STATE OF IDAHO)
County of KOOTENAI)ss
FILED 8/19/2020
AT 5:30 O'clock P M
CLERK, DISTRICT COURT
Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

STATE OF IDAHO, *Plaintiff,*
vs.
PAUL C. STONECYPHER, *Defendant.*

Case No. **CR28-20-7593**

MEMORANDUM DECISION AND ORDER GRANTING PLAINTIFF'S MOTION FOR JOINDER

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IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

STATE OF IDAHO, *Plaintiff,*
vs.
TABATHA ANN MOSCA, *Defendant.*

Case No. **CR28-20-7595**

MEMORANDUM DECISION AND ORDER GRANTING PLAINTIFF'S MOTION FOR JOINDER

STATE OF IDAHO)
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IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

STATE OF IDAHO, *Plaintiff,*
vs.
RODNEY CARROLTON HARRELL, *Defendant.*

Case No. **CR28-20-7596**

MEMORANDUM DECISION AND ORDER GRANTING PLAINTIFF'S MOTION FOR JOINDER

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY.

These three cases are before this Court on plaintiff's Motion for Joinder filed by plaintiff in each of the three cases on July 24, 2020. All three of these cases were from

inception assigned to the undersigned; State v. Tabatha Ann Mosca, was later re-assigned to Judge Christensen. All three cases are currently scheduled for trial beginning September 21, 2020. The plaintiff's Motion for Joinder cited Idaho Criminal Rules 8(b) as the legal basis. On August 18, 2020, counsel for the plaintiff filed an Amended Motion for Joinder. That motion cited Idaho Criminal Rule 8 and 13 as the legal basis. In both the original and amended motion, the factual basis for the motion, simply stated, was all three defendants "are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Additionally, the cases all involve the same witnesses and it would be in the best interest of judicial economy to try all the cases together." Mot. for Joinder, 1; Am. Mot. for Joinder, 1. No brief was filed by the plaintiff in support of the motion for joinder.

On August 17, 2020, counsel for Stonecypher, Michael Palmer filed an Objection to State's Motion for Joinder, which contained argument and briefing. On August 17, 2020, counsel for Mosca, Benjamin Onosko, filed an Objection to State's Motion for Joinder. No basis was given for the objection in that one page document, and certainly no briefing was given. No brief was ever filed by counsel for Harrell, Jay Logsdon. Oral argument on the motions for joinder were held in all three cases on August 19, 2020. The Motion for Joinder is at issue in each of the three cases.

II. STANDARD OF REVIEW.

Whether the trial court improperly joined offenses pursuant to Idaho Criminal Rule 8 is a question of law, over which the appellate court exercises free review. *State v. Field*, 144 Idaho 559, 564, 165 P.3d 273, 278 (2007). "In contrast, an abuse of discretion standard is applied when reviewing the denial of a motion to sever joinder pursuant [Idaho Criminal Rule] 14; however, that rule presumes joinder was proper in the first place." *Id.* at

564–65, 165 P.3d at 278–79. To determine whether the trial court abused its discretion, the appellate court considers: "whether the lower court correctly perceived the issue as one of discretion, acted within the boundaries of such discretion and consistently with any legal standards applicable to the specific choices before it, and reached its decision by an exercise of reason." *State v. Williams*, 163 Idaho 285, 293, 411 P.3d 1186, 1194 (Ct. App. 2018), review denied (Feb. 15, 2018) (citing *State v. Hedger*, 115 Idaho 598, 600, 768 P.2d 1331, 1333 (1989)). This is now a four part test under *Lunneborg v. My Fun Life*, 163 Idaho 856, 863-64, 421 P.3d 187, 194-95 (2018).

III. ANALYSIS.

Idaho Criminal Rule 8(b) reads:

> **Joinder of Offenses and of Defendants. (b) Joinder of Defendants.** Two or more defendants may be charged on the same complaint, indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. The defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

Idaho Criminal Rule 13 reads:

> **Trial Together of Complaints, Indictments and Informations** The court may order that two or more complaints, indictments or informations be tried together if the offenses, and the defendants if there is more than one, could have been joined in a single complaint, indictment or information. The procedure is the same as if the prosecution were under a single complaint, indictment or information.

Counsel for Stonecypher first claims, "there are inconsistent or antagonistic defenses." Obj. to State's Mot. for Joinder 3. Counsel for Stonecypher notes that all three defendants are charged with possession of drug paraphernalia and all three are charged with trafficking in marijuana, but that only Harrell is charged with trafficking in methamphetamine while Stonecypher and Mosca are both charged with possession of methamphetamine. *Id.* Counsel for Stonecypher then notes that the methamphetamine

charged against Stonecypher was allegedly found on his person in his pants pocket and Mosca's methamphetamine was allegedly found in a small black box located in her purse. Id. at 3-4. Counsel for Stonecypher claims that even though all three defendants are charged with trafficking in marijuana, the marijuana was found in two different places within the pickup truck. Id. at 4-5. Counsel for Stonecypher then concludes:

> It appears that not only were there two different distinct locations within the pickup truck which contained more than three ounces of marijuana, both had evidence linking the marijuana to Mosca, Harrell, or both, but other than mere proximity, there was no other evidence specifically linking it to Stonecypher. Stonecypher is not charged with Trafficking in Methamphetamines. Despite this, given that it was Stonecypher's pickup truck that the drugs were located in, the incentive for either Mosca, Harrell, or both to point the finger at him in order to try and absolve themselves of the charges is high. Moreover, Mosca and Harrell are in an intimate relationship and live together. This creates a significant motivation for each to protect the other and a likelihood that one or the other, or both, would attempt to pin culpability onto Stonecypher, an outsider who was simply giving them a ride.
>
> When determining the potential prejudice under the situation, Idaho appellate court "Will determine whether, if the counts had been tried separately, the separate evidence of each count could have been admitted as evidence in the separate trial of [all] counts." *State v. Cirelli*, 115 Idaho 732, 734 (Ct. App. 1989). Rather, said evidence is highly prejudicial and extremely likely to taint or bias a jury. Here, if consolidated those counts would involve other co-defendants rather than multiple crimes against the same defendant as in *Cirelli id*, nevertheless, the analysis remains the same. Here, because Stonecypher is not charged with trafficking methamphetamines, evidence of the methamphetamines found in items associated with Mosca or Harrell, especially its quantity, should not be admitted against him. If the three of them are all tried together, this inadmissible evidence will necessarily be presented to Stonecypher's jury which otherwise would be excluded if he were tried on his own.

Id. at 5-6. This Court has not been cited to, nor is this Court aware of any case that mandates that just because one of two or more co-defendants might chose at a later time to confess and/or implicate others, joinder should not occur. Also, it is not a certainty that evidence of the methamphetamine attributed to Mosca and/or Harrell would be kept out of a separate trial for Stonecypher. And if it turns out that evidence of the methamphetamine

attributed to Mosca and/or Harrell were admitted at Stonecypher's trial, a limiting instruction would be given.

Second, counsel for Stonecypher claims:

> Second, the weight of the evidence is different as to each defendant. See *State v. Guzman*, 126 Idaho 368, 883 P.2d 726 (Ct. App., 1994). As shown in the excerpts from the police report above, the evidence alleged against co-defendant's Mosca and Harrell is significant. The evidence of Defendant's involvement in the crime of trafficking marijuana is purely circumstantial. The case law on this is clear that mere proximity to a controlled substance cannot establish possession, see *State v. Garza*, 112 Idaho 776 (Ct. App. 1987) and *State v. Maland*, 124 Idaho 537 (Ct. App. 1993). Furthermore, merely occupying a vehicle wherein contraband is found is also insufficient to establish possession of it, see *State v. Bumside*, 115 Idaho 882 (Ct. App. 1989). By combining the three co-defendants for trial the likelihood of a spill-over effect resulting in the conviction of Stonecypher, based upon the evidence of his mere proximity to the drugs linked to Mosca or Harrell, is very high. Given the lack of evidence specifically linking Stonecypher to the crime of trafficking, this high risk of "guilt by association" will serve to deprive him of a fair trial. Effectively this becomes a propensity situation due to his association with Mosca and Harrell, a convicted felon, all having been found together in the same vehicle. The danger of unfair prejudice is high against Stonecypher because this is high, while the probative value of evidence admissible against his co-defendants being heard by his jury is low. Keeping his case separate will serve to limit the prejudice that will ensue from "the possibility that the jury may confuse and cumulate the evidence." *State v. Abel*, 104 Idaho 865, 868 (1983). In the case at hand, the facts relating to each charged offense are not so distinct and simple that there is little risk the jury will cumulate or confuse the evidence. *State v. Nunez*, 133 Idaho 13, 22 (1999[)].

Obj. to State's Mot. for Joinder 6-7. The quote or argument attributed to *Guzman* is somewhat misplaced. A disparity in the "weight of the evidence" is not dispositive of a motion to join or sever, it is merely a factor to be considered by the court. Here is what the Idaho Court of Appeals said in *Guzman*, in its entirety, as to the "weight of the evidence":

> Even though the weight of the evidence against each defendant differed, counsel pointed out those differences to the jury in an attempt to strengthen Guzman's defense. Moreover, both defendants relied on the same theory of defense. We conclude that the court did not abuse its discretion when denying the motion for separate trials.

126 Idaho at 374, 883 P.2d at 732. And while counsel for Stonecypher is correct that mere proximity to a controlled substance or mere occupation in a vehicle containing contraband is not enough **by itself** to establish possession, proximity and occupation are certainly evidence of possession. Possession is an element of trafficking. I.C.J.I. 406. Idaho Criminal Jury Instruction 421 which defines possession, reads:

> A person has possession of something if the person knows of its presence and has physical control of it, or has the power and intention to control it. More than one person can be in possession of something if each knows of its presence and has the power and intention to control it.

As noted in the "comment" to I.C.J.I. 421, "There is no need to attempt to distinguish further between actual and constructive possession and sole and joint possession. *State v. Seitter*, 127 Idaho 356, 900 P.2d 1367 (1995)."

Finally, the Court turns to counsel for Stonecypher's argument that, "In the case at hand, the facts relating to each charged offense are not so distinct and simple that there is little risk the jury will cumulate or confuse the evidence", citing *Nunez*. Obj. to State's Mot. for Joinder 7. While that is essentially the standard stated in *Nunez*, the court in *Nunez* was concerned with a theoretical motion to sever, and it stated: "The test we apply on appeal from the denial of a motion to sever is whether the facts relating to each charged offense were so distinct and simple that there was little risk the jury would have cumulated or confused the evidence." *Nunez*, 133 Idaho at 22, 981 P.2d at 747 citing *State v. Cirelli*, 115 Idaho 732, 769 P.2d 609 (Ct. App. 1989). The Court finds two things are at play in the present case. First, some of the drugs are more specifically identified to one defendant (due to its packaging or where it was found) than others. With those drugs, there is little risk the jury would cumulate or confuse the evidence. Second, given the setting and the fact that all three of the defendants had been driving in the same truck for quite some time, there is evidence that the jury can properly infer that each of the defendants possessed

everything found in the truck, because the jury could find each person or more than one person had the power and intent to control it. Thus, if the jury were to cumulate evidence, it may well be that it is allowed to do so. If after hearing all the evidence at trial, if the Court finds the jury should not cumulate such evidence, that situation can be handled in a limiting instruction.

In *State v. Gamble*, 146 Idaho 331, 193 P.3d 878 (Ct. App. 2008), (discussed below in the *Bruton* context) the Idaho Court of Appeals shows you cannot just claim "antagonistic defenses", the discussion on antagonistic defenses shows they actually occur only in certain limited situations. That discussion from *Gamble*, in its entirety, is as follows:

> Gamble also contends joinder was inappropriate given that antagonistic defenses existed between the parties. Runkle's primary defense was that he did not know the bag in his truck contained methamphetamine and that he did not have the intent to distribute it. Gamble, as opposed to denying his involvement in drug activity, essentially defended himself by questioning the state's proof that he had committed the crimes for which he was charged. In regard to trafficking by possession, he admitted that more than 28 grams of methamphetamine were found in a safe in his bedroom. In regard to the gun charge, he argued that he knew the guns were there, but that they were not his and he had no control over them. And in regard to the manufacturing charge, he argued that the evidence was only sufficient to show attempt to manufacture and the state had not proven that a completed "cook" had occurred there.
>
> Notably, Gamble's defense did not include the assertion that Runkle knew about the drugs, which would have made it antagonistic to Runkle's defense. *See Caudill,* 109 Idaho at 226, 706 P.2d at 460 (finding defenses were not antagonistic where Defendant A admitted to involvement in the crime, but pointed the finger of guilt for the actual murder to Defendant B, who admitted to killing the victim, but denying that he had the requisite intent, or in the alternative, his acts were not premeditated). Accordingly, we conclude the court did not err as antagonistic defenses did not exist to make joinder inappropriate.

146 Idaho at 430, 193 P.3d at 887. In *State v. Bean*, 109 Idaho 231, 706 P.2d 1342 (1985), the Idaho Supreme Court held defendant was not denied fair trial on the ground that trial court improperly refused his motion to sever his trial from that of codefendant,

where defendant argued that he and codefendant had antagonistic defenses and that their respective counsel pursued different trial strategies, and where defendant made no specific showing as to how he was prejudiced by his counsel pursuing a different trial strategy than that pursued by counsel for codefendant. *Bean*, 109 Idaho at 232-33, 706 P.2d at 1343-44. Again, a party cannot simply claim "antagonistic defenses" and avoid joinder or obtain severance. How any "antagonistic defense" plays out must also be analyzed.

At least at this time, these cases do not present a situation where there are antagonistic defenses. This concept, along with *Bruton*, was discussed in *State v. Caudill*, 109 Idaho 222, 706 P.2d 456 (1985):

> III.
> THE JOINT TRIAL
>
> We first address Caudill's contention that his joint trial with Bean constituted reversible error. Specifically, Caudill argues that he was denied his Sixth Amendment right to confront Bean whose extrajudicial confession implicating both men was admitted into evidence, that he and Bean had antagonistic defenses and that the jury could have found him guilty by association with Bean. We discuss each point in turn.
>
> Caudill testified at the joint trial; Bean did not. One witness, an Officer Hagen, testified to a conversation which had taken place between Bean and an Officer Ericsson at the time Bean was arrested. Hagen stated, "When Ericsson asked him if he was Scott Bean, he said, 'Yes, I am.' Ericsson went to get his cuffs out and Scott Bean stated, 'I am the one you want, no trouble, I did it.'" Hagen also testified, "Mr. Bean stated, 'I have got a cut on my arm'. When we got to the patrol car Ericsson asked him how he got the cut on his arm and he said, 'I stabbed my arm when we killed him'." This testimony, which clearly implicated Caudill, was elicited on direct examination by Caudill's own counsel; it was not introduced by the prosecution.
>
> As a result of the admission of this testimony, Caudill claims that he was denied the right to confront an accomplice since Bean did not testify at the joint trial. In support of this proposition, he relies upon *Bruton v. United States,* 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968). In *Bruton,* in a joint trial of the petitioner and his accomplice, the prosecutor introduced the accomplice's confession into evidence through the testimony of a postal inspector. The accomplice did not testify. The confession explicitly incriminated the petitioner. He objected, claiming a denial of confrontation. The district court cautioned the jury that the confession was admissible only against the accomplice. The court of appeals affirmed. On certiorari, the Supreme Court reversed. It found a

denial of the right of confrontation notwithstanding the trial court's cautionary jury instruction.

In response, the state argues that the *Bruton* rule does not apply to the admission in a joint trial of extrajudicial statements of a non-testifying co-defendant which are admissible against the defendant by the operation of some rule of evidence such as an exception to the hearsay rule. In making this assertion, however, the state paints with too broad a brush. The hearsay rule and the confrontation clause of the Sixth Amendment cannot be equated. *Dutton v. Evans,* 400 U.S. 74, 91 S.Ct. 210, 27 L.Ed.2d 213 (1970). In *Bruton,* the Court held that, quite apart from the law of evidence, "a cautionary instruction to the jury is not an adequate protection for the defendant where the co-defendant does not take the witness stand." *Nelson v. O'Neil,* 402 U.S. 622, 91 S.Ct. 1726, 29 L.Ed.2d 222 (1971). Even were we to assume that the state's reading of *Bruton* is accurate, the record does not support the state's contention that Bean's confession would be admissible against Caudill under the co-conspirator exception to the hearsay rule which provides that where a conspiracy to commit a crime has been established, each declaration of any of the conspirators, during the pendency of the criminal enterprise, in pursuance of the original plan and with reference to the common object, is competent evidence against each of them. *See* G. Bell, Handbook of Evidence for the Idaho Lawyer, 172–173 (2d ed. 1972); *State v. Brooks,* 103 Idaho 892, 655 P.2d 99 (1983 Ct. App.) It is not necessary that a formal charge of conspiracy be made against co-conspirators before this exception applies, but is necessary that there be some evidence of conspiracy or promise of its production before the court can admit evidence of statements made in furtherance of the conspiracy. *State v. Brooks, supra.*

We are satisfied that the prosecution established a prima facie showing of a conspiracy; however, the record does not establish that the statement here objected to was made in furtherance of the conspiracy; on the contrary, it was made after the crime had been completed and at a time when the accomplice had "come clean." Clearly, Bean was not, at the time he made his confession, attempting to further conceal the crime or to obstruct justice. Since his confession and accompanying statement implicating Caudill were not made until after the conspiracy terminated, they were not properly admitted under the co-conspirator exception to the hearsay rule.

Although under *Bruton* this error would appear to compel reversal, we will not reverse for the reason that one may not successfully complain of errors one has consented to or acquiesced in. In other words, invited errors are not reversible. *State v. Owsley,* 105 Idaho 836, 673 P.2d 436 (1983). In the instant case the prosecution did not introduce the extrajudicial statement or elicit the testimony to which Caudill now objects, rather Caudill's own counsel elicited the testimony. If we were to reverse this case we would in effect be inviting defense counsel to turn all joint trials into reversible trials by simply eliciting constitutionally impermissible hearsay on direct examination. This we decline to do.

> Caudill next asserts that his defense and that of his co-defendant were irreconcilably antagonistic and thus that they should not have been tried together. Caudill's defense consisted of admitting involvement with the crime, but pointing the finger of guilt for the actual murder to Bean. Bean's defense consisted of admitting murdering Walker but denying that he had the requisite intent either because he had a mental disease or, alternatively, because his acts were not premeditated.
>
> These defenses, though differing, cannot be said to be mutually antagonistic or conflicting. Caudill also claims that he and Bean disagreed about whether to introduce or exclude certain evidence; however, he does not specify over which evidence he and Bean disagreed. Hence, his assertion is merely conclusory and does not furnish grounds for reversal. 567 Finally, Caudill argues that the denial of his motion to sever resulted in prejudicial spillover from evidence admissible only against Bean. Parties properly joined under I.C.R. 8(b) may be severed under I.C.R. 14 if it appears that joint trial would be prejudicial, and the defendant has the burden of showing such prejudice. *State v. Cochran,* 97 Idaho 71, 539 P.2d 999 (1975). Since Caudill has not met this burden, we reject his contention that his trial was not properly joined with that of his co-defendant.

109 Idaho at 225-26, 706 P.2d 459-60.

United States v. Rivas, 528 Fed.App. 784 (10th Cir. 2018) is instructive as is a drug distribution case with multiple defendants and the claim of antagonistic defenses. The Tenth Circuit Court of Appeals concluded:

> The Federal Rules of Criminal Procedure express a "preference in the federal system for joint trials of defendants who are indicted together." *Zafiro v. United States,* 506 U.S. 534, 537, 113 S.Ct. 933, 122 L.Ed.2d 317 (1993). "Prejudicial joinder occurs only when an individual's right to a fair trial is threatened or actually deprived." *United States v. Johnson,* 130 F.3d 1420, 1427 (10th Cir.1997). To establish "real prejudice, the defendant must demonstrate that the alleged prejudice he suffered outweighed the expense and inconvenience of separate trials." *United States v. Martin,* 18 F.3d 1515, 1518 (10th Cir.1994) (quotation omitted). The trial record reveals no antagonism of defenses among any of the co-defendants. Each defendant simply asserted the government failed to prove its case. No defendant tried to blame any other defendant for drugs the government attributed to him.

528 Fed.App. at 784. Thus, in the present case there is a "preference" for joint trials. While the Idaho Supreme Court has not made the statement that there is such a preference (at least that this Court can find), there is no indication that the Idaho Supreme

Court would not find such a preference and follow federal appellate interpretation of that rule. At the present time in the instant cases, the three defendants have not shown "real prejudice" sufficient to outweigh the expense and inconvenience of separate trials. *Id.* This Court finds no antagonistic defense issue in these three cases at this time.

Third, counsel for Stonecypher claims there are issues under *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1970). Obj. to State's Mot. for Joinder 7-9. *Bruton* protects a defendant from incriminating out-of-court statements of a co-defendant being used against him in a joint trial where the co-defendant does take the stand and thereby becomes subject to cross-examination. *State v. Gamble*, 146 Idaho 331, 337, 193 P.3d 878, 885 (Ct. App. 2008). Counsel for Stonecypher claims:

> 34. Upon the completion of my investigation, I transported STONECYPHER and HARRELL to the Idaho State Police District One Office. On the way to the office, I informed HARRELL the methamphetamine appeared to be more than a quarter pound. HARRELL stated that was because "your weighing the bags and shit too". This caused me to believe the approximately 211.3 grams of methamphetamine belonged to him.

Obj. to State's Mot. for Joinder 7. The Court finds that there is no evidence at present that Harrell made a confession. While Harrell's statement is inferential evidence of Harrell's knowledge and control of the drugs, his statement implicates no one other than himself.

The United States Supreme Court in *Bruton* stated the precise inquiry as: "This case presents the question, last considered in *Delli Paoli v. United States*, 352 U.S. 232, 77 S.Ct. 294, 1 L.Ed.2d 278, whether the conviction of a defendant at a joint trial should be set aside although the jury was instructed that a codefendant's confession inculpating the defendant had to be disregarded in determining his guilt or innocence." 391 U.S. at 123--24. Bruton and Evans were both criminal defendants in a joint trial for armed postal robbery. *Id.* at 124. "A postal inspector testified that Evans orally confessed to him that

Evans and petitioner committed the armed robbery." *Id.* Both Evans and Bruton were convicted; the trial judge set aside Evans' conviction on the ground that his oral confession could not be used against him. "However, the [trial] court, relying upon *Delli Paoli*, affirmed petitioner's [Bruton's] conviction because the trial judge instructed the jury that although Evans' confession was competent evidence against Evans it was inadmissible hearsay against petitioner and therefore had to be disregarded in determining petitioner's guilt or innocence. 375 F.2d, at 361—363." *Id.* The United States Supreme Court then discussed whether a limiting instruction cures the problem, and found it did not. The United States Supreme Court wrote:

> In joint trials, however, when the admissible confession of one defendant inculpates another defendant, the confession is never deleted from the case and the jury is expected to perform the overwhelming task of considering it in determining the guilt or innocence of the declarant and then of ignoring it in determining the guilt or innocence of any codefendants of the declarant. A jury cannot 'segregate evidence into separate intellectual boxes.' * * * It cannot determine that a confession is true insofar as it admits that A has committed criminal acts with B and at the same time effectively ignore the inevitable conclusion that B has committed those same criminal acts with A.
>
> In addition to [Justice] Jackson [in *Delli Paoli*] , our action in 1966 in amending Rule 14 of the Federal Rules of Criminal Procedure also evidences our repudiation of *Delli Paoli's* basic premise. Rule 14 authorizes a severance where it appears that a defendant might be prejudiced by a joint trial. The Rule was amended in 1966 to provide expressly that '(i)n ruling on a motion by a defendant for severance the court may order the attorney for the government to deliver to the court for inspection in camera any statements or confessions made by the defendants which the government intends to introduce in evidence at the trial.' The Advisory Committee on Rules said in explanation of the amendment:
>
> > 'A defendant may be prejudiced by the admission in evidence against a co-defendant of a statement or confession made by that co-defendant. This prejudice cannot be dispelled by cross-examination if the co-defendant does not take the stand. Limiting instructions to the jury may not in fact erase the prejudice. * * *
> > 'The purpose of the amendment is to provide a procedure whereby the issue of possible prejudice can be resolved on the motion for severance. * * *'

Id. at 131-32.

Stonecypher, Mosca and Harrell are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting the offense or offenses. *See* I.C.R. 8(b). Therefore, Stonecypher, Mosca and Harrell may be tried together since they, and the offenses they have been charged with, could have been joined in a single complaint, indictment or information. *See* I.C.R. 13. Counsel for Stonecypher in briefing and counsel for Mosca at oral argument claim this is not true, but neither have provided any cogent argument why that is the case.

This Court has read the testimony in the June 18, 2020, preliminary hearing transcript in Mosca and the June 5, 2020, preliminary hearing transcript in Harrell (Stonecypher waive his right to a preliminary hearing) and listened to the testimony at the July 29, 2020, hearing on the motions to suppress in Stonecypher and Harrell. The Court has also reviewed the police reports found in the Affidavit of Warrantless Arrest filed in each case. The Court is not aware of any other evidence that has been presented up to this point. This Court finds that neither Stonecypher, Mosca nor Harrell have made a confession. Neither Stonecypher, Mosca nor Harrell have even made a statement implicating another defendant. And no attorney has brought to the attention of this Court any such confession or implicating statement.

If, between now and trial, it comes to light that either Stonecypher, Mosca or Harrell have made a confession which implicates the another, or made a statement which implicates the other, then there may be a *Bruton* issue. However, at present no such issue has been brought to the Court's attention.

It is fair to say that the three defendants' stories did not coincide as to their trip from California to Montana. Mosca Preliminary Hrg. T. 53. But that is not a confession, and that

is not a statement implicating another.

This is a situation which took place in one thirty-minute period on May 24, 2020, all at the same time and place in each case, unlike the situation in *State v. Cook*, 144 Idaho 784, 1717 P.3d 1282 (Ct. App. 2007) and *State v. Bussard and Mason*, 114 Idaho 781, 760 P.2d 1197 (Ct. App. 1988). In *Cook,* the Idaho Court of Appeals found there was no basis to try delivery of methamphetamine to the statutory rape charge. "Similarly here, there was not a sufficient nexus between each of the charges to make joinder permissible. The proscribed conduct giving rise to each charge was distinct and occurred at various times and locations and except for one minor overlap—the victim of the rape was one of five persons to whom Cook was accused of delivering methamphetamine—the parties involved, other than Cook, were different." 114 Idaho at 790, 760 P.2d at 1288. "There is also no allegation that any offense was the predicate to completing any other offense such that Cook's actions were part of an overall design or continuing course of conduct—rather, they were distinct and self-contained." *Id.* In *Bussard* and *Mason*, (which was not a case about joinder) the two defendants were tried together and convicted of two separate burglaries. At the trial, evidence of other burglaries was admitted. Because of the time period that transpired between events, there was no common scheme or plan, and the case had to be re-tried. In the present case, the investigation by Trooper Green took place within thirty minutes. While the three defendants were obviously travelling together for quite some time, and all were exhibiting manifestations of recent drug use, the events surrounding the possession took place with all three together, over the course of thirty minutes.

In addition to the cases cited above, this Court has re-read its prior April 19, 2019, decision in *State v. Jordan Avery Erickson*, Kootenai County Case No. CR28-19-4042 and

State v. Nathaniel Ka Wett Jones, Kootenai County Case No. CR28-19-4027, found at https://www.kcgov.us/DocumentCenter/View/11003/April-19-2019-CR28-19-4027-State-v-Jones-and-CR28-19-4042-State-v-Erickson-PDF, and its April 12, 2018, decision in *State v. Frank Edward Canavero*, III, Kootenai County Case No. CR 2018 85 and CR 2018 794, found at https://www.kcgov.us/DocumentCenter/View/2065/April-13-2018-CRF-2018-85-and-CR-2018-794-State-v-Canavero-PDF. In *Canevero*, this Court noted:

> There are three potential sources of prejudice for a court to consider when considering a motion to sever based on [Idaho Criminal Rule] 14:
>
> > (1) the jury may confuse and cumulate the evidence, and convict the defendant of one or both crimes when it would not convict him of either if it could keep evidence properly segregated; (2) the defendant may be confounded in presenting defenses, as where he desires to assert his privilege against self-incrimination with respect to one crime but not to the other; or (3) the jury may conclude that the defendant is guilty of one crime and then find him guilty of the other because of his criminal disposition.
>
> *State v. Williams*, 163 Idaho 285, 411 P.3d 1186, 1194 (Ct. App. 2018) (citation omitted).

Canevero, April 12, 2018, Memorandum Decision and Order Denying Plaintiff's Motion for Joinder 9. This Court specifically finds that at the present time, none of these three potential sources of prejudice are present in these three cases, and that joinder for purposes of trial is appropriate. The Court finds that joinder is in the best interest of judicial resources, *especially* under the present Idaho Supreme Court rules regarding the Covid 19 pandemic, and the local administrative rule in place regarding jury selection, and given the fact that Harrell remains in custody. Mosca and Stonecypher are out on bond, but still potentially have a right to a speedy trial.

IV. CONCLUSION AND ORDER.

The Court appreciates that this is a matter committed to its discretion, the Court believes it is acting within the bounds of that discretion, the Court is acting consistently with the legal standards applicable to the specific choices available to it, and has

reached its decision by the exercise of reason. *Lunneborg,* 163 Idaho at 863-64, 421 P.3d at 194-95. Based on the above, the Court finds plaintiffs motion for joinder in each case must be granted.

IT IS HEREBY ORDERED THAT plaintiff's Motion for Joinder is GRANTED in each of these three cases, but only as to a joint trial. The jury trial currently set in both cases to begin on September 21, 2020, will be a joint trial before the undersigned. There is no actual joinder of the three cases. The attorneys are directed to continue to make all filings in their own respective cases. In other words, this case will not proceed forward as one case from this moment on, and counsel in one case are not required to copy counsel in the other cases on anything they might file in their own respective case (though they are encouraged to do so out of professional courtesy).

DATED this 19th day of August, 2020.

JOHN T. MITCHELL District Judge

CERTIFICATE OF MAILING

I hereby certify that on the 20th day of August, 2020, copies of the foregoing Order were mailed, postage prepaid, or sent by facsimile or interoffice mail to:

Michael Palmer, defense attorney for Stonecypher amber@cdalawoffice.com
Jay Logsdon, defense attorney for Harrell pafax@kcgov.us
Benjaminn Onosko, defense attorney for Mosca pafax@kcgov.us
Deputy Prosecuting Attorney – Laura McClinton kcpaicourtsec@kcgov.us.

CLERK OF THE DISTRICT COURT
KOOTENAI COUNTY
BY: Deputy