IN THE SUPREME COURT OF THE STATE OF NEVADA

Barry Harris, Appellant vs. The State of Nevada, Respondent,	Supreme Court Case No.: 76774 **APPELLANT'S REPLY BRIEF**

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MEMORANDUM OF POINTS AND AUTHORITIES

I. Use of a Deadly Weapon Was an Element Necessary to Appellant's Kidnapping Charge as Alleged by the State

In response to Appellant's argument, the State claims that use of a deadly weapon during the commission of the alleged kidnapping is not an "element" of the crime, but rather a "sentencing enhancement" severable from the underlying charge. Specifically, the State wrote that "the use of a deadly weapon was not an element or necessary factual theory of Appellant's charge; it was merely a sentencing enhancement for the crime of kidnapping" (State's Answering Brief, hereinafter "SAB," 13). However, the State's position has been struck down by the United States Supreme Court. "The State's argument that the [enhancement] finding is not an 'element' of a distinct hate crime offense but a 'sentencing factor' of motive is nothing more than a disagreement with the rule applied in this case. Beyond this, the argument cannot succeed on its own terms… we dismissed the possibility that a State could circumvent the protections of *Winship* merely by 'redefining the elements that constitute different crimes, characterizing them as factors that bear solely on the extent of punishment.'" *Apprendi v. New Jersey*, 530 U.S. 466, 468, 120 S. Ct. 2348, 2351 (2000).

Apprendi is directly on point with regards to the State's position, and in fact the very argument struck down by the Court in *Apprendi* virtually mirrors the State's argument made in this case.

The State here argues that Appellant could still be found guilty because the use of a firearm was a sentence enhancement rather than essential element of the offense, and "the jury was instructed that Appellant could be found guilty of several different theories of kidnapping" (SAB, 13). Additionally, the State cites to NRS 193.165, which notes that the deadly weapon enhancement "does not create any separate offense but provides an additional penalty for the primary offense" (SAB, 12).

To summarize, *Apprendi* holds that a sentencing factor *is* an essential element of the crime charged so long as it carries the possibility of a sentence enhancement greater than the maximum sentence for the underlying offense. As an essential element, the same procedural safeguards attach to the enhancement as to any other element of the crime, including notice requirements, pleading requirements and a finding by the jury beyond a reasonable doubt.

In *Apprendi*, the defendant pled guilty to an underlying charge that was subsequently enhanced at sentencing as a hate crime based on the trial judge's

determination by a preponderance of the evidence that Apprendi acted with a racial motive. Additionally, none of the charges in Apprendi's indictment alleged that he had acted with a racially biased purpose. The New Jersey Supreme Court affirmed the conviction on a very similar basis cited by the State in this case.

> In upholding the sentence, the Appellate Division of the Superior Court of New Jersey… expressed the view that (1) the state legislature's decision to make the hate-crime enhancement a sentencing factor, rather than an element of an underlying offense, was within the state's established power… In the majority's view, the statute did not allow impermissible burden shifting, and did not "create a separate offense calling for a separate penalty." Rather, "the Legislature simply took one factor that has always been considered by sentencing courts to bear on punishment and dictated the weight to be given that factor." *Id*. (citations omitted).

Thus, very much like the State in this case, the State of New Jersey in *Apprendi* argued that (1) the enhancement was not an essential element of the charge, and thus severable from the underlying crime which must be proven beyond a reasonable doubt; and (2) that the enhancement "did not create a separate offense calling for a separate penalty" (mirroring the statutory language cited by the State from NRS 193.169 that the deadly weapon enhancement is severable because it "does not create any separate offense but

provides an additional penalty for the primary offense"). Both of these arguments were struck down by the U.S. Supreme Court.

> [W]ith regard to federal law, the Fifth Amendment's Due Process Clause and the Sixth Amendment's notice and jury trial guarantees require that any fact other than prior conviction that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proved beyond a reasonable doubt. The Fourteenth Amendment commands the same answer when a state statute is involved…
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> In light of the constitutional rule expressed here, New Jersey's practice cannot stand...**The State's argument that the biased purpose finding is not an "element" of a distinct hate crime offense but a "sentencing factor" of motive is nothing more than a disagreement with the rule applied in this case. Beyond this, the argument cannot succeed on its own terms.** It does not matter how the required finding is labeled, but whether it exposes the defendant to a greater punishment than that authorized by the jury's verdict, as does the sentencing "enhancement" here. The degree of culpability the legislature associates with factually distinct conduct has significant implications both for a defendant's liberty and for the heightened stigma associated with an offense the legislature has selected as worthy of greater punishment. **That the State placed the enhancer within the criminal code's sentencing provisions does not mean that it is not an essential element of the offense.**
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> Any possible distinction between an "element" of a felony offense and a "sentencing factor" was unknown to the practice of criminal indictment, trial by jury, and judgment by court as it existed during the years surrounding our Nation's founding. As a general rule, criminal proceedings were

> submitted to a jury after being initiated by an indictment containing "all the facts and circumstances which constitute the offence, . . . stated with such certainty and precision, that the defendant . . . may be enabled to determine the species of offence they constitute, in order that he may prepare his defence accordingly . . . and that there may be no doubt as to the judgment which should be given, if the defendant be convicted." The defendant's ability to predict with certainty the judgment from the face of the felony indictment flowed from the invariable linkage of punishment with crime.
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> This practice at common law held true when indictments were issued pursuant to statute. **Just as the circumstances of the crime and the intent of the defendant at the time of commission were often essential elements to be alleged in the indictment, so too were the circumstances mandating a particular punishment**. "Where a statute annexes a higher degree of punishment to a common-law felony, if committed under particular circumstances, an indictment for the offence, in order to bring the defendant within that higher degree of punishment, must expressly charge it to have been committed under those circumstances, and must state the circumstances with certainty and precision." *Id.* (emphasis added).

Apprendi unequivocally held that factors which are "sentence enhancers" are still material elements of the charge that must be proven beyond a reasonable doubt. The additional procedural safeguards, such as notice and pleading requirements, also apply to enhancements, as they do to all other elements of the offense.

Given the State alleged only one theory of kidnapping – that which resulted in substantial bodily harm and required the use of a deadly weapon –

each of these elements must be proven for the conviction to stand. Failure to prove each material element of a charge beyond a reasonable doubt must result in an acquittal as a matter of law. Due Process "indisputably entitles a criminal defendant to a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." *United States v. Gaudin*, 515 U.S. 506, 510, 132 L. Ed. 2d 444, 115 S. Ct. 2310 (1995).

The State's final argument – that "the jury was instructed that Appellant could be found guilty of several different theories of kidnapping, including those that did not involve the use of a deadly weapon" – only further exacerbates the flaws inherent in this particular conviction (SAB, 13). Per Due Process and Nevada's notice and pleading requirements, the State is *not* permitted to change theories of the offense at the time of trial from that which was alleged in the charging document. This holds especially true if a new "theory" of the case is being presented for the first time to the jury when the Defense was not put on notice of, or adequately prepared to defend against, the change.

Nevada case law holds that when the theory of liability changes, amending the theory mid-way through the trial is not permissible without adequate actual notice to the Defense.

> The State is required to give adequate notice to the accused of the various theories of prosecution. *See Alford v. State,* 111 Nev. 1409, 906 P.2d 714 (1995); *Koza v. State,* 104 Nev. 262, 756 P.2d 1184 (1988); *Barren v. State,* 99 Nev. 661, 669 P.2d 725 (1983). NRS 173. 095(1) provides, "[t]he court may permit an indictment or information 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." Amendment of the information **prior to trial** is an appropriate method for giving the accused the notice to which he or she is entitled.
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> …
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> We further conclude, however, that the 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. *State v. Eighth Judicial Dist. Court of State, ex rel. Cty. of Clark*, 116 Nev. 374, 377–78, 997 P.2d 126, 129 (2000) (emphasis added).

The above case stands for two applicable and controlling rules of law: First, that changing the theory of the case may result in prejudice to the substantial rights of the defendant, as the Defense has not prepared to respond to the new theories; second, that the State must provide the Defense "adequate *actual* notice" in order to lawfully amend the Information to reflect a new theory of liability. That does not exist here.

The State's theory of the case is the center of the defensive strategy, as evident in this case; the State alleged only one theory as to how Barry allegedly kidnapped Ms. Dotson, and it was by confining her with the use of a firearm. The firearm is central to the allegation itself, as it's not just a sentencing enhancement, but the very basis with which the State alleged the crime took place. Come trial, the presence of a firearm, or lack thereof, was a key focus of the defense strategy that resulted in acquittal of **all** firearms-based charges.

In essence, the State made their bed and now must lie in it. The State failed to allege alternative theories of liability for kidnapping, and only alleged that it occurred with the assistance of a deadly weapon. Whether considered as an "enhancement" or otherwise, the use of a deadly weapon became an essential element that must be proven for the conviction to stand based on the face of the charging document. Because Barry was acquitted of this material element, the conviction that requires this fact as a material element must be vacated.

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II. Kidnapping Requires Restraint of Movement, not Use of Force

Even in the event that the firearms element is severable from the remainder of the kidnapping charge as the underlying theory of liability, at the very least the final conviction must be amended to simple kidnapping because the substantial bodily harm occurred prior to the kidnapping taking place. The State claims that "Appellant's kidnapping of the victim began with the use of force against her, not her movement" (SAB, 15). Not only is this assertion unsupported by any legal authority, but it is also contrary to the statutory definition of kidnapping. As the State cited to no legal authority in support of this position, this Court need not consider it. *Carson v. Sheriff*, 87 Nev. 357, 487 P.2d 334 (1971); *Nev. Emp't Sec. Dep't v. Weber*, 100 Nev. 121, 123, 676 P.2d 1318, 1319 (1984).

However, even if addressed on the merits, the State's position is untenable and contrary to the established definition of kidnapping. Kidnapping takes place when a defendant "willfully seizes, confines, inveigles, entices, decoys, abducts, conceals, kidnaps or carries away a person by any means whatsoever." NRS 200.320. The unlawful act initiates with the seizures, confinement, abduction, etc. – not with an unrelated use of force *prior to* the alleged restraint on movement. The use of force is not required for

kidnapping, is not an element of kidnapping, and thus cannot be used as the starting point for determining when a kidnapping takes place.

Further, the State's position would turn every crime that denotes some element of physical contact to be a kidnapping. Every simple battery, domestic violence, robbery and other crimes involving the use of force would automatically be the initiation of a kidnapping charge, a position expressly disavowed by the Nevada Supreme Court in *Wright v. State*, 94 Nev. 415, 581 P.2d 442 (1978). The State's position also ignores the law that movement which is incidental to another offense, such as a battery, does *not* result in liability for kidnapping for this very reason. *Id.*

Lastly, even if the State's position were correct, the recitation of facts provided is belied by the record. Specifically, the State writes in its Answering Brief that the kidnapping took place in the bedroom with the use of force because "from the time he inflicted harm on her until he left the apartment, the victim was unable to leave" (SAB, 16). This is contradicted by the victim's testimony and the State's own charging document. Ms. Dotson told the first responding office that although he struck her eye, Ms. Dotson was then able to run from the bedroom into the living room, where Barry followed (AA, 531: 2). At trial, Ms. Dotson consistently testified that after Barry struck her in the

bedroom, she ran into the living room and began screaming for help (AA, 531: 2). Barry then followed her into the living room where they began to "tussle."

The testimony by the victim herself is that she was capable of running, of her own volition, out of the bedroom and into the living room. Once in the living room, she claims that Barry thereafter did not let her leave the apartment, but she testified that he never restrained her movement when she ran from the bedroom to the living room. Additionally, the State's Answering Brief diverges from their own charging document. Per the Information, Barry was alleged to have committed kidnapping "to wit: by forcing her into the bathroom and/or preventing her from leaving the apartment and/or bathroom, with use of a deadly weapon…" Nothing in the State's charging document would allege the kidnapping took place with the initial use of force in the bedroom.

The use of force is not the initiation of the kidnapping, which requires only a restraint on movement, not the use of force. Ms. Dotson was able to run from the living room into the bedroom, and therefore the use of force did not restrain her beyond anything that could be, at best, incidental movement. Therefore, as the substantial harm was inflicted prior to the kidnapping, the charge of kidnapping resulting in substantial bodily harm must be dismissed.

III. The Victim's Statement Lacks Trustworthiness for an Excited Utterance

The State contends that Ms. Dotson's statements given to the officers qualifies as an excited utterance primarily under *Medina v. State*, 122 Nev. 346, 143 P.3d 471 (2006). Specifically, the State relies on *Medina* because the victim in that case gave a valid excited utterance a day after the crime had taken place. However, while Appellant agrees that an excited utterance carries no strict time limitation when determining admissibility, the Nevada Supreme Court in *Medina* also took careful note of the extenuating circumstances that permitted the excited utterance in that particular case and why the admission of the statements was not manifest error:

> Golden testified that Ryer "had on a bra and panties, and her panties were drenched in blood. And she had cuts on her thighs, and her hair was all over her head. And she just looked like a ghost. She just looked horrified." Golden further testified that Ryer was crying, appeared pale and shaken, and had bruises on her arms and throat. Ryer had not changed out of her blood-soaked undergarments or attempted to seek help from emergency services. Ryer was physically and mentally incapable of seeking help because she continued to suffer from the trauma of the rape after the rape occurred. However, the moment Golden arrived, Ryer immediately exclaimed to her that she had been raped and how the rape occurred. In essence, Ryer's excitement was uttered in response to the appearance of Golden, a rescuer. Thus, under the particular facts of this case, Ryer made the statement while still under the stress of excitement caused by the rape.

> Accordingly, the district court did not manifestly err when it admitted Golden's testimony under the excited utterance exception. *Id.* at 353.

The ruling in *Medina* was also appropriate because the victim was "physically and mentally incapable of seeking help" and had no motive to fabricate her statements that were visibly corroborated by her external injuries. The same rationale, however, cannot apply to this case. Although the State contends that Ms. Dotson had no motive to fabricate her story (SAB, 18), this is simply not the case from Ms. Dotson's own testimony. She had both the opportunity and motive to fabricate, that being the very basis of their argument to begin with – Barry "cheating as usual."

Ms. Dotson's statement also has several indicia of untrustworthiness. Not only is there a motive to fabricate, but Ms. Dotson presented several versions of events that were mutually exclusive. She claimed to the responding officers that Barry choked her with two hands and beat her about the head with a firearm. She testified at the preliminary hearing that Barry brandished a firearm at some point, but never struck her with it. She testified at the trial that there was no firearm at all. By providing these various accounts, Ms. Dotson confirmed that, whether it was to arriving officers or to the court, she *did* actually fabricate at some point. Additionally, unlike in

Medina, Ms. Dotson's statements were not corroborated by physical injuries except the injury to her eye, which Barry conceded. Despite claims of being choked and hit repeatedly with a gun, there were no signs of strangulation and not even bruising to corroborate her story. These factors, in conjunction with Ms. Dotson's testimony that she left the apartment because she felt "safe," would indicate that her statements lack the trustworthiness that marks the cornerstone of all hearsay exceptions.

The State then argues that there was no evidence that her statements were improperly solicited by law enforcement (SAB, 18). This, too, is belied by the record. Officer Bianco conceded that *prior* to giving Ms. Dotson a blank voluntary statement, he specifically told her what to say and emphasize in her report, even telling her that emphasizing certain aspects of the incident was "icing on the cake" (AA, 760: 8).

Lastly, the State responds that even if admission of the statements was erroneous, Appellant suffered no prejudice as a result. However, from the onset, Ms. Dotson's inconsistent statements were the focus of her credibility. As the sole victim and witness, her credibility was the only basis on which to find Barry guilty of the charges (with the exception of the battery). Ms. Dotson's statements to police is perhaps the least trustworthy of all

statements that she has given throughout the case given the motive to lie and lack of physical corroboration, yet the State put great emphasis to the jury to believe that this statement as the correct one. In just one of several instances, the State told the jury:

> And, ladies and gentlemen, the State submits to you what she said that night, what she said over and over again to those officers on that body cam minutes after it happened to paramedics, that's the truth and it should be considered by you substantively (AA, 1071: 21).

The State cannot plead to the jury to believe the version of events that was otherwise largely inadmissible, then subsequently claim that Barry suffered no prejudice when the jury did just that. The statements lack trustworthiness for numerous reasons, were made after a extended time lapse when Ms. Dotson felt "safe" to leave the premises, were not utterances at all but in many instances were responses to solicited questions, and do not correlate to the stress from the incident itself because Ms. Dotson's demeanor never changed throughout the hours-long investigative process. For these reasons, it was manifestly erroneous for the trial court to admit her statements in their entirety as an excited utterance.

IV. Lawfully Yielding to an Emergency Vehicle is Not Indicative of Flight or Consciousness of Guilt

Appellant argued in his Opening Brief that the jury instruction for flight as consciousness of guilt was improper because the basis for the instruction was merely Appellant gathering his belongings after the argument and leaving the premises. The State does not seem to dispute that his action in this sense is best defined as simply leaving the scene, as at that time Appellant had no knowledge that the police were en route (police were called by an anonymous neighbor) and so could not have been "fleeing" to evade capture.

However, the State argues that the brief moment where Appellant saw Officer Ferron's patrol vehicle while already on his way out of the apartment complex is "more than enough evidence for the jury to reasonably infer that Appellant stopped, thought about his next steps, and then decided to leave the apartment for the purpose of evading police" (SAB 19). Respectfully, the State is raising this argument for this first time on appeal, as this is very distinct from the basis for the jury instruction argued to the District Court during trial. When the Defense objected to the admission of this instruction, the trial court found it to be justified because "you have him gathering up his items and

clothes of a man found in the trunk. I think the State's got enough there to justify it" (AA, 1040: 13).

Notwithstanding this, however, the State's argument is both speculative and flawed. The State speculates as to Appellant's personal knowledge – that Appellant "thought about his next steps," which is not supported anywhere in the record, and then "decided to leave the apartment for the purpose of evading the police," which is belied by the record since he was already leaving before police arrived.

Finally, the State argues there is a basis for the jury instruction because Appellant stopped briefly when he saw Officer Ferron's vehicle entering the apartment complex. However, what the State construes as strange or guilty behavior, Nevada statute would otherwise classify as a lawful yield to an emergency vehicle. In fact, had Appellant *not* stopped his vehicle in this manner upon seeing Officer Ferron entering the apartment complex, he would have been guilty of a misdemeanor. NRS 484B.267 states: "Upon the immediate approach of an authorized emergency vehicle or an official vehicle of a regulatory agency, making use of flashing lights meeting the requirements of subsection 3 of NRS 484A.480, the driver of every other vehicle shall yield the right-of-way and shall immediately drive to a position parallel to, and as

close as possible to, the right-hand edge or curb of a highway clear of any intersection and shall stop and remain in such position until the authorized emergency vehicle or official vehicle has passed."

The State is attempting to construe Appellant's lawful yield to an emergency vehicle as evidence of flight and consciousness of guilt. Appellant is aware of no authority that would view obedience to traffic laws as an indication of evasion. For these reasons, the State has not provided a valid basis on which to introduce the jury instruction regarding flight.

V. The Omitted Portion of the Kidnapping Jury Instruction was Relevant, Accurate and Properly Requested by the Defense

The Defense proposed instruction contained two very important details for a kidnapping charge, particularly circumstances that could operate to exclude a conviction. Specifically, the requested portions included language that movement which is merely incidental to a battery is not sufficient grounds for a kidnapping charge, unless that incidental movement increased the risk of harm above and beyond the battery itself.

Using the State's transcript excerpt, the Defense requested the language be inserted because the law is clear that incidental movement alone cannot result in a kidnapping conviction. The trial judge disagreed with this position

because, in some instances, incidental movement can support a conviction when it increases the risk or harm to the victim – the *same language* that was proposed in the jury instruction, and declined by the Court.

The law provides that the Defense is entitled to its requested instruction – in this case, the requested instruction was the possibility that Barry could not be convicted of kidnapping if the jury felt that Ms. Dotson's movement was incidental, a legitimate possibility given her widely diverging versions of what took place. For example, taking Ms. Dotson's third version of events at trial as true, she was struck in the eye and from there proceeded to the bathroom voluntarily in order to tend to her eye and remain in a safe area until Barry left. Potentially, that could be defined as movement incidental to the battery. However, although these scenarios are speculative by necessity, such speculation over possible interpretation of facts should have been placed within the purview of the jury from the onset.

The Defense proffered a jury instruction consistent with the defensive strategy of the case that was fully supported by Nevada law. The State misstates the content of that jury instruction in its Answering Brief, noting that "Appellant's jury instruction was denied because it completely eliminated the possibility for the jury to find a conviction for kidnapping if there was any

incidental movement, which is a misstatement of the law" (SAB, 24). However, Appellant's proposed instruction would not deny a conviction with "any" incidental movement as the State suggests, but rather would deny a conviction for "only" or "merely" incidental movement. This is not a misstatement of the law. "If, indeed, the movement of the victim is incidental to the robbery and does not substantially increase the risk of harm over and above that necessarily present in the crime of robbery itself, it would be unreasonable to believe that the legislature intended a double punishment." *Wright v. State*, 94 Nev. 415, 417, 581 P.2d 442, 443-44 (1978).

For these reasons, the jury instruction submitted to the jury was a partial statement of the law, as it excluded a specifically requested portion that kidnapping does not exist when movement is merely incidental. The Defense was entitled to this instruction consistent with their theory of the case, and it was error to deny it.

CONCLUSION

For these reasons, Appellant respectfully requests the convictions be vacated, and the matter remanded for a new trial and/or sentencing hearing.

VERIFICATION OF KELSEY BERNSTEIN, ESQ.

1. I am an attorney at law, admitted to practice in the State of Nevada.
2. I am the attorney handling this matter on behalf of Appellant.
3. The factual contentions contained within the Opening Brief are true and correct to the best of my knowledge.

Dated this 24 day of June, 2019.

MAYFIELD GRUBER & SHEETS.
Respectfully Submitted By:

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CERTIFICATE OF COMPLIANCE

1. I certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 with 14 point, double spaced Cambria font.

2. I further certify that this brief complies with the page-or-type-volume limitations of NRAP 32(a)(7)(A)(ii) because it is proportionally spaced, has a monospaced typeface of 14 points or more and contains 5,070 words.

3. 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(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 matte relied on is to be found.

I understand that I may be subject to sanction in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 24 day of June, 2019.

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25(d), I hereby certify that on the 24 day of June, 2019, I served a true and correct copy of the Opening Brief to the last known address set forth below:

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Employee of Mayfield Gruber & Sheets