

IN THE SUPREME COURT OF THE STATE OF NEVADA

* * *

JACOB DISMONT

Petitioner,

vs.

THE HONORABLE VALERIE
ADAIR, DISTRICT JUDGE; AND
THE EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF
NEVADA, IN AND FOR THE
COUNTY OF CLARK,

Respondents.

and

THE STATE OF NEVADA,

Real Party in Interest.

CASE NO. 68106

Electronically Filed
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Tracie K. Lindeman
Clerk of Supreme Court

**MOTION FOR LEAVE TO FILE
JOINDER TO PETITION FOR
WRIT OF PROHIBITION FILED
BY DISMONT ON MAY 29, 2015**

COMES NOW, Defendant MICHAEL SOLID, co-defendant to Petitioner JACOB DISMONT, by and through his attorneys DAVID M. SCHIECK, Clark County Special Public Defender, RANDALL H. PIKE, Assistant Special Public Defender, and ROBERT ARROYO, Deputy Special Public Defender, and hereby submits this Motion for Leave to File Joinder to Petition for Writ of Prohibition.

Michael Solid and Jacob Dismont are named defendants in Case No. C-13-290260-1.

Dated this 4th day of June, 2015.

RESPECTFULLY SUBMITTED

DAVID M. SCHIECK
SPECIAL PUBLIC DEFENDER

/s/ RANDALL H. PIKE

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MEMORANDUM OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

On June 5, 2013, Michael Solid and co-Defendant Jacob Dismont were charged by way of Indictment with Conspiracy to Commit Robbery, Robbery and Murder with Use of a Deadly Weapon. The Defendants pled not guilty and waived their right to speedy trial. Trial was set for June 1, 2015.

On the eve of trial, the State made an oral motion to amend the Grand Jury's

Indictment to strike the “premeditation and deliberation” language from count 3. The district court granted the State’s Motion over the defendants’ objections. The Court denied Dismont’s oral motion to stay the proceedings.

On May 29, 2015, Petitioner Dismont filed a Petition for Prohibition with this Honorable Court concerning the district court’s granting of the State’s motion to substantively alter the Indictment against Dismont and Solid and requested this Court stay the proceedings in district court.

Michael Solid, co-defendant in the lower court, was not listed as a real party in interest.

Solid and Dismont have no plain, speedy, or adequate remedy under the law.

This Court filed an Order Staying Trial and Directing Answer, on May 29, 2015, ordering the real party in interest [The State of Nevada] to file an answer on behalf of the Respondents.

Solid respectfully requests that this Honorable court accept and consider his proposed Joinder to Petition for Writ of Prohibition Filed by Dismont on May 29, 2015. Solid has an interest in the outcome of the current petition as he is Dismont’s named co-defendant in the lower court proceedings. Solid asserts that his rights to join in the instant Petition were preserved as he is party in the Indictment filed in district court under Case Number C-13-290260-1.

In addition, Solid objected to the State's motion to amend the indictment. Therefore, Solid would have the right to bring his own Petition for Prohibition in regards to the court's ruling on the issue at hand, however, judicial economy will better be served if the Court accepts and considers Solid's supplemental points and authorities set forth hereinbelow.

**SOLID'S JOINDER IN DISMONT'S
PETITION FOR WRIT OF PROHIBITION**

SOLID moves this Court to allow him to join in DISMONT'S Petition as he, as a co-defendant in the joint trial, is also a real party in interest.

The Indictment in this case has been existant since June 2013. The Indictment indicated that the defendants were indicted under one of three theories of first degree murder: 1) premeditation and deliberation; 2) felony murder; and/or 3) aiding and abetting. There was no indication as to which theories applied to which of the defendants. As different theories would allow for various lesser included offenses to be presented, the State demanded that it be allowed to abandon the premeditation and deliberation theory. The State's proffered reasoning was, if there is no theory of premeditation or malice aforethought, SOLID and DISMONT would not be entitled to lesser-included offense instructions or verdicts.

As there was no specificity in the indictment or in the announcement of the

decision by the Grand Jury, there is no basis to select one theory over the other. To do so, the State would have to initiate a new presentation or remand the matter for a preliminary hearing.

Prior to seeking writ relief from this Honorable Court, the parties opposed the State's oral motion to amend the Indictment and DISMONT orally requested a stay of the trial scheduled to begin on June 1, 2015 which was denied. DISMONT filed his Writ of Prohibition with this Court and a stay of the trial in district court was granted.

After the initial stay was entered on Friday May 29, 2015, the district court on Monday, June 1, 2015, gave the State the option of proceeding to trial upon the indictment as returned or to litigate the matter and continue the trial. The State elected the latter. As the parties previous motions for separate trials were denied, the joint trial was continued. SOLID and DISMONT have no plain, speedy, or adequate remedy under the law if the State were to proceed on the Amended Indictment.

SOLID as a real party in interest seeks to join in this matter as the decision of this Honorable Court directly affects his rights under the Nevada and United States Constitutions.

RELIEF SOUGHT BY PETITIONER SOLID

SOLID adopts by this reference the Petition and Appendices heretofore filed

by his co-defendant Jacob Dismont.

ISSUES PRESENTED

1. Whether the district court improperly allowed the State of Nevada to substantively alter the Grand Jury's Indictment by striking a theory of intent without returning to the Grand Jury.

SOLID'S STATEMENT OF THE FACTS NECESSARY TO UNDERSTAND THE ISSUES PRESENTED BY THE PETITION

The alleged facts are as follows: Petitioners/Co-Defendants Solid and Dismont drove Dismont's vehicle to a gas station/convenience store at the intersection of Charleston and Torrey Pines in Clark County Nevada. Solid paid for some gas and Dismont exited the vehicle. Solid awaited the return of Dismont who had left the area. Solid was seen on surveillance waiting in the passenger side of the vehicle. Solid drove the vehicle to a spot where Dismont was located after cell phone records indicate Dismont called Solid. Dismont approached Marcos Arenas, who was across Charleston and almost a block away and grabbed Mr. Arenas' iPad, and a struggle ensued. Dismont took the iPad from Mr. Arenas, and ran to the vehicle. The vehicle was in a turn lane. Dismont jumped into the vehicle, and while Solid was driving away, Mr. Arenas, who was grabbing the vehicle, lost his footing, fell, and was struck by the vehicle which caused his death.

On June 4, 2013, a Grand Jury proceeding took place. Deputy District Attorney Robert ("Brad") Turner, Esq. advised the grand jury on the elements of the crimes charged. In so doing, he instructed the Grand Jury that "[m]urder is the unlawful killing of a human being with malice aforethought, either express or implied." He informed the Grand Jury that "express malice is that deliberate intention unlawfully to take away the life of a fellow creature which is manifested by external circumstances capable of proof." Mr. Turner then went on to explain that murder committed in the perpetration of a robbery may be conclusive evidence of malice aforethought. The Grand Jury returned, charging Solid and Dismont with the crimes of conspiracy to commit robbery, robbery, and murder with use of a deadly weapon.

The murder charge stems from one of three possible theories of liability, as there was no request or finding regarding one theory or another.

On June 5, 2013, an Indictment was filed against both defendants including:

(1) Conspiracy to Commit Robbery (Category B Felony-NRS 199.480, 200.380); (2) Robbery (Category B Felony-NRS 200.380) and (3) Murder with Use of a Deadly Weapon (Category A Felony-NRS 200.010, 200.030, 193.165). *See* Appendix, Tab 1. [Appendix refers to the Appendix submitted by Dismont and adopted hereto by reference by Solid].

Count 3 of the Indictment, charging Defendants with Murder with Use of a

Deadly Weapon, provides as follows, in pertinent part:

“the parties did then and there willfully, unlawfully, feloniously, and without authority of law, and with malice aforethought, kill MARCOS ARENAS a human being... the said killing having been (1) done with premeditation and deliberation; and/or (2) committed during the perpetration or attempted perpetration of a robbery, to wit; (1) by directly committing the acts constituting the offense and/or (2) by Defendants conspiring with each other to commit robbery; and/or (3) by Defendants aiding or abetting each other in the commission of the crime...” *Id.* at 3:5-16.

Thus, the Indictment reflects three possible theories of liability under which the State intends to prove the murder charge against Dismont and Solid. On May 17, 2015, Dismont filed a Motion to Dismiss the murder count based on the premise that the asportation of the stolen property was complete prior to the time of the alleged murder and the facts as alleged are insufficient to establish premeditation and deliberation. *See* Appendix, Tab 3. Alternatively, Dismont moved to permit the jury to consider the lesser included offenses of second degree murder and involuntary manslaughter. Solid believes that there are numerous vehicular offenses that may be applicable in the case.

At a May 28, 2015 hearing, Judge Adair denied Dismont's Motion to Dismiss, finding that whether the robbery was complete at the time of the murder was a question of fact for the jury to determine. The State then orally moved to amend the Grand Jury's Indictment to strike the "premeditation and deliberation" language from

Count 3 in an effort to prevent defendants from seeking all of the lesser included offenses of a first degree murder charge. On June 1, 2015, no proposed Amended Indictment was presented, however, the State declined the Court's invitation to proceed on the Indictment after the stay was issued and the trial was thereafter continued.

**THE WRIT HAS BEEN ISSUED ON ISSUES WHICH
APPLY EQUALLY TO CO-DEFENDANT/ PETITIONER SOLID**

1. The withdrawal of alternate theories considered before the Grand Jury is violative of the substantive constitutional rights of Solid.

NRS 173.095(1) provides that a court may permit an indictment "to be amended at any time before verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced." Unlike an Information, which is the product of a court proceeding, an Indictment "may be found only upon the concurrence of 12 or more jurors." NRS 172.255(1). In the present case, the Grand Jury was presented three possible theories but failed to articulate which applied to either or both of the defendants. See, State v. Hancock, 114 Nev. 161, 955 P.2d 183 (1998).

The significant effect of the change sought by the State materially alters the Indictment, both in body and intent. State v. Chamberlain, 6 Nev. 257, 260 (1871).

This amendment, if allowed, is violative of the defendants' "rights under the U.S. Constitution which are applicable to the states, such as fair notice of criminal charges, double jeopardy, and effective assistance of counsel." Watson v. Jago, 558 F.2d 330, 338 (6th Cir. 1977). "An amendment of the indictment occurs when the charging terms of the indictment are altered, either literally or in effect, by the prosecutor or court after the grand jury has last passed on them. " United States v. Montgomery, 384 F.3d 1050, 1060 (9th Cir. 2004). If the change in the indictment constitutes an amendment, it is prejudicial per se and may warrant reversal of a conviction. Jones v. Smith, 231 F.3d 1227, 1232 (9th Cir. 2000).

2. The State's Amendment Of The Indictment is unduly prejudicial to Defendant SOLID and violative of his due process rights.

Petitioners will be substantially prejudiced if required to proceed to trial with the dismissed "premeditation and deliberation" language from Count 3 of the Indictment. It is impossible to know to what degree the language was considered during the Grand Jury's deliberations on the murder charge, and the State cannot establish its theory is the one upon which the Grand Jury returned. The State's announced intention of amending the Indictment is to prevent Petitioners from seeking the lesser included offenses to first degree murder at trial and/or preventing a compromise verdict from the Jury. (Although this was, in fairness, more the

articulation of the District Court Judge without correction by the State).

Co-Defendant/Petitioner Dismont disclosed his defense theory that the crime was a petit larceny, a misdemeanor under NRS 205.230, which would render the death of Mr. Arenas involuntary manslaughter under NRS 200.070, or at best, second degree murder. Defendant/ Petitioner Solid denies the existence of or participation in a Robbery at all, and the Amendment would require an “all or nothing” verdict as to Solid. The Amended Indictment will preclude Solid from presenting the same theories of defense as articulated by Dismont in his petition.

The State cannot show that the district court's decision allowing the State to amend the Grand Jury's Indictment will not have a prejudicial impact on the jury's verdict, or that it was mere harmless error. The district court must be prohibited from proceeding with the action as against Defendants with an amended Indictment striking the "premeditation and deliberation" language from Count 3.

CONCLUSION

For the foregoing reasons, and as Movant is a real party in interest as co-defendant in the lower court proceedings, Solid respectfully requests that this honorable Court grant the Motion for Leave to File Joinder in the writ of prohibition

...

which was filed on May 29, 2015; and that this Honorable Court allow him to join and participate in the litigation of this matter.

DATED this 4th day of June, 2015

RESPECTFULLY SUBMITTED

DAVID M. SCHIECK
SPECIAL PUBLIC DEFENDER

/s/ RANDALL H. PIKE

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that on 6-4-2015, a copy of Solid's Motion for Leave to File Joinder to Petition for Writ of Prohibition Filed by Dismont on May 29, 2015 was served as follows:

BY ELECTRONIC FILING TO

District Attorney's Office
200 Lewis Ave., 3rd Floor
Las Vegas, NV 89155

Peter S. Christiansen, Esq.
Kendele L. Works, Esq.
810 S. Casino Center Blvd.
Las Vegas NV 89101

Nevada Attorney General's Office
100 N. Carson St.
Carson City NV 89701

CERTIFICATE OF MAILING

The undersigned employee of the Clark County Special Public Defender's Office, hereby certifies that on 6-4-2015, a copy of the foregoing document was put in the U.S. mail, with first class postage was fully prepaid, addressed to The Honorable Valerie Adair, RJC, Department 21, 200 Lewis Ave., Las Vegas NV 89155.

Dated: 6-4-15

/s/ KATHLEEN FITZGERALD

KATHLEEN FITZGERALD
Legal Executive Assistant