IN THE SUPREME COURT OF THE STATE OF NEVADA

LUIS A. HIDALGO, III

Appellant,

v. Docket No. 54272

STATE OF NEVADA,

Respondent.

_____/

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

APPELLANT'S REPLY BRIEF

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I. Jury Instruction #40 Had A Pernicious Effect On The Beyond A Reasonable Doubt Standard

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

The State misperceives the challenge made by Little Lou regarding the District Court giving the "slight evidence" instruction to the jury. Little Lou has no quarrel with the "slight evidence" standard being applied by the trial court in deciding the admissibility issue regarding out of court statements by those alleged to be co-conspirators of the person on trial. The word "slight" is perfectly permissible, understandable and manageable by a district court judge when determining whether to admit a piece of evidence for the jury to consider in its task of evaluating the question of guilt beyond a reasonable doubt. This Court was correct in McDowell v. State, 103 Nev. 527, 746 P. 2d 149 (1987) in its conclusion that in Bourjaily v. United States, 483 U.S., 171, 107 S.Ct. 2775 (1987) was one of federal statutory interpretation.

The question presented in this case is one that was left unanswered by McDowell and now must be addressed. Specifically, the question for this Court is as follows: "should the standard utilized by the trial court in deciding the question of admissibility be communicated to the jury by way of an instruction that they must apply in their decision making process?" The answer should be a resounding "no." "A juror should not be expected to be a legal expert. Jury instructions should be clear and unambiguous." Culverson v. State, 106 Nev. 484, 488, 797 P. 2d 238, 240 (1990). Because the standard for judging the predicates for admission of

the evidence is less than beyond a reasonable doubt, and because the jury should not be deciding questions of admissibility, the instruction is unnecessary and has a pernicious impact on the confidence that the elements of the crime – which are identical to the predicates for admission of the evidence- were decided by the jury using the beyond a reasonable doubt standard of proof.

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

Circuit Judge Frank Easterbrook of the United States Court of Appeals for the Seventh Circuit, in United States v. Martinez De Ortiz, 883 F. 2d 515 (7th Cir. 1989) (Easterbrook, J. concurring) *rehearing granted and judgment vacated on other grounds,*897 F.2d 220 (7th Cir. 1990), *affirmed upon rehearing en banc*, United States v. Martinez de Ortiz, 907 F. 2d 629 (7th

Cir. 1990)(*en banc*), decried the use of the language "slight evidence" or "slight connection" as a standard of review in conspiracy prosecutions, stating:

> "What do these formulas mean? They could mean that once A and B conspire, "slight evidence" or "slight connection" is enough to convict C of the same crime, an intolerable proposition. They could mean that evidence may be sufficient to establish guilt beyond a reasonable doubt even though "slight", thus watering down the reasonable doubt standard. They could mean that an appellate court must keep in mind the possibility that evidence may be slight quantitatively although substantial qualitatively – that a single piece of evidence may be enough in context, an unexceptionable proposition. *They could mean that "slight" evidence of participation in the conspiracy is enough to admit other evidence, but that which comes in must be substantial enough to support a finding beyond a reasonable doubt*….[they] could mean that if someone joins the conspiracy, "slight" activity to accomplish its objectives is enough, that peripheral conspirators commit the crime no less than the mastermind…*That we have to tease [a non-troubling interpretation] out of a formula with dubious alternative meanings, though, is a mark against its use.* And the other variation – "Once the existence of a conspiracy is proven only *very slight evidence* is needed to establish a defendant's membership in the conspiracy" – cannot be massaged to yield a meaning with which we should want to live. It says "very slight evidence" is enough to send a person up the river. *Maybe we could torture the phrase until it confessed to a constitutionally acceptable meaning, but why bother?* …Nothing we do as a judge is more important than assuring that the innocent go free….Conspiracy is a net in which prosecutors catch many little fish. We should not go out of our way to tighten the mesh. Prosecutors have many legitimate advantages in the criminal process. *Defendants' great counterweight is the requirement that the prosecution establish guilt beyond a reasonable doubt. References to "slight evidence" and "slight connection" reduce the power of that requirement."*

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

That expression of dissatisfaction with the "slight evidence" standard of review and the damage that it causes when it makes its way into jury instructions marked the watershed of uniform recognition of the dangers of using it and its consistent rejection. Federal circuits

have uniformly directed that it not be used in jury instructions in prosecutions in which a conspiracy is charged because of the confusion that it causes and the damage that it does to the application by the same jury of the reasonable doubt standard. The most plenary analysis is contained in a concurring opinion written by Circuit Judge Jon. O. Newman[1] in United States v. Huezo, 546 F. 3d 174, 184-189, fn.10; 191, fn.2 (2nd Cir. 2008).

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

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

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

establishment of the conspiracy itself, …may too easily be taken as an implication that proving participation in a conspiracy is subject to a lesser standard of proof than proving the existence of the conspiracy. But that implication is simply wrong." Id. at 185.

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

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

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

In Cortinas v. State, 124 Nev. 1013, 195 P.3d 315, 323 (2008), cert. denied, 130 S. Ct. 416 (2009), this Court recognized that erroneous jury instructions can be structural. The Fifth Circuit has treated the precise language complained of in this case as such in the aforementioned cases. The Huezo court also rejected the "slight evidence" standard for use by appellate courts in reviewing conspiracy convictions for sufficiency of the evidence, noting that it "too easily permits appellate courts to fail to examine the evidence rigorously to assure that it sufficed to permit a jury to find guilt beyond a reasonable doubt." 546 F.3d at 188. The Second Circuit went on to observe that although the recognition by the Ninth Circuit in United States v. Dunn, 564 F. 2d 348, 357 (9th Cir. 1977), that the term "slight" is tied to the connection of the defendant to the conspiracy and not the type of evidence or burden of proof, it "doubt[s] that the typical jury can appreciate the distinction" and that it was "[f]ar better, as Judge Easterbrook has urged, to discard all references to 'slight'…because these words inevitably create the risk of lowering the standard of proof significantly below 'beyond a reasonable doubt'. 546 F.3d at 189. (Emphasis added).

The Seventh Circuit has warned against instructing the jury on the appellate review standard of "substantial evidence." In United States v. Durrive, 902 F. 2d 1221, 1229, fn.6

(7th Cir. 1990), wherein it adopted that standard of review for sufficiency of the evidence in conspiracy cases, it recognized that "[i]t would be improper for a district court to charge a jury that only substantial evidence is needed to connect a person with a conspiracy. Such an action would only confuse the jury and would likely undermine the fundamental requirement of proof of guilt beyond a reasonable doubt for all elements of a crime." (Emphasis added).

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

Moreover, in citing the unreported case of United States v. Garcia, 77 F.3d 471 (4th Cir. 1996), cert. denied, 519 U.S. 846, 117 S. Ct. 133 (1996), the State conflates the "slight evidence" standard used as the predicate for admissibility of co-conspirator statements, with the "slight connection" standard which, when proven beyond a reasonable doubt, is all that is necessary for a conviction. It is simply not applicable to this case. That same year, in which it decided not to publish Garcia, the Fourth Circuit rejected the concept of instructing a jury on

the "slight evidence" standard in future conspiracy trials, overruling its earlier precedents. In doing so, it stated that "[f]idelity to the Constitution directs us to hold that the Government must prove the existence of a conspiracy beyond a reasonable doubt, but upon establishing the conspiracy, only a *slight connection* need be made linking a defendant to the conspiracy to support a conspiracy conviction, *although this connection also must be proved beyond a reasonable doubt.* We dispel any other formulation of this precept from the Fourth Circuit, and to the extent any decisions…are inconsistent with this dictate, we expressly overrule them." United States v. Burgos, 94 F.3d 849, 862 (4th Cir. 1996)(*en banc*) (emphasis added).

It is respectfully submitted that the plenary treatment given to the fact that the "slight evidence" instruction violates due process standards by the United States Court of Appeals for the Second Circuit in Huezo and all of the cases upon which it relies from the other federal circuits, renders the State's contrary position that this issue is not one of constitutional magnitude and/or not prejudicial error impotent. The only reported decision upon which State relies for the proposition that this issue is essentially inconsequential is People v. Jourdain, 111 Cal. App. 3d 396, 404, 168 Cal. Rptr. 702 (Cal. Ct. App. 1980). However, Jourdain actually supports Little Lou's position in this matter. In Jourdain, there was *no conspiracy alleged in the indictment* against the defendant. It was merely an evidentiary mechanism for the introduction of co-conspirator statements, which were otherwise hearsay, in a case wherein *the predicates for admissibility were not part of the elements of the allegations in the charging document.*

Therefore, there could not have been any confusion as to the burden of proof to convict the defendant therein of conspiracy, for that decision and function was not part of what was asked of the jury. While the evidence of co-conspirators statements could have been presented to the jury without the instruction once the judge made the determination of admissibility, in Jourdain it could not result in a conviction for conspiracy.

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

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

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

In addition, the issue of the status of the witness as an accomplice is not one that must be proven beyond a reasonable doubt. Rather, the issue for the jury is whether the witness needed to be corroborated. The status of the witness as an accomplice is not an element of the offense that must be determined beyond a reasonable doubt when the jury decides the defendant's liability for the offense. In actuality the witness is rarely still facing charges by the time he or she testifies, as the testimony of an accomplice usually takes place after the witness has entered a plea of guilty to some lesser charge. His fate is not in the hands of the jury. He is not charged with the crime of "accomplice." The jury is not considering it on a beyond a reasonable doubt standard again after first determining the 'accomplice' status on a lower standard of proof. If it finds that there is insufficient proof that the witness was an accomplice, it can altogether dispose of the need for corroboration, believe the witness' testimony and judge that it alone is sufficient to convict! Or it can believe the accomplice status, in which case it must seek corroboration, a process which it most likely would have done in any case. See State v. Sheeley, 63 Nev. 88, 95-97 (1945); Cutler v. State, 93 Nev. 329 (1977); State v. Williams, 35 Nev. 276 (1913). That corroboration need only have "slight probative effect." State v. Hilbish, 59 Nev. 469, 479, 97 P. 2d 435, 439 (1940). This is important because the jury is not sitting as a court of review of the trial judge's decision to admit the testimony on a

"slight" *anything* standard and later reevaluating the identical elements on a "beyond a reasonable doubt" standard.

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

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

Although the State places great importance on what appears from the transcript as counsel for Mr. H telling the Court that Instruction #40 "favors the defendant more" and suggests that this demonstrates that the instruction was acknowledged by trial counsel as not harmful to the defendant, the State's position is not feasible when set in a "real world" view.

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

Courts have often recognized that in the heat of battle lawyers can misspeak and have historically dealt with such events by recognizing that it is the substance of what is being communicated, as given meaning by the surrounding context, which should be the focus of their attention. As the United States District Court for the District of Colorado observed in Cook v. Rockwell International Corp., "Judges, witnesses-even counsel-occasionally misspeak, and court reporters occasionally misapprehend, on the record. Where an omitted "but" or "not" changes the meaning of a sentence in a manner inconsistent with the context in which it is made, reviewing courts are capable of reading the sentence in its overall context." 428 F. Supp. 2d 1152, 1160-1161 (D. Colo., 2006). Surely this Court will do so in this case and recognize that the State's seizing upon the absence of a prefix modifying the meaning of "favors" is an example of defense counsel misspeaking in this context if the court reporter's

transcript was accurate. See Raymond v. Wrobel, 2010 WL 3611058, fn.4 (Cal. App. 4th Dist. 2010); People v. Zayas, 2010 WL 3530426, fn.5, (Cal. App. 4th Dist. 2010); People v. Ramirez, 2009 WL 1303229 (Cal. App. 6th Dist. 2009); Castenano v. State, 2007 WL 491603 (Tex. App. 1st Dist. 2007); State v. Pflepsen, 590 N.W. 2d 759, 767, fn.3 (Minn., 1999).[3]

In the final analysis, because the instructions taken as a whole permitted the jury to find Little Lou guilty of the general intent crimes of battery with a deadly weapon or with substantial bodily harm under a theory of vicarious liability once it found him guilty of the conspiracy, the impact of the erroneous, confusing, unnecessary and "pernicious" instruction (#40) employing an improper and unconstitutional standard - to which Mr. H's counsel objected, and Little Lou's counsel joined, on proper grounds - is clear. When coupled with the evidence against Little Lou being slight at best, it results in a lack of confidence in the jury's verdict. The instruction permitted the jury to consider a less than "beyond a reasonable doubt" standard in deciding the issue of membership in the conspiracy. Once that was done, there was nothing more for the jury to do.

There were no other factual findings that can be said with requisite certainty to have been decided beyond a reasonable doubt. Moreover, it unnecessarily focused the jury's attention on the co-conspirators' statements. "The customary problem with hearsay is not

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

irrelevance but excessive persuasive force; jurors may think the evidence more reliable that it is and so rely too heavily on it. That is a serious risk, but **the safeguard is the judge's preliminary decision** …" Martinez De Ortiz, 907 F. 2d at 633. Coupled with the "slight evidence" instruction, nothing good could have come of it. For these reasons, this Court should reverse the judgment and remand to the district court. A new trial should be ordered.

II. The District Court Erred When It Failed To Admit A Recorded Statement Of Carroll, Which Exculpated Little Lou, For The Truth Of The Matter Asserted And As Substantive Evidence Of Innocence In Violation Of Chia v. Cambra, 360 F.3D 997 (9TH Cir. 2004), NRS 51.315, and NRS 51.035(3)(b),(d).

A. Chia v. Cambra, 360 F.3d 997 (9th Cir. 2004).

Little Lou asserts that the District Court erred in failing to admit the statement that Carroll made when speaking to Little Lou and Espindola at Simone's autobody after the murder of Hadland in which Carroll was recorded stating that Little Lou had nothing to do with Hadland's murder. AA,Vol.III,598-603. The five-part test pronounced in Chia demonstrates that the District Court's ruling denying the admission of Carroll's exculpatory statement that Little Lou had nothing to do with it was in error.

The State claims that the District Court did not err in failing to admit this exculpatory statement of Carroll regarding Little Lou for various reasons. First, the State claims that Carroll's statement did not exhibit an indicia of reliability. Specifically, the State claims that State witness Detective McGrath testified that he did not view Carroll as trustworthy or credible and that Carroll was convicted of a felony. The State is incorrect.

Carroll's statement regarding Little Lou's lack of involvement with the murder of Hadland undoubtedly possessed an indicia of reliability. Carroll's statement was spontaneous and not the result of questioning from police or otherwise and was close in time to the event which "offer strong assurances of accuracy." See NRS 51.315. Further, the "trustworthiness of spontaneous statements is established on grounds distinct from the general credibility of the declarant." Shaffer v. Field, 484 F.2d 1196, 1197 (9th Cir. 1973). Therefore, the State's assertion that the statement lacked an indicia of reliability due to the credibility of Carroll is inapposite.

The State also claims, and supports such claim with two unpublished court decisions from other jurisdictions, that Carroll's statement was not reliable because it was not against Carroll's penal interest since he had previously confessed to law enforcement. The State admits, however, that he was trying to "curry favor with law enforcement" when he agreed to be wired and speak to the suspected co-conspirators. His ulterior motive, therefore, was obviously to lessen his involvement with the crime as he had not been formally charged with any crime at the time of the taped conversation. Carroll's statement, however, had the opposite effect due to the fact that he exculpated an alleged co-conspirator, Little Lou, which further highlighted Carroll's involvement with the crime. Given that Carroll's statement was spontaneous and given the fact that Carroll exculpated Little Lou by his statement and highlighted Carroll's own involvement, makes Carroll's statement that Little Lou had nothing to do with the murder of Hadland reliable.

In final support of their argument that Carroll's statement was unreliable, the State claims that Little Lou cannot establish with the "required certainty" that Carroll's statement to Little Lou was not false like many of the other statements that Detective McGrath told him to say in the conversation with Little Lou and Espindola. Not only is it difficult to prove a negative, it is even more difficult when the State does not allow Carroll to testify. See AA,Vol.III, 602. It was established at trial that the State wired Carroll to become an informant and elicit incriminating statements from the alleged co-conspirators. See AA,Vol.III,694-97,703,714-15. It was also established at trial that Carroll was told to make false statements to elicit incriminating responses, and that Carroll's statement regarding Little Lou's involvement was not one of the those false statements. AA,Vol.IV,841-42. Further, the State fails to cite any case law as to what is the "required certainty" that Little Lou has to establish. Given the spontaneous nature of the statement, its reliability is inherent eliminating the need for Little Lou to prove whether the statement is true.

The State also claims that Little Lou's argument regarding the District Court's error in failing to admit Carroll's exculpatory statement regarding Little Lou is undermined by the fact that Little Lou made inculpatory statements during the conversation with Carroll. [4] The State fails to support this claim with any citation to the record on appeal. Despite this fact, as the

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[4] Little Lou's post-conspiracy actions are irrelevant to show that he participated in the alleged conspiracy to kill Hadland. Little Lou incriminated himself for the solicitation of the murder of Taoipu and Zone after the alleged conspiracy to kill Hadland concluded, and Little Lou was convicted of solicitation of murder. This appeal does not apply to Little Lou's solicitation of murder conviction and reference to those statements are irrelevant.

court stated in Chia that "it was unfair for the trial court to permit California to present evidence as to its theory behind Chia's actions, but to deny Chia the same opportunity and right," it is unfair for the State to present these alleged inculpatory statements of Little Lou (although Espindola testified that she did not believe that Little Lou's statements were serious, AA,Vol. VI, 1287) in support of their theory, but deny Little Lou to present exculpatory statements made about him to support his theory of defense. See Chia 360 F.3d at 1005.

Additionally, the State references the testimony of Zone in which Zone testified that Little Lou told Carroll to bring baseball bats and bags. Again, this testimony by Zone was contradicted by the testimony of Taoipu in which Taoipu specifically and succinctly testified in the Kenneth Counts's trial that Espindola was the author of the baseball bats and bags statement. Taoipu's testimony was also incorrectly ruled inadmissible by the District Court and again Little Lou was prevented from presenting his defense while the State was allowed to present their case. See Little Lou's argument supra. at p. 33.

The State also submits that Little Lou failed to meet the fourth prong of the test adopted by Chia that the declarant's statement was the sole evidence of the issue of Little Lou's innocence. Although the State is correct in that Espindola testified that Little Lou did not participate in any agreement to harm Hadland and that he did not pay anyone to harm Hadland, Carroll's statement was the only statement made close in time to the crime that Little Lou was not part of the plan to harm Hadland. Espindola's statements that Little Lou did not plan or participate in the murder of Hadland were presented at trial. Her statements were not made prior to trial. Carroll's exculpatory statement regarding Little Lou, therefore, was the

sole evidence of his innocence that was derived close in time to the alleged crime. Carroll's statement, consequently, was the "best and only evidence" that Little Lou possessed to substantiate his claim of innocence. See Chia, 360 F.3d at 1005.

The State finally claims that the District Court allowed Little Lou to highlight and argue Carroll's exculpatory statement regarding Little Lou for its truth without opening the door to Carroll's other hearsay statements implicating Little Lou. The State's argument is inaccurate. Specifically, the District Court explicitly stated on the record that Little Lou may not comment on the veracity of Carroll's statement. AA,Vol.III, 596. Little Lou abided by the District Court's erroneous ruling which deprived Little Lou from fully presenting his defense. Further, the State's argument that at trial the "State proffered five highly incriminating statements from Carroll's recorded interview with detectives, including that Little Lou showed up in black and wanted to personally kill Hadland," is inaccurate. This evidence was not presented at trial. Instead, this was part of the State's argument to the Court regarding the admissibility of Carroll's statement. See AA,Vol.III, 600-01. Additionally, no offer of proof was made regarding this evidence and therefore this Court should not consider it. See Burgeon v. State, 102 Nev. 43, 46, 714 P.2d 576, 579 (1986)(stating that an offer of proof is essential to preserve for the court's review the testimony that the party reasonably expected the jury to hear).

B. Adoptive Admission

The District Court allowed Carroll's statement that Little Lou had nothing to do with the murder of Hadland to be admitted as an "adoptive admission" because when Carroll made

the statement, Little Lou and Espindola did not refute it. AA,Vol.III,603. Pursuant to NRS 51.035, adoptive admissions are not hearsay. See NRS 51.035(3)(b). Courts have ruled that because adoptive admissions are not hearsay, they are admitted as substantive evidence. See State v. Browning, 485 S.E. 2d (W.VA. 1997); Wallace v. State, 608 S.E. 2d 634, 635-36 (GA. 2005); see also People v. Couch, 211 N.W. 2d 250,253 (MI. 1973). The District Court erred in failing to admit Carroll's statement as substantive evidence.

As stated, the District Court ruled that Carroll's statement could be considered as an adoptive admission of Espindola. See AA,Vol.III,603. As an adoptive admission of Espindola, the statement became Espindola's statement, i.e. she adopted it. Espindola testified. Carroll's statement, therefore, should have been admitted as substantive evidence of Little Lou's innocence. The Court, however, specifically ruled that Carroll's statement cannot be admitted for its truth and Little Lou cannot comment on the veracity of the statement because it would then call into question Carroll's credibility. See AA,Vol.III, 596, 602-03. In addition to the District Court's erroneous ruling, jury instruction 40 regarding this adoptive admission specifically stated that the statement cannot be considered for the truth of the matter asserted. See AA,Vol.I,47.

The State claims that Little Lou's argument regarding an adoptive admission is highly flawed because Jury Instruction 40 stated that Carroll's statement could be considered an adoptive admission and therefore the jury could consider the statement for its truth. The State further submits that the District Court advised Little Lou that he could argue for the truth of

the statement based on it being Espindola's adoptive admission. The State's analysis is not only incorrect but also inaccurate.

Jury instruction 40 plainly states that "statements of a co-conspirator after he has withdrawn from the conspiracy . . . may not be considered by you, for the truth of the matter asserted." The instruction then proceeds to state that such statements were only offered . . . as adoptive admissions." The instruction concludes stating that an "adoptive admission is a statement of which a listener has manifested his adoption or belief in its truth." See AA,Vol.I,47.

The State, therefore, is correct in that Jury Instruction 40 does state that it could be considered as an adoptive admission which is a statement in which a listener has manifested his adoption or belief in its truth; however, the jury instruction also sets forth that the statement cannot be considered for the truth of the matter asserted. The State's argument, therefore, that the adoptive admission definition was given and the jury was allowed to consider the actual truth in the statement, is incorrect. As shown, the jury instruction provides for the exact opposite analysis. Further, contrary to the State's position that the District Court informed Little Lou that he could argue for the truth of the statement, the trial transcript reflects that the District Court specifically stated that the Little Lou cannot comment on the veracity of the statement or its truth. See AA,Vol.III, 596, 603.

As stated previously, an adopted admission is a non-hearsay statement. As such, Carroll's statement should have been admitted as substantive evidence allowing the jury to consider the statement for its truth - - that Little Lou had nothing to do with the murder of

Hadland. The District Court did not allow this during the trial and the jury instruction compounded the Court's erroneous ruling by stating that the statement cannot be considered for the truth of the matter asserted.

C. NRS 51.035(3)(b),(d)

The District Court ruled that the "statements made by Carroll in the tape when he was acting as a police informant or agent or whatever we want to call him cannot be considered for the truth of the matter asserted." AA,Vol.III,596. The District Court erred in misapplying the statements by party agents. Such error was not harmless to Little Lou.

Pursuant to NRS 51.035(3)(d), a statement made by a party's agent or servant concerning a matter within the scope of the party's agency is not hearsay. Thus, such statements should be admitted as nonhearsay against the State. See U.S. v. Branham, 97 F.3d 835, 850-51 (6th Cir. 1996); Allen v. State, 787 N.E. 2d 473, 477-480 (Ind. 2003); see also U.S. v. Van Griffin, 874 F.2d 634, 638 (Nev. 1989).

The State contends that courts remain divided regarding the admissibility as to who and what can bind the State under the rules of evidence regarding admissions made by party-opponents. See Bellamy v. State, 941 A.2d 1107, 1115-20 (MD. 2008). The State cites U.S. v. Kampiles, 609 F.2d 1233 (7th Cir. 1979), and urges this Court to follow U.S. v. Yildiz, 355 F.3d 80 (2nd Cir. 2004) as well as State v. Brown, 784 A.2d 1244 (N.J. 2001) and Lippay v. Christos, 996 F.2d 1490 (3rd Cir.1993), all of which are premised on the analysis of the common law rule regarding admissions by party-opponents expressed in U.S. v. Santos, 372 F.2d 177 (2nd Cir. 1967).

In Santos, the court held that out-of-court statements of a government agent made in the course of the exercise of his authority and within the scope of that authority are not admissible as evidence. See Santos, 372 F.2d at 180. Santos rationalized its holding on the premise that admissions by government agents should not be able to bind the State because agents of the government are "disinterested in the outcome of a trial" and "their statements seem less the product of the adversary process and hence less appropriately described as admissions of a party." Kampiles, 609 F.2d at 1246 (citing Santos, 372 F.2d at 180).

Although the State urges this Court to follow their cited cases because these cases are "consistent with over four decades of caselaw," the State fails to address the fact that most federal courts hold that statements made by government agents are admissible as nonhearsay. See Garland v. State, 834 So.2d 265, 267 (Fl. 2003) (citing U.S. v. Kattar, 840 F.2d 118 (1st Cir. 1988); U.S. v. Barile, 286 F.3d 749 (4th Cir. 2002); U.S. Ramirez, 174 F.3d 584 (5th Cir. 1999); U.S. v. Reed, 167 F.3d 984 (6th Cir. 1999); U.S. v. Morgan, 581 F.2d 933 (D.C. Cir. 1978; U.S. v. Van Griffin, 874 F.2d 634 (9th Cir. 1989)). In particular, the State fails to address the fact that the Ninth Circuit, our circuit, has ruled contrary to the cited cases by the State.

Specifically in Van Griffin, a Ninth Circuit case involving a conviction for driving under the influence in a national recreation area, the Court ruled that a government manual "setting out the correct procedure to be followed in a variety of sobriety tests" was admissible as a party admission of the United States to show the necessary measures to be taken to have a reliable nystagmus test. See Van Griffin, 874 F.2d at 636, 638. Although the facts in Van

Griffin differ from our facts, the premise is the same – agents of the government can bind the government and their statements are admissible as nonhearsay against the government.

In further support of Little Lou's analysis, the court in Allen v. State, 787 N.E. 2d 473, 478-79 (Ind. 2003), held, after considering the varying views of the federal circuits regarding admissions of party-opponents or agents of the party, that statements of government employees concerning matters within the scope of their agency are admissible in criminal cases under the party-opponent provision of the Indiana Rules of Evidence. See id. at 479. The court subsequently held that the trial court erred in excluding a statement made by a police officer prior to the defendant's arrest because the statement was not hearsay.

The Allen court premised its ruling on the fact that the Seventh Circuit in Kampiles as well as the other concurring circuits, reached their view that admissions by the State agents and employees are not admissible under the admissions by party-opponents by relying on the analysis articulated by the Santos Court expressed above. The Allen court concluded that because the Indiana Evidence Rule regarding statements of a party-opponent uses the heading of "statement by party-opponent" versus "admission of party-opponent" the Indiana Court does not have the concerns expressed by the Seventh Circuit in Kampiles and Santos relating to admissions and the adversarial process. See id.

NRS 51.035(3)(d) mirrors the wording of the Indiana Rule of Evidence in that it uses the word "statement" versus "admissions." This similarity leads to the conclusion that the concerns expressed by Santos and Kampiles, that statements made by state agents should not

be classified as admissions because the state agents are normally disinterested parties, are not relevant in Nevada.

In further support of Little Lou's position that the State's cited cases are not relevent is that Carroll was obviously *interested* in the outcome of the court proceedings associated with the murder of Hadland. Carroll was a major player in the death of Hadland. Additionally, Carroll was recruited by the State to elicit and capture inculpatory statements from the other suspected co-conspirators in the death of Hadland, making him a state agent. By assisting the State, Carroll was hoping to gain favor with the State regarding his involvement in the crime. Carroll was, therefore, interested in the outcome of the court proceedings that would be associated with this case. Instead of eliciting inculpatory statements, however, Carroll made a spontaneous statement admitting that Little Lou was not involved with the death of Hadland, which is properly described as an admission.

Therefore, the concerns expressed in Santos (that informants are uninterested parties so their statements can't bind the state because their admissions are less likely seen as admissions of the state) and subsequent cases cited by the State are inapposite to Little Lou's case because Carroll was an state agent who had the ability to bind the State and who was interested in the outcome of the court proceedings associated with the case making his statement an admission.

Further, applying the party-opponent provision against the government in criminal cases advances a general concept of fairness because

> The evenhandedness of justice as between subject and sovereign is a reassuring doctrine, and especially so its corollary: that, at a minimum the law of evidence regulates the mode of proof

> impartially for the subject and the for the sovereign. The hearsay rule that troubles the former equally vexes the latter; the exceptions to the hearsay rule that ease the latter equally comfort the former.

Id. (quoting Garland v. State, 834 So.2d 265, 267 (Fla.Dist.Ct.Ap.2002)(quoting Irving Younger, *Sovereign Admissions: A comment on United States v. Santos*, 43 N.Y.U. L.Rev. 108, 115 (1968))).

Although Little Lou objected to the District Court denying Carroll's statement as nonhearsay, Little Lou did not specifically raise, as the basis for the objection, NRS 51.035(3)(d). The District Court's denial of the admission of Carroll's statement as substantive evidence after the District Court stated that the statements made by Carroll occurred when he was acting as a police informant or agent is plain error. In conducting a plain error analysis, the Court determines whether there was error, whether the error was plain and clear, and whether the error affected Defendant's substantial rights. See Anderson v. State, 121 Nev. 511, 517, 118 P.3d 184,187 (2005).

Here, according to the majority of federal circuit courts, the District Court erred in failing to admit Carroll's statement that Little Lou had nothing to do with the murder of Hadland as nonhearsay as a statement made by an agent of the State. Further, the error affected Defendant's substantial rights. Carroll's statement was evidence of Little Lou's innocence regarding participation in a conspiracy to murder Hadland and, as shown in the trial transcript, the evidence against Little Lou was far from overwhelming. The exclusion of this

evidence prejudiced Little Lou because he was prevented from presenting his defense which denied Little Lou a fair trial and due process.

III. The Trial Court Erred In Denying The Admission Of The Former Testimony Of Jayson Taoipu.

A. The Former Testimony of Jayson Taoipu Should Have Been Admitted Pursuant to NRS 51.325.

Little Lou sought to admit the former testimony of Jayson Taoipu, a witness at the previously held murder trial of Kenneth Counts who was the alleged shooter of Hadland, against the State for the purposes of demonstrating Little Lou's innocence in the conspiracy to kill Hadland. AA,Vol.IX,1881-90, 2068-73. The District Court erroneously denied the admission of Taoipu's former testimony under NRS 51.325, despite the fact that all of the prongs of NRS 51.325 were satisfied. The District Court denied its admission because it "opens the door to other statements that Jason Taoipu made in his trial testimony that indicate that Little Lou was involved and gave the order" and because it would be prejudicial to Mr. H. AA,Vol.IX,2072. The District Court was incorrect in its ruling and improperly injected herself into Little Lou's defense usurping Little Lou's defense strategy thereby violating his right to a fair trial and due process.

In support of their argument that the District Court did not err in failing to admit Taoipu's former testimony under NRS 51.325, the State claims that Little Lou misstated the District Court's reasoning for the denial of the admission of Taoipu's former testimony. The State is absolutely incorrect. Little Lou restated the District Court's ruling denying the admission of Taoipu's former testimony that the District Court delivered during Little Lou's

trial which is supported by the trial transcript. See AA,Vol.IX,1881-90, 2068-73. The State, however, recites the District Court's ruling regarding this issue that the District Court set forth in its order denying Little Lou's post-trial motion for a new trial. In that District Court Order, the District Court incorrectly reiterated its ruling regarding the Taoipu former testimony that it gave at Little Lou's trial. The District Court's restatement of its ruling, which the State cites to, is not supported in the trial transcript. See AA,Vol.IX,1881-90, 2068-73.

The State further claims that Little Lou was not entitled to have only favorable portions of the testimony admitted because NRS 51.325 provides for admission of an unavailable witness's entire prior testimony. Nowhere in the language of NRS 51.325 does it contemplate a requirement that a witness's "entire prior testimony" must be admitted. See NRS 51.325. Further, the State does not support this proposition with any case law. See NRS 51.325. In fact, NRS 47.120 states that when "any part of a writing or a recorded statement is introduced by a party, the party may be required at that time to introduce any other part of it which is relevant to the part introduced, and any party may introduce any other relevant parts." NRS 47.120. At trial, Little Lou stated that he did not object to the admission of other relevant portions of the Taoipu's testimony. See AA,Vol.IX,1886.

The State also claims that Little Lou's argument fails under NRS 51.325 because the State had no motive to impeach Taoipu or correct Taoipu's "misattribution of the baseball bat and bags statement." It appears that the State is claiming that the Little Lou failed to meet second prong of NRS 51.325 where the statute contemplates that the issues have to be substantially the same. The State is incorrect. As stated in Little Lou's opening brief, the

issues were the same in that the issue was who was the maker of the statement to determine involvement and culpability of all the alleged players in this alleged conspiracy. Further, the statute only requires that the issues be substantially the same. See NRS 51.325.

The remaining portions of the State's argument regarding NRS 51.325 rest on speculation as to what the State could have allegedly proved had the District Court admitted Taoipu's testimony. In fact, the State cites to facts that were not admitted into evidence at trial to support their arguments, and whose admissibility is not challenged in this appeal. Specifically, the State cites to Taoipu's testimony from the Kenneth Count's trial that Carroll told Taoipu that Carroll's boss ordered the hit and that Taoipu knew that Carroll's bosses were Luis and Espindola and that the State would have been able to prove that Luis was Little Lou. The record cited by the State does not support the State's speculation. Additionally, the State directs this Court to Taoipu's voluntary statement which was also not admitted at trial and no offer of proof was made at trial regarding Taoipu's statement. See State's Record on Appeal, RA 7-11. This portion of the State's record, therefore, should be stricken and not considered by this Court. See Burgeon, 102 Nev. at 47, 715 P.2d at 579. This speculation does not minimize the fact that the District Court erroneously ruled that Taoipu's testimony was inadmissible despite the fact that it met all of the requirements of NRS 51.325.

That State also attempts to refute Little Lou's argument that the District Court's denial of the admission of this evidence created a conflict between the defenses of Little Lou and Mr. H. The State claims that Little Lou did not raise this issue in his joint opposition to the State's motion to consolidate the trial with Mr. H and that Zone had testified in his preliminary

hearing in 2005 that Carroll told Zone that Little Lou made the baseball bat and bags statement.

During a trial, issues arise that trial counsel cannot predict that require trial counsel to amend their trial strategy. Trial counsel did not first decide on day 12 of the trial to seek to have Taoipu's former testimony admitted. Instead, trial counsel had to make this trial decision because Taoipu could not be found to testify to refute Zone's testimony. In fact, as set forth in the trial transcript, Little Lou exhaustively attempted to locate Taoipu prior to trial so that he could testify, to no avail. AA, Vol. IX, 2067-68. Due to the fact that Little Lou could not locate Taoipu, and the Court concluded that Taoipu was unavailable, Little Lou properly sought the admission of Taoipu's former testimony pursuant to NRS 51.325. Mr. H objected to the admission of Taoipu's former testimony because it would violate Mr. H's confrontation rights if the entire former testimony of Taoipu was admitted. This conflict could not be foreseen before trial because counsel did not and could not predict the unavailability of Taoipu.

The State finally argues that even if the Court erred in failing to admit Taoipu's former testimony, this error was harmless. The State is incorrect. This error affected Little Lou's substantial right to a fair trial. Specifically, Taoipu's testimony that Espindola made the statement to bring baseball bats and bags contradicted Zone's testimony that Little Lou made the statement regarding baseball bats and bags. Taoipu's testimony was evidence of Little Lou's innocence, the denial of which prevented Little Lou from a fair trial. Further, overwhelming evidence of Little Lou's guilt did not exist.

IV. There Was Insufficient Corroboration Of The Accomplice Testimony To Allow The Verdict To Stand

The State suggests that this Court adopt the test used by the Texas Court of Criminal Appeals set out in yet another unreported decision from a division of an intermediate appellate court of another state as the standard for determining the sufficiency of accomplice corroboration in Nevada. See Cooley v. State, 2009 WL 566466 (Tex. Crim. App. 2009) It is respectfully submitted that jurisprudence in Nevada is already in place. See Hegelmeier v. State, 111 Nev. 1244, 903 P.2d 799 (1995); Eckert v. State, 91 Nev. 183 (1975). It was legislatively mandated by NRS 175.291. The Court must engage in an independent review of the record to determine what evidence was adduced at trial, apart from accomplice testimony, and determine whether it is sufficient to connect the defendant with the commission of **the offense**. The corroboration shall not be sufficient if it merely shows the commission of the offense or the circumstances of it. Because each case must rest on its own facts when examining a record for independent corroboration of an accomplice that connects the defendant to the crime, the first step in the analysis where conspiracy leads to vicarious liability for general intent offenses must be to determine "**to which crime must there be a connection?"**

It is undisputed that Little Lou was not present at the scene of the Hadland killing. He can only be held responsible for it if he conspired to have it occur. Nothing in this case demonstrates any pre-event connection or knowledge on the part of Little Lou to any conspiracy to do harm to Hadland. It is fundamental conspiracy law that a criminal agreement

is defined by the scope of the commitment of its co-conspirators. Thus, where a defendant is unaware of the overall objective of an alleged conspiracy or lacks any interest in, and therefore any commitment to, that objective, he is not a member of that conspiracy. See United States v. Smith, 82 F. 3d 1261, 1269 (3rd Cir 1996).

For over a century it has been recognized that while in theory and in law there can be no objection to proving a crime by proof of a conspiracy to commit it, yet in practice that method of establishing the issue is liable to give the prosecution an undue advantage. Where the scope, limits, or purpose of the alleged conspiracy are accurately defined by the pleading in the case, the accused has to meet at the trial a multitude of inculpatory facts claimed to be relevant to the main fact in issue. There is always danger in such cases that the specific charge will be lost sight of and disappear in the mass of collateral facts growing out of other subjects, and that the defendant may be convicted because of other wrongdoing with which he was not charged. See People v. McCain, 9 N.Y. Crim. R. 377, 38 N.E. 950 (N.Y. 1894). To guard against this, the law recognizes that proof of a conspiracy with an objective different from that charged in the Indictment results in a fatal variance, as it is not the same conspiracy. As the United States Court of Appeals for the Eleventh Circuit held in reversing a conviction due to a fatal variance caused by multiple conspiracies being proven when one was charged in the case of United States v. Chandler, 388 F. 3d 796 (11th Cir. 2004):

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

> reasonable doubt that the conspiracy existed, that the defendant knew about it and that he voluntarily agreed to join it

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

One cannot join a conspiracy after the objective has been achieved. Thus, once the criminal objective contemplated by the conspiratorial agreement has been achieved or abandoned, it is completed and one cannot join that conspiracy or commit an overt act in furtherance of it. See Grunewald v. United States, 353 U.S. 391, 77 S. Ct. 963 (1957); People v. Zamora, 18 Cal.3d 538, 560, 557 P.2d 75, 90 fn. 20 (Cal. 1976) (cannot join murder conspiracy once murder occurs); People v. Marks, 45 Cal. 3d 1335, 1345, 756 P. 2d 260, 267-268 (Cal. 1988)(cannot be criminally liable under conspiracy theory for a crime committed prior to joining the conspiracy). In other words, once the crime that was the objective of the conspiracy occurs - here, murder - one can approve of it, even celebrate it, but it is simply too late to agree that it occur. See People v. Brown, 226 Cal. App. 3d 1361, 1368, 277 Cal. Rptr. 309, 313 (Cal. App., 5th Dist. 1991)(The object of a punishable conspiracy is commission of a crime which cannot be brought about, produced, caused, or accomplished if it has already been committed). Here, there is no proof that Little Lou participated in the conspiracy to kill Hadland. In fact, just the opposite occurred. As stated by Espindola, Little Lou did not plan, participate or pay for the murder of Hadland, and as stated by Carroll, Little Lou had nothing to do with the murder of Hadland. See AA, Vol.VI, 1255-56; see also AA, Vol.I, 93, Vol.IV,842.

A conspirator is one who agrees to the commission of a crime before it occurs whereas one who learns of a crime that has occurred and assists a person to get away with it is an accessory after the fact. See State v. Skipintheday, 717 N.W. 2d 423, 426-427 (Minn. 2006). The accessory after the fact has had no part in causing the crime or assisting in its perpetration but instead interferes with the process of justice after the crime occurs. The same principal holds true as to aiding and abetting a murder. As a matter of law one cannot aid and abet a murder after it has been accomplished. One can be an accessory after the fact. See Ex parte Overfield, 39 Nev. 30, 152 P. 568 (Nev. 1915). Moreover, the two are mutually exclusive as a matter of law. See United States v. Ortega, 44 F.3d 505, 507 (7th Cir. 1995); Givens v. State, 273 Ga. 818, 546 S.E. 2d 509, 512 (Ga. 2001) (a person cannot be both party to a crime and an accessory after the fact as under common law and modern practice an accessory after the fact is not an accomplice.) People v. Verlinde, 100 Cal. App. 4th 1146, 1158, 123 Cal. Rptr. 2d 322, 331 (Cal App 4th Dist. 2002)(citing People v. Sully, 53 Cal 3d 1195, 812 P. 2d 163, 182 (Cal 1991)).

Evaluating the corroboration of accomplices in this case requires an analysis of timing as to when a person must join a conspiracy in relationship to when the crime that is the object of the conspiracy is complete. See Grunewald v. United States, 353 U.S. 391, 77 S. Ct. 963 (1957)(conspiracy); People v. Zamora, 18 Cal.3d 538, 560, 557 P.2d 75, 90 fn. 20 (Cal. 1976)(conspiracy); People v. Marks, 45 Cal. 3d 1335, 1345, 756 P. 2d 260, 267-268 (Cal. 1988)(conspiracy); United States v. Delpit, 94 F. 3d 1134, 1150-1151 (8th Cir. 1996); Givens

v. State, 273 Ga. 818, 546 S.E. 2d 509, 512 (Ga. 2001); People v. Verlinde, 100 Cal App. 4th 1146, 1158, 123 Cal. Rptr. 2d 322, 331 (Cal App 4th Dist. 2002).

There was only one witness at trial who implicated Little Lou as having any pre-event knowledge or connection to any harm that was ultimately forthcoming to Hadland: Zone, who merely repeated statements made by Carroll that would have been directly contradicted by Taoipu. See argument supra. p.32. Zone had no independent knowledge of their truth, and he supplied nothing in his testimony other than Carroll's statements that would "connect" Little Lou with the commission of the offense. While it is Little Lou's position that Zone should be treated as an accomplice and require corroboration as such, as set out in his Opening Brief, if the jury rejected that proposition it surely could not have returned a guilty verdict entirely dependent on Zone's testimony. Zone was percipient to the homicide and had enough discussions between Carroll, Counts and Taoipu to establish their conspiracy existed, but was bereft of contact with Little Lou to connect him to it other than through Carroll's statements which were not exposed to cross-examination and confrontation.

The State claims that Little Lou's recorded statements corroborate Zone's testimony. In support of this proposition, the State cites to an unpublished opinion from another jurisdiction. Even if this proposition was accepted by this Court, Little Lou's recorded statements do not connect him to the death of Hadland. The conspiracy and death of Hadland was complete at the time of the Little Lou's statements regarding Zone and Taoipu. Further, Espindola testified that she did not believe that Little Lou was being serious when making those statements. See AA,Vol. VI, 1287.

It is also evident from the transcript of Little Lou's recorded statements that he asked Carroll the penalty for a conspiracy conviction as it would relate to Carroll, not himself. Such a question does not connect Little Lou to the conspiracy. In addition, the note allegedly found regarding surveillance was found in an employee breakroom, not in the room that Little Lou where Little Lou stayed. The State also attempts to show evidence linking Little Lou to the crime by incorrectly stating that Little Lou was a manager of the Palomino. The testimony at trial plainly shows that Little Lou had no involvement in the day to day operations of the Palomino and was not a manager. See AA, Vol.VI,1261; Vol.IX, 2004-06.

The State then cites to a slew of facts in an attempt to connect Little Lou to the crime. Not one of the facts cited by the State, however, involve Little Lou in any way. Despite this misappropriation of the facts, the State concludes that the facts linking Little Lou to the crimes were "overwhelming." The State's misappropriation and misapprehension of the facts of this case can be cured by a careful reading of the trial transcript that will evidence the fact that Little Lou had no involvement with the murder of Hadland.

The State's contention that somehow the information on Exhibit 239 (chart depicting cell phone towers and calls) establishes that "Little Lou was in the general vicinity of the co-conspirators" cannot be fully responded to because 19 AA 3596-3600 is not part of Little Lou's record on appeal; however, even if this was a valid contention, returning to Eckert and Hegelmeier, this evidence does not provide sufficient corroboration.

It is respectfully submitted that nothing in the record sufficiently corroborates Zone in that most important and governing principle. That one who was a conspirator can take part in

an effort to conceal it afterwards is true, but it does not provide the corroboration necessary to support the accomplice testimony that one was a conspirator prior to the objective of the conspiracy being achieved.

V. Failure To Record Espindola's Plea Negotiation Proffer Violated Little Lou's Rights To Due Process, Cross-Examination And A Fair Trial.

A. Meaningful Cross-Examination Is Dependent Upon Proffer Recordation.

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

Thus, Little Lou respectfully submits that the textual requirements of Acuna that "the defendant or his counsel must be allowed to fully cross-examine the [cooperating] witness concerning . . . [his plea] bargain," so as to achieve "the *baring of all aspects*" thereof at trial can be meaningfully served no other way than by and through obligatory proffer recordation. Id. 107 Nev. at 669-670, 819 P.2d at 200-201. Nor may the express condition precedent imposed by the Acuna Court upon a permissible exculpatory plea agreement between the State and a cooperating witness that "the putative witness *persuasively*

profess[ ] to have truthful information of value and a *willingness* to accurately relate such information at trial" be otherwise "tested by cross-examination" as Acuna demands. Id. (Emphasis added).

Thus, the State argues that Little Lou "points to nothing in the record indicating the State offered Espindola some improper inducement or attempted to script her testimony" in violation of the prohibitions of Acuna. See State's Answering Brief at page 44, lines 11-13. However, it is beyond peradventure that such skullduggery uniquely occurs only under cover of unaccountability, and is affirmatively facilitated by the cloak of secrecy that non-recordation uniquely provides. And Little Lou respectfully submits that it is an unreasonable imposition upon an accused to require him to marshal evidence of such constitutional violations on the basis of disclosures by the cooperating witnesses themselves against their own penal interests, or acquire such information from police officers who may indulge in such unconstitutional tactics and who are "engaged in the often competitive enterprise of ferreting out crime." Thus, Little Lou respectfully submits that the scrupulous protection of the constitutional rights of the accused in the premises articulated in Acuna must be more facilely susceptible of the vindication that only proffer- recordation permits.

B. Bad Faith Is Shown By The Deliberate Failure To Record Espindola's Proffer.

As pointed out in the law review article cited in Little Lou's Opening Brief, "courts have allowed for the possibility that the government's failure to record interviews with government witnesses may violate due process if the defendant can show that government agents acted in bad faith by *deliberately* failing to record the witnesses' statements . . . ." Note,

Should Prosecutors be Required to Record Their Pretrial Interviews with Accomplices and Snitches?, 74 Fordham L. Rev. 257, 264-265 (2005)(Citations omitted)(Emphasis added). But the State fails entirely to address Little Lou's contention that the record demonstrates that the failure to record Espindola's de-briefing proffer in the instant case was in fact deliberate.

Thus, Little Lou continues to respectfully submit that a bad faith police or prosecutorial purpose to intentionally frustrate the full cross-examination demanded by Acuna is shown by deliberate failure to record the proffer of a cooperating witness, and that deliberate failure to record is shown, in turn, by conspicuous variance from practice. Indeed, as pointed out in Little Lou's Opening Brief, in conspicuous contradistinction in the case of Espindola, the negotiation proffers of State witnesses Carroll and Zone were videotaped. And the State fails to address this disparity in State's Answering Brief.

CONCLUSION

For the above stated reasons, the verdict against Louis Hidalgo III, Little Lou, must be reversed and a new trial granted.

Dated this 10th day of October, 2011.

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CERTIFICATE OF COMPLIANCE

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

Dated this 10th day of October, 2011.

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