IN THE SUPREME COURT OF THE STATE OF NEVADA

LUIS HIDALGO, JR.,
Appellant,

vs.

THE STATE OF NEVADA,
Respondent.

Case No. 71458

APPELLANT'S APPENDIX VOLUME XX

Appeal from Eighth Judicial District Court, Clark County

The Honorable Valerie Adair, District Judge

District Court Case No. 08C241394

MCLETCHIE SHELL LLC
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CERTIFICATE OF SERVICE

I certify that I am an employee of McLetchie Shell LLC and that on this 24th day of July, 2017 the APPELLANT'S APPENDIX VOLUME XX was filed electronically with the Clerk of the Nevada Supreme Court, and therefore electronic service was made in accordance with the Master Service List as follows:

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I hereby further certify that the foregoing APPELLANT'S APPENDIX VOLUME XX was served by first class U.S. mail on July 24, 2017 to the following:

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/s/ Pharan Burchfield
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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

LUIS HIDALGO, JR.,

Petitioner,

vs.

THE STATE OF NEVADA,

Respondent.

Case No.: 08C241394

Dept. No.: XXI

PETITIONER'S APPENDIX FOR SUPPLEMENTAL PETITION FOR WRIT OF HABEAS CORPUS

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III	01/30/2009	Transcript of Proceedings: Jury Trial - Day 4	HID PA00523 - HID PA00538
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VOLUME	DATE	DOCUMENT	BATES
XVIII	03/30/2012	Appellant's Motion To Reconsider Submission For Decision Without Oral Argument	HID PA03240 - HID PA03251
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VOLUME	DATE	DOCUMENT	BATES
XX	01/08/2014	Order For Petition For Writ Of Habeas Corpus	HID PA03489
XX	01/13/2014	State's Response To Defendant's Pro Per Motion For Appointment of Counsel	HID PA03490 - HID PA03494
XX	01/13/2016	Documents received from the Nevada Secretary of State	HID PA03495 – HID PA03516

DATED this 29th day of February, 2016.

/s/ Margaret A. McLetchie

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b)(2)(B) I hereby certify that on the 29th day of February, 2016, I mailed a true and correct copy of the foregoing VOLUME XVIII: PETITIONER'S APPENDIX FOR SUPPLEMENTAL PETITION FOR WRIT OF HABEAS CORPUS by depositing the same in the United States mail, first-class postage pre-paid, to the following address:

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IN THE SUPREME COURT OF THE STATE OF NEVADA

LUIS A. HIDALGO, JR.

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

Docket No. 54209

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

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

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Statutes

Other Authority

I. STATEMENT OF JURISDICTION

Luis A. Hidalgo Jr. (hereafter "H")[1] was found guilty by a jury of conspiracy to commit battery with a deadly weapon and/or causing substantial bodily harm and second degree murder with the use of a deadly weapon in case C241394 in the Eighth Judicial District Court. 24 ROA 4500. A judgment of conviction was entered July 10, 2009, sentencing him to consecutive terms of life imprisonment with the possibility of parole. 25 ROA 4656-4657. The notice of appeal was timely filed on July 16, 2009. 25 ROA 4658-4659. This Court has jurisdiction over this appeal pursuant to NRS 177.015(3).

II. STATEMENT OF ISSUES PRESENTED FOR REVIEW

A. Did the trial court commit reversible error when it instructed the jury that existence of the conspiracy and H's membership in it could be established by 'slight evidence'?

B. Was there sufficient corroboration of the accomplice testimony to support the verdict?

C. Did the intentional failure by the State to record an accomplice witness's plea negotiation proffer violate H's right to due process of law and a fair trial ?

D. Was H's right to confrontation violated by admitting into evidence statements by a purported co-conspirator who both sides agreed had withdrawn from the conspiracy when he made them?

E. Was the district court's denial, without a hearing, of H's Motion for New Trial based upon juror misconduct an abuse of discretion?

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[1] Appellant and his son, Luis A. Hidalgo III, have identical names and are both appealing their convictions in this matter. The use of the appellation 'H' and 'III' is as an economical aid to the Court to distinguish between them, is artificial and is not intended to demean their dignity.

III. STATEMENT OF THE CASE

This case was consolidated with one filed in May, 2005, charging Kenneth Counts ("Counts"), Luis Alonso Hidalgo III ("III"), Anabel Espindola ("Anabel") and Deangelo Reshawn Carroll ("Deangelo") with Conspiracy to Commit Murder and Murder of Timothy J. Hadland ("TJ"), and Anabel and III with soliciting the murder of Ronte Zone ("Zone") and Jayson Taoipu ("JJ"). 1 ROA 1-3. 5 ROA 916-918. All were denied bail and facing the death penalty. 1 ROA 4, 9-25. A writ issued from this Court striking the death penalty, later modified to allow amendment. 1 ROA 188-192; 3 ROA 516-529. Less than one month before the trial of III and Anabel, the State amended its notice of intent to seek the death penalty (3 ROA 530-533) and filed a petition for rehearing in this Court. 3 ROA 534-548. Soon thereafter, while the State's petition for rehearing was pending and after being in jail (hereinafter "CCDC") since May 24, 2005 (32 months and 11 days), Anabel cut a deal with the State. Under the terms of her February 2, 2008 plea agreement she entered a "fictional plea" to "voluntary manslaughter with use of a deadly weapon." 3 ROA 549-557. In exchange for her testimony, the State agreed that her sentence could include the possibility of probation and that it would not argue against it. Id. The agreement also provided that she could be released from jail and placed on house arrest as soon as she testified under cross-examination. Id. and 5 ROA 822. [2]

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[2] Anabel's sentencing in case C212667 is set for February 10, 2011, over three years after she agreed to testify against H. 25 ROA 4667. Because of the close relationship between the two cases, this Court can take judicial notice of the fact that as of the filing of this brief, Anabel has still not been sentenced. Mack v. Estate of Mack, __Nev __, 206 P.3d 98, 106 (2009).

H was thereafter charged on vicarious liability theories for the murder of TJ. The State presented Anabel's testimony to a grand jury and obtained an indictment. 3 ROA 574-575, 4 ROA 724-727. H was released on bail pending trial, notwithstanding that he was facing the death penalty at that time. 4 ROA 789. Trial commenced on January 27, 2009 and the case went to the jury on February 12, 2009. The verdict was returned on February 17, 2009. 24 ROA 4500-4501. H's timely filed post-trial motions were supplemented after discovering evidence of jury misconduct. 24 ROA 4506-4523; 24 ROA 4558-4566. The district court denied the motions on May 1, 2009. 25 ROA 4660-4663. H received consecutive sentences of life with the possibility of parole for second degree murder with use of a deadly weapon and conspiracy to commit battery with use of a weapon on June 29, 2009 and judgment of conviction was entered July 10, 2009. 25 ROA 4656-4657. The notice of appeal was timely filed on July 16, 2009. 25 ROA 4658-4659.

IV. STATEMENT OF FACTS.

A. Preliminary Statement

H is an American citizen who emigrated from El Salvador in 1957. 21 ROA 3959. He moved to Las Vegas in 1999 from Northern California, where he worked for a Sheriff's Department and owned an auto body shop. 21 ROA 3960-3962. In Las Vegas he opened the same type of business, Simone's Auto Plaza (hereinafter "Simone's") in which his investment partner was the doctor who introduced angioplasty to the United States. 21 ROA 3965-3968.. The doctor owned the Palomino Club ("the Club") and the real estate upon which it sat but later sold it to H. 21 ROA 3967-3968, 3974.

H, who had never before been charged with a criminal offense, was convicted and sentenced to consecutive life terms when he was fifty-eight years old and in poor health. 15 ROA 2859; 25 ROA 4656-4657. This was solely because of Anabel's testimony. 4 ROA 724-727. She had served thirty-two months in jail awaiting trial and facing the death penalty prior to making a deal with the State for probation and release from confinement. She was required to provide testimony against H to secure that deal Id. The State acknowledged that it did not have sufficient evidence to charge H without Anabel. 14 ROA 2724; 15 ROA 2837-2838.

H never contested the evidence concerning the murder, as it was clear that he was not present. The State's theory was that H was a co-conspirator or aider and abettor in the murder. 5 ROA 836-838. The defense was that H did neither, knew of no impending harm to TJ and reacted out of fear when he later paid the gangster/killer who demanded it. 23 ROA 4292,4306.

B. Statement of Facts Relevant to Assignments of Error

1. The Criminal Investigation

TJ's body was found on a desolate road near Lake Mead before midnight on May 19, 2005. 12 ROA 2814-2815. TJ had been shot twice. 13 ROA 2370-2391. The autopsy revealed .07 grams per milliliter of alcohol, and marijuana metabolite present in TJ's blood. 13 ROA 2383; 2386-2387. According to TJ's girlfriend, they had been camping at Lake Mead that evening when TJ received a phone call from Deangelo, a former co-worker at the Club. 12 ROA 2231,2241. TJ worked at the Club until a few weeks prior to his death. 12 ROA 2208, 2215. After receiving the call, TJ left her alone at Lake

Mead in the dark- over her objections because she had never camped before - and drove her KIA to meet Deangelo to get marijuana. 12 ROA 2215, 2221-2222. He never returned. 12 ROA 2222. TJ had $40 or $50 with him when he left. 12 ROA 2235.[3]

At the crime scene, Detective McGrath found a phone in the KIA and noted that the last call on the phone was to "Deangelo." 14 ROA 2653, 2660.[4] He learned the next

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[3] Only $6.03 was found at the crime scene. 12 ROA 2292.

[4] Records relating to several telephone/direct-connect devices involving subscribers H, III, Anabel, Deangelo, TJ and Counts were introduced at trial.. 13 ROA 2326-2396. **Not a single call or direct connect "chirp" came to or from H's phone** among the series of communications between Anabel, Deangelo, Counts and TJ before or after TJ was shot. 13 ROA 2354; 19 ROA 2594.

Anabel's phone received a call from Counts' phone on May 19, 2005 at 11:10:12 p.m. that lasted 1.4 minutes. 19 ROA 3615. Anabel's phone called back to Counts' phone at 11:12:58 pm but it shows 0 seconds duration. 19 ROA 3616. At 3:51:35 on May 19, 2005, phone #239-2350 (P.K. Handley's phone, see below) called Anabel's phone for 2.2 minutes. 19 ROA 3615. Deangelo's home phone called Anabel's phone at 4:58:56 p.m. on May 19, 2005 for 1.1 minutes and again at 7:27:05 p.m. for 3.75 minutes. 19 ROA 3622. There were also two phone calls, one inbound one outbound, between Deangelo's home phone and III's cell phone between 7:42:58 p.m. and 8:07:31 p.m. on 5/19/05 and two additional calls from Anabel's phone to Deangelo's home phone at 8:13 and 8:15 p.m. on that date. 19 ROA 3623. Anabel called #239-2350 at 8:42:16 p.m. for a duration of 1.33 minutes on that date as well. 19 ROA 3624. Deangelo's cell phone chirped TJ's at 10:39 p.m. and then Anabel's for 25.7 seconds at 10:42:07 and again at 10:45:25 for 8.3 seconds. Anabel chirped Deangelo for 12.6 seconds at 10:45:35 p.m. 19 ROA 3624-2635.

Eight minutes later, Deangelo chirped TJ at 10:53:41 and again at 10:54:52 p.m., the second for 20.7 seconds. 19 ROA 3625-3626. The 9-1-1 call reporting TJ's body in the road came in at 11:44 p.m. 19 ROA 3625-3626. At 11:08:06 Anabel chirped Deangelo. At 11:08:10 Deangelo chirped Anabel for a duration of 13 seconds. 19 ROA 3626-3627. At 11:10:12 Counts phone called Anabel for 84 seconds. 19 ROA 3627. At 11:12:58 Anabel called Counts' phone for 0 seconds. Id. At 11:13:21 Deangelo chirped TJ for 13.6 seconds. 19 ROA 3628. It is the last known communication prior to his death. 19 ROA 3626- 3627. At 11:37:35 Anabel chirped Deangelo for 0 seconds and at 11:37:41 Deangelo called Anabel for 21.2 seconds. 19 ROA 3627.

At trial, Anabel contended that she didn't speak with Deangelo after he left the Club with the $5,000 she gave him until May 23, 2005 at Simone's. 17 ROA 3232-3233. However, the phone records reflect that starting on May 20, 2005, 12:10:45 **PM** (12+ hours after previous chirp) Deangelo called Anabel for 30.5 seconds. 19 ROA 3628. At 2:53:19 PM Anabel called Deangelo for 7.4 seconds. Id. At 2:53:25 PM Deangelo called Anabel for 16 seconds. 19 ROA 3629. At 2:53:31 PM Deangelo chirped Anabel 35.4 seconds and at 2:54:13 PM Deangelo

morning that Deangelo worked at the Club. 14 ROA 2660-2661. Detective Wildemann called H and made an appointment to meet him at the Club. 19 ROA 3570-3571. H confirmed that Deangelo worked at the Club. 19 ROA 3572, 3604. H advised Wildemann to come back later that night and speak with Ariel, an employee, to obtain Deangelo's records. 19 ROA 3572, 3604-3605.

That evening McGrath and Wildemann were at the Club interviewing Ariel when Deangelo arrived. 19 ROA 3572, 3605; 14 ROA 2665-2666. The detectives asked Deangelo to accompany them to an interview. 14 ROA 2667; 19 ROA 3572, 3606. He complied and was interviewed on videotape. 14 ROA 2667. He gave "at least" three versions regarding the death of TJ. 19 ROA 3573. Detectives then located Zone at Deangelo's home. 14 ROA 2668-2669. After Deangelo told Zone to "tell the truth"[5], 14 ROA 2669-2670, Zone was interviewed on videotape. 14 ROA 2671. His statement was consistent with the 3rd version of Deangelo's. 19 ROA 3579. Hours later SWAT officers forcefully removed Counts, an "extremely violent" known gang member, from the ceiling of a home and arrested him. 14 ROA 2653, 2679, 15 ROA 2860-2862.

On May 23, 2005, detectives wired Deangelo with a digital recorder and sent him into Simone's because they "didn't think they had enough" evidence to charge anyone from the Club with the murder. 14 ROA 2724; 15 ROA 2837-2838. Deangelo was directed to speak with H. 14 ROA 2672, 2705-2707; 15 ROA 2848. When he exited,

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chirped Anabel for 8.1 seconds. 19 ROA 3628-3630. Perhaps these calls resulted in the "blur" that she describes in her testimony set out below.

[5] Zone testified that what Deangelo meant by this was to tell a story that would help him out. 14 ROA 2587.

Deangelo (who had not been searched previously) gave the detective $1400 cash and a bottle of gin. 14 ROA 2707. The digital recording was found to be of very poor quality, 14 ROA 2708, 2711, but established that Deangelo had made no attempt to speak to H. 15 ROA 2749-2751. The detectives decided to try again the following day and sent Deangelo into Simone's wired. 14 ROA 2712-2714. Deangelo again wasn't searched before entry and on departure he gave the detectives $800.00 along with the recorder. 15 ROA 2759,14 ROA 2713-2714. Although he had been specifically directed to do so, Deangelo again made no request or attempt to speak with H, who was observed by detectives to be inside before Deangelo entered and to leave hours after his departure.15 ROA 2749-2751, 2832, 19 ROA 3588-3589. [6]

After Deangelo left Simone's on May 24, 2005, Anabel and III were arrested. 15 ROA 2766; 19 ROA 3590. Search warrants were executed at Simone's and the Club. While many items were found linking Anabel to Deangelo and the van used to kill TJ 12 ROA 2264-5, 2290, 2295; 19 ROA 3590, 3603-07, the only piece of forensic evidence that had anything to do with H was a note in H's handwriting which said "we may be under surveills(sp). Keep your mouth shut" found on the pool table in the waiting area of Simone's. 18 ROA 3449-3475, 19 ROA 3606.

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[6] McGrath testified that some of the information supplied by Deangelo proved to be incorrect, unsupported or false. 15 ROA 2833. At trial, McGrath acknowledged his continued doubts about Deangelo's credibility. 15 ROA 2834.

2. Testimony of Zone.

Zone was interviewed by Metro shortly after the murder. He had never met or spoken to H and his sole source of information about him was Deangelo, his friend and roommate, whom he knew was a convicted felon, liar and braggart. 13 ROA 2392; 14 ROA 2501-2504, 2507, 2551-2552. On May 19, 2005, Zone smoked marijuana all day (as he did every day, believing it made him "smarter", while admitting it didn't help his memory of that day's events). 14 ROA 2521-2522, 2556-2557. He worked for Deangelo passing out flyers for the Club and around noon that day he was with him and JJ in the van when Deangelo asked him if he was into hurting someone. 13 ROA 2397, 2401-2402; 14 ROA 2505-2506. Later Deangelo mentioned someone had to be "dealt with." 13 ROA 2403. Deangelo also pulled out a .22 revolver. Id. JJ was given an unloaded gun and Zone was given bullets. 14 ROA 2524, 2559. Zone never heard Deangelo talking about this matter on the phone. 13 ROA 2408. They went back to Deangelo's house to get ready for work. 13 ROA 2405. They later went to pick up Counts. 13 ROA 2409. Zone thought they were going out to promote again but instead they drove to Lake Mead, smoking pot along the way. 13 ROA 2412, 2415-2417. During the drive, there was no conversation as to the purpose of the trip amongst the group. 13 ROA 2413, 2414.

Deangelo spoke on the phone during the drive to Lake Mead. 13 ROA 2413. Zone heard Anabel on the phone say "go to plan B." 14 ROA 2575. The phone signal faded while they were there. 13 ROA 2417. Deangelo also phoned TJ and said that they were coming to smoke with him. 14 ROA 2600; 13 ROA 2415. When he drove to meet them, TJ got out of the KIA and walked towards the driver's side of the van, where

Deangelo was sitting. 13 ROA 2422. Counts got out of the van, snuck up on TJ and shot him in the head twice.[7] 13 ROA 2423. No one else exited the van. 13 ROA 2423-2424. Counts reentered the van and Deangelo drove off. 13 ROA 2424. They drove to the Club and Deangelo went inside while the others remained in the van. 13 ROA 2426. Ten minutes later, he came back and got Counts to go inside with him. 13 ROA 2426-2427. JJ and Zone did not enter the Club. 13 ROA 2427. Counts came back out and got in a yellow taxi cab in front of the Club and left. 13 ROA 2427. Deangelo exited about 30 minutes later and the three went back to his house. 13 ROA 2427-2428.

The next day, May 20, 2005, Deangelo replaced the tires and cleaned the van. 13 ROA 2428-2430. [8] Later that day, Deangelo, JJ and Zone went to Simone's in the van.13 ROA 2432-2433. JJ and Zone waited on a couch and Deangelo went to the back of the building. 13 ROA 2433. Zone did not hear any conversations or see anyone at that time. 13 ROA 2434. Deangelo told Zone that they should have stuck with the plan and that he was disappointed they weren't involved and indicated Counts had been paid $6,000 for what they were supposed to have done. 13 ROA 2434-2435. It was not until that day that he heard Deangelo mention that other people had put him up to shooting TJ. 14 ROA 2576. Zone admitted to telling several lies in previous statements and that Deangelo had spoken with him before speaking to police officers about trying to put "a truth" together; a story that would help him out. 14 ROA 2586-7.

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[7] During his testimony in the Counts trial, Zone claimed that he could not identify Counts. 14 ROA 2580.

[8] Zone previously testified that they washed the car immediately after leaving the Club on the night of the incident before heading home. 13 ROA 2430.

3. Testimony of Anabel

Anabel had been with H for about 15 years prior to her arrest. 17 ROA 3206. She managed Simone's and H managed the Club. 17 ROA 3186, 3328. 17 ROA 3186. Both TJ and Deangelo had worked at the club as doormen and passing out VIP cards and flyers. 17 ROA 3187, 3202. H and Deangelo did not have a relationship or association outside of work. 16 ROA 3002. About one week before the murder she heard III and H discussing the possibility that TJ was falsifying tickets and getting kickbacks from cabbies. 16 ROA 3004. H said "watch TJ." 16 ROA 3008. A day or two later H told Ariel that TJ needed to be fired and Anabel issued his final check. 16 ROA 3007-3008. [9]

On May 19, 2005, Deangelo called Anabel and told her that TJ had been "bad mouthing" the Club. 16 ROA 3011-3013. She told H and III this information. 16 ROA 3013, 3015. H did not react. 16 ROA 3015. III became angry and vocal about how something had to be done about it. 16 ROA 3015-3016. She says that III told H that "Rizzolo or Galardi" would do something about it and that is why his father would never be as successful as them. 16 ROA 3015. H did not respond, but instead told III to mind his own business. 16 ROA 3017. She says that III stormed out of the room and left. 16 ROA 3018. She and H later went to the Club and shortly after they arrived, Deangelo came to H's office and had a short conversation which Anabel did not hear. 16 ROA 3035-3036. Later, H went into the office where Pilar Handley ("PK") was with Anabel. 16 ROA 3037; 17 ROA 3228. H told Anabel to go into the room behind the office and to call Deangelo and tell him to "go to plan B." 17 ROA 3227; 16 ROA 3037-3038. When

[9] See testimony of Pilar Handley, *below*, wherein he says that Anabel fired TJ.

she called him, Deangelo said he was "already here" and the call disconnected. 16 ROA 3038-3041. She tried to call him back with no success. 16 ROA 3044. She told H that she called Deangelo while PK was still in the room. H and PK walked out of the room.16 ROA 3045. Later that night, Deangelo came back while H was in the office. 16 ROA 3045-3046. She claims that Deangelo said "its done" and H told her to get $5,000 out of the safe, which she did. 16 ROA 3046-3047. Deangelo took the money and departed. 16 ROA 3049. Anabel still claimed to be in the dark about what happened to TJ 17 ROA 3226.[10]

Anabel claims that Friday May 20th, was "somewhat of a blur".[11] 16 ROA 3056-3057. She says that when he saw a story on the morning news about a death at Lake Mead, H said he needed to call his attorney. 16 ROA 3054. She and H met with attorney Jerome DePalma on Saturday, May 21 but she only spoke to DePalma for a minute or two and was instructed to leave and waited in the car. 16 ROA 3058, 3065, 3069-72. She testified that no one else was present with DePalma and if he were to testify (as he later did) that he had a detailed conversation with her about this matter, he would be lying. 17

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[10] However, it is clear from the conversation she had with Deangelo when he was wired that he told her what had happened to TJ before the surreptitious recording. On the tape Deangelo says "We were gonna call it quits, and fuckin' KC got mad and *I told you he went fucking stupid and fuckin' shot the dude, not nothing we could fuckin' do about it."* 17 ROA 3241-3242. To which Anabel responded "You should have fuckin' turned your ass around before this guy—knowing that you had people in the fuckin' car that could pinpoint you, that this motherfucker had his wife, you should have motherfuckin' turned around on the road. Id. Don't give a fuck what KC said. You know what, bad deal, turn around." 17 ROA 3241. This evidence, coupled with the May 20th calls set out in footnote 4, calls into question Anabel's self-portrayal of her role. 17 ROA 3242.

[11] Footnote 4 establishes that she at spoke with Deangelo several times on that day.

ROA 3239-40.[12] The next day, Anabel and H met with Dominic Gentile and Don Dibble. 16 ROA 3080. Gentile said not to speak with Deangelo as he may be wired. 16 ROA 3081. After meeting with Gentile, H was calm but then he got nervous again and the next morning H said "I don't know what I told him to do." 16 ROA 3082. Anabel asked "what have you done" and H said "I feel like killing myself". 16 ROA 3083. Anabel asked H if he wanted her to speak with Deangelo and he replied "yes." 16 ROA 3084.

On May 23rd, Anabel summoned Deangelo to Simone's. She claims she'd not spoken to him since he left the Club on the night of May 19th. 16 ROA 3050; 17 ROA 3232-3233.[13] When Deangelo arrived she put him in a room with III. 16 ROA 3086, 3089. She asked Deangelo if he was wearing a wire. 17 ROA 3349. H was not present in the room. 16 ROA 3089. 16 ROA 3092. She believed she spoke with H in her office while getting the $600 for Deangelo 16 ROA 3085, 3094. She could not explain the source of the other $800 that Deangelo gave to the detectives. Id. On May 24, Deangelo again arrived at Simone's and told Anabel he needed to talk to her. 16 ROA 3096. She took him to a room where III was in bed. Id. Anabel left the room and went to talk to H in the kitchen. 16 ROA 3098. She told H that Deangelo wanted more money and she gave

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[12] In spite of their sworn testimony to the contrary (see below), Anabel denied speaking with Jerome DePalma and Don Dibble about the events of May 19, 2005. 17 ROA 3290. She did not recall ever seeing Exhibit 200-I until she commenced testifying at trial. 17 ROA 3306-3307. Neither did she recall having Exhibit E with her when she went to see Jerome DePalma but acknowledged that the only persons at issue at the time of the visit with DePalma were TJ and Deangelo and their social security numbers are on the exhibit in her handwriting. 17 ROA 3308-3309. .

[13] This testimony is contradicted by the phone records detailed in footnote 4 and the surreptitious tape recordings made by Deangelo at LVMPD direction.

it to him . 16 ROA 3100-01. Anabel was driving H to the Club later that day when the car was pulled over and she was arrested and taken in for a videotape recorded interview. 16 ROA 3102-3105. After initially answering questions, she stopped when the detectives revealed that her conversations with Deangelo had been recorded. 16 ROA 3107-3108. 17 ROA 3255-3257.[14]

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[14] Anabel acknowledged at trial that she is "pronoun sensitive" and understands how to use them. 17 ROA 3245. Yet she consistently used the word "I" in her conversations with Deangelo. 17 ROA 3234-3236. When Deangelo said he needed more money, she responded "where the fuck am **I** supposed to get more money?" … "look, if **I** tell Louie that these motherfuckers are asking for money and if not they're going to go to the cops, Louie's gonna freak. **I** – **me** – **my** personal – **me** personally have about, uh, shit, how much do **I** have, maybe six bills? **I**'ll fuckin' give it to you". 17 ROA 3237. Anabel told Deangelo "All right, **I**'m gonna have to find an in-between person to talk to you, somebody **I** can trust. It might be—if a person calls, looks for you, she'll say it Boo. **I'm Boo**." Id. After Deangelo asked her whether he is to come back to work, Anabel responded "This is what **I** need you to do". 17 ROA 3238. She asked Deangelo "**I**'ve been thinking…your son is still sick, right? …"Listen, what **I'm** going to tell you, **I'm** going to give you some money so you can maintain yourself. 17 ROA 3240-3241. **I** need you to go in tonight and see Ariel and tell her.." Id.

Later in the recording Anabel warned Deangelo "All **I'm** tellin' you is stick to your motherfucking 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 fuckin' out than its gonna be for everybody to go to fuckin' jail. **I'm** telling you once that happens we can kiss every fuckin' thing goodbye, all of it, your kid's salvation and everything else, it's all gonna depend on you." 17 ROA 3243.

In the May 23rd recording, Anabel advised Deangelo "All right. Have your wife get in contact with ---see if she can find any ---'cause **I'm** gonna go ahead and talk to this guy, as well, and this motherfucker, **I'm** tellin' you, he's fucking outrageous, he's gonna want you—**I** know he's gonna want you to go ahead and rat the other guys out, and there ain't no fuckin' way. And **I'll** tell you what everybody is gonna—**I'll** tell you what, everybody is gonna fuckin' die, we're all gonna be under the fuckin' trigger." Id. 17 ROA 3244.

Anabel agained warned Deangelo " And if **I** lose the shop and **I** lose the club, **I** can't help you or your family,". 17 ROA 3245. She continued "**I'll** tell you right now **I'm** going to tell Louie that you are done" … "like **I** said, you need a motherfucking prepaid phone so **I** can call you when **I** need to talk to you." 17 ROA 3246.

On the recording Anabel told Deangelo "**I** used my money last night in the fucking—for change money, so **I** got no change, fucking---this is it, **I** have no more. **I** got like $11 to my name." 17 ROA 3247. She admitted in court, however, that when arrested the next day she had $2300 in cash in her purse and there was $151,000 in cash in the safe at the Club. Id.

Court Exhibit 3 is the transcript of the May 24, 2005 surreptitiously recorded conversation that she helped prepare. On it, after Deangelo said "I did everything you guys asked

She learned at a hearing on January 15, 2008, that the State had challenged the decision by this Court striking the death penalty. 17 ROA 3263. When she returned to her cell, she called H and described what the prosecutors had said in court as "all lies." 17 ROA 3265. Up until then, Anabel and H were still in a relationship. 16 ROA 3111, 17 ROA 3299. At her request H assisted inmates she had met in custody by giving them housing, money or other aid. 17 ROA 3295-3298. H took care of an inmate's baby for five months. 17 ROA 3296. Anabel received a letter claiming that H and one of the females she asked him to help were having an affair. 17 ROA 3299-3300. Anabel told H that he had one week to make her bail. 17 ROA 3291. At the same time, she began speaking to her attorney regarding making a deal with the State. 17 ROA 3266-3267. She knew that the State wanted her assistance in being able to charge H. 17 ROA 3280. Prior to speaking with the State, she went over all of the hearing transcripts, tape recordings, police reports and witness statements with her attorney. 17 ROA 3259. Anabel had no objection to the State recording her plea negotiation proffer and doesn't know why it

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me to do. You told me to 'take care of' the guy and I took care of him." Id. Anabel said "Talk to the guy, not fucking 'take care of' him. Goddamn it, **I** fuckin' called you." Id. Then, after Deangelo said "And when I talked to you on the phone, Ms. Anabel, I said ---specifically said, I said, if he's by himself do you still want me to do him in. You said 'yeah'", Anabel responded "I did not say 'yeah'." When Deangelo responded "you said 'if he is with somebody then just beat him up'," Anabel responded "**I** said to go to Plan B, fuckin' Deangelo. And, Deangelo, you're just minutes away. **I** told you 'no'. **I** fuckin' told you 'no'." Id. At 3:39 of the May 24, 2005 recorded conversation between her and Deangelo, Anabel stated "All **I'm** tellin' you is denial because **I'm---I'm** fucking saying and **I** already said **I** don't know shit, **I** don't know shit, fucking and **I** don't know a motherfucking thing and that's how **I** got to fuckin' play it and that's how **I** told everybody else to play it." 17 ROA 3250.

didn't happen. 17 ROA 3270-3271. The statement lasted a couple of hours with two Deputy District Attorneys, two detectives and her attorney there. 17 ROA 3271-3272.

After she was debriefed, her plea agreement and agreement to testify were signed. 5 ROA 812-824. Days later she entered a guilty plea to a "fictional charge" of Voluntary Manslaughter with Use of a Deadly Weapon. 16 ROA 3115 3117. At her change of plea she stated that she "assisted all the co-conspirators" and was not asked for any other factual basis by the judge. 17 ROA 3277. She did not say that she agreed to kill someone or knew that someone was to be killed. 17 ROA 3277. Her lawyer told her that making the phone call to Deangelo regarding "plan B...come back" – even without having any idea that the telephone call was part of a plan to harm TJ – made her complicit in the crime. 18 ROA 3247. She has never been advised of the law of aiding and abetting or conspiracy. Id. She entered the guilty plea because she believed her lawyer. 18 ROA 3428-3429. Based upon what her lawyer told her, although she didn't know of any facts indicating prospectively that TJ was going to be harmed, she became a conspirator in a murder by (1) paying money to Deangelo that night after it occurred; (2) paying money to Deangelo four days after the murder of TJ to give to Zone and JJ; and (3) participating in the conversation with Deangelo four days after the murder of TJ. 18 ROA 3430-3435.

The plea agreement also provided that she would be eligible for probation and would be released from the CCDC and placed on house arrest after being cross-examined. 16 ROA 3119; 17 ROA 3281. In exchange, she needed to testify as a State witness. 17 ROA 3286. When she entered her change of plea she knew that the State

could be successful in reinstating the death penalty against her and she didn't want that to happen. Id. She feared if she testified at her own trial as a defendant the jury may not believe her and she could be executed. 17 ROA 3278. By making the deal with the State, she didn't have to take the chance of the jury not believing her. 17 ROA 3277-3279. At the time that she made her deal with the State she knew that they wanted her to testify against H because he had not been charged. Id. She knew that she was transitioning from the death penalty to probation and no worse than a sentence of between 8 and 20 years in prison. 17 ROA 3281. She had already served four years in custody waiting for trial. 17 ROA 3280-3281. She also knew that the State must remain silent at sentencing and make no recommendation and if she is sentenced to prison it is nothing like what a murder sentence would be. 17 ROA 3281-3282. Over a year has passed since she entered her plea and no presentence report interview has occurred. 17 ROA 3385.. 25 ROA 4664.[15] She was told by her attorney that she needed to testify before she would be interviewed for the presentence report. 17 ROA 3281-3286.

4. Defense Testimony

Kevin Kelly's testimony addressed the State's claim that H had a financial motive to want TJ dead. He has been a Nevada lawyer since 1979. 19 ROA 3673. He was a military intelligence officer in Viet Nam, Laos, Cambodia and Thailand. Id. He has owned a gentlemen's club named Spearmint Rhino since 1999. 19 ROA 3636-3640. He became involved in a trade organization which held monthly meetings to deal with

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[15] Indeed, as of the date of the filing of this brief, she has still not been sentenced. See footnote 2, above.

problems common to the industry, one of which was clubs making payments to cab drivers and diverting customers from other clubs. 19 ROA 3640-3642. Cooperation of cabdrivers is an important source of business to clubs. Some clubs would pay cabdrivers more than other clubs and it created a problem in the industry. Members reached an agreement that all would pay the same, but allowed the Club and to pay $5-$10 more because of it remote location. 19 ROA 3643. The Club was a member and H frequently attended meetings. 19 ROA 3642-3644. Kelly has had former employees leave his club and speak badly of it, but it didn't affect business. 19 ROA 3644-3645. Talking badly about a club won't hurt it; not paying cabdrivers will. 19 ROA 3644-3646.

Michelle Schwanderlik testified that she also uses the name "Ariel" and has worked at the Club for almost ten years. 19 ROA 3661-3663. She was working there in May 2005 as the Office and Floor Manager. 19 ROA 3664. She did the hiring and firing of employees, payroll, opening, scheduling, etc. Id. H would arrive and leave with Anabel. Id. Ariel would always report banks, etc., to Anabel and never saw H become involved with it until Anabel was arrested. Id. On May 19, 2005, she was in her office about 7 or 8 p.m. and Deangelo was there. 19 ROA 3672-3673. She knew him about one year by then and he was "never truthful" and would be caught in lies by her and others "all the time." Id. H told her to come upstairs and bring Deangelo with her. Id. When they arrived in H's office, they both "got chewed out" for the way Deangelo had been leaving the van in poor condition. 19 ROA 3674. Anabel was either in the kitchen area or back of office when this occurred. Deangelo left H's office when she did. Id. When

they arrived downstairs, Deangelo left the Club. 19 ROA 3675-3676. She next saw Deangelo after midnight on May 20, 2005. Id.

Kathleen Crouse lives in San Bruno, California and has known H since 1971. 19 ROA 3695-3698. He was her former husband's police partner for three and one half to four years. Id. She became very good friends with H, speaks with him by phone at least once a month and in her opinion he is "very truthful." Id.

Jerome DePalma is a 64 years old, semi-retired attorney. 19 ROA 3702-3704. He has practiced law with Gentile under the firm name Gentile DePalma in Illinois and then Nevada. He is godfather to Gentile's son. Id. He knew that he was going to testify and retrieved his notes from May 21, 2005 so that he could use them to refresh his memory. Id. The notes were produced to the District Attorney before his testimony. 19 ROA 3708. On May 21, 2005, at the request of Gentile, DePalma went to his office to meet for about an hour with H and Anabel. 19 ROA 3710. Investigator Dibble was present before, during and after that meeting. Id. Anabel was in the meeting the whole time except for going to the bathroom once. Id. He doesn't recall ever telling her that she couldn't remain in the office. 19 ROA 3713-3714. Most of what was said during the hour long meeting was said by her. H did not say very much at the meeting, but sat by passively and listened to what was being said by DePalma and Anabel. 19 ROA 3713-3714. She was "very animated" and "very vocal." Id.

Anabel said the following during the meeting: (1) a detective visited the Club and wanted information about an employee who worked there named Deangelo. Id.; (2) Deangelo was a "jack of all trades" and worked at the Club and she had seen him there on

Thursday night May 19, 2005. Id; (3) she overheard H tell Deangelo to tell TJ to "stop spreading shit" on Thursday night. Id.; (4) she had heard Deangelo say when he came back "it's done" and that "one of my home boys shot him". 19 ROA 3716; (5) she heard H respond "what the fuck are you talking about?" Id.; (6) she saw a black man on a camera and heard H say, "What the fuck did you do?" Id.; (7) she received a call from Deangelo that TJ had been bad-mouthing the Club. Id.; (8) that there was a suspicion that TJ may have been selling drugs out of the Club and illegally dealing with cab drivers by getting kickbacks. Id.; (9) TJ and Deangelo's relationship was that their kids played together and wives knew and visited each other and that TJ and a girl named Amy were seeing each other. 19 ROA 3717; (10) she counted out $5,000 and gave it to Deangelo because she had taken what Deangelo said about the other black man on the television camera as threatening them by saying "you better take care of us." 19 ROA 3718.

Anabel and H provided DePalma the information about H's address and telephone numbers. Id. Most of what is reflected on the notes taken at the meeting was said by Anabel. Id. He can attribute the statements to Anabel because, as to H, "I wondered if he could speak because he was quiet the whole time." 19 ROA 3710-3721. Anabel told him the information about a one hour interview by Detectives Bardy and Keiger that appears in the notes. 19 ROA 3723-3725. She provided the information contained in the notes as to "asked by Metro lying concerning the crime." Id. DePalma's recollection is that every note had Anabel as its source. Id. Both H and Anabel suspected TJ of things. Id. Anabel told DePalma that H suspected TJ of spreading rumors. Exhibit 241 is DePalma's notes from the May 21, 2005 interview of Anabel and H. 19 ROA 3730. Before that interview,

all DePalma knew was generally that the police had visited the Club. DePalma only learned of TJ's murder about half-way through the interview; the notes reflect that H said that he paid $5000 to Deangelo to give to the "homeboy" because he felt threatened. 19 ROA 3731-3732. Exhibit 241 reflects that 604-9646 is Anabel's cellular phone. 19 ROA 3735.

Don Dibble testified that he was an investigator at Gordon Silver, working under Gentile's direction. 19 ROA 3736-3738. He worked for LVMPD and its predecessor Clark County Sheriff's Department from 1968 until 1992. Id. He was a detective, and spent his final years in the homicide division prior to retiring. Id. On May 21, 2005, he had been working for Gentile for a little over a month. Id. When directed by Gentile to DePalma's law office all he knew was that a client needed some immediate attention and Gentile was in San Diego in trial. Id. He was to learn facts and report back to Gentile. Id. He did not recall knowing the name H before he arrived at DePalma's office. Id. DePalma and he talked for a while before H and Anabel arrived. Id. They all went in to DePalma's office and met for 45 minutes to an hour. Id.

When H and Anabel left, DePalma and Dibble called Gentile and suggested that he fly in the next day to meet with H and Anabel. 19 ROA 3739 While he doesn't recall if either H or Anabel were taking notes, he does recall discussing surveillance with them. Id. H would give a short response if asked a direct question; Anabel did 80% or more of the talking. Id. During the meeting with H and Anabel, Dibble learned that they had an employee who had come into their office and informed them that he had been out with someone at a meeting or a site with another former employee and that a party unknown to

either H or Anabel had just simply gone crazy, pulled a gun out and shot the ex-employee in the head for no reason. The guy panicked and came back, told them that the person who had done the shooting was demanding money and they gave him $5,000 out of fear. 19 ROA 3740. On May 22, 2005, Dibble and Gentile met with H and Anabel. 20 ROA 3745-3746. Gentile asked Anabel to leave the room because he needed to meet with H privately. Id. She returned to the room when the meeting ended.

Rudolfo Villalta has known the Hidalgo family for 42 years. Id. He went to work for H in San Francisco in 1982 and he worked for H at Simone's and the Club. 20 ROA 3749-3751 He has spent almost every day in the last 34 years with H, who is very truthful. 20 ROA 3763-3764.

Pilar Handley ("PK") testified that he was in the USAF from 1990 to 1994, was stationed in Las Vegas in 1991 and has lived here ever since then. 20 ROA 3775-3777 PK started doing work at the Club in 2000. In May 2005 there was a problem at the Club getting cabs to take customers to other locations. 20 ROA 3783-3788. PK noticed that TJ was not on his post outside the Club so that cabs could see him. Id. He saw TJ sitting on a shoeshine stand and told him to go outside. Id. TJ responded in a manner that caused PK to create a written report and give it to Anabel. Id. Anabel later terminated TJ and asked PK to notify him of it "to make sure he left without any problems." Id. PK had spoken to H about observing TJ and Deangelo selling VIP passes in front of the Club. Id. VIP passes are for free admission. Id. If the customer used a VIP card, there was no admission fee. Id. The cab driver would either not be paid or paid less than what they were expecting if the VIP card was used. Id. H used the term "Plan B" with PK in

describing the method and amount of payment to cab drivers. 20 ROA 3789. It meant 'pay across the board' both as to VIP passes and regular admission as opposed to "Plan A" which was to differentiate between them as to how much was to be paid. Id.

On the night of May 19, 2005, PK was at the Club to meet a client. 20 ROA 3790. He was making sure they were picked up by the Club limo on time. On a previous occasion Deangelo failed to do so. Id. When PK arrived early that evening, there was once again a problem. 20 ROA 3790-3796. Deangelo was away in the van and the limo was out in front of the Club. Id. The clients were to be picked up after 9 p.m. Id. When he walked outside and saw the limo it was about 8 pm. Id. PK first called Cheryl, who attempted to chirp Deangelo. 21 ROA 3845-3850. He then tried to call III on his cell phone and then went upstairs to the office where H, III and Anabel were, and told them they should fire Deangelo. Id. He was "not happy" with him and voiced his concerns with his character. Id. He watched III try to call and Anabel tried to chirp Deangelo when he didn't answer III's phone call, but the chirp kept going out of range. Id. He then left the office when he saw them arguing about what should happen to Deangelo and how irresponsible he was. Id. A lot of people were chewed out by H as to why they couldn't reach Deangelo and didn't know where he was. 21 ROA 3851.

Deangelo was off of work when TJ was fired from the Club. 21 ROA 3822. Days afterwards, when PK saw Deangelo for the first time since TJ's firing, Deangelo told him "don't put me in with TJ." 21 ROA 3822-3823. After midnight on May 20, 2005, he saw Deangelo again by the entrance to the Club. Id. He "looked like he had woken up …from a bad dream or a bad trip or something like that. Id. He was wild and kind of out of it."

Id. Deangelo said "I need to see Anabel, I need to see H, I fucked up." Id. PK thought he was speaking about not picking up PK's clients and said to him "you're damned right you fucked up…you did it again." 21 ROA 3825-3827. Deangelo asked PK to come outside so that he could talk to him and PK replied, "I got nothing to say to you, get out of my face." Id. Deangelo went outside and came back in. Id. It was the last time PK ever saw Deangelo. 21 ROA 3828. PK's cell phone number is 702-239-2350. 21 ROA 3831.[16]. He was the one using his phone on May 19th. 21 ROA 3823.

Carlos Cordon has known H for about 50 years, since he was 8. 21 ROA 3885-3888. They worked and spoke together every day for 15 years. H is a very truthful person. 21 ROA 3888-3889.

Obi Perez is 28 years old and has three children. She met Anabel in CCDC where they became like sisters; Perez still feels that way about her. 21 ROA 3913-3914. In the Spring of 2007, Anabel was crying when she came back from court. 21 ROA 3914-3915. She told Perez that she was afraid that she was going to receive the death penalty. Id. Anabel said that she contacted Deangelo because she was mad at the guy that got killed. Id. She said that the guy also had issues with Deangelo but didn't say what they were. Id. Anabel never mentioned any involvement of either H or III. Id. She said that Deangelo and his "fellas" were only supposed to "fuck him up" and went too far. Id. She said that the guy that went camping had been there before and that is why she knew where he was going to be. Id. She said she told Deangelo to fuck him up and it turned out they killed him. Id. She said that he contacted her afterwards and told her TJ had died and she said

[16] See footnote 4

"what the fuck did you guys do?" in those words. 21 ROA 3916. She doesn't know if what Anabel told her was true, only that she said it. Id.

The first time she told anyone what Anabel said to her was a few days before she testified at trial. 21 ROA 3933. The first person she told was Gentile. Id. She didn't want to hurt Anabel's deal, so she was afraid to tell anyone, but thought it was the right thing to do. 21 ROA 3937-3939. Perez got out of jail on August 29, 2007 and visited Anabel on four occasions, three times in September 2007, once in October. 21 ROA 3935-3346. On one occasion Anabel told Perez that she had suspicions H was being unfaithful. 21 ROA 3917. When Perez was released from CCDC Anabel loaned her a truck. Id. H picked her up from the CCDC and took her to his house and gave her the keys and the truck. Id. There came a time when she lived at H's house, but never in a boyfriend/girlfriend relationship. Id. Anabel asked her to live there and tell her what was going on, but nothing ever happened. 21 ROA 3918-3919. Perez didn't need to stay at H's. Id. She stayed there because Anabel wanted "to see if she was doing the right thing…by staying…in the relationship" with H. Id. Later Perez told her that H was not having an affair, as she had never seen him do so. 21 ROA 3925-3926. The last time she visited Anabel was October 30, 2007. At times when Anabel came back from court she would tell Perez about deals that were offered to her that required her to go to prison. . 21 ROA 3923-3924

Defense Exhibit I, a phone call made by Deangelo to his wife from the CCDC on February 23, 2007 was played for the jury. 21 ROA 3942; 22 ROA 4142. In it, he

admitted that he was high on cocaine the night that TJ was murdered. 21 ROA 3938; 22 ROA 4142.

H testified that he was an intern for the South San Francisco Police Department and then worked for Chevron Oil. 21 ROA 3961-3965. He attended College of San Mateo and became one of the first community service officers, a liaison position between the police department and the public. Id. He obtained an AA degree in police science and criminology and became a San Bruno police officer. Id. He then went to work for his father's automobile repair facility in Daly City when he was about 20 years old. Id. He helped establish the shop with his father. Id. He has lived in Las Vegas since 1999. Id. H met Dr Simon Stertzer in the Bay area about ten years before moving to Las Vegas. Id. Stertzer influenced him to open another auto body repair shop in Las Vegas. 21 ROA 3965-3968. H became involved with the Club because Stertzer wanted to invest more in Las Vegas. Id. Stertzer acquired the Club in 2000 or 2001 and brought H in. Prior to that H had never spent any time in a strip club nor had he ever owned one. 21 ROA 3968-3973. His average work day was between 10 and 14 hours. 21 ROA 3973-3977. Anabel moved to Las Vegas when H did. I21 ROA 3977-3979d. She worked at both Simone's and the Club. Id. At Simone's she dealt with closing files, billing, insurance companies, estimates, quality control, hire and fire employees, correspondence, update software, handle the money and cook. Id. At the Club she would do the banks, closing reports, cab payout reports, oversee the entire office staff, monitor the internal surveillance cameras and do all of this from H's office. Id.

From late 2001 to May 19, 2005, the cabs were not always paid the same amount per customer dropped off. 21 ROA 4984-3985. A competitor club would start paying more, forcing the other clubs to raise the payout. Id. When he first took over, the Club was paying cab drivers $15 per customer. Id. The Club also used VIP cards offering free admission to attract local clientele that didn't arrive by cab. 19 ROA 3986-3987. This became a problem when Club employees started to sell them to make money. Id. Some even counterfeited VIP cards. 19 ROA 3988-3989. He never retaliated against anyone who did this. Id. He knew that in any cash business you face problems with employees. Id. He had the legal advice of the Gordon Silver law firm on employment matters since 2001 and followed it. 21 ROA 3986-3990.

He knew who TJ was but only spoke with him three or four times. 21 ROA 3991-3993. Several people reported to H that TJ was suspected of conducting himself contrary to the best interests of the Club, but H never saw it occur. Id. H didn't know that TJ had been fired until a week or week and a half after it happened. Id.

H is sure that (1) Anabel did not tell him that Deangelo called her and said that TJ was badmouthing the Club; (2) his son did not become angry and say "you'll never be like Rizzolo and Galardi" (his son has never said anything like that to him); (3) he did not become angry and silent in response. Id. H testified that Deangelo said to him and Anabel "I heard that TJ is badmouthing the Club." 21 ROA 3996-3998. That is when H heard it for the first time. Id. H responded "so what, what's the big deal, what's the problem?" Id. He was already furious at Deangelo. Id. Deangelo said something to Anabel that was stupid like "it's kind of like job security." Id. Deangelo was looking at Anabel when he

said it as if H wasn't in the room. Id. He said "well maybe I should go and talk to him" and H said "what for?" 21 ROA 3999. Anabel said "if you're going to go talk to him, talk to him on your own. That's entirely up to you." Id. H then said to Deangelo "I didn't know that you had that kind of a close relationship with him." Id. Deangelo said their families visit each other and they smoke dope together. Id. H said "I don't want to hear it" and told Deangelo to leave, which he did. Id. III was not in the room when H heard about TJ badmouthing from Deangelo. 21 ROA 4000. H wasn't bothered by TJ badmouthing the Club because it was petty to him. 21 ROA 3999-4001. "One person is going to stop the industry? You've got to be kidding me." Id. As long as the cabdrivers are making money they will continue to bring patrons. Id.

H felt "awful" about the fact that a man died. 21 ROA 4002-4003. He "never asked, insinuated, or otherwise for anybody to do anything in the Club or anytime in my entire life in 58 years. Never. I would never do such a thing." Id. H never asked Deangelo to harm anyone. Anabel favored Deangelo and that is why he was still working there. Id. "How many times her and I argued. I want him out. Id. She always said 'no, no, no.'" Id. That is the only reason Deangelo was still there. Id. H never had any idea that someone was going to harm TJ before Deangelo came into the Club "sweating like a pig…profusely. Id. Shaking." 21 ROA 4003-4004. Deangelo said "I fucked up. I fucked up" and starts fumbling his words but says "the dude got out of the car and put a bullet in the guy's head." Id. H looked at Deangelo and said: "What the fuck did you do?" Id. Anabel stood up from the chair, grabbed her hands, covered her face and said "Oh my God, oh my God, oh my God." 21 ROA 4005. She then made a gesture and said: "you

stupid, stupid man, what the hell have you done?" Id. H "was stunned," "flabbergasted" when he saw the reaction in Anabel. Deangelo said "there's nothing we can do about it now" and that they were smoking dope on the way up there. Id. He then said "the guy wants money." Id.

When Deangelo said that, H got up from his chair and said "for what?" 21 ROA 4005-4007. Deangelo said "the guy wants five" and H said "five what?" Anabel said "five what?" as well. Id. Deangelo said "$5000" and said that the guy was a gang member with the Crips. Id. Deangelo said "you better not fuck with my boy. You don't want to fuck with my boy." Id. At that point H was in great fear because the guy was a gang member. Id. He had experience with gangs in law enforcement and according to H "You just don't take gang members lightly." Id. H looked at Anabel and she looked at him like "what are we going to do?" 21 ROA 4007-4008. H waived his hand like "go for it." Id. There was between $150,000 and $160,000 in currency in the safe in the room behind his office. Id. He didn't know who or how many people were involved. Id. H was in "major fear," which "will make you do a lot of stupid things." Id. That is why he paid the money instead of calling the police. Id. H testified that it was not true that he called Anabel into the kitchenette and asked her to call Deangelo and tell him to "go to Plan B." Id. He never told her to call Deangelo at all that night. Id. Nor did he call Deangelo. Id. H may have used "plan B" at times in the past to describe systems of cab payouts. 21 ROA 4009. There was even a "plan C" at times. Id. "Plan B" related to how to pay the cabbies. 21 ROA 4055. Anabel knew that from having discussed it with H. Id.

When H met with a detective on May 20, 2005, he did not tell him what had happened because he did not know what the Crips members were planning 21 ROA 4009. H realized he should have told the detective what he knew and regretted that he did not. Id. But at that time he feared for his son, his father, Anabel and himself, because he had been threatened, and he knew he was dealing with members of a gang, but didn't know who they were. 21 ROA 2010; 21 ROA 4046-4049. Instead, he directed Dangelo to his office to the detectives. 21 ROA 4013. When Anabel testified that they didn't want to go back to the Club because they were afraid, it was true. 21 ROA 4051. They were afraid of Deangelo and his friends and the Club was a location that they knew they could be found. Id.

Exhibit 200-I-A is H's handwriting. 21 ROA 4018-4019. It was created at DePalma's office as part of H's notes from the meeting on the same type of pad from the same company as Exhibit E, which bears Anabel's handwriting. Id. H had no idea how it became torn or how it wound up in a public area of Simone's. Id. He wrote the note but it wasn't intended for anyone. Id. He also wrote other notes at the DePalma meeting but doesn't know where they are. Id. He took them when he left DePalma's office and put them in the vehicle. Id.

H told Anabel to fire Deangelo on May 21, 2005. 21 ROA 4021-4022. H hasn't spoken to Deangelo since May 20, 2005 at the Club, when he told him that the detectives were in Ariel's office and wanted to talk to him. 21 ROA 4024-4025 He never asked Anabel to speak to Deangelo for him. Id. Deangelo has never attempted to speak to H since then. Id. H doesn't dispute that he was in Simone's when Deangelo came in on

May 23, 2005, but he didn't see him. Id. He did not know that Deangelo was in the building that day seeking more money. Id.

Although he heard Anabel say on the May 23, 2005 tape-recording that he was "in a panic," it wasn't true. Id. He was "concerned, worried, not in a panic." 21 ROA 4028. He felt that he had a problem but thought that he and Anabel were following the advice of his lawyer. Id. H never told Anabel that he wanted to kill himself. Id. H has no idea why III would say that H was ready to close the Club, Simone's and go into exile. He wasn't doing any of that. 21 ROA 4052-4053. H had Anabel pay the $5000 not because he had anything to do with the killing but because he took what Deangelo said as true and was in fear. 21 ROA 4030-4031. H was still in fear when he signed the final check for Deangelo and told Anabel to fire him. 21 ROA 4034-4035. Either H or Anabel told DePalma that they took Deangelo's statement as a threat. 21 ROA 4037-4038. If Anabel said it, H did not disavow it to DePalma. Id. Anabel did 90% of the talking. Id. Among the statements of Deangelo's that Anabel reported to DePalma was that the shooter was outside and he was a Crip. 21 ROA 4058-4060. They also told DePalma that Deangelo said (1) the guy is a gang member from the Crips; (2) he's demanding money; (3) you don't want to fuck with my boy. Id. H didn't know the shooter's name at the time of meeting with DePalma. Id. Neither did he know what he looked like or how many members there were in the Crips. Id.

5. State's Rebuttal

Christopher Oram testified that he was hired to represent Anabel shortly after her arrest. ROA 4095-4097. Id. He met with her at CCDC 80 to 90 times. Id. She told him in

late May 2005 and numerous times later that H told her to "go and make a phone call and say 'go to plan B' and then to return to where he was." 22 ROA 4101-4102. Anabel described for him Deangelo being in H's office and saying "it's done" and Anabel "putting $5000 down." 22 ROA 4101-4102. Anabel never said it was because H was scared of Deangelo or any other person. Id. He did not make any notes from the 80 to 90 meetings with Anabel in preparation for a murder case that once carried the death penalty. Nor does he "have independent recollection of everything my clients have said to me. My, --no, not a chance." 22 ROA 4120-4021.

V. SUMMARY OF ARGUMENT

The judgment should be reversed outright because the accomplice witnesses were not sufficiently corroborated by independent evidence of H's involvement in the charged offenses to sustain it. In the alternative, reversal and remand is appropriate because (1) the district court instructed the jury to apply the "slight evidence" standard in determining the existence of a conspiracy and H's membership in it, a standard to be used only in determining admissibility of evidence, an exclusively judicial function; (2) the State intentionally failed to make a recording of the key accomplice witness's plea negotiation proffer, thereby violating H's right to due process of law and a fair trial under the circumstances of this case; (3) the admission into evidence of out-of-court statements by Deangelo, who didn't testify at trial and was a police operative and not a co-conspirator when they were made, violated the H's right to confrontation and cross-examination; and, (4) the jury disobeyed a critical instruction limiting its use of the out-of-court statement made by Deangelo, yet the district court refused to conduct a hearing on the matter.

VI. ARGUMENT

A. The Court's Instruction to the Jury that Existence of the Conspiracy and H's Membership in it Could be Established by 'Slight Evidence' Requires Reversal

1. Standard of Review

Whether a jury instruction accurately states applicable law is a legal question subject to de novo review. Berry v. State, __ Nev. __, 212 P. 3d 1085, 1091 (2009). A district court's decision settling jury instructions is reviewed for abuse of discretion or judicial error. Judicial error occurs when the court reaches an incorrect result in the intentional exercise of the judicial function, that is, when a judge renders an incorrect decision in deciding a judicial question. In re Humboldt River System (Marble), 77 Nev. 244, 248, 362 P. 2d 265, 267 (1961). Jury instructions that tend to confuse or mislead the jury are erroneous. Culverson v.State, 106 Nev. 484, 488, 797 P. 2d 238, 240 (1990) ("a juror should not be expected to be a legal expert. Jury instructions should be clear and unambiguous."); Rowland v. State, 96 Nev. 300, 302, 608 P. 2d 500 (1980) ("Instructions ...must be given clearly, simply and concisely, in order to avoid misleading the jury"). While structural error such as an unconstitutional burden of proof instruction is self-evident and needs no prejudice analysis, the trial transcript and/or statement of evidence adduced at trial must be considered where an erroneous instruction is subject to a harmless error analysis. See Carver v. El-Sabawi, M.D., 121 Nev. 11, 14-15, 107 P. 3d 1283, 1285 (2005). The error here was structural, but the record before this Court mandates reversal under either analysis. The evidence against H was, at most, slight.

The opening language of Instruction #40 (24 ROA 4487) articulated the standard that the trial court must apply when deciding admissibility of the evidence.[17] In objecting, Defense counsel advised the court that Instruction #40 did not deal with the substantive law of conspiracy that the jury must apply but rather the admissibility of evidence - a matter that was the exclusive province of the trial judge. 23 ROA 4211-4213.

2. The Beyond a Reasonable Doubt Standard of Proof is a Constitutional Imperative

The Due Process Clause of the Fifth Amendment of the United States Constitution "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068 (1970). Labastida v. State, 115 Nev. 298, 303, 989 P. 2d 443, 447 (1999). A jury instruction that "creat[es] an artificial barrier to the consideration of relevant defense testimony putatively credible ... reduce[s] the level of proof necessary for the Government to carry its burden [and] ... is plainly inconsistent with the constitutionally rooted presumption of innocence." Cool v. United States, 409 U.S. 100, 104, 93 S.Ct. 354 (1972). When an instructional error consists of an inaccurate

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[17] Instruction #40 commenced: "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 be 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 knowingly made and done during the continuance of such conspiracy, and in furtherance of some object or purpose of the conspiracy. This holds true, even if the statement was made by the co-conspirator prior to the time the defendant entered the conspiracy, so long as the co-conspirator was a member of the conspiracy at the time"

description of the burden of proof to be employed, it vitiates all of the jury's findings and violates the Sixth Amendment right to a trial by jury in addition to the Fifth Amendment Due Process clause. It is structural error in the constitution of the trial mechanism which defies harmless error standards and requires automatic reversal. Sullivan v. Louisiana, 508 U.S. 275, 113 S. Ct. 2078, 2082 (1993).

3. Identical Issues, Separate Roles, Different Standards: Admissibility or Liability?

From the first direct address to the venire panel (6 ROA 1023; 10 ROA 1967), in the Trial Memorandum (8 ROA 1441-1494), in the opening statement (12 ROA 2119-2122), during the instruction settlement conference (23 ROA 4185-87), the jury charge (24 ROA 4462 & 4473) and in closing argument (23 ROA 4287-4321), H put forth as his defense that he never joined any conspiracy and had no prospective knowledge of any impending or intended harm to the victim. There was no dispute that H was not at the scene of the offense or connected to the murder weapon. The State's case relied entirely on accomplice testimony of purported co-conspirators, including as a chief component out-of-court statements by Deangelo[18] to Zone. Even as augmented by Deangelo's consensual tape recordings, the prosecution team believed that it lacked probable cause to charge H until Anabel became a witness. 13 ROA 2724. Thus, the jury's use of out-of-court statements was essential to the State's case. The challenged instruction that directed the jury to employ a reduced burden of proof on the conspiracy theory was prejudicial.

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[18] Despite making two surreptitious tape recordings of Anabel and III at the LVMPD's direction, Deangelo did not testify at the trial. Both Zone and Anabel testified to his out-of-court statements. It appears that the jury used some of his statements during the surreptitious recordings for the truth of his assertions, contrary to their instructions. See Argument V., *below*.

It has been said that Nevada "jumped the gun" when it adopted the Preliminary Draft of the Federal Rules of Evidence. Wright & Graham, Federal Practice & Procedure, §5051 (2nd ed.). No other state did so. No decisions exist interpreting the precise language of the Nevada statutes at issue herein: NRS 47.060, which deals with who initially determines admissibility[19], and NRS 47.070, which concerns the relative roles of the judge and jury when evidence requires additional facts to be proven in order to make it relevant.[20] The judge sits as a fact finder under both provisions. Under the first his ruling is final unless additional predicate facts are necessary to make the evidence relevant, in which case it is preliminary and triggers the second into action. The specific category of evidence at issue *sub judice* is "a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy". NRS 51.035-3(e). Where an objection is made to such evidence at the time of its being offered, as it was in this case, [21] NRS 47.060 mandates that the judge alone makes the determination of its admissibility.

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[19] 1. Preliminary questions concerning ... the admissibility of evidence shall be determined by the judge, subject to the provisions of N.R.S. 47.070.

2. In making his determination he is not bound by the rules of evidence provisions of this Title except the provisions of chapter 49 of NRS with respect to privileges.

[20] 1. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the judge shall admit it upon the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

2. If under all the evidence upon the issue the jury might reasonably find that the fulfillment of the condition is not established, the judge shall instruct the jury to consider the issue and to disregard the evidence unless they find the condition was fulfilled.

3. If under all the evidence upon the issue the jury could not reasonably find that the condition was fulfilled, the judge shall instruct the jury to disregard the evidence.

[21] A standing objection was allowed by the district court to all out-of-court statements by persons alleged to be co-conspirators. 13 ROA 2398, 2478-2488, 2715-2716.. 14 ROA 2493-2500.

This Court has declined the opportunity to adopt the United States Supreme Court's holding in Bourjaily v. United States, 483 U.S. 171, 107 S.Ct. 2775 (1987) on two pertinent points. It has decided that "slight evidence" of the existence of a conspiracy and mutual membership in it of the declarant and the non-offering party is all that is necessary for the judge to admit what would otherwise be excluded hearsay, so long as the statement is made during the course and in furtherance of the conspiracy. McDowell v. State, 103 Nev. 527, 529, 746 P. 2d 149 (Nev. 1987) (declining to adopt "preponderance of the evidence" standard). This Court also requires that before an out-of-court statement by an alleged co-conspirator may be admitted into evidence against a defendant, the existence and membership of the conspiracy must be established by evidence independent of the statement itself. Wood v State, 115 Nev 344, 349 (Nev. 1999). See Carr v. State, 96 Nev. 238, 239, 607 P. 2d 114, 116 (1980). Thus, unlike Bourjaily, the out-of-court statements themselves may not be considered by the judge in deciding whether NRS 51.035-3(e) conditions have been established. This Court has never addressed whether the jury should be instructed to apply the "slight evidence" standard where the exclusively judicial decision to admit evidence requires resolution of the identical issues to be ultimately determined by the jury under a beyond a reasonable doubt standard. This case presents that opportunity.

NRS 47.060, when read in light of McDowell, Wood and Carr, in its first paragraph, requires the judge to find that "slight evidence", independent of the statement itself, of the existence of the conspiracy and the defendant's and declarant's membership in it, is contained in the record. If so, the statement is admitted if it was made during the

existence and in furtherance of the conspiracy. All of that deals with the law of admissibility of the evidence. The judge is not concerned at that point as to sufficiency to convict. Bourjaily v. United States, 483 U.S. 171, 107 S.Ct. 2775, 2778 (1987) ("The inquiry made by a court concerned with [admissibility] is not whether the proponent of the evidence wins or loses his case on the merits, but whether the evidentiary Rules have been satisfied. Thus, the evidentiary standard is unrelated to the burden of proof on the substantive issues). At that juncture the judge's use of the lower standard of proof does no violence to the beyond a reasonable doubt standard the jury must apply. "Once a trial judge makes a preliminary determination under [NRS 47.060 & 47.070] that the requirements of [NRS 51.035-3(e)] have been satisfied, there is no reason to instruct the jury that it is required to make an identical determination independently of the court: whether such a statement can be considered at all is for the court alone to determine." United States v. Hagmann, 950 F. 2d 175, 181 n.11 (5th Cir. 1991), cert. denied 506 U.S. 835 (1992), rehearing denied 506 U.S. 982 (1992) (bracketed material substituted for federal equivalents in original).

Simply stated, a jury cannot be expected to apply the "slight evidence" standard to the identical elements to which they must also apply the beyond a reasonable doubt standard under the substantive law of conspiracy. And the law doesn't ask or demand it of the jury.

As the charge to the jury herein invited finding H vicariously liable for the murder because of membership in the conspiracy (24 ROA 4465) by applying a constitutionally impermissible standard, the infectious instruction undermines confidence in the verdict.

See Perez v. United States, 968 A.2d 39, 102 (D.C. Ct. App. 2009). Many courts have recognized the impropriety of instructing the jury as to the quantum of proof employed by the trial judge in admitting co-conspirators statements. In United States v. Martinez de Ortiz, 907 F.2d 629 (7th Cir. 1990)(en banc) the court addressed the mechanics of deciding the admissibility of such evidence. As here, the defendant conceded that a conspiracy existed, defending on the theory that she was not a member. Unlike the case *sub judice*, the defendant was at hand when the substantive crime occurred and uttered the word "kilo" in the presence of the cooperating witness. The court postulated that while that might be enough to support a conviction, "the case is much stronger with the two kinds of hearsay" that the prosecution introduced. Martinez de Ortiz, 907 F.2d at 631. It held "..the jury does not decide the hearsay question. The question for the jury is one of the substantive law of conspiracy. Conspirators, like agents, are mutual partners. Declarations by others count against the accused only if the accused has joined the conspiracy personally....Unless her words and deeds place her among the conspirators, other persons statements are (substantively) irrelevant." Martinez de Ortiz, 907 F.2d at 632-33. It explained "the judge's decision is conclusive...the jury may not re-examine the question whether there is 'enough' evidence of the defendant's participation to allow the hearsay to be used." Martinez de Ortiz, 907 F.2d at 633. To do so allows the jury to second guess the judge's decision to admit the statements; to impermissibly sit in review of the judge's legal determination. To present this issue to the jury unnecessarily confuses them as to the proper burden of proof of the conspiracy charge in the indictment. Once the judge rules that the prerequisites to NRS 51.035-3(e) have been

met, the jury does not revisit the issue and can consider the co-conspirator statements for all purposes in its determination as to whether there has been proof beyond a reasonable doubt that the defendant is guilty of conspiracy. Martinez de Ortiz, 907 F.2d at 634-635.

In other words, the statements are not "conditionally relevant," as that term is used in NRS 47.070, as to the membership in the conspiracy. In determining whether the alleged conspiracy existed or the defendant was a member, the jury can consider the actions and statements of all of the alleged participants that the judge admitted into evidence. United States v. Stephenson, 53 F.3d 836, 847 (7th Cir. 1995). In United States v. Bell, 573 F.2d 1040 (8th Cir. 1978) the court held "[a]fter a ruling on the record that the out-of-court declaration is admissible (as a co-conspirator's statement) the court may submit the case to the jury. The court should not charge the jury on the admissibility of the co-conspirator's statement, but should, of course, instruct that the government is required to prove the ultimate guilt of the defendant beyond a reasonable doubt." 573 F.2d at 1044-1045. See United States v. Ammar, 714 F.2d 238, 249 (3rd Cir. 1983) (once admitted, co-conspirator statements should go to the jury without further instruction); United States v. Vinson, 606 F.2d 149, 153 (6th Cir. 1979) (once admitted statements go to jury, judge should not describe to the jury the government's burden of proof on the preliminary question); People v. Vega, 413 Mich. 773, 780, 321 N.W.2d 675 (Mich. 1982) (trial judge must make determination of admissibility, not jury.).

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4. Vicarious Liability and Conditional Relevancy

Co-conspirator statements are, however, "conditionally relevant" under NRS 47.070 for other purposes. If the jury is satisfied beyond a reasonable doubt that the defendant was a member of the conspiracy, the statements can then be used to determine for which, if any, substantive offenses committed by co-conspirators the defendant may be held vicariously liable. Martinez de Ortiz, 907 F.2d at 635. That is, the statements are only relevant as to the vicarious liability issue if the defendant has first been found to be a member of the conspiracy beyond a reasonable doubt. United States v. Collins, 966 F.2d 1214, 1223 (7th Cir. 1992). Nevada does not follow the doctrine of vicarious liability announced in Pinkerton v. United States, 328 U.S. 640, 66 S.Ct. 1180 (1946), which makes one conspirator liable for a crime committed by another if it was foreseeable and committed in furtherance of the conspiracy. Bolden v. State, 121 Nev. 908, 921-922, 124 P.3d 191 (2005). For specific intent offenses the accused must have the requisite statutory intent. For general intent offenses, if the offense was a reasonably foreseeable consequence of the object of the conspiracy, the defendant may be criminally liable for his co-conspirators acts even if he did not intend the precise harm or result.[22] Bolden, 121 Nev. at 923; Sharma v. State, 118 Nev. 648, 56 P.3d 868 (2002).

By allowing the jury to consider the "slight evidence" standard for determining membership in the conspiracy, the challenged instruction undermines confidence in the verdict and mandates reversal. The Indictment charged alternative substantive offenses

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[22] "We caution the State that this court will not hesitate to revisit the doctrine's applicability to general intent crimes if it appears that the theory of liability is alleged for crimes too far removed and attenuated from the object of the conspiracy. " Bolden v. State, 121 Nev. at 923.

as objects of the conspiracy. Some were specific intent and some were general intent offenses. The jury returned a verdict of guilty as to a conspiracy to commit battery with a deadly weapon[23] or with substantial bodily harm, both of which are general intent crimes.[24] It was instructed that it could use either of them as the predicate for finding the defendant guilty of murder in the second degree. 24 ROA 4466 & 4469. This allowed the jury to find the predicate conspiracy upon less than a reasonable doubt standard and violated both the due process clause of the Fifth Amendment and the jury trial right of the Sixth Amendment. It deprived the jury of its essential deliberative tool - the applicable law upon which to evaluate the facts. The danger of confusion and erroneous conviction on the charges that were tied to the conspiracy exacerbates the gravity of the error. See People v. Duncan, 610 N.W.2d 551, 554-555 (Mich. 2000).

The decision that "slight evidence" existed of H's membership in the conspiracy was already made twice before the jury received the case. The judge made it when she admitted the evidence and so did the grand jury when it voted a True Bill. Sheriff, Clark County v. Burcham, ____ Nev. ___, 198 P.3d 326, 328 (2008) (grand jury may find probable cause based upon *slight* or marginal evidence). Yet neither can direct a guilty

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[23] The record is bereft of any evidence that H knew of any weapon being possessed or used by Deangelo or anyone else until after Deangelo returned to the Club after the homicide. The State failed to prove he had knowledge the armed offender was armed and had the ability to exercise control over the firearm. Brooks v. State, 180 P.3d 657, 659 (Nev. 2008).

[24] H proposed a verdict form that separated battery with substantial bodily harm from battery with a deadly weapon. 24 ROA 4502-4504. Although recognizing the idea as "fine" pretrial 5 ROA 999, the judge rejected it without announcing her reasons, an independent, additional ground for reversal here. Allstate Insurance Company v. Miller, __Nev. __. 212 P. 3d 318, 332-333 (Nev. 2009). At sentencing, the judge acknowledged that separating the crimes in the verdict form would have been better. 25 ROA 4627.

verdict as to a criminal charge no matter how clear the defendant's culpability. Rose v. Clark, 478 U.S. 570, 578, 106 S.Ct. 3101(1986). Nor does it cure the problem created by an erroneous or confusing instruction on burden of proof that the jury was also given a correct definition of reasonable doubt. Collins v. State, 111 Nev. 56, 57-58, 888 P. 2d 926, 927 (1995). The 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 and the reviewing court can only engage in pure speculation. Sullivan v. Louisiana, 508 U.S. 275, 281, 113 S.Ct. 2078 (1993).

Under the circumstances here, the consequences of the erroneous instruction are unquantifiable and indeterminate, and therefore not subject to harmless error analysis. See Wegner v. State, 116 Nev. 1149, 14 P.3d 25, 29-30 (2000). Since the only issues that the jury needed to resolve to convict H of conspiracy and the general intent objects were the existence of the conspiracy and his membership in it - the same issues that the judge had to resolve to admit the co-conspirator statements - the erroneous instruction left no additional facts that needed to be decided by the jury. Therefore, the jury made no other factual findings that can be said with requisite certainty to have been decided beyond a reasonable doubt. It is structural error mandating reversal and remand. Powell v. Galaza, 328 F.3d 558, 566 (9th Cir. 2003).

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B. As the State's Case Was Entirely Dependent Upon the Testimony of Accomplices, There Was Insufficient Evidence to Convict. [25]

1. 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 (1995); Eckert v. State, 91 Nev. 183 (1975). No Nevada case succinctly articulates a discreet standard of review.

2. H'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, Anabel and Zone, to prove that H conspired to harm TJ. As Nevada's legislature deems accomplice testimony as inherently unreliable, NRS 175.291 mandates:

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

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

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[25] H'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. 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. 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. Ford v. Wainwright, 477 U.S. 399, 428 (1986). Here, because NRS 175.291 was not enforced, H's right to Due Process has been violated. U.S. Const. amend. XIV.

accomplice is given." NRS 175.291; see also Cutler v. State, 93 Nev. 329 (1977). Clearly both Anabel and Zone were accomplices to the murder and conspiracy charged against H.[26] Thus, their testimony was required to be: (1) corroborated independently of other accomplices; and, (2) the corroborated evidence must have connected H 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 conviction cannot be had based on accomplice testimony alone has long been recognized by this Court. See State v. Carey, 34 Nev. 309 (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

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[26] Although 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. Accomplice status is a question of fact. Rowland v. State, 118 Nev. 31, 41, 39 P. 3d 114 (Nev. 2002).

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, 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 195. 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. Additionally, when Eckert purchased the weapons he signed a federal form for one of the guns which was later identified as the murder weapon. Id. Eckert was convicted of murder and on appeal he argued his conviction was based on uncorroborated accomplice testimony. Eckert, 91 Nev. at 185. 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. [27]

Similarly, in Heglemeier this Court found there was insufficient evidence to sustain a conviction based on accomplice testimony. Heglemeier, 111 Nev. at 1245. At Heglemeier's trial, in addition to accomplice testimony, the state presented strong evidence of Heglemeier's connection to the murder weapon. Heglemeier, 111 at 1249. 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.

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 Anabel. Anabel was the state's key witness. Until she provided her testimony, H had never been charged because even after an exhaustive investigation the State knew it did not have probable cause to connect him with the crimes. 14 ROA 2724; 15 ROA 2837-2838. Zone's testimony (recounting statements made to him by Deangelo) was based upon information received by the State early in its investigation, years before Anabel cut her deal. Had Zone's retelling of Deangelo's statements provided sufficient evidence against H, he would have been charged years earlier. The only independent

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[27] Such "self-purposes" are patent here. Anabel's testimony was procured under a plea bargain made when she was under threat of execution and resulted in her release from custody and plea to a fictitious offense, fabricated for the purpose, for which she has yet to be sentenced. 25 ROA 4667. Zone avoided being charged while knowledgeable and present before, during and after the murder.

evidence produced at trial which could tend to connect H to the events surrounding TJ's death was the fact H and Anabel gave Deangelo $5,000 after TJ was killed. 21 ROA 4007. "[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.

H provided a reasonable explanation as to why he agreed that Anabel give the $5,000 to Deangelo to hand over to an unidentified gangster/killer who was in the building at the time: FEAR! 21 ROA 4005-4010. Specifically, Deangelo said "you don't want to fuck with my boy." 21 ROA 4006. H testified that he paid Counts because he was afraid for his family's safety. 21 ROA 4010.[28] It is reasonable that H would be concerned for his family's safety as H had experience with gang members and knew that "you don't take a gang member lightly." 21 ROA 4007.

There was no evidence linking H to the commission of the crimes other than what came from the mouths of (1) Zone, retelling through his drug addled memory, Deangelo's statements; (2) Anabel and III in the recordings made by Deangelo after the object of the conspiracy to harm TJ was achieved, and (3) Anabel at trial after her probation was in sight and execution no longer a danger. No rational motive was suggested; no fingerprints were found which could connect H to the events; no evidence was produced that H was ever aware that anything was going to be done (other than H's own testimony

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[28] Jerome DePalma's testimony and Exhibit 241 (notes from his meeting with H and Anabel on May 21, 2005) corroborate this. 19 ROA 3716-3732.

that Deangelo volunteered to speak with TJ) and certainly not that a weapon would be used or substantial bodily harm would occur to TJ. No incriminatory statement of H was intercepted or reported by any non-accomplice trial witness who heard H utter it; and no phone calls were made between H and any of the other alleged accomplices prior to the murder of TJ. Most importantly, there was insufficient probable cause to even arrest H until Anabel found a way out for herself and agreed to assist the State in its prosecution of H. Since there was insufficient evidence to arrest H for these crimes absent Anabel's testimony, the significance of her testimony is self-evident. Therefore, as in Eckert and Hegelmeier, when the accomplice testimony is removed from this record, there is no legally sufficient evidence to connect H to these crimes and his convictions must be reversed.

C. The Prosecutor's Intentional Failure to Memorialize Anabel's Plea Negotiation Proffer Requires Reversal in this Case.

1. 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.. Hardison v. State of Nevada, 84 Nev. 125, 128, 437 P.2d 868 (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).

2. An Accomplice is an Inherently Unreliable Category of Witness as a Matter of Law

As explained above, NRS 175.291 renders Anabel's testimony inherently unreliable standing on its own. Austin v. State, 87 Nev. 578, 588, 491 P.2d 724 (1971),

Heglemeier v. State, 111 Nev. 1244, 903 P.2d 799 (1995); Eckert v. State, 91 Nev. 183, 533 P.2d 468 (1975) and State v. Carey, 34 Nev. 309 (1912). This Court has recognized that accomplice witnesses are "persons vulnerable to criminal prosecution [who] have incentives to dissemble as an inducement for more favorable treatment by the State," Sheriff v. Acuna, 107 Nev. 664, 667, 819 P.2d 197 (1991); and there is an inexorable "danger posed by perjured testimony concocted by persons seeking lenient treatment in connection with their own criminal problems." Acuna, 107 Nev. at 669. Because the above-quoted provisions of NRS 175.291 categorically preclude conviction of an accused on the basis of the uncorroborated testimony of accomplices, they establish a "statutory entitlement" to such corroboration, cognizable as an independent "liberty interest" arising under state law subject to the imperative of due process mandated by the Fourteenth Amendment to the Constitution of the United States.[29]

3. Anabel's Statements Were not Memorialized for the Improper Purpose of Depriving H 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, 107 Nev. 664, 670, 819 P.2d 197 (1991), this Court held that "[g]enerally, it is only

[29] See footnote 25, *above.*

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. (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. (Emphasis added). The Acuna Court insisted upon the scrupulous observation of certain constitutionally-mandated "established safeguards". And 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. [30]

Here, because Anabel'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. 7 ROA 1180-1182. H 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

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[30] See 15 ROA 2810-2811 re: why homicide detectives recorded Deangelo, 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".

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 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[31] and deliberately refrained from making any record whatsoever memorializing its pretrial interviews with and debriefings of Anabel, it is reasonable to infer that the State's intention was 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. 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

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[31] Deangelo, Zone and Anabel all were accomplices and were all videotaped during their initial interrogations in May 2005, *above*. Moreover, defense counsels' demands for recordings and/or notes of the plea negotiations proffer were repeatedly denied. 3 ROA 559, 563-566; 9 ROA 1729-1731; Notwithstanding her saying "I'll make a copy so I don't lose them", 3 ROA 566, the notes were lost by the court and are not available for this Court's review.9 ROA 3507-3509; 25 ROA 4668-4672.

have truthful information of value and a willingness to accurately relate such information at trial;" or (2) "bargained for 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.

D. Admission of Deangelo's Statements Made During the Surreptitious Recordings Violated the Confrontation Clause of the Nevada and United States Constitutions

1. Standard of Review

This Court applies *de novo* review when considering whether a defendant's confrontation clause rights have been violated. Chavez v. State, 125 Nev. __, __, 213 P. 3d 476, 484 (Nev. 2009).

2. Admissibility of Out-of-court Declarations of Deangelo

The district court recognized that the conspiracy to murder TJ ended when the payment was made to Deangelo and a subsequent, separate conspiracy occurred on May 23 & 24, 2005, to murder Counts, Zone and JJ. 5 ROA 998-1008, 1010. The objection to statements of Deangelo and the other participants in the tape recordings being admitted into evidence as to H was clearly stated to the district court many times over. 5 ROA 1004-1006; 9 ROA 1720-1736; 13 ROA 2479-2483; 14 ROA 2493-2499; 14 ROA 2715-2717. When the tapes were played over these objections, the judge instructed the jury:

> "on the tape, any discussion with respect to rat poison and/or any alleged plan to cause harm or death to Mr. Zone, Mr. Taoipu and/or Mr. Counts is not being admitted as evidence as to Mr. Hidalgo Jr."14 ROA 2734.

No further limiting instruction was given until Instruction #40 was made part of the charge to the jury. 24 ROA 4487. There, the judge instructed in relevant part:

> "The statements of a co-conspirator after he has withdrawn from the conspiracy were not offered, and may not be considered by you, for the truth of the matter asserted. They were only offered to give context to the statements made by the other individuals who are speaking, or as adoptive admissions or other circumstantial evidence in the case."

H objected to the admission of Anabel's or III's statements on the tapes as not being during the course of and in furtherance of the only conspiracy in which he was charged.[32] Deangelo's statements on the tape recordings made at the behest of law enforcement were admitted over objection in clear violation of H's right to confront witnesses as guaranteed by the Constitutions of the State of Nevada and United States of America as they were clearly testimonial when made. Medina v. State, 122 Nev. 346, 143 P.3d 471, 476 (Nev. 2006). See City of Las Vegas v. Walsh, 121 Nev. 899, 124 P. 3d 203 (Nev. 2005); Flores v. State, 121 Nev. 706, 120 P.3d 1170 (Nev. 2005).. And since H was not a party to the conversation, he could not be held to have made an adoptive admission. Maginnis v. State, 93 Nev. 173, 175, 561 P. 2d 922, 923 (Nev. 1977).

In Crawford v. Washington, 541 U.S. 36, 68, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) the Court held that the Confrontation Clause bars the use of a testimonial statement made by a witness who is unavailable for trial unless the defendant had an opportunity to previously cross-examine the witness regarding the witness's statement. In

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[32] H argued that the conspiracy ended with TJ's death and relied upon Grunewald v. United States, 353 U.S. 391, 77 S. Ct. 963 (1957); Krulewich v. United States, 336 U.S. 440, 443-444, 69 S.Ct. 716, 718-719 (1949) and Lutwak v. United States, 344 U.S. 604, 617-618, 73 S.Ct. 481, 489-490 (1953). Anabel testified at trial. III did not.

Crawford, the United States Supreme Court did not define "testimonial" for purposes of the Confrontation Clause analysis, but it did give examples of what would qualify as testimonial. The Court listed "affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially" as the "core class" of testimonial statements. It is noteworthy that Crawford itself dealt with a tape recording of an interview made by police. Deangelo was a police operative and the tape was clearly made with an intention of using it as evidence in a criminal prosecution.[33]

Deangelo did not testify at trial because he was himself a charged defendant. The State could have immunized him and still used any evidence it had obtained, prior to granting immunity, in his prosecution, but it chose not to do so. It should not be allowed to have it both ways. It isn't even arguable that these statements were not "testimonial". They should not have come into evidence in the State's case in chief against H and reversal is required.

E. The District Court Abused Its Discretion When It Denied H a New Trial Based on Juror Misconduct.

At the close of trial after the jury returned its verdict, counsel for H had a conversation with the foreperson and two additional jurors. During this discussion, the jurors revealed to H's attorneys that they considered evidence that they had been instructed by the district court not to consider in the manner in which they did. Specifically, the jurors disclosed that they considered the out-of-court statements made

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[33] See testimony of Detective McGrath: 14 ROA 2723-2724; 15 ROA 2837-2841.

by Deangelo while wearing a wire on May 23 & 24, 2005, for the truth of the matter asserted. 24 ROA 4564-4566. After the issue of this juror misconduct was brought it's attention, the district court required briefing on whether the juror misconduct warranted a new trial. 24 ROA 4558-4566. Briefing on this issue was completed and H's request for a new trial based on juror misconduct was ultimately denied. 25 ROA 4660-4663. For the reasons set forth below, the district court erred in denying the request for a new trial based on juror misconduct. As such, H's convictions must be reversed.

1. Standard of Review

A denial of a motion for a new trial based upon juror misconduct will be upheld absent an abuse of discretion by the district court. Absent clear error, the district court's findings of fact will not be disturbed. Meyer v. State, 119 Nev. 554, 80 P.3d 447 (2003).

2. The Court Abused its Discretion by Failing to Grant a New Trial As the Jury Disobeyed the Court's Instructions on the Limitations of the Use of Deangelo Statements on the Tapes

The essence of the allegation of jury misconduct requiring reversal is that the jurors ignored the judge's instruction not to take Deangelo's statements on the tapes "for the truth of the matter asserted". Although H objected to the introduction of these tapes in their entirety as to him, the court ruled that the jury would be permitted to consider the statements of Anabel and III, but not those of Deangelo, as to H's membership in the conspiracy that existed prior to the death of TJ. 13 ROA 2480-2487; 14 ROA 2494-2495. The proffer contained in the Declaration of Paola M. Armeni did not reveal the content of the statement by Deangelo on the tape but merely that they were used as if their assertion was true. That use was in direct disobedience to Instruction #40. The

statement itself was revealed by both Ms. Armeni and Deputy District Attorney DiGiacomo at the judge's direction in the hearing on the motion. 24 ROA 4567-4593. Ignoring both the State's and defense's versions of the transcripts of the tapes - both of which had Anabel, a participant in the taped conversations, as a contributing drafter - the jury found that Deangelo used the word "he" (where Anabel herself did not so find) in reference to H on the tapes. The jury accepted that statement as truthful and used it as the basis of finding H guilty. Id.

A jury's failure to follow a district court's instruction is intrinsic juror misconduct. A new trial must be granted unless it appears, beyond a reasonable doubt, that no prejudice has resulted from the jury misconduct. The defendant must prove the nature of the jury misconduct and that there is a reasonable possibility that the misconduct affected the verdict. The defendant may only prove the misconduct using objective facts and not the "state of mind or deliberative process of the jury." Valdez v. State, 124 Nev. 97, 196 P.3d 465, 475 (2008). A sitting juror commits misconduct by failing to follow the instructions and admonitions given by the trial court. See People v. Whitaker, 2009 WL 904485 (Cal App 2 dist 2009) citing In re Hamilton, 20 Cal 4th 273, 295 (Cal 1999). A juror who disobeys his obligation to apply the law as outlined by the trial court is more likely than not going to have a demonstrable impact on the deliberative process and require removal of the juror or a new trial. See State v. Sullivan, 157 N.H. 124, 139, 949 A. 2d 140, 152 (N.H. 2008). The test is whether the juror performed his duties in accordance with the court's instructions and his oath. See Weber v. State, 121 Nev. 554, 119, P. 3d 107, 125 (2005). NRS 50.065, subd. 2, provides:

> Upon an inquiry into the validity of a verdict or indictment: (a) A juror shall not testify concerning the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith.

When read together with NRS 48.025, which provides that all relevant evidence is admissible unless excluded by statute or by the Constitution, the statute does allow juror testimony regarding objective facts, or overt conduct, which constitutes juror misconduct. Thus, so long as the court excludes from its consideration those portions of the affidavits which deal with "mental processes" or the "effect" upon jurors of the alleged misconduct and focuses on objective facts, overt and capable of ascertainment by any observer, without regard to the state of mind of any juror, the court proceeds properly under the rule. Barker v. State, 95 Nev. 309, 594 P.2d 719, 721 (1979).

Here, whether or not the jurors considered alleged words of Deangelo in contravention of the instructions is an objective fact verifiable and subject to being corroborated by any member of the jury who was present when the juror urging its consideration spoke the words to do so. What Deangelo was believed by the jurors to have said on the tapes is not at issue under these circumstances. Whether it was heard accurately or should have been believed or weighed against H is of no consequence to the determination of this issue. The fact that it was done in violation of the jurors oath to follow the instructions of the court is the act of misconduct that is the focus of the inquiry. See Bushnell v. State, 95 Nev. 570, 599 P. 2d 1038, 1041 (1979).

Juror misconduct clearly occurred as the jury ignored and failed to follow the instructions of the district court with regard to not using the statement of Deangelo after

withdrawal from the conspiracy for the truth of the assertion. Additionally, the district court abused its discretion by failing to grant a new trial based on the misconduct or in the alternative to hold a hearing at which the foreperson would have been called as a witness to establish the fact that juror misconduct took place. For these reasons, H's convictions must be reversed. At a minimum the case should be remanded to the district court to conduct an evidentiary hearing to allow for testimonial proof from percipient witnesses.

VII. CONCLUSION

For the foregoing reasons, this Court should recognize that there is an absence of judicial confidence in the outcome of the trial in this case. The errors are both cumulative and substantial and the evidence slight Valdez v. State, 124 Nev. 97, 196 P.3d 465, 482 (Nev. 2008)(cumulative error can require reversal even where evidence sufficient). A reversal is the only cure. Retrial is only necessary if the Court rejects the sufficiency of the evidence argument, in which case a remand should take place.

DATED this _____ day of February, 2011.

Respectfully submitted,

GORDON SILVER

By: _____
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CERTIFICATE OF COMPLIANCE

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

DATED this _____ day of February, 2011.

GORDON SILVER

By:_____
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CERTIFICATE OF SERVICE

The undersigned hereby declares that on the 2 day of February, 2011, I deposited a true and correct copy of the foregoing APPELLANT LUIS A. HIDALGO, JR.'S OPENING BRIEF in the United States Mail, postage fully prepaid, addressed to the following:

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IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Case No. 54209

RESPONDENT'S ANSWERING BRIEF

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

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THE STATE OF NEVADA,	)	
Respondent.	)	

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, under the accomplice corroboration rule, the State presented sufficient independent evidence of corroboration.
3. Whether Appellant's due process and fair trial rights required the State to record the guilty plea negotiation proffer of Anabel Espindola.
4. Whether the admission of Appellant's former co-conspirator's recorded statements denied Appellant his Confrontation Clause rights.
5. Whether the district court abused its discretion in denying Appellant's motion for a new trial based on alleged juror misconduct consisting of jurors failing to comply with a jury instruction.

STATEMENT OF THE CASE

On February 13, 2008, a grand jury returned a true bill of Indictment charging Appellant Luis Hidalgo, Jr. (Mr. H) with: Count 1 – Conspiracy to Commit Murder (Felony – NRS 200.010; 200.030; 199.480); and Count 2 – Murder with Use of a Deadly Weapon (Felony – NRS 200.010; 200.030; 193.165). 4 Appellant's Appendix (AA) 724-727. On March 7, 2008, the State filed a Notice of Intent to Seek the Death Penalty. 4 AA 784-786. On February 20, 2008, Mr. H was arraigned on the Indictment, pleaded not guilty, and invoked his right to be tried within sixty (60) days. 4 AA 779. On May 1, 2008, the State

filed an Amended Indictment, which struck from Count 1 language relating to solicitation to murder witnesses. 5 AA 836-838. On June 25, 2008, the State filed a motion to consolidate Mr. H's case with the case of his co-defendants, Luis Hidalgo, III (Little Lou), Kenneth "KC" Counts (Counts), Anabel Espindola (Espindola), Jayson "JJ" Taoipu (Taoipu), C212667, which was granted on January 16, 2009. 5 AA 917-918. Also at that time, the State withdrew its Notice of Intent to Seek the Death Penalty. 5 AA 916.

On January 27, 2009, Mr. H, along with his co-defendant and son, Little Lou, proceeded to trial. 6 AA 1015-1172. On February 17, 2009, the jury returned a verdict finding Mr. H guilty on Count 1, Conspiracy to Commit Murder, and guilty on Count 2, Second Degree Murder with Use of a Deadly Weapon. On March 10, 2009, Mr. H filed a "Motion for Judgment of Acquittal, Or, In the Alternative, a New Trial." 24 AA 4506-4523. Mr. H's motion sought to litigate, among other things, the instant grounds of appeal designated 1, 4, and 5, supra. The State filed its Opposition on March 17, 2009. 24 4524-0436. On April 17, 2009, Mr. H filed his Reply in support of the motion, and, on April 27, 2009, filed a supplemental points and authorities in support of the motion. 24 AA 4537-4557; 4558-4566. On May 1, 2009, the court heard argument on the motion and denied it, with a written order filed on August 4, 2009. 24 AA 4567-4593; 25 AA 4660-4663.

On June 23, 2009, the Court sentenced Mr. H to the following: Count 1 – twelve (12) months in the Clark County Detention Center (CCDC); and 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, concurrent with Count 1. The Court awarded Mr. H one hundred eighty four (184) days credit for time served, and filed its Judgment of Conviction on July 10, 2009. On July 18, 2009, Mr. H filed a timely Notice of Appeal.

STATEMENT OF THE FACTS

In May of 2005, Appellant Luis Hidalgo, Jr. (Mr. H) was the former owner of the Palomino Club (Palomino or the club), which is Las Vegas's only all-nude strip club

licensed to serve alcohol. 16 AA 3001. 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 Carroll (Carroll); Carroll was an employee of the Palomino serving as a "jack of all trades" handling promotions, disc jockeying, and other assorted duties. 16 AA 3001-3002; 3011-3013. Espindola was the Palomino's general manager and handled all of the club's financial and management affairs. 16 AA 2989; 3000-3001. 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. 16 AA 3003; 3011-3013; 22 AA 4099. A week prior to this news, Mr. H's son and co-defendant, Luis Hidalgo, III (Little Lou), had informed Mr. H that Hadland had been falsifying Palomino taxicab voucher tickets in order to generate unauthorized kickbacks from the drivers. 16 AA 3004-3008.[1] In response, Mr. H ordered that Hadland be fired. 16 AA 3008-3009.[2]

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. 16 AA 2988-2997; 3048; 3158. Taxicab drivers are a critically important form of advertising for strip clubs generally. 19 AA 3642:6-17. Because of the Palomino's location in North Las Vegas, revenue generated through taxicab drop-offs was very important to the club's operation. 19 AA 3642-3643. Due to a legal dispute among the area strip clubs regarding bonus payments to taxicab drivers, all payments were suspended during

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[1] The Palomino paid cash bonuses to taxi drivers for each person a driver dropped off. 16 AA 3004-3005. 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. 16 AA 3004-3005. 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. 16 AA 3007-3008.

[2] 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 patrons local to the club. 17 AA 3223-3224; 20 AA 3787-3788; 21 AA 3992-3993. This practice created a problem for the club because taxi drivers would begin disputing their entitlement to be paid bonuses. 16 AA 3224; 20 AA 3788.

the period encompassing May 19-20, 2005; the Palomino was the only club permitted to continue paying taxi drivers for dropping off customers. 13 AA 2457-2458.

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.[3] 16 AA 2979-2983. After taking Carroll's call, Espindola informed Mr. H and Little Lou of Carroll's news about Hadland disparaging the club. 16 AA 3013; 3015. 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." 16 AA 3015. Little Lou told Mr. H, "You'll never be like Rizzolo and Galardi. They take care of business." 16 AA 3015; 22 AA 4099.[4] He further criticized Mr. H by pointing out that Rizzolo had once ordered an employee to beat up a strip club patron. 16 AA 3017.[5] Mr. H became angry, telling Little Lou to mind his own business. 16 AA 3017. 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. 16 AA 3017.

Visibly angered, Mr. H walked out of Espindola's office and sat on Simone's reception area couch. 16 AA 3027. At approximately 6:00 or 7:00 PM, Espindola and a still visibly-angered Mr. H drove from Simone's to the Palomino. 16 AA 3028-3029. Once at the Palomino, Espindola went into Mr. H's office, which was her customary workplace at the club. 16 AA 3035. Approximately half an hour later, Carroll arrived at the club and knocked on the office door, which Mr. H answered. 16 AA 3035. Mr. H and Carroll had a short

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[3] Financially, Simone's was breaking even at the time of this case's underlying events, but the business never turned a profit. 16 AA 2985-2986; 3000.

[4] 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. 16 AA 3016-3017.

[5] Mr. H had previously enlisted his own employee, Carroll, to physically harm the boyfriend of Mr. H's daughter whom the boyfriend had caused to use methamphetamine; Espindola later intervened to stop Carroll from harming the boyfriend. 18 AA 3423-3425. This evidence came in after Mr. H attempted to suggest to the jury that he was unlike Gillardi and Rizzolo. 18 AA 3406-3422. The evidence was not admitted as to Little Lou. 18 AA 3425-3426.

conversation and then walked out the office door together. 16 AA 3035-3036. 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. 16 AA 3037. Mr. H instructed Espindola to call Carroll and tell Carroll to "go to Plan B." 16 AA 3038.

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. 16 AA 3041. Carroll called Espindola back through a land-based telephone line, and Espindola instructed Carroll that Mr. H wanted Carroll to "switch to Plan B." 16 AA 3041; 22 AA 4101. Carroll protested that "we're here" and "I'm alone" with Hadland, and he told Espindola that he would get back to her. 14 AA 2575; 16 AA 3041-3044. Espindola and Carroll's phone connection was then cut off. 16 AA 3044. At that point, Espindola knew "something bad" was going to happen to Hadland. 16 AA 3044. She attempted to call Carroll back, but could not reach him. 16 AA 3044. Espindola returned to the office and informed Mr. H that she had instructed Carroll to go to "Plan B," after which Mr. H left the office with Handley. 16 AA 3045.

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. 13 AA 2399-2400. Zone and Taoipu worked alongside Carroll and performed jobs Carroll delegated to them in exchange for being paid "under the table" by Carroll. 13 AA 2392-2393; 2397. Zone and Taoipu would pass out Palomino flyers to taxis at cabstands. 13 AA 2392. Zone lived at the apartment with Carroll, Carroll's wife, and Zone's pregnant girlfriend, Crystal Payne. 13 AA 2392; 14 AA 2413-2514. Zone and Taoipu had been friends for several years. 13 AA 2396.

While at the apartment, Carroll informed Zone and Taoipu that Little Lou had told him Mr. H wanted a "snitch" killed. 13 AA 2399-2400; 14 AA 2591; 2638. Carroll asked Zone if he would be "into" doing something like that, and Zone responded "No," he would not. 13 AA 2400. Carroll also asked the same question of Taoipu who indicated he was "down," i.e., interested in helping out. 13 AA 2400-2401. 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. 13 AA 2401. 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. 13 AA 2408. 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. 13 AA 2407-2408.

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. 13 AA 2403; 2449; 14 AA 2525; 2640. 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. 13 AA 2403-2404. Carroll attempted to give the revolver to Zone who refused to take it. 13 AA 2404. Taoipu was willing to take the revolver from Carroll and did so. 13 AA 2404. 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. 13 AA 2404-2405.[6]

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. 13 AA 2405-2406. 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. 13 AA 2405-2406. On this next trip, however, Carroll took them to a residence on F Street where they picked up Kenneth "KC" Counts (Counts). 13 AA 2409. Zone had no idea they were traveling to pick up Counts whom he had never previously met. 13 AA 2409. Once at Counts' 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. 13 AA 2409-2410. Counts entered the Astro van and seated himself in the back

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[6] Carroll would attempt a second time, unsuccessfully, to give the bullets to Zone when they were back at Carroll's apartment. 14 AA 2559.

passenger seat next to Zone who was seated in the rear passenger seat directly behind the driver. 13 AA 2410-2411. Taoipu was seated in the front, right-side passenger seat. 13 AA 2411.

At the time, Zone believed they were headed out to do more promoting for the Palomino. 13 AA 2412. 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. 13 AA 2412. Carroll told Zone and the others that they were going to be meeting Hadland and were going to "smoke [marijuana] and chill" with Hadland. 13 AA 2413.[7] Carroll continued driving toward Lake Mead. 13 AA 2412.

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. 13 AA 2415; 14 AA 2575; 19 AA 3625-3626. Carroll was also using his phone's walkie-talkie function to chirp. 13 AA 2418; 19 AA 3624-3628. Little Lou chirped Carroll and they conversed. 14 AA 2637. Carroll spoke with Espindola who told him to "Go to Plan B," and then to "come back" to the Palomino. 14 AA 2575; 17 AA 3346; 3358. Zone recalled Carroll responding "We're too far along Ms. Anabel. I'll talk to you later," and terminated the conversation. 14 AA 2575. 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 around the lake where his cell phone service would be reestablished. 13 AA 2418-2419.

Carroll was able to describe a place for Hadland to meet him along the road to the lake. 13 AA 2420. Hadland arrived driving a Kia Sportage sport utility vehicle (SUV), executed a U-turn, and pulled to the side of the road. 13 AA 2420-2421; 14 AA 2638. 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. 13 AA 2422. As Carroll and Hadland spoke, Counts opened the van's right-side sliding door and crept out onto the street, moving

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[7] Zone had been smoking marijuana throughout the day; on the ride to Lake Mead, Zone, Carroll, Counts, and Taoipu smoked one "blunt" or cigar of marijuana. 13 AA 2415-2416.

first to the front of the van, then back to its rear, and back to its front again. 13 AA 2422-2423. Counts then snuck up behind Hadland and shot him twice in the head. 13 AA 2423; 14 AA 2639-2640. One bullet entered Hadland's head near the left ear, passed through his brain, and exited out the top of his skull. 13 AA 2374-2379. The other bullet entered through Hadland's left cheek, passed through and destroyed his brain stem, and was instantly fatal. 13 AA 2374-2379.

One of the group deposited a stack of Palomino Club fliers near Hadland's body. 12 AA 2190; 14 AA 2658. Counts then hurriedly hopped back into the van and Carroll drove off. 13 AA 2424. Counts then questioned both Zone and Taoipu as to whether they were carrying a firearm and why they had not assisted him. 13 AA 2424-2425. Zone responded that he did not have a gun and had nothing to do with the plan. 13 AA 2425. Taoipu responded that he had a gun, but did not want to inadvertently hit Carroll with gunfire. 13 AA 2425.

Carroll then drove the four through Boulder City and to the Palomino, where Carroll exited the van and entered the club. 13 AA 2426. Carroll met with Espindola and Mr. H in the office. 16 AA 3045-3046. He sat down in front of Mr. H and informed him "It's done," and stated "He's downstairs." 16 AA 3046-3047; 22 AA 4102. Mr. H instructed Espindola to "Go get five out of the safe." 16 AA 3047. Espindola queried, "Five what? $500?," which caused Mr. H to become angry and state "Go get $5,000 out of the safe." 16 AA 3047; 22 AA 4102; see also 21 AA 4005-4007. 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. 16 AA 3047-3049. Espindola placed the money in front of Carroll who picked it up and walked out of the office. 16 AA 3048-3049. 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?" 16 AA 3049-3050.

Ten minutes after entering the Palomino, Carroll emerged from the club, got Counts, and then went back in the club accompanied by Counts. 13 AA 2426. Counts then emerged from the club, got into a yellow taxicab minivan driven by taxicab driver Gary McWhorter,

and left the scene. 13 AA 2427; 2459-2460; 14 AA 2639.[8] Carroll again emerged from the Palomino about 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. 13 AA 2427-2428; 14 AA 2531-2534. Zone was very shaken up about the murder and did not say much after they returned to his and Carroll's apartment. 13 AA 2428.

The next morning, May 20, 2005, Espindola and Mr. H awoke at Espindola's house after a night of gambling at the MGM. 16 AA 3051-3053. Mr. H appeared nervous and as though he had not slept; he told Espindola he needed to watch the television for any news. 16 AA 3053-3054. While watching the news, they observed a report of Hadland's murder; Mr. H said to Espindola, "He did it." 16 AA 3054. Espindola again asked Mr. H, "What did you do?" and Mr. H responded that he needed to call his attorney. 16 AA 3054.

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. 13 AA 2429; 14 AA 2583; 19 AA 3578-3579. Carroll paid $100.00 cash to have all four tires replaced. 13 AA 2429. 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. 13 AA 2431-2432. Carroll, Zone, Taoipu, Zone's girlfriend, Carroll's wife and kids, and some other individuals ate breakfast at an International House of Pancakes restaurant later that day; Carroll paid for the party's breakfast. 13 AA 2432; 14 AA 2565-2568; 2641. At some point also, Carroll, accompanied by Zone, went to get a haircut. 14 AA 2539-2540.[9]

Carroll then drove himself, Zone, and Taoipu in the Astro van to Simone's where Mr. H, Little Lou, and Espindola were present. 13 AA 2432-2433. Carroll made Zone and Taoipu wait in the van while he went into Simone's; Carroll emerged about thirty minutes

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[8] Counts had to go back into the Palomino to obtain some change because McWhorter did not have change for the $100.00 bill Counts tried to pay him with. 13 AA 2460.

[9] During trial, Mr. H would point to Zone's post-murder association with Carroll as evidence of Zone's complicity in the murder. In fact, however, the evidence would demonstrate overwhelmingly that Zone accompanied Carroll only out of fear. See Section II.B, infra.

later and directed Zone and Taoipu inside where they sat on a couch in Simone's central office area. 13 AA 2432-2433. 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. 13 AA 2436; 2440-2441; 14 AA 2635-2636; 2648. 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. 13 AA 2434-2435. He informed Zone and Taoipu that Counts received $6,000.00 for his part in Hadland's murder. 13 AA 2435. 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." 14 AA 2648-2649.

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. 14 AA 2661; 19 AA 3569. 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. 19 AA 3572.

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. 14 AA 2666-2667; 19 3572-3573. 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. 19 AA 3578-3579. Carroll then told Zone within earshot of the detectives: "Tell them the truth, tell them the truth. I told them the truth." 14 AA 2669-2670. Zone recalled Carroll also saying: "If you don't tell the truth, we're going to jail." 13 AA 2439. Zone interpreted Carroll's statements to mean that Zone should fabricate a story that tended to exculpate Carroll, himself, and Taoipu. 14 AA 2586-2587. Zone gave the police a voluntary statement on May

21, 2005. 19 AA 3579. Also on that day, Carroll brought Taoipu to the detectives' office for an interview. 14 AA 2678-2679; 19 AA 3580.

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. 19 AA 3710-3711. The next morning, May 22, 2005, a completely distraught Mr. H said to Espindola, "I don't know what I told him to do." 16 AA 3083. 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." 16 AA 3083. Espindola asked Mr. H if he wanted her to speak to Carroll and Mr. H responded affirmatively. 16 AA 3084; 22 AA 4111:10-18. Espindola arranged through Mark Quaid, parts manager for Simone's, to get in touch with Carroll. 16 AA 3084-3085.

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. 14 AA 2704-2705. Prior to Carroll arriving at Simone's, Mr. H and Espindola engaged in a conversation by passing handwritten notes back and forth. 16 AA 3098-3099. 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. 16 AA 3087; see also 22 AA 4111:10-18. 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. 16 AA 3087; see also 22 AA 4111:10-18. After the conversation, Espindola tore the notes up and flushed them down a toilet in the women's bathroom at Simone's. 16 AA 3099.

When Carroll arrived at Simone's, Espindola directed him to Room 6 where he met with Little Lou. 16 AA 3086. 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. 15 AA 2914; 16 AA 3089; 17 AA 3349. Mr. H was present in his office at Simone's while the three met in Room 6. 16 AA 3085; 18 AA

3441-3442. 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." 15 AA 2915. Little Lou informed Carroll that "[Mr. H]'s all ready to close the doors and everything and hide go into exile and hide." 14 AA 2924. 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."
> 15 AA 2916.

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.
> 15 AA 2916.[10]

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. 15 AA 2919.

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.
> 15 AA 2923.

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

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[10] The audio recordings of Carroll's conversations are of poor quality and inaudible portions are indicated by blanks.

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." 15 AA 2921. 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_____
> 15 AA 2927.

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.
> 15 AA 2920.
> …
> 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.
> 15 AA 2926.

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. 15 AA 2928. 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. 14 AA 2707-2708.[11]

On May 24, 2005, the detectives again outfitted Carroll with a wire and sent him back to Simone's. 14 AA 2712-2713. After Carroll's unexpected arrival, Espindola again directed him to Room 6 where the two again meet with Little Lou while Mr. H was present in the body shop's kitchen area. 16 AA 3096-3097. 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 (Unitelligible)
> 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.
> Espindola: I couldn't reach you.
> Carroll: I never turned off my phone. My phone was on the whole fucking night.
> …
> Carroll: Ms. Anabel
> Espindola: I couldn't fucking reach you, as soon as you spoke and told me where you were I tried calling you again and I couldn't fucking reach you.
> 15 AA 2935-2936.

At some point in this May 24 meeting, Espindola left the room to go speak with Mr. H. 16 AA 3097. She informed Mr. H that Carroll wanted more money and Mr. H instructed her to give Carroll some money. 16 AA 3100-3101. After Carroll returned from Simone's, he gave the detectives $800.00, which Espindola had provided to him. 14 AA 2713.[12] After Carroll's

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[11] 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. 16 AA 3092-3094; 17 AA 3318-3319; 3358-3360.

[12] If Carroll had these amounts of cash on him prior to detectives sending him out on the surveillance operations, Detective McGrath would have noticed because that amount of currency would have made Carroll's wallet much bigger. 15 AA 2759-2761. Espindola testified at trial that she thinks she gave Carroll $500.00 on the 24th. 16 AA 3101.

second wiretapped meeting, detectives took Little Lou and then Espindola into custody for the murder of Hadland. 15 AA 2766.

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.

Mr. H'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…
> 24 AA 4487 (Jury Instruction #40 (JI 40)).

Mr. H 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.) 37. Mr. H also asserted this argument in his Motion for Judgment of Acquittal. 24 AA 4521-4522. The district court rejected the argument based on the following analysis:

> Defendant Hidalgo, Jr. asserts that the language of "slight evidence of a conspiracy" reduced the burden of proof of the State in jury instruction number 40. 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.
> 25 AA 4663.

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 Mr. H 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 Mr. H'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 Mr. H.

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 clearly restated the standard of review for addressing a defendant's claim that jury instructions were legally erroneous:

> This court generally reviews a district court's decision settling jury instructions for an abuse of discretion or judicial error. Brooks v. State, 124 Nev. ----, ----, 180 P.3d 657, 658-59 (2008). However, whether the jury instruction was an accurate statement of the law is a legal question subject to de novo review. Nay v. State, 123 Nev. 326, 330, 167 P.3d 430, 433 (2007). We review the legal accuracy of the court's instructions de novo.
> Id. at 1091.

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)). Mr. H must be able to demonstrate there is 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).

Mr. H 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). In the context of jury instructions, an error is structural if it, for example, "consists of a misdescription of the burden of proof, which vitiates all the jury's findings." Sullivan v. Louisiana, 508 U.S. at 281, 113 S.Ct. 2078.

The inapplicability of a structural error analysis is patent already 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 Mr. H's claim of structural error. See Pungitore, Chaney, Noll, Monaco, Nickerson, Chindawongse, and Lutz, infra. Mr. H 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 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. Mr. H 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.[13] Unlike Sullivan, in Mr. H's case, a reviewing court can determine whether the alleged instructional error played a part in the jury's guilt determination. Further, Mr. H 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 Mr. H's jury that the State had met its burden to prove Mr. H conspired to harm Hadland, had committed second degree murder, and his testimony 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 Mr. H's challenge, it has not applied structural error review. See U.S. v. Lugpong, 933 F.2d 1017 at 4 (9th Cir. 1991);[14] see also Garcia v. Evans, 2010 WL 2219177 at 22 (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)

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[13] ("A reviewing court may thus be able to conclude that the presumption played no significant role in the finding of guilt beyond a reasonable doubt. Yates, supra, 500 U.S., at 402-406, 111 S.Ct., at 1892-1894. But the 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.'").

[14] ("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).

(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 Mr. H 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. 36. 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), cert. denied, 551 U.S. 1117, 127 S.Ct. 2940 (2007) (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.");[15] 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 WL 3279780 at 9 (Cal. Ct. App. 2010); People v. Hall, 2009 WL 3110938 at 17-19 (Cal. Ct. App. 2009)

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[15] Like Mr. H, the Tran defendant unsuccessfully attempted to invoke Sullivan v. Louisiana's structural error analysis.

Thus, these numerous and closely analogous practices demonstrate there was no confusion created by the district court giving JI 40.

Mr. H 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.

Mr. H 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. 23 AA 4212-4213; 24 AA 4531-4532. Indeed, the record demonstrates the State defended JI 40 on the basis that it was a correct statement of the law and inured to Mr. H's benefit. Id. It is the State's belief that had the Court *not* given JI 40, Mr. H 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, Mr. H 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's second and final claim is that she was denied due process by the trial court's failure to instruct the jury with CALJIC Nos. 6.21 and 6.24).

Moreover, Mr. H 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 Mr. H'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 Mr. H'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 Mr. H.[16]

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. Mr. H 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 Mr. H based on slight evidence of his involvement in a conspiracy. See Boyde, Collman, supra. Mr. H has already admitted on the record that mention of the slight evidence admissibility standard actually benefited him:

> 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.

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[16] In the midst of arguing this first ground of appeal, Mr. H 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. 41 n.24. This purported ground of appeal is 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, Mr. H'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 Mr. H 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. 5 AA 998-1000. Mr. Gentile's objection was to the Information, which he viewed as "duplicitous [*sic*] [in] that it had two conspiracies jammed into one." 5 AA 999. With the exception of the proposed verdict form, the record is entirely devoid of Mr. H 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 an opportunity to provide a supplemental brief on the issue.

> [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.
> 23 AA 4212 (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:

> [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, by Mr. H's own admission and 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 Mr. H. Finally, as the district court's order pointed out, because Mr. H'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. "[N]ot every ambiguity, inconsistency, or deficiency in a jury instruction rises to the level of a due process violation." Middleton v. McNeil, 541 U.S. 433, 436, 124 S.Ct. 1830, 1832 (2004).

II
THE STATE PRESENTED SUFFICIENT CORROBORATING EVIDENCE TO PERMIT CONVICTION OF MR. H BASED ON ACCOMPLICE TESTIMONY

Mr. H's second 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. One fact alone establishes Mr. H was a participant in the conspiracy to murder Hadland, Mr. H's own admission he directed Espindola to pay Counts $5,000.00 for murdering Hadland.

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

Mr. H 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. 43. 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. 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,[17] 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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[17] Tex. Code Crim. Proc. Ann. art. 38.14 (Vernon 2005).

> Cooley v. State, 2009 WL 566466 at 6-7 (Tex. Crim. App. 2009) (citations omitted).[18]

Thus, Mr. H 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 Mr. H 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 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).[19]

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[18] 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) (trier of fact's determination on the issue of corroboration is binding on review unless the corroborating evidence should not have been admitted or does not reasonably tend to connect the defendant with the commission of the crime) (citation omitted).

[19] Mr. H attempts to invoke federal due process principles as somehow prohibiting the use of accomplice testimony to convict him. App. Op. Br. 43 n.25 "[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 accomplices 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 Mr. H 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.

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 Mr. H, the jury had to find 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.[20]

There was more than sufficient evidence for the jury to rationally conclude Zone was not an accomplice. Mr. H 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. 44 n.26. It is not clear what part of the record Mr. H examined because he cites to nothing. In fact, the record (and Mr. H'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. 14 AA 2575-2576. 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[.]" 14 AA 2572. If the jury believed

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[20] 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 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).

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. 14 AA 2563-2564.

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. 14 AA 2526-2541. Zone testified to being in a state of fear and "concerned and worried for [his] own safety" the next day while accompanying Carroll. 14 AA 2547. Zone testified that Crystal Payne, his pregnant girlfriend lived at Carroll's house, and he felt that to report the crime would jeopardize the lives of Payne and Zone's unborn son.14 AA 2528-2529. 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. 14 AA 2582; see also 14 AA 2544-2545. 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 Mr. H and the other co-conspirator's trials. 14 AA 2588. 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 Mr. H to Commission of the Conspiracy and Hadland's Murder[21]

The independent evidence tending to connect Mr. H to the conspiracy and Hadland's murder was overwhelming. Although explaining that he acted out of fear rather than a pre-existing plan, Mr. H testified, and admitted in out-of-court statements, to ordering that $5,000.00 be paid to KC Counts in compensation for Counts murdering Hadland. 19 AA 3732:8-12; 3740; 21 AA 4005-4007. For purposes of determining the existence of sufficient corroborating evidence, it is irrelevant that Mr. H offers a self-serving explanation for this highly-inculpatory conduct. His explanations for the conduct do not vitiate the admission as a basis for corroboration; indeed, they are irrelevant because the standard of review requires the Court to resolve disputed evidentiary issues in favor of the jury's verdict. Cooley, Abilez, supra. In itself, payment of the money to Counts "tends to connect" Mr. H to commission of the conspiracy and Hadland's murder, which is all the corroboration required.[22] Mr. H will certainly complain that this evidence at most demonstrated he was an accessory after the

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

[22] Even assuming Mr. H's convenient, self-serving explanation was relevant to the Court's inquiry, the jury was clearly not persuaded that Mr. H feared Carroll or Counts. Mr. H's claimed fear was obviously belied by numerous facts, including: his possession of a concealed carry firearms permit and two firearms including a pistol that could fire an assault rifle type bullet; his possession of a bulletproof vest, the complete live video surveillance over the Palomino premises; the presence and willing assistance of PK Handley, a blackbelt-level jujitsu practitioner on whom Mr. H had relied for personal security in the past; his past experience in law enforcement; and his prior resort to police help when threatened with extortion. 21 AA 4031-4032. His claim of fear was further belied by his testimonial claim that he ordered Espindola to fire Carroll. 21 AA 4034-4038.

fact, and thus does not connect him to the conspiracy, but he will recall that the accomplice corroboration inquiry only asks whether some evidence tends to connect him to the offenses, not that it directly links him to commission of the offenses.

Mr. H's efforts to conceal the conspiracy are also corroborating evidence independent of accomplice testimony. The day after the murder Mr. H met with LVMPD Detectives at the Palomino, but, although having full knowledge of the direct perpetrators' identities, he continued to conceal the crime and his role in it. 19 AA 3570-3572; 21 AA 4009-4010. Additionally, when LVMPD Detective Martin Wildemann inquired about Carroll and specifically requested Carroll's phone number, Mr. H claimed only another employee, Ariel, would be able to provide contact information for Carroll. 19 AA 3570-3572; 21 AA 4042-4045. In fact, the evidence demonstrated Mr H. actually had Carroll's phone contact information written on a memo pinned to a memo board in his Palomino office. 19 AA 3570-3572; 21 AA 4042-4045. Mr. H would actually face this memo board everyday when seated in his office and gave equivocal answers on cross-examination as to whether he was aware of the memo's presence. 21 AA 4045. "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).

In addition, the Palomino's Astro van was used in the commission of the crime. As owner of the Palomino, the fact that Mr. H's vehicle was used is corroboration of his involvement. After Carroll confirmed to Mr. H that Hadland was dead and received $5,000 from Mr. H to pay Counts, Carroll attempted to conceal evidence of the crime by, for instance, destroying and replacing the tires of the Palomino's Astro van. 19 AA 3578-3579. Moreover, a note in Mr. H's handwriting was found at Simone's which states, "Maybe we're under surveils [*sic*], keep your mouth shut!!" 18 AA 3461; 19 AA 3606-3607. "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 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)). Again, Mr. H has a convenient, self-serving explanation for this piece of highly incriminating evidence: he wrote the note during a meeting with attorney Jerome DePalma in order to remind himself in writing to avoid wiretaps. Again, Mr. H's statements are irrelevant to the Court's inquiry because factual disputes are resolved in favor of the jury's verdict. Cooley, Abilez, supra. Additionally, the jury obviously found this justification utterly implausible; not only did Mr. H inexplicably claim to have lost the other alleged notes he took from the DePalma meeting, but the "surveillance" note was recovered by police inside of Simone's, not in Mr. H's vehicle where he claimed to have left his alleged notes. 21 AA 4039-4041.[23] Moreover, "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." Origel-Candido, 114 Nev. at 381, 956 P.2d at 1380. 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. Id. Assuming the jury did not believe Mr. H's explanations, both that disbelief and the evidence tend to connect Mr. H to the conspiracy to murder Hadland and the murder itself.

There is also a small mountain of corroborating evidence consisting of connections between Mr. H'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

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[23] It is axiomatic that efforts to conceal are within the scope and in furtherance of a conspiracy to commit murder or other offenses. Cf., e.g., State v. Savage, 172 N.J. 374, 405, 799 A.2d 477, 496 (N.J. 2002); State v. Robertson, 254 Conn. 739, 747, 760 A.2d 82 (Conn. 2000) ("The actions to conceal and dispose of the murder weapon and to escape detection for the crime reasonably may be construed as part of the original conspiracy to murder the victim and escape detection."); Hadley v. State, 735 S.W.2d 522, 531 (Tex. Crim. App. 1987) (murder co-conspirator's statement while fleeing to escape detection after the murder properly admitted under coconspirator exception to hearsay rule); U.S. v. Payne, 437 F.3d 540, 547 (6th Cir. 2006) ("statements were part of a discussion regarding concealment of an ongoing conspiracy, they were made in furtherance of the conspiracy."); State v. De Righter, 145 Ohio St. 552, 62 N.E.2d 332 (Ohio 1945) (subsequent concealment is within scope of a conspiracy and thus comes within the hearsay exception for admission coconspirator statements); State v. Keeton, 2004 WL 1549421 at 2-3 (Ohio Ct. App. 2004); State v. Garlington, 122 Conn.App. 345, 998 A.2d 1197 (Conn. Ct. App. 2010) (coconspirator's post-murder statements regarding obtaining money for an escape and whether a witness would report him to the police took place during the pendency of a conspiracy to commit murder).

concealment efforts. Mr. H testified that Carroll told him Hadland was "badmouthing" the Palomino. 21 AA 3999-4000.[24] 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. 12 AA 2217-2218. 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. 12 AA 2258-2259. Non-accomplice testimony established that 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. 20 AA 3787-3788. This practice was creating problems for the Palomino because it upset the cab drivers. 21 AA 3835. This independent evidence tended to demonstrate Mr. H's connection with the crimes as it furnished evidence of a motive.[25]

Thirty-three (33) Palomino Club advertisement cards were found on the shoulder of the road next to Hadland's corpse. 12 AA 2190; 2257-2258; 14 AA 2658. 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. 12 AA 2264.[26] Palomino VIP cards and fliers were found among Counts's possessions after a SWAT team extracted him from the attic of a residence. 14 AA 2692; 2702. Forensic examination found both Counts and Carroll's fingerprints on the VIP cards. 19 AA 3530-3551. Detectives also found $595.00 cash among Counts's possessions. 14 AA 2692-2693; 2700-2701. Forensic examination revealed Carroll's fingerprint was on one of those $100.00 bills. 19 AA 3526-3528. At 12:26

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[24] Mr. H disputed whether Carroll called Espindola as Espindola recalled, but that claim was contradicted by Jerome DePalma's notes, and Mr. H inexplicably failed to retain his own alleged notes from the meeting with DePalma. 21 AA 4039-4040.

[25] "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)).

[26] 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. 12 AA 2265; 13 AA 2354-2355.

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. 13 AA 2459-2465. Finally, like the defendant in Fish v. State, 92 Nev. 272, 549 P.2d 338 (1976), Mr. H's automobile "was used in perpetrating the homicide and [] his accomplices depended upon him for financial support both before and after the killing." Id. at 277, 549 P.2d at 342.

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 demonstrated that Mr. H was always in the immediate vicinity of the co-conspirators. 19 AA 3596-3600. And Mr. H testified to being at Simone's when Espindola and Little Lou had their wiretapped conversations with Carroll. 21 AA 4057. 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. 18 AA 3441-3443. 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. 19 AA 3587-3588. And it is undisputed that Mr. H was constantly in Espindola's presence from the inception of the conspiracy through her arrest for Hadland's murder. See generally 21 AA 3958-4075. 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);[27] cf. also People v. Jewsbury,

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[27] ("Petitioner asserts that, even if co-defendant's statements during the September 22, 1995, conversation implicitly corroborate her alleged prior false representations, the taped conversation was inadmissible…petitioner argues that Miller's tape recorded statements were out-of-court statements of an accomplice, which themselves must be corroborated under the accomplice [corroboration] rule…In the instant case, co-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.").

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 prior consistent statement was sufficient evidence in itself to corroborate the accomplice:

> Were the foregoing insufficient by way of corroborating evidence, its insufficiency would be remedied by McKinnis's statement to Long in the Santa Clara jail. "Did they get Cheats?" One certainly could infer from this unguarded, thought-to-be-confidential statement by McKinnis that McKinnis expected the police to apprehend Cheatham because Cheatham had participated in the robbery and murder of Arritt. Taking the circumstances and evidence in this case as a whole, we conclude that there was sufficient corroboration evidence tending to connect Cheatham to the robbery and murder of Arritt to sustain a conviction.
> Id. at 505-506, 761 P.2d at 423.[28]

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[28] Other corroborating facts in Cheatham included: "a fairly constant association and companionship between the three accomplices, McKinnis, Long and Howard, 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

Thus, clearly Espindola's wiretapped statements, uttered long before she had any inclination 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 statement's regarding Mr. H's panicky state of mind, that "[Carroll] and Louie are gonna have to stick together," and that "…what *we* really wanted was for him to be beat up…" clearly tend to connect Mr. H with the conspiracy and Hadland's murder. 15 AA 2915-2916 (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 Mr. H. Indeed, the record shows Espindola unsuccessfully attempted to determine whether Carroll was recording their conversations. 15 AA 2914. 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 Mr. H to the crimes was overwhelming, and clearly sufficient for a rational jury to conclude there was independent corroboration of Espindola and Zone.[29]

Mr. H 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

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know that Cheatham was with the murderers after the criminal event." Id. at 505, 761 P.2d at 423.

[29] 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 Mr. H. 22 AA 4095-4112; 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 directly implicating Mr. H 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.

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 the quantum of independent corroborating evidence presented in Mr. H's trial. In neither case did independent evidence show the defendant: (1) providing a substantial amount of money to the direct perpetrator of the murder; (2) lying to police detectives and encouraging other members of the conspiracy "to keep [their] mouth[s] shut"; (3) possessing an obvious motive for conspiring to harm the victim; and (4) being constantly in the presence and in communication with the other conspirators who relied upon him financially and utilized his vehicle to commit the murder. 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 Mr. H'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 Mr. H to the charged offenses.

III
Failure to Record Espindola's Plea Negotiation Proffer Did Not Violate Mr. H's Due Process Rights and Does Not Warrant Reversal

Mr. H's third 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. Mr. H fails to present any legal authority for his view that the State is obligated to tape or video-record plea negotiation proffers. Mr. H relies solely on a law student note proposing a model ethical rule for prosecutors to record all plea negotiation proffers.[30] 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. Mr. H'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:

> [W]e now embrace the rule generally prevailing in both state and federal courts, and hold that any consideration promised by the State in exchange for a

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[30] App. Op. Br. 50-51 (citing Note, *Should Prosecutors be Required to Record Their Pretrial Interviews with Accomplices and Snitches?*, 74 FORDHAM L. REV. 257 (2005) (Note)).

> witness's testimony affects only the weight accorded the testimony, and not its admissibility. Second, we also hold that the 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.
> Id. at 669, 819 P.2d at 200.

Acuna requires nothing more, and there is no requirement that a contingent plea agreement 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 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, there is no per se requirement for video or audio recordation of a cooperating witness's proffer. Even Mr. H's law student note mentions Acuna as establishing an accomplice testimony safeguard not involving a per se recording requirement. Note 286-287. Indeed, the note correctly summarizes the state of the law, which does not impose on prosecutors any duty to record witness interviews. Note 264-265.[31]

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[31] ("As was noted in the Memorandum in Koubriti, prosecutors and government agents have no legal duty to record the statements of government witnesses. Federal and state courts have held that due process rules and disclosure statutes do not require prosecutors and their agents to record interviews with government witnesses. Although courts have allowed for the possibility that the government's failure to record interviews with government witnesses may violate due process if the defendant can show that government agents acted in bad faith by deliberately failing to record the witnesses' statements, 'bad faith' exceptions have not been defined. Absent the defendant's showing of 'bad faith' on the part of the interviewer, an interview between a prosecutor and a government witness is 'presumed to have been conducted with regularity.'" (footnotes omitted)).

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).[32] "[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 Mr. H'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);[33] 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 Mr. H proposes, his argument really sounds in Brady; but Mr. H 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 Mr. H's law student note, the principal supporting authority for his claim of a due process violation, 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 proposition that a defendant is entitled to have

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[32] In addressing Leslie, Mr. H 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 to police, does not mean negotiation proffers must be recorded.

[33] ("In Acuna [] the Nevada Supreme Court overruled Franklin and held "that when our prosecutors bargain in good faith for testimony represented to be factually accurate, it is not a violation of due process or public policy to withhold the benefit of the bargain until after the witness testifies." 819 P.2d at 200. Due process requires that the government disclose evidence of any understanding or agreement as to future prosecution of a key witness that would be relevant to the credibility of that witness. See Giglio v. United States, 405 U.S. 150, 153-55 (1972). As the district court noted, Clyde had a full opportunity to question Kolbus concerning his testimony. Under cross-examination, Kolbus freely admitted that he faced fifteen years in prison unless he could offer assistance with Clyde's conviction. Kolbus also testified that there were no negotiations concerning his testimony. Clyde does not contend that Kolbus lied under oath about any negotiations with the State relevant to his testimony, or that he minimized the inducement to testify against him. There is no evidence of any secret and undisclosed negotiations between the State and Kolbus concerning Kolbus' trial testimony. There was no due process violation from the admission of the testimony.").

prosecutors record pre-trial interviews with its witnesses in order to preserve potential exculpatory or impeachment material:

> Marashi's remaining Brady claim is that the government committed error by failing to record all but two of its interviews with Sharon Smith. In other words, Marashi claims the government had a constitutional obligation to compile Brady material. We flatly rejected this theory in United States v. Bernard, 625 F.2d 854 (9th Cir. 1980). In that case, Agent Fredericks of the Drug Enforcement Agency had deliberately decided not to take notes of a series of interviews with one Richard May, a paid drug informant. *Fredericks candidly stated that his purpose in doing so was to avoid leaving a paper trail of inconsistent factual remarks which the defense could use to impeach May*. Id. at 859. The defendant argued, inter alia, that this practice ran afoul of Brady. Although we sharply criticized this practice, we nonetheless concluded that failure to record government interviews does not constitute Brady error. Id. at 860. The two decisions upon which Marashi relies pertain only to the destruction of existing government materials and thus are inapposite.
> U.S. v. Marashi, 913 F.2d 724, 734 (9th Cir. 1990) (citations omitted, emphasis added).[34]

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, Mr. H establishes no due process or other basis for granting him relief on this ground of appeal.

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[34] This quote from Marashi demonstrates the incomplete use of authority in Mr. H's law student note. The student saw fit to block quote condemnatory dicta from the 1980 Bernard decision, Note 292-293, but the 1990 Marashi decision itself gets mentioned once and only after being buried deep in a footnote. Note 265 n.59. A reader might want to be apprised that the Ninth Circuit revisited the issue ten years later and found Bernard's dicta not compelling enough to warrant a change in the law. More importantly, not content to downplay the authorities he viewed as disfavoring his argument, the student also misstates Bernard's holding as merely "'find[ing] no statutory basis for compelling the creation of Jencks Act material,'" Note 292, 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.").

IV

Mr. H's Confrontation Clause Rights Were Not Infringed by Admission of Deangelo Carroll's Out-of-Court Recorded Statements

Mr. H's fourth ground of appeal alleges the district court erred by admitting Deangelo Carroll's recorded statements from the May 23rd and 24th wiretapped meetings with Mr. H's co-conspirators, Espindola and Little Lou. Mr. H alleges his Confrontation Clause rights were infringed because he did not have the opportunity to cross-examine Carroll. This argument has no merit whatsoever because Carroll's statements were not admitted for their truth; and the jury was repeatedly instructed not to consider the statements for their truth. The relevant jurisprudence overwhelmingly holds that a defendant's Confrontation Clause rights are not infringed under these precise circumstances.

In admitting Carroll's recorded statements, the district court was very clear that the statements would not be admitted for their truth. 14 AA 2605. The court instructed the jury to that effect prior to its deliberations. 24 AA 4487:12-15 (JI 40 advising jury that statements of co-conspirator after he has withdrawn from conspiracy are not admissible for truth of the matter asserted, and were only offered to show context). Moreover, the record is devoid of the State ever arguing that the jury should consider Carroll's statements as substantive evidence of Mr. H's guilt.

Mr. H relies solely on Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354 (2004), to argue his Confrontation Clause rights were violated. He fails to cite any of Crawford's interpretive jurisprudence because it overwhelmingly rejects his argument. Under Crawford, it is axiomatic that "[w]hen recorded evidence is admitted in the absence of testimony by an informant who recorded the conversation, the Confrontation Clause of the Sixth Amendment is not violated if the statements are non-testimonial and are not offered for the truth of the matter asserted. It is well settled that non-hearsay statements are admissible if they are offered to provide context." U.S. v. Van Sach, 458 F.3d 694, 701 (7th Cir. 2006). The Seventh Circuit has elaborated this "crucial" aspect of Crawford:

> It is important to emphasize again that, aside from the testimonial versus nontestimonial issue, a crucial aspect of Crawford is that it only covers hearsay, i.e., out-of-court statements "offered in evidence to prove the truth of the matter asserted." Thus, to restate, Crawford only covers testimonial statements proffered to establish the truth of the matter asserted. In this case, as

> pointed out by the government, [the confidential informant] Shye's statements were admissible to put Dunklin's admissions on the tapes into context, making the admissions intelligible for the jury. Statements providing context for other admissible statements are not hearsay because they are not offered for their truth. As a result, the admission of such context evidence does not offend the Confrontation Clause because the declarant is not a witness against the accused… this form of non-hearsay, [is] not subject to the strictures of Crawford and the Confrontation Clause…
> U.S. v. Tolliver, 454 F.3d 660, 666 (7th Cir. 2006) (citations and footnotes omitted), cert. denied, 549 U.S. 1149, 127 S.Ct. 1019 (2007).[35]

This analysis also applies to situations where the recorded conversation took place between a defendant's co-conspirator and the non-testifying informant, and the statements are necessary to provide context to the co-conspirator's statements. "[I]f a Defendant or his or her coconspirator makes statements as part of a reciprocal and integrated conversation with a government informant who later becomes unavailable for trial, the Confrontation Clause does not bar the introduction of the informant's portions of the conversation as are reasonably required to place the defendant or coconspirator's nontestimonial statements into context." U.S. v. Hendricks, 395 F.3d 173, 184 (3rd Cir. 2005).

Thus, Mr. H fails to demonstrate his Confrontation Clause rights were even triggered by the admission of Carroll's recorded statements. Finally, the court's repeated admonitions and instructions as to the proper use of the statements ensured Mr. H's rights were not affected. See, e.g., U.S. v. Simmons, 582 F.3d 730, 735-736 (7th Cir. 2009) (reaffirming no Crawford violation based on admission of non-testifying informants recorded statements, and noting "the court properly instructed the jury that Barnes's statements were not to be

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[35] See also U.S. v. Brazil, 395 Fed.Appx. 205 at 10 (6th Cir. 2010); U.S. v. Boykins, 380 Fed.Appx. 930, 934 (11th Cir. 2010); U.S. v. Barraza, 365 Fed.Appx. 526, 530 (4th Cir. 2010); U.S. v. Hidalgo, 226 Fed.Appx. 391, 399 (5th Cir. 2007); U.S. v. James, 487 F.3d 518, 524 (7th Cir. 2007) (collecting cases); U.S. v. Faulkner, 439 F.3d 1221, 1226 (10th Cir. 2006) ("One thing that is clear from Crawford is that the [Confrontation] Clause has no role unless the challenged out-of-court statement is offered for the truth of the matter asserted in the statement"); U.S. v. Le, 172 Fed.Appx. 208 at 1 (9th Cir. 2006) ("the confidential informant's statements do not violate the Confrontation Clause because the district court permitted them to be read to the jury to provide context for the statements of Bi Le's co-defendant, not to prove the truth of their contents."); see also State v. Williams, 2010 WL 4162013 at 3 (N.M. Ct. App. 2010) (because police detective "did not introduce the informants' statements to prove that Defendant committed the crimes at issue, Defendant's confrontation rights were never triggered."); State v. Hernandez, 2010 WL 816828 at 4-5 (N.J. Super. App. Div. 2010); State v. Cunningham, 2009 WL 5174151 at 4 (Ohio Ct. App. 2009).

considered for their truth but rather solely for the context they provided for Sims's statements.") (citing U.S. v. McClain, 934 F.2d 822, 832 (7th Cir. 1991)).[36] This fourth ground of appeal lacks any merit.

V
The District Court Did Not Abuse Its Discretion in Denying Mr. H a New Trial Based on Alleged Juror Misconduct

Mr. H's fifth and final ground of appeal alleges the district court abused its discretion in denying his motion for a new trial, which alleged that one or more jurors told one of his attorneys post-verdict that they considered Carroll's wiretapped statements as substantive evidence of Mr. H's guilt. Specifically, Mr. H alleges the jury may have considered Carroll's statement to Espindola, "…[he] wanted him fucking taken care of we took care of him," as substantive evidence that Mr. H conspired to have Hadland "take[n] care of." 24 AA 4568-4569.[37] In rejecting Mr. H's motion for a new trial, the district court provided the following analysis:

> Defendant asserts misconduct occurred during the deliberation stage of the trial. The common law and statutory rule that a jury's verdict may not be impeached by affidavits, testimony, or statements of the jurors themselves clearly precludes consideration of this allegation. See Meyer v. State, 119 Nev. 554, 80 P.3d 447 (2003); NRS 50.065. The allegation that the jury misinterpreted the instruction of the Court is premised directly on a statement of a juror about his mental processes which are contained in the affidavit of Ms. Armeni. The Court finds that such mental processes are specifically the type and nature of allegations which are precluded from consideration by both NRS 50.065 and Meyer. As such, those portions of Ms. Armeni's affidavit which reference such mental processes are stricken. Moreover, even if the Court were to consider the allegations of the defense, the mere fact that the jury heard something different on the tape does not necessarily mean that the jury misconstrued the instructions of the Court. The fact that Ms. Espindola and Mr. Hidalgo, III did not correct Deangelo Carrol when he used the

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[36] Mr. H is not challenging the court's order permitting admission of Little Lou and Anabel's statements on the tapes. Even if he was, that argument would fail because he wrongly assumes the "conspiracy ended with [Hadland's death]." App. Br. 53 n.32. The jurisprudence is very clear that statements made during an effort to cover-up or conceal a crime are within the scope and in furtherance of the original conspiracy. See Payne, Garlington, De Righter, Savage, Robertson, Keeton, and Hadley, supra, n.23. In any event, Mr. H has failed to adequately brief such a challenge and thus has waived it for appeal.

[37] Contrary to the State and Mr. H's interpretations of the tape recorded meetings between Carroll, Espindola, and Little Lou, the jury collectively heard Carroll say "*he* wanted him fucking taken care of…," rather than "…you wanted him fucking taken care of…." 24 AA 4569; cf. 15 AA 2916 (State's transcript); 15 AA 2945 (Mr. H's transcript).

> pronoun "He," could be considered an adoptive admission by those parties. As such, the jury would have properly been following the instructions of the Court.
> 25 AA 4661-4662.

A. Standard of Review for a District Court's Denial of a Motion for New Trial Based on Alleged Juror Misconduct

In Meyer v. State, 119 Nev. 554, 80 P.3d 447 (2003), the Court addressed the applicable standard of review for this precise situation. The Court has determined:

> A denial of a motion for a new trial based upon juror misconduct will be upheld absent an abuse of discretion by the district court. Absent clear error, the district court's findings of fact will not be disturbed. However, where the misconduct involves allegations that the jury was exposed to extrinsic evidence in violation of the Confrontation Clause, de novo review of a trial court's conclusions regarding the prejudicial effect of any misconduct is appropriate. Id. at 561-562, 80 P.3d at 453.

"[P]roof of misconduct must be based on objective facts and not the state of mind or deliberative process of the jury. Juror affidavits that delve into a juror's thought process cannot be used to impeach a jury verdict and must be stricken." Id. at 563, 80 P.3d at 454 (citing Government of Virgin Islands v. Gereau, 523 F.2d 140, 148-149 (3rd Cir. 1975)); see also Barker v. State, 95 Nev. 309, 312, 594 P.2d 719, 721 (1979). A district court does not abuse its discretion in denying a motion for new trial and evidentiary hearing where the only evidence submitted is inadmissible. See, e.g., Tanner v. U.S., 483 U.S. 107, 127, 107 S.Ct. 2739 (1987) ("[T]he District Court did not err in deciding, based on the inadmissibility of juror testimony and the clear insufficiency of the nonjuror evidence offered by petitioners, that an additional post-verdict evidentiary hearing was unnecessary.").

B. The District Court Did Not Abuse Its Discretion In Denying Mr. H's Motion Because It Relied on Inadmissible Evidence of the Jurors' Internal Deliberative Processes

It is very well-established that the evidence Mr. H sought to introduce as demonstrating juror misconduct is never admissible and cannot form the basis for demonstrating juror misconduct. Thus, because there was no competent evidence of juror misconduct before the district court, it did not abuse its discretion in denying Mr. H's motion. NRS 50.065(2) provides:

> Upon an inquiry into the validity of a verdict or indictment:

> (a) A juror shall not testify concerning the effect of anything upon the juror's or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith.
> (b) The affidavit or evidence of any statement by a juror indicating an effect of this kind is inadmissible for any purpose.[38]

NRS 50.065(2) and its federal analog FRE 606(b) are "designed to protect the finality of verdicts and to ensure that jurors are insulated from harassment by defeated parties." Doan v. Brigano, 237 F.3d 722, 730 (6th Cir. 2001) (quoting State v. Schiebel, 55 Ohio St.3d 71, 564 N.E.2d 54, 61 (Ohio 1990)). Post-trial jury scrutiny is disfavored because of its potential to undermine "full and frank discussion in the jury room, jurors' willingness to return an unpopular verdict, and the community's trust in a system that relies on the decisions of laypeople." Tanner v. U.S., 483 U.S. 107, 120-21, 107 S.Ct. 2739 (1987). The Advisory Committee's notes for FRE 606 reason that "[t]he mental operations and emotional reactions of jurors in arriving at a given result would, if allowed as a subject of inquiry, place every verdict at the mercy of jurors and invite tampering and harassment." Advisory Committee Notes to the 1972 Proposed Rules (citing Grenz v. Werre, 129 N.W.2d 681 (N.D. 1964)).

Courts have overwhelmingly and unanimously held that a court may not inquire post-verdict into whether or how the jurors followed the court's jury instructions because that aspect of juror conduct is quintessentially part of the deliberative process. In rejecting a contrary rule, Advisory Committee notes for the federal rule's 2006 amendments stated: "The broader exception is rejected because an inquiry into whether the jury misunderstood or misapplied an instruction goes to the jurors' mental processes underlying the verdict, rather than the verdict's accuracy in capturing what the jurors had agreed upon." Advisory Committee Notes to the 2006 Amendments (citing Karl v. Burlington Northern R.R., 880 F.2d 68, 74 (8th Cir. 1989), and Robles v. Exxon Corp., 862 F.2d 1201, 1208 (5th Cir. 1989)). Courts have overwhelmingly applied this principal to claims identical to Mr. H's claim. See, e.g., U.S. v. Voigt, 877 F.2d 1465, 1468-1469 (10th Cir. 1989) (denying as "specious and frivolous" defense counsel's attempt to have the court inquire, based on

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[38] In construing NRS 50.065, the Court has in the past referred to the analogous federal rule, Federal Rule of Evidence 606(b), and its interpretive jurisprudence. See Meyer, supra.[38]

affidavit recounting post-verdict discussion with jurors, into whether jurors disregarded jury instruction); Vasquez v. Walker, 359 Fed.Appx. 758, 760 (9th Cir. 2009) ("extraneous influence" does not include juror's erroneous legal interpretation of the jury instructions); U.S. v. Jackson, 549 F.3d 963, 984 (5th Cir. 2008) (in death penalty case, no abuse of discretion in denying new trial and evidentiary hearing where only purported evidence of misconduct was investigator's affidavit indicating jurors did not understand jury instruction); U.S. v. Stewart, 433 F.3d 273, 307-308 (2d Cir. 2006) (606(b) rendered inadmissible evidence that jurors disregarded instruction not to draw adverse inference based on defendant's failure to testify); U.S. v. Kelley, 461 F.3d 817, 831-832 (6th Cir. 2006) (same); U.S. v. Tran, 122 F.3d 670, 672-673 (8th Cir. 1997) (same); Gapen v. Bobby, 2011 WL 237279 at 5 (S.D. Ohio 2011) ("A jury's interpretation and application of the court's instructions is a part of the deliberative process and correctly excluded under Fed.R.Evid. 606(b)."") (citing U.S. v. Tines, 70 F.3d 891, 898 (6th Cir. 1995)); U.S. v. Davis, 612 F.Supp.2d 48, 54 (D. D.C. 2009) ("inquiring into how the jurors interpreted the instructions or how they deliberated *is the very inquiry* into the jurors' mental processes during deliberations that Rule 606(b) forbids… Davis' allegation that a juror expressed confusion about the conspiracy instructions warrants neither an evidentiary hearing nor a new trial as it is wholly unsupported and Rule 606(b) bars inquiry into the jurors' mental impressions during deliberations.") (emphasis added) (citing U.S. v. Richards, 241 F.3d 335, 343 (3d Cir. 2001)); U.S. v. Stewart, 317 F.Supp.2d 426, 432 (S.D.N.Y. 2004) ("A jury's ability to follow legal instructions falls squarely within the realm of internal jury deliberations, which Rule 606(b) staunchly protects.").

This rule obviously extends to the situation where a defendant in a multi-defendant case, like Mr. H, asserts the inquiry is necessary because jurors applied against him evidence that was only admissible against a co-defendant. See U.S. v. Stewart, 433 F.3d 273, 306-307 (2d Cir. 2006). Finally, Mr. H's claims for a new trial bear no resemblance to past instances where the Court has found objective indicia of juror misconduct. See Bushnell v. State, 95 Nev. 570, 574, 599 P.2d 1038, 1041 (1979) (foreperson's incorrect relaying of court's

instruction given in response to jury's query was an objective fact of juror misconduct because "it obviously misrepresented the content of the judge's communication, it effectively relayed an unauthorized and erroneous instruction to the other jurors, under the guise of judicial sanction."). Valdez v. State, 124 Nev. 97,__, 196 P.3d 465, 472 (2008) (objective evidence of juror misconduct where jury foreperson blurted out statement that jury had already determined defendant's punishment during guilt phase of first degree murder case, prior to penalty phase even beginning). Thus, because there was no legal or evidentiary basis for Mr. H's argument for a new trial based on juror misconduct, the district court obviously did not abuse its discretion.

Additionally, the court was clearly correct in concluding the jury did not depart from its instruction not to use Carroll's statements for the truth of the matter asserted. Although the jury believed it heard Carroll make the statement "he wanted him fucking taken care of…," referring to Mr. H, it only used that statement to add context to Espindola and Little Lou's failure to respond, which constituted an adoptive admission. Thus, assuming purely for purposes of argument that the evidence was admissible as to juror misconduct, Mr. H was not entitled to a new trial because he failed to demonstrate the jurors departed from the court's instructions.

CONCLUSION

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

Dated this 9th day of June, 2011.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the record on appeal. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 9th day of June, 2011.

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I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on June 9, 2011. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Docket No. 54209

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

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ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III.

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

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

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

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

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

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

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

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

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

As pointed out in the law review article cited in Appellant's Opening Brief and quoted in Respondent's Answering Brief at page 42, footnote 31: "courts have allowed for the possibility that the government's failure to record interviews with government witnesses may violate due process if the defendant can show that government agents acted in bad faith by *deliberately* failing to record the witnesses' statements . . . ." Note, *Should Prosecutors be Required to Record Their Pretrial Interviews with Accomplices and Snitches?*, 74 Fordham L. Rev. 257, 264-265 (2005). (Citations omitted). (Emphasis added). And the Respondent concedes that this note "correctly summarizes the state of the law." Respondent's Answering Brief at page 42, line 20.

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

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

IV.

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

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

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

> "[T]he court was clearly correct in concluding the jury did not depart from its instruction not to use Carroll's statements for the truth of the matter asserted. Although the jury believed it heard Carroll make the statement 'he wanted him fucking taken care of . . . , referring to H, it only used that statement to add context to Espindola and Little Lou's failure to respond, which constituted an adoptive admission." Respondent's Answering Brief page 51, lines 10-17.

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

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

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

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

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

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

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

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

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

DATED this 28th day of September, 2011.

Respectfully submitted,

GORDON SILVER

By: _____

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CERTIFICATE OF COMPLIANCE

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

DATED this 26th day of September, 2011.

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CERTIFICATE OF SERVICE

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

NANCY A. BECKER
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ADELE L. JOHANSEN, an employee of
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IN THE SUPREME COURT OF THE STATE OF NEVADA

LUIS HIDALGO, JR. A/K/A LUIS A. HIDALGO, Appellant, vs. THE STATE OF NEVADA, Respondent.	No. 54209 FILED MAR 09 2012 TRACIE K. LINDEMAN CLERK OF SUPREME COURT BY DEPUTY CLERK

ORDER SUBMITTING APPEAL FOR DECISION WITHOUT ORAL ARGUMENT

Oral argument will not be scheduled in this appeal, and it shall stand submitted on the record and the briefs filed herein, as of the date of this order. NRAP 34(f).

It is so ORDERED.

______________________, C.J.

cc: Gordon & Silver, Ltd.
Attorney General/Carson City
Clark County District Attorney

IN THE SUPREME COURT OF THE STATE OF NEVADA

LUIS A, HIDALGO, JR. Appellant, vs. THE STATE OF NEVADA Respondent.	CASE NO. 54209 **APPELLANT'S MOTION TO RECONSIDER SUBMISSION FOR DECISION WITHOUT ORAL ARGUMENT**

COMES NOW Appellant, Luis A. Hidalgo, Jr., by and through counsel, Dominic P. Gentile, Esq., of the law firm of Gordon Silver, and pursuant to Rule 27 of the Nevada Rules of Appellate Procedure hereby moves the Court to reconsider its Order of March 9, 2012 submitting the above-entitled matter for decision without oral argument. (Appended hereto as Exhibit "A"). This Motion is made and based on all pleadings and papers on file herein, the exhibits appended hereto, and the following Memorandum of Points and Authorities.

Dated this 30th day of March, 2012.

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MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

Rule 34(f)(1) of the Nevada Rules of Appellate Procedure ("NRAP") provides that "[t]he court may order a case submitted for decision on the briefs, without oral argument." The Nevada rule does not prescribe any standards or criteria for consideration by this Court in making a determination to order an appeal submitted for decision without oral argument.[1] However, its federal counterpart does. Thus, Rule 34(a)(2) of the Federal Rules of Appellate Procedure ("FRAP") provides as follows:

> "**(2) Standards**. Oral argument must be allowed in every case unless a panel of three judges who have examined the briefs and record unanimously agrees that oral argument is unnecessary for any of the following reasons:
>
> **(A)** the appeal is frivolous;
>
> **(B)** the dispositive issue or issues have been authoritatively decided; or
>
> **(C)** the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument."

Although NRAP 34(f)(1) does not prescribe standardized criteria for the submission of an appeal for decision without oral argument, the jurisprudence of this Court does reflect consideration of factors similar to those set forth in the above-quoted federal rule. See *e.g., In re Discipline of Winter,* 2012 WL 642837 (Nev. February 24, 2012) (ordering appeal submitted on the record without oral argument where parties did not submit briefs challenging findings and recommendation of state bar panel or inform the Court of intent to contest the same); *Simpson v. State*, No. 58435, 2011 WL 5827791 (Nev. Nov. 17, 2011) (ordering appeal submitted on the record without oral argument where "there were no non-frivolous issues . . . on appeal"); *Luckett v. Warden*, 91 Nev. 681, 541 P.2d 910 (1975) (denial of oral argument with respect to successive

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[1] NRAP 34(f)(3) does provide that "[a]ppeals brought in proper person and appeals in post-conviction proceedings instituted under NRS 34.360 et seq. will be submitted for decision without oral argument, but the court may direct that a case be argued." Neither of these circumstances is present in the case at bar.

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application for post-conviction relief absent explanation as to why issues were not previously raised).

Appellant Luis Hidalgo, Jr. respectfully submits that circumstances justifying the submission of an appeal for decision without oral argument do not obtain in the instant case, and that for the reasons hereinafter stated, the Court should therefore reconsider its order of March 9, 2012 submitting his appeal on the record and the briefs on file without oral argument – at least with respect to the three issues identified hereinafter.[2]

I.
THE INSTANT APPEAL PRESENTS IMPORTANT CONSTITUTIONAL AND LEGAL ISSUES OF FIRST IMPRESSION IN THIS JURISDICTION; AND THEREFORE, THE COURT SHOULD NOT TAKE THIS APPEAL UNDER SUBMISSION WITHOUT PROVIDING THE APPELLANT AN OPPORTUNITY TO PRESENT ORAL ARGUMENT.

Appellant respectfully submits that his appeal in this case is hardly frivolous. Nor have the dispositive issues in question been authoritatively decided. Indeed, the instant appeal implicates important constitutional and legal issues of first impression in this jurisdiction. And therefore, it cannot be said that the decisional process of this Court would not be significantly aided by oral argument in this case.

Thus, appellant's challenge to jury instruction number 40, given by the court over his contemporaneous objection at trial, presents this Court with its first opportunity to construe the constitutional implications of NRS 47.060 (Preliminary questions of admissibility: Determination) and 47.070 (Preliminary questions of admissibility: Relevancy conditioned on fact) identified in the briefs with respect to the impermissible confusion inherent in a jury's consideration of the "slight evidence" standard applicable with respect to the admissibility of co-conspirator statements in view of its ultimate and overriding simultaneous constitutional duty to apply the "beyond a reasonable doubt" standard in its determination of guilt or innocence under the substantive law of conspiracy. Appellant's Opening Brief pages 32-42; Appellant's Reply Brief pages 1-14. Indeed, as the state expressly concedes in its brief in this case: "In Nevada, it is

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[2] Appellant's Opening Brief identifies a total of five issues on appeal. Pages ii, 1.

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an unresolved issue of statutory interpretation whether a jury may be charged with also making an admissibility determination regarding co-conspirator statements." Respondent's Answering Brief Page 16, lines19-21.[3] See also Respondent's Answering Brief Page 20, lines 4-6 ("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"); Respondent's Answering Brief Page 24, lines 25-28 ("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 Mr. H's case does present the question").[4]

Likewise, Appellant's challenge to the state's deliberate and purposeful decision in this case not to memorialize the evidentiary proffer of a cooperating alleged accomplice who testified against him at trial pursuant to an executory agreement with the state providing for substantial benefits and inducements in exchange for such testimony in order to frustrate meaningful cross-examination and confrontation of that witness implicates important state and federal constitutional questions of due process and confrontation that have never been authoritatively decided by this Court. However, this Court's decisions in *Sheriff v. Acuna*, 107 Nev. 664, 819 P.2d 197 (1991) and *Leslie v. State*, 114 Nev. 8, 952 P.2d 966 (1998) strongly suggest that such sharp practice is constitutionally repugnant and precludes the admissibility of the testimony of a putative accomplice. Appellant's Opening Brief pages 48-52; Appellant's Reply Brief pages 25-27.

In addition, this case involves critical and important issues involving the insufficiency of corroboration of the accomplice testimony which was absolutely essential to the state's case against this moving Appellant; corroboration of which by independent evidence was likewise

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[3] *I.e.,* after the trial court has already made a threshold determination to admit such a statement into evidence pursuant to NRS 47.070(1).

[4] Furthermore, this issue is particularly – and uniquely – important in the case of this moving Appellant because – in contradistinction to the case of co-defendant and appellant Luis Hidalgo, III (as to whom this Court *has* granted oral argument), the co-conspirator statements in question are entirely *vicarious* with respect *only* to Appellant Luis Hidalgo, Jr. (Notice of Oral Argument Setting in the case of Luis Hidalgo, III appended hereto as Exhibit "B").

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essential to support the Appellant's conviction. Appellant's Opening Brief pages 42-48; Appellant's Reply Brief pages 17-25.

The deliberate, calculated, and selective official decision not to memorialize the initial evidentiary proffer *only* of alleged accomplice Anabel Espindola and the lack of adequate independent corroboration of her testimony against this moving Appellant at trial are particularly troubling in this case. For her testimony was the *sine qua non* of any arguable hypothesis of culpability on the part of this moving Appellant and the testimony of other, highly-credible witnesses affirmatively undermined the credibility of her testimony.

Indeed, Espindola had been jailed for 32 months awaiting trial on a murder charge and facing the death penalty in this matter prior to making a deal with the state to testify against this moving Appellant – who, unlike herself, had not theretofore been charged in this case – in exchange for avoidance of the death penalty, probation-eligibility and release from confinement. The state has affirmatively acknowledged that without Espindola it did not have sufficient evidence to charge Appellant in this matter. 14 ROA 2724; 15 ROA 2837-2838; 16 ROA 3119; 17 ROA 3281, 3286. And prior to cutting her deal, Espindola knew that the state wanted her to tie this moving Appellant to the crimes with which she was charged. 17 ROA 3280.

The evidence showed that prior to making her deal with the state, Espindola had come to believe that Appellant – with whom she had been involved in a long-standing intimate relationship – had been unfaithful to her while she was locked up, and had told him that he had one week to procure her release on bail. 17 ROA 3291, 3299-3300.

Espindola was debriefed for hours in the presence of 2 deputy district attorneys, 2 detectives and her attorney without recordation. 17 ROA 3271-3271. She was the only state's cooperating witness in this case whose evidentiary proffer was not memorialized.

And Espindola had given a detailed account of the events in question -- completely inconsistent with her trial testimony and exculpatory as to this moving Appellant – in a face-to-face meeting attended by both Attorney Jerome De Palma and private investigator Don Dibble, a 24 year veteran of the Las Vegas Metropolitan Police Department and its predecessor Clark County Sheriff's Department, as both De Palma and Dibble testified at trial. 19 ROA 3702-3704,

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3710-3721, 3723-3725, 3731-3732, 3736-3738. Mr. De Palma's notes of the meeting were produced to the district attorney in advance of his trial testimony, (19 ROA 3708), and were admitted in evidence as Exhibit 241. 19 ROA 3730.

Despite the detailed testimony of both De Palma and Dibble to the contrary, Espindola denied ever speaking with them about the events at issue in this case, (16 ROA 3058, 3065, 3069-3072,17 ROA 3290), and testified that if Attorney De Palma were to testify that she had done so (as he later did) he would be lying. 17 ROA 3239-3240, 3306-3309.

Appellant respectfully submits that, in view of the foregoing, the deliberate, selective decision of state officials not to memorialize Espindola's debriefing by them for the calculated purpose of thereby insulating her from meaningful cross-examination as required by *Sheriff v. Acuna*, 107 Nev. 664, 819 P.2d 197 (1991) and *Leslie v. State*, 114 Nev. 8, 952 P.2d 966 (1998) raises profound due process and confrontation issues sufficient to preclude the admissibility of her testimony against this moving Appellant at trial, and requires scrupulous insistence that her testimony against him have been corroborated by sufficient independent evidence. And Appellant further respectfully submits that the Court should entertain oral argument on all of the issues identified herein before taking the instant appeal under advisement.

II.
THE COURT HAS SET ORAL ARGUMENT IN THE COMPANION APPEAL OF APPELLANT'S CO-DEFENDANT, LUIS HIDALGO, III, WHICH RAISES SEVERAL APPELLATE ISSUES CO-EXTENSIVE WITH THOSE RAISED BY APPELLANT LUIS HIDALGO, JR., WITHOUT LIMITING THE SCOPE OF ORAL ARGUMENT TO APPELLATE ISSUES WHICH ARE UNIQUE TO CO-DEFENDANT LUIS HIDALGO III'S APPEAL; AND THEREFORE, THE COURT SHOULD PROVIDE APPELLANT LUIS HIDALGO, JR. AN EQUAL OPPORTUNITY TO PRESENT ORAL ARGUMENT WITH RESPECT TO THOSE ISSUES WHICH ARE COMMON TO THE APPEALS OF BOTH CO-DEFENDANTS.

As pointed out *supra*, at footnote 4, this Court has granted oral argument in the appeal of this moving Appellant's co-defendant, Luis Hidalgo, III. See Exhibit "B." But in so doing, the Court has not limited the scope of oral argument in the latter's case to those issues raised in his briefs which are unique to his case on appeal. Rather, Appellant's co-defendant has been

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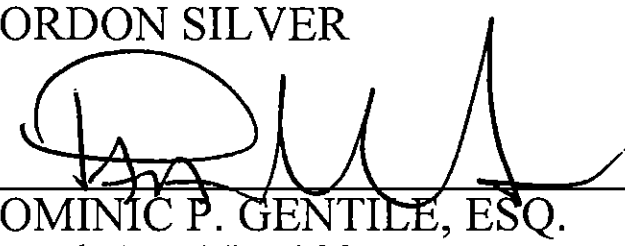
permitted oral argument with respect to all issues raised on appeal, including those which are co-extensive with the issues raised in the briefs filed by this moving Appellant – including the three issues identified in this Motion as particularly deserving of oral argument. And Appellant respectfully submits that, in fairness, his counsel should likewise be permitted to present oral argument to this Court with respect to these issues. This is particularly true in that, as pointed out *supra*, at footnote 4, in contradistinction to the case of co-defendant Luis Hidalgo, III, the co-conspirator statements implicated by the jury instruction issue are merely vicarious in the case of this moving Appellant, Luis Hidalgo, Jr., and particularly in view of the fact that the testimony of alleged accomplice Anabel Espindola was absolutely essential to any arguable hypothesis of culpability in the case of this moving Appellant.

Respectfully submitted this 30th day of March, 2012.

GORDON SILVER



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Attorneys for Appellant
LUIS HIDALGO, JR.

CERTIFICATE OF SERVICE

The undersigned, an employee of Gordon Silver, hereby certifies that on the 30th day of March, 2012, she served a copy of the Motion to Reconsider Submission for Decision Without Oral Argument, by Electronic Service, in accordance with the Master Service List as follows:

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

ADELE L. JOHANSEN, an employee of
GORDON SILVER

EXHIBIT “A”

PA3421

HID PA03248

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

No. 54209

FILED

MAR 09 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER SUBMITTING APPEAL FOR DECISION WITHOUT ORAL ARGUMENT

Oral argument will not be scheduled in this appeal, and it shall stand submitted on the record and the briefs filed herein, as of the date of this order. NRAP 34(f).

It is so ORDERED.

_____, C.J.

cc: Gordon & Silver, Ltd.
Attorney General/Carson City
Clark County District Attorney

12-07866

EXHIBIT “B”

PA3423

HID PA03250

CLERK OF THE SUPREME COURT
201 SOUTH CARSON STREET
CARSON CITY, NEVADA 89701-4702
(775) 684-1600

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

Supreme Court No. 54272
District Court Case No. C212667

NOTICE OF ORAL ARGUMENT SETTING

DATE: March 01, 2012

TO: Christopher W. Adams
Arrascada & Arrascada, Ltd./John L. Arrascada
Clark County District Attorney/Nancy A. Becker, Deputy District Attorney
Attorney General/Carson City/Catherine Cortez Masto, Attorney General
Clark County District Attorney/Steven S. Owens, Chief Deputy District Attorney

Pursuant to **NRAP 34**, the above-referenced matter is set for oral argument as follows:

Date: April 11, 2012

Time: 10:00 AM

Length: 30 minutes

Location: Regional Justice Center
200 Lewis Avenue
Courtroom - 17th Floor
Las Vegas, NV 89101

BEFORE: Southern Panel 12

Justices Douglas, Gibbons, Parraguirre

Notification List
Electronic
Arrascada & Arrascada, Ltd./John L. Arrascada
Attorney General/Carson City/Catherine Cortez Masto, Attorney General
Clark County District Attorney/Steven S. Owens, Chief Deputy District Attorney
Clark County District Attorney/Nancy A. Becker, Deputy District Attorney
Gordon & Silver, Ltd./Dominic P Gentile
Gordon & Silver, Ltd./Paola M. Armeni

Paper
Christopher W. Adams

12-06600

IN THE SUPREME COURT OF THE STATE OF NEVADA

LUIS A, HIDALGO, JR.

Appellant,

vs.

THE STATE OF NEVADA

Respondent.

CASE NO. 54209

APPELLANT'S EMERGENCY SUPPLEMENTAL MOTION TO RECONSIDER SUBMISSION FOR DECISION WITHOUT ORAL ARGUMENT

COMES NOW Appellant, Luis A. Hidalgo, Jr., by and through counsel, Dominic P. Gentile, Esq., of the law firm of Gordon Silver, and pursuant to Rule 27 of the Nevada Rules of Appellate Procedure hereby files his emergency supplemental motion for reconsideration of this Court's Order of March 9, 2012 submitting the above-entitled matter for decision without oral argument. This emergency Motion is made and based on all pleadings and papers on file herein, the attached declaration of Dominic P. Gentile, Esq.; the exhibits appended hereto, and the following Memorandum of Points and Authorities.

Dated this 16th day of April, 2012.

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MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

Rule 34(f)(1) of the Nevada Rules of Appellate Procedure ("NRAP") provides that "[t]he court may order a case submitted for decision on the briefs, without oral argument." The Nevada rule does not prescribe any standards or criteria for consideration by this Court in making a determination to order an appeal submitted for decision without oral argument. However, its federal counterpart does. Thus, Rule 34(a)(2) of the Federal Rules of Appellate Procedure ("FRAP") provides, *inter alia*, that oral argument is appropriate, and "must" be allowed, in "every" case where "the decisional process would . . . be significantly aided by oral argument."

Appellant Luis Hidalgo, Jr. has previously moved for reconsideration of the above-referenced Order by motion dated March 30, 2012, which motion remains pending as of the filing of the instant supplemental Motion. And Appellant hereby respectfully reiterates by reference the arguments set forth therein in support of the relief hereby requested.

Appellant hereby further respectfully submits that submission of the instant appeal for decision without oral argument is inappropriate for the additional reasons hereinafter stated, which are based upon the oral arguments made by counsel for the Appellant and Respondent, respectively, in the companion case of *Luis Hidalgo III, Appellant v. The State of Nevada, Respondent, Case No. 54272* concerning issues which are common to both the appeal in that case and the instant appeal of this moving Appellant, which were heard by this Court on April 11, 2012 at Las Vegas, Nevada. And accordingly, based upon the following additional grounds, Appellant Luis Hidalgo, Jr. reiterates his request that this Court reconsider its Order of March 9, 2012 submitting his appeal on the record and the briefs on file without oral argument.

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ARGUMENT

I.

DURING HIS ORAL ARGUMENT BEFORE THIS COURT IN THE COMPANION CASE OF *LUIS HIDALGO III, APPELLANT V. THE STATE OF NEVADA, RESPONDENT, CASE NO. 54272*, COUNSEL FOR THE STATE MISREPRESENTED THE RECORD ON APPEAL IN SEVERAL SIGNIFICANT RESPECTS HAVING AN IMPORTANT BEARING UPON THE MERITS OF THE INSTANT APPEAL OF THIS MOVING APPELLANT, WHICH SHOULD NOT BE PERMITTED TO STAND WITHOUT PROVIDING THIS APPELLANT AN OPPORTUNITY FOR INDEPENDENT ORAL ARGUMENT.

Introduction

Appellant Luis Hidalgo, Jr. maintains that the State deliberately and selectively avoided the recordation or other memorialization of the pre-trial evidentiary proffer provided by cooperating accomplice-witness Anabel Espindola to police and prosecutorial authorities, in a calculated effort to purposefully frustrate the meaningful exercise of his state and federal constitutional rights to due process, fair trial, cross-examination and confrontation.[1] See *Sheriff v. Acuna*, 107 Nev. 664, 819 P.2d 197 (1991); *Leslie v. State*, 114 Nev. 8, 952 P.2d 966 (1998).[2] During the presentation of its oral argument in the companion appeal of co-appellant Luis Hidalgo III, counsel for Respondent, State of Nevada made several substantial misrepresentations of the record on appeal, particularly with respect to the trial testimony of Attorney Christopher Oram, counsel for cooperating accomplice-witness Anabel Espindola

---

[1] Espindola was the only one of the State's four cooperating witnesses in this case whose pretrial evidentiary proffer was not memorialized by police and prosecutorial authorities. And this is of critical importance with respect to the instant appeal in that her testimony was the *sine qua non* of any arguable hypothesis of culpability on the part of this moving Appellant. Indeed, the State has affirmatively acknowledged that, without Espindola, it did not have sufficient evidence to even charge this moving Appellant in this matter. 14 ROA 2724; 15 ROA 2837-2838; 16 ROA 3119; 17 ROA 3281, 3286.

[2] See Appellant's Opening Brief at pages 48-52; Appellant's Reply Brief at pages 25-27.

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which directly undermine the substantive merits of this argument.[3] These misrepresentations and the oral argument of the State related thereto were not challenged by counsel for co-appellant Luis Hidalgo III during the presentation of his rebuttal oral argument. Instead, Mr. Arrascada elected to focus on those issues on appeal which are unique to the appeal of his client. And therefore, this moving Appellant respectfully submits that absent an opportunity for independent oral argument by his counsel, the State's misrepresentations and related oral argument will be unfairly permitted to stand without challenge, to his substantial prejudice.

A.

Counsel For The State Misrepresented The Record On Appeal, And In Particular, The Trial Testimony Of Attorney Christopher Oram, Counsel For Accomplice-Witness Anabel Espindola.

In his oral argument on April 11, 2012, counsel for the State argued, *inter alia*, as follows with reference to the briefs of counsel on appeal for *both* Luis Hidalgo III *and* Luis Hidalgo, Jr.:

> "***[T]hey*** have an area in ***their*** brief[s] that relates to Anabelle and her proffer and ***the record reflects*** that ***the reason that the proffer wasn't recorded was at the request of her lawyer, Mr. Oram, Christopher Oram, it wasn't our request***.
>
> But if you were to follow the defense's suggestion that every proffer needs to be recorded, ***what we would be doing is harming defendants who wish to have a communication with the state about what it is that they know without having us report it*** and ***Mr. Oram was afraid we wouldn't be able to reach a negotiation***.
>
> So ***there was a proffer letter, Mr. Oram said I don't want it recorded***. Immediately after the proffer there was an arrest report written by Detective Wildman, there was grand jury testimony by Ananbelle Espendolla.
>
> And what ***they*** failed to mention is that Mr. Oram got on the stand and Anabelle Espendolla waived her privilege to her lawyer and ***Mr. Oram testified that the story she told to the police, the story that she testified here, the story from the grand jury, all the truths consistent was the same thing she told me from day one as her lawyer and that's exactly what she always said her story is***."

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[3] This argument is one of three arguments on appeal which are common to the appeals of both co-appellant Luis Hidalgo III and this moving Appellant.

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> Unofficial Transcript of Audio Recording of Oral Argument before the Southern Panel of the Nevada Supreme Court on April 11, 2012, pages 6-8, (Argument of Clark County Deputy District Attorney Mark DiGiacomo), (appended hereto and incorporated herein by reference as Exhibit "A"). (Emphasis added.)[4]

Thus, by means of the foregoing representations with respect to the record on appeal, the State purported to interject the following claims bearing upon the merits of this moving Appellant's legal argument as set forth *supra*:

1. That Ms. Espindola did not want her pretrial proffer to be recorded;
2. That Ms. Espindola's attorney, Christopher Oram did not want her pretrial proffer to be recorded;
3. That Mr. Oram was afraid that the recordation of Ms. Espindola's pretrial proffer might preclude Ms. Espindola and the State from reaching a negotiated resolution of her case;
4. That the failure to record Ms. Espindola's pretrial proffer was therefore not at the behest of the State but was rather pursuant to the request of Mr. Oram ; and
5. That Mr. Oram testified at trial that the story privately conveyed to him by his client regarding the alleged events pertinent to the instant case was consistent in all respects with the story to which she testified before the grand jury, the story to which she testified at trial, and the story that she told to the police pursuant to her pretrial proffer, all of which versions were consistent with one another.

However, the record on appeal in fact reflects that these representations of Mr. DiGiacomo are either untrue or inaccurate.

Thus, in truth and in fact, Ms. Espindola actually testified at trial that she would have had no objection whatsoever to the recordation of her pretrial proffer to State authorities in this case, but it was never requested by the prosecutor. Transcript of trial testimony of Anabel Espindola,

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[4] As time is of the essence in this matter, Movant has commissioned a certified court reporter to transcribe the audio recording of the Oral Argument in case #54272 found on this Court's website as an aid to the Court in locating the challenged arguments of counsel for Respondent in that case. See Declaration of Dominic P. Gentile, attached.

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ROA, Jury Trial-Day 10, February 9, 2009, pages 117-118, (appended hereto and incorporated herein by reference as Exhibit "B").

Secondly, contrary to the representation of Mr. DiGiacomo at oral argument in case #54272, the record does not in fact reflect any of the following: that the State's failure to record Ms. Espindola's pretrial proffer was at the request of her lawyer rather than at the behest of the State, (Declaration of Dominic P. Gentile, appended hereto and incorporated herein by reference as Exhibit "C" page 1, paragraph 5(a)); that Mr. Oram did not want Espindola's proffer to be recorded (Exhibit "C" page 1, paragraph (b)); or that Oram was afraid that recordation of Espindola's proffer might preclude Ms. Espindola and the State from reaching a negotiated resolution of her case. Exhibit "C" page 1, paragraph 5(c).

Furthermore, in contradistinction to the representations of Mr. DiGiacomo at oral argument in case #54272, Mr. Oram never in fact testified at trial in this case that the story to which Espindola testified before the grand jury, the story to which she testified at trial, and the story that she told to the police pursuant to her pretrial proffer were consistent with one another. Exhibit "C" page 2, paragraph 5(d);Transcript of trial testimony of Christopher Oram, ROA, Jury Trial-Day 12, February 11, 2009, pages 284-319, (appended hereto and incorporated herein by reference as Exhibit "D"). [5]

. . .

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[5] Moreover, the trial testimony of Attorney Jerome DePalma and investigator Don Dibble shows that at an in-person meeting, Espindola provided them with a pretrial version of relevant events that was completely exculpatory of this moving Appellant and was irreconcilably inconsistent with her testimony against him at trial. 19 ROA 3702-3704, 3710-3721, 3723-3725, 3731-3732, 3736-3738. Mr. De Palma's notes of this meeting were produced to the district attorney in advance of his trial testimony, (19 ROA 3708), and were admitted in evidence as Exhibit 241. 19 ROA 3730. The testimony of DePalma and Dibble further belies Espindola's trial testimony that she never even participated in any substantive debriefing with either of those defense witnesses. Indeed, despite the detailed testimony of both De Palma and Dibble to the contrary, Espindola denied ever speaking with them about the events at issue in this case, (16 ROA 3058, 3065, 3069-3072,17 ROA 3290), and claimed that if Attorney De Palma were to testify that she had done so (as he later did) he would be lying. 17 ROA 3239-3240, 3306-3309.

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B.

The State's Misrepresentations And Related Argument Directly Undermine The Substantive Merits Of This Moving Appellant's Argument That The State Deliberately And Selectively Avoided The Recordation Of Espindola's Pretrial Proffer In Violation Of Appellant's Rights To Due Process, Fair Trial, Cross-Examination And Confrontation But Were Not Challenged By Counsel For Co-Appellant Luis Hidalgo III.

The above-identified misrepresentations of the record on appeal by appellate counsel for the State at oral argument in the companion appeal of co-appellant Luis Hidalgo III, that the pretrial evidentiary proffer of Anabel Espindola was not memorialized by recordation at the request of Espindola's attorney and because Espindola herself objected thereto, and not at the behest of State authorities, directly undermine the substantive merits of this moving Appellant's argument that the selective failure to record only the pretrial evidentiary proffer of Anabel Espindola was the function of a deliberate and calculated determination of the *State* to frustrate the meaningful exercise of his state and federal constitutional rights to confront and cross-examine Espindola at trial; and that that deliberate effort on the part of prosecutorial authorities was undertaken in violation of Luis Hidalgo, Jr.'s state and federal constitutional rights to due process and a fair trial. [6] See *Sheriff v. Acuna*, 107 Nev. 664, 819 P.2d 197 (1991); *Leslie v. State*, 114 Nev. 8, 952 P.2d 966 (1998).

However, it did not become manifest that the State intended to rely upon the foregoing misrepresentations until such time as Mr. DiGiacomo delivered his oral argument in the companion appeal of co-appellant Luis Hidalgo III. See *Davis v. US Bank, National Association*, ___ Nev. ___, ___ P. 3d ___, 2012 WL 642544, note 7 (February 24, 2012) ("Not until oral argument were we able to confirm that appellant's contention was actually false"). The

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[6] The pretrial evidentiary proffers of cooperating witnesses Deangelo Carroll, Ronte Zone, and Jason Taoipu were each video and audio recorded by State officials. So was the pre-arrest statement of Anabel Espindola. Only the proffer of Anabel Espindola – occurring after she was incarcerated for 32 months - was not, notwithstanding the singular importance of it to the State's case against this moving Appellant.

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contentions at issue here appeared nowhere in any of the State's briefs in these related appeals so as to provide an opportunity to contradict them by means of a reply brief. Yet, counsel for co-appellant Luis Hidalgo III did not challenge the relevant misrepresentations and related oral argument of the State during the presentation of his rebuttal oral argument, but rather, focused on those issues which are unique to his client's appeal. And whereas Espindola's testimony was essential to any arguable hypothesis of culpability on the part of this moving Appellant, it would be profoundly prejudicial and fundamentally unfair to Appellant Luis Hidalgo, Jr. to permit these misrepresentations and related oral argument to stand without opportunity for his counsel to challenge the same by independent oral argument.

II.

DURING HIS ORAL ARGUMENT BEFORE THIS COURT ON APRIL 11, 2012 IN *CASE NO. 54272*, COUNSEL FOR LUIS HIDALGO III FOCUSED ON THOSE ISSUES ON APPEAL WHICH ARE UNIQUE TO HIS CLIENT AND DID NOT REBUT THE STATE'S ARGUMENT IN OPPOSITION TO THE MUTUAL CONTENTION OF BOTH APPELLANTS THAT JURY INSTRUCTION #40 WAS UNCONSTITUTIONALLY PREJUDICIAL TO THE DEFENSE, AND THE STATE'S ARGUMENT IN OPPOSITION THERETO SHOULD NOT BE PERMITTED TO STAND WITHOUT PROVIDING COUNSEL FOR THIS MOVING APPELLANT AN OPPORTUNITY FOR INDEPENDENT ORAL ARGUMENT.

During his oral argument on behalf of the State in the companion appeal of co-appellant, Luis Hidalgo III, Mr. DiGiacomo also delivered the following argument in opposition to the common contention of *both* this moving Appellant and his son, Luis Hidalgo III, that jury instruction number 40 (regarding "slight evidence" of conspiracy), which was given by the trial court over the objection of counsel for *both* appellants, was unconstitutionally prejudicial to the defense by unfairly confusing the jury as to the State's ultimate burden of proving their guilt of the offense of conspiracy with which they were both charged in this case beyond a reasonable doubt:[7]

"[A]nother issue ***and I know it's in Mr. H's brief as well*** as it

[7] See Appellant's Opening Brief pages 32-42; Appellant's Reply Brief pages 1-14.

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relates to the slight evidence of a conspiracy.

The difference between the federal rules of evidence and the Nevada rules are 104 in the federal rules says that it's the judge's determination and only the judge's determination.

NRS 47.070 which Rodriquez discusses says that if there's any question of a condition of the precedent of the admissibility of the evidence it should be submitted to the jury and as such under the Nevada rules it is why the court must allow the jury to make that determination.

If they hadn't allowed the jury to make that determination, you'd have a brief on the opposite side saying the court violated 47.070.

And when I went through ***their*** briefs – ***their*** cases in the opening brief every one of ***their*** cases stands for the proposition that instructing the jury you give them that second bite of the apple actually is a benefit to the defendant, it's not required. It's never a case that says it's a harmful error to the defendant to instruct the jury on this.

The court says, hey, we told the jury I think nine times the reasonable doubt standard, there's no way on Earth this is confused of the reasonable doubt standard, it's not even in the area that talks about the elements of the offense in the area that goes to evidence.

And in ***their*** reply brief ***they*** cite you a number of cases in which ***they*** claim that the slight evidence standard was found to be harmful error but if you actually read the cases, they are not talking about the evidentiary, they are talking about the federal law that says once a conspiracy is established slight connection, a slight evidence of a connection to that conspiracy makes the defendant liable under the conspiracy.

That instruction was never given to the jury and I'm not even sure that that instruction applies in the State of Nevada but what those cases stand for is that if you say slight evidence of ***their*** involvement that might be used to hurt ***them***.

It doesn't talk at all about evidentiary requirements that the jury must find that there is the existence of a conspiracy before they are allowed to use the statement for the coconspirator in the furtherance of the conspiracy." Exhibit "A" pages 12-15. (Emphasis added.)

It is clear from the emphasized portions of the above-quoted remarks of Mr. DiGiacomo

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that the foregoing argument is intended by the State to apply in opposition to the common challenge of *both* Luis Hidalgo III, as well as this moving Appellant, to the constitutionality of jury instruction number 40. Mr. DiGiacomo's argument misperceives or misstates the holdings and import of the cases cited in this moving Appellant's briefs in that regard.

Moreover, the State's argument regarding jury instruction number 40 highlights the need to resolve the issue both for this particular case and for the jurisprudence of this Court. As given, the language of this instruction required the jury to weigh identical evidence under two different standards for two different purposes: (1) admissibility and (2) liability.

The admissibility decision regarding out of court statements by alleged co-conspirators rests not upon "conditional relevance" but upon **a proper foundation being demonstrated** to the trial court alone by proof independent of the statements themselves, as judged by the "slight evidence" standard, of the existence of a conspiracy and the speaker and defendant's membership in it. By contrast, the jury must find that the existence and the membership of the conspiracy were proven beyond a reasonable doubt. In the aftermath of the rejection of the *Pinkerton*[8] doctrine by this Court in *Bolden v. State*, 121 Nev. 908, 124 P.3d 191 (2005), to so use the statements, the jury must have first found beyond a reasonable doubt the conspiracy and its membership. Those are the "conditions" that make the statements "relevant." The alleged co-conspirators statements are "conditionally relevant" for the jury only **after being admitted into evidence, after the jury has determined guilt beyond a reasonable doubt as to a defendant's conspiratorial status** and only as to vicarious liability for substantive offenses committed by others found to be co-conspirators. See *United States v. Martinez de Ortiz*, 907 F. 2d 629, 634-635 (7th Cir. 1990) (once jury determines guilt beyond a reasonable doubt of defendants membership in conspiracy, the condition is fulfilled and the statements then are relevant to show whether defendant is vicariously liable for the crimes committed by co-conspirators); *United States v. Collins*, 966 F.2d 1214, 1223 (7th Cir. 1992).

However, counsel for co-appellant Luis Hidalgo III did not rebut or otherwise address

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[8] See *Pinkerton v. United States*, 328 U.S. 640 (1946).

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this common challenge to jury instruction 40 or these distinctions at any time during his oral argument; but elected instead to focus both his opening and rebuttal oral argument upon those issues which are unique to the appeal of his client alone. Thus, it would likewise be prejudicial and fundamentally unfair to this moving Appellant to permit the State's oral argument in opposition to his constitutional challenge to jury instruction number 40 to stand without opportunity for his counsel to rebut the same by independent oral argument.

CONCLUSION

THEREFORE, for all the foregoing reasons, Appellant Luis Hidalgo, Jr. respectfully prays that this Court: (1) reconsider its Order of March 9, 2012 submitting the instant appeal for decision without oral argument; (2) set oral argument in the instant appeal; and (3) grant such further and other relief as the Court deems fair and just in the premises.

Respectfully submitted this 16th day of April, 2012.

GORDON SILVER

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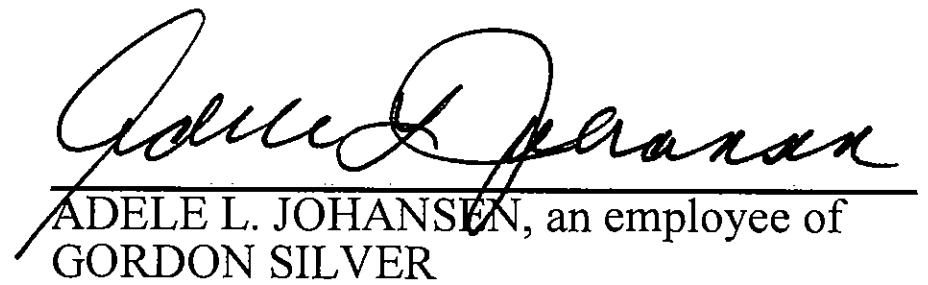
Attorneys for Appellant
LUIS HIDALGO, JR.

CERTIFICATE OF SERVICE

The undersigned, an employee of Gordon Silver, hereby certifies that on the 16th day of April, 2012, she served a copy of the Motion to Reconsider Submission for Decision Without Oral Argument, by Electronic Service, in accordance with the Master Service List as follows:

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



ADELE L. JOHANSEN, an employee of
GORDON SILVER

EXHIBIT “A”

PA3437

HID PA03264

DISTRICT COURT

CLARK COUNTY, NEVADA

STATE OF NEVADA,	)
	)
Plaintiff,	)
	)
vs.	)
	)
LUIS HIDALGO, III,	)
	)
Defendant.	)
	)

ORAL ARGUMENT

BEFORE THE SOUTHERN PANEL

OF THE NEVADA SUPREME COURT

Taken on Wednesday, April 11, 2012

At 10:16 o'clock a.m.

Las Vegas, Nevada

Reported by: Katherine M. Silva, CCR #203

LST JOB NO.: 159704

MR. DIGIACOMO: May it please the Court, my name is Mark Digiacomo, I'm a Deputy District Attorney, I represent the State of Nevada.

I want to start with the fact that the defense attorneys in the Carroll case which is a wire transcript and the statement of DeAngelo Carroll in its entirety is a conversation between DeAngelo Carroll and Anabelle Espendolla where they are talking about two witnesses, Bronte and Jason, having witnessed the shooting, going back to the Palomino, getting the money for the payment and then leaving the Palomino, something to which the State of Nevada has always taken the position Little Lou wasn't there or part of that particular part of it.

During the course of this recording Little Lou made the statement that is unrecorded or that's unintelligible, DeAngelo says huh. Little Lou says something else and response from DeAngelo Carroll is you are not going -- what the fuck are you talking about, don't worry about it, you didn't have nothing to do with it.

What was said before that he was responding to is unintelligible and nobody has

any idea what he has said.

The State took the position and throughout the record that, Judge, make a ruling. If this comes in for the truth of the matter asserted, then under NRS 51.069 we have the right to impeach his statement if it comes in.

And DeAngelo Carroll gave a full statement and in that statement the explanation for why he would have said that was in there.

Little Lou and him engaged in a conspiracy to commit the murder. Little Lou from there tried to force his father to do it. Little Lou called him to get the baseball bats and garbage bags and come down.

And it was only when DeAngelo got to the Palomino Club that Mr. H was worried about having his son involved in this murder that Mr. H said I want you to do this by yourself, I don't want Little Lou out there and I don't want Little Lou involved.

And our position was look, Judge, you let it in for the truth, if that's what you want to do, we should be entitled to impeach him or as accurate in all those case laws say, this is a statement, it is not -- it is not a declaration

against interest in any way against DeAngelo Carroll, he had nothing to worry about these recordings because he was at the time working with the police, not the State but the police and he gave this statement in response -- and we don't know what it is he was making it in response to or what it said.

She ultimately rules that it could be an adopted admission and this does not -- it precludes the State from explaining what this means and why it is this is in here and we'll talk about it later on but Little Lou clearly acknowledges what DeAngelo Carroll had said all along which is he was the impetus behind the murder.

What happens is that during closing argument Mr. Arrascada and his co-counsel start arguing the truth of this matter asserted. Even DeAngelo Carroll said he didn't do it and we object, Judge, the violation of your prior ruling, she overrules the objection.

So they got the best of both worlds; they got to argue this for the truth of the matter to a jury and we didn't get to dispute it or give context to what he was saying.

The defense in their brief also fails to -- I don't want to say they were somewhat disingenuous but they claim the court did not hear Little Lou's acknowledgement that he had had a prior conversation with DeAngelo Carroll about the harming of TJ and that statement was made by Little Lou after they are talking about how Kenneth Counts did this and why in the heck would you grab Kenneth Counts, why would you put another person in the middle of this, how do you know who this Kenneth Counts or KC they are calling him, you know, why is this all happening.

And Little Lou says next time you do something stupid like that, I told you you should have taken care of -- and then there was an argument, did he say this or did he say TJ and that's what the court wouldn't make a determination but clearly said I told you you should have taken care of and then he makes the statement.

The State's position was and the jury ultimately made the determination it wasn't necessarily dispositive whether he said TJ or this but clearly he's indicating, look, I told you, DeAngelo, to do this, and then he goes on to

say you do this stuff all the time. KC, how do you know this guy, why did you use KC and he's clearly upset that KC is the one that they enlisted to do this.

And so the jury heard directly out of Little Lou's mouth everything that Bronte Zone said and everything Anabelle Espendolla said was confirmed by the wire recording.

They are taking one line in DeAngelo Carroll which is open to many interpretations to assert that somehow this defendant didn't get a fair trial. The trial in which you have every ruling that the State won in front of you right now.

I never had a trial in which so many discretionary rulings went against the State. This is one in which I think the State was actually harmed by the ruling of the court.

That if the court was going to allow this in, she should have allowed us to explain it with the statement of DeAngelo Carroll and she didn't.

And additionally the defense fails to note that Anabelle Espendolla was more than corroborative -- I know they have an area in

their brief that relates to Anabelle and her proffer and the record reflects that the reason the proffer wasn't recorded was at the request of her lawyer, Mr. Oram, Christopher Oram, it wasn't our request.

But if you were to follow the defense's suggestion that every proffer needs to be recorded, what we would be doing is harming defendants who wish to have a communication with the State about what it is that they know without having us report it and Mr. Oram was afraid we wouldn't be able to reach a negotiation.

So there was a proffer letter, Mr. Oram said I don't want it recorded. Immediately after the proffer there was an arrest report written by Detective Wildman, there was grand jury testimony by Anabelle Espendolla.

And what they failed to mention is that Mr. Oram got on the stand and Anabelle Espendolla waived her privilege to her lawyer and Mr. Oram testified that the story she told to the police, the story that she testified here, the story from the grand jury, all the truths consistent was the same thing she told me from day one as her lawyer and that's exactly what she always said her story

is.

So suggestion that the State of Nevada provided her the information when in fact she does not provide us a slam dunk, yeah, there was an order to kill, yeah, it all came back. No, she provides little bits and pieces about what she knew about the underlying conspiracy.

That leads the question of the reliability of the statement under Chia. Even if you were to accept the rank hearsay under Chia should be admissible somehow, this is an individual who is being sent into a situation.

You don't know what Little Lou knows Anabelle knows about this conspiracy. You don't know what Anabelle knows what Little Lou knows about the conspiracy and you don't know because Anabelle, the only knowledge she had of Little Lou, is when Little Lou tries to force his dad to issue the order and the last thing she knows the order wasn't issued and Little Lou leaves from the Sonoma Auto Plaza.

And they say in their brief, well, PK was present for the only phone call between Little Lou and DeAngelo Carroll. Well, that's not true. PK is at the club and he claims that

conversation that he overheard was at the club.

But the phone call happened while Little Lou was driving according to cell phone records after he gets into the place, at the Sonoma Auto Plaza with his father. As he's driving north, he calls DeAngelo Carroll and Bronte Zone says I overhear a phone call with DeAngelo Carroll talking about this conspiracy of I don't know whose on the other end.

Well, he doesn't need to because the phone records show it's Little Lou calling DeAngelo Carroll and it's from there that they get told to get dressed in black and come to the club and they go to the club and Mr. H ultimately issues the order at the club.

The entire trial of both defense counsels spent an abundant amount of time with Mr. H's testimony that DeAngelo Carroll is the most untrustworthy person that they know. They presented a whole ton of evidence on the trustworthiness of DeAngelo Carroll and you can't believe anything that DeAngelo Carroll ever said.

This is an individual who the State of Nevada didn't have as a witness, he was a defendant, he was a defendant who got convicted

of first degree murder with use of a deadly weapon in this particular case.

You can't hold me to the reliability of DeAngelo Carroll that somehow I'm vouching for the credibility of a murderer, no. He said, hey, I can get you more information about that, okay, they set him in a room but are we going to suggest that somehow he's reliable because he has the motivation to lie or told to lie? We have no idea what's going through DeAngelo Carroll's mind or why is it DeAngelo Carroll is saying what he said.

I want to jump to the testimony of Jason Tiuga as well because that's once again a situation where I heard Mr. Arrascada say the court had a duty to issue a severance.

Well, there was never a request for a severance by either counsel that I'm aware of and I didn't see it referenced in their brief, I didn't read the entire record from beginning to end last night but I don't recall and I also don't ever recall a request by them for a mistrial because the court issued the ruling that the court issued.

And so ultimately the court was left

with this position; you have a statement by Jason Tiuga in the trial of Kenneth Counts in which he makes a statement as wholly irrelevant to the issue at hand of Kenneth Counts. It didn't matter who issued the order of the baseball bat and garbage bags in Kenneth Counts's trial. Kenneth Counts was the shooter and ultimately it was the last question asked on direct examination of Jason Tiuga there was an abundant amount of evidence that was available to dispute it, he gave taped statements to the police, his talked in pretrial conferences with an investigator present in which he made a mistake, witnesses make mistakes, they say lawyers make mistakes, yeah, he made a mistake and as lawyers in a tactical position, why go up there and impeach him on an irrelevant fact.

And ultimately that was the ruling of the court, that that one line out of the prior testimony of Jason Tiuga is totally irrelevant to the Counts trial and because of that, it wasn't a substantive issue in the trial and as such it didn't qualify as prior testimony by itself.

THE COURT: What about this recent case that is referred to here as the Justices Douglas

and Parraguirre, have you had a chance to look at that?

MR. DIGIACOMO: I did. In fact I read Rodriguez from a totally different point and I'll tell you this that they argued with me -- in that case it says that an adoptive admission is admissible but it's an adoptive admission of the person that adopts it.

DeAngelo Carroll said that Little Lou adoption and Anabelle Espendolla adoption and their adoption can be utilized for any purpose whatsoever. It does not mean that DeAngelo Carroll -- well, it doesn't make any difference because it's now admissible to argue as an adoptive admission and the court instruction doesn't preclude that.

The only thing it says is that it wasn't offered -- DeAngelo Carroll wasn't offered for the truth of the matter asserted but if it becomes an adoptive admission it can be argued for substantive evidence.

Rodriguez also said this which is important to another issue and I know it's in Mr. H's brief as well as it relates to the slight evidence of a conspiracy.

The difference between the federal rules of evidence and the Nevada rules are 104 in the federal rule says that it's the judge's determination and only the judge's determination.

NRS 47.070 which Rodriguez discusses says that if there's any question of a condition of the precedent of the admissibility of the evidence it should be submitted to the jury and as such under the Nevada rules it is why the court must allow the jury to make that determination.

If they hadn't allowed the jury to make that determination, you'd have a brief on the opposite side saying the court violated NRS 47.070.

And when I went through their briefs -- their cases in the opening brief every one of their cases stands for the proposition that instructing the jury you give them that second bite of the apple actually is a benefit to the defendant, it's not required. It's never a case that says it's a harmful error to the defendant to instruct the jury on this.

The court says, hey, we told the jury I think nine times the reasonable doubt standard,

there's no way on earth this is confused of the reasonable doubt standard, it's not even in the area that talks about element of defense in the area that goes to evidence.

And in their reply brief they cite you a number of cases in which they claim that the slight evidence standard has found to be harmful error but if you actually read the cases, they are not talking about the evidentiary, they are talking about the federal law that says once a conspiracy is established slight connection, a slight evidence of a connection to that conspiracy makes the defendant liable under the conspiracy.

That instruction was never given to the jury and I'm not even sure that that instruction applies in the State of Nevada but what those cases stand for is that if you say slight evidence of their involvement that might be used to hurt them.

It doesn't talk at all about evidentiary requirements that the jury must find that there is the existence of a conspiracy before they are allowed to use the statement for the coconspirator in the furtherance of the

conspiracy.

And so I would say that Rodriguez does absolutely nothing to further this court other than for the standards that the court had to give the instruction that they gave on slight evidence but it is irrelevant to the determination as to DeAngelo Carroll.

That statement was heard by a jury, it was argued to the jury as substantive evidence and the State was the one who was actually precluded from explaining what that statement meant.

Throughout their brief they say in there that he had nothing to do with it and they put in little parentheses the murder of TJ Hefner. I don't know where they are getting that from. That's solely speculative argument. It is not listed from DeAngelo Carroll in one of his statements to the police and it's certainly up to question as to what it is he's referring to with Little Lou during the course of the transcript.

But the jury had the entire recording and I recall that the argument from codefendant was that the jury relied upon DeAngelo Carroll despite the court's instruction to the truth of

the matter asserted. It was the State is damned if we did or damned if we didn't.

The court ultimately changed the ruling at the very end and allowed them to argue the truth. So I submit it on that.

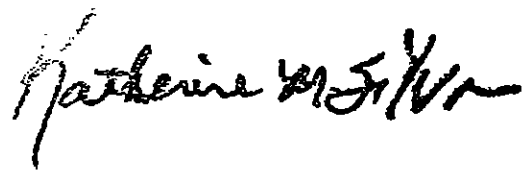
Thank you.

CERTIFICATE OF REPORTER

STATE OF NEVADA)
SS:
COUNTY OF CLARK)

I, Katherine M. Silva, certified court reporter, do hereby certify that I took down in shorthand (Stenotype) the selected proceedings had in the before-entitled matter; and that thereafter said shorthand notes were transcribed into typewriting at and under my direction and supervision and that the foregoing transcript is a full, true and accurate record of the selected proceedings had.

IN WITNESS WHEREOF, I have hereunto affixed my hand this 12th day of April, 2012.



KATHERINE M. SILVA, CCR #203

EXHIBIT "B"

PA3455
HID PA03282

COPY

DISTRICT COURT
CLARK COUNTY, NEVADA

FILED
NOV 24 2009
CLERK OF COURT

STATE OF NEVADA, Plaintiff, vs. LUIS ALONSO HIDALGO, aka LUIS ALONSO HIDALGO, III, and LUIS ALONSO HIDALGO, JR., Defendants.	)	CASE NO: C212667/C241394 DEPT NO: XXI **Transcript of Proceedings**

BEFORE THE HONORABLE VALERIE P. ADAIR, DISTRICT COURT JUDGE

JURY TRIAL - DAY 10

MONDAY, FEBRUARY 9, 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:

Q -- am I right?

A Yes.

Q All right. And there were -- and you knew that a lot -- most, if not all, of the statements that had been given by witnesses had been recorded somehow; am I right?

A Yes.

Q Okay. But when you met with the District Attorneys and the District Attorneys' investigator and the police officers on that Saturday, what you said to them was not recorded, was it?

A No.

Q And that was at your request, was it not?

A I personally didn't request it, no.

Q So the District Attorney insisted upon it?

A No.

Q You don't know how that came about?

A No.

Q Am I right?

A Yes.

Q Okay. But it wasn't you that said that?

A I don't recall saying I didn't want to be recorded. I would have -- if they wanted me to go ahead and make a recorded statement, I would have.

Q All right. But you didn't, and you weren't asked to. Is that what you're saying?

A I don't recall being asked.

Q And you have no idea why they didn't want to record what you were saying that day; am I right?

A Correct.

Q But we can agree that that meeting took a couple of hours?

A Yes.

Q Okay. Do you remember how long that meeting took?

A No.

Q But at least a couple of hours?

A Yes.

Q So we can agree that it did not take place at the jail?

A Correct.

Q Took place at the District Attorney's office?

A Yes.

Q And Mr. DiGiacomo was there; right?

A Yes.

Q And Mr. Pesci was there?

A Yes.

Q And Mr. Falkner, that fellow back there in the blue shirt, he was there, wasn't he?

A I don't remember Mr. Falkner.

Q Do you remember Detective Kieger being there,

EXHIBIT “C”

PA3460

HID PA03287

DECLARATION OF DOMINIC P. GENTILE

DOMINIC P. GENTILE, ESQ., having first been duly sworn, deposes and states that:

1. I am an attorney licensed to practice before all of the courts of the State of Nevada and represent Appellant Luis Hidalgo, Jr. in the matter entitled *Luis A. Hidalgo, Jr., Appellant v. The State of Nevada, Respondent, Case No. 54209*, presently pending before this Court;

2. I am over the age of 18 years; I am competent to attest to all of the matters set forth herein; and if called upon to do so, I am prepared to testify to all of the matters set forth in this Declaration;

3. I have had the partial transcript of the oral argument before this Court of Case #54272 prepared by a licensed certified court reporter as an aid to this Court in deciding this motion. I was also present for the oral argument in that case on April 11, 2012 and have compared the audio recording of that event contained on this Court's website with the transcript. It appears to me that the transcript is accurate and faithful as to the live argument and the audio recording and, as a bystander to the argument itself, I so declare to this Court.

4. I was trial counsel for Appellant Luis A. Hidalgo, Jr. in the matter entitled *State of Nevada, Plaintiff v. Luis A. Hidalgo, Jr. and Luis A. Hidalgo, III, Defendants, Case No. C212667/C241394* before the Eighth Judicial District Court in and for the County of Clark, State of Nevada, Dept. XXI;

5. I prepared the Appellant's Opening Brief and the Appellant's Reply Brief in the above-entitled, presently pending appeal before this Court;

6. I have personally conducted a thorough review of the entire record on appeal in the matter entitled *Luis A. Hidalgo, Jr., Appellant v. The State of Nevada, Respondent, Case No. 54209* and do thereupon attest that nowhere does the record on appeal reflect in any manner or to any extent whatsoever any of the following:

a. That the State's failure to record the pretrial evidentiary proffer of Anabel Espindola to law enforcement authorities was at the request of her lawyer rather than at the behest of the State;

b. That Anabel Espindola's attorney, Christopher Oram, did not want

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Espindola's proffer to be recorded;

c. That Mr. Oram was afraid that recordation of Espindola's proffer might preclude Ms. Espindola and the State from reaching a negotiated resolution of her case; or

d. That Mr. Oram ever in fact testified at trial in this case that the story to which Espindola testified before the grand jury, the story to which she testified at trial, and the story that she told to the police pursuant to her pretrial proffer were consistent with one another.

I declare under penalty of perjury that the above and foregoing is true and correct. Dated this _____ day of April, 2012.

DOMINIC P. GENTILE

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