anything to Mr. Hadland?

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

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

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

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

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

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

testifies in this case.

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

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

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

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

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

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

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

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

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

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

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

Rontae Zone never spoke to Little Lou Hidalgo, never

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

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

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

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

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

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

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

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

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

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

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

estimation, he was killed somewhere in that time period.

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

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

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

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

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

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

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

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

THE COURT: I'm sorry.

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

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

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

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

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

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

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

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

MR. DIGIACOMO: Objection, Your Honor.

THE COURT: Yeah.

MR. DIGIACOMO: Thank you.

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

MR. ADAMS: Yes.

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

THE COURT: Well --

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

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

THE COURT: Yeah. It's sustained.

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

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

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

Thank you.

THE COURT: All right.

MR. ADAMS: Thank you, Your Honor.

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

Is the State prepared to call its first witness?

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

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

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

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

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

(In the presence of the jury.)

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

Mr. DiGiacomo, please call your first witness.

MR. DIGIACOMO: Larry Morton.

THE COURT: Larry Morton.

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

LARRY RAY MORTON, STATE'S WITNESS, SWORN

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

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

DIRECT EXAMINATION

BY MR. DIGIACOMO:

Q Good afternoon, sir. How are you employed?

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

Q What does that mean you do for a living?

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

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

Q How long have you been a crime scene analyst?

A For 14 years.

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

A Yes, I was.

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

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

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

Q Specifically on May 20th, were you at the

autopsy of Timothy J. Hadland?

A Yes, I was.

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

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

MR. DIGIACOMO: May I approach, Judge?

THE COURT: Yes.

BY MR. DIGIACOMO:

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

A Yes, I do.

Q Is that Mr. Hadland?

A Yes, it is.

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

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

Q How do you know that?

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

Q Yeah -- well, hold on.

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

MR. GENTILE: No objection.

THE COURT: All right. Those will be admitted.

MR. ARRASCADA: No objection either, Your Honor.

THE COURT: Oh, I'm sorry.

(State's Exhibits 1 through 4 admitted.)

BY MR. DIGIACOMO:

Q What I'll do is put them on the overhead and let you answer that question, sir. I'm showing you what's now been admitted as State's Exhibit No. 1.

A Every photograph taken by the medical examiner's office has this -- this gray marker placed in the photograph. My photograph would not have that marker in them. If there's any markers, I would put in a ruler with my initials and identification number on it.

Q And then that marker has unique numbers on it so the medical office can make sure they -- that the picture associates with the correct report with the correct person, correct?

A Yes, that is correct.

Q All right. You also indicated that your responsibility is to collect evidence at an autopsy. Now,

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

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

Q And did you collect that?

A Yes, I did.

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

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

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

A Yes, I did.

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

A Yes, I do.

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

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

this particular package.

Q Obviously that package is cut open, correct?

A Yes, it is.

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

A Yes.

Q Do you know what that blue seal represents?

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

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

A Yes, it is.

MR. DIGIACOMO: Move to admit 134.

THE COURT: Any objection?

MR. GENTILE: No.

MR. ARRASCADA: No, Your Honor.

THE COURT: All right. 134 is admitted.

(State's Exhibit 134 admitted.)

BY MR. DIGIACOMO:

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

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

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

A Yes, it is.

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

THE COURT: Any objection?

MR. GENTILE: No.

MR. ARRASCADA: No, Your Honor.

THE COURT: All admitted.

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

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

THE COURT: All right.

Who would like to go first, Mr. Gentile?

MR. GENTILE: I would.

THE COURT: Thank you.

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

THE COURT: Yes, that's fine.

MR. GENTILE: Thank you.

CROSS-EXAMINATION

BY MR. GENTILE:

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

A Yes, it is.

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

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

Q Okay. And have you worked with such experts?

A Only minimally.

Q Only minimally. Okay.

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

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

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

A Yes.

Q -- as far as the samples go?

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

A Yes.

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

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

A Yes, that is correct.

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

A Yes.

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

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

Q Mr. Krylo?

A Jim Krylo, yes.

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

A No, I did not.

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

A That's correct.

Q Okay.

MR. GENTILE: Thank you.

THE COURT: All right. Mr. Arrascada.

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

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

A No, I did not.

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

A That is correct.

MR. ARRASCADA: Thank you.

THE COURT: All right. Thank you.

Any redirect?

MR. DIGIACOMO: No.

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

THE WITNESS: Thank you, Your Honor.

THE COURT: State, your next witness.

MR. PESCI: State calls Ismael Madrid.

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

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

the oath to you.

ISMAEL MADRID, STATE'S WITNESS, SWORN

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

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

THE COURT: All right. Thank you.

Mr. Pesci.

MR. PESCI: Thank you.

DIRECT EXAMINATION

BY MR. PESCI:

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

A I was at Lake Mead.

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

A I was actually at the lake.

Q Okay. That's here in Clark County?

A Yes.

Q And who were you there with?

A With two friends.

Q And who were those friends?

A Chelsea Dixon and Monique Gonzales.

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

What was going on that day?

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

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

A About 7:00.

Q 7:00 p.m.?

A Yeah, about 7:00 p.m.

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

A Yes.

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

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

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

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

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

A Yes.

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

A Yes.

Q What is it that you saw?

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

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

A Yes.

Q What was she driving?

A A truck.

Q And what kind of a truck is this?

A A Dodge Ram.

Q Where were you seated in the truck?

A Passenger.

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

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

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

A No.

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

A I can't recall.

Q But is this the road to drive back into the

city from the lake?

A I believe so, yes.

MR. PESCI: May I approach the witness?

THE COURT: Yes, that's fine.

BY MR. PESCI:

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

A (Complying.)

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

A Yes.

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

A Yes.

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

A Yes.

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

THE COURT: Any objection?

MS. ARMENI: No, Your Honor.

MR. GENTILE: No, Your Honor.

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

(State's Exhibits 5 through 9 admitted.)

BY MR. PESCI:

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

A Yes.

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

A Yes.

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

THE COURT: Any objection?

MS. ARMENI: No, Your Honor.

MR. ARRASCADA: No.

THE COURT: You don't have to stand.

That will all be admitted.

MR. PESCI: Thank you.

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

BY MR. PESCI:

Q Now, you said you almost missed the body?

A Yes.

Q All right. Let's look at State's 5 first. Now, as we're looking at State's 5, can you show us where the body is? You can touch the screen there.

A Right there.

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

the body?

A Yes.

Q Were those there?

A Only one of them.

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

A Yes.

Q Showing you State's 6, as you got closer -- if you tap the bottom right-hand corner of your screen, it will clear -- thanks -- State's 6, as you got closer, is that what you saw?

A Yes.

Q Eventually did you get to a point where you did see the body?

A Yes.

Q How close do you think you got when -- were you still in the truck at this time?

A No, I exited the truck.

Q Did anybody else get out at that point?

A Shortly after, yes, Chelsea did.

Q When you got out, what did you do?

A I didn't -- I was yelling, you know, Hey, can you hear me? I didn't know he was dead at first.

Q Okay. Looking at State's 7, at that point, you're telling us you're not sure if that person was alive or

not?

A Yes.

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

A Yes.

Q Could you circle that particular car?

A (Complying.)

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

A Facing away from us.

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

A Yes.

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

A Yes.

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

A Yes.

Q What did you do based on that?

A I called 9-1-1.

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

A Yes, I had a cell phone.

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

them what the situation was?

A Yes.

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

A At first, no.

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

A I believe so, yes.

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

A Later.

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

A Yes.

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

A Advertisement cards.

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

A Yes.

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

A I don't believe so, no.

Q Okay. Let me approach and show you State's 15. Do you see anything else in that photograph?

A Tube.

Q Okay. And was that out there at that time?

A Yes.

Q As far as you know?

A As far as I know, yes.

Q Okay. And when you talk about the tube, can you point that out to the ladies and gentlemen of the jury?

A (Complying.)

Q Okay. Thank you.

Did police or medical arrive?

A Yes.

Q And did police eventually speak with you?

A Yes.

Q Did they ask you to fill out what's commonly referred to as a voluntary statement?

A Yes.

Q Did you fill that voluntary statement out?

A Yes, I did.

Q And do you have any experience now, as you sit here today, with voluntary statements?

A Yes.

Q And how is that?

A I'm a police officer.

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

A No, I wasn't.

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

A I had a month before I started the academy.

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

A No.

Q Since then have you handed those out to witnesses?

A Yes.

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

A I was with them.

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

A No. We filled them out separately.

Q Did you compare notes?

A No.

Q Okay.

MR. PESCI: Pass the witness.

THE COURT: All right. Thank you.

Ms. Armeni.

MS. ARMENI: Yes, Your Honor.

CROSS-EXAMINATION

BY MS. ARMENI:

Q Mr. Madrid, I just have one question. Exhibit 8, I don't know if you remember that -- do you still have the exhibits in front of you?

A No.

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

A Yes.

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

A Yes.

MS. ARMENI: Court's indulgence.

No further questions.

THE COURT: All right. Mr. Arrascada.

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

CROSS-EXAMINATION

BY MR. ARRASCADA:

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

A Yes.

Q And you saw that when you walked up?

A Yes.

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

A I believe that's what it says.

MR. ARRASCADA: Thank you.

Nothing further, Your Honor.

THE COURT: Okay. Thank you.

Redirect?

MR. PESCI: Sure, if I could.

REDIRECT EXAMINATION

BY MR. PESCI:

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

A Yes.

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

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

A Chain.

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

A Yes.

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

A No.

MR. PESCI: Thanks.

THE COURT: Any recross?

MS. ARMENI: No, Your Honor.

MR. ARRASCADA: No, Your Honor.

THE COURT: Thank you for your testimony. Please don't discuss your testimony with anyone else who may be called as a witness. Thank you, and you are excused.

State, call your next witness.

MR. PESCI: State calls Officer Lafreniere.

THE COURT: Sir, just please remain standing, facing our court clerk who's going to be administering the oath to you.

JASON LAFRENIERE, STATE'S WITNESS, SWORN

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

THE WITNESS: Jason Lafreniere, L-a-f-r-e-n-i-e-r-e.

THE CLERK: I'm sorry. I got lost. Jason.

THE WITNESS: Yes. Yes, ma'am, Jason, J-a-s-o-n. Yes, ma'am.

THE CLERK: Okay. Sorry.

THE WITNESS: Jason Lafreniere.

THE COURT: Is that J-a-s-o-n?

THE WITNESS: Yes, ma'am. Yes, Your Honor.

THE CLERK: L --

THE WITNESS: L-a-f-r-e-n-i-e-r-e.

THE CLERK: Thank you.

MR. PESCI: May I proceed, Your Honor?

THE COURT: You may, Mr. Pesci.

DIRECT EXAMINATION

BY MR. PESCI:

Q Sir, what do you do for a living?

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

Q How long have you been with Metro?

A For over seven years.

Q How long have you been a detective?

A About a year and a half.

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

A Juvenile sex abuse.

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

A No, sir.

Q What were you?

A I was a patrol officer.

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

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

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

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

Q Is that within your patrol area?

A Yes.

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

A No, sir, I was by myself.

Q Were you dressed in uniform?

A Yes.

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

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

Q And were you driving a patrol unit car?

A Yes, a marked car. Yes, sir.

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

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

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

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

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

A It is, yes, sir.

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

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

Q Let me stop you there.

A Yes, sir.

MR. PESCI: May I approach?

THE COURT: Sure.

BY MR. PESCI:

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

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

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

A Yes, sir, they are.

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

THE COURT: Any objection?

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

MS. ARMENI: He showed them to us.

MR. GENTILE: Oh, he did? Okay.

MR. ARRASCADA: No objection.

MS. ARMENI: No objection.

MR. ARRASCADA: And no objection.

THE COURT: All right. Thank you. All right. 10 and 11 are admitted.

(State's Exhibits 10 and 11 admitted.)

BY MR. PESCI:

Q Okay. You talked about a car, correct?

A Yes, sir.

Q And I'll show you -- let's start with 10. We're going to have to zoom out on that one.

Okay. Looking at State's 11 -- or State's 10, is the car depicted here on the left-hand side?

A Yes, sir.

Q Okay. And you say as you sit here today you don't recall whether it was running or not?

A I have no idea.

Q All right. And in the body, showing you

State's 11, do you recognize that?

A Yes, sir, I do.

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

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

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

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

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

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

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

A Yes, sir.

Q What's the rationale for securing the scene?

A Just to secure any evidence or anything that

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

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

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

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

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

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

A Yes, sir.

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

A Yes, sir.

Q Why was that?

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

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

Q Did you find anything?

A Nothing -- no people.

Q All right. Did you actually open the door and go look --

A No, not at all.

Q What did you do, just looking to ascertain whether there was --

A What's called quick peeks. We approach it down low, kind of, you know, where you're using it as cover or concealment from what might be in there and quick peeks looking up in the window going back down, doing that all the way around the vehicle to make sure nobody was in there.

Q Did you have a flashlight or something with you?

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

Q Would that be something you would normally use?

A Absolutely.

Q Okay. And then after you -- is it commonly referred to as clear the vehicle?

A Yes.

Q Did you clear the vehicle?

A Yes.

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

A That's correct.

Q Did you also look at the body?

A Yes, sir.

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

A He appeared dead to me.

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

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

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

A Yes.

Q Eventually were they asked to fill out voluntary statements?

A Yes, sir.

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

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

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

other police personnel take over?

A Yes, absolutely.

Q And how does that come about?

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

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

A Yes, or a senior officer.

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

A Yes.

Q Did you remain out at that scene?

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

Q Were you a part of securing that scene --

A Yes, sir.

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

A Yes, sir, I'm sorry.

Q It's being recorded, sir.

A Yes, sir.

MR. PESCI: Pass the witness.

THE COURT: All right. Who would like to go next?

MS. ARMENI: We have no questions, Your Honor.

THE COURT: All right. Mr. Arrascada.

MR. ARRASCADA: No questions, Your Honor.

THE COURT: Detective, thank you for your testimony. Please don't discuss your testimony with anyone else who may be called as a witness and you are excused.

THE WITNESS: Thank you, Your Honor.

THE COURT: All right. State, call your next witness.

MR. PESCI: State calls Paijik Karlson.

THE COURT: Come on up to the witness stand, please, and please remain standing, facing our court clerk who will give the oath.

PAIJIK KARLSON, STATE'S WITNESS, SWORN

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

THE WITNESS: My name is Paijik Karlson, P-a-i-j-i-k, Karlson with a K, K-a-r-l-s-o-n.

DIRECT EXAMINATION

BY MR. PESCI:

Q Ma'am, where are you from?

A Thailand.

Q And is English your second language?

A Yes.

Q Do you feel comfortable enough to speak to the jury in English today?

A Yes.

Q Okay. If you have any questions of what we're asking, just stop us; is that all right?

A Yes.

Q Who was Timothy Hadland to you?

A Timothy Hadland's my boyfriend.

Q And did he have a nickname?

A TJ.

Q TJ?

A Yes.

Q When did you meet TJ?

A December 25, 2004.

Q Okay. And how did you meet?

A I met him at the bar.

Q At the bar? How did you start to have a relationship? Did you start dating? What happened?

A We talked first and we dated after that.

Q And how long did you date for?

A Six months by the phone.

Q I'm sorry, by the phone?

A Six months by the phone.

Q Okay. Then eventually did you two live together?

A Yes.

Q Do you know about when that was?

A That was 2005 -- 2004 when I come back from Thailand.

Q When who came back from Thailand?

A Me.

Q Did TJ go with you?

A No, he picked me up from the airport.

Q Did you know TJ to work during the time period when you were dating?

A He worked, yes.

Q Do you know where he worked?

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

Q He worked --

A He had his own business.

Q He had his own business? All right.

And whatever your answer is, it just needs to be out loud so the woman who is recording it will catch it.

A Okay.

Q Is that a yes?

A Yes.

Q Okay. Did you know him to ever work at the Palomino Club?

A Yes, after we lived together.

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

A Not the first time. After that.

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

MR. GENTILE: Objection. Foundation.

THE COURT: All right. Sustained.

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

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

Do you know?

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

BY MR. PESCI:

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

MR. GENTILE: Foundation.

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

MR. GENTILE: Well, it should be --

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

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

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

THE WITNESS: Yes.

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

THE WITNESS: I'm sorry.

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

THE WITNESS: Okay.

THE COURT: -- so on. Okay?

BY MR. PESCI:

Q How do you know?

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

Q Do you know who that friend was?

MR. GENTILE: Objection. Foundation.

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

THE COURT: Right. No --

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

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

MR. GENTILE: Okay. I agree with that.

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

BY MR. PESCI:

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

A He knows friend -- he tell me. He go get a job and then...

Q So TJ told you that?

A Yes.

Q So is your knowledge about this from TJ himself?

A Yes.

Q Okay. Do you know who the friend is that helped him with the job at the Palomino?

MR. GENTILE: Objection. Hearsay.

MR. PESCI: I said does she know, Judge, that's the question.

THE COURT: Well, do you know, yes or no, who the friend was?

THE WITNESS: I know the name, but I don't -- never met him.

THE COURT: You never met him so you didn't witness a conversation or anything like that; is that right?

THE WITNESS: Yes. He told me, but he told me.

THE COURT: TJ told you?

THE WITNESS: Yes.

THE COURT: But you never saw this friend?

THE WITNESS: No.

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

MR. PESCI: Thank you, Judge.

BY MR. PESCI:

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

MR. GENTILE: Same objection. Hearsay.

MR. ARRASCADA: Objection, hearsay.

MR. GENTILE: Without a foundation.

THE COURT: Yeah.

BY MR. PESCI:

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

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

Q Okay.

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

Q Did you actually drop TJ off at work?

A Yes.

Q At the Palomino?

A Yes.

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

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

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

A He tell me about it, yes.

Q Okay. What did he tell you?

MR. GENTILE: Objection, hearsay.

MR. ARRASCADA: Hearsay.

THE COURT: Sustained.

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

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

MR. GENTILE: Then it's not relevant.

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

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

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

THE WITNESS: He tell me he -- yes.

THE COURT: Okay.

THE WITNESS: He tell me he --

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

BY MR. PESCI:

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

A Yes.

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

A I need --

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

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

THE COURT: Overruled.

BY MR. PESCI:

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

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

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

MR. GENTILE: Objection. Foundation. That --

THE WITNESS: How did he appear?

MR. GENTILE: May we approach?

THE COURT: Yes.

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

(Off-record bench conference)

THE COURT: All right. Go on, Mr. Pesci.

Mr. Pesci's going to ask you some other questions.

Go on.

BY MR. PESCI:

Q Let's put a time frame on this. I want to kind of go off the subject and we'll come back in a few minutes.

I want you to focus on May 19, 2005. Did there come a time when you and TJ went camping at Lake Mead?

A Yes.

Q Now, who did you go out there with?

A TJ.

Q How did you get there?

A He drive.

Q What did you drive?

A His --

Q I'm sorry?

A We drive truck.

Q A truck?

A Yes.

Q Did you say Sportage?

A Yes.

Q And was that the car that you drove out there in?

A Yes.

Q Whose idea was it to go camping?

A TJ.

Q Did you want to go camping?

A No.

Q Had you been camping before?

A No.

Q With that time in your head, how long before you went camping did TJ stop working at the Palomino?

A About two or three week.

Q Two or three weeks?

A About -- before he quit.

Q So two or three weeks before May 19th of 2005?

A Yes.

Q Now, between that time of going camping and the time that TJ stopped working at the Palomino, were the two of you still living together?

A Yes.

Q Did you speak with him often?

A We speak a lot, yes.

Q Did -- had you been living with him for -- how long at that time?

A About a year.

Q Without saying what he said, did you have conversations on many different subjects with TJ during the time that you lived together?

A Say that again, please. Sorry. Slow, please.

Q I'm sorry. I apologize.

THE COURT: Did you talk about different things with him?

THE WITNESS: We talk many things, yes. Yes.

BY MR. PESCI:

Q Did you know TJ well from living with him?

A He's a good man.

Q Okay. Did you ever see him emotional?

A At time, yes.

Q Okay. Describe the emotional --

THE COURT: Well, just -- no. Describe what you observed.

THE WITNESS: He nervous.

BY MR. PESCI:

Q Okay. And how is it that you, knowing him, saw that he was nervous? What was nervous about him?

A Usually he calm, but he talk. He worried about -- he's getting worried, getting nervous.

Q Getting worried about what?

MR. GENTILE: Objection.

THE COURT: Sustained.

THE WITNESS: He --

THE COURT: No, no. When I --

MR. PESCI: Hold on a second.

THE COURT: Mr. Pesci's going to ask you a different

question.

BY MR. PESCI:

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

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

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

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

Try to have smaller sentences, Mr. Pesci.

MR. PESCI: Sure.

BY MR. PESCI:

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

A Okay.

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

A Yes.

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

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

IN THE SUPREME COURT OF THE STATE OF NEVADA

★ ★ ★ ★ ★ ★

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

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

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

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

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

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

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

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

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

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

A. Standard of Review

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

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

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

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

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[14] Little Lou's state and federal constitutional rights to due process of law and equal protection were violated because there was insufficient evidence produced at his trial to convict him of the charges as the State failed to introduce sufficient evidence to corroborate the statements of his alleged accomplices. See U.S. Const. amend. V, VI, XIV; Nevada Const. Art. I, Sec. 3, 6 and 8; Art. IV, Sec. 21. Where a state statute imposes mandatory requirements for the protection of a defendant's rights, the statute creates an expectation protected by the Due 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.

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

NRS 175.291

An accomplice is defined as "one who is liable to prosecution for the identical offense charged against the defendant at the trial in the case in which the testimony of the accomplice is given." NRS 175.291; see also Cutler v. State, 93 Nev. 329, 566 P.2d 809 (1977). Clearly both Espindola and Zone were accomplices to the murder and conspiracy charged against Little Lou.[15] Thus, their testimony was required to be: (1) corroborated independently of other accomplices; and, (2) the corroborated evidence must have connected Little Lou to the commission of the charged offense. See NRS 175. 291. Both elements must be satisfied for a conviction to stand.

Accomplice testimony "ought to be received with suspicion, and with the very greatest of care and caution, and ought not be passed upon by the jury under the same rules governing other apparently credible witnesses." Crawford v. United States, 212 U.S. 183, 204 (1909). By enacting NRS 175. 291, the Nevada Legislature acknowledged " one who has participated criminally in a given criminal venture shall be deemed to have such character, and such motives, that his testimony alone shall not rise to the dignity of proof beyond a reasonable doubt." Austin v. State, 87 Nev. 731, 491 P.2d 724 (1971). The indelible principal that a

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[15] Although Zone was not charged, an examination of his testimony and the Carroll tapes 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).

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

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

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

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

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

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

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

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

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

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

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

A. Standard of Review

Because this challenge is predicated upon federal and state constitutional provisions, it is susceptible to appellate review in the absence of contemporaneous objection or motion to strike. See Hardison v. State of Nevada, 84 Nev. 125, 128, 437 P.2d 868, 870 (1968). It is reviewed as plain error to determine if it was prejudicial and affected substantial rights. Ramirez v. State, ___ Nev. ___, 235 P.3d 619, 624 (2010).

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

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

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

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

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

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[16] See AA,Vol.IV,799 re: why homicide detectives recorded Carroll, Zone and the first interview of Anabel:
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."

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

Where, as here, it is clear that the State has conspicuously deviated from an otherwise routine practice and procedure[17] and deliberately refrained from making any record whatsoever memorializing its pretrial interviews with and debriefings of Espindola, it is reasonable to infer that the State's intention to thereby purposefully frustrate the "full cross-examination" mandated by Acuna as an essential prerequisite to the admissibility of accomplice testimony pursuant to an executory plea agreement. This conclusion is supported by the prosecutor not only announcing that no recording was made of the plea negotiation debriefing but asserting a work product privilege for any notes that were taken at it and persisting in that assertion throughout. See Docket No. 54209, Luis A. Hidlago Jr's Record on Appeal at 3 ROA 563-566.

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

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[17] Carroll, Zone and Espindola all were accomplices and were all videotaped during their initial interrogations in May 2005. Moreover, defense counsels' demands for recordings and/or notes of the plea negotiations proffer were repeatedly denied. See Docket No. 54209, Luis A. 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.

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

CONCLUSION

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

Dated this 3rd day of February, 2011.

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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.

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EXHIBIT 6

IN THE SUPREME COURT OF THE STATE OF NEVADA

LUIS A. HIDALGO, III,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 54272

RESPONDENT'S ANSWERING BRIEF

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

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

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

STATEMENT OF THE ISSUE(S)

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

STATEMENT OF THE CASE

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

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

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

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

STATEMENT OF THE FACTS

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

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

Carroll (Carroll); Carroll was an employee of the Palomino serving as a "jack of all trades" handling promotions, disc jockeying, and other assorted duties. 5 AA 932-933; 942-944. Espindola was the Palomino's general manager and handled all of the club's financial and management affairs. 5 AA 920; 931-932. During the call, Carroll informed Espindola that the victim in this case, T.J. Hadland (Hadland), a recently fired Palomino doorman, had been "badmouthing" the Palomino to taxicab drivers. 5 AA 934; 942-944; 9 AA 2031. A week prior to this news, Little Lou had informed Mr. H that Hadland was falsifying Palomino taxicab voucher tickets in order to generate unauthorized kickbacks from the drivers. 5 AA 935-939.[2] In response, Mr. H ordered Hadland fired. 5 AA 939-940.[3]

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

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

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

[3] Mr. H had also received prior reports that, at other times, Hadland was selling Palomino VIP passes to arriving customers in exchange for cash, which deprived the taxicab drivers of bonuses for bringing customers to the club, and diverted the passes from their intended purpose of attracting local patrons. 4 AA 1154-1155; 8 AA 1718-1719; 9 AA 1924-1925. This practice created a problem for the club because taxi drivers would begin disputing their entitlement to be paid bonuses. 4 AA 1155; 8 AA 1719.

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

Hadland disparaging the club. 5 AA 944; 946. Upon hearing the news, Little Lou became enraged and began yelling at Mr. H, demanding of Mr H: "You're not going to do anything?" and stating "That's why nothing ever gets done." 5 AA 946. Little Lou told Mr. H, "You'll never be like Rizzolo and Galardi. They take care of business." 5 AA 946; 9 AA 2031.[5] He further criticized Mr. H by pointing out that Rizzolo had once ordered an employee to beat up a strip club patron. 5 AA 948. Mr. H became angry, telling Little Lou to mind his own business. 5 AA 948. Little Lou again told Mr. H, "You'll never be like Galardi and Rizzolo," and then stormed out of Simone's heading for the Palomino. 5 AA 948.

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

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

[5] Frederick John "Rick" Rizzolo was the owner of a Las Vegas strip club known as Crazy Horse Too, and Jack Galardi is the owner of Cheetah's strip club as well as a number of other clubs in Atlanta, Georgia. 5 AA 947-948.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> Carroll: Hey what's done is done, you wanted him fucking taken care of we took care of him...
> Espindola: Why are you saying that shit, what we really wanted was for him to be beat up, then anything else, _____mother fucking dead.
> RA 54.

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

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

> Espindola: _____all I'm telling you is all I'm telling you is stick to your mother fucking story_____Stick to your fucking story. Cause I'm telling you right now it's a lot easier for me to try to fucking get an attorney to get you fucking out than it's gonna be for everybody to go to fucking jail. I'm telling you once that happens we can kiss everything fucking goodbye, all of it…your kids' salvation and everything else….It's all gonna depend on you.
> RA 61.

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

> Little Lou: …How much is the time for a conspiracy_____
> Carroll: [F]ucking like 1 to 5 it aint shit.
> Little Lou: In one year I can buy you twenty-five thousand of those [savings bonds],___thousand dollars___one year, you'll come out and you'll have a shit load of money_____I'll take care of your son I'll put em in a nice condo_____
> RA 65.

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

> Carroll: They're gonna fucking work deals for themselves, they're gonna get me for sure cause I was driving, they're gonna get KC because he was the fucking trigger man. They're not gonna do anything else to the other guys cause they're fucking snitching.
> Little Lou: Could you have KC kill them too, we'll fucking put something in their food so they die rat poison or something.
> Carroll: We can do that too.
> Little Lou: And we get KC last.
> RA 58.
> …
> Little Lou: Listen____You guys smoke weed right, after you have given them money and still start talking they're not gonna expect rat poisoning in the marijuana and give it to them_____
> Espindola: I'll get you some money right now.
> Little Lou: Go buy rat poison____and take_____back to the club…Here, [d]rink this right.

> Carroll: [W]hat is it?
> Little Lou: Tanguerey, [*sic*] you stir in the poison_____
> Espindola: Rat poison is not gonna do it I'm telling you right now_____
> Little Lou: [Y]ou know what the fuck you got to do.
> Espindola:_____takes so long_____not even going to fucking kill him.
> RA 64.

Little Lou appeared at one point to criticize Carroll for deviating from what Little Lou had told him to do and instead enlisting Counts. RA 63 at 22:15. At the end of the meeting, Espindola stated she would give Carroll some money and promised to financially contribute to Carroll and his son, as well as arrange for an attorney for Carroll. RA 66. After the meeting, Carroll provided the detectives $1,400.00 and a bottle of Tanqueray, which he stated were given to him by Espindola and Little Lou, respectively. 3 AA 698-699.[6]

On May 24, 2005, the detectives again outfitted Carroll with a wire and sent him back to Simone's. 3 AA 703-704. After Carroll's unexpected arrival, Espindola again directed him to Room 6 where the two again met with Little Lou while Mr. H was present in the body shop's kitchen area. 5 AA 1027-1028. During the conversation, Carroll and Espindola engaged in an extended colloquy regarding their agreement to harm Hadland:

> Carroll: You know what I'm saying, I did everything you guys asked me to do. You told me to take care of the guy; I took care of him.
> Espindola: O.K. wait, listen, listen to me (Unintelligible)
> Carroll: I'm not worried.
> Espindola: Talk to the guy, not fucking take care of him like get him out of the fucking way (Unintelligible). God damn it, I fucking called you.
> Carroll: Yeah, and when I talked to you on the phone, Ms. Anabel, I specifically I specifically said, I said "if he's by himself, do you still want me to do him in."
> Espindola: I I…
> Carroll: You said Yeah.
> Espindola: I did not say "yes."
> Carroll: you said if he's with somebody, then beat him up.
> Espindola: I said go to plan B, – fucking Deangelo, Deangelo you just told admitted to me that you weren't fucking alone I told you 'no', I fucking told you 'no' and I kept trying to fucking call you and you turned off your mother fucking phone.
> Carroll: I never turned off my phone.
> RA 73.

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

[6] Espindola would later testify Mr. H gave her only $600 to give to Carroll, which she did in fact give to Carroll on the 23rd. 5 AA 1023-1025; 6 AA 1249-1250; 1289-1291.

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

ARGUMENT

I

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

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

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

> Whenever there is slight evidence that a conspiracy existed, and that the defendant was one of the members of the conspiracy, then the statements and the acts by any person likewise a member may be considered by the jury as evidence in the case as to the defendant found to have been a member, even though the statements and acts may have occurred in the absence and without the knowledge of the defendant, provided such statements and acts were in furtherance of some object or purpose of the conspiracy...
> 1 AA 47 (Jury Instruction #40 (JI 40)).

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

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

> Jury Instruction number 40 was a correct statement of the law as it relates to how the jury is to assess statements of co-conspirators during the course and in furtherance of the crime. The instruction does not in any manner relate to the burden of proof on the underlying charge. In contradistinction, jury instructions number 16, 23, 24, 26, 28, 29, 30, 35, 36, and 37 each reference the State's burden of proof of beyond a reasonable doubt. Additionally, during deliberations, the Court responded to a question from the jury which reiterated the burden of proof. Not only are jurors presumed to follow the instructions on the law, Richardson v. Marsh, 481 U.S. 200, 107 S.Ct. 1702 (1987), but it seems inconceivable that the jury could have misunderstood those six (6) words in instruction 40 considering that the jury was instructed more than ten (10) times on the State's burden of proof.
> 1 AA 70.

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

A. Appellate Standard for Reviewing Trial Court Jury Instructions

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

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

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

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

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

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

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

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

B. Giving An Admissibility Determination Instruction Was Not Error

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

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

> Evidence of a statement made by one alleged conspirator other than at this trial shall not be considered by you as against another alleged conspirator unless you determine by a preponderance of the evidence:
>
> 1. That from other independent evidence that at the time the statement was made a conspiracy to commit a crime existed;
> 2. That the statement was made while the person making the statement was participating in the conspiracy;

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

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

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

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

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

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

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

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

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

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

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

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

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

[10] In the midst of arguing this first ground of appeal, Little Lou secretes in a footnote a completely unrelated "independent additional ground for reversal" alleging the district court erred by not providing a verdict form listing separate, alternate entries for Battery Causing Substantial Bodily Harm and Battery with a Deadly Weapon. App. Op. Br. 25 n.9. This purported ground of appeal is

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

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

> Mr. Gentile: But this is conspiracy law in an evidentiary sense. This is in the [*sic*] conspiracy law in a liability sense. And, frankly, I don't see any need for this jury to – I mean, it really – it really – how do I put it? *It really disfavors the defendant more not to have the instruction.* We're basically – you have basically ruled that they can consider this evidence. It is true that you make the finding in terms of admissibility, okay.
>
> [Bourjaily] and the cases in Nevada that follow [Bourjaily] makes [*sic*] that clear. And so I really don't think that this – at this point in time it's a jury issue anymore. The jury can consider that evidence period.
>
> 3 RA 620 (emphasis added).

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

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inadequately presented and thus waived. See, e.g., Nat'l Foreign Trade Council v. Natsios, 181 F.3d 38, 60 n.17 (1st Cir. 1999) ("We have repeatedly held that arguments raised only in a footnote or in a perfunctory manner are waived."). Further, Little Lou's claim that he ever raised this issue below is pure fiction. The district court never acknowledged the propriety of a verdict form separating the two battery offenses. Such an acknowledgement does not appear in the portion of the record Little Lou cites to. In fact, the court was actually describing as "fine" a special verdict form providing separate entries for the conspiracies to murder Hadland and Zone/Taoipu. 3 RA 514-515. Mr. Gentile's objection was to the Information, which he viewed as "duplicitous [*sic*] [in] that it had two conspiracies jammed into one." 3 RA 514. With the exception of the proposed verdict form, the record is entirely devoid of Little Lou objecting to the court's selected verdict forms. His attorneys cannot stand mute during settling of verdict forms and then for the first time, *at sentencing* when the jury has already been discharged, argue entitlement to a particular verdict form. Brascia v. Johnson, 105 Nev. 592, 596 n.2, 781 P.2d 765, 786 n.2 (1989) (post-discharge challenge to verdict form does not preserve error). Further, merely submitting a proposed, alternative verdict form fails to preserve an issue for appeal. Eberhard Mfg. Co. v. Baldwin, 97 Nev. 271, 273 628 P.2d 681, 682 (1981) (efficient administration of justice requires that submission of alternative verdict form coupled with failure to object to verdict form prior to jury discharge does not preserve issue for appeal). Although waived and inadequately presented, if the Court believes this footnoted ground of appeal warrants a response, the State requests to provide a supplemental brief on the issue.

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

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

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

The 11th, 6th, 4th, and 9th Circuits have long concurred in this view. See U.S. v. Monaco, 702 F.2d 860, 878 (11th Cir. 1983) (submission to jury of co-conspirator admissibility determination did not prejudice defendant because "by giving [the] instruction, the judge merely gave the jury the opportunity to overturn his own ruling"); U.S. v. Nickerson, 606 F.2d 156, 158 (6th Cir. 1979) (holding that identical error did not prejudice defendant because it merely gave the defendant "the benefit of the jury's consideration of admissibility" or a "second bite at the apple"), cert. denied, 444 U.S. 994, 100 S.Ct. 528 (1979); U.S. v. Chindawongse, 771 F.2d 840, 845 n.4 (4th Cir. 1985) (quoting U.S. v. Spoone, 741 F.2d 680, 686 n.1 (4th Cir. 1984), cert. denied, 474 U.S. 1085, 106 S.Ct. 859 (1985); U.S. v. Lutz, 621 F.2d 940, 946 n.2 (9th Cir. 1980), cert. denied, 449 U.S. 859, 101 S.Ct. 160 (1980), abrogated on other grounds by Bourjaily, supra, (submitting co-conspirator statement admissibility determination to the jury "was not reversible error [] since it simply afforded the defendants unnecessary double protection: hearings before both the court and the jury.").

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IV

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

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

> (1) A conviction shall not be had on the testimony of an accomplice unless the accomplice is corroborated by other evidence which in itself, and without the aid of the testimony of the accomplice, tends to connect the defendant with the commission of the offense; and the corroboration shall not be sufficient if it merely shows the commission of the offense or the circumstances thereof.
> (2) An accomplice is hereby defined as one who is liable to prosecution, for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given.

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

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

Little Lou correctly notes that "[n]o Nevada case succinctly articulates a [discrete] standard of review[,]" for a jury's determination that accomplice testimony was sufficiently corroborated. App. Op. Br. 42. It seems clear that the standard to be applied is some hybrid of NRS 175.291's substantive legal standard and the Court's standard for reviewing the sufficiency of the evidence on appeal. Origel-Candido v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998); see also Jackson v.

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

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

> [W]e apply the well-settled standard of review, which requires that [we] evaluate the sufficiency of corroboration evidence under the accomplice-witness rule by first eliminating testimony of the accomplice from consideration and then examining the remainder of the record for non-accomplice witness evidence that "tends to connect the accused with the commission of the crime."...In applying this standard, we view the evidence in the light that most favors the jury's verdict. We consider the combined weight of the non-accomplice evidence, even if that evidence is entirely circumstantial. Corroborating evidence is "incriminating" evidence that does not come from an accomplice witness. Corroborating evidence that shows only that the offense was committed is not sufficient. Yet, the corroborating, i.e., non-accomplice, evidence need not be sufficient, by itself, to establish that the accused is guilty beyond a reasonable doubt. Likewise, the corroborating evidence need not directly link the accused to the offense. Circumstances that appear insignificant may constitute sufficient evidence of corroboration. Likewise, though "mere presence" is insufficient corroboration, evidence that the accused was at or near the scene when or about when it was committed may sufficiently tend to connect the accused to the crime, provided the evidence is "coupled with other suspicious circumstances." Because each case must rest on its own facts, corroboration does not require a set quantum of proof. The single requirement is that "some" non-accomplice evidence, on which rational jurors could properly rely tends to connect the accused to the commission of the offense.
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> Cooley v. State, 2009 WL 566466 at 6-7 (Tex. Crim. App. 2009) (citations omitted).[23]

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

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

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

[23] See also People v. Abilez, 41 Cal.4th 472, 505, 61 Cal.Rptr.3d 526, 161 P.3d 58 (Cal. 2007), cert. denied, 552 U.S. 1067, 128 S.Ct. 720 (2007).

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

B. Zone was Not an Accomplice

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

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[24] Little Lou attempts to invoke federal due process principles as somehow prohibiting the use of accomplice testimony to convict him. App. Op. Br. 42 n.14 "[T]he United States Supreme Court has never recognized an independent constitutional requirement that the testimony of an accomplice-witness must be corroborated." Cummings v. Sirmons, 506 F.3d 1211, 1237-1238 (10th Cir. 2007). There is only a very narrow category of due process violations where the accomplice's testimony is "incredible or insubstantial on its face" Laboa v. Calderon, 224 F.3d 972, 979 (9th Cir. 2000). The standard for proving the accomplice's testimony was "incredible or insubstantial on its face" is "extraordinarily stringent," involving problems such as physical impossibility, and is not satisfied by merely showing the witness had credibility problems. U.S. v. Jenkins-Watts, 574 F.3d 950, 963 (8th Cir. 2009) ("Credibility challenges are for the jury, and '[t]he test for rejecting evidence as incredible is extraordinarily stringent and is often said to bar reliance only on testimony asserting facts that are physically impossible.'"). Moreover, in making the "incredible or insubstantial determination" federal courts "draw[] all credibility determinations in favor of the verdict, even in instances where the conviction relies solely on the uncorroborated testimony of a confidential informant." U.S. v. Ciocca, 106 F.3d 1079, 1084 (1st Cir. 1997). The error Little Lou alleges, even if proved true, does not demonstrate a due process violation under this exceptionally narrow federal standard. His resort to Hicks v. Oklahoma, 447 U.S. 343, 100 S.Ct. 2227 (1980), proves nothing because that case narrowly held a defendant has a liberty interest in his state statutory right to have a jury determine his sentence. Id. at 346.

[25] The majority of States actually place the burden on the defendant to demonstrate by a preponderance of the evidence that a person was an accomplice. See People v. Tewksbury, 15 Cal.3d 953, 968-969, 544 P.2d 1335 (Cal. 1976), cert. denied 429 U.S. 805, 97 S.Ct. 38 (1976) (footnotes omitted) (noting "the majority [of states] hold the defendant's burden to be proof by a preponderance," and reasoning: "The degree of proof by which an accused must establish that a witness is an accomplice is the same as in other instances wherein he has the burden of establishing a collateral fact which conditions a challenge to the reliability of incriminating evidence...Certainly if the trier of fact can give full weight to an accomplice's testimony if that testimony is corroborated on meager proof, it likewise should be able to give full weight to that testimony if it appears that the

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

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

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witness is not an accomplice on proof which falls short of the standard of beyond a reasonable doubt."); See also People v. Frye, 18 Cal.4th 894, 967-969 959 P.2d 183 (Cal. 1998), cert. denied 526 U.S. 1023, 119 S.Ct. 1262 (1999), overruled on other grounds by People v. Doolin, 45 Cal.4th 390, 421 n.22 (Cal. 2009).

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

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

C. Setting Aside Zone and Espindola's Testimony Completely, a Rational Jury Could Conclude the Remaining Evidence Tended to Connect Little Lou to Commission of the Conspiracy and Hadland's Murder[26]

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

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

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

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

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

[27] Little Lou repeats his allegation that he was merely calling Carroll about work related matters. When reviewing the sufficiency of the evidence, as noted above, a reviewing court looks at the evidence in the light most favorable to the prosecution. Origel-Candido, 114 Nev. at 381, 956 P.2d at 1380. And "it is the jury's function, not that of the court, to assess the weight of the evidence and determine the credibility of the witnesses." Id. Thus, it is irrelevant that Little Lou advances a non-incriminating explanation for these corroborating facts.

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

Thirty-three (33) Palomino Club advertisement cards were found on the shoulder of the road next to Hadland's body. 1 AA 182; 179-180; 3 AA 649. Additionally, forty-two (42) Palomino Club business cards were found in the glove compartment of the white Chevrolet Astro van used by Hadland's murderers. 2 AA 255.[28] Palomino VIP cards and fliers were found among Counts's possessions after a SWAT team extracted him from the attic of a residence. 3 AA 683; 693. Forensic examination found both Counts and Carroll's fingerprints on the VIP cards. 7 AA 1461-1482. Detectives also found $595.00 cash among Counts's possessions. 3 AA 683-684; 691-692. Forensic examination revealed Carroll's fingerprint was on one of those $100.00 bills. 19 AA 3526-3528. At 12:26 AM on May 20, 2005, the shooter, Counts, was picked up by Gary McWhorter's taxi at the Palomino immediately after committing the murder, and Counts only had $100.00 bills to pay the cab fare. 2 AA 450-456. This independent evidence tended to demonstrate Little Lou's connection with the crimes as it furnished evidence of a motive to eliminate a perceived threat to his father's business.[29]

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

[28] Virtually all the phones used by the conspirators were registered to Hidalgo Auto Body Works, which is the name of Mr. H's California-based predecessor to Simone's Auto Plaza, and the Astro van was insured in the name of Simone's. 2 AA 256; 345-346. Little Lou lived at Simone's. 5 AA 949.

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

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

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

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

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

An accomplice's wiretapped statements are corroborating as long as the wiretapped statements appear incriminating in themselves and do not require testimony from the accomplice in order to explain why the wiretapped statements incriminate the defendant. See Harris v. Garcia, 734 F.Supp.2d 973, 992 (N.D. Cal. 2010);[30] cf. also People v. Jewsbury, 115 A.D.2d 341, 342, 496 N.Y.S.2d 164 (N.Y. App. Div. 1985); People v. Potenza, 92 A.D.2d 21, 28, 459 N.Y.S.2d 639 (N.Y. App. Div. 1983) (tapes of telephone conversations intercepted through the use of legal wiretaps can corroborate the testimony of an accomplice). An accomplice's tape recorded statement implicating the defendant is sufficient evidence to corroborate the accomplice's trial testimony. The Court addressed an identical situation in Cheatham v. State, 104 Nev. 500, 761 P.2d 419 (1988), and determined the accomplice's wiretapped out-of-court statements may be used as corroboration if they are accompanied by circumstantial guarantees of trustworthiness, i.e., an absence of suspicious circumstances.

In Cheatham, the defendant was alleged to have conspired with three other individuals to murder the victim. While detained in a California jail, one of the accomplices was recorded stating to another accomplice, "Did they get Cheat[ham]?" Id. at 502, 761 P.2d at 420. The Court determined the accomplice's out-of-court statement was a prior consistent statement admissible under NRS 51.035(2)(b), and was reliable because, like Espindola's statements, it was the result of surreptitious eavesdropping. Id. at 502-503, 761 P.2d at 421. The Court then went on to address Cheatham's argument that the accomplice's trial testimony was insufficiently corroborated and thus should have been excluded. The Court determined the accomplice's incriminating wiretapped statement was sufficient evidence in itself to corroborate the accomplice. Id. at 505-506, 761 P.2d at 423.[31] Thus, clearly Espindola's wiretapped statements, uttered long before she had any inclination

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[30] ("[C]o-defendant Miller's statements were not made under suspect circumstances. She was not being questioned by the police or by any other person arguably connected with law enforcement who might have been able to secure more lenient treatment for her.").

[31] Other corroborating facts in Cheatham were: "a fairly constant association and companionship between the three accomplices...and Cheatham during the day that the crime was committed in McKinnis's room. We know from Cheatham that he was in the room shortly before his companions robbed and killed the victim, and we know that Cheatham was with the murderers after the criminal event." Id. at 505, 761 P.2d at 423.

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

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

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

[32] The State also notes that Cheatham adds another layer of corroboration for Espindola's testimony: her prior consistent statements to her attorney, Mr. Christopher R. Oram, Esq. Mr. Oram testified for the State as a rebuttal witness, and corroborated Espindola's version of events inculpating Little Lou and Mr. H. 9 AA 2027-2044; see Cheatham, supra (accomplice's prior consistent wiretapped statements sufficiently corroborating). Espindola relayed her version of events to Mr. Oram beginning with meetings taking place on May 24th, 25th, 26th, 27th, and 28th, which was many months prior to Espindola engaging in any negotiations with the State. Thus, these prior consistent statements came in for their substantive truth and directly implicated Little Lou in the conspiracy and Hadland's murder. NRS 51.035(2)(b). Again, this subset of evidence in itself corroborates the testimony of both Zone and Espindola.

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

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

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

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

V

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

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

The State had no obligation to record Espindola's plea negotiation proffer. In Sheriff v. Acuna, 107 Nev. 664, 819 P.2d 197 (1991), the Court very specifically elaborated the State's obligations in regard to conducting and disclosing its negotiations with the defendant's cooperating accomplice, which do not include recordation of cooperating witness interviews. Id. at 669, 819 P.2d at 200.[34] Acuna does not require that a contingent plea agreement even be reduced to writing.

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

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

[34] ("[T]he State may not bargain for testimony so particularized that it amounts to following a script, or require that the testimony produce a specific result. Finally, the terms of the quid pro quo must be fully disclosed to the jury, the defendant or his counsel must be allowed to fully cross-examine the witness concerning the terms of the bargain, and the jury must be given a cautionary instruction.").

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

The circumstances of Espindola's plea and resulting testimony comport with all due process safeguards as recognized in Acuna and the Court's decision in Leslie v. State, 114 Nev. 8, 17, 952 P.2d 966, 972-973 (1998).[35] "[G]overnment interviews with witnesses are 'presumed to have been conducted with regularity.'" U.S. v. Houlihan, 92 F.3d 1271, 1289 (1st Cir. 1996). Under Acuna, there is no merit to Little Lou's contention that he was denied a meaningful opportunity to cross-examine Espindola. See Clyde v. Demosthenes, 955 F.2d 47 at 3 (9th Cir. 1992) (no Acuna or Giglio violation where cooperating witness was cross-examined about disclosed plea agreement, there was no evidence of any undisclosed promises, and defendant did not allege witness lied about negotiation of agreement); see also People v. Steinberg, 170 A.D.2d 50, 76, 573 N.Y.S.2d 965, 980-981 (N.Y. App. Div. 1991), aff'd 79 N.Y.2d 673, 584 N.Y.S.2d 770, 595 N.E.2d 845 (1991) (no New York or "related authority hold[s] that a defendant's right of cross-examination is unfairly frustrated by the failure to record the witness's statement.").

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

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

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

CONCLUSION

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

Dated this 12th day of July, 2011.

Respectfully submitted,

DAVID ROGER
Clark County District Attorney
Nevada Bar # 002781

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

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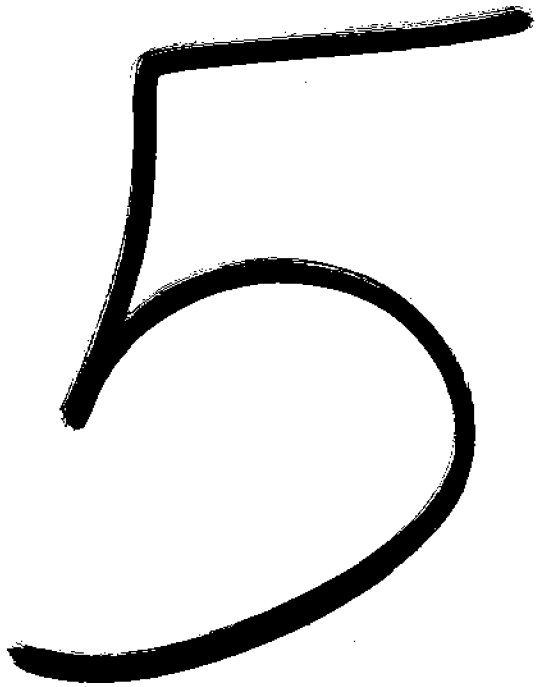
[36] Cf. Note at 265 n.59 (mentioning Marashi once in a footnote); 292 (misstating Bernard's holding as merely "'find[ing] no statutory basis for compelling the creation of Jencks Act material,'" which elides the court's constitutional analysis that Brady *too* provided no basis for creating a record of witness interviews. Bernard, 625 F.2d at 859-860 ("we can find no statutory basis for compelling the creation of Jencks Act material...Nor can we find a constitutional basis for compelling the creation of such material under Brady.")).

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



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EIGHTH JUDICIAL DISTRICT COURT FOR THE STATE OF NEVADA

AND FOR THE COUNTY OF CLARK

LUIS HIDALGO, III, Petitioner, v. ISIDRO BACA, WARDEN, NORTHERN NEVADA CORRECTIONAL CENTER; AND J. GREG COX, DIRECTOR OF THE NEVADA DEPARTMENT OF CORRECTIONS, Respondents.	CASE NO. 05C212667-2 DEPT NO. XXI

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

Date of hearing: September 23, 2014.

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

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

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

INTRODUCTION

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

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

There are two time frames to consider in this case: The time frame before and up to the point where Counts murdered Hadland; and the time frame after. In the time frame after, there is no question the State proved solicitation of murder by "Little Lou," in his effort to help his father in covering up the murder. This

Petition does not attack the convictions for solicitation; there is nothing that effective counsel could have done for Petitioner in that regard, except to have a separate trial of those counts from the trial of the murder count. Rather, this Petition focuses on the murder and conspiracy to murder charges against Petitioner.

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

Let us review the "inculpatory" evidence against Petitioner:

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

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

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

Zone.

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

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

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

6. Prior to the point in time when Counts murdered Hadland, Carroll told

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

That's it. That's all. Nobody could credibly call the "murder" evidence against "Little Lou" to be overwhelming. Underwhelming, or precious thin, would be more like it.

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

In this case, however, the five grounds asserted as theories for relief are not trivial. We agree with the State that in a typical post-conviction *habeas* case where the complaint is about counsel objecting or not, calling witnesses or not, and developing theories of defense or not, there is a strong presumption of effectiveness, to where if a trial counsel can state or even create any credible -

sounding theory of strategy, the State will win. That is, those kind of attacks, although not impossible to prevail upon, are very difficult to prove.

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

Ground I alleges ineffective counsel, or the failure to seek a jury instruction per Moore v. State, 117 Nev. 659, 662-63, 27 P.3d 447, 450 (2001), directing the jury not to find the existence of the deadly weapon enhancement of NRS 193.165 if the jury were to find the defendant guilty of second degree murder on a conspiracy theory. Alternatively, because the jury in fact found the defendant guilty of murder on a conspiracy theory and returned the finding of a deadly weapon, counsel was ineffective in not filing a motion on this point per NRS 175.381(2).

Ground II alleges that counsel was ineffective in not objecting to Instruction no. 40, not only on the asserted ground that proof of the conspiracy could be made by slight evidence before the jury was to determine the out-of-court statements of the defendant, but also that the instruction failed to advise the jury that there had to be evidence of the defendant's participation in the conspiracy independent of

his statements before the jury could consider the statements; and the jury had to determine that the statements were reliable before they could consider them.

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

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

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

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

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

If we are correct in our legal analysis, as we most certainly believe we are, then it follows that the failure to object to erroneous instructions, and/or the failure to tender accurate instructions, either or both of which make the State's job in obtaining a conviction easier than it should be, as a matter of law cannot be attributed to a reasonable strategy. As noted by the Ninth Circuit in Lankford v. Arave, 468 F.3d 578 (9th Cir. 2006), the point of Strickland v. Washington, 466 U.S. 668 (1984) is that an attorney has a duty to bring to bear such skill and knowledge as will render the trial a *reliable adversarial testing process*. Lankford, 468 F.3d at 583 citing Strickland, 446 U.S. at 688. Failing to object to an erroneous jury instruction, or tendering an erroneous jury instruction that makes the state's job easier in obtaining a conviction, cannot be considered to be a "strategic decision" to forego one defense in favor of another; rather, that action results from an misunderstanding of the law. Lankford, 468 F.3d at 584, citing United States v. Span, 75 F.3d 1383, 1390 (9th Cir. 1996). When counsel does not object to or invites a jury instruction that misstates state law and makes it easier

for the jury to convict his client, counsel unwittingly undermines the very "adversarial testing process" he is supposed to protect. Lankford, 468 F.3d at 585. And that is so, even where counsel is shown otherwise to be dutiful and conscientious. (Id.) Certainly, Messers Arrascada and Adams were most dutiful and conscientious in representing Petitioner; but we are all human, and this is the kind of case where one slip-up from an otherwise effective advocate can be the fatal cause of a miscarriage of justice.

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

As noted in Everett v. Beard, 290 F.3d 500, 509-15 (3d. Cir. 2002), *cert denied*, 537 U.S. 1107 (2003), wherein the Third Circuit held that trial counsel was prejudicially ineffective in failing to object to a jury instruction that permitted a first degree murder conviction without proof of an intent to kill, the state of law is central to an evaluation of counsel's performance at trial. A reasonably competent attorney patently is required to know the state's applicable law, so the

parties' focus upon the state of law at the time of the defendant's trial is not misplaced. Everett, 290 F.3d at 509.

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

The same principles apply to a jury instruction that sets forth a theory of the case based upon the defense's presentation of evidence. Counsel is ineffective in not presenting an accurate theory of the case instruction when he presents such evidence. See: Pirtle v. Morgan, 313 F.3d 1160, 1169 (9th Cir. 2002), *cert denied*, 539 U.S. 916 (2003), citing United States v. Span, *supra*. The issue ultimately is whether the jury had a legal framework in which to place the exculpatory testimony. Pirtle, 313 F.3d at 1171, and cases cited therein. Ineffectiveness in this

context does not mean that effective counsel certainly would have secured an acquittal. 313 F.3d at 1169. Rather, it means that counsel would have caused proper, correct statements of the law to be given as jury instructions, such that there is a reasonable probability that the jury, following the correct instructions, would have acquitted. (Id.)

The same principles also hold true for instructions that would have to clarify findings that the jury would have to make to in order to convict. Luchenburg v. Smith, 79 F.3d 388, 392-93 (4th Cir. 1996) [affirming grant of *habeas*]. As noted by the Fourth Circuit, if trial counsel's response is that he thought the instruction given accurately stated the law, when in fact it did not, then he has not made a "reasonable tactical choice." Failure to become informed of the governing law affecting his client cannot be considered a "reasonable strategy." Luchenburg, 79 F.3d at 392-93. When an instruction does not clarify for the jury the circumstances under which it may find the defendant guilty or not guilty, and the circumstances by which a reasonably jury could find the defendant not guilty are at issue, the instructions render his trial fundamentally unfair, and trial counsel's failure to object is constitutionally deficient. Luchenburg, Id.

The same type of analysis goes towards failing to file a meritorious pre-trial or during - trial motion. Where a favorable plea bargain that would cause a

reasonable defendant to forebear filing such a motion is not on the table, there certainly is no downside to filing such a motion. In that instance, there cannot be a "strategy" that could be deemed "reasonable" to justify the failure to file such a motion. As noted by the Seventh Circuit in Gentry v. Sevier, 597 F.3d 838 (7th Cir. 2010), wherein in the Seventh Circuit held that counsel was prejudicially ineffective by virtue of failing to file a meritorious motion to suppress pre-trial, while second - guessing strategic decisions in hindsight generally is not a meritorious basis to find an effective assistance of counsel, a decision not to seek suppression of material evidence based on a violation of the defendant's Fourth Amendment Rights is beyond the pale of objectively reasonable strategy. There cannot be a strategic benefit in that instance that would accord to the defendant by reason of his trial counsel's failure to seeks suppression of the evidence. Gentry, 597 F.3d at 851-52.

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

PETITIONER IS ENTITLED TO RELIEF ON GROUND I

Very frankly, it is so patently obvious per Moore that this defendant, having

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

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

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

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

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

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

That being so, the defendant has the constitutional right to have the jury decide each and every element of a charged offense beyond a reasonable doubt. Carella v. California, 491 U.S. 263, 265-66 (1989), and cases cited therein. And the instructions in that regard must be accurate. Ho v. Carey, 332 F.3d 587, 592-

93 (9th Cir. 2003), citing United States v. Gaudin, 515 U.S. 506 (1995). The same principles apply to a penalty verdict. An improper jury instruction setting forth the findings upon which the jury may impose the appropriate penalty is a federal constitutional violation. See: Mollet v. Mullin, 348 F.3d 902, 910-16 (10th Cir. 2003), and cases cited therein.

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

The State argues that counsel saved his error by filing an NRS 175.382(2) motion for judgment of acquittal. Counsel did that, but did not argue therein a lack of a Moore instruction or a Moore violation. A theory of ineffective assistance of counsel can be based upon the filing of a motion but on the wrong theory. See: Hernandez v. Cowan, 200 F.3d 995, 999-1000 (7th Cir. 2000) [counsel was ineffective in filing a severance motion, but on the wrong theory, ignoring a meritorious theory of severance which would have been apparent to counsel from a prior suppression motion hearing].

But again, we invite the State, in the name of basic justice, to stipulate to the inapplicability of the deadly weapon enhancement in this case and to enter an amended judgment of conviction that strikes the deadly weapon enhancement sentence relative to the original judgment of conviction. That would be the right thing to do.

DEFENDANT IS ENTITLED TO RELIEF ON GROUND II

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

defendant on trial. (See: Exhibit 5 at 23)

Here is one irony of this case: In retrospect, and with all due respect, counsel was correct in their specific attack on Instruction No. 40. Notwithstanding the Order of Affirmance herein, respectfully, McDowell is indeed erroneously decided based upon law that has developed between 1987 and the time of trial. Further, McDowell is inconsistent with United States v. Tracy, 12 F.3d 1186, 1199 (2d. Cir. 1993) and United States v. Ammar, 714 F.2d 238, 249 (3d Cir. 1983).

But Ground II concerns an additional attack on Instruction no. 40 that should have been but was not made: Based upon the cases cited at p. 24 of the Supplemental Petition[1], the jury should have been advised that out-of-court statements made by co-conspirators may not be considered against the Defendant at all, if the statements themselves are the only evidence of the Defendant's participation in the conspiracy. I.e., counsel's "concession" at page 23 of the Opening Brief never should have been made. Further, based upon the many cases cited at pp. 21-22, the jury should have been advised, as a matter of the Sixth

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

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

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

If the jury had been correctly instructed, it would not have considered any statement made by any co-conspirator - including the Petitioner - unless and until it found it to be reliable; but between the fact that there is no independent corroborating evidence that "Little Lou" did anything in furtherance of the so-called conspiracy, and with the overwhelming evidence that Carroll is an unreliable source of information per se, and with Carroll's "contextual" statement that "Little Lou" wasn't involved in the murder at all, a reasonable jury would not have considered the out-of-court statements upon which this prosecution was based at all. And without consideration of the statements, there simply was no evidence to link "Little Lou" to any conspiracy, charged or otherwise.

The State argues that counsel argued the points contained in Ground II to the court below and the Nevada Supreme Court. Not only did he not do so, but if

the Court were to agree with that incorrect argument, and if counsel were to contain the within arguments in federal *habeas* in the body of what counsel did argue, we can guarantee this Honorable Court that the Attorney General in that hypothetical instance otherwise would move to dismiss such a hypothetical ground on the basis that it was not exhausted. For a federal issue to be presented by citing to a state case that does not in and of itself resolve the federal issue at hand is improper. The state case does not fairly present or exhaust the claim. Casey v. Moore, 386 F.3d 896, 912 n. 13 (9th Cir. 2004), *cert denied*, 545 U.S. 1146 (2005). McDowell does not address the specific challenge to Instruction No. 40 being made here, and neither did trial or appellate counsel. We appreciate the Clark County District Attorney's efforts in attempting to hamstring the Nevada Attorney General on down the road; but the better course would be to reach the merits of Ground II now, and rule in favor of the Petitioner so that the federal courts do not ever see this case!

PETITIONER IS ENTITLED TO RELIEF ON GROUND III

Ground III is an amalgam of jury instruction theories: Counsel should have objected to Instructions Nos. 19, 20 and 22, rather than "craft them" as they did;

counsel should have proposed a "Prettyman" instruction[2]; and counsel should have tendered a Rose and Ramirez instruction[3] regarding the requirement of proof of an immediate and direct causal relationship between the felonious actions of the defendant and the victim's death.

Addressing Instructions Nos. 19, 20 and 22 first, the State's response is simple: Per Hancock v. State, 80 Nev. 581, 583, 397 P.2d 181, 182 (1964) and Poole v. State, 97 Nev. 175, 178-79, 625 P.2d 1163, 1165 (1981), second degree murder is a general intent offense; therefore, the fact that Instructions Nos. 19 and 22 stated that murder in the second degree **may be a general intent crime** or **can be** a general intent crime did not prejudice the Petitioner, but if anything helped him in creating an aura of ambiguity.

Hancock and Poole actually hold that second degree murder is not a specific intent offense, meaning, to return a guilty verdict a jury need not find a specific intent to kill. The vice of that holding would be the thought: "If second degree murder is not a specific intent crime, then it must be a general intent crime. End of story."

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

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

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

But Instructions no. 19 and 22 say nothing regarding proof of malice. They simply allow a second degree murder conviction on the "possibility" of a finding of general intent. I.e., per those instructions, if Petitioner joined a conspiracy to commit a non-lethal battery on Hadland, and Hadland died in a manner foreseeable to any of the co-conspirators, and petitioner knew the wrongfulness of his agreement to commit a non-lethal battery, the *mens rea* of second degree murder based on a conspiracy theory would be proven. That is the point of Ground III: That theory of law is wrong. It allows a conviction for second degree murder without proof of malice.

Second degree murder really is defined the same way throughout the country. The "general intent" of second degree murder, consistent with malice, is that a defendant intend to commit an act with knowledge that his acts create a strong probability of death or great bodily harm to the victim. State v. Carrasco,

172 P.3d 611, 613 (N.M. App. 2007). That is, where the evidence does not support a finding either of an intent to kill, an intent to inflict great bodily harm or an act with willful and wanton disregard for the lethal consequence of the act, resulting in the death of the victim, generally the result is a conviction of manslaughter but not second degree murder. See: People v. Langworthy, 331 N.W.2d 171, 178-80 (Mich. 1982). The essential distinction between second degree murder based on implied malice and involuntary manslaughter is the subjective versus the objective criteria to evaluate the defendant's state of mind. If the defendant commits an act which endangers human life, but the defendant does not realize the risk involved, he is guilty of manslaughter. However, if he realizes the risk and acts in total disregard of the danger, he is guilty of murder based on implied malice. People v. Cleaves, 280 Cal. Rptr. 146, 153 (Cal. App. 1991), and cases cited therein.

Nowhere in Instructions Nos. 19 or 22 was the jury told this. And that fact makes this case indistinguishable from Ho v. Carey, 332 F.3d 587, 592 (9th Cir. 2003) citing People v. Zerillo, 223 P.2d 223, 229-30 (1950). There, the Ninth Circuit mandated *habeas* in a second degree murder conviction, where the jury instruction advised that a defendant could be found guilty based on general intent, without fully and accurately describing the concept of implied malice. Since the

jury was not instructed on an essential element of the offense accurately, such constituted a constitutional violation. Ho, 332 F.3d at 592-93, citing United States v. Gaudin, 515 U.S. 506 (1995).

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

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

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

same result should attend here.

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

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

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

First, Rose and Ramirez are not cases that "came out of the blue." Rather, Rose is based on Labastida v. State, 115 Nev. 298, 986 P.2d 443 (1999), a case that predates this trial *by ten years*.

In Labastida, the Nevada Supreme Court reversed a second degree murder conviction, where the defendant's underlying felony was child neglect, but the murder of her child was done by the child's father completely outside of her presence - just as Counts murdered Hadland completely outside of "Little Lou's" presence.

The Nevada Supreme Court noted two things:

1) The fact that the defendant committed the felony of child neglect did not establish the immediate and direct causal relationship between the illegal act and the death of the child, where the child died as a result of the child's father's abuse rather than as an immediate and direct consequence of the defendant's neglect. Labastida, 115 Nev. at 305-07, 986 P.2d at 447-49.

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

Here, call it a Labastida instruction if you must; but a Labastida instruction certainly would have directed a reasonable jury to acquit the Petitioner of murder. The "act" of "running off one's mouth to co-conspirators, who ignore that person" simply cannot under any reasonable view be deemed as an "affirmative act that harms the victim"; nor can it be deemed as "the immediate and direct causal

relationship between the illegal act and the death of the victim." To any reasonable juror, the fact that the defendant's words were *ignored* by the co-conspirators broke the chain of "immediate and direct causal relationship," with the absence of evidence of any type of independent relationship between "Little Lou" and Counts.

Secondly, the State's argument overlooks Brooks v. State, *supra*. There, the Nevada Supreme Court held that the defendant was entitled to an instruction advising the jury that absent an agreement to cooperate in achieving a criminal purpose, the mere knowledge of, acquiescence in, or approval of that purpose did not establish the defendant's participation in the criminal conspiracy. Brooks, 124 Nev. at 211, 180 P.3d at 662. Appropo to the case at bar, however, the Nevada Supreme Court noted that a proposed instruction on the theory of the case that is a rewording of an element of the offense may not be refused because the legal principle it espouses may be inferred from other instructions. Brooks, 124 Nev. at 211, n. 31, 180 P.3d at 662, n. 31, and cases cited therein.

That is, it simply will not do to say that the jury could have figured out the "immediate and direct causal relationship" requirement as an inference from other instructions. Clearly, counsel's theory at trial was that Petitioner did not engage in a criminal conspiracy that, insofar as he knew and intended, had the death of T.J.

Hadland as its reasonable and natural consequence. A Rose/Ramirez instruction or, if you prefer, a Labastida instruction, not only would have brought the point home perfectly, but would have stated accurately the third requirement of the judge - made rule of felony second degree murder.

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

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

a Prettyman instruction is so fatal to this case.

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

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

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

As noted at pp. 33-37 of the Appellant's Reply Brief on direct appeal, the reason this Court would not allow Taoipu's former testimony to be admitted under NRS 51.325 at trial was "because it opens the door to other statements that Jayson Taoipu made in his trial testimony that indicate that Little Lou was involved and gave the order" and because "it would be prejudicial to Mr. H."

We seriously question whether, had Mr. Gentile not objected on behalf of Mr. H., the court's ruling would have been the same way. The remaining prong of

the court's ruling was essentially fencing with Mr. Arrascada and Mr. Adams, in effect indicating that if the trial court were the trial lawyer, she would not have wanted this testimony admitted. As pointed out in the Supplemental Petition, that ruling by itself cannot be reconciled with Rhyne v. State, 118 Nev. 1, 7-9, 38 P.3d 163, 167-68 (2002).

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

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

Accordingly, the reality is that the real reason this Honorable Court would not admit Taoipu's former cross-examined testimony is because the same would violate Mr. H.'s Sixth Amendment Rights to confrontation. That being so, a severance of the trials was the answer to the problem. It would have been very easy to continue with the trial; have the jury only deliberate on Mr. H. first; then

present Taoipu's out-of-court testimony; and then submit the cause to the jury to deliberate on "Little Lou's" guilt.

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

However, Petitioner acknowledges: The Nevada Supreme Court ruled against Petitioner at p. 7 of the June 21, 2012 Order of Affirmance; that the Nevada Supreme Court can affirm on a basis not considered by the district court; and that the Nevada Supreme Court's ruling is the law of the case. But we cannot abandon Ground IV for a basic reason: In terms of admissibility of Taoipu's testimony from the Counts trial, we think Mr. Arrascada was right based on how Fed. R. Evid. Rule 804(b)(1)(B) has been interpreted in criminal cases. Since Taoipu was the State's witness in the Counts trial, his motive for testifying would not have changed had he been a live witness in this case. The question is whether Taoipu's testimony had "sufficient indicia of reliability" to be admitted, not whether it was critical or important to the State's case against Counts. See: United States v. Mohawk, 20 F.3d 1480, 1488 (9th Cir. 1994).

But that said, we acknowledge: We will have to save it for federal court, unless the Nevada Supreme Court reverses itself. Hopefully, we will never get

there!

PETITIONER IS ENTITLED TO RELIEF ON GROUND V

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

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

Motive is the impetus that supplies the reason for a person to commit a criminal act. United States v. Benton, 637 F.2d 1052, 1056-57 (5th Cir. 1981). Evidence of other crimes may be admitted to show that the defendant had a reason to commit the act charged, and from this motive, it may be inferred that the defendant did commit the act charged. See: United States v. Holley, 23 F.3d 902, 912-13 (5th Cir. 1994).

That leads to the first problem: Events occurring after the charged crime do not, beyond propensity evidence, explain why the defendant committed the

offense, unless it explains the desire to hide the charged offense. See: Richmond v. State, 118 Nev. 924, 932-33, 59 P.3d 1249, 1255 (2002).

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

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

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

The Court can analyze the problem this way: For uncharged misconduct to

be admissible, it not only must be relevant to one of the categories of NRS 48.045(2), but that "category" must also be a bona fide trial issue. If the latter requirement is not met, the evidence is irrelevant and inadmissible. See: Honkanen v. State, 105 Nev. 901, 902, 784 P.2d 981, 982 (1989); Rosky v. State, 121 Nev. 184, 197, 111 P.3d 690, 698 (2005). If "Little Lou" were facing trial only on the charges of conspiracy and murder, his "motive" to cover up his father's participation in the murder would not have been relevant to any issue in "Little Lou's" murder trial. Therefore, the solicitation evidence would certainly have been excluded as more prejudicial than probative.

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

And when evidence is admitted on that type of theory, the closer the uncharged misconduct comes to the charged misconduct, the more prejudicial it

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

An example of the principle at hand is United States v. Brown, 880 F.3d 1012 (9th Cir. 1989). There the defendant was charged with first degree murder of a postal employee and use of a firearm during the commission of a felony. The defense was that the defendant lacked the specific intent required to commit first degree murder. The prosecution introduced evidence that three months prior, the defendant shot a gun into a woman's house. She was unrelated to the postal employee, who was shot to death in his home. The prosecution also presented an incident that seven years prior, the defendant used the same kind of gun to "strong arm" a man, unrelated to the postal worker, to retrieve a different gun.

The prosecution contended the two uncharged incidences were admissible to rebut the defense's claim of lack of motive.

In reversing the conviction, the Ninth Circuit noted that since motive is not an element of the offense, the prior bad act evidence must show motive that is relevant to establish Brown's specific intent to commit the charged murder. Brown, 880 F.2d at 1014-15. There, the evidence established at most, the defendant's propensity for violence, as the acts could not be linked as the reason for killing the postal worker. (Id. at 1015) Therefore, the uncharged misconduct was inadmissible.

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

a not guilty verdict viz. Count II.

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

CONCLUSION

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

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

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

DATED this 5 day of September, 2014.

Respectfully submitted,

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

By: _____
Richard F. Cornell
Attorney for Defendant/Petitioner

CERTIFICATE OF SERVICE

Pursuant to N.R.C.P. 5(b), I certify that I am an employee of 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:

Nancy A. Becker
Chief Deputy District Attorney
Regional Justice Center
200 Lewis Avenue
Las Vegas, Nevada 89155-2211

DATED this 5th day of September, 2014.

Marianne Tom-Kadlic
Legal Assistant to Richard F. Cornell

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ORIGINAL

FILED IN OPEN COURT
EDWARD A. FRIEDLAND
CLERK OF THE COURT
JAN 26 2009
BY: Denise Husted
DENISE HUSTED, DEPUTY

INFO
DAVID ROGER
Clark County District Attorney
Nevada Bar #002781
MARC DIGIACOMO
Chief Deputy District Attorney
Nevada Bar #006955
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

LUIS ALONSO HIDALGO, III,
#1849634

Defendant.

Case No: C212667
Dept No: XXI

FOURTH AMENDED

INFORMATION

STATE OF NEVADA)
) ss.
COUNTY OF CLARK)

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

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

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COUNT 1 - CONSPIRACY TO COMMIT MURDER

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

COUNT 2 - MURDER WITH USE OF A DEADLY WEAPON

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

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

COUNT 3 – SOLICITATION TO COMMIT MURDER

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

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COUNT 4 – SOLICITATION TO COMMIT MURDER

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

BY

MARC DIGIACOMO
CHIEF DEPUTY DISTRICT ATTORNEY
Nevada Bar #006955

DA#05FB0052A/dd
LVMPD EV#0505193516
CONSP MURDER;MWDW - F
(TK7)

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NOV 24 2009
CLERK OF COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

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

I N D E X

WITNESSES FOR THE STATE:

E X H I B I T S

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

P R O C E E D I N G S

(Outside the presence of the jury.)

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

MR. GENTILE: There are two separate ones.

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

(Off-record colloquy)

(Pause in proceedings)

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

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

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

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

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

THE MARSHAL: They're on their chairs.

THE COURT: All right. Thank you.

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

THE CLERK: Yes, Your Honor.

(Clerk swears jury)

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

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

Ms. Husted.

THE CLERK: Yes, Your Honor.

(Clerk reads Indictment)

THE COURT: All right. Thank you.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Do not make up your mind about what the verdict

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

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

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

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

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

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

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

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

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

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

That concludes my opening remarks.

Is the State ready to proceed with its opening statement?

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

STATE'S OPENING STATEMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. ADAMS: Your Honor, may we approach?

THE COURT: Sure.

(Off-record bench conference)

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

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

Club.

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

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

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

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

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

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

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

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

When they get to the club, Deangelo Carroll goes in

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

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

During the trip, as -- if any of you, if you head out towards -- out towards Lake Mead, as you get out towards those mountains, and there's a little guard shack out there as you go pass into the Lake Mead area there, well, right about there is when you start having some severe cell phone problems. And what you will learn is that Deangelo has to keep looping back and forth because he's losing cell phone coverage. And he does it on a couple of occasions. He passed by that guard shack.

During this trip you'll hear that there's a phone call from Anabel to Deangelo and eventually when they arrive at the location you'll hear that there's some conversation with TJ. TJ gets out of the car and he's kind of walking towards the car. Kenneth Counts slides out of that side door. And you've already seen what he does to TJ.

Once they -- the murder occurs, Kenneth Counts jumps

back in the car and they drive off. The van does a U-turn, drives directly back to the Palomino. At first Deangelo enters the Palomino and then KC enters the Palomino and eventually KC exits the Palomino first. And there will be some discrepancy as to whether it's 5,000 or $6,000, but he gets -- he has $6,000.

Jayson and Rontae, they're in the van and they see KC leave the Palomino in a yellow cab. Eventually Deangelo comes out of the club. They take the van. Deangelo punctures the tires on the van because they're afraid they might have driven over some blood or something that would link the van back to the murder scene and they throw the tires away and they get new tires.

What you will learn when the cops check out the yellow cab story -- let me back up for just a second as to how we get there. That morning Jayson, Rontae, and Deangelo go and have breakfast. There's some time period during the day on the 20th, and eventually at 7:30 at night when the police are at the Palomino Club, you will learn that Deangelo Carroll walks into the Palomino Club. They stop Deangelo. They talk to him a few minutes. He agrees to come down to the police station and what proceeds from there is a lengthy interview.

At the end of that interview, they take Deangelo Carroll and his vehicle and they drive him home. And when they get home, they find Rontae Zone in Deangelo Carroll's

house. They ask Rontae to go with them. Rontae comes out of the house. He goes down to the police station. Most of what I just told you about what happened during the days of the 19th and the 20th you're going to learn from the interview that was given by Rontae Zone that night and the testimony he's going to give to you.

And he indicates that KC took a yellow cab. The cops were able to identify KC at Kenneth Counts. They start searching and, low and behold, what do they find? They find a trip sheet from yellow cab. On the back of the trip sheet at 12:00 o'clock in the evening, this is the early morning hours of the 20th, 12:26 to 12:31, a pick up at the Palomino. And what you'll hear about this is the person tells them they want to go to 513 Wyatt. And what he says is initially the person only has hundred dollar bills and he says he can't change hundred dollar bills. He sends him back in the club to get change.

He indicates that an African male adult gets back in his car, tells him 513, and as he's driving him over to 513, he asks him to get out at 508. So that's why the cab driver notes down 508 because he didn't get out at 513. And the cab driver watches the individual not go into 508, but actually walk behind it. And what you'll learn in this case, that's Kenneth Counts' home.

Based upon the interview with Rontae and the other

information that they've gathered, the police want to go looking for Kenneth Counts. As the SWAT team comes down Burns Avenue there at the corner of Burns and E Street, Kenneth Counts runs from his home into his aunt's home across the street, and the cops eventually get a search warrant and have to pull Kenneth Counts out of the attic of that home.

When they do a search warrant on that home, they find VIP cards in the name of -- or from the Palomino. They have fingerprints from Kenneth Counts on them. They have fingerprints from Deangelo Carroll on them.

After they got the shooter into custody, the police actually -- because they had been up 72 hours -- sleep on the 22nd, but on the 23rd they put what -- a surreptitious recording device on Deangelo Carroll and they send Deangelo Carroll into Simone's Autoplaza. And the reason that they send him in there is that Simone's Autoplaza is also owned by Mr. H. And there's an office there that he has as well as Anabel Espindola as well as Luis Hidalgo, III, actually lives in room six, the back room of this place.

You're going to hear these recordings and there's some things you're going to need to know about these recordings. First and foremost, there of terrible quality. The reason being this, it's a surreptitious recording device that's placed on Deangelo Carroll so you can actually hear kind of like his clothing rubbing against it, but then you're

also going to hear the whispering of the coconspirators during the entire recording.

And eventually when they get this recording off of Deangelo Carroll, they can hear certain things, but it's of poor quality and it eventually gets sent to the FBI and it also gets sent to an independent agency in Toledo, Ohio and what you'll eventually hear is an enhanced version of the recordings.

None of the statements are going to be changed, but some of the background noise and other things. So you will have the original poor quality, you will have the enhancement. And I'm going to tell you right now you're not going understand every word. You'll probably get about 90 percent of the words after you listen to it over and over and over again. But one thing is going to be a hundred percent clear when we're done, that the order was given by Mr. H, Luis Hidalgo, III, was involved in it and that the order was to kill Timothy Hadland.

You will also hear a second recording that occurs on May 24th and since -- at some point you're going to need to hear these recordings. You're going to need to hear them on multiple occasions. I'm going to play portions of them for you now.

Ms. Olsen, can you flip to the --

(Tape being played.)

MR. ADAMS: Your Honor, we have an objection to the --

THE COURT: Okay.

MR. ARRASCADA: May we approach?

THE COURT: Yeah. Approach on this.

(Off-record bench conference)

THE COURT: Ladies and gentlemen, just so you know, the transcript was prepared by the State. It is not going to be evidence in the case. It's something that they're offering you to guide you in listening to the tape. The contents of the transcript are disputed. And again, it won't be evidence. What will control is your hearing and interpretation of what is on the tape, not any transcript.

Is that -- anything else? All right.

Now go on, Mr. DiGiacomo.

(Tape continues)

MR. DIGIACOMO: And the tape goes on for longer than that. There's actually about another five minutes of conversation that you'll hear.

Let's talk a little bit about what you heard on that tape. Never take a single piece of evidence to try and find out the answer to a complex story, but this is a very good piece of evidence to find out --

MR. GENTILE: Objection. Argument.

THE COURT: Sustained.

MR. DIGIACOMO: Let's talk about certain things. When you first heard that, what went through your mind is that 13 minutes and 30 seconds Deangelo Carroll makes a statement to Little Lou that says, What are you worried about? You had nothing to do with this. At the end of this case, I'm going to suggest to you that that statement doesn't mean he had nothing to do with the case. That statement means that Deangelo Carroll knows nothing about conspiracy law and you will hear what the meaning of that statement is.

So as you sit here today, ask yourself what he meant at 22:15 when you heard Little Lou say, Next time you do something stupid like this, I told you you should have taken care of TJ. And then --

MR. ADAMS: Objection to that, Your Honor. That was not in the transcript.

THE COURT: That's sustained. Sustained.

MR. DIGIACOMO: Sorry. I wasn't allowed to tell them what it's going to say?

THE COURT: Well, just go on, Mr. DiGiacomo.

And ladies and gentlemen, I'll just remind you, as I said in the opening, this is the State's impression or -- of what the evidence will be. At the end of the day, it's what you recall of the evidence and what you yourselves hear in the tape.

Go on.

MR. DIGIACOMO: Thank you.

I won't tell you what it says. Let's listen to it again.

MR. ARRASCADA: Judge, now this is getting --

(Tape being played.)

MR. ARRASCADA: Your Honor, we want to object --

THE COURT: How much are you going to play, Mr. DiGiacomo?

MR. DIGIACOMO: Just that whole --

MR. ARRASCADA: Your Honor, we're raising an objection that's argumentative.

THE COURT: All right.

MR. DIGIACOMO: Argumentative?

THE COURT: Well, it was -- you can play a little bit more. It is getting argumentative.

MR. DIGIACOMO: And you'll have that tape back there, 22:15. Write it on your note pads because when you're back there, you're not going to have the transcript. And do it in Real Player, by the way, because if you play it in a different player on the computer, it actually -- the time will be slightly off, but 22:15.

In addition to what you will learn during the course of the time period, what else he's talking about is, How do you know this guy KC, that the conspirators are upset that he used someone else as opposed to doing it himself, and you'll

also hear that they are upset that he had those two kids in the car who could pinpoint exactly where he was.

What else you also heard that should give some --

MR. GENTILE: Objection to what they heard. He can talk about what they're going to hear.

THE COURT: Right. That's sustained.

MR. DIGIACOMO: What else you're going to hear on this tape -- well, first of all, there's no question that Luis Hidalgo, III, wants Rontae and Jayson killed. There's no question that he wants KC to do it first, and then after he's told that KC isn't the person who could do it because -- well, Deangelo knows that KC's in jail, but as he tells them that he's not going to be able to find KC, that he gives them a bottle of Tanquerae, and you're going to hear that Deangelo Carroll leaves that -- Simone's Autoplaza with a bottle of Tanquerae. He wants rat poisoning in it. And even when Anabel Espindola tells Luis Hidalgo, III, rat poisoning's not going to work, his response isn't, You're right. It's, You know what you've got to do.

What else you heard, which caused the recording to occur on the next day, was --

THE COURT: We'll hear.

MR. DIGIACOMO: -- what Anabel Espindola said.

MR. ARRASCADA: Your Honor, again, objection. This is argument.

THE COURT: All right.

MR. DIGIACOMO: Rephrase.

What you're going to hear is her statement which caused the second recording. On there you heard her make a statement, something to the effect of, What we really wanted for him was to be beat up, not M F'ing dead. And based upon that, the cops decided that they needed to send Deangelo back up a second day.

And you're going to hear a recording from May 24th, once again at Simone's, once again with Anabel and Little Lou on the recording in which the discussion is had about what the actual plan was.

(Tape being played.)

MR. DIGIACOMO: You'll learn that that device is left in the bathroom for 28 minutes and it's dead recording until Deangelo puts it back on himself and he walks out of that club on the 24th. You will hear --

And, I'm sorry. Ms. Olsen, can you switch it back to --

THE COURT: You know, while she's doing that, how much more do you have, Mr. DiGiacomo?

MR. DIGIACOMO: Ten minutes, maybe.

THE COURT: All right. I'm sorry. Go on.

MR. DIGIACOMO: You will hear and you heard a discussion about a lot of things. One of the things you will

learn during this time period is that Luis Hidalgo, Jr. is inside Simone's club. Surveillance on that club puts him inside the club on that date and shortly after the 23rd recording is done, sees him leaving with Anabel Espindola.

The next day, once again, he's surveilled. He's in that place. And eventually Luis Hidalgo, on the 24th, Jr. -- III, winds up leaving and the cops come into contact with him and arrest him.

He was the person who was supposed to open the Palomino Club that night, so about 5:00 o'clock when the dancers are standing outside the door and they can't get in, they start calling Anabel and Mr. H. And you will hear about Anabel and Mr. H leaving Simone's on the 24th together and then they're pulled down and then Anabel Espindola is arrested.

After that time period, a search warrant is executed on the evening of the 24th on Simone's Autoplaza. During the course of the execution of the search warrant there's a lot of items of evidence found, but one of them was a note, Maybe we are being surveilled, keep your mouth shut.

When this case first started out and Mr. H was not a defendant in the case, an exemplar was taken from Luis Hidalgo, III, to see if he wrote that note. A forensic analyst was able to conclude he's not the author of that note.

Eventually, later on when you hear about the arrest of Mr. H, an exemplar is taken from Mr. H and the forensic analyst was able to say to a reasonable degree of scientific certainty that Luis Hidalgo, Jr., the father, wrote that note.

In addition, there's an execution of a search warrant at the Palomino Club as well and there's documents related to the fact that TJ was an employee there, Deangelo Carroll and everything else.

You also heard a discussion about cell phones. Each one of these individuals had a cell phone and you will learn about their number. Mr. H has kind of got a green border there, and I did that to help you follow along with some of the colors. Luis Hidalgo, III, has paint. Anabel's is purple. Deangelo's is yellow and so is Kenneth Counts, and I'll tell you about that in a minute, why.

Now, everyone at the club has Nextels. There's two ways to work a Nextel. I don't know if any of you guys have a Nextel. There's Nextel regular, you talk on the phone. When that happens, you do just like a normal telephone calls. There's cell site coverage and you can learn the cell site information about where everybody is that's talking regularly on the phone. The Nextel's also have a walkie-talkie function where they can just chirp back and forth and do direct connects.

Deangelo Carroll's Nextel telephone only does direct

connects out of the Palomino. So if you're going to have a regular telephone conversation with Deangelo Carroll, it either has to be on a different cell phone or it has to be on his home phone. And you'll learn during the course of this case (702)643-0842 is Deangelo Carroll's home phone.

On May 19th of 2005, he calls Anabel Espindola's phone on two occasions, one at 5:00 o'clock and one at 7:30. You're also going to see that at 7:42 p.m. Little Lou calls Deangelo Carroll's home. And when there are cell site information, this is an actual telephone call, those are minutes. So they talk for over a minute, Little Lou and Deangelo Carroll.

And I submit to you that at the end of this case the evidence is going to show that that phone call is the phone call where he tells Deangelo Carroll to come to the club with the baseball bats and the garbage bags.

Then you'll see the time period of the murder. This inbound/outbound is actually a cell phone, and all of these are direct connects. You're going to see direct connects between Mr. H and Anabel. At one part you're going to see Deangelo Carroll and Anabel Espindola direct connects, Mr. H and Anabel direct connects, Deangelo Carroll and Timothy Hadland, who still had his Palomino cell phone, Nextel cell phone. These right here and then this call right here.

You heard during the course -- or you will hear

during the course of those tapes that a regular phone call Deangelo Carroll can't make. You heard that discussion -- or you will hear that discussion about the son and calling his wife. As it turns out, you will hear the testimony about how there was problems with the connections and eventually there's an actual regular phone call made inbound to Kenneth Counts -- I mean, inbound to Anabel Espindola, 1.4 minutes.

And the cops run down the phone number, which just happens to be Kenneth Counts' cell phone. Deangelo -- you will find that Deangelo Carroll borrowed Kenneth Counts' cell phone so he could have a regular conversation with Anabel Espindola shortly before the murder of TJ Hadland.

You keep following those and you'll see that at 12:24 Mr. H calls Anabel and Anabel calls Little Lou. And interestingly, at 1:48 a.m., Mr. H direct connects with Deangelo Carroll.

Eventually, you will hear from Anabel Espindola. Ms. Espindola was arrested on May 24th of 2005. She sat in jail and, in fact, is still in jail for the better part of three years and ultimately reached a resolution with the State. And you will hear her story. And at the end of this case you will be instructed on the law and you're not going to be asked to find what crime she committed, but when you read that law, the evidence is probably going to show you that she committed second degree murder.

She enters a plea to what's known as voluntary manslaughter with use of a deadly weapon, one step down. And she remains in jail to this day and she's going to tell you what she knows about this crime.

She's going to tell you that on the morning -- or during the daytime on May 19th of 2005 she received a phone call from Deangelo Carroll just like the phone records show, that during the course of that phone call Deangelo Carroll started telling her about TJ and TJ's talking bad about the club. And she'll explain to you a little bit about the club. The club was once owned by Jack Perry. He eventually had to sell the club. He sells it to a Dr. Simon Sturtzer, (phonetic) who's a close friend of Mr. H, and eventually Mr. Sturtzer's getting such bad press because he's a doctor that he wants a partner and he wants to go silent and Mr. H becomes that partner.

Dr. Sturtzer still gets paid $10,000 a month even after Mr. H takes over the club, and the club's not making that much money to cover the nut every month that they have to pay Dr. Sturtzer. And Simone's isn't doing that much either.

She will tell you that after she receives the phone call from Deangelo Carroll, she's in the house -- or she's in the -- Simone's Autoplaza with both Luis Hidalgo, III, and Mr. H. And the cell sites from their phone records will confirm that fact. She will tell you that she told them what

Deangelo Carroll had told her and that the two of them started an argument and during the course of that argument Luis Hidalgo, III, said to his father, You're never going to make the kind of money that Rizzalo and Gallardi do.

For those of you who don't know, Rizzalo was the owner of the Crazy Horse II, here in town, and Gallardi was the owner of Cheetah's and I think Jaguar's as well before his legal troubles. And he says -- Little Lou says, you know, you won't even have this guy beat up, Rizzalo had a customer beat up who wouldn't pay. And this argument ensues in which Little Lou finally leaves the club. And, in fact, when you look at his cell phone records, he's hitting off a cell phone tower between Simone's where he left after this argument and when he gets to the Palomino Club where that phone call was made to Deangelo Carroll.

Anabel will tell you that Mr. H was stewing. He wasn't happy about the conversation. He was mad. He was sitting outside her office. And she'll say that eventually sometime after 7:30 or 8:00 o'clock she and Mr. H drove to the Palomino Club. She'll tell you that once she got there, she went into the office like she always does and she remained in the office. And then eventually Mr. H and Deangelo Carroll walked into the office -- or Deangelo Carroll knocked on the door, him and Mr. H had a short conversation. They walked out the door.

A short time later, Mr. H came back into the office, asked her to step to the back area away from an individual by the name of PK, Pilar Handley (phonetic) and she said, Go call Deangelo and tell him to go to plan B. She'll tell you that she went to the back. She couldn't direct connect with him. She kept clicking back and forth and eventually was able to get a land line connection with him, just like the phone records will show you.

And during the course of that conversation he was saying stuff about, But we're alone, and she says, Look, Mr. H wants you to go to plan B, go to plan B. She'll tell you that after that phone call and her conversations with Mr. H, Deangelo Carroll came back to the club, that he came into the office, that he said it was done and Mr. H ordered her to give him five. She says five what? He says, $5,000.

She'll tell you that she went and got the cash and she put it on the table and Deangelo Carroll walked out of the room. She'll tell you that the next day or the day after, on Saturday, she went to Luis Hidalgo, Jr. After having his conversation with the police that evening of the 20th, was concerned, he was upset.

And so they called their lawyer and eventually talked to an individual by the name of Jerome DePalma. And the next day, on Sunday, their usual lawyer, Mr. Gentile, flew back into town and they had a meeting with him on that day.

She'll tell you that at the end of that meeting she was instructed in the presence of Mr. H not to have conversations with Deangelo Carroll, that he could be wired.

And she'll tell you that later that night she left and despite the warning that she was provided, Mr. H was upset. He was scared as to what Deangelo Carroll was going to do and he asked her to have a conversation with Mr. Carroll. And when you listen to that recording, what you will find or what you will hear is exactly what she's saying. You and Luis have to stick together. You and Luis -- Luis's in a panic. Even his own son admits Luis's the person in the panic.

And she'll tell you that during the time period of that wire, Mr. H was inside the place. You will also hear that the next day nobody told Deangelo to come down there. He just goes walking in. And when he walked in, she had a short conversation with Mr. H. She talked to him. And then you heard her -- hear her leave the room and you will hear that she talked to him and he ordered her to give Deangelo Carroll more money. She then left and gave Deangelo Carroll more money. He left and eventually she was arrested in this case.

Ladies and gentlemen, at the end of this case, while it's complex, while it's complex conspiracy law and you're going to have a lot of law provided to you related to the elements of the case, there's going to be simply no conclusion other than Mr. H gave the order that his son encouraged the

order and that ultimately they're responsible for the death of Timothy Hadland.

Thank you.

THE COURT: All right. Thank you, Mr. DiGiacomo.

Ladies and gentlemen, we're just going to take a quick ten-minute break until 11:00 o'clock. You are reminded that during this break you're not to discuss this case or anything relating to the case with anyone else. You're not to read, watch, listen to any reports of or commentaries on any subject matter relating to the case and please don't form or express an opinion on the trial.

If everyone would please put their notepads in there chairs, and I do need to remind everyone when you are in the building, please make sure that you're wearing your blue Department XXI jurors -- jury badges. The reason for that is so that people immediately recognize you as jurors and don't inadvertently discuss the case or something like that in your presence.

So if all of you will please put your notepads in your chairs and follow Jeff through the double doors, we'll be back in session at 11:00.

(Court recessed at 10:52 a.m. until 11:02 a.m.)

(Outside the presence of the jury.)

THE COURT: Go ahead.

MR. ADAMS: Thank you, Your Honor. During the

State's opening, we approached the bench --

THE COURT: Yeah. The first objection was referencing Mr. DiGiacomo's commenting on the state of the case against Deangelo Carroll, which I told him to move on. I didn't sustain the objection. I should have, but it is what it is.

MR. ADAMS: Yes, ma'am, we objected and said that --

THE COURT: But then he did -- for the record, he did move on after -- there's probably not going to be any evidence of what Deangelo Carroll did or did not do. But anyway, he moved on from that and took another -- moved on to something else is what I'm trying to say.

MR. ADAMS: Yes, ma'am. We objected on the grounds of hearsay and prejudicial effect and lack of relevance and the Court overruled.

We do at this time raise a continuing objection to the State eliciting that information from any witness in the case as Deangelo Carroll's status of incarceration at this point in time is irrelevant to the trial of these two defendants.

MR. DIGIACOMO: Judge, it's not irrelevant. As you heard them say at the bench, the police made a deal with him. The police made no deal with him. He offered to wear a wire. They took him up on that wire. We have never used -- we have never provided him a deal.

THE COURT: Yeah. Here's the --

MR. DIGIACOMO: He's charged and that's going to become relevant if they're going to start --

THE COURT: Right. If they start --

MR. DIGIACOMO: -- questioning that.

THE COURT: I mean, obviously we can't get into the Kenneth Count situation. Anyone who testifies -- so it kind of creates an incomplete or haphazard picture. Anyone who testifies, obviously, you can get into what they were offered and anything like that. Deangelo Carroll isn't going to be testifying, so I don't know how it's going to come in. But if the defense tries to make an issue that there was a deal and he got a benefit from this, then certainly that opens the door and the State can get into, Oh, no, there was no benefit. We didn't favor this defendant over any other defendant. So I think then it would become relevant.

MR. ADAMS: Correct. And we had a second objection regarding the transcripts. Mr. Arrascada--

THE COURT: Right, which was sustained, and they did not use the --

MR. ADAMS: I believe that was --

THE COURT: -- they did not use the offending -- or the question part of the transcript which referred to TJ. That has been redacted by Mr. DiGiacomo. He informed the Court of that at the bench and then was allowed to go forward

and any reference to the disputed part was sustained and Mr. DiGiacomo then did not reference it but told the jury to listen for themselves or something to that effect.

And I also would address there had been previously a Batson challenge made. There are two African Americans on the regular jury and one African American is the second alternate in Chair No. 7.

MR. DIGIACOMO: And first alternate, we still don't know the answer to.

MR. GENTILE: Your Honor, it's taking us a bit of time to get set up, but I believe --

THE COURT: That's fine.

MR. GENTILE: I apologize to the Court.

MR. ARRASCADA: Judge, on the transcript issue, could we just request that throughout the trial if the transcript is brought up that the limiting instruction be provided to them contemporaneously?

THE COURT: That's fine.

MR. PESCI: Judge, we'd ask for that for the defense's version as well.

THE COURT: Right. Anytime they reference the transcript, I'll just remind everyone they won't have copies, it's not evidence, and it's disputed and is merely being given to aid them in listening to the tape, let their own -- you know, something to that effect. Their own hearing of the tape

is what controls.

In response, Mr. Arrascada and Mr. Adams, the JAVS people are going to come up at the break and try to set something up so that you can see a monitor as well. So they don't know if they'll be able to do it, but they'll try.

I think an hour's optimistic.

MR. GENTILE: I agree.

THE COURT: I'm not going to interrupt you, but as soon as you're finished, we'll take our lunch break.

MR. DIGIACOMO: So if he gets to 12:15, that's 1:15, and they said that --

You're still going to have about a half hour, Mr. Adams?

THE COURT: 40 minutes.

MR. ADAMS: I'm going to be 45.

(Off-record colloquy)

THE COURT: All right. Bring them in.

(Jury reconvened at 11:07 a.m.)

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

Mr. Gentile, are you ready to proceed with your opening statement?

MR. GENTILE: I am, Your Honor.

THE COURT: All right. Thank you.

MR. GENTILE: Thank you.

DEFENDANT HIDALGO, JR. OPENING STATEMENT

MR. GENTILE: Good morning. When we stood up to give you that brief overview of this case, what now seems like a long time ago, remember, I said to you that the bottom line was that Luis Hidalgo, Jr. didn't know anything about anything that happened in this horrible tragic death of Timothy Hadland until after it happened. Thus, the theme of this case.

Everybody in this jury has said that, certainly everybody has heard it, we have all experienced it, and it is what this case is about. Over the next hour or so, to be honest, I'm going to talk to you about what the facts will show. I'm going to identify for you some issues that will arise in this case so that when you hear the facts as they come in, you can kind of have a road map, some sort of a way of putting the facts as they come in into context for the decision that you're going to be asked to make when this is all over with, but what I would like you to remember throughout -- those three words and three others -- consider the source, also something that I'm sure most of us have either heard in our life -- maybe our mother said it to us, and most of us have said it in our life.

This is a conspiracy case and the three questions that you're going to be asking yourselves as the evidence

comes in in this case, the first one is, what's conspiracy? Now, understand something, only the judge can instruct you on the law. That is her exclusive province and role in this case. None of the lawyers, no matter how much we've worked with the law or how little, can talk to you about what the law is. At the end of the case, the judge is going to instruct you what the law is and then we'll be able to argue with those instructions before you what the facts show as it meets the elements of the law.

But in simple terms, conspiracy's an agreement. It's an agreement to do something illegal. And obviously it has to have a starting time's, and a stating time's no different than any other starting time of any other agreement. When two people, at least two people, get together and they talk to each other and they agree to do something, you have a conspiracy. Other people can join that same conspiracy later. They can agree later on to accomplish the objective of that conspiracy. But like anything else, a conspiracy has to have an end.

And at the end of this case, the judge is going to instruct you as to when a conspiracy ends, but obviously if the objective of the conspiracy has been completed, you can't very well join a conspiracy to accomplish that goal. It's too late to do that and that's why we get back to timing is everything. As you listen to the facts as they come into this

case, keep that in mind.

It's going to be critical. Time lines are going to be critical in this case for you to reach a just and correct decision.

The judge will instruct you at the end of the case that if you did not join a conspiracy before its objective has been reached, then while you may be responsible for some things that you did do, you're not responsible for the objective of that conspiracy. And that makes sense.

Another theory in this case that the State has -- and by the way, everything is -- everything that comes into this case with respect to Luis Hidalgo, Jr., who you will referred to as Louie and you will hear referred to as Mr. H by people that have been calling him that his whole life, everything is governed by this document. This document is called an amended indictment. And as the judge said, it's nothing more than a piece of paper that kind of puts on it what the charges are so that you can have some guidance.

You don't come into a courtroom to decide whether you like a guy or not. You don't come into a courtroom to decide whether he's a bad guy or not, whether he did something right or did something wrong. You come into a courtroom to determine whether what's on this piece of paper has been proven beyond a reasonable doubt.

And in this case -- Mr. DiGiacomo said that this is

kind of a complex case, and he's right. And the reason that he's right is because it charges two Counts. It charges a conspiracy to commit murder, an agreement to commit murder, and then by its language, it incorporates by reference Count 2, which is the murder count.

In Count 2, it has four different theories about how the murder may have been committed.

MR. DIGIACOMO: Judge, I apologize. I gave him some leeway, but one, it's argumentative; and, two, it's not proper opening.

MR. GENTILE: Your Honor, we're entitled to discuss issues at this point and then go into the facts.

THE COURT: All right. Well, you're kind of on the line, but --

MR. GENTILE: Thank you.

The second of those theories is called aiding and abetting, and so one of the things you're going to be wondering throughout this case is what is aiding and abetting. Well, aiding is a word that you use all the time. Abetting, most liking, isn't. And it has nothing to do with going to a sports book. Okay.

What you're going to be instructed at the end of the case is that, in simple terms, it means helping somebody or encouraging them or hiring them, even, to do something before it's done. If it's already done, it's too late; thus, timing

is everything in this case.

And so now I want to get into the second thing that we talked about, and we're going to get into the evidence, what the evidence will show. And the second thing we talked about is consider the source. As you hear witnesses testify in this case, I'm going to talk to you now about what evidence you're going to hear about the credibility of those witnesses so that you know before you hear them. And when we're talking about consider the source and we're talking about credibility, we're talking about believability. That's what it means. And we deal with it in our everyday lives.

This man is Deangelo Rashaun Carroll. As Mr. DiGiacomo says, he is not going to call him as a witness in this case. I cannot call him as a witness in this case and so you're going to hear from this man, but you're going to hear from this man through what other people say he said in their presence.

Now, there's going to be some objections as to whether you should be able to hear that or not, and you're going to hear me say "hearsay," but that's the Judge's call. But because he isn't coming into this courtroom and he isn't going is to be sitting over here, we're not going to be able to cross-examine him.

The law does provide and our procedure does provide another way of coming close to that, addressing his

credibility. Mr. Rontae Zone, most likely, will testify in this case. He is another source. Mr. Carroll, of course, is a source of information even though he's not coming in here. Mr. Zone is going to testify about things that he heard Mr. Carroll say. We will be able to cross-examine Mr. Zone and we're going to get into what the evidence will show with respect to him in a bit.

Jayson Taoipu, I do not know if the State is going to call him as a witness. If the State calls him as a witness, we will have an opportunity to cross-examine him. If the State does not call him as a witness, then we'll have to see whether something he said before or somebody that said something to him comes into evidence.

The first thing I want to talk about in terms of what the evidence is going to show as far as the believability, the credibility of these witnesses deals with something simple. Right now you're looking at me and you're listening to me, I hope. That's called perception, right? You are perceiving me at this moment. Most of you are sober, maybe all of you. That's a joke. After you perceive me today, an hour from now, you may forget what I said. A week from now, you may forget. A year from now, you most definitely won't remember. And so let's address that with respect to Mr. Carroll.

What is the evidence going to show about

Mr. Carroll's perception and his memory? Well, we won't be able to show anything about his memory because the man's not going to be in here, and so we won't be able to cross-examine him with respect to that, but we will -- you will hear --

MR. DIGIACOMO: I apologize, Mr. Gentile.

May we approach?

THE COURT: Yeah.

(Off-record bench conference)

MR. GENTILE: We were talking about memory. Now we're talking about perception.

Go back to perception and memory, please. There we go. Okay.

Mr. Carroll -- I can't do this technology stuff myself.

Mr. Carroll -- you are going to hear testimony in this case that on the 19th of May, 2005, Mr. Carroll was smoking pot all day. You're going to hear evidence in this case that on the 19th of May, 2005, Mr. Carroll was using cocaine and so keep that in mind. You're going to have to wait to hear that, but you will hear it and that is something you are entitled to use to determine perception.

With respect to Mr. Zone and Mr. Taoipu, you're going to learn that Mr. Zone and Mr. Taoipu were smoking pot with Mr. Carroll all day and that's something that you can take into consideration.

Anabel Espindola. Anabel Espindola's perception -- there will be no evidence in this case that she was somehow under the influence of anything, at least I don't think there will be, but what you're going to find out is that it took 33 months before she said anything to anybody similar to what she is saying here in court. And so memory comes into play there. She repeated it to no one for 33 months.

Motive. There will be evidence of motive in this case. With respect to Mr. Carroll, Mr. Carroll's motive, when he said some of the things that will come into in evidence this case such as the tape recording, was to keep himself out of jail. He was wearing a recording device that was provided to him by the Federal Bureau of Investigation and the Las Vegas Metropolitan Police Department. That was after he gave at least a three-hour statement to Metro. And his motive in wearing that device and his motive in manipulating the conversation -- and you will hear testimony that he was told how to create an environment in that conversation for the purposes of getting responses, and his motive in doing so at time was to stay out of jail.

Mr. Zone. Mr. Zone has not been charged in this case. The testimony in this case is going to be that Mr. Zone, after smoking pot all day long with Taoipu and Carroll, got into a vehicle, along with Carroll, Taoipu and Counts, drove out to the lake and was an eyewitness to

Counts -- if it be Counts -- he says Counts -- to Counts shooting Timothy Hadland in the head twice.

The State has chosen not to charge him. Mr. Zone at the time he makes his original statements is motivated to see to it that he is not charged and so that's something that you could take into consideration. Just listen -- just listen to it. Whether you take it into consideration or not, I don't care. That's your business. But listen to it because it's coming.

Mr. Taoipu. Mr. Taoipu had a motive -- has a motive for the things that he says. Mr. Taoipu you will learn was charged originally with this murder. Mr. Taoipu you will learn basically fled the State of Nevada for a period of time and then was brought back here in a custodial setting. And the time that Mr. Taoipu finally starts saying things, he said them the night of the event, the next morning after he had an opportunity to talk to Mr. Carroll alone. It was Mr. Carroll who brought Mr. Taoipu to the police. And at that point in time, he too was motivated to stay out of trouble.

You will learn that Mr. Taoipu ultimately did plead guilty to reduced charged --

MR. DIGIACOMO: Judge, I apologize. Until Mr. Zone testifies, that's not admissible and I object.

THE COURT: Overruled.

MR. GENTILE: I'm not talking about Zone.

MR. DIGIACOMO: I mean Mr. Taoipu. Excuse me.

THE COURT: Overruled.

MR. GENTILE: Mr. Taoipu entered a plea of guilty to a reduced charge and was sentenced to probation. The testimony in this case is going to be that he, along with Zone, Carroll, and Counts went out to the lake. The testimony is going to be that Counts is the one that did the killing. The testimony is going to be that Mr. Taoipu had a 22 semiautomatic with him at the lake during the killing and the testimony will be that he received probation.

So there will be evidence in this case that he had a motive as well to say the things that he might say if he's called by the State in this case.

Anabel Espindola. Anabel Espindola also had a motive and you will hear about it. The testimony that you will hear is that Anabel Espindola was arrested on the 24th of May, 2005. I want to make sure I get this right. The 24th of May 2005. And on the 6th of July 2005, it came to Anabel Espindola's attention that the State filed a notice of intent to seek the death penalty as to her. Anabel Espindola's attorney, along with the attorney for Mr. Luis Hidalgo, III, challenged that action on the part of the State.

And so that you understand, this man was not arrested until February of last year 2008. He was not arrested in May of 2005. Timing is everything. On December

the 27th of 2007, after Anabel Espindola had been in jail by that time two years and seven months, 31 months or so, the Supreme Court of Nevada struck the death penalty in this case.

On the 14th of January, the State sought what's called a rehearing. This was all known to Anabel Espindola. She was in jail at the time. On the 15th of January, she was in this courtroom and she will have to admit to that. And she heard the State argue in her presence about its intention of trying to reinstitute the death penalty against her. At that moment she did not have -- it was kind of in limbo. The State announced that day that the day before they sought a rehearing on the death penalty issue. The State filed on that day an amended notice of intent to seek death.

Also, on that day, Anabel Espindola sought bail. She filed a motion for bail because the death penalty was not in effect at that time as to her. And later on that day after court at about 3:15 in the afternoon she had a telephone call where she's speaking to Luis Hidalgo Jr., who, of course, is not in jail at that time, not charged at that time. And in that call you will hear her say, unless she admits it and we don't need to play it, that everything that was being said by the State in court on the 15th of January 2008 was a lie.

On the 24th of January, 2008, this Court set a bail for Anabel Espindola. It was a high bail. It was $550,000. And she will tell you that. And you will hear that she wanted

to get out of jail and that Luis Hidalgo Jr., my client, had difficulty raising the premium for the bail, which is 15 percent. You will hear that.

And so on the 2nd of February 2008, nine days after the bail was set, while the petition for rehearing was pending, while the possibility of the death penalty being reinstated was still there, Anabel Espindola made a deal with the State to testify in this case and to plead guilty to reduced charges. The charges -- she has not been sentenced. She has been sitting there for a year without being sentenced, waiting to testify in this case.

After she's testified in this case, then and only then will she be sentenced. She has not requested that the Court sentence her beforehand as was her right to do. She pled guilty to something that is called a fictional charge. She said that she heard that on the day she pled guilty. And the agreement that she made, while, of course, it says in it that she agrees to tell the truth, the agreement that she made guaranteed her that she would not have to run the risk of the death penalty, and it did more than that.

You will learn that she has pled guilty and the deal that she's got makes her eligible for probation. This is all evidence that will come into this case and I ask you to consider the source as you're hearing her testimony.

Bias. Bias, of course, means that you are favorable

to -- you're not supposed to be. Okay. It's what we spent four days trying to find people that wouldn't be. But bias is also something that you can take into consideration as this case develops. And you're going to hear testimony about bias.

Anabel Espindola. Here we go again. You're going to hear that during this 30 something months that she was sitting in jail, Anabel Espindola was, of course, in a woman's lockup. She still is. And during that time there were women that were in jail with her that she, as they were released, asked Luis Hidalgo, Jr. to help out. There were several. He did.

You will also hear that during that period of time she believed that Louie Hidalgo, Jr., my client, Mr. H, became unfaithful to her with these women that she was sending to him. You will hear testimony from this witness stand from a woman who had a direct -- I won't call it a confrontation -- a conversation with Anabel Espindola wherein Anabel Espindola asked her, Are you cheating with Louie? Is Louie cheating on me with you? You're going to hear that in this case. That is evidence of bias. It will come in. And, of course, that was heard by her before she made her deal with the State.

Credibility. There will be in evidence in this case that Deangelo Carroll, who again you're going to only hear through what other people are saying that he said in their presence, that Deangelo Carroll has a prior felony conviction

for robbery.

Prior inconsistent statements. You will hear testimony in this case that the witnesses who testify -- let's go to the next slide, please.

Deangelo Carroll. You will hear certain statements that he made prior to these statements or even after these statements that are coming in through the people who are going to say they heard him. You're going to hear things that he said that were different from the things that these people are saying that he said in their presence. That's an inconsistent statement and, of course, it then becomes your province to decide what to believe, if anything.

Rontae Zone has testified how many times? Probably five or six times between statements that he's made, hearings that he's testified at. You will hear that he has testified differently about the same thing on different occasions. It will be for you to decide what to do with that.

Jayson Taoipu, it sounds like from the last objection, that the State's not going to call him, so --

MR. DIGIACOMO: Objection.

THE COURT: Yeah.

MR. GENTILE: But if they do -- if Taoipu is called in, he will also have things that he has said before or after that are different from what he's going to say here. And that's evidence that you're going to hear.

Anabel Espindola, okay -- Deangelo Carroll, on the day of -- on May the 20th of 2005, he was brought to the police station, to the homicide offices, actually, and he was interrogated, questioned -- you put the word on it. I don't care what you want to call it. He was questioned with a couple of police officers in the room and the entire thing was videotaped.

Rontae Zone, when he went in, the entire debriefing, the entire interrogation was videotaped. When Mr. Taoipu went in -- I said videotaped. It was at least audio taped. I'm not certain it was videotaped. When Mr. Taoipu went in, same thing, verbatim recording.

You're going to learn that when Anabel Espindola made her deal with the State, she is the only witness that was not recorded. There was no recording made of her debriefing at the time that she was trying to cut her deal with the State. The only recording of anything that she has ever said is her testimony before the grand jury and one other. She was also brought in when they arrested her, obviously, and she was interrogated. She didn't say much, but it was on videotape. And so the initial contact was recorded, but after she changed her mind and made her deal, that contact was not recorded. We have absolutely no way of knowing what she had said to police in the past after she made her deal.

Next please.

Character for truthfulness. You will hear testimony in this case about character for truthfulness. It comes in one of two ways. Either the opinion of other people who actually know these people who could tell you whether they're truthful or not in their opinion, and there's also what we all know is reputation. Now, some people think of reputation as nothing more than rumor and gossip, and that's okay, you can think of it that way. But nevertheless, you will hear testimony in this case, if you will, that this man Deangelo Carroll, both with respect to people's opinions about his truthfulness and people's -- and his reputation for truthfulness, you will hear evidence in this case that he's not deemed to be a truthful person by people who know him.

So now we'll go into what the evidence is going to show about Luis Hidalgo, Jr. I think what we should probably start off doing is explaining Luis Hidalgo, the name Luis Hidalgo. In that photograph you see three men and one woman. It is obvious from looking at it that the three men are of three different generations. I bet you could already tell me what their first name is. You are looking there -- and you will hear testimony about Pops, who's this man, Luis A. Hidalgo, Sr., Louie, or Mr. H, who's this man, also that man who is Mr. Hidalgo, Jr., Louie Hidalgo, Jr., and Luisito or Little Lou or Luis, depending upon who's referring to him, who is Luis Hidalgo, III.

I'm going to talk to you about Luis Hidalgo, Jr. The testimony in this case is going to show that Luis Hidalgo, Jr., he is Salvadoran. He lived his whole life up in northern California in the San Bruno area. And you can see him there. He, at one point in time, was a civilian employee of the San Bruno Sheriff's Department where he was a fingerprint technician and also did process serving. Family man, three children, a daughter in the Coast Guard with a high security clearance in Washington, D.C. A good friend. You're going to have people come in here who have known him for years and years and years who are going to come in here and tell you, Look, I've known this man a long time, and we get back to opinion and reputation and character evidence. They're going to tell you this is not that kind of guy. Okay.

And let's talk about how he came to Nevada. The evidence is going to show that along with his father, Louie Hidalgo, Jr. has been a body and fender guy. That's what I was brought up talking to him -- I guess they don't call them body and fender guys anymore, but you know what I'm talking about, people who repair vehicles, motor vehicles. Okay. And from the time that he's 18 year old, he was in that business with his father. That's the family business. He did not grow up in the strip club industry.

There came a time in the late '90s -- in the '90, period, where he befriended a man by the name of Simon

Stertzer, Dr. Stertzer. Dr. Stertzer is on the board -- or was at least on the board of regents of Stanford Medical School. And Dr. Stertzer wanted to invest money and he trusted Louie Hidalgo, Jr. And Louie Hidalgo, Jr. came to Las Vegas, bought a piece of ground over on Bermuda and opened up the biggest, the largest body -- I'm going to call it body and fender because that's what I call it -- largest body and fender repair store -- shop in southern Nevada. And it was called Simone's Auto Body.

Mr. DiGiacomo in his opening statement referred to Simone's as a club. Simone's is not a club. It is a body and fender repair store. They make their money on insurance claims and on custom paint and stuff like that, and that's why he came to southern Nevada. And after operating Simone's for a year and a half, he became friendly with -- he met people in this community, and amongst the people that he met in the community were people that were in the real estate industry, which is, you will recall ten years ago you might make some money on, try to get back what you spent.

In any case, one of the deals that was brought to him was an almost five-acre parcel of property zoned for a hotel, casino, resort and commercial retail. At 1848 -- actually, the 1800 block of North Las Vegas Boulevard, Las Vegas Boulevard north in North Las Vegas.

Now, you will also learn that on that 4.93-acres of

gaming property there are three liquor licenses, have been forever, two of which had topless entertainment licenses to go with it, one of which had a totally nude license to go with it. And so within one block, all of one block of what is really gaming property, you've got three strip clubs. And they were all owned by the same person who owned the real estate who was Gail Perry, the trust of Paul Perry. Paul Perry is the man who created the Palomino Club back in 1958.

And in 1968, the Palomino Club went into the adult entertainment business. Prior to that, it actually was a gaming property.

And so from 1968 until actually even now it has been operating that way. And some of you, during jury selection, said that you were familiar with it. But you're going to hear evidence about that.

And Dr. Stertzer wanted to buy the piece of property and he did. And Louie Hidalgo did not -- well, I shouldn't say that. The evidence is going to show that there came a point in time after Dr. Stertzer bought this property that Louie Hidalgo took over the management of it, having never been in that industry before, although he did have some background in just basic saloons.

You're going to hear people that are going to come in and tell you who have worked with him at the Palomino Club that this is a peaceful, tranquil, even-tempered person, that

they have never seen him act out in a violent manner, that they have never heard him talk that way.

You will also find out that he had never been -- until now, until last year, he'd never been in trouble with the law in a sense of having been charged with any kind of a crime of any serious nature, anything more than serious traffic maybe, but nothing like that. And just so that the record is clear, you're going to learn that he is now 58 years old and when all this was going on he was 54 years old. So he had managed to make it 54 years without having a problem.

At the time that these events were occurring that bring us here, you're going to learn that he was going through a hellacious divorce, a hotly contested divorce.

Okay. Next slide, please.

Now, there is no doubt that throughout this case, as you're hearing evidence come in, you're going to be saying, why did this happen. You're going to be asking yourself that. And again, we do not dispute that this was a tragic thing that happened to TJ Hadland.

According to the opening statement that Mr. DiGiacomo made and the evidence that he says he's going to put in this case, somehow Deangelo Carroll told Anabel Espindola who then told Luis Hidalgo, Jr. that TJ Hadland was badmouthing the Palomino Club to cab drivers, and the next thing you know TJ Hadland gets killed.

Well, the testimony in this case is going to show that as far back as anybody can remember strip clubs -- at one point in time there was no other strip club other than the Palomino -- strip clubs have always paid cab drivers something, always something. It started out two dollars 50 years ago, 40 years ago. It's up to $50 per person today, per person.

And you're going to see, if I may, that every day records are kept at every one of these clubs, every one of them. You're only going to see the Palomino, but you're going to hear some expert testimony, and I'll get to that in a second.

We talked during jury selection and you're going to hear testimony that -- well, February 4, 2005 -- is that today?

THE COURT: It's either today or tomorrow.

MR. GENTILE: Okay. Today's the 2nd. Well, there you go.

February 4th, 2005, TJ Hadland was already working at the Palomino Club. He started January 31st. And the system that existed there with respect to the payout of cab drivers -- and some of you probably have seen these documents before -- was that this yellow chip up here, which you're going to see one of in this case, is something that is handed to the cab driver, and on that chip it will say how many

people -- this one says two at $25 -- the cab driver dropped off. The cab driver gets that from the doorman.

The cab driver then takes that ticket, drives around the back of the Palomino Club at that time, goes inside where there's a little cage -- I call it a cage, but it's like a casino cage, you know, an office, little booth. That booth has cash in it. The cab driver walks up to the person who is manning that booth or womaning that booth, whichever it may be, hands that ticket to that person and is then given the amount of cash that is on the ticket.

You will also learn and have that there are VIP comp tickets and that the VIP comp ticket says that it is not valid if arriving by taxi cab. You will hear testimony that not only the Palomino Club but the industry itself runs into a situation where people who work for the clubs will sell these tickets, these VIP passes, to the passenger after the passenger is dropped off. They will tell the passenger, It's costing you 50 bucks to get in here, but if you give me $20 for this ticket or $25 for this ticket, you're going to save half the money. And so the passenger pays that person the money.

That person goes to the cage, you know, the admission both at the club, presents this pass to the admission booth, and at that point in time the admission booth negates the cab driver's right to get paid and will call the

back of the house where the cab driver's going to present this ticket and the cab driver either won't get paid or there'll be issues and problems and maybe the cab driver will get paid something.

And then these -- this document all the way to the left basically represents a calculation of how many cabs -- how many customers are dropped off by a cab and how much the payment per customer was.

On this particular day, there were 73 people dropped off, $25 per person was paid for each of those 73 people, so it was a total pay out of $1,825. There's also a different amount of money paid for women because in those days the Palomino, and still -- the Palomino Club operates a totally nude male review that women attend. It's one of two clubs in town that has always done that. But they don't pay as much for women that are dropped off by cabs. And then there's also promotions and other things like that.

This becomes important because you're going to hear testimony in this case that both Deangelo Carroll and Timothy Hadland, TJ Hadland, were seen by employees of the Palomino Club selling the VIP passes to customers that were dropped off by cab drivers and pocketing the money. I'm not saying to you that that's true. What you're going to hear is that people reported that and the person who saw it and reported it will come in here.

Next slide, please.

By the way, anytime a cab driver dropped off somebody, they had to sign another document that said they didn't divert that passenger from some other club that they wanted to go to and brought it to the Palomino. And the reason that that's important, if I may, there was a lot of litigation going on at that point in time.

You're going to hear the testimony of Kevin Kelly. Kevin Kelly is a lawyer. He's been a lawyer here in Nevada for 30 years. He served two tours of duty in Vietnam and he had a saloon and the saloon wasn't doing very well, but the saloon became Spearmint Rhino as a result of somebody coming to him and making a deal with him and him merging with them. Many of you have used -- have talked about Spearmint Rhino.

Mr. Kelly's going to come in and he is going to tell you about the industry and how clubs are run and what they do to ensure against unlawful activity taking place at those clubs. And obviously it is impossible to eliminate it. It can't be done, but it can be controlled. And you're going to hear about those controls, but you're also going to hear about the Nevada Association of Nightclubs of which Mr. Kelly was an organizer.

And at the time in 2005, every club that served alcohol in Clark County that had either totally nude, which would only be one, or topless, which would be all the others,

entertainment was a member of the Nevada Association of Nightclubs.

And the reason that it was created, he will tell you, is because as new clubs moved into our community, they threw -- they basically created a price war. If one club would pay a cab driver $30, the other club would pay 35, then another club would pay 40, and there were times that the price to the cab driver per drop off would change multiple times in one night. And so in order to try to avoid that, this organization was created.

He will tell you that the life blood of any topless bar -- for that matter, I guess it would be any bar -- is the number of customers. But the reason that it's more important, perhaps, to a topless bar, he will tell you, is because a topless bar makes its money from selling alcohol and from the fees that the dancer pays to the club. The dancers are independent contractors. They rent time in order to be there to dance. They pay a flat fee. Whatever money they make is theirs.

We will talk to you about the kind of security that goes on to see to it that nothing unlawful happens on the premises. And so the more customers you have, the more dancers you're going to get. The more dancers you get, the more revenue you generate from the dancers' fee. He will tell you that's how it works.

And ultimately what he will tell you, ladies and gentlemen, is he's going to come in here and he's going to say that everybody -- all of the members of this organization except one had to agree to whatever they were going to be paying cab drivers at that time. At least that was its goal. It didn't really work out for very long, but it was its goal, except one, and that one was the Palomino Club.

The Palomino Club was always permitted to pay $5 more per customer than whatever anybody else was paying. And he will tell you that the reason for that was because a cab driver might have to deadhead back and so there were some cab drivers that did not want to make that run to North Las Vegas because if they weren't staging, if there wasn't a lot of business, then they would have to deadhead back and -- so that's what you're going to hear.

You're going hear that the badmouthing of cab -- two cab drivers was absolutely inconsequential. And anybody in the industry would know that. And Louie Hidalgo knew that.

Rontae Zone on the 21st of May, 2005, presumably here as well, he will tell you that he was asked by the homicide detectives after he told them that this guy KC left the Palomino Club in a taxi, he was asked what color. And he told the law enforcement officers that night, There's no way I know. There were so many cabs. That comes from the mouth of a coconspirator and that is proof -- I won't tell you what

that's proof of, but you're going to hear that he told the officers, There were so many cabs, I can't tell you what color it was.

You're also going to hear from a cab driver by the name of Gary McWhorter who is the man that picked up KC, Kenneth Counts, and he's going to tell you that when he picked him up, there was a cab staging going on over there, that there were other cabs there behind him when Counts got into his cab.

You will also hear that when the Palomino Club was searched, there was $151,000 in cash in the safes at the Palomino Club. You have heard and will hear Anabel Espindola on that tape that Mr. DiGiacomo played in his opening statement deposits to Mr. Carroll when she says that she only has $600, where am I going to get the money. And if I tell Louie, he's going to have a fit -- or whatever she says.

You're going to hear testimony that the police counted out $151,000 at the club when they searched it on the 24th of May, 2005.

And so we then turn our attention to something else. Why did this happen? What the evidence is going to show -- you heard me elude to the evidence that's going to come in with respect to Mr. Hadland and Mr. Carroll both having been seen selling passes to customers that came to the club and got out of taxis.

Deangelo Carroll, the testimony is going to show, had a robbery conviction, was absolutely totally dependent upon the good graces of the Palomino Club's owners to maintain his lifestyle.

You're going to learn that Rontae Zone when he was first questioned by the police on the 21st of May said to the police that Carroll told him that something bad was going to happen to somebody -- actually, he said that somebody needed to be dealt with. Those were the exact words that he used, dealt with, whatever that means. And when they asked him why, Carroll said because -- excuse me, Zone said that Carroll told him because they were snitching. They were telling. They were ratting.

And so you will have to make a decision as you go through this trial whether those terms have any application at all of badmouthing a club driver -- not -- badmouthing a club to a cab driver, or whether they pertain more likely to TJ Hadland snitching off Deangelo Carroll and cutting off his lifeline, his support line. That will be for you to decide.

Next.

You will learn that when Mr. Hadland was terminated from the club, which he was, and it had nothing to do with any accusation of stealing, you will learn that Deangelo Carroll had taken a couple of weeks off. He was on leave. His uncle had been murdered and so he took some time off. And you'll

have a witness come in here who will tell you that upon him returning to work, upon Carroll -- excuse me -- yeah, Carroll -- upon Carroll returning to work, he confronted this person whom he suspected as having basically reported -- having seen him pull this deal with these free passes, and he said to that person, Don't put me with TJ. This was upon his return to work at the Palomino. Hadland was fired, no longer working there, but still alive.

This is Kenneth Counts. The testimony in this case is going to show that Kenneth Counts, whether he is or whether he isn't, he was portrayed by Mr. Carroll to be a member -- and I want to get this right -- of the Black Pee Stone Bloods. This is the man that Zone will say used the 357 magnum to shoot Hadland in the head twice and kill him. You are going to learn that this man was brought back to the Palomino Club after this event occurred and that Mr. Carroll -- and you hear it on the tape actually. You'll hear it on the tape -- that this man Carroll told Anna Espindola on the tape and other people, Louie Hidalgo on the night of this event, that this man Carroll was on the other side of the door, that he had just committed a murder, and that he was demanding money, and that if he didn't get paid the money, he was going to harm Carroll and he was going to harm the Hidalgos, that he was a member of the Black Pee Stone Nation, Black Pee Stone Crips. And his exact word were, You don't want to fuck with my boy.

Now, that occurred after the murder. The testimony in this case is going to be that that engendered a hell of a lot of fear at that moment. You will hear that the security team at the Palomino Club is not armed and so there was a dilemma. The dilemma was what to do.

The testimony's going to be that under certain circumstances you might just pick up the phone and call the police department and have them come over and pick somebody up, but that's not what happened. What happened was the money was paid, but it was paid by Anabel Espindola. Even she said she paid the money. She's going to come in here and she's going to tell you a different version and you can compare what she says here, after you think about all the reasons that she might have and all of the time that she had to look at all the statements, to decide whether you believe that version or not and then you can compare that version that she's talking about here with the tape, the tapes that she's on, using the first person, singular pronoun "I." So listen carefully.

In any case, I could go on, but let's just get started. The case is going to be for you to decide. That's a very powerful motivator and you're going to hear testimony about its presence. You're going to hear testimony about a 357 and you're going to hear testimony about gangs. At the end of the day and at the beginning of this trial, I ask you to please keep in mind that timing is everything.

What you're going to find at the end of the day is that there is no proof of any involvement that would rise to the level of criminal guilt on the part of Luis Hidalgo, Jr. prior to the death of Timothy Hadland. If anything, this man is an accessory after the fact, if anything.

The judge will instruct you at the end of the case. At that point in time, I'm going to ask that you follow your oath and return a verdict of not guilty as to Count 1, conspiracy, and as to Count 2, the murder.

THE COURT: All right. Thank you, Mr. Gentile.

Ladies and gentlemen, we're going to go ahead and take our lunch recess now. We will be in recess for the lunch break until 1:15.

And once again, you're reminded of the admonishment that is still in place not to discuss the case or anything relating to the case with each other or anyone else. Don't read, watch, listen to reports or commentaries on any subject relating to the case. Please don't visit any of the locations in question -- any of the locations at issue. Don't do any independent research and please don't form or express an opinion on the case.

If everyone will please leave their notepads in their chairs and follow Jeff through the double doors, we'll see you all back here at 1:15.

(Court recessed at 12:14 p.m. until 1:23 p.m.)

(In the presence of the jury.)

THE COURT: All right. Court is now back in session. The record will reflect the presence of the State --

MR. GENTILE: We would request of the Court to sit behind the bar.

THE COURT: That's fine --

Through the deputy district attorneys, the defendants and their counsel, the officers of the Court and the members of the jury.

Mr. Adams, are you ready to make your opening statement?

MR. ADAMS: Yes, ma'am, thank you.

THE COURT: All right.

DEFENDANT HIDALGO, III OPENING STATEMENT

MR. ADAMS: Good afternoon. The afternoon of May the 23rd in a little room in Simone's Auto body Shop, the man who was sent by the police to get incriminating evidence, to get incriminating evidence, stopped Luis Hidalgo, III, stopped him when he first made a comment and he said, What are you saying? You had nothing to do with this, nothing to do with this.

Little Luis wasn't present. He didn't pay and he did not participate in the death of Mr. Hadland. He didn't. The evidence is going to show that four people were present when Mr. Hadland was killed. Deangelo Carroll drove a van, a

van that was owned by Anabel Espindola. He drove it filled with three other people: Jayson Taoipu who had a .22 caliber weapon under his seat, maybe unloaded; Rontae Zone who was along for the ride and smoking pot; and Kenneth Counts. Louie Hidalgo wasn't there. Little Louie wasn't there.

Who paid? Well, they said in their opening that you'll hear testimony that Anabel Espindola laid five large, $5,000 in cash in the office of the Palomino Club and that Deangelo Carroll took that $5,000. What you didn't hear was that Little Lou wasn't in that office on that night. He didn't participate. He didn't pay.

Anabel Espindola will come in and she's expected to testify that there was this conversation beforehand where he got into some kind of disagreement with his father. In that conversation she's expected to testify that Little Luis Hidalgo never said, Dad, dad, you've got to kill Hadland. Dad, dad Hadland needs dead. Dad, beat him up real bad. The State's star witness is going to come in and not say those things. She's going to say there was an argument and that Little Luis said, Dad, you don't take care of your business. He wasn't present. He didn't pay and he did not participate.

So why are we here? Well, we're here because of what the State didn't share with you, the body wire from May 23rd, four days after Mr. Hadland was killed up at Lake Mead. Four days later in Room 6 of Simone's Auto body Shop,

Anabel Espindola sent Deangelo Carroll to Little Lou's room/office and on that body wire Little Lou mouthed off and said some pretty stupid stuff. That's why we're here.

The question is talking about rat poison, does that mean you're responsible four days before for the death of Mr. Hadland? Nowhere on that tape, nowhere on that tape are you going to hear Little Lou say, Man, I'm so glad I got you to go kill TJ. Nowhere are you going to hear, Man, I'm so glad I called you about bats and bags and got you to come meet with my dad so then you guys could enter into a conspiracy to go do something to Mr. Hadland. You're not going to hear that.

There will be evidence that between the 19th of May 2005 when Mr. Hadland was killed up by Lake Mead and Room 6 at Simone's, four days later, that Little Lou did learn about the death of Mr. Hadland, a former employee of the club. He did learn that Anabel was involved. He's known Anabel Espindola since he was nine years old and he loves her.

The prosecutor in their opening said -- and played snippets of tape where Little Luis, on the transcript part rolling down, talks about rat poison, talks about a bottle of gin. He said those things. He said those things. No if ands or buts about it, 100 percent, those words came out of his mouth.

The main thrust of the case that they're going to

present is by saying those things he must be responsible for the death of Mr. Hadland. So let's look at the whole tape and that's what I'm asking of you in the next week or so. This tape is 34 minute and 56 seconds long. There's a lot of conversation back and forth. The first ten minutes or so Little Luis doesn't say anything. And I'm going to ask you to look at this tape very critically and to evaluate the full tape, the entire wire, keeping in mind that Deangelo Carroll knew fully well that the recorder was on and Little Luis did not.

I'm going to ask you to check out the reactions between the parties when something is said on the tape. I'm going to ask you to look at the tape and to see, is there some way I can tell who's really in control here, who's in charge, who's calling the shots? Can I tell what happened up at Lake Mead four days earlier based on what's talked about in Room 6 at Simone's? Does this conversation on this wire tell us anything that we need to know in determining what happened to Mr. Hadland? When you do this critical evaluation of the tape, one thing's going to be crystal clear. There's three people in the room: Deangelo Carroll, Anabel Espindola, and Little Lou, Luis Hidalgo, III.

Let's first talk about Mr. Carroll. We'll hear about Mr. Carroll and we'll hear on that body wire that he drove up to Lake Mead with three people in the van. It wasn't

Little Luis and it wasn't Little Luis' van. We'll hear on this tape that he's directing all of his conversation, all of his important questions about money, about what to do next, about attorneys -- they are all directed to one person. There's only three people in the room. And you'll hear on that wire those conversations, those remarks were not directed to Little Luis. They were all directed to the next person, Anabel Espindola.

We'll hear from Anabel Espindola. She'll say, What did you do? What did you do? I told you to go to plan B. We'll hear from her that plan B meant -- and she'll testify to this -- plan B meant come back to the club. Don't do anything to Hadland, come back.

Deangelo Carroll will tell her, Ms. Anabel, I don't know what happened. Kenneth Counts went F'ing stupid. And you heard enough of the tape earlier to know that the F word was used quite a bit, so when I talk to you about the tape, I'll leave those out for the most part. He went stupid and he shot the dude. Nothing we could do about it. Ain't none of us had no pistol. That's what he said.

And on our copy of the tape, the full 34 minutes and 56 seconds, that's at the 13 minute and 56 second mark. You'll hear from Deangelo Carroll's own mouth on the wire that he'd been picked up by the police, that he'd been released by the police and thanked for his cooperation. You'll learn from

the witness stand that that's not fully true. You'll learn from the witness stand that he had been picked up and you'll learn from the witness stand that he was cooperating with the police to try to get evidence for the police to have and for -- ultimately for jurors to have.

You'll hear evidence that on May the 20th, 26 hours or a little less than that, about 22 hours after the killing of Mr. Hadland, Mr. Carroll was taken to the homicide office and stayed for a lengthy period of time.

Immediately after he was in that homicide office and was interviewed or interrogated or talked to by police he was allowed to leave. The police drove him home and drove him to help them get Rontae Zone. Rontae Zone came in at 1:00 a.m. that morning, 26 hours later, 1:00 a.m. on the 21st of May, and he gave a statement to the police.

The next day Deangelo Carroll drove -- he drove Jayson Taoipu to the police office so they could get a statement from him. Deangelo Carroll was motivated to not be arrested for his involvement for driving Kenneth Counts and these other guys up to the lake.

The police made the choice to allow Deangelo Carroll to stay out of jail for a few days. They were trying to get with him to use him to get more evidence. They took a little recording device and they placed it -- like a beeper, placed it on him and they sent him to get evidence. And where did he

go? He didn't go to Room 6 of Simone's where Little Lou sleeps, where Little Lou works. He went to Anabel Espindola in the main office. Anabel sent him down the hall to Little Luis' room so they could talk behind a closed door.

He didn't just go in and talk, but he came up with a scenario. After talking with the police, he came up with a few new facts and he said -- the facts you'll hear on the tapes, Kenneth Counts is threatening to kill us. We need more money. Deangelo and Jayson, they're going to rat me out. We need more money. This, in fact, was not true. These were things that he created with the police to try to get a reaction from Anabel so that she would say something on the wire. He knew fully well that he was wired up and he was trying to get information because he was trying to not get arrested.

So who was truly in charge? Well, that wasn't the one I wanted, but that's okay. That's fine. We'll get to that in a minute.

I'm going to read you three snippets and we'll play this over and over. And you heard these earlier on the prosecutor's opening.

Talk may be cheap, but we're going to hear from the witness stand that Anabel Espindola gave $1,000 in hard cash to Deangelo Carroll on the 23rd. That's at the end of the wire. You didn't hear that in the part they played. That's

further down, but she left the room and came back and gave him $1,000, not Little Lou.

At the -- on their version, the 14 -- I believe it was 14 minutes and ten seconds, on the full version, it's right around the 20, 21-minute mark, Anabel Espindola says, quote, You want to lose it all? If I lose the shop and I lose the club, I can't help you or your family. She didn't say, If Mr. H loses the shop or the club or if Little Lou loses the shop or the club. The words out of her mouth on this wire are, If I lose the shop and I lose the club, Deangelo, I can't take care of you.

There was also a part on the earlier tape that I think is important for you to listen to when it's played in evidence, and it was the part about finding an attorney. And there was a lot of talk about that. And at one point she said, I'm going to go talk to the attorney tomorrow. And on there you may have heard it, He's outrageous. He's going to want you to go ahead and wrap these other guys up and there's no fucking way.

So here we are four days after the death of Mr. Hadland. The question is who's really in charge of what happened on the 19th. Well, who's in charge? It's not Deangelo. Who's in charge? It's not a defense lawyer four days after, after attorneys have been consulted. She's saying there's no way we're going to turn people in for their

involvement in this crime. Anabel Espindola was in charge. She was in charge on the 23rd, and by the words out of her mouth, she was in charge sooner than that.

What did Anabel do in direct relation to controlling Deangelo Carroll and his actions? Well, she said, Deangelo --

How about the next one? Yeah.

All right. Deangelo, you need a prepaid phone. You need this phone so we can stay in touch so I can send you messages. You heard on the wire the prosecutor played and you'll hear from the witness stand, she says, I'm going to give you a code name, this code name of Boo so that way you'll know the messages are really from me. She was talking about being the sole person to kind of control Deangelo after the fact, how he would operate, how he would cooperate with police or say things, how he could stay undetected for his involvement.

Let's go down two more, please, not two more slides, two more clips.

She tells Deangelo that, You've got to resign from the club for personal reasons and that -- I'm going to give you some money so that you can maintain yourself. I'm not going to leave you hanging. Does this shed some light as to who's really in charge of what went on on the 19th?

She also made some comments on what she expected to happen on the 19th. And she said --

Can you pull all three of them up?

Let's look at the one at the bottom. What we really wanted was him beaten up, if anything. We didn't want him dead. Then she goes on to say, Are you so stupid? Are you so heartless? How could this happen? Once you saw that guy had a gun, why didn't you just turn around?

She's saying on the tape that she knew what -- she knew something was going to happen, some sort of confrontation, and she's saying on the tape nobody was supposed to die. When she's saying, He's supposed to get beaten up, she's going to testify on the witness stand what she means by that. She's not going to testify that she was talking about Little Lou and I wanted you to beat him up. She's not going to say that.

The entire tape shows that Anabel Espindola was in charge certainly on the 23rd of May and it suggests very strongly that she was in charge on the 19th of May when Deangelo Carroll got behind the wheel of Anabel Espindola's van and drove up to Lake Mead to meet Mr. Hadland.

I've talked about the other two, so let's talk for a second about Little Luis' statements on the body wire. When you listen to the whole wire, ask yourself, does any of these statements help us understand what he knew and when he knew it or did he know this stuff beforehand on the 21st? Does this help us know whether he ever entered a conspiracy to do