

IN THE SUPREME COURT OF THE STATE OF NEVADA**FILED**

JAN 24 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY 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

Respondent,

THE STATE OF NEVADA,

Real Party in Interest.

Case No. 50939

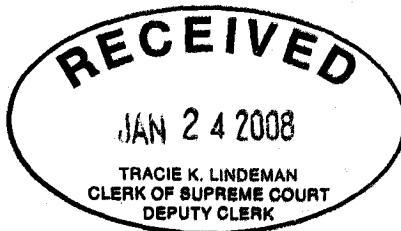
Dist. Ct. No. C212667

**STATE'S OPPOSITION TO EMERGENCY
MOTION FOR STAY OF PROCEEDINGS**

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08-01877

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THE EIGHTH JUDICIAL DISTRICT
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**STATE'S OPPOSITION TO EMERGENCY
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On January 23, 2008, undersigned counsel received a copy of an emergency motion for stay of proceedings styled with an unusual caption.¹ The State, by and through DAVID ROGER, District Attorney and his representative, Deputy District Attorney NANCY A. BECKER does hereby oppose the motion for stay of the capital trial below currently set to commence on January 29, 2008.

This is the tenth trial setting for Kenneth Counts on this two and half year old murder case with prior trial dates having been set and vacated for August 29, 2005, October 6, 2005, July 26, 2006, December 7, 2006, April 16, 2007, April 23, 2007, June 4, 2007, June 26, 2007, and August 28, 2007. Counts has waited and carefully timed the filing of his motion to this Court specifically to undermine the legitimate

¹ Defendant's counsel has incorrectly named himself as the Petitioner and his client as the real party in interest.

1 efforts of the district court judge and the prosecution to get this matter to trial. The
2 issues raised by Counts, namely the adequacy of the aggravating circumstances, are
3 capable of review on direct appeal.

4 The State filed the original notice of intent to seek death penalty against
5 Kenneth Counts on July 6, 2005. Counts waited over two years before challenging
6 the language of the aggravating circumstances. Moreover, Counts's co-defendants
7 sought similar relief from this Court following a denial of their motions to strike
8 aggravating circumstances in 2006. See Luis Hidalgo, III and Anabel Espindola, Case
9 No. 48233. Counts could have raised his issues at that time and taken a writ of
10 mandamus as did his co-defendants. Instead, Counts only sought to strike the Notice
11 of Intent on Apprendi grounds in July, 2006 and April, 2007.

12 The fact that Counts did not raise this issues at an earlier date and instead
13 waited another year and a half to raise his claims in district court and then file the
14 instant motion for stay with this Court on the eve of trial, belies any claim that there is
15 an "emergency" need for consideration of his claims. Writs of mandamus are subject
16 to the doctrine of laches which precludes consideration of his claim at this point.
17 Buckholt v. Second Judicial Dist. Ct., 94 Nev. 631, 584 P.2d 672 (1978) (overruled on
18 other grounds).

19 As to the language of the first enumerated aggravator, "under sentence of
20 imprisonment," Counts asserted two reasons below, and in his Petition before this
21 Court, for striking that aggravator: (1) it is facially invalid as it applied to any crime,
22 including non-violent crimes such as possession of a controlled substance, and
23 therefore does not perform a narrowing function; and (2) there is a possibility Counts
24 completed his probation and was not under sentence of imprisonment at the time of
25 the murder of Timothy Hadland.

26 The Legislature could have restricted the "sentence of imprisonment"
27 aggravator to certain types of crimes, but chose not to do so. It is not ambiguous and
28 it does perform a narrowing function because it relates to a defendant's background.

1 Allegations that there is insufficient evidence to support the aggravator should not
2 support a motion to strike, as this is a matter left to the jury. Counts claims the State
3 has no evidence that he was under a sentence of imprisonment, however the record
4 and the notice of evidence in support demonstrate that Counts' never completed his
5 probation, has an outstanding bench warrant, and is thus still under a sentence of
6 imprisonment.

7 The arguments given in the Petition do not demonstrate a reasonable likelihood
8 of success on the merits, which, combined with the untimely nature of the challenge,
9 should weigh in favor of denying the stay.

10 As to the second "pecuniary gain" aggravator, Counts failed to join in or file
11 any motion to strike this aggravator until after this Court issued its ruling in Hidalgo
12 v. District Court, 123 Nev.Adv.Op. 59 (2007) (Petition for Rehearing pending). More
13 importantly, as Counts was the shooter and the notice clearly indicated he received
14 money for killing Hadland, the problems that this Court addressed in Hidalgo do not
15 apply to Counts and this case is factually distinguishable from Hidalgo. In addition,
16 the State has filed a new Notice of Intent² reiterating that Counts was paid \$6,000 to
17 kill Hadland as well as a detailed statement of the facts surrounding the decision made
18 by individuals affiliated with the Palomino Club to kill Hadland for a price and to stop
19 him from interfering with the Club's customers causing the Club to lose money. Thus
20 the notice issues of concern to the Court in Hidalgo do not exist in this case.
21 Moreover, the facts and evidence have been known to Counts for almost two years, so
22 the short continuance date, from January 10 until January 28th poses no prejudice to
23 Counts. Again these factors weigh against granting the stay.

24 Finally, Counts argues that the State has an ulterior motive for maintaining the
25 death penalty in this case, it wishes to place Counts in a position to negotiate by
26 providing testimony against Luis Hidalgo, Jr., owner of the Palomino Club. This
27

28 ² The Notice was mistakenly titled notice of evidence.

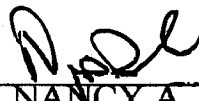
1 ignores the fact that Counts is the classic example of the killer for which the death
2 penalty was designed, a killer for hire. Of course the State intends to pursue the death
3 penalty against him.

4 For the above reasons the request for a stay should be denied.

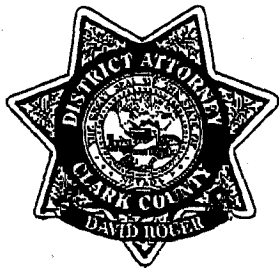
5 Dated this 24th day of January, 2008.

6 DAVID ROGER
7 Clark County District Attorney
8 Nevada Bar # 002781

9 BY


10 NANCY A. BECKER
11 Deputy District Attorney
12 Nevada Bar #000145
13 Attorney for Respondent
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CERTIFICATE OF MAILING



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FROM: Deputy District Attorney Nancy A. Becker
SUBJECT: Kenneth Counts – C212667
DATE: January 24, 2008

State's Opposition to Emergency Motion for Stay of Proceedings

NO. OF PAGES, EXCLUDING COVER PAGE: 5
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