tried calling you again and I couldn't fucking reach you.
> 15 AA 2935-2936.

At some point in this May 24 meeting, Espindola left the room to go speak with Mr. H. 16 AA 3097. She informed Mr. H that Carroll wanted more money and Mr. H instructed her to give Carroll some money. 16 AA 3100-3101. After Carroll returned from Simone's, he gave the detectives $800.00, which Espindola had provided to him. 14 AA 2713.[12] After Carroll's

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[11] Espindola would later testify Mr. H gave her only $600 to give to Carroll, which she did in fact give to Carroll on the 23rd. 16 AA 3092-3094; 17 AA 3318-3319; 3358-3360.

[12] If Carroll had these amounts of cash on him prior to detectives sending him out on the surveillance operations, Detective McGrath would have noticed because that amount of currency would have made Carroll's wallet much bigger. 15 AA 2759-2761. Espindola testified at trial that she thinks she gave Carroll $500.00 on the 24th. 16 AA 3101.

second wiretapped meeting, detectives took Little Lou and then Espindola into custody for the murder of Hadland. 15 AA 2766.

## ARGUMENT

### I

### The District Court Did Not Err in Instructing the Jury on the Evidentiary Standard for Admissibility of Co-Conspirator Statements

NRS 51.035(3)(e) excludes from the definition of hearsay a statement offered against a party that is a "statement by a coconspirator of [the] party during the course and in furtherance of the conspiracy." In McDowell v. State, 103 Nev. 527, 746 P.2d 149 (1987), the Court addressed the evidentiary standard for determining admissibility of co-conspirator statements. The Court acknowledged the U.S. Supreme Court's approach to interpreting the federal analog to NRS 51.035(3)(e), Federal Rule of Evidence (FRE) 801(d)(2)(E), which requires a trial court to use a preponderance of the evidence standard in determining the admissibility of co-conspirator statements. Id. at 103 Nev. at 529, 746 P.2d at 150 (citing Bourjaily v. U.S., 483 U.S. 171, 107 S.Ct. 2775 (1987)). In other words, the federal court must determine by a preponderance of evidence that there was a conspiracy involving the declarant and the defendant and the statement was made in the course of and in furtherance of the conspiracy. The Court noted Bourjaily's approach derived from statutory interpretation, not constitutional imperatives, rejected the Bourjaily standard, and held that in Nevada courts, the preliminary question of the existence of a conspiracy need only be established by "slight evidence." Id.

Mr. H's first ground of appeal argues the district court abused its discretion in providing the following jury instruction regarding the circumstances under which the statements of a co-conspirator become admissible and may be attributed to a defendant:

> 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 have been 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 in furtherance of some object or purpose of the conspiracy…
> 24 AA 4487 (Jury Instruction #40 (JI 40)).

Mr. H contends JI 40's language was confusing and created the risk that his jury would confuse the standard for admissibility of co-conspirator statements with the reasonable doubt proof standard for convicting him of conspiracy. Appellant's Opening Brief (App. Op. Br.) 37. Mr. H also asserted this argument in his Motion for Judgment of Acquittal. 24 AA 4521-4522. The district court rejected the argument based on the following analysis:

> Defendant Hidalgo, Jr. asserts that the language of "slight evidence of a conspiracy" reduced the burden of proof of the State in jury instruction number 40. Jury Instruction number 40 was a correct statement of the law as it relates to how the jury is to assess statements of co-conspirators during the course and in furtherance of the crime. The instruction does not in any manner relate to the burden of proof on the underlying charge. In contradistinction, jury instructions number 16, 23, 24, 26, 28, 29, 30, 35, 36, and 37 each reference the State's burden of proof of beyond a reasonable doubt. Additionally, during deliberations, the Court responded to a question from the jury which reiterated the burden of proof. Not only are jurors presumed to follow the instructions on the law, Richardson v. Marsh, 481 U.S. 200, 107 S.Ct. 1702 (1987), but it seems inconceivable that the jury could have misunderstood those six (6) words in instruction 40 considering that the jury was instructed more than ten (10) times on the State's burden of proof.
> 25 AA 4663.

The district court did not abuse its discretion or commit a legal error by giving JI 40. The applicable caselaw overwhelmingly demonstrates there is no "reasonable likelihood" the jury used the standard for admissibility of co-conspirator statements to convict Mr. H of conspiracy by less than proof beyond a reasonable doubt. Further, even assuming JI 40 should not have been given, as Mr. H's attorney has already noted on the record, any confusion inured to Mr. H's benefit and was thus harmless. Finally, in Nevada, it is an unresolved issue of statutory interpretation whether a jury may be charged with also making an admissibility determination regarding co-conspirator statements, thus the district court did not abuse its discretion or commit a legal error. As the Court will see from the analysis below, there are two different approaches to this issue as exemplified by the federal and California approaches. The State takes no position about which approach should be adopted prospectively by this Court, but notes clearly that giving of the instruction in this case was not an incorrect statement of the law and did not prejudice Mr. H.

### A. Appellate Standard for Reviewing Trial Court Jury Instructions

Jury instructions must be "consistent with existing law." Beattie v. Thomas, 99 Nev. 579, 583, 668 P.2d 268, 271 (1983). In Berry v. State, 212 P.3d 1085 (2009), this Court clearly restated the standard of review for addressing a defendant's claim that jury instructions were legally erroneous:

> This court generally reviews a district court's decision settling jury instructions for an abuse of discretion or judicial error. Brooks v. State, 124 Nev. ----, ----, 180 P.3d 657, 658-59 (2008). However, whether the jury instruction was an accurate statement of the law is a legal question subject to de novo review. Nay v. State, 123 Nev. 326, 330, 167 P.3d 430, 433 (2007). We review the legal accuracy of the court's instructions de novo.
> Id. at 1091.

If a jury instruction was legally erroneous, then this Court "evaluates [the claim] using a harmless error standard of review[, which] requires that '[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.'" Barnier v. State, 119 Nev. 129, 132, 67 P.3d 320, 322 (2003). "It is well established that the instruction 'may not be judged in artificial isolation,' but must be considered in the context of the instructions as a whole and the trial record." Estelle v. McGuire, 502 U.S. 62, 112 S.Ct. 475 (1991) (quoting Cupp v. Naughten, 414 U.S. 141, 147, 94 S.Ct. 396, 400-401 (1973)). Mr. H must be able to demonstrate there is a "reasonable likelihood" that the jury would have concluded JI 40, read in the context of other instructions, authorized it to convict him based on slight evidence that a conspiracy existed. See Boyde v. California, 494 U.S. 370, 380, 110 S.Ct. 1190, 1198 (1990); see also Collman v. State, 116 Nev. 687, 722 n.16, 7 P.3d 426, 448 n.16 (2000).

Mr. H contends structural error applies in the instant case. The recognized categories of structural error, however, are extremely limited. Even serious trial errors constituting constitutional violations will rarely amount to structural error. See Arizona v. Fulminante, 499 U.S. 279, 309-310, 111 S.Ct. 1246, 1265 (1991) (listing examples of structural errors); see also Dowling v. United States, 493 U.S. 342, 352, 110 S.Ct. 668, 674 (1990) (category of errors affecting fundamental fairness extremely narrow); Cortinas v. State, 195 P.3d 315,

323 (2008), cert. denied, 130 S.Ct. 416 (2009) (noting "the Supreme Court has found structural error in the context of jury instructions only once."). Structural errors "affect the entire conduct of the trial from beginning to end and deprive the defendant of basic protections, without which a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence." U.S. v. Pearson, 203 F.3d 1243, 1260 (10th Cir. 2000) (internal quotation marks and alterations omitted). In the context of jury instructions, an error is structural if it, for example, "consists of a misdescription of the burden of proof, which vitiates all the jury's findings." Sullivan v. Louisiana, 508 U.S. at 281, 113 S.Ct. 2078.

The inapplicability of a structural error analysis is patent already from the numerous cases cited below which hold that instructing a jury on the admissibility standard for co-conspirator statements is not prejudicial; those courts' application of a harmless error analysis belies Mr. H's claim of structural error. See Pungitore, Chaney, Noll, Monaco, Nickerson, Chindawongse, and Lutz, infra. Mr. H has failed to allege any misinstruction on the State's burden of proof, but alleges only an arguable inference of confusion among the instructions, which has never been held to constitute a structural error. His citation to Sullivan v. Louisiana is unavailing. That decision reversed a defendant's conviction because the trial court's reasonable doubt instruction equated reasonable doubt with "grave uncertainty" and "actual substantial doubt," which was identical to language previously found unconstitutional in Cage v. Louisiana, 498 U.S. 39, 41, 111 S.Ct. 328 (1990) (per curiam), overruled in part on other grounds by Estelle, 502 U.S. at 72 n. 4, 112 S.Ct. at 482 n.4. Sullivan found the existence of a structural error because, having never been properly instructed on reasonable doubt, the jury did not find the defendant guilty by proof beyond a reasonable doubt, thus a harmless error analysis was impossible. Sullivan, 508 U.S. at 281, 113 S.Ct. at 2082. Mr. H cannot demonstrate the alleged error "vitiates all the jury's findings" because his jury was properly instructed on the reasonable doubt standard of proof and its duty to apply that standard to all the elements and charges. Cf. Sullivan, 508 U.S. at

281, 113 S.Ct. 2082.[13] Unlike Sullivan, in Mr. H's case, a reviewing court can determine whether the alleged instructional error played a part in the jury's guilt determination. Further, Mr. H cannot rely usefully on the Ninth Circuit's holding in Powell v. Galaza, 328 F.3d 558 (9th Cir. 2003), where the trial court actually instructed the jury that the state had met its burden on the only disputed element in the case. Id. at 566. Powell might be a useful authority had the district court instructed Mr. H's jury that the State had met its burden to prove Mr. H conspired to harm Hadland, had committed second degree murder, and his testimony failed to negate any offense elements. Indeed, when the Ninth Circuit has had the occasion to address a jury instruction challenge very similar to—but much more grave—than Mr. H's challenge, it has not applied structural error review. See U.S. v. Lugpong, 933 F.2d 1017 at 4 (9th Cir. 1991);[14] see also Garcia v. Evans, 2010 WL 2219177 at 22 (E.D. Cal. 2010) (Powell structural error analysis not apply where alleged error consisted of trial court instructing that defendant was an accomplice as a matter of law); U.S. v. Brasseaux, 509 F.2d 157 (5th Cir. 1975) (instruction to jury that "[o]nce the existence of the agreement or common scheme or conspiracy is shown, however, 'slight evidence' is all that is required to connect a particular defendant with the conspiracy," not plain error because "[a]t several other places in the charge the judge reiterated that each element of the offense must be proved beyond a reasonable doubt."); U.S. v. Walden, 578 F.2d 966, 971 (3rd Cir. 1978)

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[13] ("A reviewing court may thus be able to conclude that the presumption played no significant role in the finding of guilt beyond a reasonable doubt. Yates, supra, 500 U.S., at 402-406, 111 S.Ct., at 1892-1894. But 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, which vitiates all the jury's findings. A reviewing court can only engage in pure speculation-its view of what a reasonable jury would have done. And when it does that, 'the wrong entity judge[s] the defendant guilty.'").

[14] ("The district court erred, however, when it attempted to explain to the jury that a defendant need only have played a minor or 'slight' role in the conspiracy, instructing the jury that it could find a connection based on slight evidence. This instruction was incorrect. We believe, however, that the several accurate statements of the law regarding membership in a conspiracy that preceded the erroneous instruction on 'connection' adequately apprised the jury of the correct standard. The jury was told it had to find beyond a reasonable doubt that defendants joined the conspiracy knowing of the unlawful plan and intending to carry it out. Therefore, we hold it is not highly probable that the error affected the result of the trial.") (citation omitted).

(same). Thus, it is clear the instruction at issue here is subject to harmless, not structural, error review.

**B. Giving An Admissibility Determination Instruction Was Not Error**

As Mr. H acknowledges, it is unsettled law in Nevada whether a jury must be instructed to make an admissibility determination prior to considering the statements of a defendant's co-conspirators. App. Op. Br. 36. This Court has never interpreted NRS 51.035(3)(e) (or NRS 47.060, 070) as foreclosing a jury determination of the admissibility of co-conspirator statements. Nor has it opined that such instructions must be given as in California. Given this Court's holding in McDowell and the cases dealing with the need to instruct the jury on accomplice corroboration testimony, it was reasonable for the district court to conclude a similar instruction was necessary when dealing with co-conspirator statements.

As noted above, under FRE 801(d)(2)(E), a judge alone makes the determination on the admissibility of co-conspirator statements. Once admitted they can be considered as substantive evidence against any member of the conspiracy. But there is law to the contrary, namely in California, where the judge only makes a preliminary ruling and the jury makes the final determination on the use of a co-conspirator statement. California permits its trial courts to submit the admissibility determination to the jury. CALJIC 6.24 (Fall 2008), governing "Determination of Admissibility of Co-Conspirator's Statements" provides the following model instruction:

> Evidence of a statement made by one alleged conspirator other than at this trial shall not be considered by you as against another alleged conspirator unless you determine by a preponderance of the evidence:
>
> 1. That from other independent evidence that at the time the statement was made a conspiracy to commit a crime existed;
> 2. That the statement was made while the person making the statement was participating in the conspiracy;
> 3. That the statement was made in furtherance of the objective of the conspiracy, and was made before or during the time when the party against whom it was offered was participating in the conspiracy...

California appellate courts have expressly rejected defendants' claims that CALJIC 6.24 confuses the jury and lessens the State's burden to prove guilt beyond a reasonable doubt.

People v. Tran, 2006 WL 2790460 at 8-10 (Cal. Ct. App. 2006), cert. denied, 551 U.S. 1117, 127 S.Ct. 2940 (2007) (CALJIC 6.24 did not lessen State's burden of proof in light of trial court's instructions that: district attorney had the burden of proving Tran guilty beyond a reasonable doubt, and "each fact which is essential to complete a set of circumstances necessary to establish the defendant's guilt must be proved beyond a reasonable doubt.");[15] People v. Berumen, 2003 WL 21464625 at 7 (Cal. Ct. App. 2003). People v. Jourdain, 111 Cal.App.3d 396, 404, 168 Cal.Rptr. 702 (Cal Ct. App. 1980). Cf. also, U.S. v. Garcia, 77 F.3d 471 at 12 (4th Cir. 1996), cert denied, 519 U.S. 846, 117 S.Ct. 133 (1996) (no reasonable likelihood of confusion where trial court instructed jury it "may find a particular defendant guilty of participation in [a] conspiracy, even if the evidence of his membership in the conspiracy is slight."). Thus, California's approach to the identical issue provides abundant empirical evidence that providing the admissibility standard to a jury does not confuse it into convicting a defendant by proof less than beyond a reasonable doubt.

In numerous related contexts also, courts have held the inclusion of a "slight evidence" standard in a jury instruction does not confuse a jury into convicting a defendant by less than proof beyond a reasonable doubt. For instance, an accomplice corroboration jury instruction that applies only a "slight evidence" requirement for corroboration does not risk a jury convicting the defendant by less than proof beyond a reasonable doubt. People v. Atencio, 2010 WL 1820185 at 15 (Cal. Ct. App. 2010). Similarly, a jury instruction requiring "slight" evidence of the corpus delicti independent of the defendant's own statements does not lessen the State's burden or encourage a jury to convict the defendant on less than proof beyond a reasonable doubt. People v. Steffan, 2011 WL 150229 at 3-4 (Cal. Ct. App. 2011). The same analysis obtains in a number of analogous contexts. See People v. Surico, 2010 WL 4296623 at 7-8 (Cal. Ct. App. 2010); People v. Lilly, 2010 WL 3279780 at 9 (Cal. Ct. App. 2010); People v. Hall, 2009 WL 3110938 at 17-19 (Cal. Ct. App. 2009)

[15] Like Mr. H, the Tran defendant unsuccessfully attempted to invoke Sullivan v. Louisiana's structural error analysis.

Thus, these numerous and closely analogous practices demonstrate there was no confusion created by the district court giving JI 40.

Mr. H believes any approach other than the federal approach is incorrect and a violation of due process rights. He presents no caselaw supporting that proposition; nor could he because none exists. Further, he ignores McDowell's holding that the evidentiary standard at issue is "merely the result of statutory interpretation," not constitutional due process principles. McDowell, 103 Nev. at 529, 746 P.2d at 150. Just as the Court elected not to adopt Bourjaily's preponderance standard, it might elect not to adopt the federal standard that admissibility determinations are only for the court. Further, just as in Rowland v. State, 118 Nev. 31, 41-42, 39 P.3d 114, 120-121 (2002) and its preceding lines of cases, where the Court elected to place the admissibility of accomplice statements in the hands of the jury, the Court might also decide to require an additional jury determination of admissibility of co-conspirator statements.

Moreover, that the federal approach holds the admissibility determination is solely an issue for the trial judge, does not mean the district court in this case was precluded from instructing the jury on the issue. As explained above, California, which incorporates Bourjaily's preponderance standard, permits the admissibility determination to be made by the jury. California appellate courts routinely address whether trial courts commit an error in failing to use CALJIC 6.24 to instruct the jury to make a threshold admissibility determination for co-conspirator statements. See, e.g., People v. Prieto, 30 Cal.4th 226, 66 P.3d 1123 (Cal. 2003) (no prejudice where trial court failed to instruct jury with CALJIC 6.24); People v. Herrera, 83 Cal.App.4th 46, 46–63, 98 Cal.Rptr.2d 911 (Cal. Ct. App. 2000) ("prima facie" evidence of the conspiracy, in the context of Evidence Code § 1223, means that the jury cannot consider the statement in issue unless it finds the preliminary facts to be true from a preponderance of the evidence); People v. Smith, 187 Cal.App.3d 666, 679–680, 231 Cal.Rptr. 897, 905 (Cal. Ct. App. 1986) (error not to give CALJIC 6.24 in a murder-robbery case, where the jury had to consider a witness's hearsay statements tending to show defendant's knowledge of the robbery plan); People v. Jourdain, 111 Cal.App.3d 396, 168

Cal.Rptr. 702 (Cal. Ct. App. 1980); Royal v. Kernan, 2009 WL 1034502 at 15-18 (E.D. Cal. 2009) (noting question is one of state evidentiary law and observing trial court has discretion whether to instruct jury with CALJIC 6.24). California's approach demonstrates there is no immutable legal principle requiring that the admissibility determination never be submitted to the jury.

Mr. H argues the admissibility of co-conspirator statements does not constitute a question properly submitted to the jury under NRS 47.070. He claims the admissibility of co-conspirator evidence is always a matter for preliminary judicial determination under NRS 47.060 *only*. App. Op. Br. 39 (first full paragraph). There is some support for this view in McDowell, which quotes in a footnote the federal analog to NRS 47.060, FRE 104(a). McDowell, 103 Nev. at 529, 746 P.2d at 150. Nevertheless, McDowell's mention of FRE 104(a) is not dispositive of the question in light of the Court's prior guidance on similar evidentiary issues, particularly the accomplice corroboration requirement where the Court has long required, where the evidence is in dispute, the sufficiency of non-accomplice corroborating evidence to be submitted to the jury. See, e.g., State v. Sheeley, 63 Nev. 88, 95-97, 162 P.2d 96, 99 (1945); Cutler v. State, 93 Nev. 329, 334, 566 P.2d 809, 812 (1977). Accomplice corroboration also is not an issue of conditional relevance under NRS 47.070, but, when disputed, must be submitted to the jury for resolution; indeed, the inquiry is the same: the jury must find slight evidence inculpating the defendant, independently of the accomplice testimony. State v. Williams, 35 Nev. 276, 129 P. 317, 318 (1913); Servin v. State, 117 Nev. 775, 796-797, 32 P.3d 1277, 1292 (2001) (Leavitt, J., concurring) (quoting State v. Hilbish, 59 Nev. 469, 479, 97 P.2d 435, 439 (1940)). Like the co-conspirator hearsay exception, the accomplice corroboration rule is a question of competence and reliability, not relevance. Thus, there is no reason the competence and reliability of co-conspirator hearsay statements cannot also be submitted to the jury. Again, such a process would only benefit a defendant by requiring a second admissibility determination prior to turning to the ultimate issue of whether all the elements and charges have been proved beyond a reasonable doubt.

In this case, as in other cases, the State requested the instruction believing it was required and to forestall arguments of error if it was not given. 23 AA 4212-4213; 24 AA 4531-4532. Indeed, the record demonstrates the State defended JI 40 on the basis that it was a correct statement of the law and inured to Mr. H's benefit. Id. It is the State's belief that had the Court *not* given JI 40, Mr. H would now be arguing he was entitled to a jury determination of the admissibility of the co-conspirator statements because it goes to an ultimate issue, his membership in the conspiracy. Because the evidentiary standards and jury instructions governing admission of co-conspirator statements are a matter of state statutory law, had the district court not included the disputed language in JI 40, Mr. H would now be arguing he was entitled to have the jury also make an admissibility determination. Cf., e.g., Prieto, supra; People v. Royal, 2005 WL 44401 at 9-11 (Cal. Ct. App. 2005) (any error in not giving CALJIC 6.24 instructing jury to make admissibility determination was harmless); People v. Rossum, 2005 WL 1385312 at 7-9 (Cal. Ct. App. 2005) (rejecting claim that trial court erred by electing not to instruct jury with CALJIC 6.24); Galache v. Kenan, 2008 WL 3833411 at 5 (C.D. Cal. 2008) ("Petitioner's second and final claim is that she was denied due process by the trial court's failure to instruct the jury with CALJIC Nos. 6.21 and 6.24).

Moreover, Mr. H may allege on post-conviction that he received ineffective assistance of counsel because his attorneys did not insist on the evidentiary issue being submitted to the jury. Cf., e.g., King v. Borg, 21 F.3d 1113 at 8-9 (9th Cir. 1994) (denying relief based on post-conviction claim that attorney was ineffective in failing to request CALJIC 6.24 instructing jury to make co-conspirator admissibility determination). Thus, the district court clearly did not abuse its discretion or commit a legal error by mentioning in JI 40 the standard for admissibility of co-conspirator statements.

Notwithstanding Mr. H's copious citations to the nonbinding practice in federal courts, the Court is free to now permit or prohibit Nevada's district courts from instructing their juries to make the admissibility determination regarding co-conspirator statements. The law would probably benefit from the Court's guidance and Mr. H's case does present the question; that would not demonstrate, however, that the district court committed an error.

And, in any event, assuming the Court finds JI 40 is not the best practice, it was clearly harmless in this case and in fact benefited Mr. H.[16]

### C. Assuming the District Court Erred in Giving JI 40, Any Error was Harmless Beyond a Reasonable Doubt

Assuming the district court erred by including in JI 40 the slight evidence admissibility standard for co-conspirator statements, any error was harmless. Mr. H cannot demonstrate a "reasonable likelihood" that the jury would have concluded JI 40, read in the context of the other instructions, authorized it to convict Mr. H based on slight evidence of his involvement in a conspiracy. See Boyde, Collman, supra. Mr. H has already admitted on the record that mention of the slight evidence admissibility standard actually benefited him:

> Mr. Gentile: But this is conspiracy law in an evidentiary sense. This is in the [*sic*] conspiracy law in a liability sense. And, frankly, I don't see any need for this jury to – I mean, it really – it really – how do I put it? *It really disfavors the defendant more not to have the instruction*. We're basically – you have basically ruled that they can consider this evidence. It is true that you make the finding in terms of admissibility, okay.

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[16] In the midst of arguing this first ground of appeal, Mr. H secretes in a footnote a completely unrelated "independent additional ground for reversal" alleging the district court erred by not providing a verdict form listing separate, alternate entries for Battery Causing Substantial Bodily Harm and Battery with a Deadly Weapon. App. Op. Br. 41 n.24. This purported ground of appeal is inadequately presented and thus waived. See, e.g., Nat'l Foreign Trade Council v. Natsios, 181 F.3d 38, 60 n.17 (1st Cir. 1999) ("We have repeatedly held that arguments raised only in a footnote or in a perfunctory manner are waived."). Further, Mr. H's claim that he ever raised this issue below is pure fiction. The district court never acknowledged the propriety of a verdict form separating the two battery offenses. Such an acknowledgement does not appear in the portion of the record Mr. H cites to. In fact, the court was actually describing as "fine" a special verdict form providing separate entries for the conspiracies to murder Hadland and Zone/Taoipu. 5 AA 998-1000. Mr. Gentile's objection was to the Information, which he viewed as "duplicitous [*sic*] [in] that it had two conspiracies jammed into one." 5 AA 999. With the exception of the proposed verdict form, the record is entirely devoid of Mr. H objecting to the court's selected verdict forms. His attorneys cannot stand mute during settling of verdict forms and then for the first time, *at sentencing* when the jury has already been discharged, argue entitlement to a particular verdict form. Brascia v. Johnson, 105 Nev. 592, 596 n.2, 781 P.2d 765, 786 n.2 (1989) (post-discharge challenge to verdict form does not preserve error). Further, merely submitting a proposed, alternative verdict form fails to preserve an issue for appeal. Eberhard Mfg. Co. v. Baldwin, 97 Nev. 271, 273 628 P.2d 681, 682 (1981) (efficient administration of justice requires that submission of alternative verdict form coupled with failure to object to verdict form prior to jury discharge does not preserve issue for appeal). Although waived and inadequately presented, if the Court believes this footnoted ground of appeal warrants a response, the State requests an opportunity to provide a supplemental brief on the issue.

> [Bourjaily] and the cases in Nevada that follow [Bourjaily] makes [*sic*] that clear. And so I really don't think that this – at this point in time it's a jury issue anymore. The jury can consider that evidence period.
> 23 AA 4212 (emphasis added).

Mr. Gentile's analysis is strongly supported by the federal caselaw addressing instances where a jury is erroneously instructed on the federal preponderance standard for admissibility of co-conspirator statements. Indeed, the error always inures to a defendant's benefit, thus it does not warrant reversal; in discussing Bourjaily, the Third Circuit has explained:

> [W]e have never "condemned" the practice of giving jury instructions on the admissibility of co-conspirator's statements against individual defendants. In Continental Group, we suggested in dicta that jury instructions concerning the factual foundation required for application of the co-conspirator exception to the hearsay rule are best omitted, as they give the jury the "opportunity to second-guess the court's decision to admit coconspirator declarations." 603 F.2d at 459. We observed, however, that *such instructions could not give rise to reversible error because, if anything, they inure to the benefit of the defendant*. Id.
> U.S. v. Pungitore, 910 F.2d 1084, 1147 (3d Cir. 1990) (emphasis added), cert denied, 500 U.S. 915, 111 S.Ct. 2010 (1991).

Likewise, the Fifth Circuit has noted the absence of any prejudice to a defendant:

> The judge [] erred by permitting the jury to consider the admissibility question. However, as we noted in United States v. Noll, 600 F.2d 1123 (5th Cir. 1979), when a jury is instructed about the admissibility of a co-conspirator's statements, *the government is essentially "required to demonstrate twice the admissibility of the (evidence), once to the court ... and once to the jury ...."* Id. at 1128. The appellant, having been given two bites at the apple, was afforded greater protection than required under James and therefore was not prejudiced by the instruction.
> U.S. v. Chaney, 662 F.2d 1148, 1154 (5th Cir. 1981) (emphasis added).

The 11th, 6th, 4th, and 9th Circuits have long concurred in this view. See U.S. v. Monaco, 702 F.2d 860, 878 (11th Cir. 1983) (submission to jury of co-conspirator admissibility determination did not prejudice defendant because "by giving [the] instruction, the judge merely gave the jury the opportunity to overturn his own ruling"); U.S. v. Nickerson, 606 F.2d 156, 158 (6th Cir. 1979) (holding that identical error did not prejudice defendant because it merely gave the defendant "the benefit of the jury's consideration of admissibility" or a "second bite at the apple"), cert. denied, 444 U.S. 994, 100 S.Ct. 528 (1979); U.S. v. Chindawongse, 771 F.2d 840, 845 n.4 (4th Cir. 1985) (quoting U.S. v. Spoone, 741 F.2d 680, 686 n.1 (4th Cir. 1984)), cert. denied, 474 U.S. 1085, 106 S.Ct. 859

(1985); U.S. v. Lutz, 621 F.2d 940, 946 n.2 (9th Cir. 1980), cert. denied, 449 U.S. 859, 101 S.Ct. 160 (1980), abrogated on other grounds by Bourjaily, supra, (submitting co-conspirator statement admissibility determination to the jury "was not reversible error [] since it simply afforded the defendants unnecessary double protection: hearings before both the court and the jury.").

Thus, by Mr. H's own admission and the great weight of directly applicable authority, JI 40's inclusion of the "slight evidence" admissibility standard for co-conspirator statements was utterly harmless and actually benefited Mr. H. Finally, as the district court's order pointed out, because Mr. H's jury was repeatedly instructed and reminded during deliberations of the State's burden to prove every element and charge beyond a reasonable doubt, JI 40 did not create a reasonable likelihood of an erroneous conviction, therefore the only error would be harmless beyond a reasonable doubt. "[N]ot every ambiguity, inconsistency, or deficiency in a jury instruction rises to the level of a due process violation." Middleton v. McNeil, 541 U.S. 433, 436, 124 S.Ct. 1830, 1832 (2004).

## II
## THE STATE PRESENTED SUFFICIENT CORROBORATING EVIDENCE TO PERMIT CONVICTION OF MR. H BASED ON ACCOMPLICE TESTIMONY

Mr. H's second ground of appeal asserts the State failed to present sufficient evidence to corroborate the testimony of Zone and Espindola. NRS 175.291 provides:

> (1) A conviction shall not be had on the testimony of an accomplice unless the accomplice is corroborated by other evidence which in itself, and without the 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.
> (2) An accomplice is hereby defined as one who is liable to prosecution, for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given.

The State submits Zone was not an accomplice and his testimony was independent corroboration of Espindola's testimony. Even if both Zone and Espindola were considered accomplices, there was still sufficient corroboration. One fact alone establishes Mr. H was a participant in the conspiracy to murder Hadland, Mr. H's own admission he directed Espindola to pay Counts $5,000.00 for murdering Hadland.

### A. Standard of Review for Accomplice Corroboration – Sufficiency of the Evidence Tending to Connect the Defendant with the Charged Offenses

Mr. H correctly notes that "[n]o Nevada case succinctly articulates a [discrete] standard of review[,]" for a jury's determination that accomplice testimony was sufficiently corroborated. App. Op. Br. 43. It seems clear that the standard to be applied is some hybrid of NRS 175.291's substantive legal standard and the Court's standard for reviewing the sufficiency of the evidence on appeal. Origel-Candido v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998); see also Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789 (1979). The inquiry differs, however, from reviewing sufficiency of the evidence to convict because it "does not require [the Court] to find [evidence] establish[ing the] appellant's guilt or directly link[ing] him to the commission of the crime. It is only necessary that [the Court] find some evidence that tends to connect [the] appellant to the offense." Perry v. State, 2011 WL 286132 at 10 (Tex. Crim. App. 2011). Texas courts, which interpret and apply a rule virtually identical to Nevada's,[17] have thoughtfully considered the contours of the applicable standard of review, which the State asserts this Court should adopt.

> [W]e apply the well-settled standard of review, which requires that [we] evaluate the sufficiency of corroboration evidence under the accomplice-witness rule by first eliminating testimony of the accomplice from consideration and then examining the remainder of the record for non-accomplice witness evidence that "tends to connect the accused with the commission of the crime."…In applying this standard, we view the evidence in the light that most favors the jury's verdict. We consider the combined weight of the non-accomplice evidence, even if that evidence is entirely circumstantial. Corroborating evidence is "incriminating" evidence that does not come from an accomplice witness. Corroborating evidence that shows only that the offense was committed is not sufficient. Yet, the corroborating, i.e., non-accomplice, evidence need not be sufficient, by itself, to establish that the accused is guilty beyond a reasonable doubt. Likewise, the corroborating evidence need not directly link the accused to the offense. Circumstances that appear insignificant may constitute sufficient evidence of corroboration. Likewise, though "mere presence" is insufficient corroboration, evidence that the accused was at or near the scene when or about when it was committed may sufficiently tend to connect the accused to the crime, provided the evidence is "coupled with other suspicious circumstances." Because each case must rest on its own facts, corroboration does not require a set quantum of proof. The single requirement is that "some" non-accomplice evidence, on which rational jurors could properly rely tends to connect the accused to the commission of the offense.

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[17] Tex. Code Crim. Proc. Ann. art. 38.14 (Vernon 2005).

> Cooley v. State, 2009 WL 566466 at 6-7 (Tex. Crim. App. 2009) (citations omitted).[18]

Thus, Mr. H must demonstrate that—after setting aside Zone and Espindola's testimony—a rational jury could not have viewed any of the remaining evidence as tending to connect Mr. H with the conspiracy and Hadland's murder.

The analysis set forth above is mirrored by language found in Nevada cases, though no single case incorporates all of these elements. See Heglemeier v. State, 111 Nev. 1244, 903 P.2d 799 (1995); Cheatham v. State, 104 Nev. 500, 505, 761 P.2d 419, 423 (1988); Howard v. State, 729 P.2d 1341, 102 Nev. 572 (1986), cert. denied, 484 U.S. 872, 108 S.Ct. 203 (1986); Fish v. State, 92 Nev. 272, 277, 549 P.2d 338, 341-342 (1976); Eckert v. State, 91 Nev. 183, 533 P.2d 468 (1975). The appellate standard of review for sufficiency of the evidence is "whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Origel-Candido v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998); see also Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789 (1979).[19]

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[18] See also People v. Abilez, 41 Cal.4th 472, 505, 61 Cal.Rptr.3d 526, 161 P.3d 58 (Cal. 2007), cert. denied, 552 U.S. 1067, 128 S.Ct. 720 (2007) (trier of fact's determination on the issue of corroboration is binding on review unless the corroborating evidence should not have been admitted or does not reasonably tend to connect the defendant with the commission of the crime) (citation omitted).

[19] Mr. H attempts to invoke federal due process principles as somehow prohibiting the use of accomplice testimony to convict him. App. Op. Br. 43 n.25 "[T]he United States Supreme Court has never recognized an independent constitutional requirement that the testimony of an accomplice-witness must be corroborated." Cummings v. Sirmons, 506 F.3d 1211, 1237-1238 (10th Cir. 2007). There is only a very narrow category of due process violations where the accomplices testimony is "incredible or insubstantial on its face" Laboa v. Calderon, 224 F.3d 972, 979 (9th Cir. 2000). The standard for proving the accomplice's testimony was "incredible or insubstantial on its face" is "extraordinarily stringent," involving problems such as physical impossibility, and is not satisfied by merely showing the witness had credibility problems. U.S. v. Jenkins-Watts, 574 F.3d 950, 963 (8th Cir. 2009) ("Credibility challenges are for the jury, and '[t]he test for rejecting evidence as incredible is extraordinarily stringent and is often said to bar reliance only on testimony asserting facts that are physically impossible.'"). Moreover, in making the "incredible or insubstantial determination" federal courts "draw[] all credibility determinations in favor of the verdict, even in instances where the conviction relies solely on the uncorroborated testimony of a confidential informant." U.S. v. Ciocca, 106 F.3d 1079, 1084 (1st Cir. 1997). The error Mr. H alleges, even if proved true, does not demonstrate a due process violation under this exceptionally narrow federal standard. His resort to Hicks v. Oklahoma, 447 U.S. 343, 100 S.Ct. 2227 (1980), proves nothing because that case narrowly held a defendant has a liberty interest in his state statutory right to have a jury determine his sentence. Id. at 346.

**B. Zone was Not an Accomplice**

First, a jury is presumed to have followed its instructions. Summers v. State, 122 Nev. 1326, 1333, 148 P.3d 778, 783 (2006). Thus, to convict Mr. H, the jury had to find either Zone was not an accomplice, or there was sufficient independent corroboration of Zone and Espindola's testimony. Assuming the State had the burden of proving Zone was not an accomplice below, a fact the State does not concede, that standard was met in this case.[20]

There was more than sufficient evidence for the jury to rationally conclude Zone was not an accomplice. Mr. H simply assumes Zone was an accomplice for evidentiary purposes based on speculation that "[a]lthough 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." App. Op. Br. 44 n.26. It is not clear what part of the record Mr. H examined because he cites to nothing. In fact, the record (and Mr. H's efforts in cross-examining Zone) clearly demonstrates a rational jury could conclude Zone was not an accomplice. All of the evidence demonstrated Zone was merely present for the murder and subsequent concealment efforts. First, Zone received no money as a result of Hadland's murder in contrast to Carroll and Counts. Second, Zone testified that if he had known Carroll was taking them out to Lake Mead to murder Hadland, he would not have gone along. 14 AA 2575-2576. On cross-examination, Zone testified that he: (1) was totally surprised when Carroll stopped to pick up Counts; (2) assumed Counts was merely a new person who would be handing out flyers; and (3) "had no idea [Counts] was going to shoot somebody[.]" 14 AA 2572. If the jury believed

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[20] The majority of States actually place the burden on the defendant to demonstrate by a preponderance of the evidence that a person was an accomplice. See People v. Tewksbury, 15 Cal.3d 953, 968-969, 544 P.2d 1335 (Cal. 1976), cert. denied 429 U.S. 805, 97 S.Ct. 38 (1976) (footnotes omitted) (noting "the majority [of states] hold the defendant's burden to be proof by a preponderance," and reasoning: "The degree of proof by which an accused must establish that a witness is an accomplice is the same as in other instances wherein he has the burden of establishing a collateral fact which conditions a challenge to the reliability of incriminating evidence…Certainly if the trier of fact can give full weight to an accomplice's testimony if that testimony is corroborated on meager proof, it likewise should be able to give full weight to that testimony if it appears that the witness is not an accomplice on proof which falls short of the standard of beyond a reasonable doubt."); See also People v. Frye, 18 Cal.4th 894, 967-969 959 P.2d 183 (Cal. 1998), cert. denied 526 U.S. 1023, 119 S.Ct. 1262 (1999), overruled on other grounds by People v. Doolin, 45 Cal.4th 390, 421 n.22 (Cal. 2009).

Zone's testimony, it would be sufficient to demonstrate Zone was "merely present" at the time of the murders and not a member of the conspiracy or participant in the murder. Third, Zone's testimony that he never possessed a gun and refused to participate is, in part, supported by the taped conversations between Carroll, Espindola, and Little Lou. Zone also did not participate in any of the post-murder concealment activities. 14 AA 2563-2564.

Zone was thoroughly cross-examined as to why he: (1) did not warn Hadland that Hadland was going to be shot; (2) did not report the crime after he and the others returned to the Palomino and Counts departed; (3) after the murder, was present when Carroll cleaned the van, changed the van tires, and got a haircut; and (4) failed to encourage Carroll not to destroy evidence of the murder or to report the crime. 14 AA 2526-2541. Zone testified to being in a state of fear and "concerned and worried for [his] own safety" the next day while accompanying Carroll. 14 AA 2547. Zone testified that Crystal Payne, his pregnant girlfriend lived at Carroll's house, and he felt that to report the crime would jeopardize the lives of Payne and Zone's unborn son.14 AA 2528-2529. Moreover, Zone testified to being the subject of intense nonverbal intimidation from Counts, which caused Zone to be more scared than he had ever been in his life. 14 AA 2582; see also 14 AA 2544-2545. Again, these facts, if believed, would be sufficient for a rationale trier of fact to conclude Zone was not liable for prosecution on the charges of conspiracy, battery, or murder and therefore he was not an accomplice.

Little Lou's counsel was able to elicit from Zone testimony that police detectives had threatened to arrest him for conspiracy to commit Hadland's murder if he did not cooperate and show up to testify in Mr. H and the other co-conspirator's trials. 14 AA 2588. Nevertheless, the Court's inquiry is whether the jury had evidence upon which it could rationally conclude Zone was not an accomplice. The inquiry asks not whether the witness was threatened with arrest or prosecution, but whether the person was *liable* to prosecution as an accomplice. The jury could rationally conclude that, despite a threat of prosecution, the Zone was at most an accessory after the fact. "A mere accessory ... is not liable to prosecution for the identical offense, and therefore is not an accomplice." People v. Horton,

11 Cal.4th 1068, 1114, 47 Cal.Rptr.2d 516, 906 P.2d 478 (Cal. 1995)), cert. denied, 519 U.S. 815, 117 S.Ct. 63, 136 L.Ed.2d 25 (1996); see also U.S. v. Vidal, 504 F.3d 1072, 1077 n.8 (9th Cir. 2007) ("'The person is not an accomplice if he participated with the accused only as an accessory after the fact.'") (quoting Charles E. Torcia, WHARTON'S CRIMINAL LAW § 38 (15th ed. 1993)). Because the evidence showed at most that Zone was liable to prosecution as an accessory, the jury was free to rationally conclude that he was not an accomplice and thus required no corroboration.

### C. Setting Aside Zone and Espindola's Testimony Completely, a Rational Jury Could Conclude the Remaining Evidence Tended to Connect Mr. H to Commission of the Conspiracy and Hadland's Murder[21]

The independent evidence tending to connect Mr. H to the conspiracy and Hadland's murder was overwhelming. Although explaining that he acted out of fear rather than a pre-existing plan, Mr. H testified, and admitted in out-of-court statements, to ordering that $5,000.00 be paid to KC Counts in compensation for Counts murdering Hadland. 19 AA 3732:8-12; 3740; 21 AA 4005-4007. For purposes of determining the existence of sufficient corroborating evidence, it is irrelevant that Mr. H offers a self-serving explanation for this highly-inculpatory conduct. His explanations for the conduct do not vitiate the admission as a basis for corroboration; indeed, they are irrelevant because the standard of review requires the Court to resolve disputed evidentiary issues in favor of the jury's verdict. Cooley, Abilez, supra. In itself, payment of the money to Counts "tends to connect" Mr. H to commission of the conspiracy and Hadland's murder, which is all the corroboration required.[22] Mr. H will certainly complain that this evidence at most demonstrated he was an accessory after the

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[21] For the sake of argument, this section assumes the insupportable premise that the jury determined Zone was an accomplice.

[22] Even assuming Mr. H's convenient, self-serving explanation was relevant to the Court's inquiry, the jury was clearly not persuaded that Mr. H feared Carroll or Counts. Mr. H's claimed fear was obviously belied by numerous facts, including: his possession of a concealed carry firearms permit and two firearms including a pistol that could fire an assault rifle type bullet; his possession of a bulletproof vest, the complete live video surveillance over the Palomino premises; the presence and willing assistance of PK Handley, a blackbelt-level jujitsu practitioner on whom Mr. H had relied for personal security in the past; his past experience in law enforcement; and his prior resort to police help when threatened with extortion. 21 AA 4031-4032. His claim of fear was further belied by his testimonial claim that he ordered Espindola to fire Carroll. 21 AA 4034-4038.

fact, and thus does not connect him to the conspiracy, but he will recall that the accomplice corroboration inquiry only asks whether some evidence tends to connect him to the offenses, not that it directly links him to commission of the offenses.

Mr. H's efforts to conceal the conspiracy are also corroborating evidence independent of accomplice testimony. The day after the murder Mr. H met with LVMPD Detectives at the Palomino, but, although having full knowledge of the direct perpetrators' identities, he continued to conceal the crime and his role in it. 19 AA 3570-3572; 21 AA 4009-4010. Additionally, when LVMPD Detective Martin Wildemann inquired about Carroll and specifically requested Carroll's phone number, Mr. H claimed only another employee, Ariel, would be able to provide contact information for Carroll. 19 AA 3570-3572; 21 AA 4042-4045. In fact, the evidence demonstrated Mr H. actually had Carroll's phone contact information written on a memo pinned to a memo board in his Palomino office. 19 AA 3570-3572; 21 AA 4042-4045. Mr. H would actually face this memo board everyday when seated in his office and gave equivocal answers on cross-examination as to whether he was aware of the memo's presence. 21 AA 4045. "Denials, untruths and misleading stories given by persons accused of criminal acts have been found to be suspicious conduct which may tend to connect the accused to the offense." Powell v. State, 1999 WL 966659 at 4 (Tex. Crim. App. 1999) (citations omitted).

In addition, the Palomino's Astro van was used in the commission of the crime. As owner of the Palomino, the fact that Mr. H's vehicle was used is corroboration of his involvement. After Carroll confirmed to Mr. H that Hadland was dead and received $5,000 from Mr. H to pay Counts, Carroll attempted to conceal evidence of the crime by, for instance, destroying and replacing the tires of the Palomino's Astro van. 19 AA 3578-3579. Moreover, a note in Mr. H's handwriting was found at Simone's which states, "Maybe we're under surveils [*sic*], keep your mouth shut!!" 18 AA 3461; 19 AA 3606-3607. "The accused's own statement can corroborate the accomplice witness testimony if the statement tends to connect the accused with the crime." Brogdan, Jr. v. State, 1996 WL 307450 at 3 (Tex. Crim. App. 1996) (citing Romero v. State, 716 S.W.2d 519, 523 (Tex. Crim. App.

1986), cert. denied, 479 U.S. 1070 (1987)). Again, Mr. H has a convenient, self-serving explanation for this piece of highly incriminating evidence: he wrote the note during a meeting with attorney Jerome DePalma in order to remind himself in writing to avoid wiretaps. Again, Mr. H's statements are irrelevant to the Court's inquiry because factual disputes are resolved in favor of the jury's verdict. Cooley, Abilez, supra. Additionally, the jury obviously found this justification utterly implausible; not only did Mr. H inexplicably claim to have lost the other alleged notes he took from the DePalma meeting, but the "surveillance" note was recovered by police inside of Simone's, not in Mr. H's vehicle where he claimed to have left his alleged notes. 21 AA 4039-4041.[23] Moreover, "it is the jury's function, not that of the court, to assess the weight of the evidence and determine the credibility of the witnesses." Origel-Candido, 114 Nev. at 381, 956 P.2d at 1380. When reviewing the sufficiency of the evidence, as noted above, a reviewing court looks at the evidence in the light most favorable to the prosecution. Id. Assuming the jury did not believe Mr. H's explanations, both that disbelief and the evidence tend to connect Mr. H to the conspiracy to murder Hadland and the murder itself.

There is also a small mountain of corroborating evidence consisting of connections between Mr. H's business, the Palomino Club, and every critical stage and significant event from the inception of the conspiracy through Hadland's murder and the resulting

[23] It is axiomatic that efforts to conceal are within the scope and in furtherance of a conspiracy to commit murder or other offenses. Cf., e.g., State v. Savage, 172 N.J. 374, 405, 799 A.2d 477, 496 (N.J. 2002); State v. Robertson, 254 Conn. 739, 747, 760 A.2d 82 (Conn. 2000) ("The actions to conceal and dispose of the murder weapon and to escape detection for the crime reasonably may be construed as part of the original conspiracy to murder the victim and escape detection."); Hadley v. State, 735 S.W.2d 522, 531 (Tex. Crim. App. 1987) (murder co-conspirator's statement while fleeing to escape detection after the murder properly admitted under coconspirator exception to hearsay rule); U.S. v. Payne, 437 F.3d 540, 547 (6th Cir. 2006) ("statements were part of a discussion regarding concealment of an ongoing conspiracy, they were made in furtherance of the conspiracy."); State v. De Righter, 145 Ohio St. 552, 62 N.E.2d 332 (Ohio 1945) (subsequent concealment is within scope of a conspiracy and thus comes within the hearsay exception for admission coconspirator statements); State v. Keeton, 2004 WL 1549421 at 2-3 (Ohio Ct. App. 2004); State v. Garlington, 122 Conn.App. 345, 998 A.2d 1197 (Conn. Ct. App. 2010) (coconspirator's post-murder statements regarding obtaining money for an escape and whether a witness would report him to the police took place during the pendency of a conspiracy to commit murder).

concealment efforts. Mr. H testified that Carroll told him Hadland was "badmouthing" the Palomino. 21 AA 3999-4000.[24] Hadland's live-in girlfriend, Paijik Karlson, testified that after being fired by the Palomino, Hadland appeared "nervous and [not] himself" when discussing the club. 12 AA 2217-2218. At the murder scene, 28 Palomino VIP cards were found in Hadland's bag located on the front passenger seat of the KIA Sportage SUV Hadland had been driving. 12 AA 2258-2259. Non-accomplice testimony established that Mr. H had received prior reports that Hadland was selling Palomino VIP passes to arriving customers in exchange for cash, which deprived the taxicab drivers of bonuses for bringing customers to the club. 20 AA 3787-3788. This practice was creating problems for the Palomino because it upset the cab drivers. 21 AA 3835. This independent evidence tended to demonstrate Mr. H's connection with the crimes as it furnished evidence of a motive.[25]

Thirty-three (33) Palomino Club advertisement cards were found on the shoulder of the road next to Hadland's corpse. 12 AA 2190; 2257-2258; 14 AA 2658. Additionally, forty-two (42) Palomino Club business cards were found in the glove compartment of the white Chevrolet Astro van used by Hadland's murderers. 12 AA 2264.[26] Palomino VIP cards and fliers were found among Counts's possessions after a SWAT team extracted him from the attic of a residence. 14 AA 2692; 2702. Forensic examination found both Counts and Carroll's fingerprints on the VIP cards. 19 AA 3530-3551. Detectives also found $595.00 cash among Counts's possessions. 14 AA 2692-2693; 2700-2701. Forensic examination revealed Carroll's fingerprint was on one of those $100.00 bills. 19 AA 3526-3528. At 12:26

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[24] Mr. H disputed whether Carroll called Espindola as Espindola recalled, but that claim was contradicted by Jerome DePalma's notes, and Mr. H inexplicably failed to retain his own alleged notes from the meeting with DePalma. 21 AA 4039-4040.

[25] "Motive and opportunity evidence is insufficient on its own to corroborate accomplice-witness testimony, but both may be considered in connection with other evidence that tends to connect the accused to the crime." Smith v. State, --- S.W.3d ----, 2011 WL 309654 at 14 (Tex. Crim. App. 2011) (citing Reed v. State, 744 S.W.2d 112 (Tex. Cr. App. 1988)).

[26] Virtually all the phones used by the conspirators were registered to Hidalgo Auto Body Works, which is the name of Mr. H's California-based predecessor to Simone's Auto Plaza, and the Astro van was insured in the name of Simone's. 12 AA 2265; 13 AA 2354-2355.

AM on May 20, 2005, the shooter, Counts, was picked up by Gary McWhorter's taxi at the Palomino immediately after committing the murder, and Counts only had $100.00 bills to pay the cab fare. 13 AA 2459-2465. Finally, like the defendant in Fish v. State, 92 Nev. 272, 549 P.2d 338 (1976), Mr. H's automobile "was used in perpetrating the homicide and [] his accomplices depended upon him for financial support both before and after the killing." Id. at 277, 549 P.2d at 342.

While mere presence during commission of a crime is not per se corroborating, in conjunction with other evidence it helps demonstrate corroboration; "'proof that the accused was at or near the scene of the crime at or about the time of its commission, when coupled with other suspicious circumstances, may tend to connect the accused to the crime so as to furnish sufficient corroboration to support a conviction.'" Smith v. State, --- S.W.3d ----, 2011 WL 309654 at 14 (Tex. Crim. App. 2011) (internal quotation marks omitted) (quoting Richardson v. State, 879 S.W.2d 874, 880 (Tex. Crim. App. 1993)). Cell phone tower information demonstrated that Mr. H was always in the immediate vicinity of the co-conspirators. 19 AA 3596-3600. And Mr. H testified to being at Simone's when Espindola and Little Lou had their wiretapped conversations with Carroll. 21 AA 4057. Henderson Police Department Detective Kenneth Z. Simpson observed Mr. H at Simone's on May 23 and 24, 2005, when Espindola, Carroll, and Little Lou were discussing the murder and how to avoid apprehension. 18 AA 3441-3443. Detective Wildemann observed Mr. H was at Simone's during Carroll's visit on the 24th and did not leave the building while Carroll was meeting with Espindola and Little Lou. 19 AA 3587-3588. And it is undisputed that Mr. H was constantly in Espindola's presence from the inception of the conspiracy through her arrest for Hadland's murder. See generally 21 AA 3958-4075. In a murder prosecution, evidence suggesting a close association among the defendant and the direct perpetrators, when combined with defendant's motive, is sufficient to corroborate testimony of an accomplice. See Fish v. State, 92 Nev. 272, 277, 549 P.2d 338, 341-342 (1976); see also Cheatham v. State, 104 Nev. 500, 505, 761 P.2d 419, 423 (1988).

Finally, while there is sufficient evidence corroborating Zone and Espindola when the Court sets aside both witnesses' testimony *and* out-of-court statements, Espindola's wiretapped admissions are also properly considered corroborating evidence because they are not "testimony," which is all the accomplice corroboration rule requires the jury to set aside. In the context of the accomplice corroboration rule, the notion of "testimony" only encompasses out-of-court statements made under "suspicious circumstances," i.e., circumstances where the accomplice knows, at the time of making the statements, that she could potentially secure leniency or some other benefit at the expense of the defendant. As the California Supreme Court has noted:

> "[T]estimony"…includes all oral statements made by an accomplice or coconspirator under oath in a court proceeding and all out-of-court statements of accomplices and coconspirators used as substantive evidence of guilt which are made under suspect circumstances. The most obvious suspect circumstances occur when the accomplice has been arrested or is questioned by the police. On the other hand, when the out-of-court statements are not given under suspect circumstances, those statements do not qualify as "testimony" and hence need not be corroborated.
> People v. Williams, 16 Cal.4th 153, 245, 66 Cal.Rptr.2d 123 (Cal. 1997), cert. denied, 522 U.S. 1150, 118 S.Ct. 1169 (1998) (citations and internal quotation marks omitted).

See also People v. Carrington, 47 Cal.4th 145, 190, 211 P.3d 617, 654 (Cal. 2009) ("'testimony' includes an accomplice's out-of-court statements made under questioning by police or under other suspect circumstances."); People v. Leon, 2008 WL 5352935 at 4-6 (Cal. Ct. App. 2008).

An accomplice's wiretapped statements are corroborating as long as the wiretapped statements appear incriminating in themselves and do not require testimony from the accomplice in order to explain why the wiretapped statements incriminate the defendant. See Harris v. Garcia, 734 F.Supp.2d 973, 992 (N.D. Cal. 2010);[27] cf. also People v. Jewsbury,

[27] ("Petitioner asserts that, even if co-defendant's statements during the September 22, 1995, conversation implicitly corroborate her alleged prior false representations, the taped conversation was inadmissible…petitioner argues that Miller's tape recorded statements were out-of-court statements of an accomplice, which themselves must be corroborated under the accomplice [corroboration] rule…In the instant case, co-defendant Miller's statements were not made under suspect circumstances. She was not being questioned by the police or by any other person arguably connected with law enforcement who might have been able to secure more lenient treatment for her.").

115 A.D.2d 341, 342, 496 N.Y.S.2d 164 (N.Y. App. Div. 1985); People v. Potenza, 92 A.D.2d 21, 28, 459 N.Y.S.2d 639 (N.Y. App. Div. 1983) (tapes of telephone conversations intercepted through the use of legal wiretaps can corroborate the testimony of an accomplice). An accomplice's tape recorded statement implicating the defendant is sufficient evidence to corroborate the accomplice's trial testimony. The Court addressed an identical situation in Cheatham v. State, 104 Nev. 500, 761 P.2d 419 (1988), and determined the accomplice's wiretapped out-of-court statements may be used as corroboration if they are accompanied by circumstantial guarantees of trustworthiness, i.e., an absence of suspicious circumstances.

In Cheatham, the defendant was alleged to have conspired with three other individuals to murder the victim. While detained in a California jail, one of the accomplices was recorded stating to another accomplice, "Did they get Cheat[ham]?" Id. at 502, 761 P.2d at 420. The Court determined the accomplice's out-of-court statement was a prior consistent statement admissible under NRS 51.035(2)(b), and was reliable because, like Espindola's statements, it was the result of surreptitious eavesdropping. Id. at 502-503, 761 P.2d at 421. The Court then went on to address Cheatham's argument that the accomplice's trial testimony was insufficiently corroborated and thus should have been excluded. The Court determined the accomplice's incriminating prior consistent statement was sufficient evidence in itself to corroborate the accomplice:

> Were the foregoing insufficient by way of corroborating evidence, its insufficiency would be remedied by McKinnis's statement to Long in the Santa Clara jail. "Did they get Cheats?" One certainly could infer from this unguarded, thought-to-be-confidential statement by McKinnis that McKinnis expected the police to apprehend Cheatham because Cheatham had participated in the robbery and murder of Arritt. Taking the circumstances and evidence in this case as a whole, we conclude that there was sufficient corroboration evidence tending to connect Cheatham to the robbery and murder of Arritt to sustain a conviction.
> Id. at 505-506, 761 P.2d at 423.[28]

[28] Other corroborating facts in Cheatham included: "a fairly constant association and companionship between the three accomplices, McKinnis, Long and Howard, and Cheatham during the day that the crime was committed in McKinnis's room. We know from Cheatham that he was in the room shortly before his companions robbed and killed the victim, and we

Thus, clearly Espindola's wiretapped statements, uttered long before she had any inclination to negotiate with the State, constituted supporting corroborative evidence, which the jury properly considered as corroborating Zone and Espindola.

Substantively, Espindola's wiretapped statements more than sufficiently corroborate her and Zone's testimony. Her statement's regarding Mr. H's panicky state of mind, that "[Carroll] and Louie are gonna have to stick together," and that "…what *we* really wanted was for him to be beat up…" clearly tend to connect Mr. H with the conspiracy and Hadland's murder. 15 AA 2915-2916 (emphasis added). For purposes of the accomplice corroboration rule, these statements were not made under suspicious circumstances because Espindola did not believe she was speaking to a police informant and her statements, at the time, would have been highly damaging evidence if she were tried for Hadland's murder alongside Mr. H. Indeed, the record shows Espindola unsuccessfully attempted to determine whether Carroll was recording their conversations. 15 AA 2914. The recording of the wiretapped conversations and both Mr. H and the State's transcriptions reveal Espindola had no belief that she could secure leniency or any benefit through her statements to Carroll on the 23rd and 24th of May 2005. Recall that it would be many months before Espindola came to a negotiation with the State. Thus, the corroborating evidence tending to link Mr. H to the crimes was overwhelming, and clearly sufficient for a rational jury to conclude there was independent corroboration of Espindola and Zone.[29]

Mr. H has searched the Court's jurisprudence for holdings that might help him claim the State failed to present sufficient accomplice corroboration evidence. He settles on Eckert

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know that Cheatham was with the murderers after the criminal event." Id. at 505, 761 P.2d at 423.

[29] The State also notes that Cheatham adds another layer of corroboration for Espindola's testimony: her prior consistent statements to her attorney, Mr. Christopher R. Oram, Esq. Mr. Oram testified for the State as a rebuttal witness, and corroborated Espindola's version of events inculpating Mr. H. 22 AA 4095-4112; see Cheatham, supra (accomplice's prior consistent wiretapped statements sufficiently corroborating). Espindola relayed her version of events to Mr. Oram beginning with meetings taking place on May 24th, 25th, 26th, 27th, and 28th, which was many months prior to Espindola engaging in any negotiations with the State. Thus, these prior consistent statements came in for their substantive truth directly implicating Mr. H in the conspiracy and Hadland's murder. NRS 51.035(2)(b). Again, this subset of evidence in itself corroborates the testimony of both Zone and Espindola.

v. State, 91 Nev. 183, 533 P.2d 468 (1975), and Heglemeier v. State, 111 Nev. 1244, 903 P.2d 799 (1995). Both cases are distinguishable. The State's showings in Eckert and Heglemeier do not begin to approach the quantum of independent corroborating evidence presented in Mr. H's trial. In neither case did independent evidence show the defendant: (1) providing a substantial amount of money to the direct perpetrator of the murder; (2) lying to police detectives and encouraging other members of the conspiracy "to keep [their] mouth[s] shut"; (3) possessing an obvious motive for conspiring to harm the victim; and (4) being constantly in the presence and in communication with the other conspirators who relied upon him financially and utilized his vehicle to commit the murder. The State will not repeat the litany of other corroborating facts because these few facts more than distinguish Eckert and Heglemeier.

The sole corroborative evidence in Eckert was the defendant's signature on the registration for guns used in the murder and that he was associated with the accomplice. Moreover, a major problem in Eckert, which is not present in this case, was the State alleged the defendant was directly involved in perpetrating the murder, but he possessed an alibi corroborated by an uninterested, reliable witness who placed Eckert *in another state at the time of the crime*. 91 Nev. 183, 186, 533 P.2d at 740 ("Other than that, nothing independent of Overton connects Eckert with being in Las Vegas to participate in the killing. As a matter of fact, an eyewitness maintenance worker at the Gallup motel near which they had parked the automobile positively identified Eckert at the time of thereabouts that the crime was committed."). Heglemeier is similarly distinguishable in that the corroborative showing in that case does not begin to approach the corroboration in Mr. H's case. Heglemeier, 111 Nev. at 1251, 903 P.2d at 804.

This evidence in this case, more closely mirrors those cases in which this Court has found sufficient evidence of corroboration. See Cheatham, supra; Evans v. State, 113 Nev. 885, 944 P.2d 253 (1997) (accomplice corroborated where two strongest pieces of corroborative evidence were (1) testimony of eye witness who saw the Jeep on defendant's lawn at about 6:15 a.m., and (2) the 7-11 receipt stamped at 6:30 a.m., which were facts of

timing tending to make incredible defendant's self-exculpatory testimony at trial); LaPena v. State, 92 Nev. 1, 3, 544 P.2d 1187, 1188 (1976) ("From the testimony of other witnesses it is established that LaPena was not merely an acquaintance of Weakland… but one who with Maxwell had a motive to get rid of Hilda Krause and who was therefore linked inculpably to Weakland in a criminal scheme."). Thus, the State provided more than sufficient evidence upon which a rational jury could find independent, non-accomplice corroborating evidence tending to connect Mr. H to the charged offenses.

## III
## Failure to Record Espindola's Plea Negotiation Proffer Did Not Violate Mr. H's Due Process Rights and Does Not Warrant Reversal

Mr. H's third ground of appeal alleges he was denied due process by the State's failure to record Espindola's proffer of her potential trial testimony made during plea negotiations. Mr. H fails to present any legal authority for his view that the State is obligated to tape or video-record plea negotiation proffers. Mr. H relies solely on a law student note proposing a model ethical rule for prosecutors to record all plea negotiation proffers.[30] He fails to identify any due process or other fair trial right infringed by the State not recording Espindola's plea negotiation proffer. Further, he points to nothing in the record indicating the State offered Espindola some improper inducement or attempted to script her testimony. Mr. H's idiosyncratic view that recordation of proffers should be required fails to present a cognizable ground of appeal, much less a plain error.

The State had no obligation to record Espindola's plea negotiation proffer. In Sheriff v. Acuna, 107 Nev. 664, 819 P.2d 197 (1991), the Court very specifically elaborated the State's obligations in regard to conducting and disclosing its negotiations with the defendant's cooperating accomplice:

> [W]e now embrace the rule generally prevailing in both state and federal courts, and hold that any consideration promised by the State in exchange for a

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[30] App. Op. Br. 50-51 (citing Note, *Should Prosecutors be Required to Record Their Pretrial Interviews with Accomplices and Snitches?*, 74 FORDHAM L. REV. 257 (2005) (Note)).

> witness's testimony affects only the weight accorded the testimony, and not its admissibility. Second, we also hold that the State may not bargain for testimony so particularized that it amounts to following a script, or require that the testimony produce a specific result. Finally, the terms of the quid pro quo must be fully disclosed to the jury, the defendant or his counsel must be allowed to fully cross-examine the witness concerning the terms of the bargain, and the jury must be given a cautionary instruction.
> Id. at 669, 819 P.2d at 200.

Acuna requires nothing more, and there is no requirement that a contingent plea agreement be reduced to writing.

In fashioning its rule, Acuna relied on jurisprudence from the First Circuit, particularly U.S. v. Dailey, 759 F.2d 192 (1st Cir. 1985). While Dailey suggests a written agreement documenting testimonial agreements would be a nice practice, it is not required. The First Circuit recognized this and rejected a requirement that agreements with interested accomplice witnesses be in writing. U.S. v. Cresta, 825 F.2d 538, 546 n.5 (1st Cir. 1987), cert. denied, 486 U.S. 1042, 108 S.Ct. 2033 (1988) ("Appellant argues that Dailey mandates a written contingency agreement. We disagree. A written agreement is suggested as a better safeguard, but is not a per se requirement. See also U.S. v. Shearer, 794 F.2d 1545 (11th Cir.1986) (upholding admission of paid informant's testimony even though no written agreement)."). A fortiori, there is no per se requirement for video or audio recordation of a cooperating witness's proffer. Even Mr. H's law student note mentions Acuna as establishing an accomplice testimony safeguard not involving a per se recording requirement. Note 286-287. Indeed, the note correctly summarizes the state of the law, which does not impose on prosecutors any duty to record witness interviews. Note 264-265.[31]

[31] ("As was noted in the Memorandum in Koubriti, prosecutors and government agents have no legal duty to record the statements of government witnesses. Federal and state courts have held that due process rules and disclosure statutes do not require prosecutors and their agents to record interviews with government witnesses. Although courts have allowed for the possibility that the government's failure to record interviews with government witnesses may violate due process if the defendant can show that government agents acted in bad faith by deliberately failing to record the witnesses' statements, 'bad faith' exceptions have not been defined. Absent the defendant's showing of 'bad faith' on the part of the interviewer, an interview between a prosecutor and a government witness is 'presumed to have been conducted with regularity.'" (footnotes omitted)).

The circumstances of Espindola's plea and resulting testimony comport with all due process safeguards as recognized in Acuna and the Court's decision in Leslie v. State, 114 Nev. 8, 17, 952 P.2d 966, 972-973 (1998).[32] "[G]overnment interviews with witnesses are 'presumed to have been conducted with regularity.'" U.S. v. Houlihan, 92 F.3d 1271, 1289 (1st Cir. 1996). Under Acuna, there is no merit to Mr. H's contention that he was denied a meaningful opportunity to cross-examine Espindola. See Clyde v. Demosthenes, 955 F.2d 47 at 3 (9th Cir. 1992);[33] see also People v. Steinberg, 170 A.D.2d 50, 76, 573 N.Y.S.2d 965, 980-981 (N.Y. App. Div. 1991), aff'd 79 N.Y.2d 673, 584 N.Y.S.2d 770, 595 N.E.2d 845 (1991) (no New York or "related authority hold[s] that a defendant's right of cross-examination is unfairly frustrated by the failure to record the witness's statement.").

Because Acuna and Leslie do not apply to the rule Mr. H proposes, his argument really sounds in Brady; but Mr. H does not allege a Brady violation because he must be aware that, despite numerous opportunities, no courts have extended Brady to create a prosecutorial duty to record pretrial witness interviews. Even Mr. H's law student note, the principal supporting authority for his claim of a due process violation, bases its argument largely on an analogy to Brady and Giglio. See Note 257, 267-268, 279, 281-287. The Ninth Circuit has rejected for over thirty years the proposition that a defendant is entitled to have

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[32] In addressing Leslie, Mr. H confuses what was sufficient for what is necessary; that the Court found no improper bargaining for testimony based in part on the witness's prior recorded interview statements to police, does not mean negotiation proffers must be recorded.

[33] ("In Acuna [] the Nevada Supreme Court overruled Franklin and held "that when our prosecutors bargain in good faith for testimony represented to be factually accurate, it is not a violation of due process or public policy to withhold the benefit of the bargain until after the witness testifies." 819 P.2d at 200. Due process requires that the government disclose evidence of any understanding or agreement as to future prosecution of a key witness that would be relevant to the credibility of that witness. See Giglio v. United States, 405 U.S. 150, 153-55 (1972). As the district court noted, Clyde had a full opportunity to question Kolbus concerning his testimony. Under cross-examination, Kolbus freely admitted that he faced fifteen years in prison unless he could offer assistance with Clyde's conviction. Kolbus also testified that there were no negotiations concerning his testimony. Clyde does not contend that Kolbus lied under oath about any negotiations with the State relevant to his testimony, or that he minimized the inducement to testify against him. There is no evidence of any secret and undisclosed negotiations between the State and Kolbus concerning Kolbus' trial testimony. There was no due process violation from the admission of the testimony.").

prosecutors record pre-trial interviews with its witnesses in order to preserve potential exculpatory or impeachment material:

> Marashi's remaining Brady claim is that the government committed error by failing to record all but two of its interviews with Sharon Smith. In other words, Marashi claims the government had a constitutional obligation to compile Brady material. We flatly rejected this theory in United States v. Bernard, 625 F.2d 854 (9th Cir. 1980). In that case, Agent Fredericks of the Drug Enforcement Agency had deliberately decided not to take notes of a series of interviews with one Richard May, a paid drug informant. *Fredericks candidly stated that his purpose in doing so was to avoid leaving a paper trail of inconsistent factual remarks which the defense could use to impeach May*. Id. at 859. The defendant argued, inter alia, that this practice ran afoul of Brady. Although we sharply criticized this practice, we nonetheless concluded that failure to record government interviews does not constitute Brady error. Id. at 860. The two decisions upon which Marashi relies pertain only to the destruction of existing government materials and thus are inapposite.
> U.S. v. Marashi, 913 F.2d 724, 734 (9th Cir. 1990) (citations omitted, emphasis added).[34]

See also U.S. v. Rodriguez, 496 F.3d 221, 224-225 (2d Cir. 2007) (Brady and Giglio do not require state to take notes during witness interviews); U.S. v. Ortiz, 2011 WL 109087 at 3 (D. Ariz. 2011) (rejecting defendant's argument that government consciously elected not to record material witness statements in order to avoid production of exculpatory material, noting "…Government had no constitutional obligation to compile potential Brady material by recording the first witness interviews." (citing U.S. v. Marashi, 913 F.2d 724, 734 (9th Cir. 1990)). Thus, Mr. H establishes no due process or other basis for granting him relief on this ground of appeal.

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[34] This quote from Marashi demonstrates the incomplete use of authority in Mr. H's law student note. The student saw fit to block quote condemnatory dicta from the 1980 Bernard decision, Note 292-293, but the 1990 Marashi decision itself gets mentioned once and only after being buried deep in a footnote. Note 265 n.59. A reader might want to be apprised that the Ninth Circuit revisited the issue ten years later and found Bernard's dicta not compelling enough to warrant a change in the law. More importantly, not content to downplay the authorities he viewed as disfavoring his argument, the student also misstates Bernard's holding as merely "'find[ing] no statutory basis for compelling the creation of Jencks Act material,'" Note 292, which elides the court's constitutional analysis that Brady *too* provided no basis for creating a record of witness interviews. Bernard, 625 F.2d at 859-860 ("we can find no statutory basis for compelling the creation of Jencks Act material…Nor can we find a constitutional basis for compelling the creation of such material under Brady.").

## IV
## Mr. H's Confrontation Clause Rights Were Not Infringed by Admission of Deangelo Carroll's Out-of-Court Recorded Statements

Mr. H's fourth ground of appeal alleges the district court erred by admitting Deangelo Carroll's recorded statements from the May 23rd and 24th wiretapped meetings with Mr. H's co-conspirators, Espindola and Little Lou. Mr. H alleges his Confrontation Clause rights were infringed because he did not have the opportunity to cross-examine Carroll. This argument has no merit whatsoever because Carroll's statements were not admitted for their truth; and the jury was repeatedly instructed not to consider the statements for their truth. The relevant jurisprudence overwhelmingly holds that a defendant's Confrontation Clause rights are not infringed under these precise circumstances.

In admitting Carroll's recorded statements, the district court was very clear that the statements would not be admitted for their truth. 14 AA 2605. The court instructed the jury to that effect prior to its deliberations. 24 AA 4487:12-15 (JI 40 advising jury that statements of co-conspirator after he has withdrawn from conspiracy are not admissible for truth of the matter asserted, and were only offered to show context). Moreover, the record is devoid of the State ever arguing that the jury should consider Carroll's statements as substantive evidence of Mr. H's guilt.

Mr. H relies solely on Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354 (2004), to argue his Confrontation Clause rights were violated. He fails to cite any of Crawford's interpretive jurisprudence because it overwhelmingly rejects his argument. Under Crawford, it is axiomatic that "[w]hen recorded evidence is admitted in the absence of testimony by an informant who recorded the conversation, the Confrontation Clause of the Sixth Amendment is not violated if the statements are non-testimonial and are not offered for the truth of the matter asserted. It is well settled that non-hearsay statements are admissible if they are offered to provide context." U.S. v. Van Sach, 458 F.3d 694, 701 (7th Cir. 2006). The Seventh Circuit has elaborated this "crucial" aspect of Crawford:

> It is important to emphasize again that, aside from the testimonial versus nontestimonial issue, a crucial aspect of Crawford is that it only covers hearsay, i.e., out-of-court statements "offered in evidence to prove the truth of the matter asserted." Thus, to restate, Crawford only covers testimonial statements proffered to establish the truth of the matter asserted. In this case, as

> pointed out by the government, [the confidential informant] Shye's statements were admissible to put Dunklin's admissions on the tapes into context, making the admissions intelligible for the jury. Statements providing context for other admissible statements are not hearsay because they are not offered for their truth. As a result, the admission of such context evidence does not offend the Confrontation Clause because the declarant is not a witness against the accused… this form of non-hearsay, [is] not subject to the strictures of Crawford and the Confrontation Clause…
> U.S. v. Tolliver, 454 F.3d 660, 666 (7th Cir. 2006) (citations and footnotes omitted), cert. denied, 549 U.S. 1149, 127 S.Ct. 1019 (2007).[35]

This analysis also applies to situations where the recorded conversation took place between a defendant's co-conspirator and the non-testifying informant, and the statements are necessary to provide context to the co-conspirator's statements. "[I]f a Defendant or his or her coconspirator makes statements as part of a reciprocal and integrated conversation with a government informant who later becomes unavailable for trial, the Confrontation Clause does not bar the introduction of the informant's portions of the conversation as are reasonably required to place the defendant or coconspirator's nontestimonial statements into context." U.S. v. Hendricks, 395 F.3d 173, 184 (3rd Cir. 2005).

Thus, Mr. H fails to demonstrate his Confrontation Clause rights were even triggered by the admission of Carroll's recorded statements. Finally, the court's repeated admonitions and instructions as to the proper use of the statements ensured Mr. H's rights were not affected. See, e.g., U.S. v. Simmons, 582 F.3d 730, 735-736 (7th Cir. 2009) (reaffirming no Crawford violation based on admission of non-testifying informants recorded statements, and noting "the court properly instructed the jury that Barnes's statements were not to be

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[35] See also U.S. v. Brazil, 395 Fed.Appx. 205 at 10 (6th Cir. 2010); U.S. v. Boykins, 380 Fed.Appx. 930, 934 (11th Cir. 2010); U.S. v. Barraza, 365 Fed.Appx. 526, 530 (4th Cir. 2010); U.S. v. Hidalgo, 226 Fed.Appx. 391, 399 (5th Cir. 2007); U.S. v. James, 487 F.3d 518, 524 (7th Cir. 2007) (collecting cases); U.S. v. Faulkner, 439 F.3d 1221, 1226 (10th Cir. 2006) ("One thing that is clear from Crawford is that the [Confrontation] Clause has no role unless the challenged out-of-court statement is offered for the truth of the matter asserted in the statement"); U.S. v. Le, 172 Fed.Appx. 208 at 1 (9th Cir. 2006) ("the confidential informant's statements do not violate the Confrontation Clause because the district court permitted them to be read to the jury to provide context for the statements of Bi Le's co-defendant, not to prove the truth of their contents."); see also State v. Williams, 2010 WL 4162013 at 3 (N.M. Ct. App. 2010) (because police detective "did not introduce the informants' statements to prove that Defendant committed the crimes at issue, Defendant's confrontation rights were never triggered."); State v. Hernandez, 2010 WL 816828 at 4-5 (N.J. Super. App. Div. 2010); State v. Cunningham, 2009 WL 5174151 at 4 (Ohio Ct. App. 2009).

considered for their truth but rather solely for the context they provided for Sims's statements.") (citing U.S. v. McClain, 934 F.2d 822, 832 (7th Cir. 1991)).[36] This fourth ground of appeal lacks any merit.

## V
## The District Court Did Not Abuse Its Discretion in Denying Mr. H a New Trial Based on Alleged Juror Misconduct

Mr. H's fifth and final ground of appeal alleges the district court abused its discretion in denying his motion for a new trial, which alleged that one or more jurors told one of his attorneys post-verdict that they considered Carroll's wiretapped statements as substantive evidence of Mr. H's guilt. Specifically, Mr. H alleges the jury may have considered Carroll's statement to Espindola, "…[he] wanted him fucking taken care of we took care of him," as substantive evidence that Mr. H conspired to have Hadland "take[n] care of." 24 AA 4568-4569.[37] In rejecting Mr. H's motion for a new trial, the district court provided the following analysis:

> Defendant asserts misconduct occurred during the deliberation stage of the trial. The common law and statutory rule that a jury's verdict may not be impeached by affidavits, testimony, or statements of the jurors themselves clearly precludes consideration of this allegation. See Meyer v. State, 119 Nev. 554, 80 P.3d 447 (2003); NRS 50.065. The allegation that the jury misinterpreted the instruction of the Court is premised directly on a statement of a juror about his mental processes which are contained in the affidavit of Ms. Armeni. The Court finds that such mental processes are specifically the type and nature of allegations which are precluded from consideration by both NRS 50.065 and Meyer. As such, those portions of Ms. Armeni's affidavit which reference such mental processes are stricken. Moreover, even if the Court were to consider the allegations of the defense, the mere fact that the jury heard something different on the tape does not necessarily mean that the jury misconstrued the instructions of the Court. The fact that Ms. Espindola and Mr. Hidalgo, III did not correct Deangelo Carrol when he used the

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[36] Mr. H is not challenging the court's order permitting admission of Little Lou and Anabel's statements on the tapes. Even if he was, that argument would fail because he wrongly assumes the "conspiracy ended with [Hadland's death]." App. Br. 53 n.32. The jurisprudence is very clear that statements made during an effort to cover-up or conceal a crime are within the scope and in furtherance of the original conspiracy. See Payne, Garlington, De Righter, Savage, Robertson, Keeton, and Hadley, supra, n.23. In any event, Mr. H has failed to adequately brief such a challenge and thus has waived it for appeal.

[37] Contrary to the State and Mr. H's interpretations of the tape recorded meetings between Carroll, Espindola, and Little Lou, the jury collectively heard Carroll say "*he* wanted him fucking taken care of…," rather than "…you wanted him fucking taken care of…." 24 AA 4569; cf. 15 AA 2916 (State's transcript); 15 AA 2945 (Mr. H's transcript).

> pronoun "He," could be considered an adoptive admission by those parties. As such, the jury would have properly been following the instructions of the Court.
> 25 AA 4661-4662.

### A. Standard of Review for a District Court's Denial of a Motion for New Trial Based on Alleged Juror Misconduct

In Meyer v. State, 119 Nev. 554, 80 P.3d 447 (2003), the Court addressed the applicable standard of review for this precise situation. The Court has determined:

> 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. However, where the misconduct involves allegations that the jury was exposed to extrinsic evidence in violation of the Confrontation Clause, de novo review of a trial court's conclusions regarding the prejudicial effect of any misconduct is appropriate. Id. at 561-562, 80 P.3d at 453.

"[P]roof of misconduct must be based on objective facts and not the state of mind or deliberative process of the jury. Juror affidavits that delve into a juror's thought process cannot be used to impeach a jury verdict and must be stricken." Id. at 563, 80 P.3d at 454 (citing Government of Virgin Islands v. Gereau, 523 F.2d 140, 148-149 (3rd Cir. 1975)); see also Barker v. State, 95 Nev. 309, 312, 594 P.2d 719, 721 (1979). A district court does not abuse its discretion in denying a motion for new trial and evidentiary hearing where the only evidence submitted is inadmissible. See, e.g., Tanner v. U.S., 483 U.S. 107, 127, 107 S.Ct. 2739 (1987) ("[T]he District Court did not err in deciding, based on the inadmissibility of juror testimony and the clear insufficiency of the nonjuror evidence offered by petitioners, that an additional post-verdict evidentiary hearing was unnecessary.").

### B. The District Court Did Not Abuse Its Discretion In Denying Mr. H's Motion Because It Relied on Inadmissible Evidence of the Jurors' Internal Deliberative Processes

It is very well-established that the evidence Mr. H sought to introduce as demonstrating juror misconduct is never admissible and cannot form the basis for demonstrating juror misconduct. Thus, because there was no competent evidence of juror misconduct before the district court, it did not abuse its discretion in denying Mr. H's motion. NRS 50.065(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 the juror's or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith.
> (b) The affidavit or evidence of any statement by a juror indicating an effect of this kind is inadmissible for any purpose.[38]

NRS 50.065(2) and its federal analog FRE 606(b) are "designed to protect the finality of verdicts and to ensure that jurors are insulated from harassment by defeated parties." Doan v. Brigano, 237 F.3d 722, 730 (6th Cir. 2001) (quoting State v. Schiebel, 55 Ohio St.3d 71, 564 N.E.2d 54, 61 (Ohio 1990)). Post-trial jury scrutiny is disfavored because of its potential to undermine "full and frank discussion in the jury room, jurors' willingness to return an unpopular verdict, and the community's trust in a system that relies on the decisions of laypeople." Tanner v. U.S., 483 U.S. 107, 120-21, 107 S.Ct. 2739 (1987). The Advisory Committee's notes for FRE 606 reason that "[t]he mental operations and emotional reactions of jurors in arriving at a given result would, if allowed as a subject of inquiry, place every verdict at the mercy of jurors and invite tampering and harassment." Advisory Committee Notes to the 1972 Proposed Rules (citing Grenz v. Werre, 129 N.W.2d 681 (N.D. 1964)).

Courts have overwhelmingly and unanimously held that a court may not inquire post-verdict into whether or how the jurors followed the court's jury instructions because that aspect of juror conduct is quintessentially part of the deliberative process. In rejecting a contrary rule, Advisory Committee notes for the federal rule's 2006 amendments stated: "The broader exception is rejected because an inquiry into whether the jury misunderstood or misapplied an instruction goes to the jurors' mental processes underlying the verdict, rather than the verdict's accuracy in capturing what the jurors had agreed upon." Advisory Committee Notes to the 2006 Amendments (citing Karl v. Burlington Northern R.R., 880 F.2d 68, 74 (8th Cir. 1989), and Robles v. Exxon Corp., 862 F.2d 1201, 1208 (5th Cir. 1989)). Courts have overwhelmingly applied this principal to claims identical to Mr. H's claim. See, e.g., U.S. v. Voigt, 877 F.2d 1465, 1468-1469 (10th Cir. 1989) (denying as "specious and frivolous" defense counsel's attempt to have the court inquire, based on

[38] In construing NRS 50.065, the Court has in the past referred to the analogous federal rule, Federal Rule of Evidence 606(b), and its interpretive jurisprudence. See Meyer, supra.[38]

affidavit recounting post-verdict discussion with jurors, into whether jurors disregarded jury instruction); Vasquez v. Walker, 359 Fed.Appx. 758, 760 (9th Cir. 2009) ("extraneous influence" does not include juror's erroneous legal interpretation of the jury instructions); U.S. v. Jackson, 549 F.3d 963, 984 (5th Cir. 2008) (in death penalty case, no abuse of discretion in denying new trial and evidentiary hearing where only purported evidence of misconduct was investigator's affidavit indicating jurors did not understand jury instruction); U.S. v. Stewart, 433 F.3d 273, 307-308 (2d Cir. 2006) (606(b) rendered inadmissible evidence that jurors disregarded instruction not to draw adverse inference based on defendant's failure to testify); U.S. v. Kelley, 461 F.3d 817, 831-832 (6th Cir. 2006) (same); U.S. v. Tran, 122 F.3d 670, 672-673 (8th Cir. 1997) (same); Gapen v. Bobby, 2011 WL 237279 at 5 (S.D. Ohio 2011) ("A jury's interpretation and application of the court's instructions is a part of the deliberative process and correctly excluded under Fed.R.Evid. 606(b)."") (citing U.S. v. Tines, 70 F.3d 891, 898 (6th Cir. 1995)); U.S. v. Davis, 612 F.Supp.2d 48, 54 (D. D.C. 2009) ("inquiring into how the jurors interpreted the instructions or how they deliberated *is the very inquiry* into the jurors' mental processes during deliberations that Rule 606(b) forbids… Davis' allegation that a juror expressed confusion about the conspiracy instructions warrants neither an evidentiary hearing nor a new trial as it is wholly unsupported and Rule 606(b) bars inquiry into the jurors' mental impressions during deliberations.") (emphasis added) (citing U.S. v. Richards, 241 F.3d 335, 343 (3d Cir. 2001)); U.S. v. Stewart, 317 F.Supp.2d 426, 432 (S.D.N.Y. 2004) ("A jury's ability to follow legal instructions falls squarely within the realm of internal jury deliberations, which Rule 606(b) staunchly protects.").

This rule obviously extends to the situation where a defendant in a multi-defendant case, like Mr. H, asserts the inquiry is necessary because jurors applied against him evidence that was only admissible against a co-defendant. See U.S. v. Stewart, 433 F.3d 273, 306-307 (2d Cir. 2006). Finally, Mr. H's claims for a new trial bear no resemblance to past instances where the Court has found objective indicia of juror misconduct. See Bushnell v. State, 95 Nev. 570, 574, 599 P.2d 1038, 1041 (1979) (foreperson's incorrect relaying of court's

instruction given in response to jury's query was an objective fact of juror misconduct because "it obviously misrepresented the content of the judge's communication, it effectively relayed an unauthorized and erroneous instruction to the other jurors, under the guise of judicial sanction."). Valdez v. State, 124 Nev. 97,__, 196 P.3d 465, 472 (2008) (objective evidence of juror misconduct where jury foreperson blurted out statement that jury had already determined defendant's punishment during guilt phase of first degree murder case, prior to penalty phase even beginning). Thus, because there was no legal or evidentiary basis for Mr. H's argument for a new trial based on juror misconduct, the district court obviously did not abuse its discretion.

Additionally, the court was clearly correct in concluding the jury did not depart from its instruction not to use Carroll's statements for the truth of the matter asserted. Although the jury believed it heard Carroll make the statement "he wanted him fucking taken care of…," referring to Mr. H, it only used that statement to add context to Espindola and Little Lou's failure to respond, which constituted an adoptive admission. Thus, assuming purely for purposes of argument that the evidence was admissible as to juror misconduct, Mr. H was not entitled to a new trial because he failed to demonstrate the jurors departed from the court's instructions.

## CONCLUSION

Based on the foregoing arguments, the State respectfully requests that this Court affirm Mr. H's convictions and sentences.

Dated this 9th day of June, 2011.

Respectfully submitted,

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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 NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the record on appeal. 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 9th day of June, 2011.

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## CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on June 9, 2011. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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