IN THE SUPREME COURT OF NEVADA

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IN THE SUPREME COURT FOR THE STATE OF NEVADA

WAR MACHINE A/K/A JONATHAN KOPPENHAVER,

APPELLANT,

vs.

THE STATE OF NEVADA,

RESPONDENT

Supreme Court Case No: 73276

District Court Case Number: C-14-302379-1

APPELLANT'S OPENING BRIEF

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Contents

Cases

I

NRAP RULE 26.1. DISCLOSURE STATEMENTS

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II

ROUTING STATEMENT

This case is to be heard by the Nevada Supreme Court because it involves the imposition of a life sentence arising from convictions for both A and B felonies based upon a jury verdict and are thus excluded from being heard by the Court of Appeal. NRAP 17(b)(2)(A). The notice of appeal was filed on 10 June 2017, which is timely. This appeal is from a final order of judgment after a jury trial.

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III

STATEMENT OF ISSUES

1. Like any other defendant, Mr. Koppenhaver[1] is not criminally responsible for conduct committed when he was acting unconsciously/autonomically/ reflexively and without the requisite criminal intent during any crime for which he was convicted. NRS 194.010(6)

2. The denial of an unconsciousness instruction based upon the significant evidence adduced in this case amounts to prejudicial error of Constitutional magnitude requiring reversal and a remand for a new trial with the appropriate instructions.

3. Counts 2, 3, 5 and 6 were not charged precisely in terms of both the conduct at issue and the date range such that they gave notice for what conduct Mr. Koppenhaver was charged and convicted.

4. Denial of the request to discover statements of Ms. Mackinday made to the prosecution amounted to a *BRADY v. MARYLAND* 373 U.S. 83 (1963) violation. Accordingly, NRS 173.235(2)(a) is either inapplicable to the statements at issue or

[1] Appellant refers to himself as Mr. Jonathan Koppenhaver throughout this appeal. He has almost completed the process to change lawful his name back to Jonathan Koppenhaver from his *nom de guerre* "War Machine."

is unconstitutional as applied to the set of facts herein as it contravenes the plain dictates of *Brady*.

5. The errors, when taken together, amount to cumulative error.

6. The errors and each of them, when taken together or viewed individually, are not harmless.

IV

STATEMENT OF THE CASE

Mr. Koppenhaver, a professional fighter, asked the jury about acting unconsciously at the outset of the trial during *voir dire*. It was made plain to all that his defense rested upon the reflexive and unconscious nature of his actions. He adduced evidence during trial about his actual brain injury and how it impacts the consciousness of his behavior. A doctor testified that persons with his condition could have been acting unconsciously within the legal definition during all of the events for which defendant was charged and convicted. The District Court failed to give an instruction that Mr. Koppenhaver may have been legally unconscious during all acts charged based upon a traumatic brain injury (TBI), notwithstanding substantial evidence upon which to rest the instruction and clear Nevada law to ground the instruction in sufficient legal basis. He was forced to concede many general intent counts due to a lack of a defense, which, in turn,

rested upon the failure to properly instruct the jury on the defense of unconsciousness. The District Court also denied Mr. Koppenhaver the ability to argue the defense to the jury at summation. He was deprived of the ability to defend himself.[2]

The District Court should have ordered the disclosure of statements by the central prosecution witness. Such statement contradicted earlier statements and led to the genesis of over two dozen new felony counts. The defendant was sentenced to life based upon those statements.

The charges were not sufficiently differentiated and described such that Mr. Koppenhaver had notice of exactly what he was charged with in which count and when the complained of conduct occurred.

The cumulative totality of the errors operates as a denial of due process. No error was harmless.

V.

FACTUAL STATEMENT

From the time that Lead Trial Counsel appeared at the pre-trial conference and throughout the trial, the Trial Court said[3] repeatedly: "I don't want to do this

[2] Precise citations to support these statements appear in the argument section.

trial twice." Alas, The Court's prescience abounded. The multiplicity of errors in this case compel a retrial.

This case involves charges stemming from four incidents arising out of a long-standing domestic violence-laced romantic relationship between Defendant Jon Koppenhaver, a professional mixed martial arts fighter and a so-called "porn star" or "adult film actress" named Christine Mackinday (A VOL IX BATES 1766, 1803 *et al.*), though she went by the name Christy Mack. (A VOL X, BATES 2039, LINE 2, for example). The two had common interests in snakes and tattoos and the like. They were a celebrity couple within the community who follow mixed martial arts and pornography. The two took their personal lives and romantic relationship to social media regularly, incessantly posting to Twitter and Instagram. What happened in their lives was almost immediately posted to social media. Much of the trial evidence was taken from these public postings. (X BATES 2092 ln 9-25, (Discussing Ms. Mackinday's "rape fantasies"))

Mr. Koppenhaver, due to years of fighting,[4] has a traumatic brain injury ("TBI") to his frontal lobe, per a brain scan conducted during trial. (A VOL XIV BATES 2911 LN 19, 2917 lln. 6-25, 2918 lln 1-14). The injury hampers his ability

[4] See generally the testimony of friend and fellow fighter Herman Terrado, for example beginning at BATES 2701. (A VOL XIII).

to control his behavior and causes him to act without consciousness thereof, reflexively and autonomically. (A VOL XIV BATES 2937 LN 1-8). In layman's terms, he has been hit too many times in the head and thereby can no longer control himself. **Indeed, it is curious that the Court disallowed the defense in that the Court signed off on funds and all orders to have Mr. Koppenhaver transported to a local hospital for his brain scan. Pre-trial, the defense put in a so-called "Widdis" motion (under seal) detailing that unconsciousness would be the defense in this case.**[5]

On August 8, 2014, just before 2:00 a.m., Mr. Koppenhaver surprised Ms. Mackinday, at her home. (A VOL X BATES 2128 ln 25 to 2130 ln 25). He had intended to propose marriage to her. He let himself in with his key and made his way to her bedroom and turned on the light. (A VOL X BATES 1962, Ln 15). Mr. Koppenhaver found Ms. Mackinday in bed asleep with another man, Corey Thomas. Mr. Koppenhaver "lost it" (*Id.* BATES 1885, ln 7-8). First, Mr. Koppenhaver starting to yell and then scuffled with, hit and choked Mr. Thomas, who, as a wrestling champion in his youth, fought back admirably and then, after Mr. Thomas was subdued and ushered out and things temporarily cooled down,

[5] The defense asks the Court to take judicial notice of the files, records and exhibits in this case, including "Widdis" matters filed under seal.

Mr. Koppenhaver, calm at the time, "lost it" again and beat, kicked and sexually assaulted Ms. Mackinday. (A VOL X BATES 2125 ln. 11-14, for example). Mr. Koppenhaver initially faced 7 counts, mostly misdemeanors, alleging various conduct, including a sexual battery during Ms. Mackinday's assault.[6]

Ms. Mackinday initially denied that there was prior domestic or sexual violence between the two[7] and that she was vaginally penetrated on August 8th. Reports taken in the hospital by both the SART nurse and the investigating officer indicate the denials. (A VOL II BATES 174 Ln. 3-8 (Ms. Bluth describing Ms. Mackinday's change of position while meeting with the District Attorney) A VOL X BATES 2152 ln 12-13, Ms. Mackinday explaining that her definition of penetration had changed during her meeting with the District Attorney) After a meeting with the District Attorney several weeks later, Ms. Mackinday determined that she was penetrated and that there were many more prior domestic violence incidents. (A VOL II BATES 0177 LN 4- 7, as summarized by Mr. Sua, as additional support.) Mr. Koppenhaver's complaint was amended to allege 32 and

[6] See Vol I at BATES 1-3.

[7] A VOL XI BATES 2045 ln 22-23 (Sexual assault detective referencing learning of prior sexual assault via the DA, see also 2417 ln 16.)

then 34 counts. (See A VOL I, BATES 4-12 and 24-33) Almost all were felonies and 8 of those new counts carried life sentences.

A preliminary hearing was conducted that yielded little information helpful for the defense in terms of determining what conduct led to what conduct. Indeed, P. 91 of the Preliminary hearing transcript, A VOL I at page 0090; lines 11-19 States: "Q (By Ms.Bluth): I want to talk about the choking that you talked about. Can you give me one or two specific instances, so I can ask you some questions about when that occurred and how? A (By Ms. Mackinday) There was one time before my friend's birthday party where he picked me up by my throat and carried me up the stairs and threw me on the bed. There were many times. There was one time when I gave my mother a ferret cage and he got very mad. He thought I was giving him attitude[,] so he picked me up by the throat and carried me into the laundry room, slammed the door behind him and continued to choke me and hold me down." NO mention was made of the "Snake Water Incident." The incident that happened before a birthday party was not part of the charged conduct, though throughout the case the defense believed it was defending that count. Mr. Sua, who was conducting his first ever preliminary hearing, and was unprepared for such a serious case, dared not ask for clarification lest there be more and more counts added.

Mr. Koppenhaver's jury trial lasted three weeks, including jury selection. The case was broken down into a few different incidents that each were given names to distinguish them. There was the "Houston Incident" involving four counts of sexual assault. Mr. Koppenhaver was convicted of having non-consensual sex with Ms. Mackinday after she returned home from a trip to Houston. He tried to penetrate her vagina twice and her anus twice. He received a life sentence on all four counts.

The "Boulevard Mall Incident" involved kidnapping with serious bodily injury. This incident also had a "life" count. Mr. Kopenhaver allegedly stopped Ms. Mackinday from leaving his car and slammed her head against the car dashboard, chipping a tooth. The incident happened while stopped at a traffic light.

The "Ferret Cage Incident" involved strangulation in Victim Christine Mackinday's home. Likewise, the "Snake Water Incident" involved strangulation in Victim Christine Mackinday's home. Both incidents involved Mr. Koppenhaver losing his temper and grabbing Ms. Mackinday by the throat and choking her.

The crux of the case, and the majority of the charges, revolved around the "August 8th Incident." Those counts involved the battery and choking of Victim Corey Thomas (for a small portion, SEE A VOL VII BATES 1432 lln 8-16) and a

brutal assault, kidnapping and sexual assault on Victim Christine Mackinday. (*Passim*)

Mr. Koppenhaver adduced evidence that he was acting unconsciously at the times that several counts took place. (A VOL XIV BATES 2905 – 2937 inclusive) At the close of trial, Mr. Koppenhaver was denied a jury instruction on unconsciousness and was prohibited from arguing that defense to the jury during closing arguments. (A VOL XVI pg. 3103 lln. 13-20) Mr. Koppenhaver's traumatic brain injury made his actions less than fully volitional. He was acting in a legally unconscious/automatic state and relied upon that as the basis for his defense. (A VOL XIV BATES 2930 ln. 25, BATES 2931 lln. 1-8)

Defense witness Dr. Stephen Holper's testimony indicated that someone with a "TBI" like Mr. Koppenhaver's will reach reflexively in situations such as the one that occurred on August 8, 2014. Dr. Holper indicated that Mr. Koppenhaver lacked the free will to control his actions. (*Id.*)

Moreover, Mr. Koppenhaver *Voir Dire'd* extensively on this issue. Indeed, in addition to discussions of traumatic brain injuries (A VOL III BATES 347 ln. 4,8,11; BATES 433 ln. 11; bates 447 ln. 5; BATES 479 ln. 20; bates 484 ln. 17) AND Chronic traumatic encephalopathy or "CTE" (A VOL III BATES 347 LN. 11; BATES 348 ln. 2; BATES 372 LN. 19; BATES 433 ln. 12; BATES 481 lln. 11,16; BATES 486 lln. 6,7,11), there was significant discussion with the jurors

about the movie "Concussion." (A VOL III 346 ln. 2, 347 lln. 115,18; BATES 348 ln. 2; BATES 372 LLn. 19,23; BATES 447 LN. 16; BATES 479 ln. 20; BATES 484 ln. 15). These are by no means exhaustive lists of voir dire. The State also used voir dire to ask about these issues. See, for example, BATES 1127 ln. 23-25; BATES 1128 ln. 1-8.

The information contains none of the language annotated in the verdict forms, namely "Snake Water," "Ferret Cage," "Boulevard Mall," "Houston," or "August 8." (A VOL I BATES 60-67) No dates are listed for each count. The breakdown exemplifies the vagueness regarding dates and incidents. In particular, counts 1-7 delineate no specifics. Counts 1-7 could apply to either Ferret Cage or Snake Water or perhaps one of the other beatings Ms. Mackinday vaguely alleged. She testified slapping occurred usually once a month. Language in a verdict form given to counsel the morning of closing arguments is not sufficient notice to satisfy due process. It was impossible to distinguish in the minute offered to review the new form. Counsel confused incidents during closing arguments. Perhaps due to a PowerPoint made the day before (A VOL XIX BATES 3464-3560), perhaps due to the fact that it was impossible to tell the two incidents apart. Indeed, Counsel could not tell from the verdict form in A VOL XVIII bates 3414-3420. See also BATES 3565, confusing "snake water" for "Ferrett" and BATES 3569, for the same thing,

but vice-versa. Counsel did not know what to defend against. The PowerPoint is irrefutable proof.

Additional facts are detailed throughout as they relate to the particular issue at hand.

VI

STANDARD OF REVIEW

Whether a jury instruction accurately states the law is reviewed de novo. *Funderburk v. State*, 125 Nev. 260, 263, 212 P.3d 337, 339 (2009). When the instruction concerns a defendant's right to self-defense, the issue is of constitutional magnitude. See *United States v. Sayetsitty*, 107 F.3d 1405, 1414 (9th Cir.1997). *Gonzalez v. State*, 366 P. 3d 680, 684 (2015). Accordingly, the failure to instruct upon unconsciousness would seem to be an issue of constitutional magnitude reviewed de novo. This court applies a de novo standard of review to constitutional challenges. *Rico v. Rodriguez*, 121 Nev. 695, 702, 120 P.3d 812, 817 (2005).

Determining whether a pleading provides sufficient notice is reviewed de novo. *Shoen v. SAC Holding Corp*., 137 P. 3d 1171 (2006).

Determining whether the state adequately disclosed information under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), requires consideration of both factual circumstances and legal issues; thus, this court

reviews de novo the district court's decision. *Mazzan v. Warden*, 993 P. 2d 25 (2000).

VII

ARGUMENT

A.

MR. KOPPENHAVER WAS ACTING UNCONSCIOUSLY AND WITHOUT THE REQUISITE CRIMINAL INTENT DURING EACH OF THE CRIMES FOR WHICH HE WAS CONVICTED HEREIN, AND THUS HE WAS IMPORPERLY CONVICTED OF ALL CHARGES, ACCORDING TO NRS SECTION 194.010 ***All persons are liable to punishment except those belonging to the following classes: (6) Persons who committed the act charged without being conscious thereof.***

Nothing in the law is as clear as a statute directly on point that is plain and not subject to multiple interpretations. Such is the case here. There does not appear to be any Nevada caselaw directly authorizing the defense of

unconsciousness a/k/a atomism.[8] A reasonable conclusion is that no caselaw is needed when a statute is so clear on its face. Nor was it apparent that there was a statute on point, as, for some reason, it did not come clearly up on a search of the terms in the NRS. Counsel searched. Neither the Court nor the State was aware of such a statute or had ever heard of such a defense. Nonetheless, a statute right on point exists. NRS 194.010 states:

NRS 194.010 Persons capable of committing crimes. All persons are liable to punishment except those belonging to the following classes:

***

6. Persons who committed the act charged without being conscious thereof.

***

[1911 C&P § 3; RL § 6268; NCL § 9952]—(NRS A 1979, 145; 1981, 1660; 1995, 2467; 2001 Special Session, 136; 2003, 1480; 2015, 787)[9]

[8] There is law to support the existence and the tacit and assumed approval of the defense of unconsciousness as far back as 1879. *State v. Frazier* (1879) 14 Nev. 210, 214.

[9] In 1872 California adopted the statute upon which this Nevada statute is based, CA Penal Code section 26.

The requested instruction, which, in its raw form, based upon California CALCRIM 3425 was as follows:

> 3425.Unconsciousness
>
> The defendant is not guilty of <insert crime[s]> if (he/she) acted while unconscious. Someone is unconscious when he or she is not conscious of his or her actions. [Someone may be unconscious even though able to move.]
>
> Unconsciousness may be caused by (a blackout[,]/ [or] an epileptic seizure[,]/ [or] involuntary intoxication[,]/ [or] <insert a similar condition>).
>
> [The defense of unconsciousness may not be based on voluntary intoxication.]
>
> The People must prove beyond a reasonable doubt that the defendant was conscious when (he/she) acted. If there is proof beyond a reasonable doubt that the defendant acted as if (he/she) were conscious, you should conclude that (he/she) was conscious, unless based on all the evidence, you have a reasonable doubt that (he/she) was conscious, in which case you must find (him/her) not guilty.

In this case, Dr. Holper testified again and again that defendant acted reflexively.[10] Reflexively is defined as "an automatic and often inborn response."[11] "A defendant in a criminal case is entitled, upon request, to a jury instruction on his or her theory of the case, so long as there is some evidence, no matter how weak or incredible, to support it." *Williams v. State, 99 Nev. 530, 531, 665 P.2d 260, 261 (1983), Boykins v. State, 995 P. 2d 474 (2000)* (Battered Woman's Syndrome).

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[10] This is so notwithstanding the fact that Counsel continued to add variables concerning voluntary intoxication. Dr. Holper never wavered from his opinion that Mr. Koppenhaver reacted autonomically.

[11] https://www.merriam-webster.com/dictionary/reflex

Margetts v. State, 107 Nev. 616, 619, 818 P.2d 392, 394 (1991) stands for the proposition that the denial of an instruction that identified that Mr. Koppenhaver had a defense, coupled with the Court disallowing Counsel to argue to the jury that unconsciousness was, indeed a defense to all crimes charged, and that toward that end the Court produced an infirmity of mammoth Constitutional proportions. Under any view of the Constitution, Mr. Koppenhaver was denied a fair trial. The defense of unconsciousness applied to every count upon which Mr. Koppenhaver was convicted. *Margetts* is discussed in more detail *infra.*

That Mr. Koppenhaver labored under an unconsciousness of action due to a traumatic brain injury is essential in understanding the actions for which he was charged in this case. To deprive him of the opportunity to explain that to the jury that he was acting reflexively or automatically amounted to a denial of due process. Mr. Koppenhaver could have argued to the jury that his brain injury was a defense to all counts. He was prevented from doing so. It was clear to both Court and Counsel that Mr. Koppenhaver relied upon this defense.[12] Indeed, at

[12] A television show called "Sin City Justice" made a full hour TV show out of this case as part of the series. Included in the episode were DA meetings where they discuss that the defense would be unconsciousness. https://www.investigationdiscovery.com/tv-shows/sin-city-justice/full-episodes/rage-against-the-machine

summation, Mr. Koppenhaver had to concede many counts due to the deprivation of this defense. (A VOL XVI BATES 3122, LINES 20-24)

Barger v. State, 81 Nev. 548, 407 P.2d 584 (1965) holds that if a defense theory of the case is supported by some evidence which, if believed, would support a corresponding jury verdict, failure to instruct on that theory totally removes it from the jury's consideration and constitutes reversible error.

1. Nevada recognizes the defense of unconsciousness

As previously stated, NRS 194.010(6) provides that persons who committed the act charged without being conscious thereof are not subject to punishment for crimes charged under the NRS.

As NRS 194.010 has existed for over a century and was almost in its entirety derived from California Penal Code section 26,[13] this Court must ultimately engage in an examination of California law (among others) on the subject - - something the Court declined to do when considering the appropriateness of the instruction

[13] CA Pen. C. section 26. All persons are capable of committing crimes except those belonging to the following classes: ¶ Four Persons who committed the act charged without being conscious thereof.

during the trial. (See A VOL XVI BATES 3114 ln 14 through BATES 3115 ln 10) Moreover, as discussed in *State v. Frasier* (1879) 14 Nev. 210, 214 (See above fn. 5), Nevada has recognized unconsciousness may have been a defense as early as 1879.

2. Unconsciousness is a venerated and widely recognized defense throughout American Jurisprudence

Instructive language in the summation of the unconsciousness/atomism defense can be found in *State of North Carolina v. Caddell*, 215 SE 2d 348, 360 (N.C. Supreme Court 1975):

> The defense of unconsciousness, or automatism, while not an entirely new development in the criminal law, has been discussed in relatively few decisions by American appellate courts, most of these being in California where the defense is expressly provided by statute. In *Bratty v. Attorney General for Northern Ireland*, All E.R. 3 (1961) 523, Lord Denning observed: "Until recently there was hardly any reference in the English books to this so-called defense of automatism. There was a passing reference to it in 1951 in *R. v. Harrison-Owen* [1951] 2 All E.R. 726." The only express reference to it which we have found in our Reports is in *State v. Mercer*, 275 N.C. 108, 165 S.E.2d 328, which we discuss below.
>
> At page 360 of *Caddell*, the North Carolina High Court does revisit *Mercer*: In *State v. Mercer, supra*, at p. 119, 165 S.E.2d at 336, this Court said: "Upon the present record, defendant was entitled to an instruction to the effect the jury should

return verdicts of not guilty if in fact defendant was completely unconscious of what transpired when [the victims] were shot." See also: 21 Am.Jur.2d, Criminal Law, § 29; 22 C.J.S. Criminal Law § 55; Burdick, Law of Crime, §§ 216, 217 (1946); Brill, Cyclopedia of Criminal Law, §§ 124, 128 (1922); Bishop, Criminal Law, §§ 388, 395 (9th ed. 1923); Wharton, Criminal Law and Procedure, § 50 (Anderson's Edition 1957); Weihofen, Mental Disorder as a Criminal Defense, pp. 121-122 (1958); Miller, Criminal Law, § 39 (1934).” *Id*.

The first time the defense of unconsciousness was used in the United States was in *Massachusetts v. Tirrell* in 1846. The doctrine remained in steady use from there and was applied to a diverse set of factual scenarios in various states from there. See, e.g.; *Fain v. Commonwealth*, 78 Ky. 183, 39 Am.Rep. 213 (1879). *Smith v. Commonwealth*, Ky. (“a blackout of his mind or had become unconscious”), 268 S.W.2d 937; *Corder v. Commonwealth*, Ky., 278 S.W.2d 77 (“The question in this case resolves itself into one of whether there was sufficient evidence to raise an issue as to Corder's insanity or unconsciousness at the time of the offense. If there was such evidence, the issue should have been submitted to the jury by appropriate instructions.”)[14].

[14] See Also *Bradley v. State* 102 Tex. Crim. 41 (Tex. Crim. App. 1925, *Commonwealth of Pennsylvania v. Ricksgers*, No. 153 of 1994; *State of Oregon v.*

Newman, 302 P.3d 435 (2013), 353 Or. 632, ("[W]hile "unconsciousness" may imply collapse or coma, there are "states of physical activity where self-awareness is grossly impaired or even absent," — i.e., … states of active automatism — that are subsumed within the meaning of the term [unconsciousness]" … and is thus part of what was meant to be covered in ORS 161.095(1)); *People v. Hardy*, 33 Cal. 2d 52, 198 P.2d 865 (1948); *People v. Martin*, 87 Cal. App. 2d 581, 197 P.2d 379 (1948); *People v. Taylor*, 31 Cal. App. 2d 723, 88 P.2d 942 (1939); *People v. Grant*, 46 Ill. App. 3d 125, 4 Ill. Dec. 696, 360 N.E.2d 809 (1977); *Carter v. State*, Okl. Cr., 376 P.2d 351 (1962); 21 Am.Jur.2d § 29, Criminal Law, p. 115 (1965); *State of Arizona v. McKeon*, 38 P.3d 1236 (2002); 201 Ariz. 571A.R.S. § 13-105(37) (1994), *State of Arizona v. Venegas*, 137 Ariz. 171, 173, 669 P.2d 604, 606 (App.1983) (quoting *People v. Ray*, 14 Cal.3d 20, 120 Cal.Rptr. 377, 533 P.2d 1017, 1019 (Cal.1975))." Idaho has a jury instruction for the defense of unconsciousness. The instruction is found at "ICJI 1507 UNCONSCIOUS ACT DEFENSE." Ohio has a statute that harmonizes with Nevada's. See 21 Ohio St. 1951 § 152, reading in part as follows: "All persons are capable of committing crimes, except those belonging to the following classes: 6. Persons who committed the act charged without being conscious thereof." Montana has a slightly different statute about unconsciousness, adding a bit of flavor and expanse of the defense.

We end our survey where Mr. Koppenhaver's argument for the unconsciousness began; in California. California has stated as follows in extending the defense to homicide crimes:

> Where not self-induced, as by voluntary intoxication or the equivalent…, unconsciousness is a complete defense to a charge of criminal homicide. [Citations omitted.] "Unconsciousness," as the term is used in the rule just cited, need not reach the physical dimensions commonly associated with the term (coma, inertia, incapability of locomotion or manual action, and so on); it can exist - and the above-stated rule can apply - where the subject physically acts in fact but is not, at the time, conscious of acting.

See MONT. CODE ANN. § 45-2-101(33) An "involuntary act" means an act that is: (a) a reflex or convulsion; (b) a bodily movement during unconsciousness or sleep; As for South Dakota, "The defense of unconsciousness is based upon SDCL 22-3-1, which provides, in pertinent part: 'Any person is capable of committing a crime, except those belonging to the following classes: . . . (4) Persons who committed the act charged without being conscious thereof[.]'" In Washington State, the acceptance of the defense of unconsciousness goes as far back as the Territory of Washington, in *McAllister v. Washington Territory*, (1872) 1 Wash. Territory 360, 366 [approving an instruction that if defendant was unconscious due to a blow to the head at the time of the murder the jury was excusable; the issue being which side bore the burden of proof].

People v. Newton (1970) 8 Cal.App.3d 359, 376, 87 C.R. 394. This survey of states was by no means exhaustive.

3. Unconsciousness defined

Nevada does not define unconsciousness or atomism outside the statutory language. The Wyoming Supreme Court, relying heavily upon California law, syllogized unconsciousness with automatism. They defined and discussed autonomism as follows:

> "Automatism is the state of a person who, though capable of action, is not conscious of what he is doing. While in an automatistic state, an individual performs complex actions without an exercise of will. Because these actions are performed in a state of unconsciousness, they are involuntary. Automatistic behavior may be followed by complete or partial inability to recall the actions performed while unconscious. Thus, a person who acts automatically does so without intent, exercise of free will, or knowledge of the act." *Id.* at 145. ¶ "Automatism may be caused by an abnormal condition of the mind capable of being designated a mental illness or deficiency. Automatism may also be manifest in a person with a perfectly healthy mind." *Id.*

Fulcher v. State, 633 P.2d 142, 144 (Wyo. 1981)

The State of Illinois, in *People v. Grant* 46 Ill.App.3d 125, 360 N.E.2d 809, 4 Ill.Dec. 696 (1977) defines autonomism as follows:

> The term automatism is defined as the state of a person who, though capable of action, is not conscious of what he is doing. Automatism is

not insanity. (LaFave & Scott, Criminal Law s 44 at 337.) In the language of section 4--1 of our Criminal Code, it is manifested by the performance of involuntary acts that can be of a simple or complex nature. Clinically, automatism has been identified in a wide variety of physical conditions including: epilepsy, organic brain disease, **concussional states following head injuries**, drug abuse, hypoglycemia and, less commonly, in some types of schizophrenia and acute emotional disturbance. (LaFave & Scott, 337.) Psychomotor epileptics not only engage in automatic or fugue-like activity, but they may also suffer convulsive seizures. 2 Cecil-Loeb, Textbook of Medicine, ed. Beeson & McDermott, 1512--1513 (12th ed., 1967)(**emphasis added**).

4. Unconsciousness is different than insanity

The mental illness or deficiency plea does not adequately cover automatic or unconscious behavior. The two have overlaps, but neither fully describes the behavior of the other that is the subject of the defense. Unless the plea of automatism, separate and apart from the plea of mental illness or deficiency is allowed, certain anomalies will result. For example [much like the case at bar], if the court determines that the automatistic defendant is sane, but refuses to recognize automatism, the defendant has no defense to the crime with which he is charged. If found guilty, he faces a prison term. The rehabilitative value of imprisonment for the automatistic offender who has committed the offense unconsciously is nonexistent. The cause of the act was an uncontrollable physical disorder that may never recur and is not a moral deficiency. *Fulcher v. State*, 633 P.2d 142, 146 (Wyo. 1981).

> "A defense related to but different from the defense of insanity is that of unconsciousness, often referred to as automatism: one who engages in what would otherwise be criminal conduct is not guilty of a crime if he does so in a state of unconsciousness or semi-consciousness. * * *" LaFave & Scott, Criminal Law, § 44, p. 337 (1972).
> "The defenses of insanity and unconsciousness are not the same in nature, for unconsciousness at the time of the alleged criminal act need not be the result of a disease or defect of the mind. As a consequence, the two defenses are not the same in effect, for a defendant found not guilty by reason of unconsciousness, as distinct from insanity, is not subject to commitment to a hospital for the mentally ill." *State v. Caddell*, 287 N.C. 266, 215 S.E.2d 348, 360 (1975).
>
> The principal reason for making a distinction between the defense of unconsciousness and insanity is that the consequences which follow an acquittal will differ. The defense of unconsciousness is usually a complete defense. [fn omitted] *State v. Mercer*, 275 N.C. 108, 165 S.E.2d 328, 334 (1969). *State v. Caddell*, supra; 21 Am.Jur.2d, Criminal Law, § 29, p. 115 (1965). That is, there are no follow-up consequences after an acquittal; all action against a defendant is concluded.

Fulcher v. State, 633 P.2d 142, 144 (Wyo. 1981)

Here, the Court forced Counsel to choose whether or not to enter a plea of not guilty by reason of mental disease or defect (formerly insanity) or to lose his defense. He was forced to lose the defense, as he was not insane. (See A VOL XVI BATES 3096 ln. 24 AND BATES 3101 lln 8-10)

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5. Various types of recognized unconsciousness or atomism

Some types of unconsciousness that have been legally recognized are: **Traumatic brain injuries** (*Carter v. State*, Okl. Cr., 376 P.2d 351 (1962)(**emphasis added)**), *People v. Magnus*, 92 Misc. 80, 155 N.Y.S. 1013); Blackouts (*People v. Cox* (1944) 67 Cal.App.2d 166, 172 [153 P.2d 362]), delirium, somnambulism (*People v. Methever* (1901) 132 Cal. 326, 329 [64 P. 481], overruled on other grounds in *People v. Gorshen* (1953) 51 Cal.2d 716 [336 P.2d 492]), [ ] and epileptic seizures (*People v. Freeman* (1943) 61 Cal.App.2d 110, 115-116 [142 P.2d 435]).

6. Unconsciousness does not require that the defendant be incapable of movement

See, e.g. *People v. Hughes* (2002) 27 Cal.4th 287, 343-344 [116 Cal.Rptr.2d 401, 39 P.3d 432] [jury was adequately informed that unconsciousness does not require that person be incapable of movement].

7. Lastly, and most importantly, unconsciousness is a complete defense to the *actus reas.*

As unconsciousness is a defense to the *actus reus* and not the *mens rea* it applies to both general and specific intent crimes. As proof positive of this principle, unconsciousness was held to be a valid defense in cases involving only

criminal negligence. (See *People v. Freeman* (1943) 61 Cal.App.2d 110, 142 P.2d 435[former negligent homicide statute]:

> "No principle of criminal jurisprudence was ever more zealously guarded than that a person is guiltless if at the time of his commission of an act defined as criminal[,] he has no knowledge of his deed. ... A person who cannot comprehend the nature and quality of his act is not responsible therefor. An act done in the absence of the will is not any more the behavior of the actor than is an act done contrary to his will." (61 Cal.App.2d at 117.)

Dr. Holper testified that Mr. Koppenhaver's actions were reflexive and not the product of thought; that they were autonomic or unconscious responses. (See A VOL XIV BATES 2930 ln 25 – BATES 2931 ln 8; BATES 2937 ln 1-8). That was enough to trigger the instruction on unconsciousness/atomism.

B.

THE DENIAL OF AN UNCONSCIOUSNESS INSTRUCTION IS PREJUDICIAL ERROR REQUIRING REVERSAL AND A REMAND FOR A NEW TRIAL

The Trial Court's refusal to give the defense requested jury instruction relating to unconsciousness denied Mr. Koppenhaver of his fundamental constitutional right to a fair trial. It is reversible error. *Barger v. State*, 81 Nev. 548, 407 P.2d 584 (1965)[entrapment].

"It is well established in our state that a defendant in a criminal case is entitled to have the jury instructed on his theory of the case, no matter how weak or incredible the evidence appears to be." *Margetts v. State,* 107 Nev. 616, 619, 818 P.2d 392, 394 (1991).

In *Margetts*, "[t]he defense offered an instruction which read: '[i]f you find that at the time Mr. Margetts received the krugerrands from Mr. Hendrickson he lacked the specific intent to defraud Mr. Hendrickson then you must return a verdict of Not Guilty on both counts.'" Like Mr. Koppenhaver, Margetts did not testify. The district court denied the request to give this instruction. This Court held that the district court's failure to give this instruction was error and remanded the case for a new trial. It held that "failure to instruct on the absence of an element of the crime is reversible error." *Margetts*, 818 P.2d 392, 395 (citing *Brooks v. State*, 103 Nev. 611, 747 P.2d 893 (1987.) *See also Vallery v. State*, 118 Nev. 357, 46 P.3d 66 (2002) (held definition of "willfully" in jury instructions was incorrect statement of the law; reversed and remanded on that count.), as well as *Boykins v. State, supra*, 995 P. 2d 474 (2000) and *Williams v. State, supra, 99 Nev. 530, 531, 665 P.2d 260, 261 (1983); United States v. Burt*, 410 F.3d 1100, 1103 (9th Cir.2005). ("If a defense negates an element of the crime, rather than mitigates culpability once guilt is proven, it is unconstitutional to put the burden of

proof on the defendant.") *Walker v. Endell*, 850 F.2d 470, 472 (9th Cir. 1987); *Patterson v. New York*, 432 U.S. 197, 210, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977).

In Mr. Koppenhaver's case, refusal of the court to instruct on unconsciousness was a refusal to instruct on the absence of an element of the crime, namely, a criminal intent. There is evidence on the record that Mr. Koppenhaver acted without intent. Dr. Holper testified during trial that Mr. Koppenhaver acted reflexively, without thought. Even if this evidence is considered weak or incredible, Mr. Koppenhaver was entitled to an instruction on unconsciousness as it relates to the absence of criminal intent. Intent, whether general or specific, is an element of all the crimes of which Mr. Koppenhaver was convicted.

As unconsciousness is also recognized and authorized as a defense in the Nevada Revised Statutes, NRS 194.010, failure to instruct on unconsciousness denied Mr. Koppenhaver due process and a fundamentally fair trial. As a matter of law, Mr. Koppenhaver should be granted a new trial. *Margetts, supra; Barger, supra.*

Moreover, failure to properly instruct the jury on an apposite defense to all charged counts clearly and unequivocally subjected Mr. Koppenhaver to a denial of due process as applied to the states in the 14th Amendment to the United States Constitution. See, for example see NRS 176.525, *et. seq.*, *Hogan v. State* 441

P.2d 620 (1968) (This appeal is taken from . . . the denial of the motion in arrest of judgment, upon the ground that the appellant's rights, protected by the Fourteenth Amendment of the U.S. Constitution, had been violated).

C.

COUNTS 2, 3, 5 AND 6 FAIL TO ALLEGE THE COUNTS AND DATE RANGE WITH MORE PRECISION TO A DEGREE THAT AMOUNTED TO A FAILURE OF NOTICE OF CONSTITUTIONAL PROPORTIONS

Mr. Koppenhaver is constitutionally entitled to know and to be able to defend himself at trial against the specific instances of conduct alleged both in the charges and uncharged bad acts. The lack of specificity in the charging document denied Mr. Koppenhaver of the ability to present defenses, including an alibi or jurisdictional defense. In this particular case, there is undisputed evidence on the record that various incidents occurred in two different states. See VOLS IX AND X at BATES 1808 ln 19, 1856 ln 13, 1878 ln 23, 1879 ln 6 and VOL IX BATES 1959 ln 3 (regarding beating occurring in San Diego), 2008 ln 11, 2010 ln 10, 2015 ln 4, for some small examples from Ms. Mackinday herself.) This evidence showed that Mr. Koppenhaver lived in San Diego with Ms. Mackinday on and off for periods of time during the relationship. Without specifying with more

particularly the incidents in the criminal information, Mr. Koppenhaver was unable to present an alibi defense that he was in San Diego at time of these events rather than Nevada. Indeed, the defense and jury only became aware that there were "stand alone counts" that made the time periods more imprecise during jury deliberations. BATES 3436. Worse, inadequate notice of what conduct applies to which count did not give the defense notice as to potential other bad acts of the defendant alleged by the victim.

During jury deliberations (A VOL XVIII BATES 3436 (JURY QUESTION RE: STAND-ALONE COUNTS) and at sentencing the defense moved to set aside Counts 2, 3, 5, and 6, the "stand alone" counts for insufficiency of the evidence. NRS 178.381 permits the trial court to set aside the verdict and enter a judgment of acquittal if the evidence is insufficient to sustain the verdict. Though the Trial Court declined to do so, the evidence presented is nonetheless insufficient for a jury finding of guilt as to Counts 2, 3, 5, and 6. The only evidence as to those counts was Ms. Mackinday's testimony. Ms. Mackinday was asked how often he took her phone and she said, "nearly every time." When asked how many times this occurred in Las Vegas, she said "at least two to three times." (VOL IX 1827 ln 7 "nearly every time became 2-3 times in Las Vegas). That was the extent of the evidence as to Counts 2, 3, 5, 6. The defense was unable to tell whether the "two to three times" at issue in this case were those that occurred in Las Vegas.

In *Bradley v. State*, 864 P.2d 1272, 1276 (1993), this Court held there was insufficient evidence provided by a child victim to sustain a count of sexual abuse. The court in *Bradley* summarized the pertinent facts to include a detailed recital of a July 20, 1990 incident. Then, the prosecutor asked the Victim if anything ever happened on December 1st. The Victim responded, "the same thing as my birthday." The Victim's birthday is July 20th. The Victim offered no other testimony of the December 1, 1990 incident. *Id.* In *Bradley*, this Court held that the victim's testimony regarding Count VIII was insufficient to sustain the jury's finding of guilt.

Like in *Bradley*, Ms. Mackinday's testimony was not sufficiently specific to sustain the guilty verdicts on the "stand alone" counts. Ms. Mackinday never really says when these threats and he usually took the phone, she never specifies on the record what events occurred prior to taking her phone or threatening her not to tell anyone.

LaPierre v. State, 836 P.2d 56 (1992) is also similar to this case. In *La Pierre*, this Court held that the child victim's testimony was insufficient to sustain a guilty verdict on five of the counts. The court held, "In this case, the child's testimony consisted of her speculation that it must have happened at least ten times. Something more is required to support a conviction." The court in *LaPeirre*, summarized the facts as follows:

> When the child was asked at trial how many times Richard assaulted her, she answered, "Ten or more." When asked how she knew that was the number, she replied, "Because he was doing I don't know. I know it's ten or more because he was doing it up until he left." When she was asked later if she was absolutely sure how many times it happened, she answered, "No, I'm not absolutely sure. That's why I said ten or more."

LaPeirre v. State, 836 P.2d 56, 57 (1992).

Similarly, Ms. Mackinday is speculating as to the number of times these events occurred in Las Vegas, as she said they happened at least once a month and could have occurred during the rather long stretches of the relationship she lived with Mr. Koppenhaver in San Diego, California. Accordingly, she isn't even aware if the charged counts occurred in Nevada or not. Sans specificity, the convictions cannot stand.

Compounding the above issue, the District Attorney included a date range at the very being of the criminal information broadly referring to all 34 counts as occurring "on or between May 1, 2013 and August 8, 2014." This time period spanned the entire relationship between Mr. Koppenhaver and Ms. Mackinday. While it is true that the prosecution has no obligation to allege an exact date and may instead give an approximate date, "[t]his does not mean, however, that the state may fail to allege any date whatsoever in the information… since such a failure would clearly deprive the defendant of adequate notice of the charge against him…Moreover the state should,

whenever possible, allege the exact date on which it believes a crime was committed, or as closely thereto as possible." *Cunningham v. State* 683 P.2d 500, 502 (1984) (citing *Simpson v. District Court*, 88 Nev. 654, 503 P.2d 1225 (1972.)

As enunciated in *Cunningham*, the standard is that if the prosecution is able to allege specific dates in the criminal information, then the prosecution should be specific as possible in the charging document. Here, it was possible for the prosecution to be more specific, the notes added to the verdict form at the last minute were in fact more specific, though it was too late at that point to present a defense to the counts based upon the dates. The district attorney failed to include these specifics in in the criminal information and thereby deprived Mr. Koppenhaver of proper notice as required by due process. By the morning of summation, it was too late to mount a defense to charges 1-7. The defense had but a split second to review the new forms, didn't notice any changes, lodged an objection in that the new forms changed the charges in the second amended criminal information and then submitted the matter to the Court. (VOL XVII BATES 3301 Lln 6-25, page 3303 lln 1-3).

It is important to note that the majority of this Court's cases which give great latitude to the prosecution with picking broad dates are cases involving the sexual abuse of children, not adults. In *Cunningham*, the victim was a child and the prosecution specified dates for each count. Likewise, *Bradley* and *La Pierre.*

This case is so manifestly distinct from a child victim case that we are obliged to cite *Cunningham* only to the extent that it is one of the leading prosecution cases in the area. The fact that the prosecution and the court knew that the verdict form had to be annotated because the jury would be confused, (See cites to record *infra*) proves the defense's point that this criminal information was so vague it denied Mr. Koppenhaver of due process. The Sixth Amendment of the United States Constitution guarantees the right of a criminal defendant "to be informed of the nature and cause of the accusation." According to the United States Supreme Court, "No principle of procedural due process is more clearly established than that notice of the specific charge and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal." *Cole v. Arkansas* 333 U.S. 196, 201 (1948.)

NRS 173.075 expressly provides, "the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged." In *Simpson v. District Court*, 88 Nev. 654, 503 P.2d 1225 (1972), this

Court explained that "a fundamental vice of indefinite charges is that they permit prosecutors to try cases on theories totally different than those propounded earlier." *Simpson*, 503 P.2d 1225, 1230. Per the court in *Simpson*: "Whether at common law or under statute, the accusation must include a characterization of the crime and such description of the particular act alleged to have been committed by the accused as will enable him properly to defend against the accusation, and the description of the offense must be sufficiently full and complete to accord the accused his constitutional right to due process of law." *Id*. (quoting 4 R. Anderson, Wharton's Criminal Law and Procedure, section 1760, at 553 (1957).

The last minute adding of the language, "Snake Water," "Ferret Cage," "Boulevard Mall," "Houston," and "August 8" to the verdict form illustrates two things. First, there is the aforementioned recognition on the part of the Court and the Prosecution that the criminal information is too vague to decipher what conduct goes to which count. Secondly, it is not possible to cure a due process notice violation by last minute supplementation after the close of evidence. Clarification for the jury in a verdict form or an answer to a jury question, where the defense is called upon to make snap decisions without reflection, does not cure a due process notice violation. The defense must be on notice prior to the jury trial and prior to closing arguments. In this case, the counts were a moving target.

For example, in the verdict form for Count 1, Battery, the district attorney put a note next to count 1 "(Ferret Cage)." Count 2 is Coercion, but there is no note next to Count 2 on the verdict form. Count 3 is Dissuading, but there is no note next to Count 3. Then, the district attorney put a note next to Count 4 "(Snake Water)." Count 5 is Coercion, but there is no note next to Count 5, and Count 6 is Dissuading, but there is no note next to Count 6. It seems logical that the incidents were chronologically delineated in the verdict forms. In other words, Counts 2 and 3 relate to the "Ferret Cage" incident and Counts 5 and 6 related to the "Snake Water" incident. The jurors' obvious confusion when the district attorney's supplemental notes were not in the verdict form buttresses the defense argument that the criminal information was too vague to put the defense on notice of what conduct or which incident applied to each count.

A further illustration of the vagueness problem was the jury's first question to the court. (See A VOL XVII BATES 3436) The district attorney stated, and the court instructed that these counts were "stand alone." Until that moment, the defense was completely unaware that these were "stand alone" counts and assumed these counts applied to the incidents in parenthesis chronologically previous to the "stand alone" counts, and did not object to the amended verdict form, handed to him the morning of deliberations, and led the defense to allow an instruction that these were standalone counts. A VOL XVIII BATES 3302 ln 17

THROUGH BATES 3305 ln 25. However, peppered through the pages before 3302 is defense argument that if these were stand-alone counts then Mr. Koppenhaver was denied a defense. The defense also raised the issue of unanimity as to the jury deciding on what count fit what act. They were never instructed on that important point of law (*Id.*)

Lastly, due to the lack of specificity in the criminal information, a unanimity problem arose. The Trial Court refused the defense request for a unanimity instruction. Based upon the jury question and the state of the pleadings and verdict forms, it is impossible to tell if all 12 jurors used the same incident as grounds to find the elements necessary for particular counts, especially counts 2, 3, 5, and 6. The denial of an instruction on unanimity further compounded the due process violation and deprived Mr. Koppenhaver of the right to a unanimous verdict as to each count. Accordingly, those verdicts cannot stand.

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D.

DENIAL OF THE REQUEST TO DISCOVER STATEMENTS OF MS. MACKINDAY MADE TO THE PROSECUTION AMOUNTED TO A *BRADY v. MARYLAND* 373 U.S. 83 (1963) VIOLATION; NRS 173.235(2)(a) IS THUS UNCONSTITUTIONAL AS APPLIED.

The failure to turn over statements made to the prosecution by Ms. Mackinday eviscerated Mr. Koppenhaver's right to due process and fundamentally denied him a fair trial. There were meetings, emails, and text messages between Ms. Mackinday and the prosecution over a 2 and ½ year period, commencing shortly after August 8, 2014 and continuing throughout trial. Ms. Mackinday testified to these things during trial. (See generally VOL IX BATES 1738 lln 15-25). During these meetings the prosecution acted as the investigating agency. Ms. Mackinday made statements to the prosecution about prior abuse that was outside the scope of the investigation conducted by the police. Off the record Ms. Bluth related that she types fast enough that she can capture statements in real time. In other words, there were electronic documents of these meetings that were not turned over.

Prior to trial Mr. Koppenhaver sought discovery of these materials. The prosecution argued these were work product and not *Brady* materials and therefore the defense was not entitled to their discovery. The Trial Court ruled

that the defense was not entitled to those statements based upon the prosecution's theory. The statements of Ms. Mackinday should have been discovered to the defense because they were additional accusations against Mr. Koppenhaver and additional statements of a witness. Additionally, and crucially, as almost 30 new counts were added as the result of this secret meeting with the prosecutor, the statements were material to guilt and especially to punishment. Of the almost 30 new felonies, the case had 8 life counts added to it based upon these new allegations. Ms. Mackinday herself testified that her definition of penetration changed because of her meeting with the DA. (A VOL X BATES 2152 ln 12-13) Of course, statements of Ms. Mackinday should have also been turned over if they were exculpatory, but the defense is entirely in the dark and would have no way of knowing whether they were or were not exculpatory and is left guessing whether the Prosecution would correctly assume the defense would not find the statements exculpatory. Any statements made by Ms. Mackinday that were inconsistent would tend to be exculpatory. Indeed, she told investigating officers and the SART Nurse on August 8, 2014 that she was not sexually penetrated and reversed this statement in the prosecutor's office. Such information alone suffices. Moreover, Ms. Mackinday, after previously stating that there were not prior incidents of domestic violence, detailed many different incidents that were later

charged as counts that became known as “Houston” and “Boulevard Mall” and the like. Cumulatively those two things add up to a *Brady* violation.

Mr. Koppenhaver suffered convictions on counts related to all prior incidents. Defense has no idea how these changes in Ms. Mackinday’s statements came about – only that Ms. Mackinday changed her mind about factors directly central to the case.

The Trial Court also made a ruling during trial that if Mr. Koppenhaver took the stand and testified the prosecution would be permitted to introduce prior bad acts or uncharged acts of abuse committed by Mr. Koppenhaver. However, because the defense was never provided the additional statements of Ms. Mackinday, the defense had no idea what prior bad acts she may be claiming occurred. The defense would be left guessing what it was defending while the Defendant was on the stand. Such a denial of discovery deprived and held hostage Mr. Koppenhaver’s right to testify.

NRS 173.235 governs discovery of statements made by a witness to a prosecuting attorney and includes in pertinent part: (1)(a) Written or recorded statements … made by a witness the prosecuting attorney intends to call during the case in chief of the State….and excludes in pertinent part (2) (a) An internal report, document or memorandum that is prepared by or on behalf of the

prosecuting attorney in connection with the investigation or prosecution of the case.

The provisions in the plain language of subdivision (2)(a) allow for what happened here – a witness made contradictory and thus exculpatory statements and the Prosecution was able to avoid *Brady* disclosure in that they were supposedly part of the Prosecution investigation.

Mr. Koppenhaver had no notice of the accusations of uncharged bad acts Ms. Mackinday made to the prosecution. The due process clauses of the State and Federal Constitution provide for notice of "accusations". Although not charged conduct, Ms. Mackinday's statements concerning uncharged bad conduct or abusive conduct by Mr. Koppenhaver are "accusations" under the plain language of the due process clause; the plain language of the United States Constitution says "accusations" not criminal charges. In other words, it is not just *Brady* material that is discoverable; its statements that amount to accusations of which due process requires the defense be on notice. The failure to disclose these statements transcends a simple *Brady* violation into a due process and notice issue under the 6th Amendment.

Mr. Koppenhaver has a right to present evidence and call his own witness in defense to uncharged bad conduct or uncharged accusations. By failing to inform

the defense of statements of Ms. Mackinday alleging prior uncharged abuse, the defense was unable to know whether or not there was a viable defense to the uncharged conduct.

The defense requested that the trial court conduct an *in camera ex-parte* hearing, outside the presence of the defense, with the prosecution and any of their agents who took statements from Ms. Mackinday. The DA had contemporaneous notes from the meetings with Ms. Mackinday. The content of these emails, texts, and conversations should have been put on the record, and the record should have been sealed for review by an appellate court. This Court will have no such record to examine. Like the defense, this Court is also left in the dark.

E.

THE ERRORS, WHEN TAKEN TOGETHER, AMOUNT TO CUMULATIVE ERROR

"[I]f the cumulative effect of errors committed at trial denies the appellant his right to a fair trial, this court will reverse the conviction." *DeChant v. State*, 116 Nev. 918, 927, 10 P.3d 108, 113 (2000). "Relevant factors to consider in deciding whether error is harmless or prejudicial include whether the issue of innocence or guilt is close, the quantity and character of the error, and the gravity of the crime charged." *Id*. (internal quotations omitted). *Gonzalez v. State*, 366 P. 3d 680, 688 (2015).

Each of the errors raised above may in fact be harmless in isolation, but when taken collectively, the unfair prejudice to Appellant is substantial. Here, the charges were extremely serious, or "the crimes he was convicted of were grave," *Id.*, and Mr. Koppenhaver was sentenced to 36 years to life. The quantity and character of the errors in this case were colossal. Mr. Koppenhaver was denied a defense. Nothing could be more powerful in a criminal case than a defendant prohibited from defending himself against accusations. Worse, this was compounded by a lack of notice of what conduct was charged in what count – or at all – and by a denial of crucial discovery.

Taken together Mr. Koppenhaver was denied due process and a fair trial.

F.

THE ERRORS COMPLAINED OF HEREIN WERE NOT HARMLESS

"We have previously established certain considerations that are relevant when deciding if an error is harmless or prejudicial. *Big Pond v. State*, 101 Nev. 1, 3, 692 P.2d 1288, 1289 (1985). These considerations include the margin of difference between innocence or guilt, the quantity and character of the error, and the gravity of the crime charged. *Id*." The argument immediately above in section "E" compels a finding of cumulative error and likewise prohibits a finding of harmless error.

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VI.

CONCLUSION

For the foregoing reasons Mr. Koppenhaver was denied a fair trial under Nevada Statutes, Nevada caselaw, the Nevada Constitution and the United States Constitution. The convictions must be overturned and the case remanded for a new trial.

Dated this 16th Day of December 2018

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2017 in Times New Roman 14 point font.

2. I further certify that per Microsoft Word, the word count of this brief is 10,882. Thus, this brief complies with NRAP 32(a)(7)(A)(ii).

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found.

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

DATED this 16 day of December 2018.

Respectfully submitted by:

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on the 15th day of October 2018. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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