

1 anything to Mr. Hadland?

2 The best, the most solid evidence in this case is we
3 know Mr. Carroll's motivation. I think we can understand it.
4 I think many of us would want to have -- to do whatever we
5 could to stay unarrested. He was wearing a wire. He was
6 going in to get people and to get evidence, and at that
7 critical part when Little Lou opened his mouth, he turned to
8 him and said, What are you saying? You had nothing to do with
9 this.

10 Why? There's no explanation for that other than he
11 had nothing to do with it. It would make sense if he tried to
12 argue it in a way that roped somebody else in to get him off,
13 but it makes no sense for him to say, You were guilty as can
14 be but shut up, I don't want to get you on this tape. That
15 doesn't make sense. Out of Deangelo Carroll's mouth is the
16 best evidence in the case, Little Lou, you had nothing to do
17 with it.

18 The prosecutor started out his opening statement to
19 you by saying Little Luis Hidalgo would be heard saying, I
20 told you you should have taken care of TJ. Well, we heard the
21 tape they played and we'll hear it again. I didn't hear that
22 on the tape. And even if you listen to it 50 times, 100
23 times, and you decide ultimately that you do hear it, it
24 doesn't mean -- or it doesn't have to mean, You've got to go
25 kill the guy.

1 Deangelo Carroll, when he left Simone's on the
2 23rd of May with this wire on, he left and met right back up
3 with the police. And before the police listened to any of
4 that tape, they said, What happened? Did you get anything?
5 And in that debriefing session Deangelo Carroll never said,
6 Yeah, I got Little Lou saying, You've got to do this to TJ.
7 That wasn't part of his debriefing to the police.

8 I would like to talk to you now about three facts
9 that are not on the tape on the 23rd, three facts that the
10 prosecutor mentioned and three facts which will be in issue
11 and in dispute in the trial.

12 The first is about the conversation from Anabel
13 Espindola that she says happened at 4:58, 5:00 o'clock at
14 Simone's where she got off the phone with Deangelo Carroll,
15 turned and looked at Mr. Hidalgo and his son and said, TJ's
16 out there badmouthing the club. And her story, her statement,
17 her testimony is expected to be -- and by the way, Mr. Gentile
18 raised this in his opening. This was -- this was a story
19 shared with police in February of last year, 32 and a half
20 months after her arrest, and Mr. Gentile talked to you about
21 her plea deal. The one thing that he did not mention to you
22 is that you'll hear testimony of her sentencing range. And he
23 mentioned -- or he may have mentioned, or if he did not, I
24 will mention she's eligible for probation. And the
25 prosecutor -- and she's eligible for probation after she

1 testifies in this case.

2 The prosecutor, as part of the plea deal, agreed --
3 Mr. DiGiacomo and Mr. Pesci, they agreed to not argue against
4 probation. And she knows that. That was part of her
5 understanding when she entered the plea. So that doesn't mean
6 she'll get probation, but it means when her lawyer's up there
7 saying, Judge, Judge, give us probation, they're not going to
8 say, We don't agree with that. They're going to sit silent on
9 that point.

10 She's going to say that this phone call came in from
11 Deangelo, that she got off the telephone and said to Mr. H,
12 Apparently TJ's out running his mouth about the club, that's
13 what Deangelo said, and that Little Lou became upset and that
14 Little Lou said, Dad, you're not going to do anything. You
15 don't take care of business.

16 And they mentioned that Rizolo and Gilardi -- Rizolo
17 and Gilardi know how to take care of business. Apparently
18 they know how to take care of it so well they both end up in
19 prison. They know how to take care of business. You're not
20 going to be like them.

21 What's not said in that conversation is, You've got
22 to go hurt Hadland. You've got to go kill Hadland. You've
23 got to hire somebody to kill Hadland. He said, You don't know
24 how to take care of business. And she's going to say
25 Mr. Hidalgo, Jr. said, Mind your own business. He didn't say,

1 That's a good idea. He said, Mind your own business, Little
2 Lou.

3 And Anabel Espindola's expected to testify at that
4 point Little Lou said, Dad, I mean, Gilardi takes care of
5 business. He even beat a customer up one time.

6 And Mr. Hidalgo goes -- said, Son, I told you, mind
7 your own business.

8 And Little Lou, upset, left. Left. That's it.
9 That's the aiding and abetting under one of the two theories.
10 We'll talk about the other theory in a second.

11 He never said Hadland should be killed, never
12 suggested a plan on how to do it, never participated in any
13 way. Even based on the star witness, it's a kid mouthing off
14 to the father and the father putting him in his place and that
15 being the end of it.

16 A conspiracy involves an agreement between people to
17 accomplish something illegal. Based on Anabel Espindola,
18 we've got nothing but a disagreement.

19 The second item the prosecutor mentioned was this
20 phone call about bats and bags where Little Lou apparently
21 picks up the telephone, calls Deangelo Carroll and says, Bring
22 bats and bags. Now, it would be nice to hear that from
23 Deangelo Carroll. What we're going to hear is Rontae Zone,
24 Deangelo's friend, the young man who was living with Deangelo.

25 Rontae Zone never spoke to Little Lou Hidalgo, never

1 talked to him, has no first-hand information about what Little
2 Lou Hidalgo may have said or may not have said. All his
3 information about bats and bags is filtered through what
4 Deangelo Carroll said. And it's filtered through on a day
5 where they were smoking pot from the time they got up until
6 the time they went to sleep.

7 Rontae Zone, who knows Deangelo Carroll pretty well,
8 will tell you that he doesn't always find him to be
9 trustworthy, that he talks a lot, doesn't also know what to
10 believe out of his mouth, but he'll say, as he best remembers
11 it, that Deangelo said that Little Lou called, said something
12 about, Bring bats and bags to the club.

13 On the wire, on the May 23rd body wire that we heard
14 some this morning -- we'll hear a lot more in the trial --
15 there's no reference at all to bats and bags. And I think
16 it's a fair question for you to have as you're listening to
17 the evidence to ask, well, if that's an important piece of
18 evidence, wouldn't the police have gotten Deangelo Carroll to
19 bring that up on this body wire, this 34-minute, 56-second
20 body wire? Wouldn't they get him to say, Hey, Little Lou, you
21 remember when you called me about bats and bags, and try to
22 get him talking about that, if that's an important piece of
23 evidence? Nowhere on the wire is the word bats and nowhere on
24 the wire is the word bags. They're never together and they're
25 never attributed to Little Lou Hidalgo.

1 Jayson Taoipu was present with Rontae Zone all day
2 and with Deangelo Carroll. He was told something about bats
3 and bags. He was told by Deangelo Carroll something about
4 bats and bags. And Jayson Taoipu says Deangelo said, Anabel
5 Espindola told me to bring bats and bags to the club. Anabel,
6 not Little Lou. Anabel is expected, from the witness stand,
7 to deny ever having made that statement.

8 The last point on the bats and bags is, do you have
9 any way of knowing, when you're listening to the evidence, was
10 this comment ever really made? And you may want to listen for
11 evidence that suggests anything about bats and bags ever being
12 gotten. There's going to be a lot of talk about phone calls
13 and getting bats and bags and what that may be code for, but
14 at the end of the day, you're not going to hear a single
15 witness say, And after that, Deangelo turned and said, I've
16 got to go get bats and bags, and he walked to the closet to
17 get a bat and walked to the kitchen to get bags. Nothing like
18 that.

19 What we're going to hear is Rontae Zone saying,
20 Deangelo told me something about bats and bags. I don't know
21 if that call was made or not, that's the best memory I have.
22 That's it.

23 The third item of proof outside of this tape that
24 the prosecution talked about and is relying on the case is a
25 phone call. There's this phone call at 7:42 p.m. between

1 Little Lou Hidalgo to Deangelo Carroll's house. Absolutely
2 true. Little Lou called him all the time. Deangelo worked at
3 the club. He promoted. He handed out flyers at the club and
4 that was part of Little Lou's responsibility, to make sure
5 those guys were out on the strip passing things out, giving
6 items out to the cab drivers.

7 You'll hear from a defense witness that on this
8 night Deangelo Carroll was supposed to have a special pickup
9 from a group of businessmen who were in a hotel and that they
10 were trying to make sure -- because Deangelo wasn't always so
11 responsible -- trying to make sure this pickup was made.
12 Absolutely, little Lou called at 7:42 p.m. trying to find the
13 employee who was not at work. It's interesting the
14 significance placed on that call as --

15 I'm looking for the phone records. I'll give you a
16 minute to catch up with me. I changed the order a little bit
17 and I forgot to let Andy know. There we go. Thank you.

18 What the records are going to show is on May the
19 19th Deangelo Carroll tried to contact Timothy Hadland five
20 times. The first time was a chirp with no time at all. He
21 chirped him again at 10:53 for eight seconds, 10:54 for 21
22 seconds, 11:13 for 14 seconds, and then the last attempt was
23 at 11:27. And based on that, the police are going to tell you
24 they believe that Mr. Hadland was alive at 11:27. He was
25 found and 9-1-1 was called at 11:44. So to the best of their

1 estimation, he was killed somewhere in that time period.

2 Contrast Little Lou's 7:42 call, one call at 7:42,
3 with all the communication between the two key people,
4 Deangelo Carroll and Anabel Espindola. Deangelo called seven
5 times, appeared to be six communications. He called her from
6 his house to Simone's, 4:58 p.m. This allegedly is when this
7 thing about TJ's out badmouthing the club that ultimately the
8 State's theory lead to his death. That call was at 4:59. He
9 called again at 7:27. Then there's a series of chirps later
10 in the night, the last one being significantly ten minutes
11 after Mr. Hadland who was attempted to be reached at 11:27.
12 Those are calls from Deangelo to Anabel Espindola.

13 Anabel wasn't just received. She was trying to
14 contact Deangelo as well. She attempted to chirp him at 8:13
15 and that's -- you know, let them know, I'm available, here I
16 am, 8:13. 8:15, there's some sort of talk for six seconds.
17 She tries him at 11:08 and then again they're switching little
18 chirps at 11:37.

19 This may be too small for you guys to see. I'll try
20 your other TV down here.

21 What we have at the end of the day, in contrast to
22 one call which is supposed to have such great incriminating
23 value in this case, we have 12 communications or attempted
24 communications between Deangelo Carroll and Anabel Espindola.
25 That's not hunches, that's not speculation. Those are facts.

1 When all the evidence is in, you'll know who was in
2 constant contact on the 19th. You'll know who the main people
3 were in the phone conversation -- or on the body wire on the
4 23rd. You'll know who was in charge and you'll know that
5 based on Anabel Espindola's expected testimony that she's
6 going to say Little Lou never mentioned killing anybody, much
7 less killing Hadland. And you're going to hear Deangelo
8 Carroll on that tape who's trying to get incriminating
9 evidence say, Little Lou had nothing to do with it.

10 On the murder charge and on the conspiracy charge,
11 that's the evidence. He's not guilty. And at the end of this
12 case, we'll ask you to please find him not guilty of those two
13 charges.

14 THE COURT: All right. Thank you, Mr. --

15 MR. ADAMS: I'm not quite done yet. I need to talk
16 about the other two charges for a few minutes.

17 THE COURT: I'm sorry.

18 MR. ADAMS: The last two charges are two charges not
19 referenced by Mr. Gentile because they don't apply to his
20 client. They're two charges related to the comment about rat
21 poison of Mr. Zone and Mr. Taoipu. And I told you earlier
22 Little Lou said it, and he did. The question for you is did
23 he mean it. No question those words came out of his mouth.
24 No question they're on the wire. The question is was he
25 trying to have a first-degree murder done on those two people.

1 To evaluate that, to evaluate whether these were
2 stupid words or whether they were intentional words trying to
3 get people killed, you've got to look at all the evidence.
4 One thing to look at is did Little Lou leave his room to go
5 find Deangelo Carroll so that something terrible would happen
6 to Mr. Zone and Mr. Taoipu? The evidence will be no.

7 Mr. Carroll came to Luis Hidalgo's room. Luis
8 Hidalgo was sick. You can hear him coughing and hacking on
9 the wire. He was sick in his own room. Deangelo Carroll came
10 to his room before the 23rd.

11 Is there going to be any evidence -- and listen for
12 evidence -- that Little Lou was out in these three days
13 between Mr. Hadland's death and the wire? Is there any
14 evidence that Little Lou Hidalgo was going out trying to
15 figure out who was with Deangelo so they could be eliminated?
16 I don't expect you're going to hear any evidence about that.

17 And then most importantly, if this was such an
18 intentional comment, what do we hear on that wire on May the
19 24th? On May the 24th, the day after, they played a little
20 snippet of it, he says, The witnesses got on the bus, they got
21 some money. They got on the bus and took off. Did Little Lou
22 say, How did you let those guys get away? I gave you Jen, I
23 gave you Ray, I told you to get rat poison. You've got to go
24 find those guys so they don't snitch on you later, man.

25 You don't hear that on the tape. There was none of

1 that. The question at the end of the day is, did Little Lou's
2 comments mean he was really trying to have a first degree
3 murder done?

4 The judge told you earlier about the presumption of
5 innocence. The presumption of innocence remains with a client
6 throughout the case. If there's evidence that can be
7 interpreted two ways --

8 MR. DIGIACOMO: Objection, Your Honor.

9 THE COURT: Yeah.

10 MR. DIGIACOMO: Thank you.

11 THE COURT: Can you rephrase what you're about to
12 say.

13 MR. ADAMS: Yes.

14 MR. DIGIACOMO: Well, then I'd argue it's
15 argumentative as well, Judge.

16 THE COURT: Well --

17 MR. ADAMS: If there are facts out there, you have a
18 duty to interpret those facts consistent with the presumption
19 of innocence. If the facts can only be viewed --

20 MR. DIGIACOMO: I object. That's a misstatement of
21 the law.

22 THE COURT: Yeah. It's sustained.

23 MR. ADAMS: If the evidence can only be viewed in a
24 way that points to guilt, look at it that way, but if it
25 doesn't, keep the presumption of innocence in mind. What

1 you'll have are comments. You'll have comments by Little Lou
2 and no steps taken before the 23rd or after the wire to have
3 anything done to these other two men.

4 At the end of the evidence, we'll ask you to please
5 acquit Luis Hidalgo on those charges as well.

6 Thank you.

7 THE COURT: All right.

8 MR. ADAMS: Thank you, Your Honor.

9 THE COURT: I was afraid to say anything. Thank
10 you, Mr. Adams.

11 Is the State prepared to call its first witness?

12 MR. DIGIACOMO: We are, Judge, but can we have a
13 five-minute break?

14 THE COURT: All right. Ladies and gentlemen, we're
15 going to take a brief break before we go into the testimony.
16 We'll give you until 2:10.

17 And once again, you're reminded of the admonishment
18 which is, of course, still in place that you're not to discuss
19 anything relating to the case with each other, with anyone
20 else. Don't read, watch, listen to reports of or commentaries
21 on any subject matter relating to this. Please don't form or
22 express an opinion on the trial.

23 If you folks can leave your pads on your chairs and
24 follow Jeff through the double doors. We'll see you all back
25 here at 2:10.

1 (Court recessed at 2:02 p.m. until 2:14 p.m.)

2 (In the presence of the jury.)

3 THE COURT: All right. Court is now back in
4 session. The record will reflect the presence of the State,
5 the defendants, their counsel, officers of the Court and
6 members of the jury.

7 Mr. DiGiacomo, please call your first witness.

8 MR. DIGIACOMO: Larry Morton.

9 THE COURT: Larry Morton.

10 Sir, just come on up here, please, to the witness
11 stand, just up those couple of stairs. And please remain
12 standing facing our court clerk.

13 LARRY RAY MORTON, STATE'S WITNESS, SWORN

14 THE CLERK: Please be seated and please state and
15 spell your name.

16 THE WITNESS: Larry Ray Morton, L-a-r-r-y, R-a-y,
17 M-o-r-t-o-n.

18 DIRECT EXAMINATION

19 BY MR. DIGIACOMO:

20 Q Good afternoon, sir. How are you employed?

21 A I'm a senior crime scene analyst for the Las
22 Vegas Metropolitan Police Department.

23 Q What does that mean you do for a living?

24 A It means that I respond to incidents, document
25 the incidents through note taking, photography, latent print

1 processing, evidence collection, preservation, also attend
2 autopsies to collect any evidence that is available from the
3 victim.

4 Q How long have you been a crime scene analyst?

5 A For 14 years.

6 Q And while we'll have other analysts who
7 actually do some of -- the scenes, were you the analyst
8 assigned to the autopsy of Timothy Hadland?

9 A Yes, I was.

10 Q Can you tell the ladies and gentlemen of the
11 jury what your duties are when you're in an autopsy.

12 A My duties at the autopsy began with documenting
13 the seal that is on the body bag. I photograph the seal. I
14 record the number on the report. Then as the bag is unsealed
15 and opened, I photograph the -- first the open bag with the
16 body usually wrapped in a sheet within the bag. Then as the
17 sheet is unwrapped, another series of photographs, then
18 photographing with the clothing on, remove the clothing,
19 photograph with the clothing off the body, then clean the body
20 up, photograph the body after it's cleaned up.

21 During this process, also I take buccal swabs. Any
22 forensic -- any evidence that is on the body that's visible at
23 the time is also collected. I also then fingerprint the body
24 and take palm prints for elimination purposes at a later date.

25 Q Specifically on May 20th, were you at the

1 autopsy of Timothy J. Hadland?

2 A Yes, I was.

3 Q Okay. And you talked about the body in your --
4 and your photography of it. In addition to your photographs,
5 is there anybody else who takes photographs of that time?

6 A The coroner's forensic technician also takes
7 photographs of the body. We work around each other doing
8 photographs pretty much of the same photograph sets prior to
9 the autopsy actually beginning.

10 MR. DIGIACOMO: May I approach, Judge?

11 THE COURT: Yes.

12 BY MR. DIGIACOMO:

13 Q I'm showing you what's been marked as State's
14 Proposed Exhibit Nos. 1 through 4 and ask you to flip through
15 those and tell me if you recognize the individual who's
16 depicted in the photograph.

17 A Yes, I do.

18 Q Is that Mr. Hadland?

19 A Yes, it is.

20 Q Now, looking at those photographs, can you
21 determine whether or not those are the photographs you took or
22 the photographs that the ME's office or the medical examiner's
23 office took?

24 A These were taken by the medical examiner's
25 office.

1 Q How do you know that?

2 A There's a gray -- may I show these?

3 Q Yeah -- well, hold on.

4 MR. DIGIACOMO: I'll move to admit 1 through 4.

5 MR. GENTILE: No objection.

6 THE COURT: All right. Those will be admitted.

7 MR. ARRASCADA: No objection either, Your Honor.

8 THE COURT: Oh, I'm sorry.

9 (State's Exhibits 1 through 4 admitted.)

10 BY MR. DIGIACOMO:

11 Q What I'll do is put them on the overhead and

12 let you answer that question, sir. I'm showing you what's now

13 been admitted as State's Exhibit No. 1.

14 A Every photograph taken by the medical

15 examiner's office has this -- this gray marker placed in the

16 photograph. My photograph would not have that marker in them.

17 If there's any markers, I would put in a ruler with my

18 initials and identification number on it.

19 Q And then that marker has unique numbers on it

20 so the medical office can make sure they -- that the picture

21 associates with the correct report with the correct person,

22 correct?

23 A Yes, that is correct.

24 Q All right. You also indicated that your

25 responsibility is to collect evidence at an autopsy. Now,

1 let's talk about this particular autopsy. Did you collect
2 some evidence that was outside the body of Timothy Hadland?

3 A As we opened the body bag and were preparing
4 the body for autopsy, we found a bullet fragment underneath
5 his head within the body bag.

6 Q And did you collect that?

7 A Yes, I did.

8 Q And during the course of the autopsy, as the
9 doctor's performing the autopsy, does there come a point in
10 time when you collect any other evidence?

11 A Any other evidence such as additional bullet
12 fragments I would collect from the doctor.

13 Q In this case, did you receive additional bullet
14 fragments from the doctor?

15 A Yes, I did.

16 Q Showing you what's been marked as State's
17 Proposed Exhibit No. 134, do you recognize that?

18 A Yes, I do.

19 Q And does that appear to be a packaging that you
20 created from the autopsy?

21 A Yes. This is a manila envelope with an
22 evidence label attached to one side of it which is the label
23 that I prepared and placed on this bag. Also there's a red
24 tape across the flap. The top flap is closed with a string
25 closure. It also bears my initials and the date that I sealed

1 this particular package.

2 Q Obviously that package is cut open, correct?

3 A Yes, it is.

4 Q And there's also a blue seal on the bottom of
5 that package, correct?

6 A Yes.

7 Q Do you know what that blue seal represents?

8 A That blue seal is placed on the packaging by
9 the forensic examiners who would open the package, take
10 anything out and examine it for forensic evidence.

11 Q With the exception of the slip put in the
12 package by the clerk and that blue seal that's on the bottom,
13 is that package in substantially or similar condition as when
14 you impounded it into the vault?

15 A Yes, it is.

16 MR. DIGIACOMO: Move to admit 134.

17 THE COURT: Any objection?

18 MR. GENTILE: No.

19 MR. ARRASCADA: No, Your Honor.

20 THE COURT: All right. 134 is admitted.

21 (State's Exhibit 134 admitted.)

22 BY MR. DIGIACOMO:

23 Q Let's pull out 134 A, B, and C. If you could,
24 describe for the ladies and gentlemen of the jury what's 134
25 A, B, and C.

1 A These are plastic vials that I prepared at the
2 autopsy and placed the bullet fragments in as I received them
3 from the doctor and the one bullet fragment that I had taken
4 from the body bag. It bears writing placed on the side, the
5 event number, item number from my evidence impound report and
6 my initials and identification number.

7 Q Is A, B, C the sum total of all the firearms
8 related evidence that was collected at the autopsy of Timothy
9 Hadland?

10 A Yes, it is.

11 MR. DIGIACOMO: Move to admit A, B and C.

12 THE COURT: Any objection?

13 MR. GENTILE: No.

14 MR. ARRASCADA: No, Your Honor.

15 THE COURT: All admitted.

16 (State's Exhibits 134A, B, and C admitted.)

17 MR. DIGIACOMO: I pass the witness, Your Honor.

18 THE COURT: All right.

19 Who would like to go first, Mr. Gentile?

20 MR. GENTILE: I would.

21 THE COURT: Thank you.

22 MR. GENTILE: May I approach the witness, Your
23 Honor?

24 THE COURT: Yes, that's fine.

25 MR. GENTILE: Thank you.

1 CROSS-EXAMINATION.

2 BY MR. GENTILE:

3 Q 134 A, 134 B, let's talk about A. This is a
4 bullet fragment, if I understood you correctly.

5 A Yes, it is.

6 Q Okay. Now, let's -- why do you collect
7 bullets?

8 A I collect bullets so that they can be later
9 examined by the forensic examiner who's an expert in the area
10 of firearms evidence.

11 Q Okay. And have you worked with such experts?

12 A Only minimally.

13 Q Only minimally. Okay.

14 Do you know if -- if something as small as 134 A has
15 any value to such an expert?

16 A Without removing it, I couldn't tell you
17 specifically, but it may.

18 Q Okay. But 134 B, now that looks like a real
19 substantial sized bullet, right --

20 A Yes.

21 Q -- as far as the samples go?

22 And here's also C. This doesn't have -- yeah, it
23 does, 134 C, same thing, right?

24 A Yes.

25 Q Okay. And if given to an expert, based on your

1 experience, they can identify a weapon that this -- sometimes
2 they can identify a weapon from which a bullet was fired?

3 A Yes, that is correct.

4 Q Okay. And sometimes they can take multiple
5 bullets that have been recovered from different people and
6 trace it to the same weapon?

7 A Yes.

8 Q Okay. Do you know -- can you tell from looking
9 at this package if any such testing was done by any firearms
10 identification expert in this case?

11 A The -- one of our firearms examiners, Jim
12 Krylo, placed his initials on the blue seal. So, yes, it was
13 looked at by a forensic -- a firearms examiner, yes.

14 Q Mr. Krylo?

15 A Jim Krylo, yes.

16 Q Okay. Did you speak -- don't tell us what he
17 said, but did you speak with him about anything he might have
18 done in this case?

19 A No, I did not.

20 Q All right. So we'd have to hear from him?

21 A That's correct.

22 Q Okay.

23 MR. GENTILE: Thank you.

24 THE COURT: All right. Mr. Arrascada.

25 MR. ARRASCADA: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. ARRASCADA:

Q Mr. Morton, correct?

A That's correct.

Q All you did was attend the autopsy in this case, correct?

A That is correct.

Q You never went out to Lake Mead highway to collect any evidence, right?

A No, I did not.

Q And everything you're testifying about today has nothing to do with anything found at Lake Mead highway?

A That I wouldn't know.

Q It wasn't there. You found it at the autopsy?

A This was from the autopsy, that's correct.

Q That was a bad question I asked first. I apologize.

And you did not go to the Palomino Club to process evidence, correct?

A No, I did not.

Q The same question, the evidence that you're testifying about was recovered at the autopsy, not the Palomino Club?

A That is correct.

Q And you did not go to Simone's Auto Plaza or

1 the auto body shop and do any investigation or recovery of
2 evidence, correct?

3 A No, I did not.

4 Q And again, Items A, B, C, the bullet fragments,
5 and all the rest of your testimony comes from the autopsy, not
6 from anything that occurred -- you don't know anything from
7 Simone's Auto body; is that correct?

8 A That is correct.

9 MR. ARRASCADA: Thank you.

10 THE COURT: All right. Thank you.

11 Any redirect?

12 MR. DIGIACOMO: No.

13 THE COURT: Mr. Morton, thank you for your
14 testimony. Please don't discuss your testimony with anyone
15 else who may be called as a witness in the case. Thank you,
16 and you are excused.

17 THE WITNESS: Thank you, Your Honor.

18 THE COURT: State, your next witness.

19 MR. PESCI: State calls Ismael Madrid.

20 THE COURT: All right. And if Mr. Madrid is not
21 going to be testifying about these exhibits, perhaps you can
22 collect those.

23 Sir, just follow our bailiff right up here to the
24 witness stand and then just once you get up those couple of
25 stairs, remain standing and our court clerk will administer

1 the oath to you.

2 ISMAEL MADRID, STATE'S WITNESS, SWORN

3 THE CLERK: Please be seated and please state and
4 spell your name.

5 THE WITNESS: First name is Ismael, I-s-m-a-e-l.
6 Last name Madrid, M-a-d-r-i-d.

7 THE COURT: All right. Thank you.

8 Mr. Pesci.

9 MR. PESCI: Thank you.

10 DIRECT EXAMINATION

11 BY MR. PESCI:

12 Q Sir, I want to direct your attention to May the
13 19, 2005, the late hours of that day. Where were you?

14 A I was at Lake Mead.

15 Q And when you say Lake Mead, I mean, there are
16 streets in the city called Lake Mead, but this is actually the
17 lake?

18 A I was actually at the lake.

19 Q Okay. That's here in Clark County?

20 A Yes.

21 Q And who were you there with?

22 A With two friends.

23 Q And who were those friends?

24 A Chelsea Dixon and Monique Gonzales.

25 Q And had you been at the lake the whole day?

1 What was going on that day?

2 A We went out there, I guess, for a small picnic,
3 I guess you would say, about three hours, four hours at the
4 most.

5 Q So about what time was it when you went to the
6 lake?

7 A About 7:00.

8 Q 7:00 p.m.?

9 A Yeah, about 7:00 p.m.

10 Q All right. At some point, did you and your
11 friends decide to go home?

12 A Yes.

13 Q Tell us about that, how you got there and how
14 you got home.

15 A Driving. We got there -- in my truck, we drove
16 up there. And then going back, Chelsea was driving. And as
17 we were driving back into town, we see a body lying in the
18 middle of the roadway.

19 Q Do you remember about what time it was when you
20 were driving back?

21 A Oh, roughly 11:30, 12:30 in there.

22 Q Okay. So the late hours of the 19th?

23 A Yes.

24 Q You said that you saw something as you were
25 coming back?

1 A Yes.

2 Q What is it that you saw?

3 A We saw a body laying in the middle of the
4 roadway.

5 Q All right. Now, was it Chelsea that was
6 driving?

7 A Yes.

8 Q What was she driving?

9 A A truck.

10 Q And what kind of a truck is this?

11 A A Dodge Ram.

12 Q Where were you seated in the truck?

13 A Passenger.

14 Q When was it that you were first able to see the
15 body? Where was the body situated?

16 A It was -- I mean, we almost missed it. We came
17 up pretty close. We just came right up on it. I can't -- I
18 mean...

19 Q When you say you almost missed it, are there
20 street lights out on this road?

21 A No.

22 Q Is this Lake Shore or what street was this? Do
23 you know?

24 A I can't recall.

25 Q But is this the road to drive back into the

1 city from the lake?

2 A I believe so, yes.

3 MR. PESCI: May I approach the witness?

4 THE COURT: Yes, that's fine.

5 BY MR. PESCI:

6 Q Showing you State's Proposed Exhibits 5 through
7 9 and 12, 14, and 15, take a look at those and let me know
8 when you're done.

9 A (Complying.)

10 Q State's 5 through 9, you've gone through those,
11 sir?

12 A Yes.

13 Q Do you recognize what's depicted in State's 5
14 through 9?

15 A Yes.

16 Q Are those accurate depictions of how the scene
17 looked on that night when you were there?

18 A Yes.

19 MR. PESCI: Move for the admission of 5 through 9,
20 Your Honor.

21 THE COURT: Any objection?

22 MS. ARMENI: No, Your Honor.

23 MR. GENTILE: No, Your Honor.

24 THE COURT: All right. 5 through 9 are admitted.

25 (State's Exhibits 5 through 9 admitted.)

1 BY MR. PESCI:

2 Q All right. Looking at 12, 14, and 15, did you
3 recognize those?

4 A Yes.

5 Q Are those accurate depictions as well of the
6 things that you saw there that night?

7 A Yes.

8 MR. PESCI: Move for the admission of 12, 14, and
9 15.

10 THE COURT: Any objection?

11 MS. ARMENI: No, Your Honor.

12 MR. ARRASCADA: No.

13 THE COURT: You don't have to stand.

14 That will all be admitted.

15 MR. PESCI: Thank you.

16 (State's Exhibits 12, 14, and 15 admitted.)

17 BY MR. PESCI:

18 Q Now, you said you almost missed the body?

19 A Yes.

20 Q All right. Let's look at State's 5 first.

21 Now, as we're looking at State's 5, can you show us where the
22 body is? You can touch the screen there.

23 A Right there.

24 Q Now, when you were out there that night and you
25 first came up on there, are those some cars situated behind

1 the body?

2 A Yes.

3 Q Were those there?

4 A Only one of them.

5 Q Is that why you couldn't see the body at that

6 point?

7 A Yes.

8 Q Showing you State's 6, as you got closer -- if

9 you tap the bottom right-hand corner of your screen, it will

10 clear -- thanks -- State's 6, as you got closer, is that what

11 you saw?

12 A Yes.

13 Q Eventually did you get to a point where you did

14 see the body?

15 A Yes.

16 Q How close do you think you got when -- were you

17 still in the truck at this time?

18 A No, I exited the truck.

19 Q Did anybody else get out at that point?

20 A Shortly after, yes, Chelsea did.

21 Q When you got out, what did you do?

22 A I didn't -- I was yelling, you know, Hey, can

23 you hear me? I didn't know he was dead at first.

24 Q Okay. Looking at State's 7, at that point,

25 you're telling us you're not sure if that person was alive or

1 not?

2 A Yes.

3 Q And you mentioned something about one of the
4 cars depicted in State's 7 was, in fact, out there when you
5 got there?

6 A Yes.

7 Q Could you circle that particular car?

8 A (Complying.)

9 Q And was that car facing towards you as you
10 approached or facing away from you?

11 A Facing away from us.

12 Q Eventually did you get close enough to the body
13 to ascertain whether the person was alive or not?

14 A Yes.

15 Q Showing you State's 8 -- could you clear that
16 out -- is this what you saw at that location?

17 A Yes.

18 Q Were you able to figure out whether or not he
19 was alive at point?

20 A Yes.

21 Q What did you do based on that?

22 A I called 9-1-1.

23 Q Did you have a cell phone or what was going on?

24 A Yes, I had a cell phone.

25 Q When you made contact with 9-1-1, did you tell

1 them what the situation was?

2 A Yes.

3 Q And at first, were you sure whether or not he
4 was alive?

5 A At first, no.

6 Q Showing you -- we're still looking at State's
7 8. Now, is that the side of the body that you approached when
8 you first came up?

9 A I believe so, yes.

10 Q All right. Showing you State's 12, did you
11 make it to the other side of the body eventually while you
12 were out there?

13 A Later.

14 Q All right. When you saw this, did you have a
15 better idea as to whether or not he was alive?

16 A Yes.

17 Q Now, out in that area did you see any other
18 items around the body of Mr. Hadland?

19 A Advertisement cards.

20 Q Showing you State's 14, are these those cards
21 that you're referring to?

22 A Yes.

23 Q Did you find something else in the area of
24 those cards?

25 A I don't believe so, no.

1 Q Okay. Let me approach and show you State's 15.
2 Do you see anything else in that photograph?
3 A Tube.
4 Q Okay. And was that out there at that time?
5 A Yes.
6 Q As far as you know?
7 A As far as I know, yes.
8 Q Okay. And when you talk about the tube, can
9 you point that out to the ladies and gentlemen of the jury?
10 A (Complying.)
11 Q Okay. Thank you.
12 Did police or medical arrive?
13 A Yes.
14 Q And did police eventually speak with you?
15 A Yes.
16 Q Did they ask you to fill out what's commonly
17 referred to as a voluntary statement?
18 A Yes.
19 Q Did you fill that voluntary statement out?
20 A Yes, I did.
21 Q And do you have any experience now, as you sit
22 here today, with voluntary statements?
23 A Yes.
24 Q And how is that?
25 A I'm a police officer.

1 Q At the time that this happened back on May the
2 19, 2005, were you a police officer?

3 A No, I wasn't.

4 Q Were you about to become or trying to become a
5 police officer?

6 A I had a month before I started the academy.

7 Q Did you have any experience with voluntary
8 statements before that night?

9 A No.

10 Q Since then have you handed those out to
11 witnesses?

12 A Yes.

13 Q When the police asked you to fill out your
14 voluntary statement, were you still with Chelsea and the other
15 individual?

16 A I was with them.

17 Q Were you asked to fill them out separately or
18 did you all kind of gather up together and --

19 A No. We filled them out separately.

20 Q Did you compare notes?

21 A No.

22 Q Okay.

23 MR. PESCI: Pass the witness.

24 THE COURT: All right. Thank you.

25 Ms. Armeni.

1 MS. ARMENI: Yes, Your Honor.

2 CROSS-EXAMINATION

3 BY MS. ARMENI:

4 Q Mr. Madrid, I just have one question.

5 Exhibit 8, I don't know if you remember that -- do you still

6 have the exhibits in front of you?

7 A No.

8 Q Do you see that hat, sir, in the picture?

9 A Yes.

10 Q When you -- to the best of your recollection,
11 when you showed up, when you saw the body, was that hat there?

12 A Yes.

13 MS. ARMENI: Court's indulgence.

14 No further questions.

15 THE COURT: All right. Mr. Arrascada.

16 MR. ARRASCADA: May I also see them, please.

17 CROSS-EXAMINATION

18 BY MR. ARRASCADA:

19 Q Sir, also referring to Exhibit 8, when you
20 walked up, on the right arm there's a tattoo; is that correct?

21 A Yes.

22 Q And you saw that when you walked up?

23 A Yes.

24 Q And it's -- it says "cash daddy" on it up at
25 the top; is that correct?

1 A I believe that's what it says.

2 MR. ARRASCADA: Thank you.

3 Nothing further, Your Honor.

4 THE COURT: Okay. Thank you.

5 Redirect?

6 MR. PESCI: Sure, if I could.

7 REDIRECT EXAMINATION

8 BY MR. PESCI:

9 Q You were asked some questions about the body of
10 the victim just now, about the tattoo. Did you see that?

11 A Yes.

12 Q All right. Remember that, I should say, not
13 see. I apologize.

14 Looking at State's 8, what's that right there?

15 A Chain.

16 Q Okay. Have you responded to any robbery scenes
17 since you've become an officer?

18 A Yes.

19 Q Do you normally find things of value still on
20 the body if someone's been robbed?

21 A No.

22 MR. PESCI: Thanks.

23 THE COURT: Any recross?

24 MS. ARMENI: No, Your Honor.

25 MR. ARRASCADA: No, Your Honor.

1 THE COURT: Thank you for your testimony. Please
2 don't discuss your testimony with anyone else who may be
3 called as a witness. Thank you, and you are excused.
4 State, call your next witness.
5 MR. PESCI: State calls Officer Lafreniere.
6 THE COURT: Sir, just please remain standing, facing
7 our court clerk who's going to be administering the oath to
8 you.
9 JASON LAFRENIERE, STATE'S WITNESS, SWORN
10 THE CLERK: Please be seated, and please state and
11 spell your name.
12 THE WITNESS: Jason Lafreniere, L-a-f-r-e-n-i-e-r-e.
13 THE CLERK: I'm sorry. I got lost. Jason.
14 THE WITNESS: Yes. Yes, ma'am, Jason, J-a-s-o-n.
15 Yes, ma'am.
16 THE CLERK: Okay. Sorry.
17 THE WITNESS: Jason Lafreniere.
18 THE COURT: Is that J-a-s-o-n?
19 THE WITNESS: Yes, ma'am. Yes, Your Honor.
20 THE CLERK: L --
21 THE WITNESS: L-a-f-r-e-n-i-e-r-e.
22 THE CLERK: Thank you.
23 MR. PESCI: May I proceed, Your Honor?
24 THE COURT: You may, Mr. Pesci.
25 DIRECT EXAMINATION

1 BY MR. PESCI:

2 Q Sir, what do you do for a living?

3 A I'm a detective with the Las Vegas Metropolitan
4 Police Department.

5 Q How long have you been with Metro?

6 A For over seven years.

7 Q How long have you been a detective?

8 A About a year and a half.

9 Q Focusing back -- or where are you a detective?
10 What --

11 A Juvenile sex abuse.

12 Q Back on May the 19th, the late hours going into
13 May the 20th of 2005, were you a detective at that point?

14 A No, sir.

15 Q What were you?

16 A I was a patrol officer.

17 Q And when you're a patrol officer, is there a
18 specific area that you patrol?

19 A Yes, sir. I, patrolled the northeast area
20 command.

21 Q And did you respond out to -- was it North
22 Shore Road?

23 A I believe that was the name of it. Yes, out by
24 Lake Mead. Yes, sir.

25 Q Is that within your patrol area?

1 A Yes.

2 Q Now, when you're working as patrol and on that
3 specific night, did you have a partner? Was there somebody
4 with you?

5 A No, sir, I was by myself.

6 Q Were you dressed in uniform?

7 A Yes.

8 Q As you appear today, is this normally how you
9 dress when you're working as a detective now?

10 A As a detective, yes. When I was a patrol
11 officer, I wore the standard Las Vegas Metropolitan Police
12 Department uniform.

13 Q And were you driving a patrol unit car?

14 A Yes, a marked car. Yes, sir.

15 Q Originally how did the call get to you? How
16 were you requested to go out this?

17 A I don't know if it came through dispatch or if
18 I saw it on the screen, but we have a little computer in our
19 car and also a radio. I was dispatched to the location via
20 dispatch either over the radio or on my computer.

21 Q When you first arrived at the scene, what did
22 you see?

23 A I came in contact with a young man and I
24 believe there were two females as well. They had called in a
25 body in the road.

1 Q Let me ask you this: The young man that you're
2 referring to, is that the individual that just left the
3 courtroom?

4 A It is, yes, sir.

5 Q And when you saw Mr. Madrid out there, what did
6 you do?

7 A I -- I don't remember exactly the order it was,
8 but I spoke with him. I saw a body lying in the road. It was
9 a white male. I believe he was not wearing a shirt. He was
10 laying on his back. I approached the body. I didn't get too
11 closed. He appeared deceased. I didn't touch the body. I
12 noticed there was a vehicle off to the side of the road. I
13 don't recall if the vehicle was running or not.

14 Q Let me stop you there.

15 A Yes, sir.

16 MR. PESCI: May I approach?

17 THE COURT: Sure.

18 BY MR. PESCI:

19 Q Showing you State's Proposed Exhibits 10 and
20 11, I ask you to take a look at those and let me know if you
21 recognize those.

22 A Yes, sir. This is the scene when I arrived out
23 there off of North Shore Road.

24 Q Are those fair and accurate depictions of the
25 scene on that day?

1 A Yes, sir, they are.

2 MR. PESCI: Move for the admission of 10 and 11,

3 Your Honor.

4 THE COURT: Any objection?

5 MR. GENTILE: I'd like to see them.

6 MS. ARMENI: He showed them to us.

7 MR. GENTILE: Oh, he did? Okay.

8 MR. ARRASCADA: No objection.

9 MS. ARMENI: No objection.

10 MR. ARRASCADA: And no objection.

11 THE COURT: All right. Thank you. All right. 10

12 and 11 are admitted.

13 (State's Exhibits 10 and 11 admitted.)

14 BY MR. PESCI:

15 Q Okay. You talked about a car, correct?

16 A Yes, sir.

17 Q And I'll show you -- let's start with 10.

18 We're going to have to zoom out on that one.

19 Okay. Looking at State's 11 -- or State's 10, is

20 the car depicted here on the left-hand side?

21 A Yes, sir.

22 Q Okay. And you say as you sit here today you

23 don't recall whether it was running or not?

24 A I have no idea.

25 Q All right. And in the body, showing you

1 State's 11, do you recognize that?

2 A Yes, sir, I do.

3 Q Now, what did you say you do with that -- with
4 this scene when you approached and saw this?

5 A Again, I don't remember the exact order, but I
6 know -- I don't remember the young man and the two females
7 being up close to the body, but I remember backing them off,
8 securing the scene with crime tape, meaning putting up the
9 crime -- the yellow tape on both ends of the scene so nobody
10 else could interfere with the scene. I approached the vehicle
11 to make sure it was unoccupied. I did that with my gun drawn.
12 I believe I was still the only officer out there at that time.

13 Q Let me stop you for a second. You mentioned a
14 minute ago something about tape, some kind of -- let me zoom
15 in on 11. Are we looking at some tape here?

16 A Yes. It's blurry, but I believe that's it,
17 yes, sir.

18 Q All right. Let's do it this way. I'm showing
19 you State's 11 up close.

20 A Yes, that's the crime scene tape that we --

21 Q All right. And you were involved -- or part of
22 the process of securing that scene?

23 A Yes, sir.

24 Q What's the rationale for securing the scene?

25 A Just to secure any evidence or anything that.

1 might be in the scene to keep unauthorized persons out of
2 there. We back any witnesses or anybody else that would have
3 arrived up beyond to scene and nobody else arrived in there
4 until I'm relieved by a supervisor or superior officer.

5 Q Did you call all the people in? You just
6 testified you weren't sure if there was anyone else out there
7 at that point?

8 A No, I do not recall if another officer was
9 out -- I was the first officer to arrive and I don't remember
10 when the next one arrived.

11 Q But did you call in asking for others to
12 arrive?

13 A I don't know if I called and asked for others.
14 I know others were dispatched as well. I know others were in
15 route as I was already out there.

16 Q Okay. And we've seen some other cars in these
17 photos and those were other police personnel?

18 A Yes, sir.

19 Q Okay. You said that you approached this car
20 depicted in State's 10 and you said you had your gun drawn?

21 A Yes, sir.

22 Q Why was that?

23 A The unknown. I'm not sure what was in there,
24 if there was another -- if there was a suspect in there, if
25 there was another victim in there. You don't know what you're

1 approaching. You can't see inside the vehicle, so...

2 Q Did you find anything?

3 A Nothing -- no people.

4 Q All right. Did you actually open the door and

5 go look --

6 A No, not at all.

7 Q What did you do, just looking to ascertain

8 whether there was --

9 A What's called quick peeks. We approach it down

10 low, kind of, you know, where you're using it as cover or

11 concealment from what might be in there and quick peeks

12 looking up in the window going back down, doing that all the

13 way around the vehicle to make sure nobody was in there.

14 Q Did you have a flashlight or something with

15 you?

16 A I know I carried a flashlight. I don't know --

17 Q Would that be something you would normally use?

18 A Absolutely.

19 Q Okay. And then after you -- is it commonly

20 referred to as clear the vehicle?

21 A Yes.

22 Q Did you clear the vehicle?

23 A Yes.

24 Q To make sure there's no one else there?

25 A That's correct.

1 Q Did you also look at the body?

2 A Yes, sir.

3 Q When you looked at the body, did you make a
4 determination as to whether you thought the person was alive
5 or not?

6 A He appeared dead to me.

7 Q You mentioned that you backed up the male and
8 the two females?

9 A Yeah. I -- I don't remember how far I -- back
10 they were or exactly where they were in relation to the body,
11 but, yeah, just to give ourselves enough area to keep the
12 scene secure.

13 Q And did you ask some questions about what they
14 had seen and heard?

15 A Yes.

16 Q Eventually were they asked to fill out
17 voluntary statements?

18 A Yes, sir.

19 Q Were you a part of that process or do you know
20 if other personnel was doing that?

21 A I don't recall, but I -- I think I may have
22 handed them the statements to fill out while waiting for
23 others or before -- I don't recall if I gave them the
24 statement or not.

25 Q Okay. At a scene like this, at some point, do

1 other police personnel take over?

2 A Yes, absolutely.

3 Q And how does that come about?

4 A Once a supervisor arrives, they would take over
5 and say, Hey, I've got it from here, go sit over there and
6 make sure no cars come into the scene or go over there, help
7 out with witnesses. If -- I know homicide would have
8 responded out and ID techs or crime scene analysts would have
9 responded out there, and once the homicide -- being their
10 case, they would have taken over as well.

11 Q Before homicide gets there, is it one of your
12 immediate supervisors in patrol that's in charge?

13 A Yes, or a senior officer.

14 Q And was the scene handed over, then, to a
15 senior officer at some point?

16 A Yes.

17 Q Did you remain out at that scene?

18 A Oh, yes, I was there for hours. Yes, sir.

19 Q Were you a part of securing that scene --

20 A Yes, sir.

21 Q -- out there for hours? Is that a yes?

22 A Yes, sir, I'm sorry.

23 Q It's being recorded, sir.

24 A Yes, sir.

25 MR. PESCI: Pass the witness.

1 THE COURT: All right. Who would like to go next?
2 MS. ARMENI: We have no questions, Your Honor.
3 THE COURT: All right. Mr. Arrascada.
4 MR. ARRASCADA: No questions, Your Honor.
5 THE COURT: Detective, thank you for your testimony.
6 Please don't discuss your testimony with anyone else who may
7 be called as a witness and you are excused.
8 THE WITNESS: Thank you, Your Honor.
9 THE COURT: All right. State, call your next
10 witness.
11 MR. PESCI: State calls Paijik Karlson.
12 THE COURT: Come on up to the witness stand, please,
13 and please remain standing, facing our court clerk who will
14 give the oath.
15 PAIJIK KARLSON, STATE'S WITNESS, SWORN
16 THE CLERK: Please be seated and please state and
17 spell your name.
18 THE WITNESS: My name is Paijik Karlson,
19 P-a-i-j-i-k, Karlson with a K, K-a-r-l-s-o-n.
20 DIRECT EXAMINATION
21 BY MR. PESCI:
22 Q Ma'am, where are you from?
23 A Thailand.
24 Q And is English your second language?
25 A Yes.

1 Q Do you feel comfortable enough to speak to the
2 jury in English today?
3 A Yes.
4 Q Okay. If you have any questions of what we're
5 asking, just stop us; is that all right?
6 A Yes.
7 Q Who was Timothy Hadland to you?
8 A Timothy Hadland's my boyfriend.
9 Q And did he have a nickname?
10 A TJ.
11 Q TJ?
12 A Yes.
13 Q When did you meet TJ?
14 A December 25, 2004.
15 Q Okay. And how did you meet?
16 A I met him at the bar.
17 Q At the bar? How did you start to have a
18 relationship? Did you start dating? What happened?
19 A We talked first and we dated after that.
20 Q And how long did you date for?
21 A Six months by the phone.
22 Q I'm sorry, by the phone?
23 A Six months by the phone.
24 Q Okay. Then eventually did you two live
25 together?

1 A Yes.

2 Q Do you know about when that was?

3 A That was 2005 -- 2004 when I come back from

4 Thailand.

5 Q When who came back from Thailand?

6 A Me.

7 Q Did TJ go with you?

8 A No, he picked me up from the airport.

9 Q Did you know TJ to work during the time period

10 when you were dating?

11 A He worked, yes.

12 Q Do you know where he worked?

13 A He worked at the -- he worked by himself. He

14 worked with the --

15 Q He worked --

16 A He had his own business.

17 Q He had his own business? All right.

18 And whatever your answer is, it just needs to be out

19 loud so the woman who is recording it will catch it.

20 A Okay.

21 Q Is that a yes?

22 A Yes.

23 Q Okay. Did you know him to ever work at the

24 Palomino Club?

25 A Yes, after we lived together.

1 Q So after you and TJ were living together, TJ
2 was working at the Palomino Club?

3 A Not the first time. After that.

4 Q Do you know how he got the job there or how
5 that came about?

6 MR. GENTILE: Objection. Foundation.

7 THE COURT: All right. Sustained.

8 MR. PESCI: I'm asking if she knows how that came
9 about.

10 THE COURT: Well, this is a yes or no answer.

11 Do you know?

12 THE WITNESS: He know someone so he tried to get a
13 job.

14 BY MR. PESCI:

15 Q Okay. Do you know who it was that he knew?

16 MR. GENTILE: Foundation.

17 THE COURT: Well, I think we have to know if she
18 knew and then he could say, How do you know, so...

19 MR. GENTILE: Well, it should be --

20 THE WITNESS: He tell me he get a job, yes.

21 MR. GENTILE: Can she be ordered to answer yes or
22 no?

23 THE COURT: Okay. If it's a yes or no question --

24 THE WITNESS: Yes.

25 THE COURT: -- just try to answer yes or no --

1 THE WITNESS: I'm sorry.

2 THE COURT: -- and then Mr. Pesci can follow up with
3 how do you know or what do you know or --

4 THE WITNESS: Okay.

5 THE COURT: -- so on. Okay?

6 BY MR. PESCI:

7 Q How do you know?

8 A He knows friend and he go there and get --
9 apply and he --

10 Q Do you know who that friend was?

11 MR. GENTILE: Objection. Foundation.

12 MR. PESCI: Well, it's whether she knows or not. I
13 don't see how she's --

14 THE COURT: Right. No --

15 MR. GENTILE: Well, but he's got to establish how
16 she learned. So I'll say it differently --

17 THE COURT: Well, if she doesn't know, then how do
18 we ask her how did she learn?

19 MR. GENTILE: Okay. I agree with that.

20 THE COURT: First he can ask her if she knows and
21 then the follow up would be, Well, how is it that you know
22 this, or, How did you learn that information, or whatever.

23 BY MR. PESCI:

24 Q Let me ask you this way: How did you know that
25 TJ worked at the Palomino?

1 A He knows friend -- he tell me. He go get a job
2 and then...
3 Q So TJ told you that?
4 A Yes.
5 Q So is your knowledge about this from TJ
6 himself?
7 A Yes.
8 Q Okay. Do you know who the friend is that
9 helped him with the job at the Palomino?
10 MR. GENTILE: Objection. Hearsay.
11 MR. PESCI: I said does she know, Judge, that's the
12 question.
13 THE COURT: Well, do you know, yes or no, who the
14 friend was?
15 THE WITNESS: I know the name, but I don't -- never
16 met him.
17 THE COURT: You never met him so you didn't witness
18 a conversation or anything like that; is that right?
19 THE WITNESS: Yes. He told me, but he told me.
20 THE COURT: TJ told you?
21 THE WITNESS: Yes.
22 THE COURT: But you never saw this friend?
23 THE WITNESS: No.
24 THE COURT: Okay. Go on, Mr. Pesci.
25 MR. PESCI: Thank you, Judge.

1 BY MR. PESCI:

2 Q What did you know about what TJ did at the
3 club?

4 MR. GENTILE: Same objection. Hearsay.

5 MR. ARRASCADA: Objection, hearsay.

6 MR. GENTILE: Without a foundation.

7 THE COURT: Yeah.

8 BY MR. PESCI:

9 Q Did TJ ever talk about his job? I mean, you
10 guys are dating, you're living together. Does he come home at
11 night and say, I'm not going to talk about my day's work?

12 A We don't talk -- he work first and he --
13 usually we work, but we don't talk about work.

14 Q Okay.

15 A He tell me he get a job and I drop him off most
16 of the time.

17 Q Did you actually drop TJ off at work?

18 A Yes.

19 Q At the Palomino?

20 A Yes.

21 Q All right. And on any of these occasions where
22 he went to work at the Palomino, when he came back home after,
23 did he ever talked to you -- TJ, talk to you about him working
24 at the Palomino and his time at the Palomino?

25 A Some things, sometimes, yes, but not a lot.

1 Q Okay. Did there come a point in time when TJ
2 was no longer working at the Palomino as far as you knew?

3 A He tell me about it, yes.

4 Q Okay. What did he tell you?

5 MR. GENTILE: Objection, hearsay.

6 MR. ARRASCADA: Hearsay.

7 THE COURT: Sustained.

8 MR. PESCI: It's not being offered for the truth of
9 the matter asserted, Your Honor.

10 THE COURT: Well, then why is it being offered?

11 MR. GENTILE: Then it's not relevant.

12 MR. PESCI: To explain the relationship that he had
13 with the other individuals when he was or was not working.

14 THE COURT: Well, that's still then being offered
15 for the truth.

16 At some point in time you became aware that TJ was
17 no longer working at the Palomino; is that right?

18 THE WITNESS: He tell me he -- yes.

19 THE COURT: Okay.

20 THE WITNESS: He tell me he --

21 THE COURT: Okay. Go on, Mr. Pesci.

22 BY MR. PESCI:

23 Q So don't say what he said. Did you have a
24 conversation with TJ about him no longer working at the
25 Palomino Club?

1 A Yes.

2 Q Now, when he had these conversations with you
3 about him no longer working at the Palomino, how did TJ
4 appear? What was his demeanor?

5 A I need --

6 MR. GENTILE: Objection. That actually is an
7 assertion and it's out of court. I object.

8 MR. PESCI: It's her observation. She's the
9 recipient of --

10 THE COURT: Overruled.

11 BY MR. PESCI:

12 Q She's saying you can answer the question.
13 That's what she meant by overruled.

14 A But I need it one more time. Can you answer
15 that --

16 Q All right. When TJ would talk to you about him
17 no longer working at the Palomino, don't tell us what he said,
18 but when he talked to you about no longer working at the
19 Palomino, how did he appear to you --

20 MR. GENTILE: Objection. Foundation. That --

21 THE WITNESS: How did he appear?

22 MR. GENTILE: May we approach?

23 THE COURT: Yes.

24 Well, we're going to argue and then --

25 (Off-record bench conference)

1 THE COURT: All right. Go on, Mr. Pesci.
2 Mr. Pesci's going to ask you some other questions.
3 Go on.
4 BY MR. PESCI:
5 Q Let's put a time frame on this. I want to kind
6 of go off the subject and we'll come back in a few minutes.
7 I want you to focus on May 19, 2005. Did there come
8 a time when you and TJ went camping at Lake Mead?
9 A Yes.
10 Q Now, who did you go out there with?
11 A TJ.
12 Q How did you get there?
13 A He drive.
14 Q What did you drive?
15 A His --
16 Q I'm sorry?
17 A We drive truck.
18 Q A truck?
19 A Yes.
20 Q Did you say Sportage?
21 A Yes.
22 Q And was that the car that you drove out there
23 in?
24 A Yes.
25 Q Whose idea was it to go camping?

1 A TJ.
2 Q Did you want to go camping?
3 A No.
4 Q Had you been camping before?
5 A No.
6 Q With that time in your head, how long before
7 you went camping did TJ stop working at the Palomino?
8 A About two or three week.
9 Q Two or three weeks?
10 A About -- before he quit.
11 Q So two or three weeks before May 19th of 2005?
12 A Yes.
13 Q Now, between that time of going camping and the
14 time that TJ stopped working at the Palomino, were the two of
15 you still living together?
16 A Yes.
17 Q Did you speak with him often?
18 A We speak a lot, yes.
19 Q Did -- had you been living with him for -- how
20 long at that time?
21 A About a year.
22 Q Without saying what he said, did you have
23 conversations on many different subjects with TJ during the
24 time that you lived together?
25 A Say that again, please. Sorry. Slow, please.

1 Q I'm sorry. I apologize.
2 THE COURT: Did you talk about different things with
3 him?
4 THE WITNESS: We talk many things, yes. Yes.
5 BY MR. PESCI:
6 Q Did you know TJ well from living with him?
7 A He's a good man.
8 Q Okay. Did you ever see him emotional?
9 A At time, yes.
10 Q Okay. Describe the emotional --
11 THE COURT: Well, just -- no. Describe what you
12 observed.
13 THE WITNESS: He nervous.
14 BY MR. PESCI:
15 Q Okay. And how is it that you, knowing him, saw
16 that he was nervous? What was nervous about him?
17 A Usually he calm, but he talk. He worried
18 about -- he's getting worried, getting nervous.
19 Q Getting worried about what?
20 MR. GENTILE: Objection.
21 THE COURT: Sustained.
22 THE WITNESS: He --
23 THE COURT: No, no. When I --
24 MR. PESCI: Hold on a second.
25 THE COURT: Mr. Pesci's going to ask you a different

1 question.

2 BY MR. PESCI:

3 Q Did you have conversations, after the time TJ
4 left the Palomino and before you went camping, about him
5 leaving the Palomino?

6 THE COURT: Did you talk about him leaving the
7 Palomino?

8 THE WITNESS: Yeah, he talk about that. He --

9 THE COURT: Okay. Now, there's going to be
10 another --

11 Try to have smaller sentences, Mr. Pesci.

12 MR. PESCI: Sure.

13 BY MR. PESCI:

14 Q All right. So we know what time we're talking
15 about. We're talking about after TJ left the Palomino and
16 before camping. Okay?

17 A Okay.

18 Q All right. You said you had conversations
19 about TJ leaving the Palomino? That's what you just said a
20 minute ago?

21 A Yes.

22 Q All right. Describe how TJ was when he talked
23 to you about that. Don't say what he said, just how did he
24 appear to you?

25 MR. ARRASCADA: Your Honor, I have to object to

IN THE SUPREME COURT OF THE STATE OF NEVADA

Electronically Filed
May 29 2015 01:40 p.m.
Tracie K. Lindeman
Clerk of Supreme Court

★ ★ ★ ★ ★

LUIS HIDALGO, III ,

CASE NO. 67640

Appellant.

v.

THE STATE OF NEVADA,

Respondent.

APPELLANT'S APPENDIX, VOLUME II

**APPEAL FROM JUDGMENT DENYING
POST-CONVICTION HABEAS CORPUS**

Eighth Judicial District
State of Nevada

THE HONORABLE VALIERIE ADAIR, PRESIDING

Richard F. Cornell, Esq.
Attorney for Appellant
150 Ridge Street
Second Floor
Reno, NV 89501
775/329-1141

Clark County District Attorney's Office
Appellate Division
Attorney for Respondent
200 Lewis Ave.
Las Vegas, NV 89155
702/671-2500

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1 trial and at Little Lou's trial. In addition, the State asked Taoipu and Zone the same question
2 regarding baseball bats and bags at the trials that each testified.

3
4 The issue surrounding Taoipu's testimony at the Counts trial, which was who was the
5 maker of the statement to bring baseball bats and bags, is the same issue that was at hand in
6 Little Lou's trial. The underlying issue regarding who was the maker of the statement
7 regarding baseball bats and bags was to determine involvement and culpability of all the
8 alleged players in this alleged conspiracy. Even if the issues were not exactly the same, NRS
9 51.325 only requires that the issues surrounding the former testimony be *substantially* the
10 same. The requirements for admitting the former testimony of Taoipu, therefore, were met by
11 Little Lou and the Court erred in denying the admission of this former testimony.
12

13
14 Although Little Lou met the requirements of NRS 51.325 to admit Taoipu's former
15 testimony, the Court did not admit the evidence because it believed that Taoipu's statement
16 opened the door to other inculpatory statements made by Taoipu against Little Lou. AA,
17 Vol.X,2072. The Court further denied the admission of the former testimony on the basis that
18 the admission of the entire former testimony of Taoipu, instead of the small portion sought by
19 Little Lou, would prejudice Mr. H, the co-defendant. AA, Vol.X,2072. Although not clear
20 from the record on appeal, if the Court was excluding the evidence based upon NRS 48.035(2)
21 which states that "its probative value is substantially outweighed by considerations of undue
22 delay, waste of time or needless presentation of cumulative evidence," it made none of these
23 determinations in ruling that the prior testimony of Taoipu was inadmissible at Little Lou's
24 trial. Even if the Court was surmising that the admission of Taoipu's former testimony was
25 more prejudicial than probative, the Court ruled that it was prejudicial to Little Lou's co-
26
27
28

1 defendant and to Little Lou, who was the person offering the evidence, instead of prejudicial
2 against the State who the evidence was being offered against. AA, Vol. IX, 2072.

3
4 This is not a sound basis to reject this evidence because it does not rest on legal
5 analysis of the law, but on the beliefs of the Court that Little Lou, who was offering the
6 evidence, would be prejudiced along with his co-defendant, Mr. H. The Court's stated basis
7 for not allowing the testimony in essence put the Court into the defense's mind and tactics,
8 which is an impermissible position. A party's right to present its own witnesses in order to
9 establish a defense is a fundamental element of due process. See Washington v. Texas, 388
10 U.S. 14, 19 (1967).
11

12
13 Further, the Court's denial of the admission of Taoipu's testimony created a conflict
14 between the defenses of Little Lou and Mr. H. In determining whether to admit the Taoipu
15 former testimony, the State objected to admission of the relevant portion of the testimony on
16 the grounds that the entire testimony of Taoipu should be admitted if the Court was inclined to
17 admit any of it. AA, Vol. IX, 2068-70. Mr. H, however, objected to the admission of the entire
18 testimony of Taoipu because it would be prejudicial to him and he told the Court that if the
19 entire transcript of Taoipu's former testimony was admitted he would move for a mistrial.
20
21 AA, Vol. IX, 2071. He did not object, however, to the admission of the small portion sought
22 by Little Lou. AA, Vol. IX, 2071.
23

24
25 The Court then denied the entire testimony of Taoipu stating that in addition to opening
26 the door to other inculpatory statements about Little Lou, the admission of the entire former
27 testimony of Taoipu was prejudicial to Mr. H. AA, Vol. IX, 2072. This denial created a
28 conflict between the defenses of Little Lou and Mr. H which was prejudicial to Little Lou and

1 violated Little Lou's due process rights by not allowing him to present a defense through
2 contradicting the only testifying witness that stated that Little Lou was involved in the
3 conspiracy against TJ Hadland.
4

5 **IV. As The State's Case Was Entirely Dependent Upon The Testimony Of An**
6 **Accomplice, Insufficient Evidence Existed To Convict Little Lou.**¹⁴

7 **A. Standard of Review**

8 Historically, this Court engages in an independent review of the record to determine
9 compliance with NRS 175.291. See Heglemeier v. State, 111 Nev. 1244, 1251, 903 P.2d 799,
10 804 (1995); see also Eckert v. State, 91 Nev. 183, 533 P.2d 468 (1975). No Nevada case
11 succinctly articulates a discreet standard of review.
12

13 **B. Little Lou's Convictions Must be Reversed as the Testimony of his**
14 **"Accomplices" was Insufficiently Corroborated.**

15 At trial, the State presented the testimony of two accomplice witnesses, Espindola and
16 Zone, to prove that Little Lou conspired to harm TJ. Nevada's legislature deems accomplice
17 testimony as inherently unreliable. See NRS 175.291. NRS 175.291 mandates that:
18

19 A conviction shall not be had on the testimony of an accomplice
20 unless the accomplice is corroborated by other evidence which in
21

22 ¹⁴ Little Lou's state and federal constitutional rights to due process of law and equal protection
23 were violated because there was insufficient evidence produced at his trial to convict him of
24 the charges as the State failed to introduce sufficient evidence to corroborate the statements of
25 his alleged accomplices. See U.S. Const. amend. V, VI, XIV; Nevada Const. Art. I, Sec. 3, 6
26 and 8; Art. IV, Sec. 21. Where a state statute imposes mandatory requirements for the
27 protection of a defendant's rights, the statute creates an expectation protected by the Due
28 Process Clause. See Hicks v. Oklahoma, 447 U.S. 343, 346 (1980). Liberty interests
protected by the Due Process Clause arise from two sources, the Due Process Clause itself and
the laws of the States. See Ford v. Wainwright, 477 U.S. 399, 428 (1986). Here, because
NRS 175.291 was not enforced, Little Lou's right to Due Process has been violated. See U.S.
Const. amend. XIV.

1 itself, and without aid of the testimony of the accomplice, tends to
2 connect the defendant with the commission of the offense; and the
3 corroboration shall not be sufficient if it merely shows the
4 commission of the offense or the circumstances thereof.

5 NRS 175.291

6 An accomplice is defined as "one who is liable to prosecution for the identical offense charged
7 against the defendant at the trial in the case in which the testimony of the accomplice is
8 given." NRS 175.291; see also Cutler v. State, 93 Nev. 329, 566 P.2d 809 (1977). Clearly
9 both Espindola and Zone were accomplices to the murder and conspiracy charged against
10 Little Lou.¹⁵ Thus, their testimony was required to be: (1) corroborated independently of
11 other accomplices; and, (2) the corroborated evidence must have connected Little Lou to the
12 commission of the charged offense. See NRS 175.291. Both elements must be satisfied for a
13 conviction to stand.
14

15
16 Accomplice testimony "ought to be received with suspicion, and with the very greatest
17 of care and caution, and ought not be passed upon by the jury under the same rules governing
18 other apparently credible witnesses." Crawford v. United States, 212 U.S. 183, 204 (1909).
19 By enacting NRS 175.291, the Nevada Legislature acknowledged "one who has participated
20 criminally in a given criminal venture shall be deemed to have such character, and such
21 motives, that his testimony alone shall not rise to the dignity of proof beyond a reasonable
22 doubt." Austin v. State, 87 Nev. 731, 491 P.2d 724 (1971). The indelible principal that a
23 doubt." Austin v. State, 87 Nev. 731, 491 P.2d 724 (1971). The indelible principal that a
24 doubt." Austin v. State, 87 Nev. 731, 491 P.2d 724 (1971). The indelible principal that a
25

26
27 ¹⁵ Although Zone was not charged, an examination of his testimony and the Carroll tapes
28 indicate that this was more likely an exercise of prosecutorial discretion than an absence of
evidence. Accomplice status is a question of fact. Rowland v. State, 118 Nev. 31, 41, 39 P.
3d 114, 120 (2002).

1 conviction cannot be had based on accomplice testimony alone has long been recognized by
2 this Court. See State v. Carey, 34 Nev. 309, 122 P. 868 (1912) ("Unless there [is]
3 corroborating evidence, it would be the duty of the jury to acquit for by the statute conviction
4 cannot be had upon the uncorroborated testimony of an accomplice.") Corroborative
5 evidence is not sufficient if it requires any of the accomplice's testimony to form the link
6 between the defendant and the crime, or if it tends to connect the defendant with the
7 perpetrators and not the crime. See Glossip v. State, 157 P. 3d 143, 152 (Ok. Cr. App. 2007).
8

9
10 The test for determining sufficiency of corroborating evidence requires that the
11 accomplice testimony be removed and the remaining evidence examined to determine whether
12 it provides an independent connection between the defendant and the crime charged. See
13 People v. Morton, 139 Cal. 719 (Cal. 1903). This Court has often found that the remaining
14 evidence was insufficient to convict the defendant.
15

16
17 In Eckert, the defendant was convicted of homicide after allegedly shooting the victim
18 near a bar on Boulder highway. Eckert, 91 Nev. at 184-85, 533 P.2d at 469-70. During trial,
19 an accomplice to the crime testified that Eckert threatened to shoot the victim for no reason,
20 and then ordered the two accomplices to fire shots into the victim. Trial evidence revealed
21 that two of the guns used to kill the victim were the same types of weapons that Eckert
22 previously purchased. Eckert, 91 Nev. at 184, 533 P.2d at 469. Additionally, when Eckert
23 purchased the weapons he signed a federal form for one of the guns which was later identified
24 as the murder weapon. See id. Eckert was convicted of murder and on appeal he argued his
25 conviction was based on uncorroborated accomplice testimony. Eckert, 91 Nev. at 185, 533
26 P.2d at 470. This Court determined that the following facts lacked sufficient corroborative
27
28

1 value: (1) Eckert purchased two of the weapons at a shooting range; (2) the victim was killed
2 by three different weapons of the type in possession of the three defendants; and, (3) one of
3 the weapons purchased by Eckert was identified as the murder weapon. This Court reversed
4 the conviction finding that the "dangers are too great in view of the self-purposes to be served
5 by the accomplice to suggest that the content of this record supply the needed corroboration to
6 uphold the defendant's conviction." Eckert, 91 Nev. at 186, 533 P.2d at 470.
7
8

9 Similarly, in Heglemeier this Court found there was insufficient evidence to sustain a
10 conviction based on accomplice testimony. See Heglemeier, 111 Nev. at 1245, 903 P.2d at
11 800. At Heglemeier's trial, in addition to accomplice testimony, the state presented strong
12 evidence of Heglemeier's connection to the murder weapon. See Heglemeier, 111 Nev. at
13 1249, 903 P.2d at 802-03. Nonetheless, this Court reversed the conviction, finding that
14 "[a]lthough the State did introduce some evidence that might be construed as tending to
15 connect Heglemeier with the crime, we conclude that the evidence is insufficient, as a matter
16 of law, to corroborate [the accomplice's] testimony." Heglemeier, 111 Nev. at 1251, 903 P.2d
17 at 803-04.
18
19
20

21 Here, just as in Eckert and Heglemeier, it is clear that the non-accomplice evidence was
22 insufficient corroboration to the testimony by the State's two accomplice witnesses, Zone and
23 Espindola. Zone's testimony was composed of Zone retelling, through his drug addled
24 memory, Carroll's statements, which would have been directly contradicted by Taoipu's
25 testimony at the Counts trial had the District Court properly allowed admission of that
26 testimony. Zone's statements were, therefore, unreliable.
27
28

1 Espindola's testimony exculpated Little Lou. Specifically, Espindola testified that after
2 the alleged argument that Mr. H and Little Lou had on the evening hours before the death of
3 TJ, she never spoke to or saw Little Lou again that night. AA Vol.V,977. She also testified
4 that Little Lou did not plan, participate, or pay any money regarding the alleged conspiracy.
5 AA,Vol.VI,1247,1251,1255.
6

7 The only possible corroborating fact presented by the State was in closing argument
8 wherein it alleged that on the tape recording, Little Lou stated something to the effect of
9 taking care of TJ. AA,Vol.III,614-17. This alleged statement by Little Lou regarding TJ,
10 however, was not included in the State's transcript of the recording, which was prepared by
11 experts, or in the defenses' transcript of the recording. AA,Vol.III, 614-18. Before the tape
12 was played for the jury, the Court stated that it could not hear the part of the statement
13 regarding TJ. AA,Vol.III,617. The Court, however, allowed the State to argue the statement
14 in closing arguments. This alleged statement, at best, raises suspicions. "[W]here the
15 connecting evidence shows no more than an opportunity to commit a crime, simply proves
16 suspicion, or is equally consonant with a reasonable explanation pointing toward innocent
17 conduct on the part of the defendant, the evidence is to be deemed insufficient." Heglemeier,
18 111 Nev. at 1250-1251, 903 P.2d at 803-04.
19
20
21
22

23 The State failed to present any other evidence linking Little Lou to the crime. No
24 rational motive was suggested; no fingerprints were found which could connect Little Lou to
25 the events; no evidence was produced that Little Lou was ever aware that anything was going
26 to be done to TJ and especially not that a weapon would be used or substantial bodily harm
27 would occur to TJ. One telephone call was made by Little Lou to Carrol, which PK testified
28

1 was to locate Carroll and the club's limousine. AA, Vol. VIII, 1780-81. Therefore, as in Eckert
2 and Heglemeier, when the accomplice testimony of Zone is removed from this record, there is
3 no legally sufficient evidence to connect Little Lou to these crimes and his convictions must
4 be reversed.
5

6 **V. The Prosecutor's Intentional Failure To Memorialize Espindola's Plea**
7 **Negotiation Proffer Requires Reversal In This Case.**

8 **A. Standard of Review**

9 Because this challenge is predicated upon federal and state constitutional provisions, it
10 is susceptible to appellate review in the absence of contemporaneous objection or motion to
11 strike. See Hardison v. State of Nevada, 84 Nev. 125, 128, 437 P.2d 868, 870 (1968). It is
12 reviewed as plain error to determine if it was prejudicial and affected substantial rights.
13

14 Ramirez v. State, ___ Nev. ___, 235 P.3d 619, 624 (2010).
15

16 **B. Espindola's Statements Were Not Memorialized for the Improper Purpose of**
17 **Depriving Little Lou of the Ability to Utilize Them in Cross-examination.**

18 "Due process requires the State to preserve material evidence." Steese v. State, 114
19 Nev. 479, 491, 960 P.2d 321, 329 (1998). The State's failure to preserve material evidence can
20 lead to dismissal of the charges "if the defendant can show 'bad faith or connivance on the
21 part of the government' or 'that he was prejudiced by the loss of the evidence.' " Daniels v.
22 State, 114 Nev. 261, 267, 956 P.2d 111, 115 (1998) (quoting Howard v. State, 95 Nev. 580,
23 582, 600 P.2d 214, 215-16 (1979)).
24

25 In Sheriff v. Acuna, this Court held that "[g]enerally, it is only where the prosecution
26 has bargained for false or specific testimony, or a specific result, that an accomplice's
27
28

1 testimony is so tainted as to require its preclusion." 107 Nev. at 671, 819 P.2d at 201.
2 (Emphasis added). In so doing, the Acuna Court defined "specific trial testimony" as
3
4 "testimony that is essentially consistent with the information represented to be factually true
5 during negotiations with the State." 107 Nev. at 669, 819 P.2d at 200 (Emphasis added). The
6 Acuna Court insisted upon the scrupulous observation of certain constitutionally-mandated
7
8 "established safeguards." In Leslie v. State, 114 Nev. 8, 952 P.2d 966 (1998), this Court
9 thereafter held that the foregoing constitutional safeguards required by Acuna were satisfied in
10 that the pretrial statements of the putative accomplice in that case were memorialized by tape
11 recording; and were therefore demonstrably consistent with her subsequent trial testimony.¹⁶
12

13 Here, because none of Espindola's plea negotiation proffers, pretrial interviews and
14 debriefings by the State were deliberately not recorded in any manner or to any extent
15 whatsoever, this essential assessment of the constitutional propriety of her executory bargain
16 with the prosecution was effectively placed beyond the reach of the "full[] cross-
17 examin[ation]" required by Acuna. Little Lou was therefore denied his rights to due process
18 of law and a fair trial as guaranteed by the Nevada and federal constitutions. See generally,
19 Note, "Should Prosecutors Be Required To Record Their Pretrial Interviews With
20 Accomplices And Snitches?" 74 Fordham L. Rev. 257 (October, 2005). Stated differently,
21 the proffered testimony of a bargained for witness is part of the plea bargain - part of the *quid*
22
23
24
25

26 ¹⁶ See AA, Vol. IV, 799 re: why homicide detectives recorded Carroll, Zone and the first
27 interview of Anabel:
28 Defense Counsel: "...if you want to have an accurate record of what somebody said, the best
thing to do is record it?"
Detective Sean Michael McGrath: "Yes."

1 *pro quo* - and must be memorialized for the safeguards contemplated by Acuna and Leslie to
2 provide the fodder for proper cross-examination and meaningful confrontation.

3
4 Where, as here, it is clear that the State has conspicuously deviated from an otherwise
5 routine practice and procedure¹⁷ and deliberately refrained from making any record
6 whatsoever memorializing its pretrial interviews with and debriefings of Espindola, it is
7 reasonable to infer that the State's intention to thereby purposefully frustrate the "full cross-
8 examination" mandated by Acuna as an essential prerequisite to the admissibility of
9 accomplice testimony pursuant to an executory plea agreement. This conclusion is supported
10 by the prosecutor not only announcing that no recording was made of the plea negotiation
11 debriefing but asserting a work product privilege for any notes that were taken at it and
12 persisting in that assertion throughout. See Docket No. 54209, Luis A. Hidlago Jr's Record
13 on Appeal at 3 ROA 563-566.

14
15
16
17 Absent a record memorializing the pretrial statements of the witness during the course
18 and conduct of plea negotiations with the State, counsel for the accused cannot effectively and
19 "fully cross-examine" percipient witnesses - including the putative accomplice herself - with
20 respect to whether or not, she (1) "persuasively professe[d] to have truthful information of
21 value and a willingness to accurately relate such information at trial;" or (2) "bargained for
22
23
24

25 ¹⁷ Carroll, Zone and Espindola all were accomplices and were all videotaped during their
26 initial interrogations in May 2005. Moreover, defense counsels' demands for recordings and/or
27 notes of the plea negotiations proffer were repeatedly denied. See Docket No. 54209, Luis A.
28 Hidlago Jr's Record on Appeal at 3 ROA 559, 563-566; 9 ROA 1729-1731; Notwithstanding
her saying "I'll make a copy so I don't lose them," the notes were lost by the court and are not
available for this Court's review. See Docket No. 54209, Luis A. Hidlago Jr's Record on
Appeal at 3 ROA 5669; 9 ROA 3507-3509; 25 ROA 4668-4672.

1 specific trial testimony . . . that is essentially consistent with the information represented to be
2 factually true during negotiations with the State," as contemplated by the due process
3 safeguards prescribed in Acuna. Such a maneuver must be stopped before it becomes an
4 ingrained practice. Not to reverse is to reduce Acuna's safeguards to platitudes.
5

6 **CONCLUSION**

7 For the above stated reasons. The verdict against Louis Hidalgo III must be reversed
8 and a new trial granted on counts I and II.
9

10 Dated this 3rd day of February, 2011.
11

12 /s/

13 John L. Arrascada, Esq.
14 Nevada Bar #4517
15 Arrascada & Arrascada, Ltd.
16 145 Ryland Street
17 Reno, Nevada 89501
18 (775)329-1118

19 /s/

20 Christopher W. Adams, Esq.
21 Admitted Pro Hac Vice
22 102 Broad Street, Suite C
23 P.O. Box 561
24 Charleston, SC 29402-0561
25 (843)577-2153

26 /s/

27 Christine A. Aramini, Esq.
28 Nevada Bar #7263
Arrascada & Arrascada, Ltd.
145 Ryland Street
Reno, Nevada 89501
(775)329-1118

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CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular N.R.A.P. 28(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 3rd day of February, 2011.

/s/
John L. Arrascada, Esq.
Nevada Bar #4517
Arrascada & Arrascada, Ltd.
145 Ryland Street
Reno, Nevada 89501
(775)329-1118

EXHIBIT 6

1 IN THE SUPREME COURT OF THE STATE OF NEVADA

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4 Electronically Filed
Jul 12 2011 02:45 p.m.
Tracie K. Lindeman
Clerk of Supreme Court

5 LUIS A. HIDALGO, III,
6 Appellant,

7 v.

8 THE STATE OF NEVADA,
9 Respondent.

Case No. 54272

10
11 **RESPONDENT'S ANSWERING BRIEF**

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

14 JOHN L. ARRASCADA, ESQ.
15 Arrascada & Arrascada, LTD.
16 Nevada Bar #004517
17 CHRISTINE ARRASCADA ARMINI, ESQ.
18 Arrascada & Arrascada, LTD.
19 Nevada Bar #007263
20 145 Ryland Street
21 Reno, Nevada 89501
22 (775) 329-1118

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

23 CHRISTOPHER W. ADAMS, ESQ.
24 Admitted Pro Hac Vice
25 102 Broad Street, Suite C
26 P.O. Box 561
27 Charleston, SC 29402-0561
28 (843) 577-2152

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

Counsel for Appellant

Counsel for Respondent

1
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27	Rule 801(d)(2)(D)	29
28	Rule 803(8)	28
	Tex. Code Crim. Proc. Ann. art. 38.14 (Vernon 2005)	33

1 IN THE SUPREME COURT OF THE STATE OF NEVADA

2
3
4
5 LUIS A. HIDALGO, III,

) Case No. 54272

6 Appellant,

7 v.

8 THE STATE OF NEVADA,

9 Respondent.

10 **RESPONDENT'S ANSWERING BRIEF**
11 **Appeal from Judgment of Conviction**
12 **Eighth Judicial District Court, Clark County**

13 **STATEMENT OF THE ISSUE(S)**

- 14 1. Whether the district court erred in giving a use of co-conspirator statement
15 instruction containing the words "slight evidence."
16 2. Whether the district court erred in not admitting as substantive evidence the out-of-
17 court statement of Appellant's former co-conspirator Deangelo Carroll.
18 3. Whether the trial court erred in refusing to admit a portion of the prior testimony of
19 Appellant's co-conspirator Jayson Taoipu.
20 4. Whether, under the accomplice corroboration rule, the State presented sufficient
21 independent evidence of corroboration.
22 5. Whether Appellant's due process and fair trial rights required the State to record the
23 guilty plea negotiation proffer of Anabel Espindola.

24 **STATEMENT OF THE CASE**

25 On May 31, 2005, the State of Nevada filed a Criminal Complaint charging Appellant Luis
26 Hidalgo, III (Little Lou), and his co-defendants, Kenneth "KC" Counts (Counts), Anabel Espindola
27 (Espindola), and Deangelo Carroll (Carroll), with: Count 1 – Conspiracy to Commit Murder (Felony
28 – 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

1 counts. RA 113-245. The State filed a conforming Information on June 20, 2005. On July 6, 2005,
2 the State filed a Notice of Intent to Seek Death Penalty as to Little Lou. 2 RA 481-485.¹

3 On January 27, 2009, Little Lou and Mr. H, proceeded to trial, and, on February 17, 2009,
4 the jury returned a verdict finding Little Lou guilty on Counts 1-4. 1 AA 60-61. On March 10, 2009,
5 Little Lou filed a post-trial Motion for Judgment of Acquittal, or in the Alternative, a New Trial,
6 which raised in summary fashion the claims of error designated above as issues 1 and 3. 2 RA 429-
7 440. The State filed its Opposition on March 17, 2009. 2 RA 472-480. On May 1, 2009, the Court
8 heard argument on the motion and denied it, with a written order filed on August 4, 2009. 2 RA 486-
9 489.

10 On June 23, 2009, the Court sentenced Little Lou to the following: Count 1 – twelve (12)
11 months in the Clark County Detention Center (CCDC); Count 2 – Life in the Nevada Department of
12 Corrections (NDOC) with parole eligibility beginning after having served a minimum of one
13 hundred twenty (120) months, plus an equal and consecutive term of one hundred twenty (120)
14 months to Life for the deadly weapon enhancement; Count 3 – twenty-four (24) to seventy-two (72)
15 months NDOC, concurrent with Counts 1-2; Count 4 – twenty-four (24) to seventy-two (72) months
16 NDOC, concurrent with Counts 1-3. 1 AA 62-63. The Court filed its Judgment of Conviction on
17 July 10, 2009. 1 AA 62-63. On July 16, 2009, Little Lou filed a timely Notice of Appeal. 1 AA 64-
18 65.

19 STATEMENT OF THE FACTS

20 In May of 2005, Appellant Luis Hidalgo, III (Little Lou) worked for his father, co-defendant
21 Luis Hidalgo, Jr. (Mr. H), at the Palomino Club (Palomino or the club), which is Las Vegas's only
22 all-nude strip club licensed to serve alcohol. 5 AA 932. Mr. H. owned the Palomino and Little Lou
23 served as one of its managers. 5 AA 932. On the afternoon of May 19, 2005, Mr. H's romantic
24 partner of eighteen (18) years, Anabel Espindola (Espindola), received a phone call from Deangelo
25

26
27 ¹ On February 13, 2008, a grand jury returned a true bill of indictment charging Little Lou's father,
28 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.

1 Carroll (Carroll); Carroll was an employee of the Palomino serving as a "jack of all trades" handling
2 promotions, disc jockeying, and other assorted duties. 5 AA 932-933; 942-944. Espindola was the
3 Palomino's general manager and handled all of the club's financial and management affairs. 5 AA
4 920; 931-932. During the call, Carroll informed Espindola that the victim in this case, T.J. Hadland
5 (Hadland), a recently fired Palomino doorman, had been "badmouthing" the Palomino to taxicab
6 drivers. 5 AA 934; 942-944; 9 AA 2031. A week prior to this news, Little Lou had informed Mr. H
7 that Hadland was falsifying Palomino taxicab voucher tickets in order to generate unauthorized
8 kickbacks from the drivers. 5 AA 935-939.² In response, Mr. H ordered Hadland fired. 5 AA 939-
9 940.³

10 The Palomino was not in a good financial state and Mr. H was having trouble meeting the
11 \$10,000.00 per month payment due to Dr. Simon Sturtzer from whom he purchased the club in early
12 2003. 5 AA 919-928; 979; 6 AA 1089. Taxicab drivers are a critically important form of advertising
13 for strip clubs generally. 7 AA 1573:6-17. Because of the Palomino's location in North Las Vegas,
14 revenue generated through taxicab drop-offs was very important to the club's operation. 7 AA 1573-
15 1574. Due to a legal dispute among the area strip clubs regarding bonus payments to taxicab drivers,
16 all payments were suspended during the period encompassing May 19-20, 2005; the Palomino was
17 the only club permitted to continue paying taxi drivers for dropping off customers. 2 AA 453-454.

18 At the time Espindola took Carroll's call, she was at Simone's Auto Body, which was a
19 bodyshop/collision repair business also owned by Mr. H and managed by Espindola.⁴ 5 AA 910-
20 914. After taking Carroll's call, Espindola informed Mr. H and Little Lou of Carroll's news about
21

22 ² The Palomino paid cash bonuses to taxi drivers for each person a driver dropped off. 5 AA 935-
23 936. The club accomplished this by having a doorman, such as Hadland, provide a ticket or voucher
24 to the driver, which reflected the number of passengers (customers) dropped off. 5 AA 935-936.
25 Apparently, Hadland was inflating the number of passengers taxi drivers dropped off in exchange
26 for the driver agreeing to kick back to Hadland some of the bonus paid out by the club for these
27 phantom customers. 5 AA 938-939.

28 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.

1 Hadland disparaging the club. 5 AA 944; 946. Upon hearing the news, Little Lou became enraged
2 and began yelling at Mr. H, demanding of Mr H: "You're not going to do anything?" and stating
3 "That's why nothing ever gets done." 5 AA 946. Little Lou told Mr. H, "You'll never be like
4 Rizzolo and Galardi. They take care of business." 5 AA 946; 9 AA 2031.⁵ He further criticized Mr.
5 H by pointing out that Rizzolo had once ordered an employee to beat up a strip club patron. 5 AA
6 948. Mr. H became angry, telling Little Lou to mind his own business. 5 AA 948. Little Lou again
7 told Mr. H, "You'll never be like Galardi and Rizzolo," and then stormed out of Simone's heading
8 for the Palomino. 5 AA 948.

9 Visibly angered, Mr. H walked out of Espindola's office and sat on Simone's reception area
10 couch. 5 AA 958. At approximately 6:00 or 7:00 PM, Espindola and a still visibly-angered Mr. H
11 drove from Simone's to the Palomino. 5 AA 959-960. Once at the Palomino, Espindola went into
12 Mr. H's office, which was her customary workplace at the club. 5 AA 966. Approximately half an
13 hour later, Carroll arrived at the club and knocked on the office door, which Mr. H answered. 5 AA
14 966. Mr. H and Carroll had a short conversation and then walked out the office door together. 5 AA
15 966-967. A short time later, Mr. H came back into the office and directed Espindola to speak with
16 him out of earshot of Palomino technical consultant, Pee-Lar "PK" Handley, who was nearby. 5 AA
17 966. Mr. H instructed Espindola to call Carroll and tell Carroll to "go to Plan B." 5 AA 967.

18 Espindola went to the back of the office and attempted to contact Carroll by "direct connect"
19 (chirp) through her and Carroll's Nex-tel cell phones. 5 AA 972. Carroll called Espindola back, and
20 Espindola instructed Carroll that Mr. H wanted Carroll to "switch to Plan B." 3 AA 566; 5 AA 972;
21 9 AA 2033. Carroll protested that "we're here" and "I'm alone" with Hadland, and he told Espindola
22 that he would get back to her. 3 AA 566; 5 AA 972-975. Espindola and Carroll's phone connection
23 was then cut off. 5 AA 975. At that point, Espindola knew "something bad" was going to happen to
24 Hadland. 5 AA 975. She attempted to call Carroll back, but could not reach him. 5 AA 975.

25
26
27
28 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.

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

3 Earlier in the day, May 19, 2005, at approximately noon, Carroll was at his apartment with
4 Rontae Zone (Zone) and Taoipu, who were both "flyer boys" working unofficially for the Palomino.
5 2 AA 390-391. Zone and Taoipu worked alongside Carroll and performed jobs Carroll delegated to
6 them in exchange for being paid "under the table" by Carroll. 2 AA 383-384; 388. Zone and Taoipu
7 would pass out Palomino flyers to taxis at cabstands. 2 AA 383. Zone lived at the apartment with
8 Carroll, Carroll's wife, and Zone's pregnant girlfriend, Crystal Payne. 2 AA 383-384. Zone and
9 Taoipu were close friends. 2 AA 387.

10 While at the apartment, Carroll informed Zone and Taoipu that Little Lou had told him Mr.
11 H wanted a "snitch" killed. 2 AA 390-391; 3 AA 582; 629. Carroll asked Zone if he would be "into"
12 doing something like that, and Zone responded "No," he would not. 2 AA 391. Carroll also asked
13 the same question of Taoipu who indicated he was "down," i.e., interested in helping out. 2 AA 391-
14 392. Later, when Taoipu and Zone were in the Palomino's white Chevrolet Astro Van with Carroll,
15 Carroll told them that Little Lou had instructed Carroll to obtain some baseball bats and trash bags to
16 use in aid of killing the person. 2 AA 392. After the initial noontime conversation about killing
17 someone on Mr. H's behalf, Zone observed Carroll using the phone, but he could not hear what
18 Carroll was talking about. 2 AA 399. At some point after the noon conversation and after Zone
19 observed him using the phone, Carroll informed Zone and Taoipu that Mr. H would pay \$6,000.00
20 to the person who actually killed the targeted victim. 2 AA 398-399.

21 A couple hours later while the three were still in the van, Carroll again discussed on the
22 phone having an individual "dealt with," i.e., killed, although Zone did not know the specific person
23 to be killed. 2 AA 394; 440; 3 AA 516; 631. Carroll produced a .22 caliber revolver with a pearl
24 green handle and displayed it to Zone and Taoipu as if it were the weapon to be utilized in killing the
25 targeted victim. 2 AA 394-395. Carroll attempted to give the revolver to Zone who refused to take it.
26 2 AA 395. Taoipu was willing to take the revolver from Carroll and did so. 2 AA 395. Carroll also
27 produced some bullets for the gun and placed them in Zone's lap, but Zone dumped the bullets onto
28 the van's floor where Taoipu picked them up and put them in his own lap. 2 AA 395-396.

1 The three then proceeded back to Carroll's apartment where Carroll instructed Zone and
2 Taoipu to dress in all black so they could go out and work promoting the Palomino. 2 AA 396-397.
3 The three then used the Astro van to go out promoting, returned briefly to Carroll's apartment for a
4 second time, and again left the apartment to go promoting. 2 AA 396-397. On this next trip,
5 however, Carroll took them to a residence on F Street where they picked up Kenneth "KC" Counts
6 (Counts). 2 AA 400. Zone had no idea they were traveling to pick up Counts whom he had never
7 previously met. 2 AA 400. Once at Counts's house, Carroll went inside the house and emerged ten
8 minutes later accompanied by Counts who was dressed in dark clothing, including a black hooded
9 sweatshirt and black gloves. 2 AA 400-401. Counts entered the Astro van and seated himself in the
10 back passenger seat next to Zone who was seated in the rear passenger seat directly behind the
11 driver. 2 AA 401-402. Taoipu was seated in the front, right-side passenger seat. 2 AA 402.

12 At the time, Zone believed they were headed out to do more promoting for the Palomino. 2
13 AA 403. As Carroll drove onto Lake Mead Boulevard, Zone realized they were not going to be
14 promoting because there are no taxis or cabstands at Lake Mead. 2 AA 403. Carroll told Zone and
15 the others that they were going to be meeting Hadland and were going to "smoke [marijuana] and
16 chill" with Hadland. 2 AA 404. Carroll continued driving toward Lake Mead. 2 AA 403.

17 On the drive up, Zone observed Carroll talking on his cell phone and he heard Carroll tell
18 Hadland that Carroll had some marijuana for Hadland. 2 AA 406; 3 AA 566; 7 AA 1556-1557.
19 Carroll was also using his phone's walkie-talkie function to chirp. 2 AA 409; 7 AA 1555-1559.
20 Little Lou chirped Carroll and they conversed. 3 AA 628. Carroll spoke with Espindola who told
21 him to "Go to Plan B," and then to "come back" to the Palomino. 3 AA 566; 6 AA 1277; 1289. Zone
22 recalled Carroll responding "We're too far along Ms. Anabel. I'll talk to you later," and terminated
23 the conversation. 3 AA 566. After executing a left turn, Carroll lost the signal for his cell phone and
24 was unable to communicate with it, so he began driving back to areas where his cell phone service
25 would be reestablished. 2 AA 409-410.

26 Carroll was able to describe a place for Hadland to meet him along the road to the lake. 2 AA
27 411. Hadland arrived driving a Kia Sportage sport utility vehicle (SUV), executed a U-turn, and
28 pulled to the side of the road. 2 AA 411-412; 3 AA 629. Hadland walked up to the driver's side

1 window where Carroll was seated and began having a conversation with Carroll; Zone and Taoipu
2 were still seated in the rear right passenger's seat and front right passenger's seat, respectively. 2 AA
3 413. As Carroll and Hadland spoke, Counts opened the van's right-side sliding door and crept out
4 onto the street, moving first to the front of the van, then back to its rear, and back to its front again. 2
5 AA 413-414. Counts then snuck up behind Hadland and shot him twice in the head. 2 AA 414; 3 AA
6 630-631. One bullet entered Hadland's head near the left ear, passed through his brain, and exited
7 out the top of his skull. 2 AA 365-370. The other bullet entered through Hadland's left cheek, passed
8 through and destroyed his brain stem, and was instantly fatal. 2 AA 365-370.

9 One of the group deposited a stack of Palomino Club fliers near Hadland's body. 1 AA 182;
10 3 AA 649. Counts then hurriedly hopped back into the van and Carroll drove off. 2 AA 415. Counts
11 then questioned both Zone and Taoipu as to whether they were carrying a firearm and why they had
12 not assisted him. 2 AA 415-416. Zone responded that he did not have a gun and had nothing to do
13 with the plan. 2 AA 416. Taoipu responded that he had a gun, but did not want to inadvertently hit
14 Carroll with gunfire. 2 AA 416.

15 Carroll then drove the four back to the Palomino, where Carroll exited the van and entered
16 the club. 2 AA 417. Carroll met with Espindola and Mr. H in the office. 5 AA 976-977. He sat down
17 in front of Mr. H and informed him "It's done," and stated "He's downstairs." 5 AA 977-978; 9 AA
18 2034. Mr. H instructed Espindola to "Go get five out of the safe." 5 AA 978. Espindola queried,
19 "Five what? \$500?," which caused Mr. H to become angry and state "Go get \$5,000 out of the safe."
20 5 AA 978; 9 AA 2034; see also 9 AA 1937-1939. Espindola followed Mr. H's instructions and
21 withdrew \$5,000.00 from the office safe, a substantial sum in light of the Palomino's financial
22 condition. 5 AA 978-980. Espindola placed the money in front of Carroll who picked it up and
23 walked out of the office. 5 AA 979-980. Alone with Mr. H, Espindola asked Mr. H, "What have you
24 done?," to which Mr. H did not immediately respond, but later asked "Did he do it?" 5 AA 980-981.

25 Ten minutes after entering the Palomino, Carroll emerged from the club, retrieved Counts,
26 and then went back in the club accompanied by Counts. 2 AA 417. Counts then emerged from the
27 club, got into a yellow taxicab minivan and left the scene. 2 AA 418; 450-451; 3 AA 630. Carroll
28 again emerged from the Palomino thirty minutes later and drove the van first to a self-serve car wash

1 and then back to his house, all the while accompanied by Zone and Taoipu. 2 AA 418-419; 3 AA
2 522-525. Zone was very shaken up about the murder and did not say much after they returned to his
3 and Carroll's apartment. 2 AA 419.

4 The next morning, May 20, 2005, Espindola and Mr. H awoke at Espindola's house after a
5 night of gambling at the MGM. 5 AA 982-984. Mr. H appeared nervous and as though he had not
6 slept; he told Espindola he needed to watch the television for any news. 5 AA 984-985. While
7 watching the news, they observed a report of Hadland's murder; Mr. H said to Espindola, "He did
8 it." 5 AA 985. Espindola again asked Mr. H, "What did you do?" and Mr. H responded that he
9 needed to call his attorney. 5 AA 985. Meanwhile, that same morning, Carroll slashed the tires on
10 the van and, accompanied by Zone, used another car to follow Taoipu who drove the van down the
11 street to a repair shop. 2 AA 420; 3 AA 574; 7 AA 1509-1510. Carroll paid \$100.00 cash to have all
12 four tires replaced. 2 AA 420. Carroll, Zone, and Taoipu subsequently went to a Big Lots store
13 where Carroll purchased cleaning supplies, after which Carroll cleaned the interior of the Astro van.
14 2 AA 422-423.

15 Carroll then drove himself, Zone, and Taoipu in the Astro van to Simone's where Mr. H,
16 Little Lou, and Espindola were present. 2 AA 423-424. Carroll made Zone and Taoipu wait in the
17 van while he went into Simone's; Carroll emerged about thirty minutes later and directed Zone and
18 Taoipu inside where they sat on a couch in Simone's central office area. 2 AA 423-424. While at
19 Simone's, Zone observed Carroll speaking with Mr. H in between trips to a back room, and he also
20 observed Carroll speaking with Espindola. 2 AA 427; 431-432; 3 AA 626-627; 639. Carroll then
21 went into a back room of Simone's, but emerged later to direct Zone and Taoipu into the bathroom.
22 Carroll expressed disappointment in Zone and Taoipu for not involving themselves in Hadland's
23 murder, and he told them they had missed the opportunity to make \$6,000.00. 2 AA 425-426. He
24 informed Zone and Taoipu that Counts received \$6,000.00 for his part in Hadland's murder. 2 AA
25 426. After Carroll, Zone, and Taoipu left Simone's, Carroll told Zone that Mr. H had instructed
26 Carroll that the "job was finished and that [they] were just to go home." 3 AA 639-640.

27 Las Vegas Metropolitan Police Department (LVMPD) detectives identified Carroll as
28 possibly involved in the murder after speaking with Hadland's girlfriend, Pajik Karlson, and

1 because his name showed as the last person called from Hadland's cell phone. 3 AA 652; 7 AA
2 1500. On May 20, 2005, Detective Martin Wildemann spoke with Mr. H and inquired about Carroll,
3 requesting any contact information Mr. H might have for Carroll; Mr. H told Detective Wildemann
4 he had no contact information for Carroll and that Wildemann should speak with one of the
5 Palomino managers, Ariel aka Michelle Schwanderlik, who could put the detectives in touch with
6 Carroll. 7 AA 1503.

7 At approximately 7:00 PM, the detectives returned to the Palomino where they found Carroll
8 who agreed to accompany them back to their office for an interview. 3 AA 657-658; 7 AA 1503-
9 1504. After the interview, the detectives took Carroll back to his apartment where they encountered
10 Zone who agreed to come to their office for an interview. 7 AA 1509-1510. Carroll then told Zone
11 within earshot of the detectives: "Tell them the truth, tell them the truth. I told them the truth." 3 AA
12 660-661. Zone recalled Carroll also saying: "If you don't tell the truth, we're going to jail." 2 AA
13 430. Zone interpreted Carroll's statements to mean Zone should fabricate a story tending to
14 exculpate Carroll, himself, and Taoipu. 3 AA 577-578. Zone gave the police a voluntary statement
15 on May 21, 2005. 7 AA 1510. Also on that day, Carroll brought Taoipu to the detectives' office for
16 an interview. 3 AA 669-670; 7 AA 1511.

17 Meanwhile on May 21, 2005, Mr. H and Espindola consulted with attorney Jerome A.
18 DePalma, Esq., and defense attorney Dominic Gentile, Esq.'s Investigator, Don Dibble. 8 AA 1641-
19 1642. The next morning, May 22, 2005, a completely distraught Mr. H said to Espindola, "I don't
20 know what I told him to do." 5 AA 1014. Espindola responded by again asking Mr. H, "What have
21 you done?" to which Mr. H responded, "I don't know what I told him to do. I feel like killing
22 myself." 5 AA 1014. Espindola asked Mr. H if he wanted her to speak to Carroll and Mr. H
23 responded affirmatively. 5 AA 1015; 9 AA 2044:10-18. Espindola arranged through Mark Quaid,
24 parts manager for Simone's, to get in touch with Carroll. 5 AA 1015-1016.

25 On the morning of May 23, 2005, LVMPD Detective Sean Michael McGrath and Federal
26 Bureau of Investigation (FBI) agent Bret Shields put an electronic listening device on Carroll's
27 person; the detectives intended for Carroll to meet at Simone's with Mr. H and the other co-
28 conspirators. 3 AA 695-696. Prior to Carroll arriving at Simone's, Mr. H and Espindola engaged in a

1 conversation by passing handwritten notes back and forth. 5 AA 1029-1030. In this conversation,
2 Mr. H instructed Espindola that she should tell Carroll to meet Arial and resign from working at the
3 Palomino under a pretext of taking a leave of absence to care for his sick son. 5 AA 1018; see also 9
4 AA 2043:10-18. He further instructed Espindola to warn Carroll that if something bad happens to
5 Mr. H then there would be no one to support and take care of Carroll. 5 AA 1018; see also 9 AA
6 2043:10-18. After the conversation, Espindola tore the notes up and flushed them down a toilet. 5
7 AA 1030.

8 When Carroll arrived at Simone's, Espindola directed him to Room 6 where he met with
9 Little Lou. 5 AA 1017. Espindola joined them and asked Carroll if he was wearing "a wire," to
10 which Carroll responded, "Oh come on man. I'm not fucking wired. I'm far from fucking wired,"
11 and he lifted his shirt up. RA 52; 5 AA 1020; 6 AA 1280. Mr. H was present in his office at
12 Simone's while the three met in Room 6. 5 AA 1016; 7 AA 1372-1373. In the course of the
13 conversation among Carroll, Espindola, and Little Lou, Espindola informed Carroll: "Louie is
14 panicking, he's in a mother fucking panic, cause I'll tell you right now...if something happens to
15 him we all fucking lose. Every fucking one of us." RA 53. Little Lou informed Carroll that "[Mr.
16 H]'s all ready to close the doors and everything and hide go into exile and hide." RA 62. Espindola
17 emphasized the importance of Carroll not defecting from Mr. H:

18 "Yeah but...if the cops can't go no where with you, the shits gonna have to, fucking
19 end, they gonna have to go someplace else, they're still gonna dig. They are gonna
20 keep digging, they're gonna keep looking, they're gonna keep on, they're gonna keep
21 on looking. [pause] Louie went to see an attorney not just for him but for you as well,
22 just in case. Just in case...we don't want it to get to that point, I'm telling you
23 because if we have to get to that point, you and Louie are gonna have to stick
24 together."
25 RA 54.

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

28 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.

1 Carroll also stated to Little Lou: "You [] not gonna fucking[...] what the fuck are you talking about
2 don't worry about it...you didn't have nothing to do with it," to which Little Lou had no response.
3 RA 57.

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

6 Espindola: _____ all I'm telling you is all I'm telling you is stick to your mother
7 fucking story _____ Stick to your fucking story. Cause I'm telling you right now it's
8 a lot easier for me to try to fucking get an attorney to get you fucking out than it's
9 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.

10 Little Lou also instructed Carroll to remain quiet and what Carroll should tell police if confronted:
11 "[whispering] _____ don't say shit, once you get an attorney, we can say _____ TJ, they thought
12 he was a pimp and a drug dealer at one time _____ I don't know shit, I was gonna get in my car
13 and go promote but they started talking about drugs and pow pow." RA 59. He also promised to
14 support Carroll should Carroll go to prison for conspiracy:

15 Little Lou: ...How much is the time for a conspiracy _____
Carroll: [F]ucking like 1 to 5 it aint shit.
16 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
17 of money _____ I'll take care of your son I'll put em in a nice condo _____
RA 65.

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

21 Carroll: They're gonna fucking work deals for themselves, they're gonna get me for
22 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.

23 Little Lou: Could you have KC kill them too, we'll fucking put something in their
food so they die rat poison or something.

24 Carroll: We can do that too.

25 Little Lou: And we get KC last.
RA 58.

26 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 _____

27 Espindola: I'll get you some money right now.

28 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,

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.

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

3 ARGUMENT

4 I

5 **The District Court Did Not Err in Instructing the Jury on the Evidentiary Standard 6 for Admissibility of Co-Conspirator Statements**

7 NRS 51.035(3)(e) excludes from the definition of hearsay a statement offered against a party
8 that is a "statement by a coconspirator of [the] party during the course and in furtherance of the
9 conspiracy." In McDowell v. State, 103 Nev. 527, 746 P.2d 149 (1987), the Court addressed the
10 evidentiary standard for determining admissibility of co-conspirator statements. The Court
11 acknowledged the U.S. Supreme Court's approach to interpreting the federal analog to NRS
12 51.035(3)(e), Federal Rule of Evidence (FRE) 801(d)(2)(E), which requires a trial court to use a
13 preponderance of the evidence standard in determining the admissibility of co-conspirator
14 statements. Id. at 103 Nev. at 529, 746 P.2d at 150 (citing Bourjaily v. U.S., 483 U.S. 171, 107 S.Ct.
15 2775 (1987)). In other words, the federal court must determine by a preponderance of evidence that
16 there was a conspiracy involving the declarant and the defendant and the statement was made in the
17 course of and in furtherance of the conspiracy. The Court noted Bourjaily's approach derived from
18 statutory interpretation, not constitutional imperatives, rejected the Bourjaily standard, and held that
19 in Nevada courts, the preliminary question of the existence of a conspiracy need only be established
20 by "slight evidence." Id.

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

24 Whenever there is slight evidence that a conspiracy existed, and that the defendant
25 was one of the members of the conspiracy, then the statements and the acts by any
26 person likewise a member may be considered by the jury as evidence in the case as to
27 the defendant found to have been a member, even though the statements and acts may
28 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)).

26 Little Lou contends JI 40's language was confusing and created the risk that his jury would confuse
27 the standard for admissibility of co-conspirator statements with the reasonable doubt proof standard
28 for convicting him of conspiracy. Appellant's Opening Brief (App. Op. Br.) 23. During settling of

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

5 Jury Instruction number 40 was a correct statement of the law as it relates to how the
6 jury is to assess statements of co-conspirators during the course and in furtherance of
7 the crime. The instruction does not in any manner relate to the burden of proof on the
8 underlying charge. In contradistinction, jury instructions number 16, 23, 24, 26, 28,
9 29, 30, 35, 36, and 37 each reference the State's burden of proof of beyond a
10 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.

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

23 **A. Appellate Standard for Reviewing Trial Court Jury Instructions**

24 Jury instructions must be "consistent with existing law." Beattie v. Thomas, 99 Nev. 579,
25 583, 668 P.2d 268, 271 (1983). In Berry v. State, 212 P.3d 1085 (2009), this Court stated that it
26 "generally reviews a district court's decision settling jury instructions for an abuse of discretion or
27 judicial error [and] whether the jury instruction was an accurate statement of the law is a legal
28 question subject to de novo review." Id. at 1091 (citations omitted). If a jury instruction was legally

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

11 Little Lou contends structural error applies in the instant case. The recognized categories of
12 structural error, however, are extremely limited. Even serious trial errors constituting constitutional
13 violations will rarely amount to structural error. See Arizona v. Fulminante, 499 U.S. 279, 309-310,
14 111 S.Ct. 1246, 1265 (1991) (listing examples of structural errors); see also Dowling v. United
15 States, 493 U.S. 342, 352, 110 S.Ct. 668, 674 (1990) (category of errors affecting fundamental
16 fairness extremely narrow); Cortinas v. State, 195 P.3d 315, 323 (2008), cert. denied, 130 S.Ct. 416
17 (2009) (noting “the Supreme Court has found structural error in the context of jury instructions only
18 once.”). Structural errors “affect the entire conduct of the trial from beginning to end and deprive the
19 defendant of basic protections, without which a criminal trial cannot reliably serve its function as a
20 vehicle for determination of guilt or innocence.” U.S. v. Pearson, 203 F.3d 1243, 1260 (10th Cir.
21 2000) (internal quotation marks and alterations omitted).

22 The inapplicability of a structural error analysis is patent from the numerous cases cited
23 below which hold that instructing a jury on the admissibility standard for co-conspirator statements
24 is not prejudicial; those courts’ application of a harmless error analysis belies Little Lou’s claim of
25 structural error. See Pungitore, Chaney, Noll, Monaco, Nickerson, Chindawongse, and Lutz, *infra*.
26 Little Lou has failed to allege any misinstruction on the State’s burden of proof, but alleges only an
27 arguable inference of confusion among the instructions, which has never been held to constitute a
28 structural error. His citation to Sullivan v. Louisiana, 508 U.S. 275, 113 S.Ct. 2078 (1993), is

1 unavailing. That decision reversed a defendant's conviction because the trial court's reasonable
2 doubt instruction equated reasonable doubt with "grave uncertainty" and "actual substantial doubt,"
3 which was identical to language previously found unconstitutional in Cage v. Louisiana, 498 U.S.
4 39, 41, 111 S.Ct. 328 (1990) (per curiam), overruled in part on other grounds by Estelle, 502 U.S. at
5 72 n. 4, 112 S.Ct. at 482 n.4. Sullivan found the existence of a structural error because, having never
6 been properly instructed on reasonable doubt, the jury did not find the defendant guilty by proof
7 beyond a reasonable doubt, thus a harmless error analysis was impossible. Sullivan, 508 U.S. at 281,
8 113 S.Ct. at 2082. Little Lou cannot demonstrate the alleged error "vitiates all the jury's findings"
9 because his jury was properly instructed on the reasonable doubt standard of proof and its duty to
10 apply that standard to all the elements and charges. Cf. Sullivan, 508 U.S. at 281, 113 S.Ct. 2082.⁷
11 Unlike Sullivan, in Little Lou's case, a reviewing court can determine whether the alleged
12 instructional error played a part in the jury's guilt determination. Further, Little Lou cannot rely
13 usefully on the Ninth Circuit's holding in Powell v. Galaza, 328 F.3d 558 (9th Cir. 2003), where the
14 trial court actually instructed the jury that the state had met its burden on the only disputed element
15 in the case. Id. at 566. Powell might be a useful authority had the district court instructed Little
16 Lou's jury that the State had met its burden to prove Little Lou conspired to harm Hadland, had
17 committed Second Degree Murder, and failed to negate any offense elements. Indeed, when the
18 Ninth Circuit has had the occasion to address a jury instruction challenge very similar to—but much
19 more grave—than Little Lou's challenge, it has not applied structural error review. See U.S. v.
20 Luepong, 933 F.2d 1017 at 4 (9th Cir. 1991);⁸ see also Garcia v. Evans, 2010 WL 2219177 at 22

21

22

23 ⁷ ("[T]he essential connection to a 'beyond a reasonable doubt' factual finding cannot be made
24 where the instructional error consists of a misdescription of the burden of proof, which vitiates all
25 the jury's findings. A reviewing court can only engage in pure speculation—its view of what a
26 reasonable jury would have done. And when it does that, 'the wrong entity judge[s] the defendant
27 guilty.'").

28 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).

1 (E.D. Cal. 2010) (Powell structural error analysis not apply where alleged error consisted of trial
2 court instructing that defendant was an accomplice as a matter of law); U.S. v. Brasseaux, 509 F.2d
3 157 (5th Cir. 1975) (instruction to jury that "[o]nce the existence of the agreement or common
4 scheme or conspiracy is shown, however, 'slight evidence' is all that is required to connect a
5 particular defendant with the conspiracy," not plain error because "[a]t several other places in the
6 charge the judge reiterated that each element of the offense must be proved beyond a reasonable
7 doubt."); U.S. v. Walden, 578 F.2d 966, 971 (3rd Cir. 1978) (same). Thus, it is clear the instruction
8 at issue here is subject to harmless, not structural, error review.

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

10 As Little Lou acknowledges, it is unsettled law in Nevada whether a jury must be instructed
11 to make an admissibility determination prior to considering the statements of a defendant's co-
12 conspirators. App. Op. Br. 21. This Court has never interpreted NRS 51.035(3)(e) (or NRS 47.060,
13 070) as foreclosing a jury determination of the admissibility of co-conspirator statements. Nor has it
14 opined that such instructions must be given as in California. Given this Court's holding in
15 McDowell and the cases dealing with the need to instruct the jury on accomplice corroboration
16 testimony, it was reasonable for the district court to conclude a similar instruction was necessary
17 when dealing with co-conspirator statements.

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

25 Evidence of a statement made by one alleged conspirator other than at this trial shall
26 not be considered by you as against another alleged conspirator unless you determine
27 by a preponderance of the evidence:

- 28
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;

1 3. That the statement was made in furtherance of the objective of the
2 conspiracy, and was made before or during the time when the party
 against whom it was offered was participating in the conspiracy...

3 California appellate courts have expressly rejected defendants' claims that CALJIC 6.24 confuses
4 the jury and lessens the State's burden to prove guilt beyond a reasonable doubt. People v. Tran,
5 2006 WL 2790460 at 8-10 (Cal. Ct. App. 2006) (CALJIC 6.24 did not lessen State's burden of proof
6 in light of trial court's instructions that: district attorney had the burden of proving Tran guilty
7 beyond a reasonable doubt, and "each fact which is essential to complete a set of circumstances
8 necessary to establish the defendant's guilt must be proved beyond a reasonable doubt."), cert.
9 denied, 551 U.S. 1117, 127 S.Ct. 2940 (2007);⁹ People v. Berumen, 2003 WL 21464625 at 7 (Cal.
10 Ct. App. 2003); People v. Jourdain, 111 Cal.App.3d 396, 404, 168 Cal.Rptr. 702 (Cal Ct. App.
11 1980). Cf. also, U.S. v. Garcia, 77 F.3d 471 at 12 (4th Cir. 1996), cert denied, 519 U.S. 846, 117
12 S.Ct. 133 (1996) (no reasonable likelihood of confusion where trial court instructed jury it "may find
13 a particular defendant guilty of participation in [a] conspiracy, even if the evidence of his
14 membership in the conspiracy is slight."). Thus, California's approach to the identical issue provides
15 abundant empirical evidence that providing the admissibility standard to a jury does not confuse it
16 into convicting a defendant by proof less than beyond a reasonable doubt.

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

27
28 ⁹ Like Little Lou, the Tran defendant unsuccessfully attempted to invoke Sullivan v. Louisiana's
 structural error analysis.

1 WL 3279780 at 9 (Cal. Ct. App. 2010); People v. Hall, 2009 WL 3110938 at 17-19 (Cal. Ct. App.
2 2009) Thus, these numerous and closely analogous practices demonstrate there was no confusion
3 created by the district court giving JI 40.

4 Little Lou believes any approach other than the federal approach is incorrect and a violation
5 of due process rights. He presents no caselaw supporting that proposition; nor could he because none
6 exists. Further, he ignores McDowell's holding that the evidentiary standard at issue is "merely the
7 result of statutory interpretation," not constitutional due process principles. McDowell, 103 Nev. at
8 529, 746 P.2d at 150. Just as the Court elected not to adopt Bourjaily's preponderance standard, it
9 might elect not to adopt the federal standard that admissibility determinations are only for the court.
10 Further, just as in Rowland v. State, 118 Nev. 31, 41-42, 39 P.3d 114, 120-121 (2002), and its
11 preceding lines of cases, where the Court elected to place the admissibility of accomplice statements
12 in the hands of the jury, the Court might also decide to require an additional jury determination of
13 admissibility of co-conspirator statements.

14 Moreover, that the federal approach holds the admissibility determination is solely an issue
15 for the trial judge does not mean the district court in this case was precluded from instructing the
16 jury on the issue. As explained above, California, which incorporates Bourjaily's preponderance
17 standard, permits the admissibility determination to be made by the jury. California appellate courts
18 routinely address whether trial courts commit an error in failing to use CALJIC 6.24 to instruct the
19 jury to make a threshold admissibility determination for co-conspirator statements. See, e.g., People
20 v. Prieto, 30 Cal.4th 226, 66 P.3d 1123 (Cal. 2003) (no prejudice where trial court failed to instruct
21 jury with CALJIC 6.24); People v. Herrera, 83 Cal.App.4th 46, 46-63, 98 Cal.Rptr.2d 911 (Cal. Ct.
22 App. 2000) ("prima facie" evidence of the conspiracy, in the context of Evidence Code § 1223,
23 means that the jury cannot consider the statement in issue unless it finds the preliminary facts to be
24 true from a preponderance of the evidence); People v. Smith, 187 Cal.App.3d 666, 679-680, 231
25 Cal.Rptr. 897, 905 (Cal. Ct. App. 1986) (error not to give CALJIC 6.24 in a murder-robbery case,
26 where the jury had to consider a witness's hearsay statements tending to show defendant's
27 knowledge of the robbery plan); People v. Jourdain, 111 Cal.App.3d 396, 168 Cal.Rptr. 702 (Cal.
28 Ct. App. 1980); Royal v. Kernan, 2009 WL 1034502 at 15-18 (E.D. Cal. 2009) (noting question is

1 one of state evidentiary law and observing trial court has discretion whether to instruct jury with
2 CALJIC 6.24). California's approach demonstrates there is no immutable legal principle requiring
3 that the admissibility determination never be submitted to the jury.

4 Little Lou argues the admissibility of co-conspirator statements does not constitute a question
5 properly submitted to the jury under NRS 47.070. He claims the admissibility of co-conspirator
6 evidence is always a matter for preliminary judicial determination under NRS 47.060 *only*. App. Op.
7 Br. 39 (first full paragraph). There is some support for this view in McDowell, which quotes in a
8 footnote the federal analog to NRS 47.060, FRE 104(a). McDowell, 103 Nev. at 529, 746 P.2d at
9 150. Nevertheless, McDowell's mention of FRE 104(a) is not dispositive of the question in light of
10 the Court's prior guidance on similar evidentiary issues, particularly the accomplice corroboration
11 requirement where the Court has long required, where the evidence is in dispute, the sufficiency of
12 non-accomplice corroborating evidence to be submitted to the jury. *See, e.g., State v. Sheeley*, 63
13 Nev. 88, 95-97, 162 P.2d 96, 99 (1945); Cutler v. State, 93 Nev. 329, 334, 566 P.2d 809, 812 (1977).
14 Accomplice corroboration also is not an issue of conditional relevance under NRS 47.070, but, when
15 disputed, must be submitted to the jury for resolution; indeed, the inquiry is the same: the jury must
16 find slight evidence inculcating the defendant, independently of the accomplice testimony. State v.
17 Williams, 35 Nev. 276, 129 P. 317, 318 (1913); Servin v. State, 117 Nev. 775, 796-797, 32 P.3d
18 1277, 1292 (2001) (Leavitt, J., concurring) (*quoting State v. Hilbish*, 59 Nev. 469, 479, 97 P.2d 435,
19 439 (1940)). Like the co-conspirator hearsay exception, the accomplice corroboration rule is a
20 question of competence and reliability, not relevance. Thus, there is no reason the competence and
21 reliability of co-conspirator hearsay statements cannot also be submitted to the jury. Again, such a
22 process would only benefit a defendant by requiring a second admissibility determination prior to
23 turning to the ultimate issue of whether all the elements and charges have been proved beyond a
24 reasonable doubt.

25 In this case, as in other cases, the State requested the instruction believing it was required and
26 to forestall arguments of error if it was not given. 3 RA 620-621; 2 AA 466-467. Indeed, the record
27 demonstrates the State defended JI 40 on the basis that it was a correct statement of the law and
28 inured to Little Lou's benefit. *Id.* It is the State's belief that had the Court *not* given JI 40, Little Lou

1 would now be arguing he was entitled to a jury determination of the admissibility of the co-
2 conspirator statements because it goes to an ultimate issue: his membership in the conspiracy.
3 Because the evidentiary standards and jury instructions governing admission of co-conspirator
4 statements are a matter of state statutory law, had the district court not included the disputed
5 language in JI 40, Little Lou would now be arguing he was entitled to have the jury also make an
6 admissibility determination. Cf., e.g., Prieto, supra; People v. Royal, 2005 WL 44401 at 9-11 (Cal.
7 Ct. App. 2005) (any error in not giving CALJIC 6.24 instructing jury to make admissibility
8 determination was harmless); People v. Rossum, 2005 WL 1385312 at 7-9 (Cal. Ct. App. 2005)
9 (rejecting claim that trial court erred by electing not to instruct jury with CALJIC 6.24); Galache v.
10 Kenan, 2008 WL 3833411 at 5 (C.D. Cal. 2008) ("Petitioner[] claim[s]...she was denied due process
11 by the trial court's failure to instruct the jury with CALJIC Nos. 6.21 and 6.24.").

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

19 Notwithstanding Little Lou's copious citations to the nonbinding practice in federal courts,
20 the Court is free to now permit or prohibit Nevada's district courts from instructing their juries to
21 make the admissibility determination regarding co-conspirator statements. The law would probably
22 benefit from the Court's guidance and Little Lou's case does present the question; that would not
23 demonstrate, however, that the district court committed an error. And, in any event, assuming the
24 Court finds JI 40 is not the best practice, it was clearly harmless in this case and in fact benefited
25 Little Lou.¹⁰

26
27 ¹⁰ In the midst of arguing this first ground of appeal, Little Lou secretes in a footnote a completely
28 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

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

2 Assuming the district court erred by including in JI 40 the slight evidence admissibility
3 standard for co-conspirator statements, any error was harmless. Little Lou cannot demonstrate a
4 "reasonable likelihood" that the jury would have concluded JI 40, read in the context of the other
5 instructions, authorized it to convict Little Lou based on slight evidence of his involvement in a
6 conspiracy. See Boyde, Collman, supra. When the two defendants were arguing their joint objection
7 to the instruction, Little Lou's co-defendant, Mr. H, admitted on the record that mention of the slight
8 evidence admissibility standard actually benefits a defendant:

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

14 [Bourjaily] and the cases in Nevada that follow [Bourjaily] makes [sic] that
15 clear. And so I really don't think that this - at this point in time it's a jury issue
16 anymore. The jury can consider that evidence period.
17 3 RA 620 (emphasis added).

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

22 inadequately presented and thus waived. See, e.g., Nat'l Foreign Trade Council v. Natsios, 181 F.3d
23 38, 60 n.17 (1st Cir. 1999) ("We have repeatedly held that arguments raised only in a footnote or in
24 a perfunctory manner are waived."). Further, Little Lou's claim that he ever raised this issue below
25 is pure fiction. The district court never acknowledged the propriety of a verdict form separating the
26 two battery offenses. Such an acknowledgement does not appear in the portion of the record Little
27 Lou cites to. In fact, the court was actually describing as "fine" a special verdict form providing
28 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 "duplicious [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.

1 [W]e have never "condemned" the practice of giving jury instructions on the
2 admissibility of co-conspirator's statements against individual defendants. In
3 Continental Group, we suggested in dicta that jury instructions concerning the factual
4 foundation required for application of the co-conspirator exception to the hearsay rule
5 are best omitted, as they give the jury the "opportunity to second-guess the court's
6 decision to admit coconspirator declarations." 603 F.2d at 459. We observed,
7 however, that *such instructions could not give rise to reversible error because, if*
8 *anything, they inure to the benefit of the defendant.* *Id.*
9 U.S. v. Pungitore, 910 F.2d 1084, 1147 (3d Cir. 1990) (emphasis added), cert denied,
10 500 U.S. 915, 111 S.Ct. 2010 (1991).

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

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

20 The 11th, 6th, 4th, and 9th Circuits have long concurred in this view. See U.S. v. Monaco, 702 F.2d
21 860, 878 (11th Cir. 1983) (submission to jury of co-conspirator admissibility determination did not
22 prejudice defendant because "by giving [the] instruction, the judge merely gave the jury the
23 opportunity to overturn his own ruling"); U.S. v. Nickerson, 606 F.2d 156, 158 (6th Cir. 1979)
24 (holding that identical error did not prejudice defendant because it merely gave the defendant "the
25 benefit of the jury's consideration of admissibility" or a "second bite at the apple"), cert. denied, 444
26 U.S. 994, 100 S.Ct. 528 (1979); U.S. v. Chindawongse, 771 F.2d 840, 845 n.4 (4th Cir. 1985)
27 (quoting U.S. v. Spooone, 741 F.2d 680, 686 n.1 (4th Cir. 1984), cert. denied, 474 U.S. 1085, 106
28 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.")).

23 Thus, based on the great weight of directly applicable authority, JI 40's inclusion of the
24 "slight evidence" admissibility standard for co-conspirator statements was utterly harmless and
25 actually benefited Little Lou. Finally, as the district court's order pointed out, because Little Lou's
26 jury was repeatedly instructed and reminded during deliberations of the State's burden to prove
27 every element and charge beyond a reasonable doubt, JI 40 did not create a reasonable likelihood of
28 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.

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.

1 Chia is not applicable to Little Lou because Carroll's statements bore none of the indicia of
2 reliability found in Chia. Chia is only a useful authority where the defendant can point to the same
3 "strong" and "poignant" indicia of reliability. See Christian v. Frank, 595 F.3d 1076, 1085-1086 (9th
4 Cir. 2010), cert. denied, 131 S.Ct. 511 (2010); Fields, 220 P.3d at 716-717 (2009). The contextual
5 circumstances of Carroll's statement indicate a strong and poignant unreliability. It was undisputed
6 that LVMPD detectives prepared Carroll to make false statements to Espindola and Little Lou in
7 order to elicit incriminating statements. 4 AA 836:12-842:19. Detective Sean McGrath testified that
8 he did not view Carroll as trustworthy or credible, and Little Lou's counsel established through
9 McGrath that Carroll was a convicted felon. 4 AA 822; 846:23-847:17. Additionally, Carroll's
10 statement was not against his penal interest because his whole purpose for engaging in the meeting
11 with Espindola and Little Lou was to curry favor with law enforcement after he had already
12 provided a full confession. Cf. Chia, 360 F.3d at 1005.¹³ Thus, the context of Carroll's statement is
13 rife with indicia of unreliability, the opposite of what Chia requires. Id. at 1004-1005.

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

23 Little Lou's Chia argument is further undermined by his contemporaneous statements and the
24 testimony of Rontae Zone. Unlike the Chia defendant, Little Lou made highly incriminating
25 statements contemporaneously with the declarant's allegedly exculpatory hearsay statement. Unlike
26

27
28 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)

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

7 Little Lou also fails to establish that he meets the Miller test's fourth factor. Unlike the Chia
8 defendant, Little Lou had the opportunity to examine an available, surviving co-conspirator,
9 Espindola, and elicit from her evidence of his alleged non-participation in the conspiracy. 6 AA
10 1246-1288; see also 10 AA 2256:17-20. In Chia, the declarant's hearsay statements were so critical
11 because the other two co-conspirators were killed in the process of being apprehended, thus leaving
12 the declarant as the *sole* survivor with knowledge of the conspiracy's membership. Chia, 360 F.3d at
13 1005. This distinction is pivotal and prevents Little Lou from demonstrating a due process violation.
14 In fact, Little Lou was successful in eliciting testimony from Espindola that he never entered into
15 any agreement to harm Hadland, and paid no money to the other conspirators. 6 AA 1250-1251;
16 1254-1256; 1282-1283; see also 10 AA 2256. That is exactly the evidence Little Lou asserts
17 Carroll's statement would have provided. Thus, Carroll's "You had nothing to do with this,"
18 statement was cumulative evidence and certainly not the "sole evidence on the issue" as Chia
19 requires. Chia, 360 F.3d at 1004-1005 (citing Miller, supra).

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

1 Lou was permitted to argue in closing that the statement demonstrated he was not involved in the
2 conspiracy, and when the State objected, the Court failed to sustain the objection or otherwise
3 admonish the jury. 10 AA 2254. He then later recapitulated that closing argument without any
4 objection whatsoever. 10 AA 2256:15-24. Thus, in addition to the many material distinctions
5 between Little Lou's case and Chia, he cannot show that he was at all harmed because he was
6 essentially permitted to introduce Carroll's statement for its truth without opening the door via NRS
7 51.069 to Carroll's numerous other hearsay statements implicating him; the State proffered five
8 highly incriminating statements from Carroll's recorded interview with detectives, including his
9 claim that Little Lou showed up dressed in black and wanted to personally kill Hadland. 3 AA 600-
10 601.¹⁴

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

23 Little Lou argues Carroll's statements constitute the State's admissions because Carroll was
24 "operating as an agent of the prosecution," thus they should have been admitted for their truth as
25 admissions of a party-opponent under NRS 51.035(3)(d). App. Op. Br. 34:8-35:19.¹⁵ The federal
26

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

28 ¹⁵ Despite citing to two unresponsive 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

1 circuits and state courts are divided as to whether a government agent's statements constitute
2 admissions of a party-opponent. Bellamy v. State, 403 Md. 308, 323-326, 941 A.2d 1107, 1115-
3 1117 (Md. 2008). Nevertheless, "[a]lthough there appears to be some disagreement among the courts
4 over the admissibility of statements by government attorneys after the initiation of proceedings, it
5 appears fairly well-settled that statements by government agents at the investigative level are not
6 admissible under Rule 801(d)(2)." State v. Asbridge, 555 N.W.2d 571, 576 (N.D. 1996).

7 Little Lou cites U.S. v. Branham, 97 F.3d 835 (6th Cir. 1996), which is one of the very few
8 authorities holding that statements of a paid informant constitute admissions of the government. Id.
9 at 850-851.¹⁶ In Branham, the government simply conceded that, under U.S. v. Morgan, 581 F.2d
10 933 (D.C. Cir. 1978), admissions of the paid informant could be attributable to it. The Seventh
11 Circuit has cataloged Morgan's critical analytical flaws in U.S. v. Kampiles, 609 F.2d 1233, 1246
12 n.16 (7th Cir. 1979).¹⁷ Thus, Branham only came to its conclusion based on the concession that a
13 flawed persuasive authority dictated considering paid informant statements to be government
14 admissions.¹⁸

15
16
17 error review. See U.S. v. Reed, 167 F.3d 984, 988-989 (6th Cir. 1999) (defendant's failure to
18 contend at trial that informant's tape-recorded statements were government admissions rendered
claim subject only to plain error review).

19 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.

20 ¹⁷ ("Defendant does cite United States v. Morgan[], in which the court did raise a question about the
21 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
22 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
23 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.").

24 ¹⁸ Note also that the Sixth Circuit has clarified Branham by stating that not everything an informant
25 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
26 does not imply that 'anything said' would be admissible. Nothing in Branham forecloses the
argument that certain utterances do not constitute statements.").

1 The better rule, consistent with over four decades of caselaw,¹⁹ is exemplified by the Second
2 Circuit's holding in U.S. v. Yildiz, 355 F.3d 80 (2d Cir. 2004), that informant statements are not
3 attributable to the government. Id. at 82 ("...Rule 801(d)(2)(D) does not abrogate the common law
4 rule articulated in Santos. And we hold, following Santos, that the out-of-court statements of a
5 government informant are not admissible in a criminal trial pursuant to Rule 801(d)(2)(D) as
6 admissions by the agent of a party opponent."); see also State v. Brown, 170 N.J. 138, 784 A.2d
7 1244, 1254 (N.J. 2001) (government does not adopt informant statements submitted in search
8 warrant affidavit submitted pre-indictment). The Third Circuit has also clarified that "[w]e do not
9 believe that the authors of Rule 801(d)(2)(D) intended statements by informers as a general matter to
10 fall under the rule, given their tenuous relationship with the police officers with whom they work."
11 Lippay v. Christos, 996 F.2d 1490, 1499 (3d Cir. 1993). The chilling effect of any contrary rule is
12 obvious; law enforcement officers would be severely hampered in their ability to use ruse-based
13 investigative techniques to ferret out criminal activity. Moreover, it is completely counterintuitive
14 that the informant's statements will constitute admissions when he has been sent out to utter untrue
15 statements calculated to elicit admissions by the investigative targets. Finally, Branham is inapposite
16 in that it involved paid informants who possess a degree of agency not present where an unpaid
17 informant, such as Carroll, has only a subjective hope of nonmonetary favorable future treatment.
18 The Third Circuit has held that even informants receiving sporadic payment are at most independent
19 contractors and thus not properly considered agents of the state. Lippay, 996 F.2d at 1499. Thus, it is
20 beyond clear that Carroll's statements during the wiretapped conversation did not constitute the
21 State's admissions.

22 III

23 The District Court Did Not Err In Refusing To Admit The Testimony Of Little Lou's Former 24 Co-Conspirator, Jason Taoipu

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

27 ¹⁹ See U.S. v. Santos, 372 F.2d 177, 180 (2d Cir. 1967) (government agent's statements are not the
28 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).

1 Taoipu attributing the "baseball bats and trash bags" comment to Espindola rather than Little Lou.
2 His co-defendant, Mr. H, did not object to admission of the testimonial fragment, but asserted his
3 Confrontation Clause rights in order to prevent Taoipu's entire testimony from coming in. 9 AA
4 2070-2071. Little Lou begins his argument by misstating the court's rationale for excluding the
5 evidence. The district court was concerned about the impact on Mr. H's confrontation rights, but that
6 was not the sole—or even primary—rationale for excluding Taoipu's testimony. In denying Mr. H
7 and Little Lou's post-trial motions, the district court noted the basis for its refusal to admit Taoipu's
8 prior testimony as Little Lou requested:

9 As to the admissibility of Jayson Taoipu's testimony from the Kenneth Counts trial,
10 the Court stands by its decision to not admit the testimony. Defendant LUIS
11 HIDALGO, III sought to admit just a miniscule portion of the transcript to establish
12 one fact. Defendant LUIS HIDALGO, III objected to the entire transcript[] being
13 read, and to impeachment of that portion of the transcript allowed under NRS 51.069.
14 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.

15 Thus, the court's order reflects a determination that selectively admitting a tiny fragment of Taoipu's
16 testimony was inconsistent with NRS 51.069, and, independently, Little Lou had failed to meet
17 NRS 51.325(2) because the issues were not "substantially the same." District court evidentiary
18 rulings are reviewed on appeal for abuse of discretion. See Hernandez v. State, 124 Nev. 60, ___, 188
19 P.3d 1126, 1131 (2008). The court's decision refusing to admit only the fragment of Taoipu's prior
20 testimony was clearly not an abuse of discretion. Little Lou was never entitled to have only the
21 favorable portions of the testimony admitted because NRS 51.325 provides for admission of an
22 unavailable witness's entire prior testimony. Additionally, Little Lou's argument fails NRS
23 51.325(2) because the State had no motive at the Counts trial to follow up and impeach Taoipu's
24 testimony. Because Counts was the direct perpetrator of the murder and there was already abundant
25 evidence that he conspired with Carroll and Taoipu, the State had no motive to gratuitously establish
26 the complete membership of the conspiracy by correcting Taoipu's misattribution of the baseball bat
27 and trash bags statement. Finally, Little Lou was not entitled to admission of one favorable
28 testimonial fragment while having the State precluded from exercising its right to impeach Taoipu

1 with the rest of the testimony or other inconsistent hearsay statements under NRS 51.069. Taoipu
2 also testified that Carroll told him his boss ordered "the hit" and that he knew Carroll's bosses were
3 a "Luis" and Espindola. 11 AA 2331; 2367-2368. The State was in a position to establish through
4 Detective Wildemann and the rest of Taoipu's testimony that Little Lou was the "Luis" Taoipu was
5 referring to. See 9 AA 2070; 2072; RA 7-11.²⁰ Thus, the State was entitled to attempt to impeach
6 Taoipu with his other statements indicating Little Lou may have ordered the murder. Moreover, the
7 State would have been entitled to call Detective Wildmann to testify that, during Taoipu's voluntary
8 statement, Taoipu said it was only after a call from Little Lou that Carroll informed him and Zone
9 about the plan to kill Hadland. RA 7-11. Further, Taoipu told detectives about a call from Espindola
10 to Carroll, but failed to mention that she said anything about baseball bats or trash bags. RA 4-5.

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

21 Even if the court committed an error in not permitting Little Lou to present Taoipu's
22 testimonial fragment, the error would have been harmless. Had the evidence been admitted, it would
23 have constituted an allegation that Zone's testimony attributing the statement to Little Lou was a
24 recent fabrication or the result of an improper influence or motive, and thus the State would have
25 been entitled to introduce Zone's prior consistent testimony from Little Lou's preliminary hearing.
26 NRS 51.035(2)(b); RA 121. Additionally, on the same basis, the State would have presented Zone's
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28 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.

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

IV

7 The State Presented Sufficient Corroborating Evidence To Permit Conviction Of Little Lou 8 Based On Accomplice Testimony

9 Little Lou's fourth ground of appeal asserts the State failed to present sufficient evidence to
10 corroborate the testimony of Zone and Espindola. NRS 175.291 provides:

11 (1) A conviction shall not be had on the testimony of an accomplice unless the
12 accomplice is corroborated by other evidence which in itself, and without the aid of
13 the testimony of the accomplice, tends to connect the defendant with the commission
14 of the offense; and the corroboration shall not be sufficient if it merely shows the
15 commission of the offense or the circumstances thereof.

16 (2) An accomplice is hereby defined as one who is liable to prosecution, for the
17 identical offense charged against the defendant on trial in the cause in which the
18 testimony of the accomplice is given.

19 The State submits Zone was not an accomplice and his testimony was independent
20 corroboration of Espindola's testimony. Even if both Zone and Espindola were considered
21 accomplices, there was still sufficient corroboration. Little Lou's numerous, highly inculpatory
22 recorded statements and his act of a soliciting the murder of Zone and Taoipu clearly established
23 sufficient evidence tending to connect Little Lou to the conspiracy.

24 A. Standard of Review for Accomplice Corroboration – Sufficiency of the Evidence 25 Tending to Connect the Defendant with the Charged Offenses

26 Little Lou correctly notes that "[n]o Nevada case succinctly articulates a [discrete] standard
27 of review[.]" for a jury's determination that accomplice testimony was sufficiently corroborated.
28 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.

1 Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789 (1979). The inquiry differs, however, from
2 reviewing sufficiency of the evidence to convict because it "does not require [the Court] to find
3 [evidence] establish[ing the] appellant's guilt or directly link[ing] him to the commission of the
4 crime. It is only necessary that [the Court] find some evidence that tends to connect [the] appellant
5 to the offense." Perry v. State, 2011 WL 286132 at 10 (Tex. Crim. App. 2011). Texas courts, which
6 interpret and apply a rule virtually identical to Nevada's,²² have thoughtfully considered the contours
7 of the applicable standard of review, which the State asserts this Court should adopt:

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

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

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

23 The analysis set forth above is mirrored by language found in Nevada cases, though no single
24 case incorporates all of these elements. See Heglermeier v. State, 111 Nev. 1244, 903 P.2d 799
25 (1995); Cheatham v. State, 104 Nev. 500, 505, 761 P.2d 419, 423 (1988); Howard v. State, 729 P.2d

27 ²² Tex. Code Crim. Proc. Ann. art. 38.14 (Vernon 2005).

28 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).

1 1341, 102 Nev. 572 (1986), cert. denied, 484 U.S. 872, 108 S.Ct. 203 (1986); Fish v. State, 92 Nev.
2 272, 277, 549 P.2d 338, 341-342 (1976); Eckert v. State, 91 Nev. 183, 533 P.2d 468 (1975). The
3 appellate standard of review for sufficiency of the evidence is "whether, after reviewing the
4 evidence in the light most favorable to the prosecution, any rational trier of fact could have found the
5 essential elements of the crime beyond a reasonable doubt." Origel-Candido v. State, 114 Nev. 378,
6 381, 956 P.2d 1378, 1380 (1998); see also Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781,
7 2789 (1979).²⁴

8 **B. Zone was Not an Accomplice**

9 First, a jury is presumed to have followed its instructions. Summers v. State, 122 Nev. 1326,
10 1333, 148 P.3d 778, 783 (2006). Thus, to convict Little Lou, the jury had to find that either Zone
11 was not an accomplice, or there was sufficient independent corroboration of Zone and Espindola's
12 testimony. Assuming the State had the burden of proving Zone was not an accomplice below, a fact
13 the State does not concede, that standard was met in this case.²⁵

14
15 ²⁴ Little Lou attempts to invoke federal due process principles as somehow prohibiting the use of
16 accomplice testimony to convict him. App. Op. Br. 42 n.14 "[T]he United States Supreme Court has
17 never recognized an independent constitutional requirement that the testimony of an accomplice-
18 witness must be corroborated." Cummings v. Simons, 506 F.3d 1211, 1237-1238 (10th Cir. 2007).
19 There is only a very narrow category of due process violations where the accomplice's testimony is
20 "incredible or insubstantial on its face" Laboa v. Calderon, 224 F.3d 972, 979 (9th Cir. 2000). The
21 standard for proving the accomplice's testimony was "incredible or insubstantial on its face" is
22 "extraordinarily stringent," involving problems such as physical impossibility, and is not satisfied by
23 merely showing the witness had credibility problems. U.S. v. Jenkins-Watts, 574 F.3d 950, 963 (8th
24 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 ²⁵ The majority of States actually place the burden on the defendant to demonstrate by a
26 preponderance of the evidence that a person was an accomplice. See People v. Tewksbury, 15
27 Cal.3d 953, 968-969, 544 P.2d 1335 (Cal. 1976), cert. denied 429 U.S. 805, 97 S.Ct. 38 (1976)
28 (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

1 There was more than sufficient evidence for the jury to rationally conclude Zone was not an
2 accomplice. Little Lou simply assumes Zone was an accomplice for evidentiary purposes based on
3 speculation that "[a]lthough Zone was not charged, an examination of his testimony indicates that
4 this was more likely an exercise of prosecutorial discretion than an absence of evidence." App. Op.
5 Br. 43 n.15. It is not clear what part of the record Little Lou examined because he cites to nothing. In
6 fact, the record (and Little Lou's efforts in cross-examining Zone) clearly demonstrates a rational
7 jury could conclude Zone was not an accomplice. All of the evidence demonstrated Zone was
8 merely present for the murder and subsequent concealment efforts. First, Zone received no money as
9 a result of Hadland's murder in contrast to Carroll and Counts. Second, Zone testified that if he had
10 known Carroll was taking them out to Lake Mead to murder Hadland, he would not have gone
11 along. 3 AA 566-567. On cross-examination, Zone testified that he: (1) Was totally surprised when
12 Carroll stopped to pick up Counts; (2) Assumed Counts was merely a new person who would be
13 handing out flyers; and (3) "had no idea [Counts] was going to shoot somebody[.]" 3 AA 563. If the
14 jury believed Zone's testimony, it would be sufficient to demonstrate Zone was "merely present" at
15 the time of the murders and not a member of the conspiracy or participant in the murder. Third,
16 Zone's testimony that he never possessed a gun and refused to participate is, in part, supported by
17 the taped conversations between Carroll, Espindola, and Little Lou. Zone also did not participate in
18 any of the post-murder concealment activities. 3 AA 554-555.

19 Zone was thoroughly cross-examined as to why he: (1) Did not warn Hadland that Hadland
20 was going to be shot; (2) Did not report the crime after he and the others returned to the Palomino
21 and Counts departed; (3) After the murder, was present when Carroll cleaned the van, changed the
22 van tires, and got a haircut; and (4) Failed to encourage Carroll not to destroy evidence of the
23 murder or to report the crime. 3 AA 517-532. Zone testified to being in a state of fear and
24 "concerned and worried for [his] own safety" the next day while accompanying Carroll. 3 AA 538.
25 Zone testified that Crystal Payne, his pregnant girlfriend lived at Carroll's house, and he felt that to
26

27 witness is not an accomplice on proof which falls short of the standard of beyond a reasonable
28 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).

1 report the crime would jeopardize the lives of Payne and Zone's unborn son. 3 AA 519-520.
2 Moreover, Zone testified to being the subject of intense nonverbal intimidation from Counts, which
3 caused Zone to be more scared than he had ever been in his life. 3 AA 573; see also 3 AA 535-536.
4 Again, these facts, if believed, would be sufficient for a rational trier of fact to conclude Zone was
5 not liable for prosecution on the charges of Conspiracy, Battery, or Murder and therefore he was not
6 an accomplice.

7 Little Lou's counsel was able to elicit from Zone testimony that police detectives had
8 threatened to arrest him for conspiracy to commit Hadland's murder if he did not cooperate and
9 show up to testify in Little Lou and the other co-conspirator's trials. 3 AA 579. Nevertheless, the
10 Court's inquiry is whether the jury had evidence upon which it could rationally conclude Zone was
11 not an accomplice. The inquiry asks not whether the witness was threatened with arrest or
12 prosecution, but whether the person was *liable* to prosecution as an accomplice. The jury could
13 rationally conclude that, despite a threat of prosecution, the Zone was at most an accessory after the
14 fact. "A mere accessory ... is not liable to prosecution for the identical offense, and therefore is not
15 an accomplice." People v. Horton, 11 Cal.4th 1068, 1114, 47 Cal.Rptr.2d 516, 906 P.2d 478 (Cal.
16 1995)), cert. denied, 519 U.S. 815, 117 S.Ct. 63, 136 L.Ed.2d 25 (1996); see also U.S. v. Vidal, 504
17 F.3d 1072, 1077 n.8 (9th Cir. 2007) ("The person is not an accomplice if he participated with the
18 accused only as an accessory after the fact.") (quoting Charles E. Torcia, WHARTON'S CRIMINAL
19 LAW § 38 (15th ed. 1993)). Because the evidence showed at most that Zone was liable to
20 prosecution as an accessory, the jury was free to rationally conclude that he was not an accomplice
21 and thus required no corroboration.

22 **C. Setting Aside Zone and Espindola's Testimony Completely, a Rational Jury Could**
23 **Conclude the Remaining Evidence Tended to Connect Little Lou to Commission of**
24 **the Conspiracy and Hadland's Murder²⁶**

25 The independent evidence tending to connect Little Lou to the conspiracy and Hadland's
26 murder was overwhelming. "The accused's own statement can corroborate the accomplice witness
27 testimony if the statement tends to connect the accused with the crime." Brogdan, Jr. v. State, 1996

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

1 WL 307450 at 3 (Tex. Crim. App. 1996) (citing Romero v. State, 716 S.W.2d 519, 523 (Tex. Crim.
2 App. 1986), cert. denied, 479 U.S. 1070 (1987)). Little Lou's solicitation of Zone and Taoipu's
3 murder is singularly sufficient to tend to connect him with the conspiracy to harm Hadland and the
4 resulting murder. Additionally, his recorded statements telling Carroll not to cooperate with police,
5 suggesting a fabricated story, and offering Carroll material and legal support in exchange for
6 Carroll's silence also independently constitute sufficient evidence tending to connect Little Lou to
7 the crimes. The jurisprudence on accomplice corroboration sufficiency clearly supports this
8 conclusion. See Glossip v. State, 157 P.3d 143 (Okla. Crim. App. 2007) ("Evidence that a defendant
9 attempted to conceal a crime and evidence of attempted flight supports an inference of
10 consciousness of guilt, either of which can corroborate an accomplice's testimony." (citations
11 omitted)), cert. denied, 552 U.S. 1167, 128 S.Ct. 1124 (2008); People v. Avila, 38 Cal.4th 491, 563,
12 133 P.3d 1076, 1127 (Cal. 2006) ("Defendant's initial attempt to conceal from the police his
13 involvement in the activities culminating in the murders implied consciousness of guilt constituting
14 corroborating evidence." (citations omitted)), cert. denied, 549 U.S. 1306, 127 S.Ct. 1875 (2007);
15 Smith v. State, 245 Ga. 168, 169, 263 S.E.2d 910, 912 (Ga. 1980) ("Evidence from an independent
16 source of an attempt by the accused to conceal his participation in a crime is sufficient to corroborate
17 the testimony of the accused's accomplice relating to the accused's participation in the crime."
18 (citation omitted)); Llewellyn v. State, 241 Ga. 192, 193-194, 243 S.E.2d 853, 854 (Ga. 1978)
19 (defendant's efforts to conceal murder conspiracy by intimidating or influencing co-conspirators was
20 evidence tending to connect him with the conspiracy). "Denials, untruths and misleading stories
21 given by persons accused of criminal acts have been found to be suspicious conduct which may tend
22 to connect the accused to the offense." Powell v. State, 1999 WL 966659 at 4 (Tex. Crim. App.
23 1999) (citations omitted). Finally, at one point on the tape, Little Lou appeared to criticize Carroll
24 for deviating from what Little Lou had told him to do and instead enlisting Counts, which tends to
25 show Little Lou's advanced knowledge of the conspiracy and role in planning the crimes. RA 63 at
26 22:15. Thus, Little Lou's numerous recorded statements foreclose any argument that the jury lacked
27 sufficient evidence to find Espindola and Zone's testimony was corroborated.
28

1 In addition to Little Lou's foregoing highly inculpatory recorded statements, other
2 independent evidence tended to connect him with the crimes. Phone records showed that Little Lou
3 called Carroll at home just several hours prior to the murder, and that he repeatedly attempted to call
4 Carroll after the murder. 7 AA 1554:4-13; 10 AA 2274:3-11.²⁷ In his recorded statements, Little Lou
5 discussed the potential penalty attaching to conspiracy, which indicates he had advanced knowledge
6 of the conspiracy. RA 65. Little Lou actually resided at Simone's and a note in Mr. H's handwriting
7 was found at Simone's which states, "Maybe we're under surveils [sic], keep your mouth shut!!" 7
8 AA 1392; 1537-1538. Because Espindola appears to have been warned contemporaneously with Mr.
9 H about potential surveillance, the jury likely found the note was directed at Little Lou. Finally,
10 Little Lou had a history of loaning vehicles to Carroll, Little Lou was in charge of scheduling
11 pickups for the Palomino, and a vehicle insured in the name of Simone's, the Chevrolet Astro van,
12 was used in murdering Hadland. 5 AA 254-256; 8 AA 1722; 1773-1774.

13 There is also a small mountain of corroborating evidence consisting of connections between
14 Little Lou's father's business, the Palomino Club, and every critical stage and significant event from
15 the inception of the conspiracy through Hadland's murder and the resulting concealment efforts. As
16 one of the managers for his father's business, Little Lou obviously had a personal and pecuniary
17 interest in the Palomino's financial health. Mr. H testified that Carroll told him Hadland was
18 "badmouthing" the Palomino. 9 AA 1931-1932. Hadland's live-in girlfriend, Pajjik Karlson,
19 testified that after being fired by the Palomino, Hadland appeared "nervous and [not] himself" when
20 discussing the club. 1 AA 209-210. At the murder scene, 28 Palomino VIP cards were found in
21 Hadland's bag located on the front passenger seat of the KIA Sportage SUV Hadland had been
22 driving. 1 AA 249-250. Non-accomplice testimony established Mr. H had received prior reports that
23 Hadland was selling Palomino VIP passes to arriving customers in exchange for cash, which
24 deprived the taxicab drivers of bonuses for bringing customers to the club. 8 AA 1718-1719. This
25

26 ²⁷ Little Lou repeats his allegation that he was merely calling Carroll about work related matters.
27 When reviewing the sufficiency of the evidence, as noted above, a reviewing court looks at the
28 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.

1 practice was creating problems for the Palomino because it upset the cab drivers who, according to
2 Mr. H's expert witness, are critical to the advertising success of a strip club. 7 AA 1573:6-17; 8 AA
3 1767.

4 Thirty-three (33) Palomino Club advertisement cards were found on the shoulder of the road
5 next to Hadland's body. 1 AA 182; 179-180; 3 AA 649. Additionally, forty-two (42) Palomino Club
6 business cards were found in the glove compartment of the white Chevrolet Astro van used by
7 Hadland's murderers. 2 AA 255.²⁸ Palomino VIP cards and fliers were found among Counts's
8 possessions after a SWAT team extracted him from the attic of a residence. 3 AA 683; 693. Forensic
9 examination found both Counts and Carroll's fingerprints on the VIP cards. 7 AA 1461-1482.
10 Detectives also found \$595.00 cash among Counts's possessions. 3 AA 683-684; 691-692. Forensic
11 examination revealed Carroll's fingerprint was on one of those \$100.00 bills. 19 AA 3526-3528. At
12 12:26 AM on May 20, 2005, the shooter, Counts, was picked up by Gary McWhorter's taxi at the
13 Palomino immediately after committing the murder, and Counts only had \$100.00 bills to pay the
14 cab fare. 2 AA 450-456. This independent evidence tended to demonstrate Little Lou's connection
15 with the crimes as it furnished evidence of a motive to eliminate a perceived threat to his father's
16 business.²⁹

17 While mere presence during commission of a crime is not per se corroborating, in
18 conjunction with other evidence it helps demonstrate corroboration; "proof that the accused was at
19 or near the scene of the crime at or about the time of its commission, when coupled with other
20 suspicious circumstances, may tend to connect the accused to the crime so as to furnish sufficient
21 corroboration to support a conviction." Smith v. State, --- S.W.3d ---, 2011 WL 309654 at 14 (Tex.
22 Crim. App. 2011) (internal quotation marks omitted) (quoting Richardson v. State, 879 S.W.2d 874,
23 880 (Tex. Crim. App. 1993)). Cell phone tower information shows Little Lou was in the general
24

25 ²⁸ Virtually all the phones used by the conspirators were registered to Hidalgo Auto Body Works,
26 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.

27 ²⁹ "Motive and opportunity evidence is insufficient on its own to corroborate accomplice-witness
28 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)).

1 vicinity of some of the lead co-conspirators. 19 AA 3596-3600. Mr. H testified to being at Simone's,
2 Little Lou's place of residence, when Espindola and Little Lou had their wiretapped conversations
3 with Carroll. 9 AA 1989. Henderson Police Department Detective Kenneth Z. Simpson observed
4 Mr. H at Simone's on May 23 and 24, 2005, when Espindola, Carroll, and Little Lou were
5 discussing the murder and how to avoid apprehension. 7 AA 1372-1374. Detective Wildemann
6 observed Mr. H was at Simone's during Carroll's visit on the 24th and did not leave the building
7 while Carroll was meeting with Espindola and Little Lou. 7 AA 1518-1519. In a murder prosecution,
8 evidence suggesting a close association among the defendant and the direct perpetrators, when
9 combined with defendant's motive, is sufficient to corroborate testimony of an accomplice. See Fish
10 v. State, 92 Nev. 272, 277, 549 P.2d 338, 341-342 (1976); see also Cheatham v. State, 104 Nev. 500,
11 505, 761 P.2d 419, 423 (1988).

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

20 "[T]estimony" ...includes all oral statements made by an accomplice or coconspirator
21 under oath in a court proceeding and all out-of-court statements of accomplices and
22 coconspirators used as substantive evidence of guilt which are made under suspect
23 circumstances. The most obvious suspect circumstances occur when the accomplice
24 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).

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

1 An accomplice's wiretapped statements are corroborating as long as the wiretapped
2 statements appear incriminating in themselves and do not require testimony from the accomplice in
3 order to explain why the wiretapped statements incriminate the defendant. See Harris v. Garcia, 734
4 F.Supp.2d 973, 992 (N.D. Cal. 2010);³⁰ cf. also People v. Jewsbury, 115 A.D.2d 341, 342, 496
5 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.
6 App. Div. 1983) (tapes of telephone conversations intercepted through the use of legal wiretaps can
7 corroborate the testimony of an accomplice). An accomplice's tape recorded statement implicating
8 the defendant is sufficient evidence to corroborate the accomplice's trial testimony. The Court
9 addressed an identical situation in Cheatham v. State, 104 Nev. 500, 761 P.2d 419 (1988), and
10 determined the accomplice's wiretapped out-of-court statements may be used as corroboration if
11 they are accompanied by circumstantial guarantees of trustworthiness, i.e., an absence of suspicious
12 circumstances.

13 In Cheatham, the defendant was alleged to have conspired with three other individuals to
14 murder the victim. While detained in a California jail, one of the accomplices was recorded stating
15 to another accomplice, "Did they get Cheat[ham]?" Id. at 502, 761 P.2d at 420. The Court
16 determined the accomplice's out-of-court statement was a prior consistent statement admissible
17 under NRS 51.035(2)(b), and was reliable because, like Espindola's statements, it was the result of
18 surreptitious eavesdropping. Id. at 502-503, 761 P.2d at 421. The Court then went on to address
19 Cheatham's argument that the accomplice's trial testimony was insufficiently corroborated and thus
20 should have been excluded. The Court determined the accomplice's incriminating wiretapped
21 statement was sufficient evidence in itself to corroborate the accomplice. Id. at 505-506, 761 P.2d at
22 423.³¹ Thus, clearly Espindola's wiretapped statements, uttered long before she had any inclination
23
24

25 ³⁰ ("[C]o-defendant Miller's statements were not made under suspect circumstances. She was not
26 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.").

27 ³¹ Other corroborating facts in Cheatham were: "a fairly constant association and companionship
28 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.

1 to negotiate with the State, constituted supporting corroborative evidence, which the jury properly
2 considered as corroborating Zone and Espindola.

3 Substantively, Espindola's wiretapped statements more than sufficiently corroborate her and
4 Zone's testimony. Her statements made in Little Lou's presence regarding Mr. H's panicky state of
5 mind, that "[Carroll] and [Mr. H] are gonna have to stick together," and that "...what we really
6 wanted was for him to be beat up..." clearly tend to connect Little Lou with the crimes in light of his
7 incriminating statements and adoption of Espindola's statements. RA 54 (emphasis added). For
8 purposes of the accomplice corroboration rule, these statements were not made under suspicious
9 circumstances because Espindola did not believe she was speaking to a police informant and her
10 statements, at the time, would have been highly damaging evidence if she were tried for Hadland's
11 murder alongside Little Lou and Mr. H. Indeed, the record shows Espindola unsuccessfully
12 attempted to determine whether Carroll was recording their conversations. RA 52. The recording of
13 the wiretapped conversations and both Mr. H and the State's transcriptions reveal Espindola had no
14 belief that she could secure leniency or any benefit through her statements to Carroll on the 23rd and
15 24th of May 2005. Recall that it would be many months before Espindola came to a negotiation with
16 the State. Thus, the corroborating evidence tending to link Little Lou to the crimes was
17 overwhelming, and clearly sufficient for a rational jury to conclude there was independent
18 corroboration of Espindola and Zone.³²

19 Little Lou has searched the Court's jurisprudence for holdings that might help him claim the
20 State failed to present sufficient accomplice corroboration evidence. He settles on Eckert v. State, 91
21 Nev. 183, 533 P.2d 468 (1975), and Heglemeier v. State, 111 Nev. 1244, 903 P.2d 799 (1995). Both
22 cases are distinguishable. The State's showings in Eckert and Heglemeier do not begin to approach
23

24 ³² The State also notes that Cheatham adds another layer of corroboration for Espindola's testimony:
25 her prior consistent statements to her attorney, Mr. Christopher R. Oram, Esq. Mr. Oram testified for
26 the State as a rebuttal witness, and corroborated Espindola's version of events inculcating Little Lou
27 and Mr. H. 9 AA 2027-2044; see Cheatham, *supra* (accomplice's prior consistent wiretapped
28 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.

1 the quantum of independent corroborating evidence presented in Little Lou's trial. In neither case
2 did independent evidence show the defendant: (1) Soliciting the murder of two witnesses in order to
3 cover-up the crime testified to by the accomplice; (2) Encouraging one of the co-conspirators to lie
4 to police and promising to provide that individual with material and legal support in exchange for
5 concealing the crimes and not cooperating with police; (3) Possessing an obvious motive for
6 conspiring to harm the victim; and (4) Being in the presence and in communication with the other
7 conspirators. The State will not repeat the litany of other corroborating facts because these few facts
8 more than distinguish Eckert and Heglemeier.

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

20 This evidence in this case, more closely mirrors those cases in which this Court has found
21 sufficient evidence of corroboration. See Cheatham, *supra*; Evans v. State, 113 Nev. 885, 944 P.2d
22 253 (1997) (accomplice corroborated where two strongest pieces of corroborative evidence were (1)
23 testimony of eye witness who saw the Jeep on defendant's lawn at about 6:15 a.m., and (2) the 7-11
24 receipt stamped at 6:30 a.m., which were facts of timing tending to make incredible defendant's self-
25 exculpatory testimony at trial); LaPena v. State, 92 Nev. 1, 3, 544 P.2d 1187, 1188 (1976) ("From
26 the testimony of other witnesses it is established that LaPena was not merely an acquaintance of
27 Weakland... but one who with Maxwell had a motive to get rid of Hilda Krause and who was
28 therefore linked inculpably to Weakland in a criminal scheme."). Thus, the State provided more than

1 sufficient evidence upon which a rational jury could find independent, non-accomplice corroborating
2 evidence tending to connect Little Lou to the charged offenses.

3 V

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

5 Little Lou's fifth ground of appeal alleges he was denied due process by the State's failure to
6 record Espindola's proffer of her potential trial testimony made during plea negotiations. Little Lou
7 fails to present any legal authority for his view that the State is obligated to tape or video-record plea
8 negotiation proffers. Little Lou relies solely on a law student note proposing a model ethical rule for
9 prosecutors to record all plea negotiation proffers.³³ He fails to identify any due process or other fair
10 trial right infringed by the State not recording Espindola's plea negotiation proffer. Further, he
11 points to nothing in the record indicating the State offered Espindola some improper inducement or
12 attempted to script her testimony. Little Lou's idiosyncratic view that recordation of proffers should
13 be required fails to present a cognizable ground of appeal, much less a plain error.

14 The State had no obligation to record Espindola's plea negotiation proffer. In Sheriff v.
15 Acuna, 107 Nev. 664, 819 P.2d 197 (1991), the Court very specifically elaborated the State's
16 obligations in regard to conducting and disclosing its negotiations with the defendant's cooperating
17 accomplice, which do not include recordation of cooperating witness interviews. Id. at 669, 819 P.2d
18 at 200.³⁴ Acuna does not require that a contingent plea agreement even be reduced to writing.

19 In fashioning its rule, Acuna relied on jurisprudence from the First Circuit, particularly U.S.
20 v. Dailey, 759 F.2d 192 (1st Cir. 1985). While Dailey suggests a written agreement documenting
21 testimonial agreements would be a nice practice, it is not required. The First Circuit recognized this
22 and rejected a requirement that agreements with interested accomplice witnesses be in writing. U.S.
23 v. Cresta, 825 F.2d 538, 546 n.5 (1st Cir. 1987), cert. denied, 486 U.S. 1042, 108 S.Ct. 2033 (1988)
24 ("Appellant argues that Dailey mandates a written contingency agreement. We disagree. A written
25

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

28 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.").

1 agreement is suggested as a better safeguard, but is not a per se requirement. See also U.S. v.
2 Shearer, 794 F.2d 1545 (11th Cir.1986) (upholding admission of paid informant's testimony even
3 though no written agreement)."). A fortiori, then, there is no requirement for video or audio
4 recordation of a cooperating witness's proffer. Even Little Lou's law student note mentions Acuna
5 as establishing an accomplice testimony safeguard not involving a per se recording requirement.
6 Note 286-287. The note correctly summarizes the state of the law, which does not impose on
7 prosecutors any duty to record witness interviews. Note 264-265.

8 The circumstances of Espindola's plea and resulting testimony comport with all due process
9 safeguards as recognized in Acuna and the Court's decision in Leslie v. State, 114 Nev. 8, 17, 952
10 P.2d 966, 972-973 (1998).³⁵ "[G]overnment interviews with witnesses are 'presumed to have been
11 conducted with regularity.'" U.S. v. Houlihan, 92 F.3d 1271, 1289 (1st Cir. 1996). Under Acuna,
12 there is no merit to Little Lou's contention that he was denied a meaningful opportunity to cross-
13 examine Espindola. See Clyde v. Demosthenes, 955 F.2d 47 at 3 (9th Cir. 1992) (no Acuna or Giglio
14 violation where cooperating witness was cross-examined about disclosed plea agreement, there was
15 no evidence of any undisclosed promises, and defendant did not allege witness lied about
16 negotiation of agreement); see also People v. Steinberg, 170 A.D.2d 50, 76, 573 N.Y.S.2d 965, 980-
17 981 (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
18 New York or "related authority hold[s] that a defendant's right of cross-examination is unfairly
19 frustrated by the failure to record the witness's statement.").

20 Because Acuna and Leslie do not apply to the rule Little Lou proposes, his argument really
21 sounds in Brady; but Little Lou does not allege a Brady violation because he must be aware that,
22 despite numerous opportunities, no courts have extended Brady to create a prosecutorial duty to
23 record pretrial witness interviews. Even Little Lou's law student note, the principal supporting
24 authority for his due process argument, bases its argument largely on an analogy to Brady and
25 Giglio. See Note 257, 267-268, 279, 281-287. The Ninth Circuit has rejected for over thirty years the
26

27
28 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.

1 proposition that a defendant is entitled to have prosecutors record pre-trial interviews with its
2 witnesses in order to preserve potential exculpatory or impeachment material. U.S. v. Marashi, 913
3 F.2d 724, 734 (9th Cir. 1990) (explaining that under U.S. v. Bernard, 625 F.2d 854 (9th Cir. 1980),
4 Brady creates no duty to record witness interviews, even where lack of note-taking derives from
5 desire not generate impeachment material).³⁶ See also U.S. v. Rodriguez, 496 F.3d 221, 224-225 (2d
6 Cir. 2007) (Brady and Giglio do not require state to take notes during witness interviews); U.S. v.
7 Ortiz, 2011 WL 109087 at 3 (D. Ariz. 2011) (rejecting defendant's argument that government
8 consciously elected not to record material witness statements in order to avoid production of
9 exculpatory material, noting "...Government had no constitutional obligation to compile potential
10 Brady material by recording the first witness interviews." (citing U.S. v. Marashi, 913 F.2d 724, 734
11 (9th Cir. 1990)). Thus, Little Lou establishes no due process or other basis for granting him relief on
12 this ground of appeal.³⁷

13 CONCLUSION

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

16 Dated this 12th day of July, 2011.

17 Respectfully submitted,

18 DAVID ROGER
19 Clark County District Attorney
20 Nevada Bar # 002781

21 BY /s/ Nancy A. Becker
22 NANCY A. BECKER
23 Deputy District Attorney
24 Nevada Bar #00145

25 ³⁶ Cf. Note at 265 n.59 (mentioning Marashi once in a footnote); 292 (misstating Bernard's holding
26 as merely "find[ing] no statutory basis for compelling the creation of Jencks Act material," which
27 elides the court's constitutional analysis that Brady too provided no basis for creating a record of
28 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.

5

1 CODE RPLY

2 Law Offices of Richard F. Cornell
3 150 Ridge Street, Second Floor
4 Reno, NV 89501
5 Nevada Bar 1553
6 (775)329-1141
7 Attorney for Petitioner

8 EIGHTH JUDICIAL DISTRICT COURT FOR THE STATE OF NEVADA
9
10 AND FOR THE COUNTY OF CLARK

11 LUIS HIDALGO, III,)
12)
13 Petitioner,)
14)
15 v.)
16)
17 ISIDRO BACA, WARDEN,)
18 NORTHERN NEVADA)
19 CORRECTIONAL CENTER;)
20 AND)
21 J. GREG COX, DIRECTOR OF)
22 THE NEVADA DEPARTMENT)
23 OF CORRECTIONS,)
24)
25 Respondents.)
26)
27)
28)

CASE NO. 05C212667-2

DEPT NO. XXI

21 **REPLY TO STATE'S RESPONSE TO DEFENDANT'S SUPPLEMENTAL**
22 **PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)**

23 Date of hearing: September 23, 2014.

24 Time of hearing: 9:30 a.m..

25 COMES NOW, Petitioner and Defendant, Luis Alonzo Hidalgo, III, and replies

1 to the State's Response to his Supplemental Petition for Writ of *Habeas Corpus*
2 (Post-Conviction), filed July 16, 2014:
3

4 INTRODUCTION

5 The State's Response contains a 24-page introduction. We reply to that
6 more succinctly, but we acknowledge that the stage that gets set for this Petition is
7 extremely important:
8

9 First, whether one use the facts of this case in the light most favorable to
10 Petitioner, as stated at pp. 7-15 of the Supplemental Petition, or as stated at pp. 6-
11 19 of the State's Response, one is left with the unshakeably abiding impression
12 that "Little Lou" is serving two consecutive ten year to life imprisonment
13 sentences for having opened his big mouth. And that's it. He did nothing. If this
14 Petition is denied, he will serve as much time as Kenneth Counts, the man who
15 actually murdered T.J. Hadland - if not more. It doesn't appear from the transcript
16 that "Little Lou" ever met Counts, much less spoke with him. Nevertheless, the
17 State believes the result at bar to be just. We beg to differ.
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21

22 There are two time frames to consider in this case: The time frame before
23 and up to the point where Counts murdered Hadland; and the time frame after. In
24 the time frame after, there is no question the State proved solicitation of murder by
25 "Little Lou," in his effort to help his father in covering up the murder. This
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1 Petition does not attack the convictions for solicitation; there is nothing that
2 effective counsel could have done for Petitioner in that regard, except to have a
3 separate trial of those counts from the trial of the murder count. Rather, this
4 Petition focuses on the murder and conspiracy to murder charges against
5 Petitioner.
6
7

8 As to the murder, the evidence begs the question: What did this Petitioner
9 do? Answer: He did nothing!

10
11 Let us review the "inculpatory" evidence against Petitioner:

12 1. Per Anabel Espindola, prior to Hadland's murder, Petitioner argued with
13 his father, in which Petitioner stated that Mr. H. "would never be like Gallardi and
14 Rizzolo." Mr. H., per Espindola, told him to mind his own business and Petitioner
15 then left the building.
16
17

18 In other words, whatever Petitioner meant by that statement, it was instantly
19 disregarded.
20

21 2. Rontae Zone testified that DeAngelo Carroll - an unavailable witness
22 whom everybody described, in effect, as a "fount of unreliable information," -
23 made the out-of-court statement prior to the murder that Petitioner "wanted
24 someone dealt with." Apparently, this was double hearsay, since the statement did
25 not from Petitioner to Carroll to Zone, but from Petitioner to Mr. H. to Carroll to
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28

1 Zone.

2
3 3. In the same conversation, Carroll told Zone that Petitioner had spoken
4 about baseball bats and trash bags. However, no baseball bats and trash bags
5 were ever discovered or seized. There is no evidence that ties any bat or any bag
6 to the murder of Hadland. Again, the best that can be said about this evidence is if
7 Petitioner made suggestions on how to kill Hadland and dispose of the body, his
8 suggestions were rejected out of hand, well before Counts murdered Hadland.
9

10
11 4. While Carroll and Counts were driving to Lake Mead, where Counts
12 murdered Hadland, Petitioner called Carroll. However, since Carroll and
13 Petitioner both worked at the Palomino Club, the subject of the call was Petitioner
14 telling Carroll to come back to work. There is no evidence that they discussed -
15 whether directly or "in code" - the "murder to be" of Counts during that
16 conversation.
17

18
19 5. After the murder, the State argued that a portion of the intercepted tape,
20 the tape between Detective McGrath and Carroll, had Carroll's claim of Petitioner
21 saying something to the effect of, "I told you to take care of T.J." While the issue
22 of whether Petitioner actually said that is highly controverted, the fact remains:
23 What does "take care of T.J." mean? The statement is ambiguous, at best.
24

25
26 6. Prior to the point in time when Counts murdered Hadland, Carroll told
27
28

1 Zone that Little Lou had told him that Mr. H. wanted a “snitch” killed. Again, that
2 triple hearsay begs the question: What did “Little Lou” do in that regard? And, for
3 that matter, what did Hadland do to merit the label of a “snitch”? About whom did
4 Hadland “tattle”? The evidence is less than clear in that regard as well!

5
6 That’s it. That’s all. Nobody could credibly call the “murder” evidence
7 against “Little Lou” to be overwhelming. Underwhelming, or precious thin,
8 would be more like it.
9

10
11 Where counsel’s performance is found to be below the standard of
12 reasonably effective counsel, the question of whether or not the *habeas* Petitioner
13 has established prejudice depends on how strong the State’s case against him is.
14 See: Wilson v. Henry, 185 F. 3d 986, 989 (9th Cir. 1999); Foster v. Ward, 182 F.
15 3d 1177, 1184-85 (10th Cir. 1999). On this record, quite frankly, the most minor
16 of ineffectiveness should be enough to cause the petition to be granted and either
17 this case to be retried again or for the Petitioner to be freed.
18
19

20
21 In this case, however, the five grounds asserted as theories for relief are not
22 trivial. We agree with the State that in a typical post-conviction *habeas* case
23 where the complaint is about counsel objecting or not, calling witnesses or not,
24 and developing theories of defense or not, there is a strong presumption of
25 effectiveness, to where if a trial counsel can state or even create any credible -
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1 sounding theory of strategy, the State will win. That is, those kind of attacks,
2 although not impossible to prevail upon, are very difficult to prove.
3

4 But this case is different. This case is about jury instructions that were not
5 tendered on what was the theory of the case (or clearly related thereto); critical
6 jury instructions that were not objected to on specific grounds; and motions that
7 were not made.
8

9 Ground I alleges ineffective counsel, or the failure to seek a jury instruction
10 per Moore v. State, 117 Nev. 659, 662-63, 27 P.3d 447, 450 (2001), directing the
11 jury not to find the existence of the deadly weapon enhancement of NRS 193.165
12 if the jury were to find the defendant guilty of second degree murder on a
13 conspiracy theory. Alternatively, because the jury in fact found the defendant
14 guilty of murder on a conspiracy theory and returned the finding of a deadly
15 weapon, counsel was ineffective in not filing a motion on this point per NRS
16 175.381(2).
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21 Ground II alleges that counsel was ineffective in not objecting to Instruction
22 no. 40, not only on the asserted ground that proof of the conspiracy could be made
23 by slight evidence before the jury was to determine the out-of-court statements of
24 the defendant, but also that the instruction failed to advise the jury that there had
25 to be evidence of the defendant's participation in the conspiracy independent of
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1 his statements before the jury could consider the statements; and the jury had to
2 determine that the statements were reliable before they could consider them.

3
4 Ground III charges ineffective assistance of counsel by reason of failure to
5 object to Jury Instructions Nos. 19, 20 and 22, and failure to tender instructions
6 consistent with People v. Prettyman, (1996), 58 Cal. Rptr.2d 827 (Cal. 1996),
7 Rose v. State, 127 Nev. Ad. Op. 43, 255 P.3d 291, 297-98 (2011) and Ramirez v.
8 State, 126 Nev. Ad. Op. 22, 235 P.3d 619, 622-23 (2010), thus lowering the state's
9 burden of proof of guilt beyond a reasonable doubt and making it far easier for the
10 state to obtain a second degree murder conviction than otherwise should have
11 been.
12

13
14
15 Ground IV charges ineffective assistance of counsel, in the failure to seek a
16 severance of his trial during the trial with the co-defendant, Luis Hidalgo, Jr., in
17 order to obtain the admissibility of the prior testimony of Jayson Taoipu.
18

19 And Ground V charges ineffective assistance of counsel, by reason of
20 failure to file a motion to sever the trials of Counts I and II, the charges highly
21 disputed in this case, from Counts III and IV, the charges that really are not
22 disputed at all.
23

24
25 In short, this Petition really is legalistic in nature. When the subject at hand
26 concerns objecting to instructions that define the crime or tendering instructions
27

1 that refine the theory of the case, or failing to tender objections to instructions that
2 make it easier for the state to obtain a judgment of conviction than otherwise, there
3 isn't a whole lot that trial counsel can really say. That is likewise true for the
4 failure to file motions.
5

6
7 If we are correct in our legal analysis, as we most certainly believe we are,
8 then it follows that the failure to object to erroneous instructions, and/or the failure
9 to tender accurate instructions, either or both of which make the State's job in
10 obtaining a conviction easier than it should be, as a matter of law cannot be
11 attributed to a reasonable strategy. As noted by the Ninth Circuit in Lankford v.
12 Arave, 468 F.3d 578 (9th Cir. 2006), the point of Strickland v. Washington, 466
13 U.S. 668 (1984) is that an attorney has a duty to bring to bear such skill and
14 knowledge as will render the trial a *reliable adversarial testing process*.
15

16
17 Lankford, 468 F.3d at 583 citing Strickland, 446 U.S. at 688. Failing to object to
18 an erroneous jury instruction, or tendering an erroneous jury instruction that makes
19 the state's job easier in obtaining a conviction, cannot be considered to be a
20 "strategic decision" to forego one defense in favor of another; rather, that action
21 results from an misunderstanding of the law. Lankford, 468 F.3d at 584, citing
22 United States v. Span, 75 F.3d 1383, 1390 (9th Cir. 1996). When counsel does not
23 object to or invites a jury instruction that misstates state law and makes it easier
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1 for the jury to convict his client, counsel unwittingly undermines the very
2 “adversarial testing process” he is supposed to protect. Lankford, 468 F.3d at 585.
3
4 And that is so, even where counsel is shown otherwise to be dutiful and
5 conscientious. (Id.) Certainly, Messers Arrascada and Adams were most dutiful
6 and conscientious in representing Petitioner; but we are all human, and this is the
7 kind of case where one slip-up from an otherwise effective advocate can be the
8 fatal cause of a miscarriage of justice.
9

10
11 Typically, when the charge is that counsel failed to object to an erroneous
12 jury instruction that makes it easier for the State to obtain a conviction, counsel’s
13 response would be: Had he been aware of the unconstitutional nature of the
14 instruction, he would have lodged an objection to it. Such a response does not
15 meet the state’s burden in establishing effective assistance of counsel. See: Cox v.
16 Donnelly, 432 F.3d 388, 390 (2d. Cir. 2005) [*habeas* mandated].
17
18

19 As noted in Everett v. Beard, 290 F.3d 500, 509-15 (3d. Cir. 2002), *cert*
20 *denied*, 537 U.S. 1107 (2003), wherein the Third Circuit held that trial counsel
21 was prejudicially ineffective in failing to object to a jury instruction that permitted
22 a first degree murder conviction without proof of an intent to kill, the state of law
23 is central to an evaluation of counsel’s performance at trial. A reasonably
24 competent attorney patently is required to know the state’s applicable law, so the
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1 parties' focus upon the state of law at the time of the defendant's trial is not
2 misplaced. Everett, 290 F.3d at 509.

3
4 Further, counsel's status as a reasonably competent attorney is not strictly
5 confined to the law as enunciated by the decisions of the jurisdiction's highest
6 court. More is expected from a reasonably competent attorney, especially one in a
7 major criminal case, than merely to parrot supreme court cases. A law student can
8 do as much. Instead, a reasonably competent attorney will have reason to rely on
9 authority, especially favorable authority, even if it had not yet been enunciated by
10 the state's supreme court or even by the United States Supreme Court. Everett,
11 290 F.3d at 513. Accord: Gray v. Lynn, 6 F.3d 265, 268-69 (5th Cir. 1993) [failing
12 to object to an erroneous instruction defining the crime cannot be considered to be
13 within the wide range of professional competence].

14
15 The same principles apply to a jury instruction that sets forth a theory of the
16 case based upon the defense's presentation of evidence. Counsel is ineffective in
17 not presenting an accurate theory of the case instruction when he presents such
18 evidence. See: Pirtle v. Morgan, 313 F.3d 1160, 1169 (9th Cir. 2002), *cert denied*,
19 539 U.S. 916 (2003), citing United States v. Span, *supra*. The issue ultimately is
20 whether the jury had a legal framework in which to place the exculpatory
21 testimony. Pirtle, 313 F.3d at 1171, and cases cited therein. Ineffectiveness in this
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1 context does not mean that effective counsel certainly would have secured an
2 acquittal. 313 F.3d at 1169. Rather, it means that counsel would have caused
3 proper, correct statements of the law to be given as jury instructions, such that
4 there is a reasonable probability that the jury, following the correct instructions,
5 would have acquitted. (Id.)
6

7
8 The same principles also hold true for instructions that would have to clarify
9 findings that the jury would have to make to in order to convict. Luchenburg v.
10 Smith, 79 F.3d 388, 392-93 (4th Cir. 1996) [affirming grant of *habeas*]. As noted
11 by the Fourth Circuit, if trial counsel's response is that he thought the instruction
12 given accurately stated the law, when in fact it did not, then he has not made a
13 "reasonable tactical choice." Failure to become informed of the governing law
14 affecting his client cannot be considered a "reasonable strategy." Luchenburg, 79
15 F.3d at 392-93. When an instruction does not clarify for the jury the
16 circumstances under which it may find the defendant guilty or not guilty, and the
17 circumstances by which a reasonably jury could find the defendant not guilty are
18 at issue, the instructions render his trial fundamentally unfair, and trial counsel's
19 failure to object is constitutionally deficient. Luchenburg, Id.
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25 The same type of analysis goes towards failing to file a meritorious pre-trial
26 or during - trial motion. Where a favorable plea bargain that would cause a
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1 reasonable defendant to forebear filing such a motion is not on the table, there
2 certainly is no downside to filing such a motion. In that instance, there cannot be
3 a “strategy” that could be deemed “reasonable” to justify the failure to file such a
4 motion. As noted by the Seventh Circuit in Gentry v. Sevier, 597 F.3d 838 (7th
5 Cir. 2010), wherein in the Seventh Circuit held that counsel was prejudicially
6 ineffective by virtue of failing to file a meritorious motion to suppress pre-trial,
7 while second - guessing strategic decisions in hindsight generally is not a
8 meritorious basis to find an effective assistance of counsel, a decision not to seek
9 suppression of material evidence based on a violation of the defendant’s Fourth
10 Amendment Rights is beyond the pale of objectively reasonable strategy. There
11 cannot be a strategic benefit in that instance that would accord to the defendant by
12 reason of his trial counsel’s failure to seek suppression of the evidence. Gentry,
13 597 F.3d at 851-52.

14 All of these basic principles inform how the Court should exercise its
15 discretion in this proceeding, especially on a record like this where the evidence
16 against this defendant in support of the murder charge is so underwhelming and
17 precious - thin.

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25 **PETITIONER IS ENTITLED TO RELIEF ON GROUND I**

26 Very frankly, it is so patently obvious per Moore that this defendant, having
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1 been convicted of second degree murder on the “conspiracy theory” of Bolden v.
2 State, 121 Nev. 908, 124 P.3d 191 (2005), cannot suffer a sentencing deadly
3 weapon enhancement per NRS 193.165, that this Court could reach this issue not
4 under the guise of ineffective assistance of counsel, but under the guise of illegal
5 sentence per NRS 176.555, whereby the Court may correct an illegal sentence at
6 any time when the sentence is illegal on its face. See: Edwards v. State, 112 Nev.
7 704, 918 P.2d 321 (1996). Here, the State has argued about everything
8 imaginable -- except for the proposition that Moore does not apply. It does.

9
10
11 Not only has Moore never been overruled, in fact it is consistent with
12 Brooks v. State, 124 Nev. 203, 180 P.3d 657 (2008). A jury must be instructed
13 that an unarmed offender cannot “use” a deadly weapon, necessary for the
14 enhancement, when another offender fires the gunshot, if the unarmed offender
15 doesn’t have knowledge that the co-offender has fired the gun and did not use the
16 fact of the gunshot to further his own criminal objective. Brooks, 124 Nev. at 206-
17 10, 180 P. 3d at 659-62.

18
19 In Nevada a district court cannot impose a deadly weapon enhancement per
20 NRS 193.165 based upon the defendant’s participation in a conspiracy - especially
21 here, a conspiracy to commit a battery. NRS 193.165 applies only where a deadly
22 weapon is used in conscious furtherance of a criminal objective. Buschauer v.

1 State, 106 Nev. 890, 895-96, 804 P.2d 1048, 1049-50 (1990) [deadly weapon
2 enhancement inapplicable to involuntary manslaughter]. If the criminal objective,
3 as the jury found viz. Count I, is to engage in a battery causing substantial bodily
4 harm, and if the conspiracy is completed upon the making of an agreement to that
5 end, a deadly weapon as a matter of law cannot be used in conscious furtherance
6 of that objective. That is the upshot of Moore, and it applies fully to this situation.
7
8 The deadly weapon enhancement has to go. We invite the State to so stipulate.
9
10

11 Otherwise, to the extent that the Court will reach the merits of this ground
12 only in the guise of ineffective assistance of counsel, we note as follows:
13

14 The jury is the one that must make a finding as to the defendant's use of a
15 deadly weapon in order for the court to impose the enhancement. Even where it is
16 obvious in retrospect that the defendant used a deadly weapon in furtherance of
17 the charged crime, the court cannot make that determination; only the jury can do
18 that. Stroup v. State, 110 Nev. 525, 527-28, 874 P.2d 769, 771 (1994). Accord:
19 Apprendi v. New Jersey, 530 U.S. 466 (2000).
20
21

22 That being so, the defendant has the constitutional right to have the jury
23 decide each and every element of a charged offense beyond a reasonable doubt.
24 Carella v. California, 491 U.S. 263, 265-66 (1989), and cases cited therein. And
25 the instructions in that regard must be accurate. Ho v. Carey, 332 F.3d 587, 592-
26
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1 93 (9th Cir. 2003), citing United States v. Gaudin, 515 U.S. 506 (1995). The same
2 principles apply to a penalty verdict. An improper jury instruction setting forth the
3 findings upon which the jury may impose the appropriate penalty is a federal
4 constitutional violation. See: Mollet v. Mullin, 348 F.3d 902, 910-16 (10th Cir.
5 2003), and cases cited therein.
6
7

8 Accordingly, counsel had the duty to propose a jury instruction that said: "If
9 you should find the defendant guilty on Count II on a conspiracy theory, you must not
10 find the deadly weapon enhancement." Had counsel done so, a reasonable jury
11 certainly would not have found the deadly weapon enhancement to apply in this
12 case. Counsel was prejudicially ineffective in failing to propose such a simple
13 instruction.
14
15

16 The State argues that counsel saved his error by filing an NRS 175.382(2)
17 motion for judgment of acquittal. Counsel did that, but did not argue therein a
18 lack of a Moore instruction or a Moore violation. A theory of ineffective
19 assistance of counsel can be based upon the filing of a motion but on the wrong
20 theory. See: Hernandez v. Cowan, 200 F.3d 995, 999-1000 (7th Cir. 2000)
21 [counsel was ineffective in filing a severance motion, but on the wrong theory,
22 ignoring a meritorious theory of severance which would have been apparent to
23 counsel from a prior suppression motion hearing].
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1 But again, we invite the State, in the name of basic justice, to stipulate to the
2 inapplicability of the deadly weapon enhancement in this case and to enter an
3 amended judgment of conviction that strikes the deadly weapon enhancement
4 sentence relative to the original judgment of conviction. That would be the right
5 thing to do.
6
7

8 **DEFENDANT IS ENTITLED TO RELIEF ON GROUND II**
9

10 Ground II is interesting for this reason: When one reads McDowell v. State,
11 103 Nev. 527, 529, 746 P.2d 149, 150 (1989), and when one reads the Appellant's
12 Opening Brief, Exhibit 5 to the State's Response, one sees that the attack made to
13 Instruction No. 40 is the State's ability, in having the jury consider out-of-court
14 statements by unavailable co-conspirators, to prove the existence of the conspiracy
15 by "slight evidence," mixing the preliminary standard for admissibility versus the
16 standard of proof of beyond a reasonable doubt at trial. The specific argument
17 made, both to this Court at time of trial and to the Nevada Supreme Court, was
18 that the Fifth and Sixth Amendment to the Federal Constitution cannot
19 countenance a jury's consideration of such evidence on a "slight evidence"
20 standard. (See: Exhibit 5 at pp. 16-27) In fact, counsel "conceded" that proof of
21 the conspiracy could be based upon actions and statements of all of the alleged
22 participants - which, inferentially, would include the actions and statements of the
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1 defendant on trial. (See: Exhibit 5 at 23)

2 Here is one irony of this case: In retrospect, and with all due respect,
3
4 counsel was correct in their specific attack on Instruction No. 40.

5 Notwithstanding the Order of Affirmance herein, respectfully, McDowell is
6
7 indeed erroneously decided based upon law that has developed between 1987 and
8 the time of trial. Further, McDowell is inconsistent with United States v. Tracy,
9
10 12 F.3d 1186, 1199 (2d. Cir. 1993) and United States v. Ammar, 714 F.2d 238,
11 249 (3d Cir. 1983).

12 But Ground II concerns an additional attack on Instruction no. 40 that
13
14 should have been but was not made: Based upon the cases cited at p. 24 of the
15 Supplemental Petition¹, the jury should have been advised that out-of-court
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17 statements made by co-conspirators may not be considered against the Defendant
18 at all, if the statements themselves are the only evidence of the Defendant's
19 participation in the conspiracy. I.e., counsel's "concession" at page 23 of the
20 Opening Brief never should have been made. Further, based upon the many cases
21
22 cited at pp. 21-22, the jury should have been advised, as a matter of the Sixth
23

24
25 ¹United States v. Padilla, 203 F.3d 156, 161 (2d Cir. 2000); United States v.
26 Clark, 18 F.3d 1337, 1341-42 (6th Cir.), *cert denied*, 513 U.S. 852 (1994); United
27 States v. Gordon, 844 F.2d 1397, 1402 (9th Cir. 1998) and United States v. Tracy,
28 *supra*.

1 Amendment's Confrontation Clause, not to consider the out-of-court statements if
2 the jury were not to find them to be inherently reliable.
3

4 For all the State has said in its Response, it hasn't proven that we are wrong
5 on the law. That is because we aren't. The State has argued that those principles
6 of law come from cases where there was overwhelming evidence of actions of the
7 defendant in those cases, such as to make the out-of-court statements inherently
8 reliable. But as we have seen, that simply is not our case!
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10

11 If the jury had been correctly instructed, it would not have considered any
12 statement made by any co-conspirator - including the Petitioner - unless and until
13 it found it to be reliable; but between the fact that there is no independent
14 corroborating evidence that "Little Lou" did anything in furtherance of the so-
15 called conspiracy, and with the overwhelming evidence that Carroll is an
16 unreliable source of information per se, and with Carroll's "contextual" statement
17 that "Little Lou" wasn't involved in the murder at all, a reasonable jury would not
18 have considered the out-of-court statements upon which this prosecution was
19 based at all. And without consideration of the statements, there simply was no
20 evidence to link "Little Lou" to any conspiracy, charged or otherwise.
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25 The State argues that counsel argued the points contained in Ground II to
26 the court below and the Nevada Supreme Court. Not only did he not do so, but if
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1 the Court were to agree with that incorrect argument, and if counsel were to
2 contain the within arguments in federal *habeas* in the body of what counsel did
3 argue, we can guarantee this Honorable Court that the Attorney General in that
4 hypothetical instance otherwise would move to dismiss such a hypothetical ground
5 on the basis that it was not exhausted. For a federal issue to be presented by citing
6 to a state case that does not in and of itself resolve the federal issue at hand is
7 improper. The state case does not fairly present or exhaust the claim. Casey v.
8 Moore, 386 F.3d 896, 912 n. 13 (9th Cir. 2004), *cert denied*, 545 U.S. 1146 (2005).
9 McDowell does not address the specific challenge to Instruction No. 40 being
10 made here, and neither did trial or appellate counsel. We appreciate the Clark
11 County District Attorney's efforts in attempting to hamstring the Nevada Attorney
12 General on down the road; but the better course would be to reach the merits of
13 Ground II now, and rule in favor of the Petitioner so that the federal courts do not
14 ever see this case!

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21 **PETITIONER IS ENTITLED TO RELIEF ON GROUND III**

22 Ground III is an amalgam of jury instruction theories: Counsel should have
23 objected to Instructions Nos. 19, 20 and 22, rather than "craft them" as they did;
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1 counsel should have proposed a “Prettyman” instruction²; and counsel should have
2 tendered a Rose and Ramirez instruction³ regarding the requirement of proof of an
3 immediate and direct causal relationship between the felonious actions of the
4 defendant and the victim’s death.
5

6
7 Addressing Instructions Nos. 19, 20 and 22 first, the State’s response is
8 simple: Per Hancock v. State, 80 Nev. 581, 583, 397 P.2d 181, 182 (1964) and
9 Poole v. State, 97 Nev. 175, 178-79, 625 P.2d 1163, 1165 (1981), second degree
10 murder is a general intent offense; therefore, the fact that Instructions Nos. 19 and
11 22 stated that murder in the second degree may be a general intent crime or can
12 be a general intent crime did not prejudice the Petitioner, but if anything helped
13 him in creating an aura of ambiguity.
14
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16
17 Hancock and Poole actually hold that second degree murder is not a specific
18 intent offense, meaning, to return a guilty verdict a jury need not find a specific
19 intent to kill. The vice of that holding would be the thought: “If second degree
20 murder is not a specific intent crime, then it must be a general intent crime. End of
21 story.”
22
23

24 ²People v. Prettyman, (1996) 14 Cal. 4th 248, 58 Cal. Rptr.2d 827, 926 P.2d
25 1013.

26 ³Rose v. State, 127 Nev. Ad. Op. 43, 255 P.3d 291, 297-98 (2011); Ramirez
27 v. State, 126 Nev. Ad. Op. 22, 235 P.3d 619, 622-23 (2010).

1 No - beginning of story. What the State overlooks and what Instructions
2 Nos. 19, 20 and 22 leave out is that murder in either degree requires proof of
3 malice. Per the basic definitions of NRS 200.010, 200.020(2) and 200.030(2),
4 second degree murder requires proof of implied malice. That means the proof
5 must establish either that no considerable provocation appears, or that all
6 circumstances of the killing establish an abandoned and malignant heart.
7

8
9 But Instructions no. 19 and 22 say nothing regarding proof of malice. They
10 simply allow a second degree murder conviction on the “possibility” of a finding
11 of general intent. I.e., per those instructions, if Petitioner joined a conspiracy to
12 commit a non-lethal battery on Hadland, and Hadland died in a manner
13 foreseeable to any of the co-conspirators, and petitioner knew the wrongfulness of
14 his agreement to commit a non-lethal battery, the *mens rea* of second degree
15 murder based on a conspiracy theory would be proven. That is the point of
16 Ground III: That theory of law is wrong. It allows a conviction for second degree
17 murder without proof of malice.
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22 Second degree murder really is defined the same way throughout the
23 country. The “general intent” of second degree murder, consistent with malice, is
24 that a defendant intend to commit an act with knowledge that his acts create a
25 strong probability of death or great bodily harm to the victim. State v. Carrasco,
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1 172 P.3d 611, 613 (N.M. App. 2007). That is, where the evidence does not
2 support a finding either of an intent to kill, an intent to inflict great bodily harm or
3 an act with willful and wanton disregard for the lethal consequence of the act,
4 resulting in the death of the victim, generally the result is a conviction of
5 manslaughter but not second degree murder. See: People v. Langworthy, 331
6 N.W.2d 171, 178-80 (Mich. 1982). The essential distinction between second
7 degree murder based on implied malice and involuntary manslaughter is the
8 subjective versus the objective criteria to evaluate the defendant's state of mind. If
9 the defendant commits an act which endangers human life, but the defendant does
10 not realize the risk involved, he is guilty of manslaughter. However, if he realizes
11 the risk and acts in total disregard of the danger, he is guilty of murder based on
12 implied malice. People v. Cleaves, 280 Cal. Rptr. 146, 153 (Cal. App. 1991), and
13 cases cited therein.

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19 Nowhere in Instructions Nos. 19 or 22 was the jury told this. And that fact
20 makes this case indistinguishable from Ho v. Carey, 332 F.3d 587, 592 (9th Cir.
21 2003) citing People v. Zerillo, 223 P.2d 223, 229-30 (1950). There, the Ninth
22 Circuit mandated *habeas* in a second degree murder conviction, where the jury
23 instruction advised that a defendant could be found guilty based on general intent,
24 without fully and accurately describing the concept of implied malice. Since the
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1 jury was not instructed on an essential element of the offense accurately, such
2 constituted a constitutional violation. Ho, 332 F.3d at 592-93, citing United States
3 v. Gaudin, 515 U.S. 506 (1995).

4
5 The State would reply (if it were permitted to do so) that here, the jury was
6 instructed on implied malice in other instructions, so the error, if any, was cured.
7 That argument, when made, holds no water.
8

9 In Culverson v. State, 106 Nev. 484, 488, 797 P.2d 238, 240 (1990), the
10 Nevada Supreme Court reversed a murder conviction, based upon inconsistent jury
11 instructions on self-defense. Obviously, one of them was wrong; another was
12 correct. In reversing, the Court noted that it could not rely on other jury
13 instructions given which, taken with the challenged defective instruction, served
14 to create an ambiguity. A juror should not expected to be a legal expert. Jury
15 instructions should be clear and unambiguous.
16
17

18 It would have been simple in Instructions Nos. 19 and 22 to ensure that the
19 jury refer back to the implied malice instruction(s) and insist that the jury find
20 malice before returning a verdict to a second degree murder. In Instructions Nos.
21 19 and 22, however, all the jury had to do is find a general intent to commit a
22 battery, without finding implied malice. These instructions were as defective as
23 the instruction in Ho, which caused the Ninth Circuit to mandate *habeas*. The
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1 same result should attend here.

2 But to the extent that more need be said, we say this:

3
4 Based upon Rose and Ramirez, there is no question but that it is not enough,
5 for one to be convicted of second degree murder based on a theory nowhere
6 contained in the Nevada Revised Statutes, to say that the defendant's acts must
7 have the natural and probable consequence of death of the victim. While that is
8 required, what is also required is an immediate and direct causal relationship
9 between the defendant's illegal act and the death of the victim. Had that
10 instruction been given, no reasonable jury would have convicted Petitioner on this
11 evidence. There simply is no evidence of anything that "Little Lou" did that
12 immediately and directly caused the death of Mr. Hadland. Rather, the
13 overwhelming evidence is that Counts (and Carroll) acted as he (they) did,
14 completely and totally independently of "Little Lou."
15

16 The State argues that since Rose and Ramirez post-date this 2009 trial,
17 counsel cannot be deemed prejudicially ineffective for failing to present such a
18 jury instruction. The State overlooks two things:

19 First, Rose and Ramirez are not cases that "came out of the blue." Rather,
20 Rose is based on Labastida v. State, 115 Nev. 298, 986 P.2d 443 (1999), a case
21 that predates this trial *by ten years*.
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1 In Labastida, the Nevada Supreme Court reversed a second degree murder
2 conviction, where the defendant's underlying felony was child neglect, but the
3 murder of her child was done by the child's father completely outside of her
4 presence - just as Counts murdered Hadland completely outside of "Little Lou's"
5 presence.
6
7

8 The Nevada Supreme Court noted two things:

9
10 1) The fact that the defendant committed the felony of child neglect did not
11 establish the immediate and direct causal relationship between the illegal act and
12 the death of the child, where the child died as a result of the child's father's abuse
13 rather than as an immediate and direct consequence of the defendant's neglect.
14

15 Labastida, 115 Nev. at 305-07, 986 P.2d at 447-49.

16
17 2) To establish implied malice necessary for a second degree murder
18 conviction, the evidence must establish an affirmative act that harms the victim.
19 Labastida, 115 Nev. at 307-08, 986 P.2d at 449.
20

21 Here, call it a Labastida instruction if you must; but a Labastida instruction
22 certainly would have directed a reasonable jury to acquit the Petitioner of murder.
23 The "act" of "running off one's mouth to co-conspirators, who ignore that person"
24 simply cannot under any reasonable view be deemed as an "affirmative act that
25 harms the victim"; nor can it be deemed as "the immediate and direct causal
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1 relationship between the illegal act and the death of the victim.” To any
2 reasonable juror, the fact that the defendant’s words were *ignored* by the co-
3 conspirators broke the chain of “immediate and direct causal relationship,” with
4 the absence of evidence of any type of independent relationship between “Little
5 Lou” and Counts.
6

7
8 Secondly, the State’s argument overlooks Brooks v. State, *supra*. There, the
9 Nevada Supreme Court held that the defendant was entitled to an instruction
10 advising the jury that absent an agreement to cooperate in achieving a criminal
11 purpose, the mere knowledge of, acquiescence in, or approval of that purpose did
12 not establish the defendant’s participation in the criminal conspiracy. Brooks, 124
13 Nev. at 211, 180 P.3d at 662. Appropo to the case at bar, however, the Nevada
14 Supreme Court noted that a proposed instruction on the theory of the case that is a
15 rewording of an element of the offense may not be refused because the legal
16 principle it espouses may be inferred from other instructions. Brooks, 124 Nev. at
17 211, n. 31, 180 P.3d at 662, n. 31, and cases cited therein.
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22 That is, it simply will not do to say that the jury could have figured out the
23 “immediate and direct causal relationship” requirement as an inference from other
24 instructions. Clearly, counsel’s theory at trial was that Petitioner did not engage in
25 a criminal conspiracy that, insofar as he knew and intended, had the death of T.J.
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1 Hadland as its reasonable and natural consequence. A Rose/Ramirez instruction
2 or, if you prefer, a Labastida instruction, not only would have brought the point
3 home perfectly, but would have stated accurately the third requirement of the
4 judge - made rule of felony second degree murder.
5

6
7 While the Court could grant relief on this ground based on the above, for
8 purposes of completeness, we add this:

9 A Prettyman instruction would have caused the jury to surmise: If "Little
10 Lou" entered into a conspiracy, what did he conspire to do? With whom did he
11 conspire? What precisely did he agree to? If his words "you should have taken
12 care of T.J." mean he agreed to join a conspiracy to batter, how was the battery in
13 the four corners of "Little Lou's" mind supposed to be accomplished? Shoot
14 Hadland in his foot? Beat him upside the head with a tire iron? Slap him in his
15 face? What did "Little Lou" specifically agree to do? A Prettyman instruction
16 would have caused the jury more carefully to assess the evidence and to conclude,
17 "We cannot conclude from this evidence that "Little Lou" specifically agreed to
18 any specific form of battery on the person of Hadland." If the jury were to so
19 conclude, then it could not conclude an agreement to commit battery with a deadly
20 weapon, or battery with intent to cause substantial bodily harm, necessary to serve
21 as the predicate of second degree murder, per Bolden. That is why the absence of
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1 a Prettyman instruction is so fatal to this case.

2
3 Interestingly, the Nevada Supreme court set up this sub issue in Footnote 2
4 of its Order of Affirmance of June 27, 2012 relative to Mr. H's appeal. They noted
5 the Defendants' "participation" in the verdict form that did not differentiate
6 between battery with a deadly weapon and battery causing substantial bodily
7 harm. Here, we say that Petitioner's "participation" in this regard was through his
8 prejudicially ineffective counsel. That is, this sub issue can no longer be shuffled
9 off to a footnote!
10
11

12 **PETITIONER ULTIMATELY IS ENTITLED TO RELIEF ON**
13 **GROUND IV, BUT PROBABLY NOT FROM THIS COURT**

14 While it is tempting simply to say "submitted on the briefs," we cannot do
15 that because of the federal *habeas corpus* implication of this ground.
16

17 As noted at pp. 33-37 of the Appellant's Reply Brief on direct appeal, the
18 reason this Court would not allow Taoipu's former testimony to be admitted under
19 NRS 51.325 at trial was "because it opens the door to other statements that Jayson
20 Taoipu made in his trial testimony that indicate that Little Lou was involved and
21 gave the order" and because "it would be prejudicial to Mr. H."
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24 We seriously question whether, had Mr. Gentile not objected on behalf of
25 Mr. H., the court's ruling would have been the same way. The remaining prong of
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1 the court's ruling was essentially fencing with Mr. Arrascada and Mr. Adams, in
2 effect indicating that if the trial court were the trial lawyer, she would not have
3 wanted this testimony admitted. As pointed out in the Supplemental Petition, that
4 ruling by itself cannot be reconciled with Rhyne v. State, 118 Nev. 1, 7-9, 38 P.3d
5 163, 167-68 (2002).
6

7
8 This is particularly the case in light of the fact that, after the trial court
9 pointed out to Mr. Arrascada and Mr. Adams that the balance of Taoipu's
10 testimony could be admitted, they indicated they did not object to the admission of
11 other relevant portions of Taoipu's prior testimony.
12

13
14 We agree fully with Mr. Arrascada and Mr. Adams that the second prong of
15 NRS 51.325 was met here or substantially met here. The issue of who actually
16 made the statement "bring the bats and bags" was relevant in both Counts' trial
17 and in this trial; the only difference is that it was critical in this trial, whereas it
18 was not quite so critical in Counts' trial.
19

20
21 Accordingly, the reality is that the real reason this Honorable Court would
22 not admit Taoipu's former cross-examined testimony is because the same would
23 violate Mr. H.'s Sixth Amendment Rights to confrontation. That being so, a
24 severance of the trials was the answer to the problem. It would have been very
25 easy to continue with the trial; have the jury only deliberate on Mr. H. first; then
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1 present Taoipu's out-of-court testimony; and then submit the cause to the jury to
2 deliberate on "Little Lou's" guilt.
3

4 If "Little Lou" did not make the "bring the bats and bags" statement, then
5 the evidence in this case has transformed from "precious thin" to "microscopically
6 thin." When the evidence is that thin, a finding of prejudice necessarily follows.
7

8 However, Petitioner acknowledges: The Nevada Supreme Court ruled
9 against Petitioner at p. 7 of the June 21, 2012 Order of Affirmance; that the
10 Nevada Supreme Court can affirm on a basis not considered by the district court;
11 and that the Nevada Supreme Court's ruling is the law of the case. But we cannot
12 abandon Ground IV for a basic reason: In terms of admissibility of Taoipu's
13 testimony from the Counts trial, we think Mr. Arrascada was right based on how
14 Fed. R. Evid. Rule 804(b)(1)(B) has been interpreted in criminal cases. Since
15 Taoipu was the State's witness in the Counts trial, his motive for testifying would
16 not have changed had he been a live witness in this case. The question is whether
17 Taoipu's testimony had "sufficient indicia of reliability" to be admitted, not
18 whether it was critical or important to the State's case against Counts. See: United
19 States v. Mohawk, 20 F.3d 1480, 1488 (9th Cir. 1994).
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25 But that said, we acknowledge: We will have to save it for federal court,
26 unless the Nevada Supreme Court reverses itself. Hopefully, we will never get
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1 there!

2 **PETITIONER IS ENTITLED TO RELIEF ON GROUND V**

3
4 The parties agree on one thing, which focuses the Court's analysis: If Little
5 Lou's trials on Counts I and II had been severed from III and IV, and if the trial on
6 Counts I and II had gone first, would his activities in soliciting the murder of the
7 witnesses after the fact of the murder have been admissible to show that he
8 committed a premeditated and/or deliberated murder prior to his solicitation?
9
10 Would that evidence be relevant to motive?
11

12 The State response: "Of course it would have." Petitioner's response: "Of
13 course it would not have." And the reason Petitioner is correct is because the
14 Court necessarily has to ask the question: "Relevant to motive to do what?"
15

16 Motive is the impetus that supplies the reason for a person to commit a
17 criminal act. United States v. Benton, 637 F.2d 1052, 1056-57 (5th Cir. 1981).
18 Evidence of other crimes may be admitted to show that the defendant had a reason
19 to commit the act charged, and from this motive, it may be inferred that the
20 defendant did commit the act charged. See: United States v. Holley, 23 F.3d 902,
21 912-13 (5th Cir. 1994).
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25 That leads to the first problem: Events occurring after the charged crime do
26 not, beyond propensity evidence, explain why the defendant committed the
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1 offense, unless it explains the desire to hide the charged offense. See: Richmond
2 v. State, 118 Nev. 924, 932-33, 59 P.3d 1249, 1255 (2002).

3
4 Clearly, the fact that "Little Lou" [unsuccessfully] solicited the murder of
5 the witnesses, Zone and Taiopu, after the fact does not explain why he joined a
6 conspiracy to batter Hadland, with Hadland's murder resulting, before the fact.
7 The core issue is: Does it explain a desire to hide the charged offense?
8

9
10 And the State's problem in that regard is quite plain: Based upon the
11 intercepted statements between Anabel Espindola and DeAngelo Carroll,
12 Petitioner had nothing to do with the murder. Therefore, logically, Petitioner's
13 motive in soliciting the murder of the witnesses had to do with covering up his
14 father's crime!
15

16
17 Neither party has located a case to cite to the Court on whether an
18 uncharged act that post dates a charged act can be admitted on the issue of the
19 charge of defendant's motive to cover up someone else's criminal participation.
20 But logically, it makes no sense! If motive is supposed to be the impetus that
21 supplies the reason for the charged offender's criminal activity, then a motive to
22 cover up someone else's criminal activity is logically immaterial to the
23 proposition.
24
25

26 The Court can analyze the problem this way: For uncharged misconduct to
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1 be admissible, it not only must be relevant to one of the categories of NRS
2 48.045(2), but that “category” must also be a bona fide trial issue. If the latter
3 requirement is not met, the evidence is irrelevant and inadmissible. See:
4 Honkanen v. State, 105 Nev. 901, 902, 784 P.2d 981, 982 (1989); Rosky v. State,
5 121 Nev. 184, 197, 111 P.3d 690, 698 (2005). If “Little Lou” were facing trial
6 only on the charges of conspiracy and murder, his “motive” to cover up his
7 father’s participation in the murder would not have been relevant to any issue in
8 “Little Lou’s” murder trial. Therefore, the solicitation evidence would certainly
9 have been excluded as more prejudicial than probative.
10

11 The second problem with admitting the post-charge conduct of soliciting
12 murders of the witnesses attends to all cases wherein “motive” is the asserted
13 reason for admissibility. The “motive” in question has to be based on something
14 other than propensity evidence. In other words, we cannot say that the solicitation
15 evidence is relevant to Little Lou’s motive to murder Hadland, because he has a
16 propensity of seeking to kill people who get in his way. That theory makes the
17 evidence flatly inadmissible per Mortensen v. State, 115 Nev. 273, 281, 986 P.2d
18 1105, 1110 (1999).
19

20 And when evidence is admitted on that type of theory, the closer the
21 uncharged misconduct comes to the charged misconduct, the more prejudicial it
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1 becomes. Prior instances of the same crime are not admissible to establish motive,
2 because use of evidence is based on the forbidden inference that the defendant had
3 the propensity to respond to stimulus by committing the charged (and uncharged)
4 act(s). See: United States v. Varoudakis, 233 F.3d 113, 120 (1st Cir. 2000); United
5 States v. Utter, 97 F.3d 509, 514 (11th Cir. 1996). And See: United States v.
6 Oreira, 29 F.3d 185, 190 (5th Cir. 1994) [evidence that narcotics dog alerted on
7 deposit of cash did not prove defendant's "motive" in a structuring of currency
8 transaction to avoid reporting requirements].
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11

12 An example of the principle at hand is United States v. Brown, 880 F.3d
13 1012 (9th Cir. 1989). There the defendant was charged with first degree murder of
14 a postal employee and use of a firearm during the commission of a felony. The
15 defense was that the defendant lacked the specific intent required to commit first
16 degree murder. The prosecution introduced evidence that three months prior, the
17 defendant shot a gun into a woman's house. She was unrelated to the postal
18 employee, who was shot to death in his home. The prosecution also presented an
19 incident that seven years prior, the defendant used the same kind of gun to "strong
20 arm" a man, unrelated to the postal worker, to retrieve a different gun.
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25 The prosecution contended the two uncharged incidences were admissible
26 to rebut the defense's claim of lack of motive.
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1 In reversing the conviction, the Ninth Circuit noted that since motive is not
2 an element of the offense, the prior bad act evidence must show motive that is
3 relevant to establish Brown's specific intent to commit the charged murder.
4 Brown, 880 F.2d at 1014-15. There, the evidence established at most, the
5 defendant's propensity for violence, as the acts could not be linked as the reason
6 for killing the postal worker. (Id. at 1015) Therefore, the uncharged misconduct
7 was inadmissible.
8
9
10

11 Here, the conspiracy to batter was only as to Hadland, not as to Zone or
12 Taiopu. If "Little Lou" was not involved in that conspiracy, as he and Carroll
13 contend, then he had no motive to do harm either to Zone or to Taiopu. There was
14 no reason for "Little Lou" to get rid of witnesses for himself since "Little Lou" did
15 nothing to cause Hadland's death. At worst, the solicitation evidence established
16 Petitioner's propensity to "talk violent smack." But "talking violent smack," by
17 itself, cannot be the foundation of a murder prosecution, absent action evidencing
18 an intent to engage in violence. See: Childs v. State, 109 Nev. 1050, 1052, 864
19 P.2d 277, 278 (1993). By its verdict the jury overlooked this basic point. But the
20 most likely reason is they confused Petitioner's intent to do harm to Zone and
21 Taoipu with an intent to kill or do harm to Hadland. Had the trials been severed, a
22 reasonable jury would not have been so confused, and likely would have returned
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1 a not guilty verdict viz. Count II.

2 The bottom line is this: The subsequent solicitations of murder of Zone and
3
4 Taoipu really do not bear on the Defendant's motive or intent to murder Hadland,
5 other than to serve as propensity evidence or evidence relevant to "Mr. H" but
6 irrelevant to "Little Lou." Because it would have been inadmissible for that
7 purpose, the trials of Counts I and II should have been severed from Counts III
8 and IV. And because the evidence on Counts III and IV was overwhelming,
9
10 versus the evidence on Counts I and II which was underwhelming, Petitioner was
11 prejudiced by the lack of severance. If anything, this case serves as a better case
12 for severance of counts than did the famous case of Tabish v. State, 119 Nev. 293,
13
14 72 P.3d 584 (2003). Therefore, because trial counsel did not file a pre-trial
15 motion to sever the trial of the counts in question, he was prejudicially ineffective.
16
17

18 CONCLUSION

19 The Court should allow this case to go to evidentiary hearing on all
20 grounds except Ground IV, although it is difficult to imagine what trial counsel
21 will testify to other than "I didn't think of that."
22

23 But even though the Court cannot summarily grant *habeas* under NRS
24 34.724 et. seq., the Court truly could dispose of Ground I right now as an illegal
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26 ///

1 sentence, which the Court can correct right now under NRS 176.555. Again, in
2 the name of justice, we invite the Clark County District Attorney to so stipulate.
3

4 DATED this 5 day of September, 2014.

5 Respectfully submitted,

6
7 LAW OFFICES OF RICHARD F. CORNELL
8 150 Ridge Street, Second Floor
9 Reno, NV 89501

10 By: 
11 Richard F. Cornell
12 Attorney for Defendant/Petitioner
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LAW OFFICES OF RICHARD F. CORNELL, and that on this date I caused to be , deposited for mailing in the United States Mail a true and correct copy of the foregoing document, addressed to:

DATED this 5th day of September, 2014.

Marianne Tom-Kadlic
Marianne Tom-Kadlic
Legal Assistant to Richard F. Cornell

6

ORIGINAL

FILED IN OPEN COURT
EDWARD A. FRIEDLAND
CLERK OF THE COURT

JAN 26 2009

BY *Denise Husted*
DENISE HUSTED, DEPUTY

1 INFO
2 DAVID ROGER
3 Clark County District Attorney
4 Nevada Bar #002781
5 MARC DIGIACOMO
6 Chief Deputy District Attorney
7 Nevada Bar #006955
8 200 Lewis Avenue
9 Las Vegas, Nevada 89155-2212
10 (702) 671-2500
11 Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

9 THE STATE OF NEVADA,

10 Plaintiff,

11 -vs-

12 LUIS ALONSO HIDALGO, III,
13 #1849634

14 Defendant.

Case No: C212667
Dept No: XXI

FOURTH AMENDED
INFORMATION

15
16 STATE OF NEVADA }
17 COUNTY OF CLARK } ss.

18 DAVID ROGER, District Attorney within and for the County of Clark, State of
19 Nevada, in the name and by the authority of the State of Nevada, informs the Court:

20 That LUIS ALONSO HIDALGO, III, the Defendant above named, having committed
21 the crimes of CONSPIRACY TO COMMIT MURDER (Felony - NRS 200.010, 200.030,
22 193.165); MURDER WITH USE OF A DEADLY WEAPON (Felony - NRS 200.010,
23 200.030, 193.165), and SOLICITATION TO COMMIT MURDER (Felony - NRS
24 199.500), on or between May 19, 2005, and May 24, 2005, within the County of Clark,
25 State of Nevada, contrary to the form, force and effect of statutes in such cases made and
26 provided, and against the peace and dignity of the State of Nevada,

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1 COUNT 1 - CONSPIRACY TO COMMIT MURDER

2 Defendant LUIS ALONSO HIDALGO, III, along with co-conspirators KENNETH
3 JAY COUNTS, ANABEL ESPINDOLA, DEANGELO RESHAWN CARROLL and
4 JAYSON TAOIPU did, on or about May 19, 2005, then and there meet with each other
5 and/or Luis Hildago, Jr. and between themselves, and each of them with the other, wilfully,
6 unlawfully, and feloniously conspire and agree to commit a crime, to-wit: the murder of
7 TIMOTHY JAY HADLAND, and in furtherance of said conspiracy, the Defendants and/or
8 their co-conspirators, did commit the act as set forth in Count 2, said acts being incorporated
9 by this reference as though fully set forth herein.

10 COUNT 2 - MURDER WITH USE OF A DEADLY WEAPON

11 Defendant LUIS ALONSO HIDALGO, III, along with co-conspirators KENNETH
12 JAY COUNTS, ANABEL ESPINDOLA, DEANGELO RESHAWN CARROLL and
13 JAYSON TAOIPU did, on or about May 19, 2005, then and there wilfully, feloniously,
14 without authority of law, and with premeditation and deliberation, and with malice
15 aforethought, kill TIMOTHY JAY HADLAND, a human being, by shooting at and into the
16 body and/or head of said TIMOTHY JAY HADLAND, with a deadly weapon, to-wit: a
17 firearm, the Defendant being liable under one or more of the following theories of criminal
18 liability, to-wit: (1) by aiding and abetting the commission of the crime by, directly or
19 indirectly, counseling, encouraging, hiring, commanding, inducing or otherwise procuring
20 each other to commit the crime, to-wit: by DEFENDANT Luis Hidalgo, III and/or Luis
21 Hidalgo, Jr., procuring Defendant DEANGELO CARROLL to beat and/or kill TIMOTHY
22 JAY HADLAND; thereafter, Defendant DEANGELO CARROLL procuring KENNETH
23 COUNTS and/or JAYSON TAOIPU to shoot TIMOTHY HADLAND; thereafter, Defendant
24 DEANGELO CARROLL and KENNETH COUNTS and JAYSON TAOIPU did drive to the
25 location in the same vehicle; thereafter, Defendant DEANGELO CARROLL calling victim
26 TIMOTHY JAY HADLAND to the scene; thereafter, by KENNETH COUNTS shooting
27 TIMOTHY JAY HADLAND; and/or (2) by conspiring to commit the crime of battery
28 and/or battery with use of a deadly weapon and/or battery resulting in substantial bodily

1 harm and/or to kill TIMOTHY JAY HADLAND whereby each and every co-conspirator is
2 responsible for not only the specific crime intended, but also for the natural and foreseeable
3 general intent crimes of each and every co-conspirator during the course and in furtherance
4 of the conspiracy.

5 COUNT 3 - SOLICITATION TO COMMIT MURDER

6 Defendant LUIS ALONSO HIDALGO, III did, on or between May 23, 2005, and
7 May 24, 2005, then and there willfully, unlawfully, and feloniously counsel, hire, command
8 or other solicit another, to-wit: DEANGELO CARROLL, to commit the murder of
9 JAYSON TAOIPU; the defendant being liable under one or more theories of criminal
10 liability, to-wit: (1) by directly or indirectly committing the acts constituting the offense;
11 and/or (2) by aiding and abetting the commission of the crime by, directly or indirectly,
12 counseling, encouraging, hiring, commanding, inducing or otherwise procuring ANABEL
13 ESPINDOLA to commit the crime.

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1 COUNT 4 - SOLICITATION TO COMMIT MURDER

2 Defendant LUIS ALONSO HIDALGO, III did, on or between May 23, 2005, and
3 May 24, 2005, then and there willfully, unlawfully, and feloniously counsel, hire, command
4 or other solicit another to-wit: DEANGELO CARROLL, to commit the murder of
5 RONTAE ZONE; the defendant being liable under one or more theories of criminal liability,
6 to-wit: (1) by directly or indirectly committing the acts constituting the offense; and/or (2) by
7 aiding and abetting the commission of the crime by, directly or indirectly, counseling,
8 encouraging, hiring, commanding, inducing or otherwise procuring ANABEL ESPINDOLA
9 to commit the crime.

10
11
12 BY


13 MARC DIGIACOMO
14 CHIEF DEPUTY DISTRICT ATTORNEY
15 Nevada Bar #006955
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26 DA#05FB0052A/dd
27 LVMPD EV#0505193516
28 CONSP MURDER;MWDW - F
(TK7)

7

COPY

DISTRICT COURT
CLARK COUNTY, NEVADA

FILED

NOV 24 2009

Ann. J. Blum
CLERK OF COURT

STATE OF NEVADA,

Plaintiff,

vs.

LUIS ALONSO HIDALGO, aka

LUIS ALONSO HIDALGO, III, and

LUIS ALONSO HIDALGO, JR.,

Defendants.

CASE NO: C212667/C241394

DEPT NO: XXI

**Transcript of
Proceedings**

BEFORE THE HONORABLE VALERIE P. ADAIR, DISTRICT COURT JUDGE

JURY TRIAL - DAY 5

MONDAY, FEBRUARY 2, 2009

APPEARANCES:

FOR THE STATE:

MARC DiGIACOMO, ESQ.
Chief Deputy District Attorney
GIANCARLO PESCI, ESQ.
Deputy District Attorney

FOR LUIS ALONSO HIDALGO, JR.:

DOMINIC P. GENTILE, ESQ.
PAOLA M. ARMENI, ESQ.

FOR LUIS ALONSO HIDALGO, III:

JOHN L. ARRASCADA, ESQ.
CHRISTOPHER ADAMS, ESQ.

RECORDED BY: JANIE OLSEN, COURT RECORDER

TRANSCRIBED BY: KARReporting and Transcription Services

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1 LAS VEGAS, NEVADA, MONDAY, FEBRUARY 2, 2009, 9:02 A.M.

2 P R O C E E D I N G S

3 (Outside the presence of the jury.)

4 THE COURT: You guys, before Denise reads the
5 indictment, just double check that she's got the right thing.

6 MR. GENTILE: There are two separate ones.

7 THE COURT: Right, I know, the indictments -- just
8 make sure because there's been a few. Just make sure she's
9 got the right thing.

10 (Off-record colloquy)

11 (Pause in proceedings)

12 (Jury reconvened at 9:26 a.m.)

13 THE COURT: All right. The Court is now in session.

14 The record will now reflect the presence of the
15 State through Mr. Pesci and Mr. DiGiacomo, the presence of the
16 defendant Mr. Hidalgo, Jr., with his attorneys Ms. Armeni and
17 Mr. Gentile, the presence of the defendant, Mr. Hidalgo, III,
18 along with his attorneys Mr. Arrascada and Mr. Adams, the
19 officers of the Court and the 15 members of the jury.

20 Good morning, ladies and gentlemen. After a very
21 long, arduous process, you have been selected as the 15
22 members of our jury. In a moment I'm going to have the clerk
23 administer the oath to the jury. That will be followed up by
24 some introductory comments from me and then the opening
25 statements from the attorneys.

1 And, Jeff, did you have a chance to pass out the
2 notepads?

3 THE MARSHAL: They're on their chairs.

4 THE COURT: All right. Thank you.

5 All right. Ms. Husted, if you'll please administer
6 the oath to the members of the jury.

7 THE CLERK: Yes, Your Honor.

8 (Clerk swears jury)

9 THE COURT: Ladies and gentlemen, I will now take a
10 few minutes to talk to you about what to expect in this case.
11 My comments are intended to serve as an introduction to the
12 trial. At the end of the trial, I will give you more detailed
13 instructions in writing and those instructions will control
14 your deliberations.

15 This is a criminal case brought by the State of
16 Nevada against the defendants. The case is based on two
17 indictments. The clerk will now read the two indictments and
18 state the pleas of the defendants.

19 Ms. Husted.

20 THE CLERK: Yes, Your Honor.

21 (Clerk reads Indictment)

22 THE COURT: All right. Thank you.

23 Ladies and gentlemen, you should distinctly
24 understand that the indictments just read to you are simply
25 descriptions of the charges made by the State against the

1 defendants. It is not evidence of anything. It does not
2 prove anything. Therefore, each defendant starts out with a
3 clean slate. Each defendant has plead not guilty and is
4 presumed innocent.

5 This is a criminal case and there are two basic
6 rules you must keep in mind. First, the defendants are
7 presumed innocent unless and until proved guilty beyond a
8 reasonable doubt.

9 A defendant is not required to present any evidence
10 or prove his innocence. The law never imposes upon a
11 defendant in a criminal case the burden of calling any
12 witnesses or introducing any evidence.

13 Second, to convict, the State must prove beyond a
14 reasonable doubt that the crime was committed and the
15 defendant is the person who committed the crime.

16 It will be your duty to decide from the evidence to
17 be presented whether the defendant is guilty or not guilty.
18 You are the sole judges of the facts. You will decide what
19 the facts are from the evidence which will be presented. The
20 evidence will consist of testimony of witnesses and documents
21 and other things received into evidence as exhibits. You must
22 apply the facts to the law which I shall give you and in that
23 way reach your verdict.

24 It is important you perform your duty of determining
25 the facts diligently and consciously, for ordinarily, there is

1 no way of correcting an erroneous determination of facts by
2 the jury.

3 You should not take anything I may say or do during
4 the trial as indicating my opinion as to how you should decide
5 the case or to influence you in any way in your determination
6 of the facts. At times I may even ask questions of witnesses.
7 If I do so, it is for the purpose of bringing out matters
8 which should be brought out and not in any way to indicate my
9 opinion about the facts or to indicate the weight or value you
10 should give to the testimony of a witness.

11 There are two kinds of evidence direct and
12 circumstantial. Direct evidence is testimony about what the
13 witness personally saw, heard or did. Circumstantial evidence
14 is indirect evidence. It is proof of one or more facts from
15 which one can find another fact.

16 By way of example, direct evidence that it had
17 rained during the night would be the testimony of a witness
18 who said, I was outside last night and it was raining and my
19 hair got all wet and my shoes got all wet.

20 Circumstantial evidence that it had rained during
21 the night would be the testimony of a witness who said, When I
22 went to bed last night, it was cloudy and overcast, and when I
23 woke up in the morning, I looked out the window and my car was
24 all wet and the streets and the sidewalks were wet and there
25 was water running down the gutter.

1 You may consider both direct and circumstantial
2 evidence in deciding this case. The law permits you to give
3 equal weight or value to both, but it is for you to decide how
4 much consideration to give to any evidence. Certain things
5 are not evidence and you must not consider them as evidence in
6 deciding the facts of the case. They include: Statements and
7 arguments by the attorneys, questions and objections of the
8 attorneys, testimony I instruct you to disregard, and anything
9 you may see or hear if court is not in session, even if what
10 you see or hear is done or said by one of the parties or by
11 one of the witnesses.

12 Remember, evidence is sworn testimony by a witness
13 while court is in session and documents and other things
14 received into evidence as exhibits.

15 There are rules of law which control what can be
16 received into evidence. When a lawyer asks a question or
17 offer an exhibit into evidence and the lawyer on the other
18 side thinks that it is not permitted by the rules, that lawyer
19 may object. If I overrule the objection, the question may be
20 answered or the exhibit received. If I sustain the objection,
21 the question cannot be answered and the exhibit cannot be
22 received.

23 Whenever I sustain an objection to a question,
24 ignore the question and do not guess at what the answer might
25 have been. Sometimes I may order evidence stricken from the

1 record and tell you to disregard or ignore such evidence.
2 This means that when you are deciding the case, you must not
3 consider the evidence which I told you to disregard.

4 It is the duty of a lawyer to object to evidence
5 which the lawyer believes may not be permitted under the
6 rules. You should not be prejudiced in any way against the
7 lawyer who makes objections on behalf of the party the lawyer
8 represents.

9 Also, I may find it necessary to admonish a lawyer.
10 If I do, you should not be prejudiced towards the lawyer or
11 client because I found it necessary to admonish him or her.

12 At the end of the trial, you will have to make your
13 decision based on what you recall of the evidence. You will
14 not have a written transcript to consult and it is difficult
15 and time consuming for the court recorder to play back lengthy
16 testimony; therefore, I urge you to pay close attention to the
17 testimony as it is given.

18 If you wish, you may take notes to help you remember
19 what witnesses said. If you do take notes, please keep them
20 to yourself until you and your fellow jurors go to the jury
21 room to decide the case. Do not let note taking distract you
22 so that you do not hear other answers by witnesses. You
23 should rely upon your own memory of what was said and not be
24 overly influenced by the notes of other jurors.

25 Do not make up your mind about what the verdict

1 should be until after you've gone to the jury room to decide
2 the case and you and your fellow jurors have discussed the
3 evidence. It is important that you keep an open mind.

4 A juror may not declare to a fellow juror any fact
5 relating to this case of which the juror has knowledge. If
6 any juror discovers during the trial or after the jury has
7 retired that that juror or any other juror has personal
8 knowledge of any fact in controversy in this case, that juror
9 shall disclose that situation to me in the absence of the
10 other jurors.

11 This means that if you learn during the course of a
12 trial that you have personal knowledge of any fact that is not
13 presented by the evidence in this case, you must declare that
14 fact to me. You communicate to the Court through the bailiff.

15 During the course of this trial, the attorneys for
16 both sides and all court personnel other than the bailiff are
17 not permitting to converse with members of the jury. These
18 individuals are not being antisocial. They are bound by
19 ethics in the law not to talk to you. To do so might
20 contaminate your verdict.

21 The trial will proceed in the following manner: The
22 deputy district attorney will make an opening statement which
23 is an outline to help you understand what the State expects to
24 prove. Next, the defendant's attorney may, but does not have
25 to, make an opening statement.

1 Opening statements serve as an instruction to the
2 evidence which the party making the statement intends to
3 prove. The State will then present its evidence and counsel
4 for the defendant may cross-examine the witnesses.

5 Following the State's case, the defendant may
6 present evidence and the deputy district attorney may
7 cross-examine those witnesses. However, as I have already
8 said, the defendant is not obligated to present any evidence.

9 After all the evidence has been presented, I will
10 instruct you on the law. After the instructions on the law
11 have been read to you, each side has the opportunity to
12 present oral argument. What is said in closing argument is
13 not evidence. The arguments are designed to summarize and
14 interrupt the evidence. Since the State has the burden of
15 proving the defendant's guilty beyond a reasonable doubt, the
16 State has the right to open and close the arguments.

17 After the arguments have been completed, you will
18 retire to deliberate on your verdict. Jurors are now
19 permitted to ask questions of the witnesses. I ask that if
20 you have a question for one of the witnesses that you write it
21 down using a full sheet of note paper, then wait until all of
22 the attorneys have had a chance to question that witness,
23 because very frequently one of the attorneys will ask one of
24 your questions. Then get either my attention or our bailiff's
25 attention and he will get the question from you.

1 Please don't be offended if I don't ask one of your
2 questions. That does not mean it's not a good question. It
3 doesn't mean it's not an interesting question, but the
4 questions from the jurors are governed by the same rules of
5 evidence that govern the questions from the attorneys. So
6 your question could call for hearsay or other types of
7 inadmissible evidence, and for that reason, I may not ask it.

8 That concludes my opening remarks.

9 Is the State ready to proceed with its opening
10 statement?

11 MR. DIGIACOMO: Yes, Your Honor. Thank you.

12 STATE'S OPENING STATEMENT

13 MR. DIGIACOMO: I told you you should have taken
14 care of TJ. Those are the words of Luis, Little Lou Hidalgo,
15 III, the son, on May 23, 2005. And at the end of this case,
16 one thing will certainly not be in question is what "taking
17 care of" means. Because on May 19th out at Lake Mead Timothy
18 J. Hadland was certainly taken care of. He was executed with
19 two shots to the head from a .38 or .357 caliber revolver.

20 On May 19th at about 11:45, a motorist rolls up on
21 this scene, calls the police, the police arrive on scene.
22 They find TJ out in the middle of the street. They find his
23 car still running. It's actually his girlfriend's, Paijik
24 Karlson's car. It's on the side of the road.

25 They find that an empty canister -- it's called a

1 pneumatic tube. Most people have used that before, either at
2 a bank, or if you've gone to a Walgreens and done your
3 prescription, this is the tube that sucks through the vacuum.
4 They find TJ's cell phone, which becomes very important in the
5 case, and lying right next to the body of Timothy J. Hadland
6 is the calling card of the Palomino.

7 When the police are out there and processing the
8 scene, they pick up TJ's phone and they start going through it
9 and the very last person that they happen to see on the --
10 calling TJ was an individual by the name of Deangelo. At this
11 point the cops have no idea who Deangelo is. In fact, they
12 don't even know that Paijik Karlson is down at the lake at the
13 campsite.

14 Eventually they find Paijik and Paijik tells them
15 that, I was here with TJ, we were camping, he got phone calls
16 from Deangelo, they were going to meet up over some marijuana
17 that -- Deangelo had some marijuana for TJ. And so TJ drove
18 out to meet them on North Shore Road.

19 So you find out that Deangelo's an employee at the
20 Palomino Club so the cops think that the next best thing to do
21 is to go down and check out to Palomino Club.

22 The Palomino Club is an old time gentlemen's club
23 here. It has been around for decades. If any of you know
24 where North Las Vegas Boulevard runs into North Las Vegas,
25 there's a Jerry's Nugget Casino across the street, and that's

1 the Palomino Club that sits on the corner right across the
2 street.

3 By May of 2005, the Palomino was owned by an
4 individual by the name of Mr. H, the defendant, the father in
5 this particular case. It is managed by his girlfriend,
6 Mr. H's girlfriend, Anabel Espindola, and another person who
7 works there and is listed as a manager of the club is Luis
8 Hidalgo, III, or Little Lou.

9 On the afternoon of the 20th, the day after the
10 murder, the police get ahold of Mr. H. They ask him to come
11 down to the Palomino Club and they ask him about Deangelo, and
12 he says, Well, that's Deangelo Carroll, my employee, but I
13 don't -- I can't give you any information on him. You're
14 going to have to come back later that night and talk to the --
15 to Ariel, who was another manager of the club, and she'll be
16 able to give you the information about Deangelo. I don't know
17 anything about him. That's Deangelo Carroll.

18 Deangelo Carroll -- you're going to hear a lot of
19 testimony about Deangelo in this particular case. Deangelo
20 Carroll works for the Palomino Club, had been there since
21 September Of 2004. He has a somewhat colorful history. And
22 let me tell you right up front, you're going to not like
23 Deangelo Carroll. You are not going to believe some of what
24 he says, but you're not going to have to judge his credibility
25 because he's not a witness in this case. He's a defendant and

1 you're going to hear that he's still a defendant today.

2 MR. ADAMS: Your Honor, may we approach?

3 THE COURT: Sure.

4 (Off-record bench conference)

5 MR. DIGIACOMO: Some of the other players in this
6 particular case you're going to need to know about. Deangelo
7 Carroll is actually a full-time employee. You'll see that he
8 has employee records at the Palomino. He's got a work card
9 for the Palomino. Now, what Deangelo Carroll does, he's a
10 little bit of a jack-of-all-trades. He does a little bit of
11 this, sometimes he'll take over the DJ booth when the DJ booth
12 needs someone to work out for it. But a lot of the time he
13 uses a white Chevy Astro van to do what's known as promoting
14 for the Palomino Club.

15 The Palomino Club's not down in the area where all
16 the other strip clubs are in Las Vegas, so they rely heavily
17 on cabs, and you've heard something about this in jury
18 selection, to bring their customers to them, to the Palomino
19 Club. And then those cab drivers get tipped out. The way it
20 kind of works is a cab driver rolls up and he's got two people
21 in his car. The doorman writes down two on a little sheet of
22 paper, gives it to the cab driver. The cab driver drives
23 around back and there's a cashier back there who then pays out
24 the tip to the cashier and then those two people who got out
25 of the cab pay at the front door to get into the Palomino

1 Club.

2 Well, in order to provide information to the cab
3 drivers as to the payout and to get more people to come up
4 there, they have Deangelo Carroll going out and passing out
5 flyers. And there's actually a list of information to give to
6 the various cab drivers. And he enlists the help of two
7 individuals, two kids basically, Jayson Taoipu and Rontae
8 Zone.

9 Jayson's 15 or 16 at the time; Rontae's barely 18
10 years old. And they go out and Rontae and Jayson aren't
11 employees in the true sense of the word of the Palomino Club.
12 They get tipped a certain amount of money at the end of the
13 night for doing -- passing out this paperwork.

14 The last person you're going to need to know about
15 is an individual by the name of Kenneth Counts or as you're
16 going to hear him repeatedly referred to in this case as KC.
17 He's the shooter. He's ultimately the person that Deangelo
18 Carroll goes and gets to go out to the lake with him, with
19 Jayson and Rontae in the car, and he's the person who actually
20 gets out of the car and fires twice into the head of Timothy
21 Hadland.

22 So what are you going to know? First you're going
23 to know about May 19. I already told you Deangelo's using
24 that white Chevy Astro van to go promote for the club and he
25 has the two kids Jayson and Rontae with him. Well, during the

1 daytime he starts telling Jayson and Rontae that Mr. H, the
2 owner of the Palomino Club, wants to do something to an
3 individual. He wants to hurt an individual. He wants -- as
4 one of them puts it, he wants to put out a hit on one of the
5 individuals, that he wanted somebody, quote, taken care of.

6 And Jayson, you will hear, says, Yeah, I'm down with
7 that. I'm good. And Rontae says, Woe, hey. And what Rontae
8 will tell you is, hey, Deangelo, I thought he was talking big,
9 I didn't really believe him. But essentially Rontae says, I
10 don't really want to be involved.

11 Deangelo Carroll does give Jayson a .22 caliber
12 revolver -- semiautomatic firearm, and he attempts on at least
13 one occasion to give Rontae the bullets. They go out that day
14 and they actually do some promoting, Jayson, Rontae, and
15 Deangelo. And sometime in the evening hours they're back at
16 Deangelo Carroll's house when Little Lou, the son, calls and
17 tells them to come back to the club. And when he tells them
18 to come back to the club, he tells them to bring some baseball
19 bats and trash bags.

20 And at that point you will hear from Rontae Zone
21 that when Deangelo Carroll gets off the phone he tells them,
22 Hey, we've got to go back to the club. We need to bring the
23 baseball bats and the garbage bags. And at that point they
24 drive to the club.

25 When they get to the club, Deangelo Carroll goes in

1 the club. When he comes out of the club, they get in the car.
2 They drive over to E Street, which happens to be Kenneth
3 Counts' house. Deangelo Carroll goes in the house. He comes
4 out of the house with Kenneth Counts. He's dressed in black
5 and he's wearing gloves.

6 They get in the van and they all start heading out
7 towards Lake Mead. As they're driving out there, Deangelo's
8 calling TJ back and forth about having marijuana for him. TJ
9 eventually agrees to meet Deangelo.

10 During the trip, as -- if any of you, if you head
11 out towards -- out towards Lake Mead, as you get out towards
12 those mountains, and there's a little guard shack out there as
13 you go pass into the Lake Mead area there, well, right about
14 there is when you start having some severe cell phone
15 problems. And what you will learn is that Deangelo has to
16 keep looping back and forth because he's losing cell phone
17 coverage. And he does it on a couple of occasions. He passed
18 by that guard shack.

19 During this trip you'll hear that there's a phone
20 call from Anabel to Deangelo and eventually when they arrive
21 at the location you'll hear that there's some conversation
22 with TJ. TJ gets out of the car and he's kind of walking
23 towards the car. Kenneth Counts slides out of that side door.
24 And you've already seen what he does to TJ.

25 Once they -- the murder occurs, Kenneth Counts jumps

1 back in the car and they drive off. The van does a U-turn,
2 drives directly back to the Palomino. At first Deangelo
3 enters the Palomino and then KC enters the Palomino and
4 eventually KC exits the Palomino first. And there will be
5 some discrepancy as to whether it's 5,000 or \$6,000, but he
6 gets -- he has \$6,000.

7 Jayson and Rontae, they're in the van and they see
8 KC leave the Palomino in a yellow cab. Eventually Deangelo
9 comes out of the club. They take the van. Deangelo punctures
10 the tires on the van because they're afraid they might have
11 driven over some blood or something that would link the van
12 back to the murder scene and they throw the tires away and
13 they get new tires.

14 What you will learn when the cops check out the
15 yellow cab story -- let me back up for just a second as to how
16 we get there. That morning Jayson, Rontae, and Deangelo go
17 and have breakfast. There's some time period during the day
18 on the 20th, and eventually at 7:30 at night when the police
19 are at the Palomino Club, you will learn that Deangelo Carroll
20 walks into the Palomino Club. They stop Deangelo. They talk
21 to him a few minutes. He agrees to come down to the police
22 station and what proceeds from there is a lengthy interview.

23 At the end of that interview, they take Deangelo
24 Carroll and his vehicle and they drive him home. And when
25 they get home, they find Rontae Zone in Deangelo Carroll's

1 house. They ask Rontae to go with them. Rontae comes out of
2 the house. He goes down to the police station. Most of what
3 I just told you about what happened during the days of the
4 19th and the 20th you're going to learn from the interview
5 that was given by Rontae Zone that night and the testimony
6 he's going to give to you.

7 And he indicates that KC took a yellow cab. The
8 cops were able to identify KC at Kenneth Counts. They start
9 searching and, low and behold, what do they find? They find a
10 trip sheet from yellow cab. On the back of the trip sheet at
11 12:00 o'clock in the evening, this is the early morning hours
12 of the 20th, 12:26 to 12:31, a pick up at the Palomino. And
13 what you'll hear about this is the person tells them they want
14 to go to 513 Wyatt. And what he says is initially the person
15 only has hundred dollar bills and he says he can't change
16 hundred dollar bills. He sends him back in the club to get
17 change.

18 He indicates that an African male adult gets back in
19 his car, tells him 513, and as he's driving him over to 513,
20 he asks him to get out at 508. So that's why the cab driver
21 notes down 508 because he didn't get out at 513. And the cab
22 driver watches the individual not go into 508, but actually
23 walk behind it. And what you'll learn in this case, that's
24 Kenneth Counts' home.

25 Based upon the interview with Rontae and the other

1 information that they've gathered, the police want to go
2 looking for Kenneth Counts. As the SWAT team comes down Burns
3 Avenue there at the corner of Burns and E Street, Kenneth
4 Counts runs from his home into his aunt's home across the
5 street, and the cops eventually get a search warrant and have
6 to pull Kenneth Counts out of the attic of that home.

7 When they do a search warrant on that home, they
8 find VIP cards in the name of -- or from the Palomino. They
9 have fingerprints from Kenneth Counts on them. They have
10 fingerprints from Deangelo Carroll on them.

11 After they got the shooter into custody, the police
12 actually -- because they had been up 72 hours -- sleep on the
13 22nd, but on the 23rd they put what -- a surreptitious
14 recording device on Deangelo Carroll and they send Deangelo
15 Carroll into Simone's Autoplaza. And the reason that they
16 send him in there is that Simone's Autoplaza is also owned by
17 Mr. H. And there's an office there that he has as well as
18 Anabel Espindola as well as Luis Hidalgo, III, actually lives
19 in room six, the back room of this place.

20 You're going to hear these recordings and there's
21 some things you're going to need to know about these
22 recordings. First and foremost, there of terrible quality.
23 The reason being this, it's a surreptitious recording device
24 that's placed on Deangelo Carroll so you can actually hear
25 kind of like his clothing rubbing against it, but then you're

1 also going to hear the whispering of the coconspirators during
2 the entire recording.

3 And eventually when they get this recording off of
4 Deangelo Carroll, they can hear certain things, but it's of
5 poor quality and it eventually gets sent to the FBI and it
6 also gets sent to an independent agency in Toledo, Ohio and
7 what you'll eventually hear is an enhanced version of the
8 recordings.

9 None of the statements are going to be changed, but
10 some of the background noise and other things. So you will
11 have the original poor quality, you will have the enhancement.
12 And I'm going to tell you right now you're not going
13 understand every word. You'll probably get about 90 percent
14 of the words after you listen to it over and over and over
15 again. But one thing is going to be a hundred percent clear
16 when we're done, that the order was given by Mr. H, Luis
17 Hidalgo, III, was involved in it and that the order was to
18 kill Timothy Hadland.

19 You will also hear a second recording that occurs on
20 May 24th and since -- at some point you're going to need to
21 hear these recordings. You're going to need to hear them on
22 multiple occasions. I'm going to play portions of them for
23 you now.

24 Ms. Olsen, can you flip to the --

25 (Tape being played.)

1 MR. ADAMS: Your Honor, we have an objection to
2 the --

3 THE COURT: Okay.

4 MR. ARRASCADA: May we approach?

5 THE COURT: Yeah. Approach on this.

6 (Off-record bench conference)

7 THE COURT: Ladies and gentlemen, just so you know,
8 the transcript was prepared by the State. It is not going to
9 be evidence in the case. It's something that they're offering
10 you to guide you in listening to the tape. The contents of
11 the transcript are disputed. And again, it won't be evidence.
12 What will control is your hearing and interpretation of what
13 is on the tape, not any transcript.

14 Is that -- anything else? All right.

15 Now go on, Mr. DiGiacomo.

16 (Tape continues)

17 MR. DIGIACOMO: And the tape goes on for longer than
18 that. There's actually about another five minutes of
19 conversation that you'll hear.

20 Let's talk a little bit about what you heard on that
21 tape. Never take a single piece of evidence to try and find
22 out the answer to a complex story, but this is a very good
23 piece of evidence to find out --

24 MR. GENTILE: Objection. Argument.

25 THE COURT: Sustained.

1 MR. DIGIACOMO: Let's talk about certain things.
2 When you first heard that, what went through your mind is that
3 13 minutes and 30 seconds Deangelo Carroll makes a statement
4 to Little Lou that says, What are you worried about? You had
5 nothing to do with this. At the end of this case, I'm going
6 to suggest to you that that statement doesn't mean he had
7 nothing to do with the case. That statement means that
8 Deangelo Carroll knows nothing about conspiracy law and you
9 will hear what the meaning of that statement is.

10 So as you sit here today, ask yourself what he meant
11 at 22:15 when you heard Little Lou say, Next time you do
12 something stupid like this, I told you you should have taken
13 care of TJ. And then --

14 MR. ADAMS: Objection to that, Your Honor. That was
15 not in the transcript.

16 THE COURT: That's sustained. Sustained.

17 MR. DIGIACOMO: Sorry. I wasn't allowed to tell
18 them what it's going to say?

19 THE COURT: Well, just go on, Mr. DiGiacomo. .

20 And ladies and gentlemen, I'll just remind you, as I
21 said in the opening, this is the State's impression or -- of
22 what the evidence will be. At the end of the day, it's what
23 you recall of the evidence and what you yourselves hear in the
24 tape.

25 Go on.

1 MR. DIGIACOMO: Thank you.

2 I won't tell you what it says. Let's listen to it
3 again.

4 MR. ARRASCADA: Judge, now this is getting --

5 (Tape being played.)

6 MR. ARRASCADA: Your Honor, we want to object --

7 THE COURT: How much are you going to play,

8 Mr. DiGiacomo?

9 MR. DIGIACOMO: Just that whole --

10 MR. ARRASCADA: Your Honor, we're raising an
11 objection that's argumentative.

12 THE COURT: All right.

13 MR. DIGIACOMO: Argumentative?

14 THE COURT: Well, it was -- you can play a little
15 bit more. It is getting argumentative.

16 MR. DIGIACOMO: And you'll have that tape back
17 there, 22:15. Write it on your note pads because when you're
18 back there, you're not going to have the transcript. And do
19 it in Real Player, by the way, because if you play it in a
20 different player on the computer, it actually -- the time will
21 be slightly off, but 22:15.

22 In addition to what you will learn during the course
23 of the time period, what else he's talking about is, How do
24 you know this guy KC, that the conspirators are upset that he
25 used someone else as opposed to doing it himself, and you'll

1 also hear that they are upset that he had those two kids in
2 the car who could pinpoint exactly where he was.

3 What else you also heard that should give some --

4 MR. GENTILE: Objection to what they heard. He can
5 talk about what they're going to hear.

6 THE COURT: Right. That's sustained.

7 MR. DIGIACOMO: What else you're going to hear on
8 this tape -- well, first of all, there's no question that Luis
9 Hidalgo, III, wants Rontae and Jayson killed. There's no
10 question that he wants KC to do it first, and then after he's
11 told that KC isn't the person who could do it because -- well,
12 Deangelo knows that KC's in jail, but as he tells them that
13 he's not going to be able to find KC, that he gives them a
14 bottle of Tanquerae, and you're going to hear that Deangelo
15 Carroll leaves that -- Simone's Autoplaza with a bottle of
16 Tanquerae. He wants rat poisoning in it. And even when
17 Anabel Espindola tells Luis Hidalgo, III, rat poisoning's not
18 going to work, his response isn't, You're right. It's, You
19 know what you've got to do.

20 What else you heard, which caused the recording to
21 occur on the next day, was --

22 THE COURT: We'll hear.

23 MR. DIGIACOMO: -- what Anabel Espindola said.

24 MR. ARRASCADA: Your Honor, again, objection. This
25 is argument.

1 THE COURT: All right.

2 MR. DIGIACOMO: Rephrase.

3 What you're going to hear is her statement which
4 caused the second recording. On there you heard her make a
5 statement, something to the effect of, What we really wanted
6 for him was to be beat up, not M F'ing dead. And based upon
7 that, the cops decided that they needed to send Deangelo back
8 up a second day.

9 And you're going to hear a recording from May 24th,
10 once again at Simone's, once again with Anabel and Little Lou
11 on the recording in which the discussion is had about what the
12 actual plan was.

13 (Tape being played.)

14 MR. DIGIACOMO: You'll learn that that device is
15 left in the bathroom for 28 minutes and it's dead recording
16 until Deangelo puts it back on himself and he walks out of
17 that club on the 24th. You will hear --

18 And, I'm sorry. Ms. Olsen, can you switch it back
19 to --

20 THE COURT: You know, while she's doing that, how
21 much more do you have, Mr. DiGiacomo?

22 MR. DIGIACOMO: Ten minutes, maybe.

23 THE COURT: All right. I'm sorry. Go on.

24 MR. DIGIACOMO: You will hear and you heard a
25 discussion about a lot of things. One of the things you will

1 learn during this time period is that Luis Hidalgo, Jr. is
2 inside Simone's club. Surveillance on that club puts him
3 inside the club on that date and shortly after the
4 23rd recording is done, sees him leaving with Anabel
5 Espindola.

6 The next day, once again, he's surveilled. He's in
7 that place. And eventually Luis Hidalgo, on the 24th, Jr. --
8 III, winds up leaving and the cops come into contact with him
9 and arrest him.

10 He was the person who was supposed to open the
11 Palomino Club that night, so about 5:00 o'clock when the
12 dancers are standing outside the door and they can't get in,
13 they start calling Anabel and Mr. H. And you will hear about
14 Anabel and Mr. H leaving Simone's on the 24th together and
15 then they're pulled down and then Anabel Espindola is
16 arrested.

17 After that time period, a search warrant is executed
18 on the evening of the 24th on Simone's Autoplaza. During the
19 course of the execution of the search warrant there's a lot of
20 items of evidence found, but one of them was a note, Maybe we
21 are being surveilled, keep your mouth shut.

22 When this case first started out and Mr. H was not a
23 defendant in the case, an exemplar was taken from Luis
24 Hidalgo, III, to see if he wrote that note. A forensic
25 analyst was able to conclude he's not the author of that note.

1 Eventually, later on when you hear about the arrest
2 of Mr. H, an exemplar is taken from Mr. H and the forensic
3 analyst was able to say to a reasonable degree of scientific
4 certainty that Luis Hidalgo, Jr., the father, wrote that note.

5 In addition, there's an execution of a search
6 warrant at the Palomino Club as well and there's documents
7 related to the fact that TJ was an employee there, Deangelo
8 Carroll and everything else.

9 You also heard a discussion about cell phones. Each
10 one of these individuals had a cell phone and you will learn
11 about their number. Mr. H has kind of got a green border
12 there, and I did that to help you follow along with some of
13 the colors. Luis Hidalgo, III, has paint. Anabel's is
14 purple. Deangelo's is yellow and so is Kenneth Counts, and
15 I'll tell you about that in a minute, why.

16 Now, everyone at the club has Nextels. There's two
17 ways to work a Nextel. I don't know if any of you guys have a
18 Nextel. There's Nextel regular, you talk on the phone. When
19 that happens, you do just like a normal telephone calls.
20 There's cell site coverage and you can learn the cell site
21 information about where everybody is that's talking regularly
22 on the phone. The Nextel's also have a walkie-talkie function
23 where they can just chirp back and forth and do direct
24 connects.

25 Deangelo Carroll's Nextel telephone only does direct

1 connects out of the Palomino. So if you're going to have a
2 regular telephone conversation with Deangelo Carroll, it
3 either has to be on a different cell phone or it has to be on
4 his home phone. And you'll learn during the course of this
5 case (702)643-0842 is Deangelo Carroll's home phone.

6 On May 19th of 2005, he calls Anabel Espindola's
7 phone on two occasions, one at 5:00 o'clock and one at 7:30.
8 You're also going to see that at 7:42 p.m. Little Lou calls
9 Deangelo Carroll's home. And when there are cell site
10 information, this is an actual telephone call, those are
11 minutes. So they talk for over a minute, Little Lou and
12 Deangelo Carroll.

13 And I submit to you that at the end of this case the
14 evidence is going to show that that phone call is the phone
15 call where he tells Deangelo Carroll to come to the club with
16 the baseball bats and the garbage bags.

17 Then you'll see the time period of the murder. This
18 inbound/outbound is actually a cell phone, and all of these
19 are direct connects. You're going to see direct connects
20 between Mr. H and Anabel. At one part you're going to see
21 Deangelo Carroll and Anabel Espindola direct connects, Mr. H
22 and Anabel direct connects, Deangelo Carroll and Timothy
23 Hadland, who still had his Palomino cell phone, Nextel cell
24 phone. These right here and then this call right here.

25 You heard during the course -- or you will hear

1 during the course of those tapes that a regular phone call
2 Deangelo Carroll can't make. You heard that discussion -- or
3 you will hear that discussion about the son and calling his
4 wife. As it turns out, you will hear the testimony about how
5 there was problems with the connections and eventually there's
6 an actual regular phone call made inbound to Kenneth Counts --
7 I mean, inbound to Anabel Espindola, 1.4 minutes.

8 And the cops run down the phone number, which just
9 happens to be Kenneth Counts' cell phone. Deangelo -- you
10 will find that Deangelo Carroll borrowed Kenneth Counts' cell
11 phone so he could have a regular conversation with Anabel
12 Espindola shortly before the murder of TJ Hadland.

13 You keep following those and you'll see that at
14 12:24 Mr. H calls Anabel and Anabel calls Little Lou. And
15 interestingly, at 1:48 a.m., Mr. H direct connects with
16 Deangelo Carroll.

17 Eventually, you will hear from Anabel Espindola.
18 Ms. Espindola was arrested on May 24th of 2005. She sat in
19 jail and, in fact, is still in jail for the better part of
20 three years and ultimately reached a resolution with the
21 State. And you will hear her story. And at the end of this
22 case you will be instructed on the law and you're not going to
23 be asked to find what crime she committed, but when you read
24 that law, the evidence is probably going to show you that she
25 committed second degree murder.

1 She enters a plea to what's known as voluntary
2 manslaughter with use of a deadly weapon, one step down. And
3 she remains in jail to this day and she's going to tell you
4 what she knows about this crime.

5 She's going to tell you that on the morning -- or
6 during the daytime on May 19th of 2005 she received a phone
7 call from Deangelo Carroll just like the phone records show,
8 that during the course of that phone call Deangelo Carroll
9 started telling her about TJ and TJ's talking bad about the
10 club. And she'll explain to you a little bit about the club.
11 The club was once owned by Jack Perry. He eventually had to
12 sell the club. He sells it to a Dr. Simon Sturtzer,
13 (phonetic) who's a close friend of Mr. H, and eventually
14 Mr. Sturtzer's getting such bad press because he's a doctor
15 that he wants a partner and he wants to go silent and Mr. H
16 becomes that partner.

17 Dr. Sturtzer still gets paid \$10,000 a month even
18 after Mr. H takes over the club, and the club's not making
19 that much money to cover the nut every month that they have to
20 pay Dr. Sturtzer. And Simone's isn't doing that much either.

21 She will tell you that after she receives the phone
22 call from Deangelo Carroll, she's in the house -- or she's in
23 the -- Simone's Autoplaza with both Luis Hidalgo, III, and
24 Mr. H. And the cell sites from their phone records will
25 confirm that fact. She will tell you that she told them what

1 Deangelo Carroll had told her and that the two of them started
2 an argument and during the course of that argument Luis
3 Hidalgo, III, said to his father, You're never going to make
4 the kind of money that Rizzalo and Gallardi do.

5 For those of you who don't know, Rizzalo was the
6 owner of the Crazy Horse II, here in town, and Gallardi was
7 the owner of Cheetah's and I think Jaguar's as well before his
8 legal troubles. And he says -- Little Lou says, you know, you
9 won't even have this guy beat up, Rizzalo had a customer beat
10 up who wouldn't pay. And this argument ensues in which Little
11 Lou finally leaves the club. And, in fact, when you look at
12 his cell phone records, he's hitting off a cell phone tower
13 between Simone's where he left after this argument and when he
14 gets to the Palomino Club where that phone call was made to
15 Deangelo Carroll.

16 Anabel will tell you that Mr. H was stewing. He
17 wasn't happy about the conversation. He was mad. He was
18 sitting outside her office. And she'll say that eventually
19 sometime after 7:30 or 8:00 o'clock she and Mr. H drove to the
20 Palomino Club. She'll tell you that once she got there, she
21 went into the office like she always does and she remained in
22 the office. And then eventually Mr. H and Deangelo Carroll
23 walked into the office -- or Deangelo Carroll knocked on the
24 door, him and Mr. H had a short conversation. They walked out
25 the door.

1 A short time later, Mr. H came back into the office,
2 asked her to step to the back area away from an individual by
3 the name of PK, Pilar Handley (phonetic) and she said, Go call
4 Deangelo and tell him to go to plan B. She'll tell you that
5 she went to the back. She couldn't direct connect with him.
6 She kept clicking back and forth and eventually was able to
7 get a land line connection with him, just like the phone
8 records will show you.

9 And during the course of that conversation he was
10 saying stuff about, But we're alone, and she says, Look, Mr. H
11 wants you to go to plan B, go to plan B. She'll tell you that
12 after that phone call and her conversations with Mr. H,
13 Deangelo Carroll came back to the club, that he came into the
14 office, that he said it was done and Mr. H ordered her to give
15 him five. She says five what? He says, \$5,000.

16 She'll tell you that she went and got the cash and
17 she put it on the table and Deangelo Carroll walked out of the
18 room. She'll tell you that the next day or the day after, on
19 Saturday, she went to Luis Hidalgo, Jr. After having his
20 conversation with the police that evening of the 20th, was
21 concerned, he was upset.

22 And so they called their lawyer and eventually
23 talked to an individual by the name of Jerome DePalma. And
24 the next day, on Sunday, their usual lawyer, Mr. Gentile, flew
25 back into town and they had a meeting with him on that day.

1 She'll tell you that at the end of that meeting she was
2 instructed in the presence of Mr. H not to have conversations
3 with Deangelo Carroll, that he could be wired.

4 And she'll tell you that later that night she left
5 and despite the warning that she was provided, Mr. H was
6 upset. He was scared as to what Deangelo Carroll was going to
7 do and he asked her to have a conversation with Mr. Carroll.
8 And when you listen to that recording, what you will find or
9 what you will hear is exactly what she's saying. You and Luis
10 have to stick together. You and Luis -- Luis's in a panic.
11 Even his own son admits Luis's the person in the panic.

12 And she'll tell you that during the time period of
13 that wire, Mr. H was inside the place. You will also hear
14 that the next day nobody told Deangelo to come down there. He
15 just goes walking in. And when he walked in, she had a short
16 conversation with Mr. H. She talked to him. And then you
17 heard her -- hear her leave the room and you will hear that
18 she talked to him and he ordered her to give Deangelo Carroll
19 more money. She then left and gave Deangelo Carroll more
20 money. He left and eventually she was arrested in this case.

21 Ladies and gentlemen, at the end of this case, while
22 it's complex, while it's complex conspiracy law and you're
23 going to have a lot of law provided to you related to the
24 elements of the case, there's going to be simply no conclusion
25 other than Mr. H gave the order that his son encouraged the

1 order and that ultimately they're responsible for the death of
2 Timothy Hadland.

3 Thank you.

4 THE COURT: All right. Thank you, Mr. DiGiacomo.

5 Ladies and gentlemen, we're just going to take a
6 quick ten-minute break until 11:00 o'clock. You are reminded
7 that during this break you're not to discuss this case or
8 anything relating to the case with anyone else. You're not to
9 read, watch, listen to any reports of or commentaries on any
10 subject matter relating to the case and please don't form or
11 express an opinion on the trial.

12 If everyone would please put their notepads in there
13 chairs, and I do need to remind everyone when you are in the
14 building, please make sure that you're wearing your blue
15 Department XXI jurors -- jury badges. The reason for that is
16 so that people immediately recognize you as jurors and don't
17 inadvertently discuss the case or something like that in your
18 presence.

19 So if all of you will please put your notepads in
20 your chairs and follow Jeff through the double doors, we'll be
21 back in session at 11:00.

22 (Court recessed at 10:52 a.m. until 11:02 a.m.)

23 (Outside the presence of the jury.)

24 THE COURT: Go ahead.

25 MR. ADAMS: Thank you, Your Honor. During the

1 State's opening, we approached the bench --

2 THE COURT: Yeah. The first objection was
3 referencing Mr. DiGiacomo's commenting on the state of the
4 case against Deangelo Carroll, which I told him to move on. I
5 didn't sustain the objection. I should have, but it is what
6 it is.

7 MR. ADAMS: Yes, ma'am, we objected and said that --

8 THE COURT: But then he did -- for the record, he
9 did move on after -- there's probably not going to be any
10 evidence of what Deangelo Carroll did or did not do. But
11 anyway, he moved on from that and took another -- moved on to
12 something else is what I'm trying to say.

13 MR. ADAMS: Yes, ma'am. We objected on the grounds
14 of hearsay and prejudicial effect and lack of relevance and
15 the Court overruled.

16 We do at this time raise a continuing objection to
17 the State eliciting that information from any witness in the
18 case as Deangelo Carroll's status of incarceration at this
19 point in time is irrelevant to the trial of these two
20 defendants.

21 MR. DIGIACOMO: Judge, it's not irrelevant. As you
22 heard them say at the bench, the police made a deal with him.
23 The police made no deal with him. He offered to wear a wire.
24 They took him up on that wire. We have never used -- we have
25 never provided him a deal.

1 THE COURT: Yeah. Here's the --

2 MR. DIGIACOMO: He's charged and that's going to
3 become relevant if they're going to start --

4 THE COURT: Right. If they start --

5 MR. DIGIACOMO: -- questioning that.

6 THE COURT: I mean, obviously we can't get into the
7 Kenneth Count situation. Anyone who testifies -- so it kind
8 of creates an incomplete or haphazard picture. Anyone who
9 testifies, obviously, you can get into what they were offered
10 and anything like that. Deangelo Carroll isn't going to be
11 testifying, so I don't know how it's going to come in. But if
12 the defense tries to make an issue that there was a deal and
13 he got a benefit from this, then certainly that opens the door
14 and the State can get into, Oh, no, there was no benefit. We
15 didn't favor this defendant over any other defendant. So I
16 think then it would become relevant.

17 MR. ADAMS: Correct. And we had a second objection
18 regarding the transcripts. Mr. Arrascada--

19 THE COURT: Right, which was sustained, and they did
20 not use the --

21 MR. ADAMS: I believe that was --

22 THE COURT: -- they did not use the offending -- or
23 the question part of the transcript which referred to TJ.
24 That has been redacted by Mr. DiGiacomo. He informed the
25 Court of that at the bench and then was allowed to go forward

1 and any reference to the disputed part was sustained and
2 Mr. DiGiacomo then did not reference it but told the jury to
3 listen for themselves or something to that effect.

4 And I also would address there had been previously a
5 Batson challenge made. There are two African Americans on the
6 regular jury and one African American is the second alternate
7 in Chair No. 7.

8 MR. DIGIACOMO: And first alternate, we still don't
9 know the answer to.

10 MR. GENTILE: Your Honor, it's taking us a bit of
11 time to get set up, but I believe --

12 THE COURT: That's fine.

13 MR. GENTILE: I apologize to the Court.

14 MR. ARRASCADA: Judge, on the transcript issue,
15 could we just request that throughout the trial if the
16 transcript is brought up that the limiting instruction be
17 provided to them contemporaneously?

18 THE COURT: That's fine.

19 MR. PESCI: Judge, we'd ask for that for the
20 defense's version as well.

21 THE COURT: Right. Anytime they reference the
22 transcript, I'll just remind everyone they won't have copies,
23 it's not evidence, and it's disputed and is merely being given
24 to aid them in listening to the tape, let their own -- you
25 know, something to that effect. Their own hearing of the tape

1 is what controls.

2 In response, Mr. Arrascada and Mr. Adams, the JAVS
3 people are going to come up at the break and try to set
4 something up so that you can see a monitor as well. So they
5 don't know if they'll be able to do it, but they'll try.

6 I think an hour's optimistic.

7 MR. GENTILE: I agree.

8 THE COURT: I'm not going to interrupt you, but as
9 soon as you're finished, we'll take our lunch break.

10 MR. DIGIACOMO: So if he gets to 12:15, that's 1:15,
11 and they said that --

12 You're still going to have about a half hour,
13 Mr. Adams?

14 THE COURT: 40 minutes.

15 MR. ADAMS: I'm going to be 45.

16 (Off-record colloquy)

17 THE COURT: All right. Bring them in.

18 (Jury reconvened at 11:07 a.m.)

19 THE COURT: All right. Court is now back in
20 session. The record will reflect the presence of the State,
21 the defendants, their counsel, the officers of the Court, the
22 members of the jury.

23 Mr. Gentile, are you ready to proceed with your
24 opening statement?

25 MR. GENTILE: I am, Your Honor.

1 THE COURT: All right. Thank you.

2 MR. GENTILE: Thank you.

3 DEFENDANT HIDALGO, JR. OPENING STATEMENT

4 MR. GENTILE: Good morning. When we stood up to
5 give you that brief overview of this case, what now seems like
6 a long time ago, remember, I said to you that the bottom line
7 was that Luis Hidalgo, Jr. didn't know anything about anything
8 that happened in this horrible tragic death of Timothy Hadland
9 until after it happened. Thus, the theme of this case.

10 Everybody in this jury has said that, certainly
11 everybody has heard it, we have all experienced it, and it is
12 what this case is about. Over the next hour or so, to be
13 honest, I'm going to talk to you about what the facts will
14 show. I'm going to identify for you some issues that will
15 arise in this case so that when you hear the facts as they
16 come in, you can kind of have a road map, some sort of a way
17 of putting the facts as they come in into context for the
18 decision that you're going to be asked to make when this is
19 all over with, but what I would like you to remember
20 throughout -- those three words and three others -- consider
21 the source, also something that I'm sure most of us have
22 either heard in our life -- maybe our mother said it to us,
23 and most of us have said it in our life.

24 This is a conspiracy case and the three questions
25 that you're going to be asking yourselves as the evidence

1 comes in in this case, the first one is, what's conspiracy?
2 Now, understand something, only the judge can instruct you on
3 the law. That is her exclusive province and role in this
4 case. None of the lawyers, no matter how much we've worked
5 with the law or how little, can talk to you about what the law
6 is. At the end of the case, the judge is going to instruct
7 you what the law is and then we'll be able to argue with those
8 instructions before you what the facts show as it meets the
9 elements of the law.

10 But in simple terms, conspiracy's an agreement.
11 It's an agreement to do something illegal. And obviously it
12 has to have a starting time's, and a stating time's no
13 different than any other starting time of any other agreement.
14 When two people, at least two people, get together and they
15 talk to each other and they agree to do something, you have a
16 conspiracy. Other people can join that same conspiracy later.
17 They can agree later on to accomplish the objective of that
18 conspiracy. But like anything else, a conspiracy has to have
19 an end.

20 And at the end of this case, the judge is going to
21 instruct you as to when a conspiracy ends, but obviously if
22 the objective of the conspiracy has been completed, you can't
23 very well join a conspiracy to accomplish that goal. It's too
24 late to do that and that's why we get back to timing is
25 everything. As you listen to the facts as they come into this

1 case, keep that in mind.

2 It's going to be critical. Time lines are going to
3 be critical in this case for you to reach a just and correct
4 decision.

5 The judge will instruct you at the end of the case
6 that if you did not join a conspiracy before its objective has
7 been reached, then while you may be responsible for some
8 things that you did do, you're not responsible for the
9 objective of that conspiracy. And that makes sense.

10 Another theory in this case that the State has --
11 and by the way, everything is -- everything that comes into
12 this case with respect to Luis Hidalgo, Jr., who you will
13 referred to as Louie and you will hear referred to as Mr. H by
14 people that have been calling him that his whole life,
15 everything is governed by this document. This document is
16 called an amended indictment. And as the judge said, it's
17 nothing more than a piece of paper that kind of puts on it
18 what the charges are so that you can have some guidance.

19 You don't come into a courtroom to decide whether
20 you like a guy or not. You don't come into a courtroom to
21 decide whether he's a bad guy or not, whether he did something
22 right or did something wrong. You come into a courtroom to
23 determine whether what's on this piece of paper has been
24 proven beyond a reasonable doubt.

25 And in this case -- Mr. DiGiacomo said that this is

1 kind of a complex case, and he's right. And the reason that
2 he's right is because it charges two Counts. It charges a
3 conspiracy to commit murder, an agreement to commit murder,
4 and then by its language, it incorporates by reference Count
5 2, which is the murder count.

6 In Count 2, it has four different theories about how
7 the murder may have been committed.

8 MR. DIGIACOMO: Judge, I apologize. I gave him some
9 leeway, but one, it's argumentative; and, two, it's not proper
10 opening.

11 MR. GENTILE: Your Honor, we're entitled to discuss
12 issues at this point and then go into the facts.

13 THE COURT: All right. Well, you're kind of on the
14 line, but --

15 MR. GENTILE: Thank you.

16 The second of those theories is called aiding and
17 abetting, and so one of the things you're going to be
18 wondering throughout this case is what is aiding and abetting.
19 Well, aiding is a word that you use all the time. Abetting,
20 most liking, isn't. And it has nothing to do with going to a
21 sports book. Okay.

22 What you're going to be instructed at the end of the
23 case is that, in simple terms, it means helping somebody or
24 encouraging them or hiring them, even, to do something before
25 it's done. If it's already done, it's too late; thus, timing

1 is everything in this case.

2 And so now I want to get into the second thing that
3 we talked about, and we're going to get into the evidence,
4 what the evidence will show. And the second thing we talked
5 about is consider the source. As you hear witnesses testify
6 in this case, I'm going to talk to you now about what evidence
7 you're going to hear about the credibility of those witnesses
8 so that you know before you hear them. And when we're talking
9 about consider the source and we're talking about credibility,
10 we're talking about believability. That's what it means. And
11 we deal with it in our everyday lives.

12 This man is Deangelo Rashaun Carroll. As
13 Mr. DiGiacomo says, he is not going to call him as a witness
14 in this case. I cannot call him as a witness in this case and
15 so you're going to hear from this man, but you're going to
16 hear from this man through what other people say he said in
17 their presence.

18 Now, there's going to be some objections as to
19 whether you should be able to hear that or not, and you're
20 going to hear me say "hearsay," but that's the Judge's call.
21 But because he isn't coming into this courtroom and he isn't
22 going is to be sitting over here, we're not going to be able
23 to cross-examine him.

24 The law does provide and our procedure does provide
25 another way of coming close to that, addressing his

1 credibility. Mr. Rontae Zone, most likely, will testify in
2 this case. He is another source. Mr. Carroll, of course, is
3 a source of information even though he's not coming in here.
4 Mr. Zone is going to testify about things that he heard
5 Mr. Carroll say. We will be able to cross-examine Mr. Zone
6 and we're going to get into what the evidence will show with
7 respect to him in a bit.

8 Jayson Taoipu, I do not know if the State is going
9 to call him as a witness. If the State calls him as a
10 witness, we will have an opportunity to cross-examine him. If
11 the State does not call him as a witness, then we'll have to
12 see whether something he said before or somebody that said
13 something to him comes into evidence.

14 The first thing I want to talk about in terms of
15 what the evidence is going to show as far as the
16 believability, the credibility of these witnesses deals with
17 something simple. Right now you're looking at me and you're
18 listening to me, I hope. That's called perception, right?
19 You are perceiving me at this moment. Most of you are sober,
20 maybe all of you. That's a joke. After you perceive me
21 today, an hour from now, you may forget what I said. A week
22 from now, you may forget. A year from now, you most
23 definitely won't remember. And so let's address that with
24 respect to Mr. Carroll.

25 What is the evidence going to show about

1 Mr. Carroll's perception and his memory? Well, we won't be
2 able to show anything about his memory because the man's not
3 going to be in here, and so we won't be able to cross-examine
4 him with respect to that, but we will -- you will hear --

5 MR. DIGIACOMO: I apologize, Mr. Gentile.

6 May we approach?

7 THE COURT: Yeah.

8 (Off-record bench conference)

9 MR. GENTILE: We were talking about memory. Now
10 we're talking about perception.

11 Go back to perception and memory, please. There we
12 go. Okay.

13 Mr. Carroll -- I can't do this technology stuff
14 myself.

15 Mr. Carroll -- you are going to hear testimony in
16 this case that on the 19th of May, 2005, Mr. Carroll was
17 smoking pot all day. You're going to hear evidence in this
18 case that on the 19th of May, 2005, Mr. Carroll was using
19 cocaine and so keep that in mind. You're going to have to
20 wait to hear that, but you will hear it and that is something
21 you are entitled to use to determine perception.

22 With respect to Mr. Zone and Mr. Taoipu, you're
23 going to learn that Mr. Zone and Mr. Taoipu were smoking pot
24 with Mr. Carroll all day and that's something that you can
25 take into consideration.

1 Anabel Espindola. Anabel Espindola's perception --
2 there will be no evidence in this case that she was somehow
3 under the influence of anything, at least I don't think there
4 will be, but what you're going to find out is that it took 33
5 months before she said anything to anybody similar to what she
6 is saying here in court. And so memory comes into play there.
7 She repeated it to no one for 33 months.

8 Motive. There will be evidence of motive in this
9 case. With respect to Mr. Carroll, Mr. Carroll's motive, when
10 he said some of the things that will come into in evidence
11 this case such as the tape recording, was to keep himself out
12 of jail. He was wearing a recording device that was provided
13 to him by the Federal Bureau of Investigation and the Las
14 Vegas Metropolitan Police Department. That was after he gave
15 at least a three-hour statement to Metro. And his motive in
16 wearing that device and his motive in manipulating the
17 conversation -- and you will hear testimony that he was told
18 how to create an environment in that conversation for the
19 purposes of getting responses, and his motive in doing so at
20 time was to stay out of jail.

21 Mr. Zone. Mr. Zone has not been charged in this
22 case. The testimony in this case is going to be that
23 Mr. Zone, after smoking pot all day long with Taoipu and
24 Carroll, got into a vehicle, along with Carroll, Taoipu and
25 Counts, drove out to the lake and was an eyewitness to

1 Counts -- if it be Counts -- he says Counts -- to Counts
2 shooting Timothy Hadland in the head twice.

3 The State has chosen not to charge him. Mr. Zone at
4 the time he makes his original statements is motivated to see
5 to it that he is not charged and so that's something that you
6 could take into consideration. Just listen -- just listen to
7 it. Whether you take it into consideration or not, I don't
8 care. That's your business. But listen to it because it's
9 coming.

10 Mr. Taoipu. Mr. Taoipu had a motive -- has a motive
11 for the things that he says. Mr. Taoipu you will learn was
12 charged originally with this murder. Mr. Taoipu you will
13 learn basically fled the State of Nevada for a period of time
14 and then was brought back here in a custodial setting. And
15 the time that Mr. Taoipu finally starts saying things, he said
16 them the night of the event, the next morning after he had an
17 opportunity to talk to Mr. Carroll alone. It was Mr. Carroll
18 who brought Mr. Taoipu to the police. And at that point in
19 time, he too was motivated to stay out of trouble.

20 You will learn that Mr. Taoipu ultimately did plead
21 guilty to reduced charged --

22 MR. DIGIACOMO: Judge, I apologize. Until Mr. Zone
23 testifies, that's not admissible and I object.

24 THE COURT: Overruled.

25 MR. GENTILE: I'm not talking about Zone.

1 MR. DIGIACOMO: I mean Mr. Taoipu. Excuse me.

2 THE COURT: Overruled.

3 MR. GENTILE: Mr. Taoipu entered a plea of guilty to
4 a reduced charge and was sentenced to probation. The
5 testimony in this case is going to be that he, along with
6 Zone, Carroll, and Counts went out to the lake. The testimony
7 is going to be that Counts is the one that did the killing.
8 The testimony is going to be that Mr. Taoipu had a 22
9 semiautomatic with him at the lake during the killing and the
10 testimony will be that he received probation.

11 So there will be evidence in this case that he had a
12 motive as well to say the things that he might say if he's
13 called by the State in this case.

14 Anabel Espindola. Anabel Espindola also had a
15 motive and you will hear about it. The testimony that you
16 will hear is that Anabel Espindola was arrested on the 24th of
17 May, 2005. I want to make sure I get this right. The 24th of
18 May 2005. And on the 6th of July 2005, it came to Anabel
19 Espindola's attention that the State filed a notice of intent
20 to seek the death penalty as to her. Anabel Espindola's
21 attorney, along with the attorney for Mr. Luis Hidalgo, III,
22 challenged that action on the part of the State.

23 And so that you understand, this man was not
24 arrested until February of last year 2008. He was not
25 arrested in May of 2005. Timing is everything. On December

1 the 27th of 2007, after Anabel Espindola had been in jail by
2 that time two years and seven months, 31 months or so, the
3 Supreme Court of Nevada struck the death penalty in this case.

4 On the 14th of January, the State sought what's
5 called a rehearing. This was all known to Anabel Espindola.
6 She was in jail at the time. On the 15th of January, she was
7 in this courtroom and she will have to admit to that. And she
8 heard the State argue in her presence about its intention of
9 trying to reinstitute the death penalty against her. At that
10 moment she did not have -- it was kind of in limbo. The State
11 announced that day that the day before they sought a rehearing
12 on the death penalty issue. The State filed on that day an
13 amended notice of intent to seek death.

14 Also, on that day, Anabel Espindola sought bail.
15 She filed a motion for bail because the death penalty was not
16 in effect at that time as to her. And later on that day after
17 court at about 3:15 in the afternoon she had a telephone call
18 where she's speaking to Luis Hidalgo Jr., who, of course, is
19 not in jail at that time, not charged at that time. And in
20 that call you will hear her say, unless she admits it and we
21 don't need to play it, that everything that was being said by
22 the State in court on the 15th of January 2008 was a lie.

23 On the 24th of January, 2008, this Court set a bail
24 for Anabel Espindola. It was a high bail. It was \$550,000.
25 And she will tell you that. And you will hear that she wanted

1 to get out of jail and that Luis Hidalgo Jr., my client, had
2 difficulty raising the premium for the bail, which is
3 15 percent. You will hear that.

4 And so on the 2nd of February 2008, nine days after
5 the bail was set, while the petition for rehearing was
6 pending, while the possibility of the death penalty being
7 reinstated was still there, Anabel Espindola made a deal with
8 the State to testify in this case and to plead guilty to
9 reduced charges. The charges -- she has not been sentenced.
10 She has been sitting there for a year without being sentenced,
11 waiting to testify in this case.

12 After she's testified in this case, then and only
13 then will she be sentenced. She has not requested that the
14 Court sentence her beforehand as was her right to do. She
15 pled guilty to something that is called a fictional charge.
16 She said that she heard that on the day she pled guilty. And
17 the agreement that she made, while, of course, it says in it
18 that she agrees to tell the truth, the agreement that she made
19 guaranteed her that she would not have to run the risk of the
20 death penalty, and it did more than that.

21 You will learn that she has pled guilty and the deal
22 that she's got makes her eligible for probation. This is all
23 evidence that will come into this case and I ask you to
24 consider the source as you're hearing her testimony.

25 Bias. Bias, of course, means that you are favorable

1 to -- you're not supposed to be. Okay. It's what we spent
2 four days trying to find people that wouldn't be. But bias is
3 also something that you can take into consideration as this
4 case develops. And you're going to hear testimony about bias.

5 Anabel Espindola. Here we go again. You're going
6 to hear that during this 30 something months that she was
7 sitting in jail, Anabel Espindola was, of course, in a woman's
8 lockup. She still is. And during that time there were women
9 that were in jail with her that she, as they were released,
10 asked Luis Hidalgo, Jr. to help out. There were several. He
11 did.

12 You will also hear that during that period of time
13 she believed that Louie Hidalgo, Jr., my client, Mr. H, became
14 unfaithful to her with these women that she was sending to
15 him. You will hear testimony from this witness stand from a
16 woman who had a direct -- I won't call it a confrontation -- a
17 conversation with Anabel Espindola wherein Anabel Espindola
18 asked her, Are you cheating with Louie? Is Louie cheating on
19 me with you? You're going to hear that in this case. That is
20 evidence of bias. It will come in. And, of course, that was
21 heard by her before she made her deal with the State.

22 Credibility. There will be in evidence in this case
23 that Deangelo Carroll, who again you're going to only hear
24 through what other people are saying that he said in their
25 presence, that Deangelo Carroll has a prior felony conviction

1 for robbery.

2 Prior inconsistent statements. You will hear
3 testimony in this case that the witnesses who testify -- let's
4 go to the next slide, please.

5 Deangelo Carroll. You will hear certain statements
6 that he made prior to these statements or even after these
7 statements that are coming in through the people who are going
8 to say they heard him. You're going to hear things that he
9 said that were different from the things that these people are
10 saying that he said in their presence. That's an inconsistent
11 statement and, of course, it then becomes your province to
12 decide what to believe, if anything.

13 Rontae Zone has testified how many times? Probably
14 five or six times between statements that he's made, hearings
15 that he's testified at. You will hear that he has testified
16 differently about the same thing on different occasions. It
17 will be for you to decide what to do with that.

18 Jayson Taoipu, it sounds like from the last
19 objection, that the State's not going to call him, so --

20 MR. DIGIACOMO: Objection.

21 THE COURT: Yeah.

22 MR. GENTILE: But if they do -- if Taoipu is called
23 in, he will also have things that he has said before or after
24 that are different from what he's going to say here. And
25 that's evidence that you're going to hear.

1 Anabel Espindola, okay -- Deangelo Carroll, on the
2 day of -- on May the 20th of 2005, he was brought to the
3 police station, to the homicide offices, actually, and he was
4 interrogated, questioned -- you put the word on it. I don't
5 care what you want to call it. He was questioned with a
6 couple of police officers in the room and the entire thing was
7 videotaped.

8 Rontae Zone, when he went in, the entire debriefing,
9 the entire interrogation was videotaped. When Mr. Taoipu went
10 in -- I said videotaped. It was at least audio taped. I'm
11 not certain it was videotaped. When Mr. Taoipu went in, same
12 thing, verbatim recording.

13 You're going to learn that when Anabel Espindola
14 made her deal with the State, she is the only witness that was
15 not recorded. There was no recording made of her debriefing
16 at the time that she was trying to cut her deal with the
17 State. The only recording of anything that she has ever said
18 is her testimony before the grand jury and one other. She was
19 also brought in when they arrested her, obviously, and she was
20 interrogated. She didn't say much, but it was on videotape.
21 And so the initial contact was recorded, but after she changed
22 her mind and made her deal, that contact was not recorded. We
23 have absolutely no way of knowing what she had said to police
24 in the past after she made her deal.

25 Next please.

1 Character for truthfulness. You will hear testimony
2 in this case about character for truthfulness. It comes in
3 one of two ways. Either the opinion of other people who
4 actually know these people who could tell you whether they're
5 truthful or not in their opinion, and there's also what we all
6 know is reputation. Now, some people think of reputation as
7 nothing more than rumor and gossip, and that's okay, you can
8 think of it that way. But nevertheless, you will hear
9 testimony in this case, if you will, that this man Deangelo
10 Carroll, both with respect to people's opinions about his
11 truthfulness and people's -- and his reputation for
12 truthfulness, you will hear evidence in this case that he's
13 not deemed to be a truthful person by people who know him.

14 So now we'll go into what the evidence is going to
15 show about Luis Hidalgo, Jr. I think what we should probably
16 start off doing is explaining Luis Hidalgo, the name Luis
17 Hidalgo. In that photograph you see three men and one woman.
18 It is obvious from looking at it that the three men are of
19 three different generations. I bet you could already tell me
20 what their first name is. You are looking there -- and you
21 will hear testimony about Pops, who's this man, Luis A.
22 Hidalgo, Sr., Louie, or Mr. H, who's this man, also that man
23 who is Mr. Hidalgo, Jr., Louie Hidalgo, Jr., and Luisito or
24 Little Lou or Luis, depending upon who's referring to him, who
25 is Luis Hidalgo, III.

1 I'm going to talk to you about Luis Hidalgo, Jr.
2 The testimony in this case is going to show that Luis Hidalgo,
3 Jr., he is Salvadoran. He lived his whole life up in northern
4 California in the San Bruno area. And you can see him there.
5 He, at one point in time, was a civilian employee of the San
6 Bruno Sheriff's Department where he was a fingerprint
7 technician and also did process serving. Family man, three
8 children, a daughter in the Coast Guard with a high security
9 clearance in Washington, D.C. A good friend. You're going to
10 have people come in here who have known him for years and
11 years and years who are going to come in here and tell you,
12 Look, I've known this man a long time, and we get back to
13 opinion and reputation and character evidence. They're going
14 to tell you this is not that kind of guy. Okay.

15 And let's talk about how he came to Nevada. The
16 evidence is going to show that along with his father, Louie
17 Hidalgo, Jr. has been a body and fender guy. That's what I
18 was brought up talking to him -- I guess they don't call them
19 body and fender guys anymore, but you know what I'm talking
20 about, people who repair vehicles, motor vehicles. Okay. And
21 from the time that he's 18 year old, he was in that business
22 with his father. That's the family business. He did not grow
23 up in the strip club industry.

24 There came a time in the late '90s -- in the '90,
25 period, where he befriended a man by the name of Simon

1 Stertzer, Dr. Stertzer. Dr. Stertzer is on the board -- or
2 was at least on the board of regents of Stanford Medical
3 School. And Dr. Stertzer wanted to invest money and he
4 trusted Louie Hidalgo, Jr. And Louie Hidalgo, Jr. came to Las
5 Vegas, bought a piece of ground over on Bermuda and opened up
6 the biggest, the largest body -- I'm going to call it body and
7 fender because that's what I call it -- largest body and
8 fender repair store -- shop in southern Nevada. And it was
9 called Simone's Auto Body.

10 Mr. DiGiacomo in his opening statement referred to
11 Simone's as a club. Simone's is not a club. It is a body and
12 fender repair store. They make their money on insurance
13 claims and on custom paint and stuff like that, and that's why
14 he came to southern Nevada. And after operating Simone's for
15 a year and a half, he became friendly with -- he met people in
16 this community, and amongst the people that he met in the
17 community were people that were in the real estate industry,
18 which is, you will recall ten years ago you might make some
19 money on, try to get back what you spent.

20 In any case, one of the deals that was brought to
21 him was an almost five-acre parcel of property zoned for a
22 hotel, casino, resort and commercial retail. At 1848 --
23 actually, the 1800 block of North Las Vegas Boulevard, Las
24 Vegas Boulevard north in North Las Vegas.

25 Now, you will also learn that on that 4.93-acres of

1 gaming property there are three liquor licenses, have been
2 forever, two of which had topless entertainment licenses to go
3 with it, one of which had a totally nude license to go with
4 it. And so within one block, all of one block of what is
5 really gaming property, you've got three strip clubs. And
6 they were all owned by the same person who owned the real
7 estate who was Gail Perry, the trust of Paul Perry. Paul
8 Perry is the man who created the Palomino Club back in 1958.

9 And in 1968, the Palomino Club went into the adult
10 entertainment business. Prior to that, it actually was a
11 gaming property.

12 And so from 1968 until actually even now it has been
13 operating that way. And some of you, during jury selection,
14 said that you were familiar with it. But you're going to hear
15 evidence about that.

16 And Dr. Stertzner wanted to buy the piece of property
17 and he did. And Louie Hidalgo did not -- well, I shouldn't
18 say that. The evidence is going to show that there came a
19 point in time after Dr. Stertzner bought this property that
20 Louie Hidalgo took over the management of it, having never
21 been in that industry before, although he did have some
22 background in just basic saloons.

23 You're going to hear people that are going to come
24 in and tell you who have worked with him at the Palomino Club
25 that this is a peaceful, tranquil, even-tempered person, that

1 they have never seen him act out in a violent manner, that
2 they have never heard him talk that way.

3 You will also find out that he had never been --
4 until now, until last year, he'd never been in trouble with
5 the law in a sense of having been charged with any kind of a
6 crime of any serious nature, anything more than serious
7 traffic maybe, but nothing like that. And just so that the
8 record is clear, you're going to learn that he is now 58 years
9 old and when all this was going on he was 54 years old. So he
10 had managed to make it 54 years without having a problem.

11 At the time that these events were occurring that
12 bring us here, you're going to learn that he was going through
13 a hellacious divorce, a hotly contested divorce.

14 Okay. Next slide, please.

15 Now, there is no doubt that throughout this case, as
16 you're hearing evidence come in, you're going to be saying,
17 why did this happen. You're going to be asking yourself that.
18 And again, we do not dispute that this was a tragic thing that
19 happened to TJ Hadland.

20 According to the opening statement that
21 Mr. DiGiacomo made and the evidence that he says he's going to
22 put in this case, somehow Deangelo Carroll told Anabel
23 Espindola who then told Luis Hidalgo, Jr. that TJ Hadland was
24 badmouthing the Palomino Club to cab drivers, and the next
25 thing you know TJ Hadland gets killed.

1 Well, the testimony in this case is going to show
2 that as far back as anybody can remember strip clubs -- at one
3 point in time there was no other strip club other than the
4 Palomino -- strip clubs have always paid cab drivers
5 something, always something. It started out two dollars 50
6 years ago, 40 years ago. It's up to \$50 per person today, per
7 person.

8 And you're going to see, if I may, that every day
9 records are kept at every one of these clubs, every one of
10 them. You're only going to see the Palomino, but you're going
11 to hear some expert testimony, and I'll get to that in a
12 second.

13 We talked during jury selection and you're going to
14 hear testimony that -- well, February 4, 2005 -- is that
15 today?

16 THE COURT: It's either today or tomorrow.

17 MR. GENTILE: Okay. Today's the 2nd. Well, there
18 you go.

19 February 4th, 2005, TJ Hadland was already working
20 at the Palomino Club. He started January 31st. And the
21 system that existed there with respect to the payout of cab
22 drivers -- and some of you probably have seen these documents
23 before -- was that this yellow chip up here, which you're
24 going to see one of in this case, is something that is handed
25 to the cab driver, and on that chip it will say how many

1 people -- this one says two at \$25 -- the cab driver dropped
2 off. The cab driver gets that from the doorman.

3 The cab driver then takes that ticket, drives around
4 the back of the Palomino Club at that time, goes inside where
5 there's a little cage -- I call it a cage, but it's like a
6 casino cage, you know, an office, little booth. That booth
7 has cash in it. The cab driver walks up to the person who is
8 manning that booth or womaning that booth, whichever it may
9 be, hands that ticket to that person and is then given the
10 amount of cash that is on the ticket.

11 You will also learn and have that there are VIP comp
12 tickets and that the VIP comp ticket says that it is not valid
13 if arriving by taxi cab. You will hear testimony that not
14 only the Palomino Club but the industry itself runs into a
15 situation where people who work for the clubs will sell these
16 tickets, these VIP passes, to the passenger after the
17 passenger is dropped off. They will tell the passenger, It's
18 costing you 50 bucks to get in here, but if you give me \$20
19 for this ticket or \$25 for this ticket, you're going to save
20 half the money. And so the passenger pays that person the
21 money.

22 That person goes to the cage, you know, the
23 admission both at the club, presents this pass to the
24 admission booth, and at that point in time the admission booth
25 negates the cab driver's right to get paid and will call the

1 back of the house where the cab driver's going to present this
2 ticket and the cab driver either won't get paid or there'll be
3 issues and problems and maybe the cab driver will get paid
4 something.

5 And then these -- this document all the way to the
6 left basically represents a calculation of how many cabs --
7 how many customers are dropped off by a cab and how much the
8 payment per customer was.

9 On this particular day, there were 73 people dropped
10 off, \$25 per person was paid for each of those 73 people, so
11 it was a total pay out of \$1,825. There's also a different
12 amount of money paid for women because in those days the
13 Palomino, and still -- the Palomino Club operates a totally
14 nude male review that women attend. It's one of two clubs in
15 town that has always done that. But they don't pay as much
16 for women that are dropped off by cabs. And then there's also
17 promotions and other things like that.

18 This becomes important because you're going to hear
19 testimony in this case that both Deangelo Carroll and Timothy
20 Hadland, TJ Hadland, were seen by employees of the Palomino
21 Club selling the VIP passes to customers that were dropped off
22 by cab drivers and pocketing the money. I'm not saying to you
23 that that's true. What you're going to hear is that people
24 reported that and the person who saw it and reported it will
25 come in here.

1 Next slide, please.

2 By the way, anytime a cab driver dropped off
3 somebody, they had to sign another document that said they
4 didn't divert that passenger from some other club that they
5 wanted to go to and brought it to the Palomino. And the
6 reason that that's important, if I may, there was a lot of
7 litigation going on at that point in time.

8 You're going to hear the testimony of Kevin Kelly.
9 Kevin Kelly is a lawyer. He's been a lawyer here in Nevada
10 for 30 years. He served two tours of duty in Vietnam and he
11 had a saloon and the saloon wasn't doing very well, but the
12 saloon became Spearmint Rhino as a result of somebody coming
13 to him and making a deal with him and him merging with them.
14 Many of you have used -- have talked about Spearmint Rhino.

15 Mr. Kelly's going to come in and he is going to tell
16 you about the industry and how clubs are run and what they do
17 to ensure against unlawful activity taking place at those
18 clubs. And obviously it is impossible to eliminate it. It
19 can't be done, but it can be controlled. And you're going to
20 hear about those controls, but you're also going to hear about
21 the Nevada Association of Nightclubs of which Mr. Kelly was an
22 organizer.

23 And at the time in 2005, every club that served
24 alcohol in Clark County that had either totally nude, which
25 would only be one, or topless, which would be all the others,

1 entertainment was a member of the Nevada Association of
2 Nightclubs.

3 And the reason that it was created, he will tell
4 you, is because as new clubs moved into our community, they
5 threw -- they basically created a price war. If one club
6 would pay a cab driver \$30, the other club would pay 35, then
7 another club would pay 40, and there were times that the price
8 to the cab driver per drop off would change multiple times in
9 one night. And so in order to try to avoid that, this
10 organization was created.

11 He will tell you that the life blood of any topless
12 bar -- for that matter, I guess it would be any bar -- is the
13 number of customers. But the reason that it's more important,
14 perhaps, to a topless bar, he will tell you, is because a
15 topless bar makes its money from selling alcohol and from the
16 fees that the dancer pays to the club. The dancers are
17 independent contractors. They rent time in order to be there
18 to dance. They pay a flat fee. Whatever money they make is
19 theirs.

20 We will talk to you about the kind of security that
21 goes on to see to it that nothing unlawful happens on the
22 premises. And so the more customers you have, the more
23 dancers you're going to get. The more dancers you get, the
24 more revenue you generate from the dancers' fee. He will tell
25 you that's how it works.

1 And ultimately what he will tell you, ladies and
2 gentlemen, is he's going to come in here and he's going to say
3 that everybody -- all of the members of this organization
4 except one had to agree to whatever they were going to be
5 paying cab drivers at that time. At least that was its goal.
6 It didn't really work out for very long, but it was its goal,
7 except one, and that one was the Palomino Club.

8 The Palomino Club was always permitted to pay \$5
9 more per customer than whatever anybody else was paying. And
10 he will tell you that the reason for that was because a cab
11 driver might have to deadhead back and so there were some cab
12 drivers that did not want to make that run to North Las Vegas
13 because if they weren't staging, if there wasn't a lot of
14 business, then they would have to deadhead back and -- so
15 that's what you're going to hear.

16 You're going hear that the badmouthing of cab -- two
17 cab drivers was absolutely inconsequential. And anybody in
18 the industry would know that. And Louie Hidalgo knew that.

19 Rontae Zone on the 21st of May, 2005, presumably
20 here as well, he will tell you that he was asked by the
21 homicide detectives after he told them that this guy KC left
22 the Palomino Club in a taxi, he was asked what color. And he
23 told the law enforcement officers that night, There's no way I
24 know. There were so many cabs. That comes from the mouth of
25 a coconspirator and that is proof -- I won't tell you what

1 that's proof of, but you're going to hear that he told the
2 officers, There were so many cabs, I can't tell you what color
3 it was.

4 You're also going to hear from a cab driver by the
5 name of Gary McWhorter who is the man that picked up KC,
6 Kenneth Counts, and he's going to tell you that when he picked
7 him up, there was a cab staging going on over there, that
8 there were other cabs there behind him when Counts got into
9 his cab.

10 You will also hear that when the Palomino Club was
11 searched, there was \$151,000 in cash in the safes at the
12 Palomino Club. You have heard and will hear Anabel Espindola
13 on that tape that Mr. DiGiacomo played in his opening
14 statement deposits to Mr. Carroll when she says that she only
15 has \$600, where am I going to get the money. And if I tell
16 Louie, he's going to have a fit -- or whatever she says.

17 You're going to hear testimony that the police
18 counted out \$151,000 at the club when they searched it on the
19 24th of May, 2005.

20 And so we then turn our attention to something else.
21 Why did this happen? What the evidence is going to show --
22 you heard me elude to the evidence that's going to come in
23 with respect to Mr. Hadland and Mr. Carroll both having been
24 seen selling passes to customers that came to the club and got
25 out of taxis.

1 Deangelo Carroll, the testimony is going to show,
2 had a robbery conviction, was absolutely totally dependent
3 upon the good graces of the Palomino Club's owners to maintain
4 his lifestyle.

5 You're going to learn that Rontae Zone when he was
6 first questioned by the police on the 21st of May said to the
7 police that Carroll told him that something bad was going to
8 happen to somebody -- actually, he said that somebody needed
9 to be dealt with. Those were the exact words that he used,
10 dealt with, whatever that means. And when they asked him why,
11 Carroll said because -- excuse me, Zone said that Carroll told
12 him because they were snitching. They were telling. They
13 were ratting.

14 And so you will have to make a decision as you go
15 through this trial whether those terms have any application at
16 all of badmouthing a club driver -- not -- badmouthing a club
17 to a cab driver, or whether they pertain more likely to TJ
18 Hadland snitching off Deangelo Carroll and cutting off his
19 lifeline, his support line. That will be for you to decide.

20 Next.

21 You will learn that when Mr. Hadland was terminated
22 from the club, which he was, and it had nothing to do with any
23 accusation of stealing, you will learn that Deangelo Carroll
24 had taken a couple of weeks off. He was on leave. His uncle
25 had been murdered and so he took some time off. And you'll

1 have a witness come in here who will tell you that upon him
2 returning to work, upon Carroll -- excuse me -- yeah,
3 Carroll -- upon Carroll returning to work, he confronted this
4 person whom he suspected as having basically reported --
5 having seen him pull this deal with these free passes, and he
6 said to that person, Don't put me with TJ. This was upon his
7 return to work at the Palomino. Hadland was fired, no longer
8 working there, but still alive.

9 This is Kenneth Counts. The testimony in this case
10 is going to show that Kenneth Counts, whether he is or whether
11 he isn't, he was portrayed by Mr. Carroll to be a member --
12 and I want to get this right -- of the Black Pee Stone Bloods.
13 This is the man that Zone will say used the 357 magnum to
14 shoot Hadland in the head twice and kill him. You are going
15 to learn that this man was brought back to the Palomino Club
16 after this event occurred and that Mr. Carroll -- and you hear
17 it on the tape actually. You'll hear it on the tape -- that
18 this man Carroll told Anna Espindola on the tape and other
19 people, Louie Hidalgo on the night of this event, that this
20 man Carroll was on the other side of the door, that he had
21 just committed a murder, and that he was demanding money, and
22 that if he didn't get paid the money, he was going to harm
23 Carroll and he was going to harm the Hidalgos, that he was a
24 member of the Black Pee Stone Nation, Black Pee Stone Crips.
25 And his exact word were, You don't want to fuck with my boy.

1 Now, that occurred after the murder. The testimony
2 in this case is going to be that that engendered a hell of a
3 lot of fear at that moment. You will hear that the security
4 team at the Palomino Club is not armed and so there was a
5 dilemma. The dilemma was what to do.

6 The testimony's going to be that under certain
7 circumstances you might just pick up the phone and call the
8 police department and have them come over and pick somebody
9 up, but that's not what happened. What happened was the money
10 was paid, but it was paid by Anabel Espindola. Even she said
11 she paid the money. She's going to come in here and she's
12 going to tell you a different version and you can compare what
13 she says here, after you think about all the reasons that she
14 might have and all of the time that she had to look at all the
15 statements, to decide whether you believe that version or not
16 and then you can compare that version that she's talking about
17 here with the tape, the tapes that she's on, using the first
18 person, singular pronoun "I." So listen carefully.

19 In any case, I could go on, but let's just get
20 started. The case is going to be for you to decide. That's a
21 very powerful motivator and you're going to hear testimony
22 about its presence. You're going to hear testimony about a
23 357 and you're going to hear testimony about gangs. At the
24 end of the day and at the beginning of this trial, I ask you
25 to please keep in mind that timing is everything.

1 What you're going to find at the end of the day is
2 that there is no proof of any involvement that would rise to
3 the level of criminal guilt on the part of Luis Hidalgo, Jr.
4 prior to the death of Timothy Hadland. If anything, this man
5 is an accessory after the fact, if anything.

6 The judge will instruct you at the end of the case.
7 At that point in time, I'm going to ask that you follow your
8 oath and return a verdict of not guilty as to Count 1,
9 conspiracy, and as to Count 2, the murder.

10 THE COURT: All right. Thank you, Mr. Gentile.

11 Ladies and gentlemen, we're going to go ahead and
12 take our lunch recess now. We will be in recess for the lunch
13 break until 1:15.

14 And once again, you're reminded of the admonishment
15 that is still in place not to discuss the case or anything
16 relating to the case with each other or anyone else. Don't
17 read, watch, listen to reports or commentaries on any subject
18 relating to the case. Please don't visit any of the locations
19 in question -- any of the locations at issue. Don't do any
20 independent research and please don't form or express an
21 opinion on the case.

22 If everyone will please leave their notepads in
23 their chairs and follow Jeff through the double doors, we'll
24 see you all back here at 1:15.

25 (Court recessed at 12:14 p.m. until 1:23 p.m.)

1 (In the presence of the jury.)

2 THE COURT: All right. Court is now back in
3 session. The record will reflect the presence of the State --

4 MR. GENTILE: We would request of the Court to sit
5 behind the bar.

6 THE COURT: That's fine --

7 Through the deputy district attorneys, the
8 defendants and their counsel, the officers of the Court and
9 the members of the jury.

10 Mr. Adams, are you ready to make your opening
11 statement?

12 MR. ADAMS: Yes, ma'am, thank you.

13 THE COURT: All right.

14 DEFENDANT HIDALGO, III OPENING STATEMENT

15 MR. ADAMS: Good afternoon. The afternoon of May
16 the 23rd in a little room in Simone's Auto body Shop, the man
17 who was sent by the police to get incriminating evidence, to
18 get incriminating evidence, stopped Luis Hidalgo, III, stopped
19 him when he first made a comment and he said, What are you
20 saying? You had nothing to do with this, nothing to do with
21 this.

22 Little Luis wasn't present. He didn't pay and he
23 did not participate in the death of Mr. Hadland. He didn't.
24 The evidence is going to show that four people were present
25 when Mr. Hadland was killed. Deangelo Carroll drove a van, a

1 van that was owned by Anabel Espindola. He drove it filled
2 with three other people: Jayson Taoipu who had a .22 caliber
3 weapon under his seat, maybe unloaded; Rontae Zone who was
4 along for the ride and smoking pot; and Kenneth Counts. Louie
5 Hidalgo wasn't there. Little Louie wasn't there.

6 Who paid? Well, they said in their opening that
7 you'll hear testimony that Anabel Espindola laid five large,
8 \$5,000 in cash in the office of the Palomino Club and that
9 Deangelo Carroll took that \$5,000. What you didn't hear was
10 that Little Lou wasn't in that office on that night. He
11 didn't participate. He didn't pay.

12 Anabel Espindola will come in and she's expected to
13 testify that there was this conversation beforehand where he
14 got into some kind of disagreement with his father. In that
15 conversation she's expected to testify that Little Luis
16 Hidalgo never said, Dad, dad, you've got to kill Hadland.
17 Dad, dad Hadland needs dead. Dad, beat him up real bad. The
18 State's star witness is going to come in and not say those
19 things. She's going to say there was an argument and that
20 Little Luis said, Dad, you don't take care of your business.
21 He wasn't present. He didn't pay and he did not participate.

22 So why are we here? Well, we're here because of
23 what the State didn't share with you, the body wire from
24 May 23rd, four days after Mr. Hadland was killed up at Lake
25 Mead. Four days later in Room 6 of Simone's Auto body Shop,

1 Anabel Espindola sent Deangelo Carroll to Little Lou's
2 room/office and on that body wire Little Lou mouthed off and
3 said some pretty stupid stuff. That's why we're here.

4 The question is talking about rat poison, does that
5 mean you're responsible four days before for the death of
6 Mr. Hadland? Nowhere on that tape, nowhere on that tape are
7 you going to hear Little Lou say, Man, I'm so glad I got you
8 to go kill TJ. Nowhere are you going to hear, Man, I'm so
9 glad I called you about bats and bags and got you to come meet
10 with my dad so then you guys could enter into a conspiracy to
11 go do something to Mr. Hadland. You're not going to hear
12 that.

13 There will be evidence that between the 19th of
14 May 2005 when Mr. Hadland was killed up by Lake Mead and Room
15 6 at Simone's, four days later, that Little Lou did learn
16 about the death of Mr. Hadland, a former employee of the club.
17 He did learn that Anabel was involved. He's known Anabel
18 Espindola since he was nine years old and he loves her.

19 The prosecutor in their opening said -- and played
20 snippets of tape where Little Luis, on the transcript part
21 rolling down, talks about rat poison, talks about a bottle of
22 gin. He said those things. He said those things. No if ands
23 or buts about it, 100 percent, those words came out of his
24 mouth.

25 The main thrust of the case that they're going to

1 present is by saying those things he must be responsible for
2 the death of Mr. Hadland. So let's look at the whole tape and
3 that's what I'm asking of you in the next week or so. This
4 tape is 34 minute and 56 seconds long. There's a lot of
5 conversation back and forth. The first ten minutes or so
6 Little Luis doesn't say anything. And I'm going to ask you to
7 look at this tape very critically and to evaluate the full
8 tape, the entire wire, keeping in mind that Deangelo Carroll
9 knew fully well that the recorder was on and Little Luis did
10 not.

11 I'm going to ask you to check out the reactions
12 between the parties when something is said on the tape. I'm
13 going to ask you to look at the tape and to see, is there some
14 way I can tell who's really in control here, who's in charge,
15 who's calling the shots? Can I tell what happened up at Lake
16 Mead four days earlier based on what's talked about in Room 6
17 at Simone's? Does this conversation on this wire tell us
18 anything that we need to know in determining what happened to
19 Mr. Hadland? When you do this critical evaluation of the
20 tape, one thing's going to be crystal clear. There's three
21 people in the room: Deangelo Carroll, Anabel Espindola, and
22 Little Lou, Luis Hidalgo, III.

23 Let's first talk about Mr. Carroll. We'll hear
24 about Mr. Carroll and we'll hear on that body wire that he
25 drove up to Lake Mead with three people in the van. It wasn't

1 Little Luis and it wasn't Little Luis' van. We'll hear on
2 this tape that he's directing all of his conversation, all of
3 his important questions about money, about what to do next,
4 about attorneys -- they are all directed to one person.
5 There's only three people in the room. And you'll hear on
6 that wire those conversations, those remarks were not directed
7 to Little Luis. They were all directed to the next person,
8 Anabel Espindola.

9 We'll hear from Anabel Espindola. She'll say, What
10 did you do? What did you do? I told you to go to plan B.
11 We'll hear from her that plan B meant -- and she'll testify to
12 this -- plan B meant come back to the club. Don't do anything
13 to Hadland, come back.

14 Deangelo Carroll will tell her, Ms. Anabel, I don't
15 know what happened. Kenneth Counts went F'ing stupid. And
16 you heard enough of the tape earlier to know that the F word
17 was used quite a bit, so when I talk to you about the tape,
18 I'll leave those out for the most part. He went stupid and he
19 shot the dude. Nothing we could do about it. Ain't none of
20 us had no pistol. That's what he said.

21 And on our copy of the tape, the full 34 minutes and
22 56 seconds, that's at the 13 minute and 56 second mark.
23 You'll hear from Deangelo Carroll's own mouth on the wire that
24 he'd been picked up by the police, that he'd been released by
25 the police and thanked for his cooperation. You'll learn from

1 the witness stand that that's not fully true. You'll learn
2 from the witness stand that he had been picked up and you'll
3 learn from the witness stand that he was cooperating with the
4 police to try to get evidence for the police to have and
5 for -- ultimately for jurors to have.

6 You'll hear evidence that on May the 20th, 26 hours
7 or a little less than that, about 22 hours after the killing
8 of Mr. Hadland, Mr. Carroll was taken to the homicide office
9 and stayed for a lengthy period of time.

10 Immediately after he was in that homicide office and
11 was interviewed or interrogated or talked to by police he was
12 allowed to leave. The police drove him home and drove him to
13 help them get Rontae Zone. Rontae Zone came in at 1:00 a.m.
14 that morning, 26 hours later, 1:00 a.m. on the 21st of May,
15 and he gave a statement to the police.

16 The next day Deangelo Carroll drove -- he drove
17 Jayson Taoipu to the police office so they could get a
18 statement from him. Deangelo Carroll was motivated to not be
19 arrested for his involvement for driving Kenneth Counts and
20 these other guys up to the lake.

21 The police made the choice to allow Deangelo Carroll
22 to stay out of jail for a few days. They were trying to get
23 with him to use him to get more evidence. They took a little
24 recording device and they placed it -- like a beeper, placed
25 it on him and they sent him to get evidence. And where did he

1 go? He didn't go to Room 6 of Simone's where Little Lou
2 sleeps, where Little Lou works. He went to Anabel Espindola
3 in the main office. Anabel sent him down the hall to Little
4 Luis' room so they could talk behind a closed door.

5 He didn't just go in and talk, but he came up with a
6 scenario. After talking with the police, he came up with a
7 few new facts and he said -- the facts you'll hear on the
8 tapes, Kenneth Counts is threatening to kill us. We need more
9 money. Deangelo and Jayson, they're going to rat me out. We
10 need more money. This, in fact, was not true. These were
11 things that he created with the police to try to get a
12 reaction from Anabel so that she would say something on the
13 wire. He knew fully well that he was wired up and he was
14 trying to get information because he was trying to not get
15 arrested.

16 So who was truly in charge? Well, that wasn't the
17 one I wanted, but that's okay. That's fine. We'll get to
18 that in a minute.

19 I'm going to read you three snippets and we'll play
20 this over and over. And you heard these earlier on the
21 prosecutor's opening.

22 Talk may be cheap, but we're going to hear from the
23 witness stand that Anabel Espindola gave \$1,000 in hard cash
24 to Deangelo Carroll on the 23rd. That's at the end of the
25 wire. You didn't hear that in the part they played. That's

1 further down, but she left the room and came back and gave him
2 \$1,000, not Little Lou.

3 At the -- on their version, the 14 -- I believe it
4 was 14 minutes and ten seconds, on the full version, it's
5 right around the 20, 21-minute mark, Anabel Espindola says,
6 quote, You want to lose it all? If I lose the shop and I lose
7 the club, I can't help you or your family. She didn't say, If
8 Mr. H loses the shop or the club or if Little Lou loses the
9 shop or the club. The words out of her mouth on this wire
10 are, If I lose the shop and I lose the club, Deangelo, I can't
11 take care of you.

12 There was also a part on the earlier tape that I
13 think is important for you to listen to when it's played in
14 evidence, and it was the part about finding an attorney. And
15 there was a lot of talk about that. And at one point she
16 said, I'm going to go talk to the attorney tomorrow. And on
17 there you may have heard it, He's outrageous. He's going to
18 want you to go ahead and wrap these other guys up and there's
19 no fucking way.

20 So here we are four days after the death of
21 Mr. Hadland. The question is who's really in charge of what
22 happened on the 19th. Well, who's in charge? It's not
23 Deangelo. Who's in charge? It's not a defense lawyer four
24 days after, after attorneys have been consulted. She's saying
25 there's no way we're going to turn people in for their

1 involvement in this crime. Anabel Espindola was in charge.
2 She was in charge on the 23rd, and by the words out of her
3 mouth, she was in charge sooner than that.

4 What did Anabel do in direct relation to controlling
5 Deangelo Carroll and his actions? Well, she said, Deangelo --

6 How about the next one? Yeah.

7 All right. Deangelo, you need a prepaid phone. You
8 need this phone so we can stay in touch so I can send you
9 messages. You heard on the wire the prosecutor played and
10 you'll hear from the witness stand, she says, I'm going to
11 give you a code name, this code name of Boo so that way you'll
12 know the messages are really from me. She was talking about
13 being the sole person to kind of control Deangelo after the
14 fact, how he would operate, how he would cooperate with police
15 or say things, how he could stay undetected for his
16 involvement.

17 Let's go down two more, please, not two more slides,
18 two more clips.

19 She tells Deangelo that, You've got to resign from
20 the club for personal reasons and that -- I'm going to give
21 you some money so that you can maintain yourself. I'm not
22 going to leave you hanging. Does this shed some light as to
23 who's really in charge of what went on on the 19th?

24 She also made some comments on what she expected to
25 happen on the 19th. And she said --

1 Can you pull all three of them up?

2 Let's look at the one at the bottom. What we really
3 wanted was him beaten up, if anything. We didn't want him
4 dead. Then she goes on to say, Are you so stupid? Are you so
5 heartless? How could this happen? Once you saw that guy had
6 a gun, why didn't you just turn around?

7 She's saying on the tape that she knew what -- she
8 knew something was going to happen, some sort of
9 confrontation, and she's saying on the tape nobody was
10 supposed to die. When she's saying, He's supposed to get
11 beaten up, she's going to testify on the witness stand what
12 she means by that. She's not going to testify that she was
13 talking about Little Lou and I wanted you to beat him up.
14 She's not going to say that.

15 The entire tape shows that Anabel Espindola was in
16 charge certainly on the 23rd of May and it suggests very
17 strongly that she was in charge on the 19th of May when
18 Deangelo Carroll got behind the wheel of Anabel Espindola's
19 van and drove up to Lake Mead to meet Mr. Hadland.

20 I've talked about the other two, so let's talk for a
21 second about Little Luis' statements on the body wire. When
22 you listen to the whole wire, ask yourself, does any of these
23 statements help us understand what he knew and when he knew it
24 or did he know this stuff beforehand on the 21st? Does this
25 help us know whether he ever entered a conspiracy to do