IN THE SUPREME COURT OF THE STATE OF NEVADA

KODY HARLAN

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

Supreme Court Case No.: 80318

APPELLANT'S APPENDIX
Volume I

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Harlan v. State Case No. 80318

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I.A. 7/18/18
10:00 AM
W.B. TERRY, ESQ.
K. BROWER, ESQ.

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

JAIDEN CARUSO #8213339,
KODY HARLAN, aka,
Kody W. Harlan #5124517,

Defendants.

CASE NO: C-18-333318-2

DEPT NO: III

I N F O R M A T I O N

STATE OF NEVADA)
) ss.
COUNTY OF CLARK)

STEVEN B. WOLFSON, District Attorney within and for the County of Clark, State of Nevada, in the name and by the authority of the State of Nevada, informs the Court:

That JAIDEN CARUSO and KODY HARLAN, aka, Kody W. Harlan, the Defendant(s) above named, having committed the crimes of MURDER WITH USE OF A DEADLY WEAPON (Category A Felony - NRS 200.010, 200.030, 193.165 - NOC 50001); ROBBERY WITH USE OF A DEADLY WEAPON (Category B Felony - NRS 200.380, 193.165 - NOC 50138) and ACCESSORY TO MURDER WITH USE OF A DEADLY WEAPON (Category C Felony - NRS 195.030, 195.040, (NRS 200.010, 200.030) - NOC 53090), on or about the 8th day of June, 2018, within the County of Clark, State of Nevada, contrary to the form, force and effect of statutes in such cases made and provided, and against the peace and dignity of the State of Nevada,

COUNT 1 - MURDER WITH USE OF A DEADLY WEAPON

Defendants JAIDEN CARUSO and KODY HARLAN, did willfully, unlawfully, feloniously and with malice aforethought, kill MATTHEW MINKLER, a human being, with use of a deadly weapon, to wit: a firearm, by shooting at and/or into the head and/or body of the said MATTHEW MINKLER, the said killing having been (1) willful, deliberate and premeditated, and/or (2) committed during the perpetration or attempted perpetration of a robbery, the Defendant(s) being criminally liable under one or more of the following principles of criminal liability, to wit: (1) by directly committing this crime; and/or (2) by aiding or abetting in the commission of this crime, with the intent that this crime be committed, by counseling, encouraging, hiring, commanding, inducing and/or otherwise procuring the other to commit the crime; and/or (3) pursuant to a conspiracy to commit this crime, with the intent that this crime be committed, Defendants aiding or abetting and/or conspiring by Defendants acting in concert throughout.

COUNT 2 - ROBBERY WITH USE OF A DEADLY WEAPON

Defendants JAIDEN CARUSO and KODY HARLAN, aka, Kody W. Harlan did willfully, unlawfully, and feloniously take personal property, to wit: a wallet and contents, from the person of MATTHEW MINKLER, or in his presence, by means of force or violence, or fear of injury to, and without the consent and against the will of MATTHEW MINKLER, with use of a deadly weapon, to wit: a firearm, Defendant using force or fear to obtain or retain possession of the property, to prevent or overcome resistance to the taking of the property, and/or to facilitate escape; the Defendant(s) being criminally liable under one or more of the following principles of criminal liability, to wit: (1) by directly committing this crime; and/or (2) by aiding or abetting in the commission of this crime, with the intent that this crime be committed, by counseling, encouraging, hiring, commanding, inducing and/or otherwise procuring the other to commit the crime; and/or (3) pursuant to a conspiracy to commit this crime, with the intent that this crime be committed, Defendants aiding or abetting and/or conspiring by Defendants acting in concert throughout.

///

COUNT 3 - ACCESSORY TO MURDER WITH USE OF A DEADLY WEAPON

Defendant KODY HARLAN, aka, Kody W. Harlan, did willfully, unlawfully, and feloniously, after the commission of a murder with use of a deadly weapon, a felony, conceal and/or destroy and/or aid in the destruction or concealment of material evidence, to wit: the body of MATTHEW MINKLER and/or the crime scene, with the intent that JAIDEN CARUSO might avoid or escape arrest, trial, conviction, and/or punishment, having knowledge that JAIDEN CARUSO had committed the murder and/or was liable to arrest therefore.

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

BY /s/GIANCARLO PESCI
GIANCARLO PESCI
Chief Deputy District Attorney
Nevada Bar #7135

Names of witnesses known to the District Attorney's Office at the time of filing this Information are as follows:

NAME	ADDRESS
AMEZCUA, L.	HPD P#2395
CALVANO, N.	HPD P#1339
COCHRAN, K.	HPD P#2390
CONDRATOVICH, M.	HPD P#924
CUSTODIAN OF RECORDS	CCDC
CUSTODIAN OF RECORDS	CCME
CUSTODIAN OF RECORDS	HENDERSON DETENTION CENTER
CUSTODIAN OF RECORDS	HENDERSON POLICE DEPARTMENT
CUSTODIAN OF RECORDS	HENDERSON POLICE DISPATCH
CUSTODIAN OF RECORDS	HENDERSON POLICE RECORDS
FRESHOUR, JACY	UNKNOWN ADDRESS

HIGGINS, ANNE	UNKNOWN ADDRESS
HONAKER, JAMIE	CCDA INVESTIGATOR
HORNBACK, J.	HPD P#1826
KNOX, ANGELINA	UNKNOWN ADDRESS
LEON, RUTH	CCDA INVESTIGATOR
LIPPISCH, K.	HPD P#1710
MANCUSO, O.	HPD P#2382
MBOGO, REXVIN	UNKNOWN ADDRESS
MEADOWS, TRACEO	UNKNOWN ADDRESS
METHVIN, GHUNNER	UNKNOWN ADDRESS
MINKLER, STEVEN	c/o CCDA VWAC, 200 LEWIS AVE., LVN
NEWBOLD,	HPD P#1951
NICHOLS, W.	HPD P#1242
OLIVER, ALARIC	2267 MILLBRAE DR., HENDERSON, NV
OSURMAN, CHARLES	UNKNOWN ADDRESS
PLANELLS, NATHANIEL	UNKNOWN ADDRESS
PRENTISS, KRISTIN	UNKNOWN ADDRESS
ROQUERO, DR. LEONARD	CCME, 1704 PINTO LN., LVN
SHANKIN, JAMIE	9580 SUMMERSWEET CT., LVN
SPANGLER, J.	HPD P#1211
STAUFFENBERG, PATRICK	UNKNOWN ADDRESS
THOMPSON, KAYMARI	2615 W. GARY AVE. #2050, LVN
TROIANO, JOSEPH	UNKNOWN ADDRESS
VALENTINE, SAMANTHA	c/o CCDA VWAC, 200 LEWIS AVE., LVN

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HPD EV#1812238
(TK)

K. RYAN HELMICK, ESQ
Nevada Bar #12769
RICHARD HARRIS LAW FIRM, LLC.
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Las Vegas, NV 89101
Attorney for Defendant
Ryan@richardharrislaw.com

EIGTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, vs. KODY HARLAN, Defendant.	Case No: C-18-333318-2 Dept No: 3

DEFENDANT HARLAN'S MOTION TO SEVER OR IN THE ALTERNATIVE MOTION TO DEEM STATEMENTS OF THE CO-DEFENDANT INADMISSABLE

COMES NOW, Defendant KODY HARLAN, by and through his attorney of record, K. RYAN HELMICK, with the RICHARD HARRIS LAW FIRM, LLC., does hereby move this Honorable Court to sever Mr. Harlan's ("Harlan"), trial from that of his co-defendant Caruso, or in the alternative deem the statements of Harlan's co-defendant inadmissible.

Dated this 6 day of April 2019.

RICHARD HARRIS LAW FIRM, LLP.

K. RYAN HELMICK, ESQ.
Nevada Bar No. 12769
801 S. 4th St.
Las Vegas, Nevada 89101
(702) 333-3333
Attorney for Defendant

NOTICE OF MOTION

The above-referenced matter is to be placed on calendar on the _____ day of _____, 2019, at the hour of_____ a.m. in Department____.

CLERK OF THE COURT

By:

DATED this 8 day of April, 2019.

RICHARD HARRIS LAW FIRM, LLP.

K. RYAN HELMICK, ESQ.
Nevada Bar No. 12769
801 S. 4th St.
Las Vegas, Nevada 89101
(702) 333-3333
Attorney for Defendant

PROCEDURAL HISTORY

On July 9, 2018, Harlan was bound over to the District Court after his pre-liminary hearing. He was charged by way of Information with the following counts: 1) Robbery With the Use of a Deadly Weapon, 2) Murder With the Use of a Deadly Weapon and 3) Accessory to Murder With Use of a Deadly Weapon. On July 18, 2018, Harlan entered a plea of Not Guilty. This counsel substituted in as attorney of record on March 29, 2019. A jury trial is presently set to commence May 13, 2019. This motion follows.

FACTS

On June 8, 2018, my client Mr. Kody Harlan (Harlan) was at 2736 Cool Lilac house. He was there with co-defendant Jaiden Caruso, Matthew Minkler, Kymani Thompson, Alaric Oliver, Traceo Meadows and a few others. While they are at this house, Harlan as well as Caruso and Minkler were

smoking marijuana and taking Xanax. (Preliminary Hearing Transcript 35, 39, 41, 53; hereinafter PHT). While they are there, Caruso had a revolver handgun that he is taking the bullets in and out and "dry firing" the gun. (PHT 45, 46, 75). Specifically, Caruso removed all the bullets except for one and then aimed the gun at nearly everyone in the room and squeezed the trigger. (Ghunner Methvin Interview, P. 30-31 of Det. Nichols report). At one-point Caruso shoots a bullet into the ceiling. (PHT 45-46). A little bit later in the afternoon, Minkler had possession of Caruso's revolver which he was just observing. (Methvin Interview, P.32, Det. Nichols Report). Minkler then sets the gun down on the kitchen counter. (Id). After Minkler sets the gun down, Caruso picks up the gun, points it at Minkler and shoots him. (Id).

At the time Minkler is shot, Harlan was on the couch basically sleeping. (PHT 53-54). This was corroborated through multiple witness statements during their interviews. Methvin stated that "Kody was laying on the couch almost passed out from the Xanax when Caruso fired the first shot into the ceiling (Methvin Interview, P.33 of Det. Nichols Report). Harlan's demeanor only became more lethargic as Oliver stated, "Harlan was sleeping at the time Minkler was shot and as soon as he heard the bang he popped up." (Thompson Interview, P.39 of Det. Calvano's Report).

Shortly after Minkler is killed by Caruso, videos of Minkler deceased were taken. The videos were taken by Caruso from his cell phone. (PHT 172, 174-175). In one video Caruso says "Bro, **"I"** just caught a body." (PHT 172) (Emphasis added). Caruso then calls Methvin's phone in which Thompson answers and Caruso tells Thompson that "**He** just killed Matt bro," "**I** killed him bro, **I** shot him." (Thompson Interview P. 39, Det. Calvano's Report) (Emphasis added). Caruso also tells his other friend Nathaniel Planells that "**He** just caught a body" and sent him a video of the deceased. (See Nathan Planells Audio Interview- not transcribed at this time) (Emphasis added). Even after the shooting when Traceo Meadows arrives, Harlan was still in some type of drugged out state where "he couldn't even comprehend, like he didn't even know what was going on, he was just standing there." (Traceo Meadows Interview, P. 19).

Later that night Harlan and Caruso are arrested. During Caruso's first interview with Det. Nichols, he literally tries to pin every aspect of the murder on Harlan because Harlan was a "lesser person" and "homeless." (PHT 192). Even after Caruso is confronted with the videos from his cell phone showing that he killed Minkler he still tries to pin the taking of Minkler's wallet and phone on Harlan. (Jaiden Caruso Interview #2 (Audio) 20:25).

POINTS AND AUTHORITIES

ARGUMENT

1. HARLAN'S CASE REQUIRES SEVERANCE TO PROTECT HIM FROM UNFAIR PREJUIDICE, OR IN THE ALTERNATIVE, THE CO-DEFENDANT'S STATEMENTS SHOULD BE SUPRESSED SO AS TO NOT FORCE HARLAN TO DEFEND AGAINST EVIDENCE THAT WOULD BE INADMISSABLE AGAINST HIM AT A SEPARATE TRIAL.

A. Harlan's Case Requires Severance In Order To Protect Him From Unfair Prejudice

The Nevada Revised Statutes authorize severance, and state in pertinent part as follows:

> If it appears that a Defendant or the State of Nevada is prejudiced by a joinder of offenses or of Defendants in an indictment or information, or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of Defendants or provide whatever other relief justice requires.

NRS 174.165(1) (emphasis added). Severance of defendants is required "if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants or prevent the jury from making a reliable judgment about guilt or innocence." Marshall v. State, 118 Nev. 642, 647 (2002) (*quoting* Zafiro v. United States, 506 U.S. 534, 113 S.Ct. 933 (1993)). The decisive factor in any severance analysis remains prejudice to the defendant. Id. Thus, courts should grant severance when joined defendants have "conflicting and irreconcilable defenses and there is danger that the jury will unjustifiably infer that this conflict alone demonstrates that both are guilty." Id. at 647 (*quoting* Jones v. State, 111 Nev. 848, 854, 899 P.2d 544, 547 (1995)). While Defendant Harlan is mindful that joinder promotes judicial economy and efficiency as well as consistent verdicts and is preferred, it is preferred only *as long as it does not compromise a defendant's right to a fair trial.* Id.; *see also*

Brown v. State, 114 Nev. 1118, 1126, 967 P.2d 1126, 1131 (1998); Jones, 111 Nev. at 853–54, 899 P.2d at 547; Zafiro v. United States, 506 U.S. 534, 537, 113 S.Ct. 933, 122 L.Ed.2d 317 (1993). Additionally, despite the concern for efficiency and consistency, the district court has "a continuing duty at all stages of the trial to grant a severance if prejudice does appear." Id.[1]

Furthermore, conflicting defenses may cause prejudice warranting severance if the defendant seeking severance shows that the codefendants have "conflicting and irreconcilable defenses and that there is a danger that the jury will unjustifiably infer that this conflict alone demonstrates that both are guilty." Chartier v. State, 124 Nev. 760, 765 (2008) (reversing defendant's judgment of conviction where the defendant's theory of defense was that he was not

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[1] The issue of antagonistic defenses is explored in Zafiro v. United States, where the United States Supreme Court defined the right to trial severance under Federal Rule of Criminal Procedure 14. Zafiro v. United States, 506 U.S. 534, 537, 113 S.Ct. 933, 122 L.Ed.2d 317 (1993). Rule 14 is essentially the same as NRS 174.165(1), providing that a court may grant a severance of defendants or other relief if it appears that a defendant is prejudiced by a joinder of defendants for trial. Marshall v. State, 118 Nev. 642, 647 (2002) (*quoting* Zafiro v. United States, 506 U.S. 534, 113 S.Ct. 933 (1993)).

In Zafiro, Zafiro and her co-defendants challenged their convictions based upon the misjoinder by the District Court. Zafiro v. United States, 506 U.S. 534, 113 S.Ct. 933 (1993). The Supreme Court upheld the trial court's decision to have one trial with the multiple defendants. The Court declined to adopt a bright line rule allowing for severance based upon inconsistent defenses. Instead, the Court addressed those occasions when a trial court should sever defendants.

> A district court should grant a severance . . . if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants or prevent the jury from making a reliable judgment about guilt or innocence. Such a risk might occur when evidence that the jury should not consider against a defendant and that would not be admissible if a defendant were tried alone is admitted against a co-defendant. For example, evidence of a co-defendant's wrongdoing in some circumstances erroneously could lead a jury to conclude that a defendant was guilty. When many defendants are tried together in a complex case and they have markedly different degrees of culpability, this risk of prejudice is heightened. . . Evidence that is probative of a defendant's guilt but technically admissible only against a co-defendant also might present a risk of prejudice. . . The risk of prejudice will vary with the facts in each case, and district courts may find prejudice in situations not discussed here.

Id. at 539.

involved in the crimes at any stage and that the co-defendant acted alone, but the co-defendants theory of defense was that the defendant was the mastermind who was present at the scene and was the attacker). The Chartier Court found that Chartier suffered significant prejudice when his co-defendant implicated him as part of a conspiracy. Id.

As demonstrated above, this Court must sever Harlan's case from that of his co-defendant. Harlan and Caruso have mutually exclusive, antagonistic defenses, which are revealed in the police reports, witness statements and pre-liminary hearing transcripts. The witness statements specifically reveal the antagonistic nature of the various defenses for the co-defendant.

We know beyond a shadow of a doubt that Caruso killed Minkler and did so alone. The video from his own phone shows us that. Caruso doesn't say "We"….. "caught a body," he says "I" …"caught a body." The message he sent to Nathan Planells also says, "He just caught a body." The phone call to Thompson says, "He just killed Matt," "I killed him," "I shot him." These statements by Caruso right after the murder indicate he was acting alone. Harlan was laying down on the couch sleeping when Caruso shot and killed Minkler. Caruso was the only one playing this modified game of Russian Roulette where he would empty all but one bullet then point the gun at people in the room including himself and squeeze the trigger. There was no testimony that Harlan was doing this. Caruso's actions and his actions alone were what led to Minkler being killed.

Counsel is sure that it is obvious to the Court that Harlan's defense at trial is that he had nothing to do with Minkler's death as he was laying down on the couch passed out at the time. The State will surely argue this Felony Murder theory wherein the murder was a consequence of some intended robbery. The problem with that theory is that it is solely based on the speculation of one witness, Kymani Thompson. Thompson stated at the prelim that I just told them what I think happened," and that "he wasn't there," so he didn't "know." (PHT 107). That is the only string that the State has too tie Caruso and Harlan together, but Counsel submits that the string is that of a thread. However, if Harlan is faced to stand trial sitting next to Caruso, that thread, at least in the

jury's eyes, will become an illusion of a steel chain, binding the two together. We would be trying Harlan along side a confessed killer-someone who video taped the deceased, someone who bragged about it to others- the jury will surely hate Caruso. And that hate against Caruso will infect Harlan's case by way of prejudice.

Lastly, Counsel submits that the Defense's between these two defendants couldn't be more different. The Defense will surely be pointing the finger at Caruso many times during this trial to show that he committed this heinous act as a result of his reckless behavior. Counsel can envision that he may feel at some points during this trial that he will be sitting at the prosecutors table. When you have a complex case like this one where the roles of the Defendant's are so uniquely different it is hard to just allow justice to proceed in the normal fashion with one trial. The stakes are far to great here. Harlan's right to a fair, partial and un-biased trial is at a severe risk of being taken away from him if he is forced to try this case along side Caruso.

B. In The Alternative, The Co-Defendants' Statements Should Be Suppressed So As To Not Force Harlan To Defend Against Evidence That Would Be Inadmissible Against Him At A Separate Trial

Again, severance of defendants may by required when evidence that the jury should not consider against a defendant and that would not be admissible if a defendant were tried alone, is admissible in a joint trial, or when essential exculpatory evidence that would be available to a defendant tried alone were unavailable in a joint trial, handicapping a defendant in presenting a defense theory. See Zafiro v. U.S., 506 U.S. 534 (1993), Buff v. State, 114 Nev. 1237, 1244-45 (1998). A defendant's right of cross-examination, secured by the Sixth Amendment's Confrontation Clause, is violated when, at a joint trial, the trial court admits a non-testifying co-defendant's confession inculpating the defendant, regardless of jury instructions admonishing jurors to disregard the co- defendant's confession in determining the defendant's guilt. Bruton v. U.S., 391 U.S. 123, 137 (1968). The Court explained:

> [T]here are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of the failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored. Such a context is presented here, where the powerfully incrimination extrajudicial statements of a co-defendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial. Not only are the incriminations devastating to the defendant, but their credibility is inevitably suspect, a fact recognized when accomplices do take the stand and the jury is instructed to weigh their testimony carefully given the recognized motivation to shift blame onto others. The unreliability of such evidence is intolerably compounded when the alleged accomplice, as here, does not testify and cannot be tested by cross-examination. Id.

In Bruton, the Court found that the co-defendant's confession constituted such a "powerfully incriminating extrajudicial statement," and that its introduction into evidence, insulated from cross-examination, violated Bruton's Sixth Amendment rights. Id. at 135. The Court also found that the confession was so prejudicial that a limiting instruction was not enough to shield the defendant from the prejudicial effects of a co-defendant's confession. Id. Under Bruton, because joinder of defendants for the purpose of obtaining the overlapping consideration of evidence or use of innuendo based on the strength of one case is fundamentally unfair, at a minimum, the statements of the co-defendants should be suppressed. Id. A joint trial will necessarily force Harlan to defend against evidence not otherwise admissible against him.

Caruso, even after being confronted by the videos he took from his phone showing that he committed the murder tells Det. Nichols that Harlan was the one who took Minkler's wallet and phone. Just a little earlier in the day during his first interview with the detective he completely lied throughout the entire thing and tried to pin it all on Harlan because Harlan life wasn't a meaningful as his. (Caruso Interview #2 (Audio), 11:07). We know Caruso is still lying even in this second interview because he tells the detective that Kymani Thompson shot the bullet into the ceiling when all the other people there said it was him. (Id at 8:10). Det. Nichols goes so far as to call Caruso a "pathological liar." (Id at 22:15).

Caruso says other things that if allowed in would severely prejudice Harlan such as "stolen cars are Harlan's way of life." (Id at 30:25). Additionally, he states that Harlan ""probably" used some of the money he stole from Minklers wallet to buy some shoes at the mall." A statement based on pure speculation and made to shift culpability to anyone but him.

Courts have recognized that "a great disparity in the amount of evidence introduced against joined defendants may, in some cases, be grounds for severance." U.S. v.Patterson, 819 F.2d 1495, 1503 (9th cir. 1987). The **'spillover'** or 'rub-off' theory involves the questions of whether a jury's unfavorable impression of [one] defendant will affect others. Lisle v. State, 113 Nev. 679, 689 (1997) (overruled on other grounds by Middleton v. State, 114 Nev. 1089, 1117 (1998) (*quoting* State v. Rendon, 715 P.2d 777, 782 (Ariz. App. 1986)) (Emphasis added). To test this, courts are concerned with whether the jury can keep separate the evidence that is relevant to each defendant and render a fair and impartial verdict. Rendon, at 782; Lisle, at 689 ("the ultimate issue is 'whether a jury can reasonably be expected to compartmentalize the evidence as it relates to separate defendants.'") (*quoting* Jones v. State, 111 Nev. 848, 854 (1995)). When defendants are tried together, and they have markedly different degrees of culpability, this risk of prejudice is heightened. *See* Zafiro, 506 U.S. at 540. Jurors cannot be reasonably expected to compartmentalize the evidence in this case, and the co-defendant's statements should be suppressed. Here, Harlan will be unfairly prejudiced by the evidence against Caruso.

Additionally, simple redaction of a co-defendant's statements has been disapproved by the United States Supreme Court. Gray v. Maryland, 523 U.S. 185, 118 S. Ct. 1151 (1999). In Gray, the Court addressed a situation where a co-defendant's confession had been redacted but, as it demonstrated obvious indication of deletion, it still directly referred to the existence of a non-confessing defendant, thereby linking the defendant to the crime. The Court stated, "Unless the prosecutor wishes to hold separate trials or to use separate juries or to abandon use of the confession, he must redact the confession to reduce or to eliminate the special prejudice that the

Bruton Court found." Id. at 192, 118 S. Ct. at 1155. Cf. Richardson v. Marsh, 481 U.S. 200, 211, 107 S. Ct. 1702 (1987) (admission at a joint trial of co-defendant's confession that is redacted to omit all reference to defendant's existence, does not violate defendant's confrontation rights).

The Nevada Supreme Court has also recognized that redaction or limiting instructions are not always enough to cure the prejudice to a defendant from the admission of confessions of a non-testifying co-defendant. Stevens v. State, 97 Nev. 443, 444, 634 P.2d 662 (1981). In Stevens, although the State had excised all references to defendant Stevens before admitting the non-testifying co-defendant's confession at a joint trial, the Court reversed Stevens' conviction pursuant to the Bruton rule. Id. The Court reasoned:

> It appears likely that the jury read the appellant's [Stevens] name into the blanks in each of the [co-defendant] Oliver's statements introduced at the trial below. The circumstantial links between Oliver and Stevens, referred to by the prosecutor, and the fact that Oliver and appellant were being tried together made it not only natural, but seemingly inevitable that the jury would infer appellant to be the person referred to in the blanks of Oliver's statement.

Id. at 444.

The Nevada Supreme Court again addressed the issue in Ducksworth State, 113 Nev. 780, 942 P.2d 157 (1997). Here the Supreme Court held that the district court erred in refusing to sever defendant Martin's trial from his co-defendant Ducksworth's. Id. "The evidence against Martin was **largely circumstantial and was much less convincing than was the evidence against Ducksworth**. Id. (Emphasis added). Most damaging to Martin was the testimony of Crawl and Al concerning Ducksworth's confessions which mentioned, both directly and by inference that Ducksworth acted with an accomplice. Id. at 794, 942 P.2d at 166. Because Ducksworth did not testify, the introduction of his confession, violated co-defendant Martin's Sixth Amendment rights. Id. at 795, 942 P.2d at 167. The evidence against Harlan, like Martin, supra, is largely circumstantial and based on pure speculation. As such, the evidence against Harlan is much less convincing than that against his co-defendant Caruso.

If the State argues that the statements can be "sanitized" or redacted in order to prevent the co-defendants' statement from directly implicating Harlan, it would still dramatically and completely destroy Harlan's right to confront his accusers. Further the statements of the co-defendant, even if redacted, would still imply that the other person that they are sitting in trial with, are the other people to whom they are referring to. The Jury would quickly pick up on the fact that there are holes in the statement and start to fill the holes in on their own.

There are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant that the practical and human limitations of the jury system cannot be ignored. See Gray v. Maryland, 523 U.S. 185, 190, 118 S.Ct. 1151, 1154 (1998); (*citing* Bruton v. United States, 391 U.S. 123,135-36, 88 S.Ct. 1620, 1627-28 (1968)). Such a context is presented here, where the powerfully incriminating extrajudicial statements of a codefendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial. Id. Not only are the incriminations devastating to the defendant, but their credibility is inevitably suspect . . . The unreliability of such evidence is intolerably compounded when the alleged accomplice, as here, does not testify and cannot be tested by cross-examination. Id.

Attempts to get around the holding of Bruton by simply removing a codefendants name and leaving a blank space or inserting 'we' or 'they' or other pronoun is a violation under Bruton. The Nevada Supreme Court considered the constitutionality of introducing a non-testifying codefendant's confession in which references to the appellant were simply redacted with a blank space, as is the case here. Stevens v. State, 91 Nev. 443, 444 634 P.2d 662, 663 (1981). Given that the appellant in Stevens had been jointly tried with the non-testifying codefendant, the Supreme Court concluded that it was "not only natural, but seemingly inevitable, that the jury would infer appellant to be the person referred to in in the blanks in [the codefendant's] statements. Id. Consequently, the Supreme Court determined that a Bruton violation had occurred. Id. at 445, 634

P.2d 662, 634, *cf.* Gray v. Maryland, 523 U.S. 185, l95-96, 118 S.Ct. 1151 (1998) (*finding* a Bruton violation under a similar fact pattern); *see also* Ducksworth v. State, l 14 Nev. 951 (1998) (wherein the Nevada Supreme Court was concerned with statements made by one codefendant that either implicitly or specifically referred to the other codefendant).

If Caruso's statement is allowed in, Harlan's defense would now, not only have to hold the State to its burden of proof beyond a reasonable doubt, but with the co-defendants' statements being allowed into evidence, Harlan would have to battle any information that the co-defendant stated to the police after the fact. Harlan would not have an opportunity to explore the truthfulness of those statements without the co-defendant violating their own Fifth Amendment Rights. As a result, Harlan's ability to get a fair trial if any portion of the co-defendants' statements are used is non-existent.

CONCLUSION

Under the authority set forth above, this Court must sever Harlan's case from co-defendant Caruso.

In the alternative, any mention of Harlan and his purported role in the charged crimes as told by Caruso is not something that can be redacted from their statements without betraying an obvious indication of deletion. Accordingly, absent an agreement by prosecutors not to use Caruso's statements at the upcoming trial of this matter, the suppression of the co-defendant's statements sought herein is required.

Dated this 8 day of April 2019.

RICHARD HARRIS LAW FIRM, LLP.

K. RYAN HELMICK, ESQ.

Nevada Bar No. 12769
801 S. 4th St.
Las Vegas, Nevada 89101
(702) 333-3333
Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on the 8 day of April, 2019, I served a true and correct copy of the foregoing **DEFENDANT HARLAN'S MOTION TO SEVER OR IN THE ALTERNATIVE MOTION TO DEEM STATEMENTS OF THE CO-DEFENDANT INADMISSABLE**, addressed to the following counsel of record at the following address(es), as follows:

X E-MAIL on April 8, 2019, by emailing the address below:

Giancarlo Pesci
CLARK COUNTY DISTRICT ATTORNEY'S OFFICE
200 E. Lewis Ave.
Las Vegas, NV 89155
giancarlo.pesci@clarkcountyda.com

An employee at RICHARD HARRIS LAW FIRM

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Steven D. Grierson
CLERK OF THE COURT

OPPS

STEVEN B. WOLFSON
Clark County District Attorney
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DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, -vs- KODY HARLAN, #5124517, Defendant.	CASE NO: C-18-333318-2 DEPT NO: III

STATE'S OPPOSITION TO DEFENDANT HARLAN'S MOTION TO SEVER OR IN THE ALTERNATIVE MOTION TO DEEM STATEMENTS OF THE CO-DEFENDANT INADMISSABLE

DATE OF HEARING: 4/23/19
TIME OF HEARING: 9:00 A.M.

COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, District Attorney, through GIANCARLO PESCI, Chief Deputy District Attorney, and hereby submits the attached Points and Authorities in Opposition to Defendant Harlan's Motion to Sever or in the Alternative Motion to Deem Statements of the Co-Defendant Inadmissable.

This Opposition is made and based upon all the papers and pleadings on file herein, the attached points and authorities in support hereof, and oral argument at the time of hearing, if deemed necessary by this Honorable Court.

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STATEMENT OF THE CASE

On June 13, 2018, Kody Harlan ("Harlan") was charged by way of Criminal Complaint with one (1) count of Robbery (Category B Felony) and one (1) count of Accessory to Murder with Use of Deadly Weapon (Category C Felony) in Henderson Justice Court. On June 20, 2018, an Amended Criminal Complaint was filed adding a felony murder theory to the count of Murder with Use of Deadly Weapon against co-defendant Jaiden Caruso ("Caruso") and a deadly weapon enhancement to the count of Robbery.

On July 9, 2018, a preliminary hearing was held and the State filed a Second Amended Criminal Complaint charging Harlan with one (1) count of Murder with Use of Deadly Weapon, asserting various theories of liability against both Defendants, specifically charging a theory of felony murder by alleging Defendants committed the murder during the perpetration or attempted perpetration of a robbery. The Justice Court held Caruso and Harlan to answer all charges in District Court.

On July 18, 2018, Harlan was arraigned, pled not guilty, and invoked his right to jury trial within sixty (60) days. On July 31, 2018, Harlan waived his right to trial within sixty (60) days. Jury trial is currently scheduled for May 13, 2019, with a respective Calendar Call date of May 2, 2019.

On August 29, 2018, Caruso filed a Petition for Writ of Habeas Corpus. The State filed a Return to the Writ on September 11, 2018. The Court subsequently denied Caruso's writ on September 13, 2018. The same day, Harlan filed his Petition for Writ of Habeas Corpus. The State oppossed and the Court denied Harlan's writ as well. On April 8, 2019, Defendnt Harlan filed the instant motion severe and/or suppress. The State opposes as follows.

STATEMENT OF FACTS

On June 7, 2018, Caruso, Harlan, Alaric Jordan ("Jordan"), Traceo Meadows ("Meadows"), and Kymani Thompson ("Thompson") went to an abandoned house located at 2736 Cool Lilac in Henderson to hang out. "Preliminary Hearing Transcript" PHT, 21-23; 135.

The following day there was a conversation about "matching" and doing a "lick,[1]" both of which Caruso and Harlan were present for and did not denounce. PHT, 71-73; 84-87. Specifically, Caruso and Harlan were involved in the conversation regarding a lick. PHT, 87. Roughly an hour later, Caruso and Harlan left the house and returned with Matthew Minkler ("Minkler"), who brought marijuana. PHT, 74; 90; 110. Everyone continued to hang out, drink alcohol, and smoke marijuana. PHT, 26.

While at the house, Caruso possessed a black revolver that he occasionally played, at one point shooting the firearm into the ceiling. PHT, 27. After Caruso fired the gun, Thompson fled the house with Gunner Methvin ("Methvin"). PHT 83. Harlan was also in possession of a handgun. PHT, 27-28. At one point, Minkler asked to see Caruso's gun, looked at it, and placed it back on the kitchen counter. PHT, 28-29. Caruso then grabbed the gun and shot Minkler one time, resulting in Minkler's death. PHT, 29. Shortly after, Caruso called Methvin and mentioned something about a "body." PHT, 102.

Later that day, Caruso and Harlan were arrested after they fled from a Mercedes Benz during a traffic stop. PHT, 119-120. Police recovered a blue wallet from the back seat of the Mercedes. PHT, 134-135. The wallet contained only a Silverado High School identification card in Minkler 's name. PHT, 135.

Police subsequently recovered a Samsung phone at the Cool Lilac residence that was consistent with the type of cell phone owned by Minkler. PHT, 135-136. Minkler's deceased body was found inside of a closet with the words "Fuck Matt" spray painted on the exterior of the door. PHT, 155. When questioned by police about Minkler's murder, Thompson stated he believed it was the result of a robbery. PHT, 107. Caruso told police that Harlan stole Minkler's money and that they used it to shop for various items including shoes. PHT, 177-178.

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[1] Thompson refers to a "lick" as a "robbery." PHT, 84.

POINTS AND AUTHORITIES

INTRODUCTION

NRS §173.135 allows for two or more defendants to be charged under the same indictment or information if they participated in the same criminal conduct. Persons who have been jointly indicted should be tried jointly, absent compelling reasons to the contrary. Jones v. State, 111 Nev. 848, 853, 899 P.2d 544 (1995).

NRS §174.165, however, provides that "[i]f it appears that a defendant or the State of Nevada is prejudiced by a joinder of offenses or of defendants in an indictment or information . . . the court may . . . grant a severance of defendants or provide what other relief justice requires." In order to obtain a severance, a defendant must demonstrate that substantial prejudice would result from a joint trial.

The decision to sever is left to the discretion of the trial court and such decision will not be reversed absent an abuse of discretion. Amen v. State, 106 Nev. 749, 801 P.2d 1354 (1990), overruled on other grounds by Grey v. State, 124 Nev. 110, 117–18, 178 P.3d 154, 160 (2008). Broad allegations of prejudice are not enough to require a trial court to grant severance. United States v. Baker, 10 F.3d 1374, 1389 (9th Cir. 1993), cert. denied, 513 U.S. 934, 115 S. Ct. 330 (1994), overruled on other grounds by United States v. Nordby, 225 F.3d 1053 (9th Cir. 2000). Finally, even if prejudice is shown, the trial court is not required to sever; rather, it must grant relief tailored to alleviate the prejudice. See, e.g., Zafiro v. United States, 506 U.S. 534, 540-41, 113 S. Ct. 933 (1993).

Within the federal system, and specifically the Ninth Circuit, the presumption is heavily in favor of joint trials. "[C]o-defendants jointly charged, are, prima facie, to be jointly tried." United States v. Gay, 567 F.2d 916, 919 (9th Cir.), cert. denied, 435 U.S. 999, 98 S. Ct. 1655 (1978); United States v. Silla, 555 F.2d 703, 707 (9th Cir. 1977) ("compelling circumstances" are generally necessary to show need for separate trials). The trial court has the broad discretion to join or sever trials and severance is not required unless a joint trial would be manifestly prejudicial. See Gay, 567 F.2d at 919. Federal appellate courts review a denial of a motion to sever for abuse of discretion and "[t]o satisfy this heavy burden, an appellant must

show that the joint trial was so prejudicial as to require the exercise of the district judge's discretion in only one way: by ordering a separate trial." United States v. Ford, 632 F.2d 1354, 1373 (9th Cir. 1980), cert. denied, 450 U.S. 934, 101 S. Ct. 1399 (1981), overruled on other grounds by United States v. DeBright, 730 F.2d 1263 (9th Cir. 1984).

In both the state and federal system, the general rule favoring joinder has evolved for a specific reason—there is a substantial public interest in joint trials of persons charged together because of judicial economy. Jones, 111 Nev. at 854, 899 P.2d at 547. Joint trials of persons charged with committing the same offense expedites the administration of justice, relieves trial docket congestion, conserves judicial time, lessens the burden on citizens called to sacrifice time and money while serving as jurors, and avoids the necessity of calling witnesses more than one time. Id. at 853-54, 899 P.2d at 547, see also United States v. Brady, 579 F.2d 1121 (9th Cir. 1978), cert. denied, 439 U.S. 1074, 99 S. Ct. 849 (1979). Therefore, the legal presumption is in favor of a joint trial among co-defendants.

ARGUMENT

1. Defendant Harlan Is Not Entitled To a Separate Trial Because of Alleged Unfair Prejudice

Defendant Harlan contends that his trial must be severed from co-defendant Caruso based on alleged, "mutually exclusive, antagnostic defenses. . ." (Defendant's Motion, Page 6, Line 6). Defendant Harlan's vague claim of "antagonistic defenses" is an insufficient legal basis upon which to grant severance. Harlan erroneously asserts that he and co-defendant Caruso have antagonistic defenses because, "Caruso's actions and his actions alone were what led to Minkler being killed. Counsel is sure that it is obvious to the Court that Harlan's defense at trial is that he had nothing to do with Minkler's death as he was laying down on the couch passed out at the time." (Defendant's Motion, Page 6, Lines 19-21). However, Harlan skirts the legal definition of antagonistic or mutually exclusive defenses and the showing that must be made to justify severance. Severance is not warranted or justified simply because each defendant seeks to blame the other for the crime. Marshall v. State, 118 Nev. 642, 56 P.3d 376 (2002). In Marshall, co-defendants Marshall and Currington were tried and convicted

together of first degree murder, robbery, and conspiracy to commit robbery. At trial, Marshall's strategy was to exclusively blame Currington; Currington's strategy was to blame Marshall. Id. at 644-45, 56 P.3d at 377-78.

On appeal, Marshall claimed that the district court erred in not severing his trial from Currington's. Id. at 645, 56 P.3d at 378. He maintained that he and Currington had "antagonistic defenses" in that each argued that the other was responsible for the murder. Id., 56 P.3d at 378. Marshall relied on the standard the Nevada Supreme Court articulated in Rowland v. State, 118 Nev. 31, 39 P.3d 114 (2002). In Rowland, the Nevada Supreme Court stated that "defenses must be antagonistic to the point that they are 'mutually exclusive' before they are to be considered prejudicial," and necessitate severance. Id. at 45, 39 P.3d at 122. The court further noted in Rowland that defenses are mutually exclusive when the core of the co-defendant's defense is so irreconcilable with the core of the defendant's own defense that the acceptance of the co-defendant's theory by the jury precludes acquittal of the defendant. Id. at 45, 39 P.3d at 123.

In Marshall, the Nevada Supreme Court expressed concern that the Rowland decision implied severance was justified in too broad of circumstances. The court explained the Rowland holding and limited the standard under which severance is appropriate. It stated:

> To the extent that this language suggests that prejudice requiring severance is presumed whenever acceptance of one defendant's defense theory logically compels rejection of another defendant's theory, it is too broadly stated. As we have explained elsewhere, where there are situations in which inconsistent defenses may support a motion for severance, the doctrine is a very limited one. A defendant seeking severance must show that the codefendants have conflicting and irreconcilable defenses and that there is a danger that the jury will unjustifiably infer that this conflict alone demonstrates that both are guilty. We take this opportunity to further clarify this issue.

Id. at 646, 56 P.3d at 378. The Court then explained the standard for severance.

> The decisive factor in any severance analysis remains prejudice to the defendant. NRS 174.165(1) provides in relevant part: "If it appears that a defendant . . . is prejudiced by a joinder . . . of defendants . . . for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires." Nevertheless, prejudice to the defendant is not the only relevant factor: a court must consider not only the possible prejudice to the defendant but also the possible prejudice to the State resulting from expensive, duplicative trials. Joinder promotes judicial economy and efficiency as well as consistent verdicts and is preferred as long as it does

> not compromise a defendant's right to a fair trial. Despite the concern for efficiency and consistency, the district court has a continuing duty at all stages of the trial to grant a severance if prejudice does appear. Joinder of defendants is within the discretion of the district court, and its decision will not be reversed absent an abuse of discretion. To establish that joinder was prejudicial requires more than simply showing that severance made acquittal more likely; misjoinder requires reversal only if it has a substantial and injurious effect on the verdict.

Marshall, 118 Nev. at 646-47, 56 P.3d at 378-79 (citations omitted).

Significantly, the Nevada Supreme Court specifically held that antagonistic defenses are a factor, but not, *in themselves*, sufficient grounds upon which to grant severance of defendants. Indeed, in Marshall, even though the defenses offered by Marshall and co-defendant Currington were antagonistic, the Nevada Supreme Court held that the joinder of the defendants at trial was proper. Id. at 648, 56 P.3d at 378. Finding Marshall's assertion that his and Currington's defenses were prejudicial by virtue of their antagonistic nature unpersuasive, the court explained that to prevail on the ground that severance was warranted, Marshall had to show that the "joint trial compromised a specific trial right or prevented the jury from making a reliable judgment about guilt or innocence." Id. at 648, 56 P.3d at 380. The court also noted that the State's case was not dependent on either defendant's statement and did not use joinder to unfairly bolster a marginal case. Id., 56 P.3d at 380. Moreover, the State argued both defendants were guilty and presented evidence to establish their separate guilt. Id., 56 P.3d at 380. The court affirmed Marshall's conviction.

The United States Supreme Court conducted a similar analysis in Zafiro v. United States, 506 U.S. 534, 113 S. Ct. 933 (1993). In that case, petitioners contended that it was prejudicial whenever two defendants each claim innocence and accuse the other of the crime. 506 U.S. at 538, 113 S. Ct at 938. The United States Supreme Court rejected this contention, holding that "mutually antagonistic defenses are not prejudicial per se." Id., 113 S. Ct. at 938. The Court explained that severance should only be granted if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants or prevent the jury from making a reliable judgment about guilt or innocence. Id. at 539, 113 S. Ct. at 938. It is not prejudicial for a co-defendant to introduce relevant, competent evidence that would be admissible against defendant at a severed trial. Id. at 540, 113 S. Ct. at 938. The Court also

noted that the trial court can cure any potential of prejudice by properly instructing the jury that it must consider the case against each defendant separately. See id. at 540-41, 113 S. Ct. at 939.

In the instant case, any incriminating statements to the police that blame each other for Matthew's death will not be introduced as that would violate Bruton, and as such, does not form a basis for severance. It is certainly possible that each defendant will opt to defend by accusing their co-defendant of killing Mathew. Under Marshall, however, this is an insufficient basis upon which to grant a severance in the case. Neither defendant can point to a particular trial right or prejudice they would suffer as a result of joinder. In fact, Harlan simply implies that severance would make acquittal more likely, which is, of course, not a proper legal basis for severance. See Marshall, 118 Nev. at 647, 56 P.3d at 379. At this juncture in the proceedings, Harlan has specifically indicated that, "Harlan's defense at trial is that he had nothing to do with Minkler's death as he was laying down on the couch passed out at th time." (Defendant's Motion, Page 6, Line 21). However, an inference or suggestion that the other co-defendant must be responsible is not adequate for severance. Indeed, such a suggestion is, actually, no more than a reasonable doubt defense that the State has not proven beyond a reasonable doubt that the particular defendant in question committed the homicide. Such a defense has been rejected as grounds for severance based on a mutual exclusivity argument. See United States v. Cruz, 127 F.3d 791, 800 (9th Cir. 1997), cert. denied, 522 U.S. 1097, 118 S. Ct. 896 (1998), abrogated on other grounds by United State v. Jimenez Recio, 537 U.S. 270, 123 S. Ct. 819 (2003).

Chartier v. State, 124 Nev. 760, 191 P.3d 1182 (2008), does not change this analysis. In that case, the Nevada Supreme Court held that the cumulative effect of the joint trial was not harmless because it had an injurious effect on the verdict as demonstrated by the conflicting and irreconcilable defenses in the case. 191 P.3d at 1186. The reversal was *not* based simply on the fact that the defendants blamed each other for the crime. The Chartier case did not overturn the Court's decision in Marshall. 191 P.3d at 1186. Rather, the Court distinguished Chartier from Marshall by highlighting how defendant Chartier was hindered in

his ability to present his defense based on the joint trial. *Id.* at 1187. Specifically, for example, the Court found that defendant Chartier was precluded from introducing into evidence his co-defendant's incriminatory wire-tapped conversations which prevented Chartier from presenting critical evidence to the jury as part of his theory of defense. *Id.* at 1187. Chartier would have been able to introduce evidence of Wilcox's wiretapped incriminating statements had the trials been severed. *Id.* The Court concluded that the jury was precluded from making a reliable judgment about Chartier's guilt or innocence because of Chartier's inability to present his full theory of the defense. *Id.*

Here, on the other hand, Defendant Harlan has not made any showing that he will be precluded from presenting his theory of defense. On the contrary, the defense that he was asleep on the couch when the shooting occurred is in no way precluded from being presented at a joint trial of the two co-defendants. Defendant Harlan has failed to articulate how he will be hindered in his ability to present evidence based on a joint trial. Instead, he simply concludes that his trial must be severed based on the idea that Defendant Caruso is the shooter. The Defendant acknowledges in his motion that he is tied to the murder via the felony-murder theory of robbery of the victim. Hence, he very well could have been sleeping when the shot was fired and still been vicariously liable for the shooting as part of the robbery. While Defendant Harlan can assert that such evidence is weak, this Court has already denied writs in this case alleging that there was insufficient evidence of a robbery. Whether it will be enough evidence is a question of fact for the jury and does not constitute a basis for severance.

In fact, this argument very much mirrors the Defendant's argument in his writ in which he asserted there was no evidence presented at the preliminary hearing that Minkler was the intended target of a robbery and that the State failed to establish he participated in the robbery or murder as he was "essentially asleep" when Caruso shot Minkler. (Defendant's Writ Petition, 7). However, as detailed in the State's Return to Caruso and Harlan's Petitions for Writ of Habeas Corpus, the totality of the evidence presented at the preliminary hearing clearly established probable cause for the robbery charge. Specifcally, witness Thompson indicated Caruso and Harlan had a conversation about doing a lick that day. When asked, Thompson

specifically defined a “lick” as a robbery. Approximately an hour after this conversation, Caruso and Harlan left the Cool Lilac residence and returned with Minkler. Shortly after arriving at the residence, Caruso shot and killed Minkler. Additionally, despite Harlan’s assertion that he was virtually asleep on the couch when Minkler was shot, testimony revealed that both Defendants were particularly busy post Minkler’s death.

In fact, both Defendants left the house without calling police. Defendants were apprehended later in the day after fleeing from a Mercedes during a traffic stop. Police recovered Minkler's empty wallet from the backseat of the vehicle, which constitutes the proceeds of the robbery. Defendant argues that Minkler’s wallet was merely abandoned in the back of the vehicle. However, Minkler consciously took his Samsung phone and marijuana inside of the house. It is improbable that Minkler would carry around an empty wallet with no money or legal identification and leave it in the back of the vehicle while consciously taking his other items. What is probable, however, is that Defendants robbed Minkler and took the money from his wallet. Detective Nichols also testified that video footage obtained during police investigation corroborated the defendants going shopping after Minkler’s death. Additionally, Minkler's deceased body was found inside of a closet inside the house. Notably, the words "Fuck Matt" were written on the outside of the closet Minkler was found in. This revealed that Minkler’s body was moved from the kitchen and that there was clearly no remorse for having killed him. Police also documented various cleaning agents at the residence, including a bottle of disinfectant wipes, suggesting efforts were made to clean the murder scene. As such, the State does not view the evidence as “thin” as the Defendant does and the Defendant’s view of the evidence as “thin” does not creat a need for severance.

Defendant’s argument of “spill over” also fails. The Defendant argues that the evidence is strong against Defendant Caruso and will spill over on to him, depriving him of a fair trial. However, the Defendant’s argument is flawed in that it fails to factor in the permissible admission of evidence under conspiracy liability, which he and his co-defendant are charged with. The law specifically allows for the consideration of acts of one defendant against another defendant when they are done in the course and in furtherance of the conspiracy. As such, the

evidence adduced at trial will comply with the necessary requirements under the law and will not violate the Defendant's rights.

2. The Co-Defendant's Statement Should not be Suppressed as There Will be no Bruton Violation

Defendant Harlan contends that his, "ability to get a fair trial if any portion of the co-defendant's statements are used is non-existent." (Defendant's Motion, Page 12, Lines 10-12). Harlan argues that based on this assertion the co-defendant's statement must be suppressed if severance is not granted. Defendant Harlan suggests the introduction of the co-defendant's statement in any way would violate Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620 (1968). Contrary to Defendant's suggestion, however, the law does provide for a means to introduce a co-defendant's statement, short of complete suppression or severance.

The United States Supreme Court and Nevada case-law provide that if a statement is redacted to exclude defendant's existence and the statement is not incriminating on its face but only when linked with other evidence introduced later at trial, then a limiting instruction will cure any prejudice. *See* Ducksworth v. State, 114 Nev. 951 (1998); Lisle v. State, 113 Nev. 679, 941 P.2d 459 (1997); overruled on other grounds by Middleton v. State, 114 Nev. 1089, 1117 n.9, 968 P.2d 296, 315 n.9 (1998), Stevens v. State, 97 Nev. 443 (1981); *see also* Richardson v. Marsh, 481 U.S. 200, 107 S.Ct. 1702 (1987). Therefore, a redacted version of the statement may be admitted. Accordingly, if the State seeks introduction of Caruso's statement at a joint trial, the State would provide a redacted version of the statement for this Court's review and approval. The State would also request this Court to provide a limiting instruction to the jury.

Defendant relies on Gray v. Maryland, 523 U.S. 185, 118 S.Ct. 1151 (1999), to suggest that simple redaction of statements have been disapproved by the United States Supreme Court. Defendant has stated the holding in Gray much too broadly. In Gray, the Court simply held that redactions that replace a defendant's proper name with an obvious blank, the word "delete," a symbol, or similarly notify the jury that a name has been deleted are similar enough to Bruton's unredacted confessions as to warrant the same legal results. Thus, in the instant

case, if Jaiden Caruso had implicated Kody Harlan in his statement and mentioned him by name, the State could not simply replace Harlan's name with the word "delete" and seek introduction of Caruso's statement in their joint trial. The State acknowledges this. Another possible remedy is to have the detective testify about what the co-defendant said without introducing an actual transcript, thus, avoiding "delete" or a blank space in a transcript.

In addition to the statement Caruso gave to the police, both defendants made statements to other witnesses after the murder but before Mathew's body was discovered. Those statements are clearly admissible pursuant to NRS 51.035(3)(e). In a case similar to the case at hand, the Nevada Supreme Court recognized that the duration of a conspiracy is not limited to the commission of the principal crime, but the conspiracy also extends to affirmative acts of concealment. In Crew v. State, 100 Nev. 38 (1984), the appellant contended that statements he made after the victim's body was buried were inadmissible as co-conspirator statements because the conspiracy terminated when the victims' bodies were buried. The Court, however, held that appellant's plan to move the bodies was intended to avoid detection in case appellant divulged the location of the bodies to the police. Id., at 46. The plan, therefore, was in furtherance of the conspiracy to commit the crime and to "get away with it." Id. Therefore, statements made in the course of carrying out the plan were properly admitted under the statute. Id. Thus, statements made by both defendants after the shooting but before the discovery of the body by police during the attempts to move the body and clean up after were made as part of defendants' plan to avoid detection. Just as in Crew, statements made by Harlan and Caruso during this timeframe were in furtherance of the conspiracy and to "get away with it." Accordingly, such statements are admissible pursuant to NRS 51.035(3)(e) and do not form the basis of severance or suppression.

Additionally, the State does not intend to offer any statement by the co-defendant which facially implicates Defendant Harlan at trial that do not qualify as statements made by a co-conspirator in the course and in furtherance of the conspiracy. See NRS 51.035(3)(e). Specifically, Defendant Harlan has expressed concerns regarding statements made by Co-Defendant Caruso made to police implicating Harlan being introduced by the State. (See

Defendant's Motion, Pages 8 and 9, Harlan took Minkler's wallet and phone, stolen cars are Harlan's way of life, Harlan probably used some of the money taken from Minkler's wallet to buy some shoes at the mall). Those statements would violate the holding in Bruton and will not be introduced by the State. However, other portions of Defendant Caruso's statements that do not facially implicate Defendant Harlan will be introduced and the remedy would not be severance but a limiting instruction. See Richardson v. Marsh, 481 U.S. 200, 107 S.Ct. 1702 (1987).

CONCLUSION

Based on the foregoing, Defendant Harlan's Motion to Sever or in the Alternative Motion to Deem Statements of the Co-Defendant Inadmissable should be DENIED.

DATED this 11th day of April, 2019.

Respectfully submitted,

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

BY /s/GIANCARLO PESCI
GIANCARLO PESCI
Chief Deputy District Attorney
Nevada Bar #007135

CERTIFICATE OF ELECTRONIC TRANSMISSION

I hereby certify that service of the above and foregoing was made this 11th day of April, 2019, by electronic transmission to:

MACE YAMPOLSKY, ESQ. (*Def. Caruso*)
Email: mace@macelaw.com

RYAN HELMICK, ESQ. (*Def. Harlan*)
Email: ryan@richardharrislaw.com

BY: /s/ D. Daniels
Secretary for the District Attorney's Office

18FH1236B/dd-MVU

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DISTRICT COURT
CLARK COUNTY, NEVADA

STATE OF NEVADA,

PLAINTIFF

vs.

KODY HARLAN,

DEFENDANT

Case No. C-18-333318-2

Dept. No. III

DEFENDANT'S MOTION IN LIMINE REGARDING PRIOR BAD ACTS AND PHOTO/VIDEOGRAPHIC EVIDENCE

COMES NOW, the Defendant, KODY HARLAN, by and through his counsel of record, K. RYAN HELMICK, ESQ., of the law offices of RICHARD HARRIS LAW FIRM, LLP, and respectfully files this Defendant's Motion In Limine Regarding Prior Bad Acts And Photo/Videographic Evidence.

DATED this 17 day of April 2019.

K. RYAN HELMICK, ESQ.
Nevada State Bar No. 12769
RICHARD HARRIS LAW FIRM
801 South Fourth Street
Las Vegas, Nevada 89101
Phone (702) 333-3333
Attorney for Petitioner

NOTICE OF MOTION

TO: STATE OF NEVADA, Plaintiff; and

TO: CLARK COUNTY DISTRICT ATTORNEY, its attorneys:

PLEASE TAKE NOTICE that the undersigned will bring the foregoing **DEFENDANT'S MOTION IN LIMINE REGARDING PRIOR BAD ACTS AND PHOTO/VIDEOGRAPHIC EVIDENCE** on for hearing on the ____day of _____, 2019, in Dept. _____, of the above-entitled Court, at the hour of _____ ___.m, or as soon thereafter as counsel may be heard.

DATED this 17 day of April 2019.

RICHARD HARRIS LAW FIRM, LLP.

K. RYAN HELMICK, ESQ.
Nevada State Bar No. 12769
801 South Fourth Street
Las Vegas, Nevada 89101
Phone (702) 333-3333
Attorney for Petitioner

POINTS AND AUTHORITIES

1. ANY REFERENCE TO HARLAN'S POSSESSION AND/OR USE OF A STOLEN VEHICLE IS IRRELEVANT AND SHOULD NOT BE ADMITTED.

It is the cautious belief of Mr. Harlan ("Harlan") that the State will attempt to introduce evidence at trial of Harlan's use and/or possession of a stolen vehicle. As Your Honor knows, evidence which is *not* relevant is *not* admissible. See NRS 48.025. Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. See NRS 48.015; Burton v. State, 437 P.2d 861, 84 Nev. 191 (1968) (Evidence must be relevant to the case at bar to be admissible). Additionally, if the State wants to use this information, they must establish that:

1. The prior act is relevant to the crime charged;
2. The act is proven by clear and convincing evidence; and
3. The probative value of the evidence is not substantially outweighed by the danger of unfair prejudice.

Your Honor will see from the argument below that only factor number #2 will be met.

RELEVANCE

The fact that Harlan was driving a stolen vehicle earlier in the day and was ultimately pulled over after wrecking the stolen vehicle later that night is irrelevant to the charges Harlan is being faced with. Likewise, it is irrelevant to the State's theory of the case as inferred by reading the preliminary hearing transcripts. It's irrelevant because the jury is not going to be concerned with whether the car Harlan and Jaiden drove in that day was stolen or lawfully theirs. They are called upon to determine the guilt of Harlan for his alleged role in Matthew Minkler's death ("Minkler"). Moreover, the reason Harlan ended up coming into contact with the police that night was for alleged

traffic violations not because the officer ran his plate and saw that the car was stolen. Counsel certainly recognizes that this contact with the police is what ultimately caused the officers to learn about the killing of Minkler. But the status of the lawful owner of the car Harlan drove is irrelevant to the police learning the facts surrounding Minkler's death.

CLEAR AND CONVINCING EVIDENCE

The Defense takes no issue with this factor being met because Harlan ultimately confessed to the car being stolen and a prior police report from the true owner of the car was filled out proving such.

PROBATIVE VALUE VS. PREJUDICIAL VALUE

Counsel sees no probative value in informing the jury that the car Harlan was driving was stolen, especially since neither Harlan nor Caruso were ever charged with possession of a stolen vehicle. As mentioned above, the jury will likely not care how they arrived at the house where Minkler was killed nor in what car they left the scene in or what the lawful status of the car was in general. Letting this information in would be very prejudicial because it would unnecessarily paint Harlan in an even more negative light then he is already in and it would also put in the Jury's head that Harlan is a car thief. This would be an assumption that the jury would mistakenly make because Harlan never admitted to stealing the car nor was any evidence of him stealing the car presented. The evidence only shows that he was knowingly in possession of a stolen car.

II. ANY REFERENCE TO HARLAN'S SOCIAL MEDIA PHOTOS AND VIDEOS IS IRRELEVANT AND SHOULD NOT BE ADMITTED

The Defense is also cautious of the State attempting to introduce or use in some way photos and/or videos from Harlan's social media in general but specifically from Facebook as a way to bolster their case. The lead detective in this case Det. Nichols mentions to Harlan during his interviews that Harlan's Facebook page shows pictures and videos of him posing with firearms as well as posing with another expensive car. Other photos and/or videos show Harlan posing with wads of money, rubber banded together. However, the Detective only referred to these photos and videos in an attempt to get Harlan to admit that he too was carrying a firearm the day Minkler was killed. The information found on the social media pages was not talked about in anyway in order to show some sort of link to the killing of Minkler. At the time the detective was interviewing Harlan, he was still in his preliminary investigation stage, trying to figure out who actually killed Minkler. The killer of Minkler has since been proved beyond any doubt given Caruso's confession as well as the videos found from his own cell phone.

The fact that Harlan has photos and videos on his social media pages holding a gun and posing behind the wheel of an expensive car as well as posing with money is completely irrelevant to the case at hand and to the charges with which Harlan is faced. Counsel likewise sees no probative value in this information because of this irrelevance. The photos and the videos have zero tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. Additionally, this evidence could only be introduced as a way to substantially prejudice Harlan by painting him in a very negative light. The photos and videos would paint a picture of Harlan as a kid who lives a lifestyle or brags about living a lifestyle that has to do with guns, money, expensive cars and rap music. This painted picture has nothing to do with Minkler's death nor do these facts help the trier of fact come to a verdict for

the charges with which Harlan faces. Harlan is not on trial for bragging about his lifestyle. The jury needs to be focused on the relevant facts that help determine whether or not Harlan is guilty of a Robbery/Felony Murder. As Your Honor also knows, it is not just a concern about the substantial prejudice, it is also a concern that the jury will be misled or confused with the actual issues in the case. See NRS 48.035.

CONCLUSION

For the above reasons, Harlan respectfully requests that this Court **GRANT** Defendant's Motion In Limine.

DATED this 17 day of April 2019.

RICHARD HARRIS LAW FIRM, LLP.

K. RYAN HELMICK, ESQ.
Nevada State Bar No. 12769
801 South Fourth Street
Las Vegas, Nevada 89101
Phone (702) 333-3333
Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on the 18 day of April 2019, I served a true and correct copy of the foregoing **DEFENDANT'S MOTION IN LIMINE REGARDING PRIOR BAD ACTS AND PHOTO/VIDEOGRAPHIC EVIDENCE**, addressed to the following counsel of record at the following address(es), as follows:

X E-MAIL on April 18 2019, by emailing the address below:

Giancarlo Pesci
CLARK COUNTY DISTRICT ATTORNEY'S OFFICE
200 E. Lewis Ave.
Las Vegas, NV 89155
giancarlo.pesci@clarkcountyda.com

An employee at RICHARD HARRIS LAW FIRM

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4/25/2019 10:17 AM
Steven D. Grierson
CLERK OF THE COURT

OPPS
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Attorney for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, -vs- KODY HARLAN #5124517, Defendant.	CASE NO:	C-18-333318-2
	DEPT NO:	III

STATE'S OPPOSITION TO DEFENDANT HARLAN'S MOTION IN LIMINE REGARDING PRIOR BAD ACTS AND PHOTO/VIDEOGRAPHIC EVIDENCE

DATE OF HEARING: 4/30/19
TIME OF HEARING: 9:00 A.M.

COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, District Attorney, through GIANCARLO PESCI, Chief Deputy District Attorney, and hereby submits the attached Points and Authorities in Opposition to Defendant Harlan's Motion In Limine Regarding Prior Bad Acts and Photo/Videographic Evidence.

This Opposition is made and based upon all the papers and pleadings on file herein, the attached points and authorities in support hereof, and oral argument at the time of hearing, if deemed necessary by this Honorable Court.

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STATEMENT OF THE CASE

On June 13, 2018, Kody Harlan ("Harlan") was charged by way of Criminal Complaint with one (1) count of Robbery (Category B Felony) and one (1) count of Accessory to Murder with Use of Deadly Weapon (Category C Felony) in Henderson Justice Court. On June 20, 2018, an Amended Criminal Complaint was filed adding a felony murder theory to the count of Murder with Use of Deadly Weapon against co-defendant Jaiden Caruso ("Caruso") and a deadly weapon enhancement to the count of Robbery.

On July 9, 2018, a preliminary hearing was held and the State filed a Second Amended Criminal Complaint charging Harlan with one (1) count of Murder with Use of Deadly Weapon, asserting various theories of liability against both Defendants, specifically charging a theory of felony murder by alleging Defendants committed the murder during the perpetration or attempted perpetration of a robbery. The Justice Court held Caruso and Harlan to answer all charges in District Court.

On July 18, 2018, Harlan was arraigned, pled not guilty, and invoked his right to jury trial within sixty (60) days. On July 31, 2018, Harlan waived his right to trial within sixty (60) days. Jury trial is currently scheduled for May 13, 2019, with a respective Calendar Call date of May 2, 2019.

On August 29, 2018, Caruso filed a Petition for Writ of Habeas Corpus. The State filed a Return to the Writ on September 11, 2018. The Court subsequently denied Caruso's writ on September 13, 2018. The same day, Harlan filed his Petition for Writ of Habeas Corpus. The State opposed and the Court denied Harlan's writ as well. On April 8, 2019, Defendant Harlan filed a Motion to Sever and/or Suppress. The State filed an Opposition and the Motion was denied on April 23, 2019. On April 18, 2019, Defendant Harlan filed the instant Motion in Limine. The State opposes as follows.

STATEMENT OF FACTS

On June 7, 2018, Caruso, Harlan, Alaric Jordan ("Jordan"), Traceo Meadows ("Meadows"), and Kymani Thompson ("Thompson") went to an abandoned house located at 2736 Cool Lilac in Henderson to hang out. "Preliminary Hearing Transcript" PHT, 21-23; 135.

The following day there was a conversation about "matching" and doing a "lick,[1]" both of which Caruso and Harlan were present for and did not denounce. PHT, 71-73; 84-87. Specifically, Caruso and Harlan were involved in the conversation regarding a lick. PHT, 87. Roughly an hour later, Caruso and Harlan left the house and returned with Matthew Minkler ("Minkler"), who brought marijuana. PHT, 74; 90; 110. Everyone continued to hang out, drink alcohol, and smoke marijuana. PHT, 26.

While at the house, Caruso possessed a black revolver that he occasionally played, at one point shooting the firearm into the ceiling. PHT, 27. After Caruso fired the gun, Thompson fled the house with Gunner Methvin ("Methvin"). PHT 83. Harlan was also in possession of a handgun. PHT, 27-28. At one point, Minkler asked to see Caruso's gun, looked at it, and placed it back on the kitchen counter. PHT, 28-29. Caruso then grabbed the gun and shot Minkler one time, resulting in Minkler's death. PHT, 29. Shortly after, Caruso called Methvin and mentioned something about a "body." PHT, 102.

Later that day, Caruso and Harlan were arrested after they fled from a Mercedes Benz during a traffic stop. PHT, 119-120. Police recovered a blue wallet from the back seat of the Mercedes. PHT, 134-135. The wallet contained only a Silverado High School identification card in Minkler 's name. PHT, 135.

Police subsequently recovered a Samsung phone at the Cool Lilac residence that was consistent with the type of cell phone owned by Minkler. PHT, 135-136. Minkler's deceased body was found inside of a closet with the words "Fuck Matt" spray painted on the exterior of the door. PHT, 155. When questioned by police about Minkler's murder, Thompson stated he believed it was the result of a robbery. PHT, 107. Caruso told police that Harlan stole Minkler's money and that they used it to shop for various items including shoes. PHT, 177-178.

POINTS AND AUTHORITIES

INTRODUCTION

NRS §48.015 provides that "relevant evidence" is evidence having any tendency to

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[1] Thompson refers to a "lick" as a "robbery." PHT, 84.

make the existence of any fact that is of consequence to the determination of the action more or less probable that it would be without evidence. NRS 48.025 and 48.035 provides that although generally admissible, relevant evidence is inadmissible if its probative value is substantially outweighed by unfair prejudice, if it confuses the issues, or if it amounts to the needless presentation of cumulative evidence.

District courts are vested with considerable discretion in determining the relevance and admissibility of evidence. Castillo v. State, 114 Nev. 271, 277, 956 P.2d 103, 107–08 (1998). Ordinarily, questions of the probative value of evidence are addressed to the sound discretion of the trial court. We will not disturb that discretion absent a showing of abuse. Way v. Hayes, *supra*. However, where the facts are sharply disputed and the matter is tried to the jury, and there is a proper foundation shown, the court should allow the evidence. McCourt v. J.C. Penney Co., 103 Nev. 101, 103, 734 P.2d 696, 698 (1987).

The general rule is that when evidence is sufficiently relevant it may be admitted even though it embraces evidence of the commission of another crime. Wallin v. State, 93 Nev. 10, 558 P.2d 1143 (1977); People v. Guerrero, 16 Cal.3d 719, 129 Cal.Rptr. 166, 548 P.2d 366 (1976). McMichael v. State, 94 Nev. 184, 188, 577 P.2d 398, 400 (1978), overruled by Meador v. State, 101 Nev. 765, 711 P.2d 852 (1985), and abrogated by Braunstein v. State, 118 Nev. 68, 40 P.3d 413 (2002).

ARGUMENT

I. REFERENCE TO HARLAN'S POSSESSION OF STOLEN VEHICLE

Defendant Harlan contends that evidence of his being in use or possession of a stolen 2006 silver Mercedes at the time of his arrest on June 9, 2018 is irrelevant to the charges of Murder with Use of Deadly Weapon and Robbery with Use of Deadly Weapon. (Defendant's Motion, Page 3, Lines 20-22). Defendant's erroneous assertion is belied by the facts and circumstances detailed in police reports and witness testimony.

First, the State does not intend to elicit testimony that the vehicle in question (2006 silver Mercedes) was stolen. Thus, any prejudicial effect that Defendant possessed a stolen

vehicle is moot with regards to NRS 48.045(2)[2]. However, the Defendant's possession and use of the vehicle, albeit no reference to it being stolen, is highly relevant to establishing elements of the crimes charged as well as Defendants' consciousness of guilt.

On June 8, 2018, Henderson Police Officer Cochran was patrolling the area of Valle Verde and Sunset Road in Henderson when she observed the vehicle in question committing various traffic infractions. "Officer Cochran's Incident Report," attached as Exhibit 1. When Officer Cochran attempted to initiate a traffic stop on the vehicle, the driver, later identified as Defendant Harlan, sped up and began switching in and out of lanes. Id. The driver almost collided with another vehicle heading West on Sunset Road. Id. The driver then ran a red light and collided with another vehicle before crashing into a grass area in front of a Chevron station. Id. Officer Cochran observed the occupants of the vehicle, including Defendant Harlan and Defendant Caruso, flee the vehicle and begin to run from Officer Cochran. Id. Officer Cochran yelled for Defendant Caruso to stop and eventually detained him in the rear of a Thai Cuisine restaurant where he was reluctant to comply with Officer Cochran's demands. Id. Defendant Harlan was later arrested by Henderson Police Department. Id.

The Defendants' efforts to flee the vehicle during the traffic stop speaks to their consciousness of guilt as it relates to not only the Robbery but the Murder charge as well. The Defendants not only attempted to evade the traffic stop by weaving in and out of traffic but fled on foot only after the vehicle collided with another car.

Additionally, the victim's sister, Samantha Valentine, told police that she witnessed her brother get picked up in a silver Mercedes on June 8, 2018, the same day victim was murdered. Furthermore, Henderson police located a Ruger .357 revolver with one expended cartridge casing under the front passenger seat of the vehicle. On June 9, 2019, Detectives obtained a search warrant for the 2006 Mercedes. "Detective Nichols' Supplemental Report", attached as

[2] Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Exhibit 2. Various items of evidentiary value were recovered, including a black knife with black sheath, a blue/green/yellow/orange shirt, three (3) water bottles, a blue coach NSC wallet with Silverado High School ID in the name of Matthew Minkler, a black folding knife with LVMPD badge, a Silver Apple MacBook Air Laptop, a black backpack with chargers, a White Apple Charger, Black Air Jordan left shoe (size 9.5), Black shoe box with white Air Force 1 shoes (size 10), a Foot Locker Receipt, a Black Air Jordan right shoe (size 9.5), a purple and white lighter, a black IPhone A1784, a medicine bottle with liquid, and a black IPhone A1661. Id.

Moreover, some of the items recovered from the vehicle are consistent with items purchased by the Defendants subsequent to the victim's murder. Traceo Meadows, a witness to the murder, told police that after the victim was shot, he and the Defendants left the Cool Lilac residence in the silver Mercedes (Defendant Harlan was driving while Defendant Caruso was in the front passenger seat) where they subsequently drove to the Galleria mall and shopped for shoes and clothing. Thus, the items recovered from the vehicle are highly relevant to corroborate not only the callous conduct of both Defendants after the victim's death but the efforts made to spend money and purchase material goods

Therefore, evidence of Defendant Harlan's use and/or possession of the Mercedes is relevant in establishing how the victim arrived at the Cool Lilac residence, the items recovered from the vehicle including the Ruger .357, but the conduct of Defendants during the subsequent traffic stop by Henderson police. This highly probative evidence provides facts and circumstantial evidence needed to establish the crimes of Robbery and Murder with Use of Deadly Weapon. Any prejudicial concerns are alleviated by the State's position of not eliciting any information about the vehicle and/or Ruger .357 being stolen.

II. REFERENCE TO HARLAN'S SOCIAL MEDIA PHOTOS AND VIDEOS

The admissibility of photographs is within the sound discretion of the trial court, whose decision will not be disturbed in the absence of a clear abuse of that discretion. Paine v. State, 110 Nev. 609, 617, 877 P.2d 1025, 1029 (1994), *cert. denied,* 514 U.S. 1038, 115 S.Ct. 1405, 131 L.Ed.2d 291 (1995). It is within the court's discretion to admit photographs where

the probative value outweighs any prejudicial effect the photographs might have on the jury. Ybarra v. State, 100 Nev. 167, 172, 679 P.2d 797, 800 (1984), *cert. denied*, 470 U.S. 1009, 105 S.Ct. 1372, 84 L.Ed.2d 390 (1985). Greene v. State, 113 Nev. 157, 167, 931 P.2d 54, 60 (1997).

Defendant Harlan contends that any photos and/or videos from his social media is irrelevant and prejudicial. (Defendant's Motion, Page 5). The State does not intend to introduce Defendant Harlan's social media content in the State's case in chief. However, the content of Defendant Harlan's social media may become relevant during the guilt phase depending on what evidence is elicited during cross examination or through the Defendants' case in chief. Rebuttal evidence is that which explains, repels, contradicts, or disproves evidence introduced by a defendant during his case in chief. Morrison v. Air California, 101 Nev. 233, 235–36, 699 P.2d 600, 602 (1985).

The Defendant asserts that the jury "needs to be focused on the relevant facts that help determine whether or not Harlan is guilty of a Robbery/Felony Murder." (Defendant's Motion, Page 6, Line 2). The parties cannot prematurely and conclusively determine whether or not Defendant Harlan's social media photos and/or videos is relevant in aiding the jury in making that determination. The State is unaware of what evidence might be elicited during cross examination or during Defendants' case in chief. This coupled with the extensive discovery still outstanding with the Henderson Police Department, it is impossible to ascertain whether Defendant Harlan's social media content may be relevant during trial.

Finally, independent of the guilt phase, Defendant Harlan's social media content is certainty relevant for purposes of the penalty phase. The guilt phase and the penalty phase in a capital case are separate proceedings. Evans v. State, 112 Nev. 1172, 1198–99, 926 P.2d 265, 282 (1996) (*See* NRS 175.552.) What is irrelevant and inadmissible in one may be relevant and admissible in the other. Id. Additionally, evidentiary rules are less stringent in the penalty phase of trial. Id. Under Nevada law, evidence which may or may not ordinarily be admissible under the rules of evidence may be admitted in the penalty phase of a capital trial, NRS 175.552, as long as the questioned evidence does not draw its support from

impalpable or highly suspect evidence. Evans, *citing* Young v. State, 103 Nev. 233, 237 (1987). Thus, an evidentiary ruling occurring in the guilt phase of trial based upon such concerns as relevancy and hearsay does not have automatic application to the separate penalty phase proceeding. Id.

NRS 175.552(3) provides the parameters of what evidence is to be introduced during the penalty phase. Specifically, the statute provides:

> … evidence may be presented concerning aggravating and mitigating circumstances relative to the offense, defendant or victim and on any other matter which the court deems relevant to the sentence, whether or not the evidence is ordinarily admissible. Evidence may be offered to refute hearsay matters. No evidence which was secured in violation of the Constitution of the United States or the Constitution of the State of Nevada may be introduced. The State may introduce evidence of additional aggravating circumstances as set forth in NRS 200.033, other than the aggravated nature of the offense itself, only if it has been disclosed to the defendant before the commencement of the penalty hearing.

Thus, Defendant Harlan's social media content, including that of posing with firearms expensive cars, and cash, is certainty relevant to the guilt phase. After the alleged robbery and murder, Defendants subsequently drove around in an expensive car while casually engaging in various shopping sprees while the victim lay deceased in a nearby residence. As such, Defendant Harlan's materialistic interests so boldly advertised on social media is certainty relevant when determining the imposition of sentence.

CONCLUSION

Based on the foregoing, Defendant Harlan's Motion In Limine should be DENIED.

DATED this 25th day of April, 2019.

Respectfully submitted,

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

BY /s/GIANCARLO PESCI
GIANCARLO PESCI
Chief Deputy District Attorney
Nevada Bar #007135

CERTIFICATE OF ELECTRONIC TRANSMISSION

I hereby certify that service of the above and foregoing was made this 25th day of April, 2019, by electronic transmission to:

RYAN HELMICK, ESQ.
Email: ryan@richardharrislaw.com

/s/Deana Daniels
Secretary for the District Attorney's Office

18FH1236B/GP/dd-mvu

Read @ 2:48pm
FILED IN OPEN COURT
STEVEN D. GRIERSON
CLERK OF THE COURT

AUG 07 2019

BY, Kory Schlitz
KORY SCHLITZ, DEPUTY

VER

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

KODY HARLAN,

Defendant.

CASE NO: C-18-333318-2

DEPT NO: III

VERDICT

We, the jury in the above entitled case, find the Defendant KODY HARLAN, as follows:

COUNT 1 – MURDER WITH USE OF A DEADLY WEAPON

(please check the appropriate box, select only one)

- [X] Guilty of 1st Degree Murder With Use Of A Deadly Weapon
- [ ] Guilty of 1st Degree Murder
- [ ] Guilty of 2nd Degree Murder With Use Of A Deadly Weapon
- [ ] Guilty of 2nd Degree Murder
- [ ] Guilty of Voluntary Manslaughter With Use Of A Deadly Weapon
- [ ] Guilty of Voluntary Manslaughter
- [ ] Guilty of Involuntary Manslaughter
- [ ] Not Guilty

C-18-333318-2
VER
Verdict
4854530

COUNT 2 – ROBBERY WITH USE OF A DEADLY WEAPON,

(please check the appropriate box, select only one)

☒ Guilty of Robbery with Use of a Deadly Weapon

☐ Guilty of Robbery

☐ Not Guilty

COUNT 3 – ACCESSORY TO MURDER WITH USE OF A DEADLY WEAPON,

(please check the appropriate box, select only one)

☒ Guilty of Accessory to Murder with Use of a Deadly Weapon

☐ Not Guilty

DATED this 7th day of August, 2019

FOREPERSON

INST

FILED IN OPEN COURT
STEVEN D. GRIERSON
CLERK OF THE COURT

AUG 07 2019

BY: Kory Schlitz
KORY SCHLITZ, DEPUTY

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, -vs- JAIDEN CARUSO, and KODY HARLAN, Defendant.	CASE NO: DEPT NO:	C-18-333318-1 C-18-333318-2 III

INSTRUCTIONS TO THE JURY (INSTRUCTION NO. I)

MEMBERS OF THE JURY:

It is now my duty as judge to instruct you in the law that applies to this case. It is your duty as jurors to follow these instructions and to apply the rules of law to the facts as you find them from the evidence.

You must not be concerned with the wisdom of any rule of law stated in these instructions. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your oath to base a verdict upon any other view of the law than that given in the instructions of the Court.

C-18-333318-2
INST
Instructions to the Jury
4854533

INSTRUCTION NO. 2

If, in these instructions, any rule, direction or idea is repeated or stated in different ways, no emphasis thereon is intended by me and none may be inferred by you. For that reason, you are not to single out any certain sentence or any individual point or instruction and ignore the others, but you are to consider all the instructions as a whole and regard each in the light of all the others.

The order in which the instructions are given has no significance as to their relative importance.

INSTRUCTION NO. 3

An Information is but a formal method of accusing a person of a crime and is not of itself any evidence of his guilt.

In this case, it is charged in an Information that on June 8, 2018, the Defendants committed the offenses of Murder with Use of a Deadly Weapon, Robbery with Use of a Deadly Weapon, and Defendant Kody Harlan committed Accessory to Murder, as follows:

COUNT 1 -- MURDER WITH USE OF A DEADLY WEAPON

JAIDEN CARUSO and KODY HARLAN, did willfully, unlawfully, feloniously and with malice aforethought, kill MATTHEW MINKLER, a human being, with use of a deadly weapon, to wit: a firearm, by shooting at and/or into the head and/or body of the said MATTHEW MINKLER, the said killing having been (1) willful, deliberate and premeditated, and/or (2) committed during the perpetration or attempted perpetration of a robbery, the Defendant(s) being criminally liable under one or more of the following principles of criminal liability, to wit: (1) by directly committing this crime; and/or (2) by aiding or abetting in the commission of this crime, with the intent that this crime be committed, by counseling, encouraging, hiring, commanding, inducing and/or otherwise procuring the other to commit the crime; and/or (3) pursuant to a conspiracy to commit this crime, with the intent that this crime be committed, Defendants aiding or abetting and/or conspiring by Defendants acting in concert throughout.

COUNT 2 - ROBBERY WITH USE OF A DEADLY WEAPON

Defendants JAIDEN CARUSO and KODY HARLAN, aka, Kody W. Harlan did willfully, unlawfully, and feloniously take personal property, to wit: a wallet and contents, from the person of MATTHEW MINKLER, or in his presence, by means of force or violence, or fear of injury to, and without the consent and against the will of MATTHEW MINKLER, with use of a deadly weapon, to wit: a firearm, Defendant using force or fear to obtain or retain possession of the property, to prevent or overcome resistance to the taking of the property, and/or to facilitate escape; the Defendant(s) being criminally liable under one or more of the following principles of criminal liability, to wit: (1) by directly committing

this crime; and/or (2) by aiding or abetting in the commission of this crime, with the intent that this crime be committed, by counseling, encouraging, hiring, commanding, inducing and/or otherwise procuring the other to commit the crime; and/or (3) pursuant to a conspiracy to commit this crime, with the intent that this crime be committed, Defendants aiding or abetting and/or conspiring by Defendants acting in concert throughout.

COUNT 3 - ACCESSORY TO MURDER WITH USE OF A DEADLY WEAPON

Defendant KODY HARLAN, aka, Kody W. Harlan, did willfully, unlawfully, and feloniously, after the commission of a murder with use of a deadly weapon, a felony, conceal and/or destroy and/or aid in the destruction or concealment of material evidence, to wit: the body of MATTHEW MINKLER and/or the crime scene, with the intent that JAIDEN CARUSO might avoid or escape arrest, trial, conviction, and/or punishment, having knowledge that JAIDEN CARUSO had committed the murder and/or was liable to arrest therefore.

It is the duty of the jury to apply the rules of law contained in these instructions to the facts of the case and determine whether or not the State has met its burden beyond a reasonable doubt as to whether any Defendant is guilty of any of the offense(s) charged.

Each charge and the evidence pertaining to it should be considered separately. The fact that you may find a defendant guilty or not guilty as to one of the offenses charged should not control your verdict as to any other offense charged.

INSTRUCTION NO. 4

To constitute the crime charged, there must exist a union or joint operation of an act forbidden by law and an intent to do the act.

The intent with which an act is done is shown by the facts and circumstances surrounding the case.

Do not confuse intent with motive. Motive is what prompts a person to act. Intent refers only to the state of mind with which the act is done.

Motive is not an element of the crime charged and the State is not required to prove a motive on the part of the Defendant in order to convict. However, you may consider evidence of motive or lack of motive as a circumstance in the case.

INSTRUCTION NO. 5

The Defendant is presumed innocent until the contrary is proved. This presumption places upon the State the burden of proving beyond a reasonable doubt every material element of the crime charged and that the Defendant is the person who committed the offense.

A reasonable doubt is one based on reason. It is not mere possible doubt but is such a doubt as would govern or control a person in the more weighty affairs of life. If the minds of the jurors, after the entire comparison and consideration of all the evidence, are in such a condition that they can say they feel an abiding conviction of the truth of the charge, there is not a reasonable doubt. Doubt to be reasonable must be actual, not mere possibility or speculation.

If you have a reasonable doubt as to the guilt of the Defendant, he is entitled to a verdict of not guilty.

INSTRUCTION NO. 6

You are here to determine from the evidence in the case whether the Defendants are guilty or not guilty of each of the crimes charged. You are not called upon to return a verdict as to any other person. So, if the evidence in the case convinces you beyond a reasonable doubt of the guilt of the Defendants, you should so find, even though you may believe one or more other persons are also guilty.

INSTRUCTION NO. 7

The evidence which you are to consider in this case consists of the testimony of the witnesses, the exhibits, and any facts admitted or agreed to by counsel.

There are two types of evidence; direct and circumstantial. Direct evidence is the testimony of a person who claims to have personal knowledge of the commission of the crime which has been charged, such as an eyewitness. Circumstantial evidence is the proof of a chain of facts and circumstances which tend to show whether the Defendant is guilty or not guilty. The law makes no distinction between the weight to be given either direct or circumstantial evidence. Therefore, all of the evidence in the case, including the circumstantial evidence, should be considered by you in arriving at your verdict.

Statements, arguments and opinions of counsel are not evidence in the case. However, if the attorneys stipulate to the existence of a fact, you must accept the stipulation as evidence and regard that fact as proved.

You must not speculate to be true any insinuations suggested by a question asked a witness. A question is not evidence and may be considered only as it supplies meaning to the answer.

You must disregard any evidence ordered stricken by the court. Anything you may have seen or heard outside the courtroom is not evidence and must also be disregarded.

INSTRUCTION NO. 8

The credibility or believability of a witness should be determined by his manner upon the stand, his relationship to the parties, his fears, motives, interests or feelings, his opportunity to have observed the matter to which he testified, the reasonableness of his statements and the strength or weakness of his recollections.

If you believe that a witness has lied about any material fact in the case, you may disregard the entire testimony of that witness or any portion of his testimony which is not proved by other evidence.

INSTRUCTION NO. 9

A witness who has special knowledge, skill, experience, training or education in a particular science, profession or occupation is an expert witness. An expert witness may give her opinion as to any matter in which she is skilled.

You should consider such expert opinion and weigh the reasons, if any, given for it. You are not bound, however, by such an opinion. Give it the weight to which you deem it entitled, whether that be great or slight, and you may reject it, if, in your judgment, the reasons given for it are unsound.

INSTRUCTION NO. ___10____

It is a constitutional right of a Defendant in a criminal trial that he may not be compelled to testify. Thus, the decision as to whether he should testify is left to the Defendant on the advice and counsel of his attorney. You must not draw any inference of guilt from the fact that he does not testify, nor should this fact be discussed by you or enter into your deliberations in any way.

INSTRUCTION NO. ___11_____

You have heard testimony from Traceo Meadows who was previously charged in Juvenile Court with Accessory to Murder. The testimony was given in exchange for his charges being reduced or possibily dismissed. This is a benefit to a person sentenced. Because Traceo Meadows will not be sentenced until after the trial of Jaiden Caruso and Kody Harlan there are possible related pressures upon him when he testified. If the prosecutors do not believe Traceo Meadows testified in a way that secured the negotiation they have the right to ask the Court to void the negotiation and he could be recharged with the original offense. You may consider these factors and the possible related pressures in determining his credibility and the extent to which they influenced his testimony. You should view his testimony with greater caution than that of other witnesses.

INSTRUCTION NO. 12

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. An accomplice is hereby defined as one who is liable for prosecution for the identical offenses charged against the defendants on trial in the cause in which the testimony of the accomplice is given. You are instructed that Traceo Meadows is an accomplice only as to the charge of Accessory to Murder. Therefore, he only need be corroborated as to the Accessory to Murder count.

It is not necessary that the corroborating evidence be sufficient in itself to establish every element of the offense charged or that it corroborate every fact to which the accomplice testifies. Evidence to corroborate accomplice testimony does not suffice if it merely casts grave suspicion on the defendant. Further, where the connecting evidence shows no more than an opportunity to commit a crime, simply proves suspicion, or it equally supports a reasonable explanation pointing toward innocent conduct on the part of the defendant, the evidence is to be deemed insufficient.

In determining whether an accomplice has been corroborated, you must first assume the testimony of the accomplice has been removed from the case. You must then determine whether there is sufficient evidence which tends to connect the defendant with the commission of the offense. If there is not sufficient independent evidence which tends to connect the defendant with the commission of the offense the testimony of the accomplice is not corroborated. If there is such sufficient independent evidence, which you believe, then the testimony of the accomplice is corroborated.

INSTRUCTION NO. 13

Where two or more persons are accused of committing a crime together, their guilt may be established without proof that each personally did every act constituting the offence charged.

All persons concerned in the commission of a crime who either directly and actively commit the act constituting the offense or who knowingly and with criminal intent aid and abet in its commission or, whether present or not, who advise and encourage its commission, with the intent that the crime be committed, are regarded by the law as principals in the crime thus committed and are equally guilty thereof.

A person aids and abets the commission of a crime if he knowingly and with criminal intent aids, promotes, encourages or instigates by act or advice, or by act and advice, the commission of such crime with the intention that the crime be committed.

The State is not required to prove precisely which Defendant actually committed the crime and which Defendant aided and abetted.

For the Defendant to be held accountable under the "aiding and abetting" principle of criminal liability in this case he must have intended that the crime Murder with Use of a Deadly Weapon be committed.

INSTRUCTION NO. 14

Conspiracy is an agreement or mutual understanding between two or more persons to commit a crime. To be guilty of conspiracy, a Defendant must intend to commit, or to aid in the commission of the specific crime agreed to. The crime is the agreement to do something unlawful; it does not matter whether it was successful or not. It is not necessary in proving a conspiracy to show a meeting of the alleged conspirators or the making of an express or formal agreement. The formation and existence of a conspiracy may be inferred from all circumstances tending to show the common intent and may be proved in the same way as any other fact may be proved, either by direct testimony of the fact or by circumstantial evidence, or by both direct and circumstantial evidence.

A conspiracy to commit a crime does not end upon the completion of the crime. The conspiracy continues until the co-conspirators have successfully gotten away and concealed the crime.

INSTRUCTION NO. 15

Whenever a conspiracy exists, and a Defendant was one of the members of the conspiracy, then the acts by any person likewise a member of the conspiracy may be considered by the jury as evidence in the case as to that Defendant found to have been a member, even though the acts may have occurred in the absence and without the knowledge of that Defendant, provided such acts were knowingly made and done during the continuance of such conspiracy, and in furtherance of some object or purpose of the conspiracy.

INSTRUCTION NO. 16

Each member of a criminal conspiracy is liable for each act of every other member of the conspiracy if the act is in furtherance of the object of the conspiracy. The act of one conspirator pursuant to or in furtherance of the common design of the conspiracy is the act of all conspirators.

However, in order to find a Defendant criminally liable for acts of another conspirator pursuant to a conspiracy to the crime of Murder with Use of a Deadly Weapon you must find that the Defendant possessed the specific intent to commit that crime.

INSTRUCTION NO. 17

In this case the Defendants are accused in an Information alleging one count of an open charge of murder. This charge may include murder of the first degree, murder of the second degree, and manslaughter.

The jury must decide if the Defendants are guilty of any offense and, if so, of which offense.

INSTRUCTION NO.___18____

Murder is the unlawful killing of a human being with malice aforethought, either express or implied. The unlawful killing may be effected by any of the various means by which death may be occasioned.

INSTRUCTION NO. 19

"Malice aforethought" means the intentional doing of a wrongful act without legal cause or excuse or what the law considers adequate provocation. The condition of mind described as malice aforethought may arise from anger, hatred, revenge, or from particular ill will, spite, or grudge toward the person killed. It may also arise from any unjustifiable or unlawful motive or purpose to injure another, proceeding from a heart fatally bent on mischief, or with reckless disregard of consequences and social duty. Malice aforethought does not imply deliberation or the lapse of any considerable time between the malicious intention to injure another and the actual execution of the intent, but denotes an unlawful purpose and design, as opposed to accident and mischance.

INSTRUCTION NO. 20

Express malice is that deliberate intention, unlawfully, to take away the life of a human being, which is manifested by external circumstances capable of proof.

Malice may be implied when no considerable provocation appears, or when all the circumstances of the killing show an abandoned and malignant heart.

INSTRUCTION NO. 21

Murder of the First Degree is murder which is (1) perpetrated by any kind of willful, deliberate and premeditated killing; or (2) committed in the perpetration or attempted perpetration of any robbery.

INSTRUCTION NO. 22

Murder of the first degree is murder which is perpetrated by means of any kind of willful, deliberate, and premeditated killing. All three elements -- willfulness, deliberation, and premeditation -- must be proven beyond a reasonable doubt before an accused can be convicted of first-degree murder.

Willfulness is the intent to kill. There need be no appreciable space of time between formation of the intent to kill and the act of killing.

Deliberation is the process of determining upon a course of action to kill as a result of thought, including weighing the reasons for and against the action, and considering the consequences of the actions.

A deliberate determination may be arrived at in a short period of time. But in all cases the determination must not be formed in passion, or if formed in passion, it must be carried out after there has been time for the passion to subside and deliberation to occur. A mere unconsidered and rash impulse is not deliberate, even though it includes the intent to kill.

Premeditation is a design, a determination to kill, distinctly formed in the mind by the time of the killing.

Premeditation need not be for a day, an hour, or even a minute. It may be as instantaneous as successive thoughts of the mind. For if the jury believes from the evidence that the act constituting the killing has been preceded by, and has been the result of premeditation, no matter how rapidly the act follows the premeditation, it is premeditated.

INSTRUCTION NO. 23

The law does not undertake to measure, in units of time, the length of the period during which the thought must be pondered before it can ripen into an intent to kill which is truly deliberate and premeditated. The time will vary with different individuals and under varying circumstances.

The true test is not the duration of time, but rather the extent of the reflection. A cold, calculated judgment and decision may be arrived at in a short period of time, but a mere unconsidered and rash impulse, even though it includes an intent to kill, is not deliberation and premeditation as will fix an unlawful killing as murder of the first degree.

INSTRUCTION NO. 24

The State is not required to present direct evidence of a Defendant's state of mind as it existed during the commission of a crime. The jury may infer the existence of a particular state of mind of a party or a witness from the circumstances disclosed by the evidence.

INSTRUCTION NO. 25

There is a kind of murder which carries with it conclusive evidence of premeditation and malice aforethought. This class of first degree murder is a killing committed in the perpetration or attempted perpetration of a robbery. Therefore, a killing which is committed in the perpetration or attempted perpetration of a robbery is deemed to be Murder of the First Degree, whether the killing was intentional or unintentional or accidental. This is called the Felony-Murder Rule.

The intent to perpetrate or attempt to perpetrate robbery must be proven beyond a reasonable doubt.

For the purposes of the Felony–Murder Rule, the intent to commit the robbery must have arisen before or during the conduct resulting in death. However, in determining whether the Defendant had the requisite intent to commit robbery before or during the killing, you may infer that intent from the Defendant's actions during and immediately after the killing. There is no Felony-Murder where the robbery occurs as an afterthought following the killing.

INSTRUCTION NO. 26

Your verdict must be unanimous to any charge. However, you do not have to be unanimous on the theory of criminal liability as to the murder charges. It is sufficient that each of you find beyond a reasonable doubt that the Defendant committed the charged murders.

INSTRUCTION NO. 27

All murder which is not Murder of the First Degree is Murder of the Second Degree. Murder of the Second Degree is Murder with malice aforethought, but without the admixture of premeditation and deliberation.

INSTRUCTION NO. 28

Manslaughter is the unlawful killing of a human being without malice, express or implied, and without any mixture of deliberation.

Voluntary Manslaughter is a voluntary killing upon a sudden heat of passion, caused by a provocation apparently sufficient to make the passion irresistible.

The provocation required for Voluntary Manslaughter must either consist of a serious and highly provoking injury inflicted upon the person killing, sufficient to excite an irresistible passion in a reasonable person, or an attempt by the person killed to commit a serious personal injury on the person killing. The serious and highly provoking injury which causes the sudden heat of passion can occur without direct physical contact. However, neither slight provocation nor an assault of a trivial nature will reduce a homicide from murder to manslaughter.

For the sudden, violent impulse of passion to be irresistible resulting in a killing, which is Voluntary Manslaughter, there must not have been an interval between the assault or provocation and the killing, sufficient for the voice of reason and humanity to be heard; for, if there should appear to have been an interval between the assault or provocation given and the killing, sufficient for the voice of reason and humanity to be heard, then the killing shall be determined by you to be murder. The law assigns no fixed period of time for such an interval but leaves its determination to the jury under the facts and circumstances of the case.

INSTRUCTION NO. 29

The heat of passion which will reduce a homicide to Voluntary Manslaughter must be such an irresistible passion as naturally would be aroused in the mind of an ordinarily reasonable person in the same circumstances. A Defendant is not permitted to set up his own standard of conduct and to justify or excuse himself because his passions were aroused unless the circumstances in which he was placed and the facts that confronted him were such as also would have aroused the irresistible passion of the ordinarily reasonable man if likewise situated. The basic inquiry is whether or not, at the time of the killing, the reason of the accused was obscured or disturbed by passion to such an extent as would cause the ordinarily reasonable person of average disposition to act rashly and without deliberation and reflection and from such passion rather than from judgment.

INSTRUCTION NO. 30

When a person is accused of committing a particular crime and at the same time and by the same conduct may have committed another offense of lesser grade or degree, the latter is with respect to the former, a lesser included offense.

You are instructed that if you find that the State has established that the Defendant has committed first degree murder you shall select first degree murder as your verdict. The crime of first degree murder includes the lesser offenses of second degree murder and voluntary manslaughter.

You may find the Defendant guilty of one of the lesser offenses of second degree murder or voluntary manslaughter if:

1. You have not found, beyond a reasonable doubt, that the Defendant is guilty of murder of the first degree, and

2. All twelve of you are convinced beyond a reasonable doubt that the Defendant is guilty of the the lesser offense of second degree murder or voluntary manslaughter.

If you are convinced beyond a reasonable doubt that the crime of murder has been committed by the Defendant, but you have a reasonable doubt whether such murder was of the first or of the second degree, you must give the Defendant the benefit of that doubt and return a verdict of murder of the second degree.

If you are satisfied beyond a reasonable doubt that the killing was unlawful, but you have a reasonable doubt whether the crime is murder or voluntary manslaughter, you must give the Defendant the benefit of that doubt and return a verdict of voluntary manslaughter.

INSTRUCTION NO. 31

Involuntary manslaughter is the killing of a human being, without any intent to do so, in the commission of an unlawful act or, a lawful act which probably might produce such a consequence in an unlawful manner, but where the involuntary killing occurs in the commission of an unlawful act, which, in its consequences, naturally tends to destroy the life of a human being, or is committed in the prosecution of a felonious intent, the offense is murder.

Involuntary manslaughter does not involve the conscious use of a deadly weapon in the commission of a crime.

INSTRUCTION NO. 32

Robbery is the unlawful taking of personal property from the person of another, or in his presence, against his will, by means of force or violence or fear of injury, immediate or future, to his person or property, or the person or property of a member of his family, or of anyone in his company at the time of the robbery. Such force or fear must be used to:

1. Obtain or retain possession of the property,
2. To prevent or overcome resistance to the taking of the property, or
3. To facilitate escape with the property.

In any case the degree of force is immaterial if used to compel acquiescence to the taking of or escaping with the property. Such taking constitutes robbery whenever it appears that, although the taking was fully completed without the knowledge of the person from whom taken, such knowledge was prevented by the use of force or fear.

The value of property or money taken is not an element of the crime of Robbery, and it is only necessary that the State prove the taking of some property or money.

Personal property is "in the presence" of a person, in respect to robbery, when it is within the person's reach, inspection, observation or control, and the person could, if not prevented by intimidation or threat of violence, retain possession of the property.

INSTRUCTION NO. 33

You are instructed that if you find a Defendant guilty of 1st or 2nd Degree Murder, Voluntary Manslaughter and/or Robbery, you must also determine whether or not a deadly weapon was used in the commission of this crime.

If you find beyond a reasonable doubt that a deadly weapon was used in the commission of such an offense, then you shall return the appropriate guilty verdict reflecting "With Use of a Deadly Weapon".

If, however, you find that a deadly weapon was not used in the commission of such an offense, but you find that it was committed, then you shall return the appropriate guilty verdict reflecting that a deadly weapon was not used.

INSTRUCTION NO. 34

"Deadly weapon" means any instrument which, if used in the ordinary manner contemplated by its design and construction, will or is likely to cause substantial bodily harm or death; any weapon, device, instrument, material or substance which, under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing substantial bodily harm or death.

You are instructed that a firearm is a deadly weapon.

INSTRUCTION NO. 35

In order to "use" a deadly weapon, there need not be conduct which actually produces harm but only conduct which produces a fear of harm or force by means or display of the deadly weapon in aiding the commission of the crime.

An unarmed offender "uses" a deadly weapon when the unarmed offender is liable as a principal for the offense that is sought to be enhanced, another principal to the offense is armed with and uses a deadly weapon in the commission of the offense, and the unarmed offender had knowledge of the use of the deadly weapon.

The State is not required to have recovered the deadly weapon used in an alleged crime, or to produce the deadly weapon in court at trial, to establish that a deadly weapon was used in the commission of the crime.

INSTRUCTION NO. 36

One of the factors you may take in consideration is the state of the accused at the time the alleged acts occurred.

No act committed by a person while in a state of voluntary intoxication shall be deemed less criminal by reason of his or her condition, but whenever the actual existence of any particular purpose, motive or intent is a necessary element to constitute a particular species or degree of crime, the fact of the person's intoxication may be taken into consideration in determining the purpose, motive or intent.

Thus, voluntary intoxication may be a defense to a specific intent crime but it cannot be a defense to a general intent crime.

First Degree Murder committed through willful, deliberate and premeditated conduct is a specific intent crime.

Robbery is a general intent crime.

First Degree Felony-Murder committed through the perpetration or attempted perpetration of a Robbery is a general intent crime.

Second Degree Murder is a general intent crime.

Voluntary and Involuntary Manslaughter are also both general intent crimes.

INSTRUCTION NO. 37

Every person who, after the commission of a felony, destroys or conceals, or aids in the destruction or concealment of, material evidence, or harbors or conceals such offender with intent that the offender may avoid or escape from arrest, trial, conviction or punishment, having knowledge that such offender has committed a felony or is liable to arrest, is an accessory to the felony.

INSTRUCTION NO. ___38_____

The flight of a person after the commission of a crime is not sufficient in itself to establish guilt; however, if flight is proved, it is circumstantial evidence in determining guilt or innocence. before considering flight, however, you must be convinced that the Defendant was the person who fled the scene of the crime.

The essence of flight embodies the idea of deliberately going away with consciousness of guilt and for the purpose of avoiding apprehension or prosecution. The weight to which such circumstance is entitled is a matter for the jury to determine.

INSTRUCTION NO. 39

Although you are to consider only the evidence in the case in reaching a verdict, you must bring to the consideration of the evidence your everyday common sense and judgment as reasonable men and women. Thus, you are not limited solely to what you see and hear as the witnesses testify. You may draw reasonable inferences from the evidence which you feel are justified in the light of common experience, keeping in mind that such inferences should not be based on speculation or guess.

A verdict may never be influenced by sympathy, prejudice or public opinion. Your decision should be the product of sincere judgment and sound discretion in accordance with these rules of law.

/ INSTRUCTION NO. 40

In your deliberation you may not discuss or consider the subject of punishment. Your duty is confined to the determination of whether the State of Nevada met its burden of proof as to each Defendant.

INSTRUCTION NO. 41

When you retire to consider your verdict, you must select one of your number to act as foreperson who will preside over your deliberation and will be your spokesperson here in court.

During your deliberation, you will have all the exhibits which were admitted into evidence, these written instructions and forms of verdict which have been prepared for your convenience.

Your verdict must be unanimous. As soon as you have agreed upon a verdict, have it signed and dated by your foreperson and then return with it to this room.

INSTRUCTION NO. 42

During your deliberations you are not to communicate with anyone, in any manner regarding the facts and circumstances of this case or its merits, either by phone, email, text messaging, internet, or other means.

You are admonished not to read, watch, or listen to any news or media accounts or commentary about the case. You are not permitted to do any independent research, such as consulting dictionaries, using the internet, or any other reference materials.

You are further admonished not to conduct any investigation, test a theory of the case, re-create any aspect of the case, or in any other manner investigate or learn about the case on your own.

You may, of course, during deliberations, communicate with other members of the jury while you are in the jury deliberation room after the case has been submitted to you for deliberation.

INSTRUCTION NO. 43

If, during your deliberation, you should desire to be further informed on any point of law or hear again portions of the testimony, you must reduce your request to writing signed by the foreperson. The officer will then return you to court where the information sought will be given you in the presence of, and after notice to, the district attorney and the Defendant and his counsel.

Playbacks of testimony are time-consuming and are not encouraged unless you deem it a necessity. Should you require a playback, you must carefully describe the testimony to be played back so that the court recorder can arrange her notes.

Remember, the court is not at liberty to supplement the evidence.

INSTRUCTION NO. 44

Now you will listen to the arguments of counsel who will endeavor to aid you to reach a proper verdict by refreshing in your minds the evidence and by showing the application thereof to the law; but, whatever counsel may say, you will bear in mind that it is your duty to be governed in your deliberation by the evidence as you understand it and remember it to be and by the law as given to you in these instructions, with the sole, fixed and steadfast purpose of doing equal and exact justice between the Defendant and the State of Nevada.

GIVEN: _____

DOUGLAS W. HERNDON
DISTRICT JUDGE

K. RYAN HELMICK, ESQ.
Nevada Bar # 12769
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DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,
Plaintiff,
v.
KODY HARLAN,
Defendant.

Case No.: C-18-333318-2
Dept. No.: 3

NOTICE OF MOTION TO PLACE ON CALENDER TO SET ASIDE GUILTY VERDICT AS TO COUNTS ONE AND TWO; IN THE ALTERNATIVE MOTION FOR A NEW TRIAL AND TO REQUEST ADDITIONAL TIME FOR SUPPLEMENTAL BRIEFING.

COMES NOW the Defendant, **KODY HARLAN**, by and through his attorney, **K. RYAN HELMICK, ESQ.**, of the **RICHARD HARRIS LAW FIRM, LLP.**, and moves this court to vacate the guilty verdicts returned by the jury on Counts 1 and 2, pursuant to NRS 175.381, and to find Mr. Harlan to be deemed Not Guilty on both Counts 1 and 2 or in the alternative set a new trial date and to request additional time for supplemental briefing.

This motion is made and based upon the following memorandum of points and authorities and all the papers and filed herein.

DATED this 13 day of AUGUST, 2019

K. RYAN HELMICK, ESQ.
Nevada Bar # 12769
RICHARD HARRIS LAW FIRM, LLP.

NOTICE OF MOTION

TO: THE HONORABLE JUDGE DOUGLAS HERNDON, District Court, Department 3; and

TO: STEVEN B. WOLFSON, ESQ., Attorney for Plaintiff.

YOU, AND EACH OF YOU, SHALL PLEASE TAKE NOTICE that the undersigned will bring the above and forgoing **MOTION TO PLACE ON CALENDAR** on for hearing before the Court at the Courtroom of the above entitled Court on the ____ day of _____, 2019, at _____ a.m.

DATED this 13 day of August,2019

K. RYAN HELMICK, ESQ.
Nevada Bar # 12769
RICHARD HARRIS LAW FIRM, LLP

MEMORANDUM OF POINTS AND AUTHORITIES

Defendant herein, KODY HARLAN, was charged with 1st Degree Murder With a Deadly Weapon, Robbery With Use of a Deadly Weapon and Accessory to Murder With Use of a Deadly Weapon. Mr. Harlan (Harlan) proceeded to trial from July 29, 2019 to August 7, 2019. The jury returned a guilty verdict on all counts. The Court presided over the trial and is fully aware of the facts of this case and therefore they will not be restated in this motion at this time. Harlan is asking this Court to vacate the guilty verdicts on Count 1 and Count 2 pursuant to its authority as delineated in NRS 175.381.

NRS 175.381 Court may advise jury to acquit defendant when evidence on either side closed; motion for judgment of acquittal after verdict of guilty or guilty but mentally ill; subsequent motion for new trial.

1. If, at any time after the evidence on either side is closed, the court deems the evidence insufficient to warrant a conviction, it may advise the jury to acquit the defendant, but the jury is not bound by such advice.

2. The court may, on a motion of a defendant or on its own motion, which is made after the jury returns a verdict of guilty or guilty but mentally ill, set aside the verdict and enter a judgment of acquittal if the evidence is insufficient to sustain a conviction. The motion for a judgment of acquittal must be made within 7 days after the jury is discharged or within such further time as the court may fix during that period.

3. If a motion for a judgment of acquittal after a verdict of guilty or guilty but mentally ill pursuant to this section is granted, the court shall also determine whether any motion for a new trial should be granted if the judgment of acquittal is thereafter vacated or reversed. The court shall specify the grounds for that determination. If the motion for a new trial is granted conditionally, the order thereon does not affect the finality of the judgment. If the motion for a new trial is granted conditionally and the judgment is reversed on appeal, the new trial must proceed unless the appellate court has otherwise ordered. If the motion is denied conditionally,

the defendant on appeal may assert error in that denial, and if the judgment is reversed on appeal, subsequent proceedings must be in accordance with the order of the appellate court.

It is Harlan's contention that the guilty verdicts in regard to Count 1 and Count 2 were not supported by the evidence presented at Trial. Multiple witnesses in this trial clearly stated that there was never any conversation about a planned Robbery by Harlan. It was uncontested that Harlan was asleep the majority of the time that day and was asleep when Matthew Minkler was killed by Jaiden Caruso. Additionally, Ghunnar Methvin's statement about remembering hearing talk about a robbery only came from Jaiden Caruso. Lastly, the State's "star witness" if you will, Kymani Thompson said that he based his opinion off of what he read on the news. Essentially the jury was improperly mis-led. If Harlan was not intentionally involved in any planned robbery, he cannot be guilty of 1st Degree- Felony Murder. Harlan would also ask this court for additional time to provide the court supplemental briefing on this issue as directed by the Court.

DATED this 13 day of AUGUST, 2019

K. RYAN HELMICK, ESQ.
Nevada Bar # 12769
RICHARD HARRIS LAW FIRM, LLP

CERTIFICATE OF SERVICE

I hereby certify that on the 13 day of August 2019, I served a true and correct copy of the foregoing **MOTION TO PLACE ON CALENDAR**, addressed to the following counsel of record at the following address(es), as follows:

X E-MAIL on August 13 2019, by emailing the address below:

Giancarlo Pesci
CLARK COUNTY DISTRICT ATTORNEY'S OFFICE
200 E. Lewis Ave.
Las Vegas, NV 89155
giancarlo.pesci@clarkcountyda.com

An employee at RICHARD HARRIS LAW FIRM

OPPS
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
GIANCARLO PESCI
Chief Deputy District Attorney
Nevada Bar #007135
SARAH OVERLY
Chief Deputy District Attorney
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(702) 671-0968
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

KODY HARLAN, aka,
Kody W. Harlan, #5124517

Defendant.

CASE NO: C-18-333318-2

DEPT NO: III

STATE'S OPPOSITION TO DEFENDANT'S MOTION TO SET ASIDE JURY VERDICT AS TO COUNTS ONE AND TWO; OR, IN THE ALTERNATIVE, MOTION FOR NEW TRIAL AND SUPPLEMENTAL BRIEFING

DATE OF HEARING: 8/29/19
TIME OF HEARING: 9:00 A.M.

COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through GIANCARLO PESCI, Chief Deputy District Attorney, and SARAH OVERLY, Chief Deputy District Attorney, and hereby submits the attached Points and Authorities in Opposition to Defendant's Motion to Set Aside Jury Verdict as to Counts 1 and 2, or, in the Alternative, Motion for New Trial and Supplemental Briefing.

This Opposition is made and based upon all the papers and pleadings on file herein, the attached points and authorities in support hereof, and oral argument at the time of hearing, if deemed necessary by this Honorable Court.