IN THE SUPREME COURT OF THE STATE OF NEVADA

* * *

DOMONIC MALONE, Appellant, vs. THE STATE OF NEVADA, Respondent.	CASE NO. 61006

APPELLANT'S APPENDIX

VOLUME 2

Direct Appeal From A Judgment of Conviction
Eighth Judicial District Court
The Honorable Michael Villani, District Court Judge
District Court No. C224572

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DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

vs.

DOMONIC RONALDO MALONE and JASON DUVAL MCCARTY,

Defendants.

CASE NO. C224572

DEPT. V

BEFORE THE HONORABLE JACKIE GLASS, DISTRICT COURT JUDGE

TUESDAY, NOVEMBER 21, 2006

TRANSCRIPT OF PROCEEDINGS
MOTION TO SEVER

APPEARANCES:

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Deputy Special Public Defender

For Defendant McCarty: ANTHONY P. SGRO, ESQ.

CHAD DENNIE, ESQ.

RECORDED BY: RACHELLE HAMILTON, COURT RECORDER

Tuesday, November 21, 2006 at 9:01 a.m.

THE COURT: All right. This is on Domonic Malone, who is where? Just wave to me. Okay, Mr. Malone just waved. And Jason McCarty. Sitting right next to him. Great. They're both present in custody. And we have Mr. Sgro for Mr. McCarty.

MR. SGRO: Yes, Your Honor.

MR. DENNIE: Chad Dennie also for Mr. McCarty

THE COURT: Great. And --

MR. CANO: Charles Cano and Mr. Pike for Mr. Malone, Your Honor.

THE COURT: Okay. Great. Okay. We're dealing with the motions here. It's Mr. McCarty's motion to sever and Malone joined in with that.

MR. CANO: We also filed a separate motion to sever as well, Your Honor.

THE COURT: Okay. Oh, that's right. And here's another one. So, which one do you want to deal? Do you want to just --

MR. DIGIACOMO: I think, honestly, 'cause I just received their plan, Mr. McCarty, they address the same things we addressed in Malone, too, so I think we can do them all as kind of one motion.

THE COURT: Okay.

MR. DIGIACOMO: Allow the defense to go first and then we'll respond.

THE COURT: That'll be fine. Mr. Sgro?

MR. SGRO: Certainly, Your Honor. I would -- obviously I don't want them all treated as one motion. I want the benefit of Mr. McCarty's analysis to be independent.

THE COURT: That'll be fine.

MR. SGRO: Essentially, Your Honor, there's three points relative to Jason McCarty's severance motion. One is with respect to whether or not there's a *Bruton* problem. The second involves antagonistic defendants -- defenses. And the third one involves whether or not McCarty would be prejudiced by going to trial with Counts 1 and 2 that are charged as to Defendant Malone, but not charged as to Defendant McCarty.

Relative to the *Bruton* issue, the state in it's opposition, I believe, has agreed to essentially not to admit anything --

THE COURT: Right.

MR. SGRO: -- relative to Defendant McCarty. I think the verbiage is if it has anything having to do with Jason McCarty at all, we're not going to introduce it. I think they said something about this is not the sort of evidence we would seek to introduce anyway. My concern is that they make that sort of broad statement and say the statements, I suppose, in my motion are not the sort they seek to introduce. So if that's the case and the Court's prepared to simply state if it comes to anything involving McCarty if they are statements that I submitted in my brief that we already know going in, those are not going to be admissible, then I'm going to quickly go to Arguments 2 and 3.

THE COURT: Okay. So let's --

MR. DIGIACOMO: Judge, there is no statement by Defendant Malone with is testimonial, the statement to the police officer which implicates Defendant McCarty in any manner. So to the extent that it's testimonial, correct. If he's going to argue that the statements of the coconspirator in the course of the furtherance of the conspiracy and the things that Defendant Malone said was overheard saying out at the murder scene, things that he said prior to taking the girls to the murder scene,

things that he did about changing the tires after the murder scene, all of those are statements of a coconspirator would be admissible whether or not the trials were severed. We intend to offer absolutely no testimonial evidence by Defendant Malone, and as far as I'm aware, there isn't any. Mr. Malone denied any culpability, any knowledge of the crime whatsoever. So I don't -- not aware of any *Bruton* problems that exist in the case.

MR. SGRO: Well, Your Honor --

THE COURT: Mr. Sgro?

MR. SGRO: -- knowledge, friendship. For example, the fact that Malone and McCarty know each other and have a relationship with each other from a bar that's known as The Sportsman's. I'm sure you read the briefs, Judge, but The Sportsman's is one of the pivotal locations in the place because that's where everyone congregates. Witnesses, victims, and Defendants all have some nexus to this Sportsman's bar.

THE COURT: And you don't want any of that coming in?

MR. SGRO: Well, to the extent of Domonic Malone, Codefendant Malone gave that statement to a police officer and those statements are going to come in. No, I don't want any of that coming in. That's a *Bruton* violation because they're using it as circumstantial evidence to establish a conspiracy --

THE COURT: Against him.

MR. SGRO: -- against him.

MR. DIGIACOMO: I don't have a problem, Judge.

You're right, I apologize. He does say: I know Romeo, and I was with Romeo at the Sportsman's. We've got about 27 witnesses that puts the two of them. I'm not planning on offering Mr. Malone's statement to the police officer that

he knows Mr. McCarty or that he was with him on the day of the crime.

MR. SGRO: Okay. Here's the dilemma I'm having, Your Honor.

THE COURT: Okay.

MR. SGRO: Capital murder case.

THE COURT: Right.

MR. SGRO: Most serious kind we have. Here's what the State said. The State will not admit any statement by Malone that references Defendant McCarty at all to the extent that Defendant McCarty is referenced at all, the name with be redacted. This -- the --

THE COURT: So they're going to have to -- so what you're saying Mr. DiGiacomo is you're going to use your other witnesses to be able to prove anything to do with Mr. Sgro's client and nothing that comes from Mr. Malone.

MR. DIGIACOMO: Correct.

THE COURT: Is that what you're saying?

MR. DIGIACOMO: The statements to Detective Collins, which I believe is the detective that took Mr. Malone's statements as they're related to anything that relates to Mr. McCarty will not be admitted. So I don't see that there's a problem. My reference there was could the State have introduced that Mr. Malone acknowledged to Detective Collins that he was present at The Sportsman the day of the crime? That would certainly admissible. It has nothing to do with McCarty and it has no reference to McCarty and certainly wouldn't be anything that would be admissible against Mr. McCarty. And so that wouldn't be a problem. That was the response of my motion.

THE COURT: Mr. Sgro, is that -- is that something? If there's no reference to your client --

MR. SGRO: Well, then we have the Martin Duckworth, the Duckworth problem. Be transpositioned -- in other words, they're redacted or attempt to redact a statement where I say: Charlie -- me and Charlie were at the bank right before we robbed it. And Mr. Cano and I are sitting as Defendants at the table and the cure for this statement is me --

THE COURT: Just to take it --

MR. SGRO: -- and some other guy.

THE COURT: -- out. Right.

MR. DIGIACOMO: Actually, that's probably not the cure. I would agree that that's not the cure. I could say: Mr. Sgro was at the bank. I couldn't say: Mr. Sgro was at the bank with anybody else.

MR. SGRO: Gotcha.

MR. DIGIACOMO: That would be the resolution under *Richardson v. Marsh* and *Duckworth* probably is no longer good law after *Crawford* anyways. But to the extent that it would apply to that case, I'd agree, you just can't put a blanket there, *Stevens* will apply.

THE COURT: Right. Especially when they're sitting together.

MR. SGRO: Correct.

MR. DIGIACOMO: Correct. And I don't think we disagree on that fact.

MR. SGRO: So --

THE COURT: Okay.

MR. SGRO: -- I guess what I seek from the Court prior to advancing to Arguments 2 and 3, is the assurance that when we get to trial, if --

THE COURT: If they try to admit anything --

MR. SGRO: Anything. That the objection violates Court's pretrial ruling, it's

going to be sustained. If that's the case, then I can move on to --

THE COURT: Right.

MR. SGRO: -- numbers 2 and 3.

THE COURT: And Mr. DiGiacomo, I think that's a fair statement of what's going on here.

MR. DIGIACOMO: Certainly.

THE COURT: You've made -- you have made assertions here today that you aren't going to do anything in violation of *Bruton* and the whatever the case law that comes after that, the dealing with any of these issues, so I'll hold you to it --

MR. DIGIACOMO: That's fine.

THE COURT: -- and we'll move on to issue 2.

MR. SGRO: Okay. Thank you, Your Honor. Issue 2 is the antagonistic defenses and issue 3 is the additional counts.

First of all, with respect to the antagonistic defenses, the argument from the State is the *Marshall* case essentially, that you can't look at it just in the sense of antagonistic defenses, it's not per se mandated that a severance should inure to a Defendant who has antagonistic defenses. Here's the issue, though, Your Honor, we have a couple of different matters. We have not only the antagonistic defenses issues, but also these other counts.

There is going -- there is, as you know, a third person that's involved in this case. The State has taken the position and we know this because they gave this person the deal that they did. They've taken the position that the third person that used to be in the case was accessory after the fact. Okay. I will tell you, Your Honor, when the police questioned this third person, the police artfully articulated to this third person in an effort, I'm sure they're going to say, just to break him down,

not that they ever meant it. But the police artfully articulated to this man that he was actually the principal and perhaps it was one of the other two Codefendants that was the accessory after the fact. So the police approach this man and they say: We think two people are involved. There's three of you in the case. We're going to carve out one of you guys as accessory after the fact. That, I think, is very easily argued to the prospective jury in this case. Our position, then, and I believe Codefendant's position then would be to substitute their respective clients in the place of the accessory after the fact and to then argue to the jury that it is their client that was mistakenly not attributed that role. None of this you're hearing for the first time ever. Okay. So the difficulty is, if I take that role and I say it was my client that if anything was the accessory after the fact, certainly, then, it imputes guilt as to Malone.

Now, I have two problems with that. One is I have now a second person attempting to thwart my theory of the case. Codefendant's counsel because they cannot sit there and allow me to advance that theory. So the notion that we see in a case law, the two-prosecutor theory where I'm not only faced with the prosecution team that the State of Nevada has sent down but also by my Codefendant's counsel. So he --

The second issue is the extent to which my witnesses may be unwilling to suggest or advance that theory in a joint trial where they might be willing -- in other words, witnesses may know both of these persons. They may not be willing to come and testify in front of both of those Defendants that one was one role, one was the other; where they would be amenable to testify as such when they knew they weren't hurting the other person.

So the issue in the case is whether or not antagonistic defenses

in this case. The anomaly of this case, Your Honor, is that there's three people involved and only two people get charged with the murder and that's the decision that law enforcement made and supported by the DA's office. The DA gave this person a deal. That decision being made way up front is somewhat unusual. And that is one of the anomalies that exists in this case. It's not the typical -- let's say the police find a kilo of coke in the house --

THE COURT: I get it, Mr. Sgro.

MR. SGRO: Okay. So I guess what I'm suggesting to the Court is that it -- that theory is the theory that we seek to mutually exclude or mutually advance to the detriment of the other.

With respect to the counts in the case, Mr. Malone is charged with counts 1 and 2, first degree kidnapping and count 2 is battery with substantial bodily harm. Those charges, according to the pleadings, occurred sometime in April of '06, which is relevant because my client's first charge does not occur until May 16th which is the approximately 45 days if you go right from the beginning of April which is the language in the case that we cited that says 45 days was too remote in time to be part of the complete story doctrine and on and on.

The issue here is that at the preliminary hearing with that evidence was offered, it was offered as to Defendant McCarty. However, when the State argued the case at the end of the preliminary hearing, the State reached back and started with the relationship everyone, quote/unquote, everyone had in the case and they started it in April. And that is very easy to do and very easy for a jury to immerse itself in: Well, Malone and McCarty were friends, they must have been friends a month before, they must have known what was going on. And all those inappropriate inferences to two counts that are significant and serious and involved,

by the way, very violent activity that the State can argue this was the precursor of things to come. And I think they touched on that in the preliminary hearing level. Those two counts paved the way, sort of, to what we ultimately see in the case that now involves Defendant McCarty.

And the one thing I would point out, Your Honor, is the State puts a footnote in their motion that says: My appropriate remedy would be to seek a severance of counts. I don't believe I have standing to come in here and ask to severe a Codefendant's counts from my case. I think my remedy is to say this is how they elected to charge it, Judge, I have benefit or entitlement to go on my own separate trial.

THE COURT: All right. Let me hear from the State on this -- these two issues. Go ahead, Mr. DiGiacomo.

MR. DIGIACOMO: Judge, in the severance of actual counsel, it's actually been raised by Malone, so we'll have to address that when we address Malone. But -- and I will start with that because it's the easiest solution for the Court. Because what Mr. Sgro calls a precursor is what in the law we call the motive for the crime. The acts that occurred in April were the motive because it generated the death that ultimately resulted in the beating of Red which ultimately led to the deaths of the other two girls. As such, even if you were to sever the case, evidence related to that first incident --

THE COURT: Would still come in.

MR. DIGIACOMO: -- would still come in. So that can't be the basis for a severance.

So then you go back to the other argument and what they're arguing to this court is they didn't distinguish *Marshall v. State* in the least bit which

is the exact same facts. They didn't distinguish *Zafiro v. United States* because they haven't found a specific trial right of one of the Defendants which is going to impinge on the other Defendant. Their argument to you is that there's this person, Donald Herb. Mr. Herb has never been charged with the homicides in this particular case. He was charged as an accessory. Why? Because the evidence demonstrated he wasn't involved in the initial crime. And how do we know? Because Mr. McCarty was on a cell phone at the time of the homicides. Mr. Herb tells us he's on the cell phone at the time of the homicides. When we get the cell phone records, Mr. McCarty is standing between two dead bodies on the cell phone talking to Mr. Herb who's in his house way up on the other side of town. So we know that Mr. Herb couldn't possibly have been there.

Moreover, each and every witness in the case say McCarty, Malone together the whole time. Red says: McCarty, Malone, two individuals that threatened to kill me. Donny wasn't there. Donny had nothing to do with it. Donny was around for all of about five minutes during the three days that led up to the crime and he was around sometime after the crime when he helped get rid of the tires and he helped get rid of some of the weapons.

There's absolutely not a single shred of evidence which would suggest that Mr. Herb was actually involved in the killing. He was charged with accessory to commit murder, he pled up on accessory to commit murder, and he faces sentencing on a right to argue before the Court, pending his testimony in this particular case, Judge.

So, for them to argue that somehow because there's a third person involved that that somehow impinges one of their rights is kind of -- I don't want to say it's disingenuous because that's obviously their defense, but the fact of

the matter is is that no matter if you sever it or you don't sever it, what specific piece of evidence are they suggesting would come in that wouldn't have come in if they were together and there isn't any particular since we agreed on the *Bruton* issue before the Court, Judge. And so I would submit it on that.

MR. SGRO: Just very briefly, Your Honor. The facts articulated to you just now about why Donald Herb was not charged as -- in the homicide are accurate. However, they are specifically and carefully selected. I will tell you, Your Honor, the drug use of all the witnesses in this case, except for the police officers, is extraordinarily rampant. I asked a person, for example, on this stand:

Do you use crack cocaine -- or did you use crack cocaine very often?

Answer: No, not very often.

Well, how many times did you use it?

Well, not more than four times a week.

Okay. That is the -- those are the sorts of persons upon whom we are going to be called upon to rely in terms of establishing facts. Donald Herb is attributed with taking clothing after the homicides are committed and throwing them away at some dumpsters adjacent to the apartment of two female witnesses in the case. They are -- describe in great detail his whole day where Donald Herb came over, threw some clothes away, she could see blood on the bag, and on and on. Donald Herb for this same passage of events has no idea what anyone's talking about, never been there, never done it, and on and on.

So, the point of the matter is I don't want the Court to assume that because of what Mr. DiGiacomo said is actually accurate, that it's all that's there. He wove with thread through --

THE COURT: I'm sure there's a lot more here than what I'm hearing right

now. So --

MR. SGRO: Fair enough. The issue relative to antagonistic defenses is not what I would be precluded from presenting, it would be my ability to defend against one prosecutor instead of two. That is the nature of the argument of antagonistic defenses.

THE COURT: Okay. Let me hear from the Malone camp here.

MR. CANO: Thank you, Your Honor. Similarly, like Mr. Sgro, we raised very similar issues in this case. I think it's a little bit different, though, with regarding to the *Bruton* issue regarding Mr. Malone as it applies against Mr. McCarty. And the reason why it's different is because Mr. McCarty does make many statements throughout statements to the police. He makes actually a jail phone call. I was actually reviewing some of those phone calls where he mentions Mr. Malone in particular being involved somewhat in this case, being out in the desert, being out with him. Also making statements in reference to Mr. Herb saying Mr. Herb had, you know, flipped on us and told about us being out there. In those sense, I think *Bruton* really is pertinent to Mr. Malone and mandates a severance. Because as I know you've gone through the brief itself, there are many places where seems are -- actions are attributed to Mr. Malone that are coming through statements that are being allegedly placed on Mr. McCarty about being out in the desert, about hitting one of the women in the head with a rock, you know.

In addition to that, there's also statements about disposing items after the fact, things of that nature. Things that placed them both together both prior to -- at the place where I think they were taken from the south cove in the desert area as well as disposing of items after the fact. Because it's so interwoven in all of his statements as well as phone calls after the fact once he's in custody to family

members to any -- actually, a friend of his who's actually -- Court's indulgence.

THE COURT: Mr. Cano, while you're doing that --

MR. CANO: Arian [phonetic] Robinson -- Arian Robinson was made -- statements were made to him that were also trying inculpate Mr. Malone in this case. I think they raise a myriad of *Bruton* problems here that we're going to be facing because it's going to be hard to separate those apart from us and for us to get a fair trial in this case.

Additionally, Your Honor, we also bring up the fact that, you know, there are antagonistic defenses as well. I know the State mentioned that there's nothing necessarily linking Mr. Herb to it; that he's more than an accessory after the fact, but there are statements that the phones are traded between Herb and McCarty, them being best friends. And, in what statements were made to him, one of the girls were not dead yet, he was on the way, en route, and actually found out there in that desert area. I think it's fairly -- it's very reasonable to argue that he is a part of this whole conspiracy and murder because perhaps one of the women were dead and not both of them. And he was involved in, you know, the murder of the other person themselves with whoever was out there at the desert at that point in time.

So, I think it's not just that. You know, we have phone calls and he was there after the fact and he only helped dispose a few clothing items and some tires. I think he's a lot more involved in this because he was more than likely present there while the action was there. Of course he denies any, you know, involvement whatsoever, saying I stayed 100 yards away from them and I don't know what happened out in the middle of the desert even though he drives out in the middle of the night to go out to the desert to assist his friend Mr. McCarty.

And additionally to that, Your Honor, I think the incidents that

happened. You know, we're asking for severance, we're asking for severance on counts 1 and 2 that they should be separated. We also feel that the incidents that happened days prior to involving Ms. Estores. Now let's talk about Ms. Estores separately apart from Miss --

THE COURT: Can you hold on, Mr. Cano?

MR. CANO: Okay.

THE COURT: Can I hear your response to what he just talked about, please?

MR. DIGIACOMO: Sure. Let's start with the *Bruton* issue because unlike Mr. McCarty, Mr. Malone's brief doesn't distinguish between the nature of the statements. In order for a *Bruton* existence -- issue to exist, it has to be a testimonial statement. He references all kinds of statements that are nontestimonial. There are I think four or five statements by Mr. McCarty which are in fact testimonial. He gives four or five statements to the police. And I know you haven't seen the responses to the writ yet, the State didn't offer any of those statements at the preliminary hearing. The nature of the statements are such that he says I didn't do it, you know, Malone and Herb did it. I don't normally introduce statements that give a defendant his defensive in the trial, and so we don't anticipate offering the statements made by Mr. McCarty to the police the officer that implicate Mr. Malone. We don't intend to do so, and so we've agreed not to do that.

Aside from those, the statements that Mr. Cano is discussing, they're nontestimonial. And as such, they can't be the grounds for a severance. They may be the grounds for a limine instructions should you find that any of them is not a statement made a coconspirator in the course or the furtherance of the conspiracy. But the case law is pretty darn clear that the perimeter of the confrontation clause is the determination whether or not the statement is in fact testimonial. To the extent

this Court finds any statement made by Mr. McCarty that's testimonial, we will certainly agree to the same thing we've agreed to with Mr. Sgro which is any redaction required by *Richardson vs. Marsh*, which would remove any implication of Mr. Malone or Mr. Malone from McCarty's statements.

As to -- I don't even think I need to address the counts. Clearly, those two prior counts that happened in April --

THE COURT: I know. You've already said what you need to say about those.

MR. DIGIACOMO: And so -- that's the only two arguments he has. I'm agreeing we're not going to offer testimonial statements by McCarty against Malone. And as such, there is no grounds for a severance based upon that, Judge. And I'd submit it.

MR. SGRO: Your Honor, I'm sorry to interrupt. But listening raises another issue. If they do get into statements that my client made that they consider to be testimonial and they assert or seek to get them into through their police officer, I believe on cross-examination I would be entitled to say Mr. McCarty also told you he'd -- I'm going to use his words, he didn't do it. Mr. McCarty also told you two other people did it, Donald Herb and Domonic Malone.

Now, that would be totally fair game, State versus McCarty.

THE COURT: Right. But not [points to Defendant].

MR. SGRO: Correct. And so there's -- just hearing that -- his presentation underscores my argument. My defense is hampered if I'm forced to try the case with Codefendant Malone. And I'm sorry to interrupt.

MR. DIGIACOMO: And we're hampered just as well, Your Honor.

THE COURT: I know, everybody's hampered.

MR. DIGIACOMO: And just in response to that, you know --

THE COURT: One big hamper over there. Go ahead.

MR. DIGIACOMO: To the extent that I would open the door with that and I can't imagine that I would do so, but, you know, if I offer to seek --

THE COURT: Mr. DiGiacomo, stop, please.

MR. DIGIACOMO: Okay.

THE COURT: Because here's -- you know, after sitting and listening to you all for I don't know how long, here's how I feel about all this. It's a 250 case. It's a death penalty case; right?

MR. DIGIACOMO: That's correct.

THE COURT: Okay. A lot of scrutiny on death penalty cases as there are on many of our cases, but particularly on 250 cases. I don't want to muck it up. And because I don't want to muck it up and I'm hearing all this, I'd like to keep it clean and keep the record clean. So why don't we just do -- why don't we just sever it and do two trials? Why can't we do that?

Why can't we do that, Mr. DiGiacomo?

MR. DIGIACOMO: Well, there's a variety of reasons. The most of which is everything they say in -- for the grounds of joinder, it's a massive case, I mean the preliminary hearing was 2,000 pages, it took six days. This case will take weeks to try, it'll take more --

THE COURT: Weeks?

MR. DIGIACOMO: It'll take weeks to try and if you sever them, it'll take months or maybe at least a month to try the two Codefendants.

THE COURT: This better not take weeks to try, Mr. DiGiacomo.

MR. DIGIACOMO: It will, Judge. There's absolutely no question after

sitting -- Mr. Arnold -- I was only there for day 1. He was there for day 2, day 3, day 4, day 5, day 6, eight hours a day taking testimony. The transcripts are this big [indicating].

THE COURT: Here's what I'm going to do. Is there anything else you want to add, Mr. Cano, because I'm going to -- what I'm going to do is I'm not ruling at this moment. I'm going to think about it and I'm going to tell you what my ruling is next week.

MR. CANO: Just wanted to address the issues about the severance between Ms. Estores on counts of 1 and 2 and the other counts, as well as, I think separating the events. I kind of separated them to three different kind of categories, Your Honor. The first were the April events between Mr. Malone and Ms. Estores.

THE COURT: Right.

MR. CANO: That was the beating that had taken place. That I know that they're trying to tie in with some kind of motive as being the reasons why, you know, the beatings happened a month later. I don't think there's anything necessarily to do that happens exclusively between Ms. Estores and Mr. Malone. I think you're going to hear testimony from Ms. Estores saying that necessarily doesn't have anything that leads up to what happens a month later. That was a separate, an event that happened just between them two and business that they had going on.

Then there was another beating that happened earlier in May, a couple of days prior to this. Again, involving Mr. Malone and Ms. Estores. Not necessarily having to do anything with Ms. Cambado and Ms. Magee. Mr. -- actually, McCarty says that he was present there at that case. Other than Ms. Cambado and Ms. Magee being present at the time of the beating between Mr. -- Ms. Estores and Mr. Malone, no one else was involved, it was separate and apart from them. A

couple -- they were taken maybe to the Hard Rock. A couple of days later, they ended up being murdered -- Cambado, Magee. Ms. Estores was not murdered, she -- you know, she was not involved anything to do with what happened with Ms. Magee and Ms. Cambado out in the desert. A third incident.

Therefore, I think it's prejudicial. Because what they're going to try to do is say: Oh, he's violent in this case. Of course it's leading to the violence at least to the brutal beating that happened to Ms. Cambado and Ms. Magee. I think it's extremely prejudicial. And I think that, you know, the fact that the State was trying to use that as motive doesn't outweigh the prejudice that it brings upon Mr. Malone. And I think at the very minimum, those two first counts need to be severed from the rest of it. I can see an argument that the State may have, well, the other incidents are closer in time, they happen within days apart, there may be something that's more related to it. We don't feel that that's necessarily true, but I think that they have a much stronger argument severing them into three trials as opposed to two trials. I submit with that.

THE COURT: I've got your briefs. I'm going to read them more carefully than I read them now. We're going to put them on for next Thursday.

Can I do next Thursday?

THE CLERK: Sure.

THE COURT: Next Thursday, I'll have my decision.

THE CLERK: That will be the 30th, 8:30.

MR. SGRO: Your Honor.

THE COURT: What?

MR. SGRO: Next Thursday I will be out of the jurisdiction. May Mr. Oram appear just to receive --

THE COURT: Sure.

MR. SGRO: It's just going to be just receive the ruling?

THE COURT: That's fine. See you then.

MR. SGRO: Thank you, Your Honor.

THE COURT: Thanks.

MR. DIGIACOMO: Thank you.

MR. CANO: Thank you, Your Honor.

[Proceeding concluded at 9:30 a.m.]

ATTEST: I hereby certify that I have truly and correctly transcribed the audio/visual recording in the above-entitled case.

Jill Jacoby
Court Transcriber

TRAN

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CLERK OF THE COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

vs.

DONALD J. HERB;
DOMONIC RONALDO MALONE;
JASON DUVAL MCCARTY,

Defendants.

CASE #: C224572

DEPT. V

BEFORE THE HONORABLE JACKIE GLASS, DISTRICT COURT JUDGE

THURSDAY, NOVEMBER 30, 2006

TRANSCRIPT OF PROCEEDINGS:
ALL PENDING MOTIONS

APPEARANCES:

For the State:	MARK P. DIGIACOMO, ESQ. CHRISTOPHER J. OWENS, ESQ. Deputy District Attorneys
For Defendants Malone and Herb:	RANDALL H. PIKE, ESQ. Special Public Defender
For Defendant McCarty:	CHAD N. DENNIE, ESQ.

RECORDED BY: RACHELLE HAMILTON, Court Recorder

THURSDAY, NOVEMBER 30, 2006; 9:10 A.M.

THE COURT: Mr. DiGiacomo.

[Colloquy]

MR. DENNIE: Good morning Your Honor, Chad Dennie on behalf of Defendant McCarty.

MR. PIKE: Randall Pike on behalf of Dominic Malone from the Special Public Defender's office.

THE COURT: All right, and this is on --

MR. PIKE: This matter was submitted for decision by Your Honor.

THE COURT: Right, this is on page three. And where -- just wave to me Mr. Malone and Mr. McCarty.

MR. DENNIE: He's right in the front there. Mr. McCarty.

THE COURT: All right they're both present here in custody. All right, and you're on today for my decision on the motions to severe.

MR. DENNIE: Correct, Your Honor.

THE COURT: All right, I'm denying the motions to sever. After reviewing all the pleadings in the applicable cases the Court finds the crimes were part of the same transactions and joinder of the counsel's not unfairly prejudicial. So the motions are all denied.

MR. DIGIACOMO: Thank you, Judge.

MR. PIKE: Specifically that includes our motion for counts and for Defendants?

THE COURT: Yeah, counts and people.

MR. PIKE: Okay.

THE COURT: Counts and Defendants. The original two charges that involved --

MR. PIKE: Right.

THE COURT: -- the first event is staying with the rest of the case, and the two Defendants are staying together.

Now I understand -- because --

MR. DIGIACOMO: Correct.

THE COURT: -- that there may be an issue regarding the date of the trial, and I'd like to know if you anticipate that you all are going to be ready or we're going to need to continue this matter as well?

MR. DIGIACOMO: My understanding is that Mr. Owens and Mr. Oram have another capital case that they set based upon a discussion with all counsel that they wouldn't be ready for our trial date in this particular case, so I think we're going to need to reset the trial date, but I think we're probably going to need --

THE COURT: Mr. Oram.

MR. DIGIACOMO: -- Mr. Oram and --

THE COURT: And Mr. Sgro.

MR. DIGIACOMO: Mr. Sgro. They will both be here December, I think 12th is our writ of habeas corpus date --

THE COURT: Writ date, so just save it for then?

MR. DIGIACOMO: -- so maybe we can reset it on the 12th.

THE COURT: All right, so on the 12th make sure you bring -- everybody brings their calendars please so that we can set the trial dates then. All right?

MR. PIKE: Yes, Your Honor.

THE COURT: Thank you.

MR. DIGIACOMO: Thank you, Judge.

[Proceeding concluded at 9:11 a.m.]

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video recording in the above-entitled case to the best of my ability.

RACHELLE HAMILTON
Recorder/Transcriber

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CLERK OF THE COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

vs.

DOMONIC RONALDO MALONE and JASON DUVAL MCCARTY,

Defendants.

CASE NO. C224572

DEPT. V

BEFORE THE HONORABLE JACKIE GLASS, DISTRICT COURT JUDGE

TUESDAY, DECEMBER 12, 2006

TRANSCRIPT OF PROCEEDINGS

PETITION FOR WRIT OF HABEAS CORPUS

APPEARANCES:

For the State: MARC DiGIACOMO, ESQ.
Deputy District Attorney

For Defendant Malone: DAVID M. SCHIECK, ESQ.
Special Public Defender

RANDALL H. PIKE, ESQ.
Assistant Special Public Defender

For Defendant McCarty: ANTHONY P. SGRO, ESQ.

CHAD DENNIE, ESQ.

CHRISTOPHER R. ORAM, ESQ.

RECORDED BY: RACHELLE HAMILTON, COURT RECORDER

Tuesday, December 12, 2006 at 9:10 a.m.

THE COURT: Page 2, McCarty and Malone. All right. Everybody make their appearances, please.

MR. DIGIACOMO: Marc DiGiacomo for the State, Judge.

MR. SGRO: Anthony Sgro on behalf of Mr. McCarty.

MR. ORAM: Chris Oram on behalf of Mr. McCarty.

MR. DENNIE: Chad Dennie on behalf of Jason McCarty.

MR. PIKE: Randall Pike, Assistant Special Public Defender and David Schieck, Special Public Defender on behalf of Defendant Domonic Malone.

THE COURT: So we have three for McCarty and two for Malone?

MR. PIKE: That's correct, Your Honor.

THE COURT: All right. We're ready to argue the writ?

MR. DIGIACOMO: Sure.

THE COURT: Are you ready?

MR. SGRO: Yes, Your Honor.

THE COURT: Okay. Who's going first?

MR. PIKE: I'll go ahead and go first, Your Honor.

I think that the gravamen of the arguments that I have in relation to this depend upon how you make a decision as to what -- as to the Codefendant Donald Herb's status, whether or not he is a true accessory after the fact as the State has suggested or whether or not he's a principal or liable for punishment under the same crimes. That becomes important because then the corroboration requirement comes into play and other things are affected by that. So in relationship to that, I suggest that he was chargeable as a principal. His own testimony and the

testimony in the return to the writ of habeas corpus from, that was filed by the State, indicate that Donald Herb was on his way out to the scene while at least one of the girls was still alive. He knew what he was getting into. He has testified that he was going out to help them at that time. So he was involved in the process before the death had occurred. He knew what he was getting into and so he -- at that point in time when he was on his way out there, he'd made the decision to join whatever conspiracy existed and so he -- he then became a principal or liable for prosecution in the same -- for the same offenses.

Based upon that, then we have to look and determine if there was anything to corroborate his testimony or sufficient corroboration to indicate that he -- that it was supported enough to indicate that Mr. Malone was there. There's no physical evidence to tie Mr. Malone there. There was no testimony that there was any fingerprints. There was no testimony that he made any statements that put him there in relationship to Mr. Malone. There's no evidence that he had any knowledge of where the -- these --

THE COURT: When you say he?

MR. PIKE: Mr. Malone. I'm sorry.

THE COURT: Thank you.

MR. PIKE: I'm sorry. I'll direct it to specific names. That Mr. Malone knew where these items where. The actual testimony regarding corroboration by these -- the other girls that testified in relationship to Mr. Malone indicate that he was present and some items were disposed of in a trash bin over at the Sportsman. Now Mr. Herb testified differently. Said that didn't happen. So his testimony is diametrically opposed to the civilian witnesses and so it's not corroborated by that.

When, it's easy -- the statute is put into effect because it's easy for

someone that committed a crime to come in and say, well, Domonic was here with --

THE COURT: Somebody else did it.

MR. PIKE: Right. He was here with me and I can tell you what he did because I saw him do it when that individual did it. There was nothing presented at the time of the preliminary hearing that tied Mr. Malone into any of these things.

In addition to that, in relationship to the pandering charges and the rest of that, the testimony concerning the pandering specifically dealt with Romeo, his involvement with the girls, and I suggest that the State's indication that Mr. Malone somehow had told the girl to go upstairs and to perform an act of prostitution for a rock was her going up to do it in order to obtain a drug for herself because the testimony was that she was addicted and was quite a heavy user and that's how she obtained drugs.

They relay upon the -- I hate to use bought and paid for because it hasn't been specifically paid for yet, but the testimony of an individual that they identified as -- gave him the option to either be a witness or a suspect to charge him as an accessory or to allow him -- or to prosecute him for the criminal and that was Donald Herb. And that -- that is the only thing that really ties Mr. Malone into this case at all. So I think that if the Court can make a specific ruling as to how you consider him based upon the evidence that's presented and whether or not it's corroborated, then the decision should be made to indicate that if -- if he is simply an accessory, then the corroboration requirement is not there. If he was a principal, it is, and I think he should be -- the charges against the Defendant should not hold and he should be released from custody.

THE COURT: All right. Do you want to just wait and you want to respond to that?

MR. DIGIACOMO: No, actually, why don't they both go and I can respond to both of them.

THE COURT: And then you respond to all of it.

MR. DIGIACOMO: That'll be fine.

MR. PIKE: And I just concentrated on that. I submit the other ones --

THE COURT: Right.

MR. PIKE: -- and join with Mr. Sgro's arguments on his because they also apply to mine.

THE COURT: Mr. Sgro.

MR. SGRO: Thank you, Your Honor. Your Honor, I spoke briefly to Mr. DiGiacomo this morning. And essentially, we've agreed to submit a large portion of the writ with the exception of one issue which I think does -- I don't know, the easiest one to go my way, I suppose, and that's the doctrine of merger argument.

What the State does in this case, Your Honor, is they take the act of the transportation in a vehicle and then the battery and the robbery and they just, they dissect each specific event and pummel Mr. McCarty with as many charges as possible, you know, that the adage of --

THE COURT: I've never seen any of that ever happen --

MR. SGRO: I'm sure --

THE COURT: -- before, Mr. Sgro. I'm sure you -- I'm sure --

MR. SGRO: This is the first time for me as well --

THE COURT: I'm sure it is.

MR. SGRO: -- that's why I'm so stunned, Your Honor.

Bottom line is obviously, you know, she charged someone -- the only

thing that was missing in this thing is on the relative to the murder charge, there's no -- you know, there's no battery which led to the use of the weapon which led to -- I mean, the way they broke this down is somewhat of an anomaly even relative to the prosecutions I've seen.

Relative to the kidnapping specifically, which is charged a few times in this Information, that's the one that in my view presents the most difficulty. Clearly, the State's theory was that they were going to take Estores or Cambado and Magee to a specific location in order to perform the act which they're also accused of performing. There's this issue of whether or not the robbery occurred premortem or postmortem, whether or not it was related incidental to -- you can't have it both ways. If the allegation is Donald Herb came to hide evidence, okay, dispose of evidence, that's their case, best light to the State. Well, then, it follows that the removal of items from their person, removal of clothing from their person would have been done by the person that they made the plea agreement with and now call him an accessory after the fact. Right? So there can be a robbery that way if the materials were taken in order to get away with -- to use that vernacular -- to get away with the crime of murder, then it was incidental to the crime of murder. So even under that scenario, it's incidental to the murder counts, Your Honor.

Relative to the kidnapping, it's their theory that this was their modus operandi; that's why they argued to you in the severance motion, Your Honor, that this was sort of the way that things were done. That a woman relative to counts 1 and 2, and then three women -- or two women relative to the rest of them were taken out from time to time to this desert area. If that's what they have espoused in this courtroom then they make our argument for us in that it is incidental to the ultimate objective which has been characterized as PT time, prayer time, physical

time, whatever, pimp training --

THE COURT: Pimp training. Yeah.

MR. SGRO: Pimp training, I've heard that one as well.

But nonetheless, Your Honor, those arguments really underscore our position that the kidnapping is incidental to the ultimate objective of what the conspiracy was to be. And so, it is -- those specific counts, the kidnapping counts and then the robbery counts, insofar as the robbery's related to the murder count, those are the counts that I believe are the most difficult for the State to move forward on.

And just one other observation, Your Honor, relative to findings made to Donald Herb, obviously any finding at this point would be a preliminary one. The findings you make at a trial, Your Honor, is going to impact jury instructions.

THE COURT: I don't believe that -- I'm ruling on these -- I'm ruling on the writ.

MR. SGRO: Right. Okay, then --

THE COURT: I'm not making any findings on anything --

MR. SGRO: Then --

THE COURT: -- except on the writs.

MR. SGRO: Then I will submit it on that, Your Honor.

THE COURT: Okay. You ready?

MR. DIGIACOMO: Sure, Judge.

THE COURT: Okay.

MR. DIGIACOMO: I'll start with Mr. Pike since the coconspirator/corroborator is a pretty easy issue.

The evidence from the direct testimony of Donald Herb looking at the

evidence alone of Donald Herb which is the rule for an accomplice as a matter of law says he's not an accomplice because mere knowledge of or acquiescence in the object of the conspiracy is not enough to make someone liable for the underlining crime of the conspiracy, Judge. And based upon that, the fact is that at some point on his drive down there, he might have learned that they were still alive or that they were being killed ultimately doesn't make him liable. If I was standing here on a writ right now before you with that evidence on Donald Herb, you'd be dismissing the murder count because I wasn't able to establish his actual behavior in the murder itself, Judge.

So as a matter of fact, he's not an accomplice as a matter of law, but notwithstanding as to the corroboration, I don't even think they argued McCarty's because of the overwhelming evidence of corroboration related to McCarty. But think about Mr. -- what Mr. Malone did. Mr. Malone beat a girl in the same location the night before. Mr. Malone then drove that girl and the two dead girls back to down to the Hard Rock Casino --

THE COURT: While they were still alive, though.

MR. DIGIACOMO: While they were still alive.

THE COURT: Yeah.

MR. DIGIACOMO: And told them if they didn't do certain acts that him and McCarty were going to kill them. They didn't perform the acts that he asked for, one girl got away, the other two wound up dead and just after -- days after, he's talking about leaving the girls out in the desert naked, which is exactly how the girls were found.

So even if you were to find Donald Herb as an accomplice, it's a matter of law there's an overwhelming evidence to suggest that he's the individual involved

in the crime. It's not evidence enough to convict them for corroboration, it's merely evidence to support that he was involved in the crime. He threatened to kill them and then he confessed for leaving them out there. So certainly there's overwhelming corroboration.

As it relates to the kidnapping, Mr. Sgro just combined about three different theories of law. He first said the kidnapping merges. I'm not quite understanding if he's saying merges to the robbery or merges to the murder, but it is completely irrelevant because the kidnapping is taking them out to a desert location, a secluded location where there was no help. It's not like they were drawn from one room to another room and they're arguing that the movement didn't increase their risk of harm. It allowed his client to beat these girls to death and no one to hear them. And they didn't address that after *Wright*, every case has said in all but the closest cases, sequestering for the jury, but more importantly there is a capital murder case, *Sabastian Bridges* which is the exact same fact pattern. Luring two victims out to a desert location and then killing them is not incidental to the murder of the robbery, and as such, Judge, you have to deny the writ.

THE COURT: Okay. All right. On both of these, I find that there is sufficient evidence to keep all of the charges as they are including the kidnapping, including the pandering, include -- all of them, including all of them. And you know that the standard is that there's not a lot of evidence in case to get by at this point. And all of this would be up to a jury to decide whether or not the State would be able to prove their case against both of these individuals at the time of trial. So both of the petitions for writ of habeas corpus are denied. Thank you.

MR. PIKE: Your Honor had indicated --

THE COURT: We need a trial -- we need to talk about a trial setting, folks,

because it's my understanding that the current trial date isn't going to stand based on something with Mr. Oram, I guess.

MR. ORAM: Mr. Owens and I have a capital trial we have to start on that same day that is very old.

THE COURT: You can't do both?

MR. ORAM: Mr. Owens -- I could, but Mr. Owens would [indiscernible].

THE COURT: So -- you know, with the folks I have here and all your schedules. What do we -- you know, have you talked about it? Do you have any ideas?

MR. DIGIACOMO: Judge, I didn't know what your stack was, the DNA went out a few weeks ago and I expect that there's a lot of items that we got tested for DNA. I expect that when they got back that they may want to do some independent testing. So I thought maybe the summertime might be something better for the defense to be prepared.

THE COURT: April is -- I have my other big trial and my next criminal stack after that is -- I have June.

MR. DIGIACOMO: Mr. Oram and I have a capital murder case in June. June 4th.

MR. ORAM: Yes, that's correct, Judge.

THE COURT: And once again, realistically, how many weeks do you believe this will take me?

MR. DIGIACOMO: With penalty, I'm going to say three, but maybe it's two-and-a-half.

THE COURT: Okay.

MR. DIGIACOMO: When's your next stack after June? Is it August?

THE COURT: After June would be August.

MR. DIGIACOMO: Can we take that first week in that stack?

THE COURT: It starts August 6th. Is everybody's calendars clear on that?

MR. SGRO: Yes.

THE COURT: Is that far enough out for everybody? You, too, Mr. Oram that --

MR. ORAM: Yes.

MR. DIGIACOMO: Actually, can we go to the 13th, Judge, only because Mr. Pike has a witness in one of my cases for the 6th that he represents. So, maybe we can do it the 13th.

THE COURT: So we're -- 'cause what'll happen then is is I'll have -- we have August 13th, the week of the 20th, and the week of the 27th, then we run over into Labor Day. But I think three full weeks, shouldn't that suffice?

MR. DIGIACOMO: I would think it would, Judge?

THE COURT: You think? Is everybody okay?

MR. SGRO: Your Honor --

THE COURT: Mr. Sgro, are you good with those dates?

MR. SGRO: I have a case starting July 23rd of '07 that's somewhat voluminous as well. I should be done by the 13th assuming that there's a penalty hearing. Just -- I want to just throw that out there. August 13th right now looks like it would okay. I should have that one concluded.

THE COURT: Okay. Well, just keep us up to date on -- if there's any changes in that so I don't have to worry. But right now, 'cause I'm going to make this -- I'd like to make this a firm trial setting so that we don't continue this again.

MR. PIKE: Both Mr. Cano and myself are available for the 13th.

THE COURT: Okay. And you?

MR. ORAM: I'm fine, Your Honor. Yes.

THE COURT: All right. So Sandy, put them down for trial beginning August 13th.

THE CLERK: Okay. August 13th at 10 a.m. with calendar call on August 7th at 8:30.

MR. ORAM: Thank you, Your Honor.

THE COURT: And then when are our motions? Do we have any other motions?

MR. SGRO: I think what you had done, Your Honor, is you'd asked for the severance to be done by a certain point.

THE COURT: And then I think also we need to set a --

MR. DIGIACOMO: Then we should probably set a schedule in here.

THE COURT: -- a schedule for all other motions 'cause I will anticipate a number of them to be done. So, the month before, would that be sufficient? Or do you want it --

MR. DIGIACOMO: Maybe we should do it June only because the month of July is just really bad and I know that it's a hard time finding -- because we're going to have probably 40 motions like we normally do on these cases.

THE COURT: Yeah, I know.

MR. SGRO: Also, evidentiary hearing, there's statement issues, which you know about, Your Honor.

THE COURT: Yes.

MR. SGRO: So I think we need it -- I would agree that we need to do it a little bit more in advance so we have time for evidentiary hearing.

THE COURT: Then what we need to do is we need to find a Friday in June that I can dedicate to you -- would you go get Alana and ask her to bring the calendar, please? So I'll give you the June and then we'll back date -- we'll back track from there to give you the dates for deadlines for submitting everything. How's that?

Okay. So we'll vacate the current trial dates, including Mr. Herb who's on for the 25th?

MR. DIGIACOMO: Well, he's not a trial date.

THE COURT: So we'll --

MR. DIGIACOMO: So he's just on for a status check.

THE COURT: So we'll leave that?

MR. DIGIACOMO: We'll leave that status check, Judge.

THE COURT: Leave -- so vacate the current trial date, Sandy, and then as soon as she comes back, we'll deal with a date in June where I can give you an all day date, hopefully.

The whole month is free. So, what day do you want, folks? What Friday would you like?

MR. DIGIACOMO: Can we take maybe the third week in June, that'll give Mr. Oram and I time to get out of that trial?

THE COURT: Are you talking about the 15th or the 22nd?

MR. DIGIACOMO: Week 3 you think? The end of week 3 we're not going to be done with that other trial?

MR. ORAM: 22nd, then, we'd better go the 22nd, then.

THE COURT: 22nd?

MR. DIGIACOMO: Yeah, [indiscernible].

THE COURT: All right. So, Friday the 22nd will be the date that we have for hearings.

MR. SGRO: June 22nd; is that right, Your Honor?

THE COURT: Yeah. At 9 a.m. And then -- so Sandy, give them dates. All right. When are you going to have your motions, your 40 motions or whatever we're going to have, when will you have them filed by?

MR. ORAM: Could you have 30 days beforehand, Your Honor?

THE COURT: Will that give you enough time?

MR. DIGIACOMO: Actually, could you give me 30 days to respond only 'cause if we don't have evidentiary hearing, I've got to sub it out.

THE COURT: Right. So that would be -- I need to have you file by April. Can you do that?

MR. SGRO: Can I do like April 15th, May 15th, gives us a couple of weeks for replies?

THE COURT: Yes.

MR. DIGIACOMO: That'll be fine.

THE COURT: So, actually the 15th is a Sunday, so April 16th for defense motions. Then May 16th for State's responses. Can I give you two weeks -- will two weeks be enough for reply or do you want three? For the 6th?

MR. SGRO: Yeah.

MR. PIKE: That should give us -- that'll be fine. Yes.

THE COURT: The 6th to reply and that give me a couple of weeks to synthesize all that you will be submitting.

Now, let me just put you on notice. I'm really not -- I don't really have a lot of favor for jury questionnaires, I don't like them much at all. But if you're inclined

to want to have one, don't wait until the last moment to submit it because that's the way to get it completely denied because there's not enough time to get it worked out, processed, printed, submitted to jury services. So if you want a jury questionnaire, it's got to be way before the trial date. So I suggest that's something you get started on working on so that -- if that's in fact that you want.

MR. DIGIACOMO: May I suggestion because I know, you know, they have their standards, we have our standards. Why don't they -- they're going to file a motion for jury questionnaire, they'll file it in April, we'll have our response, and then we'll have it -- be able to address it the end of June at the hearing also. So that gives the Commissioner more than six weeks to get it out.

THE COURT: Just as long as you have it ahead of time, that's why I'm just giving you a warning now.

MR. PIKE: I'll submit ours with our motion.

THE COURT: What I would appreciate is if the two of you could reach an agreement on whatever you can agree on and then submit to me whatever it is you can't agree on. How's that?

MR. DIGIACOMO: That'll work, Judge.

MR. PIKE: Thank you.

THE COURT: All right? Thanks a lot.

[Proceeding concluded at 9:32 a.m.]

ATTEST: I hereby certify that I have truly and correctly transcribed the audio/visual recording in the above-entitled case.

Jill Jacoby
Court Transcriber

ORIGINAL

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ORDR
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FILED
JAN 18 11 04 AM '07
CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,
Plaintiff,
-vs-
DOMONIC RONALDO MALONE, #1670891,
JASON DUVAL MCCARTY, #0932255
Defendant.

Case No. C224572
Dept No. V

ORDER

DATE OF HEARING: 12/12/06
TIME OF HEARING: 8:30 A.M.

THIS MATTER having come on for hearing before the above entitled Court on the 12th day of December, 2006, Defendant DOMONIC RONALDO MALONE being present, represented by DAVID SCHIECK, Special Public Defender and RANDALL PIKE, Deputy Special Public Defendant, Defendant JASON DUVAL MCCARTY being present, represented by ANTHONY SGRO, Esquire and CHRISTOPHER ORAM, Esquire, the Plaintiff being represented by DAVID ROGER, District Attorney, through MARC DIGIACOMO, Deputy District Attorney, and CHRIS J. OWENS, Chief Deputy District Attorney, and the Court having heard the arguments of counsel and good cause appearing therefor,

Document10

IT IS HEREBY ORDERED that Defendant Malone's Petition For Writ of Habeas Corpus, shall be, and it is denied.

IT IS FURTHER ORDERED that Defendant McCarty's Petition For Writ of Habeas Corpus, shall be, and it is denied.

DATED this 16 day of January, 2007.

DISTRICT JUDGE

DAVID ROGER
DISTRICT ATTORNEY
Nevada Bar #002781

MARC DIGIACOMO
Deputy District Attorney
Nevada Bar #006955

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DAVID M. SCHIECK
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FILED

2007 MAY 24 P 3:18

CLERK OF THE COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, vs. DOMONIC MALONE, Defendant.	CASE NO. C224572 DEPT. NO. V DATE: JUNE 22, 2007 TIME: 8:30 A.M.

MOTION IN LIMINE TO PROHIBIT ANY REFERENCES TO THE FIRST PHASE AS THE "GUILT PHASE"

COMES NOW, the Defendant, DOMONIC MALONE, by and through his attorneys, DAVID M. SCHIECK, Special Public Defender, CHARLES A. CANO, Deputy Special Public Defender and RANDALL H. PIKE, Deputy Special Public Defender and respectfully moves this Court for an Order in Limine to prohibit the State and the defense, from referring to the first phase of this matter as the "guilt phase" of the proceedings, or to otherwise use the word "guilt" as an adjective to refer to that state of the proceedings at which Defendant's innocence or guilt is determined.

This Motion is based upon the Memorandum of Points and Authorities set forth herein, and argument at the time set for hearing on this Motion.

NOTICE OF MOTION

TO: STATE OF NEVADA, Plaintiff; and

TO: DAVID ROGER, District Attorney, Attorney for Plaintiff

YOU WILL PLEASE TAKE NOTICE that the undersigned will bring on the above and foregoing **MOTION** on for hearing on the 22nd day of June, 2007, at the hour of 8:30 A.M., in Department No. V of the above-entitled Court, or as soon thereafter as counsel may be heard.

STATEMENT OF THE CASE

DOMINIC MALONE is charged by way of Information with 4 counts First Degree Kidnapping, 2 counts of Battery with Substantial Bodily Harm, 2 counts of Conspiracy to Commit Kidnapping, 2 counts of Pandering, 1 count of Robbery, 2 counts of Robbery with use of a Deadly Weapon, 1 count of Conspiracy to Commit Murder, 1 count of Conspiracy to Commit Burglary, 1 count of Burglary, and 2 counts of Murder with Use of a Deadly Weapon. The State filed its Notice of Intent to Seek Death Penalty on August 30, 2006. Trial is set for August 13, 2007.

FACTS

MALONE has set forth a comprehensive Statement of Facts in previous Motions filed with this Court and incorporates same as if set forth in full herein.

POINTS AND AUTHORITIES

Article I, Section 8, of the Nevada Constitution, as well as the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, guarantee every criminal defendant the right to a fair trial. This right requires the Court to conduct trial in a manner which does not appear to indicate that a particular outcome of the trial is expected or likely.

Although participants, including some defense counsel, have lapsed into referring to the verdict-determination process as the "guilt phase" of a capital proceeding (apparently to distinguish it from the "mitigation" or "punishment" phase), the "guilt" label creates an unfair inference that the very purpose of the evidentiary phase is to find a defendant guilty. The terms "evidentiary stage", "trial stage", or "fact-finding stage" would more appropriately designate that phase of the matter without unfairly predisposing the jury toward assuming

Defendant's guilt. Present use of the phrase "guilty phase" makes no more sense than referring to the trial as the "innocence phase."

CONCLUSION

WHEREFORE, Defendant hereby moves this Court for an Order in Limine to prevent the use of the word "guilt" in general designated reference to this phase of these proceedings.

DATED this 14 day of May, 2007.

SUBMITTED BY:

DAVID M. SCHIECK
SPECIAL PUBLIC DEFENDER

CHARLES A. CANO
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FILED

2007 MAY 24 P 3:19

CLERK OF THE COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, vs. DOMONIC MALONE, Defendant.	CASE NO. C224572 DEPT. NO. V DATE: JUNE 22, 2007 TIME: 8:30 A.M.

MOTION TO FEDERALIZE ALL MOTIONS, OBJECTIONS, REQUESTS AND OTHER APPLICATIONS FOR THE PROCEEDINGS IN THE ABOVE ENTITLED CASE

COMES NOW, the Defendant, DOMONIC MALONE, by and through his attorneys, DAVID M. SCHIECK, Special Public Defender, CHARLES A. CANO, Deputy Special Public Defender and RANDALL H. PIKE, Deputy Special Public Defender and moves this Honorable Court to enter an Order federalizing all motions, objections, requests and other applications for the proceedings in the above entitled case.

This Motion is based upon the Memorandum of Points and Authorities set forth herein, and argument at the time set for hearing on this Motion.

NOTICE OF MOTION

TO: STATE OF NEVADA, Plaintiff; and

TO: DAVID ROGER, District Attorney, Attorney for Plaintiff

YOU WILL PLEASE TAKE NOTICE that the undersigned will bring on the above and foregoing **MOTION** on for hearing on the 22nd day of June, 2007, at the hour of 8:30 A.M., in Department No. V of the above-entitled Court, or as soon thereafter as counsel may be heard.

STATEMENT OF THE CASE

DOMINIC MALONE is charged by way of Information with 4 counts First Degree Kidnapping, 2 counts of Battery with Substantial Bodily Harm, 2 counts of Conspiracy to Commit Kidnapping, 2 counts of Pandering, 1 count of Robbery, 2 counts of Robbery with use of a Deadly Weapon, 1 count of Conspiracy to Commit Murder, 1 count of Conspiracy to Commit Burglary, 1 count of Burglary, and 2 counts of Murder with Use of a Deadly Weapon. The State filed its Notice of Intent to Seek Death Penalty on August 30, 2006. Trial is set for August 13, 2007.

FACTS

MALONE has set forth a comprehensive Statement of Facts in previous Motions filed with this Court and incorporates same as if set forth in full herein.

TRIAL MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ALL MOTIONS, OBJECTIONS, EXCEPTIONS, REQUESTS AND OTHER APPLICATIONS

DOMINIC MALONE, by and through counsel, submits the fol lowing points and authorities in support of all motions, objections, exceptions, requests and other applications.

With regard to all of the foregoing, Malone relies upon the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution. (*See e.g.*, McKoy v. North Carolina, (1990) 494 U.S. 433; Maynard v. Cartwright, (1988) 486 U.S. 356; Johnson v. Mississippi, (1988) 486 U.S. 578; Mills v. Maryland, (1988) 486 U.S. 367; Hitchcock v. Dugger, (1987) 481 U.S. 393; Gray v. Mississippi, (1987) 481 U.S. 648; Batson v. Kentucky, (1986) 476 U.S. 79; Turner v. Murray, (1986) 476 U.S. 28; Caldwell v. Mississippi, (1985) 472 U.S. 320; Francis v. Franklin, (1985) 471 U.S. 307; Eddings v. Oklahoma, (1982) 455 U.S. 104;

Godfrey v. Georgia, (1980) 446 U.S. 420; Beck v. Alabama, (1980) 447 U.S. 625; Green v. Georgia, (1979) 442 U.S. 95; Lockett v. Ohio, (1978) 438 U.S. 586; Bell v. Ohio, (1978) 438 U.S. 637; Gardner v. Florida, (1977) 430 U.S. 349; Gregg v. Georgia, (1976) 428 U.S. 153; Furman v. Georgia, (1972) 408 U.S. 238; Witherspoon v. Illinois, (1968) 391 U.S. 510); Article 1, Sections 3, 6, 8 and 18 of the Nevada Constitution and other applicable laws.

Malone asserts all applicable grounds with regard to each and every motion, objection, exception, request, and other application made in trial of this case. Malone does not waive any ground. Malone also continues to assert all of those grounds already asserted in pleadings previously filed with this Court.

CONCLUSION

DOMINIC MALONE asserts a continuing objection throughout trial with regard to all matters upon which the Court has ruled adversely to him in response to pretrial motions.

DATED this 24 day of May, 2007.

SUBMITTED BY:
DAVID M. SCHIECK
SPECIAL PUBLIC DEFENDER

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2007 MAY 24 P 3:20

CLERK OF THE COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, vs. DOMONIC MALONE, Defendant.	CASE NO. C224572 DEPT. NO. V DATE: JUNE 22, 2007 TIME: 8:30 A.M.

MOTION IN LIMINE TO BAR IMPROPER PROSECUTORIAL ARGUMENT

COMES NOW, the Defendant, DOMONIC MALONE, by and through his attorneys, DAVID M. SCHIECK, Special Public Defender, CHARLES A. CANO, Deputy Special Public Defender and RANDALL H. PIKE, Deputy Special Public Defender and respectfully requests, pursuant to the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, Article 1 of the Nevada Constitution and applicable state law to enter an Order in limine prohibiting the State from engaging in improper argument before the jury and from violating Malone's constitutional rights in the ways discussed below, as well as in any other

way that may prejudice the accused before the jury or this Court.[1]

Malone further requests that his counsel not be placed in the precarious position of either offending the jury by making numerous objections during the prosecutor's opening statement and closing argument, and thereby drawing undue attention to the misconduct, or risking the loss of an issue for appeal by failing to object.

Accordingly, Malone requests that this Court permit counsel to make formal objections to any prosecutorial misconduct outside the presence of the jury at the first available opportunity.

NOTICE OF MOTION

TO: STATE OF NEVADA, Plaintiff; and

TO: DAVID ROGER, District Attorney, Attorney for Plaintiff

YOU WILL PLEASE TAKE NOTICE that the undersigned will bring on the above and foregoing **MOTION** on for hearing on the 22nd day of June, 2007, at the hour of 8:30 A.M., in Department No. V of the above-entitled Court, or as soon thereafter as counsel may be heard.

STATEMENT OF THE CASE

DOMINIC MALONE is charged by way of Information with 4 counts First Degree Kidnapping, 2 counts of Battery with Substantial Bodily Harm, 2 counts of Conspiracy to Commit Kidnapping, 2 counts of Pandering, 1 count of Robbery, 2 counts of Robbery with use of a Deadly Weapon, 1 count of Conspiracy to Commit Murder, 1 count of Conspiracy to Commit Burglary, 1 count of Burglary, and 2 counts of Murder with Use of a Deadly Weapon. The State filed its Notice of Intent to Seek Death Penalty on August 30, 2006. Trial is set for August 13, 2007.

FACTS

MALONE has set forth a comprehensive Statement of Facts in previous Motions filed with this Court and incorporates same as if set forth in full herein.

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[1] Malone notes, however, that "the trial court has a duty to ensure that a defendant receives a fair trial." Williams v. State, 113 Nev. ___; 945 P.2d 438 (1997) [citing Witter v. State, 112 Nev. 908; 921 P.2d 886 (1996)]. "To this end, the court must exercise its discretionary power to control obvious prosecutorial misconduct sua sponte." Id.

POINTS AND AUTHORITIES

I. INTRODUCTION

A person on trial for his life is entitled, under the Sixth, Eighth and Fourteenth Amendments, to fundamental fairness, Houston v. Estelle, 569 F.2d 372 (5th Cir. 1978); to a reliable determination of punishment, Gardner v. Florida, 430 U.S. 349 (1977); and to an individualized determination of an appropriate sentence guided by clear, objective and evenly-applied standards. Gregg v. Georgia, 428 U.S. 153 (1976).

Improper argument by the District Attorney violates these constitutional rights in various ways. See, e.g., Caldwell v. Mississippi, 472 U.S. 320 (1985); Ex parte Wilson, 571 So.2d 1251 (Ala. 1990); Ex parte Tomlin, 540 So.2d 668 (Ala. 1988); Ex parte Rutledge, 482 So.2d 1262 (Ala. 1984); Ex parte Whisenhant, 482 So.2d 1249 (Ala. 1984); Arthur v. State, 575 So.2d 1165 (Ala.Cr.App. 1990); Williams v. State, 445 So.2d 798, 810 - 12 (Miss. 1984); Wiley v. State, 449 So.2d 756 (Miss. 1984); Brooks v. Kemp, 762 F.2d 1383, 1394 - 1416 (11th Cir. 1985) (en banc), vacated, 478 U.S. 1016 (1986), on remand, 809 F.2d 700 (1987); Drake v. Kemp, 762 F.2d 1449, 1457 - 61 (11th Cir. 1985) (en banc), cert. denied, 478 U.S. 1020 (1986); Tucker (William Boyd) v. Kemp, 762 F.2d 1480, 1484 - 89 (11th Cir.) (en banc), vacated and remanded, 474 U.S. 1001 (1985), adhered to on remand, 802 F.2d 1293 (11th Cir. 1986) (en banc); Tucker (Richard) v. Kemp, 762 F.2d 1496, 1503 - 1509 (11th Cir. 1985) (en banc), subsequent history, 776 F.2d 1487 (1985), cert. denied, 478 U.S. 1022 (1986).

Stringent rules apply to the District Attorney and prosecutors from his office. The National District Attorneys Association has defined the role of a public prosecutor in our system of justice as follows:

> Each decision [the prosecutor] makes has tremendous impact on the lives of individuals involved, if not on the entire community.
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> . . .
>
> Prosecutors must strive diligently to raise the ethical, technical, and professional standards of all prosecutors throughout the nation. A single unprofessional, corrupt, or unscrupulous prosecutor can undo the fine work being done by the many thousands of dedicated prosecutors throughout the country. The modern prosecutor cannot simply be the defender of the status quo. He cannot be content to simply perpetuate himself in office by withdrawing from the frontline

> battle and practicing old routines. He must be a respected voice in the community with unquestioned integrity. From that operating base he must become a respected voice in the legislative body of his jurisdiction. The prosecutor must truly represent "the people" and conduct himself in a way to make that obvious when he rises to state his views in legislative halls.

National District Attorneys Association, The Prosecutor's Deskbook 3 - 4 (Healy & Manak, eds.).

As a result, public prosecutors owe a higher duty to the justice system:

> [The prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor -- indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Berger v. United States, 295 U.S. 78, 88 (1935).

The American Bar Association similarly states that "the duty of the prosecutor is to seek justice, not merely to convict." American Bar Association, "The Prosecution Function," 1 Standards For Criminal Justice 3.1-1(c) (1980) (hereinafter ABA Standards on the Prosecution Function); see also, State v. Locklear, 241 S.E.2d 65, 69 (N.C. 1978) ("[p]rosecuting attorneys owe honesty and fervor to the State and fairness to the defendant") (emphasis supplied).

The public prosecutor has a concomitant obligation as a public official to seek to improve the justice system and foster the public's faith in the impartiality of justice. This has been emphasized repeatedly.[2] As the National District Attorneys Association admonishes its members:

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[2] See, e.g., American Bar Association, Code of Professional Responsibility EC 7 - 13 (1975) (hereinafter ABA Code of Professional Responsibility); American Bar Association, Standards Relating to the Prosecution Function §§ 1.1(c), 1.4 (1971); National District Attorneys Association, National Prosecution Standards § 25.1 (1st ed. 1977); see also, Gershman, The Burger Court and Prosecutorial Misconduct, 21 Crim.L.Bull. 217 (1985); Adlerson, Ethics, Federal Prosecutors and Federal Courts: Some Recent Problems, 6 Hofstra L.Rev. 755 & 755 n.3 (1978); Auler, Actions Against Prosecutors Who Suppress or Falsify Evidence, 47 Tex.L.Rev. 642 (1969); Steele, Unethical Prosecutors and Inadequate Discipline, 38 S.W.L.Rev. 965, 988 (1984).

> The prosecutor must place the rights of society in a paramount position . . . in the approach to the larger issues of improving the law and making the law conform to the needs of society.

National Prosecution Standards § 1.3 (D).

It goes without saying that an "improved" legal system is one in which the citizenry feels that the prosecution is dealing with a case fairly and without favor:

> Nothing will detract more from the proper administration of the law than for the people to be impressed that the courts or prosecuting officers are unfair in their treatment of those charged with the law's violation.

State v. Cox, 167 So.2d 352, 358 n.6 (La. 1964) [quoting State v. Nicholson, 7 S.W.2d 375 (Mo. App. 1928)].

The conduct of a prosecutor at a criminal trial is circumscribed by constitutional commands, common law and canons of ethics. The purpose of the prosecutor's opening statement is narrow: It is to be limited to a brief statement of the issues and an outline of evidence intended to be introduced. The prosecutor must avoid any utterance that cannot later be supported by evidence. As expressed in the ABA Standards on the Prosecution Function:

> The prosecutor's opening statement should be confined to a brief statement of the issues in the case and to remarks on evidence the prosecutor intends to offer which the prosecutor believes in good faith will be available and admissible.

Id. § 5.5.

The role of a prosecutor in closing argument is also well defined: It is to assist the jury in analyzing the evidence and to state his contentions as to the conclusions the jury should draw from the evidence. United States v. Morris, 568 F.2d 396, 402 (5th Cir. 1978). It has long been established that the prosecutor's closing argument may not vary from the law as given by the Court, the evidence introduced at trial, or reasonable deductions from the evidence. "The prosecutor, in addressing the jury, should limit his comments to the evidence and reasonable inferences therefrom." Arthur v. State, 575 So.2d 1165, 1186 (Ala. Cr. App. 1990).

The Nevada Supreme Court, in promulgating Supreme Court Rule 172 and 173, has recognized the importance that the jury not be misled by forensic misconduct of attorneys.

SCR 172(1)(a) prohibits the intentional making of "a false statement of material fact or law." SCR 172(1)(d) states that an attorney shall not "offer evidence that the lawyer knows to be false." More specifically, SCR 173(5) provides that an attorney shall not:

> In trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused.

At the sentencing phase of a capital trial, it is particularly important that the prosecutor's closing argument be within proper bounds.

> [I]t is most important that the sentencing phase of the trial not be influenced by passion, prejudice, or any other arbitrary factor . . . With a man's life at stake, a prosecutor should not play on the passions of the jury.

Hance v. Zant, 696 F.2d 940, 951 (11th Cir. 1983).

Similarly, the Supreme Court of the United States has indicated that it is a denial of due process for consideration of the death sentence to be based upon factors that are not "fully subject to explanation by the defendant." Zant v. Stephens, 462 U.S. 862, 887 (1983). The prosecution must therefore remain within the strict confines of the law and the facts in making any statement or argument in this case.

Improper argument may infect a capital case by injecting into it material that the defense has no opportunity to rebut. In Skipper v. South Carolina, 476 U.S. 1 (1986), the Supreme Court explained:

> Where the prosecution specifically relies on a [factor] in asking for the death penalty, it is not only the rule of Lockett [v. Ohio, 438 U.S. 586 (1978)] and Eddings [v. Oklahoma, 455 U.S. 104 (1982)] that requires that the defendant be afforded an opportunity to introduce evidence on this point; it is also the elemental due process requirement that a defendant not be sentenced to death on the basis of information which he had no opportunity to deny or explain.

Id. at 5 n.1 (emphasis supplied) [quoting Gardner v. Florida, 430 U.S. 349, 362 (1977)]. As set forth in this Motion, therefore, Malone also specifically asserts his right to introduce evidence in rebuttal of any extra-record argument made by the prosecutor.

A District Attorney is also precluded from relying on an imaginary "right to reply" policy -- that is, allowing the defense to make an argument, without objection and then in closing

argument claiming that it is improper and "responding" to it with inflammatory remarks. In United States v. Young, 470 U.S. 1 (1985), the Supreme Court rejected the notion of "invited responses," holding that "[r]eviewing courts ought not be put in the position of weighing which of two inappropriate arguments was the lesser." Id. at 13. The Court therefore admonished trial courts to require prompt objections by the prosecutor and curative instructions to the jurors.

As is well recognized, curative instructions, however, are often insufficient to remedy improper argument. "The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction." Bruton v. United States, 391 U.S. 123, 129 (1968) [quoting Krulewitch v. United States, 336 U.S. 440, 453 (1949) (Jackson, J., concurring)].

Due to the essentially fictitious nature of the "curative" instruction, there are many cases "where such a strong impression has been made on the minds of the jury by the illegal and improper testimony, that its subsequent withdrawal will not remove the effect caused by its admission." Government of the Virgin Islands v. Toto, 529 F.2d 278, 282 (3d Cir. 1976) [quoting Throckmorton v. Holt, 180 U.S. 552, 567 (1901)].

Furthermore, any after-the-fact correction has little applicability to "the evaluation of the consequences of an error in the sentencing phase of a capital case . . . because of the [broad] discretion that is given to the sentencer." Satterwhite v. Texas, 486 U.S. 249, 258 (1988). Since life itself is at stake, and the jury's prerogative of mercy so boundless, it is so much more "important to avoid error in capital sentencing proceedings." Id. at 258.

The Nevada Supreme Court has repeatedly had occasion to address the types of prosecutorial misconduct referred to herein. In Collier v. State, 101 Nev. 473; 705 P.2d 1126 (1985), the Court recognized that "[p]rosecutorial misconduct can violate the fair trial provision of our State's constitution." Id. at 483 fn. 5. The Court has emphasized that the District Courts must ensure that defendants receive a fair trial. "This duty requires that trial courts exercise their discretionary power to control obvious prosecutorial misconduct sua sponte." Id., 101 Nev. at 477. The Nevada Supreme Court has expressed its frustration with Clark County

prosecutors based upon improper statements to the jury:

> [T]his court cannot condone the prosecutor's behavior during his opening statement. He ignored the district judge's repeated admonitions to confine the State's opening remarks to what the evidence would show and to refrain from injecting personal beliefs into his statement. All attorneys making presentations before the courts of law of this State have a solemn duty to respect admonitions issued by members of the bench and may be disciplined for ignoring such rulings. See, SCR 39; SCR 99. As representatives of the State, prosecutors have a special, heightened duty of fairness and responsibility, particularly in capital cases. See, Emerson v. State, 98 Nev. 158, 164; 643 P.2d 1212, 1215 - 16 (1982) [citing Berger v. U.S., 295 U.S. 78, 88; 55 S.Ct. 629, 633, 79 L.Ed. 1314 (1935)]; SCR 173; SCR 250. We issue a stern warning to trial attorneys that improper opening statements and failure to observe the admonitions of the trial judge will not be tolerated and that this Court will act whenever appropriate to deter such breaches of conduct.

Greene v. State, 113 Nev. 157; 931 P.2d 54 (1997).

The District Attorney's office in Clark County has engaged in improper arguments in other capital cases. These practices will continue in this case absent strong measures by this Court to prevent them. This practice is aggravated by the fact that even where prosecutorial misconduct is found, the Nevada Supreme Court often finds the error to be harmless. Thus, prosecutors are encouraged to engage in prosecutorial misconduct because seldom are sanctions imposed or judgments reversed.

This Court should enter an Order in limine barring the prosecution from engaging, inter alia, in the types of misconduct identified below and requiring it to abide by the requirements imposed on prosecutors by the state and federal constitutions, laws and canons.

II. EXAMPLES OF UNFAIR ARGUMENTS

In order to preserve the fairness of his trial and potential sentencing proceeding, Malone sets forth certain of the illegitimate arguments which a prosecutor may not use. This list is merely representative of improper arguments and is by no means exhaustive. An in limine ruling is necessary on these matters because a "curative" instruction at trial will generally exacerbate, rather than cure, the prejudice caused by improper argument. See, e.g., United States v. Miranda, 593 F.2d 590, 596 n.7 (5th Cir. 1979). Malone presents these arguments for the purpose of informing the Court of his unequivocal objection to them.

A. Misleading the Jury as to the Law

A prosecutor may not attempt to mislead jurors as to any aspect of the law at any stage of the proceedings.

(1) Misstating the Law on Intent

Misstatements on the law of intent have resulted in the reversal of a large number of capital convictions. See, Francis v. Franklin, 471 U.S. 307 (1985).

These arguments are sheer misstatements of the law. When a jury has been confused or misled about the state of the law on intent -- particularly with regard to what the state must prove -- a capital conviction cannot stand. Brooks v. Kemp, 762 F.2d 1383, 1389 (11th Cir. 1985), cert. denied, 478 U.S. 1022 (1986) (reversing conviction where improper instruction given on intent even though proper instruction also given); see also. Ex Parte Kyzer, 399 So.2d 330 (Ala. 1981) (particularized intent required to invoke Alabama capital statute). The prosecution cannot be permitted to misstate the law in such a manner at the Defendant's retrial.

(2) Misstating the Law Concerning the Corroboration of Accomplice Testimony

NRS 175.291 states the correct standard for convictions based on accomplice testimony:

> a. A conviction shall not be had on the testimony of an accomplice unless he is corroborated by other evidence which in itself, and without the aid of the testimony of the accomplice, tends to connect the defendant with the commission of the offense; and the corroboration shall not be sufficient if it merely shows the commission of the offense or the circumstances thereof.

Where sufficient corroboration evidence is not presented, the conviction cannot stand. See gen., Lopez v. State, 105 Nev. 68; 769 P.2d 1276 (1989); O'Donnel v. Sheriff, Washoe County, 91 Nev. 754; 542 P.2d 733 (1975). Evidence to corroborate accomplice testimony, if not sufficient, merely casts grave suspicion on the defendant. Austin v. State, 87 Nev. 578; 491 P.2d 714 (1971); Eckert v. State, 91 Nev. 183; 533 P.2d 468 (1975).

The evidence must independently incriminate the Defendant. The State must be precluded from misstating the law in this fashion at Malone's trial.

(B) Reducing the State's Burden of Establishing Guilt Beyond a Reasonable Doubt

Remarks that encourage the jurors to believe that "reasonable doubt" has to be "substantial" are unconstitutional. The United States Supreme Court has condemned any equation of reasonable doubt with "substantial doubt" or "moral certainty" as well as any other definition that would confuse jurors or lead them to believe that the State's burden is less significant than it is. Cage v. Louisiana, 498 U.S. ___; 112 L.Ed.2d 339 (1990). See also, United States v. Martin-Trigona, 684 F.2d 485, 493 (7th Cir. 1982) (holding that definitions of reasonable doubt engender confusion among jurors).

In Nevada, reasonable doubt is defined by NRS 175.211:

> A. A reasonable doubt is one based on reason. It is not mere possible doubt, but is such a doubt as would govern or control a person in the more weighty affairs of life. If the minds of the jurors, after the entire comparison and consideration of all the evidence, are in such a condition that they can say they feel an abiding conviction of the truth of the charge, there is not a reasonable doubt. Doubt to be reasonable must be actual, not mere possibility or speculation.
>
> B. No other definition of reasonable doubt shall be given by the court to juries in criminal actions in this State.

Where the jury has been led to believe some other standard may apply, reversal is required. See, State v. Rover, 11 Nev. 343 (1876); McCullough v. State, 99 Nev. 72; 657 P.2d 1157 (1983).

The State must be precluded from misstating the law on reasonable doubt at Malone's trial.

(C) Inflaming the Passions and Prejudices of the Jury

Appeals to passion and prejudice and other inflammatory remarks to the jury are also impermissible. See, Viereck v. United States, 318 U.S. 236, 247 - 48 (1943); United States v. Garza, 608 F.2d 659 (5th Cir. 1979); United States v. Gasparo, 744 F.2d 438 (5th Cir. 1984); Parks v. State, 330 S.E.2d 686 (Ga. 1985); Conner v. State, 303 S.E.2d 266 (Ga. 1983); American Bar Association, Standards on the Prosecution Function § 3-5.8(c) (1982).

The Nevada Supreme Court has held that the prosecutor's attempt to inflame the jury

is reversible error.

Gregg in no way supports the view that a prosecutor may blatantly attempt to inflame a jury by urging that, if they wish to be deemed "moral" and "caring," then they must approach their duties in anger and give the community what it "needs": "[t]he chance to see that this killer gets what he deserves." Collier, 101 Nev. at 479.

(D) Victim Impact Argument

References to victim impact are entirely inappropriate and serve only to inflame the minds of the jurors. The State must be precluded from making similar improper arguments at «Defendant» trial.

While victim impact testimony may now be permissible under the United States Constitution, see, Payne v. Tennessee, 115 L.Ed.2d 720 (1991), the Defendant asserts that victim impact evidence is still improper under Nevada law. Collier, 101 Nev. at 480.

Likewise, a "Golden Rule" argument asks the jury to place themselves in the shoes of the victim(s), has repeatedly been declared to be prosecutorial misconduct. See, e.g., Howard v. State, 106 Nev. 713, 719; 800 P.2d 175, 178 (1990); Jacobs v. State, 101 Nev. 356, 359; 705 P.2d 130, 132 (1985).

(E) Conscience of the Community

"References to the jury acting as the conscience of the community and as having to be angry unto death with a defendant to qualify as a moral community have been identified as improper arguments amounting to prosecutorial misconduct." Williams v. State, 113 Nev. ___; 945 P.2d 438 (1997) [citing Collier v. State, 101 Nev. 473; 705 P.2d 1126 (1985), cert. denied, 486 U.S. 1036; 108 S.Ct. 2025; 100 L.Ed.2d 611 (1988). See also, Haberstroh v. State, 105 Nev. 739; 782 P.2d 1343 (1989) (prosecutor committed misconduct by referring to the jury as "the conscience of the community"); Flanagan v. State, 104 Nev. 105; 754 P.2d 836 (1988), vacated on other grounds sub nom., Flanagan v. Nevada, 503 U.S. 931; 112 S.Ct. 1464; 117 L.Ed.2d 610 (1992) (prosecutor's remark, "[i]f we don't punish, then society is going to laugh at us" found to be improper).

(F) Other Inflammatory Argument

These arguments have to do with the "individualized determination" of sentence required by the Eighth Amendment. Woodson v. North Carolina, 428 U.S. 280 (1976). The District Attorney's invocation of irrelevant and prejudicial comments do not assist the jury in reaching a principled decision or aid them in distinguishing those cases in which the offender should be sentenced to death from those in which he or she should be sent to prison for life. Zant v. Stephens, 462 U.S. 862 (1983). See, Knorr v. State, 103 Nev. 604, 607; 748 P.2d 1 (1987).

Another area of prejudice is a prosecutor's inclination to "stomp his feet" and incite the jury to return a guilty verdict or a death sentence. The courts have not minced words when condemning such practices:

> The interest of the State . . . is best served by the orderly rational lawful presentation of the facts and the law. That is the way the criminal justice system is designed to operate. Justice is not served by attorneys who use closing argument to express inflammatory personal ideas or engage in personal vilification. The purpose of . . . argument is to enlighten the jury, not to enrage it. Where counsel lacks the self-discipline necessary to avoid arguments such as these, that discipline should be imposed by the trial judge from the bench. An otherwise orderly and fair trial can be instantly destroyed by such unprepared intemperate argument. The price that all of us must pay for these untimely flights of oratorical fancy is far too high.

Bridgeforth v. State, 498 So.2d 796, 801 (Miss. 1986).

The Nevada Supreme Court has also reversed for such inflammatory rhetoric.

Then, it appears, the prosecuting attorney melodramatically faced the defendant, and exhorted him: Gregory Alan Collier, you deserve to die." (Emphasis added.) Collier, 101 Nev. at 480; Guy v. State, 108 Nev. 770; 839 P.2d 578 (1992) (same). Similar admonitions have emanated from other courts, prohibiting the emotional flights of fancy in which this District Attorney's office commonly indulges. See, e.g., Brooks v. Francis, 716 F.2d 780, 788 (11th Cir. 1983), reh'g granted and vacated, 728 F.2d 1358 (11th Cir. 1984) ("A prosecutor may not incite the passions of a jury when a person's life hangs in the balance."); Wallace v. Kemp, 581 F.Supp. 1471, 1482 (M.D. Ga. 1984), rev'd, 757 F.2d 1102 (11th Cir. 1985) ("The fears and passions of a jury cannot be excited by speculation as to what might happen if the death

penalty is withheld."); Tucker v. Zant, 724 F.2d 882, 888 (11th Cir. 1984) ("The Constitution will not permit arguments on issues extrinsic to the crime or the criminal aimed at inflaming the jury's passions, playing on its fears, or otherwise goading it into an emotional state more receptive to the call for imposition of death."). See also, Arthur v. State, 575 So.2d 1165, 1184 (Ala.Cr.App. 1990) (prosecutor may not imply that this case, above most other cases, warrants the death penalty); Brooks v. Kemp, 762 F.2d 1383, 1410 (11th Cir. 1985).

Similarly, the State may not suggest that the jurors themselves could ever be harmed by the Defendant. Jones v. State, 113 Nev. 454; 937 P.2d 55 (1997) ("As to the State's warning that Jones' weapons could have been meant for inflicting harm on the jurors themselves, we conclude that this portion of the statement was clearly inflammatory.").

The prosecutors are also forbidden from referring to the Defendant as a "rabid animal" or using other like terms. Id. at ___ [The Nevada Supreme Court "has previously warned that 'such toying with the jurors' imagination is risky and the responsibility of the prosecutor is to avoid the use of language that might deprive a defendant of a fair trial." Pacheco v. State, 82 Nev. 172, 180; 414 P.2d 100, 104 (1966) (discussing prosecutor's statement calling a defendant a 'mad dog.'). The prosecutor's reference to Jones as a rabid animal was indeed risky behavior and was wholly unnecessary. The State argues that it was 'simply pointing out the heinous nature of the defendant's past conduct and his utter disregard for the sanctity of life,' we conclude that there was ample evidence from which the jury could have drawn that very same conclusion in the absence of the prosecution's demeaning and unprofessional remarks."].

The State must be precluded from making such improper remarks during the trial of MALONE.

(G) Misleading the Jury as to its Responsibility

Any argument that encourages the jury to place the ultimate responsibility for a death sentence elsewhere is inconsistent with Eighth Amendment standards. In Caldwell v. Mississippi, 472 U.S. 320 (1985), the Supreme Court reversed a death sentence after a prosecutor informed the jury that its decision was reviewable. The Supreme Court has

subsequently held that the fact that any "competent attorney should have been aware [that this was error] is apparent." Dugger v. Adams, 489 U.S. 401, 406 n.3 (1989).

Any kind of effort by the prosecutor to relieve juries of their critical responsibility to decide upon the life or death of the defendant has repeatedly been condemned by the state and federal courts. It is essential that jurors recognize "the truly awesome responsibility of decreeing death for a fellow human [so that they] will act with due regard for the consequences of their decision." McGautha v. California, 402 U.S. 183, 208 (1971).

Thus, "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." Caldwell v. Mississippi, 472 U.S. at 328 - 29; see also, Tucker v. Kemp, 762 F.2d 1480, 1485 - 86 (11th Cir. 1985) (argument that jury was merely "last link" in chain consisting of police, prosecutor, and grand jury improperly trivialized importance of jury).

Numerous courts have recognized this principle for decades. In holding that it was improper for a prosecutor to tell a jury that any mistake it made would be corrected by a reviewing tribunal, the Alabama appellate court wrote:

> The only effect of this argument would be to lead the jury into the mistaken belief that their findings on the facts would be reviewed by a higher tribunal and thereby lessen the sense of responsibility resting on them.

Beard v. State, 95 So. 333 (Ala.App. 1923) (emphasis added).

Under Nevada law and the Eighth Amendment to the United States Constitution, remarks which diminish the jurors' sense of responsibility are in violation of Caldwell v. Mississippi, supra. The State must be precluded from making any such improper remarks at the Defendant's trial.

(H) Arguing Facts not in Evidence

It is totally improper for a prosecutor to argue facts not in evidence or to misstate the facts. Donnelly v. DeChristoforo, 416 U.S. 637 (1974); United States v. Warren, 550 F.2d 219, 228 - 229 (5th Cir. 1977); Rippo v. State, ___ Nev. ___; ___ P.2d ___ (Adv.Op. ___, filed October 1, 1997). "The prosecutor has a duty to refrain from stating facts in his opening

statement that he cannot prove at trial." Lisle v. State, 113 Nev. 540; 937 P.2d 473 (1997) [citing Riley v. State, 107 Nev. 205, 212; 808 P.2d 551, 555 (1991), cert. denied, 514 U.S. 1052; 115 S.Ct. 1431; 131 L.Ed.2d 312 (1995)]. According to the American Bar Association's Standards on the Prosecution Function:

> [I]t is unprofessional conduct for the prosecutor intentionally to refer to or argue on the basis of facts outside the record . . . unless such facts are matters of common public knowledge based on ordinary human experience or matters of which the court may take judicial notice.

Id. § 3-5.9.

This is particularly important in a capital case, since the Eighth Amendment comes into play in addition to "the elemental due process requirement that a defendant not be sentenced to death 'on the basis of information which he [or she] had no opportunity to deny or explain.'" Skipper v. South Carolina, 476 U.S. 1, 7 n.1 (1986) [quoting Gardner v. Florida, 430 U.S. 349, 362 (1977)]. Therefore, the Constitution absolutely prohibits the prosecution from arguing facts that have not been subject to proof.

The prohibition against the State arguing facts not in evidence also rests on the principle that a prosecutor cannot act as both an advocate and a witness:

> Courts are especially reluctant and rightfully so, to allow lawyers, including prosecuting attorneys, to be called as witnesses in trials in which they are advocates.

Gajewski v. United States, 321 F.2d 261, 268 (8th Cir. 1963); see also, Walker v. Davis, 840 F.2d 834, 838 (11th Cir. 1988) ("[a]rguments delivered while wrapped in the cloak of state authority have a heightened impact on the jury"). Such arguments also deny the Defendant the right to confront the evidence against him. As the United States Supreme Court has held, "[t]here are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." Pointer v. Texas, 380 U.S. 400 (1965); see also, Douglas v. Alabama, 380 U.S. 415 (1965); Cruz v. New York, 481 U.S. 186 (1987); Bruton v. United States, 391 U.S. 123 (1968); Brookhart v. Janis, 384 U.S. 1 (1966); United States v. Avery,

760 F.2d 1219 (11th Cir. 1985); Holland v. Attorney General of New Jersey, 777 F.2d 150 (3d Cir. 1985); United States v. Pickett, 746 F.2d 1129, 1132 - 33 (6th Cir. 1984). This court should preclude the prosecution from arguing facts not supported by the evidence.

(I) Commenting -- Expressly or By Implication -- on the Defendant's Failure to Testify

It is well established now that the State simply may not make reference -- either explicitly or implicitly -- to the fact that the Defendant remained silent after arrest and/or did not testify at trial. Morris v. State, 112 Nev. 260; 913 P.2d 1262 (1996); McCraney v. State, 110 Nev. 250; 871 P.2d 922 (1994) (judgment reversed because of prosecutor's comments about post-Miranda silence); Neal v. State, 106 Nev. 23, 25; 787 P.2d 764 (1990); Barron v. State, 105 Nev. 767, 778; 783 P.2d 444 (1989); McGuire v. State, 100 Nev. 153, 154; 677 P.2d 1060 (1984).

The Ninth Circuit has been similarly clear in its rulings. Lincoln v. Sunn, 807 F.2d 805 (9th Cir. 1987); United States v. Soulard, 730 F.2d 1292, 1306 (9th Cir. 1984); United States v. Branson, 756 F.2d 752, 754 (9th Cir. 1985).

Nevada law is unwavering in its decisions that it is unconscionable for a prosecutor to comment on the failure of a defendant to take the stand. These comments also are in clear violation of the federal constitutional protections guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments.

(J) Commenting on the Defendant's Failure to Call Witnesses

It is improper for a prosecutor to comment on a Defendant's failure to call witnesses. Rippo v. State, ___ Nev. ___; ___ P.2d ___ (Adv.Op. ___, filed October 1, 1997) [citing Whitney v. State, 112 Nev. 499, 502; 915 P.2d 881, 882 (1996)]. Such comments impermissibly shift the burden of proof to the defense. Id. "It is improper to suggest to the jury that it is the defendant's burden to produce proof by explaining the absence of witnesses or evidence." Lisle v. State, 113 Nev. 540; 937 P.2d 473 (1997) [citing Barron v. State, 105 Nev. 767, 778; 783 P.2d 444, 451 (1989)]. It is also improper for the prosecution to inform the jury of a potential witness' invocation of a privilege and decision not to testify on the Defendant's

behalf. Franco v. State, 109 Nev. 1229, 1243; 866 P.2d 247, 256 (1993).

(K) Asserting Prosecutorial Expertise

Another type of argument that courts have expressly condemned concerns references by prosecutors to their expertise, such as statements regarding their "careful practices" in seeking death and the infrequency with which they have sought it, or their assessment of the evidence based on their experience with other cases. Brooks v. Kemp, 762 F.2d at 1410; Tucker v. Kemp, 762 F.2d at 1505; Newlon v. Armontrout, supra.

The District Attorney, because he is a "public official occupying an exalted station," possesses unique ability to "imping[e] on the jury's function." United States v. Morris, 586 F.2d 396, 402 (5th Cir. 1977). See, Newlon v. Armontrout, 885 F.2d 1328 (8th Cir. 1989) (error for prosecutor to emphasize his position of authority as district attorney in closing argument at penalty phase of capital trial).

The prosecutor must not argue to the jury that this particular case is the most deserving, the most atrocious, or the best suited for capital punishment. Due to the prosecutor's position of authority, "improper suggestions, insinuations, and especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none." Berger v. United States, 295 U.S. 78, 88 (1935).

As one court held:

> The power and force of the government tend to impart an implicit stamp of believability to what the prosecutor says. That same power and force allow him, with a minimum of words, to impress on the jury that the government's vast investigative network, apart from the ordinary machinery of trial, knows that the accused is guilty or has non-judicially reached conclusions on relevant facts which tend to show he is guilty.

Hall v. United States, 419 F.2d 582, 583 - 84 (5th Cir. 1969).

The Nevada Supreme Court has proscribed reference by the prosecutor to his office and authority in an attempt to bolster the evidence presented to the jury.

Such an injection of personal beliefs into the argument detracts from the "unprejudiced, impartial, and nonpartisan" role that a prosecuting attorney assumes in the courtroom. By stepping out of the prosecutor's role, which is to seek justice, and by invoking the authority of

his or her own supposedly greater experience and knowledge, a prosecutor invites undue jury reliance on the conclusions personally endorsed by the prosecuting attorney. Collier, 101 Nev. at 480.

Asserting the credibility of State witnesses also has been condemned by courts around the country. See, e.g., United States v. Garza, 608 F.2d 659, 664 (5th Cir. 1979) (integrity of officers unquestioned given the fact that they were "associating daily with dirty, nasty people"); United States v. Brown, 451 F.2d 1231, 1235 - 36 (5th Cir. 1971); Hall v. United States, 419 F.2d 582, 585 - 87 (5th Cir. 1969); Gradsky v. United States, 373 F.2d 706, 710 (5th Cir. 1967); Stewart v. State, 263 So.2d 754, 758 - 59 (Miss. 1972); Harris v. United States, 402 F.2d 656 (D.C. Cir. 1968); see also, Commonwealth v. Potter, 785 A.2d 492 (Pa. 1973); State v. Williams, 210 N.W.2d 21 (Minn. 1973).

The Ninth Circuit has repeatedly held that such vouching is improper. United States v. Simtob, 901 F.2d 799, 805 (9th Cir. 1990); United States v. Roberts, 618 F.2d 530 (9th Cir. 1980). See also, Lisle v. State, 113 Nev. 540; 937 P.2d 473 (1997) ("It is improper for the prosecution to vouch for the credibility of a government witness. Vouching may occur in two ways: the prosecution may place the prestige of the government behind the witness or may indicate that information not presented to the jury supports the witness's testimony.") (citing Roberts).

A variation on this theme is the argument that because the Grand Jury saw fit to charge a capital crime, the jury's verdict of death has already been ratified by its decision. This information is entirely irrelevant to the jury and serves only to prejudice the Defendant by creating some mystique and lending an imprimatur of authority to the grand jury process, which in turn can only serve to reduce the jury's sense of responsibility.

The prosecutors should be prohibited from making any confusing statement concerning the indictment process and should be strictly prohibited from making statements about their expertise or their witnesses' credibility, or about why they think the accused is guilty or should receive the death penalty.

(L) Expressing Personal Opinions

A prosecuting attorney may not express any personal opinions during a criminal proceeding, as such expressions may deny the accused a fair trial. See, e.g., United States v. Young, 470 U.S. 1, 8 (1985); Berger v. United States, 295 U.S. 78, 85 - 88 (1935); Brooks v. Kemp, 762 F.2d 1383, 1408 (11th Cir. 1985); United States v. Rodriquez, 585 F.2d 1234 (5th Cir. 1978); United States v. Diharce-Estrada, 526 F.2d 637 (5th Cir. 1976); United States v. Lamerson, 457 F.2d 371 (5th Cir. 1972). It is improper for a prosecutor to interject his personal opinion in closing argument. Ross v. State, 106 Nev. 924; 803 P.2d 1104 (1990).

The result of any expression of personal belief is to convey "the unspoken message that the prosecutor knows what the truth is and is assuring its revelation." Stringer v. State, 500 So.2d 928, 936 (Miss. 1986); Berger v. United States, 295 U.S. at 85 - 88 (statement of prosecutor carries with it governmental imprimatur). As is stated elsewhere in this Motion, prosecutorial "opinion" includes a District Attorney's views on the death penalty; deterrence; the credibility of his or her witnesses; and certainly any opinions based on "facts" that are not in evidence.

The law is clear in Nevada that the injection of the prosecutors personal beliefs is highly improper. Ross v. State, 106 Nev. 924, 927; 803 P.2d 1104 (1990) (although demonstrating bias on the part of the witness is permissible, stating that the witness is lying is not); Witherow v. State, 104 Nev. 721; 765 P.2d 1153, 1155 (1988) (an opinion as to the veracity of a witness in circumstances where veracity might well have determined the ultimate issue of guilt or innocence is improper). See also, Earl v. State, 111 Nev. 1304; 904 P.2d 1029 (1995) (the prosecutor acted inappropriately by characterizing the defendant's testimony as "malarkey." "This remark by the prosecutor violated his duty not to inject his personal beliefs into argument and more appropriately, not to ridicule or belittle the defendant or the case.").

The Ninth Circuit has expressed its abhorrence of statements of personal belief by the prosecutor. United States v. McKoy, 771 F.2d 1207, 1211 (9th Cir. 1985). These types of remarks are clearly improper and must be enjoined at the Defendant's trial.

(M) Arguing Deterrence

The State cannot properly argue that the Defendant should be sent to his death to "send a message" to others or to serve as a deterrent. These extraneous concerns have nothing to do with the "individualized determination" that the jury is called upon to make. Woodson v. North Carolina, 428 U.S. 280 (1976).

Indeed, should the State wish to argue that capital punishment is a deterrent to a crime, MALONE requests the right to present expert testimony and evidence that capital punishment is not a deterrent. See, e.g., Decker & Kohfield, Capital Punishment and Executions in the Lone Star State: A Deterrence Study, 3 Crim. Just. Research Bull. (No. 12) 1 - 6 (1988) ("there is no evidence of a deterrent effect of executions in the State of Texas"); Passell & Taylor, The Deterrence Controversy: A Reconsideration of the Time Series Evidence (reproduced in Bedau & Pierce, Capital Punishment in the United States (1976)); Georgia State Dept. of Offender Rehabilitation, Capital Punishment in Georgia: An Empirical Study (1943 - 65) 451 (1972) ("the death penalty is not effective as a deterrent"); Zeisel, The Deterrent Effect of the Death Penalty: Facts v. Faiths, 1976 Supreme Court Review 317; see also, The Harris Survey: Sizable Majorities Against Mandatory Death Penalty (Feb. 10, 1983) (63% of public and therefore potential jurors, believe in deterrence and therefore would be influenced by this improper argument). J. J. General Appeals to Prejudice.

Courts have repeatedly used strong language to condemn the prosecution's use of arguments appealing to jurors' prejudice. See, United States ex rel. Haynes v. McKendrick, 481 F.2d 152 (2d Cir. 1973); Kelly v. Stone, 514 F.2d 18 (9th Cir. 1975); Miller v. North Carolina, 583 F.2d 701 (4th Cir. 1978).

In a capital case, the danger of prejudice is heightened. See, e.g., Brooks v. Francis, 716 F.2d 780, 788 (11th Cir. 1983), reh'g granted and vacated, 728 F.2d 1358 (11th Cir. 1984) ("a prosecutor may not incite the passions of a jury when a person's life hangs in the balance"); Wallace v. Kemp, 581 F.Supp. 1471, 1482 (M.D.Ga. 1984), rev'd, 757 F.2d 1102 (11th Cir. 1985) ("the fears and passions of a jury cannot be excited by speculation as to what might happen if the death penalty is withheld"); Tucker v. Zant, 724 F.2d 882, 888 (11th Cir.

1984), vacated, 474 U.S. 1001 (1985) ("The Constitution will not permit arguments on issues extrinsic to the crime or the criminal aimed at inflaming the jury's passions, playing on its fears, or otherwise goading it into an emotional state more receptive to the call for imposition of death.")

Another example of this is the use of horrible photographs, which cause a visceral reaction against the accused. Jurors are lay people who rarely come into contact with the criminal justice system. They see such pictures and are particularly susceptible to an improper argument that they should attribute great weight in such evidence.

Arguments meant to inflame the jury produce an unreliable verdict based on "caprice" and emotion. Gardner v. Florida, 430 U.S. 349 (1977). This Court must be on guard for any subtle appeals to prejudice in the arguments of the prosecutor.

(N) Claims of Witness Intimidation

"The prosecution's intimations of witness intimidation by a defendant are reversible error unless the prosecutor also presents substantial credible evidence that the defendant was the source of the intimidation." Rippo v. State, ___ Nev. ___; ___ P.2d ___ (Adv.Op. ___, filed October 1, 1997) (citing Lay v. State, 110 Nev. 1189, 1193; 886 P.2d 448, 450 - 51 (1994).

(O) Referring to the Defendant's Custodial Status

The prosecution may not in any way allude to the fact that «Defendant» has been in prison, either because of «His_Her» prior conviction for this offense, or for any other reason. See, Cunningham v. State, 113 Nev. ___; 944 P.2d 261, 26 (1997); NRS 48.045.

(P) Other Improper or Misleading Arguments

There are numerous other arguments the State could make that would violate MALONE'S constitutional rights. For example, a prosecutor's selective use of Gregg v. Georgia, 428 U.S. 153 (1976), to argue to a jury that the United States Supreme Court had found that capital punishment "is essential in an ordered society" has been condemned, as has selective quotation from an ancient case, Eberhardt v. State, 47 Ga. 598 (1837), for the proposition that mercy was not an appropriate consideration in deciding punishment; Wilson v. Kemp, 777 F.2d 621, 625 (11th Cir. 1985). Because these prosecutors misstated the

Supreme Court's holding in Gregg and because the Eberhardt quotation is inconsistent with the present state of the law, the courts found that such argument renders the penalty phase of a trial fundamentally unfair. See also, Drake v. Kemp, 762 F.2d 1449, 1458 - 60 (11th Cir. 1985) (en banc); Potts v. Zant, 734 F.2d 526, 535 - 536 (11th Cir. 1984), reh'g denied, 764 F.2d 1369 (1985).

Any improper references to prior crimes or bad acts either at the trial/guilt or penalty phase would be reversible error. Tomarchio v. State, 99 Nev. 572, 577; 665 P.2d 804 (1983); Ex Parte Whisenhant, 482 So.2d 1249 (Ala. 1984). The State must be precluded not only from inflammatory or inadmissible argument and from conducting improper cross-examinations of the Defendant's witnesses that are designed to prejudice the Defendant in the eyes of the jury. See, Berard v. State, 486 So.2d 476 (Ala. 1985) (solicitation from psychologist about whether capital defendant could have recurrent psychotic episode and kill again highly prejudicial and reversible error).

It is also inappropriate for a prosecutor to make disparaging remarks pertaining to defense counsel's ability to carry out the required functions of an attorney. Riley v. State, 107 Nev. 205; 808 P.2d 551 (1991).

III. SECURING THE DEFENDANT'S RIGHT TO A TRIAL FREE OF PROSECUTORIAL MISCONDUCT

These are but a few of the arguments that a prosecutor can make that would violate the right to a fair trial. Various other examples could be given. This Court will therefore have to apply the principles developed in this Motion in a variety of contexts.

Through this Motion, MALONE seeks to anticipate improper arguments. To that end, he respectfully requests that this Court direct the State to indicate which, if any, of the arguments set forth above, the State believes it would be permitted to make, whatever the possible context.

MALONE hereby serves notice that he will make an evidentiary showing regarding each of the arguments which the State believes to be proper, in order that he may perfect his record under Skipper v. South Carolina, 476 U.S. 1 (1986) and Zant v. Stephens, 462 U.S. 862

(1983) as set forth above.

CONCLUSION

WHEREFORE, MALONE respectfully requests that this Court enter an Order granting the Motion in Limine and prohibiting the State from making improper opening or closing statements, from improperly examining witnesses, and from making any other improper remarks in this case.

DATED this 11 day of May, 2007.

SUBMITTED BY:
DAVID M. SCHIECK
SPECIAL PUBLIC DEFENDER

CHARLES A. CANO
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Attorneys for Defendant

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2007 MAY 24 P 3:23

CLERK OF THE COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, vs. DOMONIC MALONE, Defendant.	CASE NO. C224572 DEPT. NO. V DATE: JUNE 22, 2007 TIME: 8:30 A.M.

MOTION TO COMPEL DISCLOSURE OF EXISTENCE AND SUBSTANCE OF EXPECTATIONS, OR ACTUAL RECEIPT OF BENEFITS OR PREFERENTIAL TREATMENT FOR COOPERATION WITH PROSECUTION

COMES NOW, the Defendant, DOMONIC MALONE, by and through his attorneys, DAVID M. SCHIECK, Special Public Defender, CHARLES A. CANO, Deputy Special Public Defender and RANDALL H. PIKE, Deputy Special Public Defender and moves this Court to compel the prosecution to disclose all evidence of any witnesses' expectations of, or actual receipt of benefits for cooperation with the prosecution and/or any law enforcement agency of the State of Nevada, and/or any state, county, or federal law enforcement agency.

Such order should include the requirements to disclose any promises, favors, deals, bargains, special treatments, leniency, housing or consideration of any kind, or expectation

of the same paid, given, offered, or held out by the prosecution and/or law enforcement agency in exchange for testimony, evidence, and/or information, whether or not it is intended to be used by the prosecution. It is further requested that the prosecution reveal any and all cases in which witnesses to be used against Malone have provided information or testimony for the prosecution in other cases.

This Motion is made and based upon the due process clause of the Fifth Amendment to the United States Constitution and the Constitution of the State of Nevada, all papers and pleadings on file herein, and the Points and Authorities attached hereto.

NOTICE OF MOTION

TO: STATE OF NEVADA, Plaintiff; and

TO: DAVID ROGER, District Attorney, Attorney for Plaintiff

YOU WILL PLEASE TAKE NOTICE that the undersigned will bring on the above and foregoing **MOTION** on for hearing on the 22nd day of June, 2007, at the hour of 8:30 A.M., in Department No. V of the above-entitled Court, or as soon thereafter as counsel may be heard.

STATEMENT OF THE CASE

DOMINIC MALONE is charged by way of Information with 4 counts First Degree Kidnapping, 2 counts of Battery with Substantial Bodily Harm, 2 counts of Conspiracy to Commit Kidnapping, 2 counts of Pandering, 1 count of Robbery, 2 counts of Robbery with use of a Deadly Weapon, 1 count of Conspiracy to Commit Murder, 1 count of Conspiracy to Commit Burglary, 1 count of Burglary, and 2 counts of Murder with Use of a Deadly Weapon. The State filed its Notice of Intent to Seek Death Penalty on August 30, 2006. Trial is set for August 13, 2007.

FACTS

MALONE has set forth a comprehensive Statement of Facts in previous Motions filed with this Court and incorporates same as if set forth in full herein.

POINTS AND AUTHORITIES

It is the position of Defendant Malone that witnesses may be motivated in providing information and testimony by the expectation or receipt of benefits of some type from the

State. In all likelihood the State will report that there are no such benefits, however, in the abundance of caution, Malone submits the following legal authorities in support of his request for the disclosure by the State of the witnesses known to the State who may be called to testify by the State at the trial of Malone.

Any evidence showing that the State has made promises of leniency, immunity, or other preferential treatment in exchange for witness information or testimony is discoverable under the Brady rule. Giglio v. U.S., 405 U.S. 1560, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972). Furthermore, the Court in Giglio stated that evidence of any understanding or agreement attached to future or present prosecution would be relevant to the witnesses' credibility. The Court reaffirmed this principle in U.S. v. Bagley, 473 U.S. 667, 105 S.Ct. 3375, 85 L.Ed.2d 481 (1985). In Bagley, the Court indicated that the failure to disclose such evidence might affect trial strategy and result in ineffective assistance of counsel. Id. at 682, 683.

In the present case, a majority of the civilian witnesses have ongoing criminal charges. Co-defendant Herb has been offered negotiations, and Estores is pending sentencing on felony charges. In order to adequately defend Mr. Malone, this information is vital.

CONCLUSION

Dominic Malone respectfully requests that this Court enter an Order requiring the State to disclose in writing any promises or expectations of immunity, leniency, or other preferential treatment or benefits in exchange for testimony or information concerning Malone and further provide copies of any documentation that discusses, memorializes or effectuates same. It is further requested that the State provide any and all information concerning any other case

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wherein a witnesses against Malone provided testimony or information for the State or for any law enforcement agency.

DATED this 22 day of May, 2007.

SUBMITTED BY:
DAVID M. SCHIECK
SPECIAL PUBLIC DEFENDER

CHARLES A. CANO
Deputy Special Public Defender
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330 S. Third Street, 8th Floor
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FILED

2007 MAY 24 P 3:25

CLERK OF THE COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, vs. DOMONIC MALONE, Defendant.	CASE NO. C224572 DEPT. NO. V DATE: JUNE 22, 2007 TIME: 8:30 A.M.

MOTION FOR DISCOVERY OF INSTITUTIONAL RECORDS AND FILES NECESSARY TO A FAIR TRIAL

COMES NOW, the Defendant, DOMONIC MALONE, by and through his attorneys, DAVID M. SCHIECK, Special Public Defender, CHARLES A. CANO, Deputy Special Public Defender and RANDALL H. PIKE, Deputy Special Public Defender and respectfully requests pursuant to NRS 174.235 et seq., Article 1 of the Nevada Constitution, the Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and relevant case law, that this Court order the production of the materials specified below. Defendant Malone requests that this Court order the individuals named below to produce for inspection and copying the documents specified herein, wherever such documents may be located.

Said Motion is made and based upon the attached Points and Authorities, all papers

and pleadings on file herein, and on any oral argument at the time of the hearing of said Motion.

NOTICE OF MOTION

TO: STATE OF NEVADA, Plaintiff; and

TO: DAVID ROGER, District Attorney, Attorney for Plaintiff

YOU WILL PLEASE TAKE NOTICE that the undersigned will bring on the above and foregoing **MOTION** on for hearing on the 22nd day of June, 2007, at the hour of 8:30 A.M., in Department No. V of the above-entitled Court, or as soon thereafter as counsel may be heard.

STATEMENT OF THE CASE

DOMINIC MALONE is charged by way of Information with 4 counts First Degree Kidnapping, 2 counts of Battery with Substantial Bodily Harm, 2 counts of Conspiracy to Commit Kidnapping, 2 counts of Pandering, 1 count of Robbery, 2 counts of Robbery with use of a Deadly Weapon, 1 count of Conspiracy to Commit Murder, 1 count of Conspiracy to Commit Burglary, 1 count of Burglary, and 2 counts of Murder with Use of a Deadly Weapon. The State filed its Notice of Intent to Seek Death Penalty on August 30, 2006. Trial is set for August 13, 2007.

FACTS

MALONE has set forth a comprehensive Statement of Facts in previous Motions filed with this Court and incorporates same as if set forth in full herein.

POINTS AND AUTHORITIES

I. DEFINITIONS

Unless the context indicates otherwise, the terms listed below are defined and used herein as follows:

1. The "State" means any and all of the following organizations: the County of Clark, the Clark County District Attorney's Office, the Attorney General's Office, the Las Vegas Metropolitan Police Department, the Clark County Sheriff's Office, and the Nevada Highway Patrol. The "State" also means: (a) all present and former agents, officers, investigators, consultants, employees, and staff members of organizations or officials named above in this

paragraph; (b) any other person or entity acting on the behalf of any of these organizations or officials or on whose behalf such person or entity has acted in the past; or (c) any other person or entity otherwise subject to the control of any of these organizations or officials.

2. "Document" or "documents" means any writing, record or data in any form or medium, whether or not privileged, that is in the State's actual or constructive possession, custody or control. As used herein, a document is deemed to be within the State's control if the state has a right to obtain a copy of it. "Document" also includes the original of any document in whatever form or medium it may exist, and all copies of each such document bearing, on any sheet or side thereof, any marks (including by way of non-limiting example: initials, stamped indicia, or any comment or notation of any character) not a part of the original text or any reproduction thereof. Examples of documents that must be produced include, but are not limited to, working papers, preliminary, intermediate or final drafts, correspondence, transcripts, analyzes, X-rays, CAT scans, PET scans, EEG's, laboratory results, studies, reports, surveys, memoranda, charts, notes, records (of any sort) of meetings, diaries, telegrams, telexes, faxes, reports of telephone or oral conversations, desk calendars, appointment books, audio or video tape recordings, photographs, films, microfilm, microfiche, computer tapes, disks or printouts, press releases, and all other writings or recordings of every kind.

3. "Relating to" means discussing, describing, referring to, reflecting, containing, analyzing, studying, reporting on, commenting on, evidencing, constituting, setting forth, considering, recommending, concerning, relevant to, bearing on, or pertaining to, in whole or in part.

4. "All" means "any and all."

5. "Any" means "any and all."

6. "Each" means "any and all."

7. "And" means "and/or."

8. "Or" means "and/or."

9. "Record" means "document" as outlined in paragraph 2 above, and includes raw

data, notes, test results, narrative reports and recordings, together with all time and billing records pertaining thereto.

10. "Medical provider" includes, but is not limited to physicians, psychiatrists, psychologists, nurses, and technicians.

II. INSTRUCTIONS

1. References to the singular shall be construed to include the plural, and references to the plural shall be construed to include the singular.

2. All verbs shall be construed to include all tenses.

3. If any document or portion of any document covered by these requests is withheld from production, please furnish a list identifying each such document or portion of document, providing the following information with respect to each such document or portion:

(a) the reason(s) for withholding;

(b) the date of the document;

(c) identification by name, job, title, and the last known business and home address of each person who wrote, drafted or assisted in the preparation of the document;

(d) identification by name, job, title, and the last known business and home address of each person who received or has had custody of the document or copies thereof;

(e) a brief description of the nature and subject matter of the document;

(f) the length of the document;

(g) a statement of the facts that constitute the basis of any claim of privilege, work product or other grounds for non-disclosure; and

(h) the paragraph(s) of these requests to which the document is responsive.

4. Each request is continuing in nature and additional responsive documents that are obtained or discovered prior to the Evidentiary Hearing should be produced as soon as they are obtained or discovered.

5. If any document responsive to a request was, but is no longer, in your possession,

custody or control, state whether such document: (a) is missing or lost, (b) has been destroyed, (c) has been transferred to others, or (d) has otherwise been disposed of. For each instance, explain the circumstances surrounding such disposition, identify each person who authorized such disposition, indicate the dates of such authorization and disposition, and identify the document and each person or entity that may have custody or control of such document or any copy thereof.

6. If information responsive to a request appears on one or more pages of a multi-page document, produce the entire document.

7. Individual responses of more than one page should be stapled or otherwise separately bound, with each page consecutively numbered.

III. DOCUMENTS TO BE PRODUCED

Defendant Malone respectfully requests that this Court order that he be granted leave to inspect, copy, and photograph the following documents:

1. All records generated or maintained by the Clark County Detention Center pertaining to the Defendant, including but not limited to all disciplinary, medical, psychological, psychiatric, or mental health records;

2. All disciplinary, medical, psychological, psychiatric, or mental health records pertaining to the Defendant, generated or maintained by any medical provider at the Clark County Detention Center;

3. All records pertaining to the Defendant generated or maintained by the Nevada Department of Prisons, including but not limited to Defendant Malone, complete "C" and I" files, disciplinary records, medical records, psychological, psychiatric or mental health records, and any other records generated or maintained by any prison, medical facility or any other entity associated with the Nevada Department of Prisons;

4. All records generated or maintained by the Clark County Juvenile Court Services Department, including but not limited to all Juvenile Court records pertaining to Defendant Malone;

5. All records generated or maintained by the Nevada Department of Human

Resources, and any divisions thereof, and pertaining to Defendant Malone;

6. All records pertaining to Defendant Malone and generated or maintained by any state mental health facility in Nevada;

7. All documents generated or maintained by the Nevada Department of Parole and Probation pertaining to the Defendant;

8. Any and all medical, psychological, psychiatric, or mental health records of any kind generated or maintained by any hospital, psychological, psychiatric, or mental health facility of any kind, including, but not limited to, alcohol and drug rehabilitation centers, as well as any such records generated or maintained by any physician, psychologist, psychiatrist, medical or mental health provider of any kind, which are in the possession or constructive possession of the County of Clark or the State of Nevada.

ARGUMENT

This Motion is made under the authority of Brady v. Maryland, 373 U.S. 83 (1963) and its progeny, as well as the constitutional and statutory provisions cited in the opening paragraph. See also, Kyles v. Whitley, 514 U.S. 419 (1995); Davis v. Alaska, 415 U.S. 308 (1974); Giglio v. United States, 405 U.S. 150 (1972); Giles v. Maryland, 386 U.S. 66 (1967); Smith v. Phillips, 455 U.S. 209 (1982); United States v. Agurs, 427 U.S. 97 (1976); United States v. Valenzuela-Bernal, 458 U.S. 858 (1982); United States v. Brumel-Alvarez, 976 F.2d 1235 (9th Cir. 1992); United States v. Pitt, 717 F.2d 1334 (11th Cir. 1983); Jimenez v. State, 112 Nev. 610, 918 P.2d 687 (1996). The State can "not use the confidentiality requirement ...as a means of avoiding its duties under the constitution - specifically, those defined by Brady and Giglio." Moore v. Kemp, 809 F.2d 702, 726 (11th Cir. 1987). See, Miller v. Dugger, 820 F.2d 1135 (11th Cir. 1987); Moore v. Kemp, 809 F.2d 702 (11th Cir. 1987).

Specifically, NRS 174.245 provides, in pertinent part, that:

> Upon motion of a defendant the court may order the district attorney to permit the defendant to inspect and copy or photograph books, papers, documents, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the State, upon a showing of materiality to the preparation of his defense and that the request is

reasonable.

The instant prosecution seeks the execution of Defendant Malone. Therefore, all information pertaining to mitigation of the charges is "material" to the preparation of the defense. The United States Supreme Court has repeatedly held that all relevant mitigating evidence should be presented to the jury. "A jury must be allowed to consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed." Jurek v. Texas, 428 U.S. 262, 271, 49 L.Ed.2d 929, 96 S.Ct. 2950 (1976). See also, Bell v. Ohio, 438 U.S. 637, 98 S.Ct. 2977, 57 L.Ed.2d 1010 (1978); Blystone v. Pennsylvania, 494 U.S. 299, 108 L.Ed.2d 255, 110 S.Ct. 1078 (1990); Eddings v. Oklahoma, 455 U.S. 104, 71 L.Ed.2d 1 (1982); Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987); Lockett v. Ohio, 438 U.S. 586, 57 L.Ed.2d 973, 98 S.Ct. 2954 (1978); Parker v. Dugger, 498 U.S. 308, 112 L.Ed.2d 812, 111 S.Ct. 731 (1991); Skipper v. South Carolina, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986).

Clearly, the information requested herein is "material" to the presentation of a mitigation defense during the penalty phase, should one be required. Exculpatory and material evidence is evidence which is favorable to the defense and which may create any reasonable likelihood that the outcome of the trial or capital sentencing trial would have been different. Smith (Dennis Wayne) v. Wainwright, 799 F.2d 1442, 1444 - 1445 (11th Cir. 1986); Chaney v. Brown, 730 F.2d 1334, 1357 (10th Cir. 1984). See, Brady, 373 U.S. at 87 (reversing death sentence because suppressed evidence relevant to punishment, but not guilt/innocence); Moore v. Illinois, 408 U.S. 786, 794 (1972) ("The heart of the holding in Brady is the prosecution's suppression of evidence, in the face of a defense production request, where the evidence is favorable to the accused and is material either to guilt or to punishment"); Bowen v Maynard, 799 F.2d 593, 602 (10th Cir. 1986) ("The prosecution violates the Brady rule if after a request by the defense it suppresses evidence which is both favorable to the defense and material to guilt or punishment"); Chaney v. Brown, 730 F.2d 1334, 1339 (10th Cir. 1984) ("we must hold that the cumulative impact of the withheld evidence might have affected the jury's determination on the death penalty so that this

death sentence cannot constitutionally stand"). Materiality is established if the evidence "'might' or 'could' affect the outcome on the issue of guilt . . . [or] punishment." United States v. Agurs, 427 U.S. at 105, 106, and that there exists "a reasonable probability that had the [withheld] evidence been disclosed to the defense, the result of [the trial or sentencing] proceeding would have been different." United States v. Bagley, 105 S.Ct. 3375, 3383 (1983). See, Carter v. Rafferty, 826 F.2d 1299, 1309 (3rd Cir. 1987); McDowell v. Dixon, 858 F.2d 945, 948 (4th Cir. 1988); United States v. Brumel-Alvarez, 976 F.2d 1235, 1243 (9th Cir. 1992).

CONCLUSION

Therefore, Dominic Malone respectfully requests that this Court order the production of the above materials and grant leave to depose any individuals associated with the foregoing materials.

DATED this 03 day of May, 2007.

SUBMITTED BY:
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DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, vs. DOMONIC MALONE, Defendant.	CASE NO. C224572 DEPT. NO. V DATE: JUNE 22, 2007 TIME: 8:30 A.M.

MOTION TO SUPPRESS STATEMENTS OF DONALD HERB, OR IN THE ALTERNATIVE MOTION IN LIMINE TO PROHIBIT INTRODUCTION OF STATEMENTS MADE BY CO-DEFENDANT HERB AT THE TIME OF TRIAL

COMES NOW, Defendant DOMONIC MALONE, by and through his counsel DAVID M. SCHIECK, Special Public Defender, CHARLES A. CANO, Deputy Special Public Defender, and RANDY PIKE, Deputy Special Public Defender, and pursuant to the sixth, eighth and fourteenth amendments to the United States Constitution, and the Nevada Constitution, moves this Court to bar the introduction of the testimony of Donald Herb at the time of the trial of this matter, as well as all derivative evidence secured therefrom.

This Motion is based upon the attached points and authorities, arguments of counsel at the time of the hearing on this matter as well as the points and authorities

contained within both of the Defendants' Writs of Habeas Corpus heretofore file in this matter.

Specific to this Motion are the conflicting statements of the two alleged co-conspirators, Donald Herb, who has struck a negotiation with the State and has testified against his two co-defendants, and Co-Defendant Jason McCarty, who provided a statement to police in which he alleges that it was in fact Donald Herb and MALONE who committed the alleged crimes. The body of this motion addresses the manner in which Donald Herb was interrogated and subsequently turned to be the State's primary witness. The custodial interrogation of the investigating officers in this instance was violative of Donald Herb's rights under the sixth amendment as interpreted under the Miranda case and its progeny.

NOTICE OF MOTION

TO: STATE OF NEVADA, Plaintiff; and

TO: DAVID ROGER, District Attorney, Attorney for Plaintiff

YOU WILL PLEASE TAKE NOTICE that the undersigned will bring on the above and foregoing **MOTION** on for hearing on the 22nd day of June, 2007, at the hour of 8:30 A.M., in Department No. V of the above-entitled Court, or as soon thereafter as counsel may be heard.

POINTS AND AUTHORITIES

I.

STATEMENT OF FACTS

Defendant Dominic Malone (hereinafter referred to as Malone), by this reference, adopts the statements of facts contained within both of the Writs and Motions to Sever heretofore filed with the Court. In addition to the above, Malone also adopts co-defendant's Motion to Suppress insofar as it is specific to the instant motion.

Malone notes that on May 25, 2006, Detectives Osaka and Collins went to the residence of Donald Herb (hereinafter referred to as Herb) to question him about his involvement in the deaths of the two victims in this matter. The Detectives, pursuant to the

policy of the Henderson Police Department were recording the conversation with Herb. While starting the interrogation with questions about the alleged beating of "Red", the officers almost immediately began interrogating Herb about his involvement in the death of the victims in this case.

Listening to the interrogation by Detectives, it becomes clear that the actual purpose for the interrogation was to obtain information against Herb for the murders, which in fact occurred during the interrogation. Prior to the interrogation of Herb, the Detectives had already interviewed co-defendant McCarty.

Officers knew prior to their interview that Donald Herb aka "Donny" was a regular at Sportsman. They had made the decision to arrest him for the murders prior to meeting with him on the night of his arrest. As a result of this unconstitutional interrogation, the State was able to make Herb a cooperating co-defendant. He provided the following as a result of this improper negotiation. Donny was selling drugs at that location. "Pretty much every day." (Preliminary Hearing Transcript "PHT" volume V, page 48). Donny was the owner of the two cars in question; the 2002 green Oldsmobile Allero (PHT, volume V, page 5) and the 1993 white Honda Accord . He had allowed Romeo to use the green car for the entire months of April and May of 2006 (PHT, volume V, page 6) despite the fact that the Honda was not registered and had an expired 30 day permit. (PHT, volume V, page 64). Romeo was a friend of Herb's for three to four years and they had resided together for a period of about two years. (Id). Herb and Romeo communicated frequently by cellular telephones (Herb's number was 453-9274 and Romeo's number was 237-3308). (PHT, volume V, page 8). They saw each other "almost every day". (PHT, volume V, page 9)

Herb described the events of the night before the death of the girls. He stated that on that evening, he (Herb) called Romeo and stated "I'm going to come and get my car." (PHT, volume V, page 15). Romeo gave him directions to Exit 56A on the 95 south. (Id) Herb stated that he did this because Romeo said he was going to leave the state with the car. (PHT, volume V, page 60) However, Herb had not made any arrangements to have someone assist him in retrieving his car (PHT, volume V, page 65) nor was there any

conversation about Herb and Romeo switching cars. (PHT, volume V, page 66). They had numerous calls back and forth until Herb arrived. (PHT, volume V, pages 16-18) Romeo states on the cell phone prior to Herb arriving: "You know what we're doing out here. We're not just beating them up this time. You're involved in two murders now." (PHT, volume V, page 18) Allegedly, in the background he hears Malone saying that "he broke the club that they had. They only brought one." Mr. McCarty proceeds to tell him, "Okay. Just hit the bitch in the head with a rock." During one cell phone call, Romeo tells Herb "Victoria is dead" and then hung up. (PHT, volume V, page 39)

Arriving at the scene, Herb sees Romeo and D-Roc in the green car. He follows them toward Boulder City. (PHT, volume V, page 19). Romeo's hearsay statements (as to D-Roc) describe the prior battery by D-Roc on Red. (PHT, volume V, page 24). About a week prior to that, Romeo complained to Herb that Victoria "had went to work and then not showed up for a couple of days. She took some work [drugs] with her. She was smoking it– this being Victoria..." (PHT, volume V, page 25). Red had received some drugs from D-Roc, and she was also missing. (PHT, volume V, page 26) The two vehicles stop about "four miles south of the dam" and Romeo and D-Roc start removing things from the trunk of the car. (PHT, volume V, page 28). Herb gets out of his car, and D-Roc hands him a head of a golf club and tells him to get rid of it. Herb then throws it into the desert. Herb, Romeo and D-Roc discussed alibis, and what everyone's alibi would be. (PHT, volume V, page 36) Romeo later advised Herb that "he would have two of our friends, Correna and Lynn . . . would say that he was at their house at that time, and that the green car was there, they remember him." (PHT, volume V, page 38) After cleaning out the rest of the trunk, everyone leaves in the two cars, until they stop at Russell Road and Boulder Highway. Romeo calls Herb and "asks me to go inside and get a bottle of water for him." Herb complies (PHT, volume V, page 30)

From that location, Romeo "asks [Donny] to drive Mr. Malone home". Romeo "heads towards the Sportsman." (Id) Herb takes D-Roc to his (Herb's) house, where Herb turns off his alarm, changes his clothes for work, and drops off D-Roc near Lake Mead and

Martin Luther King Drive. Herb then picks up Lenny and takes him to work. (PHT, volume V, page 31)

During this time, D-Roc was wearing black shorts, sandals and a long sleeved black t-shirt. At the spot near the dam several discussions about clothing were held. This culminated when Romeo "told Mr. Malone to take the girls' clothes and burn them". (PHT, volume V, page 34) The night after the deaths, Romeo gave additional information to Donny, although he did not say exactly how they were killed. (PHT, volume V, pages 38-39). D-Roc "didn't say anything about it." stating that "We shouldn't talk about what happened at all. "(PHT, volume V, page 40)

In an effort to destroy evidence, Romeo "told [Donny] the we needed to change the tires so they wouldn't match the tire marks at the crime scene... I then gave him $200 cash so he could take care of that." (PHT, volume V, page 41) D-Roc, although present, said nothing. (Id)

Prior to assisting the police, Herb admitted lying to them. He lied to them about his involvement as well as Romeo's and D-Roc's involvement. (PHT, volume V, page 43). After interrogations wherein the police told Herb that Romeo had said that Herb and D-Roc did it and that D-Roc said that Herb and Romeo did it, the police made him an offer: "I could either be a witness or I could be a suspect..." (Id) After determining that he would assist the police, Herb took officers out to the locations that he had described and assisted police in recovering evidence. (V 42)

II.

PROCEDURAL STATEMENT POINTS AND AUTHORITIES

Since this has been designated as a capital prosecution, exacting standards must be met to assure that it is fair. The death penalty "is unique in it irrevocability." Furman vs. Georgia, 408 U.S. 238, 306, 92 S.Ct. 2726, 33 L.Ed. 2d. 346 (1972) (Stewart, J. concurring). As the United States Supreme Court has held, "[t]he fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special "'need for reliability in the determination that death is the

appropriate punishment'" in any capital case." Johnson vs. Mississippi, 486 U.S. 578, 584, 108 S.Ct.1981, 100 L.Ed. 2d 575 (1988) (quoting Gardner vs. Florida, 430 U.S. 349, 363-64, 97 S. Ct. 1197, 51 L.Ed 2d 393 (1977) (quoting Woodson vs. North Carolina, 428 U.S. 280, 305, 96 S.Ct. 2978, 49 L.Ed. 2d 944 (1976) (White, J., concurring).

III.

LEGAL ARGUMENT

In the present case "Donny" and co-defendant "Romeo" have offered statements to the State that alleged that Defendant Malone was acting in concert with the other defendant in committing the murders in this case. There is no independent eye witness to the murders, and the nexus to these counts to Defendant Malone are brought through the testimony of a co-defendant who offers both hearsay statements from Defendant McCarty as well as his own uncorroborated testimony to focus the blame on Mr. Malone.

A. The confession of Donald Herb as well as his subsequent negotiations which rendered him a cooperating co-defendant were occasioned by impermissible in custody interrogations.

Detectives Osaka and Collins were the primary investigators in the present case. On May 25, 2006 they went to the home of Donald Herb where he was arrested after an interrogation. On May 25, 2006, at 6:30 Detective Collins interrogated Jason McCarty. During the interrogation, although again there were never any Miranda warnings given, the Detective told Mr. McCarty "I'M GOING TO TELL YOU RIGHT NOW, YOU CAN BE A WITNESS OR YOU CAN BE A SUSPECT. (p. 65) (Citations to the Transcript of his Statement are by page number.) It was during this interrogation that the Detective showed his true purpose for the interrogation as being the murders. "The second part: those two girl (sic) were found in the desert -- . . Victoria and Christine. That's why I'm here." (p. 76) It was during this interview that the detectives were told by McCarty that "I was with the girls. Donny showed up. We all kicked it together." (p 127). McCarty was obviously concerned. "Where's Donny at? Is he in jail yet?" (p. 128).

The detective continued "Like I told you, you're either a witness or a suspect." (p.

135) Clearly however, McCarty was not free to leave. Encapsulated within the following excerpts, the interrogation is clearly custodial, as well as the subsequent intention to arrest Herb for the murders. The decision is announced before the subsequent interrogation of Herb at his residence.

"A. Can we walk for a second?

Q. Can we walk for a second?

A. Just (incomprehensible). Just you and I?

Q. We ain't walking nowhere.

A. Me and you –

Q. Listen to me.

A. I'm just asking .....

A. – I'm under arrest or anything.

Q. Listen, Jason Jason.

A. I'm asking you what's goin (sic) on.

Q. Jason. I'm calling you Jason

A. Yes, sir.

Q. Okay. This is a murder investigation.

A. That's what I'm asking ...." (p. 136)

. . .

"Q. Let's go to jail.

A. Then – can we call my --can you call my parents and tell them now that they're—that you guys are arresting me since nobody read me my rights and questioned me?

Q. You'll be able --you'll be able to make you phone calls.

A. I mean what am I being charged with?

Q. You're being charged with – right now you're being charged with – you're being charged with battery with substantial bodily harm,--

. . .

A. Man let's fill out a paper. Whatever you need me to fill out, I'll fill out. Take these fucking cuffs off. Whatever you —

Q. WHOA. Whoa. Whoa. Whoa.

A. Whatever you need me to –

Q. Talk to me.

A. No. Whatever you need me to say. I'll write it down.

Q. No. No. NO. I don't need you to say anything. I want you to tell me –

A. Then what you want me to tell you.

. . .

A. What do you want me to tell you.

Q. No. No. No.

A. I don't know what it is –

Q. I want you to tell me –

A. –you want to tell me .

Q. I want you to tell me what the truth is.

A. I told you the truth. As far as I know, I know D-Rock took somebody with him but it wasn't me.

Q. Okay. Who was it?

A. (Incomprehensible)

Q. Dude –

A. I –

Q. Dude, you think –

A. I don't –

Q. Listen to me.

A. I don't want to say his name –

Q. Listen to me.

A. – but I believe it's Donny.

Q. Listen to me.

A. Because Donny is (incomprehensible).

Q. I don't want to say his name. I do this for a living

. . .

Q. I want you to speak very clearly now. You said that D-Rock was going to go pick them up?

A. Are these cuffs coming off me right now?

Q. Listen. Hold it.

A. That's all I'm asking. I will speak – speak very clearly, say exactly what I need to say. I'm asking you are these cuffs coming off". That's all I'm asking.

Q. I'm going to tell you right now.

A. Yes, sir.

Q. I'm going to tell you right now. You are being charged with battery with substantial boldily (sic) harm.

A. Regardless –

Q. Listen to me. Okay? Now, okay, what I'm going to do now is I'm going to read you your rights.

A. It's a little late for that, though." (p. 144)

. . .

"Q. Okay. But do you want to talk to me about this?

A. I have to listen to you first. I'm just –

Q. Well, do you want me to talk to you about this? That's all I can ask you is do you want me to talk to you about this?

A. All I want to know is am I going to free to go when I'm done –

Q. Listen to me.

A. – back to my parents' house. That's all I want to do is go to my parents' house –

Q. No.

A. – when we're done.

Q. No. You're not going to be free.

A. I'm going to jail?

. . .

Q. You've got to let me talk to you.

A. Okay. Talk to me.

Q. Okay. Now, listen to me. Okay. You were with D-Rock the night that Red got beat." (p. 147)

. . .

"Q. Listen to me. You've got two charges of battery/substantial bodily harm, kidnapping, and the conspiracy. The conspiracy ties you and D-Rock together. But, now, listen to me. It's not two counts of murder. And that's where you need to basically draw the line.

A. I'm drawing the line right now.

Q. Okay.

A. that's what you just told me I needed – you told me on the beginning of this tape I need to –

Q. So –

A. – be a witness or a suspect.

Q. And I'm talking about the murder.

A. Why do I need to go to jail?

Q. What?

A. Why do I need to go to jail?

Q. I can't make deals, man." (p. 149)

. . .

"Q. Listen. Listen to me. Listen to me. You need to tell me what happened when D-Rock went to get the girls. Who was he with?

A. All I Know is Donnie.

Q. You know he was with Donnie. And why do you know he was with Donnie?

A. Because Donnie's the one that drove the car. " (p. 151)

"DETECTIVE COLLINS: Tell them to put Donnie – tell them to hook Donnie.

UNKNOWN DETECTIVE: Donnie's over at the other place."

While the enunciated basis for the arrests of McCarty and "Donny" are conspiracy regarding the battery, when McCarty's interrogation is read it is clear that the decision to arrest Herb for the murders was actually stated, by Detective Collins, before the Henderson Police Department arrived at Herb's house. The broad interpretation used in supporting

the arrests shows the abuse of the conspiracy charge, which has been called the "darling of the modern prosecutor's nursery." Harrison v. United States, 7 F.2d 259, 263 (2nd Cir. 1925).

B. The improper custodial interrogations in this case highlights the highly suspect evidence provided by the implied "deal" that detectives offer to "be a suspect or a witness" that results in Constitutionally inadmissible testimony which must be precluded at trial.

The use of "purchased" co-defendant testimony has become increasingly difficult for the defense and prosecution because the "implicit promise" of leniency, in charging a crime or sentencing, weighs heavily on the mind of the testifying individual and therefore makes it inherently unreliable. Indeed, with the clear language of NRS 199.240 in reference to "Bribing or intimidating witness to influence testimony", a person who:

> 1. Gives, offers or promises directly or indirectly any compensation", gratuity or reward to any "witness" or person who may be called as a witness in an official proceeding, upon an agreement or understanding that his testimony will be thereby influenced.....

While recognizing the need for some latitude in an interrogation setting, in this case, there appears to be a continuing enhancement of statements, inducements for cooperation and embellished testimony. From the beginning of the interrogation, the highly illegal interrogation techniques used, blaze the trail which leads to an improperly obtained statement from McCarty in which he inculpating Defendants Herb and Malone. In turn, those improperly obtained statements lead to another improperly obtained statement from Herb inculpating McCarty and Malone. As seen in the cross examination, Herb having access to all of the police reports and discovery further modifies his statement to secure his subsequent release from custody (See attached Court minutes). In the present case, the unreliability of statements, obtained in this unorthodox and illegal manner, is exemplified by the testifying co-defendant having access to the discovery and offering a vastly different statement before the Justice of the Peace than the version he gave in his previous statements to the police.

As is seen from the transcripts of the statements of Defendant McCarty, and the other specific basis for suppression, the Detectives conducted a constitutionally improper interrogation. Mr. McCarty did not make a voluntary and intelligent waiver of his Fifth Amendment privilege against self-incrimination and was denied his due process rights as accorded under the Fourteenth Amendment. Mr. McCarty's statements and questions to the detectives clearly indicated that he was confused about the legal consequences of making a statement. He was, in effect, asking if he was a "suspect or a witness". He was placed in this situation before he was advised of his rights per Miranda.

Indeed, the recording of Detective Collins telling officers to "hook" Herb and then the subsequent interrogation of Herb that resulted in his statement and subsequent use by the State shows a pattern of constitutional violations.

McCarty was intentionally deceived by the detectives in relation to the custodial status as well as the possible use of his statements. This was directly contrary to the required Miranda warning that anything the suspect says could and would be used against him in court. Miranda v. Arizona, 384 U.S. 436, 467-76 (1966). McCarty and Herb did not make any informed waiver of their rights.

This was a misrepresentation of law which is absolutely prohibited. Commonwealth v. Dustin, 373 Mass. 612, 616, 368 N.E.2d 1388 (1977). (confessions held involuntary where obtained in response to a false police representation that the confession could not be used against the defendant at trial.) The exclusionary rule which is intended to deter improper conduct squarely applies here.

IV.

LEGAL VS FACTUAL MISREPRESENTATIONS

A. There is an absolute prohibition upon any trickery which misleads the suspect as to the existence or dimensions of any of his applicable rights.

No area of constitutional criminal procedure has provoked more debate over the years than that dealing with interrogation and the extent and nature of police abuse in seeking to obtain confessions from those suspected of crimes. La Fave & Israel, Criminal

Procedure, § 6.1 at p. 434, (1984). This is particularly true when interrogation tactics of trickery and deception are employed. Id. at p. 446.

One type of trickery is exaggerating to the suspect the strength of the existing case against him and/or the actual course and scope of the interrogation. This is considered a factual misrepresentation. An example of this is when the suspect is misinformed that his fingerprints were found at the scene in an effort to persuade him to make an inculpatory statement. This form of trickery has been found to be acceptable in most cases, as in Frazier v. Cupp, 394 U.S. 731, 89 S.Ct. 1420 (1969). However, courts are much less likely to tolerate misrepresentations of law. La Fave & Israel, Criminal Procedure, § 6.1 at p. 447, (1984).

U.S. v. Womack, 542 F.2d 1047 (9th Cir. 1976) (police action/inaction negated their assertion that suspect had a present right to counsel), or as to whether the waiver really is a waiver of those rights. Redmond v. People, 180 Colo. 24, 501 P.2d 1051 (1972) (police misled suspect into believing statement would be useable only against co-defendant), or that the previously obtained confession of an accomplice could be so used. State v. Braun, 82 Wn.2d 157, 509 P.2d 742 (1973).

Miranda requires a clear and unequivocal warning to the accused of his constitutional rights, prior to the taking of any statement, whether exculpatory or inculpatory, during interrogation occurring after an accused is taken into custody. Miranda, supra; U.S. v. Twomey, 467 F.2d 1248 (7th Cir. 1972); Eagan v. Duckworth, 843 F.2d 1554 (7th Cir. 1988). One of those rights is the right to have counsel present.

In Womack, the suspect twice requested an attorney and was advised by police that "it would be taken care of" but no steps were taken to contact a lawyer. Womack, 542 F.2d at 1049. The third time he was administered *Miranda* warnings, however, he confessed "because he was 'scared' and because 'every time I asked for one I never got one, so I gave up on the fact.'" Id. The court found the suspect waived counsel because he was tricked into believing that one would never be appointed and therefore, held that his waiver was not a knowing, intelligent and voluntary one. Id. at 1051. As a result, his subsequent

incriminating statements were inadmissible at trial. Id. at 1049.

Likewise, the legal misrepresentation of the *Miranda* right involved in the case at bar, the constitutional right to know that a statement can be used against the speaker, has been expressly prohibited. A confession was held involuntary when obtained in response to a false police representation that the confession could not be used against the defendant at trial. Commonwealth v. Dustin, 373 Mass. 612, 616, 368 N.E.2d 1388 (1977).

In Dustin, the suspect asked the police officer, "If I tell you something about the incident, will I be admitting my guilt?" 373 Mass. 612. The officer replied, "You are not on the stand and you are not under oath. You can tell me anything you want to." Id. The court found that the suspect's question "clearly indicated that he was confused about the legal consequences of making a statement." Id. The court reasoned that the suspect "asked, in effect, whether if he made a statement it could be used against him. The police officer's response carried an implication that it could not be." Id. at 614. This was directly contrary to the required Miranda warning that anything the defendant said could and would be used against him in court.

The factual scenario presented in this case is much clearer than the one presented in Dustin. In the case at bar, the confusion of Mr. McCarty is evident in the above excerpt of his statement. There is not a mere subtle implication. The response is unequivocal, informing Mr. McCarty that he could be a witness or a suspect.

V

LACK OF ANY WARNINGS

Both McCarty and Herb were only provided their Miranda warnings after they had been interrogated and had given inculpatory statements. In U.S. v. Connell, 869 F.2d 1349 (Ninth Cir. 1989), two warning were given, an oral one and a written one.[1] The written

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[1] The oral warning was as follows: "If you cannot afford to pay for a lawyer, one ***may*** be appointed to represent you. (emphasis added)." In contrast, the written warning waiver stated: "I further understand that if I cannot afford to pay for a lawyer and want one ***arrangements will be made for me to obtain a lawyer in accordance with the law***." (Emphasis added).

warning was sound, but the oral one was not. The Ninth Circuit found the combination of the two versions not only confusing, but "affirmatively misleading" constituting a "subtle temptation to the unsophisticated indigent accused to forego the right to counsel at this critical moment." Connell, at 1352. While acknowledging that "no 'talismanic incantation' of this warning is necessary," they explained that "what Miranda requires 'is meaningful advice to the unlettered and unlearned in language which [they] can comprehend and on which [they] can knowingly act." Id. at 1351. The "combination of the two different warnings created additional confusion." Id. At 1353. They held that the combination was "fatally flawed" because it conveyed the contradictory alternative message. "The entire warning [was] therefore, at best misleading and confusing and, at worst, constituted a subtle temptation to the unsophisticated, indigent accused to forego his rights... at a critical moment." Id. at 1352.

In Garcia, the suspect received several different versions of the Miranda warnings. The Court found that taken together, the warnings were inconsistent. Garcia, at 134. They held that the warnings therefore failed to adequately inform her of her rights before her statement was given. Id.

In the case of McCarty, the fact that he acknowledged that it was too late for him to invoke his rights under the Miranda warnings given contradicted any prior warning. The combination of warnings given fell below minimum required standards.

VI

ABSOLUTE PROHIBITION AS WELL AS TOTALITY OF THE CIRCUMSTANCES

The statements of both Mr. McCarty and the subsequent interrogation of Herb were "involuntary." It has long been held that a confession "obtained by any direct or implied promises, however slight," is not voluntary. Bram v. U.S., 168 U.S. 532, 18 S.Ct. 183 (1897). The traditional voluntariness test requires a review of the totality of the circumstances involved. This is more commonly used when threats are made to the suspect or in cases of factual misrepresentations. The issue presented in those cases is whether as a result of the statements made, the will of the suspect was overborne.

However, the "totality of the circumstances test" does not apply for claims of legal misrepresentations. Whether the will of the suspect was overborne is not relevant. Hawaii v. Luton, 927 P.2d 844 (1996) (holding totality of the circumstances test applies to extrinsic falsehoods, however, intrinsic falsehoods or legal misrepresentations are deemed coercive per se) citing Hawaii v. Kelekolio, 849 P.2d 58 (1993). That a waiver of rights must be knowing and intelligent does not mean that the suspect would not have otherwise have chosen to talk to the police. In both Connell and Garcia, supra, the totality of the circumstances test was not applied. The Ninth Circuit reversed the convictions and suppressed the statement as soon as they determined that the warning was inadequate. Connell, 869 F.2d 1349 (9th Cir. 1989); Garcia, 431 F.2d 134 (9th Cir. 1970).

In Dustin, supra, the court specifically addressed the issue as follows:

> "We assume, without deciding, that the traditional test of voluntariness was met, and the statement would have been admissible in evidence before the decision in the Miranda case, notwithstanding the deceptive statement by the police officer." 373 Mass. 1390.

A knowing and intelligent waiver means more. It means that state procedures must scrupulously respect the suspect's free choices, made with actual knowledge of his rights at the time of interrogation. Commonwealth v. Garcia, 379 Mass. 422, 431 399 N.E.2d 460 (1980). A confession can be voluntary "in the legal sense" only if the suspect actually understands the import of each Miranda warning. Miranda v. Arizona, 384 U.S. 436, 467-76 (1966). McCarty and Herb were clearly under custodial interrogation at the time of their statements. The deceptions used as well as the implied offer of negotiations used were of such a nature and degree that public policy compels suppression. The extent of the police misconduct is also seen in the attempts by Detectives to recruit Herb's parents into recruiting him as a witness.

VIII.

UNINTENTIONAL

Even if the detectives felt that they were acting within Constitutional parameters, the intentional omission of Miranda warnings at the beginning of the custodial interrogation as

well as the intentional deception about the scope of the investigation and their perceived ability to place the defendant as either a "witness" or a "suspect". Likewise, in Dustin, supra, the court held that it was enough that the suspect "was effectively, though not intentionally, deceived by the officer's response." 373 Mass at 613. For even an innocent misrepresentation of the Miranda rights of the defendant renders the waiver invalid.

IX.

STANDING

Evidence secured as a result of an unconstitutional interrogation must be suppressed as "fruits of the poisonous tree." Wong Sun v. United States, 371 U.S. 471, 9 L.Ed. 2d 441, 83 S.Ct. 407 (1963). Under the circumstances above the questioning of both McCarty and Herb amounted to a Fifth Amendment violation, a core constitutional right. Therefore, the "fruits doctrine" comes into play. Since the Statements were not voluntary, the derivative evidence; the turning of the suspect to snitch status must be suppressed. See Wong Sun, *id,* and see also Oregon v. Elstad, 470 U.S. 298, 105 S.Ct. 1285, 84 L.Ed. 222 (1985) and Mederios v. Shimoda, 889 F.2d 819 (9th Cir.1989).

CONCLUSION

Detectives, while zealous in their investigation, nevertheless have been given some bright line rules that must be followed. When the interrogator relies upon the force of its legal authority to insure participation in interrogation, the courts must insure that the subsequent statements made are provided only after a voluntary and knowing waiver. Here, the interrogators made direct contact with a defendant knowing they were going to arrest him for murder and chose to interrogate him without basic legal warnings.

Wherefore DOMINIC MALONE prays that this Honorable Court suppress the statements of Jason McCarty and Donald Herb. Furthermore, Defendant prays that this

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Honorable Court issue an Order precluding the introduction of any testimony or evidence derived therefrom.

DATED this ____ day of May, 2007.

SUBMITTED BY:
DAVID M. SCHIECK
SPECIAL PUBLIC DEFENDER

RANDALL H. PIKE
Deputy Special Public Defender
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Attorney for Defendant Malone

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CLERK OF THE COURT

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Attorney for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

DOMONIC RONALDO MALONE,
#1670891

Defendant.

CASE NO: C224572

DEPT NO: V

STATE'S OPPOSITION TO DEFENDANT'S MOTION IN LIMINE TO PROHIBIT ANY REFERENCES TO THE FIRST PHASE AS THE "GUILT PHASE"

DATE OF HEARING: 6/22/07
TIME OF HEARING: 8:30 A.M.

COMES NOW, the State of Nevada, by DAVID ROGER, District Attorney, through CHRIS J. OWENS, Chief Deputy District Attorney, and hereby submits the attached Points and Authorities in Opposition to Defendant's Motion In Limine To Prohibit Any References To The First Phase As The "Guilt Phase".

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

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ARGUMENT

Defendant asks this Court to rule that the State not be permitted to refer to the initial stage of his trial as the "guilt phase." The State suggests to the Court and counsel that it is highly improbable the jury resolution of this case will hinge upon the semantical subtleties of phrases like "evidentiary stage", "fact-finding stage", or "guilt phase". Respondent has considerably more faith in the conscientiousness of jurors in general and in the integrity of the jury system than to presuppose that life and death decisions in a capital case are going to be influenced by semantics. Moreover, Defendant has failed to cite a single case or statute as authority for his proposition. Consequently, Defendant's Motion should be denied.

CONCLUSION

Based on the foregoing, the State of Nevada respectfully requests that this Court deny the instant Motion.

DATED this 1st day of June, 2007.

Respectfully submitted,

DAVID ROGER
Clark County District Attorney
Nevada Bar #002781

BY /s/ CHRIS J. OWENS
CHRIS J. OWENS
Chief Deputy District Attorney
Nevada Bar #001190

CERTIFICATE OF FACSIMILE TRANSMISSION

I hereby certify that service of the above and forgoing, was made this 6th day of June, 2007, by facsimile transmission to:

SPECIAL PUBLIC DEFENDER
FAX#455-6273

/s/ M. Beaird
Secretary for the District Attorney's Office

mb

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CLERK OF THE COURT

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Attorney for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, -vs- DOMONIC RONALDO MALONE, #1670891 Defendant.	CASE NO: C224572 DEPT NO: V

OPPOSITION TO DEFENDANT'S MOTION TO FEDERALIZE ALL MOTIONS, OBJECTIONS, REQUESTS AND OTHER APPLICATIONS FOR THE PROCEEDINGS IN THE ABOVE ENTITLED CASE

DATE OF HEARING: 6/22/07

TIME OF HEARING: 8:30 A.M.

COMES NOW, the State of Nevada, by STEWART L. BELL, District Attorney, through CHRIS OWENS, Deputy District Attorney, and hereby submits the attached Points and Authorities in Opposition to Defendant's Motion to Federalize all Motions, Objections, Requests and Other Applications For the Proceedings in the Above Entitled Case.

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

POINTS AND AUTHORITIES

The instant motion states only general grounds for relief. Nowhere within the body of the motion, or the single page of United States Supreme Court citations, are the terms

"Federalize" and "Authenticate" defined or the nature of the motion's prayer revealed. None of the twenty (20) string citations direct the reader to a particular page, such that one might attempt to ascertain a particular holding in any of the cases which might assist in determining the legitimate purpose of the Defendant's motion. The Points and Authorities baldly assert that "...Defendant Vannasone Quanbengboune relies upon the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution...." The purpose for which those Amendments are relied upon is absent.

The Motion then states that Defendant Quanbengboune "...asserts all applicable grounds with regard to each and every motion, objection, exemption, request and other application..." in the instant case. Finally, the Defendant "...asserts a continuing objection throughout trial to all matters upon which the court has ruled adverse to him...."

There is no other prayer for relief in the Motion, and it is difficult to imagine the content of any proposed Order granting the instant Motion. It appears to be a motion objecting to everything, on any and all grounds, asserting all cases and laws, and asking that the objection be a continuing one throughout trial. If granted, it may have the effect of rendering all other motions superfluous and moot, since all of the other pretrial motions filed by Defendant Johnson would necessarily be subparts of the instant Motion. It also appears to render defense counsel's duty to object at trial null and void, since the instant Motion asserts a continuing objection to everything.

Continuing objections are inappropriate even for particularized and delineated issues, since it prevents the Court from ameliorating any perceived prejudice by administering a curative instruction. To request an Order of this Court for silent objections to anything perceived to be prejudicial is contrary to any legal authority and to the fair administration of justice. NRS 47.040 concerning court rulings on evidence provides:

> 1. Except as otherwise provided in subsection 2, error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and:
> (a) In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection.
> (b) In case the ruling is one excluding evidence, the substance of the evidence was made known to the judge by offer or was apparent from the

context within which questions were asked.

2. This section does not preclude taking notice of plain errors affecting substantial rights although they were not brought to the attention of the judge.

In other words, a timely and specific objection is required by the evidence code, except in the unusual event of plain error. If a defendant seeks to later raise and preserve a claim, he must bring such considerations to the attention of trial court, stating the specific grounds of the objection. Edwards v. State, 90 Nev. 255, 524 P.2d 328 (1974). An appellate court will not reverse a ruling admitting evidence unless specific grounds for objection were stated at the time the objection was made. State v. Kallio, 92 Nev. 665, 557 P.2d 705 (1976). In Silver v. Telerent Leasing Corp., 105 Nev. 30, 768 P.2d 879 (1989), the failure of a defendant to object to particular testimony given at the trial precluded him from disputing the admissibility and propriety of that testimony on appeal.

The Defendant's motion clearly asks the Court to violate this rule of procedure. Accordingly, the State requests that the Court strike the instant Motion as frivolous, overbroad and illegal.

DATED this 1st day of June, 2007.

Respectfully submitted,
STEWART L. BELL
DISTRICT ATTORNEY
Nevada Bar #000477

BY/s/ Chris Owens
CHRIS OWENS
Deputy District Attorney
Nevada Bar #001190

CERTIFICATE OF FACSIMILE TRANSMISSION

I hereby certify that service of OPPOSITION TO DEFENDANT'S MOTION TO AUTHENTICATE AND FEDERALIZE ALL MOTIONS, OBJECTIONS, REQUESTS AND OTHER APPLICATIONS AND ISSUES RAISED IN THE PROCEEDINGS IN THE ABOVE ENTITLED CASE, was made this 6th day of June, 2007, by facsimile transmission to:

SPECIAL PUBLIC DEFENDER
FAX #455-6273

/s/ M. Beaird
Secretary for the District Attorney's Office

/mb

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CLERK OF THE COURT

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Attorney for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, -vs- DOMONIC RONALDO MALONE, #1670891 Defendant.	CASE NO: C224572 DEPT NO: V

STATE'S OPPOSITION TO DEFENDANT'S MOTION FOR DISCOVERY OF PROSECUTION RECORDS, FILES AND INFORMATION NECESSARY TO A FAIR TRIAL

DATE OF HEARING: 6/22/07
TIME OF HEARING: 8:30 A.M.

COMES NOW, the State of Nevada, by DAVID ROGER, District Attorney, through CHRIS J. OWENS, Chief Deputy District Attorney, and hereby submits the attached Points and Authorities in Opposition to Defendant's Motion For Discovery Of Prosecution Records, Files And Information Necessary To A Fair Trial.

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

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POINTS AND AUTHORITIES

This motion is entirely misplaced. The State has none of the records demanded. It readily appears that any of the records included within the demands are available to the defendant upon subpoena, if not simply upon his request. Insofar as they are his records, a simple release should be sufficient to obtain most, if not all, of them.

The defendant, again, must realize that under Brady v. Maryland, 373 U.S. 83 (1963), and its progeny, the defense cannot require that the prosecution conduct further investigation to uncover purported exculpatory evidence that it does not possess. The defendant is not entitled to all evidence known or believed to exist which is or may be favorable to the accused, or which pertains to the credibility of the prosecution's case. In United States v. Gardner, 611 F.2d 770 (9th Cir. 1980), the court stated that the prosecution:

> . . .does not have a constitutional duty to disclose every bit of information that might affect the jury's decision; it need only disclose information favorable to the defense that meets the appropriate standard of materiality.
>
> - 611 F.2d at 774-775 (cit. omitted).

See also, United States v. Sukumolachan, 610 F.2d 685, 687 (9th Cir. 1980) (prosecution not required to create exculpatory material).

Under federal law, Brady does not create any pretrial discovery privileges not contained in the Federal Rules of Criminal Procedure (which served as the model for Nevada law). United States v. Flores, 540 F.2d 432, 438 (9th Cir. 1980).

In short, citation to Brady does not relieve a defendant of the obligation of doing his

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own investigation. The defendant is free to seek the material he claims to want; he is not, however free to seek it from the prosecution.

The motion should be denied.

DATED this 1st day of June, 2007.

Respectfully submitted,

DAVID ROGER
Clark County District Attorney
Nevada Bar #002781

BY /s/ CHRIS J. OWENS
CHRIS J. OWENS
Chief Deputy District Attorney
Nevada Bar #001190

CERTIFICATE OF FACSIMILE TRANSMISSION

I hereby certify that service of the above and forgoing, was made this 6th day of June, 2007, by facsimile transmission to:

SPECIAL PUBLIC DEFENDER
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BY /s/ M. Beaird
Employee of the District Attorney's Office

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Attorney for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

DOMONIC RONALDO MALONE,
#1670891

Defendant.

CASE NO: C224572

DEPT NO: V

STATE'S OPPOSITION TO DEFENDANT'S MOTION IN LIMINE TO BAR IMPROPER PROSECUTORIAL ARGUMENT

DATE OF HEARING: 6/22/07
TIME OF HEARING: 8:30 A.M.

COMES NOW, the State of Nevada, by DAVID ROGER, District Attorney, through CHRIS J. OWENS, Chief Deputy District Attorney, and hereby submits the attached Points and Authorities in Opposition to Defendant's Motion In Limine To Bar Improper Prosecutorial Argument.

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

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POINTS AND AUTHORITIES

The prosecution does not intend to commit misconduct during the prosecution of the instant case. It is respectfully suggested that defense counsel exercise the same high ethical standards that they espouse in their moving papers to be necessary to the fundamental fairness of proceedings of such magnitude, including compliance with the reciprocal discovery requirements of Chapter 174 of the Nevada Revised Statutes.

The instant motion presents no cognizable request for relief and is apparently designed to provide a tome on prosecutorial misconduct and to anticipatorily offend representatives of the State long before the commencement of trial. It carries the identical weight that a motion by the State to bar ineffective assistance of defense counsel at trial would carry with this Court.

The undersigned Deputy District Attorney is aware of the ethical obligations inherent in prosecuting criminal cases. If and when experienced defense counsel hears arguments regarded as objectionable, counsel is obligated to object.

The instant motion is one made routinely by defense counsel in capital cases. To the extent that the Defendant's motion is expected to provide the Court with a handbook on prosecutorial misconduct, the Court should be aware that the motion does not, in many instances, state the law correctly. The filing of "boiler plate" motions does not relieve counsel of the ethical obligation to state the law correctly and to update these form motions as new law is made.

The rules of evidence and procedure are no different in capital cases than in other cases, save for the special procedural requirements of Supreme Court Rule 250. The State's intention to seek the death penalty does not suspend the rules of evidence applying to every

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other criminal case in the system. The prosecution is not required to outline for the defense those arguments that counsel for the State intends to present at time of trial.

DATED this 1st day of June, 2007.

Respectfully submitted,

DAVID ROGER
Clark County District Attorney
Nevada Bar #002781

BY /s/ CHRIS J. OWENS
CHRIS J. OWENS
Chief Deputy District Attorney
Nevada Bar #001190

CERTIFICATE OF FACSIMILE TRANSMISSION

I hereby certify that service of STATE'S OPPOSITION TO DEFENDANT'S MOTION IN LIMINE TO BAR IMPROPER PROSECUTORIAL ARGUMENT, was made this 6th day of June, 2007, by facsimile transmission to:

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BY /s/ M. Beaird
Employee of the District Attorney's Office

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Attorney for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

DOMONIC RONALDO MALONE,
#1670891

Defendant.

CASE NO: C224572

DEPT NO: V

STATE'S OPPOSITION TO DEFENDANT'S MOTION FOR DISCOVERY OF INSTITUTIONAL RECORDS AND FILES NECESSARY TO A FAIR TRIAL

DATE OF HEARING: 6/22/07
TIME OF HEARING: 8:30 A.M.

COMES NOW, the State of Nevada, by DAVID ROGER, District Attorney, through CHRIS J. OWENS, Chief Deputy District Attorney, and hereby submits the attached Points and Authorities in Opposition to Defendant's Motion For Discovery Of Institutional Records And Files Necessary To A Fair Trial.

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

POINTS AND AUTHORITIES

In the instant motion, the Defendant has essentially requested that the State supply him with all records pertaining to the Defendant that are generated or maintained by the

Clark County Detention Center, the Nevada State Prison system (the Defendant, to the knowledge of the undersigned, has not yet been an inmate of the Nevada State Prison), Juvenile Court, the Nevada Department of Human Resources, any state mental health facility, the Division of Parole and Probation and any medical, psychological or psychiatric facility in the state of Nevada.

NRS 174.235 has been amended to read as follows:

> 1. Except as otherwise provided in NRS 174.087, 174.089 and 174.235 to 174.295, inclusive, at the request of a defendant, the prosecuting attorney shall permit the defendant to inspect and to copy or photograph any:
>
> (a) Written or recorded statements or confessions made by the defendant, or any written or recorded statements made by a witness the prosecuting attorney intends to call during the case in chief of the state, or copies thereof, within the possession, custody or control of the state, the existence of which is known, or by the exercise of due diligence may become known, to the prosecuting attorney;
>
> (b) Results or reports of physical or mental examinations, scientific tests or scientific experiments made in connection with the particular case, or copies thereof, within the possession, custody or control of the state, the existence of which is known, or by the exercise of due diligence may become known, to the prosecuting attorney; and
>
> (c) Books, papers, documents, tangible objects, or copies thereof, that the prosecuting attorney intends to introduce during the case in chief of the state and which are within the possession, custody or control of the state, the existence of which is known, or by the exercise of due diligence may become known, to the prosecuting attorney.

The amended NRS 174.235 specifically excludes from discovery or inspection:

> (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.
>
> (b) A statement, report, book, paper, document, tangible object or any other type of item or information that is privileged or protected from disclosure or inspection pursuant to the constitution or laws of this state or the Constitution of the United States.

The State will fully comply with Nevada's statutes governing discovery in criminal cases, and it's obligations under Brady v. Maryland, 373 U.S. 83 (1963). In addition, the State will maintain its open file policy and permit counsel for the defense to inspect all

portions of the State's file except privileged and trial preparation materials.

The State is currently unaware of any records pertaining to the Defendant within the Nevada State Prison or any mental health or medical, psychological or psychiatric facility in the State of Nevada and currently has no plan to introduce any evidence derived from any of these facilities in its case in chief.

It is important to note that Brady does not obligate the prosecution to provide the defense with evidence it could obtain from other sources by exercising reasonable diligence. United States v. McKenzie, 768 F.2d 602 (5th Cir. 1985). It would appear that all of the records sought by the defense may be obtained by the defense with reasonable diligence by serving a subpoena on the appropriate agency. In so far as the defense wants to subpoena those records the State has no objection. However, it is the State's position that it is not required to obtain those records. Indeed, it appears that many of the requested materials could only be obtained with a release executed by the Defendant.

CONCLUSION

The State respectfully requests that the Defendant's Motion for Disclosure of Institutional Records and Files Necessary to a Fair Trial be denied as written. The State respectfully requests that an order be entered granting the defense discovery to the extent mandated by NRS 174.235 et. seq. and any exculpatory evidence required by Brady v. Maryland, supra, and its progeny.

DATED this 1st day of June, 2007.

Respectfully submitted,

DAVID ROGER
Clark County District Attorney
Nevada Bar #002781

BY /s/ CHRIS J. OWENS
CHRIS J. OWENS
Chief Deputy District Attorney
Nevada Bar #001190

CERTIFICATE OF FACSIMILE TRANSMISSION

I hereby certify that service of the above and forgoing, was made this _6th___ day of June, 2007, by facsimile transmission to:

SPECIAL PUBLIC DEFENDER
FAX#455-6273

BY__/s/ M. Beaird_____
Employee of the District Attorney's Office

/mb

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Attorney for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, -vs- DOMONIC RONALDO MALONE, #1670891 Defendant.	CASE NO: C224572 DEPT NO: V

STATE'S OPPOSITION TO DEFENDANT'S MOTION TO COMPEL DISCLOSURE OF EXISTENCE AND SUBSTANCE OF EXPECTATIONS, OR ACTUAL RECEIPT OF BENEFITS OR PREFERENTIAL TREATMENT FOR COOPERATION WITH PROSECUTION

DATE OF HEARING: 6/22/07
TIME OF HEARING: 8:30 A.M.

COMES NOW, the State of Nevada, by DAVID ROGER, District Attorney, through CHRIS J. OWENS, Chief Deputy District Attorney, and hereby submits the attached Points and Authorities in Opposition to Defendant's Motion To Compel Disclosure Of Existence And Substance Of Expectations, Or Actual Receipt Of Benefits Or Preferential Treatment For Cooperation With Prosecution.

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

POINTS AND AUTHORITIES

The defendant's motion requests information regarding witnesses who have received benefits for testimony.

The defense has requested far more information than either the Nevada Revised Statutes or the appurtenant case law provide, requesting in writing any "promises or expectations of immunity, lenience, or other preferential treatment or benefits in exchange for testimony or information concerning WADE and further provide copies of any documentation that discusses, memorializes or effectuates same" and information concerning any other case wherein a witness provided testimony or information for the State or any law enforcement agency. For this and other propositions, the defense has relied upon case law which does not support the request.

Giglio v. United States, 405 U.S. 150 (1972), merely requires the prosecution to reveal the existence of any benefits conferred upon a testifying witness. Similarly, Jimenez v. State, 112 Nev. 610, 918 P.2d 687 (1996), requires the State to disclose the existence of any benefits received by a confidential informant in return for his testimony.

These cases emanate from Brady v. Maryland, 373 U.S. 83 (1963), which prevents the prosecution from withholding exculpatory evidence in its possession from the defense.

At this time, the State has not conferred any benefit on a witness testifying at trial. The State has fulfilled its burden under Nevada discovery statutes, Brady, and Giglio. However, if this changes, the State will inform the defense of any witnesses that have received any deals, promises or inducements from the State for testifying prior to trial.

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CONCLUSION

Based on the foregoing, the State respectfully asks this Court to deny the instant motion at this time.

DATED this 1st day of June, 2007.

Respectfully submitted,

DAVID ROGER
Clark County District Attorney
Nevada Bar #002781

BY /s/ CHRIS J. OWENS
CHRIS J. OWENS
Chief Deputy District Attorney
Nevada Bar #001190

CERTIFICATE OF FACSIMILE TRANSMISSION

I hereby certify that service of the above and foregoing, was made this 6th day of July, 2007, by facsimile transmission to:

SPECIAL PUBLIC DEFENDER
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BY /s/ M. Beaird
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/mb

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DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

DOMONIC RONALDO MALONE,
#1670891

Defendant.

CASE NO: C224572

DEPT NO: V

OPPOSITION TO DEFENDANT MALONE'S MOTION TO SUPPRESS STATEMENTS OF DONALD HERB, OR IN THE ALTERNATIVE MOTION IN LIMINE TO PROHIBIT INTRODUCTION OF THE STATEMENT MADE BY CO-DEFENDANT HERB AT THE TIME OF TRIAL

DATE OF HEARING: 06/22/07
TIME OF HEARING: 8:30 A.M.

COMES NOW, the State of Nevada, by DAVID ROGER, District Attorney, through MARC DIGIACOMO, Chief Deputy District Attorney, and hereby submits the attached Points and Authorities in Opposition to Defendant's Motion To Suppress Statements Of Donald Herb, Or In The Alternative Motion In Limine To Prohibit Introduction Of The Statement Made By Co-Defendant Herb At The Time Of Trial.

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

STATEMENT OF FACTS

On May 20, 2006 at approximately 0915, the Henderson Police Department received a 9-1-1 emergency call that there were two naked deceased females in the desert just west of Paradise Hills and Dawson Street. (PH, vol 3, p. 366). Patrol officers responded to the location and secured the scene. At the time, there was no identification for the partial decomposed females who appeared to have been killed by both blunt and sharp force trauma. (PH, vol 3, p. 368).

MELISSA ESTORES aka "RED"

The next day, during the autopsies, two individuals contacted the HPD about the bodies, Ryan Noe and Melissa Estores (hereinafter "Red"). (PH, vol 1, p. 130). Red was a friend of Noe who informed him that she believed she knew who the two females in the desert were. Noe brought Red to the police station. (PH, vol 1, p. 131).

Red is a street hustler that sells both "hard" and "soft" drugs for various people. "Hard" refers to crack cocaine while "soft" refers to methamphetamine. In the months leading up to the killings, Red worked mainly for an individual named Tre Black (later identified as Ramaan Hall) selling methamphetamine. (PH, vol 4, p. 75). Tre Black had a protégée named D-Roc (later identified as Defendant Domonic Malone). Red would sell crack for D-Roc. (PH, Vol 1, 52-58). Red's main area of sale was the bar at the Royal Sportsman Manor located at the corner of Tropicana and Boulder Highway. (PH, vol 1, p. 60).

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APRIL KIDNAPPING AND BEATING OF RED

At some point, Red and D-Roc struck up some sort of sexual relationship. Thereafter, D-Roc either wanted more than Red, or wanted it exclusive with Red which she did not.

(PH, vol 1, p. 91). Sometime in April of 2006, D-Roc showed up at the bar in the Royal Sportsman Manor and told Red he wanted to talk to her. Red left the bar with D-Roc and he led her behind it, at night, where no one could see them. (PH, vol 1, pp. 103, 225, 230). Once they were back there, D-Roc demanded his "work" and money back from Red. Red gave D-Roc all of his stuff D-Roc then told Red it was "PT" time or "prayer time." This is a saying for getting a beating. (PH, vol 1, p. 68). Other witnesses have said "PT" stands for Pimp Training. (PH, vol 2, p. 18).

D-Roc explained the rules of the beating. (PH, vol 1, p. 65). He was going to punch Red in the chest. If she tried to block, he was going to hit her in the right temple, left temple and forehead. Then he was going to do it all over again. D-Roc began by punching Red in the chest. When he did so, she naturally tried to block. (PH, vol 1, p. 66). Then he would punch her in the head three times, and start all over. This went on for a lengthy period of time until Red ultimately was down and severely hurt. (PH, vol 1, p. 67). In fact, her injuries and pain lasted for more than six weeks. (PH, vol 1, p. 70). At that point, a friend came and helped her to a car. (PH, vol. 1, p. 68).

During the beating, Red lost Tre Black's work and money, although she isn't sure how. After several days of convalescing, Red went back to work. When she went back, she learned that Tre Black never received the "work" she had given back to D-Roc, and he wanted to get paid.

TUESDAY MAY 16th KIDNAPPING OF VICTORIA

On Tuesday, May 16, 2006, Red was "working" in the Royal Sportsman manner when she saw Charlotte Combado (hereinafter "Christine"). Christine was another local hustler who sold drugs for "D boys," or low level street drug dealers. (PH, vol 1, p. 77). On this occasion, Christine was selling for another individual known simply as "Black" (later identified as Leonard Robinson, hereinafter Leonard Black). Christine sold her work in the bar, however, she lost all of her money in the gambling machines, so she owed Leonard Black $150 and didn't know what to do. (PH, vol 1, pp. 79, 122). Red offered to help

Christine. (PH, vol 1, p. 78). This eventually led to them coming into contact with Defendant Jason McCarty (hereinafter Rome) in a green Oldsmobile Alero. (PH, vol 1, p. 80).

While everyone knew the green Oldsmobile as Rome's car, the car is actually owned by Donald Herb (hereinafter "Donny") the accessory after the fact to the murder. (PH, vol 2, p. 20). Donny is "D Boy" that hung around D-Roc and Rome. (PH, vol 1, p. 174).

Rome began driving downtown. As they were going, Christine told Rome her problem of needing $150. Rome explained that he was having an issue with one of his girls, Victoria Magee as she owed him $80. (PH, vol 1, pp. 87-9). The group wound up at the Oasis hotel downtown and began to smoke Marijuana. (PH, vol 1, p. 84). During this time, Rome and Christine struck up an agreement that Christine would find Victoria and bring her to Rome and Rome would cover her debt to Leonard Black. (PH, vol 1, pp. 87-9).

Red fell asleep in the room. When she woke up, Christine and Rome were gone. While they were gone, she looked out the window, saw the green Oldsmobile across the street at a Burger King. In the parking lot, Christine had her arm around Victoria and was leading her to the car. (PH, vol 1, pp. 93-4).

The car left, however, shortly thereafter, Rome arrived at the room. Rome and Red left the Oasis on foot and walked towards the Stratosphere. (PH, vol 1, p. 94). On the way, Rome was on the Nextel two-way with Christine in the green Oldsmobile. (PH, vol 1, p. 95). Rome told Christine that they would meet at the valet to the Sahara Hotel. By this time, it was early evening.

When Red and Rome arrived at the valet, they came into contact with green Oldsmobile. In the Oldsmobile with Donny, who was driving, was D-Roc, Christine and Victoria. (PH, vol 1, pp. 95-7). Everyone piled into the Green Oldsmobile. From the Sahara, the group drove to Donny's house, where Donny got out and the group left.

Eventually, the group, minus Donny, arrived back at the Sportsman. D-Roc and Red remained in the car, while Rome, Victoria and Christine went into the complex. (PH, vol 1, p. 97). D-Roc told Red that she still owed Tre Black $360 but Red told D-Roc that she had

paid off her debt. The $360 was allegedly the money owed from the incident in April where D-Roc had beaten Red. (PH, vol 1, p. 283). After a while, Rome, Victoria and Christine came back to the car. (PH, vol 1, p. 98).

TUESDAY MAY 16TH KIDNAPPING AND BEATING OF RED

From the Sportsman, Rome began driving south on I-95. As he was driving, D-Roc was acting strange. (PH, vol 1, p. 99). Eventually, the group pulled off the Wagonwheel exit and wound up in a desert site near some new home construction. (PH, vol 1, p. 101). Once she got there, Red was ordered out of the car by Rome. (PH, vol 1, p. 103). When she got out, D-Roc guided her to a location, and began to beat her again. (PH, vol 1, p. 104). D-Roc explained that once again, this was "PT" time. As D-Roc continued to beat her, Rome was yelling at Red to just take her beating. (PH, vol 1, p. 106). The beating was related to the prior April beating.

Ultimately, Red went down and played unconscious. Rome told D-Roc to leave her there to die and "let's go." When D-Roc stopped, Rome yelled to Red, that she had five (5) seconds to get into the car or he was going to leave her there. (PH, vol 1, p. 106). Ultimately, D-Roc dragged Red back into the car. At this point, it was approximately midnight or early morning on Wednesday, May 17th.

On the way back into town, D-Roc wanted Red's purse. (PH, vol 1, p. 110). Ultimately, Red gave D-Roc her purse, and he threw the contents of it out of the window. (PH, vol 1, p. 111). Once they got back into town, D-Roc and Rome explained what was going to happen. (PH, vol 1, p. 113).

THREATS TO KILL PRIOR TO DROPPING THE GIRLS OFF AT THE HARDROCK

D-Roc and Rome explained to the girls that Victoria had to make $80 to give to

Rome, Red had to make $360 to give to D-Roc and Christine had to make sure no one got away. (PH, vol. 1, p. 281). If any one of them did not do what they were told, there would be three shallow graves in the desert where Red had just been beaten. (PH, vol 1, p. 113). Defendant Malone alleged the $360 was owed to Tre Black from the April beating, eventhough Red believed she had paid the money back to Tre Black. (PH, vol 1, p. 283).

Thereafter, the three girls were left off at the Hardrock Hotel. Red felt like D-Roc and Rome were trying to "put her on the track." (Prostituting). (PH, vol 1, p. 115). The group remained at the Hotel for hours however, Red had nothing to sell and refused to prostitute herself, Victoria couldn't catch a date, and Christine used all the drugs that she was supposed to sell. (PH, vol 1, pp. 115-6).

Ultimately, fearing that D-Roc and Rome were coming back, Red called a friend named David Parker. Parker came and picked all three girls up and took him back to his house behind the Cancun Hotel. (PH, vol 1, p. 116).

The group spent most of Wednesday, during the day, at Parker's house. (PH, vol 1, p. 117). Finally, the three decided that they needed to head back to the South Cove Apartments where both Tre and Leonard Black live. Early in the evening on Wednesday, the group wound up at the South Cove Apartments.

WEDNESDAY KIDNAPPING OF VICTORIA AND CHRISTINE FROM THE SOUTH COVE APARTMENTS

When they got there, they tried to go to Leonard Black's apartment which is 222, however, they could not get in. (PH, vol 1, p. 117). The group ran into Tre Black near his apartment at 217 and Tre Black told Red that D-Roc was looking for her. (PH, vol 1, p. 118). Finally, Leonard Black arrived, with a friend named DeMarcus. The three girls then got into 222. (PH, vol 1, p. 120). Leonard Black, Red and Demarcus left to go get gas in Demarcus' car.

When they return to the apartment, Victoria and Christine were gone, there was a golf

club missing from the apartment, as well as signs that they did not leave voluntarily. (PH, vol 1, pp. 124-5). The clothes of both people were still there along with other personal items. Most importantly, Victoria's sandals were still there. They were the only shoes that Victoria owed, and she would not have left without them.

Leonard Black was upset that someone broke into his home and asked Red who did it. Red told Leonard Black that it was D-Roc and Rome. (PH, vol 1, p. 127). Early the next morning, Leonard went looking for D-Roc and Rome at the Sportsman.

THURSDAY MAY 18th BEATING OF ROME BY LEONARD BLACK

On May 18th, at 4 a.m., Leonard Black found Rome in the parking lot of the Sportsman and beat him pretty badly. (PH, vol 1, p. 128). The police were called and the ambulance arrived.

A couple of days later, Red saw a news story related to the two bodies and knew, since she had not seen them, that the two girls in the desert were Victoria and Christine. (PH, vol 1, p. 130). The police had Red show them where her beating took place, and she directed them to a desert area just across the street from where the bodies were taken. Based upon this information, the police set out to find D-Roc, Rome, and Donny.

CORRINA PHILLIPS AND LYNN NAGEL

In the Sportsman, a lesbian couple, Corrina Phillips and Lynn Nagel were eventually contacted. Corrina initially tried to alibi Rome and D-Roc but eventually changed her tune. (PH, vol 2, p. 103).

Corrina corroborated that Rome, Victoria and Christine showed up at their place in at the Sportsman on Tuesday night. (PH, vol 2, pp. 7-8). While there, Rome and D-Roc sent Victoria upstairs to "give a blow job to somebody for a rock." (PH, vol 2, 12). Also, D-Roc was on the phone talking about taking the girls out to the desert for "PT time." (PH, vol 2,

14).

Rome had once explained to her that he was a pimp, and the "PT training" or Pimp Training, was a method of putting his prostitutes to work and keeping them in line. (PH, vol 2, p. 18). He had previously explained that he and D-Roc were going to take the girls out to the desert and smack them around. (PH, vol 2, p. 51).

Corrina remembers D-Roc and Rome picking her up on Wednesday night from work and taking her home somewhere around 11 p.m. (PH, vol 2, p. 26 At around midnight, D-Roc and Rome left together. They did not see Rome until several hours later when he was beat up in the parking lot by Leonard Black. (PH, vol 2, p. 30). They heard statements by Rome in front of D-Roc after the murder about having the tires on the car changed. (PH, vol 2, pp. 43-4). In fact, Corrina at one point tried to get the tires changed. When queried why he needed the tires changed, Rome, in the presence of D-Roc, stated that he had been out in the desert where the girls had been killed. (PH, vol 2, p. 46). When Corrina could not get the tires changed, she told Rome and D-Roc about the problem. They indicated that they would take care of it. (PH, vol 2, p. 49). Corrina heard D-Roc make mention of leaving the girls in the desert without clothing. (PH, vol 2, p. 37). Corrina overheard a conversation between D-Roc and Rome on Friday where they were checking the paper to see if there was any news in it. (PH, vol 2, p. 40).

ACCESSORY DONNY HERB'S TESTIMONY

Donny Herb waived his preliminary hearing to plead guilty to accessory to murder. Donny testified during the preliminary hearing. Donny testified that he owed the green Oldsmobile but that Rome had borrowed it for the past two months. (PH, vol 5, pp. 5-6) That on some day in mid-May, Donny said he drove the green Oldsmobile to the Sahara Casino to pick-up Rome and Red. (PH, vol 5, p. 12). At the time, D-Roc, Victoria, and Christine were in the vehicle. After picking them up, he drove to his house and stayed there. (PH, vol 5, p. 13). The rest left in the green Oldsmobile. Sometime thereafter, Rome told Donny that D-Roc beat up Red and that Rome, Victoria and Christine were there also. (PH, vol 5, pp. 22-

3). After the beating, Rome told Donny that they drove to the Hard Rock to "put the girls to work" to sell drugs and prostitute themselves. (PH, vol 5, p. 24). D-Roc and Rome explained the reason for the beatings were the money owed by Victoria and Red. (PH, vol 5, p. 25). Additionally, both Defendants had been looking for the girls for several days.

At approximately 1:30 a.m., on Thursday morning, Donny received a call from Rome. (PH, vol 5, p. 15). At the time, Donny was home. In the first phone call, Rome told Donny that D-Roc and Rome had the girls, that they were "had to put in some work", and asked him if he wanted to come. (PH, vol 5, p. 27). Donny said no. Rome called back and told him that if he wanted the green Oldsmobile, he was going to have to come and get it or they were going to drive to California and send it back to him on a flatbed truck. Donny agreed to drive his other car to meet them. (PH, vol 5, p. 15). Donny had trouble finding the location and had multiple phone calls with Rome. (PH, vol 5, pp. 16-7). When he almost arrived, Rome called and told him, "You know what we're doing out here. We're not just beating them up this time. You're involved in two murders now." (PH, vol 5, p. 18). In the background, Donny could here Rome and D-Roc talking about the killings. Rome asked D-Roc what was taking so long. D-Roc told Rome that he had broken the golf club. In response, Rome told D-Roc, "Okay. Just hit the bitch in the head with a rock." Thereafter, Rome told Donny that they were just cleaning up and would meet him in a minute. (PH, vol 5, p. 19). At one point, Rome told Donny, "Victoria is dead." (PH, vol 5, p. 39).

Donny drove to the area of exit 56 by the Railroad pass casino and met up with D-Roc and Rome. The three then drove off to a remote desert location. (PH, vol 5, p. 28). Defendants began emptying items from the trunk of the oldsmobile. D-Roc was emptying rocks, Rome removed a knife and D-Roc gave Donny the head of a golf club. (PH, vol 5, p. 29). Rome disappeared for a shot time, then came back to the vehicles. Rome instructed D-Roc to burn the victim's clothing. (PH, vol 5, p. 34). Rome asked Donny to be his alibi, and D-Roc said his wife would alibi him. (PH, vol 5, p. 36).

Thereafter, both vehicles drove back to town. On the way, Rome called Donny and asked him to buy a bottle of water at a convenience store. (PH, vol. 5, p. 30). Donny did so,

Rome drank it and D-Roc threw a plastic bag in a dumpster at that location. Rome asked Donny for money to change the tires. (PH, vol 5, p. 41). Donny gave him $200. Thereafter, Rome left in the oldsmobile and Donny drove D-Roc home.

Later in the week, Rome acknowledged that he had blood spatter on his pants, but he didn't know if it was the victims' or his own as he was beaten later that morning. (PH, vol 5, p. 35). Rome now indicated that Corrina and Lynn were now going to be his alibi. (PH, vol 5, p. 37). When Rome, D-Roc, Corrina and Lynn were in the room, Rome said D-Roc beat up Christine, and that they took the clothes to keep them from leaving the desert. (PH, vol 5, p. 38).

Donny drove the detectives out to the remote location. (PH, vol 5, p. 42). During the ensuing search, a golf putter, broken in three places was found.

DETECTIVE COLLINS

Detective Collins testified to the examination of the crime scene. One thing of note, was a golf ball that appeared to be relatively new. (PH, vol 3, p. 373). On one occasion, Accessory Donald Herb helped him locate some of the murder weapons. (PH, vol 4, p. 87). On another occasion, Rome helped him locate some of the murder weapons. (PH, vol 4, p. 88). Additionally, Detective Collins interviewed the Defendant D-Roc.

D-ROC'S STORY

D-Roc was first contacted on May 23, 2006 by HPD. (PH, vol 3, p. 378). At that time, D-Roc denied any knowledge of the any of the crimes, with the exception of beating Red in April. (PH, vol 3, p. 382). Specifically, D-Roc told Detective Collins that Red owed money to Tre Black, and D-Roc felt it was his responsibility to collect, so he beat her. (PH, vol 3, p. 383). On May 31st, D-Roc admitted to being at the Sportsman the day of the crime, however, said that Rome took him home around midnight. (PH, vol 4, p. 68).

AUTOPSIES

CHARLOTTE "CHRISTINE" COMBADO

On May 21, 2006, Dr. Piotr Kubicek of the Clark County Coroner's Office conducted an autopsy on the person of Charlotte Combrado. (PH, vol 4, p. 5). Dr. Kubicek identified multiple blunt force and sharp force injuries to the head, neck, thorax, abdomen, and upper and lower extremeties. (PH, vol 4, p. 16). Ultimately, he appeared to identify at least 20 blunt force injuries and two sharp force injuries. (PH, vol 4, pp. 17-20). The one to the chest appears to be a superficial incision before death, however, the stab wound to the neck it peri-mortum as there is no injury to the skin itself from the wound. Ultimately, the cause of death is blunt and sharp force trauma to the head and thorax. The manner of death is homicide. There is an amount of methamphetamine in both the decomposition fluid and the liver.

VICTORIA MAGEE

On the same date, Dr. Piotr Kubicek of the Clark County Coroner's Office conducted an autopsy on the person of Victoria Magee. (PH, vol 4, p. 5). Dr. Kubicek identified multiple blunt force and sharp force injuries to the head, neck, thorax, abdomen, and upper and lower extremeties. (PH, vol 4, p. 6) Ultimately, he appeared to identify at least 31 blunt force injuries and three sharp force injuries. (PH, vol 4, pp. 8-15). All three appear to be superficial to the head, however, the stab wound to the jaw is peri- mortum as there is no injury to the skin itself from the wound. Ultimately, the cause of death is blunt and sharp force trauma to the head and thorax. The manner of death is homicide. There is an amount of cocaine in both the decomposition fluid and the liver.

POINTS AND AUTHORITIES

I.

DEFENDANT LACKS STANDING TO ASSERT A VIOLATION OF HERB'S RIGHTS

Defendant Malone asserts that Donald Herb's rights were violated, therefore, the evidence may be suppressed in a trial against Defendant Malone where Herb is a witness. Assuming for the sake of argument, that Herb's rights were violated, Defendant Malone has provided no authority which would establish his standing to raise the issue. Assuming for the sake of argument that Defendant Malone had standing to raise the issue, he provides no authority that the remedy for any violation would be suppression of the evidence against Defendant Malone.

It is the underlying principle of Constitutional law that in order to assert a constitutional violation, the person must have standing. See Rakas v. Illinois, 439 U.S. 421 (1978). "Standing" in the constitutional sense means that the person seeking redress, must have been the person's aggrieved by the conduct. *See* United States v. Salvucci, 448 U.S. 83, 100 S.Ct. 2547 (1980). In other words, there is no automatic standing to object to actions by the police. The evidence which was gathered in violation of an individual's rights may be admissible against a third person, so long as their rights were not violated. Id. There is no inherent power in the judiciary to exclude evidence based upon the violation of a third party's rights. *See* United States v. Payner, 447 U.S. 727 (1980). As such, Defendant Malone may not assert that Donald Herb's rights were violated.[1]

Assuming that Donald Herb's rights were violated and that Defendant Malone had standing to assert those rights, what would be the remedy. As no court has ever addressed another defendant asserting the Miranda Rights of someone else, there is not direct law on point. However, there is not basis in law to suggest that Donald Herb would be precluded from testifying. Since Donald Herb would be testifying, his statements would be admissible at that point even had their been a violation. *See* Harris v. New York, 401 U.S. 222, 91 S.Ct. 643 (1971) and Allan v. State, 103 Nev. 512, 746 P.2d 138 (1987). Moreover, physical evidence obtained in violation of Miranda rights do not result in suppression of physical evidence. *See, e.g.,* Michigan v. Tucker, 417 U.S. 433, 94 S.Ct. 2357 (1974); United States

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[1] This seems particularly intuitive where Donald Herb has never asserted that his rights were violated.

v. Sterling, 283 F.3d 216 (4th Cir. 2002); and Crew v. State, 100 Nev. 38, 675 P.2d 986 (1984). As to testimony of a witness, the United States Supreme Court has stated that live testimony is almost never the subject of suppression. *See* United States v. Ceccolini, 435 U.S. 268 (1978). Thus, even had there been a violation of Herb's rights, they would not preclude the testimony of Herb at trial.

II.

THERE IS NO EVIDENCE TO SUGGEST THAT HERB'S RIGHTS WERE VIOLATED

Defendant asserts that Herb's statements to police were a violation of Miranda as well as involuntary. Theoretically, an analysis of whether or not a person is entitled to Miranda warnings is something that may be done without evidence from Herb that he believed he was not free to leave, can be conducted. However, how Defendant Malone can state that Herb's statements to the police were involuntary without any evidence to that point from Herb is beyond understanding.

Notwithstanding, the record is quite clear that Herb was not entitled to Miranda warnings, nor were the statements involuntary. Miranda rights are required to be given to a defendant before a custodial interrogation. Mitchell v. State, 114 Nev. 1417, 1423, 971 P.2d 813, 817-818 (1998), *overruled on other grounds by* Sharma v. State, 118 Nev. Adv. Op. No. 69 (October 31, 2002). Custody has been defined as a "'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest.'" Alward v. State, 112 Nev. 141, 154, 912 P.2d 243, 252 (1996) (*citing* California v. Beheler, 463 U.S. 1121, 1125, 103 S.Ct. 3517, 3520 (1983)). When determining whether a person who has not been arrested is "in custody," the test "'is how a reasonable man in the suspect's position would have understood his situation.'" Alward at 154 (*citing* Berkemer v. McCarty, 468 U.S. 420, 442, 104 S.Ct. 3138, 3151-3152 (1984)).

On May 25, 2006, Detectives responded to Herb's home and requested to speak to him concerning the crimes. Herb answered the door and advised Detectives to hold on for one minute while he took care of the dogs. A moment later, Herb emerged from the house

and closed the door behind him. He was asked if he would answer some more questions, and he answered in the affirmative. Herb had previously spoken to the police and left after that prior conversation. The lead detective introduced himself and spoke with Herb in front of his garage. During the conversation, Herb was not handcuffed and never given any indicia that he was not free to leave. After telling the police about his knowledge of the crime, as well as his actions as an accessory after the fact, Herb was arrested for the crime. Prior to that time, he was not in custody in any manner whatsoever.

CONCLUSION

Herb was not entitled to Miranda Warnings prior to giving his statement on May 25, 2006. Even if he were entitled to such warnings, Defendant Malone does not have standing to assert Herb's Fifth Amendment Rights. Even if Defendant Malone had the right to assert Herb's Fifth Amendment Rights, suppression of Herb's testimony could not possibly be the remedy. As such, Defendant Malone's Motion To Suppress Statements Of Donald Herb, Or In The Alternative Motion In Limine To Prohibit Introduction Of The Statement Made By Co-Defendant Herb At The Time Of Trial should be denied.

DATED this 14th day of June, 2007.

Respectfully submitted,

DAVID ROGER
Clark County District Attorney
Nevada Bar #002781

BY /s/MARC DIGIACOMO
MARC DIGIACOMO
Chief Deputy District Attorney
Nevada Bar #006955

CERTIFICATE OF FACSIMILE TRANSMISSION

I hereby certify that service of State's Opposition To Defendant Malone's Motion In Limine To Prohibit Introduction Of The Statement Made By Co-Defendant Herb At The Time Of Trial, was made this 14th day of June, 2007, by facsimile transmission to:

SPECIAL PUBLIC DEFENDER'S OFFICE
FAX #455-6273

/s/D. McDonald
Secretary for the District Attorney's Office

MD/ddm

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FILED
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CLERK OF THE COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

vs.

DOMONIC RONALDO MALONE and
JASON DUVAL MCCARTY,

Defendants.

CASE NO. C224572

DEPT. V

BEFORE THE HONORABLE JACKIE GLASS, DISTRICT COURT JUDGE

FRIDAY, JUNE 22, 2007

TRANSCRIPT OF PROCEEDINGS
MOTIONS

APPEARANCES:

For the State: CHRIS J. OWENS, ESQ.
Chief Deputy District Attorney

MARC DiGIACOMO, ESQ.
Deputy District Attorney

For Defendant Malone: CHARLES A. CANO, ESQ.
SCOTT L. BINDRUP, ESQ
Deputy Special Public Defenders

For Defendant McCarty: ANTHONY P. SGRO, ESQ.
CHRISTOPHER R. ORAM, ESQ.

RECORDED BY: RACHELLE HAMILTON, COURT RECORDER

Friday, June 22, 2007 at 9:12 a.m.

THE COURT: All right. Just from a kind of a housekeeping standpoint, I don't think -- I think we can deal with the Crawley issue -- I think we deal with the date issue and the motion and the continuance on your case on Malone and McCarty, then I can deal with the Crawley issue, Mr. Crawley can go back to the jail and then we can deal with the rest of the motions. How's that?

MR. SGRO: Sounds fine, Your Honor.

MR. DiGIACOMO: Whatever the Court's pleasure.

THE COURT: Great. All right. So, we're on the record in State of Nevada versus Domonic Malone and Jason McCarty. They're both here. They're all here with their lawyers. For Mr. Malone, it's Mr. Sgro?

MR. SGRO: No, Your Honor, we have --

MR. CANO: Charles Cano for Mr. Malone, Your Honor.

THE COURT: All right, it's --

MR. CANO: And standing in is Scott Bindrup on behalf of Mr. Pike.

THE COURT: Okay, we have Sgro and Oram for McMarty?

MR. SGRO: Yes, Hour Honor.

THE COURT: Great. And DiGiacomo and Owens for the State.

We've got a number of motions. But I also before that have an issue regarding the scheduling of the trial.

MR. SGRO: Yes, Your Honor.

THE COURT: Which is currently scheduled for when?

MR. DiGIACOMO: August 13th.

MR. SGRO: August 13th.

THE COURT: All right. What's the problem, Mr. Sgro?

MR. SGRO: Your Honor, Mr. Owens and I have another case titled State of Nevada versus Edward Bennett. It's a very old case. We have bounced back and forth a number of times relative to a trial date in that case. And that's in front of Judge Adair. That case was set for a couple of weeks ago, it did not go. We were asked to see if we could go on August -- I think that one's the 13th as well.

Is that right, Mr. Owens?

MR. OWENS: I believe that's correct.

MR. SGRO: Judge Adair has asked us to seek other Court's assistance to make that case before --

THE COURT: I'll be happy to assist Judge Adair.

MR. SGRO: Okay. In that event, Your Honor, I -- obviously, Mr. Owens and I can't be in two places at once. If the Bennett case goes on August 13th, which we all know is going to go, we can't be here. Along those lines, we need to postpone this trial to accommodate that schedule.

THE COURT: And -- are both of you on that case or just you, Mr. Owens?

MR. OWENS: Just me, Your Honor. There's kind of a mess last time. What was set was a sure date and we were already to go and there was some complications there. And so we did set it in August with the hope that we'd be able to move several other cases around and get it done. So --

THE COURT: Like I said, I'm happy to accommodate Judge Adair, so -- and you all as well. My concern is what do we do with this one? And then following up on this one, we have the next one. So, let me see --

MR. SGRO: Mr. DiGiacomo has Crawley, has Mr. Crawley, Your Honor, so you have both DAs on both cases.

THE COURT: No, no, no, I know. Which is wonderful. I'm just talking about

with my schedule -- Sandy, what do you think?

Have you all talked to Sandy about possible dates?

MR. DiGIACOMO: No, Your Honor.

MR. CANO: On behalf of Mr. Malone, we're going to -- we were anticipate the August 13th trial date and we're doing everything we can to be ready and prepared for that trial date.

THE COURT: So you're going to object to this, right?

MR. CANO: [Indiscinerible.]

MR. DiGIACOMO: Then we need to make a record about the defense request.

THE COURT: I appreciate that.

MR. DiGIACOMO: And, Judge, just for the record, it is a defense request from Mr. Sgro for the continuance.

THE COURT: Okay.

MR. DiGIACOMO: The reason for the issues in Department 21 was a defense issue and this is going to go down as a record as a defense request for continuance so that I know Mr. Cano may object, but it's not the State's fault that this one's going to get moved.

THE COURT: Okay.

MR. CANO: That's correct, Your Honor.

THE COURT: Has everybody made their appropriate records? Great. Now. I hope everybody brought their calendars.

Sandy, what are we looking at?

Right. On this one again, three weeks? Two weeks? Four weeks? Six weeks? How much? How many weeks? How many weeks do I have to designate

for this one?

MR. CANO: I would say, you know, conservative estimate would be at least three weeks, Your Honor.

MR. SGRO: I would agree. I think the prelim in this one took two weeks.

THE COURT: All right.

MR. DiGIACOMO: I would say it's a very conservative estimate, but.

MR. SGRO: Yeah.

THE COURT: You know.

MR. SGRO: Your Honor, what's properly -- what kind -- don't remember, what kind of trial calendar do you keep in here? What time do you get started and what time do you finish? And I would say if the Court's inclined to keep its regular calendar and put us in after the calendar's over, I think you better schedule four weeks just to be safe.

THE COURT: All right. Let me tell you how it works. Monday is civil calendar, I can generally start my trials at 9:30. And then give you a whole day, 9:30, 10 o'clock gives you a whole day. Tuesdays and Thursdays are traditionally my criminal calendars, they start at 8:30. I can usually start a trial at about 10:30. Wednesdays I have nothing but a chamber's calendar, we can start 8:30, 9 o'clock, 8 o'clock, whatever works for us. We can have the entire day. So Thursday -- and then Friday's open as well. So, you get some pretty righteous trial time in here.

MR. CANO: It took us six full days of -- court days for the preliminary hearing. So -- and they were days pretty much going from 10 to 5. So --

THE COURT: We might be able to do it in three, but I'll schedule out four just --

MR. DiGIACOMO: I'd say three for guilt would be my position and I think then

there might be another week for potentially up to three or four days for penalty.

MR. CANO: Yeah, I would concur.

THE COURT: We'll block out four weeks for you.

Where would you like to put this Sandra?

THE CLERK: Well, our next stack --

THE COURT: Where's our -- where --

THE CLERK: -- is October 15. But October if it's --

THE COURT: Yeah, October's all right.

MR. DiGIACOMO: Because I can't --

THE CLERK: He's October 20.

THE COURT: No, no, no.

MR. DiGIACOMO: I can't imagine that I could do a four-week trial before the end of March.

THE COURT: Okay. How about the defense? Because I know you all have other things besides this.

MR. SGRO: Your Honor, that far out, Your Honor, I could do it.

MR.ORAM: That's fine with me.

MR. CANO: Of course over our objections, our calendars, myself and Mr. Pike's calendar are full and open until February. So it'll have to be after February of next year.

THE CLERK: March 17th?

THE COURT: I imagine that -- have you talked to your clients about this?

MR. SGRO: We talked to them about moving the date, not about what the potential date might be. But, yes.

MR. CANO: And I've discussed our position with Mr. Malone, that we

anticipated being --

THE COURT: I don't like doing this, but I -- I mean, I can't -- the other case is older than yours, I can't do anything about.

MR. OWEN: Your Honor, when we continued the Bennett case into August it was with the understanding from Mr. Sgro that there would not be an opposition from opposing counsel. I just want to put that on the record. I don't think that they are really ready for trial, I think if we insisted on going to trial in August, they would ask for a continuance. They just are seeking to create an issue out of this --

THE COURT: Well --

MR. OWENS: They may disagree with me but that's my sense that I want to put on the record.

THE COURT: And either way -- I would expect with everything in a case such as this that everything that we do they're looking to create an issue because of the ultimate penalty that's in this case.

MR. OWENS: Right.

THE COURT: So at this point, if there's an older case that Judge Adair is looking to set, you can't be in more than one place at a time, these things happen. The defendants aren't going anywhere. We're trying to accommodate them as best we can as far as getting this done as fast we can. There's a lot to be done here. I had five pages of motions that we had to deal with. So, I'm trying to do this as best I can with also their best interest in mind and that you need to be fully prepared to go.

So, Sandy -- I don't even have an '08 calendar.

THE CLERK: I do. Although, March -- March 17th, I have -- I think it's, well, it's SME case, I think it's Schieck, I'm not sure.

THE COURT: Which one?

THE CLERK: Elong [phonetic] that we sent out that far. So, I don't know how long it's going to be.

THE COURT: Do you know anything about that?

MR. CANO: I know that it's in out office, but other than that.

THE COURT: That would be obviously -- it's a --

THE CLERK: It's a 232 case.

THE COURT: -- a newer case.

THE CLERK [Indiscernible] 547.

THE COURT: -- than this one, so we could -- I could move that.

And that's March?

THE CLERK: Yeah. And we have the weeks of March 17th, 24th, 31st, and April 7th and 14th. That's our filing stack. And then it jumps until the end of May.

THE COURT: Well, let's give them that eight -- then, let's do it in March because that would be good for you

MR. SGRO: Yes.

THE COURT: That could be good for you.

MR. SGRO: March 17th, is that the date, Your Honor?

THE CLERK: It'll be March 17th.

THE COURT: Is that St. Patrick's Day?

MR. SGRO: Yes.

MR. DiGIACOMO: Yes.

MR. ORAM: Is that calendar call, trial?

THE CLERK: It'll be March 17th at 10 a.m. for a jury trial, with calendar call on March 11th at 8:30.

And maybe we should put that Elong [phonetic] case on calendar now?

THE COURT: Put that on calendar so that we can talk to them about rescheduling that.

MR. SGRO: I'm sorry, Ms. Clerk, did you say 9:30 for calendar call?

THE CLERK: 8:30.

THE COURT: 8:30.

MR. ORAM: 8:30.

MR. DiGIACOMO: Thanks, Judge.

THE COURT: So now that we've got that taken care of, now let's move over to Mr. Crawley's case, which special PD is not involved in. And, Mr. Sgro, you're representing him.

MR. SGRO: I am, Your Honor.

THE COURT: And you need to have cocounsel for that.

MR. SGRO: I do, Your Honor.

THE COURT: I would actually would like to know if Mr. Oram would be interested in that case as well. So I'm glad he's there.

MR. SGRO: Pardon me?

MR. DiGIACOMO: Judge, I know I made a record about this last time, but whenever Mr. Sgro has been appointed on a case, his associates do a substantial amount of work. It's the State's position -- I understand the Court doesn't agree, but I like to just keep making the record -- it's the State's position that he is getting two lawyers. By getting Mr. Sgro, you should appoint Mr. Sgro and one of his associates to handle the case because that would qualify under the Rule 250. But I understand the Court's position and I'll submit it.

THE COURT: Thank you. So, Mr. Sgro --

MR. SGRO: May I have a moment, Your Honor?

THE COURT: Yes. Talk with Mr. Oram.

[Colloquy between defense counsel.]

MR. SGRO: That'll be fine, Your Honor.

THE COURT: Mr. Oram, are you willing to accept the appointment to the Crawley case as well?

MR. ORAM: Yes, Your Honor; I am.

THE COURT: Good.

MR. ORAM: I'll go see him.

THE COURT: I appreciate that.

MR. ORAM: Okay.

MR. SGRO: Your Honor, can we have the minute order or do you want a written order to appoint Mr. Oram?

THE COURT: Well, I just did it on the record. If you want to prepare --

MR. SGRO: I don't know how -- if court administration will take it or not. That's logistic --

THE COURT: Well, go ahead -- why don't you go ahead and prepare an order so that you can submit it to court administration.

MR. DiGIACOMO: And I also noticed when I was going through the Blackstone, but apparently the order that Mr. Sgro submitted on this case was submitted under the case number of the robbery --

THE COURT: Yeah, we need to have the --

MR. DiGIACOMO: -- not the one of the murder.

So you might need to resubmit that under the right case number.

THE COURT: 233433.

MR. SGRO: 2-3-3 --

THE COURT: 33433.

MR. SGRO: -- 4-3. Yeah, there's a number of them, Your Honor.

THE COURT: And then, let's discuss trial setting in this case.

MR. DiGIACOMO: I would say the next criminal stack after that March one would be the most opportune. There's a number of issues related to getting ready.

MR. SGRO: Crawley is -- Mr. Crawley's case is very voluminous. The grand jury transcript I don't think is ready yet.

MR. DiGIACOMO: Yeah, it's filed.

MR. SGRO: It is ready?

MR. DiGIACOMO: It's filed. It's 400 pages long, but it's filed.

MR. SGRO: Okay. I wasn't aware it was even prepared. I just am asking the Court for enough time to conclude this one which is voluminous and then get ready for the next one. So I will need a break in there. And Mr. Oram being cocounsel in both cases is also going to need a break.

THE COURT: Okay. So --

MR. DiGIACOMO: That's a five-week break; right? I mean, if we do this one with that first stack, your next stack isn't going to be again until --

THE COURT: Then there'll be my civil stack --

MR. DiGIACOMO: Then it'll be your civil stack –

MR. SGRO: Oh, okay.

THE COURT: -- of five weeks.

MR. DiGIACOMO: -- which is five weeks --

THE COURT: It's not back to back stacks, don't worry.

MR. SGRO: Gotcha.

THE COURT: And then what would be the next stack?

THE CLERK: It'll be May 27, that's the day right after the holiday.

MR. DiGIACOMO: That'll be fine with the State.

THE COURT: How's that?

MR. SGRO: That's fine, Your Honor. That's for trial, Your Honor?

THE COURT: Yeah. And then what do you estimate for this one?

MR. DiGIACOMO: Well, there's only one codefendant, so that should shorten it, but it's voluminous. And so we started --

THE COURT: I'm going to have another case that I'm waiting -- another murder case I'm waiting on for the Supreme Court to do something and I don't know where that's going to go based on all of this.

MR. DiGIACOMO: Yeah. I understand about that.

THE COURT: Messing me up.

MR. DiGIACOMO: I understand that.

The prelim that we started in this case went 4 days and we got through about four of the witnesses, so I would imagine that it's going to be at least another 3 weeks that you need to schedule out.

THE COURT: In total or --

MR. DiGIACOMO: For the whole trial, yeah. I would say it's going to be at least 3 weeks.

THE COURT: Because there's only one Defendant, it should be a little shorter.

MR. SGRO: Well --

MR. DiGIACOMO: Except for the size of the case is actually larger.

THE COURT: Okay .

MR. SGRO: The other issue, Your Honor, is -- and I frankly don't know where

it stands because it's been difficult to keep track of, but the consolidation issues have been floating around and there's a number of defense attorneys that have each been appointed on a number of other files.

THE COURT: Well, the only other one that I have been dealing with is Mr. McArthur with the burglary and robbery.

MR. DiGIACOMO: He's the only the case that was related to this murder case. Mr. Crawley pled guilty to a felony evading case and he's awaiting for sentencing on that, I think next week.

THE COURT: So that has nothing to do with this.

MR. DiGIACOMO: But that's totally unrelated. So, as I represented in Court yesterday with Mr. Powell here. Once the writ is resolved or the issues related to the writ are resolved, the State is going to be willing to dismiss the robbery case involving Mr. McArthur --

THE COURT: And it's absorbed into your case.

MR. DiGIACOMO: -- because it's consolidated to this one --

MR. SGRO: Okay. So the case that I have in front of me now that you're about to set a trial for is the only case that Mr. Crawley will have in the system aside from the sentencing he's got coming up on the evading; is that correct?

MR. DiGIACOMO: That's my understanding. That's --

MR. SGRO: Okay.

THE COURT: That is correct once the two -- it's -- once the other case is absorbed in your -- well, it's already absorbed; right?

MR. DiGIACOMO: It's already consolidated.

THE COURT: It's already consolidated.

MR. DiGIACOMO: It's just whether or not there's this --

THE COURT: We've just to deal with the writ and then we're done with that. And then so it's just your case.

MR. SGRO: The writ is the one filed by Mr. McArthur?

MR. DiGIACOMO: No.

MR. SGRO: Or the writ --

MR. DiGIACOMO: The writ if you raise any issues related to the robbery in your writ here which I don't necessarily think you will, I think -- I don't know what you're going to raise on the writ to be truthful with you, but if you raise something on writ related to those robberies and those robberies wind up getting dismissed, I obviously don't want --

THE COURT: Then they don't --

MR. DiGIACOMO: -- to dismiss the other case yet.

THE COURT: -- then they're not with this case.

MR. SGRO: Okay. I understand. Your Honor, I don't have the grand jury transcript in my office yet on this case. As of yesterday, my information was that it had not yet been filed. I don't know if it's been filed in the last 24 hours or if I had bad information.

MR. DiGIACOMO: It's -- I think you have bad information. I downloaded it off of --

THE COURT: Blackstone.

MR. DiGIACOMO: Off Blackstone last week.

THE COURT: That must have been fun.

MR. DIGIACOMO: Yeah, it was a lot of fun. It's 366 pages, Volume 1, and 38 pages Volume 2. So it is really 400 pages.

MR. SGRO: Since we're all here, could I just ask the Court to give me 30

days from today to file a writ without having to do the ex parte request?

THE COURT: Is that fine? I mean, is that going to be enough for the 400-page transcript?

MR. SGRO: Especially we're looking at basically almost a year for trial. So --

THE COURT: Is that all right with you?

MR. DiGIACOMO: Well, I'm just checking to see when is first appearance in District Court is. First appearance in District Court was May 29th, so he's technically outside the jurisdictional limit. I'll submit it to the Court.

MR. SGRO: Well, on May 29th, I'm sure we would have said: Is the grand jury transcript in the file? If not --

THE COURT: You would have said no, and then you would have asked 30 days from the date that you received the transcript.

MR. SGRO: Right. That would be typical.

MR. DiGIACOMO: I just don't have that note. But I'll submit it to the Court, Judge.

THE COURT: Thirty days from today?

MR. SGRO: Yes, Your Honor.

THE COURT: That's fine.

Okay. So, are we done now with Mr. Crawley? Now we need a date.

MR. DiGIACOMO: The calendar call date, Your Honor.

THE CLERK: The trial date will be May 27th at 10 a.m.; calendar call, May 20th, at 8:30. Three weeks?

THE COURT: Yeah, 3 weeks.

Okay. So, we can have Mr. Crawley -- can you take a break and have Mister -- do you have anybody with you?

THE MARSHAL: [Indiscernible.]

THE COURT: We can have Mr. Crawley go.

THE MARSHAL: Okay.

THE COURT: And then I'll just do the rest of it here.

So we'll take just a little bit of a break. Thank you.

[Recess taken at 9:28 a.m.]

[Proceeding resumed at 9:32 a.m.]

THE COURT: All right. We're back on the record now on the Malone and McCarty case and everybody is still here. So what I've said to counsel is to try and keep this as under control as possible, I plan to follow what's on the calendar in making my determinations.

The first one would be Defendant McCarty's motion to declare 704.206 unconstitutional.

Anybody need to say anything about that?

MR. SGRO: Submitted.

MR. DiGIACOMO: Submit it, Judge.

THE COURT: It's denied.

The second one is Defendant's motion to strike notice of intent to seek death penalty upon unconstitutional weighing equation. Is it being submitted?

MR. SGRO: Yes, Your Honor.

MR. ORAM: Yes, Your Honor.

THE COURT: Okay. It's also denied.

The next one would be McCarty's motion to bifurcate penalty phase proceedings. Submitted?

MR. ORAM: Yes, Your Honor.

THE COURT: It's denied.

The next one is the motion -- and these are all McCarty's motions -- to strike death penalty based on unconstitutionality. Is that submitted?

MR. ORAM: Yes.

THE COURT: Okay. Based on the state of the law here, that's denied.

The next one would be motion to preclude the Court from participating in rehabilitation of potential jurors. Submitted?

MR. SGRO: Yes.

MR. ORAM: Yes.

THE COURT: Okay. It's denied.

Next, motion to prohibit evidence and argument on irrelevant mitigating circumstances. Submitted?

MR. SGRO: Yes.

MR. ORAM: Yes, Your Honor.

THE COURT: Denied.

Motion to allow the defense to argue last at the penalty phase. Submitted?

MR. SGRO: Yes.

MR. ORAM: Yes, Your Honor.

THE COURT: Denied.

Motion for in-camera review of presentence reports. Submitted?

MR. ORAM: Yes.

MR. SGRO: Yes.

THE COURT: Denied.

MR. SGRO: Your Honor, may I address, then, just a couple of things as to

that one?

THE COURT: Absolutely.

MR. SGRO: Just to make the record, Your Honor.

Your Honor, these -- this motion in particular is routinely granted what I've seen, and what has happened in the past in cases that I've participated in is that the documents get delivered to the Court in chambers. The Court will flip through them to determine whether or not there's any material there that's relevant for --

THE COURT: Are there any witnesses that have Presentence Investigation Reports that you're aware of?

MR. DiGIACOMO: The only one that may exist would be Donald Herb who's in drug court on some sort of sentence in an unrelated case, it was a dope case. Other than that --

THE COURT: So --

MR. DiGIACOMO: -- I'm not currently aware of anybody else that's a felon. I don't believe that Ms. Estory was a felon at the time of the crime.

THE COURT: And, Mr. Sgro, you're looking at them for impeachment potential?

MR. SGRO: Impeachment and/or bias. And what -- again, Your Honor --

THE COURT: Well, here's what we'll do, I'm reversing my decision. If there's any Presentence Investigation Reports regarding, and this goes for both of you --

MR. CANO: We'd like to join in on admissions. Thanks.

THE COURT: You can join in. It's fine. It's great. Any Presentence Investigation Reports on any of the witnesses, provide them to me in-camera I will look at them and I'll make a determination at that time as to what, if any, opportunity I will give you to look at them.

MR. SGRO: Fair enough. Thank you, Your Honor.

THE COURT: Death penalty data. Motion to compel prosecutor to disclose death penalty data. Anything anybody wants to say?

MR. CANO: We join in on that motion, Your Honor. Mr. Malone would.

THE COURT: Okay.

MR. ORAM: Submit it.

THE COURT: Denied.

How about disclosing informants? Are there any -- have --

MR. DiGIACOMO: Other than the one that they're fully aware of?

THE COURT: Right. Is there anybody else?

MR. DiGIACOMO: Not that I'm currently aware of.

THE COURT: And you have that information?

MR. SGRO: Yes, Your Honor.

THE COURT: Okay. So, if they're -- what this will be is the State is under an obligation to disclose any informants. So, it's essentially -- yes, Mr. Owens.

MR. OWENS: If I can get Court's indulgences just for one second here? The titles are sometimes deceptive on these things and we actually look for the relief that they pray for.

THE COURT: The relief that they pray for is the discovery provide to date is to reveal the existence of one confidential informant. If there be any additional confidential informants involved in the investigation, the defense request disclosure.

MR. OWENS: Your Honor, on page 7 of their motion, there's a laundry list of things that they want. And since there's -- when I look at the top, I think why would we oppose that, but then when I look at the motion, they want much more than what they state.

THE COURT: Okay.

MR. OWENS: And here we've got a list of seven things --

THE COURT: All right.

MR. OWENS: -- that I thought was unreasonable.

THE COURT: And what are those? I don't have the list of seven things. What are the list of seven things? I mean, they've already -- you've already provided him with information regarding the one informant; is that correct?

MR. SGRO: And just for the record, just so we're all clear, it's the individual named Donald Herb, that's who we're talking about; right?

THE COURT: Right.

MR. DiGIACOMO: Oh, yeah. I mean, there's a whole bunch of laws that relates to confidential informants like for a search warrant or those types of things.

THE COURT: Right.

MR. DiGIACOMO: If this person isn't going to be a witness, then that wouldn't be the type of thing. If they're asking for is there a witness who's also an informant, then we'll provide that information to them.

MR. OWENS: You know, *Gigglio* information we would give to them, you know, and do some things like that.

THE COURT: Right.

MR. OWENS: But you're asking for memoranda and a lot of other things in there if you look at No. 7.

THE COURT: How about under --

MR. OWENS: Information that could be work product.

THE COURT: I mean, under *Gigglio*, you have to give them whatever you need to give them.

MR. OWENS: Right.

THE COURT: So pursuant to that, to be consistent with that, other than Mr. Herb, if there's any other confidential informant, you would need to comply with the law and provide them with the information that is needed. So I would say, then, that their motion is granted in part --

MR. OWENS: Okay.

THE COURT: -- under what the Court has been set forth.

MR. OWENS: Okay.

THE COURT: I don't know that there is anybody else. I don't know that there was, you know -- I don't know. That's not -- that's for you all to know and ultimately for us to find out. So it's granted in part, denied in part.

Okay. Motion for disclosure for uncharged acts, prior criminal conduct of the Defendant. Is there anything?

MR. ORAM: I would submit it.

MR. OWENS: Submit it, Your Honor.

THE COURT: Wouldn't you -- wouldn't -- do you know of anything that -- is there --

MR. DiGIACOMO: I mean, it's a capital case, so they're saying prior to criminal conduct of the Defendant. Mr. McCarty had 23 cases in the system. There's discoveries that relates to those 23 cases which have previously been provided.

THE COURT: Okay.

MR. DiGIACOMO: I'm not exactly sure --

THE COURT: What --

MR. OWENS: Once again, what they try to do here, I think, as I recall is --

THE COURT: Same laundry list?

MR. OWENS: Well, they want them -- a lot of times, they want to move up the time period for when we have to disclose some of these things.

THE COURT: Book says -- anything which you intend to introduce at trial. You've provided them with that, have you not?

MR. DiGIACOMO: I have and --

MR. OWENS: And I assume we're continuing to provide that to them.

THE COURT: Right.

MR. DiGIACOMO: We were just having a discussion with them that because of the way Henderson does it, they submit it over, it gets discovered, and then it comes to us. I can't be aware of what they do and don't have, and I've told Mr. Owens specifically this morning: Look, you guys got to come over and look --

THE COURT: You have to come -- you have to -- you --

MR. DiGIACOMO: -- and I've previously called Mr. Pike about the DNA on the other case -- murder case related to Mr. Malone, begged him to come on over and look. So --

MR. SGRO: Here's all we're looking for, Your Honor. This case is particularly voluminous. It is also capital, everybody knows that. All we're looking for by way of this motion is a timeframe or the Court will give the State essentially a drop dead date to have the detectives provide to them everything. And have -- what we've done also in the past is sometimes detective notebooks go actually to the DA's office so we can look through everything at one shot. And what we don't like to see is, let' say we give them to July 25th. We go on July 25th, we go, we make copies of the things we don't have --

THE COURT: And then something comes up afterwards.

MR. SGRO: Something comes up while we're scrambling getting ready. So all this motion seeks to do -- and the thing where well we don't have it, they do, has obviously been abandoned two decades ago in *Thigpen versus Roberts*, they said it's the prosecution team. So that argument is there for the moment. We're asking the Court to ask the State what's reasonable for you guys to get everything in your possession that you're going to go forward to trial on, give us that date, we'll come the day after to look through their materials.

MR. OWENS: Your Honor, this -- he's supplementing their motion, they don't ask for any such thing in their motion.

MR. SGRO: That's why we create the laundry list, that's the thrust of what we're getting to, Your Honor. All we ask for is the uncharged acts of Mr. McCarty, anything they seek to introduce at trial, Mr. DiGiacomo says there's 23 files.

MR. OWENS: There's --

MR. SGRO: We're entitled to look at everything that they're going to go forward with.

MR. OWENS: There's no laundry list here and there's no request to look at everything that we're going to go forward with. And my concern here, Your Honor, is that we keep -- we keep thinking of this in terms of the trial phase. The penalty phase is our concern. Rule 250 provides that our notice is only 15 days out on evidence and aggravation. That's what we're used to filing. Now, as a matter of fact, as we give them all the information about prior criminal history as we've become aware of it. We've done that, we're continuing to do that, we don't have a problem doing that, but we don't want to be held any standard that increases our responsibility under Rule 250 with regard to our evidence of -- notice of evidence in aggravation. That's all.

MR. SGRO: So if this trial --

MR. OWENS: What he's talking about right now is even in excess of what they've even asked for here.

MR. SGRO: Fifteen days? I think this trial got set for August 13. Is that right?

THE COURT: No, no.

MR. SGRO: Oh, I'm sorry.

THE COURT: No, no. That's your other case.

MR. SGRO: That's my other case. Okay.

THE COURT: This is now in March.

MR. SGRO: That's right.

MR. DiGIACOMO: I mean, we don't have any problem with them coming over and looking at ours. They can come over next week and I can have the detective down here with everything they've got. What I don't want is some later on argument saying: Hey, the Court granted us September --

THE COURT: No, no, no, no. Here's -- here's --

MR. DiGIACOMO: -- July 15th and something came up and nobody saw it.

THE COURT: Mr. Sgro --

MR. DiGIACOMO: We'll act in good faith.

THE COURT: What I'd like to do is set up a timeframe for you to give notice to the detective to come over and bring everything he needs to bring, then for you all to go over and go through it. If something -- and I don't want that so close to the trial that it's a problem and not so far away that it's a problem. And then if anything comes up subsequent to that, you are under a continuing obligation to provide that to the defense under the discovery rules anyway.

MR. DiGIACOMO: Right.

THE COURT: So when, Mr. Sgro and Mr. Cano, would you like to be able to go over and look at the 22 boxes, is it?

MR. DiGIACOMO: Of those 22 boxes, there is just -- I mean --

THE COURT: I know. It's going to take a while.

MR. DiGIACOMO: -- there's just a lot of stuff.

THE COURT: When -- do you want to wait?

MR. SGRO: Yes. I think we --

THE COURT: It's -- now it's June. You're not going to trial until next March. I would think that maybe what? December?

MR. SGRO: That would be fine.

MR. DiGIACOMO: That would be fine. I mean, I will represent to the Court that Mr. Dennie asked for videotapes and I told Mr. Sgro a month ago that they're sitting in my office and --

THE COURT: Okay.

MR. DiGIACOMO: -- they're still there.

THE COURT: I'm not saying -- I'm not telling you not to do -- I'm just saying I'm setting this up just to have management of what we're doing. Right. So that I don't have people coming in the last moment and saying: We didn't do this. Of course you have to go over and look at their file. Of course you're going to have to spend considerable time going through what they have. You're obligated to do that and you must provide it. So I'm thinking later on towards the end of the year would probably be appropriate. Beginning of December-ish because then we get into the holidays. You're going to have to -- if there's anything you want to follow up on, I don't want that to cause you a problem. Maybe even November.

So, what I'm going to do is this, I'll set a status check for late November. You make sure you've got everything you need to have and at that point we'll set up a time for you to go -- them to go over and look at -- you can do it before then if you want, but this would be --

MR. DiGIACOMO: And I would suggest that they do. I would suggest that they come over --

THE COURT: Many times.

MR. DiGIACOMO: -- in the very near future, review it, when they can compare it against their current trial and then make sure they come back again.

THE COURT: Right.

MR. DiGIACOMO: They shouldn't come over just once and look.

THE COURT: Not on this case.

MR. DiGIACOMO: Things come in and they get filed into places and --

THE COURT: So I'm just -- what I'll do is all status -- I'll give us a status check date in November to see -- make sure you've over, make sure you've gotten so far, and make sure you go back again so that nothing is missed.

Sandy, give me a status check date.

THE CLERK: It would be November 29th at 8:30.

THE COURT: So that motion with regards to the Court's directive to provide that inspection, to make sure that the detective has provided all of the things that need to be provided to the State, the State's under an obligation to get that from the detective to make it available to the defense. In that regard, it's granted. And you've already provided much of that information.

How about motion for discovery in evidentiary hearing regarding the manner and method of determining which murder cases the death penalty will be

sought? Anybody want to say anything about that?

MR. OWENS: No, Your Honor.

MR. ORAM: Submit it.

THE COURT: It's denied.

Motion for accused to appear at all proceedings without restraints. The way it works in this court is if everybody behaves, they can come in without the restraints. If they don't behave, then the Court has to take appropriate actions to provide for the security in my courtroom as I see fit. So I have no problem with him appearing in Court without restraints as long as he follows the rules. And, so in that regard it's granted, but the Court will see fit to modify its ruling and modify its position depending on the Defendant's behavior and the safety in the courtroom.

Okay. Motion to prohibit the use of preemptory challenge to exclude jurors who express concerns about capital punishment. Anybody want to say anything about that?

MR. ORAM: Submit it.

MR. DiGIACOMO: No, Your Honor.

THE COURT: It's denied. I thought there was a general discovery rule and we kind of already -- would you say that we've already dealt with this, Mr. Sgro --

MR. SGRO: Yes.

THE COURT: -- in my previous ruling. And I thought there was another one. So, let's go --

MR. SGRO: Your Honor, I -- I'm sorry to interrupt, Your Honor. I would ask the court to simply -- that could be something that we talk about at the status check if there's a problem with discovery.

THE COURT: With discovery?

MR. SGRO: Yes, Your Honor.

THE COURT: Okay. And that's fine. I've already stated what I think everybody's obligated to do. I will expect at the status check that it will have already been done and anything that needs to be supplemented, we will certainly make sure it gets supplemented. So, you have a fold -- a ruling on that one.

Motion in limine to prohibit any references to the first phase as the guilt phase. I know that sometimes this is -- there are some Courts that have granted it and called it the trial phase.

MR. SGRO: Trial phase, Your Honor.

THE COURT: I'm happy to go with trial phase. I know you object. It's a --

MR. OWENS: Your Honor, and I don't have a problem with doing that and I've successfully been able to do that in other trials, but I just, in the event that we slip --

THE COURT: In the event that you slip --

MR. OWENS: -- the order should not create an issue.

THE COURT: -- it won't be, I'm sure that the defense will stand up and ask for a mistrial and I'll deny it.

MR. OWENS: We'll do our best.

THE COURT: I'm going to ask -- I guess it would be an advisory -- I mean, I would like this to be referred to as, during the first part of this trial, this is what we're going to do. And if there's a second part of this trial, this is what we're going to do. So do your best to comport with that. I know you have habits and there's nothing we can do about that. Just make an effort.

MR. OWENS: Okay.

THE COURT: Motion in limine to prohibit introduction of trial of

uncorroborated accomplice testimony. Okay. And I think we've kind of dealt with this somewhat. Or am I thinking of another case? Mr. DiGiacomo?

MR. DiGIACOMO: Well, there's another motion. Mr. Owens responded to this particular motion, there's nothing that precludes the introduction, we have to --

THE COURT: Right.

MR. DiGIACOMO: -- corroborate it somewhat.

THE COURT: You have to corroborate. You can't --

MR. OWENS: Right, that's the issue.

THE COURT: -- you can't -- the testimony can't stand alone on the accomplice's testimony.

MR. OWENS: Right.

THE COURT: And that's the rule. So --

MR. OWENS: They want to make a rule of exclusion, that's what we recall.

THE COURT: You can't exclude it, you're just going to have to back it up.

MR. DiGIACOMO: Right.

THE COURT: So, that's denied.

Motion for lists of names, addresses of persons who may have evidence favorable for disclosure of other discovery materials. And this goes under the same umbrella of all discovery motion -- of the discovery motion. Is there anything --

MR. ORAM: Submit it.

THE COURT: Of course if there's anything that's favorable, you have to turn that over just like anything that's unfavorable. So --

MR. OWENS: So our issue here is once again, it's a laundry list.

THE COURT: It's a laundry list.

MR. OWENS: Where they're demanding more. It says they need more than simply an open file. And --

THE COURT: I don't think they get more than an open file, Mr. Owens.

MR. DiGIACOMO: As long as your order does not go farther than any statute or case law requires --

THE COURT: In keeping with --

MR. DiGIACOMO: -- then we don't have any problem with the motion.

THE COURT: -- the requirements of discovery and the obligations that the state has to the defense and vice versa, if there are any, then I would grant that. But I'm not granting the extreme laundry list of requests that the defense will have requested.

Okay. Motion to --

THE CLERK: So, it's granted?

THE COURT: It's granted in part, within the Court's parameters. That's good.

Motion to require prosecutor to state reasons for exercising preemptory challenges. Preemptory challenges? They don't have to give a reason. It's denied.

Motion to prohibit the prosecutor from arguing and the Court from giving instructions regarding statutory mitigating factors not raised by the defense. Is that being submitted?

MR. OWENS: Yes, Your Honor.

MR. SGRO: Submit it, Your Honor.

THE COURT: It's denied.

Motion to submit questionnaire to prospective jurors. How many -- all right, let's talk about the questionnaire. I'm not a big fan of questionnaires, but you all have used -- you've used questionnaires a lot.

MR. SGRO: Yes, Your Honor.

THE COURT: So, I -- just from a practical standpoint, Mr. Sgro and you, too.

MR. DiGIACOMO: I agree with the Court's position on this that it slows down the process and adds nothing to it. That's always been my position. I know that the defense attorney sometimes say they want them. We're going to submit it to the Court.

THE COURT: Let me ask you a practical question.

MR. SGRO: Sure.

THE COURT: When I had the one trial where we got the questionnaires and I read what I read, I was like: We'll never get anybody to do this trial. I mean, out of the -- I don't know how many that we've requested, it seemed that people were putting down information that I would think perhaps -- just so they could get out and just so they wouldn't have to be involved in a trial such as this. And when we have them here and they have to answer out loud in front of a group of people, sometimes we get different answers. Just tell me your experience.

MR. SGRO: Here's what I have seen. I certainly don't quarrel with the general proposition that people try to get out of jury service. And I've seen them say extraordinary things, even lie. I will tell you, though, that the other side, the flip side of the Court's argument is that people are more candid --

THE COURT: In a questionnaire.

MR. SGRO: -- in a questionnaire than they are in front of us. Now, there are people, when we tell them: Look we don't want to embarrass you, we just need to know. For example, is race going to be a factor in this case? I will tell you the -- in my experience, it's been more likely than not that if there's a race or religion or gender issue, those things appear more often on a questionnaire than they do when

people raise their hands and say: You know, I want to go to the sidebar.

Now, will people say in the questionnaire things like I have a vacation, I hate the government, all sorts of crazy things. Yes, they will. And I think that we can determine the persons that are simply writing information down that want to be extracted from the pool. However when it comes to issues such as -- I've had one one time: I hate Mormon people. So if your defendant is Mormon, I'm not good for the jury. I'm not sure that that's the sort of information I'd had gotten from a general opened discussion on the floor.

THE COURT: Oh, based on my experience with juries, I've had all kinds of stuff come out that I'm sitting here and my mouth has fallen to the ground.

MR. SGRO: So I would simply ask the Court -- one thing that I've done in the past that has had success is I actually gotten the questionnaire to the prospective for we were going to have 30 days in advance of trial. And we did was we had the jury commissioner call them all in. Then we got them, the Court got them well in advance, we went through them. And then the lawyers got together and were able to determine if they were going to agree to just not have certain people come forward with the Judge. And it did seem to serve a filtering process that did save us some time. And if we have them well enough in advance, you can tell us, Your Honor, I think this person's just writing BS answers down to get out. I think this person, on the other hand, may be problematic. And we can call those people right away and dispense with them before you even do your generic inquiry of who's got a problem serving for a month or, you know, that sort of thing.

THE COURT: How many --

MR. DiGIACOMO: Just didn't -- from my position is that I almost never agreed based on the questionnaire to not let a juror go unless they're on vacation or

something because I honestly think that asking them questions gives you a much better idea of whether or not they're qualified juror or not. So even sometimes they write crazy stuff, I still won't agree to let them go.

THE COURT: You know what, Mr. Sgro, here's what I'd like to do. I am not a fan of questionnaires. But I would like to -- I'd like to think on this one. We have enough time in advance. So what I ask you to do is this. If you have -- and I'm sure you do on your computer -- give me an example, give me a proposed questionnaire for this case.

MR. SGRO: Sure.

THE COURT: And give it to me, I'll ask you to do it within 60 days of today's date.

MR. SGRO: We can talk about it at the status check point?

THE COURT: Yeah, we can -- and then I'm going to think about it some more.

MR. DiGIACOMO: May I suggest that he submit it to me and that we'll do whatever --

THE COURT: Right. Yeah.

MR. DiGIACOMO: -- corrections we want to do. And then --

THE COURT: You know, give it to Mr. DiGiacomo.

MR. SGRO: Sure.

THE COURT: And then come up with a proposed questionnaire --

MR. DiGIACOMO: And then we can submit it to the Court.

THE COURT: -- and then -- and I know I've seen -- the one I have had submitted to me is very detailed. I'm almost considering perhaps doing something maybe a little more generic and not so fact specific to the case. And I'll see what I

can come up to see if that's something I'd be willing to give. And then we can talk about it when I see you in November.

MR. SGRO: Fair enough. And we'll send the State one that we've used in the past with the State's --

THE COURT: And then send one to me.

MR. SGRO: Okay. Thank you, Your Honor.

THE COURT: So we'll -- that one's on hold, Sand.

THE CLERK: We'll just -- cool.

THE COURT: Okay. Motion in limine to prohibit any questions during voir dire prospective jurors considering their attitudes during the death penalty phase and to refrain from engaging in any inquiry regarding to penalty considerations. We have to know who would or would not be inclined to impose the death penalty and that's what we do in jury selection. So, that's denied.

Motion to preclude readmission of trial phase evidence and exhibits and penalty phase related to prosecutorial comment. In the penalty phase, you get a lot of discretion as to what you can submit. Right?

MR. OWENS: Right. There's a lot of crossover between penalty --

THE COURT: Right. So --

MR. OWENS: -- and --

THE COURT: -- whatever is appropriate within the rules and the law. I mean, that's what you get to submit. So that one is denied and the Court will just state that the State has to follow the rules with regards to what's admissible during a penalty phase.

Then we get to the motion to suppress which we don't need to do because we're going to do a hearing; right?

MR. SGRO: Right.

MR. DiGIACOMO: We are doing a hearing. We may need to do some briefing afterwards.

THE COURT: Right. So --

MR. DiGIACOMO: So --

THE COURT: -- we'll just -- I have that brief, but we'll wait and have a hearing.

MR. SGRO: Your Honor, does the Court want to or does it even have time on the 29th or does the Court want to select a different date closer to trial? How does it start with?

MR. DiGIACOMO: I'd actually prefer to do it earlier so that we can litigate. 'Cause based upon their reply --

THE COURT: I'll do it --

MR. DiGIACOMO: -- it appears that they think detained means arrest and that there needs to be some more litigation --

THE COURT: I'll probably do --

MR. DiGIACOMO: -- as to that issue, too.

THE COURT: I'll probably find another Friday, Mr. Sgro, where we can --

MR. SGRO: Okay.

THE COURT: -- have some time and -- but it'll be sooner during the summer than later.

MR. SGRO: So, you'll just let us know.

THE COURT: No. When we get done with this --

MR. SGRO: Okay.

THE COURT: -- we'll do that.

All right. The next one I have after the motion to suppress is the motion to declare Nevada's death penalty statutes unconstitutional. Is that submitted?

MR. SGRO: Yes.

THE COURT: Right. Now the way the Supreme Court's ruled, that's denied.

The motion to limine prohibiting references to the first phase as the guilt phase. That's Malone.

UNIDENTIFIED SPEAKER: Yes.

MR. SGRO: And, Your Honor, I'm sorry to break the flow, but I think that concludes Mr. McCarty's motions that he filed on his behalf.

THE COURT: Right.

MR. SGRO: Now we begin our joinders. So before we move on, the one question I had, Your Honor, was relative to -- we didn't bring this up earlier, but I did want to make a note that if you look at the prior page of the calendar page 2, three up from the bottom, the motion to prohibit the prosecutor from arguing about mitigated not linked by the defense.

THE COURT: Right.

MR. SGRO: That motion -- Mr. Oram concurs with me, I believe that that motion is routinely granted in part along the following lines.

THE COURT: Okay. Tell me how.

MR. SGRO: In our situation, Your Honor, one of the mitigators in every case is youth of the Defendant.

THE COURT: Right.

MR. SGRO: That mitigator is reserved, I would suggest, for someone in maybe their teens who's facing a juror that doesn't have a significant life history. Mr. McCarty's in his mid-30s. So, we're probably not going to stand up -- although,

he's young by some person's standards, I don't know that he qualifies under that particular mitigator.

THE COURT: Right.

MR. SGRO: It's been our position in other death penalty cases that the State can't get up and say: You know, pursuant to NRS 200 [indiscernible], you know, they get in here and argue that he was a young man, that sort of thing. And typically --

THE COURT: Hold on.

MR. OWENS: One man's trash is another man's treasure here, Your Honor. They may say this is not a proper mitigator, we're not raising it as a mitigator. However, the flip side of that, the absence of that is something that would be aggravating, we would be entitled to argue. For example, we might say, you know, this individual has -- we might not say he's young or -- but we would say the flip of that, he's older, he should know better, he should be more responsible. But they, by cutting us off on anything that could be a mitigator, cuts us off on anything in aggravation.

MR. SGRO: Well, the aggravator -- so here's the dilemma, the State and they have a different role in this case than we do, we can say anything. They're bound to --

THE COURT: No, you can't say everything.

MR. SGRO: -- statutory listed --

MR. OWENS: That's not the law. What the law says anything can be a mitigator. It doesn't say they can say anything and we can't say anything.

MR. SGRO: Well, I would --

MR. OWENS: We don't have to list it as a mitigator.

THE COURT: Okay. Hold on --

MR. SGRO: I would suggest to the Court that the list of mitigating circumstances is limited by a defense attorney's imagination. I would say conversely, the list of aggravating circumstances is statutory articulated and they can't veer from that statutory scheme. They're stuck to their aggravating circumstances. So to suggest that because Mr. McCarty has a certain chronological age in life that that's an aggravator is absolutely incorrect. That's not a statutorily prescribed aggravating circumstance. If he's got a prior felony -- those --

THE COURT: All right. But hypothetically, Mr. Sgro --

MR. SGRO: Yes, Your Honor.

THE COURT: -- let's talk about this.

MR. SGRO: Okay.

THE COURT: At the -- if there is a penalty phase --

MR. SGRO: Yes, Your Honor.

THE COURT: And they go through and talk about aggravators and then they say: And you know, ladies and gentlemen, this Defendant, it's not like he's a young kid, he knew what was going on. He's had life experiences. They can certainly argue that, can they not?

MR. SGRO: You know what, Your Honor? I'd say that that's gray if they approach it from that direction. I certainly don't want to be in a position right now to articulate to the Court what I think would be a palpable argument given this man's chronological age.

THE COURT: Well, right.

MR. SGRO: But I would suggest to the Court that you say that it would be erroneous to allow the State to say under Chapter -- in Chapter 200, there's one

aggravator about youth the defense didn't present to you, it's not there. There's no -- in other words, there's no reason for the Court to give an instruction on it, we're not going to use it. Mitigators are place set for the Defendant's --

THE COURT: So if you're not going to talk about it as a mitigator --

MR. SGRO: We don't want the instruction on it.

THE COURT: Okay.

MR. SGRO: Because then they would have the opportunity to speak of the jury instructions.

THE COURT: Mr. Owens, what do you say about that?

MR. OWENS: We're not limited to aggravating circumstances. You know, under 171, I think it's where it's at, it says that we can also put into evidence in aggravation. And that can include almost anything relative to a sentencing consideration. And Rule 250 says as much. Section F says we have to give them notice of that, even, not only in our death notice originally we give them evidence -- I mean, notice of our actual aggravators, but then on the 15-day notice, we give them notice of all the other things relevant to sentencing. There's numerous cases that talk about that --

MR. SGRO: Right. And --

MR. OWENS: -- there's no limitation there.

MR. SGRO: And, if that is correct, I will tell you that the notice that we have throws down the statutory aggravator list --

THE COURT: Right.

MR. SGRO: -- and the statement says nothing. Says nothing of we don't think you're going to raise these mitigators, we're going to seek the instruction and then argue that he doesn't even qualify for those.

That's the difficulty, Your Honor. We don't want to be instructed on mitigators that we're not even going to raise.

THE COURT: You understand? They don't -- it's kind of like a negative mitigating --

MR. SGRO: Exactly. Exactly.

THE COURT: -- Mr. Owens. So they don't want you commenting -- if they didn't say he's a young man or he's not a young man -- or I guess in this case, it's --

MR. OWENS: Right.

MR. SGRO: We don't seek the instruction.

THE COURT: Right.

MR. SGRO: If we don't seek the instruction --

THE COURT: They don't want you to be able to seek the instruction as well.

MR. OWENS: Right. No, I understand exactly what they're saying. We don't have a problem if they don't want to define that as a mitigator. No problem at all. Keep it off the list. But, they shouldn't be able to bar us from arguing things that are aggravating.

THE COURT: That they think are relevant that should be brought out.

MR. OWENS: Right.

MR. SGRO: That's going to be submitted to you, I suppose, in a point by point basis. I don't want Mr. Owens or Mr. DiGiacomo standing up with the mitigating instruction blown up on a board. And I'm just using that.

THE COURT: And they didn't do this and they --

MR. SGRO: Exactly.

THE COURT: -- didn't do this --

MR. SGRO: Exactly.

THE COURT: -- and he's not this and he's not this.

MR. SGRO: Right.

THE COURT: I think that's what we're talking about.

MR. SGRO: Right. And I don't know that they -- I frankly don't know that I've ever seen the State do that in the case.

THE COURT: Okay.

MR. OWENS: We do it in every case.

MR. SGRO: Because Judge, the instructions on mitigators, I've never had them come in except for the ones that I argue.

THE COURT: Right.

MR. SGRO: Okay. So I don't -- I've never seen a DA --

THE COURT: But the ones that come -- okay, certainly the ones that come in they argue about.

MR. SGRO: Of course.

THE COURT: If they don't come in, then --

MR. SGRO: They don't get the instruction.

THE COURT: -- they're asking you not to make any comment about them, Mr. Owens.

MR. OWENS: Right.

THE COURT: Is that --

MR. OWENS: Except that the inverse comment might be objectionable as well. And that's our problem. I'm not going to stand up and say: Look, on your list should be this mitigator, it doesn't meet that. We're not saying that.

THE COURT: Okay.

MR. OWENS: But we might argue the inverse of that and say, for example,

age or he wasn't -- there wasn't another individual that was an adverse influence or drugs or something like that, it should be fair game. That's proper consideration by any sentencing panel. There's never been a limitation in any case that I've ever had on our ability to argue aggravating circumstances. You know, they -- although, they have total control over what they want to list as mitigators.

THE COURT: Right. Right.

MR. SGRO: So can we agree, then, that we're not going to instruct the prospective jurors on mitigators that we do not argue as defendants?

THE COURT: Mr. Owens?

MR. OWENS: Yeah, we can instruct them. They control what the mitigators are.

MR. SGRO: Okay. As to that agreement --

THE COURT: As to that, then it's granted in part with regards to that.

MR. SGRO: As to anything else, we'll just take it as it --

THE COURT: As it comes.

MR. SGRO: As it comes. Okay. Thank you, Your Honor.

THE COURT: Can I now move to Mr. Malone?

MR. SGRO: Yes. Thank you.

MR. CANO: Your Honor, I have another one along those before you start with -- referring to the first phase -- not allowing first phase to refer as guilty phase.

THE COURT: Yeah.

MR. CANO: We had submitted a motion to declare Nevada's death penalty unconstitutional as well. And I didn't notice that on our list. On behalf of Mr. Malone.

THE COURT: You did or you didn't?

MR. CANO: We did. I have a file stamp copy in front of me right now.

THE COURT: On the unconstitutionality of the death penalty.

MR. OWENS: I know the status, it's not on calendar.

THE COURT: Okay. Well, consistent with my previous ruling with regard to Mr. McCarty, it's denied.

MR. CANO: Okay. I just wanted to make sure that was on your list.

THE COURT: That's not on the list.

MR. OWENS: It's not.

THE COURT: Okay.

THE CLERK: You know, the poor calendar clerk that had to put this together. I tell you what.

All right. So now motion to prohibit the reference to the first phase as the guilt phase. I think we already dealt with that, it's the trial phase. So that's granted as far as that goes. With every effort by everybody to refer to it as the trial phase, including the judge.

All right. The federalizing of the motions, objections, et cetera, et cetera.

MR. CANO: Yes, Your Honor. This is not meant to substitute our ability not to make the proper objections at the time in order to streamline this case in order to preserve any kind of federal issues for us not to make like a litany or a laundry list of the reasons why we're objecting to it. You know, if we object to something, we also want to preserve any issues we have federally as well. That's why we submit this motion, Your Honor.

THE COURT: Isn't it all preserved because all of these cases if they get to the point of going to be reviewed appellate-wise, don't they always go -- end up

federal?

MR. OWENS: Yeah, they do, but whether they have an issue that can be raised there as whether they created a federal issue here and sure, all of the law says that an objection has to be specific. That's not true in the inverse. I mean, we can have any reason -- the Court can have any reason for denying it. But, they do have to be specific on the objections. Were that not so, as we hopefully learned in law school, everyone else in the courtroom would be at a loss as to how to respond to the objection. This idea of just having continuing objections that are unspoken, just some sort of carte blanche at the beginning of trial is --

THE COURT: So are you saying that he'd have to articulate the --

MR. OWENS: Yes.

THE COURT: Oh.

MR. OWENS: If there's a federal issue, then he would say: And on constitutional grounds, Your Honor. I mean, whatever the grounds are. They don't apply to every motion in here --

THE COURT: I know.

MR. OWENS: -- they just want some carte blanche.

MR. CANO: And if we don't say -- I believe federally if we don't specifically delineate the constitutional issue as part of the objections, some issues may be barred at a later date through the federal system [indiscernible].

MR. OWENS: And that may be so. I don't -- I doubt that it's the case given the way things are going, but technically that could be the case.

MR. ORAM: Your Honor, if it's not raised on direct appeal, if you don't federalize something on direct appeal, there's a chance that in Federal Court the Attorney General will come in and say --

THE COURT: It is raise it.

MR. ORAM: -- it was not federalized. But as long as it's done in that direct appeal and you claim, either you give some federal case law --

THE COURT: So without the granting of this motion, that's how you preserve it?

MR. ORAM: You can preserve it on direct appeal.

THE COURT: Then -- so it will be denied at this point.

The bifurcation of the penalty phase. Didn't I already rule on that?

MR. DiGIACOMO: I'm sorry, Your Honor?

MR. OWENS: Yes.

THE COURT: Bifurcation of penalty phase.

MR. DiGIACOMO: You ruled on that, Judge.

THE COURT: All right. So I denied that.

Improper prosecutorial argument.

MR. CANO: Your Honor, the reason I always submit this is just kind of like fair warning. I know these veteran attorneys will not purposefully do that, but in case that they do cross the line --

THE COURT: They're under an obligation as are you and everybody else in this courtroom to adhere to the rules of professional conduct. The rules have been set forth in all the Nevada opinions and the NRS to comport with those rules.

MR. OWENS: So the Court's order is so stated to both sides if the Court issue's in order or?

THE COURT: Everybody.

MR. OWENS: Okay.

THE COURT: Under my rules, everybody has to follow the rules. And we'll

deal with it as it comes up. So with regards to that, that applies to everybody.

MR. OWENS: Is Court going to issue an order to that effect or just an advisement?

THE COURT: I'm advising.

So with regards to that, that's denied, but my rule covers it all.

How about the Malone's motion to preclude the consideration of victim impact evidence.

MR. CANO: We'll submit, Your Honor.

THE COURT: They get to consider victim impact evidence. So that's denied.

Malone's motion to allow defense to argue last in penalty phase. Previously ruled. Denied.

Malone's motion for separate jury -- wait, I've got to keep up with my motions -- during joint trial. You're standing up, Mr. DiGiacomo.

MR. DiGIACOMO: I'm just standing up in case Mr. Cano was --

MR. CANO: I'll submit it.

THE COURT: Didn't I already rule on this?

MR. CANO: Well, Your Honor, we did file an earlier motion to sever the trials and this, I guess, kind of highlights the inherence of just the nature of this case and how's there's --

THE COURT: Right.

MR. CANO: -- testimony that's going to be crossing over.

THE COURT: And I remember Mr. DiGiacomo making certain representations to me as to what, if any, was going to come in and wasn't going to come in in order to keep this from having to go to two separate trials and two separate juries. Is that a correct statement of what's happened here before?

MR. DiGIACOMO: That's correct. You already ruled on the motion to sever, now they want you to have --

THE COURT: The double --

MR. DiGIACOMO: -- basically a severance but in a different way.

THE COURT: Two juries.

MR. DiGIACOMO: Yeah. And it's just not appropriate as the Supreme Court has said in this department. And so --

MR. CANO: We'll submit it to the Court.

MR. DiGIACOMO: I've made representations about what is appropriate evidence, what isn't, we know what the rules are and we're going to follow those rules.

THE COURT: All right. So in keeping with that, that's denied.

The motion in limine to preclude the State from moving to admit into evidence photographs prejudicial to Malone.

MR. CANO: There is no opposition to that motion filed, Your Honor.

MR. DiGIACOMO: If we didn't file an opposition, it's because we haven't offered any yet. We'll offer them, you'll rule on them, and --

THE COURT: Right. As the photos come in -- Mr. Cano, what I generally do with regards to photographs and if there are particular ones that you feel are highly prejudicial as some photographs can be, before they decide to admit them, and you know from being in here, I'm going to limit what can be shown, you know, how many of them can show, if they're duplicative, how long they can be up in front of the jury. I take that into consideration. So that's denied, but I have control of that during the trial.

Defendant Malone's motion to compel disclosure of existence in

substance of expectations or actual receipt of benefits, preferential treatment for cooperating with the prosecution.

MR. CANO: As referenced to Mr. Herb or any other witnesses that they have --

THE COURT: Right.

MR. CANO: -- that may testify in their behalf.

MR. DiGIACOMO: We'll turn over *Gigglio* material. This is the same thing as your other discovery ones.

THE COURT: All right. In keeping with my prior ruling – well, is there a laundry list attached that I have to be concerned about with regards to your motion --

MR. DiGIACOMO: Not on this one.

THE COURT: -- or is just that you have to have *Gigglio* material turned over?

MR. OWENS: There's not a laundry list of material, I don't think.

MR. DiGIACOMO: It's a little bit water --

MR. OWENS: We'll submit on this, Your Honor.

THE COURT: Okay. So that one's granted, Mr. Cano.

MR. CANO: Okay. Thank you.

THE COURT: The jury questionnaire we've already dealt with. I'm going to consider that.

MR. CANO: And we'll try to coordinate with Mr. Sgro's office to submit something to the DAs.

THE COURT: Right. Malone's motion for discovery of prosecutorial records, files, and information necessary to a fair trial. I think we've pretty much covered that with regard to Mr. McCarty, that would apply to you as well

MR. CANO: Thank you, Your Honor. And the following motion --

THE COURT: And the same deadlines and the same -- whatever needs to be turned over, needs to be turned over. You need to go over there and look at the files. The detective needs to provide what he needs to provide to the State.

Is there a laundry list there I have to be aware of, Mr. Owens?

MR. OWENS: Court's indulgence. This is the institutional records?

MR. DiGIACOMO: No, it mentions the institutional records.

THE COURT: No, reference files, information necessary to a fair trial.

MR. DiGIACOMO: Yeah, it's a laundry list, Judge.

THE COURT: Okay, so here's what I'll do. I'll deny that, but in keeping with my previous ruling with regard to Mr. McCarty, it'll be the same.

Institutional records.

MR. CANO: The other one is a general -- more of a general motion of discovery. The other one's a little bit more specific to institutional records that the State's going to be privy to get as opposed to the defense.

THE COURT: Institutional records like?

MR. DiGIACOMO: Of Mr. Malone. I mean, usually the SPD's office has used [indiscernible] to the prison for their own client's stuff.

THE COURT: Are we talking about institutional records?

MR. OWENS: It's jail records. All records to maintain by the Clark County Detention Center pertaining to the Defendant, including disciplinary, medical, psychological, psychiatric, mental health records.

THE COURT: I would say if the --

MR. OWENS: That's from the Item 1 --

MR. CANO: If they have --

MR. OWENS: -- there's a full list of --

MR. CANO: Yes, Your Honor, I mean, if they privy to that, then we can --

THE COURT: If they have them.

MR. CANO: Yeah.

MR. OWENS: They subpoenaed that.

THE COURT: But all you have to do is send a subpoena over to the jail and get all that stuff.

MR. CANO: I understand, Your Honor.

MR. OWENS: They routinely do that.

THE COURT: And that's what I would advise you to do. So, I think what I will say it's denied. But, if the State has any of that in their files, they'll need to turn it over. If they plan on using any of that, they'll need to turn it over. If the defense wants it, they need to send a subpoena.

Motion to suppress statements of Donald Herb or in the alternative motion to limine to prohibit introduction statements made by Codefendent Herb at the time of trial.

MR. CANO: I believe you're going to be setting a hearing on that. So we'll just --

THE COURT: Are we going to hear the -- no.

MR. DiGIACOMO: Well, what? Why are going to set a hearing on this?

THE COURT: Not on this.

MR. CANO: Okay.

THE COURT: We deal with this now. So you can go ahead.

MR. DiGIACOMO: Nice try.

THE COURT: I'll hear what you have to say on this one.

MR. CANO: Well, Your Honor, in this case, what we have here is statements

that were made by Mr. Herb --

THE COURT: Right.

MR. CANO: -- that lead to, you know, inculpating our client that we believe are seemed so were improperly obtained. And as such --

THE COURT: Improperly obtained from Mr. Herb?

MR. DiGIACOMO: Yes.

MR. CANO: Yes.

MR. DiGIACOMO: They are bringing Mr. Herb [indiscernible] the rights.

THE COURT: How can you do that? I mean, you can -- I'm asking, I know you are doing it. But from a legal standpoint --

MR. CANO: Well, we feel that the procedure in the process that the police took and technique that they did in this so violates the Constitution that we're allowed to challenge those sayings that were made by Mr. Herb.

THE COURT: Well, go ahead and make your record, then.

MR. CANO: Okay. Purposely, I think the way the detectives, you know, at the time by the time they interviewed Mr. Herb, they had already had Mr. McCarty in custody, had Mr. Malone in custody, gathering information from them. Going to arrest Mr. Herb knowing that they were going to arrest him for the murder in these cases, purposely decided not to Mirandize him until he was giving statements and then after the fact, I think, Mirandized Herb at a certain point in time once they gathered information that inculpated our client, Mr. Malone. As such, the procedures and the process that, you know, the Henderson Police Department took in this place are so violated the Constitution, we feel that anything that was stated by Mr. Herb should be suppressed and anything of those fruits were derived from that as well. And if not, in alternate, we would ask to limit what he was -- what Mr. Herb

had said to statements that can be corroborated.

And an example of that I can give a quote is that really Mr. Herb made a statement at one point in time I think at the preliminary hearing where he overhears a phone call to Mr. McCarty, Mr. Malone background, you know, making some kind of comments that is substantially uncorroborated -- it can't be corroborated. The only thing that can be corroborated perhaps through the phone records, cell phone records, are that Mr. Herb and maybe Mr. McCarty had a conversation, but not necessarily anything that Mr. Malone said or had said that he overheard through the phone. And so those things I think should be severely limited and not be allowed to be presented at trial. And --

THE COURT: Okay. Go --

MR. CANO: -- we submit to the Court.

THE COURT: Go ahead, Mr. DiGiacomo.

MR. DiGIACOMO: Sorry, I wasn't -- I was going to just straight submit it to the Court because even at best it was a *Miranda* violation, which wouldn't be a constitutional violation but a prophylactic rule of the Constitution. But I just heard the defense attorney call the murder of two people comment overheard at a party, Judge. That just offends me, but I'll submit it to the Court.

THE COURT: It's denied.

Okay. Is that it? And we just need to set our hearing. Look at that. Those are good. All right. So, how long will the hearing take with regards to the evidentiary hearing on the statements and the motion to suppress. How long will that take?

MR. DiGIACOMO: Well, there's two issues, I guess. You'll have to hear testimony from Detective Ridings who first comes to contact with them. There's a

third officer who is apparently present, you may or may not hear testimony from, and then obviously Detective Collins. Depending on if the defense position did some *Miranda* violation versus an involuntary. If they're actually arguing that first statement is involuntary, you may have to listen to the two hours of Mr. McCarty fully talking to the cop. If they're arguing that it's just a *Miranda* violation, then once you establish that at most it's some further investigatory detection, we're done. So I guess it's the position to the defense as to that particular statement.

THE COURT: Mr. Sgro?

MR. SGRO: Probably need a half a day with the Court.

THE COURT: Well, let me do this. Let me --

MR. SGRO: And I'm not sure, Your Honor, that I'd agree you'd have to hear the entire -- I mean, the State can pull whatever clips they want of the audio. We plan on playing on playing some of the audio clips as well. I do agree, though, that --

THE COURT: Or if you give me a copy of the transcript, I can look at the transcript.

MR. DiGIACOMO: Yeah, but it's the tone and tenor and all those --

THE COURT: Yeah, that's true.

MR. DiGIACOMO: -- other things. I guess before and I can submit a copy of all three recordings to the Court with transcripts if the defense doesn't object and you'll be able to hear them beforehand and then we'll make them a part of the record --

THE COURT: How about that?

MR. DiGIACOMO: -- at the hearing and we'll have detectives testify to them.

MR. SGRO: I have no problem with that.

THE COURT: Okay. Great. So then that should cut down part of the time a little bit.

MR. SGRO: Yes. You have two, maybe three police officers. And maybe the State will concede that he was already a suspect, I don't know if they're going to. And if they don't, I would say, Your Honor, in an abundance of caution to allow for half a day and if we get done earlier, then that's great, we can start [indiscernible].

THE COURT: All right. It looks like I'm going to be -- that's civil. In September, I'm going to be going out of town for a couple of weeks. Ad I have two days, the 17th and 18th of September which are kind of going to be -- no?

MR. DiGIACOMO: I was just thinking I have a five-year-old murder trial in Judge Vega's starting the 17th.

THE COURT: Okay. Let's see what else.

MR. DiGIACOMO: That's a Monday; right? Aren't we looking for --

THE COURT: It's Monday and Tuesday.

MR. DiGIACOMO: -- a Friday?

THE COURT: All right. Then I need a Friday.

MR. DiGIACOMO: And I would suggest to you that August is very bad for Mr. Sgro and Mr. Oram and myself.

THE COURT: Okay. No, no. August is fine.

MR. DiGIACOMO: So, I'm just saying it's bad, so maybe we do October? That'll give us time before November to do the --

THE COURT: All right. Let me go look at what Elana's got for me in October and I'll be right back.

[Recess taken at 10:23 a.m.]

[Proceeding resumed at 10:26 a.m.]

THE COURT: How about Friday, October 5th? I'll be coming back into town that Monday and that'll be a short week for me anyway, so there'll be less of a chance of me setting something significant there. So the morning of October 5th for the evidentiary hearing.

MR. ORAM: What time, Your Honor?

THE COURT: 9.

MR. SGRO: Just for the record, the State's going to produce the officers, we won't have to serve them with subpoenas and all that.

MR. DiGIACOMO: Well, I mean, I'm going to produce the officers that I need. I don't know if you -- if you need somebody else, you can call me and I'd be happy to issue them a subpoena. But I don't anticipate serving every officer involved in the case.

MR. SGRO: No, we're going to have --

THE COURT: Would you tell him who you want?

MR. SGRO: -- the persons all involved in the statement. They're on the transcript [indiscernible].

MR. DiGIACOMO: I mean, my burden is to establish, so I'm going to put Detective Ridings to say how he came into contact with Mr. McCarty, then I'll put Detective Collins in there. If there are other officers that are present that he wants to have subpoena --

THE COURT: Let him know.

MR. DiGIACOMO: -- let me know and we'll subpoena them. But I don't anticipate calling those people.

MR. SGRO: But those two are for sure I don't have to worry about them; right?

MR. DiGIACOMO: I would imagine yes, but I also would imagine that if he wants to go involuntary, he's got to put some evidence forth of involuntariness, so I would thing he needs to call McCarty. So that may be an issue, too.

MR. SGRO: That's --

THE COURT: That's a different issue.

MR. SGRO: And it's backwards. As long -- all I have to do is write down a pleading is what the Nevada Supreme Court says. Once I place the issue of voluntariness in -- at issue, it's the State's burden to prove it was voluntary and not involuntary. So he has it backwards.

But in any event, if those two --

MR. DiGIACOMO: There has to be some evidence on it.

MR. SGRO: -- those two police officers are going to be here, and that's the concerns I've just gotten, I'll let him know if there's anybody else we need.

THE COURT: Okay.

THE MARSHAL: Judge [indiscernible].

THE COURT: During trial. Not during regular Court sessions in front of the jury.

MR. OWENS: They're request in that, Your Honor, is that they be allowed unrestrained in a courtroom.

THE COURT: No.

MR. OWENS: I know frequently they bring them in here and do it.

THE COURT: I'm sorry. Let me make this perfectly clear. During the trial and only during the trial --

THE MARSHAL: They're always [indiscernible].

THE COURT: -- they have to be out of their chains.

THE MARSHAL: Correct. All the time.

THE COURT: When they're in here during evidentiary hearings and hearings on motions and standard court appearances, they are like you usually have them with chains.

MR. OWENS: Sometimes even during the trial, they hook them up here in the courtroom after the jury's gone before they take them out.

THE COURT: Whatever --

MR. OWENS: Their motion said they shouldn't have any restraints in the courtroom.

THE COURT: I'm sorry. Okay. I'm sorry. Within the parameters of the security needs of the officers.

THE MARSHAL: Thank you, Judge.

THE COURT: In front of the jury it will appear that they're unrestrained. Whatever the officers have to do to secure the courtroom and the Defendants and everybody else in it, they may do that.

THE MARSHAL: And usually we take them in there anyways.

THE COURT: Okay.

THE MARSHAL: When the jury's out, I always have them go in the holding tank.

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MR. OWENS: Okay.

THE COURT: Okay?

MR. ORAM: Thank you very much, Your Honor.

[Proceeding concluded at 10:29 a.m.]

ATTEST: I hereby certify that I have truly and correctly transcribed the audio/visual recording in the above-entitled case.

Jill Jacoby
Court Transcriber

ORIGINAL

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FILED
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CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

DOMONIC RONALDO MALONE, #1670891
JASON DUVAL McCARTY, #0932255

Defendants

Case No. C224572
Dept No. V

ORDER

DATE OF HEARING: 6/22/07
TIME OF HEARING: 8:30 A.M.

THIS MATTER having come on for hearing before the above entitled Court on the 22nd day of June, 2007, Defendant DOMONIC RONALDO MACLONE being present, represented by CHARLES CANO and SCOTT BINDRUP, Deputy Special Public Defenders, Defendant JASON DUVAL McCARTY being present, represented by ANTHONY SGRO, Esquire and CHRISTOPHER ORAM, Esquire, the Plaintiff being represented by DAVID ROGER, District Attorney, through CHRIS J. OWENS, Chief Deputy District Attorney and MARC DIGIACOMO, Deputy District Attorney, and the Court having heard the arguments of counsel and good cause appearing therefor,

IT IS HEREBY ORDERED that the Defendants' Motion to Declare NRS 704.206 Unconstitutional, shall be, and it is denied.

IT IS HEREBY ORDERED that Defendant McCarty's Motion to Strike Notice of

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Intent to Seek death Based Upon Unconstitutional Weighing Equation, shall be, and it is denied.

IT IS HEREBY ORDERED that Defendants' Motion to Bifurcate Penalty Phase Proceedings, shall be, and it is denied.

IT IS HEREBY ORDERED that Defendant McCarty's Motion to Strike Death Penalty Based Upon Unconstitutionality, shall be, and it is denied.

IT IS HEREBY ORDERED that Defendant McCarty's Motion to Preclude the Court From Participating in Rehabilitation of Potential Jurors, shall be, and it is denied.

IT IS HEREBY ORDERED that Defendant McCarty's Motion to Prohibit Evidence and Argument on Irrelevant Mitigating Circumstances, shall be, and it is denied.

IT IS HEREBY ORDERED that Defendants' Motion To Allow Defense to Argue Last At the Penalty Phase, shall be, and it is denied.

IT IS HEREBY ORDERED that Defendants' Motion for In-Camera Review of Pre-Sentence Reports, shall be, and it is granted and the State is to provide any PSI's to the Court for in-camera review.

IT IS HEREBY ORDERED that Defendant McCarty's Motion to Compel Prosecuting Attorney to Disclose Death Penalty Data, shall be, and it is denied.

IT IS HEREBY ORDERED that Defendant McCarty's Motion to Disclose Informants, shall be, and it is denied in part and that the State is to disclose any informants and provide the defense with anything that needs to be provided pursuant to Giglio as required by the discovery rules.

IT IS HEREBY ORDERED that Defendant McCarty's Motion for Disclosure of Uncharged Acts Prior to Criminal Conduct of Defendant, shall be, and it is granted in part; the State will make its file available for the defense to review and the State is under obligation to provide anything to the defense that becomes subsequently available as required by the discovery rules.

IT IS HEREBY ORDERED that Defendant McCarty's Motion for Discovery and Evidentiary Hearing Regarding the Manner and Method of Determining In Which Murder

Cases the Death Penalty Will Be South, shall be, and it is denied.

IT IS HEREBY ORDERED that Defendant McCarty's Motion for Accused to Appear At All Proceedings Without Restraints, shall be, and it is granted as to trial proceedings only.

IT IS HEREBY ORDERED that Defendant McCarty's Motion to Prohibit the Use of Peremptory Challenges To Exclude Jurors Who Express Concerns About Capital Punishment, shall be, and it denied.

IT IS HEREBY ORDERED that Defendants' Motion to Prohibit Any References to the First Phase as the "Guilt Phase", shall be, and it is granted.

IT IS HEREBY ORDERED that Defendant McCarty's Motion for Lists of Names and Addresses of Persons Who May Have Evidence Favorable to Defendant and for Disclosure of Other Discovery Material, shall be, and it is granted in part and in compliance with the requirements of discovery, but denied in part as to the extreme laundry list requested by the defense.

IT IS HEREBY ORDERED that Defendant McCarty's Motion in Limine to Prohibit Introduction At Trial of Uncorroborated Accomplice Testimony, shall be, and it is denied.

IT IS HEREBY ORDERED that Defendant McCarty's Motion to Require Prosecutor to State Reasons For Exercising Peremptory Challenges, shall be, and it is denied.

IT IS HEREBY ORDERED that Defendant McCarty's Motion to Prohibit the Prosecutor From Arguing and the Court From Giving Instructions Regarding Statutory Mitigating Factors Not Raised By the Defense, shall be, and it is granted in part in that jurors will not be instructed on mitigators that the defense does not argue.

IT IS HEREBY ORDERED that Defendant McCarty's Motion in Limine (56), shall be, and it is denied.

IT IS HEREBY ORDERED that Defendant McCarty's Motion to Preclude Re-Admission of Trial Phase Evidence and Exhibits in Penalty Phase and Related Prosecutorial Arguments, shall be, and it is denied.

IT IS HEREBY ORDERED that Defendant McCarty's Motion to Declare Nevada's Death Penalty Statutes Unconstitutional, shall be, and it is denied.

IT IS HEREBY ORDERED that Defendant Malone's Motion to Federalize All Motions, Objections, Requests and Other Applications For the Proceedings in the Above-Entitled Case, shall be, and it is denied.

IT IS HEREBY ORDERED that Defendant Malone's Motion in Limine to Bar Improper Prosecutorial Argument, shall be, and it is denied.

IT IS HEREBY ORDERED that Defendant Malone's Motion to Preclude the Consideration of Victim Impact Evidence Pursuant to NRS 175.552, 200.033 and 200.035, shall be, and it is denied.

IT IS HEREBY ORDERED that Defendant Malone's Motion For Separate Jury During Joint Trial, shall be, and it is denied.

IT IS HEREBY ORDERED that Defendant Malone's Motion In Limine to Preclude the State From Moving to Admit Into Evidence Photographs Prejudicial to Malone, shall be, and it is denied.

IT IS HEREBY ORDERED that Defendant Malone's Motion to Compel Disclosure of Existence and Substance of Expectations, or Actual Receipt of Benefits or Preferential Treatment For Cooperation With Prosecutor, shall be, and it is granted and the State is to provide all Giglio information as required by the discovery rules.

IT IS HEREBY ORDERED that Defendant Malone's Motion for Discovery of Institutional Records and Files Necessary to a Fair Trial, shall be, and it is denied.

IT IS HEREBY ORDERED that Defendant Malone's Motion to Suppress Statements

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of Donald Herb, or in the Alternative, Motion in Limine to Prohibit Introduction of Statements Made By Co-Defendant Herb at the Time of Trial, shall be, and it is denied.

DATED this 16th day of July, 2007.

DISTRICT JUDGE

DAVID ROGER
DISTRICT ATTORNEY
Nevada Bar #002781

CHRIS J. OWENS
Chief Deputy District Attorney
Nevada Bar #001190

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