IN THE SUPREME COURT OF THE STATE OF NEVADA

LUIS A. HIDALGO, III, Appellant, v. THE STATE OF NEVADA, Respondent.	Case No. 54272

RESPONDENT'S ANSWERING BRIEF

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

JOHN L. ARRASCADA, ESQ.
Arrascada & Arrascada, LTD.
Nevada Bar #004517
CHRISTINE ARRASCADA ARMINI, ESQ.
Arrascada & Arrascada, LTD.
Nevada Bar #007263
145 Ryland Street
Reno, Nevada 89501
(775) 329-1118

CHRISTOHPER W. ADAMS, ESQ.
Admitted Pro Hac Vice
102 Broad Street, Suite C
P.O. Box 561
Charleston, SC 29402-0561
(843) 577-2152

Counsel for Appellant

DAVID ROGER
Clark County District Attorney
Nevada Bar #002781
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500
State of Nevada

CATHERINE CORTEZ MASTO
Nevada Attorney General
Nevada Bar No. 003926
100 North Carson Street
Carson City, Nevada 89701-4717
(775) 684-1265

Counsel for Respondent

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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 the district court erred in not admitting as substantive evidence the out-of-court statement of Appellant's former co-conspirator Deangelo Carroll.
3. Whether the trial court erred in refusing to admit a portion of the prior testimony of Appellant's co-conspirator Jayson Taoipu.
4. Whether, under the accomplice corroboration rule, the State presented sufficient independent evidence of corroboration.
5. Whether Appellant's due process and fair trial rights required the State to record the guilty plea negotiation proffer of Anabel Espindola.

STATEMENT OF THE CASE

On May 31, 2005, the State of Nevada filed a Criminal Complaint charging Appellant Luis Hidalgo, III (Little Lou), and his co-defendants, Kenneth "KC" Counts (Counts), Anabel Espindola (Espindola), and Deangelo Carroll (Carroll), with: Count 1 – Conspiracy to Commit Murder (Felony – NRS 200.010; 200.030; 199.480); Count 2 – Murder with Use of a Deadly Weapon (Felony – NRS 200.010; 200.030; 193.165); Count 3 – Solicitation to Commit Murder (Felony – NRS 199.500) as to Little Lou and Espindola only; and Count 4 – Solicitation to Commit Murder (Felony – NRS 199.500) as to as to Little Lou and Espindola only. RA 107-109. On June 3, 2005, the State filed a Second Amended Criminal Complaint, which added Jayson "JJ" Taoipu (Taoipu) as a co-defendant charged under Counts 1 and 2 only. RA 110-112. On June 13, 2005, Little Lou, Counts, Espindola, and Carroll's preliminary hearing was held, after which Little Lou was bound over for trial on all

counts. RA 113-245. The State filed a conforming Information on June 20, 2005. On July 6, 2005, the State filed a Notice of Intent to Seek Death Penalty as to Little Lou. 2 RA 481-485.[1]

On January 27, 2009, Little Lou and Mr. H, proceeded to trial, and, on February 17, 2009, the jury returned a verdict finding Little Lou guilty on Counts 1-4. 1 AA 60-61. On March 10, 2009, Little Lou filed a post-trial Motion for Judgment of Acquittal, or in the Alternative, a New Trial, which raised in summary fashion the claims of error designated above as issues 1 and 3. 2 RA 429-440. The State filed its Opposition on March 17, 2009. 2 RA 472-480. On May 1, 2009, the Court heard argument on the motion and denied it, with a written order filed on August 4, 2009. 2 RA 486-489.

On June 23, 2009, the Court sentenced Little Lou to the following: Count 1 – twelve (12) months in the Clark County Detention Center (CCDC); 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; Count 3 – twenty-four (24) to seventy-two (72) months NDOC, concurrent with Counts 1-2; Count 4 – twenty-four (24) to seventy-two (72) months NDOC, concurrent with Counts 1-3. 1 AA 62-63. The Court filed its Judgment of Conviction on July 10, 2009. 1 AA 62-63. On July 16, 2009, Little Lou filed a timely Notice of Appeal. 1 AA 64-65.

STATEMENT OF THE FACTS

In May of 2005, Appellant Luis Hidalgo, III (Little Lou) worked for his father, co-defendant Luis Hidalgo, Jr. (Mr. H), at the Palomino Club (Palomino or the club), which is Las Vegas's only all-nude strip club licensed to serve alcohol. 5 AA 932. Mr. H. owned the Palomino and Little Lou served as one of its managers. 5 AA 932. 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

[1] On February 13, 2008, a grand jury returned a true bill of indictment charging Little Lou's father, Luis Hidalgo, Jr. (Mr. H) with: Conspiracy to Commit Murder and Murder with Use of a Deadly Weapon. 2 RA 392-395. On June 25, 2008, the State filed a motion to consolidate Mr. H's case, C241394, with Little Lou's case, which was granted on January 16, 2009. 2 RA 428. The State also withdrew its death penalty notices. 2 RA 428.

Carroll (Carroll); Carroll was an employee of the Palomino serving as a "jack of all trades" handling promotions, disc jockeying, and other assorted duties. 5 AA 932-933; 942-944. Espindola was the Palomino's general manager and handled all of the club's financial and management affairs. 5 AA 920; 931-932. 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. 5 AA 934; 942-944; 9 AA 2031. A week prior to this news, Little Lou had informed Mr. H that Hadland was falsifying Palomino taxicab voucher tickets in order to generate unauthorized kickbacks from the drivers. 5 AA 935-939.[2] In response, Mr. H ordered Hadland fired. 5 AA 939-940.[3]

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. 5 AA 919-928; 979; 6 AA 1089. Taxicab drivers are a critically important form of advertising for strip clubs generally. 7 AA 1573:6-17. Because of the Palomino's location in North Las Vegas, revenue generated through taxicab drop-offs was very important to the club's operation. 7 AA 1573-1574. Due to a legal dispute among the area strip clubs regarding bonus payments to taxicab drivers, all payments were suspended during the period encompassing May 19-20, 2005; the Palomino was the only club permitted to continue paying taxi drivers for dropping off customers. 2 AA 453-454.

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.[4] 5 AA 910-914. After taking Carroll's call, Espindola informed Mr. H and Little Lou of Carroll's news about

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[2] The Palomino paid cash bonuses to taxi drivers for each person a driver dropped off. 5 AA 935-936. 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. 5 AA 935-936. 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. 5 AA 938-939.

[3] 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 local patrons. 4 AA 1154-1155; 8 AA 1718-1719; 9 AA 1924-1925. This practice created a problem for the club because taxi drivers would begin disputing their entitlement to be paid bonuses. 4 AA 1155; 8 AA 1719.

[4] Financially, Simone's was breaking even at the time of this case's underlying events, but the business never turned a profit. 5 AA 916-917; 931.

Hadland disparaging the club. 5 AA 944; 946. 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." 5 AA 946. Little Lou told Mr. H, "You'll never be like Rizzolo and Galardi. They take care of business." 5 AA 946; 9 AA 2031.[5] He further criticized Mr. H by pointing out that Rizzolo had once ordered an employee to beat up a strip club patron. 5 AA 948. Mr. H became angry, telling Little Lou to mind his own business. 5 AA 948. 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. 5 AA 948.

Visibly angered, Mr. H walked out of Espindola's office and sat on Simone's reception area couch. 5 AA 958. At approximately 6:00 or 7:00 PM, Espindola and a still visibly-angered Mr. H drove from Simone's to the Palomino. 5 AA 959-960. Once at the Palomino, Espindola went into Mr. H's office, which was her customary workplace at the club. 5 AA 966. Approximately half an hour later, Carroll arrived at the club and knocked on the office door, which Mr. H answered. 5 AA 966. Mr. H and Carroll had a short conversation and then walked out the office door together. 5 AA 966-967. 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. 5 AA 966. Mr. H instructed Espindola to call Carroll and tell Carroll to "go to Plan B." 5 AA 967.

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. 5 AA 972. Carroll called Espindola back, and Espindola instructed Carroll that Mr. H wanted Carroll to "switch to Plan B." 3 AA 566; 5 AA 972; 9 AA 2033. Carroll protested that "we're here" and "I'm alone" with Hadland, and he told Espindola that he would get back to her. 3 AA 566; 5 AA 972-975. Espindola and Carroll's phone connection was then cut off. 5 AA 975. At that point, Espindola knew "something bad" was going to happen to Hadland. 5 AA 975. She attempted to call Carroll back, but could not reach him. 5 AA 975.

[5] 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. 5 AA 947-948.

Espindola returned to the office and informed Mr. H that she had instructed Carroll to go to "Plan B." 5 AA 976.

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. 2 AA 390-391. Zone and Taoipu worked alongside Carroll and performed jobs Carroll delegated to them in exchange for being paid "under the table" by Carroll. 2 AA 383-384; 388. Zone and Taoipu would pass out Palomino flyers to taxis at cabstands. 2 AA 383. Zone lived at the apartment with Carroll, Carroll's wife, and Zone's pregnant girlfriend, Crystal Payne. 2 AA 383-384. Zone and Taoipu were close friends. 2 AA 387.

While at the apartment, Carroll informed Zone and Taoipu that Little Lou had told him Mr. H wanted a "snitch" killed. 2 AA 390-391; 3 AA 582; 629. Carroll asked Zone if he would be "into" doing something like that, and Zone responded "No," he would not. 2 AA 391. Carroll also asked the same question of Taoipu who indicated he was "down," i.e., interested in helping out. 2 AA 391-392. 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. 2 AA 392. 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. 2 AA 399. 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. 2 AA 398-399.

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. 2 AA 394; 440; 3 AA 516; 631. 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. 2 AA 394-395. Carroll attempted to give the revolver to Zone who refused to take it. 2 AA 395. Taoipu was willing to take the revolver from Carroll and did so. 2 AA 395. 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. 2 AA 395-396.

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. 2 AA 396-397. 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. 2 AA 396-397. On this next trip, however, Carroll took them to a residence on F Street where they picked up Kenneth "KC" Counts (Counts). 2 AA 400. Zone had no idea they were traveling to pick up Counts whom he had never previously met. 2 AA 400. Once at Counts's 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. 2 AA 400-401. Counts entered the Astro van and seated himself in the back passenger seat next to Zone who was seated in the rear passenger seat directly behind the driver. 2 AA 401-402. Taoipu was seated in the front, right-side passenger seat. 2 AA 402.

At the time, Zone believed they were headed out to do more promoting for the Palomino. 2 AA 403. 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. 2 AA 403. Carroll told Zone and the others that they were going to be meeting Hadland and were going to "smoke [marijuana] and chill" with Hadland. 2 AA 404. Carroll continued driving toward Lake Mead. 2 AA 403.

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. 2 AA 406; 3 AA 566; 7 AA 1556-1557. Carroll was also using his phone's walkie-talkie function to chirp. 2 AA 409; 7 AA 1555-1559. Little Lou chirped Carroll and they conversed. 3 AA 628. Carroll spoke with Espindola who told him to "Go to Plan B," and then to "come back" to the Palomino. 3 AA 566; 6 AA 1277; 1289. Zone recalled Carroll responding "We're too far along Ms. Anabel. I'll talk to you later," and terminated the conversation. 3 AA 566. 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 where his cell phone service would be reestablished. 2 AA 409-410.

Carroll was able to describe a place for Hadland to meet him along the road to the lake. 2 AA 411. Hadland arrived driving a Kia Sportage sport utility vehicle (SUV), executed a U-turn, and pulled to the side of the road. 2 AA 411-412; 3 AA 629. 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. 2 AA 413. As Carroll and Hadland spoke, Counts opened the van's right-side sliding door and crept out onto the street, moving first to the front of the van, then back to its rear, and back to its front again. 2 AA 413-414. Counts then snuck up behind Hadland and shot him twice in the head. 2 AA 414; 3 AA 630-631. One bullet entered Hadland's head near the left ear, passed through his brain, and exited out the top of his skull. 2 AA 365-370. The other bullet entered through Hadland's left cheek, passed through and destroyed his brain stem, and was instantly fatal. 2 AA 365-370.

One of the group deposited a stack of Palomino Club fliers near Hadland's body. 1 AA 182; 3 AA 649. Counts then hurriedly hopped back into the van and Carroll drove off. 2 AA 415. Counts then questioned both Zone and Taoipu as to whether they were carrying a firearm and why they had not assisted him. 2 AA 415-416. Zone responded that he did not have a gun and had nothing to do with the plan. 2 AA 416. Taoipu responded that he had a gun, but did not want to inadvertently hit Carroll with gunfire. 2 AA 416.

Carroll then drove the four back to the Palomino, where Carroll exited the van and entered the club. 2 AA 417. Carroll met with Espindola and Mr. H in the office. 5 AA 976-977. He sat down in front of Mr. H and informed him "It's done," and stated "He's downstairs." 5 AA 977-978; 9 AA 2034. Mr. H instructed Espindola to "Go get five out of the safe." 5 AA 978. Espindola queried, "Five what? $500?," which caused Mr. H to become angry and state "Go get $5,000 out of the safe." 5 AA 978; 9 AA 2034; see also 9 AA 1937-1939. 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. 5 AA 978-980. Espindola placed the money in front of Carroll who picked it up and walked out of the office. 5 AA 979-980. 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?" 5 AA 980-981.

Ten minutes after entering the Palomino, Carroll emerged from the club, retrieved Counts, and then went back in the club accompanied by Counts. 2 AA 417. Counts then emerged from the club, got into a yellow taxicab minivan and left the scene. 2 AA 418; 450-451; 3 AA 630. Carroll again emerged from the Palomino 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. 2 AA 418-419; 3 AA 522-525. Zone was very shaken up about the murder and did not say much after they returned to his and Carroll's apartment. 2 AA 419.

The next morning, May 20, 2005, Espindola and Mr. H awoke at Espindola's house after a night of gambling at the MGM. 5 AA 982-984. Mr. H appeared nervous and as though he had not slept; he told Espindola he needed to watch the television for any news. 5 AA 984-985. While watching the news, they observed a report of Hadland's murder; Mr. H said to Espindola, "He did it." 5 AA 985. Espindola again asked Mr. H, "What did you do?" and Mr. H responded that he needed to call his attorney. 5 AA 985. 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. 2 AA 420; 3 AA 574; 7 AA 1509-1510. Carroll paid $100.00 cash to have all four tires replaced. 2 AA 420. 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. 2 AA 422-423.

Carroll then drove himself, Zone, and Taoipu in the Astro van to Simone's where Mr. H, Little Lou, and Espindola were present. 2 AA 423-424. Carroll made Zone and Taoipu wait in the van while he went into Simone's; Carroll emerged about thirty minutes later and directed Zone and Taoipu inside where they sat on a couch in Simone's central office area. 2 AA 423-424. 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. 2 AA 427; 431-432; 3 AA 626-627; 639. 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. 2 AA 425-426. He informed Zone and Taoipu that Counts received $6,000.00 for his part in Hadland's murder. 2 AA 426. 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." 3 AA 639-640.

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. 3 AA 652; 7 AA 1500. 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. 7 AA 1503.

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. 3 AA 657-658; 7 AA 1503-1504. 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. 7 AA 1509-1510. Carroll then told Zone within earshot of the detectives: "Tell them the truth, tell them the truth. I told them the truth." 3 AA 660-661. Zone recalled Carroll also saying: "If you don't tell the truth, we're going to jail." 2 AA 430. Zone interpreted Carroll's statements to mean Zone should fabricate a story tending to exculpate Carroll, himself, and Taoipu. 3 AA 577-578. Zone gave the police a voluntary statement on May 21, 2005. 7 AA 1510. Also on that day, Carroll brought Taoipu to the detectives' office for an interview. 3 AA 669-670; 7 AA 1511.

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. 8 AA 1641-1642. The next morning, May 22, 2005, a completely distraught Mr. H said to Espindola, "I don't know what I told him to do." 5 AA 1014. 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." 5 AA 1014. Espindola asked Mr. H if he wanted her to speak to Carroll and Mr. H responded affirmatively. 5 AA 1015; 9 AA 2044:10-18. Espindola arranged through Mark Quaid, parts manager for Simone's, to get in touch with Carroll. 5 AA 1015-1016.

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. 3 AA 695-696. Prior to Carroll arriving at Simone's, Mr. H and Espindola engaged in a

conversation by passing handwritten notes back and forth. 5 AA 1029-1030. 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. 5 AA 1018; see also 9 AA 2043:10-18. 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. 5 AA 1018; see also 9 AA 2043:10-18. After the conversation, Espindola tore the notes up and flushed them down a toilet. 5 AA 1030.

When Carroll arrived at Simone's, Espindola directed him to Room 6 where he met with Little Lou. 5 AA 1017. 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. RA 52; 5 AA 1020; 6 AA 1280. Mr. H was present in his office at Simone's while the three met in Room 6. 5 AA 1016; 7 AA 1372-1373. 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." RA 53. Little Lou informed Carroll that "[Mr. H]'s all ready to close the doors and everything and hide go into exile and hide." RA 62. 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."
> RA 54.

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.
> RA 54.

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. RA 57.

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.
> RA 61.

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 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." RA 59. 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_____
> RA 65.

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.
> RA 58.
>
> …
>
> 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.
> RA 64.

Little Lou appeared at one point to criticize Carroll for deviating from what Little Lou had told him to do and instead enlisting Counts. RA 63 at 22:15. 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. RA 66. 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. 3 AA 698-699.[6]

On May 24, 2005, the detectives again outfitted Carroll with a wire and sent him back to Simone's. 3 AA 703-704. After Carroll's unexpected arrival, Espindola again directed him to Room 6 where the two again met with Little Lou while Mr. H was present in the body shop's kitchen area. 5 AA 1027-1028. 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 (Unintelligible)
> 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.
> RA 73.

At some point in this May 24 meeting, Espindola left the room to go speak with Mr. H. 5 AA 1028. She informed Mr. H that Carroll wanted more money and Mr. H instructed her to give Carroll some money. 5 AA 1031-1032. After Carroll returned from Simone's, he gave the detectives $800.00,

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[6] 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. 5 AA 1023-1025; 6 AA 1249-1250; 1289-1291.

which Espindola had provided to him. 3 AA 704. After Carroll's second wiretapped meeting, detectives took Little Lou and then Espindola into custody for the murder of Hadland. 3 AA 495.

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.

Little Lou'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…
> 1 AA 47 (Jury Instruction #40 (JI 40)).

Little Lou 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.) 23. During settling of

jury instructions, Little Lou and Mr. H jointly objected to inclusion of the "slight evidence" language. 3 RA 620. Little Lou also filed a post-trial motion seeking judgment of acquittal or a new trial, which briefly argued that JI 40 was confusing. 2 RA 429-440. The district court rejected the argument based on the following analysis:

> 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.
> 1 AA 70.

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 Little Lou 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 Little Lou'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 Little Lou.

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 stated that it "generally reviews a district court's decision settling jury instructions for an abuse of discretion or judicial error [and] whether the jury instruction was an accurate statement of the law is a legal question subject to de novo review." Id. at 1091 (citations omitted). 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)). Little Lou must be able to show 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).

Little Lou 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).

The inapplicability of a structural error analysis is patent 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 Little Lou's claim of structural error. See Pungitore, Chaney, Noll, Monaco, Nickerson, Chindawongse, and Lutz, infra. Little Lou 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, 508 U.S. 275, 113 S.Ct. 2078 (1993), 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. Little Lou 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.[7] Unlike Sullivan, in Little Lou's case, a reviewing court can determine whether the alleged instructional error played a part in the jury's guilt determination. Further, Little Lou 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 Little Lou's jury that the State had met its burden to prove Little Lou conspired to harm Hadland, had committed Second Degree Murder, and 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 Little Lou's challenge, it has not applied structural error review. See U.S. v. Lugpong, 933 F.2d 1017 at 4 (9th Cir. 1991);[8] see also Garcia v. Evans, 2010 WL 2219177 at 22

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[7] ("[T]he 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.'").

[8] ("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).

(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) (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 Little Lou 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. 21. 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) (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."), cert. denied, 551 U.S. 1117, 127 S.Ct. 2940 (2007);[9] 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

[9] Like Little Lou, the Tran defendant unsuccessfully attempted to invoke Sullivan v. Louisiana's structural error analysis.

WL 3279780 at 9 (Cal. Ct. App. 2010); People v. Hall, 2009 WL 3110938 at 17-19 (Cal. Ct. App. 2009) Thus, these numerous and closely analogous practices demonstrate there was no confusion created by the district court giving JI 40.

Little Lou 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.

Little Lou 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. 3 RA 620-621; 2 AA 466-467. Indeed, the record demonstrates the State defended JI 40 on the basis that it was a correct statement of the law and inured to Little Lou's benefit. Id. It is the State's belief that had the Court *not* given JI 40, Little Lou

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, Little Lou 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[] claim[s]…she was denied due process by the trial court's failure to instruct the jury with CALJIC Nos. 6.21 and 6.24.").

Moreover, Little Lou 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 Little Lou'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 Little Lou'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 Little Lou.[10]

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[10] In the midst of arguing this first ground of appeal, Little Lou 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. 25 n.9. This purported ground of appeal is

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. Little Lou 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 Little Lou based on slight evidence of his involvement in a conspiracy. See Boyde, Collman, supra. When the two defendants were arguing their joint objection to the instruction, Little Lou's co-defendant, Mr. H, admitted on the record that mention of the slight evidence admissibility standard actually benefits a defendant:

> 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.
>
> [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.
>
> 3 RA 620 (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:

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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, Little Lou'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 Little Lou 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. 3 RA 514-515. Mr. Gentile's objection was to the Information, which he viewed as "duplicitous [*sic*] [in] that it had two conspiracies jammed into one." 3 RA 514. With the exception of the proposed verdict form, the record is entirely devoid of Little Lou 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 to provide a supplemental brief on the issue.

> [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, based on 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 Little Lou. Finally, as the district court's order pointed out, because Little Lou'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.

II
The District Court Did Not Err In Refusing To Admit Deangelo Carroll's Recorded Statements For Their Truth

Little Lou makes several arguments concerning the district court's order preventing him from having admitted for its truth Carroll's recorded hearsay statement to Little Lou: "You had nothing to do with this."[11] The district court properly determined that Carroll's statements were only admissible to provide context for the statements of Little Lou and Espindola, not for their truth, and thus avoided any confrontation clause problems. See Wade v. State, 114 Nev. 914, 917-918, 966 P.2d 160, 162-163 (1998) (discussing U.S. v. Tangeman, 30 F.3d 950 (8th Cir. 1994)). Nevertheless, Little Lou argues he was entitled to have Carroll's statements admitted for their truth. He first contends the ruling denied him due process under Chia v. Cambra, 360 F.3d 997 (9th Cir. 2004), cert. denied, 544 U.S. 919, 125 S.Ct. 1637 (2005).[12] Drawing on Miller v. Stagner, 757 F.2d 988 (9th Cir. 1985), Chia applied the following factors in determining whether the exclusion of hearsay evidence constitutes a due process violation: (1)The probative value of the excluded evidence on the central issue; (2) Its reliability; (3) Whether it is capable of evaluation by the trier of fact; (4) Whether it is the sole evidence on the issue or merely cumulative; and (5) Whether it constitutes a major part of the attempted defense. Chia, 360 F.3d at 1004. Little Lou's reliance on Chia suffers from several critical shortcomings. First, Carroll's statement bears none of the essential indicia of reliability that supported admissibility of the Chia declarant's statements. Second, Carroll was not the sole source of evidence regarding Little Lou's role (or lack thereof) in the conspiracy. Third, Carroll's statement was not wholly excluded; indeed, Little Lou's counsel was permitted to assert in closing argument that it was substantive evidence of his innocence. Finally, had Carroll's statement been admitted, the State would have been entitled to introduce a number of Carroll's other hearsay statements implicating Little Lou in the conspiracy.

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[11] The State concurs with Little Lou that this issue is reviewed for an abuse of discretion and any potential errors are subject to harmless error analysis. App. Op. Br. 27:8-12.

[12] It is not clear the Court has adopted the 9th Circuit's Chia rule because in Fields v. State, 220 P.3d 709 (2009), it merely distinguished Chia after Fields had urged it as a supporting authority. Id. at 716-717. It appears there is still room for the Court to, as the California Court of Appeal has done, reject Chia's rule based on the analysis of the Chia dissent. People v. Dixon, 153 Cal.App.4th 985, 999-1000, 63 Cal.Rptr.3d 637, 649-650 (Cal. Ct. App. 2007). The State assumes in this appeal, however, that Fields adopted Chia's rule.

Chia is not applicable to Little Lou because Carroll's statements bore none of the indicia of reliability found in Chia. Chia is only a useful authority where the defendant can point to the same "strong" and "poignant" indicia of reliability. See Christian v. Frank, 595 F.3d 1076, 1085-1086 (9th Cir. 2010), cert. denied, 131 S.Ct. 511 (2010); Fields, 220 P.3d at 716-717 (2009). The contextual circumstances of Carroll's statement indicate a strong and poignant *un*reliability. It was undisputed that LVMPD detectives prepared Carroll to make false statements to Espindola and Little Lou in order to elicit incriminating statements. 4 AA 836:12-842:19. Detective Sean McGrath testified that he did not view Carroll as trustworthy or credible, and Little Lou's counsel established through McGrath that Carroll was a convicted felon. 4 AA 822; 846:23-847:17. Additionally, Carroll's statement was not against his penal interest because his whole purpose for engaging in the meeting with Espindola and Little Lou was to curry favor with law enforcement after he had already provided a full confession. Cf. Chia, 360 F.3d at 1005.[13] Thus, the context of Carroll's statement is rife with indicia of unreliability, the opposite of what Chia requires. Id. at 1004-1005.

Little Lou's only response to these obvious points is that detectives did not specifically prepare Carroll to make the precise statement to Little Lou "You had nothing to do with this." His argument is premised on a patent logical fallacy: that only those statements Carroll was prepared by the detectives to utter were false. In fact, the evidence at trial established Carroll also made up his own false statements for the wiretapped conversation without prompting from detectives, such as his claim that Counts was threatening to kill his wife and child. 4 AA 832:16-21. Additionally, Carroll's statements during the second interview regarding his purpose for meeting Hadland were not the result of prompting from detectives. 4 AA 830:24-831:14. Thus, Little Lou cannot establish with the required certainty that Carroll's statement to Little Lou was not also false.

Little Lou's Chia argument is further undermined by his contemporaneous statements and the testimony of Rontae Zone. Unlike the Chia defendant, Little Lou made highly incriminating statements contemporaneously with the declarant's allegedly exculpatory hearsay statement. Unlike

[13] See also People v. Hunter, 2010 WL 3191886 (Cal. Ct. App. 2010) (statement not uniquely against penal interest where declarant had already confessed to same crime); Harris v. Canulette, 1992 WL 245626 at 2 (E.D. La. 1992) (same)

Little Lou, the Chia defendant did not solicit the murder of witnesses to the crimes and did not otherwise make statements indicating a role in the plot. Further, Zone's testimony implicated Little Lou in the conspiracy based on Little Lou's "baseball bats and trash bags" statement. Finally, Carroll's recorded statements to detectives, which would have been admitted as impeachment material, thoroughly implicated Little Lou as planning to personally murder Hadland. 3 AA 600-601. Again, there were no corresponding inculpatory facts in Chia.

Little Lou also fails to establish that he meets the Miller test's fourth factor. Unlike the Chia defendant, Little Lou had the opportunity to examine an available, surviving co-conspirator, Espindola, and elicit from her evidence of his alleged non-participation in the conspiracy. 6 AA 1246-1288; see also 10 AA 2256:17-20. In Chia, the declarant's hearsay statements were so critical because the other two co-conspirators were killed in the process of being apprehended, thus leaving the declarant as the *sole* survivor with knowledge of the conspiracy's membership. Chia, 360 F.3d at 1005. This distinction is pivotal and prevents Little Lou from demonstrating a due process violation. In fact, Little Lou was successful in eliciting testimony from Espindola that he never entered into any agreement to harm Hadland, and paid no money to the other conspirators. 6 AA 1250-1251; 1254-1256; 1282-1283; see also 10 AA 2256. That is exactly the evidence Little Lou asserts Carroll's statement would have provided. Thus, Carroll's "You had nothing to do with this," statement was cumulative evidence and certainly not the "sole evidence on the issue" as Chia requires. Chia, 360 F.3d at 1004-1005 (citing Miller, supra).

Additional critical distinguishing factors are that Carroll's statement was not excluded from evidence and Little Lou was permitted to highlight and argue the statement for its truth. Little Lou will recall that in Chia, the declarant's statements were wholly excluded from evidence; conversely, Little Lou was able to introduce Carroll's statement repeatedly, and also without any limitation during closing argument. That distinction in itself is enough to reject his argument. During his cross-examination of Det. McGrath, Little Lou's counsel, Mr. Arrascada, essentially introduced Carroll's statement for its truth (although an objection was sustained). 4 AA 842:20-843-8. The State later pointed out that Mr. Arrascada's question only had relevance for establishing that Carroll's statement was true, and the district court seemed to agree. 4 AA 882:4-885:18. More critically, Little

Lou was permitted to argue in closing that the statement demonstrated he was not involved in the conspiracy, and when the State objected, the Court failed to sustain the objection or otherwise admonish the jury. 10 AA 2254. He then later recapitulated that closing argument without any objection whatsoever. 10 AA 2256:15-24. Thus, in addition to the many material distinctions between Little Lou's case and Chia, he cannot show that he was at all harmed because he was essentially permitted to introduce Carroll's statement for its truth without opening the door via NRS 51.069 to Carroll's numerous other hearsay statements implicating him; the State proffered five highly incriminating statements from Carroll's recorded interview with detectives, including his claim that Little Lou showed up dressed in black and wanted to personally kill Hadland. 3 AA 600-601.[14]

Little Lou next contends the district court erred by preventing the jury from considering the statement for its truth based on it qualifying as Espindola's adoptive admission under NRS 51.035(3)(b). This argument is highly flawed because it disregards that JI 40 clearly informed the jury that the statement could be considered an adoptive admission, which it defined as "a statement of which a listener has manifested his adoption or belief in its *truth*." 1 AA 47:9-17 (emphasis added). Thus, the instruction clearly informed the jury that, if they determined Carroll's statement was adopted by the circumstances of Espindola's response, they could consider the statement for its truth. Note that Little Lou manages to elide JI 40's autonomous emphasis on the definition of adoptive admissions by eliminating the instruction's third paragraph break. Cf. 1 AA 47:15-16 with App Op. Br. 34:1-3. Further the record clearly demonstrates the district court advised Little Lou on two separate occasions that he could argue for the truth of the statement based on it being Espindola's adoptive admission. 3 AA 596:9-19; 603:2-13.

Little Lou argues Carroll's statements constitute the State's admissions because Carroll was "operating as an agent of the prosecution," thus they should have been admitted for their truth as admissions of a party-opponent under NRS 51.035(3)(d). App. Op. Br. 34:8-35:19.[15] The federal

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[14] To the extent Little Lou alleges a violation of NRS 51.315 that claim is answered with the arguments raised above.

[15] Despite citing to two unsupportive pages of the trial transcript, App. Op. Br. 35:13-16 (citing 4 AA 596; 603), Little Lou has only first discovered this argument on appeal, thus it is subject to plain

circuits and state courts are divided as to whether a government agent's statements constitute admissions of a party-opponent. Bellamy v. State, 403 Md. 308, 323-326, 941 A.2d 1107, 1115-1117 (Md. 2008). Nevertheless, "[a]lthough there appears to be some disagreement among the courts over the admissibility of statements by government attorneys after the initiation of proceedings, it appears fairly well-settled that statements by government agents at the investigative level are not admissible under Rule 801(d)(2)." State v. Asbridge, 555 N.W.2d 571, 576 (N.D. 1996).

Little Lou cites U.S. v. Branham, 97 F.3d 835 (6th Cir. 1996), which is one of the very few authorities holding that statements of a paid informant constitute admissions of the government. Id. at 850-851.[16] In Branham, the government simply conceded that, under U.S. v. Morgan, 581 F.2d 933 (D.C. Cir. 1978), admissions of the paid informant could be attributable to it. The Seventh Circuit has cataloged Morgan's critical analytical flaws in U.S. v. Kampiles, 609 F.2d 1233, 1246 n.16 (7th Cir. 1979).[17] Thus, Branham only came to its conclusion based on the concession that a flawed persuasive authority dictated considering paid informant statements to be government admissions.[18]

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error review. See U.S. v. Reed, 167 F.3d 984, 988-989 (6th Cir. 1999) (defendant's failure to contend at trial that informant's tape-recorded statements were government admissions rendered claim subject only to plain error review).

[16] Little Lou also cites to the Utah Supreme Court's decision in State v. Worthen, 765 P.2d 839 (Utah 1988), which is an irrelevant authority holding that a prosecutor's letter to a trial judge was admissible as a party admission. Id. at 847-848.

[17] ("Defendant does cite United States v. Morgan[], in which the court did raise a question about the continuing viability of the rule in Santos and Powers. Yet Morgan was a case in which the Government had expressed its belief in the statement of the declarant under Rule 801(d)(2)(B), and the discussion of Powers and Santos is tentative and is clearly dicta. In addition, the Morgan court made an oblique reference to Rule 803(8), which excepts from the hearsay rule factual findings from law enforcement investigations to be introduced against the Government in criminal cases. It should be noted that this exception to the hearsay rule would be unnecessary if Rule 801(d)(2)(D) were found to encompass admissions by government employees.").

[18] Note also that the Sixth Circuit has clarified Branham by stating that not everything an informant says in recorded statements is admissible as an admission. Reed, 167 F.3d at 989 n.4 ("The fact that the Branham court held that 'anything said' by the informant was within the scope of the agency does not imply that 'anything said' would be admissible. Nothing in Branham forecloses the argument that certain utterances do not constitute statements.").

The better rule, consistent with over four decades of caselaw,[19] is exemplified by the Second Circuit's holding in U.S. v. Yildiz, 355 F.3d 80 (2d Cir. 2004), that informant statements are not attributable to the government. Id. at 82 ("…Rule 801(d)(2)(D) does not abrogate the common law rule articulated in Santos. And we hold, following Santos, that the out-of-court statements of a government informant are not admissible in a criminal trial pursuant to Rule 801(d)(2)(D) as admissions by the agent of a party opponent."); see also State v. Brown, 170 N.J. 138, 784 A.2d 1244, 1254 (N.J. 2001) (government does not adopt informant statements submitted in search warrant affidavit submitted pre-indictment). The Third Circuit has also clarified that "[w]e do not believe that the authors of Rule 801(d)(2)(D) intended statements by informers as a general matter to fall under the rule, given their tenuous relationship with the police officers with whom they work." Lippay v. Christos, 996 F.2d 1490, 1499 (3d Cir. 1993). The chilling effect of any contrary rule is obvious; law enforcement officers would be severely hampered in their ability to use ruse-based investigative techniques to ferret out criminal activity. Moreover, it is completely counterintuitive that the informant's statements will constitute admissions when he has been sent out to utter untrue statements calculated to elicit admissions by the investigative targets. Finally, Branham is inapposite in that it involved paid informants who possess a degree of agency not present where an unpaid informant, such as Carroll, has only a subjective hope of nonmonetary favorable future treatment. The Third Circuit has held that even informants receiving sporadic payment are at most independent contractors and thus not properly considered agents of the state. Lippay, 996 F.2d at 1499. Thus, it is beyond clear that Carroll's statements during the wiretapped conversation did not constitute the State's admissions.

III
The District Court Did Not Err In Refusing To Admit The Testimony Of Little Lou's Former Co-Conspirator, Jason Taoipu

Little Lou contends the district court erred in refusing to allow him to present a fragment of Jason Taoipu's former testimony in the Kenneth Counts trial. That sliver of prior testimony involved

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[19] See U.S. v. Santos, 372 F.2d 177, 180 (2d Cir. 1967) (government agent's statements are not the party-opponent admissions of the government); accord U.S. v. Powers, 467 F.2d 1089, 1095 (7th Cir. 1972); U. S. v. Pandilidis, 524 F.2d 644, 649-650 (6th Cir. 1975), cert. denied, 424 U.S. 933, 96 S.Ct. 1146 (1976); U.S. v. Durrani, 659 F.Supp. 1183, 1185 (D. Conn. 1987) (noting Santos rule's continuing viability after amendments to federal rules).

Taoipu attributing the "baseball bats and trash bags" comment to Espindola rather than Little Lou. His co-defendant, Mr. H, did not object to admission of the testimonial fragment, but asserted his Confrontation Clause rights in order to prevent Taoipu's entire testimony from coming in. 9 AA 2070-2071. Little Lou begins his argument by misstating the court's rationale for excluding the evidence. The district court was concerned about the impact on Mr. H's confrontation rights, but that was not the sole—or even primary—rationale for excluding Taoipu's testimony. In denying Mr. H and Little Lou's post-trial motions, the district court noted the basis for its refusal to admit Taoipu's prior testimony as Little Lou requested:

> As to the admissibility of Jayson Taoipu's testimony from the Kenneth Counts trial, the Court stands by its decision to not admit the testimony. Defendant LUIS HIDALGO, III sought to admit just a miniscule portion of the transcript to establish one fact. Defendant LUIS HIDALGO, III objected to the entire transcript[] being read, and to impeachment of that portion of the transcript allowed under NRS 51.069. The Court found that the prior testimony was not properly admissible as there was no reason for the State in the severed trial of Kenneth Counts to have impeached Mr. Taoipu on a fact wholly irrelevant to the issue before the jury in Kenneth Counts [*sic*]. As such, the Court found that it would be inappropriate to admit just one portion of the transcript as prior testimony.
> 2 RA 488-489.

Thus, the court's order reflects a determination that selectively admitting a tiny fragment of Taoipu's testimony was inconsistent with NRS 51.069, and, independently, Little Lou had failed to meet NRS 51.325(2) because the issues were not "substantially the same." District court evidentiary rulings are reviewed on appeal for abuse of discretion. See Hernandez v. State, 124 Nev. 60, __, 188 P.3d 1126, 1131 (2008). The court's decision refusing to admit only the fragment of Taoipu's prior testimony was clearly not an abuse of discretion. Little Lou was never entitled to have only the favorable portions of the testimony admitted because NRS 51.325 provides for admission of an unavailable witness's entire prior testimony. Additionally, Little Lou's argument fails NRS 51.325(2) because the State had no motive at the Counts trial to follow up and impeach Taoipu's testimony. Because Counts was the direct perpetrator of the murder and there was already abundant evidence that he conspired with Carroll and Taoipu, the State had no motive to gratuitously establish the complete membership of the conspiracy by correcting Taoipu's misattribution of the baseball bat and trash bags statement. Finally, Little Lou was not entitled to admission of one favorable testimonial fragment while having the State precluded from exercising its right to impeach Taoipu

with the rest of the testimony or other inconsistent hearsay statements under NRS 51.069. Taoipu also testified that Carroll told him his boss ordered "the hit" and that he knew Carroll's bosses were a "Luis" and Espindola. 11 AA 2331; 2367-2368. The State was in a position to establish through Detective Wildemann and the rest of Taoipu's testimony that Little Lou was the "Luis" Taoipu was referring to. See 9 AA 2070; 2072; RA 7-11.[20] Thus, the State was entitled to attempt to impeach Taoipu with his other statements indicating Little Lou may have ordered the murder. Moreover, the State would have been entitled to call Detective Wildmann to testify that, during Taoipu's voluntary statement, Taoipu said it was only after a call from Little Lou that Carroll informed him and Zone about the plan to kill Hadland. RA 7-11. Further, Taoipu told detectives about a call from Espindola to Carroll, but failed to mention that she said anything about baseball bats or trash bags. RA 4-5.

To the extent Little Lou argues his defense was constrained by the court's concern for Mr. H's confrontation rights, the State notes that Little Lou never raised this issue in his thirty-two (32) page, December 12, 2008, joint opposition to the State's motion to consolidate his trial with Mr. H, RA 396-427; indeed, he appears to have only first decided on day 12 of the trial that he would seek to have Taoipu's February 4, 2008 testimonial fragment read into the record. 9 AA 1881. Zone testified at Little Lou's June 13, 2005 preliminary hearing that Carroll told him Little Lou made the baseball bat and trash bags comment, which put Little Lou on notice that he would be confronting that evidence at trial. RA 121. Thus, Little Lou was responsible for constraining his own defense, and he waived any challenge to the court's consolidation order by failing to assert a ground of appeal challenging it.

Even if the court committed an error in not permitting Little Lou to present Taoipu's testimonial fragment, the error would have been harmless. Had the evidence been admitted, it would have constituted an allegation that Zone's testimony attributing the statement to Little Lou was a recent fabrication or the result of an improper influence or motive, and thus the State would have been entitled to introduce Zone's prior consistent testimony from Little Lou's preliminary hearing. NRS 51.035(2)(b); RA 121. Additionally, on the same basis, the State would have presented Zone's

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[20] Taoipu testified that he briefly met this "Luis," and Mr. H testified without contradiction that he had never met Taoipu or Zone. 9 AA 1999; 11 AA 2368.

consistent testimony during the Counts trial that the statement was made by Little Lou. 2 RA 271-272. The jury would obviously have placed more weight on Zone's three consistent testimonial attributions of the statement to Little Lou, one of which occurred just twenty-five (25) days after Hadland's murder.[21] Moreover, in light of Little Lou's numerous incriminating recorded statements, the baseball bats and trash bags comment was hardly the only compelling evidence implicating Little Lou in the conspiracy.

IV
The State Presented Sufficient Corroborating Evidence To Permit Conviction Of Little Lou Based On Accomplice Testimony

Little Lou's fourth 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. Little Lou's numerous, highly inculpatory recorded statements and his act of a soliciting the murder of Zone and Taoipu clearly established sufficient evidence tending to connect Little Lou to the conspiracy.

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

Little Lou 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. 42. 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.

[21] Note also that Little Lou never elected to ask Espindola whether she made the comment, which is a question that State certainly would have asked had Taoipu's testimonial fragment been admitted. 6 AA 1246-1288.

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,[22] 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.
> Cooley v. State, 2009 WL 566466 at 6-7 (Tex. Crim. App. 2009) (citations omitted).[23]

Thus, Little Lou 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 Little Lou 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

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[22] Tex. Code Crim. Proc. Ann. art. 38.14 (Vernon 2005).
[23] 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).

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).[24]

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 Little Lou, the jury had to find that 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.[25]

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[24] Little Lou attempts to invoke federal due process principles as somehow prohibiting the use of accomplice testimony to convict him. App. Op. Br. 42 n.14 "[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 accomplice's 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 Little Lou 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.

[25] 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

There was more than sufficient evidence for the jury to rationally conclude Zone was not an accomplice. Little Lou 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. 43 n.15. It is not clear what part of the record Little Lou examined because he cites to nothing. In fact, the record (and Little Lou'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. 3 AA 566-567. 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[.]" 3 AA 563. If the jury believed 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. 3 AA 554-555.

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. 3 AA 517-532. Zone testified to being in a state of fear and "concerned and worried for [his] own safety" the next day while accompanying Carroll. 3 AA 538. Zone testified that Crystal Payne, his pregnant girlfriend lived at Carroll's house, and he felt that to

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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).

report the crime would jeopardize the lives of Payne and Zone's unborn son. 3 AA 519-520. 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. 3 AA 573; see also 3 AA 535-536. 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 Little Lou and the other co-conspirator's trials. 3 AA 579. 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 Little Lou to Commission of the Conspiracy and Hadland's Murder[26]

The independent evidence tending to connect Little Lou to the conspiracy and Hadland's murder was overwhelming. "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

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

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)). Little Lou's solicitation of Zone and Taoipu's murder is singularly sufficient to tend to connect him with the conspiracy to harm Hadland and the resulting murder. Additionally, his recorded statements telling Carroll not to cooperate with police, suggesting a fabricated story, and offering Carroll material and legal support in exchange for Carroll's silence also independently constitute sufficient evidence tending to connect Little Lou to the crimes. The jurisprudence on accomplice corroboration sufficiency clearly supports this conclusion. See Glossip v. State, 157 P.3d 143 (Okla. Crim. App. 2007) ("Evidence that a defendant attempted to conceal a crime and evidence of attempted flight supports an inference of consciousness of guilt, either of which can corroborate an accomplice's testimony." (citations omitted)), cert. denied, 552 U.S. 1167, 128 S.Ct. 1124 (2008); People v. Avila, 38 Cal.4th 491, 563, 133 P.3d 1076, 1127 (Cal. 2006) ("Defendant's initial attempt to conceal from the police his involvement in the activities culminating in the murders implied consciousness of guilt constituting corroborating evidence." (citations omitted)), cert. denied, 549 U.S. 1306, 127 S.Ct. 1875 (2007); Smith v. State, 245 Ga. 168, 169, 263 S.E.2d 910, 912 (Ga. 1980) ("Evidence from an independent source of an attempt by the accused to conceal his participation in a crime is sufficient to corroborate the testimony of the accused's accomplice relating to the accused's participation in the crime." (citation omitted)); Llewellyn v. State, 241 Ga. 192, 193-194, 243 S.E.2d 853, 854 (Ga. 1978) (defendant's efforts to conceal murder conspiracy by intimidating or influencing co-conspirators was evidence tending to connect him with the conspiracy). "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). Finally, at one point on the tape, Little Lou appeared to criticize Carroll for deviating from what Little Lou had told him to do and instead enlisting Counts, which tends to show Little Lou's advanced knowledge of the conspiracy and role in planning the crimes. RA 63 at 22:15. Thus, Little Lou's numerous recorded statements foreclose any argument that the jury lacked sufficient evidence to find Espindola and Zone's testimony was corroborated.

In addition to Little Lou's foregoing highly inculpatory recorded statements, other independent evidence tended to connect him with the crimes. Phone records showed that Little Lou called Carroll at home just several hours prior to the murder, and that he repeatedly attempted to call Carroll after the murder. 7 AA 1554:4-13; 10 AA 2274:3-11.[27] In his recorded statements, Little Lou discussed the potential penalty attaching to conspiracy, which indicates he had advanced knowledge of the conspiracy. RA 65. Little Lou actually resided at Simone's and a note in Mr. H's handwriting was found at Simone's which states, "Maybe we're under surveils [*sic*], keep your mouth shut!!" 7 AA 1392; 1537-1538. Because Espindola appears to have been warned contemporaneously with Mr. H about potential surveillance, the jury likely found the note was directed at Little Lou. Finally, Little Lou had a history of loaning vehicles to Carroll, Little Lou was in charge of scheduling pickups for the Palomino, and a vehicle insured in the name of Simone's, the Chevrolet Astro van, was used in murdering Hadland. 5 AA 254-256; 8 AA 1722; 1773-1774.

There is also a small mountain of corroborating evidence consisting of connections between Little Lou's father'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 concealment efforts. As one of the managers for his father's business, Little Lou obviously had a personal and pecuniary interest in the Palomino's financial health. Mr. H testified that Carroll told him Hadland was "badmouthing" the Palomino. 9 AA 1931-1932. 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. 1 AA 209-210. 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. 1 AA 249-250. Non-accomplice testimony established 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. 8 AA 1718-1719. This

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[27] Little Lou repeats his allegation that he was merely calling Carroll about work related matters. 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. Origel-Candido, 114 Nev. at 381, 956 P.2d at 1380. And "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." Id. Thus, it is irrelevant that Little Lou advances a non-incriminating explanation for these corroborating facts.

practice was creating problems for the Palomino because it upset the cab drivers who, according to Mr. H's expert witness, are critical to the advertising success of a strip club. 7 AA 1573:6-17; 8 AA 1767.

Thirty-three (33) Palomino Club advertisement cards were found on the shoulder of the road next to Hadland's body. 1 AA 182; 179-180; 3 AA 649. 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. 2 AA 255.[28] Palomino VIP cards and fliers were found among Counts's possessions after a SWAT team extracted him from the attic of a residence. 3 AA 683; 693. Forensic examination found both Counts and Carroll's fingerprints on the VIP cards. 7 AA 1461-1482. Detectives also found $595.00 cash among Counts's possessions. 3 AA 683-684; 691-692. Forensic examination revealed Carroll's fingerprint was on one of those $100.00 bills. 19 AA 3526-3528. At 12:26 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. 2 AA 450-456. This independent evidence tended to demonstrate Little Lou's connection with the crimes as it furnished evidence of a motive to eliminate a perceived threat to his father's business.[29]

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 shows Little Lou was in the general

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[28] 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. 2 AA 256; 345-346. Little Lou lived at Simone's. 5 AA 949.

[29] "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)).

vicinity of some of the lead co-conspirators. 19 AA 3596-3600. Mr. H testified to being at Simone's, Little Lou's place of residence, when Espindola and Little Lou had their wiretapped conversations with Carroll. 9 AA 1989. 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. 7 AA 1372-1374. 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. 7 AA 1518-1519. 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);[30] cf. also People v. Jewsbury, 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 wiretapped statement was sufficient evidence in itself to corroborate the accomplice. Id. at 505-506, 761 P.2d at 423.[31] Thus, clearly Espindola's wiretapped statements, uttered long before she had any inclination

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[30] ("[C]o-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.").

[31] Other corroborating facts in Cheatham were: "a fairly constant association and companionship between the three accomplices…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 know that Cheatham was with the murderers after the criminal event." Id. at 505, 761 P.2d at 423.

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 statements made in Little Lou's presence regarding Mr. H's panicky state of mind, that "[Carroll] and [Mr. H] are gonna have to stick together," and that "…what *we* really wanted was for him to be beat up…" clearly tend to connect Little Lou with the crimes in light of his incriminating statements and adoption of Espindola's statements. RA 54 (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 Little Lou and Mr. H. Indeed, the record shows Espindola unsuccessfully attempted to determine whether Carroll was recording their conversations. RA 52. 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 Little Lou to the crimes was overwhelming, and clearly sufficient for a rational jury to conclude there was independent corroboration of Espindola and Zone.[32]

Little Lou 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 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

[32] 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 Little Lou and Mr. H. 9 AA 2027-2044; 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 and directly implicated Little Lou 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.

the quantum of independent corroborating evidence presented in Little Lou's trial. In neither case did independent evidence show the defendant: (1) Soliciting the murder of two witnesses in order to cover-up the crime testified to by the accomplice; (2) Encouraging one of the co-conspirators to lie to police and promising to provide that individual with material and legal support in exchange for concealing the crimes and not cooperating with police; (3) Possessing an obvious motive for conspiring to harm the victim; and (4) Being in the presence and in communication with the other conspirators. 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 Little Lou'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 Little Lou to the charged offenses.

V
Failure to Record Espindola's Plea Negotiation Proffer Did Not Violate Little Lou's Due Process Rights and Does Not Warrant Reversal

Little Lou's fifth 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. Little Lou fails to present any legal authority for his view that the State is obligated to tape or video-record plea negotiation proffers. Little Lou relies solely on a law student note proposing a model ethical rule for prosecutors to record all plea negotiation proffers.[33] 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. Little Lou'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, which do not include recordation of cooperating witness interviews. Id. at 669, 819 P.2d at 200.[34] Acuna does not require that a contingent plea agreement even 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

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[33] App. Op. Br. 48-49 (citing Note, *Should Prosecutors be Required to Record Their Pretrial Interviews with Accomplices and Snitches?*, 74 FORDHAM L. REV. 257 (2005) (Note)).

[34] ("[T]he 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.").

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, then, there is no requirement for video or audio recordation of a cooperating witness's proffer. Even Little Lou's law student note mentions Acuna as establishing an accomplice testimony safeguard not involving a per se recording requirement. Note 286-287. The note correctly summarizes the state of the law, which does not impose on prosecutors any duty to record witness interviews. Note 264-265.

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).[35] "[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 Little Lou'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) (no Acuna or Giglio violation where cooperating witness was cross-examined about disclosed plea agreement, there was no evidence of any undisclosed promises, and defendant did not allege witness lied about negotiation of agreement); 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 Little Lou proposes, his argument really sounds in Brady; but Little Lou 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 Little Lou's law student note, the principal supporting authority for his due process argument, 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

[35] In addressing Leslie, Little Lou 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, does not mean negotiation proffers must be recorded.

proposition that a defendant is entitled to have prosecutors record pre-trial interviews with its witnesses in order to preserve potential exculpatory or impeachment material. U.S. v. Marashi, 913 F.2d 724, 734 (9th Cir. 1990) (explaining that under U.S. v. Bernard, 625 F.2d 854 (9th Cir. 1980), Brady creates no duty to record witness interviews, even where lack of note-taking derives from desire not generate impeachment material).[36] 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, Little Lou establishes no due process or other basis for granting him relief on this ground of appeal.[37]

CONCLUSION

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

Dated this 12th day of July, 2011.

Respectfully submitted,

DAVID ROGER
Clark County District Attorney
Nevada Bar # 002781

BY */s/ Nancy A. Becker*
NANCY A. BECKER
Deputy District Attorney
Nevada Bar #00145

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[36] Cf. Note at 265 n.59 (mentioning Marashi once in a footnote); 292 (misstating Bernard's holding as merely "'find[ing] no statutory basis for compelling the creation of Jencks Act material,'" 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.")).

[37] Insofar as Little Lou suggests some alleged notes of Espindola's proffer were lost by the district court, that claim is unsupported by the record citations he presents and irrelevant to his allegation that the State constrained his right to effectively cross-examine Espindola.

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 12th day of July, 2011.

Respectfully submitted

DAVID ROGER
Clark County District Attorney
Nevada Bar #002781

BY */s/ Nancy A. Becker*
NANCY A. BECKER
Deputy District Attorney
Nevada Bar #00145

Office of the Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500

CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on July 12, 2011. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

CATHERINE CORTEZ MASTO
Nevada Attorney General

JOHN L. ARRASCADA, ESQ.
CHRISTINE ARRASCADA ARAMINI, ESQ.
Counsels for Appellant

NANCY A. BECKER
Deputy District Attorney

I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage pre-paid, addressed to:

CHRISTOPHER W. ADAMS, ESQ.
Admitted Pro Hac Vice
102 Broad Street, Ste. C
P.O. Box 561
Charleston, South Carolina 29402-0561

BY */s/ eileen davis*
Employee, District Attorney's Office

NAB/Patrick Burns/ed