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CLERK OF SUPREME COURT

IN THE SUPREME COURT OF THE STATE OF NEVADA

2008 JAN 23 PM 2:51

KRISTINA WILDEVELD,

Petitioner,

vs.

THE EIGHTH JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA, COUNTY OF
CLARK, THE HONORABLE VALERIE ADAIR,
DISTRICT COURT JUDGE,

Respondent,

KENNETH COUNTS,

Real Party in Interest.

Case No. 50939
(Dist. Ct. No. C212667)

FILED

JAN 23 2008

TRACIE LINDENMAN
CLERK OF SUPREME COURT
BY *[Signature]*
CHIEF DEPUTY CLERK

**PETITION FOR WRIT OF MANDAMUS AND
EMERGENCY MOTION FOR STAY OF PROCEEDINGS**

KRISTINA WILDEVELD, ESQ.
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Counsel for Respondent

08-01777

IN THE SUPREME COURT OF THE STATE OF NEVADA

KRISTINA WILDEVELD,

Case No.
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Petitioner,

VS.

THE EIGHTH JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA, COUNTY OF
CLARK, THE HONORABLE VALERIE ADAIR,
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Real Party in Interest.

PETITION FOR WRIT OF MANDAMUS AND
EMERGENCY MOTION FOR STAY OF PROCEEDINGS

COMES NOW the Petitioner, KRISTINA WILDEVELD, and pursuant to NRS 34.320 et. seq., respectfully petitions this Honorable Court to declare the two qualifying aggravating circumstances alleged by the State to be improper and/or unconstitutional as they relate to KENNETH COUNTS and that this matter be removed from death penalty eligibility. Additionally, the Petitioner requests a stay of the proceedings until this and the related Writ of Mandamus already pending before this court regarding Deangelo Carroll, et. al, be resolved.

This Petition is based upon the Memorandum of Points and Authorities and portions of the record relevant to the determination

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1 of this Petition and any argument should this Honorable Court order
2 a hearing on this matter.

3 DATED this 2nd day of January, 2008.

4 LAW OFFICES OF KRISTINA WILDEVELD, LTD.

5
6 By 

7 KRISTINA WILDEVELD, ESQ.

8 Nevada Bar No. 5825

9 1100 S. 10th St.

10 Las Vegas, Nevada 89104

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VERIFICATION

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

KRISTINA WILDEVELD, being first duly sworn, deposes and states as follows:

1. That she is an attorney duly licensed to practice law in the State of Nevada and one of the private attorneys assigned to represent KENNETH COUNTS in a capital matter.

2. That MR. COUNTS, has authorized and directed Ms. WILDEVELD, to file the foregoing Writ of Mandamus;

3. That Ms. WILDEVELD, has read the foregoing Writ of Mandamus and knows the contents therein and as to those matters they are true and correct and as to those matters based on information and belief he is informed and believes them to be true;


4. That MR. COUNTS has no other remedy at law available to him and that the only means to address this problem is through this writ, in that he is about to face capital murder proceedings;

5. That Ms. WILDEVELD signs this Verification on behalf of MR. COUNTS, under his direction and authorization and further that MR. COUNTS is currently in custody of the authorities of the Clark County Detention Center.

FURTHER YOUR AFFIANT SAITH NAUGHT.


KRISTINA WILDEVELD, ESQ.

SUBSCRIBED AND SWORN to before
me this 23rd day of January, 2008.


NOTARY PUBLIC in and for
said County and State.



POINTS AND AUTHORITIESSTATEMENT OF THE ISSUES

1. Whether the District Court erred in denying the Defendant's Motion to Strike Aggravating Circumstances.

II.

STATEMENT OF THE CASE

Defendant, KENNETH COUNTS, is charged with the shooting murder of Timothy Hadland (hereinafter "Hadland") on or about May 19, 2005, was charged by way of a criminal complaint with a right to a based on multiple theories of liability. The State eventually decided to seek the Death Penalty against four of the five co-defendants, including MR. COUNTS. The only co-defendant against whom the Death Penalty was not sought was a juvenile at the time and ineligible for the Death Penalty for that reason.

In the District Court, all defendants plead not guilty and the case was assigned to Eighth Judicial District Court Department XIV. Later, because of a change in counsel, the District Court recused itself and the matter was reassigned to Eighth Judicial District Court Department XXI. Co-defendants, Laish Hildago, Anabel Espindola filed a motion to strike the aggravating circumstances on numerous grounds and that motion was denied. A writ of mandamus was taken up by the co-defendants and that matter was decided on December 27, 2007 striking the notices of Intent to seek the Death Penalty against those Defendants. Deangelo Carrol who later joined the Writ, is still pending.

On or about January 9, 2008, the Defendant filed a Second Motion to Reconsider Striking Aggravating Circumstances in the

1 District Court Department XXI based on the recent Supreme Court
2 Decision in the Matter of Hidalgo and Espindola striking the Death
3 Penalty. The State was given an opportunity to respond in writing and
4 did so on January 18, 2008 after hearing brief argument by Defense
5 counsel in court on January 15, 2008 regarding the matter. The Court
6 held a full hearing on the matter on January 22, 2008. The Court
7 **denied the motion for a stay of proceedings made by the Defendant in**
8 **the District Court.** Additionally, pursuant to Supreme Court Rule
9 250 (4) (d), following the State's late notice of intent, the Defendant
10 has a right to a reasonable continuance. Here, despite the fact that
11 the State's Second Amended Notice of Evidence in Support of
12 Aggravating Circumstances was filed on January 10, 2008, the Court has
13 insisted that this Death Penalty trial begin on January 28, 2008. The
14 instant petition follows.

15 **III.**

16 **STATEMENT OF FACTS**

17 Just before midnight on May 19, 2005, the Las Vegas Metropolitan
18 Police Department (LVMPD) received a 9-1-1 call concerning a homicide
19 on North Shore Road near Lake Mead (Reporter's Transcript of the
20 Preliminary Hearing (hereinafter "RTP"), page 146). Upon arrival they
21 found the body of Timothy Hadland (hereinafter "Hadland") lying in the
22 middle of the road with an two gunshot wounds to the head. (RTP 151,
23 157). Just south of the body were several flyers from a strip club
24 in North Las Vegas called the Palomino Club which led police to do
25 begin an investigation at the club. (RTP, 152-160). Additionally, the
26 last number on Hadland's cell phone was from an individual identified
27 as "Deangelo" on the phone itself, but the number was registered to
28 an individual named Anabel Espindola (hereinafter "Espindola") who was
a key employee at the Palomino club. (RTP, 153-159).

1 It was determined that Hadland was a former employee of the
2 Palomino club and that Deangelo Carroll was a current employee of the
3 club. (RTP, 163-164). Carroll gave the police a lengthy, recorded
4 statement which contains multiple versions of the motivations and
5 intentions behind the events of the evening of May 19, 2007, but in
6 his statement, Carroll essentially admits that he drove a van out to
7 Lake Mead on May 19, 2005 with three passengers in the car, Rontae
8 Zone, Jason Taoipu, and Kenneth Counts; there they encounter Timothy
9 Hadland who was friends with Carroll; at that point Kenneth Counts
10 shot and killed Timothy Hadland. Rontae Zone, a juvenile who was not
11 charged with any offense and Jason Taoipu, the juvenile co-defendant
12 confirm this essential account and the State has not contested that
13 Kenneth Counts was the actual shooter. The discrepancies and outright
14 contradictory accounts made by Carroll to the police primarily
15 surround the motivation for meeting with Hadland at the lake in the
16 first place.

17 In one version of Carroll recitation of the events, after Hadland
18 was shot he returned to the Palomino club where Kenneth Counts
19 demanded 6,000 dollars in compensation for the shooting. Carroll told
20 police that he got the 6,000 dollars from Anabel Espindola and gave it
21 to Counts.

22 Carroll agreed to work with police in an attempt to ensnare the
23 owners/managers of the Palomino club as involved with the shooting of
24 Hadland. To that end, he wore a surreptitious listening device on his
25 person and entered an establishment where Anabel Espindola and Luis
26 Hildago, III (the son of the owner of the Palomino Club), were
27 present. There Carroll was able to solicit numerous statements from
28 his eventual co-defendants that the State has cast as incriminating.
At that meeting, Carroll placed his own life in jeopardy as the co-

1 defendant's made Carroll strip his clothes off with the implication
2 that if he was cooperating with police he would be killed. The
3 listening device was not recovered.

4 MR. COUNTS was arrested on the charge of murder and the State is
5 seeking the death penalty.

6 In the Amended Notice of Evidence in Aggravation filed January
7 10, 2008, the State alleges two aggravating circumstances pursuant to
8 NRS 200.033, to wit: murder for pecuniary gain and under sentence of
9 imprisonment. Essentially, the pecuniary gain comes from the 6,000
10 dollars given to Deangelo Carroll by Anabel Espindola. The prior
11 conviction involves a 1999 plea by Mr. Counts to the charge of
12 possession of a controlled substance to which he was given three years
13 probation. The Supreme Court has stricken the pecuniary gain
14 aggravator as a matter of law finding that the notice failed to give
15 sufficient notice to Defendants as written under NRS 250(4). The
16 pecuniary gain aggravator is written the same way for all co-
17 defendants and would therefore be applicable to Mr. Counts as well.

18 ARGUMENT

19 The relief requested by the Petitioner should be
20 properly granted by this Court¹.

21 This court may issue a writ of mandamus in order
22 "to compel the performance of an act which the law
23 especially enjoins as a duty resulting from an
24 office, trust or station." NRS 34.160.
25 Generally, a writ of mandamus may issue only when
26 there is no plain, speedy, and adequate remedy at
27 law. See NRS 34.170. However, where
28 circumstances reveal urgency or strong necessity,
this court may grant extraordinary relief. See
Jeep Corp. v. District Court, 98 Nev. 440, 443,
652 P.2d 1183, 1185 (1982). Moreover, "where an
important issue of law needs clarification and
public policy is served by this court's invocation
of its original jurisdiction, our consideration of

1 a petition for extraordinary relief may be
2 justified." Business Computer Rentals v State
3 Treas., 114 Nev. 63, 67, 953 P.2d 13, 15 (1998).

4 It is Petitioner's position that facially the so-called
5 "murder for hire" or pecuniary gain aggravating circumstance does not
6 apply to him, or in the alternative, that it is so broad as to be
7 Constitutionally infirm. Likewise, the so called "under sentence of
8 imprisonment" aggravating circumstance does not apply to him because
9 his prior conviction in 1999 and sentence of three (3) years
10 probation was too remote. In light of the utmost seriousness
11 attached to the imposition of the Death Penalty on an individual under
12 the present national and international debate on the subject that the
13 public interest can only be served by analysis of our Nevada Supreme
14 Court before another person potentially sentenced to death under an
15 unconstitutional system.

16 When the State is not required to narrow the categories of those
17 individuals eligible for and against whom the Death Penalty is sought,
18 not only is it a manifest injustice for that individual, but the
19 public confidence in a state where execution is allowed will be
20 forever lost. When the State can and cannot seek the Death Penalty,
21 especially in a case where they are seeking against all individuals
22 involved, including the non-shooter and parties not even present,
23 there can be little argument that this is not an important issue of
24 law which needs clarification and which serves the public policy. As
25 such, the Petitioner implores this Court to stay these
26 unconstitutional proceedings for time to consider the Petitioner's
27 request for writ.

28 Capital punishment is reserved for the most heinous of murders.
Not all murders qualify for death as the punishment. "Death is
different" goes the famous and oft-quoted citation of the United

1 States Supreme Court. Not surprising, the United States Supreme Court
2 has relied upon this principle and its application to Eight Amendment
3 implications for decades. See Gregg v. Georgia, 428 U.S. 153, 188
4 (1976); Ring v. Arizona, 536 U.S. 584, 606 (2002).

5 The Nevada Supreme Court also recognized its "obligation to
6 ensure that aggravators are not applied so liberally that they fail to
7 perform their constitutionally required narrowing function." Redeker
8 v. Eighth Judicial District Court, 122 Nev. ____, 127 P.3d 520, 526
9 (2006) (citations omitted). In interpreting the statute at issue, the
10 Nevada Supreme Court looks to the plain language of the statute.
11 State v. Colosimo, 122 Nev. ____, 142 P.3d 352 (2006) (citing State v.
12 Washoe County, 6 Nev. 104, 107 (1870)). If a penal statute is
13 ambiguous, "rules of statutory interpretation...require that
14 provisions which negatively impact a defendant must be strictly
15 construed, while provisions which positively impact a defendant are to
16 be given a more liberal constructions." Colosimo, 122 Nev. At ____, 142
17 P.3d at 359 (quoting Mangarella v. State, 117 Nev. 130, 134, 17 P.3d
18 989, 992 (2001)).

19 The Nevada Supreme Court has decided on December 27, 2007, that
20 the Notice, as written in this case against Mr. Hidalgo and Ms.
21 Espindola, is Constitutionally infirm and must be stricken. Since the
22 notices plead are identical, this ruling would apply to Mr. Counts as
23 well.

24 **1. UNDER THE SENTENCE OF IMPRISONMENT.**

25 Defendant Counts was convicted of *POSSESSION OF MARIJUANA* in 1999
26 in California and sentenced to three (3) years probabtion.
27 Understandably, the State has alleged in the Notice of Intent to Seek
28 the Death Penalty the "underlying" facts of the conviction to which
the Defendant plead guilty, however, the State does not allege how Mr.

1 Counts was still under a sentence of imprisonment, the crime for which
2 the judgment of conviction was entered was in 1999 in and of itself
3 which is required to proceed under the Death Penalty. See Redeker v.
4 Eighth Judicial District Court, 122 Nev. _____, 127 P.3d 520(2006).
5 Instead, the State submits an explanation by the Superior Court of
6 California County of Los Angeles "Probation Officer's Report"
7 declaring that Mr. Counts failed to pay restitution and failed to
8 submit to two periodic anti-narcotic tests. However, Mr. Counts was
9 granted leave of the California court to transfer his probation to the
10 State of Nevada. There is no proof that Mr. Counts failed to abide by
11 the terms of his Nevada Probation.

12 The State cannot offer any authority for the proposition that the
13 Nevada Supreme Court has authorized an old charge to stand for the
14 narrowing required to make it an death eligible aggravator. Indeed,
15 to the contrary, the Nevada Supreme Court seems to have indicated that
16 the moment of striking aggravators for failure to narrow is at hand.
17 See Leslie v. Warden, 118 Nev. 773, 59 P.3d 440 (2002) (Maupin
18 concurring opinion).

19 NRS 200.033(2) is unconstitutionally vague both on its face and
20 in its application to this case. Under these circumstances the
21 aggravating factor of under sentence of imprisonment is invalid. A
22 statute violates due process if it is so vague that it fails to give
23 persons of ordinary intelligence fair notice of what conduct is
24 prohibited and fails to provide law enforcement officials with
25 adequate guidelines to prevent discriminatory enforcement." Hernandez
26 v. State, 118 Nev. 513, 524 (2002).

27 **2. MURDER FOR HIRE / PECUNIARY GAIN**

28 From the onset it should be noted that this aggravator has
already been challenged by the co-defendants, Luis Hidalgo III and

1 Anabel Espindola, and the notice of intent to seek the death penalty
2 has been stricken as of Decemeber 27, 2007 as being infirm as plead.

3 **3. MOTION FOR A STAY**

4 In that there are two aggravators at issue in the Notice of
5 Intent to Seek the Death Penalty, and both are potentially infirm,
6 statutorily and constitutionally - and since the Nevada Supreme Court
7 has already considered the validity of the "murder for hire/pecuniary
8 gain" aggravator - it only makes sense to stay these proceedings until
9 at least word comes down from the Nevada Supreme Court on this issue.
10 Further, the Defendant intends to appeal this Court's ruling if it is
11 denied to grant the specific relief sought. Defendant Counts will
12 suffer irreparable harm by having to stand trial for a capital case
13 despite the invalid Notices of Intent to Seek the Death Penalty.

14 Because this is currently a capital case, he is being held
15 without bail and may not be released from custody and is therefore
16 unable to assist his counsel in preparation for his defense in an
17 effective manner. Further, court resources will be unnecessarily
18 expended by the potentially lengthy proceedings concerning the capital
19 penalty hearing, a lengthy and complicated jury selection process,
20 transcript expenses and other costs incurred by this case which would
21 not be incurred if the Notices of Intent to Seek the Death Penalty are
22 dismissed with regard to all Defendants. Finally, there is a
23 prejudice to the Defendant in facing a "death-qualified" jury. To the
24 contrary, the State in the interest of justice should be sure that the
25 aggravators being used to potentially execute a human being are valid.
26 Lastly, pursuant to Supreme Court Rule 250 (4)(d), following the
27 State's late notice of intent, the Defendant has a right to a
28 reasonable continuance. Here, despite the fact that the State's
Second Amended Notice of Evidence in Support of Aggravating

1 Circumstances was filed on January 10, 2008, the Court has insisted
2 that this Death Penalty trial begin on January 28, 2008. Pursuant
3 to the requirements of NRAP 8, the Defendant did make motion in the
4 District Court for stay and that was denied by written order.

5 CONCLUSION

6 Petitioner prays and it would be in the best interest of the
7 public, to not induce the waste of judicial resources and public
8 confidence that would result from holding a Death Penalty trial when
9 there is no justifiable or Constitutionally sound argument in support
10 of it. Death as a means of punishment in the modern era is an
11 extraordinary issue filled with debate to the extent that the United
12 States Supreme Court is currently considering whether it violates the
13 Eight Amendment and one state after another are falling in moratoriums
14 disallowing the State from even seeking it. In the present case there
15 can be no legitimate claim that KENNETH COUNTS, who did not plan the
16 killing of Timothy Hadland is facing the Death Penalty. If the
17 District Court refuses to consider the broader picture and really
18 scrutinize the State's decision-making in the case where every adult
19 co-defendant in what is, not callously, but frankly in the modern
20 world filled with hundreds of murders each year in our jurisdiction,
21 an unremarkable murder case -- the Nevada Supreme Court hopefully will
22 take on that task.

23 NRS 200.033 as used by the District Attorney in Clark County is
24 clearly on a slippery slope with regard to how and who is being
25 "narrowly" defined for eligibility. It inches closer and closer to
26 seeking it in a way that will eventually preclude the Nevada structure
27 from meeting Constitutional muster. In the present case, the State
28 has crossed the line and this extraordinary relief is the only real
remedy. Petitioner again requests that the trial be stayed and the

1 writ be fully briefed and heard so that these very important issues
2 can be resolved and guidance given to all district courts.

3 Respectfully submitted,

4 LAW OFFICES OF KRISTINA WILDEVELD, LTD.

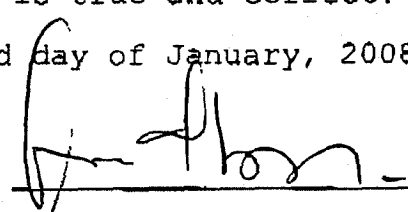
5
6 By 

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DECLARATION OF FACSIMILE AND MAILING

1
2 Ana Flores, an employee with the LAW OFFICES OF KRISTINA WILDEVELD,
3 hereby declares that she is, and was when the herein described mailing
4 took place, a citizen of the United States, over 21 years of age, and
5 not a party to, nor interested in, the within action; that on the 22nd
6 day of January, 2008., declarant deposited in the United States mail
7 at Las Vegas, Nevada, a copy of the Petition for Writ of Mandamus and
8 Emergency Motion for Stay of Proceedings in the case of Kenneth
9 Counts, Petitioner vs. The Eighth Judicial District Court of the State
10 of Nevada, County of Clark, the Honorable Valerie Adair, Respondent,
11 KENNETH COUNTS, Real Party in Interest, District Court Case No.
12 C212667, enclosed in a sealed envelope upon which first class postage
13 was fully prepaid, addressed to Catherine Cortez Masto, 100 North
14 Carson Street, Carson City, Nevada 89701-4717; Judge Valerie Adair,
15 District Court Judge, 200 Lewis Avenue and David J.J. Roger, 200 Lewis
16 Avenue that there is a regular communication by mail between the
17 places of mailing and the places so addressed. I declare under penalty
18 of perjury that the foregoing is true and correct.

19 EXECUTED on the 22nd day of January, 2008.

20
21 
22 Ana Flores
23
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1 RECEIPT OF A COPY of the foregoing **Petition for Writ of**
2 **Mandamus and Emergency Motion for Stay of Proceedgins** is hereby
3 acknowledged this 2nd day of January, 2008.

4 DAVID J.J. ROGER
5 CLARK COUNTY DISTRICT ATTORNEY

6 By 
7
8

9 RECEIPT OF A COPY of the foregoing **Petition for Writ of**
10 **Mandamus and Emergency Motion for Stay of Proceedgins** is hereby
11 acknowledged this 2nd day of January, 2008.

12 VALERIE ADAIR
13 DISTRICT COURT JUDGE, DEPARTMENT XXI

14 By 
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16 for VALERIE ADAIR
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**SUPREME COURT OF THE STATE OF NEVADA
OFFICE OF THE CLERK**

KENNETH COUNTS,
Petitioner,

vs.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF
NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE
HONORABLE VALERIE ADAIR, DISTRICT JUDGE,

Respondents,

and

THE STATE OF NEVADA,
Real Party in Interest.

Supreme Court No. 50939

District Court Case No. C212667

RECEIPT FOR DOCUMENTS

TO: Kristina M. Wildeveld
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Charles J. Short , District Court Clerk

You are hereby notified that the Clerk of the Supreme Court has received and/or filed the following:

01/23/08	Filing Fee Waived: Criminal.
01/23/08	Filed Petition for Writ of Mandamus. and Emergency Motion for Stay of Proceedings. (Filed via fax.)
01/23/08	Filed Motion/Stay. Emergency Motion for Stay of Proceedings. (Filed via fax.)

DATE: January 23, 2008

Tracie Lindeman, Clerk of Court

By: _____

NH

Deputy Clerk