IN THE SUPREME COURT OF THE STATE OF NEVADA

LUIS A. HIDALGO, JR.
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

Docket No. 54209

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

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

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ARGUMENT

A. JURY INSTRUCTION #40 HAD A PERNICIOUS EFFECT ON THE BEYOND A REASONABLE DOUBT STANDARD

1. Jury Instruction #40 was procedurally unnecessary, erroneously misallocated a judicial function to the jury and was inherently confusing

The State (hereinafter "Respondent") misperceives the challenge made by Appellant Luis A. Hidalgo, Jr. (hereinafter "H") to giving the "slight evidence" instruction to the jury. H has no quarrel with the "slight evidence" standard being applied by the trial court in deciding the admissibility issue regarding out of court statements by those alleged to be co-conspirators of the person on trial. The word "slight" is perfectly permissible, understandable and manageable by a district court judge when determining whether to admit a piece of evidence for the jury to consider in its task of evaluating the question of guilt beyond a reasonable doubt. This Court was correct in McDowell v. State, 103 Nev. 527, 746 P. 2d 149 (1987) in its conclusion that in Bourjaily v. United States, 483 U.S., 171, 107 S.Ct. 2775 (1987) was one of federal statutory interpretation. The question presented in this case is one that was left unanswered by McDowell and now must be addressed. Specifically, the question for this Court is as follows: "should the standard utilized by the trial court in deciding the question of admissibility be communicated to the jury by way of an instruction that they must apply in their decision making

process?" The answer should be a resounding "no." "A juror should not be expected to be a legal expert. Jury instructions should be clear and unambiguous." Culverson v. State, 106 Nev. 484, 488, 797 P. 2d 238, 240 (1990). Because the standard for judging the predicates for admission of the evidence is less than beyond a reasonable doubt, and because the jury should not be deciding questions of admissibility, the instruction is unnecessary and has a pernicious impact on the confidence that the elements of the crime – which are identical to the predicates for admission of the evidence- were decided by the jury using the beyond a reasonable doubt standard of proof.

The harmful effect of this practice upon the constitutionally mandated standard has been uniformly recognized in recent years by federal appellate courts, where the "slight evidence" language was created and from whence it later insinuated itself into conspiracy jurisprudence when adopted by state appellate courts without prophylactic analysis. In Bolden v. State, 121 Nev. 908, 917-922, 124 P. 3d 191 (2006), this Court recognized that its "discussion of co-conspirator liability has been limited" and went on to analyze and reject the federal embrace of the rule enunciated in Pinkerton v. United States, 328 U.S. 640, 66 S. Ct. 1180 (1946). This case presents the opportunity to further develop the law and give guidance to the district courts on how to insure verdicts in which confidence in the

outcome can be maintained where one is found criminally liable because of words uttered and acts performed outside of his presence by other persons.

Circuit Judge Frank Easterbrook of the United States Court of Appeals for the Seventh Circuit, in United States v. Martinez De Ortiz, 883 F. 2d 515 (7th Cir. 1989) (Easterbrook, J. concurring) *rehearing granted and judgment vacated on other grounds,*897 F.2d 220 (7th Cir. 1990), *affirmed upon rehearing en banc,* United States v. Martinez de Ortiz, 907 F. 2d 629 (7th Cir. 1990)(*en banc*), decried the use of the language "slight evidence" or "slight connection" as a standard of review in conspiracy prosecutions, stating:

> "What do these formulas mean? They could mean that once A and B conspire, "slight evidence" or "slight connection" is enough to convict C of the same crime, an intolerable proposition. They could mean that evidence may be sufficient to establish guilt beyond a reasonable doubt even though "slight", thus watering down the reasonable doubt standard. They could mean that an appellate court must keep in mind the possibility that evidence may be slight quantitatively although substantial qualitatively – that a single piece of evidence may be enough in context, an unexceptionable proposition. *They could mean that "slight" evidence of participation in the conspiracy is enough to admit other evidence, but that which comes in must be substantial enough to support a finding beyond a reasonable doubt*....[they] could mean that if someone joins the conspiracy, "slight" activity to accomplish its objectives is enough, that peripheral conspirators commit the crime no less than the mastermind...*That we have to tease [a non-troubling interpretation] out of a formula with dubious alternative meanings, though, is a mark against its use.* And the other variation – "Once the existence of a conspiracy is proven only *very slight evidence* is needed to establish a defendant's membership in the conspiracy" – cannot be massaged to yield a meaning with which we should want to live. It says "very slight evidence" is enough to send a

> person up the river. *Maybe we could torture the phrase until it confessed to a constitutionally acceptable meaning, but why bother?* ...Nothing we do as a judge is more important than assuring that the innocent go free....Conspiracy is a net in which prosecutors catch many little fish. We should not go out of our way to tighten the mesh. Prosecutors have many legitimate advantages in the criminal process. *Defendants' great counterweight is the requirement that the prosecution establish guilt beyond a reasonable doubt. References to "slight evidence" and "slight connection" reduce the power of that requirement."*

883 F. 2d 515, 524-525 (7th Cir. 1989)(Easterbrook, J. concurring) (emphasis added).

That expression of dissatisfaction with the "slight evidence" standard of review and the damage that it causes when it makes its way into jury instructions marked the watershed of uniform recognition of the dangers of using it and its consistent rejection. Federal circuits have uniformly directed that it not be used in jury instructions in prosecutions in which a conspiracy is charged because of the confusion that it causes and the damage that it does to the application by the same jury of the reasonable doubt standard. The most plenary analysis is contained in a concurring opinion written by Circuit Judge Jon. O. Newman[1] in United States v. Huezo, 546 F. 3d 174, 184-189, fn.10; 191, fn.2 (2nd Cir. 2008).

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[1] Circuit Judge Newman's opinion was joined by the entire panel which included now United States Supreme Court Justice Sonia Sotomayor, and circulated and adopted by the entire Second Circuit Court of Appeals.

In Huezo, the court held that although the "slight evidence" instruction "accurately states a proposition that has often been repeated in the case law of this Court, [we] believe the proposition and a related formula of it are incorrect, entered federal jurisprudence improvidently, have been routinely repeated without consideration of their infirmity, and should be discarded." [2] Huezo, 546 F. 3d at 184. The court went on to "discuss the origin of this proposition, its casual insinuation into federal jurisprudence, and its perniciousness." It recognized that "[t]he 'slight evidence' formulation is inconsistent with the constitutional requirement that every element of an offense must be proven beyond a reasonable doubt" and "creates an unacceptable risk that juries, if the phrase is included in a charge, ...will be misled (or mislead themselves) into thinking that the defendant's link to the conspiracy may be established by evidence insufficient to surmount the reasonable doubt standard. The vice of the 'slight evidence' formulation,...is that...,when stated in juxtaposition with the test for establishment of the conspiracy itself, ...may too easily be taken as an implication that proving participation in a conspiracy is subject to a lesser standard of proof than proving the existence of the conspiracy. But that implication is simply wrong." Id. at 185.

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[2] It is important to note that the "slight evidence" instruction **was not a part of the jury charge** in Huezo. Id. 546 F.3d at 180, fn.2, and therefore played no part in the decision to affirm the conviction.

2. The Compromise of the Reasonable Doubt Standard is Structural Error

The Huezo court traced the origins of the "slight evidence" standard as employed today – after many reformulations and significant omissions and additions over eight decades – to Tomplain v. United States, 42 F.2d 202 (5th Cir. 1930), which it described as "[t]he villain." It went on to observe that several of the federal circuits have squarely rejected the "slight evidence" formulation, although the language still creeps into some decisions from those circuits. Id. at 187-188, fn. 8 and cases cited therein. It noted that the Fifth Circuit had already found that the instruction is not subject to harmless error analysis and is *per se* reversible error, citing United States v. Partin, 552 F. 2d 621, 628-629 (5th Cir. 1977) and its internal citations of earlier Fifth Circuit precedent holding that "[d]espite the lack of provable prejudice to defendant's case because of other instructions giving the reasonable doubt standard, however, the erroneous instruction reduced the level of proof necessary for the government to carry its burden by possibly confusing the jury about the proper standard or even convincing jury members that a defendant's participation in the conspiracy need not be proved beyond a reasonable doubt." See United States v. Hall, 525 F.2d 1254, 1256 (5th Cir. 1976); United States v. Malatesta, 590 F2d 1379,1382 (5th Cir. 1979)(*en banc*); United States v. Gray, 626 F. 2d 494, 500-501 (5th Cir. 1980). See Cool v. United States, 409 U.S. 100, 93 S.Ct. 354 (1972) (jury instruction

which reduces the level of proof necessary for prosecutions burden is plainly inconsistent with the constitutionally rooted presumption of innocence). See also Sandstrom v. Montana, 442 U.S. 510, 514-517, 99 S. Ct. 2450 (1979) (whether a defendant has been accorded his constitutional rights depends upon the way in which a reasonable juror *could* have interpreted the instruction. The operative area of inquiry is "how *could* a reasonable juror have interpreted the instruction") (emphasis added).

In Cortinas v. State, 124 Nev. 1013, 195 P.3d 315, 323 (2008), cert. denied, 130 S. Ct. 416 (2009), this Court recognized that erroneous jury instructions can be structural. The Fifth Circuit has treated the precise language complained of in this case as such in the aforementioned cases. The Huezo court also rejected the "slight evidence" standard for use by appellate courts in reviewing conspiracy convictions for sufficiency of the evidence, noting that it "too easily permits appellate courts to fail to examine the evidence rigorously to assure that it sufficed to permit a jury to find guilt beyond a reasonable doubt." 546 F.3d at 188. The Second Circuit went on to observe that although the recognition by the Ninth Circuit in United States v. Dunn, 564 F. 2d 348, 357 (9th Cir. 1977), that the term "slight" is tied to the connection of the defendant to the conspiracy and not the type of evidence or burden of proof, it "doubt[s] that the typical jury can appreciate the distinction" and that it was "[f]ar better, as Judge Easterbrook has urged, to discard all

references to 'slight'...because these words inevitably create the risk of lowering the standard of proof significantly below 'beyond a reasonable doubt'. 546 F.3d at 189. (Emphasis added).

The Seventh Circuit has warned against instructing the jury on the appellate review standard of "substantial evidence." In United States v. Durrive, 902 F. 2d 1221, 1229, fn.6 (7th Cir. 1990), wherein it adopted that standard of review for sufficiency of the evidence in conspiracy cases, it recognized that "[i]t would be improper for a district court to charge a jury that only substantial evidence is needed to connect a person with a conspiracy. Such an action would only confuse the jury and would likely undermine the fundamental requirement of proof of guilt beyond a reasonable doubt for all elements of a crime." (Emphasis added).

This Court should adopt the rationale provided by Huezo and Durrive. The touchstone inquiry is "did the instruction allow the jury to render a guilty verdict based on findings supported by less than a constitutional quantum of evidence?" The answer in this case is "yes" where (1) there was a conspiracy charge in the indictment, and (2) the jury was given the task of evaluating the evidence on the admissibility standard first and then the liability standard. The Respondent concedes that only California has determined that the jury should do both and that the challenged instruction is not improper, relying exclusively on *dicta* in a series of unreported decisions from California's intermediate court of review. None of

those cases provide the thorough analysis that was articulated by the courts in Huezo and Martinez De Ortiz.

Moreover, in citing the unreported case of United States v. Garcia, 77 F.3d 471 (4th Cir. 1996), cert. denied, 519 U.S. 846, 117 S. Ct. 133 (1996), the Respondent conflates the "slight evidence" standard used as the predicate for admissibility of co-conspirator statements, with the "slight connection" standard which, when proven beyond a reasonable doubt, is all that is necessary for a conviction. It is simply not applicable to this case. That same year, in which it decided not to publish Garcia, the Fourth Circuit rejected the concept of instructing a jury on the "slight evidence" standard in future conspiracy trials, overruling its earlier precedents. In doing so, it stated that "[f]idelity to the Constitution directs us to hold that the Government must prove the existence of a conspiracy beyond a reasonable doubt, but upon establishing the conspiracy, only a *slight connection* need be made linking a defendant to the conspiracy to support a conspiracy conviction, *although this connection also must be proved beyond a reasonable doubt.* We dispel any other formulation of this precept from the Fourth Circuit, and to the extent any decisions...are inconsistent with this dictate, we expressly overrule them. United States v. Burgos, 94 F.3d 849, 862 (4th Cir. 1996)(*en banc*) (emphasis added).

It is respectfully submitted that the plenary treatment given to the fact that the "slight evidence" instruction violates due process standards by the United States Court of Appeals for the Second Circuit in Huezo and all of the cases upon which it relies from the other federal circuits, renders the Respondent's contrary position that this issue is not one of constitutional magnitude and/or not prejudicial error impotent. The only reported decision upon which Respondent relies for the proposition that this issue is essentially inconsequential is People v. Jourdain, 111 Cal. App. 3d 396, 404, 168 Cal. Rptr. 702 (Cal. Ct. App. 1980). However, Jourdain actually supports H's position in this matter. In Jourdain, there was *no conspiracy alleged in the indictment* against the defendant. It was merely an evidentiary mechanism for the introduction of co-conspirator statements, which were otherwise hearsay, in a case wherein *the predicates for admissibility were not part of the elements of the allegations in the charging document.* Therefore, there could not have been any confusion as to the burden of proof to convict the defendant therein of conspiracy, for that decision and function was not part of what was asked of the jury. While the evidence of co-conspirators statements could have been presented to the jury without the instruction once the judge made the determination of admissibility, in Jourdain it could not result in a conviction for conspiracy.

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3. Jury Consideration of Accomplice Testimony Is Mechanically Different From What the Jury Did In This Case

The Respondent's contention that the mechanics of the jury applying the challenged instruction is analogous to those employed by a jury when accomplice testimony is before them is demonstrably incorrect. When the court makes the decision to admit the testimony of an accomplice, it has already determined the "competency" of the witness and the testimony. NRS 50.015 and 50.025. In the absence of an objection pursuant to NRS 48.015, any issue as to relevance has been waived. Only the sufficiency of the evidence to support a verdict is left for the jury. They are told that the accomplice testimony cannot supply it "beyond a reasonable doubt" without corroboration. Were it not for the legislative policy in Nevada prohibiting the testimony of an accomplice to entirely support a criminal conviction, the jury would be permitted to merely judge the credibility of the witness and return a verdict of guilty should it alone meet the beyond a reasonable doubt standard in its probative force. The court does not consider independent evidence of the defendant's connection to the offense charged in making the decision to admit the accomplice testimony. The accomplice testimony is in court and subject to confrontation and cross-examination, not out of court and immune from both. It is not inherently hearsay at all. It is usually claimed to be percipient as it was by Anabel Espindola (hereinafter "Espindola") in this case, although

some of the testimony might be objectionable as being hearsay just as that of any other witness may. The court does not make a finding as to the witness fitting the definition of 'accomplice' at all.

In addition, the issue of the status of the witness as an accomplice is not one that must be proven beyond a reasonable doubt. Rather, the issue for the jury is whether the witness needed to be corroborated. The status of the witness as an accomplice is not an element of the offense that must be determined beyond a reasonable doubt when the jury decides the defendant's liability for the offense. In actuality the witness is rarely still facing charges by the time he or she testifies, as the testimony of an accomplice usually takes place after the witness has entered a plea of guilty to some lesser charge. His fate is not in the hands of the jury. He is not charged with the crime of "accomplice." The jury is not considering it on a beyond a reasonable doubt standard again after first determining the 'accomplice' status on a lower standard of proof. If it finds that there is insufficient proof that the witness was an accomplice, it can altogether dispose of the need for corroboration, believe the witness' testimony and judge that it alone is sufficient ot convict! Or it can believe the accomplice status, in which case it must seek corroboration, a process which it most likely would have done in any case. See State v. Sheeley, 63 Nev. 88, 95-97 (1945); Cutler v. State, 93 Nev. 329 (1977). State v. Williams, 35 Nev. 276 (1913). That corroboration need only have "slight

probative effect." State v. Hilbish, 59 Nev. 469, 479, 97 P. 2d 435, 439 (1940). This is important because the jury is not sitting as a court of review of the trial judge's decision to admit the testimony on a "slight" *anything* standard and later reevaluating the identical elements on a "beyond a reasonable doubt" standard.

In contradistinction, where a defendant is charged with conspiracy, the co-conspirator statements admissibility issues of temporal existence of and membership in the conspiracy, and its objective (so as to determine the "in furtherance of" issue) must be re-examined and re-evaluated by the jury on the issue of liability for the offense and, as in this case, other charged offenses for which only general intent is necessary. The second time around it must use the beyond a reasonable doubt standard in doing so. Thus, there is a need for the jury to do it twice under two different standards if they are instructed as to the standard for admissibility of the out of court statements made by a co-conspirator. The dangers of doing so are self-evident. And it begs the question put by Judge Easterbrook: "why bother?" Martinez De Ortiz, 883 F.2d at 524 . Surely the jury doesn't have the power to strike the evidence; it is not a reviewing court. It is there only to weigh the evidence. Why invite the dangers associated with instructing the jury on a standard less than "beyond a reasonable doubt" when doing so is entirely unnecessary?

4. Jury Review of the Admissibility Decision and the Injection of the "Slight Evidence" Standard Does Not "Favor" a Defendant.

Although the Respondent places great importance on what appears from the transcript as counsel for H telling the Court that Instruction #40 "favors the defendant more." and suggests that this demonstrates that the instruction was acknowledged by trial counsel as not harmful to the defendant, Respondent's position is not feasible when set in a "real world" view. There is no question that if the prefix "dis-" appeared before the word "favors" the Respondent would have made the same argument, only without the supposed backing derived from defense counsel's statement. However, this Court should look at the record with a practical eye educated from its members "real world" courtroom experiences, both as judges and as advocates. It should not determine the merits of an appeal on the basis of a missing syllable. The Respondent's position begs the question "why would criminal defense counsel who is making a specific and detailed objection to a proposed jury instruction in a forceful manner have done so at all if he thought that the instruction 'favored' his client more than its absence would?" The answer is self-evident: he wouldn't have objected if it was more favorable to his client. To do so would have been malpractice.

Courts have often recognized that in the heat of battle lawyers can misspeak and have historically dealt with such events by recognizing that it is the substance

of what is being communicated, as given meaning by the surrounding context, which should be the focus of their attention. As the United States District Court for the District of Colorado observed in Cook v. Rockwell International Corp., 428 F. Supp. 2d 1152, 1160-1161 (D. Colo., 2006) "Judges, witnesses-even counsel-occasionally misspeak, and court reporters occasionally misapprehend, on the record. Where an omitted "but" or "not" changes the meaning of a sentence in a manner inconsistent with the context in which it is made, reviewing courts are capable of reading the sentence in its overall context." Surely this Court will do so in this case and recognize that the Respondent's seizing upon the absence of a prefix modifying the meaning of "favors" is an example of defense counsel misspeaking in this context if the court reporter's transcript was accurate. See Raymond v. Wrobel, 2010 WL 3611058, fn.4 (Cal. App. 4th Dist. 2010); People v. Zayas, 2010 WL 3530426, fn.5, (Cal. App. 4th Dist. 2010); People v. Ramirez, 2009 WL 1303229 (Cal. App. 6th Dist. 2009); Castenano v. State, 2007 WL 491603 (Tex. App. 1st Dist. 2007); State v. Pflepsen, 590 N.W. 2d 759, 767, fn.3 (Minn., 1999).[3]

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[3] While some of the foregoing cases on this point are not reported decisions, given the frequency with which Respondent has employed other unreported decisions in its Answering Brief without advising the Court of their status as such, it is hoped that this Court will forgive counsel for their use in illustrating this topic which is rarely addressed by appellate courts in reported decisions.

In the final analysis, because the instructions taken as a whole permitted the jury to find H guilty of the general intent crimes of battery with a deadly weapon or with substantial bodily harm under a theory of vicarious liability once it found him guilty of the conspiracy, the impact of the erroneous, confusing, unnecessary and "pernicious" instruction (#40) employing an improper and unconstitutional standard - to which H's counsel objected on proper grounds - is clear. When coupled with the evidence against H being slight at best (with none of it except the co-conspirators statements demonstrating H's pre-event connection, knowledge or intent), *infra.,* it results in a lack of confidence in the jury's verdict.[4] The instruction permitted the jury to consider a less than "beyond a reasonable doubt" standard in deciding the issue of membership in the conspiracy. Once that was

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[4] Noteworthy by its absence in the Statement of Facts section of the Respondent's Answering Brief is a summary of the testimony of Jerome DePalma and Don Dibble (see Appellant's Opening Brief, pages 18-21) as well as that of Obi Perez (see Appellant's Opening Brief, page 23-24). Because they are set out in the Appellant's Opening Brief, there is no need to repeat them here. However, they certainly demonstrate that the evidence in the case was close and that his "self-serving explanations" were first uttered by Anabel Espindola to DePalma and Dibble the day after the death of Hadland. Moreover, Respondent's Statement of Facts relies almost entirely upon the testimony of Zone, whose mention of H was always based upon statements by Deangelo Carroll, an alleged accomplice/co-conspirator who did not testify at trial, and Anabel Espindola, the accomplice who denied even speaking to DePalma and Dibble. There is a noteworthy absence of any corroboration of Espindola's contention of H having pre-event knowledge of impending harm to Hadland.

done, there was nothing more for the jury to do. There were no other factual findings that can be said with requisite certainty to have been decided beyond a reasonable doubt. Moreover, it unnecessarily focused the jury's attention on the co-conspirators' statements. "The customary problem with hearsay is not irrelevance but excessive persuasive force; jurors may think the evidence more reliable that it is and so rely too heavily on it. That is a serious risk, but **the safeguard is the judge's preliminary decision** ..." Martinez De Ortiz, 907 F. 2d at 633. Coupled with the "slight evidence" instruction, nothing good could have come of it. For these reasons, this Court should reverse the judgment and remand to the district court. A new trial should be ordered.

II.

THERE WAS INSUFFICENT CORROBORATION OF THE ACCOMPLICE TESTIMONY TO ALLOW THE VERDICT TO STAND

Respondent suggests that this Court adopt the test used by the Texas Court of Criminal Appeals set out in yet another unreported decision from a division of an intermediate appellate court of another state as the standard for determining the sufficiency of accomplice corroboration in Nevada. Cooley v. State, 2009 WL 566466 (Tex. Crim. App. 2009) It is respectfully submitted that jurisprudence in Nevada is already in place. See Hegelmeier v. State, 111 Nev. 1244, 903 P.2d 799 (1995); Eckert v. State, 91 Nev. 183 (1975). It was legislatively mandated by NRS 175.291. The Court must engage in an independent review of the record to

determine what evidence was adduced at trial, apart from accomplice testimony, and determine whether it is sufficient to connect the defendant with the commission of **the offense**. The corroboration shall not be sufficient if it merely shows the commission of the offense or the circumstances of it. Because each case must rest on its own facts when examining a record for independent corroboration of an accomplice that connects the defendant to the crime, the first step in the analysis where conspiracy leads to vicarious liability for general intent offenses must be to determine "**to which crime must there be a connection?**" It is undisputed that H was not present at the scene of the Hadland killing. He can only be held responsible for it if he conspired to have it occur. Nothing in this case other than Espindola demonstrates any pre-event connection or knowledge on the part of H to any conspiracy to do harm to Hadland. It is fundamental conspiracy law that a criminal agreement is defined by the scope of the commitment of its co-conspirators. Thus, where a defendant is unaware of the overall objective of an alleged conspiracy or lacks any interest in, and therefore any commitment to, that objective, he is not a member of that conspiracy. United States v. Smith, 82 F. 3d 1261, 1269 (3rd Cir 1996). For over a century it has been recognized that while in theory and in law there can be no objection to proving a crime by proof of a conspiracy to commit it, yet in practice that method of establishing the issue is liable to give the prosecution an undue advantage. Where the scope, limits, or

purpose of the alleged conspiracy are accurately defined by the pleading in the case, the accused has to meet at the trial a multitude of inculpatory facts claimed to be relevant to the main fact in issue. There is always danger in such cases that the specific charge will be lost sight of and disappear in the mass of collateral facts growing out of other subjects, and that the defendant may be convicted because of other wrongdoing with which he was not charged. See People v. McCain, 9 N.Y. Crim. R. 377, 38 N.E. 950 (N.Y. 1894). To guard against this the law recognizes that proof of a conspiracy with an objective different from that charged in the Indictment results in a fatal variance, as it is not the same conspiracy. As the United States Court of Appeals for the Eleventh Circuit held in reversing a conviction due to a fatal variance caused by multiple conspiracies being proven when one was charged in the case of United States v. Chandler, 388 F. 3d 796 (11th Cir. 2004):

> Since no one can be said to have agreed to a conspiracy that they do not know exists, proof of knowledge of the overall scheme is critical to a finding of conspiratorial intent. "Nobody is liable in conspiracy except for the fair import of the concerted purpose or agreement as he understands it." The government, therefore, must prove beyond a reasonable doubt that the conspiracy existed, that the defendant knew about it and that he voluntarily agreed to join it.

388 F. 3d at 806. (internal citations omitted; emphasis supplied). See United States v. Varelli, 407 F. 2d 735 (7th Cir. 1969).

One cannot join a conspiracy after the objective has been achieved. Thus, once the criminal objective contemplated by the conspiratorial agreement has been achieved or abandoned, it is completed and one cannot join that conspiracy or commit an overt act in furtherance of it. See Grunewald v. United States, 353 U.S. 391, 77 S. Ct. 963 (1957); People v. Zamora, 18 Cal.3d 538, 560, 557 P.2d 75, 90 fn. 20 (Cal. 1976) (cannot join murder conspiracy once murder occurs); People v. Marks, 45 Cal. 3d 1335, 1345, 756 P. 2d 260, 267-268 (Cal. 1988)(cannot be criminally liable under conspiracy theory for a crime committed prior to joining the conspiracy). In other words, once the crime that was the objective of the conspiracy occurs - here, murder - one can approve of it, even celebrate it, but it is simply too late to agree that it occur. See People v. Brown, 226 Cal. App. 3d 1361, 1368, 277 Cal. Rptr. 309, 313 (Cal. App., 5th Dist. 1991)(The object of a punishable conspiracy is commission of a crime which cannot be brought about, produced, caused, or accomplished if it has already been committed).

A conspirator is one who agrees to the commission of a crime before it occurs whereas one who learns of a crime that has occurred and assists a person to get away with it is an accessory after the fact. See State v. Skipintheday, 717 N.W. 2d 423, 426-427 (Minn. 2006). The accessory after the fact has had no part in causing the crime or assisting in its perpetration but instead interferes with the process of justice after the crime occurs. The same principal holds true as to aiding

and abetting a murder. As a matter of law one cannot aid and abet a murder after it has been accomplished. One can be an accessory after the fact. See Ex parte Overfield, 39 Nev. 30, 152 P. 568 (Nev. 1915). Moreover, the two are mutually exclusive as a matter of law. See United States v. Ortega, 44 F.3d 505, 507 (7th Cir. 1995); Givens v. State, 273 Ga. 818, 546 S.E. 2d 509, 512 (Ga. 2001) (a person cannot be both party to a crime and an accessory after the fact as under common law and modern practice an accessory after the fact is not an accomplice.) People v. Verlinde, 100 Cal. App. 4th 1146, 1158, 123 Cal. Rptr. 2d 322, 331 (Cal App 4th Dist. 2002) citing People v. Sully, 53 Cal 3d 1195, 812 P. 2d 163, 182 (Cal 1991).

Evaluating the corroboration of accomplices in this case requires an analysis of timing as to when a person must join a conspiracy in relationship to when the crime that is the object of the conspiracy is complete. See Grunewald v. United States, 353 U.S. 391, 77 S. Ct. 963 (1957)(conspiracy); People v. Zamora, 18 Cal.3d 538, 560, 557 P.2d 75, 90 fn. 20 (Cal. 1976)(conspiracy); People v. Marks, 45 Cal. 3d 1335, 1345, 756 P. 2d 260, 267-268 (Cal. 1988)(conspiracy); United States v. Delpit, 94 F. 3d 1134, 1150-1151 (8th Cir. 1996); Givens v. State, 273 Ga. 818, 546 S.E. 2d 509, 512 (Ga. 2001); People v. Verlinde, 100 Cal App. 4th 1146, 1158, 123 Cal. Rptr. 2d 322, 331 (Cal App 4th Dist. 2002).

There were only two witnesses at trial who implicated H as having any pre-event knowledge or connection to any harm that was ultimately forthcoming to Hadland. The first, Zone, merely repeated statements made by Carroll.[5] He had no independent knowledge of their truth. He supplied nothing in his testimony other than Carroll's statements that would "connect" H with the commission of the offense. While it is H's position that Zone should be treated as an accomplice and require corroboration as such, as set out in his Opening Brief, if the jury rejected that proposition it surely could not have returned a guilty verdict entirely dependent on Zone's testimony. Nor could he have supplied the necessary corroboration for Espindola's testimony. He was percipient to the homicide and enough discussions between Carroll, Counts and Taoipu to establish their conspiracy, but was bereft of contact with H or Espindola to connect them to it other than through Carroll's statements which were not exposed to cross-examination and confrontation. When compared with the percipient testimony that this Court found insufficient in Eckert and Hegelmeier, Zone's testimony clearly fails to supply the necessary corroboration for Espindola.

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[5] Carroll never testified at trial, although his statements made during a consensual recordings were admitted over H's objection and played for the jury. Contrary to Respondent's oft repeated references to the use of "wiretaps" as trial evidence in its Answering Brief, if the State spoke the truth in response to H's pretrial Motion for Disclosure of Electronic Surveillance, there was no wiretap in this case. 4 Apellant's Amended Appendix 728 and 773.

The Respondent's position that H directed Espindola to pay $5,000 to Counts "for murdering Hadland" is not supported by the record. Respondent cites to two entries. At 19 AA 3732:8-12, the testimony of Jerome DePalma makes it clear that according to Espindola's statement to him in the presence of H the day after the death of Hadland, the purpose of the payment was because of the threat that Counts presented to H, Espindola and the Hidalgo family. At 21 AA 4005-4007, H himself testifies that the money was paid out of fear. There is no evidence that the money was paid for the murder of Hadland. Respondent acknowledges that this is proof of H being an accessory after the fact and doesn't directly link H to the charged crimes.

The Respondent's contention that somehow the information on Exhibit 239 (chart depicting cell phone towers and calls) establishes that "H was always in the immediate vicinity of the co-conspirators" indicates that it was not inspected by counsel for Respondent. 19 AA 3596-3600. There was nothing to indicate that H was anywhere but the Palomino Club and no phone traffic – none at all – transpired between his phone and any of the alleged conspirators that evening! Given the vast area covered by the range of cell phone towers, to characterize this as "in the immediate vicinity of" anyone is a desperate stretch of imagination. Once again, returning to Eckert and Hegelmeier, this doesn't cut the mustard.

As to Espindola's "wiretapped statements" supplying corroboration for her testimony, they were made under suspicious circumstances and she had enough time between meeting with DePalma and Dibble, and later H's counsel, to: (1) know that she might be recorded, and (2) make up a story implicating H so that it could later be used by her in whatever way she chose. She had been advised by DePalma, Dibble and H's counsel that she might be overheard. Moreover, these were not recorded conversations between two unsuspecting participants as is the case when a wiretap is used. That makes this case distinguishable from Cheatham v. State, 104 Nev. 500, 503, 761 P.2d 419, 421 (1988). She had a motive to fabricate as soon as the police arrived at the Palomino the day after Hadland's death and four days before her statement to Carroll on the tape. See Runion v. State, 116 Nev. 1041, 1053, 13 P.3d 52 (2000). And the fact that she had many months to listen to these tapes and fabricate a story that would dovetail with her statements on them should make this Court even more cautious about recognizing them as corroboration.

It is respectfully submitted that nothing in the record sufficiently corroborates Zone or Espindola in that most important and governing principle. That one who was a conspirator can take part in an effort to conceal it afterwards is true, but it does not provide the corroboration necessary to support the accomplice

testimony that one was a conspirator prior to the objective of the conspiracy being achieved.

III.

FAILURE TO RECORD ESPINDOLA'S PLEA NEGOTIATION PROFFER VIOLATED H'S RIGHTS TO DUE PROCESS, CROSS-EXAMINATION AND A FAIR TRIAL.

A. MEANINGFUL CROSS-EXAMINATION IS DEPENDENT UPON PROFFER RECORDATION.

The Respondent asserts that "Mr. H fails to present any legal authority for his view that the Respondent is obligated to tape or video-record plea negotiation proffers [with purported cooperating accomplices] . . . . [and that] [h]e fails to identify any due process or other fair trial right infringed by the Respondent not recording Espindola's plea negotiation proffer." Respondent's Answering Brief page 41, lines 12-16. H respectfully disagrees, and would respectfully submit that such an obligation on the part of the Respondent implicitly inheres in the jurisprudence of Sheriff v. Acuna, 107 Nev. 664, 819 P.2d 197 (1991) and Leslie v. State, 114 Nev. 8, 952 P.2d 966 (1998), both of which cases are cited and specifically relied upon in Appellant Luis A. Hidalgo, Jr.'s Opening Brief

Thus, H respectfully submits that the textual requirements of Acuna that "the defendant or his counsel must be allowed to fully cross-examine the

[cooperating] witness concerning . . . [his plea] bargain," [6] so as to achieve "the *baring of all aspects*" thereof at trial can be meaningfully served no other way than by and through obligatory proffer recordation. Id. 107 Nev. at 669-670, 819 P.2d at 200-201. . Nor may the express condition precedent imposed by the Acuna Court upon a permissible executory plea agreement between the Respondent and a cooperating witness that "the putative witness *persuasively* profess[ ] to have truthful information of value and a *willingness* to accurately relate such information at trial" be otherwise "tested by cross-examination" as Acuna demands. *Id.* (Emphasis added).

Thus, the Respondent argues that H "points to nothing in the record indicating the Respondent offered Espindola some improper inducement or attempted to script her testimony" in violation of the prohibitions of Acuna. Respondent's Answering Brief at page 41, lines 16-17. However, it is beyond peradventure that such skullduggery uniquely occurs only under cover of unaccountability, and is affirmatively facilitated by the cloak of secrecy that non-recordation uniquely provides. And H respectfully submits that it is an unreasonable imposition upon an accused to require him to marshal evidence of such constitutional violations on the basis of disclosures by the cooperating

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[6] Which the State expressly acknowledges in Respondent's Answering Brief at pages 41-42.

witnesses themselves against their own penal interests, or acquire such information from police officers who may indulge in such unconstitutional tactics and who are "engaged in the often competitive enterprise of ferreting out crime." Thus, H respectfully submits that the scrupulous protection of the constitutional rights of the accused in the premises articulated in Acuna must be more facilely susceptible of the vindication that only proffer- recordation permits.

B. BAD FAITH IS SHOWN BY THE DELIBERATE FAILURE TO RECORD ESPINDOLA'S PROFFER.

As pointed out in the law review article cited in Appellant's Opening Brief and quoted in Respondent's Answering Brief at page 42, footnote 31: "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 . . . ." Note, *Should Prosecutors be Required to Record Their Pretrial Interviews with Accomplices and Snitches?*, 74 Fordham L. Rev. 257, 264-265 (2005). (Citations omitted). (Emphasis added). And the Respondent concedes that this note "correctly summarizes the state of the law." Respondent's Answering Brief at page 42, line 20.

But the Respondent fails entirely to address H's contention that the record demonstrates that the failure to record Espindola's de-briefing proffer in the instant

case was in fact deliberate. Appellant's Opening Brief at pages 50-52. Thus, H continues to respectfully submit that a bad faith police or prosecutorial purpose to intentionally frustrate the full cross-examination demanded by Acuna is shown by deliberate failure to record the proffer of a cooperating witness, and that deliberate failure to record is shown, in turn, by conspicuous variance from practice. Indeed, as pointed out in Applellant's Opening Brief, in conspicuous contradistinction in the case of Espindola, the negotiation proffers of Respondent witnesses Carroll and Rontae Zone (hereinafter "Zone") were videotaped. And the Respondent fails to address this disparity in Respondent's Answering Brief.

IV.

IV. THE SURREPTITIOUSLY RECORDED STATEMENTS OF DEANGELO CARROLL MADE AFTER HIS WITHDRAWAL FROM THE ALLEGED CONSPIRACY AND ABSENT HIS AVAILABILITY FOR CROSS-EXAMINATION WERE NOT ADMISSIBLE AGAINST H AS "VICARIOUS" ADOPTIVE ADMISSIONS AND VIOLATED HIS RIGHT TO CONFRONTATION

The Respondent argues that the admission as against H of Deangelo Carroll's (hereinafter "Carroll") surreptitiously recorded out-of-court statements to Espindola and Luis Hidalgo, III (hereinafter "III") -- outside the presence of H -- following Carroll's withdrawal from the alleged conspiracy to murder T.J. Hadland did not violate H's right of confrontation despite Carroll's unavailability for cross-examination by counsel for H at trial. The Respondent predicates this argument on

the proposition that these statements of Carroll – which included the assertion that "he [*i.e.* H] wanted him [*i.e.* Hadland] fucking taken care of [and] we took care of him" were not hearsay. And the Respondent bases this contention, in turn, upon the notion that the statements of Carroll were not admitted for the truth of the matter asserted; but rather, were admitted to give context and intelligibility to the silence of Espindola and III in response thereto as the purported vicarious "adoptive admissions" of H. Respondent's Answering Brief pages 45-48, 51. The Respondent also relies upon the same argument in its effort to justify the trial court's denial of H's Motion for New Trial. Thus, the Respondent argues that:

> "[T]he 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 H, it only used that statement to add context to Espindola and Little Lou's failure to respond, which constituted an adoptive admission." Respondent's Answering Brief page 51, lines 10-17.

Indeed, in so doing, the Respondent directly quotes the trial court's analysis in denying H's Motion for New Trial wherein the court expressly observed that "[t]he fact that Ms. Espindola and III did not correct Carroll when he used the pronoun 'He,' could be considered an adoptive admission by those parties." Respondent's Answering Brief page 47, line 21-page 48, line 1.

However, Appellant respectfully submits that the Respondent's effort to cure the confrontation violation with respect to his rights in the premises by extending this reasoning against him so as to apply the silence of Espindola and III to Carroll's recorded statements -- outside his presence -- H's own purportedly *vicarious* "adoptive admissions" must fail.

The leading case in Nevada concerning this issue is Maginnis v. State, 93 Nev. 173, 561 P.2d 922 (1977), in which this Court articulated the general principle that "[i]f a person is accused of having committed a crime, ***under circumstances which fairly afforded him an opportunity to hear, understand, and to reply***, and which do not lend themselves to an inference that he was relying on the right of the silence guaranteed by the Fifth Amendment to the United States Constitution, and he fails to speak, or he makes an evasive or equivocal reply, both the accusatory statement and the fact of silence or equivocation may be offered as an implied or adoptive admission of guilt." 93 Nev. at 175, 561 P.2d at 923. (Emphasis added). See also McKenna v. State, 101 Nev. 338, 345, 705 P.2d 614, 619 (1985) ("If an incriminating statement is ***heard and understood*** by an accused, and his response justifies an inference that he agreed or adopted the admission, then evidence of the statement is admissible at trial"); Harrison v. State, 96 Nev. 347, 349, 608 P.2d 1107 (1980). (Emphasis added). Thus, as this Court held in McKenna: "McKenna responded to Levos' question whether he was involved in

the Nobles murder by nodding yes and smiling. Appellant's nonverbal response was not ambiguous and was properly admitted into evidence." 101 Nev. at 345,705 P.2d at 619.

Accordingly, the "adoptive admission" rationale does not apply to an accusatory out-of-court statement which is met with silence unless the particular defendant against whom the statement is admitted was personally present when the statement was made and had a fair opportunity to correct or deny it. Thus, as this Court explained in its seminal case in this area of Skidmore v. State, 59 Nev. 320, 92 P.2d 979 (1939): "'As a general rule, when a statement tending to incriminate one accused of committing a crime is made ***in his presence and hearing*** and such statement is not denied, contradicted or objected to by him, both the statement and the fact of his failure to deny are admissible in a criminal prosecution against him, as evidence of his acquiescence in its truth.'" 92 P.2d at 983. (Quoting 20 Am. Jur., p. 483, par. 570). (Emphasis added). As Skidmore pointed out: "It is the law that when one is accused and he makes prompt and direct denial, the statement is not admissible." 92 P.2d at 983. So, as this Court made clear in Skidmore, the relevant inquiry is: "were the accusatory statements made ***in the presence of the defendant*** directly or unequivocally denied by him, and if not, did such failure to deny constitute an admission by conduct?" Id. (Emphasis added).

Accordingly – by contradistinction to the situation in the case at bar – Maginnis v. State, supra, 93 Nev. 173, 561 P.2d 922 (1977) clearly demonstrates the fallacy of the Respondent's contention that Carroll's single party consensually recorded statements were admissible against Appellant pursuant to a theory of purported *vicarious* adoptive admission. Indeed, as this Court specifically held in Maginnis:

> ***In the presence of each other*** and other witnesses, each appellant made extra judicial out-of-custody statements wherein each discussed the homicides in detail and implicated the other as well as himself. The district court, ruling the statements were adoptive admissions . . . permitted the witnesses to testify about the conversations. Relying on Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968), each appellant contends the other's statements are inadmissible against him. However, Bruton involved a co-defendant's confession made to a third party ***outside the presence of the defendant***, not adoptive admissions, and is therefore inapposite. Further, we are not here faced with a post-arrest or custodial situation where one has no duty to speak and, indeed, has the constitutional right to remain silent. See: Vipperman v. State, 92 Nev. 213, 547 P.2d 682 (1976). Instead, the statements were made in a private conversation in a private home and were of such a nature that, in ordinary experience, dissent would have been expected if the communications were incorrect. 93 Nev. at 175, 561 P.2d at 922-923. (Emphasis added).

Thus, in that Appellant was not personally present at the time of the consensually recorded out-of-court statements of Carroll to Espindola and III, and therefore had no fair concomitant opportunity to deny or disassociate himself from

the same, the foregoing jurisprudence precludes the admission of those statements, as well as the silence of Espindola and III in response thereto, against H on a purported theory of "vicarious" adoptive admission as the Respondent suggests in its Answering Brief. That being the case, recognizing that the recording was made to use as evidence and Carroll knew it at the time, it falls within the ambit of Crawford v.Washington, 541 U.S. 36, 124 S. Ct. 1354 (2004) and the case must be reversed and remanded for a new trial.

DATED this 28th day of September, 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, N.R.A.P. 28(c), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 28th day of September, 2011.

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CERTIFICATE OF SERVICE

The undersigned hereby declares that on the 28 day of September, 2011, I deposited a true and correct copy of the foregoing APPELLANT LUIS A. HIDALGO, JR.'S REPLY BRIEF in the United States Mail, postage fully prepaid, addressed to the following:

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