IN THE SUPREME COURT OF THE STATE OF NEVADA

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Tracie K. Lindeman
Clerk of Supreme Court

JACOB DISMONT and MICHAEL SOLID Petitioners, vs. THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE VALERIE ADAIR, DISTRICT JUDGE Respondents, And THE STATE OF NEVADA, Real Party in Interest.	CASE NO: 68106

ANSWER TO PETITION FOR WRIT OF PROHIBITION

COMES NOW, the State of Nevada, Real Party in Interest, by STEVEN B. WOLFSON, District Attorney, through his Chief Deputy, JONATHAN VANBOSKERCK, on behalf of the above-named respondents and submits this Answer to Petition for Writ of Prohibition in obedience to this Court's order, filed May 29, 2015 and June 12, 2015, in the above-captioned case. This Answer is based on the following memorandum and all papers and pleadings on file herein.

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Dated this 18th day of June, 2015.

Respecfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar # 001565

BY */s/ Jonathan E. VanBoskerck*
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MEMORANDUM OF POINTS AND AUTHORITIES

STATEMENT OF FACTS AND PROCEDURAL HISTORY

On the afternoon of May 16, 2013, 15 year old Marcos Arenas was walking home from school with his best friend when the two were approached by Petitioner, Jacob Dismont. Tab 2 Petitioner's Appendix ("2 PA") p. 23-28; 110-12. Dismont attempted to grab the iPad Marcos was holding, but Marcos refused to let it go. Id. at 31. Dismont, who towered over Marcos, dragged Marcos into a nearby street while repeatedly punching him in the neck and back. Id. at 47-48. After a struggle, Dismont gained possession of the iPad. Id. at 32, 48. Marcos ran after Dismont as Dismont entered a nearby waiting vehicle driven by Petitioner Michael Solid. Id. at 32, 126-28. Marcos grabbed on to the vehicle as it sped off. Id. at 33, 50-51. When Marcos let go of the vehicle, his face hit the side of the vehicle and the impact knocked him down. Id. at 38. The vehicle ran directly over Marcos and proceeded to drive away, leaving the young teenager lying lifeless in the middle of the street. Id. at 51.

On June 4, 2013, the State presented the matter to a Grand Jury, and a true bill was returned against Petitioners charging Conspiracy to Commit Robbery, Robbery, and Murder With Use of a deadly Weapon. Id. at 186-87. In returning the true bill, the Grand Jury did not articulate upon which theory of liability, if it relied

on any in particular, it considered in finding probable cause to believe Petitioners committed murder. Id.

On June 5, 2013, the State filed a Grand Jury Indictment against Petitioners, charging them with the following: Count 1 – Conspiracy to Commit Robbery, Count 2 – Robbery, and Count 3 – Murder With Use of a Deadly Weapon. 1 PA 1-4. With respect to Count 3, the Indictment indicated the following possibly theories of liability:

> …[T]he actions of the defendants resulting in the death of said MARCOS ARENAS, the said killing having been (1) done with premeditation and deliberation; and/or (2) committed during the perpetration of a robbery, the defendants being responsible under one or more theories of criminal liability, to wit; (1) by directly committing the acts constituting the offense and/or (2) by Defendants conspiring with each other to commit the acts constituting the offense and/or (3) by Defendants aiding and abetting each other in the commission of the crime…

Id. at 3.

Nearly two years later, on May 17, 2015, Petitioner Dismont filed a Motion to Dismiss the charge of Murder With Use of a Deadly Weapon, arguing that because the robbery had been "completed" before Marcos was killed, the State could not prove felony murder or premeditation and deliberation. See 3 PA. Petitioner Dismont further argued that, in the event the District Court elected not to dismiss the murder charge, Petitioner Dismont should be permitted to proffer jury

instructions on the lesser-included offenses of Second Degree Murder and Manslaughter. Id.

On May 22, 2015, the State filed an Opposition wherein it argued that the Murder charge should not be dismissed because the robbery of Marcus had not been concluded at the time he was killed, and that the State's felony murder theory should therefore stand. Respondent's Appendix ("RA") p. 00001-8. The State further argued that Petitioners are not entitled to jury instructions on lesser-included homicide offenses, and indicated:

> [T]he State will be filing an amended indictment striking the 'premeditation and deliberation' language from COUNT 3 – First Degree Murder. Thus, there will no longer be any legal authority standing for the premise that Defense would be entitled to jury instructions on any lesser included charges. Id.

The District Court heard Petitioner Dismont's Motion to Dismiss on May 28, 2015. RA 000009-10. The State argued that by amending the Indictment it would not be adding new charges, but rather omitting a theory of liability, and that therefore Petitioner Dismont would not be prejudiced as he would be left to defend only against a felony murder theory. In other words, the State argued they were putting "all of their eggs into one basket" because it was now an "all or nothing" type of case. The court agreed that Petitioner would be left in a better position by the State's proposed amendment, and denied Petitioner's Motion to Dismiss. Id. Trial was set for June 1, 2015. Id.

On May 29, 2015, Petitioner Dismont filed the instant Emergency Writ of Prohibition in this Court. The same day, this Court issued an Order Staying Trial and Directing Answer. On June 4, 2015, Petitioner Solid filed a Motion for Leave to File Joinder to Petition for Writ of Prohibition Filed by Dismont on May 29, 2015. This Court filed an Order granting that motion on June 12, 2015.

ARGUMENT

A writ of prohibition is an extraordinary form of relief that enables this Court to arrest the proceedings of any tribunal exercising judicial functions in excess of its jurisdiction. NRS 34.320; Hickey v. District Court, 105 Nev. 729, 731, 782 P.2d 1336, 1338 (1989). A writ of prohibition does not serve to correct errors; its purpose is to prevent courts from transcending the limits of their jurisdiction in the exercise of judicial but not ministerial power. Olsen Family Trust v. Dist. Ct., 110 Nev. 548, 551, 874 P.2d 778, 780 (1994); Low v. Crown Point Min. Co., 2 Nev. 75 (1866). However, "a writ of prohibition must issue when there is an act to be 'arrested' which is 'without or in excess of the jurisdiction' of the trial judge." Houston Gern. Ins. Co. v. Dist. Ct., 94 Nev. 247, 248, 78 Nev. P.2d 750, 751 (1978); Ham v. Eighth Judicial Dist. Ct., 93 Nev. 409, 566 P.2d 420 (1977); see also Goicoechea v. Fourth Judicial Dist. Ct., 96 Nev. 287, 607 P.2d 1140 (1980); Cunningham v. Eighth Judicial Dist. Ct., 102 Nev. 551, 729 P.2d 1328 (1986).

The object of a writ of prohibition is to restrain inferior courts from acting without authority of law in cases where wrong, damage, and injustice are likely to follow from their action. Olsen Family Trust, 110 Nev. at 552, 874 P.2d at 781; Silver Peak Mines v. Second Judicial Dist. Ct., 33 Nev. 97, 110 P. 503 (1910). The decision to entertain an extraordinary writ petition lies within the discretion of this Court, and this Court considers whether "judicial economy and sound judicial administration militate for or against issuing the writ." NRS 34.330; Redeker v. District Court, 122 Nev. 164, 167, 127 P.3d 520, 522 (2006).

I. THE DISTRICT COURT CORRECTLY PERMITTED THE STATE TO FILE AN AMENDED INDICTMENT PURSUANT TO NRS 173.095.

NRS 173.095(1) provides that a district court, within its discretion, may permit the State to amend an indictment "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." See also Viray v. State, 121 Nev. 159, 162, 111 P.3d 1079, 1081 (2005). This statute contains no requirement that such an amendment be considered or approved by a Grand Jury as an original indictment must be. Compare NRS 173.095 and NRS 172.255(1). This Court reviews a district court's decision to permit the State to amend an indictment for abuse of discretion, which occurs only where an amended charging document directly violates the relevant statutory provisions by charging a new or different offense, or prejudicing the

defendant's substantial rights. Green v. State, 94 Nev. 176, 177, 576 P.2d 1123, 1123 (1978).

A. The Amended Indictment Did Not Charge Different or Additional Offenses.

To begin with, the State notes that Petitioners appear to misapprehend the legal standards applicable in the present case. Petitioners argue that the District Court erred because it permitted the State to "materially alter" the indictment in a manner that was "more than the correction of a clerical error." Dismont's Petition, p. 8. Although this language appears in this Court's opinion in Hancock v. State, 114 Nev. 161, 167, 955 P.2d 183, 187 (1998), it appears only in response to an argument by the State that it may amend an indictment to remedy a clerical error, and is not set forth as a governing legal standard applicable to all amendments under NRS 173.095(1). Importantly, here, the State has at no point alleged that the Indictment was amended in an effort to correct a clerical error. Moreover, as is clear from the statutory language, whether an indictment has been "materially altered" is not the relevant inquiry for this Court. Rather, the question is whether the State charged new or different offenses or violated a defendant's substantial rights. See NRS 173.095(1); Green, 94 Nev. at 177, 576 P.2d at 1123.

Additionally, Petitioners make much ado regarding the fact that the amendment in question was not approved by the Grand Jury. This ignores the fact that, as explained above, NRS 173.095(1) contains no such requirement and leaves

the decision to permit an amendment solely within the discretion of the district court. Petitioners' reliance on Hancock, 114 Nev. 161, 955 P.2d 183, in this respect is misplaced, as in Hancock the State was precluded from amending an indictment so as to add previously alternately pleaded offenses as separate counts where "it [could not] be said that the grand jury found probable cause on each and every amended count" in the original indictment to begin with. Id. at 167, 955 P.2d at 187. Here, as explained at length below, no such drastic amendment was made.

The Amended Indictment filed in this matter plainly did not violate NRS 173.095(1), as it was filed before a jury verdict was issued and did not charge new or different offenses but simply *removed a* theory of liability for Murder With Use of a Deadly Weapon. This Court has previously addressed the scope of the State's right to amend its theories of prosecution prior to trial, pursuant to NRS 173.095(1), in State v. Eighth Judicial Dist. Ct. (Taylor), 116 Nev. 374, 997 P.2d 126 (2000). There, this Court found the District Court abused its discretion by striking certain language from the State's Amended Information, where the State added two new theories of liability for Murder With Use of a Deadly Weapon. Id. Specifically, on the day trial was set to begin, the State filed a Second Amended Information which alleged two additional theories: (1) aiding and abetting murder, and (2) felony murder. Id. at 376, 997 P.2d at 128. Previously, the only theory of liability listed in the Information had been premeditation and deliberation/malice

aforethought. Id. Taylor filed a motion to strike the new theories from the Amended Information, arguing in part that their inclusion amounted to charging different offenses and prejudiced Taylor's substantial rights. Id. at 377, 997 P.2d at 128. The District Court granted the motion, and the State filed a Writ of Mandamus in this Court. Id. This Court stated:

> First, we agree with the State's argument that the amendment of the information to set forth theories of aiding and abetting murder and felony murder merely added *alternative theories* of the mental state required for first degree murder and *did not amount to the charging of additional or different offenses*.

Id. at 378-79, 997 P.2d at 129. (emphasis added).

This reasoning demonstrates that here, the State plainly did not charge new or different offenses within the meaning of NRS 173.095(1), but merely altered the theories of liability required for the crime of Murder With Use of a Deadly Weapon, for which the Grand Jury had already found probable cause. Furthermore, the fact that in Taylor the State was permitted to *add* a theory of intent that was not contained in the original indictment, and therefore was never even considered by the Grand Jury, demonstrates that the State is not forbidden from amending its theories of intent for an offense where it is unknown which theory, if any, the Grand Jury considered in indicting a defendant. Surely, if the State may amend an indictment to add a theory of intent that was never presented to the Grand Jury, the

State may likewise *omit* a theory without knowledge of the grand jury's reasoning or lack thereof as it relates to that particular theory. Thus, in the case at bar, the fact that it is unknown whether the Grand Jury considered the premeditation and deliberation theory or the felony murder theory, or both, is of no consequence and does not amount to the addition of new or different offenses.

Moreover, unlike in Hancock where the state was found to have improperly amended an indictment to include alternatively pled charges as separate counts which constituted "additional charges," the State here simply did not add *anything*, particularly not charges, in the Amended Indictment. See 114 Nev. 161, 955 P.2d 183. Thus, the District Court did not abuse its discretion in permitting the State to amend the Indictment, and extraordinary relief is not warranted.

B. The Filing of an Amended Indictment Would Not Prejudice Petitioners' Substantial Rights.

Petitioners' substantial rights will not be prejudiced by the State omitting a theory of liability from the original indictment. The only right that Petitioners contend will be prejudiced is their right to due process. This argument is meritless however, as Petitioners have long since been provided adequate notice of the charges against them.

"The principal purpose of an indictment is to provide the defendant with a description of the charges against him in sufficient detail to enable him to prepare his defense and plead double jeopardy in a later prosecution." Nevius v. Sumner,

852 F.2d 463, 471 (9th Cir. 1988) (citing United States v. Lane, 765 F.2d 1376, 1380 (9th Cir. 1985). "[A]n indictment is not constitutionally defective if it states 'the elements of an offense charged with sufficient clarity to apprise a defendant of what to defend against.'" Id. (quoting Russell v. United States, 369 U.S. 749, 763-64, 82 S. Ct. 1038, 1046 (1962)). This Court will not concern itself with whether the charging document could have been more artfully drafted, but only whether as a practical matter, the charging document provided adequate notice to the accused. Sheriff, Clark Cnty. v. Levinson, 95 Nev. 436, 437, 596 P.2d 232, 234 (1979).

Plainly, an Indictment is not intended to function as a shopping list from which a criminal defendant may choose the theories of liability that best suit his preferred defense. Rather, the sole purpose is to advise a defendant of the charges against him. Here, the State's original indictment did exactly that, and provided Petitioners notice several years ago that they would have to answer to the charge of Murder With Use of a Deadly Weapon under a liability theory of felony murder. 1 PA 3-4. Nothing about that has since changed as no new charges or theories of criminal liability have been added, and accordingly, Petitioners' right to due process has not been prejudiced.

Indeed, this Court has found under similar circumstances that no prejudice resulted from the State's amending its theories of criminal liability, so long as a defendant has adequate notice of the charges against him. In Taylor, supra, this

Court made clear that the addition of the felony murder theory in the Amended Indictment did not prejudice Taylor's substantial rights where he had notice of the possibility that the State might pursue the theory, and stated:

> …[T]he district court did not abuse its discretion in determining that Taylor's substantial rights were prejudiced by the amendment alleging aiding and abetting. Taylor's substantial rights were effectively prejudiced by the State's delay in amending the information to include this theory. Unlike the felony murder theory discussed below, there is no indication from the documents before this court that prior to the morning of trial Taylor received adequate actual notice of the State's theory that he aided and abetted the murder of Rayford…The district court did manifestly abuse its discretion, however, in determining that Taylor's substantial rights would be violated if the State amended the information to include a theory of felony murder. Taylor had notice of this theory in the criminal complaint filed in 1996…Thus, Taylor's substantial rights were not prejudiced when the State amended the information to include a theory of felony murder, and we conclude that the district court sufficiently abused its discretion in striking this theory so as to warrant our intervention by extraordinary writ.

Taylor, 116 Nev. at 378-79, 997 P.2d at 129. Additionally, this Court found that a defendant's substantial rights were prejudiced where the State amended an indictment during trial to include a felony murder theory after the defendant testified, as the State provided no notice of its intent to pursue the theory. Jennings v. State, 116 Nev. 488, 998 P.2d 557 (2000).

From this Court's finding in Taylor – that the State may properly add

theories of liability where the charged offense itself remains the same and the defendant has adequate notice of the new theories- it necessarily follows that the State certainly may *eliminate* theories of liability without violating a defendant's substantial rights. Here, unlike in Taylor or Jennings, the State has not attempted to force the Petitioners to defend against a new and additional theory of liability for murder of which the State provided no previous notice. In that regard, while this Court has held that the State is indeed required to provide a defendant with adequate notice of its various theories of prosecution in an information, this Court has not held or suggested that the State is then unconditionally bound by those theories or that it is required to pursue those theories to the conclusion of the proceedings. See Viray, 121 Nev. at 162, 111 P.3d at 1081-82.

Moreover, following the amendment, Petitioners will be left to defend against only the State's felony murder theory, of which Petitioners have had notice for several years as that theory was contained in the original indictment and has not since changed. 1 PA 3-4. Importantly, the intent required for felony murder in this instance – to commit or attempt to commit a robbery – is much less serious that the theory of premeditation and deliberation that was removed from the Indictment. Petitioner fails to demonstrate how the State's decision to proceed on a less serious theory of intent can be construed as prejudicial, particularly in light of the fact that Petitioners would be unlikely to succeed on theories of Second Degree Murder or

Manslaughter given the facts of the case.

Furthermore, the notion that the State is forbidden from electing not to pursue certain theories of liability it once set forth prior to trial is illogical. Surely, a defendant may not craft the State's case in order to best suit his preferences and desires, and therefore cannot force the State to litigate a theory of prosecution it does not wish to litigate. Rather, the State is permitted to assess the evidence in a case, which may change considerably between the time of indictment and trial, and decide to forego theories of prosecution that once seemed viable. The standard of proof is much different during the presentation of a Grand Jury versus that necessary to prove a Defendant guilty beyond a reasonable doubt at jury trial. Here, the State is concerned with the theory of "premeditation and deliberation" on these facts and the standard of "beyond a reasonable doubt" that a jury must find in order to convict the Petitioner. Accordingly, the State should not be made to litigate a premeditated/deliberated theory of liability unwillingly. The effect of the State's decision to strike the theory on Petitioners' preferences for trial are incidental and simply do not constitute a violation of their substantial rights.

If Petitioners suffered any prejudice, the District Court's decision to permit the State to file the Amended Indictment was not the source of that prejudice. Rather, the record indicates that the court denied Petitioner Dismont's Motion to Dismiss and request for jury instructions on the lesser included offenses of Second

Degree Murder and Manslaughter as legally unsupported before it granted the State's request to file an Amended Indictment. RA 00009-10. Accordingly, Petitioners cannot establish that the court's decision to permit the filing of an Amended Indictment will prejudice Petitioners' substantial rights.

Additionally, the contention that Petitioner Dismont's defense was "gutted" by omission of the premeditated/deliberated theory of liability to the extent that the defense could no longer proceed to trial, is not convincing. The State did not include an additional theory for Petitioners to prepare to defend against. Rather, the State omitted a theory of liability and left Petitioners to defend against one theory of which they have had notice since the original Indictment was filed on June 5, 2013. See 1 PA. To the extent Petitioners do in fact need additional time to adjust their defense to address an Amended Indictment, the proper remedy is a continuation rather than extraordinary relief. See Rippo v. State, 113 Nev. 1239, 1257-58, 946 P.2d 1017, 1029 (1997).

Finally, this Court should take careful notice of the fact that Petitioner Dismont's Motion to Dismiss clearly stated that Petitioner's defense in this case was that the robbery was completed at the time Marcos was killed and thus, *there is no evidence to support a felony murder theory or a premeditated/deliberated theory*. See 3 PA. Thus, by Petitioner Dismont's own admission, a theory of premeditated and deliberated First Degree Murder, and by default the lesser-

included offenses of Second Degree Murder and Manslaughter, are not legally supported in this matter. Petitioner Dismont has already clearly stated that his defense is, and always was going to be, to the charge of the felony murder. Even in Dismont's Motion to Dismiss, he does not meaningfully address the theory of premeditation and deliberation; he solely states the entire charge of murder should be dismissed as it enjoys no legal basis. See 3 PA. Petitioners should be precluded from now taking an inconsistent position in this Court in an effort to gain what they perceive to be an advantage at trial. Petitioners cannot seek to have the entire murder charge thrown out, yet still seek to ask the prospective jury for a "lesser included" conviction. This is the very essence of a "compromised verdict," and is improper.

Based on the foregoing, Petitioners have failed to demonstrate that the District Court's decision to permit the State to file an Amended Indictment violated NRS 173.095 or otherwise exceeded the court's jurisdiction.

C. Petitioners Are Not Entitled to Jury Instructions or a Special Verdict Form Related to the Lesser-Included Charges of Second Degree Murder and Manslaughter.

Petitioners have failed to demonstrate that the court erred in denying instructions on Second Degree Murder and Manslaughter, as there is no evidence to support either theory.

In Graham v. State, 116 Nev 23, 992 P.2d 255, (2000), this Court dealt with

the application of lesser included charges of first degree murder when the only charge was First Degree Murder by way of a felony murder theory. Graham was convicted by a jury of the murder of a young child. Id. On appeal, he claimed that the trial court erred in refusing to instruct on or provide verdict forms on second degree murder. Id. at 25, 992 P.2d at 256. This Court affirmed the conviction, finding that an enumerated murder, such as murder by child abuse, did not fall within the category of murder that could be reduced in degree by failure to prove intent or deliberation and premeditation. Id. at 29-31, 992 P.2d at 257-60. Because the sole agency of death proved in the case was "child abuse," the offense was, by definition, first-degree murder. Id. This court also concluded that the proofs before the jury were only consistent with a finding of either guilty of child-abuse murder or not guilty, thus the use of the involuntary manslaughter instruction without a conforming second-degree murder instruction was harmless error; in fact, the involuntary manslaughter instruction should not have been given. Id. The Court went on to say:

> When an enumerated first-degree murder is charged, such as murder by child abuse, the presence or absence of deliberation and premeditation is of no consequence. Such murders do not fall within the category of murder that can be reduced in degree by failure to prove deliberation and premeditation. Nor can such a murder be reduced in degree because it is committed without intent to kill and would otherwise fall within the ambit of *Morris*: if done with malice and in an enumerated

> manner, the killing constitutes first-degree murder by legislative fiat.
>
> We therefore hold that it is unnecessary to instruct juries on deliberation, premeditation, and second-degree murder when proofs in the case can only support a theory of guilt described within one of the specifically enumerated categories set forth in NRS 200.030(1)."

Id. at 28-29, 992 P.2d at 258.

Since the State's motion to amend the indictment striking the theory of premeditation and deliberation was granted, there is no right to the presentation of the lesser included offenses. If in Graham, the logic was due to the fact that the "sole agency of death proved was "child abuse", the offense was, by definition, first degree murder," then the same logic applies in this case. Hence, if the sole agency of death proven is by felony murder through the theory of robbery, then the jury can only return a verdict of guilty or not guilty. As in Graham, this is not the type of conduct that can fall within the category of murder that could be reduced in degree by failure to prove intent or deliberation and premeditation.

Accordingly, Petitioner is not entitled to extraordinary relief and his Petition for Writ of Prohibition should be denied. Additionally, this Court should find that Petitioner is not entitled to jury instructions on the lesser-included offenses.

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Dated this 18th day of June, 2015.

Respectfully submitted,

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BY */s/ Jonathan E. VanBoskerck*
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY AND AFFIRM that this document was filed electronically with the Nevada Supreme Court on June 18, 2015. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage pre-paid, addressed to:

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